

34(L)

9/3/64

Memorandum 64-62

Subject: Study No. 34(L) - Uniform Rules of Evidence (Evidence Code--
Division 6--Witnesses)

The division on witnesses was revised prior to printing to reflect the several actions taken by the Commission at the August meeting and to incorporate the suggestions of several individual Commissioners. In addition, some changes were made in accord with your general direction to make such revisions as the Commission would be likely to make but did not have time to consider at the August meeting. Because this division has not been thoroughly considered by the Commission, we mention in greater detail some of the changes that have been made.

Sections 703 and 704

These sections have been revised to reflect the action taken at the August meeting.

Section 721

Several Commissioners have expressed concern as to the necessity for and meaning of this section. This section was added primarily to dispel any negative implication from Section 801 (i.e., the possible suggestion that the testimony of an expert is limited to opinion testimony only) and to clarify and give substantial meaning to the introductory clauses in Sections 800 and 801 ("If a witness ['is' or 'is not'] testifying as an expert, . . ."). Thus, Section 721 spells out the competence of an expert to testify to the same extent as an ordinary witness, to testify as to facts that only an expert can know, and to testify in the form of an opinion.

At the August meeting, the Commission approved a revision to subdivision (a) of Section 801 to restate precisely the language of People v. Cole, 47 Cal.2d 99, 301 P.2d 854 (1956), regarding when expert opinion testimony is admissible. In an attempt to clarify the purpose of Section 721 and to make it more meaningful, we added similar language to subdivision (b) of Section 721.

You will recall that the Judges' Committee suggested that Section 721 be deleted as unnecessarily stating the obvious (see Memorandum 64-54, pp. 2-3). If the present draft is not acceptable to the Commission, the Commission should consider the following substitute as an alternative to deleting the section:

721. A person who is qualified to testify as an expert may testify:

- (a) To any matter of which he has personal knowledge; or
- (b) To any matter that is sufficiently beyond common experience that the testimony of an expert would assist the trier of fact.

(It should be noted that the suggested alternative would make subdivision (a) of Section 801 unnecessary.)

Section 722

Subdivision (b) of Section 722 reflects the action taken at the August meeting.

Section 733

Section 733 was again revised to clarify its meaning in light of the concern expressed by several Commissioners. The purpose of this section is twofold. First, it is intended to clarify any ambiguity that may exist with respect to the right of the parties to introduce other expert evidence on the same matter as to which an expert is appointed by the judge under

Section 730. Second, the section is needed to clarify the question of compensation: Only court-appointed experts are entitled to the compensation mentioned in Sections 730 and 731; where other experts are called by the parties, the party calling the expert is responsible for the expert's compensation and only ordinary witness fees for such experts are allowable as costs in the action.

Section 767

In response to a suggestion by the Judges' Committee, and in order to restate an affirmative statement in Code of Civil Procedure Section 2048, we added the language appearing at the end of this section stating that "a leading question may be asked of a witness on cross-examination." This states existing law and, since the principle is not elsewhere stated in the Evidence Code except by negative implication from the first part of this section, it seems desirable to state the principle explicitly.

Section 771

The Commission agreed to defer detailed consideration of this section. Except for minor language changes that might be made within the existing scheme, the staff suggests that consideration of any substantive change in this section should be deferred until after the bill is preprinted. The section presents difficult and complex problems that very likely would consume a great deal of meeting time that could more profitably be spent on reviewing other subjects.

Section 776

This section was revised to reflect the action taken at the August meeting. In addition, we added some language to this section as suggested by several Commissioners to state explicitly that the right to examine as

adverse witnesses extends to "any person who was ['a director, officer, superintendent, member, agent, employee, or managing agent' or a 'public employee'] at the time of the act or omission giving rise to the cause of action."

Subdivision (b) of Section 776 reflects the substance of existing law as approved at the August meeting. It should be noted that the second paragraph of this subdivision contains no restriction on the cross-examination of a party's own officer, agent, employee, etc. No California case has specifically considered this question, but Professor Degnan cites an Arizona case construing a similar statute as not meaning what it literally says; he concludes that the existing statute should be changed. See the Degnan Study, Part V, p. 132. Note that in any action by or against a nonpersonal party, counsel for the nonpersonal party would be permitted full cross-examination of the party's own director, officer, employee, etc. The same is true, of course, of any party; but the problem seems most acute in the case of a nonpersonal party who can act only through such persons.

Section 788

The staff has no substantive questions to raise in connection with this section. We believe it of interest, however, to bring to your attention the draft of a resolution proposed by the Criminal Courts Bar Association for consideration by the Conference of State Bar Delegates. The resolution recommends amending Code of Civil Procedure Section 2051 to limit permissible impeachment of a witness by prior criminal conviction to conviction for perjury only.

A witness may be impeached by the party against whom he was called, by contradictory evidence or by evidence that his general reputation for truth, honesty, or integrity is bad, but not by evidence of particular wrongful acts, except that it may be shown by the examination of the witness, or the record of the judgment, that he had been convicted of ~~a felony~~ the crime of perjury unless he has previously received a full and unconditional pardon, based upon a certificate of rehabilitation.

The Association's comment notes in part that "The introduction of a prior felony conviction (except perjury) for the purpose of impeaching the credibility (truthfulness) of the witness is illogical, prejudicial, without compensating beneficial purpose and under the present state of the law often abused."

Respectfully submitted,

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DIVISION 6. WITNESSES

CHAPTER 1. COMPETENCY

§ 700. General rule as to competency.

700. Except as otherwise provided by statute, every person is qualified to be a witness and no person is disqualified to testify to any matter.

§ 701. Disqualification of witness.

701. A person is disqualified to be a witness if he is:

(a) Incapable of expressing himself concerning the matter so as to be understood, either directly or through interpretation by one who can understand him; or

(b) Incapable of understanding the duty of a witness to tell the truth.

§ 702. Personal knowledge.

702. (a) Subject to Section 721, the testimony of a witness concerning a particular matter is inadmissible unless he has personal knowledge of the matter. Against the objection of a party, such personal knowledge must be shown as a prerequisite for the testimony of the witness.

(b) A witness' personal knowledge of a matter may be provided by any otherwise admissible evidence, including his own testimony.

§ 703. Judge as witness.

703. (a) Before the judge presiding at the trial of an action may testify in that trial as a witness, he shall, in proceedings held out of the presence and hearing of the jury, inform the parties of the information he has concerning any fact or matter about which he is offered to testify.

(b) Against the objection of a party, the judge presiding at the trial of an action may not testify in that trial as a witness. Upon such objection, which shall be deemed a motion for mistrial, the judge shall declare a mistrial and order the action assigned for trial before another judge.

(c) In the absence of objection by a party:

(1) The judge presiding at the trial of a civil action may testify in that trial as a witness unless his testimony would be of substantial consequence to the determination of the action, in which case the judge shall declare a mistrial and order the action assigned for trial before another judge.

(2) The judge presiding at the trial of a criminal action may testify in that trial as a witness.

§ 704. Juror as witness.

704. (a) Before a juror sworn and impaneled in the trial of an action may testify in that trial as a witness, he shall, in proceedings conducted by the judge out of the presence and hearing of the remaining jurors, inform the parties of the information he has concerning any fact or matter about which he is offered to testify.

(b) Subject to subdivision (d), against the objection of a party, a juror sworn and impaneled in the trial of an action may not testify in that trial as a witness. Upon such objection, which shall be deemed a motion for mistrial, the

judge shall declare a mistrial and order the action assigned for trial before another jury.

(c) Subject to subdivision (d), in the absence of objection by a party:

(1) A juror sworn and impaneled in the trial of a civil action may testify in that trial as a witness unless his testimony would be of substantial consequence to the determination of the action, in which case the judge shall declare a mistrial and order the action assigned for trial before another jury.

(2) A juror sworn and impaneled in the trial of a criminal action may testify in that trial as a witness.

(d) Nothing in this section prohibits a juror from testifying as to the matters covered by Section 1150 or as provided in Section 1120 of the Penal Code.

CHAPTER 2. OATH AND CONFRONTATION

§ 710. Oath Required.

710. Every witness before testifying shall take an oath or make an affirmation or declaration in the form provided by Chapter 3 (commencing with Section 2093) of Title 6 of Part 4 of the Code of Civil Procedure.

§ 711. Confrontation.

711. At the trial of an action, a witness can be heard only in the presence and subject to the examination of all the parties to the action, if they choose to attend and examine.

CHAPTER 3. EXPERT WITNESSES

Article 1. Expert Witnesses Generally

§ 720. Qualification as an expert witness.

720. (a) A person is qualified to testify as an expert if he has special knowledge, skill, experience, training, or education sufficient to qualify him as an expert on the subject to which his testimony relates. Against the objection of a party, such special knowledge, skill, experience, training, or education must be shown as a prerequisite for the testimony of the witness.

(b) A witness' special knowledge, skill, experience, training, or education may be provided by any otherwise admissible evidence, including his own testimony.

§ 721. Testimony by expert witness.

721. A person who is qualified to testify as an expert may testify:

(a) To any matter of which he has personal knowledge to the same extent (including testimony in the form of an opinion) as a person who is not an expert.

(b) To any matter of which he has personal knowledge if such matter is within the scope of his special knowledge, skill, experience, training, or education.

(c) Subject to Section 801, in the form of an opinion upon a subject that is within the scope of his special knowledge, skill, experience, training, or education.

§ 722. Cross-examination of expert witness.

722. (a) Subject to subdivision (b), a witness testifying as an expert may be cross-examined to the same extent as any other witness and, in addition, may be fully cross-examined as to his qualifications and as to the subject to which his expert testimony relates.

(b) If a witness testifying as an expert testifies in the form of an opinion, he may not be cross-examined in regard to the content or tenor of any scientific, technical, or professional text, treatise, journal, or similar publication unless:

(1) the witness referred to, considered, or relied upon such publication in arriving at or forming his opinion; or

(2) Such publication has been admitted in evidence.

§ 723. Credibility of expert witness.

723. (a) The fact of the appointment of an expert witness by the judge may be revealed to the trier of fact.

(b) The 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.

§ 724. Limit on number of expert witnesses.

724. The judge may, at any time before or during the trial of an action, limit the number of expert witnesses to be called by any party.

§ 730. Appointment of expert by court.

730. When it appears to the judge, at any time before or during the trial of an action, that expert evidence is or may be required by the court or by any party to the action, the judge on his own motion or on motion of any party may appoint one or more persons to investigate, to render a report as may be ordered by the court, and to testify as an expert at the trial of the action relative to the fact or matter as to which such expert evidence is or may be required. The judge may fix the compensation for such services, if any, rendered by any person appointed under this section, in addition to any service as a witness, at such amount as seems reasonable to the judge in the exercise of his discretion.

§ 731. Payment of expert appointed by court.

731. (a) In all criminal actions and juvenile court proceedings, the compensation fixed under Section 730 shall be a charge against the county in which such action or proceeding is pending and shall be paid out of the treasury of such county on order of the court.

(b) In any civil action in any county in which the procedure prescribed in this article has been authorized by the board of supervisors, the compensation fixed under Section 730 for any medical expert or experts shall also be a charge against and paid out of the treasury of such county on order of the court. Except as otherwise provided in this subdivision, in all civil actions, such compensation shall, in the first instance, be apportioned and charged to the several parties in such proportion as the judge may determine and may thereafter taxed and allowed in like manner as other costs.

§ 732. Calling and examining court-appointed expert.

732. Subject to Article 1 (commencing with Section 720), any person appointed by the court under Section 730 may be called and examined by any party to the action or by the court itself. When such witness is called and examined by the court, the parties have the same right as is expressed in Section 775 to cross-examine the witness and to object to the questions asked and the evidence adduced.

§ 733. Right to produce other evidence.

733. Nothing contained in this article shall be deemed or construed to prevent any party to any action from producing other expert evidence on the same fact or matter mentioned in Section 730; but, where other expert witnesses are called by a party to the action, their fees shall be paid by the party calling them and only ordinary witness fees shall be taxed as costs in the action.

CHAPTER 4. INTERPRETERS AND TRANSLATORS

§ 750. Rules relating to witnesses apply to interpreters.

750. A person who serves as an interpreter or translator in any action is subject to all the rules of law relating to witnesses.

§ 751. Oath required of interpreters and translators.

751. (a) An interpreter shall take an oath that he will make a true interpretation to the witness in a language that the witness understands and that he will truly interpret the witness' answers to questions to counsel, judge, or jury, in the English language, with his best skill and judgment.

(b) A translator shall take an oath that he will make a true translation in the English language of any writing he is to decipher or translate.

§ 752. Interpreters for witnesses.

752. (a) When a witness is incapable of hearing or understanding the English language or is incapable of expressing himself so as to be understood directly, an interpreter whom he can understand and who can understand him shall be sworn to interpret for him.

(b) The interpreter may be appointed and compensated as provided in Article 2 (commencing with Section 730) of Chapter 3.

§ 753. Translators of writings.

753. (a) When the written characters in a writing offered in evidence are incapable of being deciphered or understood directly, a translator who can decipher the characters or understand the language shall be sworn to decipher or translate the writing.

(b) The translator may be appointed and compensated as provided in Article 2 (commencing with Section 730) of Chapter 3.

§.754. Interpreters for deaf in criminal and commitment cases.

754. (a) As used in this section, "deaf person" means a person with a hearing loss so great as to prevent his understanding language spoken in a normal tone.

(b) In any criminal action where the defendant is a deaf person, all of the proceedings of the trial shall be interpreted to him in a language that he understands by a qualified interpreter appointed by the court.

(c) In any action where the mental condition of a deaf person is being considered and where such person may be committed to a mental institution, all of the court proceedings pertaining to him shall be interpreted to him in a

language that he understands by a qualified interpreter appointed by the court.

(d) Interpreters appointed under this section shall be paid for their services a reasonable sum to be determined by the judge, which shall be a charge against the county.

CHAPTER 5. METHOD AND SCOPE OF EXAMINATION

Article 1. Definitions

§ 760. Direct examination.

760. "Direct examination" is the examination of a witness by the party producing him.

§ 761. Cross-examination.

"Cross-examination" is the examination of a witness produced by an adverse party.

§ 762. Leading question.

762. A "leading question" is a question that suggests to the witness the answer that the examining party desires.

Article 2. Examination of Witnesses

§ 765. Judge to control mode of interrogation.

765. (a) The judge shall exercise reasonable control over the mode of interrogation of a witness so as to make it as rapid, as distinct, as little annoying to the witness, and as effective for the ascertainment of truth, as may be.

(b) Subject to subdivision (a) and Section 352, the parties may ask a witness such legal and pertinent questions as they see fit.

§ 766. Responsive answers.

766. A witness must give responsive answers to questions, and answers that are not responsive shall be stricken on motion of any party.

§ 767. Leading questions.

767. A leading question may not be asked of a witness on direct examination except in the discretion of the judge where, under special circumstances, it appears that the interests of justice require it, but a leading question may be asked of a witness on cross-examination.

§ 768. Writings.

768. (a) In examining a witness concerning a writing, including a statement made by him that is inconsistent with any part of his testimony at the hearing, it is not necessary to show, read, or disclose to him any part of the writing.

(b) If a writing is shown to a witness, all parties to the action must be given an opportunity to inspect it before any question concerning it may be asked of the witness.

§ 769. Inconsistent statement or conduct.

769. In examining a witness concerning a statement or other conduct by him that is inconsistent with any part of his testimony at the hearing, it is not necessary to disclose to him any information concerning the statement or other conduct.

§ 770. Evidence of inconsistent statement of witness.

770. Unless the interests of justice otherwise require, extrinsic evidence of a statement made by the witness that is inconsistent with any part of his testimony at the hearing shall be excluded unless:

(a) The witness was so examined while testifying as to give him an opportunity to identify, explain, or deny the statement; or

(b) The witness has not been excused from giving further testimony in the action.

§ 771. Refreshing recollection with a writing.

771. A witness, either while testifying or prior thereto, may use a writing to refresh his memory with respect to any matter about which he testifies, but such writing must be produced at the request of an adverse party, who may, if he chooses, inspect the writing, cross-examine the witness concerning it, and read it to the jury.

§ 772. Cross-examination.

772. Subject to the limitations of Chapter 6 (commencing with Section 780):

(a) A witness examined by one party may be cross-examined upon the same matter by each adverse party to the action in such order as the judge directs.

(b) Notwithstanding subdivision (a), a defendant in a criminal action who testifies as a witness in that action may be cross-examined only as to those matters about which he was examined in chief.

§ 773. Order of examination.

773. Unless the judge otherwise directs, the direct examination of a witness must be concluded before the cross-examination of the same witness begins.

§ 774. Re-examination.

774. A witness once examined cannot be re-examined as to the same matter without leave of the court, but he may be re-examined as to any new matter upon which he has been examined by an adverse party to the action. Leave is granted or withheld in the exercise of the discretion of the court.

§ 775. Judge may call witnesses.

775. The judge on his own motion may call witnesses and interrogate them the same as if they had been produced by a party to the action, and the parties may object to the questions asked and the evidence adduced the same as if such witnesses were called and examined by an adverse party. Such witnesses may be cross-examined by all parties to the action in such order as the judge directs.

§ 776. Examination of adverse party or witness.

776. (a) A party to the record of any civil action, or a person for whose immediate benefit such action is prosecuted or defended, or a director, officer, superintendent, member, agent, employee, or managing agent of any such party or person, or any public employee of a public entity when such public entity is a party to the action, or any person who was in any of the above named relationships at the time of the act or omission giving rise to the cause of action, may be called and examined as if under cross-examination by any adverse party at any time during the presentation of evidence by the party calling the witness. The party calling such witness is not bound by his testimony, and the testimony of such witness may be rebutted by the party calling him for such examination by other evidence.

(b) If a party is examined under this section, he may be cross-examined by all other parties to the action in such order as the judge directs, but his own counsel and counsel for any party whose interest is not adverse to the party being examined may cross-examine such party only as if under direct examination.

If a witness other than a party is examined under this section, he may be cross-examined by all other parties to the action in such order as the judge directs.

(c) For the purpose of this section, parties represented by the same counsel are deemed to be a single party.

§ 777. Exclusion of witnesses.

777. (a) Subject to subdivision (b) and (c), the judge may exclude from the courtroom any witness not at the time under examination so that such witness cannot hear the testimony of other witnesses.

(b) A party to the action cannot be excluded under this section.

(c) If a person other than a natural person is a party to the action, an officer or employee designated by its attorney is entitled to be present.

§ 778. Recall of witnesses.

778. After a witness has been excused from giving further testimony in the action, he cannot be recalled without leave of the court. Leave is granted or withheld in the exercise of the discretion of the court.

CHAPTER 6. CREDIBILITY OF WITNESSES

Article 1. Credibility Generally

§ 780. Credibility of witnesses generally.

780. Except as otherwise provided by law, the judge or jury may consider in determining the credibility of a witness any statement or other conduct that has any tendency in reason to prove or disprove the truthfulness of his testimony at the hearing, including but not limited to any of the following:

- (a) His demeanor while testifying and the manner in which he testifies.
- (b) The character of his testimony.
- (c) The extent of his capacity to perceive, to recollect, or to communicate any fact or matter about which he testifies.

(d) The extent of his opportunity to perceive any fact or matter about which he testifies.

(e) His character for honesty or veracity or their opposites.

(f) The existence or nonexistence of a bias, interest, or other improper motive.

(g) A statement previously made by him that is consistent with his testimony at the hearing.

(h) A statement made by him that is inconsistent with any part of his testimony at the hearing.

(i) The existence or nonexistence of any fact or matter testified to by him.

(j) His attitude toward the action in which he testifies or toward the giving of testimony.

(k) His admission of untruthfulness.

Article 2. Attacking or Supporting Credibility

§ 785. Parties may attack or support credibility.

785. The credibility of a witness may be attacked or supported by any party, including the party calling him.

§ 786. Character evidence generally.

786. Evidence of traits of his character other than honesty or veracity or their opposites is inadmissible to attack or support the credibility of a witness.

§ 787. Specific instances of conduct.

787. Subject to Section 788, evidence of specific instances of his conduct relevant only as tending to prove a trait of his character is inadmissible to attack or support the credibility of a witness.

§ 788. Conviction of witness for a crime.

788. (a) Subject to subdivision (b), evidence of the conviction of a witness for a crime is admissible for the purpose of attacking his credibility only if the judge, in proceedings held out of the presence and hearing of the jury, finds that:

(1) An essential element of the crime is false statement or the intention to deceive or defraud; and

(2) The witness has admitted his conviction for the crime or the party attacking the credibility of the witness has produced competent evidence of the conviction.

(b) Evidence of the conviction of a witness for a crime is inadmissible for the purpose of attacking his credibility if:

(1) A pardon based on his innocence has been granted to the witness by the jurisdiction in which he was convicted.

(2) A certificate of rehabilitation and pardon has been granted to the witness under the provisions of Chapter 3.5 (commencing with Section 4852.01) of Title 6 of Part 3 of the Penal Code.

(3) The accusatory pleading against the witness has been dismissed under the provisions of Penal Code Section 1203.4 or 1203.4a.

(4) The record of conviction has been sealed under the provisions of Penal Code Section 1203.45.

(5) The conviction was under the laws of another jurisdiction and the witness has been relieved of the penalties and disabilities arising from the conviction pursuant to a procedure substantially equivalent to that referred to in paragraph (2), (3), or (4).

§ 789. Religious belief.

789. Evidence of his religious belief or lack thereof is inadmissible to attack or support the credibility of a witness.

§ 790. Good character of witness.

790. Evidence of the good character of a witness is inadmissible to support his credibility unless evidence of his bad character has been admitted for the purpose of attacking his credibility.

§ 791. Prior consistent statement of witness.

791. Evidence of a statement previously made by a witness that is consistent with his testimony at the hearing is inadmissible to support his credibility unless it is offered after:

(a) Evidence of a statement made by him that is inconsistent with any part of his testimony at the hearing has been admitted for the purpose of attacking his credibility, and the statement was made before the alleged inconsistent statement; or

(b) An express or implied charge has been made that his testimony at the hearing is recently fabricated or is influenced by bias or other improper motive, and the statement was made before the bias, motive for fabrication, or other improper motive is alleged to have arisen.