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 8 OF 14, PAGES 1643-1916 OF 3537

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

HORVITZ & LEVY LLP
*FREDERIC D. COHEN (BAR NO. 56755)
LISA PERROCHET (BAR NO. 132858)
3601 WEST OLIVE AVENUE, 8TH FLOOR
BURBANK, CALIFORNIA 91505-4681
(818) 995-0800 • FAX: (844) 497-6592
fcohen@horvitzlevy.com
lperrochet@horvitzlevy.com

SANDERS ROBERTS LLP
JUSTIN H. SANDERS (BAR NO. 211488)
DARTH K. VAUGHN (BAR NO. 253276)
SABRINA C. NARAIN (BAR NO. 299471)
1055 WEST 7TH STREET, SUITE 3050
LOS ANGELES, CALIFORNIA 90017
(213) 426-5000 • FAX: (213) 234-4581
jsanders@sandersroberts.com
dvaughn@sandersroberts.com
snarain@sandersroberts.com

ATTORNEYS FOR REAL PARTY IN INTEREST
FORD MOTOR COMPANY

#34(L) 11/13/64

Memorandum 64-101

Subject: Study No. 34(L) - Uniform Rules of Evidence (Revised Preprint Senate Bill No. 1)

The November meeting is the last chance we have to resolve matters in connection with the Evidence Code before the bill is introduced.

We have received three letters since the October meeting commenting on Senate Preprint Bill No. 1. One of these was the report of the State Bar Committee which we have previously sent to you. The others are:

Exhibit II (blue)-Comments of Office of Legislative Counsel

Exhibit III (pink)-Comments of Professor Davis on Judicial Notice

In this memorandum we indicate the various matters raised by persons commenting on the preprinted bill and some additional matters raised by the staff. Comments are directed toward the Revised Preprinted Senate Bill No. 1 (yellow pages attached). There were no comments on the sections not listed in this memorandum.

The staff recommendations with reference to the suggestions of the State Bar Committee are based on the assumption that the Commission will want to adopt those suggestions whenever possible.

Title

The Legislative Counsel states "Pursuant to your request we have examined 1965 Preprint Senate Bill No. 1 for adequacy of the title, and we find the title to be legally adequate."

Section 12

The Legislative Counsel suggests that Section 12 and Section 152

should provide that the code and the rest of the bill shall become operative on January 1, 1967.

The State Bar (item 1) suggests in substance that Section 12 be revised to read:

> 12. (a) Subject to subdivision (c), this code shall become ~~effective~~ operative on January 1, 1967, and shall govern proceedings in actions brought on or after that date and also further proceedings in actions pending on that date.
>
> (b) Subject to subdivision (c), the provisions of Division 8 (commencing with Section 900) relating to privileges shall govern any claim of privilege made after December 31, 1966.
>
> (c) This code does not apply to any hearing commenced prior to January 1, 1967, which has not been completed prior to that date, and the provisions of law in effect on December 31, 1966, shall continue to apply until the completion of such hearing; but this code does apply to any subsequent hearings in such action.

Division 2 Generally

The State Bar Committee suggests that definitions that are pertinent primarily to a particular division of the Evidence Code should be contained in that division. We think this is a good suggestion with respect to some of the definitions. Accordingly, we make the following recommendation.

Definitions applicable to the Hearsay Evidence Division. In accordance with the State Bar Committee's suggestion (item 2), we suggest that the definitions of "declarant" (Section 135), "statement" (Section 225), and "unavailable as a witness" (Section 240) be included in the hearsay evidence division. Thus, Chapter 1 of Division 10 would be revised to read:

CHAPTER 1. DEFINITIONS AND GENERAL PROVISIONS

1200. "Hearsay evidence" is evidence of a statement that was made other than by a witness while testifying at the hearing and that is offered

to prove the truth of the matter stated.

1201. "Declarant" is a person who makes a statement.

1202. "Statement" means (a) a verbal expression or (b) nonverbal conduct of a person intended by him as a substitute for a verbal expression.

1203. (a) Except as otherwise provided in subdivision (b), "unavailable as a witness" means that the declarant is:

(1) Exempted or precluded 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 from the hearing and the court is unable to compel his attendance by its process; or

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

(b) A declarant is not unavailable as a witness if the exemption, preclusion, disqualification, death, inability, or absence of the declarant was brought about by the procurement or wrongdoing of the proponent of his statement for the purpose of preventing the declarant from attending or testifying.

1204. Except as provided by law, hearsay evidence is inadmissible. This section shall be known and may be cited as the hearsay rule.

1205. [PICK UP SECTION 1202.]

1206. [PICK UP SECTION 1203.]

1207. [PICK UP SECTION 1204.]

1208. [PICK UP SECTION 1205.]

A check of the revised preprinted bill reveals that "declarant" is used outside the hearsay division only in Section 210, and "unavailable as a witness" is used only in the hearsay division. Accordingly, we do not believe that we need any definition of these terms in Division 2 and Sections 135 and 240 should be deleted. However, because the word "statement" is used in many other parts of the Evidence Code, we suggest that Section 225 be revised to read:

225. "Statement" is defined in Section 1202.

Definitions applicable to Burden of Proof etc. Division. In accordance with the State Bar Committee suggestion (item 3), we suggest that the definition of "Burden of Proof" (Section 115) be made Section 500 and that present sections 500, 501, and 502 be renumbered to follow. We also suggest that the definition of "Burden of Producing Evidence" (Section 110) be made Section 550 and that present Section 550 be renumbered as Section 551. We also suggest that present sections 110 and 115 be revised to read:

110. "Burden of producing evidence" is defined in Section 550.

115. "Burden of proof" is defined in Section 500.

Definition of "writing." We do not believe that the State Bar Committee's suggestion (item 3) is desirable. The word "writings" is used throughout the code, and we plan to insert cross-references to the definition under all pertinent sections.

Definition of "witness"

The State Bar suggests the addition of a definition of the word "witness" to the general definitions in Division 2. If their suggestion is approved, we believe their suggested definition should be modified as

follows to carry out their intent:

> "Witness" means [~~is~~] a person [~~whose testimony under oath is offered or received in evidence~~] who testifies at the hearing.

Contrast this suggestion with the existing C.C.P. definition:

> A witness is a person whose declaration under oath is received as evidence for any purpose, whether such declaration be made on oral examination, or by deposition or affidavit.

The problem under the proposed definition is the status of deponents. Should a person whose deposition was taken in the action be regarded as a witness if the deposition is received in evidence, or should such a person be regarded as a hearsay declarant?

Several consequences flow from the way in which such a person is regarded. If he is a witness, he must be afforded an opportunity to explain or deny a prior inconsistent statement before such a statement can be received in evidence. Section 770. And such a statement, when received, is evidence of the matter stated. Section 1235. But if the deponent is regarded as a hearsay declarant, he need not be given an opportunity to explain or deny an inconsistent statement and such a statement, when received, is not evidence of the matter stated. Section 1202.

If the deponent is regarded as a hearsay declarant only, a party--even though he knows the deponent's deposition is being taken for introduction in evidence--may deliberately refuse to examine a deponent concerning a prior inconsistent statement because he knows he will be able to introduce the inconsistent statement at the trial when the deponent is not available to explain it away.

Inasmuch as the only problem to be solved by a definition of "witness" is that outlined above, we suggest that "witness" be left undefined and that the problem raised be handled directly. Either Section 770 or Section 1202 should be modified to state plainly which rules are applicable to inconsist.

statements of deponents.

Section 300.

With respect to this section, the Legislative Counsel comments:

> (1) From the background material furnished to us we understand that the intention is that the Evidence Code apply only to court proceedings, except as otherwise provided by statute or rule. We wonder if Section 300 should not express this intention more clearly.

Our purpose in Section 300 is to indicate that the code applies in court proceedings except to the extent otherwise provided by statute. We do not attempt to state when it may be made applicable to other proceedings, nor is it possible or desirable to indicate what type of authority is needed to permit an administrative agency or an arbitrator to make the code applicable in a particular administrative proceeding or in a particular arbitration proceeding.

Section 311.

The State Bar Committee considers its suggestion on this section (item 6) to be "most important."

Section 311 states existing law, but the State Bar Committee believes that "the court should be given further discretion with respect to the disposition of cases falling within this section, so as to be able to retain jurisdiction of the case where the ends of justice require it." We are not sure what problem concerns the bar committee, but we suspect the committee has in mind a continuance of the matter to provide the parties with time to research the foreign law. If this is the problem, we do not believe the section needs revision.

We recommend that no change be made in Section 311.

Order of proof.

At the October meeting, Bob Carlson suggested that the order of proof in civil actions not tried before a jury should be made clear. We suggest that a new section be added to the Code of Civil Procedure, to read:

> 631.7. Ordinarily, unless the court otherwise directs, the trial of a civil action tried by the court shall proceed in the order specified in Section 607.

The Commission may consider this section to be beyond the scope of our assignment. But the section is a substitute for the following language which we are repealing:

> 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.

Proposed Section 631.7 is a more accurate statement than the underscored language in Section 2042 which we are repealing.

Section 353.

We already deleted this section. (The State Bar Committee (item 7) considered its suggestion that this section be deleted to be "most important.")

Section 402.

The State Bar Committee considers its suggestion (item 8) on this section to be "most important."

The Committee suggests that subdivision (c) be deleted. As the Committee points out, this provision works a substantial change in existing law. "It is believed by the Committee that Section 402(c) would work far greater harm than would be justified by the magnitude of any problem it

might cure." In view of this opposition to subdivision (c), the staff suggests that it be deleted.

Treatment of spontaneous and dying declarations under Sections 403 and 405.

Although the Committee does not consider its suggestion on this matter (item 9) to be "most important," the committee apparently suggests that the jury be given a "second-crack" on spontaneous and dying declarations--i.e., that if the judge admits the hearsay statements, he instruct the jury to disregard them if the jury does not find that the foundational requirements for their admission existed. The staff believes that no change should be made in the statute.

Treatment of confessions under Sections 403 and 405.

The Committee considers its suggestion on this matter (item 10) to be "most important." The Committee suggests that we restore the "second-crack" doctrine on confessions and admissions of criminal defendants. See discussion in Committee's report at pages 6-7. This matter also concerned some of the members of the Assembly Subcommittee on Law Revision. We believe, however, that most of them were satisfied with our explanation that the change would not be detrimental to criminal defendants.

The staff makes no recommendation on this matter. If a change is to be made, subdivision (b) of Section 405 should be revised to read:

(b) If a preliminary fact governed by this section is also a fact in issue in the action:

(1) The jury shall not be informed of the court's determination as to the existence or nonexistence of the preliminary fact.

(2) 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 court's determination of the preliminary fact; but, if

the preliminary fact is the voluntariness of a confession or admission of a defendant in a criminal action, the court shall instruct the jury to determine whether the confession or admission was voluntary and to disregard the confession or admission if the jury determines that it was not voluntary.

If this change is made, subdivision (b) of Section 402 should be revised to read:

(b) The court may hear and determine the question of the admissibility of evidence out of the presence or hearing of the jury~~; but in a criminal action, the court shall hear and determine the question of the admissibility of a confession or admission of the defendant out of the presence and hearing of the jury~~.

Division 4--Judicial Notice

Both Professor Davis (Exhibit III) and the State Bar Committee had comments on this division.

Please read with care the letter from Professor Davis. He makes two points:

First, he objects to limiting judicial notice of facts to indisputable facts. See his discussion on pages 7-13. We state in the Comment to Section 450 that the judge may consider disputable factual materials in construing statutes, determining constitutional issues, and formulating rules of law. Professor Davis states that this directly contradicts the clear language of Section 450. Moreover, he states that he believes it is irrational to allow judicial resort to disputable factual materials for this purpose and not to allow a judge to resort to these materials for the purpose of exercising discretion, formulating a decree, making judicial policy, using judgment, or administering his court.

The only answer to Professor Davis is that these latter cases are not cases where the judge is taking judicial notice; he is exercising his discretion or judgment and may use whatever he wishes as long as he does not abuse his discretion.

Possibly the solution to the problem (if there is one) would be to insert "law" in place of "statute" in Section 450.

Second, Professor Davis points out that we have eliminated the requirement of an opportunity to present information to the judge in cases where he is taking notice of "facts" under subdivisions (g) and (h) of Section 452. This is a reasonable construction of the statute, and, we believe, an undesirable rule. We believe that the following revisions of the statute

would meet the problem presented by Professor Davis:

> 455. (a) With respect to any matter specified in subdivision (a), (b), (c), (d), (e), or (f) of Section 452 that is reasonably subject to dispute, before judicial notice of such matter may be taken, the court shall afford each party reasonable opportunity to present to the court 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 subdivision (e) or (f) of Section 451 or in subdivision (g) or (h) of Section 452, if any party disputes the taking of judicial notice of such matter, the court shall afford each party reasonable opportunity to present to the court information relevant to (1) the propriety of taking judicial notice of the matter and (2) the tenor of the matter to be noticed.
>
> (c) If a party disputes the taking of judicial notice of any matter specified in Section 452 and the court 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 court shall afford each party reasonable opportunity to meet such information.

Note that under the revised section, an opportunity to present information is required with respect to any matter of law covered by Section 452 that is reasonably subject to dispute. This opportunity must be provided before judicial notice is taken.

Note also that under the revised section, if a party disputes the taking of judicial notice of any matter of "fact" under Section 451 or 452, an opportunity to present information must be provided, but such opportunity need not be provided before judicial notice is taken. Hence, the judge can take judicial notice of these matters without providing an opportunity in advance; this eliminates the need for providing such an opportunity in the great majority of cases when the taking of notice will not be disputed. Under the present section, no opportunity to present information appears to be required in such cases.

The State Bar Committee objects ("Most important") to Section 456 (item 12). The Committee prefers the previous version of this section.

To meet this objection, the staff suggests that Section 456 be revised to read:

> 456. The court shall at the earliest practicable time indicate for the record the matter which is judicially noticed and the tenor thereof if the matter judicially noticed is:
>
> (a) A matter specified in subdivision (b), (c), (d), or (e) of Section 451, or in subdivision (a), (b), (c), (d), (e), or (f) of Section 452, that is reasonably subject to dispute; or
>
> (b) A matter specified in subdivision (g) or (h) of Section 452 that is of substantial consequence to the determination of the action.

This revision is consistent with the suggested revision of Section 455.

If the previous recommendations are adopted, subdivisions (c) and (d) of Section 460 should be revised to read:

> (c) When ~~taking~~ a revieving court takes judicial notice under this section of a matter specified in Section 452 , ~~that-is-reasonably-subject-to-dispute-and-of-substantial-consequence-to-the-determination-of-the-action,-the-reviewing-court-shall-comply-with~~ the provisions of subdivisions (a) and (b) of Section 455 are applicable if the matter was not theretofore judicially noticed in the action.
>
> (d) If a party disputes ~~in-determining~~ the propriety of taking judicial notice of a matter specified in Section 452 ~~that-is-reasonably-subject-to-dispute-and-of-substantial-consequence-to-the-determination-of-the-action~~ , or the tenor thereof, if and the reviewing court resorts to any source of information not received in open court or not included in the record of the action , (including the advice of persons learned in the subject matter), the reviewing court shall afford each party reasonable opportunity to meet such information before judicial notice of the matter may be taken.

The Commission may prefer to leave subdivision (d) in the bill without change.

Section 451

The State Bar Committee (item 11) suggests that the words "true signification" in Section 451(e) be changed to "ordinary meaning." We believe that the actual meaning of words and phrases and legal expressions is a matter that should be judicially noticed. Where expert testimony is necessary to take judicial notice of words that are not given their "ordinary meaning," the parties will have to provide such expert testimony, but nevertheless

the matter will be one of judicial notice. The language we have included in subdivision (e) is the language of the existing statute.

Division 5--Burden of Proof etc.

We have already revised the preprinted bill to take care of objections (items 13, 14, 15) of the State Bar Committee. The Comment that concerned the Committee (item 16) has been revised to delete the discussion that concerned the committee since the discussion no longer is necessary.

Section 600

The State Bar Committee (item 17) suggests a revision of Section 600 to improve the wording of the section. We believe that the revision is not an improvement.

Section 607

The Assembly subcommittee expressed some concern over Section 607. They were concerned with the distinction created by the section between penal statutes that now place the burden of proof on the defendant by exceptions and penal statutes that do so by presumptions. No specific suggestions were made, however.

Section 608

The State Bar Committee (item 18) suggests that this section be deleted. The staff recommends that the section be deleted. This suggestion is considered by the Committee to be "most important."

The State Bar Committee suggests the insertion of a new article relating to inferences in the Evidence Code. The Assembly subcommittee considering the bill also suggested that some provisions relating to inferences might well be added.

We do not think that enough can be said about inferences to warrant the creation of a new article. We think all of the State Bar's suggestions can be carried out by modifying Chapter 3 on Presumptions as follows:

CHAPTER 3. PRESUMPTIONS AND INFERENCES

Article 1. General

600. (a) Subject to Section 607, a presumption is an assumption of fact that the law requires to be made when another fact or group of facts is found or otherwise established in the action. A presumption is not evidence.

(b) An inference is a deduction that may logically and reasonably be drawn from a fact or group of facts found or otherwise established in the action.

604. Subject to Section 607, the effect of a presumption affecting the burden of producing evidence is to require the trier of fact to assume 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 the inferences arising therefrom and without regard to the presumption.

Articles 3 and 4 of Chapter 3 of Division 5

The State Bar Committee (item 19) suggests these articles be reversed. It would not be feasible to attempt to make such a drastic revision at this late time.

Section 721

The State Bar Committee (item 20) suggests that the words "the matter upon which his opinion is based and the reasons for his opinion"

be added at the end of Section 721(a). We have no objections to this addition.

Section 731

We have already made the revision suggested by the State Bar Committee (item 21).

Sections 760, 761, 772-774; direct and cross-examination

At the last meeting, the Commission considered a revision of these sections designed to codify the rule of A. T. & S. F. Ry. v. So. Pac. Co., 13 Cal. App.2d 505 (1936), that a party whose interest is not adverse to the party who called a witness may not cross-examine the witness. Another problem considered by the Commission at the last meeting was expressing the rule of C.C.P. § 2048 that cross-examination extending beyond the scope of the direct "is to be subject to the same rules as a direct examination." No action was taken on these problems for lack of time. When the meeting ended, the Commission had asked to consider the following legislative scheme to solve both of these problems:

760. "Direct examination" is the examination of a witness by the party [~~producing~~] calling him.

761. "Cross-examination" is the examination of a witness [~~produced~~] by [~~an adverse~~] a party other than the party calling the witness.

772. (a) Subject to Section 721, a witness examined by one party may be cross-examined upon any matter within the scope of the direct examination by each [~~adverse~~] other party to the action in such order as the court directs.

(b) The cross-examination of a witness by any party whose interest is not adverse to the party calling him is subject to the

same rules that are applicable to a direct examination.

(c) Except in a criminal action where the witness is the defendant, a party may, in the discretion of the court, cross-examine a witness upon a matter not within the scope of the direct examination; but such examination shall be deemed to be direct examination and the party examining the witness shall be deemed to be the party who called the witness in regard to such new matter.

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

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

The foregoing legislative scheme seems to meet the problems presented without seriously upsetting the existing scheme.

Section 765.

The State Bar Committee (item 22) suggests in substance that this section be revised to read:

> 765. The court shall exercise reasonable control over the mode of interrogation of a witness so as (a) to make ~~it~~ such interrogation as rapid, as distinct, ~~as little annoying to the witness,~~ and as effective for the ascertainment of the truth, as may be, and (b) to protect the witness from insult and abuse.

We believe that this is a significant improvement in the section and recommend approval of this change. The revision is one drafted by the Code Commission in a preliminary draft of its revision of the Evidence Code.

Section 780.

The State Bar Committee considers its suggestions (item 23) on this section to be of "major importance."

The Committee suggests that the words "and subject to Section 352" be inserted after the phrase "Except as otherwise provided by law." We strongly urge that this change not be made. There are many sections which are subject to Section 352 and we have not included a similar phrase. We suggest that a cross-reference to Section 352 (which is a provision of law that otherwise provides) will be sufficient. The Comment to Section 780 also will indicate that Section 780 is subject to Section 352.

The Committee recommends the insertion of the words "of the witness" in line 50 following the word "conduct." This is an undesirable change,

since inconsistent testimony by another witness may be considered in testing the credibility of a witness. See Section 780(i).

Section 788.

At the hearing of the Assembly Subcommittee on Law Revision, some subcommittee members indicated that, in their opinion, Section 788 in its present form has no chance of legislative approval. At the last meeting, Mr. Ringer from the Office of the Attorney General demonstrated that what we now provide in the Evidence Code will not operate in a sensible manner. The State Bar Committee also suggests revision of this section (items 24, 25, and 26) (changes the Committee considers to be "most important"). In view of this expression of opposition, and with a knowledge of the strong opposition of law enforcement officers, the staff suggests that subdivision (a) of Section 788 be revised to read:

> (a) Subject to subdivision (b), evidence of the conviction of a witness ~~for~~ of a crime is admissible for the purpose of attacking his credibility only if the court, in proceedings held out of the presence and hearing of the jury, finds that:
> (1) An essential element of the crime is dishonesty or false statement; ~~or the intention to deceive or defraud; and~~
> (2) The crime is a felony or, if committed in this State, is one punishable as a felony; and
> (3) The witness has admitted his conviction for the crime or the party attacking the credibility of the witness has produced competent evidence of the conviction.

The staff also suggests that the following additional paragraph be added to subdivision (b):

> (6) A period of more than 10 years has elapsed since the date of his release from imprisonment, or the expiration of the period of his parole, probation, or sentence, whichever is the later date.

Subdivision (6) is the substance of the suggestion of the State Bar Committee (item 26).

The State Bar Committee also is concerned (item 25) that it is unclear

whether the party attacking credibility need show the absence of any of the circumstances specified in subdivision (b). In this respect, subdivision (b), as presently drafted, is consistent with other sections. The staff believes that no change should be made in the statute but that this matter should be made clear by the comment.

Section 800.

The State Bar Committee (item 27) suggests a revision of Section 800 that it considered to be "most important." The revised section is set out at the bottom of page 16 of their report. The staff considers the suggested change to be undesirable; the witness should not be permitted to express an opinion unless it is helpful to a clear understanding of his testimony. Under the Committee proposal, it appears a witness could express an opinion on any matter within common experience if it was relevant to a fact in dispute. Section 800 already provides a broad rule for admissibility of lay opinion.

The State Bar Committee (item 28) suggests that the words "expressly permitted by law or is" be inserted after the word "is" in line 41 of Section 800. The Committee considers this to be "most important." Accordingly, the staff suggests that the introductory clause of Section 800 be revised to read:

> If a witness is not testifying as an expert, his testimony in the form of an opinion is limited to such an opinion as is permitted by law, including but not limited to an opinion that is:

Section 801.

The State Bar Committee in revisions considered to be "most important" suggests the deletion of the phrase "whether or not admissible" (item 29).

We believe that this is a highly desirable phrase; it indicates that the expert may rely on reports that are hearsay, etc.

The Committee also believes the phrase "commonly relied upon by experts in forming an opinion on the subject to which his testimony relates" is unduly restrictive (item 29). We agree, and suggest that this phrase be revised to read: "that is of a type ~~commonly-relied-upon by-experts~~ that may reasonably be relied upon by an expert in forming an opinion upon the subject to which his testimony relates." The last clause of the section prevents any abuse of this general standard.

Section 802.

In response to a suggestion the Committee considers to be "most important" (item 30), the staff suggests that the following additional sentence be added to Section 802: "Upon objection of a party, such matter must be stated before the witness may testify as to his opinion unless the court in its discretion otherwise determines." This should satisfy the Committee and, at the same time, permits the court to dispense with the requirement where it would be unreasonable to require such matters to be stated before the opinion is given. This seems to be a reasonable compromise on this point.

The Committee also suggests (item 31) that the last clause "unless he is precluded by law from using such reasons or matter as a basis for his opinion" because it is unnecessary and confusing. We strongly urge that this clause be retained; it was added at the request of the Department of Public Works and a number of other persons also voiced objections to Section 802 which are met by the addition of this phrase. Perhaps the purpose of the phrase would be better indicated if it were revised to read

"but a witness does not have a right to state on direct examination any reason or matter that he is precluded by law from using as a basis for his opinion." The purpose of the phrase is to permit the adverse party to object before the reason or matter is stated so that the jury will not hear the improper reason or matter. It is thought that an instruction to disregard the improper reason or matter is not sufficient protection. This is not a matter that the Committee considers to be "most important."

Section 803.

In response to a suggestion (item 32) which the State Bar Committee considers to be "most important," we suggest that the second sentence of Section 803 be revised to read: "In such case, the witness may, if there remains a proper basis for his opinion, then state his opinion after excluding from consideration the matter determined to be improper."

Section 804.

The State Bar Committee (items 33 and 34) suggests revision of Section 804(b). In light of these suggestions, we suggest that Section 804 be revised to read:

> 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 and examined as if under cross-examination concerning ~~the subject matter of~~ his opinion or statement by any adverse party.
>
> (b) ~~Unless the party seeking to examine the person upon whose opinion or statement the expert witness has relied has the right apart from this section to examine such person as if under cross-examination,~~ This section is not applicable if the person upon whose opinion or statement the expert witness has relied is (1) a party, (2) ~~an agent or employee of a party, (3) a person united in interest with a party or for whose immediate benefit the action is prosecuted or defended~~ a person identified with a party within the meaning of subdivision (d) of Section 776, or ~~(4)~~ (3) a witness who has testified in the action concerning the opinion or statement upon which the expert witness has relied.

We believe that this revision takes care of the matters that concerned the State Bar Committee. In addition, we believe that the persons mentioned in paragraphs (2) and (3) of existing Section 804(b) are more fully and accurately described in Section 766(d). Hence, we have substituted a cross-reference to Section 766(d) for these items.

Section 830

The Committee's comment concerning Section 830 (item 35) is no longer significant since Section 830 has been deleted.

Opinion as to value of property or compensation.

In a change considered to be "most important," the Committee suggests (item 36) that an additional section be included to deal with lay opinion as to the value of property and services. We believe that this is unnecessary in view of the suggested revision of Section 800 to recognize that lay opinion may be given on matters permitted by law.

Section 870

The Committee suggests (item 37) that subdivision (b) be clarified. Subdivision (b) might be revised to read:

> (b) The witness was a subscribing witness to a writing, the validity of which is in dispute, signed by the person whose sanity is in question and his opinion relates to the sanity of such person at the time the writing was signed; or

Since subdivision (b) is language of an existing statute, we question whether this revision is necessary or desirable.

Section 894

The Committee (item 38) believes that it should be made clear that a party may call his own expert witness. By implication this is permitted by Section 894. However, we agree that it should be made clear and suggest that the last sentence of Section 894 be deleted and a new section--Section 897--be added to read:

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

The proposed section is based on Section 733 of the Evidence Code.

Section 895

The Committee (item 39) notes (but does not recommend) a change that has been proposed (in a report of the Committee of the State Bar Conference) to this section. The change is an important substantive change and one that the staff considers undesirable. We strongly urge that it not be made.

Section 896

The Committee also notes (item 39) a constitutional question with respect to Section 896. Section 896 may operate to resolve the issue against the defendant if he refuses to take a blood test. The question is in part whether a blood test can be required of a criminal defendant. We do not believe that any attempt should be made to revise the statute in light of this constitutional question. (We took the position in our original self-incrimination recommendation that a blood test could be required of a criminal defendant.) This is not a matter that the Committee considers to be "most important" nor does the Committee recommend that any change be made in the statute.

Section 912

We have revised the Comment as suggested by the State Bar Committee (item 42).

Section 914

The Committee notes (item 40) that Section 914 will require the State Industrial Accident Commission, for example, to obtain a court order compelling a witness to answer before he may be adjudged in contempt for refusing to disclose privileged information. The Subcommittee on Law Revision seemed to take the view that Section 914 was a reasonable requirement. Hence, we urge that the Commission reaffirm its decision at the October meeting not to limit this section.

Section 958

The Committee suggests (item 41) that the phrase "including but not limited to an issue concerning the adequacy of the representation of the client by the lawyer" be deleted. Although the Commission discussed this at the last meeting and determined to retain the phrase, we believe that the revised comment to this section makes this matter entirely clear and, hence, we see no reason why we should not accept the suggestion of the State Bar Committee.

Section 981

The State Bar Committee strongly urges (item 42) that Section 981 be deleted. We believe that the deletion of this section would be highly undesirable. In People v. Pierce, 61 A.C. 977 (Oct. 1964), the Supreme Court held that a husband and wife who conspire only between themselves against others cannot claim immunity from prosecution for conspiracy on the basis of their marital status. The court pointed out that the contrary had been the rule in California since 1889 and overruled cases holding that a husband and wife could not conspire between themselves. The court stated:

> The present case involves, not one spouse who has conspired with third persons against the other spouse, but a husband and wife who together have conspired against others. They now raise the stale contention that they should be protected from the law of conspiracy in the interest of their domestic harmony. The law, however, poses no threat to their domestic harmony in lawful pursuits. It would be ironic indeed if the law could operate to grant them absolution from criminal behavior on the ground that it was attended by close harmony. Their situation is akin to that of a husband and wife who can both be punished for committing a crime when one abets the other. [Citation omitted.] Moreover, even in such situations domestic harmony is amply protected, since, with certain exceptions not relevant here, one spouse cannot testify against the other without the consent of both.

It is important to note that the Evidence Code gives the witness spouse a privilege not to testify against her spouse. Thus, the protection referred to by the court is still retained so long as the spouses do not testify. However, if both spouses are parties and one spouse does testify, that spouse may be compelled to disclose a communication that was made, in whole or in part, to enable or aid anyone to commit or plan to commit a crime or a fraud because of Section 981. In addition, even though neither spouse testifies, Section 981 provides an exception that permits an eavesdropper to testify. (Under existing law, the eavesdropper can testify because the marital communications privilege does not prevent his testimony as to any marital communication.)

In connection with Section 981, as indicated above, it is important to note that the privilege for confidential marital communications has been broadened to provide protection against disclosure of such communications by anyone, while the existing law is limited to preventing disclosure by a spouse. In view of this broad scope of the marital communications privilege, it will operate to exclude what often will be important evidence of the conspiracy.

The basic policy question is whether the marital privilege is to provide protection to communications made to enable or aid one to commit or plan to commit a crime or fraud. To say that two persons may conspire together with immunity merely because they are married seems undesirable as a matter of public policy. As the court states in the Pierce case: "There is nothing in the contemporary mores of married life in this state to indicate that either a husband or wife is more subject to losing himself or herself in the criminal schemes of his or her spouse than a bachelor or a spinster is to losing himself or herself in the criminal schemes of fellow conspirators.

Spousehood may afford a cover for criminal conspiracy. It should not also afford automatically a blanket of immunity from criminal responsibility."

It is not unlikely that the Supreme Court would recognize the exception provided by Section 981 if an appropriate case were presented. But if we do not provide this exception in the statute, it will not exist; the court cannot create exceptions to the privilege, for under the Evidence Code such exceptions may be created only by statute.

Section 1010

During the last year, we have received comments from a number of persons suggesting that the definition of "psychotherapist" be limited to psychiatrists and certified psychologists. The Commission has consistently refused to so limit the definition.

Mr. Westbrook states the situation well, the staff believes, in his report to the State Bar Committee:

> c. Serious problems arise from the over-lapping definitions of "patient" in Sections 971 and 1011. For the physician-patient privilege, "patient" is defined as a person who consults or submits to an examination by a physician "for the purpose of securing a diagnosis or preventative, palliative or curative treatment of his physical or mental or emotional condition." For the psychotherapist-patient privilege, the words "physical or" are eliminated but the words "mental or emotional" remain. How then is a judge to tell when consultation with a physician is in his role as such or in his role as "psychotherapist." The comment to Section 1010 wisely points out that many doctors who are not psychiatrists render valuable service in that field and that the line between organic and psychosomatic illness is indistinct. However, these two considerations are at odds with each other and the problem posed above can be revolved in only one of two ways, neither of which is completely satisfactory. On the one hand, the definition of "psychotherapist" can be narrowed so as to include only psychiatrists and certified psychologists. On the other hand, the physician-patient privilege can be narrowed to include only consultation as to "physical" condition. Of the two alternatives, the writer favors the former. Requiring the courts to determine whether a condition is "physical" as distinguished from "mental or emotional" before determining which

privilege applies is just not practical. On the other hand, disclosures which require greater protection than afforded by the physician-patient privilege will be made infrequently to a physician who is not or is not reasonably believed to be a psychiatrist.

The staff strongly prefers the alternative of limiting the definition of psychotherapist to include psychiatrists and certified psychologists. It is difficult to limit the physician-patient privilege to only cases involving "physical" ailments, since most ailments are in fact based in part on emotional factors. Accordingly, we suggest that Section 1010 be revised to read:

1010. 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 who devotes a substantial portion of his time to the practice of psychiatry; 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.

In view of the fact that a substantial number of persons have objected to the definition of "psychotherapist," we believe some revision is desirable. The State Bar Committee states that this matter is "most important."

Section 1060

The State Bar Committee (item 45) suggests that the "trade secret" privilege be deleted or limited. Accordingly, we suggest that Section 1060 be revised to read:

1060. If he or his agent or employee claims the privilege, the owner of a ~~trade~~ secret process or development or of secret

research has a privilege 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.

This revision will make the section consistent with the discovery statute which provides protection against discovering "secret processes, developments, or research." The State Bar Committee considers this matter to be "most important."

Section 1150

The State Bar Committee's objection (item 47) concerning the Comment to this section can be met by revising the Comment. We will do this.

The State Bar objects to the enlargment of the scope of inquiry into jury misconduct. See item 40. This is a policy matter for the Commission. We believe that our recommendation makes sense. It should be noted that the members of the Assembly Interim Committee on Law Revision had some concern about this change in law.

DIVISION 10. HEARSAY EVIDENCE

General format

Though recognizing the lateness of their suggestion, the Committee suggests (item 50) that consideration be given to changing the format of stating the exceptions to the hearsay rule. The staff recommends against this suggestion for two reasons. First, the suggested format is not technically accurate because the hearsay rule is applicable to each of the matters stated in the exceptions; they are merely exceptions to a rule that

is applicable to the situation. Second, we are committed to the present format not only in the hearsay division itself but also in numerous other sections scattered throughout the Evidence Code. It would be extremely wasteful and conducive to error to completely overhaul the present format at this late time.

Section 1200

We have revised subdivision (a) because the noun modified by the final "that is" clause is not immediately clear without the revision.

Section 1202

The Commission directed the staff to revise this section, but did not approve any specific language. We suggest the following:

> 1202. Evidence of a statement or other conduct by a declarant that is inconsistent with a statement by such declarant received in evidence as hearsay evidence is not inadmissible for the purpose of attacking the credibility of the declarant though he is given and has had no opportunity to explain or to deny such inconsistent statement or other conduct. Any other evidence offered to attack or support the credibility of the declarant is admissible if it would have been admissible had the declarant been a witness at the hearing.

Section 1203

Section 1203 should be consistent with Section 804 (see discussion, supra, concerning Section 804). We believe the Committee's suggestion (item 49) can best be effectuated by the following:

> (a) ~~Except as provided in subdivisions (b) and (c),~~ The declarant of a statement that is admitted as hearsay evidence may be called and examined as if under cross-examination concerning the statement ~~and its subject matter~~ by any adverse party.
>
> (b) ~~Unless the party seeking to examine the declarant has the right apart from this section to cross-examine the declarant in the action,~~ This section is not applicable if the declarant is (1) a party, (2) ~~an agent, partner, or employee of a party, (3) a person united in interest with a party or for whose immediate benefit the action is prosecuted or defended,~~ a person identified with a party within the meaning of subdivision (d) of Section 776,

or ~~(4)~~ (3) a witness who has testified in the action concerning the statement .

Section 1224

The staff takes no position with respect to the Committee's opposition to Section 1224 (see item 51); this is a question of policy to be determined by the Commission. The Committee considers the deletion of this section to be "most important." It might be helpful, however, to indicate that the section has limited application. Thus, it applies only to unauthorized, nonspontaneous, noninculpatory statements of agents, partners, or employees.

Section 1224 is based on URE Rule 63(9)(a). It goes beyond existing California law since the only statements admissible under existing law are those that the principal has authorized the agent to make.

No action need be taken in regard to the Committee's second suggestion (item 52) if the Commission approves the Committee's first suggestion in regard to Section 1224. However, if the Commission rejects the Committee's suggestion in this regard, subdivision (d) of Section 1224 should be revised to read:

> (d) The evidence is offered either after the court is persuaded of the facts specified in subdivisions (a) and (b) or, in the court's discretion as to the order of proof, subject to such proof.

Section 1226

Commissioner Sato suggests that Section 1226 does not indicate clearly enough that a declarant's admission of a party's nonliability is admissible under 1226. He suggests that it be revised to read as follows:

> 1226. When a right , [~~or~~] title , or interest in any property or claim asserted by a party to a civil action requires a deter-

mination that a right , [~~or~~] title , or interest exists or existed in the declarant, evidence of a statement made by the declarant during the time the party now claims the declarant was the holder of the right , [~~or~~] title , or interest is as admissible against the party as it would be if offered against the declarant in an action involving that right , [~~or~~] title , or interest.

Section 1227

The staff has no objection to the Committee's suggestion (item 53) to divide Section 1227 into two separate sections to read:

1227. Evidence of a statement by a minor child is not made inadmissible by the hearsay rule if offered against the plaintiff in an action brought under Section 376 of the Code of Civil Procedure for injury to such minor child.

1228. Evidence of a statement by the deceased is not made inadmissible by the hearsay rule if offered against the plaintiff in an action brought under Section 377 of the Code of Civil Procedure.

Section 1237

The staff recommends against the Committee's suggestion (item 54) to limit the writings admissible under this exception to those that are recorded verbatim or that the witness himself authenticated at the time the statement was made. We oppose this suggestion because it is too limiting. For example, if an eyewitness to an accident narrates in detail the things that he observed at the scene and a person records only the pertinent information narrated, such as the color of the vehicle involved, its license number, and a description of the driver, it would seem much too limiting and inappropriate to exclude such a writing merely because it did not record verbatim the witness' account of what he was doing at the time, where he had come from, how he was feeling, the shock he experienced at seeing the incident, and like matters. It would seem to be a sufficient guarantee of trustworthiness to satisfy the requisites already specified in

subdivisions (a)-(d) of Section 1237, and particularly subdivisions (c) and (d). If the witness who recorded the statement satisfies the condition specified in paragraph (d) by testifying to the accuracy of the recorded statement, this would seem to be a sufficient guarantee of its trustworthiness without also requiring similar authentication by the declarant at the time the statement was made or a verbatim recording of what was said on the previous occasion. The Committee does not consider its suggested revision to be "most important."

Section 1241

The staff takes no position on the Committee's opposition to Section 1241 (item 55). This is a question of policy to be determined by the Commission. Section 1241 is based on URE Rule 63(4)(a). Although the URE comment to this rule states that it is a well-recognized exception, no California case in point has been found. The matters made admissible by Section 1241 might now be admissible under the res gestae rationale, and the Commission at one time believed this exception to be desirable in order to clarify an otherwise obscure matter. The Committee considers the deletion of this section to be "most important."

Section 1242

The staff concurs in the substance of the Committee's suggested revision of Section 1242 (item 56) and suggests the following language to accomplish this result:

> 1242. Evidence of a statement made by a dying person respecting the cause and circumstances of his death is not made inadmissible by the hearsay rule if the statement was made upon his personal knowledge and was made under a sense of impending death and in the belief that there was no hope of his recovery.

Section 1250

Our Comment to this section explains that 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 an issue in the case. . . . 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." The first statement clearly appears in Section 1250(a)(1). The second statement is contained in Section 1250, if at all, in Section 1250(a)(2). The rationale seems to be that the then existing state of mind is evidence of a previously existing state of mind from which an inference to the declarant's acts or conduct is permissible. But, if the previously existing state of mind is the only matter in issue, it is difficult to see any basis for admissibility under Section 1250. This apparently is a change in the California law that we didn't intend. We think the defect may be cured by revising paragraph (1) to read:

> (1) The evidence is offered to prove [~~such-then-existing~~] the declarant's state of mind, emotion, or physical sensation when it is itself an issue in the action; or

The staff believes that the statement in subdivision (b) of Section 1250 is sufficiently clear in meaning as stated and recommends against the Committee's suggested revision (item 57). Subdivision (b) excludes evidence that is otherwise admissible under this section when it is offered to prove the fact remembered or believed. This is clearly stated in the existing subdivision but is not accurately reflected in the Committee's suggested language.

Sections 1271(b) and 1280(b)

The staff recommends against the suggested addition (item 58) to

this subdivision of language that appears to be too restrictive. The courts now require such personal knowledge where such a requirement is necessary to show a record's trustworthiness. But, construed literally, the suggested language would exclude data detected and recorded by machine because based on no one's personal knowledge. Requiring the judge to be persuaded of a record's trustworthiness seems a sufficient basis for admissibility. Moreover, the present language retains existing law. The Committee considers the suggested revision to be "most important."

Sections 1282 and 1283

These sections codify existing statutory provisions. Hence, we oppose the substance of the Committee's suggestion (item 59) to restrict the applicability of these sections to courts only. Any restriction of the type suggested by the Committee would materially change the existing law which we do not believe is warranted in this case.

Section 1290

We approve the Committee's suggestion (item 60) to delete the words "or affirmation" appearing in the introductory clause at line 25. The definition of "oath" (Section 165) is sufficient to include affirmation.

Sections 1291 and 1292

We recommend against the Committee's suggestion (item 61) to revise subdivision (a) of Section 1292 to include paragraph (1) thereof in the introductory clause. This is because paragraphs (1) and (2) of Section 1291(a) are stated in the disjunctive while paragraphs (1), (2), and (3) of Section 1292(a) are stated conjunctively. Hence, it is apparent from the face of of Section 1292(a) that three conditions must be satisfied, while as to subdivision (a) of Section 1291, only two conditions need be satisfied:

unavailability of the declarant and either of the conditions specified in paragraph (1) or paragraph (2).

Sections 1290-1292 (Article 9)

We oppose the Committee's suggestion (item 62) to add a section to Article 9 to make it clear that the discovery provisions in the Code of Civil Procedure govern the admissibility of depositions in the same action. We believe that a section such as that suggested would be unduly confusing since there is nothing in Article 9 that casts doubt upon the validity of the Code of Civil Procedure provisions. We will include under Article 9 a cross-reference to the provisions of the Code of Civil Procedure governing the admissibility of depositions in the same action.

Section 1451

On page 68, line 35, after "Title 4," "Part 4," should be inserted.

Civil Code Sections 3544-3548

The new Maxims of Jurisprudence added to the Civil Code do not sound to the Legislative Counsel like maxims of jurisprudence, "or, at any rate, do not seem to be of the same character as the principles expressed in present Sections 3510-3543 of the Civil Code." See item 3, Exhibit II.

Section 152 (of Preprint Senate Bill No. 1)

In accordance with the suggestion of the Legislative Counsel, this section should be revised to read:

> 152. Sections 2 to 151 of this act shall ~~take effect~~ become operative on January 1, 1967.

Nov. minutes
Folder

LAW OFFICES OF
O'MELVENY & MYERS
433 SOUTH SPRING STREET
LOS ANGELES, CALIFORNIA 90013
TELEPHONE 620-1120
CABLE ADDRESS "MOMS"

JOHN O'MELVENY
PAUL FUSSELL
HARRY L. DUNN
PIERCE WORKS
HONER I. MITCHELL
GRAHAM L. STERLING
WILLIAM B. CARMAN
MAYNARD J. TOLL
JAMES M. IRVINE, JR.
SIDNEY H. WALL
RICHARD G. BERGEN
DEANE F. JOHNSON
RAY H. LINDMAN
JAMES C. GREENE
WILLIAM M. ALSUP
EDWARD C. FREUTEL, JR.
GEORGE F. ELMENDORF
PHILIP F. WESTBROOK, JR.
RODNEY M. POTTER
CLYDE E. TRITT
E. HARLEY WALTHER
WARREN M. CHRISTOPHER
EVERETT B. CLARY
BENNETT W. PRIEST
JAMES E. CROSS
JAMES W. BEEBE
HUGH L. MACNEIL
R. BRADBURY CLARK
BARTON BEEK
RICHARD R. ST. JOHNS
CHARLES G. BAKALY, JR.
WILLIAM W. VAUGHN
RICHARD E. SHERWOOD

H. W. O'MELVENY 1885-1941
LOUIS W. MYERS 1927-1950
WILLIAM W. CLARY
JAMES L. BEEBE
OF COUNSEL
BEVERLY HILLS OFFICE
9601 WILSHIRE BOULEVARD
BEVERLY HILLS, CALIFORNIA 90210
TELEPHONE 273-4111
EUROPEAN OFFICE
12, RUE HAMELIN
PARIS 16e, FRANCE
TELEPHONE POINCARE 56-90

November
3rd
1964

OUR FILE NUMBER

921,499-30

John H. De Moully, Executive Secretary
California Law Revision Commission
Room 30 Crothers Hall
Stanford University
Stanford, California

Dear John:

Enclosed herewith please find 15 copies of the comments on the proposed Evidence Code by the Committee to Consider the Uniform Rules of Evidence of the State Bar of California. These comments reflect the results of the meeting of the Committee held on October 29 and 30 as well as the work of the respective sections of the Committee prior thereto.

Inasmuch as we are anxious to have the comments in your hands well in advance of the Commission's November meeting, the text of the comments has not been reviewed by the individual Committee members. If such review produces any significant changes, I will inform you at once. Also, because of the short time factor, we have not attempted to expand upon reasons for positions of the Committee which are already known to the Commission or which are readily apparent from the context of the comments. We will, of course, be pleased to elaborate on any of the comments if the Commission or its staff so desires.

In view of the Committee's responsibilities to the Board of Governors of the State Bar, it will be greatly appreciated if you will furnish to me as soon as possible after the November meeting of the Commission a summary of the action taken by the Commission with

regard to each of the numbered comments. In this way the formulation of the Committee's final recommendation to the Board of Governors will be greatly facilitated.

Sincerely yours,

Philip F. Westbrook, Jr., Chairman
Committee to Consider the
Uniform Rules of Evidence,
State Bar of California

PFW:dp
enclosure

cc: Committee Members
cc: Albert D. Barnes, Esq.
cc: Steven H. Welch, Jr., Esq.

STATE BAR OF CALIFORNIA

COMMITTEE TO CONSIDER THE UNIFORM RULES OF EVIDENCE

November 2, 1964

Comments upon the proposed Evidence Code

The following comments are directed to the provisions of the proposed Evidence Code as they appear in the initial printing of Preprint Senate Bill No. 1. For convenience of reference, the recommendations of the Committee are numbered serially. Those recommendations considered by the Committee to be most important are marked by an asterisk. While the Committee believes that these recommendations are reasonably complete, additional recommendations may be forthcoming upon further study.

DIVISION 1. PRELIMINARY PROVISIONS OF CONSTRUCTION

1. The effective date provisions of Section 12 are susceptible to the interpretation that the rules of evidence would change in a hearing in progress on December 31, 1966. Such a result would work manifest injustice by making different rules of evidence applicable to different parties and different witnesses in the same hearing. The Committee suggests a proviso making it clear that the rules of evidence in effect upon the commencement of any hearing in progress on December 31, 1966 shall continue to apply until the close of such hearing. There is no objection to making the new rules applicable in subsequent hearings in the same action.

DIVISION 2. WORDS AND PHRASES DEFINED

The Committee is of the view that the definitions in this division should be confined to those of general application throughout the Code, while definitions having primary application to particular divisions should be contained within those divisions. As now drawn, the Code does not purport to include all definitions in Division 2. For example, definitions relating to the method and scope of examination are included in Sections 760, 761 and 762 and definitions having primary application to privileges are contained in Sections 900-905, inclusive. However, Division 2 does contain several definitions which have primary, if not exclusive, application to a particular division.

The inclusion in the general definition division of some provisions having primary application to particular divisions may result in their being overlooked under some circumstances. To some extent, the inclusion of highly specialized definitions in the general definition division leads to confusion because the significance of the definition is not immediately apparent. Conversely, the inclusion of specialized definitions with the particular subject matter to which they relate facilitates understanding of that subject matter.

2. The foregoing views apply with particular force to those definitions which relate primarily to the hearsay rule. These include the definition of "declarant" in Section 135, the definition of "statement" in Section 225 and the definition of "unavailable as a witness" in Section 240. These definitions could well be incorporated in the

hearsay division as they were in earlier drafts of the Code. If the Commission is of the view that reference to these definitions in the general definitions section is important, the problem could be handled as in Section 150, which simply states that "hearsay evidence" is defined in Section 1200.

3. The Committee's view also applies to the definitions of the "burden of producing evidence" and "burden of proof" contained in Sections 110 and 115. These definitions have peculiar application to Division 5 and the presentation of that subject matter will be more comprehensible if these two definitions are included within that division.

4. To a lesser extent the same concept applies to the definition of "writing" in Section 250, which has special significance in connection with Division 11. However, in this instance, it is probable that the word has application in a number of other divisions and it may be that the problem could best be solved by inserting a section in Division 11 referring back to the definition of "writing" in Section 250.

5. The Committee is also concerned by the absence of any definition of the word "witness." At present, the Commission proposes to leave the definition of witness in Section 1878 of the Code of Civil Procedure intact as a part of the miscellaneous provisions of that Code. Undoubtedly, some definitions of the word is necessary in the Code of Civil Procedure. However, the Evidence Code uses the word "witness" in a restricted sense. For example, the provisions relating to the hearsay exception regarding former testimony treat witnesses at former hearings or trials of the same action and witnesses in all other actions or proceedings

simply as declarants. The Committee suggests the following definition:

> "'Witness' is a person whose testimony under oath is offered or received in evidence at the hearing."

The only problem occurring to the Committee under this definition is the status of persons testifying at depositions in the same action. However, in view of our liberal discovery rules, the principal impact of the Evidence Code upon deposition procedure is in connection with privileges and that division is made broadly applicable to all proceedings in which testimony can be compelled by the special definitions contained therein.

DIVISION 3. GENERAL PROVISIONS

*6. Section 311(b) gives the court only two alternatives where foreign law is applicable and the court is unable to determine it. If the first of these alternatives is unavailable, the court can only dismiss the action without prejudice. This action can be extremely drastic in situations where there are problems under the statute of limitations or problems in reobtaining personal jurisdiction of nonresident defendants. The Committee is of the view that the court should be given further discretion with respect to the disposition of cases falling within this section, so as to be able to retain jurisdiction of the case where the ends of justice require it.

*7. Section 353 is based upon U.R.E. 3. In its tentative recommendation and study on Article I, dated April, 1964, the Commission disapproved this rule. The

Commitee approved the Commission's position at that time and still believes that the reasons given by the Commission in the tentative recommendation and study are valid. In jurisdictions where the narrowing of issues before trial is not as highly developed as in California, there may be reason for a provision similar to Section 353. In California the situations where Section 353 would have meaningful application are relatively few. On the other hand, substantial injustice could result from arbitrary determination of a court that there was no bona fide dispute as to a particular fact despite the protestations of a party to the contrary. Many times the significance of a particular fact may be lost upon the court until a trial is well advanced and the efficient administration of justice is not likely to be significantly impeded by reserving to the parties the determination whether a particular fact is indeed in dispute. The Committee therefore recommends that Section 353 be deleted.

* 8. Section 402(c) provides that, in determining the existence of a preliminary fact, exclusionary rules of evidence do not apply except for Section 352 and the rules of privilege. This provision works a substantial change in existing California law. In actual litigation, the determination of a preliminary fact may be as important or more important than other phases of the trial. It is seldom that admissible evidence is excluded under existing practice. On the other hand, the proposed change in the law would permit the admission of highly prejudicial evidence even where the preliminary fact was shown solely by evidence which would be otherwise inadmissible. In the draft comment

to this section distributed on October 19, 1964, the Commission hypothesizes the exclusion of a spontaneous declaration where the only evidence of spontaneity is the statement itself or the statements of bystanders who no longer can be identified. It is difficult to see how such a statement could be admitted even under the proposed change unless there existed circumstantial evidence of spontaneity, which in any event would be admissible. It is believed by the Committee that Section 402(c) would work far greater harm than would be justified by the magnitude of any problem it might cure.

9. The Committee is divided in its view with respect to the treatment of spontaneous and dying declarations under Sections 403 and 405. A substantial segment of the Bar believe that the determination whether the requisite standards of these hearsay exceptions have been met should be subject to final determination by the jury. The Committee believes that the structure of these sections would not be seriously affected by recognizing this sentiment and that the addition of a subdivision (5) to Section 403(a) would assure more uniform support from the Bar. This additional subsection could read as follows:

> "The proffered evidence is a statement subject to the provisions of Article 4 of Division 10 of this Code and the preliminary fact is whether the requisite standards of a hearsay exception contained in said article have been met."

*10. The Committee believes that the impact of Sections 403 and 405 in the area of confessions is undesirable. A criminal defendant should have the right to

have a jury determine all material aspects of the case pertaining to his guilt. Assuming a case in which a confession plays an important part, the mere fact of the confession may have a prejudicial effect with the jury. While it is true that under Section 402(b) the defendant may request that the evidence as to the voluntariness of the confession be heard before the jury, it is likely that the court will instruct the jury that such evidence went to a question that was not theirs to determine and which they must disregard. Even without such an instruction, the defendant would lack the benefit of having the jury instructed on the significance of voluntariness in a confession. Generally, the Evidence Code protects the rights of the criminal defendant. The ultimate determination of the voluntariness of a confession should be finally determined by the jury for this same reason.

DIVISION 4. JUDICIAL NOTICE

11. Section 451(e) has been added since the tentative recommendation and study of the Commission relating to judicial notice under date of April, 1964. It is based directly upon the language of subdivision 1 of Section 1975 of the Code of Civil Procedure. While no difficulty appears to have arisen under the Code of Civil Procedure language, the term "true signification" implies a single or precise meaning of words and phrases and legal expressions which is contrary to experience. The Committee suggests that it would be more accurate to state that the "ordinary meaning" of all English words and phrases and of all legal expressions may be judicially noted. This

phrasing would recognize the possibility of extraordinary meanings which are the subject of proof in appropriate situations.

*12. As now drawn, Section 456 requires the judge to indicate promptly in the record matters he proposes to judicially notice only if they are "reasonably subject to dispute." This injects a subjective factor on which reasonable minds might well disagree and upon which the parties are entitled to be heard. In the tentative recommendation and study on this subject dated April, 1964, the Commission recommended an indication in the record at the earliest practical time as to all matters of which judicial notice was being taken, except those in Section 451(a). The reasons given by the Commission at that time for this requirement are sound and the Committee recommends that the Commission return to its April, 1964 position. For the reasons stated in the preceding paragraph, the Committee does not believe that subdivision (e) of Section 451 should be made an exception to this requirement.

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

13. The Committee is of the opinion that placing the provisions relating to the burden of producing evidence before those relating to the burden of proof is illogical and confusing. The Committee suggests reversal of the order of Chapters 1 and 2 of this division.

*14. The Committee is strongly of the view that the second sentence of Section 510 is unnecessarily obscure

and confusing. The Committee agrees that the burden of proof does not always lie on the party having the affirmative of the issue. However, in most situations where the burden of proof should not be placed on the party having the affirmative of the issue, the policy considerations suggested by the present text of the second sentence of Section 510 (and perhaps other policy considerations) will have resulted in a rule of law placing the burden. In the absence of such rule of law, there is no sound reason why the second sentence of Section 510 should not read:

"Otherwise the burden of proof is on the party who has the affirmative on the specific issue."

Adoption of this approach would mean that future assignments of burden of proof to parties other than those having the affirmative of an issue could be made only through legislative enactment. However, this result is appropriate where such assignment depends upon considerations of public policy. The approach here suggested has the virtue of definitness and certainty with resulting fairness to litigants which cannot exist if the assignment of the burden of proof is not determinable until such time as the trial judge may reach a decision on the specific issue.

*15. The Committee is also strongly of the view that the second sentence of Section 500 is abstruse, obscure and confusing. In the assignment of the burden of producing evidence, policy considerations will play a part but it is doubtful that their role will be as strong or as definite as with regard to the burden of proof. In any event, there is no sound reason why the burden of producing evidence should be left in limbo until a particular issue comes up in

the course of a trial. If policy considerations indicate that the burden of producing evidence should be assigned to someone other than the party having the affirmative of the issue, they will have found expression in a rule of law. Therefore, the Committee suggests that the second sentence of Section 500 read as follows:

> "Otherwise the burden of producing evidence is initially on the party who has the burden of proof on the specific issue."

If the Commission feels that this language is too inflexible, it could be qualified by adding a proviso that the court may determine that the burden of producing evidence is on an adverse party when it appears that he possesses peculiar knowledge of the facts concerning the specific issue.

*16. The Committee is concerned about the discussion of the burden of proof in the first two paragraphs appearing on page 502 of the comment distributed under date of October 19, 1964. It disagrees strongly with the proposition that the burden of proof is to be determined only at the close of evidence and the proposition that the burden of proof does shift on a specific issue. The example given with regard to proof of arrest without a warrant does not prove the Commission's point. On the contrary, the burden of proof on the specific issue whether an arrest was made without a warrant is always on the party claiming that it was not. The burden of proof upon the specific issue of probable cause is always on the party claiming probable cause. The Commission's comment confuses the ultimate issue (lawfulness of arrest) with the specific issues.

17. Section 600 involves a change of wording since the Committee last gave consideration to the section. Although it is not of major importance, the Committee believes that the draftsmanship could be improved by changing the word "when" in line 43 of page 26 of Preprint Senate Bill No. 1 to "from" and deleting the word "is" in line 44 of page 26.

*18. The provision of Section 600 that a presumption is not evidence has occasioned extended discussion. While it is unlikely that unanimity will be reached with regard to the elimination of the concept that presumptions are evidence, it is felt that a part of the adverse reaction to this proposal arises from failure to spell out the relationship between presumptions and inferences in the Evidence Code. The only mention of inferences in the Code itself is in Section 608. The first two sentences in that section are confusing and, so far as they deal with permissible inferences, they do not make it clear in what cases covered by former Section 1963 of the Code of Civil Procedure inferences are permissible. Moreover, the Committee believes that reference to a repealed section of another Code is most inappropriate.

A substantial part of this difficulty could be avoided by inserting a new Article 5 in Chapter 3 of Division 5 of the Evidence Code, dealing with the subject matter of inferences. The third sentence of Section 608 (defining an inference) would be the first section of this new article. There should then follow a section stating that inferences do not affect the burden of proof but may affect the burden of producing evidence if the facts giving rise to the

inferences are established by prima facie evidence. It should be also made clear that, although a presumption is not evidence, the facts giving rise to it form the basis for a permissible inference. Finally, it should be made clear that there are other inferences which may be drawn, even though the facts giving rise to them do not give rise to a presumption.

19. In line with comment 13, the Committee is of the view that reversing Articles 3 and 4 would increase the intelligibility of the Division. In addition, if the suggestions in the preceding paragraph are accepted, the heading of Chapter 3 on page 26, line 38 of Preprint Senate Bill No. 1 should be changed to "Presumptions and Inferences." The Committee also suggests that consideration be given to inserting the word "Rebuttable" before the word "Presumptions" in the headings of Articles 3 and 4.

DIVISION 6. WITNESSES

20. The Committee is concerned that subsection (a) of Section 721 might unduly restrict the cross-examination of experts. Sections 801 and 802 indicate that an expert is required to state the matters upon which his opinion is based and that an expert may state the reasons for his opinion. Thus, cross-examination to such matters and such reason is proper but Section 721(a) does not clearly so state. The Committee is of the view that adding "the matter upon which his opinion is based and the reasons for his opinion" at the end of Section 721(a) can do no harm and will avoid any problem of construction in this regard.

21. According to the comment, Section 731 restates the substance of the second paragraph of Section 1871 of the Code of Civil Procedure. However, as Section 731 is drawn, the second sentence in subsection (b) is applicable only to that subsection. The comparable provision of Code of Civil Procedure Section 1781 also applies to the provision not contained in subsection (a) of Section 731. This difficulty can be eliminated by putting the second sentence of subsection (b) in a separate subsection (c) and changing the word "subdivision" on line 8 of page 32 of Preprint Senate Bill No. 1 to "section."

22. Section 765(a) provides for the protection of witnesses in terms of interrogation "as little annoying to the witness . . . as may be." The Committee recognizes that this language has been in Section 2044 of the Code of Civil Procedure since 1872. Nevertheless, the phrasing seems inept as applied to the interrogation of adverse witnesses. The right of the witness is to be protected from undue harassment or embarrassment. This thought is supported by the language of Section 206 of the Code of Civil Procedure, which speaks of improper or insulting questions and harsh or insulting demeanor. The term "undue harassment or embarrassment" would seem to cover this concept much more effectively than the language drafted in terms of annoyance.

*23. With regard to Section 780, the Committee agrees that testing credibility of a witness should sometimes be permitted to range into "collateral" matters. However, in order to call the attention of court and counsel to the limitations upon this enlargement of existing law,

the Committee recommends that the phrase "and subject to Section 352" be inserted in line 48 of page 35 of Preprint Senate Bill No. 1 following the phrase "Except as otherwise provided by law." In addition, the Committee recommends insertion of the words "of the witness" in line 50 of the same page following the word "conduct." The specific examples of matters going to credibility which are listed in the subparagraphs of Section 780 relate to statements or conduct of the witness and the Committee sees no justification for going into collateral matters that do not relate to a statement or conduct of a witness.

*24. The Commission has been furnished with a copy of the State Bar Conference Committee report on 1963 Conference Resolution No. 69, which deals with the subject matter of Section 788, impeachment of a witness by showing conviction of a crime. The Committee does not agree with the majority report which would limit impeachment as to particular wrongful acts to conviction of the crime of perjury nor does the Committee agree with one of the minority reports which suggests the detailing of many types of crimes. The Committee approves of describing generally the types of crimes which may be used as a basis for impeachment of a witness. However, there is concern that the language employed in subparagraph (1) of subsection (a) is not broad enough to embrace such crimes as theft and robbery. For this reason, the Committee recommends the insertion of the word "dishonesty" in line 38 of page 36 of Preprint Senate Bill No. 1 between the word "is" and the word "false." This word was present in U.R.E. 21 in its original form and also as revised by the Commission in the tentative recommendation

and study on the subject of witnesses, which was published under date of March, 1964.

*25. In connection with the same section (Section 788) the Committee is concerned that it is unclear whether the party attacking credibility need not show the absence of any of the circumstances specified in subsection (b). It should be made clear that the burden of proof and the burden of producing evidence with respect to any of the matters specified in the subsection is on the party sponsoring the witness.

*26. The Conference Committee report referred to above also suggests that a time limitation be placed on the use of a criminal conviction in attacking credibility. In two of the minority reports the suggestion is made that the period be five years, dating either from the conviction or release from incarceration. The Committee is similarly concerned about the use of stale convictions where no formal evidence of rehabilitation is available. The period of five years appears to be too short and the Committee suggests consideration of a ten-year period. Adoption of a definite period of time would appear to be preferable to raising the fact issue whether or not rehabilitation has actually occurred in such cases.

DIVISION 7. OPINION TESTIMONY AND SCIENTIFIC EVIDENCE

*27. Section 800 in Preprint Senate Bill No. 1 reflects a deletion of language in the last prior draft which the Committee believes to be undesirable. At present

a lay witness is permitted to express an opinion on many matters of common experience, which are not necessarily admissible as being helpful to a clear understanding of his testimony. In the prior draft, it was made clear that a lay witness could also testify in the form of an opinion when it was helpful "to the determination of any disputed fact that is of consequence to the determination of the action." Undoubtedly, the Commission deleted the quoted language because, standing alone, it unduly broadened the permissible scope of opinion testimony from lay witnesses. However, the Committee is of the view that the Commission's cure was too drastic. The objective sought to be accomplished can be achieved by inserting a new subdivision (a) to Section 800, reading as follows:

> "(a) Related to a subject that is within common experience;"

This addition will permit the language deleted by the Commission to be added back to present subdivision (b). Under the Committee's suggestion, the present subdivisions (a) and (b) will become (b) and (c), respectively. The section would then read as follows:

> "If a witness is not testifying as an expert, his testimony in the form of an opinion is limited to such an opinion as is (a) related to a subject that is within common experience; (b) rationally based on the perception of the witness; and (c) helpful to a clear understanding of his testimony or to the determination of any disputed fact whether of consequence to the determination of the action."

*28. Another difficulty with Section 800 is that it does not recognize that lay opinion is sometimes admissible independently of its terms. For example, opinion as to insanity under subdivisions (a) and (b) of Section 870 is not necessarily based on common experience. In addition, as will be pointed out (Par. 36), a lay witness is now and should be permitted to testify to an opinion of value under some circumstances. To avoid confusion, the Committee recommends that the words:

"expressly permitted by law or is":

be inserted after the word "is" in line 41 of page 37 of Preprint Senate Bill No. 1.

*29. The Committee has two recommendations of significance in connection with subdivision (b) of Section 801. First, the phrase "whether or not admissible" is confusing and unnecessary in view of the limitations imposed by the ending clause "unless an expert is precluded by law from using such matter as a basis for his opinion." Second, the Committee is of the view that the clause "commonly relied upon by experts in forming an opinion on the subject to which his testimony relates" is unduly restrictive, particularly as applied to experts in less well known fields. In addition, this clause raises problems in laying the foundation for the expression of expert opinion. About the only way that reliance by experts could be established would be by testimony of the expert himself, thus reducing the effectiveness of this clause as a safeguard as to trustworthiness. It is the view of the Committee that reliance upon matters which are not commonly relied upon by experts in a particular field can be brought out on

cross-examination and should go to the weight of the opinion rather than to its admissibility.

*30. In connection with Section 802, the Committee reiterates a position previously taken by it. It is important in the great majority of cases that an expert be required to state the matter upon which his opinion is based before stating his opinion. The Committee recommends the accomplishment of this purpose by inserting at the beginning of line 7 of page 7 of page 38 of Preprint Senate Bill No. 1 the following words:

> "shall state on direct examination, before stating his opinion,".

If the Commission is of the view that is too rigid a requirement to make generally applicable, an alternative would be to add an additional sentence to Section 802, as follows:

> "Upon objection of a party, such matter must be stated before the witness may testify as to his opinion."

31. Another problem with Section 802 exists because of the last clause "unless he is precluded by law from using such reasons or matter as a basis for his opinion." The Committee is of the view that this clause is unnecessary and confusing as applied to this section. The problem of matter which is not a proper basis for an opinion is dealt with in Section 803. The Committee is not aware of situations in which reasons for an opinion are excluded as a matter of law but, even if there are such situations, it would be impossible to properly evaluate the expert testimony unless one knew as a result of the expert's statement that he had relied upon an improper reason.

*32. In Section 803, the Committee recommends the insertion of the following clause between the words "may be" and "then" in line 13 of page 38 of Senate Preprint Bill No. 1:

"if there remains a proper basis, . ."

This clause expresses the intention of the Commission. To avoid any problem of construction, the Committee feels that it is desirable to make it explicit that there must be the proper basis for expert opinion before an opinion is stated.

*33. The Committee believes that the first five lines of Section 804(b) are confusing and unnecessarily complicated. The Committee recommends the substitution of the following language:

"Nothing in this section permits cross-examination, not otherwise permitted, of . . ."

The same change will be recommended by the Committee in Section 1203(b) relating to hearsay evidence.

34. Under Section 804, the Committee is also concerned that a party should have the right of cross-examination of his own witness if such witness has not previously testified as to the opinion or statement relied upon by the expert. There is a division of opinion in the Committee as to whether Section 804(b) permits such cross-examination. The Committee recommends that the Commission consider whether clarification of subdivision 4 of Section 804(b) is necessary to avoid confusion in this regard. These comments are also applicable to Section 1203(b).

35. The Committee is of the view that the placement of Section 830 in a separate article, relating solely

to opinion testimony in eminent domain cases, is unnecessary and undesirable. The appropriate heading for Article 2 should be that presently used for Article 3 so that both Section 830 and Section 870 would be placed under the heading: "Article 2. Opinion Testimony on Particular Matters." It is probable that additional sections will be added to this article from time and time and there is no reason for singling out particular subject matters for treatment in separate articles.

*36. As noted in comment 28, an owner is now permitted to testify to the value of his property, a party suing for compensation is permitted to testify to the value of his own services and lay opinion is permitted as to the value of ordinary services where there is no market value or prevailing wage scale. It is doubtful that these opinions would be admissible under Section 800. Therefore, the Committee recommends the drafting of an additional section to deal with lay opinion as to the value of property and services, such section to be inserted in the article dealing with opinion testimony on particular matters.

37. The Committee notes that Section 870(b) is susceptible to the interpretation that a subscribing witness might testify to the sanity of the person at a time remote from the signing of the writing involved. This is obviously not the intent of the section and the Committee recommends clarification of the language used.

38. The Committee understands that Sections 890-896, inclusive, relating to blood tests to determine paternity, incorporate the existing provisions of the Code of Civil

Procedure without substantive change. Although blood tests by experts other than those who are court appointed is permitted under the existing law, the Committee is concerned that a literal reading of these sections might indicate that a party is not entitled to employ and call his own expert witnesses on the subject. The Committee suggests that this right be made clear either by an appropriate change in the statutory language or in the comment accompanying these sections.

39. In addition, the attention of the Committee has been called to the report of the Committee of the State Bar Conference on 1962 Conference Resolution No. 8, dealing with blood tests to establish paternity. This report was rendered to the 1963 Conference and was approved by the Conference. No action has been taken on the report by the Board of Governors. The report recommends amendment of Section 1980.6 of the Code of Civil Procedure (Section 895 in the proposed Evidence Code) to eliminate the conclusive effect given to the unanimous opinions of the experts. Instead the report would require that the conclusions of the experts be submitted to the trier of the fact, along with all other evidence, in the determination of the issue of paternity. The Committee believes that the subject matter of this report is beyond the scope of its assignment but, nevertheless, calls the report to the attention of the Law Revision Commission for such consideration as the Commission may wish to give it.

39. The Committee also notes a constitutional question with respect to Section 896 (see Witkin, Evidence § 329, p. 369).

DIVISION 8. PRIVILEGES

40. The Committee notes that Section 914(b) would work a pro tanto repeal of various statutory provisions conferring contempt powers upon governmental agencies which do not have constitutional contempt power. For example, Labor Code Section 142 gives to the Industrial Accident Commission power to punish for contempt in the same manner and to the same extent as courts of record. The Committee is divided in its view as to whether additional exceptions ought to be stated in Section 914(b) but believes that the Commission should give consideration to the matter.

41. The Committee disagrees with the inclusion in Section 958 of the clause "including but not limited to an issue concerning the adequacy of the representation of the client by the lawyer." Any matters covered by this clause would be included under the concept of "an issue of breach of a duty arising out of the lawyer-client relationship." The specific reason for the Committee's objection is that there is not a parallel clause in Sections 1001 and 1020 relating to the physician-patient and psychotherapist-patient privileges and the differences in treatment may give rise to problems of construction, which are not warranted.

*42. The Committee is of the view that Section 912(b) is broad enough to embrace the situation where jointly interested clients consult different lawyers and there are subsequent disclosures as between such clients and lawyers. This situation is one in which disclosure should not result in waiver of the privilege. It is the

thought of the Committee that it would be helpful to have the comment mention this situation in such a way as to make it clear that it is intended to be covered.

*43. The Committee is of the view that Section 981 creating a new exception to the privilege for confidential marital communications involves a policy determination beyond the scope of the Commission's function. Moreover, the comment with regard to this section indicates that it is not responsive to any compelling need. The Committee believes that there are serious dangers that this exception would vitiate a substantial part of the privilege. The fact that such an exception exists with regard to the lawyer-client, doctor-patient and psychotherapist-patient privileges is not persuasive in dealing with the confidential marital communications privilege. The obligations inherent in the relationships are so much different that the exceptions to the professional privileges do not furnish a precedent in this instance.

*44. The Committee is very concerned about the obvious overlap between the physician-patient privilege and the psychotherapist-patient privilege by reason of the definitions contained in Sections 990, 991, 1010 and 1011. Under Sections 990 and 1010, a physician is both a physician and a psychotherapist, no distinction being drawn between these two roles so far as the definition is concerned. Under Section 991, a physician's patient is one who secures diagnosis or treatment of a physical, mental or emotional condition. Under Section 1011, a psychotherapist's patient is one who secures diagnosis or treatment of a mental or emotional condition.

The Committee recognizes the considerations which have impelled the Commission to adopt these definitions. So far as Section 991 is concerned, it is clear that the line between organic and psychosomatic illness is indistinct and that many modern physicians treat a patient on physical, mental and emotional fronts at the same time. A problem arises, however, because the exceptions to the two privileges are different. The most important difference lies in the exception to the physician-patient privilege as to criminal and disciplinary proceedings under Section 998 with no comparable exception to the psychotherapist-patient privilege being provided.

One possible approach would be to make the exceptions identical for both privileges, but it would seem impractical to achieve this result. On the one hand, broadening the physician-patient privilege to the same basis as the psychotherapist-patient privilege would probably meet with opposition in many quarters. On the other hand, narrowing the psychotherapist-patient privilege to the same status as the physician-patient privilege would tend to minimize its value in areas where it is probably most needed.

Consequently, it appears that the problem can be resolved in only one of two ways. Either the definition of "psychotherapist" as contained in subdivision (a) of Section 1010 can be narrowed to embrace only physicians whose principal practice is in the field of psychiatry or the definition of "patient" in Section 991 can be narrowed to eliminate reference to diagnosis or treatment of mental or emotional conditions. A majority of the Committee favors

the latter approach and recommends striking the words "or mental or emotional" appearing on lines 24 and 25 of page 47 of Preprint Senate Bill No. 1. The reasoning of the majority is that such an approach recognizes the realities of the practice of modern medicine, in which many patients consulting a physician who is not primarily a psychiatrist will nonetheless be treated for and communicate to the doctor about mental and emotional conditions, which communications ought to be privileged even in a criminal proceeding. The minority of the Committee are troubled by the fact that the majority approach will sometimes involve difficult fact questions in determining which of the two privileges applies and, for this reason, the minority recommends the approach of narrowing the definition of "psychotherapist." Both the majority and minority are firm in the conviction that the Commission must resolve this problem by adopting one solution or the other; otherwise hopeless confusion will result.

* 45. The Committee has substantial doubt about the so-called "trade secret" privilege contained in Section 1060. Disclosure of a trade secret may be required whenever the evidence thereof is material and relevant to a material issue. The question, therefore, is not really one of privilege but rather of materiality and relevancy. In practice, the courts have protected trade secrets where the materiality and relevancy of the disclosure sought was not clearly established and have provided safeguards where disclosure has been required. Therefore, the Committee is disposed to recommend against the adoption of this section.

If the section is to be adopted, at the very least a restrictive definition of trade secrets should be adopted. Section 2019 of the Code of Civil Procedure protects only "secret processes, developments or research" in connection with discovery proceedings. Some such definition would seem to be appropriate in connection with Section 1060. Otherwise the claims of trade secrets will be as broad and as varied as the ingenuity of counsel and their clients.

*46. The newsman's "immunity" provided by Section 1072 is not treated as a privilege. The Commission's desire to qualify this immunity is appreciated and approved by the Committee. However, if this matter is to be included in the Evidence Code, it would seem wise to recognize that a newsman has a qualified privilege to refuse to disclose the source of news procured for publication and published by news media, except when the source has been disclosed previously or the disclosure of the source is required in the public interest or to otherwise prevent injustice. The last stated phrase is an addition to the concept expressed by the existing language of Section 1072. Nevertheless, it is felt to be desirable and necessary where disclosure of sources may be of importance in private litigation.

DIVISION 9. EVIDENCE EFFECTED OR EXCLUDED BY EXTENSIVE POLICIES

*47. The comment on Section 1150 appearing on page 911 of the preliminary draft distributed under date of October 19, 1964, is misleading since it states only that Section 1150 codifies existing California Law in a

certain particular. As is noted in the comment to Section 704, the two sections make a major change in existing California law with respect to the scope of inquiry into jury misconduct and this fact should be noted in connection with the discussion of Section 1150.

*48. The Committee disagrees with the enlargement of the scope of inquiry into jury misconduct under Section 1150. Recognizing that the case of Noll v. Lee, 221 Cal.App.2d 81, provides an avenue for enlarging the scope of inquiry, it is difficult to believe that it licenses an all-out invasion of the jury room. A persuasive reason for refusing to enlarge the scope of inquiry in the jury misconduct is that the intelligence, perception and understanding of jurors is bound to vary greatly. In many instances it would undoubtedly be possible to get a juror of limited intelligence, impaired perception or limited understanding to raise questions about the conduct of other jurors, particularly where issues had been debated in the jury room vigorously. The result would be a contest by conflicting testimony involving most, if not all, of the jurors in a particular case. The policy limiting inquiry into jury misconduct is based not alone on the theory of avoiding jury tampering but on the very sound premise that litigation eventually must come to a rest. The attacks on jury misconduct which are presently permitted are sufficiently broad to permit redress whenever gross misconduct exists. The Committee is most reluctant to enlarge the scope of such inquiry where there does not appear to be a demonstrated need and sound policy considerations dictate against any such enlargement.

DIVISION 10. HEARSAY EVIDENCE

*49. As previously noted in paragraph 33, the Committee recommends that Section 1203(b) be redrafted in conformance with the Committee's suggestion as to Section 804(a). In addition, clarifying language or comment as to the application of this subdivision of Section 1203 to a witness who has testified in the action would be helpful, as previously noted in connection with Section 804(b).

50. Wh ile it may be a bit late for draftsmanship comments, the Committee is of the view that the format of Sections 1220, et seq. is somewhat confusing. The framing of exceptions to the hearsay rule in terms of a double negative ("not made inadmissible") makes for difficult reading. It seems to the Committee that it would be much better to state the exceptions directly. This could be accomplished by the simple statement: "The hearsay rule is not applicable to. . ."

*51. The Committee opposes the adoption of Section 1224. This section would eliminate the requirement that the statement of an agent, partner or employee be authorized, either expressly or impliedly, in order to be admissible. The comment to this section states that its practical scope is quite limited. The Committee agrees with this comment but points out that the dangers inherent in this section are such as to warrant opposition to it. The unauthorized statement of an employee or agent with regard to matters involved in complex business litigation may be and frequently is of a damaging character, yet it may be based upon faulty knowledge, imperfect observation or inaccurate reporting of the acts or statements of another.

Once admitted, the party against whom the statements are admitted would not even have the recourse of cross-examination of the declarant. Unauthorized statements really have no place in litigation unless they fit the tests of trustworthiness inherent in other exceptions to the hearsay rule.

*52. In addition to the foregoing, the Committee points out that Section 1224(d) is deficient in that it requires only the matters in subdivision (a) to be shown as a foundation to the admission of the statement. At the very least the matters in subdivision (b) should also be shown. The Committee notes that Section 1223(c) correctly states the rule that should be stated in Section 1224(d).

*53. Section 1227 is deficient in that it does not identify the declarant whose statements may be offered. It is believed that this deficiency cannot be corrected in a single section. The Committee suggests the following:

> "1227. Evidence of a statement by a minor child is not made inadmissible by the hearsay rule if offered against the plaintiff in an action brought under Section 376 of the Code of Civil Procedure for injury to such minor child.
>
> "1228. Evidence of a statement by the deceased is not made inadmissible by the hearsay rule if offered against the plaintiff in an action brought under Section 377 of the Code of Civil Procedure."

54. In connection with Section 1237(b), the Committee is of the view that writings prepared by some other person for the purpose of recording the witness's

statement at the time it was made should be admissible under this exception only if the statement is recorded verbatim or the witness himself authenticated the accuracy of the writing at the time it was made.

*55. The Committee disapproves Section 1241 inasmuch as it applies to many statements, the accuracy of which may be subject to substantial doubt. The Committee believes that no compelling necessity has been shown for this exception and recommends against its adoption.

*56. The Committee is concerned about the draftsmanship of Section 1242. Section 1870(4) of the Code of Civil Procedure which presently states this exception to the hearsay rule refers to the statement of a "dying person" and Section 1242 contains no such limitation. It is suggested that this deficiency can be cured by inserting the word "immediate" in line 52 on page 59 of Prepint Senate Bill No. 1 between the words "under a" and "since." The Committee also believes that the words commencing with "voluntarily" in that line and the next two succeeding ones are unnecessary. How does one go about proving that such a declaration was made "in good faith"? Is not the phrase "in the belief that there was no hope of his recovery" redundant in view of the phrase "impending death"?

57. Section 1250(b) is approved in principle but it is believed that the expression of the principle is not sufficiently clear. The Committee suggests the following as a substitute:

"This section does not make admissible evidence which purports to relate a past event or statement, rather than the state of mind, emotion or physical sensation of the declarant."

*58. The Committee believes that Section 1271 does not sufficiently reflect the holding in the McLean case quoted at pages 1032 and 1033 of the comment distributed under date of October 19, 1964. It is recommended that the following language be added to subdivision (b) of Section 1271 in order to remedy this deficiency:

"and was based upon the report of an informant who had the duty to observe and report the facts recorded and who had personal knowledge of such facts."

This same change should be made in Section 1280(b).

59. The Committee notes that the "not made admissible" format of the rest of this division is missing from Sections 1282 and 1283, presumably because of a desire to make these provisions applicable to offices and other places as well as courts. However, it is submitted that it is not the function of the Evidence Code to establish what shall be accepted in offices and other places.

60. The Committee notes that Section 1290 includes the words "or affirmation" despite the fact that Section 165 specifies that the word "oath" includes affirmation.

61. The Committee also notes that reading and comparison of Sections 1291 and 1292 would be facilitated if the format were the same.

62. While it is not essential, the Committee believes that it would be desirable to add a section to Article 9 (Sections 1290 - 1292, inclusive) to make it clear that the provisions of the Code of Civil Procedure govern the admissibility of depositions in the same action.

DIVISION 11. WRITINGS

The Committee has no recommendations as to changes in this division at the present time.

-- o --

Memo 64-101

EXHIBIT II

STATE OF CALIFORNIA

OFFICE OF LEGISLATIVE COUNSEL

Sacramento, California
November 4, 1964

Honorable James A. Cobey
P. O. Box 1229
Merced, California

Evidence Code - #7136

Dear Senator Cobey:

We have previously written to you about the adequacy of the title of 1965 Preprint Senate Bill No. 1, containing the proposed new Evidence Code. [letter of November 2, 1964 stated "Pursuant to your request we have examined 1965 Preprint Senate Bill No. 1 for adequacy of the title, and we find the title to be legally adequate."] We have now, as requested, examined the body of the bill, and we have only a few comments, most of which relate to very minor matters.

(1) From the background material furnished to us we understand that the intention is that the Evidence Code apply only to court proceedings, except as otherwise provided by statute or rule. We wonder if Section 300 would not express this intention more clearly.

(2) Although we recognize that there is some precedent to the contrary, it seems to us that Section 12 of the proposed code and Section 152 of the bill should provide that the code and the rest of the bill shall become operative on January 1, 1967.

(3) We can well appreciate the difficulty in properly disposing of the contents of present Section 1963 of the Code of Civil Procedure, but we also note that the statements that have been allocated to "Maxims of Jurisprudence" (Secs. 3544-8, Civ. C., as added by Secs. 10-14 of the bill), e.g., "Private transactions are fair and regular," do not sound to us like maxims of jurisprudence, or, at any rate, do not seem to be of the

same character as the principles expressed in present Sections 3510-3543 of the Civil Code.

(4) Page 36, lines 35 and 40. We gather it was felt that too many "of's" were undesirable, but we nevertheless think that a person is convicted of a crime, not for a crime. Maybe the matter could be resolved by referring to the "criminal conviction" of the witness.

Page 54, line 37. There is a typographical error here: "of" should be "if."

Page 68, lines 34 and 35. The cross-reference should be to "Article 3 (commencing with Section 1180) of Chapter 4, Title 4, Part 4, Division 2 of the Civil Code."

Page 188, line 43. After "will not," "be" should appear in strikeout.

(5) When we set up the bill for introduction, there will, of course, be a few changes in style. In the preprint bill, full articles that are repealed by the bill are set out in strikeout. We assume that this has been done to aid readers in understanding the proposal, but in view of Joint Rule 10 we think that this cannot be done in the bill introduced at the 1965 Regular Session. We assume that the "analysis" on pages 1 through 15 is not to be in the bill as introduced.

Very truly yours,

George H. Murphy
Chief Deputy Legislative Counsel

By
Terry L. Baum
Deputy Legislative Counsel

TLB:cs

THE UNIVERSITY OF CHICAGO
CHICAGO • ILLINOIS 60637
THE LAW SCHOOL

November 5, 1964

Mr. John H. DeMoully
California Law Revision Commission
Room 30, Crothers Hall
Stanford University
Stanford, California 94305

Dear John:

Your letter of October 26 asks for further suggestions about the Evidence Code, in light of the comments on the Code which you send. I shall try to give you some further suggestions, in the hope they will be helpful. Your judicial notice provisions, in my opinion, are much in need of further revision. Indeed, I fear that in their present form they will bring discredit to the Law Revision Commission.

You have adopted some of the changes I suggested in my letter of July 2--changes that were in my view absolutely essential. The fundamental character of the changes you have made is impressive. One example is that under your old Rule 10, the judge always had to afford each party reasonable opportunity to present information before he could take judicial notice of facts; under the statutory provisions you now propose, the judge never is required to go to the parties before taking notice of facts. The change from "always" to "never" is a startling one.

I should think that your about face shows that a deeper study of judicial notice is essential.

Your new draft does not reflect some of the suggestions I made in my letter of July 2. I shall not now repeat those suggestions. Most of what is said on pages 3, 4, and 5 of that letter are fully applicable to your latest draft. What follows in this letter is an analysis of the changes you have made, that is, a statement of my reasons for believing that the changes are badly thought out. You now have a combination of the misunderstandings of the American Law Institute, with a partial and sometimes inept correction of those misunderstandings by the Law Revision Commission.

Although sections 455, 456, and 459 all recognize judicial notice of "matters" which are "reasonably subject to dispute," it is entirely clear under sections 450, 451, and 452 that "facts" may never be noticed except when they are indisputable. Legal materials apparently may be noticed when they are disputable, but I can find nothing in the proposed statutory provisions to allow judicial notice in any circumstance of facts which are disputable. Another major feature of what you propose is that participation of parties is provided for only before notice is taken, never after notice is taken.

Your system won't work. Judges cannot comply with it. Judges will be forced to violate it, and judges will violate it. The result will be much procedural injustice that does not now exist. The total impact of the judicial notice provisions will be exceedingly harmful.

I cannot now take the time to demonstrate this fully, but I shall state my main reasons for the conclusions I have just stated.

1. The statutory provisions you propose limit judicial notice of facts to indisputable facts. The practical needs of the administration of justice call for judicial notice of disputable facts, with proper opportunity for parties to challenge disputable facts after they have been noticed.

Whether a judge is finding facts, applying law, exercising discretion, formulating law, or performing administrative tasks in the operation of his court, he is constantly exercising what we call "judgment." Judgment is based upon experience and observation. Experience and observation are compounds which are partly factual. And the portion of these compounds that is factual is by no means always indisputable, even when the experience and observation is that of the strongest and wisest judge.

For instance, the process of fact-finding calls for use of experience, one ingredient of which is knowledge of facts which are often highly disputable. The judge does not believe a witness because his general knowledge based upon his past experience tells him that the facts just can't be that way. No one can appraise testimony without using a background of experience about human nature, about activities of people, about business practices, about customs and attitudes--and much of this background is made up of impressions which are imperfect and disputable.

Discerning judges often point out what I have just said. See, for instance, an outstanding opinion which has been much acclaimed, McCarthy, 194 Wis. 198 (1927): "A farmer sitting on a jury would not be bound by opinion evidence relating to farming which he knew or believed to be untrue. Neither would a pharmacist or mechanic or physician." A fact finder, whether judge or juror, must use his experience and his background of knowledge of facts when he appraises testimony. The only way a farmer, pharmacist, mechanic or physician can appraise testimony is on the basis of his experience and observation. Since the witness testifies on one side and the fact-finder is free to disbelieve him, the facts that are under appraisal have to be classified as disputable. But this does not prevent the ordinary fact-finder from disbelieving the testimony on the basis of background information which is judicially noticed.

Thayer had profound understanding of judicial notice when he wrote: "In conducting a process of judicial reasoning, as of other reasoning, not a step can be taken without assuming something which has not been proved."

Unless your proposed statutory provisions reflect the thought that Thayer expresses, they will be fundamentally unsound, in my opinion.

2. Your statutory provisions never allow a judge to go ahead and assume facts which seem to him probably true, subject to challenge by the parties of the noticed facts after notice has been

taken. Yet this is now the universal system in practice, and it is the only system that will work.

Thayer, Wigmore, Greenleaf, the federal courts, and the almost unanimous state courts are all against you.

Almost one hundred per cent of all state and federal judges now in fact conform to the wise and profound statement of Thayer: "Practical convenience and good sense demand an increase rather than a lessening of the number of instances in which courts shorten trials, by making prima facie assumptions, not likely, on the one hand, to be successfully denied, and, on the other, if they be denied, admitting readily of verification or disproof. . . . Taking judicial notice does not import that the matter is indisputable. . . . In very many cases, then, taking judicial notice of fact is merely presuming it, i.e., assuming it until there shall be reason to think otherwise." Thayer, A Preliminary Treatise on Evidence 300, 308-309 (1898).

You will find that California law is basically in agreement with Thayer, even though you will also find many statements in California opinions to the effect that only indisputable facts may be noticed. The law is what the judges do, not what they say, and in this sense the California law is with Thayer.

Wigmore had essentially the same understanding as Thayer--a very deep understanding. This is shown by his position, strongly held, that noticed facts are challengeable after notice is taken.

Greenleaf took the same view as Thayer and Wigmore.

The Supreme Court of the United States cited and relied upon both Wigmore and Greenleaf in holding that noticed facts may be challenged, in Ohio Bell, 301 U.S. 292 (1937).

The case law of the state courts is almost unanimously in agreement with Thayer, Wigmore, Greenleaf, and the federal courts, in allowing challenge of noticed facts after notice has been taken. I have recently made a full analysis of state case law, in an article which was scheduled for publication in early October; I can arrange to send you a copy if you are interested. The conclusion is that Arizona stands alone as the one state whose law denies opportunity to challenge noticed facts after the facts have been noticed.

When you have against your position the federal courts, the almost unanimous state courts, Thayer, Wigmore, and Greenleaf, surely you have reason for hesitation. What you are doing basically is rejecting the almost universal practice in favor of the misunderstandings of Morgan; it is true that Morgan spoke for the American Law Institute and that the National Conference of Commissioners on Uniform State Laws adopted what the Institute advanced. But the more significant fact is the overwhelming rejection of both the Model Code and the Uniform Rules of Evidence. Despite the prestige of those organizations and their usual success in winning state legislatures, they have won only one state legislature on the subject of evidence during more than twenty years of trying.

3. Your comment on section 450 contradicts section 450. Since section 450 is unambiguous and entirely clear, the usual principles of statutory interpretation require that the comment be disregarded.

Of the five paragraphs of comment on § 450, the last three paragraphs relate entirely to other sections and not at all to § 450. Therefore, my discussion of the comment will be limited to the first two paragraphs, the only ones that should appear under § 450.

The comment does not have the effect merely of explaining § 450; the comment directly contradicts § 450. The section provides, in full: "Judicial notice may not be taken of any matter unless authorized or required by statute." That seems to me entirely clean and clear. But the comment on § 450 says the opposite in the first sentence of the second paragraph: "Section 450 should not be thought to prevent courts from considering whatever materials are appropriate in construing statutes, determining constitutional issues, and formulating rules of law." The words "whatever materials are appropriate" include disputable factual materials, as the citation of Perez v. Sharp shows.

The statutory provision says judicial notice may not be taken unless authorized by statute. The comment says judicial notice may be taken even though not authorized by statute.

The statutory provision says judicial notice may not be taken of disputable facts. The comment says judicial notice may be taken of disputable facts.

You can't explain away the contradiction by saying that when facts are used only for such a purpose as what the comment calls "formulating rules of law" something other than judicial notice is involved. The reason you can't take that position is that § 451 says that law is the subject of judicial notice, including statutes and case law. Under prevailing usage, it would be possible to say that judicial notice has to do only with facts, not with law, and if that usage were followed, you might justify the comment on § 450 by saying that it deals with law instead of facts and that therefore judicial notice is not involved. But when § 451 rejects that prevailing usage and provides for judicial notice of law, I see no plausible way to argue that the comment on § 450 does not contradict § 450.

My surmise is that a court would be forced to follow the clear and unequivocal language of § 450, and that the direct contradiction in the comment would have to be ignored. The established principle is a clear one that a court will not resort to legislative history to upset clear and unequivocal statutory words. Yet in this instance, the intent may be what is stated in the comment, rather than what is said in the statutory provision. At all events, I think I am forced to say, but wholly without disrespect, that the drafting is atrocious.

4. The comment contradicts the comment.

The first sentence of the comment says that § 450 provides that judicial notice may not be taken unless authorized by statute.

The first sentence of the second paragraph of the comment says that judicial notice may be taken without authorization by statute.

When the comment contradicts itself, a court would have all the more reason to ignore the comment.

Yet I recognize that the real legislative intent might be embodied in the second paragraph of the comment. Therefore, I shall discuss what will happen if the second paragraph of the comment is denied effect, and then I shall discuss what will happen if the second paragraph of the comment is given full effect.

5. <u>If the second paragraph of the comment on section 450 is denied effect, the result will be disastrous, because judges will be forbidden to inform themselves by reading extra-record social science materials and other such materials</u>.

Judges who are trying to do some social engineering should be encouraged to enlighten themselves by general reading, even when they are pondering the problems of particular cases. They should not be subjected to a system of enforced ignorance. They should go on doing what they do now: whenever they have the time and the inclination they should resort to social science literature. Nearly all that literature is based upon disputable facts. Yet the best judges resort to it, for they need to know the facts about the society in order to try to meet the legal needs of the society. If the literal words of § 450 are followed, the Brandeis brief will be forbidden. Judicial research outside

the law books will be forbidden. Of the Supreme Court of the United States, Mr. Justice Brennan said in the New York Times Magazine of October 6, 1963: "The writing of an opinion always takes weeks and sometimes months. The most painstaking research and care are involved. Research, of course, concentrates on relevant legal materials--precedents particularly. But Supreme Court cases often require some familiarity with history, economics, the social and other sciences, and authorities in these areas, too, are consulted when necessary." Section 450 according to its plain terms will forbid California judges to inform themselves in the manner in which Mr. Justice Brennan says the justices of the Supreme Court of the United States inform themselves.

6. <u>If the second paragraph of the comment on section 450 is given full effect, the result will still be disastrous, because legislative facts must be used not only for formulating law but also for finding facts and for exercising discretion</u>.

The second paragraph of the comment allows use of extra-record facts, even if controversial, for purposes of formulating rules of law, but it does not allow judicial notice of controversial facts for any other purpose. The comment seems to me irrational in allowing judicial resort to social and economic facts for the one purpose but not for any other purpose.

Let me give an example: A newly appointed trial judge is confronted with his first task of sentencing a criminal defendant. He gets out the relevant literature and informs himself,

and some of the facts he reads about sentencing are inevitably disputable; indeed, he reads conflicting accounts of experience concerning sentencing. Under the comment, this conscientious judge will have violated your statutory law. Is that what you want?

Another judge has had decades of experience concerning criminal insanity. He knows what the controversial issues of fact are and he knows his own position on them, because of his long experience. He has a case in which experts testify on both sides of some of the controversial issues. He appraises their testimony by drawing deeply upon his experience. The facts, of course, are not only disputable but they are disputed in the very case. Under your comment, this judge, to the extent that he follows his own knowledge as to how best to resolve the controversial factual issues, will be violating your statutory law. Is that what you want?

A third judge is confronted with preparation of an equity decree on a complicated business problem, and he wants to inform himself of relevant social and economic facts. He reads what he can find, including business facts about a particular city. Not all that he reads can be called indisputable. Under your comment, this judge will be violating your statutory law. Is that what you want?

Illustrations could be multiplied to show that judges must use legislative facts for many purposes in addition to formulation of law. Such a thing as judicial policy exists and is often vital.

Formulating policy is every bit as important as formulating law and is every bit as much in need of guidance through understanding of legislative facts.

Assuming that your comment will be the law to the extent that it contradicts the statutory provision on which it comments, it is substantively unsound. Judges should be allowed to make use of disputable legislative facts for all purposes--finding facts, formulating law, exercising discretion, making judicial policy, using judgment, administering their courts.

Conclusions. Section 450 should not be contradicted by the comment on that section. The only way to cure 450 is by providing in the section itself, not in the comment, that judicial notice may be taken of legislative facts for all purposes, not merely for formulating law but also for appraising evidence, for exercising discretion, and for determining policy.

You can't have a successful system of judicial notice unless you give judges freedom to think in a natural way, which means using their imperfect impressions of social and economic facts, using their experience even when it is partly factual, using what they find when they read the literature of social science.

You can't have a successful system of judicial notice if the facts to be noticed are limited to indisputable facts. Useful facts too often come in compounds which are only partly factual and which mix together disputable and indisputable facts.

You can't have a successful system of judicial notice if the only party participation in determining what facts are to be noticed comes before any facts are noticed. The only practical system is to allow judges to notice what they think should be noticed, but to give parties a chance to challenge any noticed facts that may be disputable. On this proposition Thayer, Wigmore, Greenleaf, the unanimous Supreme Court of the United States, all the state case law except that of one state, and a California statute are all in agreement; your proposed Code runs counter to all these authorities. Your proposed Code runs counter to the system that all judges of the Anglo-American system now use.

The system you propose won't work.

Affirmatively, I especially recommend (1) allowing judicial notice of legislative facts for all purposes, and (2) allowing noticed facts to be challenged whenever they are disputable.

Sincerely yours,

Kenneth Culp Davis

KCD/fs

An act to establish an Evidence Code, thereby consolidating and revising the law relating to evidence; amending various sections of the Business and Professions Code, Civil Code, Code of Civil Procedure, Corporations Code, Government Code, Health and Safety Code, Penal Code, and Public Utilities Code to make them consistent therewith; adding Sections 164.5, 3544, 3545, 3546, 3547, and 3548 to the Civil Code; adding Section 1908.5 to the Code of Civil Procedure; and repealing legislation inconsistent therewith.

The people of the State of California do enact as follows:

SECTION 1. The Evidence Code is enacted, to read:

EVIDENCE CODE

DIVISION 1. PRELIMINARY PROVISIONS AND CONSTRUCTION

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

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

3. If any provision or clause of this code or application thereof to any person or circumstances is held invalid, such invalidity shall not affect other provisions or applications of the code which can be given effect without the invalid provi-

sion or application, and to this end the provisions of this code are declared to be severable.

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

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

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

7. Unless otherwise expressly stated:

(a) "Division" means a division of this code.

(b) "Chapter" means a chapter of the division in which that term occurs.

(c) "Article" means an article of the chapter in which that term occurs.

(d) "Section" means a section of this code.

(e) "Subdivision" means a subdivision of the section in which that term occurs.

(f) "Paragraph" means a paragraph of the subdivision in which that term occurs.

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

9. The masculine gender includes the feminine and neuter.

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

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

12. This code shall become effective on January 1, 1967, and shall govern proceedings in actions brought on or after that date and also further proceedings in actions pending on that date. The provisions of Division 8 (commencing with Section 900) relating to privileges shall govern any claim of privilege made after December 31, 1966.

DIVISION 2. WORDS AND PHRASES DEFINED

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

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

110. "Burden of producing evidence" means the obligation of a party to introduce evidence sufficient to avoid a ruling against him on the issue.

115. "Burden of proof" means the obligation of a party to meet the requirement of a rule of law that he raise a reasonable doubt concerning the existence or nonexistence of a fact or that he establish the existence or nonexistence of a fact by a preponderance of the evidence, by clear and convincing proof, or by proof beyond a reasonable doubt.

Except as otherwise provided by law, the burden of proof requires proof by a preponderance of the evidence.

120. "Civil action" includes [redacted] all actions and proceedings other than a criminal action.

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

130. "Criminal action" includes criminal proceedings.

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

140. "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.

145. "The hearing" means the hearing at which a question under this code arises, and not some earlier or later hearing.

150. "Hearsay evidence" is defined in Section 1200.

160. "Law" includes constitutional, statutory, and decisional law.

165. "Oath" includes affirmation.

170. "Perceive" means to acquire knowledge through one's senses.

175. "Person" includes a natural person, firm, association, organization, partnership, business trust, corporation, or public entity.

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

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

190. "Proof" is the establishment by evidence of a requisite degree of belief concerning a fact in the mind of the trier of fact or the court.

195. "Public employee" means an officer, agent, or employee of a public entity.

200. "Public entity" includes a nation, state, county, city and county, city, district, public authority, public agency, or any other political subdivision or public corporation, whether foreign or domestic.

205. "Real property" includes lands, tenements, and hereditaments.

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

220. "State" means the State of California, unless applied to the different parts of the United States. In the latter case, it includes any state, district, commonwealth, territory, or insular possession of the United States.

225. "Statement" means (a) a verbal expression or (b) nonverbal conduct of a person intended by him as a substitute for a verbal expression.

230. "Statute" includes a provision of the Constitution.

235. "Trier of fact" [redacted] (a) the jury and (b) the court when [redacted] is trying an issue of fact other than one relating to the admissibility of evidence.

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

(1) Exempted or precluded 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 from the hearing and the court is unable to compel his attendance by its process; or

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

(b) A declarant is not unavailable as a witness if the exemption, preclusion, disqualification, death, inability, or absence of the declarant was brought about by the procurement or wrongdoing of the proponent of his statement for the purpose of preventing the declarant from attending or testifying.

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

250. "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.

DIVISION 3. GENERAL PROVISIONS

CHAPTER 1. APPLICABILITY OF CODE

300. Except as otherwise provided by statute, this code applies in every action before the Supreme Court, a district court of appeal, superior court, municipal court, or justice court, including proceedings conducted by a referee, court commissioner, or similar officer, but does not apply in grand jury proceedings.

CHAPTER 2. PROVINCE OF [redacted] AND JURY

310. All questions of law (including but not limited to questions concerning the construction of statutes and other writings, the admissibility of evidence, and other rules of evidence) are to be decided by the [redacted]. Determination of issues of fact preliminary to the admission of evidence are to be decided by the [redacted] as provided in Article 2 (commencing with Section 400) of Chapter 4.

311. (a) Determination of the law of a foreign [redacted] or a [redacted] a foreign [redacted] is a question of law to be determined in the manner provided in Division 4 (commencing with Section 450).

(b) If such law is applicable and the court is unable to determine it, the court may, as the ends of justice require, either:

(1) Apply the law of this State if the court can do so consistently with the Constitution of the United States and the Constitution of this State; or

(2) Dismiss the action without prejudice or, in the case of a reviewing court, remand the case to the trial court with directions to dismiss the action without prejudice.

355.

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

court

356.

357. Where 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 an adverse party; 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.

Article 2. Preliminary Determinations on Admissibility of Evidence

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

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

court

(b) The [redacted] may hear and determine the question of the admissibility of evidence out of the presence or hearing of the jury; but in a criminal action, [redacted]

court

[redacted] the [redacted] shall hear and determine the question of the admissibility of a confession or admission of the defendant out of the presence and 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.

(d) A ruling on the admissibility of evidence implies whatever finding of fact is prerequisite thereto; a separate or formal finding is unnecessary unless required by statute.

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

court

[redacted] 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 a 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 of a particular person and the preliminary fact is whether that person made the statement or so conducted himself.

(b) Subject to Section 702, the court may admit conditionally the proffered evidence under this section, subject to evidence of the preliminary fact being supplied later in the course of the trial.

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

(1) the court may, and on request shall, instruct the jury to determine whether the preliminary fact does exist and to disregard the proffered evidence unless the jury finds that the preliminary fact exists;

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

404. Whenever the proffered evidence is claimed to be privileged under Section 940, the person claiming the privilege has the burden of showing that the proffered evidence might tend to incriminate him; and the proffered evidence is inadmissible unless it clearly appears to the court that the proffered evidence cannot possibly have a tendency to incriminate the person claiming the privilege.

405. With respect to preliminary fact determinations not governed by Section 403 or 404:

(a) When the existence of a preliminary fact is disputed, the court 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 court 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 preliminary fact is also a fact in issue in the action:

(1) The jury shall not be informed of the court's determination as to the existence or nonexistence of the preliminary fact.

(2) 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 court's determination of the preliminary fact.

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 Generally

410. As used in this chapter, "direct evidence" means evidence that directly proves a fact, without an inference or presumption, and which in itself, if true, conclusively establishes that fact.

411. 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.

412. If weaker and less satisfactory evidence is offered when it was within the power of the party to produce stronger and more satisfactory evidence, the evidence offered should be viewed with distrust.

413. In determining what inferences to draw from the evidence or facts in the case against a party, the trier of fact may consider, among other things, the party's failure to explain or to deny by his testimony such evidence or facts in the case against him, or his wilful suppression of evidence relating thereto, if such be the case.

DIVISION 4. JUDICIAL NOTICE

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

451. Judicial notice shall be taken of:

(a) The decisional, constitutional, and public statutory law of the United States and of every state of the United States and of the provisions of any charter described in Section 7½ or 8 of Article XI of the California Constitution.

(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 practice and procedure for the courts of this State adopted by the Judicial Council.

(d) Rules of pleading, practice, and procedure prescribed by the United States Supreme Court, such as the Rules of the United States Supreme Court, the Federal Rules of Civil Procedure, the Federal Rules of Criminal Procedure, the Admiralty Rules, the Rules of the Court of Claims, the Rules of the Customs Court, and the General Orders and Forms in Bankruptcy.

(e) The true signification of all English words and phrases and of all legal expressions.

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

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

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

(b) Regulations and legislative enactments issued by or under the authority of the United States or any public entity in the United States.

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

(d) Records of (1) any court of this State or (2) any court of record of the United States or of any state of the United States.

(e) Rules of court of (1) any court of this State or (2) any court of record of the United States or of any state of the United States.

(f) The law of foreign nations and public entities in foreign nations.

(g) 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.

(h) Specific facts and propositions that are not reasonably subject to dispute and are capable of immediate and accurate determination by resort to sources of reasonably indisputable accuracy.

453. Judicial notice shall be taken of any matter specified in Section 452 if a party requests it and:

(a) 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; and

(b) Furnishes the court with sufficient information to enable it to take judicial notice of the matter.

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) Exclusionary rules of evidence do not apply except for Section 352 and the rules of privilege.

455. With respect to any matter specified in Section 452 that is reasonably subject to dispute and of substantial consequence to the determination of the action:

(a) Before judicial notice of such matter may be taken, the court shall afford each party reasonable opportunity to present to the court information relevant to (1) the propriety of taking judicial notice of the matter and (2) the tenor of the matter to be noticed.

(b) If the court 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 court shall afford each party reasonable opportunity to meet such information before judicial notice of the matter may be taken.

456. The court shall at the earliest practicable time indicate for the record the matter which is judicially noticed and the tenor thereof if the matter judicially noticed:

(a) Is a matter that is reasonably subject to dispute and of substantial consequence to the determination of the action; and

(b) Is not a matter specified in subdivisions (a) or (e) of Section 451.

457. If the court denies a request to take judicial notice of any matter, the court shall at the earliest practicable time so advise the parties and indicate for the record that it has denied the request.

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

459. [redacted] The failure or refusal of the [redacted] to take judicial notice of a matter, or to instruct the jury with respect to the matter, does not preclude the [redacted] from taking judicial notice of the matter in [redacted] accordance with the procedure specified in this division.

460. (a) The reviewing court shall take judicial notice of (1) each matter properly noticed by the [redacted] and (2) each matter that the [redacted] was required to notice under Section 451 or 453. The reviewing court may take judicial notice of any matter specified in Section 452. The reviewing court may take judicial notice of a matter in a tenor different from that noticed by the [redacted]

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

(c) When taking judicial notice under this section of a matter specified in Section 452 that is reasonably subject to dispute and of substantial consequence to the determination of the action, the [redacted] reviewing court shall comply with the provisions of subdivision (a) of Section 455 if the matter was not theretofore judicially noticed in the action.

(d) In determining the propriety of taking judicial notice of a matter specified in Section 452 that is reasonably subject to dispute and of substantial consequence to the determination of the action, or the tenor thereof, if the reviewing court resorts to any source of information not received in open court or not included in the record of the action, including the advice of persons learned in the subject matter, the reviewing court shall afford each party reasonable opportunity to meet such information before judicial notice of the matter may be taken.

court

trial court

Trial court in subsequent proceedings in the action

460.

trial court

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

CHAPTER 1. BURDEN OF PROOF

Article 1. General

500. Except as otherwise provided by law, a party has the burden of proof as to each fact the existence or nonexistence of which is essential to the claim for relief or defense that he is asserting.

501. Insofar as any statute, except Section 500, assigns the burden of proof in a criminal action, such statute is subject to Penal Code Section 1096.

502. The court on all proper occasions shall instruct the jury as to which party bears the burden of proof on each issue and as to whether that burden requires that a party raise a reasonable doubt concerning the existence or nonexistence of a fact or that he establish the existence or nonexistence of a fact by a preponderance of the evidence, by clear and convincing proof, or by proof beyond a reasonable doubt.

Article 2. Burden of Proof on Specific Issues

520. The party claiming that a person is guilty of crime or wrongdoing has the burden of proof on that issue.

521. The party claiming that a person did not exercise a requisite degree of care has the burden of proof on that issue.

522. The party claiming that any person, including himself, is or was insane has the burden of proof on that issue.

CHAPTER 2. BURDEN OF PRODUCING EVIDENCE

550. The burden of producing evidence as to a particular fact is initially on the party with the burden of proof. Thereafter, the burden of producing evidence as to a particular fact is on the party who would suffer a finding against him on that fact in the absence of further evidence.

CHAPTER 3. PRESUMPTIONS

Article 1. General

600. Subject to Section 607, a presumption is an assumption of fact that the law requires to be made when another fact or group of facts is found or otherwise established in the action. A presumption is not evidence.

601. A presumption is either conclusive or rebuttable. Every rebuttable presumption is either (a) a presumption affecting the burden of producing evidence or (b) a presumption affecting the burden of proof.

602. A statute providing that a fact or group of facts is prima facie evidence of another fact establishes a rebuttable presumption.

603. A presumption affecting the burden of producing evidence is a presumption established to implement no public policy other than to facilitate the determination of the particular action in which the presumption is applied.

604. Subject to Section 607, the effect of a presumption affecting the burden of producing evidence is to require the trier of fact to assume 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 presumption.

605. A presumption affecting the burden of proof is a presumption established to implement some public policy other than to facilitate the determination of the particular action in which the presumption is applied, such as the policy in favor of the legitimacy of children, the validity of marriage, the stability of titles to property, or the security of those who entrust themselves or their property to the administration of others.

606. Subject to Section 607, the effect of a presumption affecting the burden of proof is to impose upon the party against whom it operates the burden of proof as to the nonexistence of the presumed fact.

607. When a rebuttable presumption operates in a criminal action to establish an element of the crime with which the defendant is charged, neither the burden of producing evidence nor the burden of proof is imposed upon the defendant; but, if the trier of fact finds that the facts that give rise to the presumption have been proved beyond a reasonable doubt, the trier of fact may but is not required to find that the presumed fact has also been proved beyond a reasonable doubt.

608. A matter listed in former Section 1963 of the Code of Civil Procedure, as set out in Section 1 of Chapter 860 of the Statutes of 1955, is not a presumption unless declared to be a presumption by statute. Nothing in this section shall be construed to prevent the drawing of any inference that may be appropriate in any case to which a provision of former Section 1963 would have applied.

[redacted]

Article 2. Conclusive Presumptions

620. The presumptions established by this article and all other presumptions declared by law to be conclusive are conclusive presumptions.

621. Notwithstanding any other provision of law, the issue of a wife cohabiting with her husband, who is not impotent, is conclusively presumed to be legitimate.

622. The facts recited in a written instrument are conclusively presumed to be true as between the parties thereto; but this rule does not apply to the recital of a consideration.

623. Whenever a party has, by his own statement or conduct, intentionally and deliberately led another to believe a particular thing true and to act upon such belief, he is not, in any litigation arising out of such statement or conduct, permitted to contradict it.

624. A tenant is not permitted to deny the title of his landlord at the time of the commencement of the relation.

Article 3. Presumptions Affecting the Burden of Producing Evidence

630. The presumptions established by this article and all other rebuttable presumptions established by law that [redacted] Section 603 are presumptions affecting the burden of producing evidence.

631. Money delivered by one to another is presumed to have been due to the latter.

632. A thing delivered by one to another is presumed to have belonged to the latter.

633. An obligation delivered up to the debtor is presumed to have been paid.

634. A person in possession of an order on himself for the payment of money, or delivery of a thing, is presumed to have paid the money or delivered the thing accordingly.

635. An obligation possessed by the creditor is presumed not to have been paid.

636. The payment of earlier rent or installments is presumed from a receipt for later rent or installments.

637. The things which a person possesses are presumed to be owned by him.

638. A person who exercises acts of ownership over property is presumed to be the owner of it.

639. A judgment, when not conclusive, is presumed to correctly determine or set forth the rights of the parties, but there is no presumption that the facts essential to the judgment have been correctly determined.

640. A writing is presumed to have been truly dated.

641. A letter correctly addressed and properly mailed is presumed to have been received in the ordinary course of mail.

642. A trustee or other person, whose duty it was to convey real property to a particular person, is presumed to have actually conveyed to him when such presumption is necessary to perfect title of such person or his successor in interest.

643. A deed or will or other writing purporting to create, terminate, or affect an interest in real or personal property is presumed to be authentic [redacted] it:

(a) Is at least 30 years old;

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

(c) Was kept, or [redacted] found was found, in a place where such writing, if authentic, would be likely to be kept or found; and

(d) Has been generally acted upon as authentic by persons having an interest in the matter.

644. A book, purporting to be printed or published by public authority, is presumed to have been so printed or published.

645. A book, purporting to contain reports of cases adjudged in the tribunals of the state or nation where the book is published, is presumed to contain correct reports of such cases.

Article 1. Presumptions Affecting the Burden of Proof

fall within the criteria of

660. The presumptions established by this article and all other rebuttable presumptions established by law that [redacted] Section 605 are presumptions affecting the burden of proof.

661. A child of a woman who is or has been married, born during the marriage or within 300 days after the dissolution thereof, is presumed to be a legitimate child of that marriage. This presumption may be disputed only by the people of the State of California in a criminal action brought under Section 270 of the Penal Code or by the husband or wife, or the descendant of one or both of them. In a civil action, ~~the~~ presumption may be rebutted only by clear and convincing proof.

this

662. The owner of the legal title to property is presumed to be the owner of the full beneficial title. This presumption may be rebutted only by clear and convincing proof.

663. A ceremonial marriage is presumed to be valid.

664. It is presumed that official duty has been regularly performed.

665. An arrest without a warrant is presumed to be unlawful.

666. Any court of this State or the United States, or any court of general jurisdiction in any other state or nation, or any judge of such a court, acting as such, is presumed to have acted in the lawful exercise of its jurisdiction. This presumption applies only when the act of the court or judge is under collateral attack.

667. A person not heard from in seven years is presumed to be dead.

DIVISION 6. WITNESSES

Chapter 1. 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. A person is disqualified to be a witness if he is:

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

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

702. (a) Subject to Section 801, the testimony of a witness concerning a particular matter is inadmissible unless he has personal knowledge of the matter. Against the objection of a party, such personal knowledge must be shown before the witness may testify concerning the matter.

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

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

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

(c) In the absence of objection by a party, the judge presiding at the trial of an action may testify in that trial as a witness.

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

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

(c) In the absence of objection by a party, a juror sworn and impaneled in the trial of an action may be compelled to testify in that trial as a witness.

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

court

court

of this code

Chapter 2. Oath and Confrontation

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 IV of the Code of Civil Procedure.

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

Chapter 3. Expert Witnesses

Article 1. Expert Witnesses Generally

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

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

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

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

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

(2) Such publication has been admitted in evidence.

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

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

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

Article 2. Appointment of Expert Witness by Court

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

731. (a) In all criminal actions and juvenile court proceedings, the compensation fixed under Section 730 shall be a charge against the county in which such action or proceeding

MJN 1743

is pending and shall be paid out of the treasury of such county on order of the court.

(b) In any county in which the procedure prescribed in this subdivision has been authorized by the board of supervisors, the compensation fixed under Section 730 for medical experts in civil actions in such county shall be a charge against and paid out of the treasury of such county on order of the court.

(c) Except as otherwise provided in this section, in all civil actions, the compensation fixed under Section 730 shall, in the first instance, be apportioned and charged to the several parties in such proportion as the court may determine and may thereafter be taxed and allowed in like manner as other costs.

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

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

CHAPTER 4. INTERPRETERS AND TRANSLATORS

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

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

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

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

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

753. (a) When the written characters in a writing offered in evidence are incapable of being deciphered or understood directly, a translator who can decipher the characters or un-

derstand the language shall be sworn to decipher or translate the writing.

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

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

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

(c) In any action where the mental condition of a deaf person is being considered and where such person may be committed to a mental institution, all of the court proceedings pertaining to him shall be interpreted to him in a language that he understands by a qualified interpreter appointed by the court.

(d) Interpreters appointed under this section shall be paid for their services a reasonable sum to be determined by the court, which shall be a charge against the county in which such action is pending and shall be paid out of the treasury of such county on order of the court.

CHAPTER 5. METHOD AND SCOPE OF EXAMINATION

Article 1. Definitions

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

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

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

Article 2. Examination of Witnesses

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

[redacted]

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

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

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

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

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

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

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

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

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

772. Subject to the limitations of Chapter 6 (commencing with Section 780), a witness examined by one party may be cross-examined upon any matter within the scope of the direct examination by each adverse party to the action in such order as the court directs.

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

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

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

776. (a) A party to the record of any civil action, or a person identified with a party, may be called and examined as if under cross-examination by any adverse party at any time during the presentation of evidence by the party calling the witness. The party calling such witness is not bound by his testimony, and the testimony of such witness may be re-

butted by the party calling him for such examination by other evidence.

(b) A witness examined by a party under this section may be cross-examined by all other parties to the action in such order as the court directs; but the witness may be examined only as if under redirect examination by:

(1) In the case of a witness who is a party, his own counsel and counsel for a party who is not adverse to the witness.

(2) In the case of a witness who is not a party, counsel for the party with whom the witness is identified and counsel for a party who is not adverse to the party with whom the witness is identified.

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

(d) For the purpose of this section, a person is identified with a party if he is:

(1) A person for whose immediate benefit the action is prosecuted or defended by the party.

(2) A director, officer, superintendent, member, agent, employee, or managing agent of the party or of a person specified in paragraph (1), or any public employee of a public entity when such public entity is the party.

(3) A person who was in any of the relationships specified in paragraph (2) at the time of the act or omission giving rise to the cause of action.

(4) A person who was in any of the relationships specified in paragraph (2) at the time he obtained knowledge of the matter concerning which he is sought to be examined under this section.

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

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

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

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

Chapter 6. Credibility of Witnesses

Article 1. Credibility Generally

780. Except as otherwise provided by law, the court or jury may consider in determining the credibility of a witness any statement or other conduct that has any tendency in reason

to prove or disprove the truthfulness of his testimony at the hearing, including but not limited to any of the following:

(a) His demeanor while testifying and the manner in which he testifies.

(b) The character of his testimony.

(c) The extent of his capacity to perceive, to recollect, or to communicate any matter about which he testifies.

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

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

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

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

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

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

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

(k) His admission of untruthfulness.

Article 2. Attacking or Supporting Credibility

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

DIVISION 7. OPINION TESTIMONY AND SCIENTIFIC EVIDENCE

CHAPTER 1. EXPERT AND OTHER OPINION TESTIMONY

Article 1. Expert and Other Opinion Testimony Generally

800. If a witness is not testifying as an expert, his testimony in the form of an opinion is limited to such an opinion as is:

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

(b) Helpful to a clear understanding of his testimony.

801. If a witness is testifying as an expert, his testimony in the form of an opinion is limited to such an opinion as is:

(a) Related to a subject that is sufficiently beyond common experience that the opinion of an expert would assist the trier of fact; 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 com-

monly relied upon by experts in forming an opinion upon the subject to which his testimony relates, unless an expert is precluded by law from using such matter as a basis for his opinion.

802. A witness testifying in the form of an opinion may state on direct examination the reasons for his opinion and the matter (including, in the case of an expert, his special knowledge, skill, experience, training, and education) upon which it is based, unless he is precluded by law from using such reasons or matter as a basis for his opinion.

803. The court may, and upon objection shall, exclude testimony in the form of an opinion that 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 state his opinion after excluding from consideration the matter determined to be improper.

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 and examined as if under cross-examination concerning the subject matter of his opinion or statement by any adverse party.

(b) Unless the party seeking to examine the person upon whose opinion or statement the expert witness has relied has the right apart from this section to examine such person as if under cross-examination, this section is not applicable if the person upon whose opinion or statement the expert witness has relied is (1) a party, (2) an agent or employee of a party, (3) a person united in interest with a party or for whose immediate benefit the action is prosecuted or defended, or (4) a witness who has testified in the action.

(c) 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.

(d) An expert opinion otherwise admissible is not made inadmissible by this section because it is based on the opinion or statement of a person who is unavailable for examination pursuant to this section.

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

[redacted]

2.

Article 3. Opinion Testimony on Particular Matters

870. A witness may state his opinion as to the sanity of a person when:

(a) The witness is an intimate acquaintance of the person whose sanity is in question;

(b) The witness was a subscribing witness to a writing, the validity of which is in dispute, signed by the person whose sanity is in question; or

(c) The witness is qualified under Section 800 or 801 to testify in the form of an opinion.

CHAPTER 2. BLOOD TESTS TO DETERMINE PATERNITY

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

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. In a civil action in which paternity is a relevant fact, the court may upon its own initiative or upon suggestion made by or on behalf of any person whose blood is involved, and shall upon motion of any party to the action made at a time so as not to delay the proceedings unduly, 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. 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. 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

and only ordinary witness fee shall be —

not appointed by the court shall be paid by the party calling him [redacted] be taxed as costs in the action.

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. This chapter applies to criminal actions 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.

DIVISION 8. PRIVILEGES

CHAPTER 1. DEFINITIONS

900. Unless the provision or context otherwise requires, the definitions in this chapter govern the construction of this division. [redacted] do not govern the construction of any other division.

They

901. "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) in which, pursuant to law, testimony can be compelled to be given.

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

903. "Criminal proceeding" means:

(a) A criminal action; and

(b) A proceeding pursuant to Article 3 (commencing with Section 3060) of Chapter 7 of Division 4 of Title 1 of the Government Code to determine whether a public officer should be removed from office for wilful or corrupt misconduct in office.

904. "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 or to hold a public office) should be revoked, suspended, terminated, limited, or conditioned, but does not include a criminal proceeding.

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

The provisions of any statute making rules of evidence inapplicable in particular proceedings, or limiting the applicability of rules of evidence in particular proceedings, do not make this division inapplicable to such proceedings.

CHAPTER 2. 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. Except as otherwise provided by statute:

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

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

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

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 (privilege for confidential marital communications), 994 (physician-patient privilege), 1014 (psychotherapist-patient privilege), 1033 (privilege of penitent), or 1034 (privilege of clergyman) 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 any statement or other conduct of the holder of the privilege indicating his consent to the disclosure, including his failure to claim the privilege in any proceeding in which he has the legal standing and opportunity to claim the privilege.

(b) Where two or more persons are joint holders of a privilege provided by Section 954 (lawyer-client privilege), 994 (physician-patient privilege), or 1014 (psychotherapist-patient privilege), the right of a particular joint holder of the privilege to claim the privilege [redacted] the right of another joint holder to claim the privilege. [redacted] In the case of the privilege provided by Section 980 (privilege for confidential marital communications), the right of one spouse to claim the privilege [redacted] right of the other spouse to claim the privilege. [redacted]

a waiver of

does not affect

does not affect the

a waiver of

(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. (a) If a privilege is exercised not to testify with respect to any matter, or to refuse to disclose or to prevent

or was

in the instant proceeding or on a prior occasion

another from disclosing any matter, the presiding officer, nor counsel may comment thereon, no presumption shall arise because of 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.

(b) The court, 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 because of 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.

914. (a) Subject to Section 915, the presiding officer shall determine a claim of privilege in any proceeding in the same manner as a court determines such a claim under 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 he has failed to comply with an order of a court that he disclose such information. 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. (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 (official information and identity of informer) or under Section 1060 (trade secret) or in any other situation where (subject to any exception relating to the particular privilege) a court is unable to do so without requiring disclosure of the information claimed to be privileged, the court may require the person from whom disclosure is sought or the person authorized to claim the privilege, or both, to disclose the information in chambers out of the presence and hearing of all persons except the person authorized to claim the privilege and such other persons as the person authorized 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 a person authorized to permit disclosure, what was disclosed in the course of the proceedings in chambers.

916. (a) The presiding officer, on his own motion or on the motion of any party, shall exclude 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) He is otherwise instructed by a person authorized to permit disclosure; or

(2) The proponent of the evidence establishes that there is no person authorized to claim the privilege in existence.

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, clergyman-penitent, or husband-wife relationship, the communication is presumed to have been made in confidence and the opponent of the claim of privilege has the burden of proof to establish that the communication was not confidential.

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

(a) A person authorized to claim the privilege claimed it but nevertheless disclosure erroneously was required to be made; or

(b) The presiding officer did not exclude the privileged information as required by Section 916.

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 Case

930. To the extent that such privilege exists under the Constitution of the United States or the State of California, a defendant in a criminal case has a privilege not to be called as a witness and not to testify.

Article 2. Privilege Against Self-Incrimination

940. To the extent that such privilege exists under the Constitution of the United States or the State of California, a person has a privilege to refuse to disclose any matter that may tend to incriminate him.

Article 3. Lawyer-Client Privilege

950. 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.

951. As used in this article, "client" means a person [redacted] who, 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.

952. 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 to whom disclosure is 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.

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

(a) The client when he has no guardian or conservator.

(b) A guardian or conservator of the client when the client has a guardian or conservator.

(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 firm, association, organization, partnership, business trust, corporation, or public entity that is no longer in existence.

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. 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 954.

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 to commit a crime or [redacted] a fraud.

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. 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, including but not limited to an issue concerning the adequacy of the representation of the client by the lawyer.

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

961. 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 client, now deceased, purporting to affect an interest in property.

962. 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.

Article 4. 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. 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. A married person does not have a privilege under this article in:

(a) A proceeding brought by or on behalf of one spouse against the other spouse.

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

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

(d) 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.

(e) 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 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. (a) Unless erroneously 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. Subject to Section 912 and except as otherwise provided in this article, a spouse (or his guardian or conservator when he has a guardian or conservator), 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. 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.

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

984. There is no privilege under this article in:

(a) A proceeding brought by or on behalf of one spouse against the other spouse.

(b) A proceeding between a surviving spouse and a person who claims through the deceased spouse, regardless of whether such claim is by testate or intestate succession or by inter vivos transaction.

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.

committed at any time

committed at any time

(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.

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. 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. 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.

991. 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 or emotional condition.

992. 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 to whom disclosure is 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.

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

(a) The patient when he has no guardian or conservator.

(b) A guardian or conservator of the patient when the patient has a guardian or conservator.

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

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.

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. There is no privilege under this article as to an issue concerning the condition of the patient if such issue 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; or

(d) The plaintiff in an action brought under Section 376 or 377 of the Code of Civil Procedure for damages for the injury or death of the patient.

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

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.

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

1003. 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 patient, now deceased, purporting to affect an interest in property.

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.

a communication relevant to

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

1006. There is no privilege under this article as to information that 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 is confidential or may not be disclosed in the particular proceeding.

Article 7. Psychotherapist-Patient Privilege

1010. 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.

1011. 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.

1012. 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 to whom disclosure is 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.

1013. As used in this article, "holder of the privilege" means:

(a) The patient when he has no guardian or conservator.

(b) A guardian or conservator of the patient when the patient has a guardian or conservator.

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

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

(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. 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. There is no privilege under this article as to an issue concerning the mental or emotional condition of the patient if such issue 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; or

(d) The plaintiff in an action brought under Section 376 or 377 of the Code of Civil Procedure for damages for the injury or death of the patient.

1017. There is no privilege under this article if the psychotherapist is appointed by order of a court to examine the patient, but this exception does not apply where the psychotherapist is appointed by order of the court upon the request of the lawyer for the defendant in a criminal proceeding in order to provide the lawyer with information needed so that he may advise the defendant whether to enter a plea based on insanity or present a defense based on his mental or emotional condition.

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 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. 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.

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

1022. There is no privilege under this article as to a communication relevant to an issue concerning the validity of a

a communication relevant to

deed of conveyance, will, or other writing, executed by a patient, now deceased, purporting to affect an interest in property.

1023. There is no privilege under this article in a proceeding under Chapter 6 (commencing with Section 1367) of Title 10 of Part 2 of the Penal Code initiated at the request of the defendant in a criminal action to determine his sanity.

1024. There is no privilege under this article if the psychotherapist has reasonable cause to believe that the patient is in such mental or emotional condition as to be dangerous to himself or to the person or property of another and that disclosure of the communication is necessary to prevent the threatened danger.

1025. There is no privilege under this article in a proceeding brought by or on behalf of the patient to establish his competence.

1026. There is no privilege under this article as to information that the psychotherapist 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 is confidential or may not be disclosed in the particular proceeding.

Article 8. Clergyman-Penitent Privileges

1030. As used in this article, "clergyman" means a priest, minister, or similar functionary of a church or of a religious denomination or religious organization.

1031. As used in this article, "penitent" means a person who has made a penitential communication to a clergyman.

1032. As used in this article, "penitential communication" means a communication made in confidence in the presence of no third person to a clergyman 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.

so far as the penitent is aware,

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. Subject to Section 912, a clergyman, 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. (a) As used in this section, "official information" means information acquired in confidence by a public employee in the course of his duty and not open, or officially disclosed, to the public prior to the time the claim of privilege is made.

(b) Subject to subdivision (c), a public entity [redacted] has a privilege to refuse to disclose official information, and to prevent another from disclosing such information, 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 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.

[redacted]

1041. (a) Except as provided in this section, a public entity [redacted] 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 another from disclosing such identity, 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 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 in confidence 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.

[redacted]

[redacted]

(e). There is no privilege under this section to prevent the informer from disclosing his identity.

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 required by law 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 to the defendant official information or the identity of an informer in order to establish the legality of the search or the admissibility of any evidence obtained as a result of it.

Article 10. Political 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. If he or his agent or employee claims the privilege, the owner of a trade secret has a privilege 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.

CHAPTER 5. [redacted] Immunity of Newsmen From Citation for Contempt caps & sm caps

chapter

1070. As used in this [redacted], "newsman" means a person directly engaged in the procurement of news for publication, or in the publication of news, by news media.

1071. As used in this [redacted], "news media" means newspapers, press associations, wire services, radio, and television.

1072. A newsman may not be adjudged in contempt for refusing to disclose the source of news procured for publication and published by news media, unless the source has been disclosed previously or the disclosure of the source is required in the public interest.

1073. The procedure specified in subdivisions (a) and (b) of Section 914 and in subdivisions (a) and (b) of Section 915 applies to the determination of a newsman's claim for protection under Section 1072.

DIVISION 9. EVIDENCE AFFECTED OR EXCLUDED BY EXTRINSIC POLICIES

CHAPTER 1. EVIDENCE OF CHARACTER, HABIT, OR CUSTOM

1100. Except as otherwise provided by statute, any otherwise admissible evidence (including [redacted] in the form of an opinion, evidence of reputation, and evidence of specific instances of such person's conduct) is admissible to prove a person's character or a trait of his character.

1101. (a) Except as provided in this section and in Sections 1102 and 1103, evidence of a person's character or a trait of his character (whether in the form of opinion, evidence of reputation, or evidence of specific instances of his conduct) is inadmissible when offered to prove his conduct on a specified occasion.

(b) 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.

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

1102. In a criminal action, evidence of the defendant's character or a trait of his character in the form of opinion or evidence of his reputation is not made inadmissible by Section 1101 if such evidence is:

(a) Offered by the defendant to prove his conduct in conformity with such character or trait of character.

(b) Offered by the prosecution to rebut evidence adduced by the defendant under subdivision (a).

1103. In a criminal action, evidence of the character or a trait of character (in the form of opinion, evidence of reputation, or evidence of specific instances of conduct) of the victim of the crime for which the defendant is being prosecuted is not made inadmissible by Section 1101 if such evidence is:

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

(b) Offered by the prosecution to rebut evidence adduced by the defendant under subdivision (a).

1104. Except as provided in Sections 1102 and 1103, evidence of a trait of a person's character with respect to care or skill is inadmissible to prove the quality of his conduct on a specified occasion.

1105. Any otherwise admissible evidence of habit or custom is admissible to prove conduct on a specified occasion in conformity with the habit or custom.

Chapter 2. Other Evidence Affected or Excluded By Extrinsic Policies

1150. Upon an inquiry as to the validity of a verdict, any otherwise admissible evidence 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 influenced the verdict improperly. 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. 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 inadmissible to prove negligence or culpable conduct in connection with the event.

1152. (a) Evidence that a person has, in compromise or from humanitarian motives, furnished or offered or promised to furnish money or any 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 when such evidence is offered 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 when such evidence is offered to prove the creation of a new duty on his part or a revival of his pre-existing duty.

1153. Evidence of a plea of guilty, later withdrawn, or of an offer to plead guilty to the crime charged or to any other crime, made by the defendant in a criminal action is inadmissible in any action or in any proceeding of any nature, including proceedings before agencies, commissions, boards, and tribunals.

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. 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 to prove negligence or other wrongdoing.

1156. (a) In-hospital medical staff committees of a licensed hospital may engage in research and medical study for the purpose of reducing morbidity or 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.

DIVISION 10. HEARSAY EVIDENCE

CHAPTER 1. GENERAL PROVISIONS

1200. (a) "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.

(b) Except as provided by law, hearsay evidence is inadmissible.

(c) This section shall be known and may be cited as the hearsay rule.

1201. A statement within the scope of an exception to the hearsay rule is not inadmissible on the ground that the evidence [redacted] 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 the hearsay rule.

1202. Evidence of a statement or other conduct by a declarant that is inconsistent with a statement by such declarant received in evidence as hearsay evidence is not inadmissible for the purpose of attacking the credibility of the declarant though he is given and has had no opportunity to explain or to deny such inconsistent statement or other conduct. Any other evidence offered to attack or support the credibility of the declarant is admissible if it would have been admissible had the declarant been a witness at the hearing.

1203. (a) Except as provided in subdivisions (b) and (c), the declarant of a statement that is admitted as hearsay evidence may be called and examined as if under cross-examination concerning the statement and its subject matter by any adverse party.

(b) Unless the party seeking to examine the declarant has the right apart from this section to [redacted] examine the declarant [redacted] this section is not applicable if the declarant is (1) a party, (2) an agent, partner, or employee of a party, (3) a person united in interest with a party or for whose immediate benefit the action is prosecuted or defended, or (4) a witness who has testified in the action.

(c) This section is not applicable if the statement is one described in Article 1 (commencing with Section 1220), Ar-

ticle 3 (commencing with Section 1235), or Article 10 (commencing with Section 1300) of Chapter 2 of this division.

(d) A statement that is otherwise admissible as hearsay evidence is not made inadmissible by this section because the declarant who made the statement is unavailable for [redacted] examination pursuant to this section.

1204. A statement that is otherwise admissible as hearsay evidence is inadmissible against the defendant in a criminal action if the statement was made, either by the defendant or by another, under such circumstances that it is inadmissible against the defendant under the Constitution of the United States or the State of California.

1205. 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

Article 1. Confessions and Admissions

1220. Evidence of a statement is not made inadmissible by the hearsay rule when offered against the declarant in an action to which he is a party in either his individual or representative capacity, regardless of whether the statement was made in his individual or representative capacity.

1221. Evidence of a statement offered against a party is not made inadmissible by the hearsay rule 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.

1222. Evidence of a statement offered against a party is not made inadmissible by the hearsay rule if:

(a) The statement was made by a person authorized by the party to make a statement or statements for him concerning the subject matter of the statement; and

(b) The evidence is offered either after admission of evidence sufficient to sustain a finding of such authority or, in the court's [redacted] discretion as to the order of proof, subject to the admission of such evidence.

1223. Evidence of a statement offered against a party is not made inadmissible by the hearsay rule if:

(a) The statement was made by the declarant while participating in a conspiracy to commit a crime or civil wrong and in furtherance of the objective of that conspiracy;

(b) The statement was made prior to or during the time that the party was participating in that conspiracy; and

(c) The evidence is offered either after admission of evidence sufficient to sustain a finding of the facts specified in subdivisions (a) and (b) or, in the [redacted] discretion of the court's as to the order of proof, subject to the admission of such evidence.

1224. Evidence of a statement offered against a party is not made inadmissible by the hearsay rule if:

(a) The statement was made by 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 evidence is offered either after [redacted] of the existence of the relationship between the declarant and the party or, in the [redacted] discretion as to the order of proof, subject to such proof.

court's

the court is persuaded

1225. When the liability, obligation, or duty of a party to a civil action is based in whole or in part upon the liability, obligation, or duty of the declarant, or when the claim or right asserted by a party to a civil action is barred or diminished by a breach of duty by the declarant, evidence of a statement made by the declarant is as admissible against the party as it would be if offered against the declarant in an action involving that liability, obligation, duty, or breach of duty.

1226. When a right or title asserted by a party to a civil action requires a determination that a right or title exists or existed in the declarant, evidence of a statement made by the declarant during the time the party now claims the declarant was the holder of the right or title is as admissible against the party as it would be if offered against the declarant in an action involving that right or title.

1227. Evidence of a statement is not made inadmissible by the hearsay rule if offered against the plaintiff in an action brought under Section 376 or 377 of the Code of Civil Procedure for the injury or death of the declarant.

Article 2. Declarations Against Interest

1230. Evidence of a statement 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 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.

Article 3. Statements of Witnesses

1235. Evidence of a statement made by a witness is not made inadmissible by the hearsay rule if the statement is inconsistent with his testimony at the hearing and is offered in compliance with Section 770.

1236. Evidence of a statement previously made by a witness is not made inadmissible by the hearsay rule if the statement is consistent with his testimony at the hearing and is offered in compliance with Section 791.

1237. 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, the statement concerns a matter as to which the witness has insufficient present recollection to enable him to testify fully and accurately, and the statement 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 (1) by the witness himself or under his direction or (2) 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.

1238. 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 and:

(a) The statement is an identification of a party or another as a person who participated in a crime or other occurrence;

(b) The statement was made at a time when the crime or other occurrence was fresh in the witness' memory; and

(c) The evidence of the statement is offered after the witness testifies that he made the identification and that it was a true reflection of his opinion at that time.

Article 4. Spontaneous, Contemporaneous, and Dying Declarations

1240. Evidence of a statement is not made inadmissible by the hearsay rule if the statement:

(a) Purports to narrate, describe, or explain an act, condition, or event perceived by the declarant; and

(b) Was made spontaneously while the declarant was under the stress of excitement caused by such perception.

1241. Evidence of a statement is not made inadmissible by the hearsay rule if the statement:

(a) Purports to narrate, describe, or explain an act, condition, or event perceived by the declarant; and

(b) Was made while the declarant was perceiving the act, condition, or event.

1242. Evidence of a statement respecting the cause and circumstances of his death, made by a person since deceased, is not made inadmissible by the hearsay rule if the statement was made upon the personal knowledge of the declarant 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.

Article 5. Statements of Mental or Physical State

1250. (a) Subject to Section 1252, evidence of 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 the hearsay rule when:

(1) The evidence is offered to prove such then existing state of mind, emotion, or physical sensation when it is itself an issue in the action; or

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

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

1251. Subject to Section 1252, evidence of a statement of the declarant's 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 the hearsay rule if:

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

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

1252. Evidence of a statement is inadmissible under this article if the statement was made under circumstances such as to indicate its trustworthiness.

Article 6. Statements Relating to Wills and to Claims Against Estates

1260. (a) Evidence of a statement made by 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 the hearsay rule.

(b) Evidence of a statement is inadmissible under this section unless the statement was made under circumstances such as to indicate its trustworthiness.

1261. Evidence of a statement is not made inadmissible by the hearsay rule when offered in an action upon a claim or demand against the estate of the declarant if the statement was:

(a) Made upon the personal knowledge of the declarant at a time when the matter had been recently perceived by him and while his recollection was clear; and

(b) Made under circumstances such as to indicate its trustworthiness.

Article 7. Business Records

1270. 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.

1271. Evidence of a writing made as a record of an act, condition, or event is not made inadmissible by the hearsay rule when offered to prove the act, condition, or event if:

(a) The writing was made in the regular course of a business;

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

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

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

1272. Evidence of the absence from the records of a business of a record of an asserted act, condition, or event is not made inadmissible by the hearsay rule when offered to prove the nonoccurrence of the act or event, or the nonexistence of the condition, if:

(a) 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

(b) The sources of information and method and time of preparation of the records of that business were such that the absence of a record of an act, condition, or event is a trustworthy indication that the act or event did not occur or the condition did not exist.

Article 8. Official Records and Other Official Writings

1280. Evidence of a writing made as a record of an act, condition, or event is not made inadmissible by the hearsay rule when offered to prove the act, condition, or event if:

(a) The writing was made by and within the scope of duty of a public employee [redacted];

(b) The writing was made 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.

1281. Evidence of a writing made as a record of a birth, fetal death, death, or marriage is not made inadmissible by the hearsay rule if the maker was required by law to file the writing in a designated public office and the writing was made and filed as required by law.

1282. 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 (56 Stats. 143, 1092, and P.L. 408, Ch. 371, 2d Sess. 78th Cong.; 50 U.S.C. App. 1001-1016), as enacted or as heretofore or hereafter

amended, 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.

1283. An official written report or record 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 hostile force, or besieged by a hostile force, or is dead or is alive.

1284. Evidence of 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 the hearsay rule when offered to prove the absence of a record in that office.

Article 9. Former Testimony

1290. As used in this article, "former testimony" means testimony given under oath or affirmation in:

(a) Another action or in a former hearing or trial of the same action;

(b) A proceeding to determine a controversy conducted by or under the supervision of an agency that has the power to determine such a controversy and is an agency of the United States or a public entity;

in the United States;

(c) A deposition taken in compliance with law in another action; or

(d) An arbitration proceeding if the evidence of such former testimony is a verbatim transcript thereof.

1291. (a) Evidence of former testimony is not made inadmissible by the hearsay rule 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 the declarant 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 paragraph against the defendant in a criminal action unless it was received in evidence at the trial of such other action.

(b) 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 at the hearing.

1292. (a) Evidence of former testimony is not made inadmissible by the hearsay rule if:

(1) The declarant is unavailable as a witness;

(2) The former testimony is offered in a civil action or against the prosecution 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 the declarant with an interest and motive similar to that which the party against whom the testimony is offered has at the hearing.

(b) 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 at the hearing.

Article 10. Judgments

a crime punishable as

1300. Evidence of a final judgment adjudging a person guilty of a felony is not made inadmissible by the hearsay rule 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.

1301. Evidence of a final judgment is not made inadmissible by the hearsay rule 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; or

the

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

1302. 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 the hearsay rule when offered to prove such liability, obligation, or duty.

Article 11. Family History

1310. (a) Subject to subdivision (b), evidence of a statement by a declarant who is unavailable as a witness concerning his 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 the hearsay rule, even though the declarant had no means of acquiring personal knowledge of the matter declared.

(b) Evidence of a statement is inadmissible under this section [redacted] the statement was made under circumstances such as to indicate its trustworthiness.

1311. (a) Subject to subdivision (b), evidence of 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 the hearsay rule 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 had accurate information concerning the matter declared 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.

(b) Evidence of a statement is inadmissible under this section [redacted] the statement was made under circumstances such as to indicate its trustworthiness.

1312. Evidence of entries in family bibles or other family books or charts, engravings on rings, family portraits, engravings on urns, crypts, or tombstones, and the like, is not made inadmissible by the hearsay rule when offered to prove the birth, marriage, divorce, death, legitimacy, race, ancestry, relationship by blood or marriage, or other similar fact of the family history of a member of the family by blood or marriage.

1313. Evidence of reputation among members of a family is not made inadmissible by the hearsay rule if the reputation concerns the birth, marriage, divorce, death, legitimacy, race, ancestry, relationship by blood or marriage, or other similar fact of the family history of a member of the family by blood or marriage.

1314. Evidence of reputation in a community concerning the date or fact of birth, marriage, divorce, or death of a person resident in the community at the time of the reputation is not made inadmissible by the hearsay rule.

1315. Evidence of a statement concerning a person's birth, marriage, divorce, death, legitimacy, race, ancestry, relationship by blood or marriage, or other similar fact of family history is not made inadmissible by the hearsay rule if:

(a) The statement is contained in a writing made as a record of an act, condition, or event that would be admissible as evidence of such act, condition, or event under Section 1271;

(b) The statement is of a kind customarily recorded in connection with the act, condition, or event recorded in the writing; and

(c) The writing was made as a record of a church, religious denomination, or religious society.

1316. Evidence of a statement concerning a person's birth, marriage, divorce, death, legitimacy, race, ancestry, relationship by blood or marriage, or other similar fact of family history is not made inadmissible by the hearsay rule if the statement is contained in a certificate that the maker thereof performed a marriage or other ceremony or administered a sacrament and:

(a) The [redacted] was [redacted] a clergyman, civil officer, or other person authorized to perform the acts reported in the certificate by law or by the rules, regulations, or requirements of a church, religious denomination, or religious society; and

(b) The certificate was issued by [redacted] at the time and place of the ceremony or sacrament or within a reasonable time thereafter.

Article 12. Reputation and Statements Concerning Community History, Property Interests, and Character

1320. Evidence of reputation in a community is not made inadmissible by the hearsay rule if the reputation concerns 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.

1321. Evidence of reputation in a community is not made inadmissible by the hearsay rule if the reputation concerns the interest of the public in property in the community and the reputation arose before controversy.

1322. Evidence of reputation in a community is not made inadmissible by the hearsay rule if the reputation concerns boundaries of, or customs affecting, land in the community and the reputation arose before controversy.

1323. Evidence of a statement concerning the boundary of land is not made inadmissible by the hearsay rule if the declarant is unavailable as a witness and had sufficient knowledge of the subject, but evidence of a statement is not admissible under this section unless the statement was made under circumstances such as to indicate its trustworthiness.

1324. 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 the hearsay rule.

Article 13. Dispositive Instruments and Ancient Writings

1330. Evidence of 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 the hearsay rule if:

(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.

1331. Evidence of a statement is not made inadmissible by the hearsay rule 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.

Article 14. Commercial, Scientific, and Similar Publications

1340. Evidence of a statement, other than an opinion, contained in a tabulation, list, directory, register, or other published compilation is not made inadmissible by the hearsay rule if the compilation is generally used and relied upon as accurate in the course of a business as defined in Section 1270.

1341. Historical works, books of science or art, and published maps or charts, made by persons indifferent between the parties, are not made inadmissible by the hearsay rule when offered to prove facts of general notoriety and interest.

DIVISION 11. WRITINGS

CHAPTER 1. AUTHENTICATION AND PROOF OF WRITINGS

Article 1. Requirement of Authentication

1400. Authentication of a writing means (a) the introduction of evidence sufficient to sustain a finding that it is the writing that the proponent of the evidence claims it is and that it was made or signed by the person the proponent of the evidence claims made or signed it or (b) the establishment of such facts by any other means provided by law.

1401. (a) Authentication of a writing is required before it may be received in evidence.

(b) Authentication of a writing is required before secondary evidence of its content may be received in evidence.

1402. The party producing a writing as genuine which has been altered, or appears to have been altered, after its execution, in a part material to the question in dispute, must account for the alteration or appearance thereof. He may

show that the alteration was made by another, without his concurrence, or was made with the consent of the parties affected by it, or otherwise properly or innocently made, or that the alteration did not change the meaning or language of the instrument. If he does that, he may give the writing in evidence, but not otherwise.

Article 2. Means of Authenticating and Proving Writings

1410. A writing is sufficiently authenticated to be received in evidence if there is any evidence sufficient to sustain a finding of the authenticity of the writing; and nothing in this article shall be construed to limit the means by which the authenticity of a writing may be shown.

1411. Except as provided by statute, the testimony of a subscribing witness is not required to authenticate a writing.

1412. If the testimony of a subscribing witness is required by statute to authenticate a writing and the subscribing witness denies or does not recollect the execution of the writing, the writing may be authenticated by other evidence.

1413. A writing may be authenticated by anyone who saw the writing executed, including a subscribing witness.

1414. A writing may be authenticated by evidence that:

(a) The party against whom it is offered has at any time admitted its authenticity; or

(b) The writing is produced from the custody of the party against whom it is offered and has been acted upon by him as authentic.

1415. A writing may be authenticated by evidence of the authenticity of the handwriting of the maker.

1416. A witness who is not otherwise qualified to testify as an expert may state his opinion whether a writing is in the handwriting of a supposed writer if the court finds that he has personal knowledge of the handwriting of the supposed writer. Such personal knowledge may be acquired from:

(a) Having seen the supposed writer write;

(b) Having seen a writing purporting to be the writing of the supposed writer and upon which the supposed writer has acted or been charged;

(c) Having received letters in the due course of mail purporting to be from the supposed writer in response to letters duly addressed and mailed by him to the supposed writer; or

(d) Any other means of obtaining personal knowledge of the handwriting of the supposed writer.

1417. The authenticity of handwriting, or the lack thereof, may be proved by a comparison made by the trier of fact with handwriting (a) which the court finds was admitted or treated as authentic by the party against whom the evidence is offered or (b) otherwise proved to be authentic to the satisfaction of the court.

1418. The authenticity of writing, or the lack thereof, may be proved by a comparison made by an expert witness with writing (a) which the court finds was admitted or treated as authentic by the party against whom the evidence is offered or (b) otherwise proved to be authentic to the satisfaction of the court.

1419. Where a writing sought to be introduced in evidence is more than 30 years old, the comparison under Section 1417 or 1418 may

be made with writing purporting to be authentic, and generally respected and acted upon as such, by persons having an interest in knowing whether it is authentic.

1420. A writing may be authenticated by evidence that the writing was received in response to a communication sent to the person who is claimed by the proponent of the evidence to be the author of the writing.

1421. A writing may be authenticated by evidence that the writing refers to or states facts that are unlikely to be known to anyone other than the person who is claimed by the proponent of the evidence to be the author of the writing.

Article 3. Acknowledged Writings and Official Writings

1450. The presumptions established by this article are presumptions affecting the burden of producing evidence.

1451. A certificate of the acknowledgment of a writing other than a will, or a certificate of the proof of such a writing, is prima facie evidence of the facts recited in the certificate and the genuineness of the signature of each person by whom the writing purports to have been signed if the certificate meets the requirements of Article 3 (commencing with Section 1181) of Chapter 4, Title 4, Division 2 of the Civil Code.

1452. A seal is presumed to be genuine and its use authorized if it purports to be the seal of:

(a) The United States or a department, agency, or public employee of the United States.

(b) A public entity in the United States or a department, agency, or public employee thereof.

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

(d) A [redacted] a nation recognized by the executive power of the United States.

public entity in

(e) A court of admiralty or maritime jurisdiction.

(f) A notary public within the United States or any state of the United States.

1453. A signature is presumed to be genuine and authorized if it purports to be the signature, affixed in his official capacity, of:

(a) A public employee of the United States.

(b) A public employee of any public entity in any state of the United States.

(c) A notary public within the United States or any state of the United States.

1454. A signature is presumed to be genuine and authorized if it purports to be the signature, affixed in his official capacity, of an officer, or deputy of an officer, of a nation or [redacted] a nation recognized by the executive power of the United States and the writing to which the signature is affixed is accompanied by a final statement certifying the genuineness of the signature and the official position of (a) the person who executed the writing or (b) any foreign official who has certified either the genuineness of the signature and official position of the person executing the writing or the genuineness of the signature and official position of another foreign official who has executed a similar certificate in a chain of such certificates beginning with a certificate of the genuineness of the signature and official position of the person executing the writing. The final statement may be made only by a secretary of an embassy or legation, consul general, consul, vice consul, consular agent, or other officer in the foreign service of the United States stationed in the nation, authenticated by the seal of his office.

public entity in

CHAPTER 2. SECONDARY EVIDENCE OF WRITINGS

Article 1. Best Evidence Rule

1500. Except as otherwise provided by statute, no evidence other than the writing itself is admissible to prove the content of a writing. This section shall be known and may be cited as the best evidence rule.

1501. A copy of a writing is not made inadmissible by the best evidence rule if the writing is lost or has been destroyed without fraudulent intent on the part of the proponent of the evidence.

1502. A copy of a writing is not made inadmissible by the best evidence rule if the writing was not reasonably procurable by the proponent by use of the court's process or by other available means.

1503. (a) A copy of a writing is not made inadmissible by the best evidence rule if, 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 the writing. In a criminal action, the request at the hearing to produce the writing may not be made in the presence of the jury.

(b) Though a writing requested by one party is produced by another, and is thereupon inspected by the party calling for it, he is not obliged to introduce it as evidence in the action.

1504. A copy of a writing is not made inadmissible by the best evidence rule if the writing is not closely related to the controlling issues and it would be inexpedient to require its production.

1505. Secondary evidence of the content of a writing described in Section 1501, 1502, 1503, or 1504, other than a copy thereof, is not made inadmissible by the best evidence rule if the proponent does not have in his possession or under his control a copy of the writing. This section does not apply to a writing that is also described in Section 1506 or 1507.

1506. A copy of a writing is not made inadmissible by the best evidence rule if the writing is a record or other writing in the custody of a public employee.

1507. A copy of a writing is not made inadmissible by the best evidence rule if 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.

1508. Secondary evidence of the content of a writing described in Section 1506 or 1507, other than a copy thereof, is not made inadmissible by the best evidence rule if 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.

1509. Secondary evidence, whether written or oral, of the content of a writing is not made inadmissible by the best evidence rule if 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 [redacted] discretion, may require that such accounts or other writings be produced for inspection by the adverse party.

court, in its

1510. A copy of a writing is not made inadmissible by the best evidence rule if the writing has been produced at the hearing and made available for inspection by the adverse party.

Article 2. Official Writings and Recorded Writings

1530. (a) A purported copy of a writing in the custody of a public employee, or of an entry in such a writing, is prima facie evidence of such writing or entry if:

public entity therein

(1) The copy purports to be published by the authority of the nation or state, or [redacted] in which the writing is kept;

(2) The office in which the writing is kept is within the United States [redacted] or within the Panama Canal Zone, the Trust Territory of the Pacific Islands, or the Ryukyu Islands, and the copy is attested or certified as a correct copy of the writing or entry by a public employee, or a deputy of a public employee, having the legal custody of the writing; or

(3) The office in which the writing is kept is not within the United States or any other place described in paragraph (2) and the copy is attested as a correct copy of the writing

or entry by a person having authority to make the attestation. The attestation must be accompanied by a final statement certifying the genuineness of the signature and the official position of (i) the person who attested the copy as a correct copy or (ii) any foreign official who has certified either the genuineness of the signature and official position of the person attesting the copy or the genuineness of the signature and official position of another foreign official who has executed a similar certificate in a chain of such certificates beginning with a certificate of the genuineness of the signature and official position of the person attesting the copy. The final statement may be made only by a secretary of an embassy or legation, consul general, consul, vice consul, consular agent, or other 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.

(b) The presumptions established by this section are presumptions affecting the burden of producing evidence.

1531. For the purpose of evidence, whenever a copy of a writing is attested or certified, the attestation or 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.

1532. (a) The official record of a writing is prima facie evidence of the content of the original recorded writing if:

(1) The record is in fact a record of an office of a state or nation or of any [redacted] and

(2) A statute authorized such a writing to be recorded in that office.

public entity therein;

(b) The presumption established by this section is a presumption affecting the burden of producing evidence.

Article 3. Photographic Copies of Writings

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 1270) 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. 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 1531 and stating the date on which, and the fact that, it was so taken under his direction and control.

Article 4. Hospital Records

1560. (a) Except as provided in Section 1564, when a subpoena 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 subpoena 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 is sufficient compliance therewith if the custodian or other officer of the hospital, within five days after the receipt of such subpoena, delivers by mail or otherwise a true and correct copy (which may be a photographic or microphotographic reproduction) of all the records described in such subpoena 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 1561.

(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 subpoena clearly inscribed thereon; the sealed envelope or wrapper shall then be enclosed in an outer envelope or wrapper, sealed, directed as follows:

(1) If the subpoena directs attendance in court, to the clerk of such court, or to the judge thereof if there be no clerk.

(2) If the subpoena 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 subpoena for the taking of the deposition or at his place of business.

(3) In other cases, to the officer, body, or tribunal conducting the hearing, at a like address.

(c) Unless the parties to the 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.

1561. (a) The records shall be accompanied by the affidavit of the custodian or other qualified witness, stating in substance each of the following:

(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 subpoena.

(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 1560.

1562. 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. When more than one person has knowledge of the facts, more than one affidavit may be made. The presumption established by this section is a presumption affecting the burden of proof.

1563. 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.

1564. The personal attendance of the custodian or other qualified witness and the production of the original records is required if the subpoena duces tecum contains a clause which reads:

"The procedure authorized pursuant to subdivision (a) of Section 1560, and Sections 1561 and 1562, of the Evidence Code will not be deemed sufficient compliance with this subpoena."

1565. If more than one subpoena 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 and the personal attendance of the custodian or other qualified witness is required pursuant to Section 1564, the witness shall be deemed to be the witness of the party serving the first such subpoena duces tecum.

1566. This article applies in any proceeding in which testimony can be compelled.

Chapter 3. Official Writings Affecting Property

1600. The official record of a document purporting to establish or affect an interest in property is prima facie evidence of 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 [redacted] and

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

1601. (a) Subject to subdivisions (b) and (c), when in any action it is desired to prove the contents of the official record of any writing lost or destroyed by conflagration or other public calamity, after proof of such loss or destruction,

public entity therein;

the following may, without further proof, be admitted in evidence to prove the contents of such record:

(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 made in the ordinary course of business by any person 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 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 plant in the ordinary course of its business.

(b) No proof of the loss of the original writing 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.

1602. 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.

1603. 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.

1604. 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.

1605. 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 1865-66, are receivable as prima facie evidence with like force and effect as the originals and without proving the execution of such originals.

#34(L) 11/16/64

First Supplement to Memorandum 64-101

Subject: Study No. 34(L) - Uniform Rules of Evidence (Preprint Senate Bill No. 1)

Attached as Exhibit I is a letter from the League of California Cities commenting on Preprint Senate Bill No. 1. For the convenience of the Commission, we summarize and comment on this letter below.

Section 451

The League suggests that charters of cities and counties should be given judicial notice. We have already revised Section 451(a) to so provide.

The League objects to the repeal of Section 34330 of the Government Code (requiring judicial notice of the incorporation of general law cities). We think this is clearly included under subdivisions (b) and (c) of Section 452 and recommend that Section 34330 be repealed. Judicial notice of the incorporation of all cities, not just general law cities, is required by Section 452. We see no necessity for retaining Section 34330 and believe the retention of Section 34330 to be undesirable in view of the fact that the application of Section 34330 is limited to general law cities.

The League would prefer that judicial notice be required under Section 451 of incorporation of cities, rather than permitted under Section 452. We suggest no change be made in the statute.

Psychotherapist-Patient Privilege

The League suggests that there should be an exception to the psychotherapist-patient privilege for disciplinary proceedings. The exception

provided by Section 1016 will cover all cases where the patient has tendered the issue of his mental or emotional condition. As to other cases, we believe that the privilege should be recognized in a disciplinary proceeding to the same extent as in a criminal proceeding.

The League also points out that a problem exists in distinguishing between a physician and a psychotherapist. As the League correctly points out, the distinction is predicated on the type of treatment being sought or given, so that if one doctor does both, a problem is bound to arise as to the type of information that can be revealed. We believe that this comment reveals the basic defect in the existing statute. The staff further believes that it would be better to base the distinction between the physician-patient privilege and the psychotherapist-patient privilege primarily on the type of doctor involved rather than on the type of treatment sought. The distinction can be made clear by limiting the doctors involved to psychiatrists. (Of course, if one seeks the services of a psychiatrist on a matter that does not involve a mental or emotional condition, only the physician-patient privilege would be applicable.)

Section 1041

The League suggests that the words "or of a public entity in this State", be added after the word "State" in line 28 (page 52). We believe that this is a desirable change; it is necessary so that protection is provided to an informer who discloses information concerning the violation of a local ordinance.

Sections 1530 and 1532

We have already made the change suggested by the League.

Section 1560

The League suggests that Section 1560(a) refer to "city hospital" as well as the other types of hospital. We see no need to add "city hospital" since such hospitals are "licensed" hospitals and already included under Section 1560. We have, however, no objection to the addition of "city hospital" to Section 1560.

Penal Code Section 963

Penal Code Section 963 is amended to require judicial notice when an ordinance is pleaded. At the same time, the procedural protections afforded by the Judicial Notice Division apply as in any other case where notice of an ordinance is taken. Hence, we do not believe that the comment by the League concerning Section 963 is well taken.

The League also suggests that "private statute" be deleted from Penal Code Section 963 as unnecessary since "we are not aware of any 'private statutes' mentioned in Section 963."

Respectfully submitted,

John H. DeMoully
Executive Secretary

EXHIBIT I

LEAGUE OF CALIFORNIA CITIES

MEMBER AMERICAN MUNICIPAL ASSOCIATION

"WESTERN CITY" OFFICIAL PUBLICATION

Berkeley (5) . . Hotel Claremont . . THornwall 3-3083
Los Angeles (17) . . 702 Statler Center . . MAdison 4-4934

Berkeley, California
October 30, 1964

Mr. John H. DeMoully
Executive Secretary
California Law Revision Commission
Room 30, Crothers Hall
Stanford University
Stanford, California 94305

Dear John:

In reviewing the proposed Evidence Code as set forth in Preprint Senate Bill No. 1, I have done it with the idea of how the provisions relate to city government operation. I'm sure the trial lawyers are better qualified to advise on the substantive concepts involved.

At this time let me say that so far as cities are concerned there do not appear any major objections. I have not heard from any city attorneys, and perhaps they may be able to suggest changes of greater significance; however at this time we can only suggest the following:

1. Judicial Notice.

Charters of cities and counties should be given judicial notice. At the present time, courts do take judicial notice of them. Teachout v. Bogy, 175 Cal. 481; Clark v. City of Pasadena, 102 C.A. 2d. 198. Since they actually are ratified by the legislature and therefore are included within the meaning of "public statutory law" as described in Section 451, you may have included them already. We believe specific reference of inclusion would be desirable, preferably in the mandatory provisions of Section 451 because of legislative approval.

Section 34330 of the Government Code (requiring judicial notice of the incorporation of cities) is being repealed because it is now included within Section 452 (b), the "permissive" section. We are not certain whether 452 (b) accomplishes this and also believe it would be better to require such judicial notice, rather than make it permissive. To require proof of such incorporations seems unnecessary.

Along the same lines, Section 963 of the Penal Code is being amended on p. 118 to require judicial notice in the same manner as the court notices matters listed in Section 452. However, an inconsistency arises because 452 is the "permissive" section. Shouldn't Section 451 be the section referred to in the amendment to Section 963. Incidentally, we are not aware of any "private statutes" mentioned in Section 963, and therefore reference to such statutes could be deleted.

2. Psychotherapist - Patient Privilege.

Although we have noted the distinction drawn between this privilege and the physician - patient privilege, we would like to point out the problem that might arise by permitting the privilege to be claimed in a disciplinary proceeding. It would not be unusual to require testimony from a psychotherapist in a disciplinary hearing the same as from a physician. Although Section 1026 indicates the inapplicability when the information is required to be reported to a public employee, the failure to specifically include a section like Section 998 insofar as it relates to disciplinary hearings plus the analysis on page 240 may lead to an interpretation that the privilege can be claimed in disciplinary proceedings. For these reasons we would suggest that the privilege not apply in disciplinary hearings.

Another problem may arise in distinguishing between a physician and a psychotherapist. As referred to Sections 990, 991, 1010 and 1011, a physician may include a psychotherapist. A distinction will have to be predicated on the type of treatment being sought or given, so that if one doctor does both, a problem is bound to arise as to the type of information that can be revealed.

3. Identity of Informer.

Section 1041 should also relate to disclosure of violations of a law of "a public entity" to include local ordinances and not just California or federal laws.

4. Official Writings.

Sections 1530 (a) (1) and 1532 (a) (1) should be rephrased to specifically include all public entities. A governmental subdivision does not include a municipal corporation. Although the words are used interchangeably, some cases draw a distinction. Use of the words "public entity" would obviate any ambiguity and be consistent with language of other sections.

5. Hospital Records.

Section 1560 (a) should refer to city hospitals as well as other types. A few cities do maintain and operate hospitals.

We hope these comments will be helpful and want to thank you for the opportunity to present them. The efforts of the Commission are monumental and the members and staff should be congratulated on the accomplishment of this great task.

Sincerely,

Jack

Jack D. Wickware
Assistant Legal Counsel

JDW:gh

BUSINESS AND PROFESSIONS CODE

Section 2904 (Repealed)

Comment. Section 2904 is superseded by Evidence Code Sections 1010-1026.

Section 5012 (Amended)

Comment. The deleted language in Section 5012 is inconsistent with Evidence Code Section 1452. See the Comment to that section.

Section 25009 (Amended)

Comment. The amendment merely substitutes correct references for the obsolete references in Section 25009.

CIVIL CODE

Section 53 (Amended)

Comment. This revision of Section 53 provides, in effect, that the court may take judicial notice of the matter specified in subdivision (c) and is required to take judicial notice of such matter upon request if the party making the request supplies the court with sufficient information. See EVIDENCE CODE §§ 452 and 453 and the Comments thereto.

Section 164.5 (Added)

Comment. Section 164.5, which is a new section added to the Civil Code, states existing decisional and statutory law. The presumption stated in the first sentence of Section 164.5 is established by a number of California cases. It places upon the person asserting that any property is separate property the burden of proving that it was acquired by gift, devise, or descent, or that the consideration given for it was separate property, or that it is personal injury damages, or that for some other reason the property is not community property. E.g., Rozan v. Rozan, 49 Cal. 2d 322, 317 P.2d 11 (1957); Meyer v. Kinzer, 12 Cal. 247 (1859). See THE CALIFORNIA FAMILY LAWYER § 4.8 (Cal. Cont. Ed. Bar 1961).

The second sentence of Section 164.5 also states existing case law. E.g., Estate of Rolls, 193 Cal. 594, 226 Pac. 608 (1924); Meyer v. Kinzer, supra.

The third sentence of Section 164.5 states the apparent effect of subdivision 40 of Code of Civil Procedure Section 1963. The meaning of subdivision 40, however, is not clear. See 4 WITKIN, SUMMARY OF CALIFORNIA LAW, Community Property § 26 (7th ed. 1960); Note, 43 CAL. L. REV. 687, 690-691 (1955).

Section 193 (Repealed)

Comment. Sections 193, 194, and 195 are superseded by the more accurate statement of the presumption in Evidence Code Section 661. See the Comment to that section.

Section 194 (Repealed)

Comment. See the Comment to Civil Code Section 193.

Section 195 (Repealed)

Comment. See the Comment to Civil Code Section 193.

Section 3544 (Added)

Comment. Sections 3544-3548 are new sections added to the Civil Code and are compiled among the maxims of jurisprudence. Sections 3544-3548 restate the provisions of subdivisions 3, 19, 28, 32, and 33 of Code of Civil Procedure Section 1963 and supersede those subdivisions. The maxims are not intended to qualify any substantive provisions of law, but to aid in their just application. CIVIL CODE § 3509.

Section 3545 (Added)

Comment. See the Comment to Civil Code Section 3544.

Section 3546 (Added)

Comment. See the Comment to Civil Code Section 3544.

Section 3547 (Added)

Comment. See the Comment to Civil Code Section 3544.

Section 3548 (Added)

Comment. See the Comment to Civil Code Section 3544.

CODE OF CIVIL PROCEDURE

Section 1 (Amended)

Comment. The title of Part IV has been changed to reflect the fact that the evidence provisions in Part IV have been placed in the Evidence Code.

Section 117g (Amended)

Comment. The Uniform Business Records as Evidence Act is codified in the Evidence Code as Sections 1270 and 1271.

Section 125 (Amended)

Comment. Evidence Code Section 777 sets forth precisely the conditions under which witnesses may be excluded.

Section 153 (Amended)

Comment. The deleted language, which relates to the authentication of copies of judicial records, is superseded by Evidence Code Section 1530.

Section 433 (Amended)

Comment. This revision is necessary to conform Section 433 to the judicial notice provisions of the Evidence Code.

Section 657 (Amended)

Comment. The limitation on the kinds of misconduct that can be shown by a juror's affidavit has been deleted as there is no limitation on the nature of the misconduct that can be proved by evidence from jurors under Evidence Code Sections 704 and 1150. See the Comment to EVIDENCE CODE § 704(d).

Section 1256.2 (Repealed)

Comment. Section 1256.2 is superseded by Evidence Code Section 722(b).

Section 1747 (Amended)

Comment. Section 1747 has been amended merely to substitute a reference to the pertinent section of the Evidence Code for the reference to the superseded Code of Civil Procedure section.

Title of Part IV of Code of Civil Procedure (Amended)

Comment. The title of Part IV has been changed to reflect the fact that the evidence provisions contained therein have been superseded by the Evidence Code.

Section 1823 (Repealed)

Comment. Section 1823 is superseded by the definition of "evidence" in Evidence Code Section 140.

Section 1824 (Repealed)

Comment. Section 1824 is substantially recodified as Evidence Code Section 190.

Section 1825 (Repealed)

Comment. Section 1825, which merely states in general terms the content of Part IV of the Code of Civil Procedure, serves no useful purpose. No case has been found where the section was pertinent to the decision.

Section 1826 (Repealed)

Comment. Section 1826 contains an inaccurate description of the normal burden of proof. See Tentative Recommendation and a Study Relating to the Uniform Rules of Evidence (Burden of Producing Evidence, Burden of Proof, and Presumptions), 6 CAL. LAW REVISION COMM'N., REP., REC. § STUDIES 1001, 1149-1150 (1964). Section 1826 is superseded by Division 5 (commencing with Section 500) of the Evidence Code. See also EVIDENCE CODE § 430.

Section 1827 (Repealed)

Comment. Section 1827 is superseded by the definition of "evidence" in Evidence Code Section 140. Although judicial notice is not included in the definition of "evidence" in Section 140, the subject is covered in Division 4 (commencing with Section 450) of the Evidence Code; and judicial notice will support a finding by the court.

Section 1828 (Repealed)

Comment. Section 1828 attempts to classify evidence into a number of different categories, each of which in turn is defined by the sections that follow, i.e., Sections 1829-1837. This very elaborate classification system represents the analysis of evidence law of a century ago. Writers, courts, and lawyers today use different classifications and different terminology. Accordingly, Section 1828 is repealed. To the extent that the terms defined in Sections 1829-1837 should be retained, those terms are defined in the Evidence Code. See, e.g., EVIDENCE CODE § 410, defining "direct evidence."

Section 1829 (Repealed)

Comment. Sections 1829 and 1830 serve no definitional purpose in the existing statutes and appear to state a "best evidence rule" that is inconsistent with both the Evidence Code (Sections 1500-1510) and previously existing law. See Tentative Recommendation and a Study Relating to the Uniform Rules of Evidence (Article I. General Provisions), 6 CAL. LAW REVISION COMM'N, REP., REC. & STUDIES 1, 49-51 (1964).

Section 1830 (Repealed)

Comment. See the Comment to Code of Civil Procedure Section 1829.

Section 1831 (Repealed)

Comment. Section 1831 is substantially recodified as Evidence Code Section 410. The term "direct evidence", which is defined in Section 1831, is not used in Part IV of the Code of Civil Procedure except in Section 1844. Section 1844 is also repealed and its substance is contained in Evidence Code Section 411.

Section 1832 (Repealed)

Comment. "Indirect evidence" as defined in Section 1832 is more commonly known as circumstantial evidence. The defined term has no substantive significance insofar as either the Code of Civil Procedure or the Evidence Code is concerned, for under either statutory scheme circumstantial evidence, when relevant, is as admissible as direct evidence. The defined term is used in the Code of Civil Procedure only in Section 1957 (also repealed), which merely classifies indirect evidence as either inferences or presumptions.

The repeal of Section 1832 will not affect the instructions that are to be given to the jury in appropriate cases as to the difference between direct and circumstantial evidence. Nor will the repeal of this section affect the case law or other statutes relating to what evidence is sufficient to sustain a verdict or finding.

Section 1833 (Repealed)

Comment. Section 1833 is inconsistent with Evidence Code Section 602. See Tentative Recommendation and a Study Relating to the Uniform Rules of Evidence (Burden of Producing Evidence, Burden of Proof, and Presumptions), 6 CAL. LAW REVISION COMM'N, REP., REC. & STUDIES 1001, 1143-1149 (1964).

Section 1834 (Repealed)

Comment. The substance of Section 1834 is stated as a rule of law, rather than as a definition, in Evidence Code Section 403(b).

Section 1836 (Repealed)

Comment. Section 1836 serves no useful purpose. The defined term is not used in either the Evidence Code or in the existing statutes.

Section 1837 (Repealed)

Comment. Section 1837 is unnecessary. The defined term is not used in either the Evidence Code or in the existing statutes.

Section 1838 (Repealed)

Comment. Section 1838 is unnecessary. The defined term is not used in either the Evidence Code or in the existing statutes. The repeal of Section 1838 will have no effect on the principle that cumulative evidence may be excluded, for that principle is expressed in Evidence Code Section 352--without, however, using the term "cumulative evidence".

Section 1839 (Repealed)

Comment. The definition of "corroborative evidence" in Section 1839 (which requires corroborative evidence to be evidence "of a different character") is inconsistent with the case law developed in California which has not required that corroborating evidence be of a "different character". The repeal of Section 1839, therefore, will have no effect on the interpretation of the sections in various codes that require corroborating evidence; the case law that has developed under these sections will continue to determine what constitutes corroborating evidence for the purposes of the particular sections.

One out-dated case indicates that an instruction on what constitutes corroborating evidence is adequate if given in the words of Section 1839. People v. Sternberg, 111 Cal. 11, 43 Pac. 201 (1896). See also People v. Monteverde, 11 Cal. App.2d 156, 244 P.2d 447 (1952). On the other hand, recent cases do not cite or rely on Section 1839 in defining what constitutes corroborating evidence, and California Jury Instructions, Criminal provides definitions of corroborating evidence derived from the case law rather than from Section 1839. See, e.g., CALJIC (2d ed. 1958) Nos. 203 (Rev.) (possession of stolen property), 235 (Rev.) (possession of stolen property), 592-C (Rev.) (abortion), 766 (perjury), and 822 (Rev.) (corroboration of testimony of accomplices). See CALIFORNIA CRIMINAL LAW PRACTICE 473-477 (Cal. Cont. Ed. Bar 1964);

Tentative Recommendation and a Study Relating to the Uniform Rules of Evidence (Article I. General Provisions), 6 CAL. LAW REVISION COMM'N, REP., REC. & STUDIES 1, 56-57 (1964).

Section 1844 (Repealed)

Comment. The substance of Section 1844 is recodified as Evidence Code Section 411.

Section 1845 (Repealed)

Comment. Section 1845 is superseded by Evidence Code Sections 702, 800-801, and 1200.

Section 1845.5 (Repealed)

Comment. Section 1845.5 is recodified as Evidence Code Section 830.

Section 1846 (Repealed)

Comment. Section 1846 is recodified in substance in Evidence Code Sections 710 and 711.

Section 1847 (Repealed)

Comment. Section 1847 is inconsistent with the definition of a presumption in Evidence Code Section 600. The right of a party to attack the credibility of a witness by any evidence relevant to that issue is assured by Evidence Code Sections 351, 780, and 785.

Section 1848 (Repealed)

Comment. Insofar as Section 1848 deals with hearsay it is superseded by the hearsay rule, stated in Evidence Code Section 1200, and the numerous exceptions thereto. If Section 1848 has a broader application, its meaning is not clear and its possible applications are undesirable; hence, there is no justification for retaining the section.

Section 1849 (Repealed)

Comment. Section 1849 is superseded by Evidence Code Section 1226.

Section 1850 (Repealed)

Comment. Insofar as Section 1850 relates to hearsay, it is superseded by Evidence Code Sections 1240 and 1241, which provide exceptions to the hearsay rule for contemporaneous and spontaneous declarations. Insofar as Section 1850 relates to declarations that are themselves material, the section is unnecessary; for, inasmuch as Evidence Code Sections 225 and 1200 make it clear that such declarations are not hearsay, they are admissible under the general principal that relevant evidence is admissible. See EVIDENCE CODE §§ 210, 351.

Section 1851 (Repealed)

Comment. Section 1851 is superseded by the exceptions to the hearsay rule stated in Evidence Code Sections 1225 and 1302.

Section 1852 (Repealed)

Comment. Section 1852 is superseded by the exceptions to the hearsay rule stated in Article 11 (commencing with Section 1310) of Chapter 2 of Division 10 of the Evidence Code.

Section 1853 (Repealed)

Comment. Section 1853 is an imperfect statement of the declaration against interest exception to the hearsay rule and is superseded by Evidence Code Section 1230. See the Comment to that section.

Section 1854 (Repealed)

Comment. Section 1854 is recodified as Evidence Code Section 357.

Section 1855 (Repealed)

Comment. Section 1855 is superseded by Evidence Code Sections 1500-1510.

Section 1855a (Repealed)

Comment. Section 1855a is recodified as Evidence Code Section 1601.

Section 1863 (Repealed)

Comment. Section 1863 is superseded by Evidence Code Section 753.

Section 1867 (Repealed)

Comment. Section 1867 is based on the obsolete theory that some allegations are necessary that are not material, i.e., essential to the claim or defense; it provides that only the material allegations need be proved. See Tentative Recommendation and a Study Relating to the Uniform Rules of Evidence (Burden of Producing Evidence, Burden of Proof, and Presumptions), 6 CAL. LAW REVISION COMM'N, REP., REC. & STUDIES 1001, 1119-1121 (1964). Since Section 1867 is obsolete and is not a correct statement of existing law, it is repealed.

Section 1868 (Repealed)

Comment. Section 1868 is superseded by Evidence Code Sections 210, 350, and 352.

Section 1869 (Repealed)

Comment. Section 1869 is inconsistent with and superseded by Evidence Code Sections 500 and 510. Moreover, it is an inaccurate statement of the manner in which the burden of proof is allocated under existing law. See Tentative Recommendation and a Study Relating to the Uniform Rules of Evidence (Burden of Producing Evidence, Burden of Proof, and Presumptions), 6 CAL. LAW REVISION COMM'N, REP., REC. & STUDIES 1001, 1122-1124 (1964).

Section 1870 (Repealed)

Comment. Section 1870 is superseded by the provisions of the Evidence Code indicated below:

Section 1870 (subdivision)	Evidence Code (section)
1	210, 351
2	1220
3	1221
4 (first clause)	1310, 1311
4 (second clause)	1230
4 (third clause)	1242
5 (first sentence)	1222, 1224
5 (second sentence)	1225, 1226
6	1223
7	1240, 1241 (See also the Comment to CODE CIV. PROC. § 1850)
8	1290-1292
9 (first clause)	720, 800, 801, 1416
9 (second clause)	720, 801
10	870
11	1314, 1320-1322
12	Unnecessary (See EVIDENCE CODE § 351; CODE CIV. PROC. § 1861; CIV. CODE §§ 1644, 1645. See also COM. CODE § 2208.)
13	1312, 1313, 1320-1322
14	1500-1510
15	210, 351
16	210, 780, 785

Section 1871 (Repealed)

Comment. Section 1871 is recodified in the Evidence Code as indicated below:

Section 1871 (paragraph)	Evidence Code (section)
1	730
2	731
3	733
4	732
5	723

Section 1872 (Repealed)

Comment. Section 1872 is recodified in Evidence Code Sections 721 and 802.

Section 1875 (Repealed)

Comment. Section 1875 is superseded by the provisions of the Evidence Code indicated below:

Section 1875 (subdivision)	Evidence Code (section)
1	451(e)
2	451(a)-(d), 452(a)-(f)
3	451(a)-(d), 452(a)-(c), (e)
4	452(f), 453
5	1452
6, 7, and 8	1452-1454 (official signatures and seals); 451(f), 452(g)(h)(remainder of subdivisions)
9	451(f), 452(g)(h)
Next to last paragraph	454, 455
Last paragraph	311

Section 1879 (Repealed)

Comment. Insofar as Section 1879 declares all persons to be competent witnesses, it is superseded by Evidence Code Section 700; insofar as it requires perception and recollection on the part of the witness, it is superseded in part by Evidence Code Sections 701 and 702. Insofar as it is not superseded by the Evidence Code, Section 1879 treats matters of credibility as matters of competency and is, therefore, disapproved.

Section 1880 (Repealed)

Comment. Subdivisions 1 and 2 of Section 1880 are superseded by Evidence Code Section 701.

Subdivision 3 of Section 1880 is the California version of the so-called "dead man statute." Dead man statutes provide that one engaged in litigation with a decedent's estate cannot be a witness as to any matter or fact occurring before the decedent's death. These statutes appear to rest on the belief that to permit the survivor to testify in the proceeding would be unfair because the other party to the transaction is not available to testify and, hence, only a part of the whole story can be developed. Because the dead cannot speak, the living are also silenced out of a desire to treat both sides equally. See generally Moul v. McVey, 49 Cal. App.2d 101, 121 P.2d 83 (1942); 1 CAL. LAW REVISION COMM'N, REP., REC. & STUDIES, Recommendation and Study Relating to the Dead Man Statute at D-1 (1957).

In 1957, the Commission recommended the repeal of the dead man statute and the enactment of a statute providing that, in certain specified types of actions, written or oral statements of a deceased person made upon his personal knowledge were not to be excluded as hearsay. See 1 CAL. LAW REVISION COMM'N, REP., REC. & STUDIES, Recommendation and Study Relating to the Dead Man Statute at D-1 (1957). The 1957 recommendation has not been enacted as law. For the legislative history of this measure, see 1 CAL. LAW REVISION COMM'N, REP., REC. & STUDIES IX (1957).

Although the dead man statute undoubtedly cuts off some fictitious claims, it results in the denial of just claims in a substantial number of cases. As the Commission's 1957 recommendation and study demonstrates, the statute balances the scales of justice unfairly in favor of decedents' estates. See 1 CAL. LAW REVISION COMM'N, REP., REC. & STUDIES at D-6, D-43-D-45 (1957).

See also the Comment to EVIDENCE CODE § 1261. Moreover, the dead man statute has been productive of much litigation; yet, many questions as to its meaning and effect are still unanswered. For these reasons, the Commission again recommends that the dead man statute be repealed.

However, repeal of the dead man statute alone would tip the scales unfairly against decedents' estates by subjecting them to claims which could have been defeated, wholly or in part, if the decedent had lived to tell his story. If the living are to be permitted to testify, some steps ought to be taken to permit the decedent to testify, so to speak, from the grave. This is accomplished by relaxing the hearsay rule in Evidence Code Section 1261 to provide a limited hearsay exception for a statement of a deceased person offered in an action against an executor or administrator upon a claim or demand against the estate of such deceased person. This hearsay exception is more limited than that recommended in 1957 and will, it is believed, meet most of the objections made to the 1957 recommendation.

Section 1881 (Repealed)

Comment. Section 1881 is superseded by the provisions of the Evidence Code indicated below.

Subdivision 1. Subdivision 1 of Section 1881 is superseded by Evidence Code Sections 970-973 and 980-987. Under subdivision 1 of Section 1881 [redacted] and Section 1322 of the Penal Code, a married person has a privilege, subject to certain exceptions, to prevent his spouse from testifying for or against him in a civil or criminal action to which he is a party. Section 1322 of the Penal Code also gives his spouse a privilege not to testify for or against him in a criminal action to which he is a party.

The "for" privilege. The Commission has concluded that the marital testimonial privilege provided by existing law as to testimony by one spouse *for* the other should be abolished in both civil and criminal actions. There would appear to be no need for this privilege, now given to a party to an action, not to call his spouse to testify in his *favor*. If a case can be imagined in which a party would wish to avail himself of this privilege, he could achieve the same result by simply not calling his spouse to the stand. Nor does it seem desirable to continue the present privilege of the nonparty spouse not to testify in *favor* of the party spouse in a criminal action. It is difficult to imagine a case in which this privilege would be claimed for other than mercenary or spiteful motives, and it precludes access to evidence which might save an innocent person from conviction.

The "against" privilege. Under existing law, either spouse may claim the privilege to prevent one spouse from testifying against the other in a criminal action, and the party spouse may claim the privilege to prevent his spouse from testifying against him in a civil action. The privilege under [redacted] given exclusively to the witness spouse because he, instead of the party spouse is more likely to make the determination of whether to claim the privilege on the basis of its probable effect on the marital relationship. For example, because of his interest in the outcome of the action, a party spouse would be under considerable temptation to claim the privilege even if the marriage were already hopelessly disrupted, whereas a witness spouse probably would not. Illustrative of the possible misuse of the existing privilege is the recent case of *People* v. *Ward*, 50 Cal.2d 702, 328 P.2d 777 (1958), involving a defendant who murdered his wife's mother and 13-year-old sister. He had threatened to murder his wife, and it seems likely that he would have done so had she not fled. The marital relationship was as thoroughly shattered as it could have been; yet, the defendant was entitled to invoke the privilege to prevent his wife from testifying. In such a situation, the privilege does not serve at all its true purpose of preserving a marital relationship from disruption; it serves only as an obstacle to the administration of justice.

Evidence Code Sections 970 and 971 [redacted] is

Subdivisions 2-6.

Subdivisions 2-6 of 1881 are superseded by provisions of the Evidence Code indicated below:

Section 1881 (subdivision)	Evidence Code (section)
2	950-962
3	1030-1034
4	990-1006, 1010-1026
5	1040-1042
6	1070-1072

Section 1883 (Repealed)

Comment. Section 1883 is superseded by Evidence Code Sections 703 and 704.

Section 1884 (Repealed)

Comment. Section 1884 is superseded by Evidence Code Section 752.

Section 1885 (Repealed)

Comment. Section 1885 is recodified as Evidence Code Section 754.

Section 1893 (Amended)

Comment. The language deleted from Section 1893 is unnecessary in view of Evidence Code Sections 1506 and 1530.

Section 1901 (Repealed)

Comment. Section 1901 is superseded by Evidence Code Section 1530.

Section 1903 (Repealed)

Comment. Section 1903 is unnecessary to support the validity of statutes, for the California courts have said that statutes are "presumed" to be constitutional. In re Cregler, 56 Cal.2d 308, 311, 14 Cal. Rptr. 289, 291, 363 P.2d 305, 307

(1961). If Section 1903 is deemed to have an evidentiary effect, it is undesirable to the extent that it indicates that the Legislature may exercise the judicial power of making findings on controverted facts and that such findings are conclusive. As the section is unnecessary to accomplish its essential purpose, it is repealed. This repeal will not change the law of California relating to the construction or validity of statutes because the courts have not placed that law upon the footing of this section.

Section 1905 (Repealed)

Comment. Sections 1905, 1906, 1907, 1918, and 1919 relate to hearsay, authentication of official records, and the best evidence rule. They are superseded by Evidence Code Sections 1270-1271, 1280-1284, 1452-1454, 1506-1507, 1530, 1532, and 1600.

Subdivision 4 of Section 1918 provides for the authentication of a published foreign official journal by evidence that it was commonly received in the foreign country as published by the requisite authority. Although no similar provision appears in the Evidence Code, this and other evidence of authenticity not mentioned explicitly in the Evidence Code may be used to authenticate official writings under the general language of Section 1410, which provides that the requirement of authentication may be met by "evidence sufficient to sustain a finding of the authenticity of the writing." See also EVIDENCE CODE §§ 1400 and 1530.

Section 1906 (Repealed)

Comment. See the Comment to Code of Civil Procedure Section 1905.

Section 1907 (Repealed)

Comment. See the Comment to Code of Civil Procedure Section 1905.

Section 1908.5 (Added)

Comment. Section 1908.5 recodifies the rule of pleading stated in subdivision 6 of Section 1962 of the Code of Civil Procedure. See the Comment to that section.

Section 1918 (Repealed)

Comment. See the Comment to Code of Civil Procedure Section 1905.

Section 1919 (Repealed)

Comment. See the Comment to Code of Civil Procedure Section 1905.

Section 1919a (Repealed)

Comment. Sections 1919a and 1919b are superseded by Evidence Code Sections 1315 and 1316.

Section 1919b (Repealed)

Comment. See the Comment to Code of Civil Procedure Section 1919a.

Section 1920 (Repealed)

Comment. Section 1920 is superseded by the business records exception contained in Evidence Code Sections 1270 and 1271, by the exception to the hearsay rule for official records and other official writings contained in Evidence Code Sections 1280-1284, and by various specific exceptions to the hearsay rule that will continue to exist under various sections of the Evidence Code and other codes. The broad language of Section 1920 has been limited in Evidence Code Section 1280 to reflect existing law. See the Comment to EVIDENCE CODE § 1280. See also EVIDENCE CODE § 664 (presumption that official duty has been regularly performed).

Section 1920a (Repealed)

Comment. Section 1920a is unnecessary in view of Evidence Code Sections 1506 and 1530. See also EVIDENCE CODE § 1550.

Section 1920b (Repealed)

Comment. Section 1920b is recodified as Evidence Code Section 1551.

Section 1921 (Repealed)

Comment. Sections 1921 and 1922 are superseded by Evidence Code Sections 1270-1271, 1280, 1452, 1453, 1506, and 1530.

Section 1922 (Repealed)

Comment. See the Comment to Code of Civil Procedure Section 1921.

Section 1923 (Repealed)

Comment. Section 1923 is superseded by Evidence Code Section 1531. See the Comment to that section.

Section 1924 (Repealed)

Comment. Section 1924 is unnecessary because the sections to which it relates are repealed.

Section 1925 (Repealed)

Comment. Section 1925 is recodified as Evidence Code Section 1604.

Section 1926 (Repealed)

Comment. Section 1926 is superseded by Evidence Code Sections 1270-1271 and 1280-1284.

Section 1927 (Repealed)

Comment. Section 1927 is recodified as Evidence Code Section 1602.

Section 1927.5 (Repealed)

Comment. Section 1927.5 is recodified as Evidence Code Section 1605.

Section 1928 (Repealed)

Comment. Section 1928 is recodified as Evidence Code Section 1603.

Sections 1928.1-1928.4 (Repealed)

Comment. Article 2.1 of Chapter 3, Title 2, Part 4 of the Code of Civil Procedure consists of Sections 1928.1-1928.4. The sections are discussed individually below.

Section 1928.1 (Repealed)

Comment. Section 1928.1 is recodified as Evidence Code Section 1282.

Section 1928.2 (Repealed)

Comment. Section 1928.2 is recodified as Evidence Code Section 1283. See also EVIDENCE CODE § 1530 (purported copy of writing in custody of public employee).

Section 1928.3 (Repealed)

Comment. Section 1928.3 is unnecessary in view of Evidence Code Sections 1452, 1453, and 1530.

Section 1928.4 (Repealed)

Comment. Section 1928.4 is unnecessary in view of Evidence Code Section 3.

Section 1936 (Repealed)

Comment. Section 1936 is recodified as Evidence Code Section 1341.

Section 1936.1 (Repealed)

Comment. Section 1936.1 is recodified as Evidence Code Section 1156.

Section 1937 (Repealed)

Comment. Sections 1937, 1938, and 1939 relate to the best evidence rule and are superseded by Evidence Code Sections 1500-1510.

Section 1938 (Repealed)

Comment. See the Comment to Code of Civil Procedure Section 1937.

Section 1939 (Repealed)

Comment. See the Comment to Code of Civil Procedure Section 1937.

Section 1940 (Repealed)

Comment. Section 1940 is recodified as Evidence Code Sections 1413 and 1415.

Section 1941 (Repealed)

Comment. Section 1941 is recodified in substance as Evidence Code Section 1412.

Section 1942 (Repealed)

Comment. Section 1942 is recodified in substance as Evidence Code Section 1414.

Section 1943 (Repealed)

Comment. Section 1943 is recodified in substance in Evidence Code Section 1416.

Section 1944 (Repealed)

Comment. Section 1944 is recodified in substance as Evidence Code Section 1417.

Section 1945 (Repealed)

Comment. Section 1945 is recodified as Evidence Code Section 1418.

Section 1946 (Repealed)

Comment. The first subdivision of Section 1946 is superseded by the declaration against interest exception to the hearsay rule contained in Evidence Code Section 1230; the second subdivision is superseded by the business records exception contained in Evidence Code Sections 1270 and 1271; and the third subdivision is superseded by the business records exception contained in

Evidence Code Sections 1270-1271, the official records exceptions contained in Evidence Code Sections 1280-1284, and the various other exceptions to the hearsay rule contained elsewhere in the Evidence Code and in other codes.

Section 1947 (Repealed)

Comment. Section 1947 was a necessary provision when the only hearsay exception for business records was the common law shop-book rule. That rule required that an entry be an original entry in order to qualify for admission in evidence. The business records exception to the hearsay rule contained in Evidence Code Sections 1270 and 1271 does not require that the entry be an original entry so long as it was made in the regular course of the business at or near the time of the act, condition, or event recorded. As the Section 1947 no longer has any significant meaning, it is repealed.

Section 1948 (Repealed)

Comment. Section 1948 is recodified in substance as Evidence Code Section 1451.

Section 1951 (Repealed)

Comment. Section 1951 is superseded by Evidence Code Sections 1451, 1532, and 1600.

Sections 1953e-1953h (Repealed)

Comment. Article 5 of Chapter 3 of Title 2, Part IV, of the Code of Civil Procedure consists of Sections 1953e-1953h. These sections, which constitute the Uniform Business Records as Evidence Act, are recodified as Evidence Code Sections 1270-1272. Sections 1270-1272 do not, however, include the language of Section 1963f.5, which was added to the Code of Civil Procedure in 1959. Section 1963f.5 is not in the Uniform Act, and it 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 1963f.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), 6 CAL. LAW REVISION COMM'N, REP., REC. & STUDIES Appendix at 516 (1964).

Sections 1953i-1953L (Repealed)

Comment. Article 6 of Chapter 3 of Title 2, Part IV, of the Code of Civil Procedure consists of Sections 1953i-1953L. These sections, which comprise the Uniform Photographic Copies of Business and Public Records as Evidence Act, are recodified as Evidence Code Section 1550.

Section 1954 (Repealed)

Comment. Section 1954 is unnecessary in light of Evidence Code Sections 210, 351, and 352.

Sections 1957-1963 (Repealed)

Comment. Chapter 5 of Title 2, Part IV, of the Code of Civil Procedure consists of Sections 1957 through 1963. The sections are discussed individually below.

Section 1957 (Repealed)

Comment. Sections 1957, 1958, and 1960 are superseded by Evidence Code Sections 140 (defining "evidence") and 210 (defining "relevant evidence"). See the Comments to EVIDENCE CODE §§ 140 and 210. See also the Comment to CODE CIV. PROC. § 1832.

Section 1958 (Repealed)

Comment. See the Comment to Code of Civil Procedure Section 1957. The substance of Section 1958 is restated in the last sentence of Evidence Code Section 608.

Section 1959 (Repealed)

Comment. Section 1959 is superseded by Evidence Code Section 600.

Section 1960 (Repealed)

Comment. See the Comment to Code of Civil Procedure Section 1957.

Section 1961 (Repealed)

Comment. Section 1961 is superseded by Chapter 3 (commencing with Section 600) of Division 5 of the Evidence Code, which prescribes the nature and effect of presumptions.

Section 1962 (Repealed)

Comment. Subdivision 1 of Section 1962 is repealed because it "has little meaning, either as a rule of substantive law or as a rule of evidence . . . ." *People v. Gorshen*, 51 Cal.2d 716, 731, 336 P.2d 492, 501 (1959).

Subdivisions 2, 3, 4, and 5 are superseded by Evidence Code Sections 621-624.

The first clause of subdivision 6 states the meaningless truism that judgments are conclusive when declared by law to be conclusive. The pleading rule in the next two clauses has been recodified as Section 1908.5 of the Code of Civil Procedure.

Subdivision 7 is merely a cross-reference section to all other presumptions declared by law to be conclusive. This subdivision is unnecessary.

See EVIDENCE CODE § 620.

Section 1963 (Repealed)

Comment. Many of the presumptions listed in Section 1963 are classified and restated in the Evidence Code. A few have been recodified as maxims of jurisprudence in Part 4 of Division 4 of the Civil Code. Others are not continued at all. The disposition of each subdivision of Section 1963 is given in the table below. Following the table are comments indicating the reasons for repealing those provisions of Section 1963 that are not continued in California law.

Section 1963 (subdivision)	*Superseded by*
1	Evidence Code Section 620
2	Not continued
3	Civil Code Section 3544 (added in this recommendation)
4	Evidence Code Section 521
5	Not continued
6	Not continued
7	Evidence Code Section 621
8	Evidence Code Section 622
9	Evidence Code Section 623
10	Evidence Code Section 624
11	Evidence Code Section 627
12	Evidence Code Section 628
13	Evidence Code Section 634
14	Not continued
15	Evidence Code Section 664
16	Evidence Code Section 666
17	Evidence Code Section 630
18	Not continued
19	Civil Code Section 3545 (added in this recommendation)
20	Not continued
21	Commercial Code Sections 3306, 3307, and 3408
22	Not continued
23	Evidence Code Section 640
24	Evidence Code Section 641
25	Not continued
26	Evidence Code Section 667
27	Not continued
28	Civil Code Section 3546 (added in this recommendation)
29	Not continued
30	Not continued
31	Evidence Code Section 661
32	Civil Code Section 3547 (added in this recommendation)
33	Civil Code Section 3548 (added in this recommendation)
34	Evidence Code Section 643
35	Evidence Code Section 644
36	Evidence Code Section 645
37	Evidence Code Section 642
38	Not continued
39	Unnecessary (duplicates Civil Code Section 1614)
40	Civil Code Section 164.5 (added in this recommendation)

Subdivision 2 is not continued because it has been a source of error and confusion in the cases. An instruction based upon it is error whenever specific intent is in issue. *People v. Snyder*, 15 Cal.2d 706, 104 P.2d 639 (1940); *People v. Maciel*, 71 Cal. App. 235, 234 Pac. 977 (1925). A person's intent may be inferred from his actions and the surrounding circumstances, and an instruction to that effect may be given. *People v. Besold*, 154 Cal. 363, 97 Pac. 871 (1908).

Subdivisions 5 and 6 are not continued because, despite Section 1963, there is no presumption of the sort stated. The "presumptions" merely indicate that a party's evidence should be viewed with distrust if he could produce better evidence and that unfavorable inferences should be drawn from the evidence offered against him if he fails to deny or explain it. A party's failure to produce evidence cannot be turned into evidence against him by reliance on these presumptions. *Hampton v. Rose*, 8 Cal. App.2d 447, 56 P.2d 1243 (1935); *Orvetz v. Boys' Market, Inc.*, 91 Cal. App. 2d 827, 830, 206 P.2d 6, 8-9 (1949). The substantive effect of these "presumptions" is stated more accurately in [redacted] as recommended in this recommendation.

Evidence Code Section 115 (jury instruction).

Subdivision 14. The presumption stated in subdivision 14 is not continued, for it is inaccurate and misleading. The cases have used this presumption to sustain the validity of the official acts of a person acting in a public office when there has been no evidence to show that such person had the right to hold office. See, *e.g., City of Monterey v. Jacks*, 139 Cal. 542, 73 Pac. 436 (1903); *Delphi School Dist. v. Murray*, 53 Cal. 29 (1878); *People v. Beal*, 108 Cal. App.2d 200, 239 P. 2d 84 (1951). The presumption is unnecessary for this purpose, for it is well settled that the "acts of an officer de facto, so far as the rights of third persons are concerned," are, if done within the scope and by the apparent authority of office, as valid and binding as if he were the officer legally elected and qualified for the office and in full possession of it." *In re Redevelopment Plan for Bunker Hill*, 61 Cal.2d ___, ___, 37 Cal. Rptr. 74, 88, 389 P.2d 538, 552 (1964); *Oakland Paving Co. v. Donovan*, 19 Cal. App. 488, 494, 126 Pac. 388, 390 (1912). Under the de facto doctrine, the validity of the official acts taken is conclusively established. *Town of Susanville v. Long*, 144 Cal. 362, 77 Pac. 987 (1904); *People v. Hecht*, 105 Cal. 621, 38 Pac. 941 (1895); *People v. Sassovich*, 29 Cal. 480 (1866). Thus, the cases applying subdivision 14 are erroneous in indicating that the official acts of a person acting in a public office may be attacked by evidence sufficient to overcome the presumption of a valid appointment. These cases can be explained only on the ground that they have overlooked the de facto doctrine.

In cases where the presumption might have some significance—cases where the party occupying the office is asserting some right of the office-holder—the presumption has been held inapplicable. *Burke v. Edgar*, 67 Cal. 182, 7 Pac. 488 (1885).

Subdivision 18. No case has been found where subdivision 18 has had any effect. The doctrine of res judicata determines the issues concluded between the parties without regard to this presumption. *Parnell v. Hahn*, 61 Cal. 131, 132 (1882) ("And the judgment as rendered . . . is conclusive upon all questions involved in the action and upon which it depends, or upon matters which, under the issues, might have been litigated and decided in the case . . . .").

Subdivision 20. The cases have used this "presumption" merely as a justification for holding that evidence of a business custom will sustain a finding that the custom was followed on a particular occasion. *E.g., Robinson v. Puls*, 28 Cal.2d 664, 171 P.2d 430 (1946); *American Can Co. v. Agricultural Insur. Co.*, 27 Cal. App. 647, 150 Pac. 996 (1915). [redacted] provides for the admissibility of business custom evidence to prove that the custom was followed on a particular occasion. [redacted]. There is no reason to compel the trier of fact to find that the custom was followed by applying a presumption. The evidence of the custom may be strong or weak, and the trier of fact should be free to decide whether the custom was followed or not. No case has been found giving a presumptive effect to evidence of a business custom under subdivision 20.

Evidence Code Section 1105

Subdivision 22. The purpose of subdivision 22 appears to have been to compel an accommodation endorser to prove that he endorsed in accommodation of a subsequent party to the instrument and not in accommodation of the maker. See, e.g., *Pacific Portland Cement Co. v. Reinecke*, 30 Cal. App. 501, 158 Pac. 1041 (1916). The liability of accommodation endorsers is now fully covered by the Commercial Code. Accommodation is a defense which must be established by the defendant. COM. CODE §§ 3307, 3415(5). Hence subdivision 22 is no longer necessary.

Subdivision 25. Despite subdivision 25, the California courts have refused to apply the presumption of identity of person from identity of the name when the name is common. *E.g., People v. Wong Sang Lung*, 3 Cal. App. 221, 224, 84 Pac. 843, 845 (1906). The matter should be left to inference, for the strength of the inference will depend in particular cases on whether the name is common or unusual.

Subdivision 27 has been rarely cited in the reported cases since it was enacted in 1872. It has been applied to situations where a statement has been made in the presence of a person who has failed to protest to the representations in the statement. The apparent acquiescence in the statement has been held to be proof of belief in the truth of the statement. *Estate of Flood*, 217 Cal. 763, 21 P.2d 579 (1933); *Estate of Clark*, 13 Cal. App. 786, 110 Pac. 828 (1910).

Although it may be appropriate under some circumstances to infer from the lack of protest that a person believes in the truth of a statement made in his presence, it is undesirable to require such a conclusion. The surrounding circumstances may vary greatly from case to case, and the trier of fact should be free to decide whether acquiescence resulted from belief or from some other cause. *Cf. Matt.* 27:13-14 (Revised Standard Version) ("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 . . . .").

Subdivision 29 has been cited in but one appellate decision in its 92-year history. It is unnecessary in light of the doctrine of ostensible authority. See 1 WITKIN, SUMMARY OF CALIFORNIA LAW, *Agency and Employment* §§ 49-51 (7th ed. 1960).

Subdivision 30, in effect, declares that a marriage will be presumed from proof of cohabitation and repute. *Pulos v. Pulos*, 140 Cal. App.2d 913, 295 P.2d 907 (1956). Because reputation evidence may sometimes strongly indicate the existence of a marriage and at other times fail to do so, *requiring* a finding of a marriage from proof of such reputation is unwarranted. The cases have sometimes refused to apply the presumption because of the weakness of the reputation evidence relied on. *Estate of Baldwin*, 162 Cal. 471, 123 Pac. 267 (1912); *Cacioppo v. Triangle Co.*, 120 Cal. App.2d 281, 260 P.2d 985 (1953). Discontinuance of the presumption will not affect the rule that the existence of a marriage may be inferred from proof of reputation. *White v. White*, 82 Cal. 427, 430, 23 Pac. 276, 277 (1890) (" 'cohabitation and repute do not make marriage; they are merely items of evidence from which it may be *inferred* that a marriage had been entered into' ") (italics in original).

Subdivision 38 has not been applied in any reported case in its 92-year history. The substantive law relating to implied dedication and dedication by prescription makes the presumption unnecessary. See 2 WITKIN, SUMMARY OF CALIFORNIA LAW, *Real Property* §§ 27-29 (7th ed. 1960).

Section 1967 (Repealed)

Comment. Section 1967 has no substantive meaning and is unnecessary.

Section 1968 (Repealed)

Comment. Section 1968 unnecessarily duplicates the provisions of Penal Code Sections 1103 and 1103a.

Section 1973 (Repealed)

Comment. Section 1973 is unnecessary. It merely describes in evidentiary terms the Statute of Frauds contained in Civil Code Section 1624.

Section 1974 (Amended)

Comment. The amendment to Section 1974 makes no substantive change in the law; the amendment merely makes it clear that Section 1974 is a substantive rule of law, not a rule of evidence.

Section 1978 (Repealed)

Comment. Section 1978 incorrectly states the existing law of California. Certain things are declared to be "conclusive evidence" in other codes. See, e.g., COM. CODE § 1201(6), (45). Moreover, the California courts have recognized that some evidence may be conclusive in the absence of statute, for a court, "in reviewing the evidence, is bound to exercise its intelligence, and in doing so must recognize that certain facts are controlled by immutable physical laws. It cannot permit the verdict of a jury to change such facts, because . . . to do so would, in effect, destroy the intelligence of the court." Austin v. Newton, 46 Cal. App. 493, 497, 189 Pac. 471, 472 (1920); Neilson v. Houle, 200 Cal. 726, 729, 254 Pac. 891, 892 (1927). Nonetheless, the California courts have also relied upon this section to sustain a finding of paternity despite

undisputed blood-test evidence showing that the defendant could not have been the father of the child. Arais v. Kalensnikoff, 10 Cal.2d 428, 74 P.2d 1043 (1937). The Legislature subsequently rejected this decision by enacting the Uniform Act on Blood Tests to Determine Paternity. Repeal of Section 1978 will remove the statutory basis for a similar decision in the rare case where such certainty is attainable.

Sections 1980.1-1980.7 (Repealed)

Comment. Sections 1980.1-1980.7, which comprise the Uniform Act on Blood Tests to Determine Paternity, are recodified as Evidence Code Sections 890-896.

Sections 1981-1983 (Repealed)

Comment. Chapter 1 of Title 3, Part IV, of the Code of Civil Procedure consists of Sections 1981 through 1983. These sections are discussed individually below.

Section 1981 (Repealed)

Comment. Section 1981 is superseded by Evidence Code Sections 500 and 510. See Tentative Recommendation and a Study Relating to the Uniform Rules of Evidence (Burden of Producing Evidence, Burden of Proof, and Presumptions), 6 CAL. LAW REVISION COMM'N, REP., REC. & STUDIES 1001, 1124-1125 (1964).

Section 1982 (Repealed)

Comment. Section 1982 is recodified as Evidence Code Section 1402.

Section 1983 (Repealed)

Comment. Section 1983 was held unconstitutional as applied under the Alien Land Law. Morrison v. California, 291 U.S. 82 (1934). It has been applied but once by an appellate court since the Morrison case was decided. People v. Cordero, 50 Cal. App.2d 146, 122 P.2d 648 (1942). Section 1983

appears to have been designed principally to facilitate the enforcement of the Alien Land Law. Since that law has been held unconstitutional (Sei Fujii v. State, 38 Cal.2d 718, 242 P.2d 617 (1952)) and has been repealed (Cal. Stats. 1955, Ch. 316, § 1, p. 767), Section 1983 should no longer be retained in the law of California.

Section 1998 (Repealed)

Comment. Sections 1998-1998.5 provide a special exception to the best evidence rule for hospital records. These sections are recodified as Evidence Code Sections 1560-1566.

Section 1998.1 (Repealed)

Comment. See the Comment to Code of Civil Procedure Section 1998.

Section 1998.2 (Repealed)

Comment. See the Comment to Code of Civil Procedure Section 1998.

Section 1998.3 (Repealed)

Comment. See the Comment to Code of Civil Procedure Section 1998.

Section 1998.4 (Repealed)

Comment. See the Comment to Code of Civil Procedure Section 1998.

Section 1998.5 (Repealed)

Comment. See the Comment to Code of Civil Procedure Section 1998.

Section 2009 (Amended)

Comment. Section 2009 has been amended to reflect the fact that statutes in other codes may also authorize the use of affidavits. See, e.g., PROB. CODE §§ 630, 705.

Section 2016 (Amended)

Comment. The amendment of Section 2016 merely substitutes the general definition of "unavailable as a witness" used in the Evidence Code for the substantially similar language in Section 2016.

Sections 2042-2056 (Repealed)

Comment. Article 6 of Chapter 3, Title 3, Part IV, of the Code of Civil Procedure consists of Sections 2042 through 2056. These sections are discussed individually below.

Section 2042 (Repealed)

Comment. Section 2042 is superseded by Evidence Code Section 320.

Section 2043 (Repealed)

Comment. Section 2043 is substantially recodified in Evidence Code Section 777.

Section 2044 (Repealed)

Comment. The first sentence of Section 2044 is recodified as Evidence Code Section 765. The second sentence is superseded by Evidence Code 352.

Section 2045 (Repealed)

Comment. The first sentence of Section 2045 is superseded by Evidence Code Sections 760, 761, and 772. The second sentence of Section 2045 is recodified as Evidence Code Section 773.

Section 2046 (Repealed)

Comment. The first sentence of Section 2046 is recodified as Evidence Code Section 762. The second sentence of Section 2046 is recodified as Evidence Code Section 767.

Section 2047 (Repealed)

Comment. The last sentence of Section 2047 is superseded by Evidence Code Section 1237. The remainder of Section 2047 is superseded by Evidence Code Section 771.

Section 2048 (Repealed)

Comment. Section 2048 is superseded by Evidence Code Sections 767 and 772.

Section 2049 (Repealed)

Comment. Section 2049 is inconsistent with and superseded by Evidence Code Section 785. See the Comment to that section. See also EVIDENCE CODE §§ 769, 770, and 1235.

Section 2050 (Repealed)

Comment. Section 2050 is recodified as Evidence Code Sections 774 and 778.

Section 2051 (Repealed)

Comment. Section 2051 is inconsistent with Evidence Code Sections 780 and 785-788. The provision of Section 2051 excluding evidence of particular wrongful acts is continued in Evidence Code Section 787. The principle of excluding criminal convictions where there has been a subsequent pardon has been broadened to cover analogous situations in Evidence Code Section 788.

Section 2052 (Repealed)

Comment. The first clause of Section 2052 is superseded by Evidence Code Section 780(h). The remainder of Section 2052 is inconsistent with Evidence Code Sections 768-770. See the Comments to those sections.

Section 2053 (Repealed)

Comment. Insofar as Section 2053 deals with the inability to support a witness' credibility until it has been impeached, it is superseded by Evidence Code Section 790. Insofar as Section 2053 deals with the inadmissibility of character evidence in a civil action, it is superseded by Evidence Code Sections 1100-1104.

Section 2054 (Repealed)

Comment. Section 2054 is recodified in substance as Evidence Code Section 768(b).

Section 2055 (Repealed)

Comment. Section 2055 is recodified as Evidence Code Section 776.

Section 2056 (Repealed)

Comment. Section 2056 is recodified in substance as Evidence Code Section 766.

Section 2061 (Repealed)

Comment. The first sentence of Section 2061 is recodified in Evidence Code Section 312. The remainder of Section 2061 is superseded by Chapter 6 (commencing with Section 430) of Division 3 of the Evidence Code.

Section 2065 (Repealed)

Comment. The first clause of Section 2065 is superseded by Evidence Code Sections 351 and 911. [redacted] Insofar as Section 2065 permits a witness to refuse to give an answer having a tendency to subject him to punishment for a felony, it is superseded by [redacted] dealing with the self-incrimination privilege. Evidence Code Sections 940 [redacted]

The language relating to an answer which would have a tendency to degrade the character of the witness is unnecessary. The meaning of this language seems to be [redacted] a witness must testify to non-incriminating but degrading matter that is relevant to the merits of the case.[6]

[6] Clark v. Reese, 35 Cal. 89 (1868) (breach of promise to marry; defense that plaintiff had immoral relations with X; *held*, X must answer as to such relations, though answer degrading); San Diego v. Superior Court, 156 Cal. App.2d 362, 314 P.2d 135 (1957) (separate maintenance on ground of cruelty; defendant required to answer as to cruelty, albeit degrading).

Nevertheless the witness is privileged to refuse to testify to such matter when the matter is relevant only for the purpose of impeachment. However this privilege seems to be largely—if not entirely—superfluous. [redacted] provides that a witness may not be impeached by evidence of [redacted] Manifestly, to the extent that the degrading matter referred to in Section 2065 [redacted] makes this portion of Section 2065 unnecessary. [redacted] Moreover, since the witness is protected against impeachment by evidence of [redacted] acts, though relevant, and against matter which is degrading but is irrelevant (as to which no special rule is needed), there seems to be little, if any, scope left to the "degrading matter" privilege. For criticisms of this privilege, see 6 WIGMORE, EVIDENCE §§ 2215, 2255 (McNaughton rev. 1961); 2 WIGMORE, EVIDENCE § 984 (3d ed. 1940); McGovney, *Self-Criminating and Self-Disgracing Testimony*, 5 IOWA LAW BULL. 174 (1920). This privilege seems to be seldom invoked in California opinions and, when invoked, it arises in cases in which the evidence in question could be excluded merely by virtue of its irrelevancy, or by virtue of Section 2051, or by virtue of both. See, for example, the following cases: *People v. Watson*, 46 Cal.2d 818, 299 P.2d 243 (1956) (homicide case involving cross-examination as to defendant's efforts to evade military service; *held*, irrelevant *and* violative of Section 2065); *People v. T. Wah Hing*, 15 Cal. App. 195, 203, 114 Pac. 413, 419 (1911) (abortion case in which the prosecuting witness was asked on cross-examination who was father of child; *held*, immaterial—and, if asked to degrade, "equally inadmissible"); *People v. Fong Chung*, 5 Cal. App. 587, 91 Pac. 105 (1907) (defendant's witness in statutory rape case asked whether the witness was seller of lottery tickets and operator of poker game; *held*, improper, *inter alia*, on ground of Section 2065. Note, however, the *additional* grounds for exclusion, *viz.*, immateriality and Section 2051. Thus, Section 2065 was not at all necessary for the decision.). Hence, this portion of Section 2065 is superfluous [redacted] under the Evidence Code. Section 787.

The remainder of Section 2065 is superseded by [redacted] dealing with the [redacted]

Evidence Code Section 787 (Specific instances of conduct)

Evidence Code Section 787 (pertinent portion continued as Evidence Code Section 787),

Evidence Code Section 785.

Section 2066 (Repealed)

Comment. Section 2066 is unnecessary in the light of Evidence Code Section 765, which restates the provisions of Code of Civil Procedure Section 2044.

Section 2078 (Repealed)

Comment. Section 2078 is superseded by Evidence Code Sections 1152-1154.

Section 2079 (Repealed)

Comment. Section 2079 is unnecessary because it repeats what is said in Civil Code Section 130. Moreover, it 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.

Sections 2101-2103 (Repealed)

Comment. Chapter 4 of Title 5, Part IV, of the Code of Civil Procedure consists of Sections 2101 through 2103. These sections are discussed individually below.

Section 2101 (Repealed).

Comment. Section 2101 is superseded by Evidence Code Section 312.

Section 2102 (Repealed)

Comment. The first sentence of Section 2102 is recodified in Evidence Code Section 310. The second sentence of Section 2102 is superseded by Evidence Code Section 458.

Section 2103 (Repealed)

Comment. Section 2103 is superseded by Evidence Code Section 300.

CORPORATIONS CODE

Section 6602 (Amended)

Comment. This revision of Section 6602 provides, in effect, that the judge may take judicial notice of the matters listed in amended Section 6602, and he is required to take such judicial notice if he is requested to do so and the party supplies him with sufficient information. See EVIDENCE CODE §§ 452 and 453 and the Comments thereto.

The portion of Section 6602 which has been deleted is either unnecessary because it duplicates the provisions of Evidence Code Sections 451 and 452 or undesirable because it conflicts with Evidence Code 1452.

Section 25310 (Amended)

Comment. The deleted language is inconsistent with Evidence Code Section 1452. See the Comment to that section.

GOVERNMENT CODE

Section 11513 (Amended)

Comment. The revision of the last sentence of Section 11513 is necessary because, under Division 8 (commencing with Section 900) of the Evidence Code, the privileges applicable in some administrative proceedings are at times different from those applicable in civil actions.

The substitution of "other" for "direct" in the third sentence of subdivision (c) of Section 11513 makes no significant substantive change but is desirable because "direct evidence" is not defined for the purposes of Section 11513. See the Comment to CODE CIV. PROC. § 1831 (Repealed).

Section 19580. (Amended)

Comment. The amendment merely substitutes a reference to the correct Evidence Code section for the reference to the superseded Code of Civil Procedure section.

Section 34330 (Repealed)

Comment. Section 34330 is unnecessary. The matters to be noticed under Section 34330 may be noticed under Division 4 (commencing with Section 450) of the Evidence Code, and that division provides the applicable procedures for taking judicial notice.

HEALTH AND SAFETY CODE

Section 3197 (Amended)

Comment. The revision of Section 3197 merely substitutes references to the pertinent Evidence Code sections that supersede subdivisions 1 and 4 of Code of Civil Procedure Section 1881.

PENAL CODE

Section 270e (Amended)

Comment. The revision of Section 270e merely inserts a reference to the pertinent sections of the Evidence Code.

Section 686 (Amended)

Comment. Section 686 sets forth three exceptions to the right of a defendant in a criminal trial to confront the witnesses against him. These exceptions purport to state the conditions under which the court may admit testimony taken at the preliminary hearing, testimony taken in a former trial of the action, and testimony in a deposition that is admissible under Penal Code Section 882. The section inaccurately sets forth the existing law, for it fails to provide for the admission of hearsay evidence generally or for the admission of testimony in a deposition that is admissible under Penal Code Sections 1345 and 1362, and its reference to the conditions under which depositions may be admitted under Penal Code Section 882 is not accurate. As [redacted] Evidence Code Sections 1290-1292 [redacted] cover the situations in which testimony in another action or proceeding and testimony at the preliminary hearing is admissible as exceptions to the hearsay rule, Section 686 [redacted] has been revised by eliminating the specific exceptions for these situations and by substituting for them a general cross reference to admissible hearsay. The [redacted] statement of the conditions under which a deposition may be admitted [redacted] has been also deleted, and in lieu of the deleted language there is substituted language that accurately provides for the admission of depositions under Penal Code Sections 882, 1345, and 1362. [redacted]

Section 688 (Amended)

Comment. The language deleted from Section 688 is superseded by Evidence Code Sections 930 and 940.

Section 939.6 (Amended)

Comment. The revision of Section 939.6 makes no substantive change. The amendment, however, states more clearly and precisely the meaning that has been given the section by the California courts. See, e.g., People v. Freudenberg, 121 Cal. App.2d 564, 263 P.2d 875 (1953). See also WITKIN, CALIFORNIA CRIMINAL PROCEDURE §§ 175, 228 (1963).

Section 961 (Amended)

Comment. This revision of Section 961 makes it clear that matters that will be judicially noticed, whether such notice is mandatory or discretionary, need not be stated in an accusatory pleading. See EVIDENCE CODE §§ 451 and 452.

Section 963 (Amended)

Comment. This revision of Section 963 makes the procedure provided in Evidence Code Sections 454-458 applicable when judicial notice is taken of the matter listed in Penal Code Section 963. Note that, notwithstanding Evidence Code Section 453, notice is mandatory if the private statute or ordinance is pleaded by reference to its title and the day of its passage.

Section 1120 (Amended)

Comment. Section 1120 requires a juror who discovers that he has personal knowledge of a fact in controversy in the case to disclose the same in open court. If he reveals such personal knowledge during the jury's retirement, the jury must return into court. The section then requires that the juror be sworn

as a witness and examined in the presence of the parties.

The section does not make it clear whether this examination in the presence of the parties is for the purpose of determining if "good cause" exists for the juror's discharge in accordance with Penal Code Section 1123 or whether this examination is for the purpose of obtaining the juror's knowledge as evidence in the case. The circumstances under which a juror may testify in a criminal case are fully covered in Evidence Code Section 704. Therefore, Section 1120 has been amended to eliminate the ambiguity in its provisions and to provide assurance the juror's examination is to be used solely to determine whether "good cause" exists for his discharge.

Section 1322 (Repealed)

Comment. Section 1322 is superseded by Evidence Code Sections 970-973 and 980-987. See the Comment to subdivision 1 of Section 1881 of the Code of Civil Procedure, which also is superseded by the same Evidence Code sections.

Section 1323 (Repealed)

Comment. The first clause of the first sentence of Section 1323 is superseded by Evidence Code Sections 930 and 940. The second clause is recodified as Evidence Code Section 772b. The last sentence of Section 1323 is unnecessary because it merely duplicates the provisions of Article I, Section 13 of the California Constitution.

Section 1323.5 (Repealed)

Comment. Section 1323.5 is superseded by Evidence Code Section 930, which retains the only effect the section has ever been given--to prevent the prosecution from calling the defendant in a criminal action as a witness. See People v. Talle, 111 Cal. App.2d 650, 245 P.2d 633 (1952). Whether Section 1323.5

provides a broader privilege than Evidence Code Section 930 is not clear, for the meaning of the phrase "persons accused or charged" is uncertain. For example, a witness before the grand jury or at a coroner's inquest is not technically a person "accused or charged," and Section 1323.5 would appear not to apply to such procedings. A person who claims the privilege against self-incrimination before the grand jury, at a coroner's inquest, or in some other proceeding is provided with sufficient protection under Evidence Code Section 913, for his claim of privilege cannot be shown to impeach him or to provide a basis for inferences against him in a subsequent civil or criminal proceeding.

Section 1345 (Amended)

Comment. Section 1345 has been revised so that the conditions for admitting the deposition of a witness that has been taken in the same action are consistent with the conditions for admitting the testimony of a witness in another action or proceeding under Evidence Codes Sections 1290-1292.

Section 1362 (Amended)

Comment. Section 1362 has been revised so that the conditions for admitting the deposition of a witness that has been taken in the same action are consistent with the conditions for admitting the testimony of a witness in another action or proceeding under Evidence Code Sections 1290-1292.

PUBLIC UTILITIES CODE

Section 306 (Amended)

Comment. The deleted language is inconsistent with Evidence Code Section 1452. See the Comment to that section.

Memorandum 65-1

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

As reported in the round robin letter of December 22, 1964, the Assembly Interim Committee on Judiciary held a hearing on the Evidence Code on December 16 and 17. This memorandum presents several questions that were raised at that hearing as well as a few other problems. Attached to this memorandum are the following exhibits:

I. Statement of State Bar Committee to Assembly Committee (yellow pages)

II. Amendment of Labor Code Section 5708 (green page)

III. Statement of Dr. Anderson to Assembly Committee (pink pages)

IV. Amendment of Evidence Code Section 1156 (buff page)

V. Letter from Judge Philbrick McCoy (blue page)

The following matters should be considered by the Commission:

Section 120

Mr. Bobby (of the Office of Administrative Procedure) expressed concern over the broad definition of "civil action" in Section 120. Because the definition includes all "proceedings", he is fearful that the Evidence Code might be considered applicable to administrative proceedings.

We explained to Mr. Bobby that Section 300 makes the Evidence Code applicable only in court proceedings; but he would like to have Section 120 amended to read:

120. "Civil action" includes all actions and court proceedings other than a criminal action.

We think that the revision can be made without changing the substance of the code.

Section 455

Section 455 was revised in substance at the last meeting to provide that

the judge must afford each party an opportunity to present relevant information "before the close of the taking of evidence". We have changed the quoted words to read as follows: "before the jury is instructed or before the cause is submitted for decision by the court". We made the change because in many cases the court does not take evidence. On law and motion matters, motions for new trial, review of administrative records, etc., the court's decision may be influenced by matters that are subject to judicial notice, but the court does not take evidence. A requirement tied to the close of evidence would be unworkable in such cases.

The crucial time in any case is the time when the court must decide the question to which the matter to be judicially noticed is relevant, whether that time be the time for ruling on demurrer, the time for formulating instructions to the jury, the time for ruling on a motion for new trial, etc. Is the substituted language satisfactory?

Section 780

The Commission should consider whether the rule stated in Section 780 should be "except as otherwise provided by law" or "except as otherwise provided by statute". The matter was raised once previously when there was a minimum quorum of 4 Commissioners; and since one of those present indicated opposition, the matter was not further considered.

The question is whether the courts should be able to create additional exclusionary rules to exclude evidence relating to credibility that is relevant (§ 350) and of substantial probative value (§ 352) and is not cumulative or prejudicial or excessively time-consuming (§ 352). Section 780 is now out of harmony with the general scheme of the Evidence Code (and of the URE upon which it is based), for both systems of law are predicated on the abolition of all

common law exclusionary rules of evidence. URE Rule 7; EVIDENCE CODE §§ 350, 351. We have permitted the courts to work out common law rules of admissibility in some cases, but this does not depart from the underlying principle. Section 780, however, is inconsistent.

The comment that we have published to this section contains the following discussion:

> There is no specific limitation in the Evidence Code on the use of impeaching evidence on the ground that it is "collateral". The so-called "collateral matter" limitation on attacking the credibility of a witness excludes evidence relevant to credibility unless such evidence is independently relevant to the issue being tried. It is based on the sensible notion that trials should be confined to settling those disputes between the parties upon which their rights in the litigation depend. Under existing law, this "collateral matter" doctrine has been treated as an inflexible rule excluding evidence relevant to the credibility of the witness. See, e.g., People v. Wells, 33 Cal.2d 330, 340, 202 P.2d 53, 59 (1949), and cases cited therein.
>
> The effect of Section 780 (together with Section 351) is to eliminate this inflexible rule of exclusion. This is not to say that all evidence of a collateral nature offered to attack the credibility of a witness would be admissible. Under Section 352, the court has substantial discretion to exclude collateral evidence. The effect of Section 780, therefore, is to change the present somewhat inflexible rule of exclusion to a rule of discretion to be exercised by the trial judge.
>
> There is no limitation in the Evidence Code on the use of opinion evidence to prove the character of a witness for honesty, veracity, or the lack thereof. Hence, under Sections 780 and 1100, such evidence is admissible. This represents a change in the present law. See People v. Methvin, 53 Cal. 68 (1878). However, the opinion evidence that may be offered by those persons intimately familiar with the witness is likely to be of more probative value than the generally admissible evidence of reputation. See 7 WIGMORE, EVIDENCE § 1986 (3d ed. 1940).

The foregoing discussion would be accurate if the word "statute" were substituted for "law"; but as the section stands, the discussion is incorrect, for by use of the word "law" we have retained all common-law exclusionary rules relating to the credibility of witnesses, including the rule prohibiting impeachment on a collateral matter and the rule prohibiting impeachment by character evidence in the form of opinion.

Section 788

The Assembly Committee voiced strong objection to the impeachment rule stated in Section 788. The term "dishonesty" was considered too imprecise to be of any value. Mr. B. E. Witkin, who spoke generally in glowing terms concerning the Evidence Code, also objected to the lack of precision in this language. The concern was that trial judges would be unable to apply the standard with precision, that appeals would be generated, and that cases decided erroneously against the prosecution would be lost without appellate review. It is unlikely that Section 788 would be approved by the Committee in its present form unless the district attorneys and Office of the Attorney General change their position on this section.

Several alternatives are available:

1. Limit the nature of the crimes involved to crimes involving deception or false statement (as previously recommended).

2. Broaden the crimes permitted to be shown to any felony.

3. Couple either of the preceding rules to a rule forbidding the impeachment of a criminal defendant with evidence of prior convictions unless the defendant himself has introduced evidence of his good character (as recommended in Tentative Recommendation).

Sections 788, 1153, and 1230

Mr. Powers, speaking for the District Attorneys' Association, suggests that the Code leave uncodified several recent decisions so that the courts will have time to work out the harsh aspects of the rules declared in these cases. One is Perez (preliminary showing of conviction required before defendant asked if convicted); another is Quinn (withdrawn plea of guilty); and the last is Spriggs (declaration against penal interest).

Sections 804 and 1203

As these sections were originally conceived, subdivision (b) was intended to preclude a party from cross-examining one of his own witnesses concerning a matter covered in his direct examination merely because another party used an opinion or hearsay statement of that witness relating to the matter. Subdivision (b)(3) of Section 1204 used the language, "This section is not applicable if the declarant is . . . a witness who has testified in the action concerning the subject matter of the statement," to accomplish this. The underscored words were deleted at the last meeting; and the deletion now leaves the sections open to the construction that a party may cross-examine his own witness concerning a matter within the scope of the direct examination when another party later introduces a statement or opinion of the witness concerning the matter. When a party's expert is impeached by inconsistent opinions, the party appears to be permitted by the present version to rehabilitate his witness by leading him through a cross-examination.

For example, P calls expert witness E, who gives his opinion concerning a particular matter. D does not examine E concerning an opinion relating to one facet of the entire problem that is somewhat inconsistent with E's present opinion; and E is not excused as a witness. D then calls witness W who gives his opinion, relying in part on the prior opinion of E. Because E did not testify concerning the prior opinion, P may recall E and cross-examine him concerning it. The same situation might arise with regard to hearsay under Section 1203.

The present version, therefore, seems somewhat inconsistent with the policy expressed in Section 770, which permits a party to conceal a prior inconsistent statement from a witness if the witness is not excused. Under Sections 804 and

1203, the party who does so may find that the introduction of the opinion or statement has turned the witness into his own witness.

Restoration of the words "subject matter of the" would avoid this problem.

Section 914

The IAC objects to the curtailment of its contempt power.

It also objected to making any provisions of the Evidence Code applicable in IAC proceedings.

After some correspondence on the matter, Chairman Beard indicated that the amendment to Labor Code Section 5708 that appears in Exhibit II would be acceptable. The amendment would restore to the IAC its right to overrule a claim of privilege and to hold a witness in contempt without first obtaining a court order. Both Mr. Willson and Senator Grunsky took the view that the contempt power of the IAC should not be limited by the Evidence Code. The amendment would also make the following sections of the Evidence Code inapplicable to IAC proceedings: Section 1153 (withdrawn plea of guilty)[but Penal Code provisions would still be applicable]; Section 1156 (in-hospital medical staff committee's records); 1560-1566 (special best evidence rule exception for hospital records); 1282 (official finding of presumed death); 1283 (official report that person is missing, captured, or the like).

The Staff recommends that the amendment to Labor Code Section 5708 be approved.

Sections 1010-1026

Dr. Anderson objected to several sections in the article relating to the psychotherapist-patient privilege. See Exhibit III (pink pages) attached. He would exclude psychologists. He would eliminate the exceptions for plotting

crimes (1018) and officially required information (1026). He would also like to have a less detailed statute.

We recommend no change. Excluding psychologists does not appear feasible in the light of the recent enactment of their privilege equivalent the lawyer-client privilege. The problem raised with information required to be reported lies with the laws requiring such reports, not with the exception here. The exception for crimes applies to all of the communication privileges (except clergyman-penitent); and we don't think Dr. Anderson fully appreciates that the person urging the exception must establish the purpose of the communication before it can be revealed. Loss of detail in the statute would create a false simplicity--it would simply not answer the problem.

Section 1156

Judge McCoy has written to us suggesting an amendment to Evidence Code Section 1156 to deal with the following case: The plaintiff seeks inspection of survey reports by members of the hospital staff to the Infectious Diseases Committee of the defendant hospital to the effect that one or more patients, other than the plaintiff, had been stricken with a staphylococcus infection during their stays in the hospital. These reports were made pursuant to hospital regulations, and presumably without the knowledge or consent of the patients involved. They simply reflected a fact shown on the records of the particular patients. Judge McCoy believes that however much the plaintiff may otherwise be entitled to discover the frequency of such prior inspections, the plaintiff should not be entitled to obtain the names of the other patients. He believes that the amendment set out as Exhibit IV (buff page) will take care of the problem. (The amendment was drafted by the staff after correspondence with Judge McCoy.)

In his letter of December 22 (attached as Exhibit V - blue page), Judge McCoy suggests an additional amendment to Section 1156. The staff has no objection to this additional amendment.

Section 1261

When the Commission altered the wording of the trustworthiness requirement in Section 1252, it instructed the staff to change all similar sections. At the last meeting the fact that Section 1261 had not been changed was mentioned but no action was taken to change it. It was suggested that a strict trustworthiness requirement might be desirable in Section 1261 in view of past objections to this aspect of the recommendation to repeal the Dead Man Statute. But is there any substantial reason for the difference between Section 1261 (b) and the provisions of Sections 1252, 1260(b), 1310(b), 1311(b), and 1323? As the sections are now worded, apparently if neither the proponent nor the opponent of the evidence can produce any indication of the trustworthiness or lack of trustworthiness of the particular statement, the statements are admissible under all of the cited sections except Section 1261, and the statement is inadmissible under Section 1261. This seems to weight the scales somewhat against the estate.

Respectfully submitted,

Joseph B. Harvey
Assistant Executive Secretary

MEMO 65-1

EXHIBIT I

LAW OFFICES OF
O'MELVENY & MYERS
433 SOUTH SPRING STREET
LOS ANGELES, CALIFORNIA 90013
TELEPHONE 626-1120
CABLE ADDRESS "MOMS"

December
14th
1964

OUR FILE NUMBER

921,499-30

The Honorable George A. Willson, Chairman
Assembly Interim Committee on Judiciary
State Capitol
Sacramento, California

Dear Mr. Willson:

On behalf of the California State Bar Committee on Evidence, I wish to express our appreciation of your invitation to present the views of the Committee to your Committee with respect to the proposed Evidence Code, prepared by the California Law Revision Commission. Unfortunately, pressing professional commitments and personal involvements make it impossible for me to attend the Committee hearing on December 16 and 17 and I am taking this means of communication in lieu of a personal appearance. Lawrence C. Baker, Esq. of the San Francisco Bar, presently vice chairman and formerly chairman of the State Bar Committee, will appear in person and be in a position to respond to points of inquiry which may arise.

As you know, the Board of Governors of the California State Bar have not taken action with respect to the proposed Evidence Code. In addition, it should be pointed out that the final report of the Committee on the proposed Evidence Code is still in the process of preparation. Thus, while my comments may be taken as representative of the views of the State Bar Committee, they should not be considered to be the final or definitive statement of the State Bar Committee's position. With this preface, I shall address myself to the specific questions put in your letter of November 25, 1964 to the State Bar of California.

Need For An Evidence Code

The existing statutory provisions relating to the law of evidence which appear in Part IV of the Code of Civil Procedure are in substantially the same form as when first enacted in 1872. For the most part, development of the law of evidence has depended upon judicial decisions with legislative modification being fragmentary and relatively infrequent. As a consequence, there are numerous obscurities, gaps and inconsistencies in the law of evidence as it exists in California today.

This situation gives rise to three principal considerations which require an affirmative answer to the question whether there is need for an evidence code. First, codification of existing decisional law and recodification of existing statutory law will provide a concise, authoritative statement of the California law of evidence where none exists today. This objective is of singular importance in an area of the law where the speedy and accurate determination of points at issue plays a significant role in the efficient administration of justice. Second, such codification and recodification will result in the clarification of existing law by eliminating gaps, obscurities and inconsistencies, an objective unlikely of attainment in the necessarily slow and sporadic development of decisional law. Third, while it is not proposed by codification and such recodification to work substantial changes in the existing California law of evidence, there are important areas as to which interested groups concur that change is necessary and important. In the absence of a comprehensive code, such change is difficult to accomplish, because the existing statutory provisions are neither comprehensive nor cohesive and such change can best be accomplished by integration into a consistent statement of the whole law of evidence.

This is not to say that there are not arguments against such codification and recodification. First, concern is expressed in some quarters that it may introduce an undesirable rigidity into the law of evidence. However, except in those areas where the law of evidence is based primarily on considerations of public policy which are best left to the Legislature, the proposed code reserves to the courts room for further development and clarification of the law of evidence.

Second, concern is also expressed that an evidence code will proliferate evidence problems in the courts by raising new questions of construction and application of the code provisions. While there may be some intensification of judicial concern with the law of evidence for a period of time, such concern will itself accelerate the development and clarification of the law in this important area. Third, concern is expressed that an evidence code may introduce impractical and academic concepts into the law of evidence. In this regard, all must concur that such changes in the law of evidence as are adopted should be tested against the experience and judgment of trial lawyers and judges. As will be subsequently noted, it is believed that the present proposal of the Law Revision Commission does meet this test.

A subsidiary question also exists as to the desirability of a separate evidence code as distinguished from revision of Part IV of the Code of Civil Procedure. Three considerations dictate an affirmative answer to this question. First, Part IV of the Code of Civil Procedure contains a number of provisions which do not deal with the law of evidence and which can best be left as an integral part of that code. Second, the law of evidence is, of course, applicable not only to civil but also to criminal proceedings. Third, the objective of a concise and authoritative statement of the California law of evidence can best be accomplished through a separate code.

On balance then, it would seem clear that an evidence code codifying and clarifying existing law is desirable and necessary and that a relatively few but nevertheless significant changes in the law of evidence can be most effectively accomplished by such an evidence code.

Desirability of the Proposed Evidence Code

Throughout the seven or eight-year study which has resulted in the Law Revision Commission recommendation of the proposed Evidence Code, the Commission has assiduously sought to obtain the cooperation of the bar, the judiciary and other interested groups in submitting constructive comment and criticism. Without in any way minimizing the most important and significant role of the Law Revision Commission and its staff, it is appropriate to

emphasize that the proposed Evidence Code is the result of the continuing interchange of views between the Commission and many persons and organizations possessing expertise in the law of evidence. As a consequence, the proposed Evidence Code comes as close to representing the consensus of informed and knowledgeable groups and persons as is possible. So far as is known to the State Bar Committee, the general reaction of the persons and organizations that have made a careful study of the proposed code is favorable.

Throughout the years the Commission has been most receptive to the views of the State Bar Committee and this receptivity has continued up to the present time. As recently as November 3, 1964, as a result of a recent reexamination and reevaluation of the proposed Evidence Code as it was then drafted, the State Bar Committee submitted 62 separate comments to the Commission. At its November meeting, the Commission acted favorably upon approximately 80% of these comments, including substantially all of which were regarded by the State Bar Committee as being of major importance. Of the remainder, the Commission's reasons for not accepting the State Bar Committee's views are persuasive in many instances. Consequently, there are very few areas in which there remains any difference of opinion between the State Bar Committee and the Law Revision Commission. Thus, the inquiry whether the code presently proposed by the Commission is generally what is needed is answered in the affirmative.

Debatable Provisions of the Proposed Evidence Code

The Law Revision Commission undoubtedly has or will summarize for the Committee the significant changes in existing law which are included in the proposed Evidence Code. Since the State Bar Committee concurs with the views of the Law Revision Commission as to the great majority of such changes, no comment will be made on them at this time. In a few instances, some difference of views between the Commission and the Committee remains to be resolved but it is anticipated that this may be accomplished at the January meeting of the Commission. Consequently, comment on such differences would be premature at this time.

However, there are three changes which have occasioned substantial debate within the State Bar Committee

and as to which there remains some difference of views within the Committee. The bar at large may react in like manner and it is therefore appropriate to point these changes out to your Committee at this time.

1. Admissibility of Confession or Admission of Criminal Defendant.

Under existing law, the court has discretion in a criminal trial whether to hear evidence as to the admissibility of the confession or admission of a criminal defendant out of the presence of the jury. The proposed Evidence Code (Section 402(b)) requires that the court do so in all instances. Moreover, under existing law, the court's determination of the question of admissibility is preliminary and the ultimate determination whether the conditions of admissibility have been satisfied and whether the confession or admission should be disregarded is left with the jury. The proposed Evidence Code would make the court's determination of this question of admissibility final, leaving to the jury the question of the weight to be given the confession or admission in the light of such evidence as may be introduced on that question (Section 409).

The Commission reasons that these changes will protect the rights of the criminal defendant by requiring the court to determine whether a confession or admission was voluntary without permitting the jury to hear evidence (both of the voluntariness of the confession or admission and the confession or admission itself) which may be highly prejudicial. Some members of the State Bar Committee believe that the criminal defendant should have the option of having the jury hear and finally determine the question of admissibility.

2. Spontaneous and Dying Declarations.

A similar difference of views exists as to the treatment of the question of admissibility of spontaneous and dying declarations. Under existing law, the court's determination of this question is preliminary and the final determination is with the jury. Proposed Evidence Code

(Section 405) would eliminate the jury's "second crack" at this question. While the majority of the State Bar Committee concur with this change, some members regard it as undesirable because the effect of evidence as to spontaneous and dying declarations may be very strong and the question of their admissibility may be very close.

3. Presumptions Not Evidence.

Under existing law, presumptions are evidence and the trier of fact is required even to weigh one presumption against another. This rule has been much critized and is contrary to that employed in the federal courts and many state jurisdictions. The proposed Evidence Code (Section 600) expressly declares that presumptions are not evidence.

The proposed Evidence Code (Section 600) defines a presumption as an assumption of fact that the law requires to be made from another fact or group or facts. As so defined, a presumption has importance as it affects the burden of proof or the burden of producing evidence. So far as evidentiary effect is concerned, the proposed Evidence Code (Section 600) makes it clear that an inference (a deduction of fact) may be drawn when it follows logically and reasonably from another fact or facts.

Difficulty arises only because existing law recognizes some presumptions which are not logically and reasonably based on fact and yet are not treated as conclusive presumptions. The most noteworthy example is the presumption of "due care." A majority of the State Bar Committee believe that this "presumption" is not really a presumption at all but is an expression of policy which is already recognized in the assignment of the burden of proof to the party claiming the absence of due care. Under this view, the effect of treating the "presumption of due care" as evidence is to add, illogically, an unmeasurable but significant quantity to the burden of proof. A minority of the Committee are of the view that treating the "presumption of due care" as evidence prevents injustice when the party charged with failure to exercise due care is unavailable or unable to testify.

* * * *

#7 - The Hon. George A. Willson, Chairman - 12/14/64

The State Bar Committee is aware that the adoption of an evidence code is a legislative undertaking of substantial magnitude. Subject to the approval of the Board of Governors, the State Bar Committee will welcome the opportunity to assist in this undertaking in such ways as your Committee may deem appropriate.

Very truly yours,

Philip F. Westbrook

Philip F. Westbrook, Jr.
Chairman, State Bar Committee on Evidence

EXHIBIT II

SEC. 137.5. Section 5708 of the Labor Code is amended to read as follows:

5708. (a) All hearings and investigations before the commission, panel, a commissioner, or a referee, are governed by this division and by the rules of practice and procedure adopted by the commission. In the conduct thereof they shall not be bound by the common law or statutory rules of evidence and procedure, but may make inquiry in the manner, through oral testimony and records, which is best calculated to ascertain the substantial rights of the parties and carry out justly the spirit and provisions of this division. All oral testimony, objections, and rulings shall be taken down in shorthand by a competent phonographic reporter.

(b) Except as provided in subdivision (c), the Evidence Code does not apply to the hearings and investigations described in subdivision (a).

(c) The rules of privilege provided by Division 8 (commencing with Section 900) of the Evidence Code shall be recognized in such hearings and investigations to the extent they are required by Division 8 to be recognized, but subdivision (b) of Section 914 of the Evidence Code does not apply in such hearings and investigations.

Memo 65-1 EXHIBIT III

December 15, 1964

Assembly California Legislature
Assembly Interim Committee on Judiciary
George A. Willson, Chairman

Gentlemen:

Thank you for the opportunity to appear before your committee, and comment on the new evidence code proposed by the California Law Revision Commission (Preprint Senate Bill #1).

I am Samuel T. D. Anderson, M.D. of San Rafael, California, Chairman of the Committee on Legal Aspects of Psychiatry, Northern California Psychiatric Society. I wish to restrict my comments to Division 8, "Privileges", Article 6, Physician-Patient Privilege, and Article 7, Psychotherapist-Patient Privilege.

1. First I will comment on the need:

(a) The commissions proposals generally are a great improvement over existing statutes, and would serve a presently unfulfilled need in the legal aspect of psychiatric care, for confidential communication.

(b) Confidentiality is an integral part of the basic nature of professional relationships, whether they be legal, medical or clergical. This need is especially critical in psychotherapy, where the development and the maintenance of trust and faith between patient and therapist, is the basis of all therapeutic process.

(c) The increasing complexity of society makes confidentiality increasingly difficult. The privacy of life is constantly reduced by the encroaching requirements for detailed records, information and identification. Fifty years ago a woman could lie about her age with impunity; today such an act may violate state statutes, compromise Social Security rights, and invite the suspicion of the Department of Internal Revenue.

(d) In our over-populated, over-organized, over-anxious world, the human soul needs some secure privacy inaccessible to the incessant probings of the agents of society. Such confidentiality might leave freedom to harbor bad thoughts and to plot crimes, but it also fosters freedom to grow, to be spontaneous--to be human.

(e) The major practical problems of loss of confidentiality are not related to felony criminal proceedings, but to the complications of civil and misdemeanor proceedings. The powers of subpoena of medical information include all records and information, and do not exclude the more sensitive and personal areas of psychiatric information. While irrelevant information is not admissible in court as evidence, written records which contain relevant and irrelevant material are available to agents such as Investigators, the District Attorney, Hearing Officers, etc.

(f) In a civil suit for damages incurred in an automobile accident, for instance, the whole of the medical record can be subpoenaed whether or not the material in it is pertinent or relevant to a specific injury. The Medical records of a patient in psychotherapy in such a situation may include very personal information such as a statement by the patient that they are obsessed with perverse sexual ideas. This can produce embarrassment and serious injury with no benefit to anyone.

(g) For these reasons, we feel that it is mandatory to separate the issue of general medical information from that information involved in and related to psychotherapy--as has been done by the California Law Revision Commission.

2. Second, I will comment on specific provisions of Division 8 of Articles 6 and 7:

(a) In general, the language of Article 6 and 7, although precise and specific, is difficult to read, difficult to comprehend and does not form a clear concept which can remain in the mind as an easily identified road mark. This is an extremely important point because unless a law is comprehensible, it is not applicable. Articles 6 and 7 are unacceptable from this practical standpoint. By contrast the recent (1961) "Connecticut Statute" is a model of clarity, comprehensibility, and simplicity.

My personal observations of the application of the Welfare and Institutions code in the last ten years are of continuous misunderstanding and confusion, with resultant poor and inept disposition of many cases, because not even the attorneys or the courts can comprehend the code. The code has many excellent provisions, features, protections, etc., because it lacks directness, clarity and comprehensibility, the good features are of no effective practical value.

We suggest that Article 6 and 7 should be re-written. An alternate or complementary suggestion would be to include an introductory note or commentary--a general statement of the articles, without the prolix form presently used.

(b) Section 1010--definition of "psychotherapist". This is too broad and general. We feel psychologists should not be included, because this confuses further an already new and uncertain term in the legal arena.

We feel the term "psychiatrist" is more applicable, cogent and meaningful than "psychotherapist" for the purpose of Division 8. The definition should be limited to "licensed physicians who devote a substantial portion of their time to the practice of psychiatry."

(c) Section 1018. Conspiracy or collusion between a patient or therapist for illegal purposes has never occurred to my recollection. It is unlikely this section would protect society, and it could produce serious complications. It could be used for "fishing expeditions" which are harmful and destructive to the overall aim of reasonable confidentiality.

Patients frequently have ideas of malicious or criminal intent which are part of fantasy life; yet if subject to a "fishing expedition" the usual content of fantasy may sound like a criminal plot. For instance, if a patient says: "Doc, can you give me a bunch of pills that would kill off my mother-in-law", he may be expressing a normal fantasy, or he could be seeking aid to commit a crime.

The nature of psychotherapy is such that Section 1018 is ill advised and defeats the general aim of Division 8.

(d) Section 1026. Exception regarding public information. This is too broad and general. One of the major problems we now have is with public agents seeking information. Often patients are very disturbed when they find that as part of their security clearance the investigating agency requires information from their psychiatrist.

Air Force Pilots often will not seek psychiatric care in the Service. They know that their service medical record is in actuality not confidential, due to conditions similar to this proposed section 1026.

The result is not the prevention of injury or accident, but the interference with measures which might result in injury or accident.

The tragedy is that the information obtained by measures such as Section 1026 "for the public good" is in general very useless and irrelevant, and the harm done by the investigating process is irreparable.

S.T.D. Anderson, M.D.
Chairman,
Committee on Legal Aspects
of Psychiatry, Northern
California Psychiatric Society

1156. (a) In-hospital medical staff committees of a licensed hospital may engage in research and medical study for the purpose of reducing morbidity or mortality, and may make findings and recommendations relating to such purpose. Except as provided in subdivision (b), the written reports of interviews, reports, statements, or memoranda of such in-hospital medical staff committees relating to such medical studies are subject to the Sections 2016 and 2036 of the Code of Civil Procedure (relating to discovery proceedings) but, subject to subdivisions ~~(b)~~ and (c) and (d), shall not be admitted as evidence in any action or before any administrative body, agency or person.

(b) The disclosure, with or without the consent of the patient, of information concerning him to such in-hospital medical staff committee does not make unprivileged any information that would otherwise be privileged under Section 994 or 1014; but, notwithstanding Sections 994 and 1014, such information is subject to discovery under subdivision (a) except that the identity of any patient may not be discovered under subdivision (a) unless the patient consents to such disclosure.

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

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

EXHIBIT V

CHAMBERS OF
The Superior Court
LOS ANGELES 12, CALIFORNIA
PHILBRICK McCOY, JUDGE

December 22, 1964

John H. DeMoully, Esq.
California Law Revision Commission
School of Law
Stanford, California

Dear Mr. DeMoully:

Thank you very much for your letter of December 8. Perhaps the best way to clarify the matter which we have been discussing would be by amendment to Section 1156 (which continues in effect Section 1936.1 of the Code of Civil Procedure). Your proposed amendment to that section seems to cover the situation.

Since we are considering the possibility of an amendment to Section 1156 of the proposed Evidence Code, it occurs to me to call your attention to the provision of present Section 1936.1 C.C.P. that "the written reports 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)". I am wondering what your guess is as to the intent of the Legislature in making the material described subject only to those two sections, in view of the fact that the information contained in the records of in-hospital medical staff committees is more usually called by a motion under Section 2031 C.C.P. seeking an order for the production of documents or by written interrogatories under Section 2030 C.C.P. Possibly the proposed section should be further amended to provide that such material is subject to the provisions of Section 2016 through 2036 of the Code of Civil Procedure, relating to discovery proceedings.

I shall be glad to hear from you further on this matter, and will appreciate in any event your keeping me posted as to the progress of this proposed amendment.

Sincerely,

Philbrick McCoy

PMcC:111

#34(L) 1/29/65

Memorandum 65-4

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

On January 22 and 23 the committees of the Judicial Council and the Conference of California Judges that have been considering the Evidence Code held a joint meeting to consider their suggested revisions to the Evidence Code. John DeMoully and Joseph Harvey attended the meeting in order to explain the Commission's thinking and in order to provide the Commission with the thinking of the judges' committees. This memorandum presents the matters that the judges wish to have considered by the Commission. Justice John B. Molinari has been invited to the February meeting, and he has indicated that he will appear, to present those matters that the judges believe are of greatest importance. The matters considered by the judges to be of substantial importance are identified by asterisk below.

We have received a report from the Trial Practice Committee of the San Francisco Bar Association. This memorandum also presents the matters raised by that committee.

Section 2.5 (Proposed)

The Conference of Judges Committee suggested that the Commission consider the addition of a new section following Section 2 of the Evidence Code to designate the law applicable in the event that there is no provision in the Evidence Code that applies. The suggestion was that something similar to Commercial Code Section 1103 or Corporations Code Section 15005 be included. The suggested statute would indicate

that, first, the statutory law in existence at the time of the code's adoption would apply, next the decisional law, and then the common law.

The Judicial Council Committee had not previously considered the suggestion and took no position.

Section 12

The judges' committees concur in recommending that Section 12 be modified so that the previous rules of evidence would continue to be applicable in any hearing that had commenced prior to the effective date of the Evidence Code. New trials ordered on appeal or by the trial court would be governed by the Evidence Code. The staff suggests the following revision of Section 12 if the judges' recommendation is approved:

> 12. (a) This code shall become operative on January 1, 1967, and it shall govern proceedings in actions brought on or after that date and also, except as provided in subdivision (b), further proceedings in actions pending on that date.
>
> (b) Subject to subdivision (c), a trial commenced before January 1, 1967, shall not be governed by this code. For the purpose of this section, a trial is commenced when the first witness is sworn or the first exhibit is admitted into evidence and is terminated when the issue upon which such evidence is received is submitted to the trier of fact. A new trial, or a separate trial of a different issue, commenced on or after January 1, 1967, shall be governed by this code.
>
> (c) The provisions of Division 8 (commencing with Section 900) relating to privileges shall govern any claim of privilege made after December 31, 1966.

The comment of the San Francisco Bar Trial Practice Committee in regard to Section 12 should also be considered.

> The Committee felt that this code should become effective as soon as all laws become effective after the close of the 1965 Legislature. There is no need to delay the application of sound rules of evidence.

Section 115

The judges' committees were not satisfied with the draft of Section 115 appearing in the Evidence Code. There was no consensus as to how the draft would be changed, however. One suggestion was that the first paragraph be split into two sentences with the first stating a general principle and the second giving illustrations. Another suggestion was to develop the meaning of "rule of law" in the comment. A possible revision, utilizing our definition of "proof", might be:

> 115. "Burden of proof" means the obligation of a party to meet the requirement of a rule of law that he establish by evidence a requisite degree of belief concerning a fact in the mind of the trier of fact or the court. The burden of proof may require a party to raise a reasonable doubt concerning the existence or nonexistence of a fact or that he establish the existence or nonexistence of a fact by the preponderance of the evidence, by clear and convincing proof, or by proof beyond a reasonable doubt.
>
> Except as otherwise provided by law, the burden of proof requires proof by a preponderance of the evidence.

Sections 120, 130

The judges were concerned with the definitions of "civil action" and "criminal action". The definitions as they appear seemed to the judges to be substantive definitions when, in fact, they are not. They are intended merely to obviate the need for using "or proceeding". A suggestion was made that the use of the indefinite article "a" before each of these sections might eliminate the difficulty.

A suggestion was made that "civil action" be defined as "includes a civil proceeding" and "criminal action" be defined as "includes a criminal proceeding."

Section 145

The judges suggest the revision of Section 145 to read as follows:

145. "The hearing" means the hearing at which a question under this code arises for determination , and not some earlier or later hearing.

Section 160

The San Francisco Bar Trial Practice Committee suggests that the definition of "law" should include treaties.

Section 165

Judge McCoy suggests that the definition of "oath" be revised to include a declaration. Compare Section 165 with Section 710.

Section 190

The judges suggest that Section 190 might be modified as follows:

190. "Proof" is the establishment by evidence of a ~~requisite-degree-of-belief-concerning-a~~ fact in the mind of the trier of fact or the court.

Section 210

The judges suggest that the parenthetical expression "including evidence relevant to the credibility of a witness or hearsay declarant" might be moved to the end of the section in the interest of clarity.

Section 230

The San Francisco Bar Trial Practice Committee asks "What Constitution?" To meet the objection the section might be modified to read as follows:

230. "Statute" includes a constitutional provision ~~of-the-Constitution~~.

The San Francisco Bar Committee also asks "Does this include treaties, and is the administrative code also included?"

Section 245

The judges were concerned with the definition of "verbal" to include written words when in ordinary speech the word "verbal" is frequently

used to refer to oral expression only. The suggestion was made that the section be eliminated and that its substance be incorporated in Section 225 inasmuch as the only place where the defined term is used is Section 225.

Additional definitions

The judges asked the Commission to consider the possibility of adding a definition of the term "witness" to the Evidence Code.

The judges asked the Commission to consider adding cross-referring definitions (similar to the definition of hearsay in Section 150) of the terms "cross-examination" and "presumption".

The suggestion was also made that the term "person identified with a party" be defined in the definitions division instead of in Section 776.

The suggestion was also made that the term "preponderance of the evidence" be defined.

Section 300

The Trial Practice Committee of the San Francisco Bar reports:

> It was the feeling of the Committee that many administrative agencies should be included as subject to the provisions of this code especially where adversary proceedings are involved.

Section 311

The judges recommend that Section 311 be expanded to provide for use of California law in case the court is unable to determine the law of a sister state. This appears to be the law of California at the present time. See, e.g., Gagnon Co. Inc. v. Nevada Desert Inn, 45 Cal.2d 448, 453-454 (1955):

> Whether such a judgment is a bar--res judicata--as to another action on the same cause in this state is controlled

> by Nevada law. . . . We find no Nevada statute or case law covering the case we have here . . . . Under those circumstances we will assume the Nevada law is not out of harmony with ours and thus we look to our law for a solution of the problem.

Section 401

The judges request the Commission to consider whether the definition of "proffered evidence" is necessary or whether some phrase such as "tendered evidence" should be used in lieu thereof.

Section 403

It was suggested that the word "determines" be substituted for the word "finds" in the preliminary language of subdivision (a).

The suggestion was also made that the words "of a party" be added to subdivision (c)(1) after the word "request".

*Section 451

The judges strongly recommend that judicial notice of sister state law be made permissive or mandatory on request under Section 452 instead of mandatory in every instance in Section 451. Although the comment points out the doctrine of invited error, the implication from the sections involved is that the judge has a duty to determine sister state law for himself whether or not requested to.

The judges also suggest that subdivision (f) of Section 451 be placed in Section 452.

Section 452

The judges suggest that a reference to the common law be included in Section 452 inasmuch as Civil Code Section 22.2 makes the common law of England the rule of decision in all courts of this state.

The judges also suggested that the comment be revised to indicate more clearly what is meant by "territorial jurisdiction."

It was suggested that the word "specific" be eliminated from subdivisions (g) and (h).

Section 453

The judges asked the Commission to consider the deletion of the phrase "through the pleadings or otherwise."

Section 455

The judges suggest the addition of the word "trial" before the word "court" in subdivision (b).

Section 456

The San Francisco Committee suggests that the requirement that the judge indicate promptly those matters he proposes to notice should not be limited to those "reasonably subject to dispute" but, instead, the requirement should be applicable to all matters.

Section 550

The judges recommend a revision of the second sentence somewhat as follows:

> After the production of such evidence the burden of producing further evidence as to such fact is on the party against whom a finding on such fact would be made in the absence of further evidence.

Section 600

The San Francisco Trial Practice Committee reports as follows:

> Taking away a presumption as evidence was discussed at some length by the Committee. The consensus was that this was probably not a good idea and could have some harsh results. It was felt that a jury could grasp the concept easier in argument and instructions if certain presumptions were treated as evidence in the case.

The question of a presumption as evidence and the entire presumptions scheme was discussed at some length by the judges' committees. The consensus seemed to be that the scheme is all right. There was agreement that the instructions now given on the rule that a presumption is evidence do more

harm than good. Some concern was expressed over the fact that a person who is dead or otherwise incapacitated from testifying concerning an event may be unable to explain or deny evidence presented against him in regard to that event. But the judges opposed any addition to the code permitting comment on the fact that a person who is dead or incompetent or otherwise incapacitated cannot explain the evidence against him.

The judges suggest that subdivision (b), relating to inferences, and the last sentence of Section 604 be placed in a separate article relating to inferences.

Section 620

The judges suggest that Section 620 might be modified to read as follows:

> The presumptions established by this article, and all other presumptions declared by law to be conclusive, are conclusive presumptions and no evidence may be introduced solely to dispute facts established by them .

Section 622

The judges suggest that the word "valid" be inserted prior to the words "written instrument".

Some concern was expressed over the question whether this section states the existing California law correctly. There was some indication that most of the cases citing this section do so in order to declare a parol evidence exception. The judges asked the Commission to consider whether the section should be perpetuated and if so, whether it should be perpetuated in the Evidence Code.

Captions of Articles 3 and 4 (Sections 630-667)

The judges suggest the addition of the word "rebuttable" to the captions of the articles dealing with presumptions affecting the burden of producing evidence and presumptions affecting the burden of proof.

Section 643

The judges suggest the deletion of "real or personal" as unnecessary.

Section 665

Some concern was expressed over the statement of the presumption that an arrest without a warrant is unlawful. The concern was not with the allocation of the burden of proof, but with the bald form of the statement. Some judges indicated that the implications of the section might be avoided if it were placed among the burden of proof sections (520-522) instead of among the presumptions, even though it is technically a presumption. Another view was expressed, however, that perhaps law enforcement officers should feel that there is some onus upon them to obtain a warrant in order to avoid a presumption of unlawfulness.

Section 666

Some concern was expressed over the last sentence of this presumption, and a suggestion was made that the comment should indicate that this sentence reflects existing California law. See, City of Los Angeles v. Glassell, 203 Cal. 44 (1928).

Section 704

The judges expressed concern with Section 704 because the section as it is presently worded effectively precludes a district attorney from objecting to the testimony of a juror. If the district attorney objects, it is a motion for mistrial under Section 704 and the law relating to double jeopardy prevents a retrial of the defendant. A suggestion was made that the section be modified to provide that the calling of a juror to be a witness shall be deemed a consent to a mistrial.

Section 710

The judges suggest that the cross-reference to the oath or affirmation provisions of the Code of Civil Procedure be deleted. This could be accomplished by striking out the language following the word "declaration" and inserting in lieu thereof "as required by law".

Section 721

The Conference Committee suggests that cross-examination of an expert upon books be limited to those books relied on by the expert. There was some sentiment on the Judicial Council Committee for this view also; however, the Judicial Council Committee did not oppose the provision as drafted.

Section 731

The judges suggest that subdivision (b) be revised as follows:

> (b) In any county in which the ~~procedure prescribed in this subdivision has been authorized by the~~ board of supervisors so provides , the compensation fixed under Section 730 for medical experts in civil actions in such county shall be a charge against and paid out of the treasury of such county on order of the court.

The revision is suggested on the ground that no procedure is specified in the subdivision.

Section 767

The San Francisco Trial Practice Committee suggests enumerating some of the circumstances that would justify the use of leading questions on direct examination, such as age, physical infirmity, mental condition, preliminary matters, etc.

Sections 768 and 769

The judges suggest that these sections be redrafted as follows:

> 768. ~~(a)~~ In examining a witness concerning ~~a writing, including~~ a an oral or written statement or other conduct by him that is inconsistent with any part of his testimony at the hearing, it is not necessary to ~~shew, read, or~~ disclose to him any ~~part of the~~ writing , statement, or other information concerning the statement or other conduct .

~~(b)~~ 769. If a writing is shown to a witness, all parties to the action must be given an opportunity to inspect it before any question concerning it may be asked of the witness.

The effect of this revision is to combine the existing Section 769 with subdivision (a) of existing Section 768. Subdivision (b) of existing Section 768 then becomes new Section 769. The redraft seems to eliminate considerable duplication between Section 768(a) and Section 769 and significantly improves these sections.

The Conference Committee suggests the retention of the existing rule requiring that an inconsistent writing be shown to a witness before he can be asked questions concerning the writing.

Section 770

The San Francisco Trial Practice Committee is concerned with the practice of asking a witness about a prior inconsistent statement when the cross-examiner has no evidence that any prior inconsistent statement was ever made. It suggests that a second paragraph be added to Section 770 indicating that if no extrinsic evidence is offered of a prior inconsistent statement, at the very least a motion to strike the questions relating to this area of the testimony would be in order.

Section 772

The judges recommend that subdivision (c) be amended as follows:

(c) Subject to subdivision (d), a party may, in the discretion of the court, ~~during~~ interrupt his cross-examination, redirect-examination, or recross-examination of a witness, in order to examine the witness directly or under the provisions of Section 776 upon a matter not within the scope of a previous examination of the witness.

The judges also suggest that the words "without his consent" be added to subdivision (d) following the word "examined". If a co-defendant so desires, he should be able to appear as a witness for another co-defendant.

*Section 776

The judges strongly recommend that the last sentence of subdivision (a) be deleted. They indicate that the sentence causes considerable confusion in the actual trial of cases. If the sentence is not deleted it should at least be revised to read, "The party calling such witness does not vouch for his testimony . . .".

The judges suggest that subdivision (b) be revised by deleting the word "by" at the end of the preliminary language and inserting in lieu thereof "in the following instances". They suggest also the substitution of the word "such" for the word "the" immediately before the word "witness" as it appears in the last line of paragraph (1) of subdivision (b) and in the second line of paragraph (2) of subdivision (b). This change would also necessitate the inserting of the word "by" in paragraphs (1) and (2).

Section 785

The judges suggest that the word "impeach" be used in place of the word "attack" in the heading of Article 2, Chapter 6, Division 6, and throughout the sections dealing with the impeachment of witnesses.

Section 788

The judges concurred with the view that the convictions that should be permitted to be shown for impeachment purposes should be limited to those that reflect on the honesty of the witness in some way. There was disagreement among the judges in regard to subdivision (b)(3). Some of the judges pointed out that in practice proceedings are often dismissed under Penal Code Section 1204 on the basis of inadequate reports by probation departments when there has been in fact no rehabilitation. Other judges pointed out, however, that to strike (3) from the list is penalizing the person granted probation because of the failure of the probation department to perform its

job adequately. If persons sentenced to county jail cannot be impeached, if rehabilitated felons sentenced to state prison cannot be impeached, then probationers, too, should not be permitted to be impeached under this view.

Section 901

The judges asked the Commission to consider using the term "hearing" in place of the term "proceeding" throughout the privileges division. This is to avoid the use of a term which is used in defining "action" in Section 105.

Section 911

The judges suggested a revision of the section which would include the language "no person has a privilege" in the preliminary language of the section and delete the same language from each of the subdivisions.

Section 912

The judges suggested that the words "under this division" be deleted from subdivision (c). They also suggested that subdivision (b) be removed from the section and made a separate section.

Section 954

The judges asked the Commission to consider whether the privilege should survive the distribution of the client's estate and if the right to waive the posthumous privilege might be given to someone to exercise on the client's behalf.

Sections 956-961

The judges suggested the consolidation of these sections into one section in order to avoid the repetitious use of the language "there is no privilege under this article . . .".

Sections 982-987

The judges suggested the consolidation of these sections into one

section in order to avoid the repetitious use of the preliminary language.

Section 997

The judges asked the Commission to consider whether the word "fraud" should be included in Section 997 on the ground that there may be some frauds that are neither crimes nor torts.

Sections 998-1006, 1016-1026

The judges suggested the consolidation of these sections in order to avoid the repetitious use of the preliminary language.

Section 1050

The judges asked the Commission to consider the deletion of the preliminary words "if he claims the privilege" on the ground that they are redundant and unnecessary in this section.

Sections 1102-1103, 1200-1341, 1500-1510

The Conference of Judges suggested that the Commission consider revising these sections to eliminate the use of the double negative.

Section 1152

The Conference Committee urged the deletion of the words "as well as any conduct or statements made in negotiation thereof". The Judicial Council subcommittee, however, urged the retention of the section in its present form.

The San Francisco Trial Practice Committee also objects to the language excluding admissions made in the course of compromise negotiations. Their report states that the Commission's

> view is unrealistic. Today, few parties to accidents are unsophisticated, and it is rare to find an accident not covered by insurance. Moreover it would promote injustice. For example, suppose after an accident one driver stated: "It is entirely my fault. I will recommend that my insurance company pay your medical bills". This statement should be admissible as a spontaneous, untutored and frank acknowledgement of fault.

Another situation, with greater evil result, could arise in the interpretation of the word "liability". It is noted that Section 1151 prohibits evidence of subsequent remedial measures to prove "negligence or culpable conduct". On the other hand, Section 1152a would prohibit certain conduct or statements (made in connection with negotiations for settlement) to prove "liability" for a loss or damage. Was it intended that the words "negligence or culpable conduct" should be synonymous with the word "liability"? Or was it intended that "liability" goes further and includes all of the factors necessary to entitle one to judgment, such as "identity", "negligence or culpable conduct" of defendant, absence of "contributory negligence", "proximate cause", etc? The word "liability" is not defined in the proposed code. If we accept the latter interpretation we could have a situation where the section as written would be wholly unpalatable. Let us suppose an accident where A is forced to leave the road to avoid a car that suddenly crossed over the double line into his path. Assume that there is no evidence as to the identity of the offending vehicle, except evidence offered by the plaintiff that shortly after the accident X visited him in the hospital and said: "It was my car that crossed over the double line and that compelled you to leave the roadway, but I was forced over by another car. I would like to settle for the amount of your medical bills". Should not this admission of "identity" be admissible, although it is essential to the proof of liability? Would it not be proper that the doctrine of res ipsa loquitur apply to establish liability, although it depends for its very life on the admission?

Section 1202

The Conference Committee suggested the following redraft of Section 1202:

Evidence to impeach a declarant whose statement is admitted in evidence under one or more exceptions to the hearsay rule, is admissible in like manner as if such declarant were a witness and whether or not he has had opportunity to explain or deny such apparently impeaching evidence or to rehabilitate himself; but if such impeaching evidence consists of inconsistent statements, the same shall not be admitted to prove the truth of their content unless the declarant is or becomes a witness. Any other evidence offered to attack or support the credibility of the declarant is admissible if it would have been admissible had the declarant been a witness at the hearing. For the purposes of this section, the deponent of a deposition taken in the action in which it is offered shall be deemed to be a hearsay declarant.

Section 1203

The judges suggested that subdivision (c) be revised to refer to the subject matter of the articles referred to as well as to the numerical

designation. See for example Sections 912 and 915. See also Section 12.

Section 1227

The judges asked the Commission to consider adding a reference to wrongful death to Section 1227 so that the meaning of the section would be apparent without referring to Code of Civil Procedure Section 377. This could be accomplished by adding "for wrongful death" after the word "action".

*Section 1237

The judges strongly recommend that the existing Section 1237 be made a subdivision (a) and that a subdivision (b) be added as follows:

> (b) Written evidence of a statement described in subdivision (a) shall not be taken into the jury room unless offered in evidence by a party adverse to the party who produced such written evidence.

The judges suggest that writings containing recorded memory and writings that are used to refresh memory should be treated the same insofar as admission in evidence is concerned. As a practical matter, the distinction between a dead memory and a refreshed memory is seldom clear. Sometimes, a witness will remember some parts of a transaction and will not remember others. He will remember some matters specified in a writing and will not remember others. For ease of administration, the judges believe that neither kind of writing should be taken to the jury room unless offered in evidence by the adverse party. Moreover, the judges believe that recorded memory should be treated essentially the same as a deposition that is used at a trial. The deposition does not go to the jury room because it would place undue emphasis on the testimony of the deponent. Similarly, a witness' recorded memory should not go to the jury room because it would place too much emphasis on that portion of his testimony.

*Section 1241

The Conference of Judges Committee objected strongly to the exception for contemporaneous statements. They urged the Commission to confine the exception to the one recognized in existing law for statements accompanying

acts that are offered to explain such acts. (You will recall that the State Bar Committee suggested the deletion of this exception.)

Section 1251

The Conference of Judges Committee suggests that Section 1251 be limited to statements of past mental state and that statements of part pain or bodily health be deleted. Except for the unavailability condition, this would make the section consistent with the existing law.

Section 1291

The Conference of Judges Committee suggests that we consider the following revision of subdivision (b);

> The admissibility of former testimony under this section is subject to the same limitations and objections as though the declarant were testifying in person 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.

Section 1292

The Conference Committee suggests the elimination of Section 1292. They believe that a party has adequate means now for protecting himself against witnesses who may disappear and that it is unfair to force him to rely on cross-examination conducted by another party.

Sections 1310-1313

The Conference Committee asked the Commission to consider leaving "family history" undefined in these sections. They expressed concern that the specifics listed are not extensive enough. Other matters of family history, such as military service, occupation, place of residence, etc., might properly be considered matters of family history, but apparently would be excluded by these sections.

Section 1315

The judges suggested that subdivision (c) be relocated as subdivision (a).

This would make it apparent at the outset that the section is dealing with church records.

Section 1401

The judges suggested redrafting Section 1401(a) as follows:

(a) Authentication ~~of a writing~~ is required before a writing otherwise admissible ~~it~~ may be received in evidence.

Section 1402

The judges suggested that the last sentence be deleted as unnecessary.

Section 1410

The judges suggested deleting the first clause of Section 1410 as unnecessarily duplicating the provisions of Sections 1400 and 1401.

Sections 1411-1412

The judges suggested the consolidation of these two sections inasmuch as they deal with the same problem.

Section 1413

The suggestion was made that this section be broadened to apply to tape recordings, photographs and similar writings that are not subscribed. This might be accomplished by deleting the reference to a subscribing witness and substituting the word "made" for the word "executed".

Section 1414

The judges suggested dividing subdivision (b) into two subdivisions inasmuch as custody alone may be sufficient authenticating evidence in some cases and a showing that a person has acted upon a writing as if authentic, without more, might be a sufficent showing of authentication in other cases.

Sections 1415-1419

The judges suggest that we use the word "authentic" and its various

forms in two different senses in these sections. In some of these sections we are actually concerned with genuineness in a strict sense. In these places, they believe that we should use the word "genuine" or "genuineness" in order to convey the precise meaning. Moreover, the use of "genuineness" in these sections would make it apparent that the sections do not deal with authentication only but actually set forth various methods of proving the genuineness of writings that are already in evidence.

Section 1421

The Conference Committee suggests that the words "that the contents or some part thereof" be substituted for the words "that the writing refers to or states facts that".

Title of Article 3, Chapter 1, Division 11

The judges suggest that the title of Article 3 be revised to read:

PRESUMPTIONS AFFECTING ACKNOWLEDGED WRITINGS AND OFFICIAL WRITINGS

The judges also asked the Commission to consider making the article a separate chapter.

Section 1452

The judges suggest that the Commission consider changing "public employee" to "public officer" because officers are usually thought to have seals while employees do not.

Section 1505

The judges request the Commission to consider requiring that reasonable diligence be shown under Section 1505 as well as under 1508.

Section 1530

The judges suggest changing "employee" to "officer" for the reasons mentioned in connection with Section 1452. In addition, the judges suggest

including a reference to territory under the administration of the United States Government instead of the specific references to the Ryukyu Islands, the Trust Territory of the Pacific, and the Panama Canal Zone. The substitution would avoid the need for revising the section to keep it up to date with changes in international affairs.

Section 1562

The judges suggest that our classification scheme for presumptions would indicate that the presumption in this section ought to be a presumption affecting the burden of producing evidence.

The judges also indicated that Section 1562 should indicate that the affidavit is presumed true only insofar as those facts are concerned that are required to be stated in the affidavit by Section 1561. Other facts that may be thrown in should not be presumed true.

Section 1564

The judges suggest that the quoted statement that may be appended to a subpoena under Section 1564 should be revised so that it can be readily understood by a layman. Moreover, the authorized procedure (under Sections 1562 et seq.) should be permitted only when the subpoena states that personal attendance is not required.

Section 1601

The judges suggest that subdivision (b) be revised in the interest of clarity as follows:

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

Civil Code Section 164.5

The judges suggest the addition of the words "or annulment" after the word "divorce". The policy applicable in an annulment situation seems to be the same as it would be in a divorce situation.

Respectfully submitted,

Joseph B. Harvey
Assistant Executive Secretary

#34 2/3/65

First Supplement to Memorandum 65-4

Subject: Study No. 34(L) - Evidence Code

The joint committee of the Conference of California Judges and the Judicial Council made numerous suggestions for the revision of the Evidence Code. For the most part, the drafting changes were made for Commission consideration as possible improvements and were not made as indications of vitally needed changes. The principal memorandum identifies by asterisk the four changes the judges thought were of substantial importance. Nonetheless, the remaining suggestions should be considered, and many of them should be approved.

The staff recommends that the following policy be adopted toward revisions suggested by the judges and toward changes suggested by others as well: Drafting changes should be made only if the change would make a significant improvement in the code. At the time of the Commission meeting, the code will have been reviewed in detail by an Assembly subcommittee and as a whole by both the Assembly and Senate Judiciary Committees. Revision of the code, therefore, should be held to the minimum so that it will not become necessary for the committees to go completely over the bill again.

The following memorandum sets forth all of the proposed changes that we believe merit serious consideration under the foregoing standard. The memorandum includes the amendments made by the Commission at the last meeting together with necessary changes in the Comments. If a revised Comment does not appear, it is because we think no revision is necessary. Changes that we think should be made in the light of the suggestions made by the judges and the Trial Practice Committee of the San Francisco Bar

are also included. The memorandum also includes a discussion of matters raised by the Attorney General that were not resolved at the last meeting.

Section 12

We recommend the following amendment:

12. (a) This code shall become operative on January 1, 1967, and it shall govern proceedings in actions brought on or after that date and ~~also~~ , except as provided in subdivision (b), further proceedings in actions pending on that date.

(b) Subject to subdivision (c), a trial commenced before January 1, 1967, shall not be governed by this code. For the purpose of this section:

(1) A trial is commenced when the first witness is sworn or the first exhibit is admitted into evidence and is terminated when the issue upon which such evidence is received is submitted to the trier of fact. A new trial, or a separate trial of a different issue, commenced on or after January 1, 1967, shall be governed by this code.

(2) If an appeal is taken from a ruling made at a trial commenced before January 1, 1967, the appellate court shall apply the law applicable at the time of the commencement of the trial.

(c) The provisions of Division 8 (commencing with Section 900) relating to privileges shall govern any claim of privilege made after December 31, 1966.

Comment. The delayed operative date provides time for California judges and attorneys to become familiar with the code before it goes into effect.

Subdivision (a) makes it clear that the Evidence Code governs all trials commenced after December 31, 1966.

Under subdivision (b), a trial that has actually commenced prior to the operative date of the code will continue to be governed by the rules of evidence (except privileges) applicable at the commencement of the trial. Thus, if the trial court makes a ruling on the admission of evidence in a trial commenced prior to January 1, 1967, such ruling is not affected by the enactment of the Evidence Code; if an appeal is taken from the ruling, Section 12 requires the appellate court to apply the law applicable at the commencement of the trial. On the other hand,

any ruling made by the trial court on the admission of evidence in a trial commenced after December 31, 1966, is governed by the Evidence Code, even if a previous trial of the same action was commenced prior to that date.

Under subdivision (c) all claims of privilege made after December 31, 1966, are governed by the Evidence Code in order that there might be no delay in providing protection to the important relationships and interests that are protected by the privileges division.

We have heard this recommendation from the judges, the Department of Public Works, and the State Bar. In view of this weight of opinion, we suggest the above revision.

Section 165

We recommend the following amendment:

165. "Oath" includes affirmation or declaration under penalty of perjury .

Section 230

We recommend the following amendment:

230. "Statute" includes a treaty and a constitutional provision ~~of the Constitution~~ .

Section 311

We recommend the following amendment:

311. (a) Determination of the law of a ~~foreign nation or~~ a public entity ~~in a foreign nation~~ is a question of law to be determined in the manner provided in Division 4 (commencing with Section 450).

(b) If ~~such~~ the law of a foreign nation or a state other than this State, or a public entity in a foreign nation or a state other than this State, is applicable and the court is unable to determine it, the court may, as the ends of justice require, either:

(1) Apply the law of this State if the court can do so consistently with the Constitution of the United States and the Constitution of this State; or

(2) Dismiss the action without prejudice or, in the case of a reviewing court, remand the case to the trial court with directions to dismiss the action without prejudice.

Comment. Insofar as it relates to the law of foreign nations, Section 311 restates the substance of and supersedes the last paragraph of Section 1875 of the Code of Civil Procedure. The provisions of Section 311 relating to the law of sister states reflect existing, but uncodified, California law. See, e.g., Gagnon Co. v. Nevada Desert Inn, 45 Cal.2d 448, 454, 289 P.2d 466, 471 (1955).

The court may be unable to determine the applicable foreign or sister state law because the parties have not provided the court with sufficient information to make such determination. If it appears that the parties may be able to obtain such information, the court may, of course, grant the parties additional time within which to obtain such information and make it available to the court. But when all sources of information as to the applicable foreign or sister state law are exhausted and the court is unable to determine it, Section 311 provides the rule that governs the disposition of the case.

§ 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 exclude or to strike the evidence that was timely made and so stated as to make clear the specific ground of the objection or motion; and

(b) The court which passes upon the effect of the error or errors is of the opinion that the admitted evidence should have been excluded on the ground stated and that the error or errors complained of resulted in a miscarriage of justice.

Comment. Subdivision (a) of Section 353 codifies the well-settled California rule that a failure to make a timely objection to, or motion to exclude or to strike, inadmissible evidence waives the right to complain of the erroneous admission of evidence. See WITKIN, CALIFORNIA EVIDENCE §§ 700-702 (1958). Subdivision (a) also codifies the related rule that the objection or motion must specify the ground for objection, a general objection being insufficient. WITKIN, CALIFORNIA EVIDENCE §§ 703-709 (1958).

Section 353 does not specify the form in which an objection must be made; hence, the use of a continuing objection to a line of questioning would be proper under Section 353 just as it is under existing law. See WITKIN, CALIFORNIA EVIDENCE § 708 (1958).

Subdivision (b) reiterates the requirement of Section 4½ of Article VI of the California Constitution that a judgment may not be reversed, nor may a new trial be granted, because of an error unless the error is prejudicial.

Section 353 is, of course, subject to the constitutional requirement that a judgment must be reversed if an error has resulted in a denial of due process of law. *People v. Matteson*, 61 Cal.2d ___, 39 Cal. Rptr. 1, 393 P.2d 161 (1964).

At the January meeting, the Commission directed the revision of the comment indicated above.

Section 451

We recommend the following amendment:

451. Judicial notice shall be taken of:

(a) The decisional, constitutional, and public statutory law of this State and of the United States ~~and of every state of the United States~~ and of the provisions of any charter described in Section 7 1/2 or 8 of Article XI of the California Constitution.

(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 practice and procedure for the courts of this State adopted by the Judicial Council.

(d) Rules of pleading, practice, and procedure prescribed by the United States Supreme Court, such as the Rules of the United States Supreme Court, the Federal Rules of Civil Procedure, the Federal Rules of Criminal Procedure, the Admiralty Rules, the Rules of the Court of Claims, the Rules of the Customs Court, and the General Orders and Forms in Bankruptcy.

(e) The true signification of all English words and phrases and of all legal expressions.

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

Comment. Judicial notice of the matters specified in Section 451 is *mandatory*, whether or not the court is requested to notice them. Although the court errs if it fails to take judicial notice of the matters specified in this section, such error is not necessarily reversible error. Depending upon the circumstances, the appellate court may hold that the error was "invited" (and, hence, is not reversible error) or that points not urged in the trial court may not be advanced on appeal. These and similar principles of appellate practice are not abrogated by this section.

Section 451 includes matters both of law and of fact. The matters specified in subdivisions (a), (b), (c), and (d) are all matters that, broadly speaking, can be considered as a part of the "law" applicable to the particular case. The court can reasonably be expected to discover and apply this law even if the parties fail to provide the court with references to the pertinent cases, statutes, regulations, and rules. Other matters that also might properly be considered as a part of the law applicable to the case (such as the law of foreign nations and certain regulations and ordinances) are included under Section 452, rather than under Section 451, primarily because of the difficulty of ascertaining such matters. Subdivision (e) of Section 451 requires the court to judicially notice "the true signification of all English words and phrases and of all legal expressions." These are facts that must be judicially noticed in order to conduct meaningful proceedings. Similarly, subdivision (f) of Section 451 covers "universally known" facts.

Listed below are the matters that must be judicially noticed under Section 451.

California and federal law. The decisional, constitutional, and public statutory law of California and of the United States must be judicially noticed under subdivision (a). This requirement states existing law as found in subdivision 3 of Code of Civil Procedure Section 1875 (superseded by the Evidence Code).

Charter provisions of California cities and counties. Judicial notice must be taken under subdivision (a) of the provisions of charters adopted pursuant to Section 7½ or 8 of Article XI of the California Constitution. Notice of these provisions is mandatory under the State Constitution. CAL. CONST., Art. XI, § 7½ (county charter), § 8 (charter of city or city and county).

Regulations of California and federal agencies. Judicial notice must be taken under subdivision (b) of the rules, regulations, orders, and standards of general application adopted by California state agencies and filed with the Secretary of State or printed in the California Administrative Code or the California Administrative Register. This is existing law as found in Government Code Sections 11383 and 11384. Under subdivision (b), judicial notice must also be taken of the rules of the State Personnel Board. This, too, is existing law under Government Code Section 18576.

Subdivision (b) also requires California courts to judicially notice documents published in the Federal Register (such as (1) presidential proclamations and executive orders having general applicability and legal effect and (2) orders, regulations, rules, certificates, codes of fair competition, licenses, notices, and similar instruments, having general applicability and legal effect, that are issued, prescribed, or promulgated by federal agencies). There is no clear holding that this is existing California law. Although Section 307 of Title 44 of the United States Code provides that the "contents of the Federal Register shall be judicially noticed," it is not clear that this *requires* notice by state courts. See *Broadway Fed. etc. Loan Ass'n v. Howard*, 133 Cal. App.2d 382, 386 note 4, 285 P.2d 61, 64 note 4 (1955) (referring to 44 U.S.C.A. §§ 301-314). *Compare* Note, 59 HARV. L. REV. 1137, 1141 (1946) (doubt expressed that notice is required), *with* Knowlton, *Judicial Notice*, 10 RUTGERS L. REV. 501, 504 (1956) ("it would seem that this provision is binding upon the state courts"). *Livermore v. Beal*, 18 Cal. App.2d 535, 542-543, 64 P.2d 987, 992 (1937), suggests that California courts are required to judicially notice pertinent federal official action, and California courts have judicially noticed the contents of various proclamations, orders, and regulations of federal agencies. *E.g., Pacific Solvents Co. v. Superior Court*, 88 Cal. App.2d 953, 955, 199 P.2d 740, 741 (1948) (orders and regulations); *People v. Mason*, 72 Cal. App.2d 699, 706-707, 165 P.2d 481, 485 (1946) (presidential and executive proclamations) (disapproved on other grounds in *People v. Friend*, 50 Cal.2d 570, 578, 327 P.2d 97, 102 (1958)); *Downer v. Grizzly Livestock & Land Co.*, 6 Cal. App.2d 39, 42, 43 P.2d 843, 845 (1935) (rules and regulations). Section 451 makes the California law clear.

Rules of court. Judicial notice of the California Rules of Court is required under subdivision (c). These rules, adopted by the Judicial Council, are as binding on the parties as procedural statutes. *Cantillon v. Superior Court*, 150 Cal. App.2d 184, 309 P.2d 890 (1957). See *Albermont Petroleum, Ltd. v. Cunningham*, 186 Cal. App.2d 84, 9 Cal. Rptr. 405 (1960). Likewise, the rules of pleading, practice, and procedure promulgated by the United States Supreme Court are required to be judicially noticed under subdivision (d).

The rules of the California and federal courts which are required to be judicially noticed under subdivisions (c) and (d) are, or should be, familiar to the court or easily discoverable from materials readily available to the court. However, this may not be true of the court rules of sister states or other jurisdictions nor, for example, of the rules of the various United States Courts of Appeals or local rules of a particular superior court. See *Albermont Petroleum, Ltd. v. Cunningham*, 186 Cal. App.2d 84, 9 Cal. Rptr. 405 (1960). Judicial notice of these rules is permitted under subdivision (e) of Section 452 but is not required unless there is compliance with the provisions of Section 453.

Words, phrases, and legal expressions. Subdivision (e) requires the court to take judicial notice of "the true signification of all English words and phrases and of all legal expressions." This restates the same matter covered in subdivision 1 of Code of Civil Procedure Section 1875. Under existing law, however, it is not clear that judicial notice of these matters is mandatory.

"Universally known" facts. Subdivision (f) requires the court to take judicial notice of indisputable facts and propositions universally known. "Universally known" does not mean that every man on the street has knowledge of such facts. A fact known among persons of reasonable and average intelligence and knowledge will satisfy the "universally known" requirement. *Cf. People v. Tossetti,* 107 Cal. App. 7, 12, 289 Pac. 881, 883 (1930).

Subdivision (f) should be contrasted with subdivisions (g) and (h) of Section 452, which provide for judicial notice of indisputable facts and propositions that are matters of common knowledge or are capable of immediate and accurate determination by resort to sources of reasonably indisputable accuracy. Subdivisions (g) and (h) permit notice of facts and propositions that are indisputable but are not "universally" known.

Judicial notice does not apply to facts merely because they are known to the judge to be indisputable. The facts must fulfill the requirements of subdivision (f) of Section 451 or subdivision (g) or (h) of Section 452. If a judge happens to know a fact that is not widely enough known to be subject to judicial notice under this division, he may not "notice" it.

It is clear under existing law that the court may judicially notice the matters specified in subdivision (f); it is doubtful, however, that the court *must* notice them. See *Varcoe v. Lee,* 180 Cal. 338, 347, 181 Pac. 223, 227 (1919) (dictum). Since subdivision (f) covers universally known facts, the parties ordinarily will expect the court to take judicial notice of them; the court should not be permitted to ignore such facts merely because the parties fail to make a formal request for judicial notice.

CROSS-REFERENCES

Definition:
State, see § 220

Section 452

We recommend the following amendment:

§ 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 within Section 451:

(a) Resolutions and private acts of the Congress of the United States and of the legislature of ~~any state of the United States~~ this State and the decisional, Constitutional and statutory law of any other state.

(b) Regulations and legislative enactments issued by or under the authority of the United States or any public entity in the United States.

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

(d) Records of (1) any court of this State or (2) any court of record of the United States or of any state of the United States.

(e) Rules of court of (1) any court of this State or (2) any court of record of the United States or of any state of the United States.

(f) The law of foreign nations and public entities in foreign nations.

(g) 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.

(h) Specific facts and propositions that are not reasonably subject to dispute and are capable of immediate and accurate determination by resort to sources of reasonably indisputable accuracy.

Comment. Section 452 includes matters both of law and of fact. The court *may* take judicial notice of these matters, even when not requested to do so; it is *required* to notice them if a party requests it and satisfies the requirements of Section 453.

The matters of law included under Section 452 may be neither known to the court nor easily discoverable by it because the sources of information are not readily available. However, if a party requests it and furnishes the court with "sufficient information" for it to take judicial notice, the court must do so if proper notice has been given to each adverse party. See EVIDENCE CODE § 453. Thus, judicial notice of these matters of law is mandatory only if counsel adequately discharges his responsibility for informing the court as to the law applicable to the case. The simplified process of judicial notice can then be applied to all of the law applicable to the case, including such law as ordinances and the law of foreign nations.

Although Section 452 extends the process of judicial notice to some matters of law which the courts do not judicially notice under existing law, the wider scope of such notice is balanced by the assurance that the matter need not be judicially noticed unless adequate information to support its truth is furnished to the court. Under Section 453, this burden falls upon the party requesting that judicial notice be taken. In addition, the parties are entitled under Section 455 to a reasonable opportunity to present information to the court as to the propriety of taking judicial notice and as to the tenor of the matter to be noticed.

Listed below are the matters that may be judicially noticed under Section 452 (and must be noticed if the conditions specified in Section 453 are met).

Resolutions and private acts. Subdivision (a) provides for judicial notice of 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. See the broad definition of "state" in EVIDENCE CODE § 220.

The California law on this matter is not clear. Our courts are authorized by subdivision 3 of Code of Civil Procedure Section 1875 to take judicial notice of private statutes of this State and the United States, and they probably would take judicial notice of resolutions of this State and the United States under the same subdivision. It is not clear whether such notice is compulsory. It may be that judicial notice of a private act pleaded in a criminal action pursuant to Penal Code Section 968 is mandatory, whereas judicial notice of the same private act may be discretionary when pleaded in a civil action pursuant to Section 459 of the Code of Civil Procedure.

Although no case in point has been found, California courts probably would not take judicial notice of a resolution or private act of a sister state or territory or possession of the United States. Although Section 1875 is not the exclusive list of the matters that will be judicially noticed, the courts did not take judicial notice of a private statute prior to the enactment of Section 1875. *Ellis v. Eastman*, 32 Cal. 447 (1867).

Law of sister states. [redacted]decisional, constitutional, and [redacted] statutory law in force in sister states~~must be judicially noticed under subdivision (a)~~. California courts now take judicial notice of the law of sister states under subdivision 3 of Section 1875 of the Code of Civil Procedure. However, Section 1875 seems to preclude notice of sister-state law as interpreted by the intermediate-appellate courts of sister states, whereas Section [redacted]notice of relevant decisions of *all* sister-state courts. If this be an extension of existing law, it is a desirable one, for the intermediate-appellate courts of sister states are as responsive to the need for properly determining the law as are equivalent courts in California. The existing law also is not clear as to whether a request for judicial notice of sister-state law is required and whether judicial notice is mandatory. On the necessity for a request for judicial notice, see Comment, 24 CAL. L. REV. 311, 316 (1936). On

Subdivision (a) also provides for judicial notice of the

452 permits

NEW SET

whether judicial notice is mandatory, see *In re Bartges*, 44 Cal.2d 241, 282 P.2d 47 (1955), and the opinion of the Supreme Court in denying a hearing in *Estate of Moore*, 7 Cal. App.2d 722, 726, 48 P.2d 28, 29 (1935). ~~Section 451 requires such notice to be taken without a request being made.~~

NEW SET

Subdivision (a) also provides for judicial notice of the

Law of territories and possessions of the United States. The decisional, constitutional, and public statutory law in force in the territories and possessions of the United States ~~must be judicially noticed under subdivision (a)~~. See the broad definition of "state" in EVIDENCE CODE § 220. It is not clear under existing California law whether this law is treated as sister-state law or foreign law. See WITKIN, CALIFORNIA EVIDENCE § 45 (1958).

Regulations, ordinances, and similar legislative enactments. **Subdivision (b) provides for judicial notice of regulations and legislative enactments adopted by or under the authority of the United States or of any state, territory, or possession of the United States, including public entities therein. See the broad definition of "public entity" in EVIDENCE CODE § 200. The words "regulations and legislative enactments" include such matters as "ordinances" and other similar legislative enactments. Not all public entities legislate by ordinance.**

This subdivision changes existing law. Under existing law, municipal courts take judicial notice of ordinances in force within their jurisdiction. *People v. Cowles*, 142 Cal. App.2d Supp. 865, 867, 298 P.2d 732, 733-734 (1956); *People v. Crittenden*, 93 Cal. App.2d Supp. 871, 877, 209 P.2d 161, 165 (1949). In addition, an ordinance pleaded in a criminal action pursuant to Penal Code Section 963 must be judicially noticed. On the other hand, neither the superior court nor a district court of appeal will take judicial notice in a civil action of municipal or county ordinances. *Thompson v. Guyer-Hays*, 207 Cal. App.2d 366, 24 Cal. Rptr. 461 (1962); *County of Los Angeles v. Bartlett*, 203 Cal. App.2d 523, 21 Cal. Rptr. 776 (1962); *Becerra v. Hochberg*, 193 Cal. App.2d 431, 14 Cal. Rptr. 101 (1961). It seems safe to assume that ordinances of sister states and of territories and possessions of the United States would not be judicially noticed under existing law.

Judicial notice of certain regulations of California and federal agencies is mandatory under subdivision (b) of Section 451. Subdivision (b) of Section 452 provides for judicial notice of California and federal regulations that are not included under subdivision (b) of Section 451 and, also, for judicial notice of regulations of other states and territories and possessions of the United States.

Both California and federal regulations have been judicially noticed under subdivision 3 of Code of Civil Procedure Section 1875. 18 CAL. JUR.2d *Evidence* § 24. Although no case in point has been found, it is unlikely that regulations of other states or of territories or possessions of the United States would be judicially noticed under existing law.

Official acts of the legislative, executive, and judicial departments. **Subdivision (c) provides for judicial notice of the official acts of the legislative, executive, and judicial departments of the United States and any state, territory, or possession of the United States. See the broad definition of "state" in EVIDENCE CODE § 220. Subdivision (c) states existing law as found in subdivision 3 of Code of Civil Procedure Section 1875. Under this provision, the California courts have taken judicial notice of a wide variety of administrative and executive acts, such as proceedings and reports of the House Committee on Un-American Activities, records of the State Board of Education, and records of a county planning commission. See WITKIN, CALIFORNIA EVIDENCE § 49 (1958), and 1963 Supplement thereto.**

Court records and rules of court. **Subdivisions (d) and (e) provide for judicial notice of the court records and rules of court of (1) any court of this State or (2) any court of record of the United States or of any state, territory, or possession of the United States. See the broad definition of "state" in EVIDENCE CODE § 220. So far as court records are concerned, subdivision (d) states existing law. *Flores v. Arroyo*, 56 Cal.2d 492, 15 Cal. Rptr. 87, 364 P.2d 263 (1961). While the provisions of subdivision (c) of Section 452 are broad enough to include court records, specific mention of these records in subdivision (d) is desirable in order to eliminate any uncertainty in the law on this point. See the *Flores* case, *supra*.**

Subdivision (e) may change existing law so far as judicial notice of rules of court is concerned, but the provision is consistent with the modern philosophy of judicial notice as indicated by the holding in *Flores v. Arroyo, supra.* To the extent that subdivision (e) overlaps with subdivisions (e) and (d) of Section 451, notice is, of course, mandatory under Section 451.

Law of foreign nations. Subdivision (f) provides for judicial notice of the law of foreign nations and public entities in foreign nations. See the broad definition of "public entity" in EVIDENCE CODE § 200. Subdivision (f) should be read in connection with Sections 311, 453, and 454. These provisions retain the substance of the existing law which was enacted in 1957 upon recommendation of the California Law Revision Commission. CODE CIV. PROC. § 1875. See 1 CAL. LAW REVISION COMM'N, REP., REC. & STUDIES, *Recommendation and Study Relating to Judicial Notice of the Law of Foreign Countries* at I-1 (1957).

Subdivision (f) refers to "the law" of foreign nations and public entities in foreign nations. This makes all law, in whatever form, subject to judicial notice.

Matters of "common knowledge" and verifiable facts. Subdivision (g) provides for judicial notice of matters of common knowledge within the court's jurisdiction that are not subject to dispute. This subdivision states existing case law. *Varcoe v. Lee,* 180 Cal. 338, 181 Pac. 223 (1919); 18 CAL. JUR.2d *Evidence* § 19 at 439-440. The California courts have taken judicial notice of a wide variety of matters of common knowledge. WITKIN, CALIFORNIA EVIDENCE §§ 50-52 (1958).

Subdivision (h) provides for judicial notice of indisputable facts immediately ascertainable by reference to sources of reasonably indisputable accuracy. In other words, the facts need not be actually known if they are readily ascertainable and indisputable. Sources of "reasonably indisputable accuracy" include not only treatises, encyclopedias, almanacs, and the like, but also persons learned in the subject matter. This would not mean that reference works would be received in evidence or sent to the jury room. Their use would be limited to consultation by the judge and the parties for the purposes of determining whether or not to take judicial notice and determining the tenor of the matter to be noticed.

Subdivisions (g) and (h) include, for example, facts which are accepted as established by experts and specialists in the natural, physical, and social sciences, if those facts are of such wide acceptance that to submit them to the jury would be to risk irrational findings. These subdivisions include such matters listed in Code of Civil Procedure Section 1875 as the "geographical divisions and political history of the world." To the extent that subdivisions (g) and (h) overlap subdivision (f) of Section 451, notice is, of course, mandatory under Section 451.

The matters covered by subdivisions (g) and (h) are included in Section 452, rather than Section 451, because it seems reasonable to put the burden on the parties to bring adequate information before the court if judicial notice of these matters is to be mandatory. See EVIDENCE CODE § 453 and the *Comment* thereto.

Under existing law, courts take judicial notice of the matters that are included under subdivisions (g) and (h), either pursuant to Section 1875 of the Code of Civil Procedure or because such matters are matters of common knowledge which are certain and indisputable. WITKIN, CALIFORNIA EVIDENCE §§ 50-52 (1958). Notice of these matters probably is not compulsory under existing law.

Section 703

We recommend the following amendment:

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

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

(c) The calling of the judge presiding at a trial to testify in that trial as a witness shall be deemed a consent to the granting of a motion for mistrial, and an objection to such calling of a judge shall be deemed a motion for mistrial.

~~(c)~~ (d) In the absence of objection by a party, the judge presiding at the trial of an action may testify in that trial as a witness.

Comment. Under existing law, a judge may be called as a witness even if a party objects, but the judge in his discretion may order the trial to be postponed or suspended and to take place before another judge. CODE CIV. PROC. § 1883 (superseded by EVIDENCE CODE §§ 703 and 704). *But see People v. Connors*, 77 Cal. App. 438, 450-457, 246 Pac. 1072, 1076-1079 (1926) (dictum) (abuse of discretion for the presiding judge to testify to important and necessary facts).

Section 703, however, precludes the judge from testifying if a party objects. Before the judge may be called to testify in a civil or criminal action, he must disclose to the parties out of the presence and hearing of the jury the information he has concerning the case. After such disclosure, if no party objects, the judge is permitted—but not required—to testify.

Section 703 is based on the fact that examination and cross-examination of a judge-witness may be embarrassing and prejudicial to a party. By testifying as a witness for one party, a judge appears in a partisan attitude before the jury. Objections to questions and to his testimony must be ruled on by the witness himself. The extent of cross-examination and the introduction of impeaching and rebuttal evidence may be limited by the fear of appearing to attack the judge personally. For these and other reasons, Section 703 is preferable to Code of Civil Procedure Section 1883.

Subdivision (c) is designed to prevent a plea of double jeopardy if either party to a criminal action calls or objects to the calling of the judge to testify. Under subdivision (c), both parties will have, in effect, consented to the mistrial and thus waived any objection to a retrial. See WITKIN, CALIFORNIA CRIMES § 193 (1963).

Section 704

We recommend the following amendment:

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

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

(c) The calling of a juror to testify before the jury as a witness shall be deemed a consent to the granting of a motion for mistrial, and an objection to such calling of a juror shall be deemed a motion for mistrial.

~~(c)~~ (d) In the absence of objection by a party, a juror sworn and impaneled in the trial of an action may be compelled to testify in that trial as a witness.

Comment. Under existing law, a juror may be called as a witness even if a party objects, but the judge in his discretion may order the trial to be postponed or suspended and to take place before another jury. CODE CIV. PROC. § 1883 (superseded by EVIDENCE CODE §§ 703 and 704). Section 704, on the other hand, prevents a juror from testifying before the jury if any party objects.

A juror-witness is in an anomalous position. He manifestly cannot weigh his own testimony impartially. A party affected adversely by the juror's testimony is placed in an embarrassing position. He cannot freely cross-examine or impeach the juror for fear of antagonizing the juror—and perhaps his fellow jurors as well. And, if he does not attack the juror's testimony, the other jurors may give his testimony undue weight. For these and other reasons, Section 704 forbids jurors to testify over the objection of any party.

Before a juror may be called to testify before the jury in a civil or criminal action, he is required to disclose to the parties out of the presence and hearing of the remaining jurors the information he has concerning the case. After such disclosure, if no party objects, the juror is required to testify. If a party objects, the objection is deemed a motion for mistrial and the judge is required to declare a mistrial and order the action assigned for trial before another jury.

Section 704 is concerned only with the problem of a juror who is called to testify before the jury. Section 704 does not deal with *voir dire* examinations of jurors, with testimony of jurors in post-verdict proceedings (such as on motions for new trial), or with the testimony of jurors on any other matter that is to be decided by the court. *Cf.* EVIDENCE CODE § 1150 and the *Comment* thereto.

Subdivision (c) is designed to prevent a plea of double jeopardy if either party to a criminal action calls or objects to the calling of the juror to testify. Under subdivision (c), both parties will have, in effect, consented to the mistrial and thus waived any objection to a retrial. See WITKIN, CALIFORNIA CRIMES § 193 (1963).

ections 768 and 769

We recommend the following amendments:

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

Comment. Section 768 deals with a subject now covered in Sections 2052 and 2054 of the Code of Civil Procedure. Under the existing sections, a party need not disclose to a witness any information concerning a prior inconsistent *oral* statement of the witness before asking him questions about the statement. *People v. Kidd*, 56 Cal.2d 759, 765, 16 Cal. Rptr. 793, 796-797, 366 P.2d 49, 52-53 (1961); *People v. Campos*, 10 Cal. App.2d 310, 317, 52 P.2d 251, 254 (1935). However, if a witness' prior inconsistent statements are in *writing* or, as in the case of former oral testimony, have been reduced to writing, "they must be shown to the witness before any question is put to him concerning them." CODE CIV. PROC. § 2052 (superseded by EVIDENCE CODE § 768); *Umemoto v. McDonald*, 6 Cal.2d 587, 592, 58 P.2d 1274, 1276 (1936).

Section 768 eliminates the distinction made in existing law between oral and written statements and permits a witness to be asked questions concerning a prior inconsistent statement, whether written or oral, even though no disclosure is made to him concerning the prior statement. (Whether a foundational showing is required before other evidence of the prior statement may be admitted is not covered in Section 768; the prerequisites for the admission of such evidence are set forth in Section 770.) The disclosure of inconsistent written statements that is required under existing law limits the effectiveness of cross-examination by removing the element of surprise. The forewarning gives the dishonest witness the opportunity to reshape his testimony in conformity with the prior statement. The existing rule is based on an English common law rule that has been abandoned in England for 100 years. See MCCORMICK, EVIDENCE § 28 at 53 (1954).

~~(b)~~ 769. If a writing is shown to a witness, all parties to the action must be given an opportunity to inspect it before any question concerning it may be asked of the witness.

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

Comment. Section 769 restates the substance of and supersedes Section 2054 of the Code of Civil Procedure. However, the right of inspection has been extended to all parties to the action.

Section 771

Section 771 was amended at the January meeting to read:

§ 771. Refreshing recollection with a writing

771. (a) Subject to subdivision (c), if a witness, either while testifying or prior thereto, uses a writing to refresh his memory with respect to any matter about which he testifies, such writing must be produced at the hearing at the request of an adverse party and, unless the writing is so produced, the testimony of the witness concerning such matter shall be stricken.

(b) If the writing is produced at the hearing, the adverse party who may, if he chooses, inspect the writing, cross-examine the witness concerning it, and ~~read it to the jury~~ introduce it in evidence.

(c) Production of the writing is excused, and the testimony of the witness shall not be stricken, if the writing:

(1) Is not in the possession or control of the witness or the party who produced his testimony concerning the matter; and

(2) Was not reasonably procurable by such party through the use of the court's process or other available means.

Comment. Section 771 grants to an adverse party the right to inspect any writing used to refresh a witness' recollection, whether the writing is used by the witness while testifying or prior thereto. The right of inspection granted by Section 771 may be broader than the similar right of inspection granted by Section 2047 of the Code of Civil Procedure, for Section 2047 has been interpreted by the courts to grant a right of inspection of only those writings used by the witness while he is testifying. *People v. Gallardo*, 41 Cal.2d 57, 257 P.2d 29 (1953); *People v. Grayson*, 172 Cal. App.2d 372, 341 P.2d 820 (1959); *Smith v. Smith*, 135 Cal. App.2d 100, 286 P.2d 1009 (1955). In a criminal case, however, the defendant can compel the prosecution to produce any written statement of a prosecution witness relating to matters covered in the witness' testimony. *People v. Estrada*, 54 Cal.2d 713, 7 Cal. Rptr. 897, 355 P.2d 641 (1960). The extent to which the public policy reflected in criminal discovery practice overrides the restrictive interpretation of Code of Civil Procedure Section 2047 is not clear. See WITKIN, CALIFORNIA EVIDENCE § 602 (Supp. 1963). In any event, Section 771 follows the lead of the criminal cases, such as *People v. Silberstein*, 159 Cal. App.2d Supp. 848, 323 P.2d 591 (1958) (defendant entitled to inspect police report used by police officer to refresh his recollection *before* testifying), and grants a right of inspection without regard to when the writing is used to refresh recollection. If a witness' testimony depends upon the use of a writing to refresh his recollection, the adverse party's right to inspect the writing should not be made to depend upon the happenstance of when the writing is used.

Subdivision (c) excuses the nonproduction of the memory-refreshing writing where the writing cannot be produced through no fault of the witness or the party eliciting his testimony concerning the matter. The rule is analogous to the rule announced in People v. Parham, 60 Cal.2d 378, 33 Cal. Rptr. 497, 384 P.2d 1001 (1963), which affirmed an order denying defendant's motion to strike certain witnesses' testimony where the witnesses' prior statements were withheld by the Federal Bureau of Investigation.

Section 772

We recommend the following amendment:

772. (a) The examination of a witness shall proceed in the following phases: direct examination, cross-examination, redirect examination, recross-examination, and continuing thereafter by redirect and recross-examination.

(b) Unless for good cause the court otherwise directs, each phase of the examination of a witness must be concluded before the succeeding phase begins.

(c) Subject to subdivision (d), a party may, in the discretion of the court, during interrupt his cross-examination, redirect examination, or recross-examination of a witness, in order to examine the witness upon a matter not within the scope of a previous examination of the witness.

(d) If the witness is the defendant in a criminal action, the witness may not, without his consent, be examined under direct examination by another party.

Comment. Subdivision (a) codifies existing but nonstatutory California law. See WITKIN, CALIFORNIA EVIDENCE § 576 at 631 (1958).

Subdivision (b) is based on and supersedes the second sentence of Section 2045 of the Code of Civil Procedure. The language of the existing section has been expanded, however, to require completion of each phase of examination of the witness, not merely the direct examination.

Under subdivision (c), as under existing law, a party examining a witness under cross-examination, redirect examination, or recross-examination may go beyond the scope of the initial direct examination if the court permits. See CODE CIV. PROC. §§ 2048 (last clause), 2050; WITKIN, CALIFORNIA EVIDENCE §§ 627, 697 (1958). Under the definition in Section 760, such an extended examination is direct examination. *Cf.* CODE CIV. PROC. § 2048 ("such examination is to be subject to the same rules as a direct examination"). Such direct examination may, however, be subject to the rules applicable to a cross-examination by virtue of the provisions of Section 776, 804, or 1203.

Subdivision (d) states an exception for the defendant-witness in a criminal action that reflects existing law. See WITKIN, CALIFORNIA EVIDENCE § 629 at 676 (1958).

Section 776

We recommend the following amendment:

776. (a) A party to the record of any civil action, or a person identified with such a party, may be called and examined as if under cross-examination by any adverse party at any time during the presentation of evidence by the party calling the witness. ~~The party calling such witness is not bound by his testimony, and the testimony of such witness may be rebutted by the party calling him for such examination by other evidence.~~

(1) In the case of a witness who is a party, his own counsel and counsel for a party who is not adverse to the witness.

(2) In the case of a witness who is not a party, counsel for the party with whom the witness is identified and counsel for a party who is not adverse to the party with whom the witness is identified.

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

(d) For the purpose of this section, a person is identified with a party if he is:

(1) A person for whose immediate benefit the action is prosecuted or defended by the party.

(2) A director, officer, superintendent, member, agent, employee, or managing agent of the party or of a person specified in paragraph (1), or any public employee of a public entity when such public entity is the party.

(3) A person who was in any of the relationships specified in paragraph (2) at the time of the act or omission giving rise to the cause of action.

(4) A person who was in any of the relationships specified in paragraph (2) at the time he obtained knowledge of the matter concerning which he is sought to be examined under this section.

(b) A witness examined by a party under this section may be cross-examined by all other parties to the action in such order as the court directs; but the witness may be examined only as if under redirect examination by:

The deleted languate is unnecessary. We have not included such language in Sections 804 and 1203, which are comparable. The judges strongly urge the deletion because parties are frequently confused by the word "bound"; some attorneys apparently think that testimony elicited under this section is somehow not to be considered as evidence against them.

Section 780

The Commission amended Section 780 at the January meeting to read as follows:

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

(a) His demeanor while testifying and the manner in which he testifies.

(b) The character of his testimony.

(c) The extent of his capacity to perceive, to recollect, or to communicate any matter about which he testifies.

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

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

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

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

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

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

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

(k) His admission of untruthfulness.

Section 804

The Commission amended Section 804 at the January meeting to read as follows:

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 and examined by any adverse party as if under cross-examination

concerning the opinion or statement

(b) This section is not applicable if the person upon whose opinion or statement the expert witness has relied is (1) a party, (2) a person identified with a party within the meaning of subdivision (d) of Section 776, or (3) a witness who has testified in the action concerning the subject matter of the opinion or statement upon which the expert witness has relied.

(c) 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.

(d) An expert opinion otherwise admissible is not made inadmissible by this section because it is based on the opinion or statement of a person who is unavailable for examination pursuant to this section.

Section 1006

The Commission amended Section 1006 at the January meeting to read:

1006. There is no privilege under this article as to information that 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 is confidential or may not be disclosed in the particular proceeding.~~ if such report or record is open to public inspection.

Comment. This exception is not recognized by existing law. However, no valid purpose is served by permitting a person to prevent the disclosure in court, or in some other official proceeding, of information that is required to be open to public inspection.

Section 1026

The Commission amended Section 1026 at the January meeting to read:

1026. There is no privilege under this article as to information that the psychotherapist 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 is confidential or may not be disclosed in the particular proceeding.~~ if such report or record is open to public inspection.

Section 1042

At the January meeting, the Commission directed the staff to make the following revision in the comment:

Comment. Section 1042 provides special rules regarding the consequences of invocation of the privileges provided in this article by the prosecution in a criminal proceeding or a disciplinary proceeding.

Subdivision (a). This subdivision recognizes the existing California rule in a criminal case. As was stated by the United States Supreme Court in *United States v. Reynolds*, 345 U.S. 1, 12 (1953), "since the Government which prosecutes an accused also has the duty to see that justice is done, it is unconscionable to allow it to undertake prosecution and then invoke its governmental privileges to deprive the accused of anything which might be material to his defense." This policy applies if either the official information privilege (Section 1040) or the informer privilege (Section 1041) is exercised in a criminal proceeding or a disciplinary proceeding.

In some cases, the privileged information will be material to the issue of the defendant's guilt or innocence; in such cases, the law requires that the court dismiss the case if the public entity does not reveal the information. *People v. McShann*, 50 Cal.2d 802, 330 P.2d 33 (1958). In other cases, the privileged information will relate to narrower issues, such as the legality of a search without a warrant; in those cases, the law requires that the court strike the testimony of a particular witness or make some other order appropriate under the circumstances if the public entity insists upon its privilege. *Priestly v. Superior Court*, 50 Cal.2d 812, 330 P.2d 39 (1958).

In cases where the legality of an arrest is in issue, however, Section 1042 would not require disclosure of the privileged information if there was reasonable cause for the arrest aside from the privileged information. Cf. People v. Hunt, 216 Cal. App.2d 753, 756-757, 31 Cal. Rptr. 221, 223 (1963)("The rule requiring disclosure of an informer's identity has no application in situations where reasonable cause for arrest and search exists aside from the informer's communication.").

Subdivision (a) applies only if the privilege is asserted by the State of California or a public entity in the State of California. Subdivision (a) does not require the imposition of its sanction if the privilege is invoked in an action prosecuted by the State and the information is withheld by the federal government or another state. Nor may the sanction be imposed where disclosure is forbidden by federal statute. In these respects, subdivision (a) states existing California law. *People v. Parham*, 60 Cal.2d 378, 33 Cal. Rptr. 497, 384 P.2d 1001 (1963) (prior statements of prosecution witnesses withheld by the Federal Bureau of Investigation; denial of motion to strike witnesses' testimony affirmed).

Subdivision (b). This subdivision codifies the rule declared in *People v. Keener*, 55 Cal.2d 714, 723, 12 Cal. Rptr. 859, 864, 361 P.2d 587, 592 (1961), in which the court held that "where a search is made pursuant to a warrant valid on its face, the prosecution is not required to reveal the identity of the informer in order to establish the legality of the search and the admissibility of the evidence obtained as a result of it." Subdivision (b), however, applies to all official information, not merely to the identity of an informer.

Section 1152

We recommend that the following amendment be considered:

1152. (a) Evidence that a person has, in compromise or from humanitarian motives, furnished or offered or promised to furnish money or any other thing, act, or service to another who has sustained or claims to have sustained loss or damage, as well as any statements made in negotiation thereof, is inadmissible to prove ~~his liability for the loss or damage or any part of it~~ that anything is due.

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

(1) Partial satisfaction of an asserted claim or demand without questioning its validity when such evidence is offered 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 when such evidence is offered to prove the creation of a new duty on his part or a revival of his pre-existing duty.

The effect of the foregoing suggestion is merely to substitute the language of Code of Civil Procedure Section 2078 for the language we had approved. This may meet the San Francisco Bar's objection to this section.

Section 1156

Section 1156 was revised by the Commission at the January meeting as follows:

1156. (a) In-hospital medical staff committees of a licensed hospital may engage in research and medical study for the purpose of reducing morbidity or mortality, and may make findings and recommendations relating to such purpose. Except as provided in subdivision (b), the written reports of interviews, reports, statements, or memoranda of such in-hospital medical staff committees relating to such medical studies are subject to the Sections 2016 and to 2036, inclusive, of the Code of Civil Procedure (relating to discovery proceedings) but, subject to subdivisions ~~(b)~~ and (c) and (d), shall not be admitted as evidence in any action or before any administrative body, agency or person.

(b) The disclosure, with or without the consent of the patient, of information concerning him to such in-hospital medical staff committee does not make unprivileged any information that would otherwise be privileged under Section 994 or 1014; but, notwithstanding Sections 994 and 1014, such information is subject to discovery under subdivision (a) except that the identity of any patient may not be discovered under subdivision (a) unless the patient consents to such disclosure.

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

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

Comment. Section 1156 supersedes Code of Civil Procedure Section 1936.1 (added by Cal. Stats. 1963, Ch. 1558, § 1, p. 3142). Except as

noted below, Section 1156 restates the substance of the superseded section.

The phrase "Sections 2016 to 2036, inclusive," has been inserted in Section 1156 in place of the phrase "Sections 2016 and 2036," which appears in Section 1936.1, to correct an apparent inadvertence. This substitution permits use of all kinds of discovery procedures, instead of depositions only, to discover material of the type described in Section 1156. E.g., CODE CIV. PROC. §§ 2030 (written interrogatories); 2031 (motion for order for production of documents).

Section 1156 also makes it clear that the names of patients may not be disclosed without the consent of the patient. This limitation is necessary to preserve the physician-patient and psychotherapist-patient privileges.

Section 1203

The Commission approved this amendment at the January meeting:

1203. (a) The declarant of a statement that is admitted as hearsay evidence may be called and examined by any adverse party as if under cross-examination concerning the statement.

(b) This section is not applicable if the declarant is (1) a party, (2) a person identified with a party within the meaning of subdivision (d) of Section 776, or (3) a witness who has testified in the action concerning the subject matter of the statement.

(c) This section is not applicable if the statement is one described in Article 1 (commencing with Section 1220), Article 3 (commencing with Section 1235), or Article 10 (commencing with Section 1300) of Chapter 2 of this division.

(d) A statement that is otherwise admissible as hearsay evidence is not made inadmissible by this section because the declarant who made the statement is unavailable for examination pursuant to this section.

Comment. Hearsay evidence is generally excluded because the declarant was not in court and not subject to cross-examination before the trier of fact when he made the statement. *People v. Bob*, 29 Cal.2d 321, 325, 175 P.2d 12, 15 (1946).

In some situations, hearsay evidence is admitted because there is either some exceptional need for the evidence or some circumstantial probability of its trustworthiness, or both. *People v. Brust*, 47 Cal.2d 776, 785, 306 P.2d 480, 484 (1957); *Turney v. Sousa*, 146 Cal. App.2d 787, 791, 304 P.2d 1025, 1027-1028 (1956). Even though it may be necessary or desirable to permit certain hearsay evidence to be admitted despite the fact that the adverse party had no opportunity to cross-examine the declarant when the hearsay statement was made, there seems to be no reason to prohibit the adverse party from cross-examining the declarant concerning the statement. 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 received in evidence and to cross-examine him concerning his statement.

Section 1203, therefore, reverses (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. Because a hearsay declarant is in practical effect a witness against the party against whom his hearsay statement is admitted, Section 1203 gives that party 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.

Subdivisions (b) and (c) make Section 1203 inapplicable in certain situations where it would be inappropriate to permit a party to examine a hearsay declarant as if under cross-examination. Thus, for example, subdivision (b) does not permit counsel for a party to examine his own client as if under cross-examination merely because a hearsay statement of his client has been admitted; and, because a party should not have the right to cross-examine his own witness merely because the adverse party has introduced a hearsay statement of the witness, witnesses who have testified in the action concerning the statement are not subject to examination under Section 1203.

subject matter of the

Subdivision (d) makes it clear that the unavailability of a hearsay declarant for examination under Section 1203 has no effect on the admissibility of his hearsay statements. The subdivision forestalls any argument that availability of the declarant for examination under Section 1203 is an additional condition of admissibility for hearsay evidence.

We recommend the following amendment:

§ 1237. Past recollection recorded

1237. (a) 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, the statement concerns a matter as to which the witness has insufficient present recollection to enable him to testify fully and accurately, and the statement is contained in a writing which:

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

(2) (b) Was made (1) by the witness himself or under his direction or (2) by some other person for the purpose of recording the witness' statement at the time it was made;

(i) (1) (c) Is offered after the witness testifies that the statement he made was a true statement of such fact; and

(ii) (3) (d) Is offered after the writing is authenticated as an accurate record of the statement.

(4)

Comment. Section 1237 provides a hearsay exception for what is usually referred to as "past recollection recorded." Although the provisions of Section 1237 are taken largely from the provisions of Section 2047 of the Code of Civil Procedure, there are some substantive differences between Section 1237 and existing law.

Existing *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 the time when the fact recorded in the writing actually occurred or at another 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 if the person who recorded the statement is available to testify that he accurately recorded the statement.

Second, under Section 1237 the writing embodying the statement is itself admissible in evidence. Under present law, the declarant reads the writing on the witness stand; the writing is not otherwise made a part of the record unless it is offered in evidence by the adverse party.

(b) The writing may be read into evidence, but the writing itself may not be received in evidence unless offered by an adverse party.

Under subdivision (b), as under existing law, the statement must be read into evidence. See Anderson v. Souza, 38 Cal.2d 825, 243 P.2d 497 (1952). The adverse party, however, may introduce the writing as evidence. Cf. Horowitz v. Fitch, 216 Cal. App.2d 303, 30 Cal. Rptr. 882 (1963)(dictum).

Section 1241

We recommend the following amendment:

1241. Evidence of a statement is not made inadmissible by the hearsay rule if ~~the-declarant-is-unavailable-as-a-witness~~ and the statement:

(a) Purports to ~~narrate,-describe,~~ qualify or explain ~~an-act,-condition,-or-event-perceived-by~~ conduct of the declarant; and

(b) Was made while the declarant was ~~perceiving-the-act,~~ ~~condition,-or-event~~ engaged in such conduct.

Comment. Under existing law, where a person's conduct or act is relevant but is equivocal or ambiguous, the statements accompanying it may be admitted to explain and make the act or conduct understandable. CODE CIV. PROC. § 1850 (superseded by EVIDENCE CODE § 1241); WITKIN, CALIFORNIA EVIDENCE § 216 (1958). Some writers do not regard evidence of this sort as hearsay evidence, although the definition in Section 1200 seems applicable to many of the statements received under this exception. Cf. 6 WIGMORE, EVIDENCE §§ 1772 et seq. Section 1241 removes any doubt that might otherwise exist concerning the admissibility of such evidence under the hearsay rule.

Section 1250

At the January meeting, the Commission directed the staff to revise the Comment to Section 1250 to include some discussion such as that appearing in the revision below:

> *Comment.* Section 1250 provides an exception to the hearsay rule for statements of the declarant's *then* existing mental or physical state. 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 the then existing state of mind is itself an issue in the case. *Adkins v. Brett*, 184 Cal. 252, 193 Pac. 251 (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 or subsequent to the statement. *Watenpaugh v. State Teachers' Retirement System*, 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 No. 4*, 171 Cal. 260, 152 Pac. 731 (1915). Statements of then existing pain or other bodily condition also are 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 circumstances indicating that the statement is not trustworthy. See EVIDENCE CODE § 1252 and the *Comment* thereto.
>
> In light of the definition of "hearsay evidence" in Section 1200, 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, no hearsay problem is involved 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. 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 generally in accord with the law developed in the California cases. Thus, in *Estate of Anderson*, 185 Cal. 700, 198 Pac. 407 (1921), a testatrix, after the execution of a will, declared, in effect, that the will had been made at an aunt's request; this statement 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 certain murder victims' statements relating threats by the defendant were admissible to show the victims' mental state—their fear of the defendant. Their fear was not itself an 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, 13 Cal. Rptr. 801, 362 P.2d 713 (1961), the doctrine of the Merkouris case was apparently limited to cases where identity is an issue; however, at least one subsequent decision has applied the doctrine where identity was not in issue. See People v. Cooley, 211 Cal. App.2d 173, 27 Cal. Rptr. 543 (1962).

The doctrine of the *Merkouris* case is repudiated in Section 1250(b) because that doctrine undermines the hearsay rule itself. Other exceptions to the hearsay rule are based on some indicia of reliability peculiar to the evidence involved. *People v. Brust*, 47 Cal.2d 776, 785, 306 P.2d 480, 484 (1957). The exception created by *Merkouris* is not based on any probability of reliability; it is based on a rationale that destroys the very foundation of the hearsay rule.

To be distinguished from the Merkouris decision, however, are certain other cases in which the statements of a murder victim have been used to prove or explain subsequent acts of the decedent, and are not used as a basis for inferring that the defendant did the acts charged in the statements. See, e.g., People v. Atchley, 53 Cal.2d 160, 172, 346 P.2d 764, 770 (1959); People v. Finch, 213 Cal. App.2d 752, 765, 29 Cal. Rptr. 420, 427 (1963). Statements of a decedent's then state of mind--i.e., his fear--may be offered under Section 1250, as under existing law, either to prove that fear when it is itself in issue or to prove or explain the decedent's subsequent conduct. Statements of a decedent narrating threats or brutal conduct by some other person may also be used as circumstantial evidence of the decedent's state of mind--his fear--when that fear is itself in issue or when it is relevant to prove or explain

the decedent's subsequent conduct; and for that purpose, the evidence is not subject to a hearsay objection for it is not offered to prove the truth of the matters stated. See the Comment to Section 1200. See also the Comment to Section 1252. But when such evidence is used as a basis for inferring that the alleged threatener must have made threats, the evidence falls within the language of Section 1250(b) and is inadmissible hearsay evidence.

Section 1261

The Commission approved the following amendment at the January meeting:

1261. (a) Evidence of a statement is not made inadmissible by the hearsay rule when offered in an action upon a claim or demand against the estate of the declarant if the statement was ~~(a)~~ made upon the personal knowledge of the declarant at a time when the matter had been recently perceived by him and while his recollection was clear ~~, and~~.

(b) Evidence of a statement is inadmissible under this Section if the statement was made under circumstances such as to indicate its lack of trustworthiness.

Section 1291

The Commission approved the amendment to subdivision (a) at the January meeting. In addition, we recommend the amendment indicated to subdivision (b).

1291. (a) Evidence of former testimony is not made inadmissible by the hearsay rule 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 the declarant 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 paragraph against the defendant in a criminal action unless it was received in evidence at the trial of such other action.~~

~~(b)--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~~ (b) The admissibility of former testimony under this section is subject to the same limitations and objections as though the declarant were testifying at the hearing, except that former testimony offered under this section is not subject to 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.

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 arises 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. 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 the declarant.

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 interest and motive to cross-examine the declarant. The determination of similarity of interest and motive in cross-examination should be based on practical considerations and not merely on 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.

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 these matters 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)*, 6 CAL. LAW REVISION COMM'N, REP., REC. & STUDIES *Appendix* at 581-585 (1964).

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 phrased the question himself; and where the former testimony is admitted 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.

Section 1292

We recommend the following amendment:

§ 1292. Former testimony offered against person not a party to former proceeding

1292. (a) Evidence of former testimony is not made inadmissible by the hearsay rule if:

(1) The declarant is unavailable as a witness;

(2) The former testimony is offered in a civil action or against the prosecution 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 the declarant with an interest and motive similar to that which the party against whom the testimony is offered has at the hearing.

~~(b)--Except-for-objections-based-on-competency-or-privilege which-did-not-exist-at-the-time-the-former-testimony-was-given, the~~ (b) The admissibility of former testimony under this section is subject to the same limitations and objections as though the declarant were testifying at the hearing, except that former testimony offered under this section is not subject to objections based on competency or privilege which did not exist at the time the former testimony was given.

Section 1410

We recommend the following amendment:

1410. ~~A writing is sufficiently authenticated to be received in evidence if there is any evidence sufficient to sustain a finding of the authenticity of the writing; and~~ Nothing in this article shall be construed to limit the means by which ~~the authenticity of~~ a writing may be ~~shown~~ authenticated or proved.

Section 1414

We recommend the following amendment:

1414. A writing may be authenticated by evidence that:

(a) The party against whom it is offered has at any time admitted its authenticity; or

(b) The writing ~~is produced from the custody of the party against whom it is offered and~~ has been acted upon by him as authentic.

Section 1415

We recommend the following amendment:

1415. A writing may be authenticated by evidence of the ~~authenticity~~ genuineness of the handwriting of the maker.

Section 1417

We recommend the following amendment:

1417. The ~~authenticity~~ genuineness of handwriting, or the lack thereof, may be proved by a comparison made by the trier of fact with handwriting (a) which the court finds was admitted

or treated as ~~authentic~~ genuine by the party against whom the evidence is offered or (b) otherwise proved to be ~~authentic~~ genuine to the satisfaction of the court.

Section 1418

We recommend the following amendment:

1418. The ~~authenticity~~ genuineness of writing, or the lack thereof, may be proved by a comparison made by an expert witness with writing (a) which the court finds was admitted or treated as ~~authentic~~ genuine by the party against whom the evidence is offered or (b) otherwise proved to be ~~authentic~~ genuine to the satisfaction of the court.

Section 1419

We recommend the following amendment:

1419. Where a writing whose genuineness is sought to be ~~introduced in evidence~~ proved is more than 30 years old, the comparison under Section 1417 or 1418 may be made with writing purporting to be ~~authentic~~ genuine, and generally respected and acted upon as such, by persons having an interest in knowing whether it is ~~authentic~~ genuine .

Title of Article 3, Chapter 1, Division 11 (commencing with Section 1450

We recommend the following amendment:

Article 3. Presumptions Affecting Acknowledged Writings and Official Writings

Section 1562

We recommend the following amendment:

1562. 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 pursuant to Section 1561 are presumed true. When more than one person has knowledge of the facts, more than one affidavit may be made. The presumption established by this section is a presumption affecting the burden of ~~proof~~ producing evidence.

Comment. Section 1562 supersedes the provisions of Code of Civil Procedure Section 1998.2. Under Section 1998.2, the presumption provided in this section could be overcome only by a preponderance of the evidence. Section 1562, however, classifies the presumption as affecting the burden of producing evidence only. See EVIDENCE CODE §§ 603 and 604 and the Comments thereto. Section 1562 makes it clear, too, that the presumption relates only to the truthfulness of the matters required to be stated in the affidavit by Section 1561. Other matters that may be stated in the affidavit derive no presumption of truthfulness from the fact that they have been included in it.

STATE OF CALIFORNIA
Supreme Court of California

PROOF OF SERVICE

STATE OF CALIFORNIA
Supreme Court of California

Case Name: **BERROTERAN v. S.C. (FORD MOTOR COMPANY)**
Case Number: **S259522**
Lower Court Case Number: **B296639**

1. At the time of service I was at least 18 years of age and not a party to this legal action.

2. My email address used to e-serve: **fcohen@horvitzlevy.com**

3. I served by email a copy of the following document(s) indicated below:

Title(s) of papers e-served:

Filing Type	Document Title
BRIEF	S259522_OBOM_FordMotorCompany
REQUEST FOR JUDICIAL NOTICE	S259522_MJN_FordMotorCompany
ADDITIONAL DOCUMENTS	S259522_01 of 14 - Exhs. to MJN
ADDITIONAL DOCUMENTS	S259522_02 of 14 - Exhs. to MJN
ADDITIONAL DOCUMENTS	S259522_03 of 14 - Exhs. to MJN
ADDITIONAL DOCUMENTS	S259522_04 of 14 - Exhs. to MJN
ADDITIONAL DOCUMENTS	S259522_05 of 14 - Exhs. to MJN
ADDITIONAL DOCUMENTS	S259522_06 of 14 - Exhs. to MJN
ADDITIONAL DOCUMENTS	S259522_07 of 14 - Exhs. to MJN
ADDITIONAL DOCUMENTS	S259522_08 of 14 - Exhs. to MJN
ADDITIONAL DOCUMENTS	S259522_09 of 14 - Exhs. to MJN
ADDITIONAL DOCUMENTS	S259522_10 of 14 - Exhs. to MJN
ADDITIONAL DOCUMENTS	S259522_11 of 14 - Exhs. to MJN
ADDITIONAL DOCUMENTS	S259522_12 of 14- Exhs. to MJN
ADDITIONAL DOCUMENTS	S259522_13 of 14 - Exhs. to MJN
ADDITIONAL DOCUMENTS	S259522_14 of 14 - Exhs. to MJN

Service Recipients:

Person Served	Email Address	Type	Date / Time
Frederic Cohen Horvitz & Levy LLP 56755	fcohen@horvitzlevy.com	e-Serve	5/13/2020 3:42:05 PM
Millie Cowley Horvitz & Levy LLP	mcowley@horvitzlevy.com	e-Serve	5/13/2020 3:42:05 PM
Steve Mikhov Knight Law Group 224676	stevem@knightlaw.com	e-Serve	5/13/2020 3:42:05 PM
Cynthia Tobisman Greines, Martin, Stein & Richland LLP 197983	ctobisman@gmsr.com	e-Serve	5/13/2020 3:42:05 PM
Connie Gutierrez Faegre Drinker Biddle & Reath LLP	connie.gutierrez@dbr.com	e-Serve	5/13/2020 3:42:05 PM

J.Alan Warfield Polsinelli LLP 186559	jalanwarfield@polsinelli.com	e-Serve	5/13/2020 3:42:05 PM
Matthew Proudfoot Gates, O'Doherty, Gonter & Guy, LLP	mproudfoot@gogglaw.com	e-Serve	5/13/2020 3:42:05 PM
Cara Sherman ONGARO PC 269343	csherman@ongaropc.com	e-Serve	5/13/2020 3:42:05 PM
Monique Aguirre Greines Martin Stein & Richland LLP	maguirre@gmsr.com	e-Serve	5/13/2020 3:42:05 PM
Julian Senior SJL Law. P.C 219098	admin@sjllegal.com	e-Serve	5/13/2020 3:42:05 PM
Jo-Anne Novik Horvitz & Levy LLP	jnovik@horvitzlevy.com	e-Serve	5/13/2020 3:42:05 PM
Alan Lazarus Faegre Drinker Biddle & Reath LLP 129767	alan.lazarus@dbr.com	e-Serve	5/13/2020 3:42:05 PM
Frederick Bennett Superior Court of Los Angeles County 47455	fbennett@lacourt.org	e-Serve	5/13/2020 3:42:05 PM
Justin Sanders Sanders Roberts LLP 211488	breyes@sandersroberts.com	e-Serve	5/13/2020 3:42:05 PM
Lisa Perrochet Horvitz & Levy 132858	lperrochet@horvitzlevy.com	e-Serve	5/13/2020 3:42:05 PM
Justin Sanders Sanders Roberts LLP	jsanders@sandersroberts.com	e-Serve	5/13/2020 3:42:05 PM
Edward Xanders Greines, Martin, Stein & Richland LLP 145779	exanders@gmsr.com	e-Serve	5/13/2020 3:42:05 PM
Chris Hsu Greines Martin Stein & Richland LLP	chsu@gmsr.com	e-Serve	5/13/2020 3:42:05 PM
Fred Hiestand Attorney at Law 44241	fred@fjh-law.com	e-Serve	5/13/2020 3:42:05 PM
John M. Thomas Dykema Gossett 266842	jthomas@dykema.com	e-Serve	5/13/2020 3:42:05 PM
Lauren Ungs	laurenu@knightlaw.com	e-Serve	5/13/2020 3:42:05 PM
Bryan Altman	bryan@altmanlawgroup.net	e-Serve	5/13/2020 3:42:05 PM
Christopher Urner	c.urner@altmanlawgroup.net	e-Serve	5/13/2020 3:42:05 PM
Darth Vaughn	dvaughn@sandersroberts.com	e-Serve	5/13/2020 3:42:05 PM
Sabrina Narain	snarain@sandersroberts.com	e-Serve	5/13/2020 3:42:05 PM

299471			
FREDERICK BENNETT III	pnguyen@lacourt.org	e-Serve	5/13/2020 3:42:05 PM

This proof of service was automatically created, submitted and signed on my behalf through my agreements with TrueFiling and its contents are true to the best of my information, knowledge, and belief.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

5/13/2020

Date

/s/Frederic Cohen

Signature

Cohen, Frederic (56755)

Last Name, First Name (PNum)

Horvitz & Levy LLP

Law Firm