

Date of Meeting: November 27-28, 1959

Date of Memo: November 1, 1959.

Memorandum No. 1

Subject: Uniform Rules of Evidence - Hearsay Evidence Division

In addition to the summary contained in Appendix B, (attached), you may refer for a detailed step by step summary of action taken by the Commission and the Bar Committee on the Hearsay Evidence division of Uniform Rules of Evidence to the summary dated November 13, 1958 (a copy of which is enclosed with this memorandum).

In considering these materials, two general comments should be kept in mind:

(1) The phrase "action or proceeding" has been substituted in the revised rules for the word "proceeding" or "action." This is in accord with a decision of the Commission that the phrase "action or proceeding" should be used in the Uniform Rules of Evidence where appropriate.

(2) Rule 65A, a new rule, should be studied before considering the other rules in the Hearsay Evidence Division since Rule 65A is referred to in a number of the exceptions to Rule 63.

Respectfully submitted,

John H. DeMouilly
Executive Secretary

(34(L))

A P P E N D I X A

TEXT OF

Revised Uniform Rules of Evidence - Hearsay Evidence Division

November 1, 1959

Note: This is Uniform Rule 62 as revised by the Commission. Changes in the Uniform Rule (other than the mere shifting of language from one part of the rule to another) are shown by underlined material for new material and by bracketed and strike out material for deleted material.

RULE 62. DEFINITIONS.

As used in [~~Rule 63 and its exceptions and in the following rules,~~]

Rules 62 to 66, inclusive:

(1) [~~(2)~~] "Declarant" is a person who makes a statement.

(2) [~~(3)~~] "Perceive" means acquire knowledge through one's own senses.

(3) [~~(4)~~] "Public [~~Official~~] officer or employee of a state or territory of the United States" includes: [~~an official of a political subdivision of such state or territory and of a municipality.~~]

(a) In this State, an officer or employee of the State or of any county, city, city and county, district, authority, agency or other political subdivision of the State.

(b) In other states and in territories of the United States, an officer or employee of any public entity that is substantially equivalent to those included under subparagraph (a) of this paragraph.

(4) [~~(5)~~] "State" includes each of the United States and the District of Columbia.

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

(6) [~~(7)~~] "Unavailable as a witness" includes situations where

the witness is:

- (a) Exempted on the ground of privilege from testifying concerning the matter to which his statement is relevant. [~~7-er~~]
- (b) Disqualified from testifying to the matter. [~~7-er~~]
- (c) Dead or unable [~~to-be-present~~] to testify at the hearing because of [~~death-or-then-existing~~] physical or mental illness. [~~7-er~~]
- (d) Absent beyond the jurisdiction of the court to compel appearance by its process. [~~7-er~~]
- (e) Absent from the [~~place-of~~] hearing [~~because~~] and the proponent of his statement does not know and with diligence has been unable to ascertain his whereabouts.

But a witness is not unavailable:

(a) If the judge finds that [~~his~~] the exemption, disqualification, inability or absence of the witness is due to (i) the procurement or wrongdoing of the proponent of his statement for the purpose of preventing the witness from attending or testifying [~~7~~] or [~~he~~] (ii) the culpable act or neglect of such [~~party~~] proponent; [~~7~~] or

(b) If unavailability is claimed [~~under-clause-(a)-of-the-preceding paragraph~~] because the witness is absent beyond the jurisdiction of the court to compel appearance by its process and the judge finds that the deposition of the declarant could have been taken by the proponent by the exercise of reasonable diligence and without undue hardship [~~7~~] or expense. [~~and-that-the-probable-importance-of-the-testimony-is-such-as-to justify-the-expense-of-taking-such-deposition.~~]

[~~(6)--"A-business"-as-used-in-exception-(13)-shall-include-every kind-of-business,-profession,-occupation,-calling-or-operation-of-institutions,-whether-carried-on-for-profit-or-not.~~]

Note: This is Uniform Rule 63 as revised by the Commission. Changes in the Uniform Rule (other than the mere shifting of language from one part of the rule to another) are shown by underlined material for new material and by bracketed and strike out material for deleted material.

RULE 63. HEARSAY EVIDENCE EXCLUDED -- EXCEPTIONS.

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

(1) [~~A statement previously made by a person who is present at the hearing and available for cross-examination with respect to the statement and its subject matter, provided the statement would be admissible if made by declarant while testifying as a witness;~~] When a person is a witness at the hearing, a statement made by him, though not made at the hearing, is admissible to prove the truth of the matter stated if the statement would have been admissible if made by him while testifying and the statement:

(a) Is inconsistent with his testimony at the hearing and is offered in compliance with Rule 22; or

(b) Is offered after evidence of a prior inconsistent statement or of a recent fabrication by the witness has been received and the statement is one made before the alleged inconsistent statement or fabrication and is consistent with his testimony at the hearing; or

(c) Concerns a matter as to which the witness has no present recollection and is a writing which was made at a time when the facts

recorded in the writing actually occurred or at such other time when the facts recorded in the writing were fresh in the witness's memory and the writing was made (i) by the witness himself or under his direction or (ii) by some other person for the purpose of recording the witness's statement at the time it was made.

(2) [~~Affidavits-to-the-extent-admissible-by-the-statutes-of-this State;~~] To the extent otherwise admissible under the law of this State:

(a) Affidavits.

(b) Depositions taken in the action or proceeding in which they are offered.

(c) Testimony given by a witness in a prior trial or preliminary hearing of the action or proceeding in which it is offered.

(3) [~~Subject-to-the-same-limitations-and-objections-as-though the-declarant-were-testifying-in-person,-(a)-testimony-in-the-form-of-a deposition-taken-in-compliance-with-the-law-of-this-state-for-use-as testimony-in-the-trial-of-the-action-in-which-offered,-or-(b)-if-the judge-finds-that-the-declarant-is-unavailable-as-a-witness-at-the-hearing, testimony-given-as-a-witness-in-another-action-or-in-a-deposition-taken in-compliance-with-law-for-use-as-testimony-in-the-trial-of-another-action, when-(i)-the-testimony-is-offered-against-a-party-who-offered-it-in-his own-behalf-on-the-former-occasion,-or-against-the-successor-in-interest-of such-party,-or-(ii)-the-issue-is-such-that-the-adverse-party-on-the-former occasion-had-the-right-and-opportunity-for-cross-examination-with-an interest-and-motive-similar-to-that-which-the-adverse-party-has-in-the action-in-which-the-testimony-is-offered;~~] Subject to the same limitations and objections as though the declarant were testifying in person, testimony

given under oath or affirmation as a witness in another action or proceeding conducted by or under the supervision of a court or other official agency having the power to determine controversies or testimony taken by deposition taken in compliance with law in such an action or proceeding, but only if the judge finds that the declarant is unavailable as a witness at the hearing and that:

(a) Such testimony is offered against a party who offered it in evidence on his own behalf in the other action or proceeding or against the successor in interest of such party; or

(b) In a civil action or proceeding, the issue is such that the adverse party in the other action or proceeding had the right and opportunity for cross-examination with an interest and motive similar to that which the adverse party has in the action or proceeding in which the testimony is offered; or

(c) In a criminal action or proceeding, the present defendant was a party to the other action or proceeding and had the right and opportunity for cross-examination with an interest and motive similar to that which he has in the action or proceeding in which the testimony is offered except that the testimony given at a preliminary hearing in the other action or proceeding is not admissible.

(4) Subject to Rule 65A, a statement:

(a) Which the judge finds was made while the declarant was perceiving the event or condition which the statement narrates, describes or explains; [,] or

(b) Which the judge finds [~~was-made-while-the-declarant-was~~

~~under the stress of a nervous excitement caused by such perception, or~~
(i) purports to state what the declarant perceived relating to an event or condition which the statement narrates, describes or explains and (ii) was made spontaneously while the declarant was under the stress of a nervous excitement caused by such perception.

~~{(e)--if the declarant is unavailable as a witness, a statement narrating, describing or explaining an event or condition which the judge finds was made by the declarant at a time when the matter had been recently perceived by him and while his recollection was clear, and was made in good faith prior to the commencement of the action;}~~

(5) Subject to Rule 65A, a statement by a [person unavailable as a witness because of his death] decedent if the judge finds that it was made upon the personal knowledge of the declarant, under a sense of impending death, voluntarily and in good faith and [while the declarant was conscious of his impending death and believed] in the belief that there was no hope of his recovery. [4]

(6) ~~[In a criminal proceeding as against the accused, a previous statement by him relative to the offense charged if, and only if, the judge finds that the accused when making the statement was conscious and was capable of understanding what he said and did, and that he was not induced to make the statement (a) under compulsion or by infliction or threats of infliction of suffering upon him or another, or by prolonged interrogation under such circumstances as to render the statement involuntary, or (b) by threats or promises concerning action to be taken by a~~

~~public official with reference to the crime, likely to cause the accused to make such a statement falsely, and made by a person whom the accused reasonably believed to have the power or authority to execute the same;~~]

Subject to Rule 65A, in a criminal action or proceeding, as against the defendant, a previous statement by him relative to the offense charged, unless the judge finds pursuant to the procedures set forth in Rule 8 that the statement was made:

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

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

(7) Subject to Rule 65A and except as provided in paragraph (6) of this rule, as against himself, a statement by a person who is a party to the action or proceeding in his individual or [a] representative capacity. [and-if-the-latter,-who-was-acting-in-such-representative capacity-in-making-the-statement;]

(8) Subject to Rule 65A, as against a party, a statement:

(a) By a person authorized by the party to make a statement or statements for him concerning the subject matter of the statement; [;]
or

(b) Of which the party with knowledge of the content thereof has, by words or other conduct, manifested his adoption or his belief in its truth. [;]

(9) As against a party, a statement which would be admissible if made by the declarant at the hearing if:

(a) The statement concerned a matter within the scope of an agency or employment of the declarant for the party and was made before the termination of such relationship; [7] or

(b) [~~the party and the declarant were participating in a plan to commit a crime or a civil wrong and the statement was relevant to the plan or its subject matter and was made while the plan was in existence and before its complete execution or other termination,~~] The statement is that of a co-conspirator of the party and (i) the statement was made prior to the termination of the conspiracy and in furtherance of the common object thereof and (ii) the statement is offered after proof by independent evidence of the existence of the conspiracy and that the declarant and the party were both parties to the conspiracy at the time the statement was made; or

(c) In a civil action or proceeding, one of the issues between the party and the proponent of the evidence of the statement is a legal liability of the declarant, and the statement tends to establish that liability. [8]

(10) [~~Subject to the limitations of exception-(6),~~] Subject to Rule 65A, if the declarant is not a party to the action or proceeding and is unavailable as a witness, and if the judge finds that the declarant had sufficient knowledge of the subject, a statement which the judge finds was at the time of the [assertion] statement so far contrary to the declarant's pecuniary or proprietary interest or so far

subjected him to civil or criminal liability or so far rendered invalid a claim by him against another or created such risk of making him an object of hatred, ridicule or social disapproval in the community that a reasonable man in his position would not have made the statement unless he believed it to be true. [†]

~~[(11)--A-statement-by-a-veter-concerning-his-qualifications-to vote-or-the-fact-or-content-of-his-vote;]~~

(12) Subject to Rule 65A, unless the judge finds it was made in bad faith, a statement of the declarant's:

(a) Then existing state of mind, emotion or physical sensation, including statements of intent, plan, motive, design, mental feeling, pain and bodily health, but not including memory or belief to prove the fact remembered or believed, when such a mental or physical condition is in issue or is relevant to prove or explain acts or conduct of the declarant. [, or]

(b) Previous symptoms, pain or physical sensation, made to a physician consulted for treatment or for diagnosis with a view to treatment, and relevant to an issue of declarant's bodily condition. [†]

(13) ~~[Writings-offered-as-memoranda-or-records-of-acts,-conditions-or-events-to-prove-the-facts-stated-therein,-if-the-judge-finds-that they-were-made-in-the-regular-course-of-a-business-at-or-about-the-time of-the-act,-condition-or-event-recorded,-and-that-the-sources-of-information-from-which-made-and-the-method-and-circumstances-of-their-preparation~~

~~Were such as to indicate their trustworthiness;~~ A writing offered as a record of an act, condition or event if the custodian or other qualified witness testifies to its identity and the mode of its preparation and if the judge finds that it was made in the regular course of a business, at or near the time of the act, condition or event, and that the sources of information, method and time of preparation were such as to indicate its trustworthiness. As used in this paragraph, "a business" includes every kind of business, profession, occupation, calling or operation of institutions, whether carried on for profit or not.

(14) Evidence of the absence [~~of a memorandum or record~~] from the [~~memoranda or~~] records of a business (as defined in paragraph (13) of this rule) of a record of an asserted act, event or condition, to prove the non-occurrence of the act or event, or the non-existence of the condition, if the judge finds that:

(a) It was the regular course of that business to make [such memoranda] records of all such acts, events or conditions at the time thereof or within a reasonable time thereafter, and to preserve them; and

(b) The records of that business were prepared from such sources of information and by such methods as to indicate their trustworthiness.

(15) Subject to Rule 64, statements of fact contained in a written report [~~s or findings of fact~~] made by a public [official] officer or employee of the United States or by a public officer or employee of a state or territory of the United States, if the judge finds

that the making thereof was within the scope of the duty of such

[official] officer or employee and that it was his duty to:

- (a) [te] Perform the act reported; [y] or
- (b) [te] Observe the act, condition or event reported; [y] or
- (c) [te] Investigate the facts concerning the act, condition or event. [~~and-to-make-findings-or-draw-conclusions-based-on-such-investigations;~~]

(16) Subject to Rule 64, writings made by persons other than public officers or employees as a record, report or finding of fact, if the judge finds that:

(a) The maker was authorized by a statute of the United States or of a state or territory of the United States to perform, to the exclusion of persons not so authorized, the functions reflected in the writing, and was required by statute to file in a designated public office a written report of specified matters relating to the performance of such functions; [y] and

(b) The writing was made and filed as so required by the statute. [y]

(17) Subject to rule 64; [y]

(a) If meeting the requirements of authentication under Rule 68, to prove the content of the record, a writing purporting to be a copy of an official record or of an entry therein. [y]

(b) If meeting the requirements of authentication under Rule 69, to prove the absence of a record in a specified office, a writing made by

the official custodian of the official records of the office, reciting diligent search and failure to find such record. [;]

(18) Subject to Rule 64, [~~certificates~~] a certificate that the maker thereof performed a marriage ceremony, to prove the truth of the recitals thereof, if the judge finds that:

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

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

(19) Subject to Rule 64, the official record of a document purporting to establish or affect an interest in property, to prove the content of the original recorded document and its execution and delivery by each person by whom it purports to have been executed, if the judge finds that:

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

(b) An applicable statute authorized such a document to be recorded in that office. [;]

(20) Subject to Rule 64, evidence of a final judgment adjudging a person guilty of a felony, to prove, against such person, any fact essential to sustain the judgment. [;]

(21) To prove the wrong of the adverse party and the amount of damages sustained by the judgment creditor, evidence of a final judgment if:

(a) Offered by a judgment debtor in an action or proceeding in which he seeks to recover partial or total indemnity or exoneration for money paid or liability incurred by him because of the judgment; and [, -provided]

(b) The judge finds that the judgment was rendered for damages sustained by the judgment creditor as a result of the wrong of the adverse party to the present action or proceeding. [†]

(22) To prove any fact which was essential to the judgment, evidence of a final judgment determining the interest or lack of interest of the public or of a state or nation or governmental subdivision thereof in land, if offered by a party in an action or proceeding in which any such fact or such interest or lack of interest is a material matter. [†]

(23) Subject to Rule 65A, a statement of a matter concerning a declarant's own birth, marriage, divorce, legitimacy, relationship by blood or marriage, race-ancestry or other similar fact of his family history, even though the declarant had no means of acquiring personal knowledge of the matter declared, if the judge finds that the declarant is unavailable as a witness. [-†-]

(24) Subject to Rule 65A, 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 if the judge finds that the declarant is unavailable as a witness and finds that:

(a) [~~finds-that~~] The declarant was related to the other by blood or marriage; or

(b) [~~finds-that-he~~] The declarant was otherwise so intimately associated with the other's family as to be likely to have accurate information concerning the matter declared [,] and made the statement (i) as upon information received from the other or from a person related by blood or marriage to the other [,] or (ii) as upon repute in the other's family. [, and (b) ~~finds that the declarant is unavailable as a witness;~~]

(25) [~~A statement of a declarant that a statement admissible under exceptions (23) or (24) of this rule was made by another declarant, offered as tending to prove the truth of the matter declared by both declarants, if the judge finds that both declarants are unavailable as witnesses;~~]

(26) Evidence of reputation among members of a family, if:

(a) The reputation concerns the birth, marriage, divorce, death, legitimacy, race-ancestry or other fact of the family history of a member of the family by blood or marriage; and

(b) The evidence consists of (i) a witness testifying to his knowledge of such reputation or (ii) entries in family bibles or other family books or charts, engravings on rings, family portraits, engravings on urns, crypts and tombstones and similar evidence.

(27) Evidence of reputation in a community as tending to prove the truth of the matter reputed, if ~~[-(a)-]~~ the reputation concerns:

(a) Boundaries of, or customs affecting, land in the community [,] and the judge finds that the reputation, if any, arose before controversy. ~~[,-er]~~

(b) ~~[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 judge finds that the event was of importance to the community. ~~[,-er]~~

(c) ~~[the-reputation-concerns]~~ The date or fact of birth, marriage, divorce [,] or death~~[,legitimacy,-relationship-by-blood-or-marriage, or-race-ancestry]~~ of a person resident in the community at the time of the reputation. ~~[,-er-some-other-similar-fact-of-his-family-history-or-of-his-personal-status-or-condition-which-the-judge-finds-likely-to-have-been-the-subject-of-a-reliable-reputation-in-that-community;]~~

(28) If a person's character or a trait of a person's character at a specified time is material, evidence of his general reputation with reference thereto at a relevant time in the community in which he then resided or in a group with which he then habitually associated, to prove the truth of the matter reputed. [;]

(29) Subject to Rule 64, evidence of a statement relevant to a material matter, contained in:

(a) A deed of conveyance or a will or other ~~[document]~~ writing purporting to affect an interest in property, offered as tending to prove

the truth of the matter stated, if the judge finds that the matter stated would be relevant upon an issue as to an interest in the property [,] and that the dealings with the property since the statement was made have not been inconsistent with the truth of the statement. [†]

(b) A writing more than 30 years old when the statement has been since generally acted upon as true by persons having an interest in the matter, if the writer could have been properly allowed to make such statement as a witness.

(30) Evidence of statements of matters of interest to persons engaged in an occupation contained in a list, register, periodical [,] or other published compilation to prove the truth of any relevant matter so stated if the judge finds that the compilation is published for use by persons engaged in that occupation and is generally used and relied upon by them. [†]

(31) A published treatise, periodical or pamphlet on a subject of history, science or art to prove the truth of a matter stated therein if the judge takes judicial notice, or a witness expert in the subject testifies, that the treatise, periodical or pamphlet is a reliable authority on the subject.

Note: This is Uniform Rule 64 as revised by the Commission. Changes in the Uniform Rule (other than the mere shifting of language from one part of the rule to another) are shown by underlined material for new material and by bracketed and strike out material for deleted material.

RULE 64. DISCRETION OF JUDGE UNDER CERTAIN EXCEPTIONS TO HEARSAY
RULE TO EXCLUDE EVIDENCE.

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

Note: This is Uniform Rule 65 as revised by the Commission. Changes in the Uniform Rule (other than the mere shifting of language from one part of the rule to another) are shown by underlined material for new material and by bracketed and strike out material for deleted material.

RULE 65. CREDIBILITY OF DECLARANT.

Evidence of a statement or other conduct by a declarant inconsistent with a statement of such declarant received in evidence under an exception to Rule 63 [,] is admissible for the purpose of discrediting the declarant, though he had no opportunity to deny or explain such inconsistent statement or other conduct. Any other evidence tending to impair or support the credibility of the declarant is admissible if it would have been admissible had the declarant been a witness.

(34(L))

10/22/59

Note: This is a new rule proposed by the Law Revision Commission.

RULE 65A. QUALIFICATION OF DECLARANT. [NEW]

Any statement otherwise admissible under paragraph (4), (5), (6), (7), (8), (10), (12), (23) or (24) of Rule 63 is inadmissible if the judge finds that at the time of making the statement the declarant did not possess the capacities requisite to qualify as a witness under Rule 17. The burden of establishing that a statement is inadmissible because of the provisions of this section is upon the person objecting to the admission of the evidence.

Note: This is Uniform Rule 66 as revised by the Commission. Changes in the Uniform Rule (other than the mere shifting of language from one part of the rule to another) are shown by underlined material for new material and by bracketed and strike out material for deleted material.

RULE 66. MULTIPLE HEARSAY.

A statement within the scope of an exception to Rule 63 [~~shall~~] is not [~~be~~] inadmissible on the ground that it includes a statement made by another declarant and is offered to prove the truth of the included statement if such included statement itself meets the requirements of an exception.

(34(L))

A P P E N D I X B

ACTION TAKEN

on

Uniform Rules of Evidence -- Hearsay Evidence Division

This summary indicates the action taken on the Uniform Rules of Evidence (Hearsay Evidence Division) by (1) the California Law Revision Commission and (2) the State Bar Committee to Consider the Uniform Rules of Evidence.

November 1, 1959

10/26/59

RULE 62 DEFINITIONS

Commission: The Commission has not finally approved paragraphs (3) and (4) of the revised rule.

The Commission considered deletion of subparagraph (b) of the first paragraph of paragraph (6) of the revised rule but deferred final decision pending receipt of a report from our research consultant. This report, entitled "Whether Rules Which Disqualify Certain Persons as Witnesses Also Disqualify Hearsay Declarants" (Sept. 29, 1958), was distributed at the last meeting. Our consultant does not recommend the deletion of paragraph (6) (b) of the revised rule; he does recommend some changes in Rule 63 because of the provisions of revised rule 62(6) (first paragraph) (b) and in substance recommends the new rule 65A.

ACTION BY
STATE BAR
COMMITTEE
AND BY
COMMISSION
REQUIRED

The Commission has not considered the transfer of the definition of "a business" from Uniform Rule 62 to exception (13) of revised rule 63 (to which this definition applies).

Bar Committee: The State Bar Committee has not finally approved the final form of the revised rule and has not considered the transfer of the definition of "a business" from Uniform Rule 62 to exception (13) of revised rule 63 (to which this definition applies).

Note: The staff made a number of changes in the form of this rule. The definitions are arranged in alphabetical order and the entire rule is put in tabulated form to improve readability. The sections to which the definitions apply have been clearly specified in the revised rule. The definition of "a business" has been transferred from Rule 62 to exception (13) of revised rule 63.

RULE 63 HEARSAY EVIDENCE EXCLUDED -- EXCEPTIONS

The General Rule

Commission: Approved without change.

Bar Committee: Approved without change.

Paragraph (1) - Previous Statements of Witnesses at Hearing.

Commission: All members present (three) voted in favor of revised rule. The Commission has not, however, approved the revised rule.

ACTION BY
COMMISSION
REQUIRED

Bar Committee: Approved as revised (in substance).

Note: The Commission staff has made a revision in form of subparagraph (c) of revised rule 63(1). Some changes in form of rule have been made by the staff.

Paragraph (2) - Affidavits; Depositions and Prior Testimony in Same Proceeding.

Commission: Approved as revised.

Bar Committee: Approved as revised.

Note: The Commission staff has inserted "or proceeding" after "action" in two places.

Paragraph (3) - Depositions and Prior Testimony in Another Proceeding.

Commission: Approved as revised.

Bar Committee: Approved as revised.

Note: The Commission staff has substituted "action or proceeding" for "proceeding" in this rule and has improved the form of the revised rule.

Paragraph (4) - Spontaneous Statements.

Commission: Approved as revised (but see note below).

Bar Committee: Approved as revised (but see note below)
EXCEPT Bar Committee would insert prior to
"a statement" in the introductory clause

BAR COMMITTEE
AND COMMISSION
NOT IN AGREE-

the words "if the declarant is unavailable as a witness or testifies that he does not recall the event or condition involved."

MENT; ACTION BY
BOTH BAR
COMMITTEE AND
COMMISSION
REQUIRED

Note: Neither the Bar nor the Commission has approved the insertion of the words "Subject to Rule 65A."

The Commission does not agree with the Bar on the insertion of the words indicated under the prior action of the Bar Committee.

The Commission staff has improved the form of the rule.

Paragraph (5) - Dying Declarations.

Commission: Approved as revised (but see note below).

Bar Committee: Approved as revised (but see note below).

Note: Neither the Bar nor the Commission has approved the insertion of the words "Subject to Rule 65A."

ACTION BY
BAR COMMITTEE
AND COMMISSION
REQUIRED

Paragraph (6) - Confessions and Other Admissions in Criminal Proceedings.

Commission: Approved as revised (but see note below).

Bar Committee: Has not acted on revised rule.

Note: Neither the Bar nor the Commission has approved the insertion of the words "Subject to Rule 65A."

The Bar Committee has not considered this revised rule.

"Action or proceeding" has been substituted for "proceeding" and "defendant" has been substituted for "accused" and the form of the rule has otherwise been improved.

ACTION BY
BAR COMMITTEE
AND COMMISSION
REQUIRED

Paragraph (7) - Admissions by Parties in Civil Proceedings.

Commission: Approved as revised (but see note below).

Bar Committee: Approved as revised (but see note below).

Note: Neither the Bar nor the Commission has approved the insertion of the words "Subject to Rule 65A."

The staff has made changes to improve the form of the rule.

ACTION BY
BAR COMMITTEE
AND COMMISSION
REQUIRED

Paragraph (8) - Authorized and Adoptive Admissions.

Commission: Approved as revised (but see note below).

Bar Committee: Approved as revised (but see note below).

Note: Neither the Bar nor the Commission has approved the insertion of the words "Subject to Rule 65A."

ACTION BY
BAR COMMITTEE
AND COMMISSION
REQUIRED

Paragraph (9) - Vicarious Admissions.

Commission: Approved as revised.

Bar Committee: Approved as revised.

Note: The words "or proceeding" have been inserted after the word "action."

Paragraph (10) - Declarations Against Interest.

Commission: Approved as revised (but see note below).

Bar Committee: Approved as revised but Northern Section not sufficiently represented to consider action taken as final action of State Bar Committee (but see note below).

Note: Neither the Bar nor the Commission has approved the insertion of the words "Subject to Rule 65A."

The words "or proceeding" have been inserted after the word "action."

ACTION BY
BAR COMMITTEE
AND COMMISSION
REQUIRED

Paragraph (11) - Voter's Statements.

Commission: Disapproved.

Bar Committee: Disapproved.

Paragraph (12) - Statements of Physical or Mental Condition of Declarant.

Commission: Approved (but see note below).

Bar Committee: Approved; then determined to reconsider insofar as precludes declarations relating to declarant's donative intent at a prior time (cf. William v. Kidd, 170 Cal. 631). Referred to Messrs. Baker,

ACTION BY
BAR COMMITTEE
AND COMMISSION
REQUIRED

Kaus, Kadison and Selvin for further study and report. (see note below)

Note: Neither the Bar nor the Commission has approved the insertion of the words "Subject to Rule 65A."

Paragraph (13) - Business Entries and the Like.

Commission: Approved as revised (but see note below).

Bar Committee: Approved as revised (but see note below).

Note: Neither the Bar nor the Commission has approved the transfer of the definition of "a business" from Rule 62 to Rule 63(13).

ACTION BY
BAR COMMITTEE
AND COMMISSION
REQUIRED

Paragraph (14) - Absence of Entry in Business Records.

Commission: Approved as revised (but see note below).

Bar Committee: Approved as revised (but see note below).

Note: Note that the definition of "a business" is specifically incorporated by reference in the revised rule - this has not been approved by either the Bar Committee or the Commission. The section has been tabulated to improve readability.

ACTION BY
BAR COMMITTEE
AND COMMISSION
REQUIRED

Paragraph (15) - Reports of Public Officers and Employees.

Commission: Approved as revised.

Bar Committee: Has not considered revised rule.

ACTION BY
BAR COMMITTEE
REQUIRED

Paragraph (16) - Filed Reports, Made by Persons Exclusively Authorized.

Commission: Approved as revised.

Bar Committee: Has not considered revised rule.

ACTION BY
BAR COMMITTEE
REQUIRED

Paragraph (17) - Content of Official Record.

Commission: Approved (but see note below).

Bar Committee: Approved (but see note below).

ACTION BY
BAR COMMITTEE
AND COMMISSION
REQUIRED

Note: The words "if meeting the requirements of authentication under Rule 69" have been inserted - this has not been approved by the Bar or Commission.

Paragraph (18) - Certificate of Marriage.

Commission: Approved as revised.

Bar Committee: Approved as revised.

Paragraph (19) - Records of Documents Affecting an Interest in Property.

Commission: Approved.

Bar Committee: Approved.

Paragraph (20) - Judgment of Previous Conviction.

Commission: Approved as revised.

Bar Committee: Disapproved. State Bar Committee suggests that if Commission does recommend paragraph (20), it should be revised to make it clear that a judgment admitted thereunder is not conclusive but merely evidence. It was suggested that this might be done by inserting "as tending" before "to prove."

BAR
COMMITTEE
AND
COMMISSION
DISAGREE

Paragraph (21) - Judgment Against Persons Entitled to Indemnity.

Commission: Approved.

Bar Committee: Disapproved in present form; Messrs. Hayes and Patton to redraft for Committee's further consideration.

BAR COMMITTEE
AND COMMISSION
DISAGREE

Note: The words "or proceeding" have been inserted after the word "action."

Paragraph (22) - Judgment Determining Public Interest in Land.

Commission: Approved.

Bar Committee: Approved.

Note: The words "or proceeding" have been inserted after the word "action."

Paragraph (23) - Statement Concerning One's Own Family History.

Commission: Approved (but see note below).

Bar Committee: Approved (but see note below).

Note: The words "as a witness" have been inserted at the end of this paragraph to conform to the definition in Rule 62 and to the following paragraphs of Rule 63. This insertion has not been approved by either the Commission or the Bar Committee. Neither has the insertion of the words "Subject to Rule 65A" been approved.

ACTION BY
BAR COMMITTEE
AND COMMISSION
REQUIRED

Paragraph (24) - Statement Concerning Family History of Another.

Commission: Approved as revised (but see note below).

Bar Committee: Approved as revised (but see note below).

Note: Neither the Bar Committee nor the Commission has approved the insertion of the words "Subject to Rule 65A."

ACTION BY
BAR COMMITTEE
AND COMMISSION
REQUIRED

Paragraph (25) - Statement Concerning Family History Based on Statement of Another Declarant.

Commission: Disapproved.

Bar Committee: Disapproved.

Paragraph (26) - Reputation in Family Concerning Family History.

Commission: Approved as revised.

Bar Committee: Approved as revised.

Note: The Commission staff has improved the form of the revised rule.

Paragraph (27) - Reputation -- Boundaries, General History, Family History.

Commission: Approved as revised.

Bar Committee: Approved as revised.

Note: The Commission staff has improved the form of the revised rule.

Paragraph (28) - Reputation as to Character.

Commission: Approved as revised.

Bar Committee: Approved as revised.

Paragraph (29) - Recitals in Writings.

Commission: Approved as revised.

Bar Committee: Approved as revised.

Paragraph (30) - Commercial Lists and the Like.

Commission: Approved.

Bar Committee: Disapproved as proposed; referred to Messrs. Hayes, Hoberg, Kaus and Selvin for further study and report to consider, among other things, whether paragraph (30) should be made subject to Rule 64.

ACTION BY
BAR COMMITTEE
REQUIRED

Paragraph (31) - Learned Treatises.

Commission: No action taken.

Bar Committee: Disapproved as proposed; referred to Messrs. Hayes, Hoberg, Kaus and Selvin for further study and report to consider, among other things, whether paragraph (31) should be made subject to Rule 64.

ACTION BY
COMMISSION AND
BAR COMMITTEE
REQUIRED

RULE 64 DISCRETION OF JUDGE UNDER CERTAIN EXCEPTIONS
TO HEARSAY RULE TO EXCLUDE EVIDENCE

Commission: Approved in principle only.
Bar Committee: No action taken on revised rule.

ACTION BY
COMMISSION AND
BAR COMMITTEE
REQUIRED

RULE 65 CREDIBILITY OF DECLARANT

Commission: Approved as revised.
Bar Committee: No final action taken; referred to Messrs
Baker and Patton to consider whether rule
should be modified as proposed in Patton
memorandum on paragraph (10) of Rule 63,
dated June 25, 1958.

ACTION BY
BAR COMMITTEE
REQUIRED

RULE 65A QUALIFICATION OF DECLARANT [New Rule]

Commission: No action taken (see note below).
Bar Committee: No action taken (see note below).

ACTION BY
COMMISSION AND
BAR COMMITTEE
REQUIRED

Note: This is a new rule. It is referred to in paragraphs
(4), (5), (6), (7), (8), (10), (12), (23) and (24)
of Rule 63, as revised.

RULE 66 MULTIPLE HEARSAY

Commission: Approved.
Bar Committee: Approved.

ACTION BY
COMMISSION AND
BAR COMMITTEE
REQUIRED

Note: The Commission staff has improved the form of
this rule.

November 13, 1958

SUMMARY OF ACTION TAKEN BY THE
CALIFORNIA LAW REVISION COMMISSION
AND THE STATE BAR COMMITTEE TO
CONSIDER THE UNIFORM RULES OF
EVIDENCE.

Rule 3

1. As proposed:

Preliminary Inquiry by Judge. When the qualification of a person to be a witness, or the admissibility of evidence, or the existence of a privilege is stated in these rules to be subject to a condition, and the fulfillment of the condition is in issue, the issue is to be determined by the judge, and he shall indicate to the parties which one has the burden of producing evidence and the burden of proof on such issue as implied by the rule under which the question arises. The judge may hear and determine such matters out of the presence or hearing of the jury, except that on the admissibility of a confession the judge, if requested, shall hear and determine the question out of the presence and hearing of the jury. But this rule shall not be construed to limit the right of a party to introduce before the jury evidence relevant to weight or credibility.

2. Action of Commission:

Not yet considered.

3. Action of Northern Section:

Has not yet considered Rule itself but approved Professor Chadbourn's proposal to add following at end of Rule: "In the determination of the issue aforesaid, exclusionary rules shall not apply, subject, however, to Rule 45 and any valid claim of privilege."

4. Action of Southern Section:

Not yet considered.

Rule 19

1. As proposed:

Prerequisites of Knowledge and Experience.

As a prerequisite for the testimony of a witness on a relevant or material matter, there must be evidence that he has personal knowledge thereof, or experience, training or education if such be required. Such evidence may be by the testimony of the witness himself. The judge may reject the testimony of a witness that he perceived a matter if he finds that no trier of fact could reasonably believe that the witness did perceive the matter. The judge may receive conditionally the testimony of the witness as to a relevant or material matter, subject to the evidence of knowledge, experience, training or education being later supplied in the course of the trial.

2. Original Action of Commission:

Has not considered Rule as proposed. In connection with consideration of opening paragraph of Rule 63, proposed to add following paragraph to Rule 19:

As a prerequisite for evidence of the conduct of a person reflecting his belief concerning a material or relevant matter but not constituting a statement as defined in 52(1), there must be evidence that the person had at the time of his conduct personal knowledge of such material or relevant matter or experience, training or education, if such be required.

3. Action of State Bar Committee:

Did not consider Rule itself. Disapproved amendment proposed by Commission.

4. Action of Northern Section:

Approved first two sentences of Rule as proposed. Disapproved last two sentences.

5. Action of Southern Section:

Considered Rule as proposed preliminarily and referred to Messrs. Patton and Selvin for redraft.

Revised
July 28, 1958

Rule 19 (cont.)

6. Action of Commission 7/19/58:

Withdrew proposed amendment of Rule 19.

Rule 20

1. As proposed:

See "Action of Commission."

2. Action of Commission:

Approved as proposed with modification as shown:

Evidence Generally Affecting Credibility.
Subject-to-Rules-21-and-22 Except as otherwise
provided in Rules 21 and 22 or any other of these
Rules, for the purpose of impairing or, when the
credibility of the witness has been attacked,
supporting the credibility of a witness, any party
including the party calling him may examine him
and introduce extrinsic evidence concerning any
conduct by him and any other matter relevant upon
the issues of credibility.

3. Action Northern Section:

Found rule acceptable in principle except for
inclusion of words "or supporting"; would limit
supporting evidence to cases where credibility
has been attacked. Referred Rule 20 to Mr. Baker
to draft an amendment or a separate rule to cover
admissibility of evidence to support the credi-
bility of a witness.

4. Action Southern Section:

Not yet considered.

Rule 21

1. As proposed:

Limitations on Evidence of Conviction of Crime as Affecting Credibility. Evidence of the conviction of a witness for a crime not involving dishonesty or false statement shall be inadmissible for the purpose of impairing his credibility. If the witness be the accused in a criminal proceeding, no evidence of his conviction of a crime shall be admissible for the sole purpose of impairing his credibility unless he has first introduced evidence admissible solely for the purpose of supporting his credibility.

2. Action of Commission:

Discussed but final action not taken.

3. Action Northern Section:

Proposed following as substitute for first sentence:

Evidence of the conviction of a witness of a misdemeanor, or of a felony not involving dishonesty or false statement, shall be inadmissible for the purpose of impairing his credibility.

Made several suggestions for changes in second sentence; referred to Mr. Baker to draft revision.

4. Action Southern Section:

Not yet considered.

Rule 22

1. As proposed:

Further Limitations on Admissibility of Evidence Affecting Credibility. As affecting the credibility of a witness (a) in examining the witness as to a statement made by him in writing inconsistent with any part of his testimony it shall not be necessary to show or read to him any part of the writing provided that if the judge deems it feasible the time and place of the writing and the name of the person addressed, if any, shall be indicated to the witness; (b) extrinsic evidence of prior contradictory statements, whether oral or written, made by the witness, may in the discretion of the judge be excluded unless the witness was so examined while testifying as to give him an opportunity to identify, explain or deny the statement; (c) evidence of traits of his character other than honesty or veracity or their opposites, shall be inadmissible; (d) evidence of specific instances of his conduct relevant only as tending to prove a trait of his character, shall be inadmissible.

2. Action of Commission:

Approved.

3. Action Northern Section:

Approved (a) by divided vote.

Concluded subdivision (b) unclear and referred to Mr. Baker to redraft for clarification.

Approved subdivision (c) with amendment to insert "reputation for" after "than".

Approved subdivision (d).

4. Action Southern Section:

Not yet considered.

Rule 45

1. As proposed:

Discretion of Judge to Exclude Admissible Evidence. Except as in these rules otherwise provided, the judge may in his discretion exclude evidence if he finds that its probative value is substantially outweighed by the risk that its admission will (a) necessitate undue consumption of time, or (b) create substantial danger of undue prejudice or of confusing the issues or of misleading the jury, or (c) unfairly and harmfully surprise a party who has not had reasonable opportunity to anticipate that such evidence would be offered.

2. Action of Commission::

Approved insofar as applies to Rules 20 and 22.

3. Action of Northern Section:

Not yet considered.

4. Action of Southern Section:

Not yet considered.

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9/24/58

Rule 62

1. As proposed:

See "Action of State Bar Committee."

2. Original Action of Commission:

Approved subdivision (1)

3. Action of State Bar Committee:

- a) Approved all but paragraph numbered (6) as proposed with modifications as shown:

Definitions. As used in Rule 63 and its exceptions and in Rules 64, 65 and 66 the following rules,

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

(2) "Declarant" is a person who makes a statement.

(3) "Perceive" means acquire knowledge through one's own senses.

(4) "Public Official" of a state or territory of the United States includes an official of a political subdivision of such state or territory and of a municipality.

(5) "State" includes the District of Columbia.

(6) "A business" as used in exception (13) shall include every kind of business, profession, occupation, calling or operation of institutions, whether carried on for profit or not.

(7) "Unavailable as a witness" includes situations where the witness is (a) exempted on the ground of privilege from testifying concerning the matter to which his statement is relevant,

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9/24/58

Rule 62 (cont.)

or (b) disqualified from testifying to the matter, or (c) dead or unable to be present to testify at the hearing because of ~~death or~~ then existing physical or mental illness, or (d) absent beyond the jurisdiction of the court to compel appearance by its process, or (e) absent from the ~~place of~~ hearing because and the proponent of his statement does not know and with diligence has been unable to ascertain his whereabouts.

But a witness is not unavailable (a) if the judge finds that his exemption, disqualification, inability or absence is due to procurement or wrongdoing of the proponent of his statement for the purpose of preventing the witness from attending or testifying, or to the culpable neglect of such proponent party, or (b) if unavailability is claimed under clause (d) of the preceding paragraph and the judge finds that the deposition of the declarant could have been taken by the proponent by the exercise of reasonable diligence and without undue hardship, or expense, and that the probable importance of the testimony is such as to justify the expense of taking such deposition.

- b) Decided that the paragraph of Rule 62 numbered (6) should be approved subject to such revision as may be necessary to conform it to final action taken on subdivisions (13) and (14) of Rule 63.

4. Action of Commission (9/6/58):

- a) Approved as modified by State Bar Committee, with further proposed modification of Subdivision (7) as shown:

(7) "Unavailable as a witness" includes situations where the witness is (a) exempted on the ground of privilege from testifying concerning the matter to which his statement is relevant, or (b) disqualified from testifying to the matter, or (c) dead or unable to be present to testify at the hearing because of ~~then-existing~~ physical or mental illness, or (d) absent beyond the jurisdiction of the court to compel

appearance by its process, or (e) absent from the hearing and the proponent of his statement does not know and with diligence has been unable to ascertain his whereabouts.

But a witness is not unavailable (a) if the judge finds that his exemption, disqualification, inability or absence is due to procurement or wrongdoing of the proponent of his statement for the purpose of preventing the witness from attending or testifying, or to the culpable act or neglect of such proponent, or (b) if unavailability is claimed under clause (d) of the preceding paragraph and the judge finds that the deposition of the declarant could have been taken by the proponent by the exercise of reasonable diligence and without undue hardship, or expense.

- b) Considered deletion of Subdivision (4) but deferred final decision pending receipt of staff report. (See Minutes 9/6/58)
- c) Considered modification of Subdivision (5) but deferred final decision pending receipt of staff report. (See Minutes 9/6/58)
- d) Considered deletion of subsection (b) of Subdivision 7 but deferred final decision pending receipt of report from Research Consultant.
- e) Agreed with State Bar Committee that final form of Subdivision (6) will have to be determined after Subdivision (13) of Rule 63 is put in final form.

N.B. The California Law Revision Commission staff has ascertained that the definition of "business" in Subdivision (6) is identical with that in C.C.P. § 1953e; hence no modification of Subdivision (6) is necessary.

N.B. The California Law Revision Commission staff proposes that Subdivision (4) be approved in the following form:

(4) "Public officer or employee of a state or territory of the United States" includes (1) in this State, an officer or employee of any county, city, city and county, district, authority, agency or other political subdivision of the State and (2) in other

states and in territories of the United States, an officer or employee of any substantially equivalent public entity.

The Staff suggests that Subdivision (5) be approved in the following form:

(5) "State" includes each of the United States and the District of Columbia.

It would be difficult to frame a definition which would state what other areas under the jurisdiction of the United States in one sense or another should or should not be included. This should be left to the courts to do in defining "territory of the United States" where used in the Rules.

Revised
July 15, 1958
9/24/58

Rule 63

1. As proposed:

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

2. Action of Commission:

Approved but in connection therewith recommended following addition to Rule 19:

[Same as one set forth on page entitled "Rule 19"]

3. Action of State Bar Committee:

Approved.

Note: It was the view of the State Bar Committee that consideration should be given to the desirability of stating affirmatively at an appropriate point in the Rules (possibly in Rule 7) that the following kinds of evidence are not excluded by Rule 63:

- 1) Extrajudicial statements not offered to prove the truth of the matter stated.
- 2) Non-verbal conduct not intended by the actor as a substitute for words - i.e., as a communication.

4. Action of Commission 7/19/58:

Withdrew proposed amendment of Rule 19

Subdivision (1), Rule 63

1. As proposed:

(1) Previous Statements of Persons Present and Subject to Cross Examination. A statement previously made by a person who is present at the hearing and available for cross examination with respect to the statement and its subject matter, provided the statement would be admissible if made by declarant while testifying as a witness;

2. Original Action of Commission:

Disapproved; proposed substitute, to read:

(1) Previous Statements of Witnesses at the Hearing. When a person is a witness at the hearing, a statement made by him, though not made at the hearing, is admissible to prove the truth of the matter stated, provided the statement would have been admissible if made by him while testifying and provided further:

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

3. Action of State Bar Committee:

Approved Commission substitute with modifications as shown:

(1) Previous Statements of Witnesses at the Hearing. When a person is a witness at the hearing, a statement made by him, though not made at the hearing, is admissible to prove the truth of the matter stated, provided the statement would have

Subdivision (1), Rule 63 (cont.)

been admissible if made by him while testifying and provided further:

- (a) The statement is inconsistent with his testimony at the hearing and is offered in compliance with Rule 22, or
- (b) The statement is offered following an attempt to impair his testimony as being recently fabricated or when his testimony has been impeached by evidence of a prior inconsistent statement and the statement is one made prior to the alleged fabrication or prior inconsistent statement and is consistent with his testimony at the hearing, or
- (c) The statement concerns a matter as to which the witness has no present recollection and is a writing which (i) was made by the witness himself or under his direction, (ii) was made at a time when the facts recorded in the writing actually occurred or at such other time when the facts recorded in the writing were fresh in the witness's memory, and (iii) is verified by the witness as having been true and correct when made.

4. Action of Commission 7/19/58:

1. Proposed new subsection (b) to read:

- (b) The statement is offered after evidence of a prior inconsistent statement or supporting a charge of recent fabrication by the witness has been received and the statement is one made before the alleged inconsistent statement or fabrication and is consistent with his testimony at the hearing, or

2. Declined to accept view of State Bar Committee on subsection (c); held to original action.

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5. Joint Meeting in Coronado 10-8-58:

After discussion, a proposal was made that Subdivision (1) be approved in the following form:

(1) Previous Statements of Witnesses at the Hearing. When a person is a witness at the hearing, a statement made by him, though not made at the hearing, is admissible to prove the truth of the matter stated, provided the statement would have been admissible if made by him while testifying and provided further

- (a) the statement is inconsistent with his testimony at the hearing and is offered in compliance with Rule 22, or
- (b) the statement is offered after evidence of a prior inconsistent statement or of a recent fabrication by the witness has been received and the statement is one made before the alleged inconsistent statement or fabrication and is consistent with his testimony at the hearing, or
- (c) the statement concerns a matter as to which the witness has no present recollection and is a writing which was made (1) by the witness himself or under his direction or (2) by some other person for the purpose of recording the witness's statement at the time it was made and (3) at a time when the facts recorded in the writing actually occurred or at such other time when the facts recorded in the writing were fresh in the witness's memory.

The State Bar Committee approved Subdivision (1) in this form. A motion that the Commission approve Subdivision (1) was made. Although all members of the Commission present voted in favor of the motion, it failed to carry because only three members were present.

Note by Law Revision Commission Staff: If the proposal made at the Coronado meeting is adopted, should Subsection (c) not read as follows:

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- (c) the statement concerns a matter as to which the witness has no present recollection and is a writing which was made at a time when the facts recorded in the writing actually occurred or at such other time when the facts recorded in the writing were fresh in the witness's memory and the writing was made (1) by the witness himself or under his direction or (2) by some other person for the purpose of recording the witness's statement at the time it was made.

Subdivision (2), Rule 63

1. As proposed:

(2) Affidavits. Affidavits to the extent admissible by the statutes of this State;

2. Original Action of Commission:

Proposed following substitute:

(2) To the extent otherwise admissible by the law statutes of this State:

(a) Affidavits.

(b) Depositions taken in the action in which they are offered.

(c) Testimony given by a witness in a prior trial or preliminary hearing of the action in which it is offered.

3. Action of State Bar Committee:

(a) Approved as proposed; disapproved Commission substitute.

(b) Proposed following new subdivision 2.1:

(2.1) To the extent admissible by the statutes of this State:

(a) Depositions taken in the action in which they are offered.

(b) Testimony given by a witness in a prior trial or preliminary hearing of the action in which it is offered.

4. Action of Commission 7/19/58:

Declined to accept view of State Bar Committee that should have separate subsection (2.1); reaffirmed original action with two modifications:

1. Substituted "under the law" for "by the statutes."

2. Added "taken in the action in which they are offered" after "depositions."

5. Joint Meeting in Coronado 10/8/58:

State Bar Committee concurred in Commission action of 7/19/58.

Subdivision (3), Rule 63

1. As proposed:

(3) Depositions and Prior Testimony. Subject to the same limitations and objections as though the declarant were testifying in person, (a) testimony in the form of a deposition taken in compliance with the law of this state for use as testimony in the trial of the action in which offered, or (b) if the judge finds that the declarant is unavailable as a witness at the hearing, testimony given as a witness in another action or in a deposition taken in compliance with law for use as testimony in the trial of another action, when (i) the testimony is offered against a party who offered it in his own behalf on the former occasion, or against the successor in interest of such party, or (ii) the issue is such that the adverse party on the former occasion had the right and opportunity for cross examination with an interest and motive similar to that which the adverse party has in the action in which the testimony is offered;

2. Original Action of Commission:

Proposed following as substitute (part of substance having been incorporated in Commission substitute for Subdivision (2):

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

- (a) The testimony is offered against a party who offered it in his own behalf on the former occasion or against the successor in interest of such party, or
- (b) In a civil action, the issue is such that the adverse party on the former occasion had the right and opportunity for cross-examination with an interest and motive similar to that which the adverse party has in the action in which the testimony is offered, or

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

3. Action of State Bar Committee:

Approved Commission substitute with modifications as shown:

(3) Depositions and Prior Testimony in Another Proceeding. ~~If the judge finds that the declarant is unavailable as a witness at the hearing and~~ Subject to the same limitations and objections as though the declarant were testifying in person, testimony given under oath or affirmation as a witness in another action proceeding conducted by or under the supervision of a court or other official agency having the power to determine controversies or in a deposition taken in compliance with law in another action such a proceeding, is admissible in the present action provided the judge finds that the declarant is unavailable as a witness at the hearing, and when:

- (a) (i) The Such testimony is offered against a party who offered it in evidence on his own behalf ~~on the former case~~ in the other proceeding or against the successor in interest of such party, or
- (b) (ii) In a civil action, the issue is such that the adverse party ~~on the former case~~ in the other proceeding had the right and opportunity for cross-examination with an interest and motive similar to that which the adverse party has in the action proceeding in which the testimony is offered, or
- (c) (iii) In a criminal action proceeding the present defendant was a party to the prior action other proceeding and had the right and opportunity for cross-examination with an interest and motive similar to that which he has in the action proceeding in which the testimony is offered; provided, however, that the testimony given at a preliminary hearing in the prior action other proceeding is not admissible.

Subdivision (3), Rule 63 (cont.)

4. Action of Commission 7/19/58:

Approved substitute proposed by State Bar Committee
except that will designate subparagraphs (a), (b)
and (c) rather than (i), (ii) and (iii).

5. Joint Meeting in Coronado 10-8-58:

State Bar Committee concurred in Commission action of
7/19/58.

Subdivision (4), Rule 63

1. As proposed:

See "Action of Commission".

2. Original Action of Commission:

Approved as proposed with modifications as shown:

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

3. Action of State Bar Committee:

Proposed following as substitute:

(4) Spontaneous Statements. If the declarant is unavailable as a witness or testifies that he does not recall the event or condition involved, a statement (a) which the judge finds was made spontaneously and while the declarant was perceiving the event or condition which the statement narrates, describes or explains, or (b) which the judge finds purports to state what the declarant perceived relating to an event or condition which the statement narrates, describes or explains, and was made spontaneously while the declarant was under the stress of a nervous excitement caused by such perception.

Subdivision (4), Rule 63 (cont.)

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4. Action of Commission 7/19/58:

1. Did not accept State Bar Committee proposal to add "If the declarant is unavailable as a witness or testifies that he does not recall the event or condition involved" to Subdivision (4).
2. Disapproved clause (a) of State Bar Committee substitute for Uniform Rules of Evidence Subdivision (4).
3. Accepted clause (b) of State Bar Committee substitute for Subdivision (4).
4. Concurred with State Bar Committee view that subsection (c) of Uniform Rules of Evidence Subdivision (4) should not be adopted in this State.

November 13, 1958

5. Joint Meeting in Coronado 10-8-58.

After discussion the Commission by unanimous vote reaffirmed its intention, as presently advised, to recommend that Subdivision (4) be enacted in the following form:

(4) Spontaneous Statements. A statement (a) which the judge finds was made while the declarant was perceiving the event or condition which the statement narrates, describes or explains, or (b) which the judge finds purports to state what the declarant perceived relating to an event or condition which the statement narrates, describes or explains, and was made spontaneously while the declarant was under the stress of a nervous excitement caused by such perception.

The State Bar Committee concurred with the action of the Commission except that it would insert prior to "A statement" the words "If the declarant is unavailable as a witness or testifies that he does not recall the event or condition involved."

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July 28, 1958

Subdivision (5), Rule 63

1. As proposed:

See "Action of Commission."

2. Original Action of Commission:

Approved as proposed with modification as shown:

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

3. Action of State Bar Committee:

Approved as modified by Commission with further modification as shown:

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

4. Action of Commission 7/19/58:

Approved in form proposed by State Bar Committee.

Revised
July 28, 1958
9/24/58

Subdivision (6) , Rule 63

1. As proposed:

See "Action of State Bar Committee."

2. Original Action of Commission:

Disapproved; substituted amendment of
subdivision (7).

3. Action of State Bar Committee:

Approved as proposed with modification as shown:

(6) Confessions. In a criminal proceeding as against the accused, a previous statement by him relative to the offense charged if, and only if, the judge finds that the accused when making the statement was conscious and was capable of understanding what he said and did, and that he was not induced to make the statement (a) under compulsion or by infliction or threats of infliction of suffering upon him or another, or by prolonged interrogation under such circumstances as to render the statement involuntary, or (b) by threats or promises concerning action to be taken by a public official with reference to the crime, likely to cause the accused to make such a statement falsely, and made by a person whom the accused reasonably believed to have the power or authority to execute the same, or (c) under such other circumstances that the statement was not freely and voluntarily made;

Note: At its meeting of July 11 and 12 in San Francisco the State Bar Committee did not discuss specifically whether the word "reasonably" should be deleted from clause (b)

4. Action of Commission 9/6/58:

Proposed following as substitute for Subdivision 6:

(6) Confessions and Other Admissions in Criminal Proceedings. In a criminal proceeding, as against the accused, a previous statement by him relative to the offense charged, unless the judge finds, pursuant to the procedures set forth in Rule 8, (a) that the statement was made under circumstances likely to cause the defendant to make a false statement, or (b) that the statement was made under such circumstances that it is inadmissible under the Constitution of the United States or the Constitution of this State.

Revised
November 17, 1958

Subdivision (7), Rule 63

1. As proposed:

See "Action of Commission."

2. Original Action of Commission:

Approved as proposed with modification as shown:

(7) Confessions and Admissions by Parties. As against himself a statement by a person who is a party to the action in his individual or a representative capacity and if the latter, who was acting in such representative capacity in making the statement; provided, however, that if the statement was made by the defendant in a criminal proceeding it shall not be admitted if the judge finds, pursuant to the procedures set forth in Rule 8, that the statement was made under circumstances likely to cause the defendant to make a false statement.

3. Action of State Bar Committee:

Rejected modification proposed by Commission and approved as proposed in Uniform Rules of Evidence with modifications as shown:

(7) Admissions by Parties in Civil Actions. Except as provided in exception (6), as against himself a statement by a person who is a party to the action in his individual or representative capacity and-if-the-latter, who-was-acting-in-such-representative-capacity in-making-the-statement.

4. Action of Commission 7/19/58:

1. Deleted "and if the latter, who was acting in such representative capacity in making the statement"
2. Discussed but did not take final action on other differences between the Commission and State Bar Committee views re form of Subdivision (7).

5. Action of Commission 9/6/58:

Approved as proposed to be modified by State Bar, with further modification of title to read: "Admissions by Parties in Civil Actions."

6. Joint Meeting in Coronado 10-8-58.

State Bar Committee concurred in Commission action of 9/6/58.

Revised
July 28, 1958

Subdivision (8), Rule 63

1. As proposed:

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

2. Original Action of Commission:

Approved.

3. Action of State Bar Committee:

Approved with insertion of "matter" after "subject" in (a).

4. Action of Commission 7/19/58:

Inserted "matter" after "subject" in clause (a).

Subdivision (9), Rule 63

1. As proposed:

See "Action of Commission".

2. Action of Commission:

Approved as proposed with modification as shown:

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

3. Action of State Bar Committee:

Approved (a) and (c).

Disapproved (b) and proposed, in lieu thereof, the following as subdivision 9.1:

(9.1) Admissions of Co-conspirators. After proof by independent evidence of the existence of the conspiracy and that declarant and the party against whom the statement is offered were both then parties to the conspiracy, against his co-conspirator, the statement of a conspirator in furtherance of the common object of the conspiracy and prior to its termination.

4. Action of Commission 9/6/58:

Re: State Bar Committee proposal re. statements of co-conspirators:

a) Approved in principle.

- b) Should be incorporated in Subdivision 9 if possible and requested staff to submit draft for consideration.
- c) Decided if to be 9.1 should be revised to read as follows:

(9.1) Admissions of Co-conspirators. As against a party, after proof by independent evidence of the existence of the a conspiracy and that declarant and the party against whom the statement is offered were both then parties to the conspiracy, against his co-conspirator, the statement of a conspirator in furtherance of the common object of the conspiracy and prior to its termination, provided the statement would be admissible if made by the declarant at the hearing.

N.B. The following is the staff's suggestion of a form in which the substance of proposed Subdivision 9.1 could be made subsection (b) of Subdivision (9):

(b) the statement is that of a co-conspirator of the party and (1) the statement was made prior to the termination of the conspiracy and in furtherance of the common object thereof, and (2) the statement is offered after or subject to proof by independent evidence of the existence of the conspiracy and that declarant and the party were both parties to the conspiracy at the time the statement was made.

November 13, 1958

5. Joint Meeting in Coronado 10-8-58:

The Commission and the State Bar Committee agreed to approve Subdivision (9) in the following form:

(9) Vicarious Admissions. As against a party, a statement which would be admissible if made by the declarant at the hearing if

- (a) the statement concerned a matter within the scope of an agency or employment of the declarant for the party and was made before the termination of such relationship, or
- (b) the statement is that of a co-conspirator of the party and (1) the statement was made prior to the termination of the conspiracy and in furtherance of the common object thereof, and (2) the statement is offered after proof by independent evidence of the existence of the conspiracy and that declarant and the party were both parties to the conspiracy at the time the statement was made, or
- (c) in a civil action, one of the issues between the party and the proponent of the evidence of the statement is a legal liability of the declarant, and the statement tends to establish that liability;

Subdivision (10), Rule 63

1. As proposed:

See "Action of Commission."

2. Original Action of Commission:

Approved as proposed with modification as shown:

(10) Declarations against Interest. Subject to the limitations of exception (6), a statement made by a declarant who is unavailable as a witness which the judge finds was at the time of the assertion so far contrary to the declarant's pecuniary or proprietary interest or so far subjected him to civil or criminal liability or so far rendered invalid a claim by him against another or created such risk of making him an object of hatred, ridicule or social disapproval in the community that a reasonable man in his position would not have made the statement unless he believed it to be true;

3. Action of State Bar Committee:

Approved as modified by Commission with further modification as shown:

(10) Declarations Against Interest. ~~Subject to the limitations of Exception (6) a statement made by a~~ Except as against the accused in a criminal proceeding, ~~if the declarant who is unavailable as a witness which and if the judge finds that the declarant had sufficient knowledge of the subject, a statement which the judge finds~~ was at the time of the assertion ~~statement~~ so far contrary to the declarant's pecuniary or proprietary interest or so far subjected him to civil or criminal liability or so far rendered invalid a claim by him against another ~~or created such risk of making him an object of hatred, ridicule or social disapproval in the community~~ that a reasonable man in his position would not have made the statement unless he believed it to be true.

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July 28, 1958
9/24/58

Subdivision (10), Rule 63 (cont.)

4. Action of Commission 7/19/58:

1. Approved substitution of "statement" for "assertion."
2. Disapproved deletion of clause re making object of hatred, ridicule etc.
3. Discussed but did not take final action on other amendments proposed by State Bar Committee.

5. Action of Commission 9/6/58:

Approved proposal of State Bar Committee with modifications as shown:

(10) Declarations Against Interest. Subject to the limitations of Exception (6), ~~Except-as-against-the-accused in-a-criminal-proceeding,~~ if the declarant is unavailable as a witness and if the judge finds that the declarant had sufficient knowledge of the subject, a statement which the judge finds was at the time of the statement so far contrary to the declarant's pecuniary or proprietary interest or so far subjected him to civil or criminal liability or so far rendered invalid a claim by him against another or created such risk of making him an object of hatred, ridicule or social disapproval in the community that a reasonable man in his position would not have made the statement unless he believed it to be true.

November 13, 1958

6. Joint Meeting in Coronado 10-3-58:

After discussion all present agreed that Subdivision (10) should be approved in the following form:

(10) Declarations Against Interest. If the declarant is not a party to the action and is unavailable as a witness, and if the judge finds that the declarant had sufficient knowledge of the subject, a statement which the judge finds was at the time of the statement so far contrary to the declarant's pecuniary or proprietary interest or so far subjected him to civil or criminal liability or so far rendered invalid a claim by him against another or created such risk of making him an object of hatred, ridicule or social disapproval in the community that a reasonable man in his position would not have made the statement unless he believed it to be true.

A motion that the Commission approve the insertion of "Except as against the accused in a criminal proceeding" at the beginning of Subdivision 10, did not carry.

Inasmuch as the Northern Section of the State Bar Committee was not sufficiently represented the action taken with respect to Subdivision (10) is not to be deemed the final action of the State Bar Committee.

Revised
July 15, 1958

Subdivision (11), Rule 63

1. As proposed:

(11) Voter's Statements. A statement by a voter concerning his qualifications to vote or the fact or content of his vote;

2. Action of Commission:

Disapproved.

3. Action of State Bar Committee:

Disapproved.

Subdivision (12), Rule 63

1. As proposed:

(12) Statements of Physical or Mental Condition of Declarant. Unless the judge finds it was made in bad faith, a statement of the declarant's (a) then existing state of mind, emotion or physical sensation, including statements of intent, plan, motive, design, mental feeling, pain and bodily health, but not including memory or belief to prove the fact remembered or believed, when such a mental or physical condition is in issue or is relevant to prove or explain acts or conduct of the declarant, or (b) previous symptoms, pain or physical sensation, made to a physician consulted for treatment or for diagnosis with a view of treatment, and relevant to an issue of declarant's bodily condition;

2. Action of Commission:

Approved.

3. Action of State Bar Committee:

Approved; then determined to reconsider insofar as precludes declarations relating to declarant's donative intent at a prior time (cf. Williams v. Kidd 170 Cal. 631). Referred to Messrs. Baker, Kaus, Kadison and Selvin for further study and report.

Revised
July 28, 1958
9/24/58

Subdivision (13), Rule 63

1. As proposed:

(13) Business Entries and the Like. Writings offered as memoranda or records of acts, conditions or events to prove the facts stated therein, if the judge finds that they were made in the regular course of a business at or about the time of the act, condition or event recorded, and that the sources of information from which made and the method and circumstances of their preparation were such as to indicate their trustworthiness;

2. Original Action of Commission:

Approved.

3. Action of State Bar Committee:

Disapproved; would substitute an exception embodying the present California Business Records as Evidence Act, subject to such textual modification as may be necessary to conform to the Uniform Rules of Evidence.

4. Action of Commission 7/19/58:

Agreed to substitute for Subdivision (13) a provision embodying the present California Business Records as Evidence Act with such formal textual modifications as may be necessary to conform it to the Uniform Rules of Evidence.

N. B. The following (the text of present C.C.P. Section 1953f with deletions as shown) is proposed by the California Law Revision Commission staff as language to be substituted for Subdivision (13) to accomplish the stated objective of the Commission and the Committee:

(13) Business Records. A record of an act, condition or event ~~shall, insofar as relevant, be competent evidence~~ if the custodian or other qualified witness testifies to

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its identity and the mode of its preparation, and if it was made in the regular course of business, at or near the time of the act, condition or event, and if, in the opinion of the court, the sources of information, method and time of preparation were such as to justify its admission.

5. Joint Meeting in Coronado 10-8-58:

The Law Revision Commission and the State Bar Committee approved Subdivision (13) in the following form:

- (13) Business Records. A writing offered as a record of an act, condition or event if the custodian or other qualified witness testifies to its identity and the mode of its preparation and if the judge finds that it was made in the regular course of business, at or near the time of the act, condition or event, and that the sources of information, method and time of preparation were such as to indicate its trustworthiness.

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Subdivision (14), Rule 63

1. As proposed:

See "Action of Commission."

2. Original Action of Commission:

Approved as proposed with modification as shown:

(14) Absence of Entry in Business Records.
Evidence of the absence of a memorandum or record from the memoranda or records of a business of an asserted act, event or condition, to prove the non-occurrence of the act or event, or the non-existence of the condition, if the judge finds that it was the regular course of that business to make such memoranda of all such acts, events or conditions at the time thereof or within a reasonable time thereafter, and to preserve them, and that the memoranda and the records of the business were prepared from such sources of information and by such methods as to indicate their trustworthiness;

3. Action of State Bar Committee:

Approved as modified by Commission subject to such textual modification as may be necessary to conform to subdivision (13) as eventually approved.

4. Action of Commission 7/19/58:

Reaffirmed original action and agreed to make such textual modification as may be necessary to conform to Subdivision (13) as eventually approved.

N. B. The following is proposed by the CLRC Staff as necessary modifications in Subdivision (14) (as previously modified) to accomplish the stated objective of the Commission and the Committee:

(14) Absence of Entry in Business Record.
Evidence of the ~~absence of a memorandum or record~~
from the ~~memoranda or~~ records of a business of a
record of an asserted act, event or condition, to
prove the non-occurrence of the act or event, or
the non-existence of the condition, if the judge
finds that it was the regular course of that
business to make ~~such memoranda~~ records of all
such acts, events or conditions at the time
thereof or within a reasonable time thereafter,
and to preserve them, and that ~~the memoranda and~~
the records of the business were prepared from
such sources of information and by such methods
as to indicate their trustworthiness;

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5. Joint Meeting in Coronado 10-8-58:

The Commission and the State Bar Committee agreed to approve Subdivision (14) in the following form:

- (14) Absence of Business Record. Evidence of the absence from the records of a business of a record of an asserted act, event or condition, to prove the non-occurrence of the act or event, or the non-existence of the condition, if the judge finds that it was the regular course of that business to make records of all such acts, events or conditions at the time thereof or within a reasonable time thereafter, and to preserve them, and that the records of the business were prepared from such sources of information and by such methods as to indicate their trustworthiness;

N.B. The Commission stated that in its explanatory notes to Subdivision (14) it would report that it has omitted mention of a "memorandum" because the definition of "writing" in Subdivision (13) of Rule 1 is so broad as to make "memorandum" surplusage in Subdivision (14) of Rule 63.

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July 15, 1958
9/24/58

Subdivision (15), Rule 63

1. As proposed:

(15) Reports and Findings of Public Officials. Subject to Rule 64 written reports or findings of fact made by a public official of the United States or of a state or territory of the United States, if the judge finds that the making thereof was within the scope of the duty of such official and that it was his duty (a) to perform the act reported, or (b) to observe the act, condition or event reported, or (c) to investigate the facts concerning the act, condition or event and to make findings or draw conclusions based on such investigation;

2. Action of Commission:

Disapproved; requested staff to draft a new subdivision to replace Subdivisions 15 and 16 which will embody the substance of C.C.P. § 1920.

3. Action of State Bar Committee:

Disapproved; will consider Commission redraft.

4. Action of Commission 9/6/58:

Approved with modifications as shown:

(15) Reports and Findings of Public Officials Officers and Employees. Subject to Rule 64, statements of fact contained in a written reports or findings of fact made by a public official officer or employee of the United States or of a state or territory of the United States, if the judge finds that the making thereof was within the scope of the duty of such official officer or employee and that it was his duty (a) to perform the act reported, or (b) to observe the act, condition or event reported, or (c) to investigate the facts concerning the act, condition or event, and to make findings or draw conclusions based on such investigation;

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July 15, 1958
9/24/58

Subdivision (15), Rule 63

1. As proposed:

(15) Filed Reports, Made by Persons Exclusively Authorized. Subject to Rule 64, writings made as a record, report or finding of fact, if the judge finds that (a) the maker was authorized by statute to perform, to the exclusion of persons not so authorized, the functions reflected in the writing, and was required by statute to file in a designated public office a written report of specified matters relating to the performance of such functions, and (b) the writing was made and filed as so required by the statute;

2. Action of Commission:

Disapproved; requested staff to draft a new subdivision to replace Subdivisions (15) and (16) which will embody the substance of C.C.P. § 1920.

3. Action of State Bar Committee:

No final action taken; will consider new subdivision to be prepared by Commission.

4. Action of Commission 9/6/58:

(16) Filed Reports, Made by Persons Exclusively Authorized. Subject to Rule 64, writings made by persons other than public officers or employees as a record, report or finding of fact, if the judge finds that (a) the maker was authorized by a statute of the United States or of a state or territory of the United States to perform, to the exclusion of persons not so authorized, the functions reflected in the writing, and was required by statute to file in a designated public office a written report of specified matters relating to the performance of such functions, and (b) the writing was made and filed as so required by the statute;

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July 15, 1958

Subdivision (17), Rule 63

1. As proposed:

(17) Content of Official Record. Subject to Rule 64, (a) if meeting the requirements of authentication under Rule 68, to prove the content of the record, a writing purporting to be a copy of an official record or of an entry therein, (b) to prove the absence of a record in a specified office, a writing made by the official custodian of the official records of the office, reciting diligent search and failure to find such record;

2. Action of Commission:

Approved.

3. Action of State Bar Committee:

Approved on understanding that Rule 68 will be amended as proposed by Professor Chadbourn (Re latter, believes amendment to Rule 68(d) should read "and is not an office of the United States Government.")

Subdivision (18), Rule 63

1. As proposed:

(18) Certificate of Marriage. Subject to Rule 64 certificates that the maker thereof performed a marriage ceremony to prove the truth of the recitals thereof, if the judge finds that (a) the maker of the certificate at the time and place certified as the time and place of the marriage was authorized by law to perform marriage ceremonies, and (b) the certificate was issued at that time or within a reasonable time thereafter;

2. Original Action of Commission:

Approved.

3. Action of State Bar Committee:

Approved in substance; suggests form be changed as follows:

(18) Certificate of Marriage. Subject to Rule 64 a certificate that the maker thereof performed a marriage ceremony, to prove the truth of the recitals thereof, if the judge finds that:

- (a) the maker of the certificate was, at the time and place certified as the time and place of the marriage, authorized by law to perform marriage ceremonies, and
- (b) the certificate was issued at that time or within a reasonable time thereafter.

4. Action of Commission 7/19/58:

Approved as redrafted by State Bar Committee.

Revised
July 15, 1958

Subdivision (19), Rule 63

1. As proposed:

(19) Records of Documents Affecting an Interest in Property. Subject to Rule 64 the official record of a document purporting to establish or affect an interest in property, to prove the content of the original recorded document and its execution and delivery by each person by whom it purports to have been executed, if the judge finds that (a) the record is in fact a record of an office of a state or nation or of any governmental subdivision thereof, and (b) an applicable statute authorized such a document to be recorded in that office;

2. Action of Commission:

Approved.

3. Action of State Bar Committee:

Approved.

Revised
July 28, 1958

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11/13/58

Subdivision (20), Rule 63

1. As proposed:

See "Action of Commission."

2. Original Action of Commission:

Approved as proposed with modification as shown:

(20) Judgment of Previous Conviction.
Evidence of a final judgment adjudging a
person guilty of a felony to prove, against
such person, any fact essential to sustain
the judgment;

3. Action of State Bar Committee:

Disapproved.

4. Action of Commission 7/19/58:

Discussed but did not take final action on recommendation
of State Bar Committee.

5. Joint Meeting in Coronado 10-8-58:

The Commission reaffirmed action of 9/6/58. State Bar
Committee declined to concur. The State Bar Committee
suggested that if the Commission does recommend Subdivision
(20) of Rule 63, it should be revised to make it clear that
a judgment admitted thereunder is not conclusive but merely
evidence; it was suggested that this might be done by
inserting "as tending" before "to prove."

Revised
July 15, 1958

Subdivision (21), Rule 63

1. As proposed:

(21) Judgment against Persons Entitled to Indemnity. To prove the wrong of the adverse party and the amount of damages sustained by the judgment creditor, evidence of a final judgment debtor in an action in which he seeks to recover partial or total indemnity or exoneration for money paid or liability incurred by him because of the judgment, provided the judge finds that the judgment was rendered for damages sustained by the judgment creditor as a result of the wrong of the adverse party to the present action;

2. Action of Commission:

Approved.

3. Action of State Bar Committee:

Disapproved in present form; Messrs. Hayes and Patton to redraft for Committee's further consideration.

Subdivision (22), Rule 63

1. As proposed:

(22) Judgment Determining Public Interest in Land. To prove any fact which was essential to the judgment, evidence of a final judgment determining the interest or lack of interest of the public or of a state or nation or governmental division thereof in land, if offered by a party in an action in which any such fact or such interest or lack of interest is a material matter;

2. Action of Commission:

Approved

3. Action of State Bar Committee:

Approved.

Subdivision (23), Rule 63

1. As proposed:

(23) Statement Concerning One's Own Family History. A statement of a matter concerning a declarant's own birth, marriage, divorce, legitimacy, relationship by blood or marriage, race-ancestry or other similar fact of his family history, even though the declarant had no means of acquiring personal knowledge of the matter declared, if the judge finds that the declarant is unavailable;

2. Action of Commission:

Approved.

3. Action of State Bar Committee:

Approved

Subdivision (24), Rule 63

1. As proposed:

(24) Statement Concerning Family History of Another.
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 if the judge (a) finds that the declarant was related to the other by blood or marriage or finds that he was otherwise so intimately associated with the other's family as to be likely to have accurate information concerning the matter declared, and made the statement as upon information received from the other or from a person related by blood or marriage to the other, or as upon repute in the other's family, and (b) finds that the declarant is unavailable as a witness;

2. Original Action of Commission:

Approved with following punctuation changes in clause (a) to make clear that clause beginning "and made the statement as upon" does not apply to a declarant related by blood or marriage: (1) inserted comma after "marriage"; (2) deleted comma after "declared".

3. Action of State Bar Committee:

Approved as proposed to be punctuated by Commission; suggestion made that might be even clearer if redrafted.

4. Action of Commission 7/19/58:

Approved with changes in form as follows:

(24) Statement Concerning Family History of Another. 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 if the judge finds that the declarant is unavailable as a witness and

(a) finds that the declarant was related to the other by blood or marriage or

(b) finds that he the declarant was otherwise so intimately associated with the other's family as to be likely to have accurate information concerning the matter declared, and made the statement as upon information received from the other or from a person related by blood or marriage to the other, or as upon repute in the other's family and ~~(b)-finds that the declarant is unavailable as a witness.~~

5. Joint Meeting in Coronado 10-8-58:

State Bar Committee concurred in Commission's action of 7/19/58.

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Subdivision (25), Rule 63

1. As proposed:

(25) Statement Concerning Family History Based on Statement of Another Declarant. A statement of a declarant that a statement admissible under exceptions (23) or (24) of this rule was made by another declarant, offered as tending to prove the truth of the matter declared by both declarants, if the judge finds that both declarants are unavailable as witnesses;

2. Original Action of Commission:

Approved.

3. Action of State Bar Committee:

Disapproved.

4. Action of Commission 7/19/58:

Disapproved.

Subdivision (26), Rule 63

1. As proposed:

(26) Reputation in Family Concerning Family History. Evidence of reputation among members of a family, if the reputation concerns the birth, marriage, divorce, death, legitimacy, race-ancestry or other fact of the family history of a member of the family by blood or marriage;

2. Original Action of Commission:

Approved.

3. Action of State Bar Committee:

Approved with modification as shown:

(26) Reputation in Family Concerning Family History. Evidence of reputation among members of a family, if the reputation concerns the birth, marriage, divorce, death, legitimacy, race-ancestry or other fact of the family history of a member of the family by blood or marriage.

Such reputation may be proved only by a witness testifying to his knowledge of such reputation or by entries in family bibles or other family books or charts, by engravings on rings, by family portraits, by engravings on urns, crypts and tombstones, and the like.

4. Action of Commission 7/19/58:

Approved as proposed to be modified by State Bar Committee.

Subdivision (27), Rule 63

1. As proposed:

(27) Reputation--Boundaries, General History, Family History. Evidence of reputation in a community as tending to prove the truth of the matter reputed, if (a) the reputation concerns boundaries of, or customs affecting, land in the community, and the judge finds that the reputation, if any, arose before controversy, or (b) 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 judge finds that the event was of importance to the community, or (c) the reputation concerns the birth, marriage, divorce, death, legitimacy, relationship by blood or marriage, or race-ancestry of a person resident in the community at the time of the reputation, or some other similar fact of his family history or of his personal status or condition which the judge finds likely to have been the subject of a reliable reputation in that community;

2. Original Action of Commission:

Approved.

3. Action of State Bar Committee:

Approved with modification as shown:

(27) Reputation -- Boundaries, General History, Family History. Evidence of reputation in a community as tending to prove the truth of the matter reputed, if (a) the reputation concerns boundaries of, or customs affecting, land in the community, and the judge finds that the reputation, if any, arose before controversy, or (b) 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 judge finds that the event was of importance to the community, or (c) the reputation concerns the date or fact of birth, marriage, divorce or death, legitimacy, relationship by blood or marriage, or race-ancestry of a person resident in the community at the time of the reputation; ~~or some other similar fact of his family history or of his personal status or condition which the judge finds likely to have been the subject of a reliable reputation in that community;~~

Revised
July 28, 1958
9/24/58

Subdivision (27), Rule 63 (cont.)

4. Action of Commission 7/19/58:

Discussed but did not take final action on modifications
proposed by State Bar Committee.

5. Action of Commission 9/6/58:

Approved as modified by State Bar Committee.

Revised
July 28, 1958

Subdivision (28), Rule 63

1. As proposed:

(28) Reputation as to Character. If a trait of a person's character at a specified time is material, evidence of his reputation with reference thereto at a relevant time in the community in which he then resided or in a group with which he then habitually associated, to prove the truth of the matter reputed;

2. Original Action of Commission:

Approved with addition of "a person's character or" after "If."

3. Action of State Bar Committee:

Approved as amended by Commission and with further amendment to add "general" before "reputation."

4. Action of Commission 7/19/58:

Reaffirmed original action and added "general" before "reputation."

Subdivision (29), Rule 63

1. As proposed:

See "Action of Commission."

2. Original Action of Commission:

Approved as proposed with amendment as shown:

(29) Recitals in Documents Affecting Property. Evidence of a statement relevant to a material matter: (a) Contained in a deed of conveyance or a will or other document purporting to affect an interest in property, offered as tending to prove the truth of the matter stated if the judge finds that the matter stated would be relevant upon an issue as to an interest in the property, and that the dealings with the property since the statement was made have not been inconsistent with the truth of the statement; or (b) Contained in a document or writing more than 30 years old when the statement has been since generally acted upon as true by persons having an interest in the matter provided the writer could have been properly allowed to make such statement as a witness;

3. Action of State Bar Committee:

Approved as proposed to be amended by Commission with further modification as shown:

(29) Recitals in Writings Deedments-Affecting Property. Subject to Rule 54, evidence of a statement relevant to a material matter (a) contained in a deed of conveyance or a will or other ~~document~~ writing purporting to affect an interest in property, offered as tending to prove the truth of the matter stated if the judge finds that the matter stated would be relevant upon an issue as to an interest in the property, and that the dealings with the property since the statement was made have not been inconsistent with the truth of the statement or (b) contained in a ~~document~~-or writing more than thirty years old when the statement has been since generally acted upon as true by persons having an interest in the matter, provided the writer could have been properly allowed to make such statement as a witness.

Revised
July 28, 1958

Subdivision (29), Rule 53 (cont.)

4. Action of Commission 7/19/58:

1. Concurred in State Bar Committee proposals for amendment of Subdivision (29).
2. Redrafted to read:

(29) Recitals in Writings Subject to Rule 64, evidence of a statement relevant to a material matter

(a) contained in a deed of conveyance or a will or other writing purporting to affect an interest in property, offered as tending to prove the truth of the matter stated if the judge finds that the matter stated would be relevant upon an issue as to an interest in the property, and that the dealings with the property since the statement was made have not been inconsistent with the truth of the statement or,

(b) contained in a writing more than thirty years old when the statement has been since generally acted upon as true by persons having an interest in the matter, provided the writer could have been properly allowed to make such statement as a witness.

5. Joint Meeting in Coronado 10-3-58:

State Bar Committee concurred in Commission action of 7/19/58.

Revised
July 28, 1958

Subdivision (30), Rule 63

1. As proposed:

(30) Commercial Lists and the Like.
Evidence of statements of matters of interest to persons engaged in an occupation contained in a list, register, periodical, or other published compilation to prove the truth of any relevant matter so stated if the judge finds that the compilation is published for use by persons engaged in that occupation and is generally used and relied upon by them;

2. Action of Commission:

Approved.

3. Action of State Bar Committee:

Disapproved as proposed; referred subject matter of subdivisions (30) and (37) to Messrs. Hayes, Hoberg, Kaus and Selvin for further study and report. Suggested study should consider, inter alia, whether any subdivision proposed should be made subject to Rule 64.

Subdivision (31), Rule 63

1. As proposed:

(31) Learned Treatises. A published treatise, periodical or pamphlet on a subject of history, science or art to prove the truth of a matter stated therein if the judge takes judicial notice, or a witness expert in the subject testifies, that the treatise, periodical or pamphlet is a reliable authority in the subject.

2. Action of Commission:

Discussed but did not take final action.

3. Action of State Bar Committee:

See report on subdivision (30)

9/24/58

1. As proposed:

Discretion of Judge under Exceptions (15), (16), (17), (18) and (19) to Exclude Evidence. Any writing admissible under exceptions (15), (16), (17), (18), and (19) of Rule 63 shall be received only if the party offering such writing has delivered a copy of it or so much thereof as may relate to the controversy, to each adverse party a reasonable time before trial unless the judge finds that such adverse party has not been unfairly surprised by the failure to deliver such copy.

2. Action of Commission:

Not yet considered.

3. Action of State Bar Committee:

Approved with amendment to refer to subdivision (29).

4. Action of Commission 9/6/58:

Approved as modified with further amendment to refer to Subdivision (20) and proposed amendment to make clear that does not affect discovery powers conferred by 1957 legislation.

1. As proposed:

See "Action of Commission."

2. Action of Commission:

Approved as proposed with modification as shown:

Credibility of Declarant. Evidence of a statement or other conduct by a declarant inconsistent with a statement of such declarant received in evidence under an exception to Rule 63 is admissible for the purpose of discrediting the declarant, though he had no opportunity to deny or explain such inconsistent statement or other conduct. Any other evidence tending to impair or support the credibility of the declarant is admissible if it would have been admissible had the declarant been a witness.

3. Action of state Bar Committee:

Did not take final action; referred to Messrs. Baker and Patton to consider whether Rule should be modified as proposed in Patton memorandum on Subdivision (10) of Rule 63, dated June 25, 1958.

(Revised 7/15/58)

Rule 66

1. As proposed:

Multiple Hearsay. A statement within the scope of an exception to Rule 63 shall not be inadmissible on the ground that it includes a statement made by another declarant and is offered to prove the truth of the included statement if such included statement itself meets the requirements of an exception.

2. Action of Commission:

Approved.

3. Action of State Bar Committee:

Approved.

Rule 68

1. As proposed:

See "Action of Commission".

2. Action of Commission:

Approved as proposed with modification as shown:

RULE 68. Authentication of Copies of Records. A writing purporting to be a copy of an official record or of an entry therein, meets the requirement of authentication if (a) the judge finds that the writing purports to be published by authority of the nation, state or subdivision thereof, in which the record is kept; or (b) evidence has been introduced sufficient to warrant a finding that the writing is a correct copy of the record or entry; or (c) the office in which the record is kept is within this state or is an office of the United States government whether within or without this state, and the writing is attested as a correct copy of the record or entry by a person purporting to be an officer, or a deputy of an officer, having the legal custody of the record; or (d) if the office is not within the state, or is not an office of the United States government, the writing is attested as required in clause (c) and is accompanied by a certificate that such officer has the custody of the record. If the office in which the record is kept is within the United States or within a territory or insular possession subject to the dominion of the United States, the certificate may be made by a judge of a court of record of the district or political subdivision in which the record is kept, authenticated by the seal of the court, or may be made by any public officer having a seal of office and having official duties in the district or political subdivision in which the record is kept, authenticated by the seal of his office. If the office in which the record is kept is in a foreign state or country, the certificate may be made by a secretary of an embassy or legation, consul general, consul, vice consul, or consular

agent or by any officer in the foreign service of the United States stationed in the foreign state or country in which the record is kept, and authenticated by the seal of his office.

3. Action Northern Section:

Concurred in Commission action except would make first word in underlined part of (d) "and" instead of "or".

4. Action Southern Section:

Not yet considered.

1. As proposed:

RULE 69. Certificate of Lack of Record. A writing admissible under exception (17)(b) of Rule 63 is authenticated in the same manner as is provided in clause (c) or (d) of Rule 68.

2. Action of Commission:

No final action taken; requested Professor Chadbourne to redraft Rule 69.