

Approval for Printing

Tentative Recommendation on Privileges

Memorandum 63-57 (enclosed)

Tentative Recommendation on Extrinsic Policies

Memorandum 63-60 (sent 12/11/63)

Judicial Notice (Article II--Rules 9-12)

Memorandum 63-61 (sent 12/4/63)

General Provisions (Article I--Rules 1-8)

Materials in binder

Memorandum 63-58 (to be sent)

Research Study (in your binder)

MINUTES OF MEETING

OF

DECEMBER 20 AND 21, 1963

San Bernardino

The regular meeting of the Law Revision Commission was held in San Bernardino on December 20 and 21, 1963.

Present: John R. McDonough, Jr., Vice Chairman
Hon. James A. Cobey
Joseph A. Ball
James R. Edwards
Richard H. Keatinge
Sho Sato
Thomas E. Stanton, Jr.

Absent: Herman F. Selvin, Chairman
Hon. Pearce Young
Angus C. Morrison, ex officio

Messrs. John H. DeMouly, Joseph B. Harvey, and Jon D. Smock of the Commission's staff also were present.

Minutes of November Meeting.

The Minutes of the November 1963 meeting were approved as submitted.

Future Meetings of the Commission.

Future meetings of the Commission are scheduled as follows:

January 23, 24, and 25	Los Angeles
February 20, 21, and 22	San Francisco
March 22, 23, and 24	Lake Tahoe (California Alumni Center)

1964 Annual Report.

The Commission considered Memorandum 63-54 and approved the portion of the report set out as Exhibit I of Memorandum 63-54 without change. The remainder of the annual report previously had been approved.

Election of Officers.

John R. McDonough, Jr. was elected Chairman of the Law Revision Commission. Richard H. Keatinge was elected Vice Chairman. The terms of these officers are for two years and commence on January 1, 1964.

Participation by Various Groups in Evidence Study.

The Commission discussed various measures that would encourage interested groups to participate more actively in the study of the Uniform Rules of Evidence. A number of suggestions were made for consideration by the Executive Secretary and the new Chairman.

STUDY NO. 34(L) - UNIFORM RULES OF EVIDENCE (ARTICLE I. GENERAL PROVISIONS)

The Commission considered Memorandum 63-46 and Memorandum 63-58. The following actions were taken:

General. The staff is to prepare a tentative recommendation on Article I. The definitions in Article I will be considered and, after desirable revisions have been made, will be tentatively approved for the purposes of the tentative recommendation so that it can be printed and distributed for comments. The Commission recognized that the definitions in the first portion of the Code of Civil Procedure and in the first portion of Part IV of the Code of Civil Procedure will have to be considered when the new evidence statute is drafted. However, it is important that the URE definitions and general provisions be printed and distributed for comments, even if no tentative recommendation can be made at this time as to the disposition of the definition provisions of Part IV of the Code of Civil Procedure.

Rule 2. This rule was approved as revised by the Staff.

Rule 3. This rule was deleted from the revised rules. Code of Civil Procedure Sections 2033 and 2034 provide a superior procedure in cases where a request is made for admissions. The comment to Rule 3 is to indicate this fact.

Rule 4. This rule was approved as revised by the Staff.

Rule 5. This rule was approved as revised by the Staff.

Rule 6. This rule was previously approved.

Rule 7. This rule was approved as previously revised after clause (f) was further revised to read in substance:

(f) all evidence is admissible except evidence not having a tendency in reason to prove any fact material to the proceeding.

Rule 8. This rule was discussed but no action was taken on the rule as revised by the Staff. The Staff was directed to prepare a memorandum to point out how subdivisions (2) and (3) of Rule 8 would apply to the various rules that permit admission of evidence only if a condition is fulfilled. The tentative recommendation on Rule 8 should also give some illustrations of how Rule 8 would apply to various other rules, how it would change the existing law, and why the changes are justified.

In addition, the Staff is to include in the next memorandum on Rule 8 the reasons why evidence not otherwise admissible may be considered in making a ruling under Rule 8(1) and Rule 8(3). The tentative recommendation should also indicate the reason why evidence not otherwise admissible may be considered.

It was noted that the U.S. Supreme Court makes an independent review of the evidence in cases of confessions. How would Rule 8 fit in with this concept of independent review.

STUDY NO. 34(L) - UNIFORM RULES OF EVIDENCE (ARTICLE II. JUDICIAL NOTICE)

The Commission considered Memorandum 63-61 and made the following decisions:

Government Code Section 18576. This section is to be listed in Rule 9(1)(b).

Code of Civil Procedure Section 433. This section should be revised to conform its language to the tentative recommendation on judicial notice. The revision set out on page 4 of Exhibit I of Memorandum 63-61 was approved.

Code of Civil Procedure Section 1827. This section should be revised to conform its language to the tentative recommendation on judicial notice. The revision on page 5 of Exhibit I of Memorandum 63-61 was approved.

Penal Code Sections 961 and 963. The revisions of these sections as set out on pages 6 and 7 of Exhibit I of Memorandum 63-61 were approved.

Civil Code Section 53. The revision of this section as set out on page 8 of Exhibit I of Memorandum 63-61 was approved.

Corporations Code Section 6602. The revision of this section as set out on page 9 of Exhibit I of Memorandum 63-61 was approved.

Government Code Section 34330. The repeal of this section was approved.

Revision of Rule 9(5). This subdivision of the tentative recommendation was revised to read:

(5) Judicial notice may not be taken of any matter unless authorized or required by [~~this rule~~] statute.

STUDY NO. 34(L) - UNIFORM RULES OF EVIDENCE

(Article V. Privileges)

The Commission considered Memorandum 63-57, the First Supplement thereto, and related attachments setting forth the comments of interested persons on the Commission's tentative recommendation on Privileges.

The Executive Secretary reviewed briefly the comments received to date on this tentative recommendation, noting particularly the absence of comment from the office of the Attorney General. The Executive Secretary reported the general agreement of the State Bar Committee to consider the Uniform Rules, noting the Northern Section's general approval except as to matters previously objected to and the Southern Section's objection to the privilege of a spouse not to testify against the other spouse (that Section preferring to retain the existing law).

The following actions were taken in regard to this tentative recommendation (only substantive actions are included; conforming language changes are omitted from consideration):

Introductory Material

Minor changes in language were suggested in the introductory material. These changes together with other changes suggested by individual Commissioners are to be considered by the staff for inclusion in the revised version of the tentative recommendation.

Rule 22.3--Definitions

The first two lines of paragraph (1) were revised to read

in substance: "'Criminal proceeding' means an action or proceeding brought in a court by the people of the State of California" Conforming changes are to be made throughout the privilege rules to use the revised definition of "criminal proceeding."

Paragraph (3) was revised to read: "'Presiding officer' means the person authorized to rule on a claim of privilege in the proceeding in which the claim is made."

In paragraph (4), parentheses were inserted for commas to set off the parenthetical phrase and the last line was revised to read ". . . in which, pursuant to law, testimony can be compelled to be given." It was agreed that a discussion regarding the way in which testimony can be compelled to be given should be added to the Comment on this rule.

Rule 23.5--Privilege not to Testify Against Spouse

It was agreed that the placement of this rule should be changed so that it appears together with Rule 28, the marital confidential communication privilege.

Paragraph (c) of subdivision (1) was revised to insert the word "during" in place of the word "after" immediately preceding the word "marriage" where it appears in this paragraph. This change was made to conform to the theory of the rule, since there is no privilege not to testify after the marriage is terminated. It was agreed to make a conforming change in clause (2)(i) to insert the words "the person or property of" in the phrase "against the person or property of the other spouse."

The staff was directed to revise subdivision (2) to make it clear that the prior consent of a spouse is required before an adverse party may call a spouse to testify against the other spouse in any proceeding in which the other spouse is a party.

Subdivision (3) was revised to read: "Unless wrongfully compelled to do so, a person who testifies in a particular proceeding does not have a privilege under this rule in that proceeding."

Rule 24--Definition of Incrimination

The word "relevant" was added to the last line of subdivision (3) in the phrase "and all other relevant factors."

The staff was directed to revise the first paragraph of the Comment to this rule to eliminate the reference to the close similarity between Revised Rule 24 and the rule as enacted in New Jersey. The paragraph is to be expanded to include discussion of the substance of the New Jersey revision.

Rule 25--Self-Incrimination: Exceptions

The introductory "subject to" clause was deleted as being unnecessary.

The staff was directed to add to the Comment on this rule a discussion regarding the applicability of the privilege in the police station.

Rule 26--Lawyer-Client Privilege

Subdivision (2) of this rule was revised so that the introductory clause of this rule reads as follows:

Subject to Rule 37 and except as otherwise provided in this rule, a person, whether or not a party, has a privilege to refuse to disclose, and to prevent another from disclosing, a confidential communication between client and lawyer if the privilege is claimed by: . . .

Subdivision (3) was revised by striking from the second line thereof the phrase "for the client."

Changes conforming to each of the above revisions are to be made in the other rules in which similar language appears.

A suggestion to make clear the privileged nature of communications between public entities and their attorneys vis-à-vis the Brown Act was rejected. The Commission recognized this as a Brown Act problem and not a problem to be resolved by changing the rules of evidence.

Rule 27.5--Psychotherapist-Patient Privilege

Paragraph (d) of subdivision (1) was revised by striking from the definition of "psychotherapist" persons licensed or certified as psychologists in other states where the requirements for obtaining such a license or certificate are substantially the same as under California law.

Paragraph (h) of subdivision (4) was revised to read as follows: "If the psychotherapist is appointed by order of a court to examine the patient."

Paragraph (j) of subdivision (4) was deleted.

The Comment is to be revised to make it clear that the privilege does not apply when the patient tenders the issue of his mental or emotional condition.

Rule 28--Marital Privilege for Confidential Communications

The language in paragraph (e) of subdivision (2) was revised to conform to similar changes made in the spousal privilege not to be called as a witness, i.e., clause (ii) was revised to insert the words "the person or property of" in the phrase "against the person or property of the other spouse" and clause (iv) was revised to refer to crimes defined by Sections 270 and 270a of the Penal Code.

Paragraph (g) of subdivision (2) was revised to restore the substance of the original URE language in regard to limiting the exception to criminal proceedings in which the defendant offers evidence of a communication between himself and his spouse.

Paragraph (h) of subdivision (2) was deleted.

Rule 28.5--Confidential Communications: Burden of Proof

The Commission approved revising this rule to read as follows:

Whenever a privilege is claimed on the ground that the matter sought to be disclosed is a communication made in confidence in the course of the lawyer-client, physician-patient, psychotherapist-patient, or husband-wife relationship, the communication is presumed to have been made in confidence and the opponent of the claim of privilege has the burden of proof to establish that the communication was not confidential.

Rule 34--Official Information

The Commission directed the staff to revise subdivision (3) to make that subdivision inoperative where disclosure is forbidden by a federal statute. In effect, this codifies the holding in People v. Parham.

The Commission approved the addition of a new subdivision to this rule to codify the policy expressed in People v. Keener. The new subdivision is to read as follows:

Notwithstanding subdivision (3), where a search is made pursuant to a warrant valid on its face, the prosecution is not required to reveal official information to the defendant in order to establish the legality of the search and the admissibility of the evidence obtained as a result of it.

Rule 36--Identity of Informer

The staff was directed to revise subdivision (1) to state more clearly the nonprivileged nature of the identity of an informer where such identity is known to the public or has been made officially known to the public.

The staff was directed to revise subdivision (3) to conform to the similar revision made in subdivision (3) of Rule 34 to codify the holding in People v. Parham.

The Commission agreed to add a new subdivision to codify the policy expressed in People v. Keener. The new subdivision would read as follows:

Notwithstanding subdivision (3), where a search is made pursuant to a warrant valid on its face, the prosecution is not required to reveal the identity of the informer to the defendant in order to establish the legality of the search and the admissibility of the evidence obtained as a result of it.

Rule 36.5--Claim of Privilege by Judge

This rule was revised to refer to "evidence that is subject to a claim of privilege under this article" instead of "evidence

that is privileged under this article" since the substantive provisions of the privilege rules make matters privileged only where the privilege is claimed by certain named persons, not including judges.

Rule 37--Waiver of Privilege

In connection with the discussion of this rule, the Commission agreed that the rule declared in City and County of San Francisco v. Superior Court should be overruled insofar as that case would make communications to physicians privileged under the attorney-client privilege where the communication is not itself privileged under the physician-patient privilege. Thus, the Commission adopted the policy that communications to physicians and to psychotherapists should not be privileged under the attorney-client privilege in any case where the communications are not privileged under Rule 27 or Rule 27.5. The present rule in cases involving, for example, accountants would not be changed--the attorney-client privilege would apply under the same circumstances that it may now apply.

The staff was directed to add to the Comment on this rule a discussion regarding the confidential nature of hospital records and the protection that such records would be accorded under subdivision (4) of this rule.

Rule 37.7--Ruling Upon Privileged Communications in Nonjudicial Proceedings

The staff was directed to revise this rule so that the rule itself states that it does not apply to administrative bodies that have constitutional contempt power.

Rule 38.

The staff was directed to revise this rule to make it clear that

the substantive effect of this rule would be operative in cases where the judge improperly failed to act under the provisions of Rule 36.5.

Rule 40--Effect of Error in Overruling Claim of Privilege

This rule was restored in an amended form to refer to the spousal privilege not to be called as a witness. As revised, the rule now reads:

A party may predicate error on a ruling disallowing a claim of privilege only if he is the holder of the privilege, except that a party may predicate error on a ruling disallowing a claim of privilege by his spouse under Rule 23.5 [now 27.5].

Rule 40.5--Savings Clause

The Commission approved the addition of a new rule to read as follows:

Nothing in Rules 22.3 to 40, inclusive, shall be construed to repeal by implication any other statute relating to privileges.

This provision was added for the same reason that a similar provision was added to the Commission's tentative recommendation on the Hearsay Evidence Article of the Uniform Rules, namely, to make it clear that this article does not repeal by implication any other statute relating to privilege, nor bring within any privilege information declared by statute to be unprivileged, nor make unprivileged any information declared by statute to be privileged.

Amendments and Repeals

The Commission determined that Code of Civil Procedure Section 2065 should be repealed in its entirety and that the Comment thereto should refer to the appropriate rules that supersede the various parts of Section 2065 not superseded by the privilege rules.

The Commission disapproved a staff suggestion to amend Probate Code Section 105 because amendment of that section is not essential

to conform to repealing the dead man stature. The staff was directed to perform additional research on this question when time permits and return the matter for Commission consideration at a later time if further research indicates that a revision of Probate Code Section 105 is necessary.

Approval for Printing

Each of the rules in the Privileges Article of the Uniform Rules was approved as revised and the entire tentative recommendation approved for printing, except that the Commission is to be given the opportunity to review the substantive revisions made to repeal the policy expressed in City and County of San Francisco v. Superior Court insofar as it applies to physicians and psychotherapists. Voting aye: Commissioners McDonough, Cobey, Ball, Edwards, Keatinge, and Sato. Voting no: None. Absent: Commissioners Young, Selvin and Stanton.

STUDY NO. 34(L) - UNIFORM RULES OF EVIDENCE (ARTICLE VI. EXTRINSIC
POLICIES AFFECTING ADMISSIBILITY)

The Commission considered Memorandum 63-60 and the tentative recommendation relating to Extrinsic Policies Affecting Admissibility (October 1, 1963). The following actions were taken:

Rules 41 and 43. The Commission considered the State Bar Committee objection that Rules 41 and 43 were undesirable insofar as they eliminate the prohibition against testimony by a juror to impeach a verdict. The Commission declined to change the rules.

Rule 47. The Commission revised this rule to read:

(1) Except as provided in this rule, evidence of a person's character or a trait of his character (whether in the form of opinion, evidence of reputation, or evidence of specific instances of his conduct) is inadmissible when offered to prove his conduct on a specified occasion. [except-that]

(2) In a criminal action or proceeding, evidence of the defendant's character or a trait of his character in the form of opinion or evidence of his reputation is not inadmissible under this rule:

(a) When offered by the defendant to prove his innocence. [and-such-evidence,-when-offered-by-the-defendant,-may-not-be-excluded-by-the-judge-under-Rule-45.]

(b) When offered by the prosecution to prove the defendant's guilt if the defendant has previously introduced evidence of his good character to prove his innocence.

(3) In a criminal action or proceeding, evidence of the character or a trait of character (in the form of opinion or evidence of reputation) of the victim of the crime for which the defendant is being prosecuted is not inadmissible under this rule:

(a) When offered by the defendant to prove conduct of the victim in conformity with such character or trait of character.

(b) When offered by the prosecution to meet evidence offered by the defendant under paragraph (a).

[2] (4) Nothing in this rule prohibits the admission of evidence that a person committed a crime, civil wrong, or other act when relevant to prove some fact (such as motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident) other than his disposition to commit such acts.

~~[(3)]~~ Nothing in this rule affects the admissibility of evidence offered to support or impair the credibility of a witness.

The revision was intended (1) to make it clear that subdivision (1) excludes evidence of specific instances of conduct when offered to prove conduct on a specified occasion and (2) to permit evidence of the character of the victim (by opinion or evidence of his reputation) when offered by the defendant in a criminal case or by the prosecution to meet similar evidence offered by the defendant. The State Bar Committee had objected to not permitting evidence of the character of the victim.

Rule 51. The following paragraph was added to the comment to this rule:

This rule does not prevent the use of evidence of subsequent remedial conduct for the purpose of impeachment in appropriate cases. See Pierce v. Penney Co., 167 Cal. App.2d 3, 334 P.2d 117 (1959) for a good analysis of the California cases on impeachment by use of evidence of subsequent remedial conduct.

Approval for printing. The recommendation as revised was approved for printing.

STUDY NO. 34(L) - UNIFORM RULES OF EVIDENCE (ARTICLE VII. EXPERT AND
OTHER OPINION TESTIMONY

The Commission considered Memorandum 63-56 and the tentative
recommendation on Expert and Other Opinion Testimony (December 12, 1963).

The following actions were taken:

Generally. The word "matter" is to be substituted for "facts and data."

Rule 56. This rule was revised to read (with changes from URE Rule shown):

(1) If the witness is not an expert witness or is an expert witness who is not testifying as an expert, his testimony in the form of opinions [~~or inferences~~] is limited to such opinions [~~or inferences~~] as the judge finds (a) may be rationally based on the perception of the witness and (b) are helpful to a clear understanding of his testimony or to the determination of the fact in issue.

(2) If the witness is testifying as an expert, his testimony [~~of the witness~~] in the form of opinions [~~or inferences~~] is limited to such opinions as the judge finds are [~~(a)-based-on-facts-or-data perceived-by-or-personally-known-or-made-known-to-the-witness-at the-hearing-and-(b)]~~] within the scope of the special knowledge, skill, experience, or training possessed by the witness.

(3) [~~Unless-the-judge-excludes-the-testimony-he-shall-be deemed-to-have-made-the-finding-requisite-to-its-admission.~~] The opinion of a witness may be held inadmissible or may be stricken if the judge finds that it is based in whole or in significant part on matter that is not a proper basis for such an opinion. In such case, the witness may then give his opinion after excluding from consideration the matter determined to be improper.

(4) Testimony in the form of opinions [~~or inferences~~] otherwise admissible under these rules is not objectionable because it embraces the ultimate issue or issues to be decided by the trier of [~~the~~] fact.

Rule 57. The word "matter" was substituted for the words "facts and data."

Rule 57.5. This rule is to be limited to expert witnesses. The sentences of the rule are to be tabulated.

Rule 57.7. This rule was deleted. Its substance (in a revised form) was included in Rule 56.

Rule 58. The word "matter" is to be substituted for "facts and data."

Rule 58.5. The word "matter" is to be substituted for "facts and data."

Rule 61. This rule was tabulated into two numbered paragraphs. The phrase "trier of the facts" was revised to read "trier of fact." The second paragraph was revised to read:

(2) The amount of compensation and expenses paid or to be paid to an expert witness not appointed by the judge is a proper subject of inquiry as relevant to his credibility and the weight of his testimony.

Code of Civil Procedure Section 1256.2. This section is to be repealed; it is superseded by subdivision (2) of Rule 61.

Distribution to State Bar. The revised recommendation is to be distributed to the State Bar Committee for comments.