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S259522

IN THE SUPREME COURT OF CALIFORNIA

RAUL BERROTERAN II,
Petitioner,

v.

THE SUPERIOR COURT OF LOS ANGELES COUNTY,
Respondent.

FORD MOTOR COMPANY,
Real Party in Interest.

AFTER A DECISION BY THE COURT OF APPEAL, SECOND APPELLATE DISTRICT, DIVISION ONE
CASE NO. B296639

MOTION FOR JUDICIAL NOTICE EXHIBITS 1 – 6

VOLUME 6 OF 14, PAGES 1177-1399 OF 3537

[FILED CONCURRENTLY WITH REAL PARTY IN INTEREST'S OPENING BRIEF ON THE MERITS]

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ATTORNEYS FOR REAL PARTY IN INTEREST
FORD MOTOR COMPANY

Memorandum 64-30

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

We are sending you with this memorandum a preliminary draft of the new Evidence Code. This draft contains the various Uniform Rules as revised by the Commission, together with various provisions of existing law which we plan to include in the Evidence Code. (We have made a few changes in the revised rules in order to insert them in the code.)

In some cases, the Commission has not considered provisions that are included in the Evidence Code. We will be preparing memoranda to indicate the problems that these provisions present. Some of these problems can be identified only after we have received additional portions of Professor Degnan's study.

In other cases, we have merely outlined the content of certain portions of the Evidence Code; we have not attempted to express the substance of the sections that will be included in the code. These portions of the Evidence Code will be drafted after we have considered Professor Degnan's research study and additional memoranda prepared by the staff.

The organization of the Evidence Code is tentative. We may find that further study of various provisions will require reorganization. For example, Professor Degnan suggests (Part IV of his study) that the material on weight of evidence be included

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in the Division of the Evidence Code relating to Burden of Producing Evidence, Burden of Proof, and Presumptions, whereas we have tentatively included this material in the General Provisions Division of the Evidence Code.

We have checked with the Legislative Counsel concerning whether this material would properly constitute a new code. He had no objections, and noted that the Commercial Code was made a new code.

We also checked with the Legislative Counsel concerning the numbering system to be used in the new code. Although the staff would prefer a numbering system that allows room for expansion without resorting to ".1" or "a" following section numbers, the Legislative Counsel prefers a system that numbers sections in consecutive order. We have followed the preference of the Legislative Counsel on this matter with one exception: We have numbered the sections in the definitions division by five rather than one; and we find that this system was used for the definitions division of the Vehicle Code.

We also requested the Legislative Counsel to provide us with the expert assistance of his office on the organization of the new code. He has agreed, if time permits, to provide us with such assistance sometime after June 15. After this review by his office, we may find revisions in organization of the code are needed.

At the May meeting, we will request that the Commission tentatively approve the organization of the new code, subject

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to revisions to be made later as further research indicates that such revisions are needed. Accordingly, we suggest that you read the new evidence code with care prior to the meeting.

Attached (gold sheets) is a revised schedule on this project.

Respectfully submitted,

John H. DeMoully
Executive Secretary

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EVIDENCE CODE

DIVISION 1. PRELIMINARY PROVISIONS AND CONSTRUCTION [§§ 1-14]

DIVISION 2. WORDS AND PHRASES DEFINED [§§ 100-265]

DIVISION 3. GENERAL PROVISIONS [§§ 300-449]
- Chapter 1. Applicability of Code [§ 300]
- Chapter 2. Order of Proof [§ 310]
- Chapter 3. Questions for Judge and Jury [§§ 320-330]
- Chapter 4. Admitting and Excluding Evidence [§§ 350-406]
  - Article 1. General Provisions [§§ 350-391]
  - Article 2. Preliminary Determinations on Admissibility of Evidence [§§ 400-406]
- Chapter 5. Weight of Evidence [§§ 410-439]
- Chapter 6. Instructing Jury on Effect of Evidence [§§ 440-449]

DIVISION 4. JUDICIAL NOTICE [§§ 450-458]

DIVISION 5. BURDEN OF PRODUCING EVIDENCE, BURDEN OF PROOF, AND PRESUMPTIONS (Contained in tentative recommendation) [§§ 500-667]
- Chapter 1. Burden of Producing Evidence [§ 500]
- Chapter 2. Burden of Proof [§§ 510-522]
  - Article 1. General [§§ 510-511]
  - Article 2. Burden of Proof on Specific Issues [§§ 520-522]
- Chapter 3. Presumptions [§§ 600-667]
  - Article 1. General [§§ 600-607]
  - Article 2. Conclusive Presumptions [§§ 620-624]
  - Article 3. Presumptions Affecting the Burden of Producing Evidence [§§ 630-646]
  - Article 4. Presumptions Affecting the Burden of Proof [§§ 660-667]

DIVISION 6. WITNESSES [§§ 700-795]
- Chapter 1. Competency [§§ 700-704]
- Chapter 2. Oath and Confrontation [§§ 710-711]
- Chapter 3. Expert Witnesses [§§ 720-733]
  - Article 1. Expert Witnesses Generally [§§ 720-724]
  - Article 2. Appointment of Expert Witness by Court [§§ 730-733]
- Chapter 4. Interpreters [§§ 750-752]
- Chapter 5. Method and Scope of Examination [§§ 760-773]
- Chapter 6. Testing Credibility [§§ 780-795]

DIVISION 7. OPINION TESTIMONY AND SCIENTIFIC EVIDENCE [§§ 800-896]
- Chapter 1. Expert and Other Opinion Testimony [§§ 800-871]
  - Article 1. Expert and Other Opinion Testimony Generally [§§ 800-805]
  - Article 2. Opinion Testimony in Eminent Domain Cases [§ 830]
  - Article 3. Opinion Testimony on Particular Matters [§§ 870-871]
- Chapter 2. Blood Tests to Determine Paternity [§§ 890-896]

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DIVISION 8. PRIVILEGES [§§ 900-1060]
Chapter 1. Definitions [§§ 900-905]
Chapter 2. Applicability of Division [§ 910]
Chapter 3. General Provisions Relating to Privileges [§§ 911-920]
Chapter 4. Particular Privileges [§§ 930-1060]
Article 1. Privilege of Defendant in Criminal Proceeding [§ 930]
Article 2. Privilege Against Self-Incrimination [§§ 940-948]
Article 3. Lawyer-Client Privilege [§§ 950-964]
Article 4. Privilege Not to Testify Against Spouse [§§ 970-973]
Article 5. Privilege for Confidential Marital Communications [§§ 980-987]
Article 6. Physician-Patient Privilege [§§ 990-1006]
Article 7. Psychotherapist-Patient Privilege [§§ 1010-1024]
Article 8. Priest-Penitent Privileges [§§ 1030-1034]
Article 9. Official Information and Identity of Informer [§§ 1040-1042]
Article 10. Political Vote [§ 1050]
Article 11. Trade Secret [§ 1060]

DIVISION 9. EVIDENCE AFFECTED OR EXCLUDED BY EXTRINSIC POLICIES [§§ 1100-1155]
Chapter 1. Evidence of Character, Habit, Custom, or Usage [§§ 1100-1104]
Chapter 2. Other Evidence Affected or Excluded by Extrinsic Policies [§§ 1150-1155]

DIVISION 10. HEARSAY EVIDENCE [§§ 1200-1295]
Chapter 1. General Provisions [§§ 1200-1204]
Chapter 2. Exceptions to the Hearsay Rule [§§ 1250-1295]

DIVISION 11. WRITINGS [§§ 1400-1950]
Chapter 1. Writing Indispensable [§§ 1400-1402]
Chapter 2. Authentication [§§ 1410-1416]
Chapter 3. Best Evidence Rule [§§ 1420-1422]
Chapter 4. Parole Evidence Rule [§ 1430]
Chapter 5. Proof of Content or Execution [§§ 1450-1554]
Article 1. General Provisions [§§ 1450-1453]
Article 2. Photographic Copies of Writings [§§ 1460-1461]
Article 3. Business Records [§§ 1470-1471]
Article 4. Church Records [§§ 1480-1485]
Article 5. Hospital Records [§§ 1490-1496]
Article 6. Reports of Presumed Death, Missing in Action, and the Like [§§ 1500-1502]
Article 7. Particular Writings [§§ 1550-1554]
Chapter 6. Records of Medical Studies [§ 1950]

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DIVISION 1. PRELIMINARY PROVISIONS AND CONSTRUCTION

1. Short title.

1. This code shall be known as the Evidence Code.

2. Common law rule construing code abrogated.

2. The rule of the common law, that statutes in derogation thereof are to be strictly construed, has no application to this code. The code establishes the law of this State respecting the subject to which it relates, and its provisions and all proceedings under it are to be liberally construed, with a view to effect its objects and to promote justice.

3. Continuation of existing law.

3. The provisions of this code, insofar as they are substantially the same as existing provisions relating to the same subject matter, shall be construed as restatements and continuations thereof and not as new enactments.

4. Pending proceedings and accrued rights.

4. No action or proceeding commenced before this code takes effect, and no right accrued, is affected by the provisions of this code, but all procedures thereafter taken therein shall conform to the provisions of this code so far as possible.

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5. Constitutionality.

5. If any provision of this code or its application to any person or circumstance is held unconstitutional, such decision shall not affect any other provision or application of this code which can be given effect without the unconstitutional provision or application, and to this end the provisions of this code are declared to be severable.

6. Construction of code.

6. Unless the provision or the context otherwise requires, these preliminary provisions and rules of construction shall govern the construction of this code.

7. Effect of headings.

7. Division, chapter, and article headings do not in any manner affect the scope, meaning, or intent of the provisions of this code.

8. References to statutes.

8. Whenever any reference is made to any portion of this code or of any other law, such reference shall apply to all amendments and additions heretofore or hereafter made.

9. "Chapter," "article," "section," "subdivision," and "paragraph."

9. (a) "Chapter" means a chapter of the division in which that term occurs unless otherwise expressly mentioned.

(b) "Article" means an article of the chapter in which that term occurs unless some other article is expressly mentioned.

(c) "Section" means a section of this code unless some other statute is expressly mentioned.

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(d) "Subdivision" means a subdivision of the section in which that term occurs unless some other section is expressly mentioned.

(e) "Paragraph" means a paragraph of the subdivision in which that term occurs unless some other subdivision is expressly mentioned.

10. Construction of tenses.

10. The present tense includes the past and future tenses; and the future, the present.

11. Construction of genders.

11. The masculine gender includes the feminine and neuter.

12. Construction of singular and plural.

12. The singular number includes the plural; and the plural, the singular.

13. "Shall" and "may."

13. "Shall" is mandatory and "may" is permissive.

14. When code takes effect.

14. This code takes effect on July 1, 1966.

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DIVISION 2. WORDS AND PHRASES DEFINED

100. Application of definitions.

100. Unless the provision or context otherwise requires, these definitions govern the construction of this code.

105. Action.

105. "Action" includes a civil action or proceeding and a criminal action or proceeding.

110. Burden of producing evidence.

110. "Burden of producing evidence" means the obligation of a party to introduce evidence sufficient to avoid a preemptory finding against him as to the existence or nonexistence of a disputed fact.

115. Burden of proof.

115. "Burden of proof" means the obligation of a party to meet the requirements of a rule of law that the fact be proved either by a preponderance of the evidence or by clear and convincing evidence or beyond a reasonable doubt, as the case may be. Burden of proof is synonymous with "burden of persuasion." Unless a rule of law specifically requires otherwise, the burden of proof requires proof by a preponderance of the evidence.

120. Civil action.

120 "Civil action" means a civil action or proceeding.

125. Conduct.

125. "Conduct" includes all active and passive behavior, both verbal and non-verbal.

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130. County.

130. "County" includes "city and county."

135. Court.

135. "Court" means the Supreme Court, a district court of appeal, superior court, municipal court, or justice court, but does not include a grand jury.

140. Criminal action.

140. "Criminal action" means a criminal action or proceeding.

145. Declarant.

145. "Declarant" is a person who makes a statement.

150. Evidence.

150. "Evidence" means testimony, writings, material objects, or other things presented to the senses that are offered to prove the existence or nonexistence of a fact in judicial or fact finding tribunals.

155. Finding of fact, finding, finds.

155. "Finding of fact," "finding," or "finds" means the determination from evidence or judicial notice of the existence or nonexistence of a fact. A ruling on the admissibility of evidence implies whatever supporting finding of fact is prerequisite thereto; a separate or formal finding is unnecessary unless required by statute.

160. Governmental subdivision.

160. "Governmental subdivision" means . . . .

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165. The hearing.

165. "The hearing" means the hearing at which the question concerning the admissibility of evidence under a statute section is raised, and not some earlier or later hearing.

170. Hearsay evidence.

170. "Hearsay evidence" is evidence of a statement made other than by a witness while testifying at the hearing that is offered to prove the truth of the matter stated.

175. Judge.

175. "Judge" includes a court commissioner, referee, or similar officer, authorized to conduct and conducting a court proceeding or court hearing.

180. Oath.

180. "Oath" includes affirmation.

185. Perceive.

185. "Perceive" means acquire knowledge through one's senses.

190. Person.

190. "Person" includes a corporation as well as a natural person.

195. Personal property.

195. "Personal property" includes money, goods, chattels, things in action, and evidences of debt.

200. Property.

200. "Property" includes both real and personal property.

205. Proof.

205. "Proof" is the establishment of a fact by evidence.

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210. Public employee.

210. "Public employee" means an officer, agent, or employee of the United States or of a public entity.

215. Public entity.

215. "Public entity" includes a state, county, city, district, public authority, public agency, and any other political subdivision or political corporation.

220. Real property.

220. "Real property" is coextensive with lands, tenements, and hereditaments.

225. Relevant evidence.

225. "Relevant evidence" means evidence having any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action, including the credibility of a witness or hearsay declarant.

230. Rule of law.

230. "Rule of law" includes constitutional, statutory, and decisional law.

235. State.

235. "State" means the State of California, unless applied to the different parts of the United States. In the latter case, it includes the District of Columbia and the territories.

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240. Statement.

240. "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.

245. Statute.

245. "Statute" includes a constitutional provision.

250. Trier of fact.

250. "Trier of fact" means a judge when he is trying an issue of fact other than one relating to the admissibility of evidence and a jury.

255. Unavailable as a witness.

255. (a) Except as otherwise provided in subdivision (b), "unavailable as a witness" means that the declarant is:

(1) Exempted on the ground of privilege from testifying concerning the matter to which his statement is relevant.

(2) Disqualified from testifying to the matter.

(3) Dead or unable to attend or to testify at the hearing because of then existing physical or mental illness or infirmity.

(4) Absent beyond the jurisdiction of the court to compel his attendance by its process.

(5) Absent from the hearing and the proponent of his statement has exercised reasonable diligence but has been unable to procure his attendance by subpena.

(6) Absent from the hearing because of imprisonment and the court is unable to compel his attendance at the hearing by its process.

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(b) A declarant is not unavailable as a witness:

(1) If the exemption, disqualification, death, inability, or absence of the declarant is due to the procurement or wrongdoing of the proponent of his statement for the purpose of preventing the declarant from attending or testifying; or

(2) If unavailability is claimed because the declarant is absent beyond the jurisdiction of the court to compel appearance by its process and the deposition of the declarant could have been taken by the proponent by the exercise of reasonable diligence and without undue hardship or expense.

260. Verbal.

260. "Verbal" includes both oral and written words.

265. Writing.

265. "Writing" means handwriting, typewriting, printing, photostating, photographing, and every other means of recording upon any tangible thing any form of communication or representation, including letters, words, pictures, sounds, or symbols, or combinations thereof.

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DIVISION 3. GENERAL PROVISIONS

CHAPTER 1. APPLICABILITY OF CODE

300. Applicability of code.

300. Except as otherwise provided by statute, this code applies in every proceeding, both criminal and civil, conducted by a court in which evidence is introduced, including proceedings conducted by a court commissioner, referee, or similar officer.

CHAPTER 2. ORDER OF PROOF

310. Order of proof.

[Substance of CCP 2042 to be inserted here. Section will be drafted after Commission has considered research study. Section 2042 reads:

> 2042. The order of proof must be regulated by the sound discretion of the Court. Ordinarily, the party beginning the case must exhaust his evidence before the other party begins.]

[Section 2042 may duplicate Code of Civil Procedure Section 601. If so, the chapter on order of proof could be eliminated unless it is necessary for criminal cases.]

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CHAPTER 3. QUESTIONS FOR JUDGE AND JURY

320. Questions of law for court.

[Substance of CCP 2102 to be inserted here. Section will be drafted after Commission has considered research study. Section 2102 reads:

2102. All questions of law, including the admissibility of testimony, the facts preliminary to such admission, and the construction of statutes and other writings, and other rules of evidence, are to be decided by the Court, and all discussions of law addressed to it. Whenever the knowledge of the Court is, by this Code, made evidence of a fact, the Court is to declare such knowledge to the jury, who are bound to accept it.]

321. Determination of foreign law.

321. Determination of the law of a foreign country or a governmental subdivision of a foreign country is a question of law to be determined by the court. If such law is applicable and if the judge is unable to determine it, he may, as the ends of justice require, either (a) apply the law of this State if he can do so consistently with the Constitution of this State and of the United States or (b) dismiss the action without prejudice.

330. Jury as trier of fact.

[Substance of CCP 2101 to be inserted here. Section will be drafted after Commission has considered research study. Section 2101 reads:

2101. All questions of fact, where the trial is by jury, other than those mentioned in the next section, are to be decided by the jury, and all evidence thereon is to be addressed to them, except when otherwise provided by this Code.]

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CHAPTER 4. ADMITTING AND EXCLUDING EVIDENCE

Article 1. General Provisions

350. Only relevant evidence admissible.

350. No evidence is admissible except relevant evidence.

351. Admissibility of relevant evidence.

351. Except as otherwise provided by statute, all relevant evidence is admissible.

352. Discretion of judge to exclude evidence.

352. (a) The judge may in his discretion exclude evidence if he finds that its probative value is substantially outweighed by the fact that its admission will (1) necessitate undue consumption of time or (2) create substantial danger of undue prejudice or of confusing the issues or of misleading the jury.

(b) The judge may stop the production of further evidence upon any particular point when the evidence upon it is already so full as to preclude reasonable doubt.

353. Effect of erroneous admission of evidence.

353. A verdict or finding shall not be set aside, nor shall the judgment or decision based thereon be reversed, by reason of the erroneous admission of evidence unless:

(a) There appears of record an objection to or a motion to strike the evidence timely made and so stated as to make clear the specific ground

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of the objection or motion; and

(b) The court which passes upon the effect of the error or errors is of opinion that the admitted evidence should have been excluded on the ground stated and probably had a substantial influence in bringing about the verdict or finding.

354. Effect of erroneous exclusion of evidence.

354. A verdict or finding shall not be set aside, nor shall the judgment or decision based thereon be reversed, by reason of the erroneous exclusion of evidence unless the court which passes upon the effect of the error or errors is of opinion that the excluded evidence would probably have had a substantial influence in bringing about a different verdict or finding and it appears of record that:

(a) The substance, purpose, and relevance of the expected evidence was made known to the judge by the questions asked, an offer of proof, or by any other means; or

(b) The rulings of the judge made compliance with subdivision (a) futile; or

(c) The evidence was sought by questions asked during cross-examination.

355. Limited admissibility.

355. When evidence is admissible as to one party or for one purpose and is inadmissible as to another party or for another purpose, the judge upon request shall restrict the evidence to its proper scope and instruct the jury accordingly.

390. Entire act, declaration, conversation or writing may be brought out to elucidate part offered.

[Substance of CCP 1854 will be inserted here. Section will be drafted

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after research study is reviewed. Section 1854 reads:

> 1854. When part of an act, declaration, conversation, or writing is given in evidence by one party, the whole on the same subject may be inquired into by the other; when a letter is read, the answer may be given; and when a detached act, declaration, conversation, or writing is given in evidence, any other act, declaration, conversation, or writing, which is necessary to make it understood, may also be given in evidence.]

391. Object related to fact in issue.

[Substance of CCP 1954, if retained, will be inserted here. Section will be drafted after research study is reviewed. Section 1954 reads:

> 1954. Whenever an object, cognizable by the senses, has such a relation to the fact in dispute as to afford reasonable grounds of belief respecting it, or to make an item in the sum of the evidence, such object may be exhibited to the jury, or its existence, situation, and character may be proved by witnesses. The admission of such evidence must be regulated by the sound discretion of the Court.]

Article 2. Preliminary Determinations on Admissibility of Evidence

400. "Preliminary fact" defined.

400. As used in this article, "preliminary fact" means a fact upon the existence of which depends the admissibility or inadmissibility of evidence, the qualification or disqualification of a person to be a witness, or the existence or nonexistence of a privilege.

401. "Proffered evidence" defined.

401. As used in this article, "proffered evidence" means evidence, the admissibility or inadmissibility of which is dependent upon the existence or nonexistence of a preliminary fact.

402. Procedure for determining existence of preliminary fact.

402. (a) When the existence of a preliminary fact is disputed, its existence or nonexistence shall be determined as provided in this article.

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(b) On the admissibility of a confession or admission of a defendant in a criminal action, the judge shall hear and determine the question out of the presence and hearing of the jury unless otherwise requested by the defendant. On the admissibility of other evidence, the judge may hear and determine the question out of the presence or hearing of the jury.

(c) In determining the existence of a preliminary fact under Section 404 or 405, exclusionary rules of evidence do not apply except for Section 352 and the rules of privilege.

403. Determination of preliminary fact where relevancy, personal knowledge, or authenticity is disputed.

403. (a) The proponent of the proffered evidence has the burden of producing evidence as to the existence of the preliminary fact, and the proffered evidence is inadmissible unless the judge finds that there is evidence sufficient to sustain a finding of the existence of the preliminary fact when:

(1) The relevance of the proffered evidence depends on the existence of the preliminary fact;

(2) The preliminary fact is the personal knowledge of the witness concerning the subject matter of his testimony;

(3) The preliminary fact is the authenticity of a writing; or

(4) The proffered evidence is of a statement or other conduct by a particular person and the disputed preliminary fact is whether that person made the statement or so conducted himself.

(b) The judge may admit conditionally the proffered evidence under this section, subject to the evidence of the preliminary fact being later supplied in the course of the trial.

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(c) If the judge admits the proffered evidence under this section:

(1) He may, and on request shall, instruct the jury to determine the existence of the preliminary fact and to disregard the evidence unless the jury finds that the preliminary fact exists.

(2) He shall instruct the jury to disregard the proffered evidence if he subsequently determines that a jury could not reasonably find that the preliminary fact exists.

404. Determination of whether evidence is incriminatory.

404. Whenever the proffered evidence is claimed to be privileged under Article 2 (commencing with Section 940) of Chapter 4 of Division 8, the person claiming the privilege has the burden of showing, that the proffered evidence might incriminate him as provided in Section 940; and the proffered evidence is inadmissible unless it clearly appears to the judge that the proffered evidence cannot possibly have a tendency to incriminate the person claiming the privilege.

405. Determination of preliminary fact in other cases.

405. Except as otherwise provided in Sections 403 and 404:

(a) When the existence of a preliminary fact is disputed, the judge shall indicate which party has the burden of producing evidence and the burden of proof on the issue as implied by the rule of law under which the question arises. The judge shall determine the existence or nonexistence of the preliminary fact and shall admit or exclude the proffered evidence as required by the rule of law under which the question arises.

(b) If a fact in issue in the action is also a preliminary fact, the judge shall not inform the jury of his determination of the preliminary fact.

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The jury shall make its determination of the fact without regard to the determination made by the judge. If the proffered evidence is admitted, the jury shall not be instructed to disregard the evidence if its determination of the fact differs from the judge's determination of the preliminary fact.

406. Evidence affecting weight or credibility.

406. This article does not limit the right of a party to introduce before the trier of fact evidence relevant to weight or credibility.

CHAPTER 5. WEIGHT OF EVIDENCE

Note: This chapter will be drafted after the research study covering ths subject matter of this chapter has been considered by the Commission. The sections in this chapter will begin with Section 410.

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CHAPTER 6. INSTRUCTING JURY ON EFFECT OF EVIDENCE

440. Certain instructions required on proper occasions.

441. Power of jury not arbitrary.

442. Not bound by number of witnesses.

443. Witness whose testimony is false in part.

444. Testimony of an accomplice.

445. Oral admissions.

446. Burden of proof.

447. Party having power to produce better evidence.

[Sections 440 to 447 will be based on CCP 2061. These sections will be drafted after the Commission has considered the research study.]

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DIVISION 4. JUDICIAL NOTICE

450. Judicial notice may be taken only as authorized by statute.

450. Judicial notice may not be taken of any matter unless authorized or required by statute.

451. Matters which must be judicially noticed.

451. Judicial notice shall be taken of:

(a) The decisional, constitution, and public statutory law of the United States and of every state, territory, and possession of the United States.

(b) Any matter made a subject of judicial notice by Section 11383, 11384 or 18576 of the Government Code or by Section 307 of Title 44 of the United States Code.

(c) Rules of court of this State and of the United States.

(d) Facts and propositions of generalized knowledge that are so universally known that they cannot reasonably be the subject of dispute.

452. Matters which may be judicially noticed.

452. Judicial notice may be taken of the following matters to the extent that they are not embraced with Section 451:

(a) Resolutions and private acts of the Congress of the United States and of the legislature of any state, territory, or possession of the United States.

(b) Legislative enactments and regulations of governmental subdivisions or agencies of (1) the United States and (2) any state, territory, or

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possession of the United States.

(c) Official acts of the legislative, executive, and judicial departments of this State and of the United States.

(d) Records of any court of this State or of the United States.

(e) The law of foreign countries and governmental subdivisions of foreign countries.

(f) Specific facts and propositions that are of such common knowledge within the territorial jurisdiction of the court that they cannot reasonably be the subject of dispute and are capable of immediate and accurate determination by resort to sources of reasonably indisputable accuracy.

453. Compulsory judicial notice upon request.

453. (a) Except as provided in subdivision (b), judicial notice shall be taken of each matter specified in Section 452, if a party requests it and:

(1) Furnishes the judge sufficient information to enable him to take judicial notice of the matter; and

(2) Gives each adverse party sufficient notice of the request, through the pleadings or otherwise, to enable such adverse party to prepare to meet the request.

(b) Judicial notice need not be taken under subdivision (a) if:

(1) An adverse party disputes the propriety of taking such notice or the tenor thereof; and

(2) The party requesting that judicial notice be taken fails to persuade the judge as to the propriety of taking such notice and as to the tenor thereof.

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454. Information that may be used in taking judicial notice.

454. In determining the propriety of taking judicial notice of a matter or the tenor thereof:

(a) Any source of pertinent information, including the advice of persons learned in the subject matter, may be consulted or used, whether or not furnished by a party.

(b) No exclusionary rule except a valid claim of privilege shall apply.

455. Opportunity to present information to judge.

455. (a) Before judicial notice of any matter specified in Section 452 may be taken, the judge shall afford each party reasonable opportunity to present to him information relevant to (1) the propriety of taking judicial notice of the matter and (2) the tenor of the matter to be noticed.

(b) With respect to any matter specified in Section 452, if the judge resorts to any source of information not received in open court, including the advice of persons learned in the subject matter, such information and its source shall be made a part of the record in the action, and the judge shall afford each party reasonable opportunity to meet such information before judicial notice of the matter may be taken.

456. Noting for record matter judicially noticed.

456. If a matter judicially noticed is other than a matter specified in subdivision (a) of Section 451, the judge shall at the earliest practicable time indicate for the record the matter which is judicially noticed and the tenor thereof.

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457. Instructing jury on matters noticed.

457. If a matter judicially noticed is a matter which would otherwise have been for determination by the jury, the judge may and upon request shall instruct the jury to accept as a fact the matter so noticed.

458. Judicial notice in proceedings subsequent to trial.

458. (a) The failure or refusal of the judge to take judicial notice of a matter, or to instruct the jury with respect to the matter, does not preclude the judge from taking judicial notice of the matter in subsequent proceedings in the action.

(b) The reviewing court shall judicially notice each matter specified in Sections 451 and 452 that the judge was required to notice under Section 451 or 453. The reviewing court may judicially notice any matter specified in Section 452 and has the same power as the judge under Section 321. The reviewing court may judicially notice a matter in a tenor different from that noticed by the judge.

(c) In determining the propriety of taking judicial notice of a matter or the tenor thereof, the reviewing court has the same power as the judge under Section 454.

(d) The judge or reviewing court taking judicial notice under this section of a matter specified in Section 452 shall comply with the provisions of Section 455 if the matter was not theretofore judicially noticed in the action.

(e) In determining the propriety of taking judicial notice of a matter specified in Section 452, or the tenor thereof, if the reviewing court resorts to any source of information not received in open court or

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not included in the record of the action, including the advice of persons learned in the subject matter, such information and its source shall be made a part of the record in the action, and the reviewing court shall afford each party reasonable opportunity to meet such information before judicial notice of the matter may be taken.

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DIVISION 5. BURDEN OF PRODUCING EVIDENCE, BURDEN OF PROOF, AND PRESUMPTIONS

[§§ 500-699]

[This division will be set out in statutory form in the Tentative Recommendation on Burden of Producing Evidence, Burden of Proof, and Presumptions.]

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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 by the judge and jury 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 if no trier of fact could reasonably find that he has personal knowledge of the matter.

(b) Evidence of personal knowledge may be provided by the testimony of the witness himself.

(c) The judge may receive conditionally the testimony of a witness, subject to evidence of personal knowledge being later supplied in the course of the trial.

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703. Judge as witness.

703. Against the objection of a party, the judge presiding at the trial of an action may not testify in that trial as a witness. If, after such objection, the judge finds that his testimony would be of importance, he shall order the trial to be postponed or suspended and to take place before another judge.

704. Juror as witness.

704. (a) A member of a jury, sworn and empanelled in the trial of an action, may not testify in that trial as a witness. If the judge finds that the juror's testimony would be of importance, he shall order the trial to be postponed or suspended and to take place before another jury.

(b) This section does not prohibit a juror from testifying as to 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.

[Section to be based on Section 1846 as revised by Commission. Section to be drafted after Commission has considered research study. Section 1846 as revised reads:

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1846. A witness ~~can be heard only upon oath or affirmation,~~ and upon a trial he can be heard only in the presence and subject to examination of all the parties, 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.

(b) Evidence of special knowledge, skill, experience, training, or education may be provided by the testimony of the witness himself.

(c) In exceptional circumstances, the judge may receive conditionally the testimony of a witness, subject to the evidence of special knowledge, skill, experience, training, or education being later supplied in the course of the trial.

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 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.

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(c) Subject to Section 801, in the form of 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) A witness testifying as an expert may not be cross-examined in regard to the content or tenor of any publication unless he referred to, considered, or relied upon such publication in arriving at or forming his opinion.

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 as relevant to the credibility of such witness and the weight of his testimony.

(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 the trial or during the trial, limit the number of expert witnesses to be called by any party.

Article 2. Appointment of Expert Witness by Court

730. Appointment of expert by court.

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730. Whenever it shall be made to appear to any court or judge thereof, either before or during the trial of any action or proceeding, civil, criminal, or juvenile court, pending before such court, that expert evidence is, or will be required by the court or any party to such action or proceeding, such court or judge may, on motion of any party, or on motion of such court or judge, appoint one or more experts to investigate, render a report as may be ordered by the court, and testify at the trial of such action or proceeding relative to the matter or matters as to which such expert evidence is, or will be required, and such court or judge may fix the compensation of such expert or experts for such services, if any, as such expert or experts may have rendered, in addition to his or their services as a witness or witnesses, at such amount or amounts as to the court or judge may seem reasonable.

731. Payment of expert appointed by court.

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

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732. Calling and examining court appointed expert.

732. Any expert appointed by the court under Section 730 may be called and examined as a witness by any party to such action or proceeding or by the court itself; but, when called, shall be subject to examination and objection as to his competency and qualifications as an expert witness and as to his bias. Such expert though called and examined by the court, may be cross-examined by the several parties to an action or proceeding in such order as the court may direct. When such witness is called and examined by the court, the several parties shall have the same right to object to the questions asked and the evidence adduced as though such witness were called and examined by an adverse party.

733. Right to produce other evidence.

733. Nothing contained in this article shall be deemed or construed so as to prevent any party to any action or proceeding from producing other expert evidence as to such matter or matters, but where other expert witnesses are called by a party to an action or proceeding they shall be entitled to the ordinary witness fees only and such witness fees shall be taxed and allowed in like manner as other witness fees.

CHAPTER 4. INTERPRETERS

750. Rules relating to witnesses apply to interpreters.

750. An interpreter is subject to all the provisions of law relating to witnesses.

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751. Interpreters for foreign witnesses.

751. (a) When a witness does not understand and speak the English language, an interpreter must be sworn to interpret for him.

(b) Any person, resident of the proper county, may be summoned by any court or judge to appear before such court or judge to act as an interpreter in any action. The summons must be served and returned in like manner as a subpena. Any person so summoned who fails to appear at the time and place named in the summons is guilty of a contempt.

752. Interpreters for deaf in criminal and commitment cases.

752. (a) As used in this section, "deaf person" means a person with a hearing loss so great as to prevent his understanding normal spoken language with or without a hearing aid.

(b) In all criminal prosecutions, where the accused is a deaf person, he shall have all of the proceedings of the trial interpreted to him in a language that he can understand by a qualified interpreter appointed by the court.

(c) In all cases where the mental condition of a person who is 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) An interpreter appointed under this section shall take an oath that he will make a true interpretation to the person accused or being examined of all the proceedings of his case in a language that he understands and that he will repeat such person's answers to questions to counsel, court, or jury, in the English language, with his best skill and judgment.

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

CHAPTER 5. METHOD AND SCOPE OF EXAMINATION

760. Definitions. [CCP 2045 and 2046 (part)]

761. Control by court of mode of interrogation. [CCP 2044 (part) and 2066 (part)]

762. Exclusion of witnesses. [CCP 2043]

763. Compelling answers. [CCP 2991 and 2065]

764. Power of court to call witnesses. [new]

765. Order of examination. [CCP 2045 (last sentence)]

766. Leading questions. [CCP 2046 (part)]

767. Refreshing memory from writing. [CCP 2047]

768. Examination by opposing party of writings shown to witness. [CCP 2054]

769. Cross-examination. [CCP 2048]

770. Re-examination. [CCP 2050 (first sentence)]

771. Recall of witness previously examined. [CCP 2050 (last two sentences)]

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772. Cross-examination of adverse party or witness. [CCP 2055]

773. Motion to strike nonresponsive answer. [CCP 2056]

[Sections 760 - 773 will be drafted after the research study relating to the pertinent CCP sections has been considered by the Commission.]

CHAPTER 6. TESTING CREDIBILITY

780. "Attacking credibility" and "impairing credibility" defined. [new]

781. Who may attack or impair credibility. [RURE 20(1)]

782. General rule as to admissibility of evidence relating to credibility. [new]

783. Demeanor. [CCP 1847 (part)]

784. Contradiction as to facts. [CCP 1847 (part)]

785. Organic incapacity. [new]

786. Opportunity to perceive. [new]

787. Bias and the like. [CCP 1847 (part)]

788. Corrupt attitude toward case. [new]

789. Occupation and the like. [new]

790. Prior inconsistent statement. [RURE 22(1), (2)]

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791. Character evidence. [RURE 22(3), (4)]

792. Conviction for a crime. [RURE 21(1), (2), (3)]

793. Religious belief or lack thereof. [RURE 22(5)]

794. Evidence to support credibility. [RURE 20(2)]

795. Evidence of good character of witness. [RURE 20(3)]

[Sections 780 - 795 will be drafted after the research study relating to CCP 1847 has been considered by the Commission.]

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DIVISION 7. OPINION TESTIMONY AND SCIENTIFIC EVIDENCE

CHAPTER 1. EXPERT AND OTHER OPINION TESTIMONY

Article 1. Expert and Other Opinion Testimony Generally

800. Opinion testimony by lay witness.

800. If the witness is not testifying as an expert, his opinions are limited to such opinions as are:

(a) Rationally based on the perception of the witness; and

(b) Helpful to a clear understanding of his testimony or to the determination of the fact in issue.

801. Opinion testimony by expert.

801. If the witness is testifying as an expert, his opinions are limited to such opinions as are:

(a) Related to a subject that is beyond the competence of persons of common experience, training, and education; and

(b) Based on matter (including his special knowledge, skill, experience, training, and education) perceived by or personally known to the witness or made known to him at or before the hearing, whether or not admissible, that is of a type commonly relied upon by experts in forming an opinion upon the subject to which his testimony relates, unless under the decisional or statutory law of this State such matter may not be used by an expert as a basis for his opinion.

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802. Statement of basis of opinion.

802. (a) A witness testifying in the form of opinion may state on direct examination the reasons for his opinion and the matter upon which it is based.

(b) Before testifying in the form of opinion, the witness shall first be examined concerning the matter upon which the opinion is based unless the judge in his discretion dispenses with this requirement.

803. Opinion based on improper matter.

803. The opinion of a witness may be held inadmissible or may be stricken if 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.

804. Opinion based on opinion or statement of another.

804. (a) If a witness testifying as an expert testifies that his opinion is based in whole or in part upon the opinion or statement of another person, such other person may be called as a witness by the adverse party and examined as if under cross-examination concerning the subject matter of his opinion or statement.

(b) Nothing in this section makes admissible an expert opinion that is inadmissible because it is based in whole or in part on the opinion or statement of another person.

(c) An expert opinion otherwise admissible is not inadmissible because it is based on the opinion or statement of a person who is unavailable as a witness.

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805. Opinion on ultimate issue.

805. Testimony in the form of opinion otherwise admissible under this article is not objectionable because it embraces the ultimate issue to be decided by the trier of fact.

Article 2. Opinion Testimony in Eminent Domain Cases

830. Opinion testimony in eminent domain cases.

830. In an eminent domain proceeding, a witness otherwise qualified may testify with respect to the value of the real property, including the improvements situated thereon or the value of any interest in real property to be taken, and may testify on direct examination as to his knowledge of the amount paid for comparable property or property interests. In rendering his opinion as to the highest and best use and market value of the property sought to be condemned, the witness shall be permitted to consider and give evidence as to the nature and value of the improvements and the character of the existing uses being made of the properties in the general vicinity of the property sought to be condemned.

Note: The recommendation on opinion testimony in eminent domain and inverse condemnation proceedings would add a number of sections to this article in lieu of Section 830.

Article 3. Opinion Testimony on Particular Matters

870. Opinion as to identity or handwriting.

[Section 890 will be based on CCP 1870(9)(part). Section 890 will be drafted after research study has been considered by Commission. Section 1870(9) provides in part:

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1870. In conformity with the preceding provisions, evidence may be given upon a trial of the following facts:

* * * * *

9. The opinion of a witness respecting the identity or handwriting of a person, when he has knowledge of the person or handwriting;]

871. Opinion as to sanity.

[Section 891 will be based on CCP 1870(10). Section 891 will be drafted after research study has been considered by Commission. Section 1870(10) provides in part:

1870. In conformity with the preceding provisions, evidence may be given upon a trial of the following facts:

* * * * *

10. The opinion of a subscribing witness to a writing, the validity of which is in dispute, respecting the mental sanity of the signer; and the opinion of an intimate acquaintance respecting the mental sanity of a person, the reason for his opinion being given;]

CHAPTER 2. BLOOD TESTS TO DETERMINE PATERNITY

890. Short title.

890. This chapter may be cited as the Uniform Act on Blood Tests to Determine Paternity.

891. Interpretation.

891. This act shall be so interpreted and construed as to effectuate its general purpose to make uniform the law of those states which enact it.

892. Order for blood tests in civil actions involving paternity.

892. In a civil action, in which paternity is a relevant fact, the court, upon its own initiative or upon suggestion made by or on behalf of

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any person whose blood is involved may, or upon motion of any party to the action made at a time so as not to delay the proceedings unduly, shall order the mother, child, and alleged father to submit to blood tests. If any party refuses to submit to such tests, the court may resolve the question of paternity against such party or enforce its order if the rights of others and the interests of justice so require.

893. Tests made by experts.

893. The tests shall be made by experts qualified as examiners of blood types who shall be appointed by the court. The experts shall be called by the court as witnesses to testify to their findings and shall be subject to cross-examination by the parties. Any party or person at whose suggestion the tests have been ordered may demand that other experts, qualified as examiners of blood types, perform independent tests under order of the court, the results of which may be offered in evidence. The number and qualifications of such experts shall be determined by the court.

894. Compensation of experts.

894. The compensation of each expert witness appointed by the court shall be fixed at a reasonable amount. It shall be paid as the court shall order. The court may order that it be paid by the parties in such proportions and at such times as it shall prescribe, or that the proportion of any party be paid by the county, and that, after payment by the parties or the county or both, all or part or none of it be taxed as costs in the action. The fee of an expert witness called by a party but not appointed by the court shall be paid by the party calling him but shall not be taxed as costs in the action.

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895. Determination of paternity.

895. If the court finds that the conclusions of all the experts, as disclosed by the evidence based upon the tests, are that the alleged father is not the father of the child, the question of paternity shall be resolved accordingly. If the experts disagree in their findings or conclusions, the question shall be submitted upon all the evidence.

896. Limitation on application in criminal matters.

896. This chapter applies to criminal cases subject to the following limitations and provisions:

(a) An order for the tests shall be made only upon application of a party or on the court's initiative.

(b) The compensation of the experts shall be paid by the county under order of court.

(c) The court may direct a verdict of acquittal upon the conclusions of all the experts under the provisions of Section 895; otherwise, the case shall be submitted for determination upon all the evidence.

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DIVISION 8. PRIVILEGES

CHAPTER 1. DEFINITIONS

900. Application of definitions.

900. Unless the provision or context otherwise specifically requires, the definitions in this chapter govern the construction of this division.

901. Civil proceeding.

901. "Civil proceeding" means any proceeding except a criminal proceeding.

902. Criminal proceeding.

902. "Criminal proceeding" means an action or proceeding brought in a court by the people of the State of California, and initiated by complaint, indictment, information, or accusation, either to determine whether a person has committed a crime and should be punished therefor or to determine whether a civil officer should be removed from office for wilfull or corrupt misconduct, and includes any court proceeding ancillary thereto.

903. Disciplinary proceeding.

903. "Disciplinary proceeding" means a proceeding brought by a public entity to determine whether a right, authority, license, or privilege (including the right or privilege to be employed by the public entity) should be revoked, suspended, terminated, limited, or conditioned, but does not include a criminal proceeding.

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904. Presiding officer.

904. "Presiding officer" means the person authorized to rule on a claim of privilege in the proceeding in which the claim is made.

905. Proceeding.

905. "Proceeding" means any action, hearing, investigation, inquest, or inquiry (whether conducted by a court, administrative agency, hearing officer, arbitrator, legislative body, or any other person authorized by law to do so) in which, pursuant to law, testimony can be compelled to be given.

CHAPTER 2. APPLICABILITY OF DIVISION

910. Applicability of division.

910. Except as otherwise provided by statute, the provisions of this division apply in all proceedings.

CHAPTER 3. GENERAL PROVISIONS RELATING TO PRIVILEGES

911. General rule as to privileges.

911. Except as otherwise provided by statute:

(a) No person has a privilege to refuse to be a witness.

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(b) No person has a privilege to refuse to disclose any matter or to refuse to produce any object or writing.

(c) No person has a privilege that another shall not be a witness or shall not disclose any matter or shall not produce any object or writing.

912. Waiver of privilege.

912. (a) Except as otherwise provided in this section, the right of any person to claim a privilege provided by Section 954 (lawyer-client privilege), 980 (marital privilege for confidential communications), 994 (physician-patient privilege), 1014 (psychotherapist-patient privilege), or 1033 (privilege of penitent) is waived with respect to a communication protected by such privilege if any holder of the privilege, without coercion, has disclosed a significant part of the communication or has consented to such disclosure made by anyone. Consent to disclosure is manifested by a failure to claim the privilege in any proceeding in which a holder of the privilege has the legal standing and opportunity to claim the privilege or by any other words or conduct of a holder of the privilege indicating his consent to the disclosure.

(b) Where two or more persons are the holders of a privilege provided by Section 954 (lawyer-client privilege), 980 (marital privilege for confidential communications), 994 (physician-patient privilege), or 1014 (psychotherapist-patient privilege), the privilege with respect to a communication is not waived by a particular holder of the privilege unless he or a person with his consent waives the privilege in a manner provided in subdivision (a), even though another holder of the privilege or another person with the consent of such other holder has waived the right to claim the privilege with respect to such communication.

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(c) A disclosure that is itself privileged under this division is not a waiver of any privilege.

(d) A disclosure in confidence of a communication that is protected by a privilege provided by Section 954 (lawyer-client privilege), 994 (physician-patient privilege), or 1014 (psychotherapist-patient privilege), when such disclosure is reasonably necessary for the accomplishment of the purpose for which the lawyer, physician, or psychotherapist was consulted, is not a waiver of the privilege.

913. Reference to exercise of privilege.

913. (a) Subject to subdivisions (b) and (c):

(1) If a privilege is exercised not to testify with respect to any matter, or to refuse to disclose or to prevent another from disclosing any matter, the presiding officer and counsel may not comment thereon, no presumption shall arise with respect to the exercise of the privilege, and the trier of fact may not draw any inference therefrom as to the credibility of the witness or as to any matter at issue in the proceeding.

(2) The judge, at the request of a party who may be adversely affected because an unfavorable inference may be drawn by the jury because a privilege has been exercised, shall instruct the jury that no presumption arises with respect to the exercise of the privilege and that the jury may not draw any inference therefrom as to the credibility of the witness or as to any matter at issue in the proceeding.

(b) In a criminal proceeding, whether the defendant testifies or not, his failure to explain or to deny by his testimony any evidence or facts in the case against him may be commented upon by the court and by counsel and may be considered by the court or the jury.

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(c) In a civil proceeding, the failure of a person to explain or to deny by his testimony any evidence or facts in the case against him may be commented upon by the presiding officer and by counsel and may be considered by the trier of fact.

914. Determination of claim of privilege.

914. (a) Whether or not a privilege exists shall be determined in accordance with Section 915 and Article 2 (commencing with Section 400) of Chapter 4 of Division 3.

(b) No person may be held in contempt for failure to disclose information claimed to be privileged unless a court previously has determined that the information sought to be disclosed is not privileged. This subdivision does not apply to any governmental agency that has constitutional contempt power, nor does it impliedly repeal Chapter 4 (commencing with Section 9400) of Part 1 of Division 2 of Title 2 of the Government Code.

915. Disclosure of privileged information in ruling on claim of privilege.

915. (a) Subject to subdivision (b), the presiding officer may not require disclosure of information claimed to be privileged under this division in order to rule on the claim of privilege.

(b) When a court is ruling on a claim of privilege under Article 9 (commencing with Section 1040) of Chapter 4 relating to official information and identity of informer or under Section 1060 relating to trade secrets and is unable t rule on the claim without requiring disclosure of the information claimed to be privileged, the judge may require the person from whom disclosure is sought or the person entitled to claim the privilege, or both, to disclose the information in chambers out of the presence and hearing

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of all persons except the person entitled to claim the privilege and such other persons as the person entitled to claim the privilege is willing to have present. If the judge determines that the information is privileged, neither he nor any other person may ever disclose, without the consent of the person entitled to claim the privilege, what was disclosed in the course of the proceedings in chambers.

916. Exclusion of privileged information by presiding officer on his own motion.

916. (a) The presiding officer shall exclude, on his own motion, information that is subject to a claim of privilege under this division if:

(1) The person from whom the information is sought is not a person authorized to claim the privilege; and

(2) There is no party to the proceeding who is a person authorized to claim the privilege.

(b) The presiding officer may not exclude information under this section if:

(1) There is no person entitled to claim the privilege in existence; or

(2) He is otherwise instructed by a person authorized to permit disclosure.

917. Confidential communications: burden of proof.

917. 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

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confidence and the opponent of the claim of privilege has the burden of proof to establish that the communication was not confidential.

918. Effect of error in overruling claim of privilege.

918. 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 Section 970 or 971.

919. Admissibility where disclosure wrongfully compelled.

919. Evidence of a statement or other disclosure is inadmissible against a holder of the privilege if:

(1) A person entitled to claim the privilege claimed it but nevertheless disclosure wrongfully was required to be made; or

(2) The presiding officer failed to comply with Section 916.

920. Other statutes not impliedly repealed.

920. Nothing in this division shall be construed to repeal by implication any other statute relating to privileges.

CHAPTER 4. PARTICULAR PRIVILEGES

Article 1. Privilege of Defendant in Criminal Proceeding

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930. Privilege not to be called as a witness and not to testify.

930. (a) A defendant in a criminal proceeding has a privilege not to be called as a witness and not to testify.

(b) A defendant in a criminal proceeding has no privilege to refuse, when ordered by the judge, to submit his body to examination or to do any act in the presence of the judge or the trier of fact, except to refuse to testify.

Article 2. Privilege Against Self-Incrimination

940. Definition of incrimination.

940. (a) A matter will incriminate a person within the meaning of this article if it:

(1) Constitutes an element of a crime under the law of this State or the United States; or

(2) Is a circumstance which with other circumstances would be a basis for a reasonable inference of the commission of such a crime; or

(3) Is a clue to the discovery of a matter that is within paragraph (1) or (2).

(b) Notwithstanding subdivision (a), a matter will not incriminate a person if he has become permanently immune from conviction for the crime.

(c) In determining whether a matter is incriminating, other matters in evidence or disclosed in argument, the implications of the question, the setting in which it is asked, the applicable statute of limitations, and all other relevant factors shall be taken into consideration.

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941. Privilege against self-incrimination.

941. Except as provided in this article, every natural person has a privilege to refuse to disclose any matter that will incriminate him if he claims the privilege.

942. Exception: Submitting to examination.

942. No person has a privilege under this article to refuse to submit to examination for the purpose of discovering or recording his corporal features and other identifying characteristics or his physical or mental condition.

943. Exception: Demonstrating identifying characteristics.

943. No person has a privilege under this article to refuse to demonstrate his identifying characteristics, such as, for example, his handwriting, the sound of his voice and manner of speaking, or his manner of walking or running.

944. Exception: Samples of body fluids or substances.

944. No person has a privilege under this article to refuse to furnish or permit the taking of samples of body fluids or substances for analysis.

945. Exception: Production of thing to which another has superior right.

945. No person has a privilege under this article to refuse to produce for use as evidence or otherwise a document, chattel, or other thing under his control constituting, containing, or disclosing matter incriminating him if some other person, corporation, association, or other organization (including the United States or a public entity) owns

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or has a superior right to the possession of the thing to be produced.

946. Exception: Required records.

946. No person has a privilege under this article to refuse to produce for use as evidence or otherwise any record required by law to be kept and to be open to inspection for the purpose of aiding or facilitating the supervision or regulation by a public entity of an office, occupation, profession, or calling when such production is required in the aid of such supervision or regulation.

947. Exception: Cross-examination of criminal defendant.

947. Subject to the limitations of Chapter 6 (commencing with Section 780) of Division 6, a defendant in a criminal proceeding who testifies in that proceeding upon the merits before the trier of fact may be cross-examined as to all matters about which he was examined in chief.

948. Exception: Waiver by person other than criminal defendant.

948. Except for the defendant in a criminal proceeding, a person who, without having claimed the privilege under this article, testifies in a proceeding before the trier of fact with respect to a matter does not have a privilege under this article to refuse to disclose in such proceeding anything relevant to that matter.

Article 3. Lawyer-Client Privilege

950. "Client" defined.

950. As used in this article, "client" means a person, corporation,

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association, or other organization (including a public entity) that, directly or through an authorized representative, consults a lawyer for the purpose of retaining the lawyer or securing legal service or advice from him in his professional capacity, and includes an incompetent (a) who himself so consults the lawyer or (b) whose guardian or conservator so consults the lawyer in behalf of the incompetent.

951. "Confidential communication between client and lawyer" defined.

951. As used in this article, "confidential communication between client and lawyer" means information transmitted between a client and his lawyer in the course of that relationship and in confidence by a means which, so far as the client is aware, discloses the information to no third persons other than those who are present to further the interest of the client in the consultation or those reasonably necessary for the transmission of the information or the accomplishment of the purpose for which the lawyer is consulted, and includes advice given by the lawyer in the course of that relationship.

952. "Holder of the privilege" defined.

952. As used in this article, "holder of the privilege" means:

(a) The client when he is competent.

(b) A guardian or conservator of the client when the client is incompetent.

(c) The personal representative of the client if the client is dead.

(d) A successor, assign, trustee in dissolution, or any similar representative of a corporation, partnership, association, or other organization (including a public entity) that is no longer in existence.

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953. "Lawyer" defined.

953. As used in this article, "lawyer" means a person authorized, or reasonably believed by the client to be authorized, to practice law in any state or nation.

954. Lawyer-client privilege.

954. Subject to Section 912 and except as otherwise provided in this article, the client, 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:

(a) The holder of the privilege;

(b) A person who is authorized to claim the privilege by the holder of the privilege; or

(c) The person who was the lawyer at the time of the confidential communication, but such person may not claim the privilege if there is no holder of the privilege in existence or if he is otherwise instructed by a person authorized to permit disclosure.

955. When lawyer required to claim privilege.

955. The lawyer who received or made a communication subject to the privilege under this article shall claim the privilege whenever he is present when the communication is sought to be disclosed and is authorized to claim the privilege under subdivision (c) of Section 854.

956. Exception: Crime or fraud.

956. There is no privilege under this article if the services of the lawyer were sought or obtained to enable or aid anyone to commit or plan

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to commit a crime or to perpetrate or plan to perpetrate a fraud.

957. Exception: Parties claiming through deceased client.

957. There is no privilege under this article as to a communication relevant to an issue between parties all of whom claim through a deceased client, regardless of whether the claims are by testate or intestate succession or by inter vivos transaction.

958. Exception: Breach of duty arising out of lawyer-client relationship.

958. There is no privilege under this article as to a communication relevant to an issue of breach, by the lawyer or by the client, of a duty arising out of the lawyer-client relationship.

959. Exception: Lawyer as attesting witness.

959. There is no privilege under this article as to a communication relevant to an issue concerning the intention or competence of a client executing an attested document, or concerning the execution or attestation of such a document, of which the lawyer is an attesting witness.

960. Exception: Intention of deceased client concerning writing affecting property interest.

960. There is no privilege under this article as to a communication relevant to an issue concerning the intention of a deceased client with respect to a deed of conveyance, will, or other writing, executed by the client, purporting to affect an interest in property.

961. Exception: Validity of writing affecting interest in property.

961. There is no privilege under this article as to a communication

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relevant to an issue concerning the validity of a deed of conveyance, will, or other writing, executed by a now deceased client, purporting to affect an interest in property.

962. Exception: Communication of physician.

962. There is no privilege under this article as to a communication between a physician and a client who consults the physician or submits to an examination by the physician for the purpose of securing a diagnosis or preventive, palliative, or curative treatment of his physician or mental condition if the communication, including information obtained by an examination of the client, is not privileged under Article 6 (commencing with Section 990).

963. Exception: Communication to psychotherapist.

963. There is no privilege under this article as to a communication between a psychotherapist and a client who consults the psychotherapist or submits to an examination by the psychotherapist for the purpose of securing a diagnosis or preventive, palliative, or curative treatment of his mental or emotional condition if the communication, including information obtained by an examination of the client, is not privileged under Article 7 (commencing with Section 1010).

964. Exception: Joint clients.

964. Where two or more clients have retained or consulted a lawyer upon a matter of common interest, none of them may claim a privilege under this article as to a communication made in the course of that relationship when such communication is offered in a civil proceeding between such clients.

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Article 4. Privilege Not to Testify Against Spouse

970. Privilege not to testify against spouse.

970. Except as provided in Sections 972 and 973, a married person has a privilege not to testify against his spouse in any proceeding.

971. Privilege not to be called as a witness against spouse.

971. Except as provided in Sections 972 and 973, a married person whose spouse is a party to a proceeding has a privilege not to be called as a witness by an adverse party to that proceeding without the prior express consent of the spouse having the privilege under this section.

972. When privilege not applicable.

972. A married person does not have a privilege under this article in:

(a) A proceeding to commit or otherwise place his spouse or his property, or both, under the control of another because of his alleged mental or physical condition.

(b) A proceeding brought by or on behalf of a spouse to establish his competence.

(c) A proceeding under the Juvenile Court Law, Chapter 2 (commencing with Section 500) of Part 1 of Division 2 of the Welfare and Institutions Code.

(d) A criminal proceeding in which one spouse is charged with:

(1) A crime against the person or property of the other spouse or of a child of either, whether committed before or during marriage.

(2) A crime against the person or property of a third person committed in the course of committing a crime against the person or property of the

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other spouse, whether committed before or during marriage.

(3) Bigamy or adultery.

(4) A crime defined by Section 270 or 270a of the Penal Code.

973. Waiver of privilege.

973. (a) Unless wrongfully compelled to do so, a married person who testifies in a proceeding to which his spouse is a party, or who testifies against his spouse in any proceeding, does not have a privilege under this article in the proceeding in which such testimony is given.

(b) There is no privilege under this article in a civil proceeding brought or defended by a married person for the immediate benefit of his spouse or of himself and his spouse.

Article 5. Privilege for Confidential Marital Communications

980. Privilege for confidential marital communications.

980. Subject to Section 912 and except as otherwise provided in this article, a spouse (or his guardian or conservator when he is incompetent), whether or not a party, has a privilege during the marital relationship and afterwards to refuse to disclose, and to prevent another from disclosing, a communication if he claims the privilege and the communication was made in confidence between him and the other spouse while they were husband and wife.

981. Exception: Crime or fraud.

981. There is no privilege under this article if the communication was made, in whole or in part, to enable or aid anyone to commit or plan to commit a crime or to perpetrate or plan to perpetrate a fraud.

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982. Exception: Commitment or similar proceeding.

982. There is no privilege under this article in a proceeding to commit either spouse or otherwise place him or his property, or both, under the control of another because of his alleged mental or physical condition.

983. Exception: Proceedings to establish competence.

983. There is no privilege under this article in a proceeding brought by or on behalf of either spouse in which the spouse seeks to establish his competence.

984. Exception: Proceeding between spouses.

984. There is no privilege under this article in:

(a) A proceeding by one spouse against the other spouse.

(b) A proceeding by a person claiming by testate or intestate succession or by inter vivos transaction from a deceased spouse against the other spouse.

985. Exception: Certain criminal proceedings.

985. There is no privilege under this article in a criminal proceeding in which one spouse is charged with:

(a) A crime against the person or property of the other spouse or of a child of either.

(b) A crime against the person or property of a third person committed in the course of committing a crime against the person or property of the other spouse.

(c) Bigamy or adultery.

(d) A crime defined by Section 270 or 270a of the Penal Code.

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986. Exception: Juvenile court proceedings.

986. There is no privilege under this article in a proceeding under the Juvenile Court Law, Chapter 2 (commencing with Section 500) of Part 1 of Division 2 of the Welfare and Institutions Code.

987. Communication offered by spouse who is criminal defendant.

987. There is no privilege under this article in a criminal proceeding in which the communication is offered in evidence by a defendant who is one of the spouses between whom the communication was made.

Article 6. Physician-Patient Privilege

990. "Confidential communication between patient and physican" defined.

990. As used in this article, "confidential communication between patient and physician" means information, including information obtained by an examination of the patient, transmitted between a patient and his physician in the course of that relationship and in confidence by a means which, so far as the patient is aware, discloses the information to no third persons other than those who are present to further the interest of the patient in the consultation or those reasonably necessary for the transmission of the information or the accomplishment of the purpose for which the physician is consulted, and includes advice given by the physician in the course of that relationship.

991. "Holder of the privilege" defined.

991. As used in this article, "holder of the privilege" means:

(a) The patient when he is competent.

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(b) A guardian or conservator of the patient when the patient is incompetent.

(c) The personal representative of the patient if the patient is dead.

992. "Patient" defined.

992. As used in this article, "patient" means a person who consults a physician or submits to an examination by a physician for the purpose of securing a diagnosis or preventive, palliative, or curative treatment of his physical or mental condition.

993. "Physician" defined.

993. As used in this article, "physician" means a person authorized, or reasonably believed by the patient to be authorized, to practice medicine in any state or nation.

994. Physician-patient privilege.

994. Subject to Section 912 and except as otherwise provided in this article, the patient, whether or not a party, has a privilege to refuse to disclose, and to prevent another from disclosing, a confidential communication between patient and physician if the privilege is claimed by:

(a) The holder of the privilege;

(b) A person who is authorized to claim the privilege by the holder of the privilege; or

(c) The person who was the physician at the time of the confidential communication, but such person may not claim the privilege if there is no holder of the privilege in existence or if he is otherwise instructed by a person authorized to permit disclosure.

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995. When physician required to claim privilege.

995. The physician who received or made a communication subject to the privilege under this article shall claim the privilege whenever he is present when the communication is sought to be disclosed and is authorized to claim the privilege under subdivision (c) of Section 994.

996. Exception: Patient-litigant exception.

996. There is no privilege under this article in a proceeding, including an action brought under Section 376 or 377 of the Code of Civil Procedure, in which an issue concerning the condition of the patient has been tendered by:

(a) The patient;

(b) Any party claiming through or under the patient;

(c) Any party claiming as a beneficiary of the patient through a contract to which the patient is or was a party.

997. Exception: Crime or tort.

997. There is no privilege under this article if the services of the physician were sought or obtained to enable or aid anyone to commit or plan to commit a crime or a tort or to escape detection or apprehension after the commission of a crime or a tort.

998. Exception: Criminal or disciplinary proceeding.

998. There is no privilege under this article in a criminal proceeding or in a disciplinary proceeding.

999. Exception: Proceeding to recover damages for criminal conduct.

999. There is no privilege under this article in a proceeding to recover damages on account of conduct of the patient which constitutes a crime.

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1000. Exception: Parties claiming through deceased patient.

1000. There is no privilege under this article as to a communication relevant to an issue between parties all of whom claim through a deceased patient, regardless of whether the claims are by testate or intestate succession or by inter vivos transaction.

1001. Exception: Breach of duty arising out of physician-patient relationship.

1001. There is no privilege under this article as to a communication relevant to an issue of breach, by the physician or by the patient, of a duty arising out of the physician-patient relationship.

1002. Exception: Intention of deceased client concerning writing affecting property interest.

1002. There is no privilege under this article as to a communication relevant to an issue concerning the intention of a deceased patient with respect to a deed of conveyance, will, or other writing, executed by the patient, purporting to affect an interest in property.

1003. Exception: Validity of writing affecting interest in property.

1003. There is no privilege under this artticle as to a communication relevant to an issue concerning the validity of a deed of conveyance, will, or other writing, executed by a now deceased patient, purporting to affect an interest in property.

1004. Exception: Commitment or similar proceeding.

1004. There is no privilege under this article in a proceeding to commit the patient or otherwise place him or his property, or both, under the control of another because of his alleged mental or physical condition.

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1005. Exception: Proceeding to establish competence.

1005. There is no privilege under this article in a proceeding brought by or on behalf of the patient in which the patient seeks to establish his competence.

1006. Exception: Required report.

1006. There is no privilege under this article as to information which the physician or the patient is required to report to a public employee, or as to information required to be recorded in a public office, unless the statute, charter, ordinance, administrative regulation, or other provision requiring the report or record specifically provides that the information shall not be disclosed.

Article 7. Psychotherapist-Patient Privilege

1010. "Confidential communication between patient and psychotherapist" defined.

1010. As used in this article, "confidential communication between patient and psychotherapist" means information, including information obtained by an examination of the patient, transmitted between a patient and his psychotherapist in the course of that relationship and in confidence by a means which, so far as the patient is aware, discloses the information to no third persons other than those who are present to further the interest of the patient in the consultation or those reasonably necessary for the transmission of the information or the accomplishment of the purpose for which the psychotherapist is consulted, and includes advice given by the psychotherapist in the course of that relationship.

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1011. "Holder of the privilege" defined.

1011. As used in this article, "holder of the privilege" means:

(a) The patient when he is competent.

(b) A guardian or conservator of the patient when the patient is incompetent.

(c) The personal representative of the patient if the patient is dead.

1012. "Patient" defined.

1012. As used in this article, "patient" means a person who consults a psychotherapist or submits to an examination by a psychotherapist for the purpose of securing a diagnosis or preventive, palliative, or curative treatment of his mental or emotional condition.

1013. "Psychotherapist" defined.

1013. As used in this article, "psychotherapist" means:

(a) A person authorized, or reasonably believed by the patient to be authorized, to practice medicine in any state or nation; or

(b) A person certified as a psychologist under Chapter 6.6 (commencing with Section 2900) of Division 2 of the Business and Professions Code.

1014. Psychotherapist-patient privilege.

1014. Subject to Section 912 and except as otherwise provided in this article, the patient, whether or not a party, has a privilege to refuse to disclose, and to prevent another from disclosing, a confidential communication between patient and psychotherapist if the privilege is claimed by:

(a) The holder of the privilege;

(b) A person who is authorized to claim the privilege by the holder of the privilege; or

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(c) The person who was the psychotherapist at the time of the confidential communication, but such person may not claim the privilege if there is no holder of the privilege in existence or if he is otherwise instructed by a person authorized to permit disclosure.

1015. When psychotherapist required to claim privilege.

1015. The psychotherapist who received or made a communication subject to the privilege under this article shall claim the privilege whenever he is present when the communication is sought to be disclosed and is authorized to claim the privilege under subdivision (c) of Section 1014.

1016. Exception: Patient-litigant exception.

1016. There is no privilege under this rule in a proceeding, including an action brought under Section 376 or 377 of the Code of Civil Procedure, in which an issue concerning the mental or emotional condition of the patient has been tendered by:

(a) The patient;

(b) Any party claiming through or under the patient; or

(c) Any party claiming as a beneficiary of the patient through a contract to which the patient is or was a party.

1017. Exception: Court appointed psychotherapist.

1017. There is no privilege under this article if the psychotherapist is appointed by order of a court to examine the patient.

1018. Exception: Crime or tort.

1018. There is no privilege under this article if the services of the psychotherapist were sought or obtained to enable or aid anyone to commit

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or plan to commit a crime or a tort or to escape detection or apprehension after the commission of a crime or a tort.

1019. Exception: Parties claiming through deceased patient.

1019. There is no privilege under this article as to a communication relevant to an issue between parties who claim through a deceased patient, regardless of whether the claims are by testate or intestate succession or by inter vivos transaction.

1020. Exception: Breach of duty arising out of psychotherapist-patient relationship.

1020. There is no privilege under this article as to a communication relevant to an issue of breach, by the psychotherapist or by the patient, of a duty arising out of the psychotherapist-patient relationship.

1021. Exception: Intention of deceased client concerning writing affecting property interest.

1021. There is no privilege under this article as to a communication relevant to an issue concerning the intention of a deceased patient with respect to a deed of conveyance, will, or other writing, executed by the patient, purporting to affect an interest in property.

1022. Exception: Validity of writing affecting interest in property.

1022. There is no privilege under this article as to a communication relevant to an issue concerning the validity of a deed of conveyance, will, or other writing, executed by a now deceased patient, purporting to affect an interest in property.

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1023. Exception: Proceeding to establish competence.

1023. There is no privilege under this article in a proceeding brought by or on behalf of the patient in which the patient seeks to establish his competence.

1024. Exception: Required reports.

1024. There is no privilege under this article as to information which the psychotherapist or the patient is required to report to a public official or as to information required to be recorded in a public office, unless the statute, charter, ordinance, administrative regulation, or other provision requiring the report or record specifically provides that the information shall not be disclosed.

Article 8. Priest-Penitent Privileges

1030. "Penitent" defined.

1030. As used in this article, "penitent" means a person who has made a penitential communication to a priest.

1031. "Penitential communication" defined.

1031. As used in this article, "penitential communication" means a communication made in confidence in the presence of no third person to a priest who, in the course of the discipline or practice of his church, denomination, or organization, is authorized or accustomed to hear such communications and has a duty to keep them secret.

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1032. "Priest" defined.

1032. As used in this article, "priest" means a priest, clergyman, minister of the gospel, or other officer of a church or of a religious denomination or religious organization.

1033. Privilege of penitent.

1033. Subject to Section 912, a penitent, whether or not a party, has a privilege to refuse to disclose, and to prevent another from disclosing, a penitential communication if he claims the privilege.

1034. Privilege of priest.

1034. Subject to Section 912, a priest, whether or not a party, has a privilege to refuse to disclose a penitential communication if he claims the privilege.

Article 9. Official Information and Identity of Informer

1040. Privilege for official information.

1040. (a) As used in this section, "official information" means information not open, or theretofore officially disclosed, to the public acquired by a public employee, including an officer, agent, or employee of the United States, in the course of his duty.

(b) A public entity (including the United States) has a privilege to refuse to disclose official information, and to prevent such disclosure by anyone who has acquired such information in a manner authorized by the public entity, if the privilege is claimed by a person authorized by the public entity to do so and:

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(1) Disclosure is forbidden by an Act of the Congress of the United States or a statute of this State; or

(2) Disclosure of the information is against the public interest because there is a necessity for preserving the confidentiality of the information that outweighs the necessity for disclosure in the interest of justice; but no privilege may be claimed under this paragraph if any person authorized to do so has consented that the information be disclosed in the proceeding. In determining whether disclosure of the information is against the public interest, the interest of the public entity as a party in the outcome of the proceeding may not be considered.

1041. Privilege for identity of informer.

1041. (a) A public entity (including the United States) has a privilege to refuse to disclose the identity of a person who has furnished information as provided in subdivision (b) purporting to disclose a violation of a law of this State or of the United States, and to prevent such disclosure by anyone who has acquired such information in a manner authorized by the public entity, if the privilege is claimed by a person authorized by the public entity to do so and:

(1) Disclosure is forbidden by an Act of the Congress of the United States or a statute of this State; or

(2) Disclosure of the identity of the informer is against the public interest because there is a necessity for preserving the confidentiality of his identity that outweighs the necessity for disclosure in the interest of justice; but no privilege may be claimed under this paragraph if any person authorized to do so has consented that the identity of the informer

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be disclosed in the proceeding. In determining whether disclosure of the identity of the informer is against the public interest, the interest of the public entity as a party in the outcome of the proceeding may not be considered.

(b) This section applies only if the information is furnished by the informer directly to a law enforcement officer or to a representative of an administrative agency charged with the administration or enforcement of the law alleged to be violated or is furnished by the informer to another for the purpose of transmittal to such officer or representative.

(c) There is no privilege under this section if the identity of the informer is known, or has been officially revealed, to the public.

1042. Adverse order or finding in certain cases.

1042. (a) Except where disclosure is forbidden by an Act of the Congress of the United States, if a claim of privilege under this article by the State or a public entity in this State is sustained in a criminal proceeding or in a disciplinary proceeding, the presiding officer shall make such order or finding of fact adverse to the public entity bringing the proceeding as is appropriate upon any issue in the proceeding to which the privileged information is material.

(b) Notwithstanding subdivision (a), where a search is made pursuant to a warrant valid on its face, the public entity bringing a criminal proceeding or a disciplinary proceeding is not required to reveal official information or 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.

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Article 10. Political Vote

1050. Privilege to protect secrecy of vote.

1050. If he claims the privilege, a person has a privilege to refuse to disclose the tenor of his vote at a public election where the voting is by secret ballot unless he voted illegally or he previously made an unprivileged disclosure of the tenor of his vote.

Article 11. Trade Secret

1060. Privilege to protect trade secret.

1060. The owner of a trade secret has a privilege, which may be claimed by him or by his agent or employee, to refuse to disclose the secret and to prevent another from disclosing it if the allowance of the privilege will not tend to conceal fraud or otherwise work injustice.

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DIVISION 9. EVIDENCE AFFECTED OR EXCLUDED BY EXTRINSIC POLICIES

CHAPTER 1. EVIDENCE OF CHARACTER, HABIT, CUSTOM, OR USAGE

1100. Character itself in issue: Manner of proof.

1100. When a person's character or a trait of his character is itself an issue, any otherwise admissible evidence (including testimony in the form of opinion, evidence of reputation, and evidence of specific instances of such person's conduct) is admissible when offered to prove only such person's character or trait of his character.

1101. Character evidence to prove conduct.

1101. (a) Except as provided in this section, 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 occassion.

(b) 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 section:

(1) When offered by the defendant to prove his innocence.

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

(c) In a criminal action or proceeding, evidence of the character or a trait of character (in the form of opinion, evidence of reputation, or

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evidence of specific instances of conduct) of the victim of the crime for which the defendant is being prosecuted is not inadmissible under this section:

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

(2) When offered by the prosecution to meet evidence previously offered by the defendant under paragraph (1).

(d) Nothing in this section 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.

(e) Nothing in this section affects the admissibility of evidence offered to support or attack the credibility of a witness.

1102. Character trait for care or skill.

1102. Evidence of a trait of a person's character with respect to care or skill is inadmissible as tending to prove the quality of his conduct on a specified occasion.

1103. Habit or custom to prove specific behavior.

1103. Any otherwise admissible evidence of habit or custom is admissible to prove conduct on a specified occasion in conformity with the habit or custom.

1104. Usage to explain act or writing.

[Section 1104 to be based on CCP 1870(12). Section 1104 will be drafted after the research study on CCP 1870(12) has been considered by the Commission. CCP 1870(12) provides:

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1870. In conformity with the preceeding provisions, evidence may be given upon a trial of the following facts:
*   *   *   *   *

12. Usage, to explain the true character of an act, contract, or instrument where such true character is not otherwise plain; but usage is never admissible, except as an instrument of interpretation;]

CHAPTER 2. OTHER EVIDENCE AFFECTED OR EXCLUDED BY EXTRINSIC POLICIES

1150. Evidence to test a verdict.

1150. Upon an inquiry as to the validity of a verdict, evidence otherwise admissible may be received as to statements made, or conduct, conditions, or events occurring, either within or without the jury room, of such a character as is likely to have improperly influenced the verdict. No evidence is admissible to show the effect of such statement, conduct, condition, or event upon a juror either in influencing him to assent to or dissent from the verdict or concerning the mental processes by which it was determined.

1151. Subsequent remedial conduct.

1151. When, after the occurrence of an event, remedial or precautionary measures are taken, which, if taken previously, would have tended to make the event less likely to occur, evidence of such subsequent measures is not admissible to prove negligence or culpable conduct in connection with the event.

1152. Offer to compromise and the like.

1152. (a) Evidence that a person has, in compromise or from humanitarian motives, furnished or offered or promised to furnish money or any

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other thing, act, or service to another who has sustained or claims to have sustained loss or damage, as well as any conduct or statements made in negotiation thereof, is inadmissible to prove his liability for the loss or damage or any part of it.

(b) This section does not affect the admissibility of evidence of:

(1) Partial satisfaction of an asserted claim on demand without questioning its validity, as tending to prove the validity of the claim; or

(2) A debtor's payment or promise to pay all or a part of his pre-existing debt as tending to prove the creation of a new duty on his part or a revival of his pre-existing duty.

1153. Offer to plead guilty to crime.

1153. Evidence that the defendant in a criminal action has offered to plead guilty to the alleged crime or to a lessor crime, as well as any conduct or statements made in negotiation thereof, is inadmissible in any action.

1154. Offer to discount a claim.

1154. Evidence that a person has accepted or offered or promised to accept a sum of money or any other thing, act, or service in satisfaction of a claim, as well as any conduct or statements made in negotiation thereof, is inadmissible to prove the invalidity of the claim or any part of it.

1155. Liability insurance.

1155. Evidence that a person was, at the time a harm was suffered by another, insured wholly or partially against loss arising from liability for that harm is inadmissible as tending to prove negligence or other wrongdoing.

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DIVISION 10. HEARSAY EVIDENCE

CHAPTER 1. GENERAL PROVISIONS

1200. General rule excluding hearsay evidence.

1200. Hearsay evidence is inadmissible except as provided in Chapter 2 (commencing with Section 1250).

1201. Multiple hearsay.

1201. A statement within the scope of an exception to Section 1200 is not inadmissible on the ground that the evidence of such statement is hearsay evidence if the hearsay evidence of such statement consists of one or more statements each of which meets the requirements of an exception to Section 1200.

1202. Credibility of declarant.

1202. Evidence of a statement or other conduct by a declarant inconsistent with a statement of such declarant received in evidence under an exception to Section 1200 is not inadmissible for the purpose of discrediting the declarant, though he is given and has had no opportunity to deny or explain such inconsistent statement or other conduct. Any other evidence tending to impair or support the credibility of the declarant is admissible if it would have been admissible had the declarant been a witness.

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1203. Discretion of judge under certain exceptions to exclude evidence.

Note: Rule 64 of the Uniform Rules of Evidence provides that certain writings admissible under hearsay exceptions may be received in evidence only if the party offering such writing has delivered a copy of it to each adverse party a reasonable time before trial unless the judge finds that such adverse party has not been unfairly surprised by the failure to deliver such copy. The Commission originally determined not to recommend the adoption of a provision similar to Rule 64. In light of the comments received on the tentative recommendation on hearsay evidence, the Commission has determined to reconsider its previous decision as to whether a provision similar to Rule 64 is needed.

1204. No implied repeal.

1204. Nothing in this division shall be construed to repeal by implication any other statute relating to hearsay evidence.

CHAPTER 2. EXCEPTIONS TO THE HEARSAY RULE

1250. Prior inconsistent statement; prior consistent statement.

1250. A statement made by a person who is a witness at the hearing, but not made at the hearing, is not made inadmissible by Section 1200 if the statement would have been admissible if made by him while testifying and the statement is:

(a) Inconsistent with his testimony at the hearing and is offered in compliance with Section [Rule 22];

(b) Offered after evidence of a prior inconsistent statement by the witness has been received, or after an express or implied charge has been made that his testimony at the hearing was recently fabricated, and the statement is one made before the alleged inconsistent statement or

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fabrication and is consistent with his testimony at the hearing; or

(c) Offered after an express or implied charge has been made that his testimony at the hearing is influenced by bias or other improper motive and the statement is one made before the bias or motive is alleged to have arisen and is consistent with his testimony at the hearing.

1251. Past recollection recorded.

1251. A statement made by a person who is a witness at the hearing, but not made at the hearing, is not made inadmissible by Section 1200 if the statement would have been admissible if made by him while testifying and the statement concerns a matter as to which the witness has no present recollection and is contained in a writing which:

(a) Was made at a time when the fact recorded in the writing actually occurred or was fresh in the witness' memory;

(b) Was made by the witness himself or under his direction or by some other person for the purpose of recording the witness' statement at the time it was made;

(c) Is offered after the witness testifies that the statement he made was a true statement of such fact; and

(d) Is offered after the writing is authenticated as an accurate record of the statement.

1252. Former testimony offered against a party to the former proceeding.

1252. (a) As used in this section, "former testimony" means:

(1) Testimony given under oath or affirmation as a witness in a former hearing or trial of the same action;

(2) Testimony given under oath or affirmation as a witness in

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another action or in a proceeding conducted by or under the supervision of an official agency having the power to determine controversies; and

(3) Testimony in a deposition taken in compliance with law in another action.

(b) Former testimony is not made inadmissible by Section 1200 if the declarant is unavailable as a witness and:

(1) The former testimony is offered against a person who offered it in evidence in his own behalf on the former occasion or against the successor in interest of such person; or

(2) The party against whom the former testimony is offered was a party to the action or proceeding in which the testimony was given and had the right and opportunity to cross-examine with an interest and motive similar to that which he has at the hearing, except that testimony in a deposition taken in another action and testimony given in a preliminary examination in another criminal action is not made admissible by this subdivision against the defendant in a criminal action unless it was received in evidence at the trial of such other action.

(c) Except for objections to the form of the question which were not made at the time the former testimony was given and objections based on competency or privilege which did not exist at that time, the admissibility of former testimony under this section is subject to the same limitations and objections as though the declarant were testifying in person.

1253. Former testimony offered against a person not a party to the former proceeding.

1253. (a) As used in this section, "former testimony" has the

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meaning given it by subdivision (a) of Section 1252.

(b) Former testimony is not made inadmissible by Section 1200 if:

(1) The declarant is unavailable as a witness;

(2) The former testimony is offered in a civil action or against the people in a criminal action; and

(3) The issue is such that the party to the action or proceeding in which the former testimony was given had the right and opportunity to cross-examine with an interest and motive similar to that which the party against whom the testimony is offered has at the hearing.

(c) Except for objections based on competency or privilege which did not exist at the time the former testimony was given, the admissibility of former testimony under this section is subject to the same limitations and objections as though the declarant were testifying in person.

1254. Spontaneous or contemporaneous statement.

1254. (a) A statement is not made inadmissible by Section 1200 if it (1) purports to state what the declarant perceived relating to an act, condition, or event which the statement narrates, describes, or explains, and (2) was made spontaneously while the declarant was under the stress of excitement caused by such perception.

(b) A statement is not made inadmissible by Section 1200 if it was made while the declarant was perceiving the act, condition, or event which the statement narrates, describes, or explains.

1255. Dying declaration.

1255. A statement made by a person since deceased is not made inadmissible by Section 1200 if it would be admissible if made by the

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declarant at the hearing and was made under a sense of impending death, voluntarily and in good faith, and in the belief that there was no hope of his recovery.

1256. Confession or admission of criminal defendant.

1256. A previous statement by the defendant is not made inadmissible by Section 1200 when offered against him in a criminal action if the statement was made freely and voluntarily and was not made:

(a) Under circumstances likely to cause the defendant to make a false statement; or

(b) Under such circumstances that it is inadmissible under the Constitution of the United States or the Constitution of this State.

1257. Admission by a party.

1257. A statement made by a person who is a party to a civil action is not made inadmissible by Section 1200 when it is offered against him in either his individual or representative capacity, regardless of whether the statement was made in his individual or representative capacity.

1258. Adoptive admission.

1258. A statement offered against a party is not made inadmissible by Section 1200 if the statement is one 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.

1259. Authorized admissions.

1259. A statement offered against a party is not made inadmissible by Section 1200 if the statement was made by a person authorized by the

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party to make a statement or statements for him concerning the subject matter of the statement.

1260. Admission of co-conspirator.

1260. A statement offered against a party is not made inadmissible by Section 1200 if:

(a) The statement is that of a co-conspirator of the party;

(b) The statement was made during the existence of the conspiracy and in furtherance of the common object thereof;

(c) The statement would be admissible if made by the declarant at the hearing; and

(d) The statement is offered after, or in the judge's discretion as to the order of proof subject to, proof of the existence of the conspiracy and that the declarant and the party were both parties to the conspiracy at the time the statement was made.

1261. Admission of agent, partner, or employee.

1261. A statement offered against a party is not made inadmissible by Section 1200 if:

(a) The statement is that of an agent, partner, or employee of the party;

(b) The statement concerned a matter within the scope of the agency, partnership, or employment and was made during that relationship;

(c) The statement would be admissible if made by the declarant at the hearing; and

(d) The statement is offered after, or in the judge's discretion as to the order of proof subject to, proof of the existence of the relationship between the declarant and the party.

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1262. Admission of declarant where liability of declarant is in issue.

1262. A statement offered against a party in a civil action is not made inadmissible by Section 1200 if:

(a) The liability, obligation, or duty of the declarant is in issue between the party and the proponent of the evidence of the statement;

(b) The statement tends to establish that liability, obligation, or duty; and

(c) The statement would be admissible if made by the declarant at the hearing.

1263. Declaration against interest.

1263. (a) As used in this section, "declaration against interest" means a statement that, when made, was so far contrary to the declarant's pecuniary or proprietary interest, or so far subjected him to the risk of civil or criminal liability, or so far tended to render invalid a claim by him against another, or created such a risk of making him an object of hatred, ridicule, or social disgrace in the community, that a reasonable man in his position would not have made the statement unless he believed it to be true.

(b) Subject to subdivision (c), a declaration against interest is not made inadmissible by Section 1200 if:

(1) The declarant is not a party to the action in which the statement is offered;

(2) The declarant had sufficient knowledge of the subject; and

(3) The declarant is unavailable as a witness.

(c) A statement made while the declarant was in the custody of a public employee of the United States or any state is not made admissible

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by this section against the defendant in a criminal action unless the statement would be admissible under Section 1256 against the declarant if he were the defendant in a criminal action.

1264. Statement of declarant's then existing physical or mental condition.

1264. (a) Unless it was made in bad faith, a statement of the declarant's then existing state of mind, emotion, or physical sensation (including a statement of intent, plan, motive, design, mental feeling, pain, or bodily health) is not made inadmissible by Section 1200 when:

(1) Such mental or physical condition is in issue and the statement is offered on that issue; or

(2) The statement is offered to prove or explain acts or conduct of the declarant.

(b) This section does not make admissible a statement of memory or belief to prove the fact remembered or believed.

1265. Statement of declarant's previously existing physical or mental condition.

1265. Unless it was made in bad faith, a statement by the declarant as to his state of mind, emotion, or physical sensation (including a statement of intent, plan, motive, design, mental feeling, pain, or bodily health) at a time prior to the statement is not made inadmissible by Section 1200 if:

(a) The declarant is unavailable as a witness; and

(b) His statement is offered to prove such prior state of mind, emotion, or physical sensation when it is itself an issue in the action and the statement is not offered to prove any fact other than such state

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of mind, emotion, or physical sensation.

1266. Statement of previous symptoms.

1266. When relevant to an issue of the declarant's bodily condition, a statement of his previous symptoms, pain, or physical sensation, made to a physician consulted for treatment or for diagnosis with a view to treatment, is not made inadmissible by Section 1200 unless the statement was made in bad faith.

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1267. Statement concerning declarant's will.

1267. A statement of a declarant who is unavailable as a witness that he has or has not made a will, or has or has not revoked his will, or that identifies his will, is not made inadmissible by Section 1200 unless the statement was made in bad faith.

1268. Statement of decedent offered in action against his estate.

1268. A statement offered in an action brought against an executor or administrator upon a claim or demand against the estate of the declarant is not made inadmissible by Section 1200 if the statement was made upon the personal knowledge of the declarant.

1269. Business record.

1269. (a) As used in this section, "a business" includes every kind of business, governmental activity, profession, occupation, calling, or operation of institutions, whether carried on for profit or not.

(b) A writing offered as a record of an act, condition, or event is not made inadmissible by Section 1200 if:

(1) The custodian or other qualified witness testifies to its identity and the mode of its preparation;

(2) It was made in the regular course of a business, at or near the time of the act, condition, or event; and

(3) The sources of information and method and time of preparation were such as to indicate its trustworthiness.

1270. Absence of entry in business records.

1270. (a) As used in this section, the term "a business" has the meaning given it by Section 1269.

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(b) Evidence of the absence from the records of a business or a record of an asserted act, condition, or event is not made inadmissible by Section 1200 when offered to prove the non-occurrence of the act or event, or the non-existence of the condition, if:

(1) It was the regular course of that business to make records of all such acts, conditions, or events, at or near the time of the act, condition, or event, and to preserve them; and

(2) The sources of information and method and time of preparation of the records of that business are such as to indicate that the absence of a record of an act, condition, or event warrants an inference that the act or event did not occur or the condition did not exist.

1271. Report of public employee.

1271. (a) A writing offered as a record or report of an act, condition, or event is not made inadmissible by Section 1200 if:

(1) The writing was made by and within the scope of duty of a public employee of the United States or a public entity of any state;

(2) The writing was made at or near the time of the act, condition, or event; and

(3) The sources of information and method of preparation are such as to indicate its trustworthiness.

(b) If a party offers a writing made admissible by this section and the writing is received in evidence, the public employee who made the writing may be called as a witness by the adverse party and examined as if under cross-examination concerning the writing and the subject matter of the writing.

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1272. Report of vital statistic.

1272. A writing made as a record or report of a birth, fetal death, death, or marriage is not made inadmissible by Section 1200 if the maker was required by statute to file the writing in a designated public office and the writing was made and filed as required by the statute.

1273. Content of writing in custody of public employee.

1273. A writing that is a copy of a writing in the custody of a public employee is not made inadmissible by Section 1200 when offered to prove the content of the writing in the custody of the public employee.

1274. Proof of absence of public record.

1274. A writing made by the public employee who is the official custodian of the records in a public office, reciting diligent search and failure to find a record, is not made inadmissible by Section 1200 when offered to prove the absence of a record in that office.

1275. Certificate of marriage.

1275. A certificate that the maker thereof performed a marriage ceremony is not made inadmissible by Section 1200 when offered to prove the fact, time, or place of the marriage if:

(a) The maker of the certificate was, at the time and place certified as the time and place of the marriage, authorized by law to perform marriage ceremonies; and

(b) The certificate was issued at that time or within a reasonable time thereafter.

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1280. Official record of document affecting an interest in property.

1280. The official record of a document purporting to establish or affect an interest in property is not made inadmissible by Section 1200 when offered to prove the content of the original recorded document and its execution and delivery by each person by whom it purports to have been executed if:

(a) The record is in fact a record of an office of a state or nation or of any governmental subdivision thereof; and

(b) A statute authorized such a document to be recorded in that office.

1281. Judgment of previous conviction.

1281. Evidence of a final judgment adjudging a person guilty of a felony is not made inadmissible by Section 1200 when offered in a civil action to prove any fact essential to the judgment unless the judgment was based on a plea of nolo contendere.

1282. Judgment against person entitled to indemnity.

1282. Evidence of a final judgment is not made inadmissible by Section 1200 when offered by the judgment debtor to prove any fact which was essential to the judgment in an action in which he seeks to:

(a) Recover partial or total indemnity or exoneration for money paid or liability incurred because of the judgment.

(b) Enforce a warranty to protect the judgment debtor against the liability determined by the judgment.

(c) Recover damages for breach of warranty substantially the same as a warranty determined by the judgment to have been breached.

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1283. Judgment determining liability of third person.

1283. When the liability, obligation, or duty of a third person is in issue in a civil action, evidence of a final judgment against that person is not made inadmissible by Section 1200 when offered to prove such liability, obligation, or duty.

1284. Statement concerning declarant's own family history.

1284. (a) Subject to subdivision (b), a statement of a matter concerning a declarant's own birth, marriage, divorce, legitimacy, relationship by blood or marriage, race-ancestry, or other similar fact of his family history is not made inadmissible by Section 1200, even though the declarant had no means of acquiring personal knowledge of the matter declared, if the declarant is unavailable as a witness.

(b) This section does not make a statement admissible if the statement was made under such circumstances that the declarant in making such statement had motive or reason to deviate from the truth.

1285. Statement concerning family history of another.

1285. (a) Subject to subdivision (b), a statement concerning the birth, marriage, divorce, death, legitimacy, race-ancestry, relationship by blood or marriage, or other similar fact of the family history of a person other than the declarant is not made inadmissible by Section 1200 if the declarant is unavailable as a witness and:

(1) The declarant was related to the other by blood or marriage; or

(2) The declarant was otherwise so intimately associated with the other's family as to be likely to have accurate information concerning the matter declared and made the statement (i) upon information received from

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the other or from a person related by blood or marriage to the other or (ii) upon repute in the other's family.

(b) This section does not make a statement admissible if the statement was made under circumstances that the declarant in making such statement had motive or reason to deviate from the truth.

1286. Reputation in family concerning family history.

1286. Evidence of reputation among members of a family is not made inadmissible by Section 1200 if the reputation concerns the birth, marriage, divorce, death, legitimacy, race-ancestry, or other similar fact of the family history of a member of the family by blood or marriage and the evidence is offered to prove the truth of the matter reputed.

1287. Entries concerning family history.

1287. Entries in family bibles or other family books or charts, engravings on rings, family portraits, engravings on urns, crypts, or tombstones, and the like, are not made inadmissible by Section 1200 when offered to prove the birth, marriage, divorce, death, legitimacy, race-ancestry, or other similar fact of the family history of a member of the family by blood or marriage.

1288. Community reputation concerning public interest in property, boundaries, general history, or family history.

1288. Evidence of reputation in a community is not made inadmissible by Section 1200 when offered to prove the truth of the matter reputed if the reputation concerns:

(a) The interest of the public in property in the community and the reputation, if any, arose before controversy.

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(b) Boundaries of, or customs affecting, land in the community and the reputation, if any, arose before controversy.

(c) An event of general history of the community or of the state or nation of which the community is a part and the event was of importance to the community.

(d) The date or fact of birth, marriage, divorce, or death of a person resident in the community at the time of the reputation.

1289. Statement concerning boundary.

1289. A statement concerning the boundary of land is not made inadmissible by Section 1200 if the declarant is unavailable as a witness and had sufficient knowledge of the subject, but a statement is not admissible under this section if the statement was made under such circumstances that the declarant in making such statement had motive or reason to deviate from the truth.

1290. Reputation as to character.

1290. Evidence of a person's general reputation with reference to his character or a trait of his character at a relevant time in the community in which he then resided or in a group with which he then habitually associated is not made inadmissible by Section 1200 when offered to prove the truth of the matter reputed.

1291. Recitals in documents affecting property.

1291. A statement contained in a deed of conveyance or a will or other writing purporting to affect an interest in real or personal property is not made inadmissible by Section 1200 if:

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(a) The matter stated was relevant to the purpose of the writing;

(b) The matter stated would be relevant to an issue as to an interest in the property; and

(c) The dealings with the property since the statement was made have not been inconsistent with the truth of the statement.

1292. Recitals in ancient documents.

1292. A statement is not made inadmissible by Section 1200 if the statement is contained in a writing more than 30 years old and the statement has been since generally acted upon as true by persons having an interest in the matter.

1293. Commercial lists and the like.

1293. A statement, other than an opinion, contained in a tabulation, list, directory, register, or other published compilation is not made inadmissible by Section 1200 if the compilation is generally used and relied upon by persons engaged in an occupation as accurate.

1294. Publications concerning facts of general notoriety and interest.

1294. Historical works, books of science or art, and published maps or charts, made by persons indifferent between the parties, are not made inadmissible by Section 1200 when offered to prove facts of general notoriety and interest.

1295. Evidence admissible under other statutes.

1295. Hearsay evidence declared to be admissible by statute is not made inadmissible by Section 1295.

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DIVISION 11. WRITINGS

CHAPTER 1. AUTHENTICATION

1400. Authentication required.

1400. Authentication of a writing is required before it may be received in evidence. Authentication of a writing is required before secondary evidence of its content may be received in evidence. Authentication may be by evidence sufficient to sustain a finding of its authenticity or by any other means provided by law.

1401. Private writing.

1401. A private writing, other than a will, is sufficiently authenticated to be received in evidence if it is acknowledged or proved and certified in the manner provided for the acknowledgement or proof of conveyances of real property.

1402. Writing affecting real property.

1402. A writing conveying or affecting real property, acknowledged or proved and certified as provided in the Civil Code, is sufficiently authenticated to be received in evidence.

1403. Copy of writing in custody of public employee.

1403. A purported copy of a writing in the custody of a public employee, or of an entry therein, meets the requirement of authentication as a copy of such writing or entry if:

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(a) The copy purports to be published by authority of the nation or state, or governmental subdivision thereof, in which the writing is kept;

(b) Evidence has been introduced sufficient to warrant a finding that the copy is a correct copy of the writing or entry;

(c) The office in which the writing is kept is within the United States or any state, territory, or possession thereof and the copy is attested or certified as a correct copy of the writing or entry by a person purporting to be an officer, or a deputy of an officer, having the legal custody of the writing; or

(d) The office in which the writing is kept is not within the United States or any state, territory, or possession thereof and the copy is attested or certified as required in subdivision (c) and is accompanied by a statement declaring that the person who attested or certified the copy as a correct copy is the officer, or a deputy of the officer, who has the custody of the writing. The statement may be made only by a secretary of an embassy or legation, consul general, consul, vice consul, or consular agent or by an officer in the foreign service of the United States stationed in the nation in which the writing is kept, authenticated by the seal of his office.

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1404. Writing stating absence of record in public office.

1404. A writing reciting diligent search and failure to find a record in a specified office, made by the employee who is the official custodian of the records in that office, is authenticated in the same manner as is provided in subdivision (c) or (d) of Section 1403.

1405. Ancient writings.

1405. A writing is sufficiently authenticated to be received in evidence if the judge finds that it:

(a) Is at least 30 years old at the time it is offered;

(b) Is in such condition as to create no suspicion concerning its authenticity; and

(c) Was, at the time of its discovery, in a place in which such writing, if authentic, would be likely to be found.

1415. Official seals and signatures.

1415. (a) A seal is presumed to be genuine and authorized if it purports to be the seal of:

(1) The United States or of a department, agency, or officer of the United States.

(2) A public entity, or a department, agency, or officer of a public entity, in any state, territory, or possession of the United States.

(3) A nation or sovereign, or a department, agency, or officer of a nation or sovereign, recognized by the executive power of the United States.

(4) A governmental subdivision of a nation recognized by the executive power of the United States.

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(5) A court of admiralty or maritime jurisdiction.

(6) A notary public.

(b) A signature is presumed to be genuine and authorized if it purports to be the signature, affixed in his official capacity, of:

(1) A public officer or employee of the United States.

(2) A public officer or employee of any public entity in any state, territory, or possession of the United States.

(3) A notary public.

(c) A signature is presumed to be genuine and authorized if it purports to be the signature, affixed in his official capacity, of the sovereign or a principal officer of a nation, or a principal officer of a governmental subdivision of a nation, recognized by the executive power of the United States and the writing to which the signature is affixed is accompanied by a statement declaring that the person who affixed his signature thereto is such sovereign or principal officer. The statement may be made only by a secretary of an embassy or legation, consul general, consul, vice consul, or consular agent or by any officer in the foreign service of the United States stationed in the nation, authenticated by the seal of his office.

(d) The presumptions established by this section require the trier of fact to find the existence of the presumed fact unless and until evidence is introduced which would support a finding of its nonexistence, in which case the trier of fact shall determine the existence or nonexistence of the presumed fact from the evidence and without regard to the presumptions established by this section.

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1416. Certificate to copy.

1416. Whenever a copy of a writing is certified for the purpose of evidence, the certificate must state in substance that the copy is a correct copy of the original, or of a specified part thereof, as the case may be. The certificate must be under the official seal of the certifying officer, if there be any, or if he be the clerk of a court having a seal, under the seal of such court.

CHAPTER 2. BEST EVIDENCE RULE

1420. When secondary evidence of content of writing admissible.

1420. As tending to prove the content of a writing, no evidence other than the writing itself is admissible, except as otherwise provided by statute, unless the judge finds that:

(a) The writing is lost or has been destroyed without fraudulent intent on the part of the proponent;

(b) The writing was not reasonably procurable by the proponent by use of the court's process or by other available means;

(c) At a time when the writing was under the control of the opponent, the opponent was expressly or impliedly notified, by the pleadings or otherwise, that the writing would be needed at the hearing, and on request at the hearing the opponent has failed to produce such writing; but in a criminal action, the request at the hearing for the defendant to produce the writing may not be made in the presence of the jury;

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(d) The writing is not closely related to the controlling issues and it would be inexpedient to require its production;

(e) The writing is a record or other writing in the custody of a public officer or employee;

(f) The writing has been recorded in the public records and the record or an attested or a certified copy thereof is made evidence of the writing by statute; or

(g) The writing consists of numerous accounts or other writings that cannot be examined in court without great loss of time, and the evidence sought from them is only the general result of the whole; but the judge, in his discretion, may require that such accounts or other writings be produced for inspection by the adverse party.

1421. Types of secondary evidence admissible.

1421. (a) Subject to subdivisions (b) and (c), if the judge makes one of the findings specified in Section 1420, oral or written secondary evidence of the content of the writing is admissible.

(b) If the writing is one described in subdivision (a), (b), (c), or (d) of Section 1420, oral testimony of the content of the writing is inadmissible unless the judge finds either (1) that the proponent does not have in his possession or under his control a copy of the writing or (2) that the writing is also one described by subdivision (g) of Section 1420.

(c) If the writing is one described in subdivision (e) or (f) of Section 1420, oral testimony of the content of the writing is inadmissible unless the judge finds either (1) that the proponent does not have in his possession a copy of the writing and could not in the exercise of reasonable diligence have obtained a copy or (2) that the writing is also one described by subdivision (g) of Section 1420.

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1422. Effect of production and inspection.

1422. Though a writing called for by one party is produced by the other, and is thereupon inspected by the party calling for it, he is not obliged to produce it as evidence in the action.

CHAPTER 3. BUSINESS RECORDS

Article 1. Business Records Generally

1450. "A business" defined.

1450. As used in this article, "a business" includes every kind of business, governmental activity, profession, occupation, calling, or operation of institutions, whether carried on for profit or not.

1451. Business records.

1451. A writing offered as a record of an act, condition, or event is admissible as evidence if:

(a) The custodian or other qualified witness testifies to its identity and the mode of its preparation;

(b) It was made in the regular course of a business, at or near the time of the act, condition, or event; and

(c) The sources of information and method and time of preparation were such as to indicate its trustworthiness.

[Note: This article duplicates Section 1269, but the staff suggests that this article be included in the Evidence Code and Section 1269 be deleted. A memorandum will be prepared to discuss this problem.]

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Article 2. Church Records

[Note: This article will be drafted to effectuate the determination of the Commission as set out in the Minutes of its May 1964 Meeting, pages 6-7.]

Article 3. Use of Copies of Hospital Records

1490. Compliance with subpena duces tecum of hospital records.

1490. (a) Except as provided in Section 1494, when a subpena duces tecum is served upon the custodian of records or other qualified witness from a licensed or county hospital, state hospital or hospital in an institution under the jurisdiction of the Department of Corrections in an action in which the hospital is neither a party nor the place where any cause of action is alleged to have arisen and such subpena requires the production of all or any part of the records of the hospital relating to the care or treatment of a patient in such hospital, it shall be sufficient compliance therewith if the custodian or other officer of the hospital shall, within five days after the receipt of such subpena, deliver by mail or otherwise a true and correct copy (which may be a photographic or microphotographic reproduction) of all the records described in such subpena

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to the clerk of court or to the court if there be no clerk or to such other person as described in subdivision (a) of Section 2018 of the Code of Civil Procedure, together with the affidavit described in Section 1491.

(b) The copy of the records shall be separately enclosed in an inner envelope or wrapper, sealed, with the title and number of the action, name of witness and date of subpena clearly inscribed thereon; the sealed envelope or wrapper shall then be enclosed in an outer envelope or wrapper, sealed, directed as follows:

If the subpena directs attendance in court, to the clerk of such court, or to the judge thereof, if there be no clerk; if the subpena directs attendance at a deposition or other hearing, to the officer before whom the deposition is to be taken, at the place designated in the subpena for the taking of the deposition or at his place of business; in other cases, to the officer, body, or tribunal conducting the hearing, at a like address.

(c) Unless the parties to the action or proceeding otherwise agree, or unless the sealed envelope or wrapper is returned to a witness who is to appear personally, the copy of the records shall remain sealed and shall be opened only at the time of trial, deposition, or other hearing, upon the direction of the judge, officer, body, or tribunal conducting the proceeding, in the presence of all parties who have appeared in person or by counsel at such trial, deposition, or hearing. Records which are not introduced in evidence or required as part of the record shall be returned to the person or entity from whom received.

1491. Affidavit accompanying records.

1491. (a) The records shall be accompanied by the affidavit of the custodian or other qualified witness, stating in substance each of the following:

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(1) That the affiant is the duly authorized custodian of the records and has authority to certify the records.

(2) That the copy is a true copy of all the records described in the subpena.

(3) That the records were prepared by the personnel of the hospital, staff physicians, or persons acting under the control of either, in the ordinary course of hospital business at or near the time of the act, condition or event.

(b) If the hospital has none of the records described, or only part thereof, the custodian shall so state in the affidavit, and deliver the affidavit and such records as are available in the manner provided in Section 1490.

1492. Copy of records and affidavit admissible in evidence.

1492. The copy of the records is admissible in evidence to the same extent as though the original thereof were offered and the custodian had been present and testified to the matters stated in the affidavit. The affidavit is admissible in evidence and the matters stated therein are presumed true in the absence of a preponderance of evidence to the contrary. When more than one person has knowledge of the facts, more than one affidavit may be made.

1493. Single witness or mileage fee.

1493. This article shall not be interpreted to require tender or payment of more than one witness and mileage fee or other charge unless there is an agreement to the contrary.

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1494. Personal attendance of custodian and production of original records.

1494. The personal attendance of the custodian or other qualified witness and the production of the original records is required if the subpena duces tecum contains a clause which reads:

"The procedure authorized pursuant to subdivision (a) of Section 1490, and Sections 1491 and 1492, of the Evidence Code will not be deemed sufficient compliance with this subpena."

1495. Service of more than one subpena duces tecum.

1495. If more than one subpena duces tecum is served upon the custodian of records or other qualified witness from a licensed or county hospital or hospital in an institution under the jurisdiction of the Department of Corrections and the personal attendance of the custodian or other qualified witness is required pursuant to Section 1494, the witness shall be deemed to be the witness of the party serving the first such subpena duces tecum.

1496. Application of article.

1496. This article applies in any proceeding in which testimony can be compelled.

CHAPTER 4. PROOF OF CONTENT OR EXECUTION

Article 1. General Provisions

1500. Witnessed writings.

1500. (a) Except where the testimony of a subscribing witness is required by statute, the execution of any writing may be proved by:

(1) Anyone who saw the writing executed; or

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(2) Evidence of the genuineness of the handwriting of the maker; or

(3) A subscribing witness.

(b) Notwithstanding subdivision (a), if the subscribing witness denies or does not recollect the execution of the writing, its execution may be proved by other evidence.

(c) Notwithstanding subdivision (a), where evidence is given that the party against whom the writing is offered has at any time admitted its execution no other evidence of the execution need be given if:

(1) The writing is one produced from the custody of the adverse party, and has been acted upon by him as genuine; or

(2) The writing is more than 30 years old and has been generally respected and acted upon as genuine by persons having an interest in knowing the fact.

1501. Proof of handwriting.

1501. (a) The handwriting of a person may be proved by anyone who believes it to be his, or who has seen him write, or has seen writings purporting to be his, upon which he has acted or been charged, and who has thus acquired a knowledge of his handwriting.

(b) Evidence respecting the handwriting may also be given by a comparison, made by the witness or the trier of fact, with writings admitted or treated as genuine by the party against whom the evidence is offered, or proved to be genuine to the satisfaction of the judge.

(c) Where a writing is more than 30 years old, the comparisons may be made with writings purporting to be genuine, and generally respected and acted upon as such, by persons having an interest in knowing the fact.

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Article 2. Photographic Copies of Writings

1550. Photographic copies of business records.

1550. A photostatic, microfilm, microcard, miniature photographic or other photographic copy or reproduction, or an enlargement thereof, of a writing is as admissible as the writing itself if such copy or reproduction was made and preserved as a part of the records of "a business" (as defined by Section 1450) in the regular course of such business. The introduction of such copy, reproduction or enlargement does not preclude admission of the original writing if it is still in existence.

1551. Photographic copies where original destroyed or lost.

1551. A print, whether enlarged or not, from a photographic film (including a photographic plate, microphotographic film, photostatic negative, or similar reproduction) of an original writing destroyed or lost after such film was taken is as admissible as the original writing itself if, at the time of the taking of such film, the person under whose direction and control it was taken attached thereto, or to the sealed container in which it was placed and has been kept, or incorporated in the film, a certification complying with the provisions of Section 1416 and stating the date on which, and the fact that, it was so taken under his direction and control.

Article 3. Reports of Presumed Death, Missing in Action, and the Like

1600. Finding of presumed death by authorized federal employee.

1600. A written finding of presumed death made by an employee of the United States authorized to make such finding pursuant to the Federal Missing Persons Act (50 U.S.C. App. Supp. 1001-1016), as enacted or as heretofore or

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hereafter amended, or a certified copy of such finding, shall be received in any court, office or other place in this State as evidence of the death of the person therein found to be dead and of the date, circumstances, and place of his disappearance.

1601. Report by federal employee that person is missing, captured, or the like.

1601. An official written report or record, or certified copy thereof, that a person is missing, missing in action, interned in a foreign country, captured by a hostile force, beleaguered by a hostile force, or besieged by a hostile force, or is dead, or is alive, made by an employee of the United States authorized by any law of the United States to make such report or record shall be received in any court, office, or other place in this State as evidence that such person is missing, missing in action, interned in a foreign country, captured by a hostile force, beleaguered by a hositle force, or besieged by a hostile force, or is dead, or is alive, as the case may be.

1602. Presumption of execution and authority.

1602. (a) For the purposes of this article, any finding, report, or record, or certified copy thereof, purporting to have been signed by a public employee of the United States described in this article is presumed to have been signed and issued by such employee pursuant to law, and the person signing such finding, report, or record is presumed to have acted within the scope of his authority.

(b) If a writing purports to be a copy of such finding, report, or record and purports to have been certified by a person authorized by law to certify it, the signature of the person certifying the copy and his authority so to certify the copy is presumed.

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(c) The presumptions established by this section require the trier of fact to find the existence of the presumed fact unless and until evidence is introduced which would support a finding of its nonexistence, in which case the trier of fact shall determine the existence of nonexistence of the presumed fact from the evidence and without regard to the presumptions established by this section.

Article 3. Particular Writings

1650. Authenticated Spanish title records.

1650. Duplicate copies and authenticated translations of original Spanish title papers relating to land claims in this State, derived from the Spanish or Mexican Governments, prepared under the supervision of the Keeper of Archives, authenticated by the Surveyor-General or his successor and by the Keeper of Archives, and filed with a county recorder, in accordance with Chapter 281 of the Statutes of 1865-6, are receivable as prima facie evidence with like force and effect as the originals and without proving the execution of such originals.

1651. Patent for mineral lands.

1651. If a patent for mineral lands within this State, issued or granted by the United States of America, contains a statement of the date of the location of a claim or claims upon which the granting or issuance of such patent is based, such statement is prima facie evidence of the date of such location.

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1652. Deed by officer in pursuance of court process.

1652. A deed of conveyance of real property, purporting to have been executed by a proper officer in pursuance of legal process of any of the courts of record of this State, acknowledged and recorded in the office of the recorder of the county wherein the real property therein described is situated, or the record of such deed, or a certified copy of such record is prima facie evidence that the property or interest therein described was thereby conveyed to the grantee named in such deed.

1653. Certificate of purchase or location of lands.

1653. A certificate of purchase, or of location, of any lands in this State, issued or made in pursuance of any law of the United States or of this State, is prima facie evidence that the holder or assignee of such certificate is the owner of the land described therein; but this evidence may be overcome by proof that, at the time of the location, or time of filing, a pre-emption claim on which the certificate may have been issued, the land was in the adverse possession of the adverse party, or those under whom he claims, or that the adverse party is holding the land for mining purposes.

1654. Proof of content of lost public record or document.

1654. (a) Subject to subdivisions (b) and (c), when, in any action, it is desired to prove the contents of any public record or document lost or destroyed by conflagration or other public calamity, after proof of such loss or destruction, the following may, without further proof, be admitted in evidence to prove the contents of such record or document:

(1) Any abstract of title made and issued and certified as correct prior to such loss or destruction, and purporting to have been prepared and

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made in the ordinary course of business by any person, firm or corporation engaged in the business of preparing and making abstracts of title prior to such loss or destruction; or

(2) Any abstract of title, or of any instrument affecting title, made, issued and certified as correct by any person, firm or corporation engaged in the business of insuring titles or issuing abstracts of title to real estate, whether the same was made, issued or certified before or after such loss or destruction and whether the same was made from the original records or from abstract and notes, or either, taken from such records in the preparation and upkeeping of its, or his, plant in the ordinary course of its business.

(b) No proof of the loss of the original document or instrument is required other than the fact that the original is not known to the party desiring to prove its contents to be in existence.

(c) Any party desiring to use evidence admissible under this section shall give reasonable notice in writing to all other parties to the action who have appeared therein, of his intention to use such evidence at the trial of the action, and shall give all such other parties a reasonable opportunity to inspect the evidence, and also the abstracts, memoranda, or notes from which it was compiled, and to take copies thereof.

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CHAPTER 5. RECORDS OF MEDICAL STUDIES

1950. Records of medical study of in-hospital staff committee.

1950. (a) In-hospital medical staff committees of a licensed hospital may engage in research and medical study for the purpose of reducing morbidity and mortality, and may make findings and recommendations relating to such purpose. The written records of interviews, reports, statements, or memoranda of such in-hospital medical staff committees relating to such medical studies are subject to Sections 2016 and 2036 of the Code of Civil Procedure (relating to discovery proceedings) but, subject to subdivisions (b) and (c), shall not be admitted as evidence in any action or before any administrative body, agency, or person.

(b) This section does not affect the admissibility in evidence of the original medical records of any patient.

(c) This section does not exclude evidence which is relevant evidence in a criminal action.

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#34(L) 5/13/64

Memorandum 64-31

Subject: Study No. 34(L) - URE (Hearsay Evidence)

This memorandum relates to proposed Division 10, Hearsay Evidence, of the Evidence Code. It will discuss certain definitions in Division 2 as they relate to the hearsay division. Many of the matters presented here were presented in Memorandum 64-17. There are some new matters for your consideration also, and we have brought together all the material that you are to consider in regard to the hearsay division in this Memorandum.

DEFINITIONS

Several of the definitions that appear in Rule 62 of our Tentative Hearsay Recommendation have been included in Division 2, entitled "Words and Phrases Defined". We have placed the definitions relating to hearsay among the general definitions relating to the entire code because it is easier to find them there and because the defined terms are useful in other parts of the code.

Section 145.

The definition of "declarant" is the same as that appearing in RURE 62(2).

Section 170.

The definition of "hearsay evidence" is a revised version of the definitional portion of the opening paragraph of RURE 63.

Section 185.

The definition of "perceive" is the same as RURE 62(3).

Sections 210, 215, 235.

The definitions of "public employee", "public entity", and "state" supersede the definitions of "public officer or employee" and "state"

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in subdivisions 4 and 5 of RURE 62.

Section 240.

This section is the same as RURE 62(1).

Section 255.

This definition is the same in substance as the definition in subdivisions (6) and (7) of RURE 62 as revised at the February meeting. The following matters should be considered in regard to this section:

(1) We have substituted "his attendance" for "appearance" in subdivision (a)(4) to conform to paragraphs (5) and (6) of subdivision (a). (Code of Civil Procedure Section 2064 provides in part: "A witness, served with a subpena, <u>must</u> <u>attend</u> at the time appointed, . . ." Other existing statutes also use "attend".) Either "attendance" or "appearance" should be used uniformly in the section.

(2) In paragraph (3), note that the New Jersey Committee used the word "disability" instead of "physical or mental illness or infirmity".

(3) In paragraph (5) we suggest that the words "by subpena" be deleted. Attendance can be compelled by means other than subpena. For example, attendance of a county jail prisoner is compelled by an order of court Code Civ. Proc. §§ 1995, 1997. Should a broader phrase be substituted for "by subpena"?

(4) In subdivision (b)(1), the New Jersey Committee used "was brought about by" instead of "is due to".

(5) Subdivision (b)(2) presents two important policy problems. First, there seems no logical reason why it is restricted to the case where the declarant is absent beyond the jurisdiction of the court to compel appearance by its process. The logic of the provision would seem to apply to

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any case where the deposition of the declarant could have been taken by the proponent by the exercise of reasonable diligence and without undue hardship or expense, including, for example, cases where the declarant is imprisoned, where the proponent of his statement has exercised reasonable diligence (even though within the jurisdiction) but has been unable to procure his attendance, where he is too ill to attend the hearing, and even when he is dead. New Jersey revised the equivalent of subdivision (b)(2) to meet this problem as follows: "But a witness is not unavailable . . . when his deposition could have been or can be taken by the exercise of reasonable diligence and without undue hardship . . . [or expense]." It is suggested that the New Jersey revision makes good sense.

Second, subdivision (b)(2) makes no sense when a person is offering a deposition on the ground that a person is unavailable as a witness. Subdivision (b)(2) appears to state that a person is not unavailable as a witness if his deposition can be taken. (In the Uniform Rules, a deposition is admissible even if the declarant is available as a witness. When we deleted this provision, we created this problem.) In this connection, see our proposed amendments of Code of Civil Procedure Section 2016 (page 351 of tentative recommendation) and Penal Code Sections 1345 and 1362 (page 353 of tentative recommendation). One method of dealing with the problem would be to insert in each of these three sections the definition of unavailable as a witness from Section 255 (with subdivision (b)(2) omitted). The disadvantage of this is that we then have four code sections that will need to be kept consistent and to make a change in what constitutes unavailability will require amendment of four sections in three different codes.

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Another method of dealing with the problem would be to divide subdivision (b) of Section 255 into two subdivisions to read as follows:

> (b) A declarant is not unavailable as a witness if the exemption, disqualification, death, inability, or absence of the declarant is due to the procurement or wrongdoing of the proponent of his statement for the purpose of preventing the declarant from attending or testifying.
>
> (c) If the evidence offered is not a deposition of the declarant, a declarant is not unavailable as a witness if the deposition of the declarant could have been or can be taken by the proponent of his statement by the exercise of reasonable diligence and without undue hardship or expense.

If this method is used, the introductory clause of subdivision (a) should be revised to read: "Except as otherwise provided in subdivisions (b) and (c)."

A third method of dealing with the problem is to delete the deposition provision from Section 255 and to consider each hearsay exception where unavailability of the witness is required and to determine whether the proponent of the statement should be required by the particular exception to obtain a deposition if possible. For example, if the statement is a declaration against interest, should the proponent be required to take the deposition of the declarant? Suppose the declarant does not give a deposition consistent with his previous declaration against interest. Can the proponent then offer the deposition and also offer his prior declaration against interest (as a prior inconsistent statement) as <u>substantive</u> evidence even though the declarant is not unavailable as a witness? The answer would seem to be no. See Section 1202. We discuss later in this memorandum whether unavailability of the witness should be a requirement under the declaration against interest exception. However, this example does indicate the problem presented by the definition of unavailable as a witness.

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If this method is selected by the Commission we will prepare a memorandum that will consider each exception that contains a requirement that the declarant be unavailable as a witness.

Incidentally, it is noted that, in People v. Spriggs (the recent declaration against interest case), a footnote states that a person is not available as a witness if the privilege against self-incrimination is claimed. This dictum, of course, is consistent with Section 255, but is not consistent with some previous California cases.

DIVISION 10. HEARSAY EVIDENCE

Section 1200.

This section is based on the opening paragraph of Rule 63. The opening paragraph of Rule 63 has been split into this section and the definitional section, Section 170.

Section 1201.

This is the same as RURE 66.

Section 1202.

This section is the same as RURE 65. We suggest that the words "tending to impair" that appear in the last sentence of the section be changed to "offered to attack". This change would make the rule consistent with RURE 20 and 21.

Section 1203.

Section 1203 will contain the equivalent of URE Rule 64 if the Commission decides to retain the rule.

At the March 1964 meeting the Commission directed the staff to prepare material on whether a provision similar to Rule 64 should be included in the portion of the new statute relating to hearsay evidence. Rule 64 requires

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that a pretrial disclosure be made before certain written hearsay statements may be used at the trial unless the judge finds that the adverse party has not been unfairly surprised by the failure to make pretrial disclosure. The Commission determined that further consideration should be given to the question whether a provision similar to Rule 64 should be included in the Commissions's recommendations, and special consideration should be given to the possible application of such a section in criminal proceedings since the prosecution does not have the benefit of discovery in criminal cases.

Background. The Commission's actions to date on Rule 64 are as follows. In 1959, the Commission revised Rule 64 (in a preliminary draft of the hearsay evidence recommendation) to read:

> Any writing admissible under exception[~~s~~] (15), (16), (17), (18), [~~and~~] (19), (20), or (29) of Rule 63 shall be received only if the party offering such writing has delivered a copy of it, or so much thereof as may relate to the controversy, to each adverse party a reasonable time before trial unless the judge finds that such adverse party has not been unfairly surprised by the failure to deliver such copy. Nothing in this section is intended to affect or limit the provisions of Sections 2016-2035, inclusive, of the Code of Civil Procedure, relating to depositions and discovery.

After further consideration, and after reviewing the comments of the northern and southern sections of the State Bar Committee, the Commission decided to delete the last sentence of the revised rule (the underscored sentence). It was concluded that this sentence was unnecessary and confusing.

The southern section of the State Bar Committee concluded that Rule 64 should be applicable to the subdivisions listed in Revised Rule 64 (set out above) and, in addition, to subdivisions (21) and (22). This decision was reconsidered by the State Bar Committee and affirmed at a subsequent meeting of that Committee.

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To facilitate understanding of these decisions, we indicate below the subject matter of each of the subdivisions of Rule 63 that were listed in the revised rule and that the State Bar Committee would have added to the revised rule. We also indicate the section of the draft hearsay division in which the particular subdivisions have been compiled.

Subdivision of Revised URE	Section of Statute on Hearsay Evidence	Subject matter of hearsay exception
(15)	1271	Report of public employee
(16)	1272	Report of vital statistic
(17)(a)	1273	Content of writing in custody of public employee
(17)(b)	1274	Proof of absence of public record
(18)	1275	Certificate of marriage
(19)	1280	Official record of document affecting an interest in property
(20) (deleted)	1281	Judgment of previous condition
(21)	1282	Judgment against person entitled to indemnity
(22)	omitted	Judgment determining public interest in land
(29)	1291 1292	Recitals in documents affecting property and in ancient documents. The ancient documents rule was made a separate subdivision by subsequent Commission action.

After further consideration, the Commission determined that Rule 64 should apply only to subdivisions (15) and (29) of Rule 63. The Southern Section reacted to this decision as follows:

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> It was noted that the Commission, at its December 10, 1959, meeting, apparently had reversed itself and had voted to eliminate reference in Rule 64 to the following subdivisions of Rule 63 which relate to the admissibility of certain writings: namely, (16), (17), (18), and (19). The members were at a loss to understand the reason for such deletions by the Commission. The feeling of the section was, except for business records (which ordinarily are difficult to obtain without a subpena), writings which are made admissible by any appropriate subdivision of Rule 63 should be delivered to the adverse party a reasonable time before trial. The southern section, therefore, approved Rule 64 in the following form:
>
> [Rule 64 revised to apply to subdivisions (15) through (22), inclusive, of Rule 63 and to subdivision (29) of Rule 63.]

The minutes of the meeting where this decision of the Southern Section was reconsidered and reaffirmed state:

> Rule 64 was reapproved in the same revised form that the southern section had approved at the January 25, 1960 meeting. It appears to the southern section that the philosophy of Rule 64 is that when a party wants to offer a writing which is a copy and not the original, a copy of the writing that he intends to offer should be submitted to the adversary in advance of trial so that full opportunity is given to compare the copy with the original, that this philosophy is sound, presents no hardship, and is in the interests of full discovery; that, therefore, Rule 64 should make reference to the writings referred to in subdivisions (15) to (22) inclusive, and in subdivision (29) of Rule 63.

The Commission's reconsideration of Rule 64 and the decision to limit the application of the rule to writings admissible only under subdivisions (15) and (29) of Rule 63 was the result of the fear that Rule 64 would operate to prevent impeachment by use of the various types of writings covered by the other subdivisions formerly subject to Rule 64.

At a subsequent meeting, the staff pointed out that there was some inconsistency in the action of the Commission in so limiting Rule 64. As so limited, an original official record was required to be served under Rule 64, but a copy of the same record was admissible without such service. A record of an action by a public official was required to be served under

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Rule 64, but an official report of an action by someone other than a public official was not subject to this requirement. A report of a marriage performed by a judge was inadmissible unless Rule 64 was complied with, but a report of a marriage performed by a minister was admissible without complying with Rule 64.

After considering this inconsistency, the Commission determined to delete Rule 64 entirely. This decision was made because it was concluded that the modern discovery procedures provided adequate protection. In addition, the Commission was influenced by the fact that there is no requirement like Rule 64 under existing California law.

The State Bar Committee finally agreed to the deletion of Rule 64.

Discovery in criminal cases. The Commission decided to reconsider its action on Rule 64 after receiving some comments upon the tentative recommendation that pointed out that the reason given in the tentative recommendation--discovery provides adequate protection--does not apply in criminal cases. Some Commissioners indicated that the matter should be reconsidered in regard to civil cases as well. In order that you might consider Rule 64 against the background of the existing law, we summarize here the California law relating to discovery in criminal cases. This summary is based on Louisell, Modern California Discovery 395-404 (1963).

At the trial, the defendant has the right to inspect any statements which he has made to the prosecution. The defendant has the right to inspect any statements made to the prosecution by any of the witnesses against him. The defendant may discover documents and tangible objects such as police reports, a narcotic register, photographs, etc., where he can make at least a prima facie showing that the things sought will be relevant and admissible

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as evidence at the trial. The identity of informers can also be discovered by the defendant where such information is pertinent to the defense or to the admissibility of evidence against the defendant.

Prior to the trial, the defendant by motion may inspect any statement which he has made to the prosecution authorities. He has been granted the right to inspect the statements of third persons to the prosecution even where there is no indication that the prosecution intends to use those persons as witnesses at the trial. Vetter v. Superior Court, 189 Cal. App.2d 132, 10 Cal. Rptr. 890 (1961) (hearing denied). The defendant has been granted the right to inspect documents and tangible objects prior to trial. In at least one case he has been granted the right to inspect objects and documents that would not be admissible at the trial. Walker v. Superior Court, 155 Cal. App.2d 134, 317 P.2d 130 (1957) (inspection of State Laboratory Report granted even though the report itself would not be admissible evidence at the trial). The defendant may discover the identity of an informer where such identity is reasonably necessary to his defense.

The discovery rights granted the prosecution in criminal cases are somewhat more modest than those granted the defendant. Jones v. Superior Court, 58 Cal.2d 56, 22 Cal. Rptr. 879, 372 P.2d 919 (1962), held that the prosecution could obtain a certain amount of discovery in a rape prosecution. The defendant moved for a continuance of the trial on the ground that he was impotent and needed time to gather medical evidence relating to this defense. Upon motion of the prosecution, the defendant and his attorney were required to make available to the prosecution the names and addresses of any physicians and surgeons subpenaed to testify on behalf of the defendant in regard to this defense, the names and addresses of all physicians who treated the defendant prior to trial, the reports of doctors or other reports relating to the question

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of the impotence of the defendant, and all Xrays of the defendant taken immediately following an injury he had suffered several years before. The California Supreme Court held that the trial court's order was too broad and could not be enforced. However, the Supreme Court said the trial court could order the defendant to reveal the names and addresses of witnesses he intended to call and to produce reports and Xrays he intended to introduce in evidence in support of his defense. Such a requirement would not violate the privilege against self-incrimination, it would merely advance the time at which the defendant would reveal the information. The case was, therefore, remanded for further proceedings in accordance with the Supreme Court's opinion. In People v. Lopez, 60 A.C. 171 (1963), the defendant, on motion of the prosecution, was ordered to produce the names and addresses of persons the defendant anticipated calling as alibi witnesses, written statements or notes of statements by such witnesses, and recordings, transcriptions of recordings and written statements or notes of statements of witnesses who had testified at the preliminary hearing. On appeal, the defendant objected that the granting of the order denied him a fair trial. The Supreme Court rejected the contention because the prosecution has a limited right of discovery. Moreover, neither the record nor the briefs indicated whether the information was actually furnished to the prosecution as a result of the order; hence, even if the prosecution had no right of discovery, the defendant was not in a position to complain of the order. 60 A.C. at 192-193.

New Jersey recommendation. The Commission should note the action taken by the New Jersey Committee on Rule 64. The New Jersey version is as follows:

> Whenever a declaration admissible by reason of paragraphs (2), (3), (13), (15), (16), (17), (18), (19), (21), (22), (29) or (31) of Rule 63 is a writing, the judge may exclude it at the trial if it appears that the writing was not made known to the adverse party at such time as to

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prevent unfair surprise or deprive him of a fair opportunity to prepare to meet it.

The New Jersey Committee comments on their proposal:

> Rule 64 as presented here . . . differs from the Uniform Rule as to language and also applies to a larger number of exceptions . . . . The purpose of the Rule is to provide against surprise and to give sufficient opportunity for an adverse party to compare on a pretrail basis written hearsay of a secondary character against original records, etc. The rationale has been extended to include affidavits, depositions and several other forms of written hearsay as well. This should not unduly burden the proponent of the evidence, although it could be argued that the discovery procedures already in effect sufficiently protect adverse parties against surprise. Rule 64 should remove some of the sting from hearsay rules that have been liberalized. As one lawyer remarked when suddenly confronted with hearsay at the trial, "[W]e should have some opportunity to run it down." Ephraim Willow Creek Irrigation Co. v. Olson, 70 Utah 95, 106, 258 P. 216, 220 (1927).

The subdivisions listed in the New Jersey proposal are (2) affidavits, (3) former testimony, (13) business records, (15) official records, (16) vital statistics records, (17) copies of official writings, (18) marriage certificates, (19) property records, (21) judgment against person entitled to indemnity, (22) judgment determining public interest in land, (29) recitals in dispositive instruments, and (31) learned treatises.

Recommendation. In the light of the Jones and Lopez cases, Rule 64 could be made applicable in criminal cases. It does not require the defendant to disclose anything, it merely provides that he must give advance disclosure if he is going to disclose the matter at the trial.

The Commission's principal concern with Rule 64 was over the use of hearsay evidence for impeachment purposes. You will note that the New Jersey Committee omitted subdivision (1), pretrial statements of witnesses, and subdivisions (6), (7), (8), and (9) relating to confessions and admissions. These are the principal source of impeaching material. On occasion, of course, some of the other matters listed can be used for impeachment purposes, but if

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the matter is also admissible under subdivision (1), (6), (7), (8), or (9), the evidence is admissible without regard to the requirements of Rule 64.

The matters omitted from the New Jersey version of Rule 64 are as follows: (4) spontaneous declarations; (5) dying declarations; (10) declarations against interest; (12) state of mind; (14) absence of business record; (20) judgment of previous conviction; (23) (24) (25) (26) (27) (28) family history statements and reputation evidence; and (30) commercial lists.

The reason for the exclusion of subdivision (4) and (5) is apparent: such statements are not likely to be in writing. The reason for the exclusion of subdivision (10) and (12) is not so apparent. Subdivision (14) cannot consist of a writing. The reason for the exclusion of subdivision (20) is not apparent, for it appears indistinguishable from other judgments such as those listed in subdivisions (21) and (22). The exclusion of reputation evidence is readily understandable, for reputation evidence is generally not in writing. The exclusion of family history statements that are in writing, however, is difficult to understand. The reason for the exclusion of commercial lists is not apparent.

If the principle underlying Rule 64 is sound, we think it should be extended to the following sections in the tentative hearsay statute: 1251 (recorded recollection), 1252 and 1253 (former testimony), 1263 (declaration against interest), Sections 1264-1267 (state of mind), 1269 (business record), 1271 (report of public employee), 1272 (vital statistic report), 1273 (copy of writing in public custody), 1274 (certificate of absence of public record), 1275 (certificate of marriage), 1280 (recorded documents), 1281 (judgment of previous conviction), 1282 (judgment against person entitled to indemnity), 1283 (judgment determining liability of third person), 1284-1287 (family

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history statements and reputation of family history among members of the family), 1288 (community reputation), 1289 (statement concerning boundary by person with personal knowledge thereof), 1290 (reputation as to character), 1291-1292 (recitals in dispositive instruments and ancient documents), 1293 (commercial lists), 1294 (historical works, scientific books, etc.), and 1295 (hearsay evidence made admissible by other statutes).

We have omitted 1250 (prior inconsistent and prior consistent statements) in order to retain the right to impeach without giving advance warning. 1254 (spontaneous statements) and 1255 (dying declarations) are excluded because the nature of the statements involved indicates that they are unlikely to be in writing. Sections 1256-1262 are excluded for the same reasons that prompt the exclusion of prior statements of trial witnesses. So far as the remainder of the hearsay exceptions are concerned, we see little reason to distinguish one form of written hearsay from another. If it is a good idea to require pretrial disclosure of written hearsay that is to be relied on at the trial, all of the matters listed should be included.

In some cases a rule requiring pretrial disclosure of the listed hearsay would preclude effective impeachment. For example, a marriage certificate or public record of a marriage in some out of the way place could be effectively produced after a witness or party has testified that he or she was never married. We think, however, that it is more likely that such evidence would be used affirmatively to prove one's case rather than to attack the other party's case. When used affirmatively, it would be desirable for the other party to have advance warning so that the hearsay could be checked.

So far as civil cases are concerned, it may be that the discovery tools available provide a party with adequate protection. The defendant in a

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criminal case has a considerable array of discovery tools available to him. In the light of the Jones and Lopez cases, the prosecution may be able to protect itself against documentary hearsay evidence; but the scope of the prosecution's right to discovery is still somewhat uncertain.

On balance, we think URE Rule 64 prescribes a desirable rule and a provision similar thereto should be incorporated in our statute as Section 1203. It should be made applicable to the sections listed above.

Joe Ball amendment.

Subdivision (b) of Section 1271 contains the provision first recommended by Commissioner Ball when the Commission was considering evidence in eminent domain cases. The subdivision provides that a public employee whose written report is admitted under a hearsay exception may be called as an adverse witness and cross-examined as to the subject matter of his statement. The Commission asked the staff to consider what other exceptions to the hearsay rule such a provision might be made applicable to.

We think such a rule might be made applicable to Sections 1254 (spontaneous statements), 1264 (state of mind), 1266 (statement of previous symptoms), 1269 (business records), 1271 (report of public employee), 1272 (report of vital statistics), 1274 (certificate of absence of public record), and 1275 (certificate of marriage). We would include in this list declarations against interest but for the fact that we have provided that such statements are inadmissible unless the declarant is unavailable as a witness. We have excluded from the foregoing list all exceptions based on the unavailability of the declarant as a witness.

Section 1204.

Section 1204 is the same in substance as our URE Rule 66.1. We have a similar statute in our privileges division, Section 920.

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Suggested additional section.

Our declaration against interest section (1263) contains a provision that the statement is inadmissible against the defendant in a criminal action unless the statement would be admissible under Section 1256 (the confession rule) against the declarant if he were the defendant in a criminal action. Should this provision be made general. That is, should it apply to all hearsay exceptions?

Section 1250.

Section 1250 is the same as our URE Rule 63(1)(a), (b), as revised at the February meeting.

Section 1251.

Section 1251 is the same as our URE Rule 63(1)(c).

Section 1252.

This is the same as our URE Rule 63(3). "Former testimony" is defined here, however, instead of in the definitions. We have defined the term here because it is used only in Sections 1252 and 1253 and is an artificial definition. The definition appeared in our URE Rule 62(8).

Section 1253.

This is the same as our URE Rule 63(3.1).

Section 1254.

This is the same as our URE Rule 63(4).

The Senate Subcommittee considering our recommendations expressed some concern that subdivision (b) does not require that the statement purport to state what the declarant was perceiving. Compare the language of subdivision (a)(1). The objection was made, however, after a quick look at the section and without thorough consideration. The last line of the section requires

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the statement to narrate, describe or explain the act, condition or event being perceived by the declarant. Should the language be modified to correspond more closely with subdivision (a)?

Section 1255.

This is the same as our URE Rule 63(5).

Section 1256.

This is the same as our URE Rule 63(6) as revised at the February 1964 meeting.

Section 1257.

This is the same as our URE Rule 63(7).

Section 1258.

This is the same as our URE Rule 63(8)(b).

Unless a general section applicable to all hearsay exceptions is approved, perhaps a provision should be added to Section 1258 providing that the hearsay referred to is inadmissible against a criminal defendant unless it meets the requirements of Section 1256. California, like most other jurisdictions, does not make an admission by silence inadmissible because it was made while the defendant was in police custody. WITKIN, CALIFORNIA EVIDENCE 267 (1958). Cf., MATT. 27:13-14 (R.S.V.) ("Then Pilate said to him, 'Do you not hear how many things they testify against you?' but he gave him no answer, not even to a single charge . . .").

Section 1259.

Section 1259 is the same as our URE Rule 63(8)(a).

Section 1259 relates to admissions by agents that were authorized to be made. Sections 1260 and 1261 also relate to admissions by agents. Both Sections 1260 and 1261 have a provision requiring evidence of the

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requisite relationship to be introduced before the admission is introduced. The judge, however, may vary the order of proof. In contrast, Section 1259 says nothing concerning the order of proof. The problem is the same, and under existing law the general rule is that the agency must be shown first, but the judge may alter the order of proof. CODE OF CIV. PROC. § 1870(5) provides:

> After proof of a partnership or agency, the act or declaration of a partner or agent of the party, within the scope of the partnership or agency, and during its existence [is admissible].

Notwithstanding the phrase "after proof", the admission may be admitted subject to its being stricken out if not connected up. Brea v. McGlashan, 3 Cal. App.2d 454, 467, 39 P.2d 877 (1934).

We recommend, therefore, that a provision similar to subdivision (d) of Sections 1260 and 1261 be added to Section 1259.

Should the words "the statement" be substituted for the remainder of the sentence following the word "make"? Should "expressly or impliedly" be inserted before "authorized"?

Section 1260.

This is the same as our URE Rule 63(9)(b) as revised at the February meeting.

Subdivision (c) of Section 1260 came from the URE. No California case has imposed such a requirement. The reason for the requirement in the URE was that the admissions were not limited to those in furtherance of the conspiracy. The URE abandoned the agency rationale for the conspiracy exception and made statements of conspirators admissible as admissions if they related merely to the subject matter. We have restored the traditional conspiracy exception. It is based on agency principles. Only those admissions

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made in furtherance of the conspiracy are admissible. Hence, Section 1260 is really a specific application of the rule stated in Section 1259. 1259 does not have any requirements similar to subdivision (c). Because the rule as revised by the Commission deals with a specific type of authorized admission, and not statements of conspirators generally, we recommend that subdivision (c) be deleted.

In subdivision (d), we recommend that the phrase "proof of the existence" be changed to "evidence sufficient to sustain a finding of the existence". The judge does not have to be persuaded of the existence of the conspiracy. Rule 8, as revised by the Commission so indicates. To avoid any apparent inconsistency, the word "proof" should be revised as indicated.

Section 1261.

This is the same as our URE Rule 63(9)(a) as revised at the February meeting.

We do not recommend the deletion of subdivision (c) here as we did in Section 1260. The theory of admissibility is different. Authorized admissions of agents, partners, and employees are covered by Section 1259. Section 1259 covers existing law. Section 1261, therefore, has independent significance only insofar as those statements of agents, partners, or employees are concerned that they were not authorized to make. The theory is that an agent or employee would not be likely to make an untrue statement adverse to his employer's interest during the continuance of the agency or employment relationship. These statements, therefore, are admitted because of the circumstantial guarantee of trustworthiness. Authorized admissions, on the other hand, are admitted because it is the party himself (through the agent or employee) who made the statement. Circumstantial evidence of trustworthiness

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is an irrelevant consideration so far as authorized admissions are concerned. Because the statements in Section 1261 are admitted because it is believed they are trustworthy, it is not unreasonable to require that the statement be made upon personal knowledge and not in terms of opinion.

The Senate Subcommittee expressed some concern over this section. They expressed the view that it is based on an unrealistic theory. Employers and employees deal with each other at arm's length. Frequently, there is no particular feeling of loyalty between them. Frequently, there is animosity between them. Hence, the mere fact that a person is employed by another provides no guarantee that he will say only true things concerning the subject matter of the employment.

Section 1262.

This is the same as RURE 63(9)(c).

Subdivision (c) of this section is not existing law. It is suggested that the following be substituted for subdivisions (b) and (c) of Section 1262:

> (b) The statement would be admissible if offered against the declarant in an action upon that liability, obligation, or duty.

The revision expresses more accurately the existing law as found in Section 1851 of the Code of Civil Procedure which provides that "whatever would be the evidence for or against such person is prima facie evidence between the parties."

Section 1263.

This is the same as RURE 63(10) as revised at the February meeting.

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Subdivision (c) does not permit a declaration against interest made while a person is in custody to be admitted in a criminal action unless it would be admissible against the declarant if he were the defendant in a criminal action. There seems to be no reason for limiting this subdivision to statements made while in custody. Statements taken in violation of constitutional guarantees should be excluded even though not made while in custody. We suggest that subdivision (c) be revised to read:

> (c) A statement is not made admissible by this section unless the statement would be admissible under Section 1256 against the declarant if he were the defendant in a criminal action.

The staff suggests that paragraph (3) of subdivision (b) be deleted. This requirement--that the declarant is unavailable as a witness--would change existing law. The statements admissible under Section 1263 are probably more reliable than testimony on the stand. Moreover, the same statement will be shown if the declarant is a witness; unless he repeats it on the stand, it will come in as a prior inconsistent statement.

<u>Section 1264.</u>

This is the same as RURE 63(12)(a).

Sections 1264, 1265, 1266, and 1267 do not apply to statements "made in bad faith". The Senate subcommittee raised a question concerning the meaning of this phrase. The committee wondered whether it is intended to mean anything different from Section 1285(b):

> This section does not make a statement admissible if the statement was made under circumstances that the declarant in making such a statement had motive or reason to deviate from the truth.

Professor Chadbourn (at pages 513 and 514 of the Hearsay study) indicates that the phrase may mean that the statement must be made "without any

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obvious motive to misrepresent" and " in a natural manner and not under circumstances of suspicion." Professor Chadbourn quotes Professor McCormick to the effect that the phrase probably requires the trial judge to consider the circumstances of the declaration and to determine "whether they were uttered spontaneously or designedly with a view to making evidence."

If this phrase means the same thing as Section 1285(b), the language of Section 1285(b) should be inserted in each of these four sections in lieu of the "bad faith" language. Should there be such a requirement in Section 1267 at all?

Section 1265.

This is the same as RURE 63(12)(b).

Section 1266.

This is the same as RURE 63(12)(c).

Section 1267.

This is the same as RURE 63(12)(d).

Section 1268.

This is the substance of the hearsay exception approved at the February meeting. It provides an exception to permit repeal of the Dead Man Statute.

We suggest that this section be revised to read:

> 1268. A statement is not made inadmissible by Section 1200 when offered [~~in an action against an~~] by the executor or administrator in an action against him upon a claim or demand against the estate of the declarant [~~is not made inadmissible by Section 5050~~] if the statement was made upon the personal knowledge of the declarant and in good faith at a time when the matter had been recently perceived by him and while his recollection was clear and when the declarant in making such statement had no motive or reason to deviate from the truth.

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The revisions of this section are based in part on URE Rule 4(c). These revisions should make the section more acceptable and provide some guarantee of trustworthiness that is not now provided by the section.

Section 1269.

This is the same as RURE 63(13).

Section 1270.

This is the same as RURE 63(14).

Section 1271.

This is the same as RURE 63(15) as revised at the February meeting.

We suggest that the following sentence be added to subdivision (b): "A writing otherwise admissible under this section is not inadmissible because the public employee who made the writing is unavailable as a witness."

Section 1272.

This is the same as RURE 63(16).

Section 1273.

This section is the same as RURE 63(17)(a) as revised at the February meeting.

We believe that this section is defective. When a copy of a public record is offered, the copy is a statement by the copyist asserting that its contents are the same as the original record. If the copyist testifies at the hearing, there is no hearsay problem. However, if the statement is "made other than by a witness while testifying at the hearing" and is "offered to prove the truth of the matter stated" (i.e., that the original record states what the copyist says it states), it is hearsay.

To what extent should the hearsay of copyists of official records be admissible? The URE Rule 63(17) stated that any "writing purporting to be a copy of an official record" is admissible if authenticated as

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Provided in Rule 68 (now Section 1412). The words "purporting to be" were, no doubt, intended to mean the statement of the copyist is admissible under the hearsay exception provided in what is now Section 1273.

To meet this problem, we suggest that Section 1273 be revised to read:

> 1273. A statement that a writing is a copy of a writing in the custody of a public employee is not made inadmissible by Section 1200 when offered to prove that the copy is a true copy of the writing in the custody of the public employee if the statement meets the requirements of Section 1412.

The requirement that the statement meet the requirements of Section 1412 is not essential. It may be a helpful cross reference to the pertinent authentication section, however.

Section 1274.

This is the same as RURE 63(17)(b) as revised at the February meeting.

It might be helpful to provide a cross reference to Section 1413 (formerly Rule 69) in this section by adding at the end "if the writing meets the requirements of Section 1413."

Section 1275.

This is the same as RURE 63(18).

Section 1280.

This is the same as RURE 63(19).

The word "document" is used in the first line. Should the word "writing" be substituted?

There is a further problem in connection with Section 1280 that arises out of the codification of Section 1451. The language of the two sections should be conformed when they are intended to mean the same thing. This problem, however, together with other problems relating to the proof of public writings and records, will be presented to you by a later memo.

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Section 1281.

This section was approved at the February meeting.

Vehicle Code Section 40834, enacted at the 1963 session, provides:

> A judgment of conviction for any violation of this code or of any local ordinance relating to the operation of a motor vehicle or a finding reported under Section 1816 shall not be res judicata or constitute a collateral estoppel of any issue determined therein in any subsequent civil action.

Should Section 1281 be subject to Vehicle Code Section 40834, or should Vehicle Code Section 40834 be made subject to Section 1281?

The Vehicle Code section was enacted to prevent plaintiffs from relying on judgments convicting the defendants of Vehicle Code violations. Whether plaintiffs could do so in the absence of the Vehicle Code section is uncertain. Teitelbaum Furs, Inc. v. Dominion Insur. Co., 58 Cal.2d 601, held that a person convicted of a crime was estopped from bringing an action against another based on the same occurrence. It did not deal with the question whether a plaintiff could rely on the judgment as against Teitelbaum. Professor Currie in an article entitled Mutuality of Collateral Estoppel: Limits of the Bernhard Doctrine, 9 STAN. L. REV. 281 (1957), argues that a judgment against a defendant in one case cannot be used to conclusively establish the facts determined in favor of a plaintiff in another case. He states, "I predict with confidence that the Supreme Court of California will not hold that the former judgment is res judicata in these circumstances." at page 285. His position is that the Bernhard doctrine of collateral estoppel can be asserted defensively but not offensively.

A recent case, Newman v. Larsen, 36 Cal. Rptr. 883 (1964), held contrary to Professor Currie's thesis. A defendant found guilty of

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aggravated assault was sued for civil damages on the basis of the assault. The court held that the defendant was conclusively bound by the criminal judgment against him. The opinion, however, does not discuss the Currie article nor the implications of the cases cited and discussed in the Currie article. We do not know whether a hearing was requested in the case.

Whatever the fate of the Teitelbaum doctrine, Vehicle Code Section 40834 prohibits the use of vehicle convictions for res judicata or collateral estoppel. Section 1281, however, merely makes felony conviction evidence; hence, there is no technical inconsistency. Should 1281 be revised to indicate that it applies notwithstanding the Vehicle Code, or should the evidentiary use of vehicle convictions be prohibited also?

Section 1282.

This is the same as RURE 63(21).

Section 1283.

This is the same as RURE 63(21.1).

Section 1284.

This is the same as RURE 63(23).

Section 1285.

This is the same as RURE 63(24).

Section 1286.

This is the same as RURE 63(26).

Section 1287.

This is the same as RURE 63(26.1).

Section 1288.

This is the same as RURE 63(27) as revised at the February meeting.

Section 1289.

This is the same as RURE 63(27.1).

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Section 1290.

This is the same as RURE 63(28).

Section 1291.

This is the same as RURE 63(29).

Section 1292.

This is the same as RURE 63(29.1).

Section 1293.

This is the same as RURE 63(30).

Section 1294.

This is the same as RURE 63(31).

Section 1295.

This is the same as RURE 63(32).

There are other matters with respect to the proposed statute sections on hearsay evidence that we will raise in a memorandum prepared for a future meeting.

Respectfully submitted,

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Executive Secretary

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#34(L) 5/13/64

Memorandum 64-33

Subject: Study No. 34(L)--Uniform Rules of Evidence (Existing Provisions of Part IV of the Code of Civil Procedure)

We have sent you (5/13/64) a binder containing the four portions of Professor Degnan's Research Study on Existing Provisions of Part IV of the Code of Civil Procedure. This memorandum relates to Part IV (pages 62-105) of the research study.

We outline below the policy questions that must be considered by the Commission. Unless otherwise indicated, references are to sections of the Code of Civil Procedure. The research study should be considered in connection with this memorandum.

<u>Section 1844</u>

This section is set out and discussed on pages 62-64 of the research study. The consultant states that the law would doubtless be the same if Section 1844 were wholly repealed, but that the section might be worth retaining as a basis for jury instructions if there is a significant number of sections which relate to the topic Weight of Evidence.

The staff suggests that the section be retained, but that it be revised to read as follows:

> (a) Except where additional evidence is required by statute, the direct evidence of one witness who is entitled to full credit is sufficient for proof of any fact.
>
> (b) As used in this section, "direct evidence" means evidence that directly proves a disputed fact that is of consequence to the determination of the action, without an inference or presumption, and which in itself, if true, conclusively establishes that fact.

Subdivision (a) of this section is based on Section 1844. The introductory clause of subdivision (a) is necessary since other statutes require additional evidence in some cases. See research study at page 64.

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Subdivision (b) is based on the definition of "direct evidence" found in Code of Civil Procedure Section 1831 (set out on page 82 of the research study). (We previously determined to repeal Section 1831, but also decided to include its substance in Section 1844 if necessary.) The language of Section 1831 has been revised to conform to the language used in other provisions of the new code. See, e.g., definition of relevant evidence in Section 225 of the Evidence Code.

The only effect of Section 1844 apparently is to eliminate any requirement of corroboration where there is direct evidence, unless corroboration is required by statute. However, where the evidence is not direct evidence (but instead is circumstantial evidence), a requirement of corroboration may be established by case law instead of statute. See People v. Gould, 54 Cal.2d 621, 7 Cal. Rptr. 273, 354 P.2d 685 (1960) (corroboration required where evidence was extra-judicial identification of defendant in a criminal case). Thus, in order to retain existing law, it is necessary to define direct evidence in the proposed section.

Section 1847

This section is discussed on pages 64-65 of the research study.

The Commission already has determined to repeal this section, and the research consultant concurs in that determination. (At a future meeting, we will submit a memorandum indicating whether the staff believes that we should (1) attempt to spell out in the new code the grounds for impeachment of a witness or (2) merely state in the new code that any evidence attacking or impairing the credibility of a witness is admissible, unless otherwise provided by statute.) See discussion in research study.

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Section 1903

This section is discussed on pages 65-66 of the research study.

Although the repeal of this section is not essential, the consultant suggests that it be repealed because its repeal would merely strike a superfluous section from the Code of Civil Procedure. He states that the repeal would not change the law relating to construction or validity of statutes because the courts have not placed that law on the footing of this section.

Sections 1904-1917

These sections are discussed on pages 66-68 of the research study.

The consultant recommends that these sections be retained in the Code of Civil Procedure because they serve some purpose and do not relate to evidence. This recommendation is consistent with the Commission's decision (at the April meeting) to retain these sections.

Sections 1919a and 1919b

These sections are discussed on pages 68-70 of the research study and are compiled in Sections 1480-1486 of the Evidence Code.

The consultant recommends repeal of these sections on the ground that church records are business records. Perhaps the sections should be repealed and perhaps the Business Records Act may need to be amended to make it clear that church records are business records. (It is noted by the research consultant that Sections 1919a and 1919b were enacted before the enactment of the Uniform Business Records as Evidence Act.)

On the other hand, Sections 1480-1486 may serve a useful purpose by eliminating the necessity for bringing in the custodian of the church

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records to establish the manner of keeping the records. For example, where the records are kept in a foreign country or even in another state, Sections 1480-1486 permit proof of the records without the necessity of having the custodian testify as a witness in California. Perhaps the application of these sections to church records should be limited to cases where the records are kept in a foreign country or another state.

Sections 1480-1486 provide, of course, not only a hearsay exception, but also an exception to the best evidence rule. They permit proof of the contents of the church record by a certified copy thereof. By way of contrast, the Business Records Act requires proof by the original record unless an exception is provided in the best evidence rule (Section 1420 of the Evidence Code)(and even where a certified copy may be used the testimony of the custodian is required). On the other hand, public records may be proved by a certified copy and perhaps it would be desirable to permit proof of the contents of church records by the same means.

The discussion thus far has been concerned with church records. However, Sections 1480-1486 also make admissible the original marriage, baptismal, confirmation, or other certificate (the one given by the clergyman to the interested person or persons). This original certificate would not qualify as a business record and the hearsay exception found in the Evidence Code (Section 1275) applies only to marriage certificates. Thus, an important effect of Sections 1480-1486 is to permit, for example, proof of age by recitals in original birth or confirmation certificates (as well as church records). And such certificates would seem to be as reliable as the original church records or other evidence of family history or reputation (Sections 1285, 1286, 1287). In some cases, the original

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certificate might be admissible as an ancient document under Section 1292.

It should be noted that Section 1272 of the Evidence Code makes admissible a report of a birth, death, or marriage if the maker of the report was required by statute to file it in a designated public office and the report was made and filed as required by statute. (If so recorded in California, Health and Safety Code Section 10576 makes the record prima facie evidence.) However, church certificates might be useful in cases where there is no official record of the birth, death, or marriage.

In the absence of Sections 1919a and 1919b, it is not clear whether recitals of age in church certificates would be admissible under existing law to prove the truth of such recitals. Moreover, in view of our revision of the hearsay evidence law, church certificates would not be admissible (except for marriage certificates) since no hearsay exceptions exist unless provided by statute.

Note the guarantee of trustworthiness provided by Sections 1480-1486: Subdivisions (a) and (b) of Section 1480 require that the record of the certificate be kept or issued by a clergyman or other person in accordance with law or in accordance with the rules, regulations, or requirements of a church.

The policy questions presented are:

1. Must church records be proved as business records or should all or a portion of Sections 1480-1486 be retained to provide an alternative means of providing such records? Should these sections be limited to out-of-state records? Also, should the words "or religious" be inserted after "governmental" in the second line of Section 1470 of the Evidence Code to make it clear that church records are business records?

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2. Should certified copies of church records be admissible?

3. Should original certificates issued by a clergyman be admissible to prove the truth of recitals contained in such certificates? When we included Section 1275 in the Evidence Code (marriage certificates), we also stated we intended to save Sections 1919a and 1919b as an additional hearsay exception.

4. Should the rather complex authentication requirements of Sections 1480-1486 be retained? An examination of the requirements will indicate that they are not as burdensome as they are complex.

5. Should the evidence admissible under Sections 1480-1486 be prima facie evidence? See research study at page 70.

Section 1925

This section is discussed on pages 70-71 of the research study and is compiled as Section 1553 of the Evidence Code.

Consultant recommends that this section be retained, but that the word "primary" be changed to "prima facie." The staff had already made this change in Section 1553 of the Evidence Code.

It is suggested that Section 1553 of the Evidence Code be approved.

Section 1926

This section is discussed on pages 71-72 of the research study.

The Commission recommended repeal of this section in the tentative recommendation on Hearsay Evidence because a hearsay exception was provided that covered the same subject matter. The consultant concurs in the repeal of this section because he believes that only those entries in public records should be prima facie evidence that are made prima facie evidence by specific statutory provision.

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Section 1927

This section is discussed on pages 72-73 of the research study and is compiled as Section 1551 of the Evidence Code.

The consultant recommends retention of this section, and it is suggested that Section 1551 of the Evidence Code be approved.

Section 1927.5

This section is discussed on pages 72-73 of the research study and is compiled as Section 1550 of the Evidence Code.

The consultant recommends retention of this section, and it is suggested that Section 1550 of the Evidence Code be approved.

Section 1928

This section is discussed on page 73 (top of page) of the research study and is compiled as Section 1552 of the Evidence Code.

The consultant recommends retention of this section, and it is suggested that Section 1552 of the Evidence Code be approved.

Sections 1928.1-1928.4

These sections are discussed on pages 73 and 74 of the research study and the consultant recommends that the sections be retained.

Memorandum 64-26 contains a more complete discussion of Sections 1928.1-1928.4. We will consider that memorandum in connection with this problem.

Sections 1928.1-1928.4 are compiled in the Evidence Code as Sections 1500-1502. They are compiled in the revised form suggested in Memorandum 64-26. The staff recommends approval of Sections 1500-1502, subject to consideration of Section 1502 at a later time in connection with the provisions on authentication.

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Section 1936

This section is discussed on page 74 of the research study. The Commission previously determined to repeal this section, and the research consultant agrees that it should be repealed.

Section 1946

This section is discussed on pages 74 and 75 of the research study. The Commission previously determined to repeal this section, and the research consultant agrees that it should be repealed.

Section 1948

This section is discussed on pages 75-80 of the research study and is compiled as Section 1450 of the Evidence Code.

The consultant points out the existing law is unsatisfactory and suggests that this section be revised to read in substance:

> 1450. A private writing, other than a will, which is acknowledged or proved and certified in the manner provided for conveyances of real property may, together with the certificate of acknowledgment or proof, be read in evidence without further proof.

The staff suggests that Section 1450 be approved as thus revised. We urge you to read the discussion of Section 1948 in the research study. Note that the consultant urges the repeal of Section 1933 (text on page 76 of research study). However, this section appears to be beyond the scope of the evidence recommendation and, consistent with the Commission's determinations of the April 1964 meeting, we suggest that Section 1933 be retained in the Code of Civil Procedure without change.

Section 1951

This section is discussed on pages 80-82 of the research study and is compiled as Section 1451 of the Evidence Code.

The Commission determined to delete a portion of Section 1951 in its tentative recommendations on Hearsay Evidence and Authentication. However, the

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consultant believes that it is necessary to retain the deleted portion of Section 1951. If this is true, it is because the hearsay exception provided by Section 1280 of the Evidence Code does not accomplish its purpose. This hearsay exception will be considered at a later time. For the time being, since Section 1451 of the Evidence Code retains the deleted portion of Section 1951, it is suggested that the section be approved as contained in the Evidence Code, subject to revision if necessary when the hearsay exception in Evidence Code Section 1280 is considered.

Sections 1957, 1958, and 1960

The consultant recommends repeal of these sections and the Commission determined to repeal them in its tentative recommendation on Burden of Producing Evidence, Burden of Proof, and Presumptions. See discussion on pages 82-86 of the research study, noting especially the consultant's discussion of whether "circumstantial evidence" should be defined. At the April 1964 meeting we concluded that existing case law adequately defines this term and that we should not provide a statutory definition.

Section 1967

This section is discussed on page 87 of the research study. The consultant suggests the section be repealed as useless and we have not included it in the Evidence Code.

Section 1968

This section is discussed on page 87 of the research study. The consultant recommends its repeal as unnecessary and we have not included it in the Evidence Code.

Sections 1971, 1972, 1973, and 1974

These sections are discussed on page 87 of the research study. The consultant states that these sections are not rules of evidence and suggests

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that they should be placed in the Codes in conjunction with the subject matter to which they relate.

These sections have been compiled in the Evidence Code as Sections 1400, 1401, and 1402. Section 1400 is the same as the Statute of Frauds in the Civil Code except that (1) Section 1400 applies to "agreements" while the Civil Code section applies to "contracts" and (2) Section 1400 contains the following sentence which is not contained in the Civil Code Section: "Evidence, therefore, of the agreement, cannot be received without the writing or secondary evidence of its contents." In view of this sentence, we believe that the only purpose of Section 1971 (compiled as Section 1400) is to provide a rule of evidence.

Section 1401 is phrased in terms of admissibility of evidence.

Section 1402 is not phrased in terms of admissibility of evidence. The staff suggests that if these sections are not to be compiled in the Evidence Code, they should be retained without change in the Code of Civil Procedure together with the other sections to be retained without change.

Section 1978

This section is discussed on pages 88-89 of the research study. The consultant recommends that, if the section is to be retained, it be revised to read substantially as follows:

> No evidence is conclusive or unanswerable unless declared to be so by statute.

The consultant questions the desirability of retaining the section because it prevents the courts from finding that certain evidence is scientifically so certain that it cannot be disbelieved by the factfinder. However, the provisions on judicial notice would be applicable in such a

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case, and the staff believes that no harm should result from retaining the section.

Section 1982

This section is discussed on pages 89-91 of the research study and is compiled as Section 1415 of the Evidence Code.

The consultant recommends repeal of Section 1982 as redundant. There appears to be no case which treats the section as merely a special rule about authentication of documents, requiring one who offers the document to explain any suspicious circumstances appearing on the face of the instrument which might raise doubts about whether it is still in the form in which it was originally executed. The staff included the section in the authentication portion of the Evidence Code on the mistaken assumption that the section provided a special rule concerning authentication.

Section 1983

This section is discussed on pages 91-94 of the research study and is compiled as Section 523 of the Evidence Code. (See Tentative Recommendation on Burden of Producing Evidence, Burden of Proof, and Presumptions, pages 12-13)

The consultant recommends that this section be retained. We suggest that Section 523 of the Evidence Code be approved.

Section 2061

First sentence. The research study discusses the first sentence of Section 2061 on pages 94-95. This sentence should be combined with Section 2101 of the Code of Civil Procedure, but we suggest that action be deferred

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on the substance of the Evidence Code section that should replace these provisions of the existing law until we have received a research study on Section 2101.

Introductory clause of remaining portion. We suggest that the introductory clause of Section 2061 be compiled in the Evidence Code as Section 440 to read:

> 440. The jury is to be given the instructions specified in this chapter on all proper occasions.

Subdivision (1). This subdivision is discussed on page 95 of the research study and would be compiled as Section 441. Section 441 might read:

> 441. It becomes my duty as judge to instruct you in the law that applies to this case, and it is your duty as jurors to follow the law as I shall state it to you. On the other hand, it is your exclusive province to determine the facts in the case, and to consider and weigh the evidence for that purpose. The authority thus vested in you is not an arbitrary power, but must be exercised with sincere judgment, sound discretion, and in accordance with the rules of law stated to you.

Section 441 is an exact copy of CALJIC Inst. No. 1.

Subdivision (2). This subdivision is discussed on pages 96-98 of the research study and would be compiled as Section 442. Section 442 might read:

> 442. You are not bound to decide in conformity with the testimony of any number of witnesses against a lesser number or against other evidence which appeals to your mind with more convincing force. This rule of law does not mean that you are at liberty to disregard the testimony of the greater number of witnesses merely from caprice or prejudice, or from a desire to favor one side as against the other. It does mean that you are not to decide an issue by the simple process of counting the number of witnesses who have testified on the opposing sides. It means that the final test is not in the relative number of witnesses, but in the relative convincing force of the evidence.

Section 442 is based on CALJIC Instruction No. 24, revised to eliminate the suggestion that the jury may decide against declarations "which do not produce conviction in their minds" and to eliminate the language indicating that a presumption is evidence.

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It also might be desirable to include a general instruction in the statute based on CALJIC No. 25. The section might read:

> The testimony of one witness worthy of belief is sufficient for the proof of any fact and would justify a finding in accordance with such testimony, even if a number of witnesses have testified to the contrary, if from the whole case, considering the credibility of witnesses and after weighing the various factors of evidence, you should believe that a balance of probability exists pointing to the accuracy and honesty of the one witness.

<u>Subdivision (3).</u> This subdivision is discussed on pages 98-99 of the research study. A section based on this subdivision might read:

> A witness false in one part of his or her testimony is to be distrusted in others; that is to say, you may reject the whole testimony of a witness who wilfully has testified falsely as to a material point, unless, from all the evidence, you believe that the probability of truth favors his or her testimony in other particulars.
>
> At the same time, discrepancies in a witness' testimony or between his testimony and that of others, if there were any, do not necessarily mean that the witness should be discredited. Failure of recollection is a common experience, and innocent mis-recollection is not uncommon. It is a fact, also, that two persons witnessing an incident or a transaction often will see or hear it differently. Whether a discrepancy pertains to a fact of importance or only to a trivial detail should be considered in weighing its significance. But a wilful falsehood always is a matter of importance and should be seriously considered.

This section is basically the same as CALJIC No. 27 and 27-A.

<u>Subdivision (4).</u> This subdivision is discussed on page 99 of the research study. The subdivision might result in two sections worded as follows:

> The testimony of an accomplice ought to be viewed with distrust.

> Any evidence that has been received of an act, omission, or declaration of a party which is unfavorable to his own interests should be considered and weighed by you as you would any other admitted evidence, but evidence of the oral admission of a party, other than his own testimony in this trial, ought to be viewed by you with caution.

The first section set out above is in the language of subdivision (4) of Code of Civil Procedure Section 2061. The second section is the same as CALJIC No. 29.

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Subdivision (5). This subdivision is discussed on pages 99-101 of the research study. This subdivision also was amended in the tentative recommendation relating to Burden of Producing Evidence, Burden of Proof, and Presumptions. Subdivision (5) might result in a section phrased as follows:

> The judge shall instruct the jury that the burden of proof rests on the party to whom it is assigned by rule of law, informing the jury which party that is. When the evidence is contradictory, or if not contradicted might nevertheless be disbelieved by the jury, the judge shall instruct the jury that before the jury finds in favor of the party who bears the burden of proof, the jury must be persuaded by a preponderance of the evidence, by clear and convincing evidence, or beyond a reasonable doubt, as the case may be.

An alternative that should be considered:

> The judge shall instruct the jury on which party bears the burden of proof on each issue and on whether that burden is to prove by a preponderance of the evidence or by clear and convincing evidence or beyond a reasonable doubt.

Subdivisions (6) and (7). These subdivisions are discussed on pages 101-102 of the research study. The research consultant recommends that the subdivisions be retained without attempting in any way to improve the language of the subdivisions. However, in the tentative recommendation on Burden of Producing Evidence, Burden of Proof, and Presumptions (page 61), an additional clause was added to subdivision (7). A section based on these subdivisions, including the clause added by the Commission, might be phrased as follows:

> Evidence is to be estimated not only by its own intrinsic weight, but also according to the evidence which it is in the power of one side to produce and of the other to contradict. Therefore, if weaker and less satisfactory evidence is offered when it appears that stronger and more satisfactory evidence was within the power of the party, the evidence offered should be viewed with distrust and inferences unfavorable to a party may be drawn from any evidence or facts in the case against him when such party has failed to explain or deny such evidence or facts by his testimony or has wilfully suppressed evidence relating thereto.

Section 2079

This section is discussed on pages 102-103 of the research study. The consultant recommends the repeal of this section on the ground that it is

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superfluous because it repeats what is said in Civil Code Section 130 and is misleading to the extent that it suggests that adultery is the only ground for divorce which requires corroboration of the testimony of the spouses.

Memorandum 64-25 is a staff study and recommendation on Section 2079. The staff also concluded that Section 2079 is unnecessary and also recommended repeal of the section.

Section 2079 is related to evidence only in that it declares that certain evidence is not of itself sufficient to justify a judgment. However, the section seems to be closely enough related to evidence to justify its repeal in the evidence bill if the Commission believes that the section should be repealed. The repeal of the section is not, however, essential to the evidence recommendations.

Respectfully submitted,

John H. DeMoully
Executive Secretary

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#34(L) 6/3/64

Memorandum 64-40

Subject: Study No. 34(L) - Uniform Rules of Evidence (Form of Comments on Evidence Code)

We are now engaged in preparing the comments that will appear under the various proposed sections in our final report on the Evidence Code and which will appear under the code sections when they are compiled in the code. We have already prepared some of these comments and they will be considered at the June meeting.

A general problem is presented in the preparation of these comments. The comments serve two purposes: First, they explain the bill to those persons who are interested in the bill before it is enacted. Second, they explain the code sections after the bill is enacted. To serve the first purpose (to explain the bill), the comments should be written as if the bill were to be enacted in the future. Thus, sections to be repealed would be referred to as still in existence, and the law in effect prior to the enactment of the bill would be referred to as "existing law." On the other hand, to serve the second purpose (to explain the code sections after the bill is enacted), the comments should be written as if the bill already had been enacted. Thus, the sections repealed would be referred to as "former Code of Civil Procedure Section 1963" and the law in effect prior to the enactment of the Evidence Code would be referred to as "previously existing law."

If the comments are written as if the bill were to be enacted in the future, they will require extensive editorial revision if they are to make sense when they [illegible] inserted under the sections when compiled in the new code.

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Since the staff believes that the most important purpose of the comments is to make legislative intent clear--i.e., to explain the code sections after they are enacted--we suggest that the comments be written as if the bill already had been enacted. This does not cause great difficulty in using the same comments to explain the bill. In our final recommendation that will contain the Evidence Code, we can include a paragraph indicating that the comments serve two purposes and advising the reader that they are written as if the recommendation had been enacted as law. This will be sufficient warning to the reader.

The comments we have prepared for the June meeting are written in a form to carry out this staff recommendation. We suggest that you read these comments with this memorandum in mind so that we can establish a general policy on this matter at the June meeting. See Memorandum 64-32 (includes comments to Division 1), Memorandum 64-36 (includes comments to Division 2), Memorandum 64-39 (includes comments to Privileges division).

We plan to have the statute portion of the tentative recommendation on Burden of Producing Evidence, Burden of Proof, and Presumptions set in bill form after the June meeting. The legislature will pay the cost of setting this portion of the material, and we will use the type for our tentative recommendation. We also plan to set the comments in a form that we can use without change in our final report. Accordingly, we have written the comments in the form we suggest for the final report. We will discuss the matter of this tentative recommendation in connection with Memorandum 64-37.

Attached is a revised schedule of deadlines for this project.

Respectfully submitted,

John H. DeMoully
Executive Secretary

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Revised: June 1, 1964

REVISED SCHEDULE OF DEADLINES IN STUDY OF UNIFORM RULES OF EVIDENCE

Subject Matter	Tentative Recommendation Printed	Portion of Preprinted Bill to Printer	Comments to Printer
Title of Bill	Will not be printed	August Meeting	None
Division 1 (Preliminary Provisions and Construction)	Will not be printed	July Meeting	July Meeting
Division 2 (Words and Phrases Defined)	Will not be printed	July Meeting	July Meeting
Division 3 (General Provisions)	July 1	August Meeting	August Meeting
Division 4 (Judicial Notice)	June 15	August Meeting	August Meeting
Division 5 (Burden of Producing Evidence, etc.)	July 15	June Meeting	June Meeting
Division 6 (Witnesses)	Printed	August Meeting	August Meeting
Division 7 (Experts, etc.)	July 1	August Meeting	August Meeting
Division 8 (Privileges)	Printed	June Meeting	June Meeting
Division 9 (Extrinsic Policies)	Printed	July Meeting	July Meeting
Division 10 (Hearsay Evidence)	Printed	July Meeting	July Meeting
Division 11 (Writings)	Printed (Authentication and Contents of Writings only)	July Meeting	July Meeting
Amendments and Repeals	Will not be printed	July Meeting	September Meeting
General Introductory Portion of Final Recommendation			September Meeting

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#34(L) 7/13/64

Memorandum 64-49

Subject: Study No. 34(L) - Uniform Rules of Evidence (Evidence Code - Division 10 - Hearsay Evidence)

Attached to this memorandum as Exhibit I is a letter from the Lassen County Bar Association. The section numbers used in the original letter have been revised to conform to the current numbering system.

You will also receive with this memorandum a revised Division 10 of the Evidence Code, relating to hearsay evidence. The comments to the sections appear separately and also are attached; they should be read together with the sections to which they relate. The following matters should be especially noted:

Organization of the division

At the beginning of the division, there is a divisional outline showing all of the sections in the division. You will note that Chapter 2 has been organized into articles pursuant to your directives at the June meeting. In organizing the chapter into articles, we moved some of the sections around in order to achieve a more logical organization of the chapter. The article on Confessions and Admissions and Declarations Against Interest are now at the beginning of the division instead of Prior Statements of Witnesses; and Former Testimony, which was second, has been placed between Official Reports and Judgments.

Organizational problems relating to the various sections relating to writings will be presented in the memorandum relating to Division 11.

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Drafting of hearsay rule and exceptions; Section 1200

(1) Section 1200 formerly stated that "Hearsay evidence is inadmissible except as provided in Chapter 2 . . . ." Chapter 2 contained a section providing an exception for any hearsay evidence declared to be admissible by statute. The section formerly appearing in Chapter 2 has been deleted, and instead Section 1200 is now introduced by "Except as provided by statute . . . ."

(2) Should hearsay exceptions be limited to those created by statute? The New Jersey Supreme Court Committee has revised their equivalent of this section to read:

> 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 is inadmissible except as permitted by rule of law established by statute or decision or by exceptions provided in Rules 63(1) through 63(32). [Emphasis supplied.]

(3) Section 155 defines "hearsay evidence" as "evidence of a statement . . . ." Section 1200 provides that hearsay evidence is inadmissible except as provided by statute. Accordingly, to be accurate, our exceptions should be worded:

> Evidence of a statement is not made inadmissible by the hearsay rule . . . .

Many of them formerly read:

> A statement is not made inadmissible by the hearsay rule.

We have revised the sections in Chapter 2 to read, "Evidence of a statement . . ." as suggested above.

(4) The meaning of the hearsay rule depends largely on the definition of "statement" in Section 225:

> "Statement" means not only an oral or written expression but also nonverbal conduct of a person intended by him as a substitute for words in expressing the matter stated.

Although the definition is technically accurate, the form of expression, "not

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only . . . but also . . .", does not seem to be clearly limiting. In other words, the section does not clearly state that nonverbal conduct that is not intended as a communication cannot amount to a "statement." We suggest that the meaning would be clearer if the section were revised to read:

> "Statement" means (a) an oral or written verbal expression or (b) nonverbal conduct of a person intended by him as a substitute for words in expressing the matter stated.

Section 1201

The Lassen County Bar apparently thinks the section is necessary but should be rejected. See Exhibit I. See the Comment to the section for a typical example of an application of the section.

Section 1202

The Lassen County Bar also criticized this section. See the Comment for the underlying rationale.

Section 1203

This section is new. It was added pursuant to the direction of the Commission at the last meeting. The Commission asked the staff to prepare a draft that would be applicable to all hearsay exceptions except those, such as admissions, where considerations of policy indicate that the principle of the section should not apply.

The exclusions are in subdivisions (b) and (c). Parties are excluded because a party should not have the right to cross-examine himself. Agents, partners, or employees of a party are excluded in order to restrict the right of a party to cross-examine his own representatives. The persons mentioned in (3) are excluded because they are, in effect, parties. The persons excluded in (1), (2), and (3) are comparable to those mentioned in C.C.P. § 2016(d)(2)

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as persons whose depositions may be used for any purpose by the adverse party. Witnesses are excluded under (4) because the right of cross-examination of witnesses should be determined by which party called the witness. A party should not have the right to cross-examine his own witness merely because, for example, the adverse party impeaches him with an inconsistent statement.

The exclusions in (c) may not be necessary in the light of (b). However, the reference to the articles does pick up some items of hearsay that would not be picked up by (b). See the divisional outline. Exclusion of the additional items--such as judgments--seems desirable. Are there any other forms of hearsay listed in the divisional outline that should be included?

Section 1204

Section 1204 is new. It has been added pursuant to the decision of the Commission at the June meeting.

Section 1205

The Commission approved URE Rule 64 in principle at the last meeting. However, all of the Commissioners who approved the rule were not present when the specific matters to be included were considered. As there was neither enough votes to fill in the substance of the rule nor enough to disapprove the rule, the matter was deferred for later consideration when a more adequate quorum would permit disposition one way or the other.

To summarize briefly, the Commission originally decided to reject Rule 64 on the ground that discovery was sufficient. It was pointed out in the comments received that discovery in criminal cases does not supply the deficiency. In Memorandum 64-31 (distributed last month) we discussed the scope of the

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prosecution's right of discovery in criminal cases. To summarize the discussion there, it seems possible that under Jones v. Superior Court, 58 Cal.2d 56 (1962) and People v. Lopez, 60 A.C. 171 (1963) the defendant can be ordered to furnish the prosecution with the names and addresses of the witnesses he will call and also any written statements or notes of statements by such witnesses.

To decide what subdivisions should be included in Section 1205, please refer to the divisional outline where all of the hearsay exceptions are listed.

New Jersey's revised version of Rule 64 now includes:

(3) - Evid. C. §§ 1291, 1292
(15) - Evid. C. § 1280
(16) - Evid. C. § 1281
(17) - Evid. C. §§ 1284, 1510
(18) - Evid. C. § 1316
(19) - Evid. C. § 1600
(21) - Evid. C. § 1301
(29) - Evid. C. § 1330

The policy underlying Rule 64--to give the adverse party adequate opportunity to check the accuracy of the original hearsay and an opportunity, if desired, to cross-examine the declarant under Section 1203--suggests that the following matters might be included:

All official writings, whether specified in Chapter 2 or not.

Articles 7 (business records), 8 (official reports), 9 (former testimony), and 13 (dispositive instruments and ancient writings).

Sections 1315 (church records), 1316 (marriage, baptismal, and similar certificates).

So far as the form of the section is concerned, New Jersey's last version is as follows:

> Whenever a statement admissible by reason of paragraphs . . . is in the form of a writing, the judge may exclude it at the trial if it appears that the proponent's intention to offer the writing in evidence was not made known to the adverse party at such a time as to provide him with a fair opportunity to prepare to meet it.

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Section 1206

The Lassen County Bar again suggests that all hearsay exceptions be brought within the Evidence Code.

Section 1223

The language of Section 1223 has not been presented to you before. It has been revised, however, in accordance with the Commission's instructions given at the last meeting.

Section 1226

Suppose the following case: A suffers damage for which B is liable. P compensates A pursuant to some legal obligation to do so and becomes subrogated to A's right against B. B disappears, so that A's right can be asserted only against D surety company who has agreed to compensate those injured by B. In the action of P against D, P can introduce an admission by B under Section 1226. But it seems unlikely that D can introduce an admission by A unless it also qualifies as a declaration against interest.

As a matter of policy, shouldn't the position of the respective representatives be the same? We suggest that Section 1226 be amended to refer to a "right" as well as to a "liability, obligation, or duty" of the declarant.

A similar problem exists in wrongful death cases. Under existing California law, an admission by a decedent is not admissible against his heirs or representatives in a wrongful death action brought by them. Hedge v. Williams, 131 Cal. 455, 460 (1901); Carr v. Duncan, 90 Cal. App.2d 282, 202 P.2d 855 (1949); Marks v. Reissinger, 35 Cal. App. 44, 169 Pac. 243 (1917). The reason is that the action is a new action, not merely a survival of the decedent's action.

Hence, the decedent is not in "privity" with the plaintiff.

This rule is severely criticized in Carr v. Duncan, supra, 90 Cal. App.2d at 285, where it is pointed out that the California rule is distinctly in the minority:

> It would seem that since contributory negligence of a decedent may defeat the action of his heirs or representatives, evidence of his declarations or admissions pertinent to the issue of contributory negligence should be admitted . . . just as evidence of the defending party's declarations are admitted against him on the issue of negligence.

Should a provision be added to make the admissions of the plaintiff's decedent admissible against the plaintiff? If so, the following is suggested:

> 1227. Evidence of a statement is not made inadmissible by the hearsay rule when offered against the heirs or personal representatives of the declarant in an action for the wrongful death of the declarant.

Section 1230

This section has been substantially revised in the interest of simplicity. Changes from the last approved version are shown below in strikeout and underline:

> [~~(a)--As-used-in-this-section-"declaration-against-interest"-means~~] Evidence of a statement [~~that~~] by a declarant having sufficient knowledge of the subject is not made inadmissible by the hearsay rule if the statement, when made, was so far contrary to the declarant's pecuniary or proprietary interest, or so far subjected him to the risk of civil or criminal liability, or so far tendered to render invalid a claim by him against another, or created such a risk of making him an object of hatred, ridicule, or social disgrace in the community, that a reasonable man in his position would not have made the statement unless he believed it to be true.
>
> [~~(b)--A-declaration-against-interest-is-not-made-inadmissible-by the-hearsay-rule-if:~~
>
> ~~(1)--The-declarant-is-not-a-party-to-the-action-in-which-the statement-is-offered;-and~~
>
> ~~(2)--The-declarant-had-sufficient-knowledge-of-the-subject.~~]

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You will note that the revised version has no counterpart for former subdivision (b)(1). The requirement that the declarant be a non-party was originally placed in the rule to avoid the necessity for making the section inapplicable to the defendant in a criminal case. The original URE rule made the section inapplicable to the criminal defendant. With Section 1204 in the Evidence Code--requiring all hearsay statements offered aginst criminal defendants to be admissible against the declarant under the confessions rule--the need to distinguish between criminal defendants and others, nonparties and parties, etc., has disappeared. Since the classification of the statement of a party as an admission or a declaration against interest is solely of academic interest in the light of the changes made by the Commission in the Evidence Code, we do not believe there is any need to continue former subdivision (b)(1).

Sections 1235 and 1236

These sections were previously in one section. We have split them for the sake of simplicity. We have also simplified the language of the opening paragraph. The opening paragraph formerly read:

> A statement made by a person who is a witness at the hearing, but not made at the hearing, is not made inadmissible if made by him while testifying and the statement is:

The detailed conditions for the admissibility of a prior consistent statement have been removed from Section 1236 and a cross-reference to Section 788 substituted. The admissibility of such statements depends on conditions more germane to credibility than to hearsay. Hence, we believe the conditions of admissibility should be stated in the section dealing specifically with the admissibility of such evidence on the issue of credibility.

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Section 1237

The Lassen County Bar opposes that portion of the recorded memory section that permits evidence of memory recorded by another to be admitted.

The New Jersey Committee has approved our version of this section in lieu of the URE rule that it originally recommended. There are some modifications of our provision in the New Jersey version that deserve some consideration. They are:

> Evidence of a statement previously made by a witness is not made inadmissible by the hearsay rule if the statement would have been admissible if made by him while testifying [~~at the hearing~~] and the statement concerns a matter as to which the witness has [~~no~~] insufficient present recollection to enable him to testify fully and accurately and [~~is~~] contained in a writing which:
>
> [Subdivisions (a) and (b) are identical with Section 1237.] and
>
> (c) Is offered after the witness has testified that the statement he made was a true statement of such fact, provided that where the witness remembers only a part of the contents of a writing, the part he does not remember may be read to the jury but shall not be introduced as a written exhibit over objection. [~~; and~~
>
> ~~(d) Is offered after the writing is authenticated as an accurate record of the statement.~~]

Section 1240

The New Jersey counterpart of subdivision (b) now reads:

> Was made while the declarant was under the stress of a nervous excitement caused by such perception, in reasonable proximity to the event, and without opportunity to deliberate or fabricate.

Section 1242

The Lassen County Bar approved the section; but the New Jersey committee restricted it to criminal cases.

Sections 1250-1252

Apparently, the words "state of mind, emotion, or physical sensation

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(including a statement of intent, plan, motive, design, mental feeling, pain, or bodily health)" in Section 1250 include "symptoms, pain, or physical sensation" within the meaning of Section 1252. This conclusion is reached because the equivalent of Section 1252 was included in the URE only because Section 1250 excludes evidence of a statement narrating a memory of a past mental or physical state. Hence, Section 1252 was necessary to permit evidence of statements of <u>previous</u> symptoms to be given. Evidence of existing symptoms was covered by the general language.

If the words used in Section 1250 include symptoms, the words used in Section 1251 also include symptoms, for the same words are used. Hence, there are two sections permitting statements of previous symptoms to be admitted--Sections 1251 and 1252. There are some differences in the conditions of admissibility stated in the two sections. Under Section 1251, the declarant must be unavailable, and the evidence is admissible to prove only the prior mental or physical state--the prior mental or physical state cannot be used as a basis for inferring some other fact. Under Section 1252, the statement must be made to a physician for the purpose of treatment; but the declarant need not be unavailable, and the previous symptoms, pain, etc. may be used as circumstantial evidence so long as it is relevant to an issue of the declarant's bodily condition.

The foregoing is pointed out only to make sure that the Commission intends the differences. If Section 1252 is to be the only section relating to previous symptoms, Section 1251 should be modified by deleting "physical sensation", "pain", and "bodily health".

The New Jersey counterpart of this article contains an exception for a statement if it

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described to a physician consulted for purposes of treatment the inception, general character of the cause or external source of symptoms, pain, or physical sensation where such description was pertinent to diagnosis and treatment.

Section 1261

The Lassen County Bar reports that it has grave doubts concerning the section.

Section 1271

The opening paragraph and first subdivision of the section have been modified somewhat. The former language was:

> A writing offered as a record of an act, condition, or event is not made inadmissible by the hearsay rule if:
>
> * * * * *
>
> (b) It was made in the regular course of a business, at or near the time of the act, condition, or event; . . . .

We think it is more accurate to say, insofar as the hearsay rule is concerned, that the hearsay rule does not exclude evidence of a writing made as a business record of an act, condition, or event when such evidence is offered to prove the act, condition, or event. Accordingly, the section has been revised to read as it appears in the Evidence Code draft. Usually, of course, the "evidence of a writing" must be the writing itself. Section 1500 (the best evidence rule). But secondary evidence of the writing may be used in exceptional situations.

Section 1272

Note that in Section 1271 the judge is required to find that the "sources of information and method and time of preparation" of a business record offered to prove the truth of its content "were such as to indicate its trustworthiness "

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This seems to indicate that the judge must be convinced of the reliability of the business records involved. On the other hand, Section 1272 merely requires that he determine that the "sources of information and method and time of preparation . . . are such as to indicate that the absence of a record . . . warrants an inference" of the nonoccurrence of the event. This seems to indicate that the judge must admit the evidence either upon evidence sufficient to sustain a finding or, at most, upon evidence barely tipping the scales of probability.

Should the standards be the same? If so, Section 1272 should be revised to indicate that the absence of a record "is trustworthy evidence" of the nonoccurrence of the event.

The differing standards stem to a certain extent from the fact that Section 1271 clearly involves hearsay, while Section 1272 technically involves circumstantial evidence--not hearsay. However, the problems are similar. Under Section 1271, it is the employee who observed and reported the event who cannot be cross-examined--hence, the high standard of reliability. Under Section 1272, we are relying on that same employee's failure to report. Cross-examination of the employee seems just as needful as if the employee had expressly stated that the unreported event did not occur. Since, in either case, we are relying on the perceptions of persons not before the court, there seems to be good reason for imposing the same standards of admissibility on both kinds of evidence.

Section 1280

The New Jersey Committee added the following to the official reports exception:

> A statement . . . [is not inadmissible under the hearsay rule] if in the form of . . . statistical findings made by such a public official

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[of the United States or of a state or territory of the United States] whose duty it was to investigate the facts concerning the act, condition, or event and to make statistical findings.

Copy of official writing

In the last draft of the hearsay division, a section followed what is now Section 1281 that read:

> A writing that is a copy of a writing in the custody of a public employee is not made inadmissible by the hearsay rule when offered to prove the content of the writing in the custody of the public employee.

The section has been deleted as unnecessary. The problem to which it relates is covered by Section 1510. Moreover, the section did not state a hearsay exception. A copy is not hearsay evidence of the original if there is direct testimony that it is a copy of the original. The hearsay problem, if any, relates only to certified copies, and even then the hearsay evidence is the certification, not the copy.

Section 1290

At the last meeting the Commission decided to include testimony given in an arbitration proceeding within the definition of "former testimony" if the testimony was reported by an official reporter. Subdivision (d) is designed to carry out that decision. An official reporter is one who has been appointed to act as such by the courts. Gov. C. § 69941. A certified shorthand reporter is one who has been found qualified to serve as an official reporter. Gov. C. § 69942.

Section 1311

The New Jersey equivalent of subdivision (a)(2) reads:

> The declarant was otherwise so intimately associated with the other's

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family as to be likely to have accurate information concerning the matter declared.

The foregoing is the same as our subdivision, except that our subdivision goes on to say:

> and made the statement (i) upon information received from the other or from a person related by blood or marriage to the other or (ii) upon repute in the other's family.

We suggest that this additional language in our version of the exception could be deleted without harm to the rule.

Section 1314

Section 1314 is new. We broke up the section in the last draft relating to community reputation. Most of the section appears in Article 12, but inasmuch as this portion of the section relates to family history, we moved it into this article.

Section 1315

At the May meeting, the Commission instructed the staff to add a provision to the Evidence Code making an exception to the hearsay rule for recitals of family history contained in church records that are otherwise admissible as business records. Section 1315 is the section designed to carry out that decision. The phrase "church, religious denomination, or society" is taken from the existing statute on church records. C.C.P. § 1919a.

Section 1316

The Commission, at the May meeting, also instructed the staff to broaden the provision in the RURE relating to marriage certificates so that it would apply to baptismal, confirmation, and similar certificates. Section 1316 is the section designed to carry out that decision.

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Section 1340

The Lassen County Bar suggests the addition of a foundational showing "as to how widely [such publications] are accepted, or by whom published, or some fact insuring their reliability."

Section 1341

The New Jersey version of this rule now reads:

> An expert witness may refer to and read excerpts from learned treatises in support of his testimony provided notice is given before trial when reference thereto in the direct testimony is contemplated.

Added exception

The New Jersey Committee has added the following exception:

> In a civil proceeding, a statement made by a person unavailable as a witness because of his death is admissible if the statement was made in good faith, upon the personal knowledge of the declarant, and there is circumstantial probability that the statement is trustworthy.

Respectfully submitted,

Joseph B. Harvey
Assistant Executive Secretary

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PAULA A. TENNANT
Attorney At Law
Susanville, California

March 31, 1964

Mr. John H. DeMoully
Executive Secretary
California Law Revision Commission
Room 30, Crothers Hall
Stanford University
Stanford, California 94305

Re: Tentative draft of Proposed Statute Sections Relating to Hearsay Evidence

Dear Mr. DeMoully:

The local Bar generally felt that Section 240 on the unavailability of a witness was a clarification and assistance and hence approved it.

Section 1201, while it was generally received as necessary, was rejected on the ground that this was treading on an amorphous area in which a great amount of difficulty and argument could ensue.

Section 1202 was criticized on the ground that from the defense point of view a witness should be given an opportunity to explain his inconsistent statement or other conduct. My personal view and that of two other lawyers was that it tended generally to bring out the truth and should be accepted.

Under Section 1206, as I have repeatedly said, the local Bar feels that the retention of certain admissions of hearsay evidence in the particular codes is going to result in a great amount of difficulty and request that it be included in the new code of evidence as well as being cross indexed to the particular code applicable.

Opposed that portion of Section 1237 which allows the use of a record made by a person other than the witness or under his direction. Section 1292 received doubtful approval but there was the general consensus that it would allow the admission of necessary and helpful evidence.

Approved 1242.

Approved 1230.

Approved 1260.

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Had grave doubts as to 1261.

Approved 1310.

Approved 1314, 1320, 1321, 1322.

Approved 1330.

Approved 1340 with the additional requirement that there be some showing as to how widely they are accepted, or by whom published, or some fact insuring their reliability.

Sections not commented on in this letter received no comment upon discussion. I am sure that you will be well aware of the fact that the comments and reports concerning the various sections which have been here made were the result of a rather sketchy presentation since to have explained in detail the various sections would have taken an unwarranted length of time and some of the objections and approvals I am sure are the result of first blush impressions, some were the expression of merely the more vocal members of the Bar and some were the result of the decision in a particular case which had just affected the speaker.

I hope that this will be of some assistance to you although I feel in my own mind that it is far from an adequate or comprehensive reaction of the practicing members of the local Bar.

Yours very truly,

(Mrs.) Paula A. Tennant
President
Lassen County Bar Association

PAT/dc

MJN 1354

Prepared for July 1964 Meeting

DIVISION 10. HEARSAY EVIDENCE

CHAPTER 1. GENERAL PROVISIONS

§1200. The hearsay rule.

Comment. Section 1200 states the hearsay rule. That hearsay evidence is inadmissible unless the evidence is within an exception to that rule has been the law of California since the earliest days of the state. See, e.g., People v. Bob, 29 Cal.2d 321, 175 P.2d 12 (1946); Kilburn v. Ritchie, 2 Cal. 145 (1852). Nevertheless, Section 1200 is the first statutory statement of the rule. Code of Civil Procedure Section 1845 (superseded by Evidence Code § 702) permits a witness to testify concerning those facts only that are personally known to him "except in those few express cases in which . . . the declarations of others, are admissible"; and that section has been considered to be the statutory basis for the hearsay rule. People v. Spriggs, 60 Cal.2d ___, ___, 389 P.2d 377, 380, 36 Cal. Rptr. 841, 844 (1964). It has been recognized, however, as an insufficient basis for the hearsay rule. The section merely states the requirement of personal knowledge, and a witness testifying to the hearsay statement of another must have personal knowledge of that statement just as he must have personal knowledge of any other matter concerning which he testifies. Sneed v. Marysville Gas etc. Co., 149 Cal. 704, 708, 87 Pac. 376, 378 (1906).

Under Section 1200, exceptions to the hearsay rule must be created by statute. This will change the California law; for inasmuch as the rule excluding hearsay was not statutory, the courts have not been bound by the statutes in recognizing exceptions to the rule. See, People v. Spriggs, 60 Cal.2d ___, ___, 389 P.2d 377, 380, 36 Cal. Rptr. 841, 844 (1964).

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"Hearsay evidence" is defined in Section 155 as "evidence of a statement made other than by a witness while testifying at the hearing that is offered to prove the truth of the matter stated." Under existing case law, too, the hearsay rule applies only to out-of-court statements that are offered to prove the truth of the matter asserted. If the statement is offered for some purpose other than to prove the fact stated therein, the evidence is not objectionable under the hearsay rule. Werner v. State Bar, 24 Cal.2d 611, 621, 150 P.2d 892, (1944); Smith v. Whittier, 95 Cal. 279, 30 Pac. 529 (1892). See WITKIN, CALIFORNIA EVIDENCE §§ 215-218 (1958).

The word "statement" that is used in the definition of "hearsay evidence" is defined in Section 225 as "oral or written expression" or "nonverbal conduct . . . intended . . . as a substitute for words in expressing the matter stated." Hence, evidence of a person's out-of-court conduct is not inadmissible under the hearsay rule expressed in Section 1200 unless that conduct is clearly assertive in character. Nonassertive conduct is not hearsay.

Some California cases have regarded evidence of nonassertive conduct as hearsay evidence if it is offered to prove the actor's belief in a particular fact as a basis for an inference that the fact believed is true. See, e.g., Estate of De Laveaga, 165 Cal. 607, 624, 133 Pac. 307, (1913)("the manner in which a person whose sanity is in question was treated by his family is not, taken alone, competent substantive evidence tending to prove insanity, for it is a mere extra-judicial expression of opinion on the part of the family"); People v. Mendez, 193 Cal. 39, 52, 223 Pac. 65, (1924) ("Circumstances of flight [of other persons from the scene of a crime] are in the nature of confessions . . . and are, therefore, in the nature of hearsay evidence").

Other California cases, however, have admitted evidence of nonassertive conduct as evidence that the belief giving rise to the conduct was based on fact. See, e.g., People v. Reifenstuhl, 37 Cal. App.2d 402, 99 P.2d 564 (1940)(hearing denied)(incoming telephone calls made for the purpose of placing bets admissible over hearsay objection to prove that place of reception was bookmaking establishment).

Under the Evidence Code, nonassertive conduct is not regarded as hearsay for two reasons: First, such conduct, being nonassertive, does not involve the veracity of the declarant; hence, one of the principal reasons for the hearsay rule--to exclude declarations where the veracity of the declarant cannot be tested by cross-examination--does not apply. Second, there is frequently a guarantee of the trustworthiness of the inference to be drawn from such nonassertive conduct because the actor has based his actions on the correctness of his belief. To put the matter another way, in such cases actions speak louder than words.

Of course, if the probative value of evidence of nonassertive conduct is outweighed by the likelihood that such evidence will confuse the issues, mislead the jury, or consume too much time, the judge may exclude the evidence under Section 352.

§ 1201. Multiple hearsay.

Comment. Section 1201 makes it possible to use admissible hearsay to prove another statement was made that is also admissible hearsay. For example, under Section 1201, an official reporter's transcript of the testimony at another trial may be used to prove the nature of the testimony previously given (Section 1280), the former testimony may be used

as hearsay evidence (under Section 1291) to prove that a party made an admission. The admission is admissible (Section 1221) to prove the truth of the matter stated. Thus, under Section 1201, the evidence of the admission contained in the transcript is admissible because each of the hearsay statements involved is within an exception to the hearsay rule.

Although no California case has been found where the admissibility of "multiple hearsay" has been analyzed and discussed, the practice is apparently in accord with the rule stated in Section 1201 See, e.g., People v. Collup, 27 Cal.2d 829, 167 P.2d 714 (1946)(transcript of former testimony used to prove admission).

§ 1202. Credibility of hearsay declarant.

Comment. Section 1202 deals with the impeachment of one whose hearsay statement is in evidence as distinguished from the impeachment of a witness who has testified. It has two purposes. First, it makes clear that such evidence is not to be excluded on the ground that it is collateral. Second, it makes clear that the rule applying to impeachment of a witness--that a witness may be impeached by a prior inconsistent statement only if he is provided with an opportunity to explain it--does not apply to a hearsay declarant.

The California courts have permitted a party to impeach hearsay evidence given under the former testimony exception with evidence of an inconsistent statement by the hearsay declarant, even though the declarant had no opportunity to explain or deny the inconsistency, when the inconsistent statement was made after the former testimony was given. People v. Collup, 27 Cal.2d 829, 167 P.2d 714 (1946). The courts have also permitted dying

declarations to be impeached by evidence of contradictory statements by the deceased, although no foundation was laid. People v. Lawrence, 21 Cal. 368 (1863). Apparently, however, former testimony may not be impeached by evidence of an inconsistent statement made prior to the former testimony unless the would-be impeacher either did not know of the inconsistent statement at the time the former testimony was given or provided the declarant with an opportunity to deny or explain the inconsistent statement. People v. Greenwell, 20 Cal. App.2d 266, 66 P.2d 674 (1937) as limited by People v. Collup, 27 Cal.2d 829, 167 P.2d 714 (1946).

Section 1202 substitutes for this case law a uniform rule permitting a hearsay declarant to be impeached by inconsistent statements in all cases, whether or not the declarant has been given an opportunity to deny or explain the inconsistency. If the hearsay declarant is unavailable as a witness, the party against whom the evidence is admitted should not be deprived of both his right to cross-examine and his right to impeach. Cf., People v. Lawrence, 21 Cal. 368, 372 (1863). If the hearsay declarant is available, the party electing to use the hearsay of such a declarant should have the burden of calling him to explain or deny any alleged inconsistencies.

Of course, the trial judge may curb efforts to impeach hearsay declarants if he determines that the inquiry is straying into remote and collateral matters. Section 352.

Section 1202 provides that inconsistent statements of a hearsay declarant may not be used to prove the truth of the matters stated. In contrast, Section 1235 provides that evidence of prior inconsistent statements made by a trial witness may be admitted to prove the truth of the matters stated. Unless the declarant is a witness and subject to cross-examination upon the

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subject matter of his statements, there is not a sufficient guarantee of the trustworthiness of his out-of-court statements to warrant their reception as substantive evidence unless they fall within some recognized exception to the hearsay rule.

§ 1203. Cross-examination of hearsay declarant.

Comment. Hearsay evidence is generally excluded from evidence because of the lack of opportunity for the adverse party to cross-examine the hearsay declarant before the trier of fact. People v. Bob, 29 Cal.2d 321, 325, 175 P.2d 12, (1946). In some situations, hearsay evidence is admitted because of some exceptional need for the evidence and because there is some circumstantial evidence of trustworthiness that justifies a violation of a party's right of cross-examination. People v. Brust, 47 Cal.2d 776, 785, 306 P.2d 480, (1957); Turney v. Sousa, 146 Cal. App.2d 787, 791, 304 P.2d 1025, (1956).

Even though it is necessary or desirable to permit some hearsay evidence to be received without guaranteeing the adverse party the right to cross-examine the declarant, there seems to be no reason to prohibit the adverse party from cross-examining the declarant altogether. The policy in favor of cross-examination that underlies the hearsay rule, therefore, indicates that the adverse party should be accorded the right to call the declarant of a statement that has been received and to cross-examine him concerning the subject matter of his statement.

Hence, Section 1203 has been included in the Evidence Code to reverse, insofar as a hearsay declarant is concerned, the traditional rule that a witness called by a party is a witness for that party and may not be cross-examined by him. As a hearsay declarant is in practical effect a witness

against that party, Section 1203 gives the party against whom a hearsay statement is admitted the right to call and cross-examine the hearsay declarant concerning the subject matter of the hearsay statement just as he has the right to cross-examine the witnesses who appear personally and testify against him at the trial.

§ 1204. Hearsay statement offered against criminal defendant.

Comment. In People v. Underwood, 61 Cal.2d ___, ___ P.2d ___, 37 Cal. Rptr. 313 (1964), the California Supreme Court held that a prior inconsistent statement of a witness could not be introduced to impeach him in a criminal trial when the prior inconsistent statement would have been inadmissible as an involuntary confession if the witness had been the defendant. Section 1204 applies the principle of the Underwood decision to all hearsay statements.

§ 1205. Pretrial delivery of copy of certain hearsay statements.

Comment. [The form of this rule has not yet been formulated.]

§ 1206. No implied repeal.

Comment. Although some of the statutes providing for the admission of hearsay evidence will be repealed when the Evidence Code is enacted, there will remain in the various codes a number of statutes which, for the most part, are narrowly drawn to make a particular type of hearsay evidence admissible under specifically limited circumstances. It is neither desirable nor feasible to repeal these statutes. Section 1206 makes it clear that these statutes will not be impliedly repealed by the enactment of the Evidence Code.

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CHAPTER 2. EXCEPTIONS TO THE HEARSAY RULE

Article 1. Confessions and Admissions

§ 1220. Confession or admission of criminal defendant.

Comment. Section 1220 restates the existing law governing the admissibility of the confession or admission of a defendant in a criminal action. People v. Jones, 24 Cal.2d 601, 150 P.2d 801 (1944); People v. Rogers, 22 Cal.2d 787, 141 P.2d 722 (1943); People v. Loper, 159 Cal.6, 112 P. 720 (1910); People v. Speaks, 156 Cal. App.2d 25, 319 P.2d 709 (1957); People v. Haney, 46 Cal. App. 317, 189 Pac. 338 (1920); People v. Lisenba, 14 Cal.2d 403, 94P.2d 569 (1939); People v. Atchley, 53 Cal.2d 160, 346 P.2d 764 (1959). See also Tentative Recommendation and a Study Relating to the Uniform Rules of Evidence (Article VIII. Hearsay Evidence), 4 CAL. LAW REVISION COMM'N, REP., REC. & STUDIES at 475-482 (1963).

Although subdivision (b) is technically unnecessary, for the sake of completeness it is desirable to give express recognition to the fact that any rule of admissibility established by the Legislature is subject to the requirements of the Federal and State Constitutions.

§ 1221. Admission of party to civil action.

Comment. Section 1221 states existing law as found in Code of Civil Procedure Section 1870(2). The rationale underlying this exception is that the party cannot object to the lack of the right to cross-examine the declarant, since the party himself made the statement. Moreover, the party can cross-examine the witness who testifies to the party's statement and can deny or explain the purported admission. The statement need not be one which would be admissible if made at the hearing. See Shields v. Oxnard Harbor Dist., 46 Cal. App.2d 477, 116 P.2d 121 (1941).

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§ 1222. Adoptive admission.

Comment. Section 1222 restates and supersedes subdivision 3 of Code of Civil Procedure Section 1870. See Tentative Recommendation and a Study Relating to the Uniform Rules of Evidence (Article VIII. Hearsay Evidence), 4 CAL. LAW REVISION COMM'N, REP., REC. & STUDIES at 484 (1963).

§ 1223. Authorized admission.

Comment. Section 1223 provides a hearsay exception for authorized admissions. Under this exception, if a party authorized an agent to make statements on his behalf, such statements may be introduced against the party under the same conditions as if they had been made by the party himself. Section 1223 restates and supersedes the first portion of subdivision 5 of Code of Civil Procedure Section 1870. Tentative Recommendation and a Study Relating to the Uniform Rules of Evidence (Article VIII. Hearsay Evidence), 4 CAL. LAW REVISION COMM'N, REP., REC. & STUDIES at 484-490 (1963).

§ 1224. Admission of co-conspirator.

Comment. Section 1224 is a specific example of a kind of authorized admission that is admissible under Section 1223. The statement is admitted because it is an act of the conspiracy for which the party, as a co-conspirator, is legally responsible. People v. Lorraine, 90 Cal. App. 317, 327, 265 Pac. 893, (1928). See CAL. CONT. ED. BAR, CALIFORNIA CRIMINAL LAW PRACTICE 471-472 (1964). Section 1224 restates and supersedes the provisions of subdivision 6 of Code of Civil Procedure Section 1870.

§ 1225. Statement of agent, partner, or employee.

Comment. Section 1223 makes authorized extrajudicial statements admissible. Section 1225 goes beyond this, making admissible against a party

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specified extrajudicial statements of an agent, partner or employee, whether or not authorized. A statement is admitted under Section 1225, however, only if it would be admissible if made by the declarant at the hearing whereas no such limitation is applicable to authorized admissions.

The practical scope of Section 1225 is quite limited. The spontaneous statements that it covers are admissible under Section 1240. The self-inculpatory statements which it covers are admissible under Section 1230 as declarations against the declarant's interest. Where the declarant is a witness at the trial, many other statements covered by Section 1225 would be admissible as inconsistent statements under Section 1235. Thus, Section 1225 has independent significance only as to unauthorized, nonspontaneous, noninculpatory statements of agents, partners and employees who do not testify at the trial concerning the matters within the scope of the agency, partnership or employment. For example, the chauffeur's statement following an accident, "It wasn't my fault; the boss lost his head and grabbed the wheel," would be inadmissible as a declaration against interest under Section 1230, it would be inadmissible as an authorized admission under Section 1223, it would be inadmissible under Section 1235 unless the employee testified inconsistently at the trial, it would be inadmissible under Section 1240 unless made spontaneously, but it would be admissible under Section 1225.

Section 1225 goes beyond existing California law as found in subdivision 5 of Section 1870 of the Code of Civil Procedure (superseded by Evidence Code Section 1223). Under existing California law only the statements that the principal has authorized the agent to make are admissible. Peterson Bros. v. Mineral King Fruit Co., 140 Cal. 624, 74 Pac. 162 (1903).

There are two justifications for the limited extension of the exception for agents' statements provided by Section 1225. First, because of the relationship which existed at the time the statement was made, it is unlikely that the statement would have been made unless it were true. Second, the existence of the relationship makes it highly likely that the party will be able to make an adequate investigation of the statement without having to resort to cross-examination of the declarant in open court.

§ 1226. Statement of declarant whose liability is in issue.

Comment. Section 1226 restates in substance a hearsay exception found in Section 1851 of the Code of Civil Procedure (superseded by Evidence Code Sections 1226 and 1302). Cf., Butte County v. Morgan, 76 Cal. 1, 18 Pac. 115 (1888); Ingram v. Bob Jaffee Co., 139 Cal. App.2d 193, 293 P.2d 132 (1956); Standard Oil Co. v. Houser, 101 Cal. App.2d 480, 225 P.2d 539 (1950). Section 1226, however, limits this hearsay exception to civil actions. Much of the evidence within this exception is also covered by Section 1230, which makes admissible declarations against interest. However, to be admissible under Section 1230 the statement must have been against the declarant's interest when made whereas this requirement is not stated in Section 1226.

Section 1302 supplements the rule stated in Section 1226. Section 1302 permits the admission of judgments against a third person when one of the issues between the parties is the liabilily, obligation, or duty of the third person and the judgment determines that liability, obligation, or duty. Together, Sections 1226 and 1302 codify the holdings of the cases applying Code of Civil Procedure Section 1851. See Tentative Recommendation and a Study Relating to the Uniform Rules of Evidence (Article VIII. Hearsay Evidence), 4 CAL. LAW REVISION COMM'N, REP., REC. & STUDIES at 491-496 (1963).

Article 2. Declarations Against Interest

§ 1230. Declaration against interest.

Comment. Section 1230 codifies the hearsay exception for declarations against interest as that exception has been developed in the California courts. People v. Spriggs, 60 Cal.2d ___, 389 P.2d 377, 36 Cal. Rptr. 841 (1964). It is not clear, however, whether existing law extends the declaration against interest exception to include statements that make the declarant an object of hatred, ridicule, or social disgrace in the community.

Section 1230 supersedes the partial and inaccurate statements of the declarations against interest exception found in Code of Civil Procedure Sections 1853, 1870(4), and 1946(1). See People v. Spriggs, 60 Cal.2d at ___, 389 P.2d at 380-381, 36 Cal. Rptr. at 844-845 (1964).

Article 3. Prior Statements of Witnesses

§ 1235. Prior inconsistent statement.

Comment. Under existing law, a prior statement of a witness that is inconsistent with his testimony at the trial is admissible, but because of the hearsay rule such statements may not be used as evidence of the truth of the matters stated. They may be used only to cast discredit on the testimony given at the trial. Albert v. McKay & Co., 174 Cal. 451, 456, (1917).

Section 1235, however, permits a prior inconsistent statement of a witness to be used as substantive evidence if the statement is otherwise

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admissible under the rules relating to the impeachment of witnesses. In view of the fact that the declarant is in court and may be examined and cross-examined in regard to his statements and their subject matter, there seems to be little reason to perpetuate the subtle distinction made in the cases. It is not realistic to expect a jury to understand that they cannot believe a witness was telling the truth on a former occasion when they believe the contrary story given at the trial is not true. Moreover, in many cases the prior inconsistent statement is more likely to be true than the testimony of the witness at the trial because it was made nearer in time to the matter to which it relates and is less likely to be influenced by the controversy that gave rise to litigation.

Section 1235 will permit a party to establish a prima facie case by introducing prior inconsistent statements of witnesses. This change in the law, however, will provide a party with desirable protection against the "turncoat" witness who changes his story on the stand and deprives the party calling him of evidence essential to his case.

§ 1236. Prior consistent statement.

Comment. Under existing law, a prior statement of a witness that is consistent with his testimony at the trial is admissible under certain conditions when the credibility of the witness has been attacked. The statement is admitted, however, only to rehabilitate the witness--to support his credibility--and not as evidence of the truth of the matters stated. People v. Kynette, 15 Cal.2d 731, 753-754, (1940).

Section 1236, however, permits a prior consistent statement of a witness to be used as substantive evidence if the statement is otherwise admissible

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under the rules relating to the rehabilitation of impeached witnesses. The reasons for this change in the law are much the same as those discussed in the Comment to Section 1235.

§ 1237. Past recollection recorded.

Comment. Section 1237 provides a hearsay exception for what is usually referred to as "past recollection recorded." The section makes no radical departure from existing law, for its provisions are taken largely from the provisions of Section 2047 of the Code of Civil Procedure. There are, however, two substantive differences between Section 1237 and existing California law:

First, existing law requires that a foundation be laid for the admission of such evidence by showing (1) that the writing recording the statement was made by the witness or under his direction, (2) that the writing was made at a time when the fact recorded in the writing actually occurred or at such other time when the fact was fresh in the witness' memory and (3) that the witness "knew that the same was correctly stated in the writing." Under Section 1237, however, the writing may be made not only by the witness himself or under his direction but also by some other person for the purpose of recording the witness' statement at the time it was made. In addition, Section 1237 permits testimony of the person who recorded the statement to be used to establish that the writing is a correct record of the statement. Sufficient assurance of the trustworthiness of the statement is provided if the declarant is available to testify that he made a true statement and the person who recorded the statement is available to testify that he accurately recorded the statement.

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Second, under Section 1237 the document or other writing embodying the statement is itself admissible in evidence whereas under the present law the declarant reads the writing on the witness stand and the writing is not otherwise made a part of the record unless it is offered in evidence by the adverse party.

Article 4. Spontaneous, Contemporaneous, and Dying Declarations

§ 1240. Spontaneous statement.

Comment. Section 1240 is a codification of the existing exception to the hearsay rule which makes excited statements admissible. Showalter v. Western Pacific R.R., 16 Cal.2d 460, 106 P.2d 895 (1940); Tentative Recommendation and a Study Relating to the Uniform Rules of Evidence (Article VIII. Hearsay Evidence), 4 CAL. LAW REVISION COMM'N, REP., REC. & STUDIES 465-466 (1963). The rationale of this exception is that the spontaneity of such statements and the declarant's state of mind at the time when they are made provide an adequate guarantee of their trustworthiness.

§ 1241. Contemporaneous statement.

Comment. Section 1241, which provides a hearsay exception for contemporaneous statements, may go beyond existing law, for no California case in point has been found. Elsewhere the authorities are conflicting in their results and confused in their reasoning owing to the tendency to discuss the problem only in terms of res gestae. See Tentative Recommendation and a Study Relating to the Uniform Rules of Evidence (Article VIII. Hearsay Evidence), 4 CAL. LAW REVISION COMM'N, REP., REC. & STUDIES at 466-468 (1963).

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The statements admissible under subdivision (2) are highly trustworthy because: (1) the statement being simultaneous with the event, there is no memory problem; (2) there is little or no time for calculated misstatement; and (3) the statement is usually made to one who has equal opportunity to observe and check misstatements. In applying this exception, the courts should insist on actual contemporaneousness; otherwise, the trustworthiness of the statements becomes questionable.

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§ 1242. Dying declaration.

Comment. Section 1242 is a broadened form of the well-established exception to the hearsay rule which makes dying declarations admissible. The existing law--Code of Civil Procedure Section 1870(4) as interpreted by our courts--makes such declarations admissible only in criminal homicide actions and only when they relate to the immediate cause of the declarant's death. People v. Hall, 94 Cal. 595, 30 Pac. 7 (1892); Thrasher v. Board of Medical Examiners, 44 Cal. App. 26, 185 Pac. 1006 (1919). See Tentative Recommendation and a Study Relating to the Uniform Rules of Evidence (Article VIII. Hearsay Evidence), 4 CAL. LAW REVISION COMM'N, REP., REC. § STUDIES 472-473 (1963). The rationale of the exception--that men are not apt to lie in the shadow of death--is as applicable to any other declaration that a dying man might make as it is to a statement regarding the immediate cause of his death. Moreover, there is no rational basis for differentiating, for the purpose of the admissibility of dying declarations, between civil and criminal actions, or among various types of criminal actions.

Under Section 1242, the dying declaration is admissible only if it would be admissible if made by the declarant at the hearing. Thus, the dying declaration is admissible only if the declarant would have been a competent witness and made the statement on personal knowledge.

Article 5. Statements of Mental or Physical State

§ 1250. Statement of declarant's then existing physical or mental condition.

Comment. Section 1250 provides an exception to the hearsay rule for statements of the declarant's then existing physical or mental condition. It

codifies an exception that has been developed by the courts.

Thus, under Section 1250 as under existing law, a statement of the declarant's state of mind at the time of the statement is admissible when that state of mind is itself in issue in the case. Adkins v. Brett, 184 Cal. 252, 193 Pac. 5 (1920). A statement of the declarant's then existing state of mind is also admissible when relevant to show the declarant's state of mind at a time prior to the statement. Watenpaugh v. State Teachers' Retirement, 51 Cal.2d 675, 336 P.2d 165 (1959); Whitlow v. Durst, 20 Cal.2d 523, 127 P.2d 530 (1942); Estate of Anderson, 185 Cal. 700, 198 Pac. 407 (1921); Williams v. Kidd, 170 Cal. 631, 151 Pac. 1 (1915). Section 1250 also makes a statement of then existing state of mind admissible to "prove or explain acts or conduct of the declarant." Thus, a statement of the declarant's intent to do certain acts is admissible to prove that he did those acts. People v. Alcalde, 24 Cal.2d 177, 148 P.2d 627 (1944); Benjamin v. District Grand Lodge, 171 Cal. 260, 152 Pac. 731 (1915). Statements of then existing pain or other bodily condition are also admissible to prove the existence of such condition. Bloomberg v. Laventhal, 179 Cal. 616, 178 Pac. 496 (1919); People v. Wright, 167 Cal. 1, 138 Pac. 349 (1914).

A statement is not admissible under Section 1250 if the statement was made under such circumstances that the declarant in making such statement had motive or reason to deviate from the truth. See Section 1253 and the Comment thereto.

In light of the definition of "hearsay evidence" in Section 155, a distinction should be noted between the use of a declarant's statements of his then existing mental state to prove such mental state and the use of a declarant's statements of other facts as circumstantial evidence of his mental state.

Under the Evidence Code, if the declarant's statements are not being used to prove the truth of their contents but are being used as circumstantial evidence of the declarant's mental state, no hearsay problem is involved. See the Comment to Section 1200.

Section 1250 (b) does not permit a statement of memory or belief to be used to prove the fact remembered or believed. This limitation is necessary to preserve the hearsay rule. Any statement of a past event is, of course, a statement of the declarant's then existing state of mind--his memory or belief--concerning the past event. If the evidence of that state of mind--the statement of memory--were admissible to show that the fact remembered or believed actually occurred, any statement narrating a past event would be, by a process of circuitous reasoning, admissible to prove that the event occurred.

The limitation in Section 1250(b) is, in general, in accord with the law developed in the California cases. Thus, in Estate of Anderson, 185 Cal. 700, 198 Pac. 407 (1921), a declaration of a testatrix made after the execution of a will to the effect that the will had been made at an aunt's request was held to be inadmissible hearsay "because it was merely a declaration as to a past event and was not indicative of the condition of mind of the testatrix at the time she made it." 185 Cal. at 720, 198 Pac. at 415 (1921).

A major exception to the principle expressed in Section 1250(b) was created in People v. Merkouris, 52 Cal.2d 672, 344 P.2d 1 (1959). That case held that statements made by the victims of a double homicide relating threats by the defendant were admissible to show the victims' mental state--their fear of the defendant. Their fear was not itself in issue in the case, but the court held that the fear was relevant to show that the defendant had engaged in conduct

engendering the fear, i.e., that the defendant had in fact threatened them. That the defendant had threatened them was, of course, relevant to show that the threats were carried out in the homicide. Thus, in effect, the court permitted the statements to be used to prove the truth of the matters stated in them. In People v. Purvis, 56 Cal.2d 93, 362 P.2d 713, 13 Cal. Rptr. 801 (1961), the doctrine of the Merkouris case was limited to cases where identity is in issue.

Section 1250(b) is contrary to the Merkouris case. The doctrine of that case is repudiated because it is an attack on the hearsay rule itself. Other exceptions to the hearsay rule are based on some peculiar reliability of the evidence involved. People v. Brust, 47 Cal.2d 776, 785, 306 P.2d 480, (1957). The exception created by Merkouris was not based on any evidence of the reliability of the declarations, it was based on a rationale that destroys the very foundation of the hearsay rule.

§ 1251. Statement of declarant's previously existing physical or mental condition.

Comment. Section 1250 forbids the use of a statement of memory or belief to prove the fact remembered or believed. Section 1251, however, permits a statement of memory or belief of a past mental state to be used to prove the previous mental state when the previous mental state is itself in issue in the case. If the past mental state is to be used merely as circumstantial evidence of some other fact, the limitation in Section 1250 still applies and the statement of the past mental state is inadmissible hearsay.

Section 1251 is generally consistent with the California case law, which also permits a statement of a prior mental state to be used as evidence of that

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mental state. See, e.g., People v. One 1948 Chevrolet Conv. Coupe, 45 Cal.2d 613, 290 P.2d 538 (1955) (statement of prior knowledge admitted to prove such knowledge). However, Section 1251 requires that the declarant be unavailable as a witness. No similar condition on admissibility has been imposed by the cases. Note, too, that no similar condition appears in Section 1250.

A statement is not admissible under Section 1251 if the statement was made under such circumstances that the declarant in making such statement had motive or reason to deviate from the truth. See Section 1253 and the Comment thereto.

§ 1252. Statement of previous symptoms.

Comment. Under existing California law, a statement of previous symptoms made to a physician for purposes of treatment is considered inadmissible hearsay; although the physician may relate the statement as a matter upon which he based his diagnosis of the declarant's ailment. See discussion in People v. Brown, 49 Cal.2d 577, 585-587, 320 P.2d 5, (1958).

Section 1252 permits statements of previous symptoms made to a physician for purposes of treatment to be used to prove the facts related in the statements, If there is no motive to falsify such statements, they are likely to be highly reliable, for the declarant in making them has based his actions on his belief in their truth--he has consulted the physician and has permitted the physician to use them as a basis for prescribing treatment. Statements made to a physician where there is a motive to manufacture evidence or any other motive to deceive are inadmissible under this section because of the limitation in Section 1253.

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§ 1253. Limitation on admissibility of statements of mental or physical state.

Comment. Section 1253 limits the admissibility of hearsay statements that would otherwise be admissible under Sections 1250, 1251, and 1252. If a statement of mental or physical state was made with a motive to misrepresent or to manufacture evidence, the statement is not sufficiently reliable to warrant its reception in evidence. The limitation expressed in Section 1253 has been held to be a condition of admissibility in some of the California cases. See, e.g., People v. Hamilton, 55 Cal.2d 881, 893, 895, 13 Cal. Rptr. 649, , , 362 P.2d 473, , (1961); People v. Alcalde, 24 Cal.2d 177, 187, 148 P.2d 627, (1944).

The Hamilton case mentions some further limitations on the admissibility of statements of mental state. These are not given express recognition in the Evidence Code. However, under Section 352, the judge may in a particular case exclude such evidence if he determines that its prejudicial effect will substantially outweigh its probative value. The specific limitations mentioned in the Hamilton case have not been codified because they are difficult to understand in the light of conflicting and inconsistent language in the case and because in a different case, prosecuted without the excessive prejudice present in the Hamilton case, a court might be warranted in receiving evidence of the kind involved there where its probative value is great.

For example, the opinion states that statements of a homicide victim that are offered to prove his state of mind are inadmissible if they refer solely to alleged past conduct on the part of the accused. 55 Cal.2d at 893-894, 13 Cal. Rptr. at , 362 P.2d at . But the case also states, nonetheless, that statements of "threats . . . on the part of the accused" are admissible on the

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issue. 55 Cal.2d at 893, 13 Cal. Rptr. at , 362 P.2d at . The opinion also states that the statements, to be admissible, must refer primarily to the state of mind of the declarant and not the state of mind of the accused. 55 Cal.2d at 893, 13 Cal. Rptr. at , 362 P.2d at . But the case also indicates that narrations of threats made by the accused--statements of his intent--are admissible, but statements of conduct by the accused having no relation to his intent or mental state are not admissible. 55 Cal.2d at 893, 895-896, 13 Cal. Rptr. at 362 P.2d at .

Much of the evidence involved in the Hamilton case is not classified as hearsay under the Evidence Code. It is classified as circumstantial evidence. Hence, the problem presented there is not essentially a hearsay problem. It is a problem of the judge's discretion to exclude highly prejudicial evidence when its probative value is not great. Section 352 of the Evidence Code continues the judge's power to curb the use of such evidence. But the Evidence Code does not freeze the courts to the arbitrary and contradictory standards mentioned in the Hamilton case for determining when prejudicial effect outweighs probative value.

Article 6. Statements Relating to Wills and to Claims Against Estates

§ 1260. Statement concerning declarant's will.

Comment. Section 1260 codifies an exception recognized in California case law. Estate of Morrison, 198 Cal. 1, 242 Pac. 939 (1926); Estate of Tompson, 44 Cal. App.2d 774, 112 P.2d 937 (1941). The section is, of course, subject to the provisions of Probate Code Sections 350 and 351 which relate to the establishment of a lost or destroyed will.

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The limitation in subdivision (b) is not mentioned in the few decisions involving this exception. The limitation is desirable, however, to assure the reliability of the hearsay admissible under this section.

§ 1261. Statement of decedent offered in action against his estate.

Comment. The Dead Man Statute (subdivision 3 of Code of Civil Procedure Section 1880) prohibits a party suing on a claim against a decedent's estate from testifying to any fact occuring prior to the decedent's death. The theory apparently underlying the statute is that it would be unfair to permit the surviving claimant to testify to such facts when the decedent is precluded from doing so by his death. Because the dead cannot speak, the living may not.

The Dead Man Statute operates unsatisfactorily. It prohibits testimony concerning matters of which the decedent had no knowledge. It does not prohibit testimony relating to claims under, as distinguished from against, the decedent's estate even though the effect of such a claim may be to frustrate the decedent's plan for the disposition of his property. See the Comment to Code of Civil Procedure Section 1880 and Recommendation and Study Relating to the Dead Man Statute, 1 CAL. LAW REVISION COMM'N, REP., REC. & STUDIES at D-1 (1957). Hence, the Dead Man Statute is not continued in the Evidence Code.

To equalize the positions of the parties, the Dead Man Statute excludes otherwise relevant and competent evidence--even if it is the only available evidence. This forces the courts to decide cases with a minimum of information concerning the actual facts. See the Supreme Court's complaint in Light v. Stevens, 159 Cal. 288, 292, 113 Pac. 659, 660 (1911): "Owing to the fact that the lips of one of the parties to the transaction are closed by death and those of the other party by the law, the evidence on this question is somewhat unsatisfactory."

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Section 1261 balances the positions of the parties in the opposite manner. It is based on the belief that the problem at which the Dead Man Statute is directed is better solved by throwing more light, not less, on the actual facts. Instead of excluding the competent evidence of the claimant, Section 1261 permits the hearsay statements of the decedent to be admitted, provided that they would have been admissible had the decedent made the statements as a witness at the hearing. Certain additional safeguards--recent perception, absence of motive to falsify--are included in the section to provide some protection for the party against whom the statements are offered, for he has no opportunity to test the hearsay by cross-examination.

Article 8. Business Records

§ 1270. "A business."

Comment. This article restates and supersedes the Uniform Business Records as Evidence Act appearing in Sections 1953e-1953h of the Code of Civil Procedure. The definition of "a business" in Section 1270 is substantially the same as that appearing in Code of Civil Procedure Section 1953e. A reference to "governmental activity" has been added to the Evidence Code definition to make it clear that records maintained by any governmental agency are admissible if the foundational requirements are met. This does not change existing California law, for the Uniform Act has been construed to be applicable to governmental records. See, e.g., Nichols v. McCoy, 38 Cal.2d 447, 240 P.2d 569 (1952); Fox v. San Francisco Unified School Dist., 11 Cal. App.2d 885, 245 P.2d 603 (1952).

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The definition is sufficiently broad to encompass institutions not customarily thought of as businesses. For example, the baptismal and wedding records of a church would be admissible under the section to prove the events recorded. 5 WIGMORE, EVIDENCE 371 (3d ed. 1940). Cf. EVIDENCE CODE § 1315.

§ 1271. Business record.

Comment. Section 1271 is the business records exception to the hearsay rule. It is stated in language taken from the Uniform Business Records as Evidence Act which was adopted in California in 1941 (Sections 1953e-1953h of the Code of Civil Procedure). Section 1271 does not, however, include the language of Section 1953f.5 of the Code of Civil Procedure because that section is not contained in the Uniform Act and inadequately attempts to make explicit the liberal case-law rule that the Uniform Act permits admission of records kept under any kind of bookkeeping system, whether original or copies, and whether in book, card, looseleaf or some other form. The case-law rule is satisfactory and Section 1953f.5 may have the unintended effect of limiting the provisions of the Uniform Act. See Tentative Recommendation and a Study Relating to the Uniform Rules of Evidence (Article VIII. Hearsay Evidence), 4 CAL. LAW REVISION COMM'N, REP., REC. & STUDIES at 516 (1963).

§ 1272. Absence of entry in business records.

Comment. Technically, evidence of the absence of a record may not be hearsay. Section 1272 removes any doubt that there might be, however, concerning the admissibility of such evidence under the hearsay rule. It codifies existing case law. People v. Torres, 201 Cal. App.2d 290, 20 Cal. Rptr. 315 (1962).

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Article 8. Official Reports and Other Official Writings

§ 1280. Report of public employee.

Comment. Section 1280 restates in substance and supersedes Code of Civil Procedure Sections 1920 and 1926.

The evidence that is admissible under this section is also admissible under Section 1271, the business records exception. However, Section 1271 requires a witness to testify as to the identity of the record and its mode of preparation in every instance. Under Section 1280, as under existing law, the court may admit an official record or report without necessarily requiring a witness to testify as to its identity and mode of preparation if the court has judicial notice or if sufficient independent evidence shows that the record or report was prepared in such a manner as to assure its trustworthiness. See, e.g., People v. Williams, 64 Cal. 87, 27 Pac. 939 (1883) (census report admitted, the court noting the statutes prescribing the method of preparing the report); Vallejo etc. R.R. Co. v. Reed Orchard Co., 169 Cal. 545, 571, 147 Pac. 238, 250 (1915) (statistical report of state agency admitted, the court noting the statutory duty to prepare the report).

§ 1281. Report of vital statistic.

Comment. Section 1281 provides a hearsay exception for official reports concerning birth, death, and marriage. Reports of such events occurring within California are now admissible under the provisions of Section 10577 of the Health and Safety Code. Section 1281 provides a broader exception which includes similar reports from other jurisdictions.

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§ 1282. Finding of presumed death by authorized federal employee.

Comment. Section 1282 restates and supersedes the provisions of Code of Civil Procedure Section 1928.1. The evidence admissible under Section 1282 is limited to evidence of the fact of death and of the date, circumstances, and place of disappearance.

The determination of the date of the presumed death by the federal employee is a determination ordinarily made for the purpose of determining whether the pay of a missing person should be stopped and his name stricken from the payroll. The date so determined should not be given any consideration in the California courts since the issues involved in the California proceedings require determination of the date of death for a different purpose. Hence Section 1282 does not make admissible the finding of the date of presumed death. On the other hand, the determination of the date, circumstances, and place of disappearance is reliable information that will assist the trier of fact in determining the date when the person died and is admissible under this section. Often the date of death may be inferred from the circumstances of the disappearance. See, In re Thornburg's Estate, 186 Or. 570, 208 P.2nd 349 (1949); Lukens v. Camden Trust Co., 2 N.J. Super. 214, 62 A.2nd 886 (1948).

Section 1282 provides a convenient and reliable method of proof of death of persons covered by the Federal Missing Persons Act. See, e.g., In re Jacobsen's Estate, 208 Misc. 443, 143 N.Y.S.2nd 432 (1955)(proof of death of 2-year old dependent of serviceman where child was passenger on plane lost at sea).

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§ 1283. Report by federal employee that person is missing, captured, or the like.

Comment. Section 1283 restates and supersedes the provisions of Code of Civil Procedure Section 1928.2. The language of Section 1928.2 has been revised to reflect the 1953 amendments to the Federal Missing Persons Act.

§ 1284. Statement of absence of public record.

Comment. Just as the existence and content of a public record may be proved under Section 1510 by a copy accompanied by the attestation or certificate of the custodian reciting that it is a copy, the absence of such a record from a particular public office may be proved under Section 1284 by a writing made by the custodian of the records in that office stating that no such record was found after a diligent search. The writing must, of course, be properly authenticated. See Sections 1401, 1451. The exception is justified by the likelihood that such statement made by the custodian of the records is accurate and by the necessity for providing a simple and inexpensive method of proving the absence of a public record.

Article 9. Former Testimony

§ 1290. "Former testimony."

Comment. The purpose of Section 1290 is to provide a convenient term for use in the substantive provisions in the remainder of this article. It should be noted that depositions taken in another action are considered former testimony under Section 1290, and their admissibility is determined by Sections 1291 and 1292.

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The use of a deposition taken in the same action, however, is not covered by this article. Code of Civil Procedure Sections 2016-2035 deal comprehensively with the conditions and circumstances under which a deposition taken in a civil action may be used at the trial of the action in which the deposition was taken, and Penal Code Sections 1345 and 1362 prescribe the conditions for admitting the deposition of a witness that has been taken in the same criminal action. These sections will continue to govern the use of depositions in the action in which they are taken.

§ 1291. Former testimony offered against party to former proceeding.

Comment. Section 1291 provides a hearsay exception for former testimony offered against a person who was a party to the proceeding in which the former testimony was given. For example, if a series of cases arise involving several plaintiffs and but one defendant, Section 1291 permits testimony given in the first trial to be used against the defendant in a later trial if the conditions of admissibility stated in the section are met.

Former testimony is admissible under Section 1291 only if the declarant is unavailable as a witness.

Paragraph (1) of subdivision (a) of Section 1291 provides for the admission of former testimony if it is offered against the party who offered it in the previous proceeding. This evidence, in effect, is somewhat analogous to an admission. If the party finds that the evidence he originally offered in his favor now works to his disadvantage, he can respond as any party does to an admission. Moreover, since the witness is no longer available to testify, the party's previous direct and redirect examination should be considered an adequate substitute for his present right to cross-examine.

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Paragraph (2) of subdivision (a) of Section 1291 provides for the admissibility of former testimony where the party against whom it is now offered had the right and opportunity in the former proceeding to cross-examine the declarant with an interest and motive similar to that which he now has. Since the party has had his opportunity to cross-examine, the primary objection to hearsay evidence--lack of opportunity to cross-examine the declarant--is not applicable. On the other hand, paragraph (2) does not make the former testimony admissible where the party against whom it is offered did not have a similar motive and interest to cross-examine. In determining the similarity of interest and motive to cross-examine, the judge should be guided by practical considerations and not merely by the similarity of the party's position in the two cases. For example, testimony contained in a deposition that was taken, but not offered in evidence at the trial, in a different action should be excluded if the judge determines that the deposition was taken for discovery purposes and that the party did not subject the witness to a thorough cross-examination because he sought to avoid a premature revelation of the weakness in the testimony of the witness or in the adverse party's case. In such a situation, the party's interest and motive for cross-examination on the previous occasion would have been substantially different from his present interest and motive.

Under paragraph (2), testimony in a deposition taken in another action and testimony given in a preliminary examination in another criminal action is not admissible against the defendant in a criminal case unless it was received in evidence at the trial of such other action. This limitation insures that the person accused of crime will have an adequate opportunity to cross-examine the witnesses against him.

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Section 1291 supersedes Code of Civil Procedure Section 1870(8) which permits former testimony to be admitted in a civil case only if the former proceeding was an action between the same parties or their predecessors in interest, relating to the same matter, or was a former trial of the action in which the testimony is offered. Section 1291 will also permit a broader range of hearsay to be introduced against the defendant in a criminal action than has been permitted under Penal Code Section 686. Under that section, former testimony has been admissible against the defendant in a criminal action only if the former testimony was given in the same action--at the preliminary examination, in a deposition, or in a prior trial of the action.

Subdivision (b) of Section 1291 makes it clear that objections based on the competence of the declarant or on privilege are to be determined by reference to the time the former testimony was given. Existing California law is not clear on this point; some California decisions indicate that competency and privilege are to be determined as of the time the former testimony was given, but others indicate that competency and privilege are to be determined as of the time the former testimony is offered in evidence. See Tentative Recommendation and a Study Relating to the Uniform Rules of Evidence (Article VIII. Hearsay Evidence), 4 CAL. LAW REVISION COMM'N, REP., REC. & STUDIES at 581-585 (1963).

Subdivision (b) also provides that objections to the form of the question may not be used to exclude the former testimony. Where the former testimony is offered under paragraph (1) of subdivision (a), the party against whom the former testimony is now offered himself phrased the question; and where the former testimony comes in under paragraph (2) of subdivision (a), the party against whom the testimony is now offered had the opportunity to object to the form of the question when it was asked on the former occasion. Hence, the

party is not permitted to raise this technical objection when the former testimony is offered against him.

§ 1292. Former testimony offered against person not a party to former proceeding.

Comment. Section 1292 provides a hearsay exception for former testimony given at the former proceeding by a person who is now unavailable as a witness when such former testimony is offered against a person who was not a party to the former proceeding but whose motive for cross-examination is similar to that of a person who had the right and opportunity to cross-examine the declarant when the former testimony was given. For example, if a series of cases arise involving one occurence and one defendant but several plaintiffs, Section 1292 permits testimony given against the plaintiff in the first trial to be used against a plaintiff in a later trial if the conditions of admissibility stated in the section are met.

Code of Civil Procedure Section 1870(8) (which is superseded by this article), does not permit admission of the former testimony made admissible by Section 1292. The out-dated "identity of parties" and "identity of issues" requirements of Section 1870 are too restrictive, and Section 1292 substitutes what is, in effect, a more flexible "trustworthiness" approach characteristic of other hearsay exceptions. The trustworthiness of the former testimony is sufficiently guaranteed because the former adverse party had the right and opportunity to cross-examine with an interest and motive similar to that of the present adverse party. Although the party against whom the former testimony is offered did not himself have an opportunity to cross-examine the witness on the former occasion, it can be generally assumed that most prior cross-examination is

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adequate, especially if the same stakes are involved. If the same stakes are not involved, the difference in interest or motivation would justify exclusion. And, even where if the prior cross-examination was inadequate, there is better reason here for providing a hearsay exception than there is for many of the presently recognized exceptions to the hearsay rule. As Professor McCormick states:

> . . . I suggest that if the witness is unavailable, then the need for the sworn, transcribed former testimony in the ascertainment of truth is so great, and its reliability so far superior to most, if not all the other types of oral hearsay coming in under the other exceptions, that the requirements of identity of parties and issues be dispensed with. This dispenses with the opportunity for cross-examination, that great characteristic weapon of our adversary system. But the other types of admissible oral hearsay, admissions, declarations against interest, statements about bodily symptoms, likewise dispense with cross-examination, for declarations having far less trustworthiness than the sworn testimony in open court, and with a far greater hazard of fabrication or mistake in the reporting of the declaration by the witness. [McCormick, Evidence § 238, p. 501 (1954).]

Section 1292 does not make former testimony admissible against the defendant in a criminal case. This limitation preserves the right of a person accused of crime to confront and cross-examine the witnesses against him. When a person's life or liberty is at stake--as it is in a criminal trial--the accused should not be compelled to rely on the fact that another person has had an opportunity to cross-examine the witness.

Subdivision (b) of Section 1292 makes it clear that objections based on competency or privilege are to be determined by reference to the time when the former testimony was given. Existing California law is not clear on this point; some California decisions indicate that competency and privilege are to be determined as of the time the former testimony was given but others indicate that competency and privilege are to be determined as of the time

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the former testimony is offered in evidence. See Tentative Recommendation and a Study Relating to the Uniform Rules of Evidence (Article VIII. Hearsay Evidence), 4 CAL. LAW REVISION COMM'N, REP., REC. & STUDIES at 581-585 (1963).

Article 10. Judgments

§ 1300. Judgment of felony conviction.

Comment. Analytically, a judgment that is offered to prove the matters determined by the judgment is hearsay evidence. UNIFORM RULES OF EVIDENCE, RULE 63(20), Comment (1953); Tentative Recommendation and a Study Relating to the Uniform Rules of Evidence (Article VIII. Hearsay Evidence), 4 CAL. LAW REVISION COMM'N, REP., REC. & STUDIES at 539-541 (1963). It is in substance a statement of the court that determined the previous action ("a statement made other than by a witness while testifying at the hearing") that is offered "to prove the truth of the matter stated." Section 155. Therefore, unless there is an exception to the hearsay rule provided, a judgment is inadmissible if offered in a subsequent action to prove the matters determined. This article provides hearsay exceptions for certain kinds of judgments, and thus permits them to be used in subsequent actions as evidence despite the restrictions of the hearsay rule.

Of course, a judgment may, as a matter of substantive law, conclusively establish certain facts insofar as a party is concerned. Teitlebaum Furs, Inc. v. Dominion Ins. Co., 58 Cal.2d 601, 25 Cal. Rptr. 559, 375 P.2d 439 (1962); Bernhard v. Bank of America, 19 Cal.2d 807, 122 P.2d 892 (1942). The sections of this article do not purport to deal with the doctrines of res judicata and estoppel by judgment. These sections deal only with the evidentiary use of

judgments in those cases where the substantive law does not require that the judgments be given conclusive effect.

Section 1300 provides an exception to the hearsay rule for a final judgment adjudging a person guilty of a felony. The exception does not, however, apply in criminal actions. Hence, if a plaintiff sues to recover a reward offered by the defendant for the arrest and conviction of a person who committed a particular crime, Section 1300 permits the plaintiff to use a judgment of felony conviction as evidence that the person convicted committed the crime. But, Section 1300 does not permit the judgment to be used in a criminal action as evidence of the identity of the person who committed the crime or as evidence that the crime was committed.

Section 1300 will change the California law. Under existing California law, a conviction of a crime is inadmissible as evidence in a subsequent action. Marceau v. Travelers' Ins. Co., 101 Cal. 338, 35 Pac. 856 (1894) (evidence of murder conviction inadmissible to prove insured was intentionally killed); Burke v. Wells, Fargo & Co., 34 Cal. 60 (1867) (evidence of robbery conviction inadmissible to prove identity of robber in action to recover reward). The change, however, is desirable; for the evidence involved is peculiarly reliable. The seriousness of the charge assures that the facts will be thoroughly litigated, and the fact that the judgment must be based upon a unanimous determination that there was not a reasonable doubt concerning the defendant's guilt assures that the question of guilt will be thoroughly considered.

The exception in Section 1300 for cases where the judgment is based on a plea of nolo contendere is a reflection of the policy expressed in Penal Code Section 1016.

§ 1301. Judgment against person entitled to indemnity.

Comment. If a person entitled to indemnity, or if the obligee under a warranty contract, complies with certain conditions relating to notice and defense, the indemnitor or warrantor is conclusively bound by any judgment recovered. CIVIL CODE § 2778(5); CODE CIV. PROC. § 1912; McCormick v. Marcy, 165 Cal. 386, 132 Pac. 449 (1913).

Where judgment against an indemnitee or person protected by a warranty is not made conclusive on the indemnitor or warrantor, Section 1301 permits the judgment to be used as hearsay evidence in an action to recover on the indemnity or warranty. Section 1301 reflects the existing law relating to indemnity agreements. CIVIL CODE § 2778, subdivision 6. Section 1301 probably restates the law relating to warranties, too, but the law in that regard is not altogether clear. Erie City Iron Works v. Tatum, 1 Cal. App. 286, 82 Pac. 92 (1905). But see Peabody v. Phelps, 9 Cal. 213 (1858).

§ 1302. Judgment determining liability of third person.

Comment. Section 1302 expresses an exception contained in Code of Civil Procedure Section 1851. Ellsworth v. Bradford, 186 Cal. 316, 199 Pac. 335 (1921); Nordin v. Bank of America, 11 Cal. App.2d 98, 52 P.2d 1018 (1936). Together, Evidence Code Sections 1302 and 1226 restate and supersede the provisions of Code of Civil Procedure Section 1851.

Article 11. Family History

§ 1310. Statement concerning declarant's own family history.

Comment. Section 1310 provides a hearsay exception for a statement concerning the declarant's own family history. It restates in substance and

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supersedes Section 1870(4) of the Code of Civil Procedure. Section 1870(4), however, requires that the declarant be dead whereas unavailability of the declarant for any of the reasons specified in Section 240 makes the statement admissible under Section 1310.

The statement is not admissible if it was made under such circumstances that the declarant in making the statement had motive or reason to deviate from the truth. This permits the judge to exclude the statement where it was made under such circumstances as to case doubt upon its trustworthiness. The requirement is basically the same as the requirement of existing case law that the statement be made at a time when no controversy existed on the precise point concerning which the declaration was made. See, e.g., Estate of Walder, 166 Cal. 446, 137 Pac. 35 (1913); Estate of Nidever, 181 Cal. App.2d 367, 5 Cal. Rptr. 343 (1960).

§ 1311. Statement concerning family history of another.

Comment. Section 1311 provides a hearsay exception for a statement concerning the family history of another. Paragraph (1) of subdivision (a) restates in substance existing California law as found in Section 1870(4) of the Code of Civil Procedure, which it supersedes. Paragraph (2) is new to California law, but it is a sound extension of the present law to cover a situation where the declarant was a family housekeeper or doctor or so close a friend as to be included by the family in discussions of its family history.

There are two limitations on admissibility of a statement under Section 1311. First, a statement is admissible only if the declarant is unavailable as a witness within the meaning of Section 240. (Section 1870(4) requires that

the declarant be deceased in order for his statement to be admissible.) Second, a statement is not admissible if it was made under such circumstances that the declarant in making the statement had motive or reason to deviate from the truth. For a discussion of this requirement, see comment to Section 1310.

§ 1312. Entries in family bibles and the like.

Comment. Section 1312 restates in substance and supersedes the provisions of Code of Civil Procedure Section 1870(13).

§ 1313. Reputation in family concerning family history.

Comment. Section 1313 restates in substance and supersedes the provisions of Code of Civil Procedure Sections 1852 and 1870(11). See Estate of Connors, 53 Cal. App.2d 484, 128 P.2d 200 (1942); Estate of Newman, 34 Cal. App.2d 706, 94 P.2d 356 (1939). However, Section 1870(11) requires that the family reputation in question have existed "previous to the controversy." This qualification is not included in Section 1313 because it is unlikely that a family reputation on a matter of pedigree would be influenced by the existence of a controversy even though the declaration of an individual member of the family, covered in Sections 1300 and 1311, might be.

The family tradition admitted under Section 1313 is necessarily multiple hearsay. If, however, such tradition were inadmissible because of the hearsay rule, and if direct statements of pedigree were inadmissible because they are based on such traditions (as most of them are), the courts would be virtually helpless in determining matters of pedigree. See Tentative Recommendation and a Study Relating to the Uniform Rules of Evidence (Article VIII.

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Hearsay Evidence), 4 CAL. LAW REVISION COMM'N, REP., REC. § STUDIES at 548 (1963).

§ 1314. Community reputation concerning family history.

Comment. Section 1314 restates what has been held to be existing law under Code of Civil Procedure Section 1963(30) with respect to proof of the fact of marriage. See Estate of Baldwin, 162 Cal. 471, 123 Pac. 267 (1912); People v. Vogel, 46 Cal.2d 798, 299 P.2d 850 (1956). However, Section 1314 has no counterpart in California law insofar as proof of the date or fact of birth, divorce, or death is concerned, proof of such facts by reputation now being limited to reputation in the family. See Estate of Heaton, 135 Cal. 385, 67 Pac. 321 (1902).

§ 1315. Church records concerning family history.

Comment. Church records generally are admissible as business records under the provisions of Section 1271. Under Section 1271, such records would be admissible to prove the occurence of the church activity--the baptism, confirmation, or marriage--recorded in the writing. However, it is unlikely that Section 1271 would permit such records to be used as evidence of the age or relationship of the participants; for the business records act has been held to authorize business records to be used to prove only facts known personally to the recorder of the information or to other employees of the business. Patek & Co. v. Vineberg, 210 Cal. App.2d 20, 23, 26 Cal. Rptr. 293 (1962) (hearing denied); People v. Williams, 187 Cal. App.2d 355, 9 Cal. Rptr. 722 (1960); Gough v. Security Trust & Sav. Bank, 162 Cal. App.2d 90, 327 P.2d 555 (1958).

Section 1315 permits church records to be used to prove certain additional information. Facts of family history such as birth dates, relationships,

marital records, etc., that are ordinarily reported to church authorities and recorded in connection with the church's baptismal, confirmation, marriage, and funeral records may be proved by such records under Section 1315.

Section 1315 continues in effect and supersedes the provisions of Code of Civil Procedure Section 1919a without, however, the special and cumbersome authentication procedure specified in Code of Civil Procedure Section 1919b. Under Section 1315, church records must be authenticated in the same manner that other business records are authenticated.

§ 1316. Marriage, baptismal, and similar certificates.

Comment. Section 1316 provides a hearsay exception for marriage, baptismal, and similar certificates. This exception is somewhat broader than that found in Sections 1919a and 1919b of the Code of Civil Procedure (superseded by Sections 1315 and 1316). Sections 1919a and 1919b are limited to church records and hence, as respects marriages, to those performed by clergymen. Moreover, they establish an elaborate and detailed authentication procedure whereas certificates made admissible by Section 1316 need only meet the general authentication requirement of Section 1401.

Article 12. Reputation and Statements Concerning Community History, Property Interest, and Character.

§ 1320. Reputation concerning community history.

Comment. Section 1320 provides a wider rule of admissibility than does Code of Civil Procedure Section 1870(11), which it supersedes in part. Section 1870 provides in relevant part that proof may be made of "common reputation

existing previously to the controversy, respecting facts of a public or general nature more than thirty years old." The 30-year limitation is essentially arbitrary. The important question would seem to be whether a community reputation on the matter involved exists; its age would appear to go more to its venerability than to its truth. Nor is it necessary to include in Section 1320 the requirement that the reputation existed previous to controversy. It is unlikely that a community reputation respecting an event of general history would be influenced by the existence of a controversy.

§ 1321. Reputation concerning public interest in property.

Comment. Section 1321 preserves the rule in Simons v. Inyo Cerro Gordo Co., 48 Cal. App. 524, 192 Pac. 144 (1920). It does not require, however, that the reputation be more than 30 years old, but merely that the reputation arose before controversy. See Comment to Section 1320.

§ 1322. Reputation concerning boundary or custom affecting land.

Comment. Section 1322 restates in substance existing law as found in Code of Civil Procedure Section 1870(11), which it supersedes in part. See Muller v. So. Pac. Ry. Co., 83 Cal. 240, 23 Pac. 265 (1890); Ferris v. Emmons, 214 Cal. 501, 6 P.2d 950 (1931).

§ 1323. Statement concerning boundary.

Comment. Section 1323 restates the substance of existing but uncodified California law found in such cases as Morton v. Folger, 15 Cal. 275 (1860) and Morcom v. Baiersky, 16 Cal. App. 480, 117 Pac. 560 (1911).

§ 1324. Reputation concerning character.

Comment. Section 1324 codifies a well-settled exception to the hearsay rule. See, e.g., People v. Cobb, 45 Cal.2d 158, 287 P.2d 752 (1955). Of course, character evidence is admissible only when the question of character is material to the matter being litigated. The only purpose of Section 1324 is to declare that reputation evidence as to character or a trait of character is not inadmissible under the hearsay rule.

Article 13. Dispositive Instruments and Ancient Writings

§ 1330. Recitals in writings affecting property.

Comment. Section 1330 restates in substance the existing California law relating to recitals in dispositive instruments. Although language in some cases appears to require that the dispositive instrument be ancient, cases may be found in which recitals in dispositive instruments have been admitted without regard to the age of the instrument. Russell v. Langford, 135 Cal. 356, 67 Pac. 331 (1902) (recital in will); Pearson v. Pearson, 46 Cal. 609 (1873) (recital in will); Culver v. Newhart, 18 Cal. App. 614, 123 Pac. 975 (1912) (bill of sale). There is a sufficient likelihood that the statements made in a dispositive document, when related to the purpose of the document, will be true to warrant the admissibility of such documents without regard to their age.

§ 1331. Recitals in ancient writings.

Comment. Section 1331 clarifies the existing California law relating to the admissibility of recitals in ancient documents by providing that such recitals are admissible under an exception to the hearsay rule. Code of Civil

Procedure Section 1963(34) (superseded by Evidence Code) provides that a document more than 30 years old is presumed genuine if it has been generally acted upon as genuine by persons having an interest in the matter. The Supreme Court has held that a document meeting this section's requirements is presumed to be genuine--presumed to be what it purports to be--but that the genuineness of the document imports no verity to the recitals contained therein. Gwin v. Calegaris, 139 Cal. 384, 389, 73 Pac. 851, 853 (1903). Recent cases decided by district courts of appeal, however, have held that the recitals in such a document are admissible to prove the truth of the facts recited. E.g., Estate of Nidever, 181 Cal. App.2d 367, 5 Cal. Rptr. 343 (1960); Kirkpatrick v. Tapo Oil Co., 144 Cal. App.2d 404, 301 P.2d 274 (1956). And in some of these cases the courts have not insisted that the hearsay statement itself be acted upon as true by persons with an interest in the matter; the evidence has been admitted upon a showing that the document containing the statement is genuine. The age of a document alone is not a sufficient guarantee of the trustworthiness of a statement contained therein to warrant the admission of the statement into evidence. Accordingly, Section 1331 makes clear that the hearsay statement itself must have been generally acted upon as true for at least a generation by persons having an interest in the matter.

Article 14. Commercial, Scientific, and Similar Publications

§ 1340. Commercial lists and the like.

Comment. Section 1340 codifies an exception that has been recognized by statute and by the courts in specific situations. See, e.g., COM. CODE § 2724; Emery v. So. Cal. Gas Co., 72 Cal. App.2d 821, 165 P.2d 695 (1946);

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Christiansen v. Hollings, 44 Cal. App.2d 332, 112 P.2d 723 (1941).

§ 1341. Publications concerning facts of general notoriety and interest.

Comment. Section 1341 recodifies without substantive change Section 1936 of the Code of Civil Procedure.

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Supreme Court of California

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Lower Court Case Number: **B296639**

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Date

/s/Frederic Cohen

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Cohen, Frederic (56755)

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