

Meeting of
January 24-25, 1958

Memorandum No. 2

Subject: Study No. 34(L) - Uniform
Rules of Evidence

I enclose the following:

(1) A copy of a memorandum sent to the members of the State Bar Committee to Consider the Uniform Rules of Evidence. This memorandum was prepared because Mr. Ball had advised us that he had called a meeting of his section of the committee and that the Northern Section would be meeting soon. The memorandum summarizes the Commission's work to date on the Uniform Rules.

(2) Memoranda received from Professor Chadbourn on Subdivisions 11, 21, 22, 23, 24, 25, 26, 27(c).

Matters for consideration at the January 24-25 meeting include the following:

(1) Revisions of Subdivisions 1, 2, 3, 4, 5 and 9 of Rule 63 prepared by the Staff pursuant to action taken at the December meeting. These revisions are set forth in the memorandum to the State Bar Committee.

(2) Whether the following Subdivisions of Rule 63 will be approved by the Commission: 6, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27(c).

Respectfully submitted,

John R. McDonough, Jr.
Executive Secretary

JRM:j

January 6, 1958

Memorandum to State Bar Committee to
Consider Uniform Rules of Evidence.

At its meeting in San Francisco on November 29-30 the Law Revision Commission decided that all action which it takes relating to the Uniform Rules of Evidence will be deemed tentative pending final consideration of all of the Rules after they have been individually considered. Subject to this limitation the Commission has thus far taken the following action relating to the Uniform Rules of Evidence:

1. Approved Rule 62(1) as drafted:

Rule 62. Definitions. As used in Rule 63 and its exceptions and in the following rules,

(1) "Statement" means not only an oral or written expression but also non-verbal conduct of a person intended by him as a substitute for words in expressing the matter stated.

2. Approved the opening paragraph of Rule 63 as drafted:

Rule 63. Hearsay Evidence Excluded--Exceptions. Evidence of a statement which is made other than by a witness while testifying at the hearing offered to prove the truth of the matter stated is hearsay evidence and inadmissible except:

3. Drafted the following paragraph to be added to Rule 19:

As a prerequisite for evidence of the conduct of a person reflecting his belief concerning a material or relevant matter but not constituting a statement as defined in 62(1), there must be evidence that the person had at the time of his conduct personal knowledge of such material or relevant matter or experience, training or education, if such be required.

4. Drafted the following as a substitute for subdivision (1) of Rule 63 as drafted:

(1) When a person is a witness at the hearing, a statement made by him, though not made at the hearing, is admissible to prove the truth of

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the matter stated, provided the statement would have been admissible if made by him while testifying and provided further

- (a) The statement is inconsistent with his testimony at the hearing and is offered in compliance with Rule 22, or
- (b) The statement is offered following an attempt to impair his testimony as being recently fabricated and the statement is one made prior to the alleged fabrication and is consistent with his testimony at the hearing, or
- (c) The statement concerns a matter as to which the witness has no present recollection.

5. Drafted the following as a substitute for subdivision (2) of Rule 63 as drafted:

- (2) To the extent admissible by the statutes of this State:
 - (a) Affidavits.
 - (b) Depositions taken in the action in which they are offered.
 - (c) Testimony given by a witness in a prior trial or preliminary hearing of the action in which it is offered.

6. Drafted the following as a substitute for subdivision (3) of Rule 63 as drafted:

(3) If the judge finds that the declarant is unavailable as a witness at the hearing and subject to the same limitations and objections as though the declarant were testifying in person, testimony given as a witness in another action or in a deposition taken in compliance with law in another action is admissible in the present action when

- (a) The testimony is offered against a party who offered it

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in his own behalf on the former occasion or against the successor in interest of such party, or

- (b) In a civil action, the issue is such that the adverse party on the former occasion had the right and opportunity for cross examination with an interest and motive similar to that which the adverse party has in the action in which the testimony is offered, or
- (c) In a criminal action, the present defendant was a party to the prior action and had the right and opportunity for cross examination with an interest and motive similar to that which he has in the action in which the testimony is offered; provided, however, that testimony given at a preliminary hearing in the prior action is not admissible.

7. Drafted the following as a substitute for subdivision (4) of Rule 63 as drafted. (new language underlined):

- (4) Contemporaneous Statements and Statements Admissible on Ground of Necessity Generally. A statement (a) which the judge finds was made while the declarant was perceiving the event or condition which the statement narrates, describes or explains, or (b) which the judge finds was made while the declarant was under the stress of a nervous excitement caused by such perception, or (c) if the declarant is unavailable as a witness, a statement written or otherwise recorded at the time the statement was made narrating, describing or explaining an event or condition which the judge finds was made by the declarant at a time when the matter had been recently perceived by him and while his recollection was clear, and was made in good faith prior to the commencement of the action;

8. Drafted the following as a substitute for subdivision (5) of Rule 63 as drafted (new language underlined):

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(5) Dying Declarations. A statement by a person unavailable as a witness because of his death if the judge finds that it was made upon the personal knowledge of the declarant and that it was made voluntarily and in good faith and while the declarant was conscious of his impending death and believed that there was no hope of his recovery;

9. Approved subdivision (7) of Rule 63 as drafted:

(7) Admissions by Parties. As against himself a statement by a person who is a party to the action in his individual or a representative capacity and if the latter, who was acting in such representative capacity in making the statement;

10. Approved subdivision (8) of Rule 63 as drafted:

(8) Authorized and Adoptive Admissions. As against a party, a statement (a) by a person authorized by the party to make a statement or statements for him concerning the subject of the statement, or (b) of which the party with knowledge of the content thereof has, by words or other conduct, manifested his adoption or his belief in its truth;

11. Drafted the following as a substitute for subdivision (9) of Rule 63 as drafted (new language underlined):

(9) Vicarious Admissions. As against a party, a statement which would be admissible if made by the declarant at the hearing if (a) the statement concerned a matter within the scope of an agency or employment of the declarant for the party and was made before the termination of such relationship, or (b) the party and the declarant were participating in a plan to commit a crime or a civil wrong and the statement was relevant to the plan or its subject matter and was made while the plan was in existence and before its complete execution or other termination, or (c) in a civil action one of the issues between the party and the proponent of the evidence of the statement is a legal liability of the declarant, and the statement tends to establish that liability;

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January 10, 1958

John R. McDonough, Jr.
Executive Secretary
California Law Revision Commission
School of Law
Stanford, California

Re: Committee to Consider Uniform Rules of Evidence

Dear John:

Enclosed a proposed agenda for the meeting of the Southern Section of the above committee on Saturday, January 11, 1958.

I have given the members of the committee approximately 6 weeks to assemble their ideas and arguments.

It would be of great assistance to us if you could be present at our meeting in Los Angeles on February 15, 1958.

I will notify you of the date of the meeting of the Northern Section in San Francisco.

Yours very truly,

/s/ Joseph A. Ball/G

Joseph A. Ball

JAB:gb
Enc.

cc: Jack Hayes

AGENDA FOR MEETING OF THE COMMITTEE

TO CONSIDER UNIFORM RULES OF EVIDENCE,

JANUARY 11, 1958

The State Bar Offices
458 South Spring Street - Suite 440
Los Angeles, California

I. REQUIRED READING.

Model Code of Evidence.

Uniform Rules of Evidence.

Reports by Professor James H. Chadbourn to the
Law Revision Commission.

Minutes of the Law Revision Commission.

II. SUGGESTED READING.

Chadbourn's sources in footnotes.

III. ASSIGNMENTS FOR REVIEW.

Ball:	Editorial	South-North
Selvin:	Editorial	North
Duniway:	Editorial	South

IV. ASSIGNMENTS FOR STUDY:

Selvin:	Rules 19, 20, 21, 22, 64, 65 and 66.
Barker:	Rule 63, Subdivisions 1, 7, 12, 17, 22 and 27.
Kaus:	Rule 63, Subdivisions 2, 8, 13, 18, 23 and 28.
Mack:	Rule 63, Subdivisions 3, 9, 14, 19, 24 and 29.
Patton:	Rule 63, Subdivisions 4, 5, 10, 15, 20 and 25.
Simpson:	Rule 63, Subdivisions 6, 11, 16, 21, 26 and 30.
Kaus and Mack	Rule 63, Subdivision 31.

V. PROCEDURE.

(a) Each member shall study and review the assigned topic and recommend committee action. Fourteen (14) copies of study, review and recommendation to be forwarded to chairman in accordance with schedule.

(b) Each member will receive reports from other members through chairman not less than two (2) weeks prior to scheduled meeting.

(c) Oral discussion of scheduled topics at meeting of Southern Section.

(d) Proposed recommendation of Southern Section to be forwarded to Northern Section.

(e) Final recommendation of committee to be forwarded to Board of Governors.

VI. SCHEDULE OF REPORTS.

Rule 63, Subdivisions 1-10	by	February 1, 1958
Rule 63, Subdivisions 11-20	by	March 1, 1958
Rule 63, Subdivisions 21-31	by	March 28, 1958
Rule 19	by	February 1, 1958
Rules 20, 21 and 22	by	March 1, 1958
Rules 64, 65 and 66	by	March 28, 1958

VII. SCHEDULE OF MEETINGS AND TOPICS.

February 15, 1958 (Full day meeting)	Rule 63, Subdivisions 1-10; Rule 19
March 15, 1958 (Full day meeting)	Rule 63, Subdivisions 11-20; Rules 20, 21 & 22
April 12, 1958 (Full day meeting)	Rule 63, Subdivisions 21-31; Rules 64, 65 & 66

MEETING OF THE SOUTHERN COMMITTEE TO CONSIDER

UNIFORM RULES OF EVIDENCE.

The Southern Section of the committee met at the State Bar offices in the Rowan Building, Los Angeles, California at 9:00 o'clock a.m., on Saturday, January 11th, 1958.

Present: Joseph A. Ball, Chairman
Long Beach

Stanley A. Barker - Los Angeles
Otto M. Kaus - Los Angeles
H. Pitts Mack - San Diego
Robert H. Patton - Los Angeles

Absent: J. E. Simpson - Los Angeles
Herman F. Selvin - Los Angeles

The agenda was followed as written except "Assignments For Study". After some discussion, it was decided to reassign the topics for study by grouping them as to subject matter.

The reassignments were as follows:

Selvin: Rules 19, 20, 21, 22, 63-Subdivision (1),
64, 65 and 66.

Barker: Rule 63-Subdivisions 1, 13, 14, 22 and 27.

Kaus: Rule 63-Subdivisions 7, 8, 9, 12, 23, 24, 25,
26 and 31.

Patton: Rules 19 and 63-Subdivisions 4, 5, 10, and 20.

Mack: Rule 63-Subdivisions 2, 3, 15, 16, 17, 18, 19,
28, 29 and 31.

Simpson: Rule 63-Subdivisions 4, 6, 11, 21 and 30.

The committee decided that they would adopt the following schedule for the filing of the reports with the chairman:

SCHEDULE OF REPORTS

Rule 63, Subdivisions 1-10	by	February 1, 1958
Rule 63, Subdivisions 11-20	by	March 1st, 1958
Rule 19	by	February 1, 1958
Rules 20, 21 and 22	by	March 1st, 1958
Rules 64, 65 and 66	by	March 28, 1958
Rule 63, Subdivisions 20-31	by	March 28, 1958

SCHEDULE OF MEETINGS AND TOPICS

February 15, 1958 (Full day meeting)	Rule 63, Subdivisions 1-10, Rule 19
March 15, 1958 (Full day meeting)	Rule 63, Subdivisions 11-20, Rules 20, 21 and 22.
April 12, 1958 (Full day meeting)	Rule 63, Subdivisions 21-31, Rules 64, 65 and 66.

We probably cannot cover the entire assignment for the first meeting in one day. The committee decided that the reports should be filed on time and if the reports filed by February 1st, 1958 meeting were not considered in full at the February 15th meeting, the consideration of the reports first filed can be continued to another date.

By reason of the importance of the study to the bar, it is necessary that the members of this committee report promptly on the scheduled date. We may be required to express an opinion on changes in the Rules of Evidence before the next legislative meeting. We must keep abreast of the studies of the Law Revision Commission.

At our first meeting we discovered that this is a major project and in the south we need all of the manpower that has been assigned. I would suggest that Mr. Duniway consider enlarging the size of his committee so that he can schedule work in the north as we have scheduled work in the south.

John McDonough, Executive Secretary of the Law Revision Commission has agreed to be present at the next meeting of the southern section of the committee in Los Angeles.

/s/ Joseph A. Ball
Joseph A. Ball, Chairman

cc: Edwin A. Heafey
Stanley A. Barker
Otto M. Kaus
H. Pitts Mack
J. E. Simpson
Robert H. Patton
Herman F. Selvin
Jack A. Hayes
Benjamin C. Duniway
John McDonough