#34(L) 11/13/64

Memorandum 64-101

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

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

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

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

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

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

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

Title

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

Section 12

The Legislative Counsel suggests that Section 12 and Section 152

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

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

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

Division 2 Generally

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

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

CHAPTER 1. DEFINITIONS AND GENERAL PROVISIONS

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

to prove the truth of the matter stated.

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

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

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

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

(2) Disqualified from testifying to the matter;

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

(4) Absent from the hearing and the court is unable to compel his attendance by its process; or

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

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

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

1205. [PICK UP SECTION 1202.]

1206. [PICK UP SECTION 1203.]

1207. [PICK UP SECTION 1204.]

1208. [PICK UP SECTION 1205.]

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

225. "Statement" is defined in Section 1202.

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

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

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

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

Definition of "witness"

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

follows to carry out their intent:

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

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

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

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

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

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

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

statements of deponents.

Section 300.

With respect to this section, the Legislative Counsel comments:

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

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

Section 311.

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

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

We recommend that no change be made in Section 311.

Order of proof.

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

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

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

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

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

Section 353.

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

Section 402.

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

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

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

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

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

Treatment of confessions under Sections 403 and 405.

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

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

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

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

(2) If the proffered evidence is admitted, the jury shall not be instructed to disregard the evidence if its determination of the fact differs from the court's determination of the preliminary fact; but, if

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

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

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

Division 4--Judicial Notice

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

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

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

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

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

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

would meet the problem presented by Professor Davis:

> 455. (a) With respect to any matter specified in subdivision (a), (b), (c), (d), (e), or (f) of Section 452 that is reasonably subject to dispute, before judicial notice of such matter may be taken, the court shall afford each party reasonable opportunity to present to the court information relevant to (1) the propriety of taking judicial notice of the matter and (2) the tenor of the matter to be noticed.
>
> (b) With respect to any matter specified in subdivision (e) or (f) of Section 451 or in subdivision (g) or (h) of Section 452, if any party disputes the taking of judicial notice of such matter, the court shall afford each party reasonable opportunity to present to the court information relevant to (1) the propriety of taking judicial notice of the matter and (2) the tenor of the matter to be noticed.
>
> (c) If a party disputes the taking of judicial notice of any matter specified in Section 452 and the court resorts to any source of information not received in open court (including the advice of persons learned in the subject matter), such information and its source shall be made a part of the record in the action and the court shall afford each party reasonable opportunity to meet such information.

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

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

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

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

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

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

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

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

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

Section 451

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

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

Division 5--Burden of Proof etc.

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

Section 600

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

Section 607

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

Section 608

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

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

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

CHAPTER 3. PRESUMPTIONS AND INFERENCES

Article 1. General

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

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

604. Subject to Section 607, the effect of a presumption affecting the burden of producing evidence is to require the trier of fact to assume the existence of the presumed fact unless and until evidence is introduced which would support a finding of its nonexistence, in which case the trier of fact shall determine the existence or nonexistence of the presumed fact from the evidence and the inferences arising therefrom and without regard to the presumption.

Articles 3 and 4 of Chapter 3 of Division 5

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

Section 721

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

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

Section 731

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

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

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

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

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

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

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

same rules that are applicable to a direct examination.

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

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

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

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

Section 765.

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

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

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

Section 780.

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

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

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

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

Section 788.

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

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

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

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

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

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

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

Section 800.

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

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

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

Section 801.

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

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

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

Section 802.

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

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

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

Section 803.

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

Section 804.

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

> 804. (a) If a witness testifying as an expert testifies that his opinion is based in whole or in part upon the opinion or statement of another person, such other person may be called and examined as if under cross-examination concerning ~~the subject matter of~~ his opinion or statement by any adverse party.
>
> (b) ~~Unless the party seeking to examine the person upon whose opinion or statement the expert witness has relied has the right apart from this section to examine such person as if under cross-examination,~~ This section is not applicable if the person upon whose opinion or statement the expert witness has relied is (1) a party, (2) ~~an agent or employee of a party, (3) a person united in interest with a party or for whose immediate benefit the action is prosecuted or defended~~ a person identified with a party within the meaning of subdivision (d) of Section 776, or ~~(4)~~ (3) a witness who has testified in the action concerning the opinion or statement upon which the expert witness has relied.

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

Section 830

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

Opinion as to value of property or compensation.

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

Section 870

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

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

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

Section 894

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

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

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

Section 895

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

Section 896

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

Section 912

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

Section 914

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

Section 958

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

Section 981

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

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

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

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

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

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

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

Section 1010

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

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

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

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

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

1010. As used in this article, "psychotherapist" means:

(a) A person authorized, or reasonably believed by the patient to be authorized, to practice medicine in any state or nation who devotes a substantial portion of his time to the practice of psychiatry; or

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

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

Section 1060

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

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

research has a privilege to refuse to disclose the secret, and to prevent another from disclosing it, if the allowance of the privilege will not tend to conceal fraud or otherwise work injustice.

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

Section 1150

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

The State Bar objects to the enlargment of the scope of inquiry into jury misconduct. See item 48. This is a policy matter for the Commission. We believe that our recommendation makes sense. It should be noted that the members of the Assembly Interim Committee on Law Revision had some concern about this change in law.

DIVISION 10. HEARSAY EVIDENCE

General format

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

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

Section 1200

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

Section 1202

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

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

Section 1203

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

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

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

Section 1224

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

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

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

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

Section 1226

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

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

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

Section 1227

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

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

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

Section 1237

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

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

Section 1241

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

Section 1242

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

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

Section 1250

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

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

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

Sections 1271(b) and 1280(b)

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

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

Sections 1282 and 1283

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

Section 1290

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

Sections 1291 and 1292

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

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

Sections 1290-1292 (Article 9)

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

Section 1451

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

Civil Code Sections 3544-3548

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

Section 152 (of Preprint Senate Bill No. 1)

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

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

Nov. minutes
Folder

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

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

H. W. O'MELVENY 1885-1941
LOUIS W. MYERS 1927-1950

WILLIAM W. CLARY
JAMES L. BEEBE
OF COUNSEL

BEVERLY HILLS OFFICE
9601 WILSHIRE BOULEVARD
BEVERLY HILLS, CALIFORNIA 90210
TELEPHONE 273-4111

EUROPEAN OFFICE
12, RUE HAMELIN
PARIS 16e, FRANCE
TELEPHONE POINCARE 56-90

November
3rd
1964

OUR FILE NUMBER

921,499-30

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

Dear John:

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

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

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

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

Sincerely yours,

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

PFW:dp
enclosure

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

STATE BAR OF CALIFORNIA

COMMITTEE TO CONSIDER THE UNIFORM RULES OF EVIDENCE

November 2, 1964

Comments upon the proposed Evidence Code

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

DIVISION 1. PRELIMINARY PROVISIONS OF CONSTRUCTION

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

DIVISION 2. WORDS AND PHRASES DEFINED

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

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

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

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

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

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

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

simply as declarants. The Committee suggests the following definition:

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

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

DIVISION 3. GENERAL PROVISIONS

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

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

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

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

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

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

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

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

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

DIVISION 4. JUDICIAL NOTICE

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

DIVISION 6. WITNESSES

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

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

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

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

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

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

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

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

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

DIVISION 7. OPINION TESTIMONY AND SCIENTIFIC EVIDENCE

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

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

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

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

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

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

"expressly permitted by law or is":

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

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

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

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

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

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

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

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

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

"if there remains a proper basis, . ."

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

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

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

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

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

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

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

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

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

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

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

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

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

DIVISION 8. PRIVILEGES

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

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

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

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

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

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

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

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

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

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

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

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

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

DIVISION 9. EVIDENCE EFFECTED OR EXCLUDED BY EXTENSIVE POLICIES

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

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

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

DIVISION 10. HEARSAY EVIDENCE

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

DIVISION 11. WRITINGS

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

-- o --

Memo 64-101

EXHIBIT II

STATE OF CALIFORNIA

OFFICE OF LEGISLATIVE COUNSEL

Sacramento, California
November 4, 1964

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

Evidence Code - #7136

Dear Senator Cobey:

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

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

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

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

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

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

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

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

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

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

Very truly yours,

George H. Murphy
Chief Deputy Legislative Counsel

By
Terry L. Baum
Deputy Legislative Counsel

TLB:cs

THE UNIVERSITY OF CHICAGO
CHICAGO • ILLINOIS 60637
THE LAW SCHOOL

November 5, 1964

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

Dear John:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Greenleaf took the same view as Thayer and Wigmore.

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

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

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

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

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

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

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

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

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

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

4. <u>The comment contradicts the comment</u>.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

The system you propose won't work.

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

Sincerely yours,

Kenneth Culp Davis

KCD/fs

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

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

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

EVIDENCE CODE

DIVISION 1. PRELIMINARY PROVISIONS AND CONSTRUCTION

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

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

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

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

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

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

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

7. Unless otherwise expressly stated:

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

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

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

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

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

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

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

9. The masculine gender includes the feminine and neuter.

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

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

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

DIVISION 2. WORDS AND PHRASES DEFINED

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

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

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

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

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

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

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

130. "Criminal action" includes criminal proceedings.

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

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

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

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

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

165. "Oath" includes affirmation.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(2) Disqualified from testifying to the matter;

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

(4) Absent from the hearing and the court is unable to compel his attendance by its process; or

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

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

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

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

DIVISION 3. GENERAL PROVISIONS

CHAPTER 1. APPLICABILITY OF CODE

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

CHAPTER 2. PROVINCE OF [redacted] AND JURY

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

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

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

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

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

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

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

Article 2. Preliminary Determinations on Admissibility of Evidence

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

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

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

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

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

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

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

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

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

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

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

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

(c) If the [redacted] admits the proffered evidence under this section,

(1) [redacted] may, and on request shall, instruct the jury to determine [redacted] the preliminary fact, and to disregard the proffered evidence unless the jury finds that the preliminary fact [redacted]

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

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

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

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

(b) If a preliminary fact is also a fact in issue in the action:

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

(2) If the proffered evidence is admitted, the jury shall not be instructed to disregard the evidence if its determination of the fact differs from the court's determination of the preliminary fact.

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

Chapter 5. Weight of Evidence Generally

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

411. Except where additional evidence is required by statute, the direct evidence of one witness who is entitled to full credit is sufficient for proof of any fact.

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

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

DIVISION 4. JUDICIAL NOTICE

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

451. Judicial notice shall be taken of:

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

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

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

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

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

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

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

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

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

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

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

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

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

(g) Specific facts and propositions that are of such common knowledge within the territorial jurisdiction of the court that they cannot reasonably be the subject of dispute.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

CHAPTER 1. BURDEN OF PROOF

Article 1. General

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

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

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

Article 2. Burden of Proof on Specific Issues

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

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

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

CHAPTER 2. BURDEN OF PRODUCING EVIDENCE

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

CHAPTER 3. PRESUMPTIONS

Article 1. General

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

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

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

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

604. Subject to Section 607, the effect of a presumption affecting the burden of producing evidence is to require the trier of fact to assume the existence of the presumed fact unless and until evidence is introduced which would support a finding of its nonexistence, in which case the trier of fact shall determine the existence or nonexistence of the presumed fact from the evidence and without regard to the presumption.

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

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

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

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

[redacted]

Article 2. Conclusive Presumptions

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

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

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

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

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

Article 3. Presumptions Affecting the Burden of Producing Evidence

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(a) Is at least 30 years old;

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

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

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

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

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

Article 1. Presumptions Affecting the Burden of Proof

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

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

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

663. A ceremonial marriage is presumed to be valid.

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

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

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

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

DIVISION 6. WITNESSES

CHAPTER 1. COMPETENCY

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

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

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

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

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

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

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

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

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

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

court

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

court

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

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

of this code

Chapter 2. Oath and Confrontation

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

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

Chapter 3. Expert Witnesses

Article 1. Expert Witnesses Generally

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

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

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

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

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

(2) Such publication has been admitted in evidence.

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

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

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

Article 2. Appointment of Expert Witness by Court

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

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

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

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

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

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

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

CHAPTER 4. INTERPRETERS AND TRANSLATORS

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

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

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

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

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

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

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

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

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

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

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

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

CHAPTER 5. METHOD AND SCOPE OF EXAMINATION

Article 1. Definitions

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

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

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

Article 2. Examination of Witnesses

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

[redacted]

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Chapter 6. Credibility of Witnesses

Article 1. Credibility Generally

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

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

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

(b) The character of his testimony.

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

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

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

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

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

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

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

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

(k) His admission of untruthfulness.

Article 2. Attacking or Supporting Credibility

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

DIVISION 7. OPINION TESTIMONY AND SCIENTIFIC EVIDENCE

CHAPTER 1. EXPERT AND OTHER OPINION TESTIMONY

Article 1. Expert and Other Opinion Testimony Generally

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

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

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

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

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

(b) Based on matter (including his special knowledge, skill, experience, training, and education) perceived by or personally known to the witness or made known to him at or before the hearing, whether or not admissible, that is of a type com-

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

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

court

803. The [redacted] may, and upon objection shall, exclude testimony in the form of an opinion that is based in whole or in significant part on matter that is not a proper basis for such an opinion. In such case, the witness may then state his opinion after excluding from consideration the matter determined to be improper.

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

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

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

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

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

as if under cross-examination,

[redacted]

2.

Article 3. Opinion Testimony on Particular Matters

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

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

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

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

Chapter 2. Blood Tests to Determine Paternity

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

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

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

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

894. The compensation of each expert witness appointed by the court shall be fixed at a reasonable amount. It shall be paid as the court shall order. The court may order that it be paid by the parties in such proportions and at such times as it shall prescribe, or that the proportion of any party be paid by the county, and that, after payment by the parties or the county or both, all or part or none of it be taxed as costs in the action. The fee of an expert witness called by a party but

and only ordinary witness fee shall be —

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

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

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

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

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

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

DIVISION 8. PRIVILEGES

CHAPTER 1. DEFINITIONS

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

They

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

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

903. "Criminal proceeding" means:

(a) A criminal action; and

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

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

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

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

CHAPTER 2. APPLICABILITY OF DIVISION

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

CHAPTER 3. GENERAL PROVISIONS RELATING TO PRIVILEGES

911. Except as otherwise provided by statute:

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

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

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

912. (a) Except as otherwise provided in this section, the right of any person to claim a privilege provided by Section 954 (lawyer-client privilege), 980 (privilege for confidential marital communications), 994 (physician-patient privilege), 1014 (psychotherapist-patient privilege), 1033 (privilege of penitent), or 1034 (privilege of clergyman) is waived with respect to a communication protected by such privilege if any holder of the privilege, without coercion, has disclosed a significant part of the communication or has consented to such disclosure made by anyone. Consent to disclosure is manifested by any statement or other conduct of the holder of the privilege indicating his consent to the disclosure, including his failure to claim the privilege in any proceeding in which he has the legal standing and opportunity to claim the privilege.

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

a waiver of

does not affect

does not affect the

a waiver of

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

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

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

or was

in the instant proceeding or on a prior occasion

another from disclosing any matter, the presiding officer, counsel may comment thereon, no presumption shall arise the exercise of the privilege, and the trier of fact may not draw any inference therefrom as to the credibility of the witness or as to any matter at issue in the proceeding.

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

914. (a) Subject to Section 915, the presiding officer shall determine a claim of privilege in any proceeding in the same manner as a determines such a claim under Article 2 (commencing with Section 400) of Chapter 4 of Division 3.

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

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

(b) When a ruling on a claim of privilege under Article 9 (commencing with Section 1040) of Chapter 4 (official information and identity of informer) or under Section 1060 (trade secret) lege) is unable to without requiring disclosure of the information claimed to be privileged, the may require the person from whom disclosure is sought or the person authorized to claim the privilege, or both, to disclose the information in chambers out of the presence and hearing of all persons except the person authorized to claim the privilege and such other persons as the person authorized to claim the privilege is willing to have present. If the judge determines that the information is privileged, neither he nor any other person may ever disclose, without the consent of a person authorized to permit disclosure, what was disclosed in the course of the proceedings in chambers.

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

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

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

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

(1) He is otherwise instructed by a person authorized to permit disclosure; or

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

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

918. A party may predicate error on a ruling disallowing a claim of privilege only if he is the holder of the privilege, except that a party may predicate error on a ruling disallowing a claim of privilege by his spouse under Section 970 or 971.

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

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

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

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

Chapter 4. Particular Privileges

Article 1. Privilege of Defendant in Criminal Case

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

Article 2. Privilege Against Self-Incrimination

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

Article 3. Lawyer-Client Privilege

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

951. As used in this article, "client" means a person [redacted] who, directly or through an authorized representative, consults a lawyer for

the purpose of retaining the lawyer or securing legal service or advice from him in his professional capacity, and includes an incompetent (a) who himself so consults the lawyer or (b) whose guardian or conservator so consults the lawyer in behalf of the incompetent.

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

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

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

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

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

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

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

(a) The holder of the privilege;

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

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

955. The lawyer who received or made a communication subject to the privilege under this article shall claim the privilege whenever he is present when the communication is sought to be disclosed and is authorized to claim the privilege under subdivision (c) of Section 954.

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

957. There is no privilege under this article as to a communication relevant to an issue between parties all of whom claim through a deceased client, regardless of whether the

claims are by testate or intestate succession or by inter vivos transaction.

958. There is no privilege under this article as to a communication relevant to an issue of breach, by the lawyer or by the client, of a duty arising out of the lawyer-client relationship, including but not limited to an issue concerning the adequacy of the representation of the client by the lawyer.

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

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

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

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

Article 4. Privilege Not to Testify Against Spouse

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

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

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

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

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

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

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

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

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

(2) A crime against the person or property of a third person committed in the course of committing a crime against the person or property of the other spouse, whether committed before or during marriage.

(3) Bigamy or adultery.

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

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

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

Article 5. Privilege for Confidential Marital Communications

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

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

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

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

984. There is no privilege under this article in:

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

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

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

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

committed at any time

committed at any time

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

(c) Bigamy or adultery.

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

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

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

Article 6. Physician-Patient Privilege

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

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

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

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

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

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

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

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

(a) The holder of the privilege;

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

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

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

996. There is no privilege under this article as to an issue concerning the condition of the patient if such issue has been tendered by:

(a) The patient;

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

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

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

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

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

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

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

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

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

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

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

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

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

Article 7. Psychotherapist-Patient Privilege

1010. As used in this article, "psychotherapist" means:

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

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

1011. As used in this article, "patient" means a person who consults a psychotherapist or submits to an examination by a psychotherapist for the purpose of securing a diagnosis or preventive, palliative, or curative treatment of his mental or emotional condition.

1012. As used in this article, "confidential communication between patient and psychotherapist" means information, including information obtained by an examination of the patient, transmitted between a patient and his psychotherapist in the course of that relationship and in confidence by a means which, so far as the patient is aware, discloses the information to no third persons other than those who are present to further the interest of the patient in the consultation or those to whom disclosure is reasonably necessary for the transmission of the information or the accomplishment of the purpose for which the psychotherapist is consulted, and includes advice given by the psychotherapist in the course of that relationship.

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

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

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

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

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

(a) The holder of the privilege;

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

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

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

1016. There is no privilege under this article as to an issue concerning the mental or emotional condition of the patient if such issue has been tendered by:

(a) The patient;

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

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

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

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

1018. There is no privilege under this article if the services of the psychotherapist were sought or obtained to enable or aid anyone to commit or plan to commit a crime or a tort or to escape detection or apprehension after the commission of a crime or a tort.

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

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

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

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

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

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

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

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

1026. There is no privilege under this article as to information that the psychotherapist or the patient is required to report to a public employee or as to information required to be recorded in a public office, unless the statute, charter, ordinance, administrative regulation, or other provision requiring the report or record specifically provides that the information is confidential or may not be disclosed in the particular proceeding.

Article 8. Clergyman-Penitent Privileges

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

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

1032. As used in this article, "penitential communication" means a communication made in confidence in the presence of no third person to a clergyman who, in the course of the discipline or practice of his church, denomination, or organization, is authorized or accustomed to hear such communications and has a duty to keep them secret.

so far as the penitent is aware,

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

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

Article 9. Official Information and Identity of Informer

1040. (a) As used in this section, "official information" means information acquired in confidence by a public employee in the course of his duty and not open, or officially disclosed, to the public prior to the time the claim of privilege is made.

(b) Subject to subdivision (c), a public entity [redacted] has a privilege to refuse to disclose official information, and to prevent another from disclosing such information, if the privilege is claimed by a person authorized by the public entity to do so and:

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

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

[redacted]

1041. (a) Except as provided in this section, a public entity [redacted] has a privilege to refuse to disclose the identity of a person who has furnished information as provided in subdivision (b) purporting to disclose a violation of a law of this State or of the United States, and to prevent another from disclosing such identity, if the privilege is claimed by a person authorized by the public entity to do so and:

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

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

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

[redacted]

[redacted]

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

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

(b) Notwithstanding subdivision (a), where a search is made pursuant to a warrant valid on its face, the public entity bringing a criminal proceeding or a disciplinary proceeding is not required to reveal to the defendant official information or the identity of an informer in order to establish the legality of the search or the admissibility of any evidence obtained as a result of it.

Article 10. Political Vote

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

Article 11. Trade Secret

1060. If he or his agent or employee claims the privilege, the owner of a trade secret has a privilege to refuse to disclose the secret, and to prevent another from disclosing it, if the allowance of the privilege will not tend to conceal fraud or otherwise work injustice.

CHAPTER 5.

[redacted] Immunity of Newsmen From Citation for Contempt

caps & sm caps

chapter

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

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

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

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

DIVISION 9. EVIDENCE AFFECTED OR EXCLUDED BY EXTRINSIC POLICIES

CHAPTER 1. EVIDENCE OF CHARACTER, HABIT, OR CUSTOM

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

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

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

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

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

(a) Offered by the defendant to prove his conduct in conformity with such character or trait of character.

(b) Offered by the prosecution to rebut evidence adduced by the defendant under subdivision (a).

1103. In a criminal action, evidence of the character or a trait of character (in the form of opinion, evidence of reputation, or evidence of specific instances of conduct) of the victim of the crime for which the defendant is being prosecuted is not made inadmissible by Section 1101 if such evidence is:

(a) Offered by the defendant to prove conduct of the victim in conformity with such character or trait of character.

(b) Offered by the prosecution to rebut evidence adduced by the defendant under subdivision (a).

1104. Except as provided in Sections 1102 and 1103, evidence of a trait of a person's character with respect to care or skill is inadmissible to prove the quality of his conduct on a specified occasion.

1105. Any otherwise admissible evidence of habit or custom is admissible to prove conduct on a specified occasion in conformity with the habit or custom.

CHAPTER 2. OTHER EVIDENCE AFFECTED OR EXCLUDED BY EXTRINSIC POLICIES

1150. Upon an inquiry as to the validity of a verdict, any otherwise admissible evidence may be received as to statements made, or conduct, conditions, or events occurring, either within or without the jury room, of such a character as is likely to have influenced the verdict improperly. No evidence is admissible to show the effect of such statement, conduct, condition, or event upon a juror either in influencing him to assent to or dissent from the verdict or concerning the mental processes by which it was determined.

1151. When, after the occurrence of an event, remedial or precautionary measures are taken, which, if taken previously, would have tended to make the event less likely to occur, evidence of such subsequent measures is inadmissible to prove negligence or culpable conduct in connection with the event.

1152. (a) Evidence that a person has, in compromise or from humanitarian motives, furnished or offered or promised to furnish money or any other thing, act, or service to another who has sustained or claims to have sustained loss or damage, as well as any conduct or statements made in negotiation thereof, is inadmissible to prove his liability for the loss or damage or any part of it.

(b) This section does not affect the admissibility of evidence of:

(1) Partial satisfaction of an asserted claim on demand without questioning its validity when such evidence is offered to prove the validity of the claim; or

(2) A debtor's payment or promise to pay all or a part of his pre-existing debt when such evidence is offered to prove the creation of a new duty on his part or a revival of his pre-existing duty.

1153. Evidence of a plea of guilty, later withdrawn, or of an offer to plead guilty to the crime charged or to any other crime, made by the defendant in a criminal action is inadmissible in any action or in any proceeding of any nature, including proceedings before agencies, commissions, boards, and tribunals.

1154. Evidence that a person has accepted or offered or promised to accept a sum of money or any other thing, act, or service in satisfaction of a claim, as well as any conduct or statements made in negotiation thereof, is inadmissible to prove the invalidity of the claim or any part of it.

1155. Evidence that a person was, at the time a harm was suffered by another, insured wholly or partially against loss arising from liability for that harm is inadmissible to prove negligence or other wrongdoing.

1156. (a) In-hospital medical staff committees of a licensed hospital may engage in research and medical study for the purpose of reducing morbidity or mortality, and may make findings and recommendations relating to such purpose.

The written records of interviews, reports, statements, or memoranda of such in-hospital medical staff committees relating to such medical studies are subject to Sections 2016 and 2036 of the Code of Civil Procedure (relating to discovery proceedings) but, subject to subdivisions (b) and (c), shall not be admitted as evidence in any action or before any administrative body, agency, or person.

(b) This section does not affect the admissibility in evidence of the original medical records of any patient.

(c) This section does not exclude evidence which is relevant evidence in a criminal action.

DIVISION 10. HEARSAY EVIDENCE

CHAPTER 1. GENERAL PROVISIONS

1200. (a) "Hearsay evidence" is evidence of a statement made other than by a witness while testifying at the hearing that is offered to prove the truth of the matter stated.

(b) Except as provided by law, hearsay evidence is inadmissible.

(c) This section shall be known and may be cited as the hearsay rule.

1201. A statement within the scope of an exception to the hearsay rule is not inadmissible on the ground that the evidence [redacted] is hearsay evidence if the hearsay evidence of such statement consists of one or more statements each of which meets the requirements of an exception to the hearsay rule.

1202. Evidence of a statement or other conduct by a declarant that is inconsistent with a statement by such declarant received in evidence as hearsay evidence is not inadmissible for the purpose of attacking the credibility of the declarant though he is given and has had no opportunity to explain or to deny such inconsistent statement or other conduct. Any other evidence offered to attack or support the credibility of the declarant is admissible if it would have been admissible had the declarant been a witness at the hearing.

1203. (a) Except as provided in subdivisions (b) and (c), the declarant of a statement that is admitted as hearsay evidence may be called and examined as if under cross-examination concerning the statement and its subject matter by any adverse party.

(b) Unless the party seeking to examine the declarant has the right apart from this section to [redacted] examine the declarant [redacted] this section is not applicable if the declarant is (1) a party, (2) an agent, partner, or employee of a party, (3) a person united in interest with a party or for whose immediate benefit the action is prosecuted or defended, or (4) a witness who has testified in the action.

(c) This section is not applicable if the statement is one described in Article 1 (commencing with Section 1220), Ar-

ticle 3 (commencing with Section 1235), or Article 10 (commencing with Section 1300) of Chapter 2 of this division.

(d) A statement that is otherwise admissible as hearsay evidence is not made inadmissible by this section because the declarant who made the statement is unavailable for [redacted] examination pursuant to this section.

1204. A statement that is otherwise admissible as hearsay evidence is inadmissible against the defendant in a criminal action if the statement was made, either by the defendant or by another, under such circumstances that it is inadmissible against the defendant under the Constitution of the United States or the State of California.

1205. Nothing in this division shall be construed to repeal by implication any other statute relating to hearsay evidence.

Chapter 2. Exceptions to the Hearsay Rule

Article 1. Confessions and Admissions

1220. Evidence of a statement is not made inadmissible by the hearsay rule when offered against the declarant in an action to which he is a party in either his individual or representative capacity, regardless of whether the statement was made in his individual or representative capacity.

1221. Evidence of a statement offered against a party is not made inadmissible by the hearsay rule if the statement is one of which the party, with knowledge of the content thereof, has by words or other conduct manifested his adoption or his belief in its truth.

1222. Evidence of a statement offered against a party is not made inadmissible by the hearsay rule if:

(a) The statement was made by a person authorized by the party to make a statement or statements for him concerning the subject matter of the statement; and

(b) The evidence is offered either after admission of evidence sufficient to sustain a finding of such authority or, in the [redacted] discretion as to the order of proof, subject to the admission of such evidence.

court's

1223. Evidence of a statement offered against a party is not made inadmissible by the hearsay rule if:

(a) The statement was made by the declarant while participating in a conspiracy to commit a crime or civil wrong and in furtherance of the objective of that conspiracy;

(b) The statement was made prior to or during the time that the party was participating in that conspiracy; and

(c) The evidence is offered either after admission of evidence sufficient to sustain a finding of the facts specified in subdivisions (a) and (b) or, in the [redacted] discretion as to the order of proof, subject to the admission of such evidence.

court's

1224. Evidence of a statement offered against a party is not made inadmissible by the hearsay rule if:

(a) The statement was made by an agent, partner, or employee of the party;

(b) The statement concerned a matter within the scope of the agency, partnership, or employment and was made during that relationship;

(c) The statement would be admissible if made by the declarant at the hearing; and

(d) The evidence is offered either after [redacted] of the existence of the relationship between the declarant and the party or, in the [redacted] discretion as to the order of proof, subject to such proof.

court's

the court is persuaded

1225. When the liability, obligation, or duty of a party to a civil action is based in whole or in part upon the liability, obligation, or duty of the declarant, or when the claim or right asserted by a party to a civil action is barred or diminished by a breach of duty by the declarant, evidence of a statement made by the declarant is as admissible against the party as it would be if offered against the declarant in an action involving that liability, obligation, duty, or breach of duty.

1226. When a right or title asserted by a party to a civil action requires a determination that a right or title exists or existed in the declarant, evidence of a statement made by the declarant during the time the party now claims the declarant was the holder of the right or title is as admissible against the party as it would be if offered against the declarant in an action involving that right or title.

1227. Evidence of a statement is not made inadmissible by the hearsay rule if offered against the plaintiff in an action brought under Section 376 or 377 of the Code of Civil Procedure for the injury or death of the declarant.

Article 2. Declarations Against Interest

1230. Evidence of a statement by a declarant having sufficient knowledge of the subject is not made inadmissible by the hearsay rule if the statement, when made, was so far contrary to the declarant's pecuniary or proprietary interest, or so far subjected him to the risk of civil or criminal liability, or so far tended to render invalid a claim by him against another, or created such a risk of making him an object of hatred, ridicule, or social disgrace in the community, that a reasonable man in his position would not have made the statement unless he believed it to be true.

Article 3. Statements of Witnesses

1235. Evidence of a statement made by a witness is not made inadmissible by the hearsay rule if the statement is inconsistent with his testimony at the hearing and is offered in compliance with Section 770.

1236. Evidence of a statement previously made by a witness is not made inadmissible by the hearsay rule if the statement is consistent with his testimony at the hearing and is offered in compliance with Section 791.

1237. Evidence of a statement previously made by a witness is not made inadmissible by the hearsay rule if the statement would have been admissible if made by him while testifying, the statement concerns a matter as to which the witness has insufficient present recollection to enable him to testify fully and accurately, and the statement is contained in a writing which:

(a) Was made at a time when the fact recorded in the writing actually occurred or was fresh in the witness' memory;

(b) Was made (1) by the witness himself or under his direction or (2) by some other person for the purpose of recording the witness' statement at the time it was made;

(c) Is offered after the witness testifies that the statement he made was a true statement of such fact; and

(d) Is offered after the writing is authenticated as an accurate record of the statement.

1238. Evidence of a statement previously made by a witness is not made inadmissible by the hearsay rule if the statement would have been admissible if made by him while testifying and:

(a) The statement is an identification of a party or another as a person who participated in a crime or other occurrence;

(b) The statement was made at a time when the crime or other occurrence was fresh in the witness' memory; and

(c) The evidence of the statement is offered after the witness testifies that he made the identification and that it was a true reflection of his opinion at that time.

Article 4. Spontaneous, Contemporaneous, and Dying Declarations

1240. Evidence of a statement is not made inadmissible by the hearsay rule if the statement:

(a) Purports to narrate, describe, or explain an act, condition, or event perceived by the declarant; and

(b) Was made spontaneously while the declarant was under the stress of excitement caused by such perception.

1241. Evidence of a statement is not made inadmissible by the hearsay rule if the statement:

(a) Purports to narrate, describe, or explain an act, condition, or event perceived by the declarant; and

(b) Was made while the declarant was perceiving the act, condition, or event.

1242. Evidence of a statement respecting the cause and circumstances of his death, made by a person since deceased, is not made inadmissible by the hearsay rule if the statement was made upon the personal knowledge of the declarant and was made under a sense of impending death, voluntarily and

in good faith, and in the belief that there was no hope of his recovery.

Article 5. Statements of Mental or Physical State

1250. (a) Subject to Section 1252, evidence of a statement of the declarant's then existing state of mind, emotion, or physical sensation (including a statement of intent, plan, motive, design, mental feeling, pain, or bodily health) is not made inadmissible by the hearsay rule when:

(1) The evidence is offered to prove such then existing state of mind, emotion, or physical sensation when it is itself an issue in the action; or

(2) The evidence is offered to prove or explain acts or conduct of the declarant.

(b) This section does not make admissible evidence of a statement of memory or belief to prove the fact remembered or believed.

1251. Subject to Section 1252, evidence of a statement of the declarant's state of mind, emotion, or physical sensation (including a statement of intent, plan, motive, design, mental feeling, pain, or bodily health) at a time prior to the statement is not made inadmissible by the hearsay rule if:

(a) The declarant is unavailable as a witness; and

(b) The evidence is offered to prove such prior state of mind, emotion, or physical sensation when it is itself an issue in the action and the evidence is not offered to prove any fact other than such state of mind, emotion, or physical sensation.

1252. Evidence of a statement is inadmissible under this article if the statement was made under circumstances such as to indicate its trustworthiness.

Article 6. Statements Relating to Wills and to Claims Against Estates

1260. (a) Evidence of a statement made by a declarant who is unavailable as a witness that he has or has not made a will, or has or has not revoked his will, or that identifies his will, is not made inadmissible by the hearsay rule.

(b) Evidence of a statement is inadmissible under this section unless the statement was made under circumstances such as to indicate its trustworthiness.

1261. Evidence of a statement is not made inadmissible by the hearsay rule when offered in an action upon a claim or demand against the estate of the declarant if the statement was:

(a) Made upon the personal knowledge of the declarant at a time when the matter had been recently perceived by him and while his recollection was clear; and

(b) Made under circumstances such as to indicate its trustworthiness.

Article 7. Business Records

1270. As used in this article, "a business" includes every kind of business, governmental activity, profession, occupation, calling, or operation of institutions, whether carried on for profit or not.

1271. Evidence of a writing made as a record of an act, condition, or event is not made inadmissible by the hearsay rule when offered to prove the act, condition, or event if:

(a) The writing was made in the regular course of a business;

(b) The writing was made at or near the time of the act, condition, or event;

(c) The custodian or other qualified witness testifies to its identity and the mode of its preparation; and

(d) The sources of information and method and time of preparation were such as to indicate its trustworthiness.

1272. Evidence of the absence from the records of a business of a record of an asserted act, condition, or event is not made inadmissible by the hearsay rule when offered to prove the nonoccurrence of the act or event, or the nonexistence of the condition, if:

(a) It was the regular course of that business to make records of all such acts, conditions, or events at or near the time of the act, condition, or event and to preserve them; and

(b) The sources of information and method and time of preparation of the records of that business were such that the absence of a record of an act, condition, or event is a trustworthy indication that the act or event did not occur or the condition did not exist.

Article 8. Official Records and Other Official Writings

1280. Evidence of a writing made as a record of an act, condition, or event is not made inadmissible by the hearsay rule when offered to prove the act, condition, or event if:

(a) The writing was made by and within the scope of duty of a public employee [redacted];

(b) The writing was made at or near the time of the act, condition, or event; and

(c) The sources of information and method and time of preparation were such as to indicate its trustworthiness.

1281. Evidence of a writing made as a record of a birth, fetal death, death, or marriage is not made inadmissible by the hearsay rule if the maker was required by law to file the writing in a designated public office and the writing was made and filed as required by law.

1282. A written finding of presumed death made by an employee of the United States authorized to make such finding pursuant to the Federal Missing Persons Act (56 Stats. 143, 1092, and P.L. 408, Ch. 371, 2d Sess. 78th Cong.; 50 U.S.C. App. 1001-1016), as enacted or as heretofore or hereafter

amended, shall be received in any court, office, or other place in this State as evidence of the death of the person therein found to be dead and of the date, circumstances, and place of his disappearance.

1283. An official written report or record that a person is missing, missing in action, interned in a foreign country, captured by a hostile force, beleaguered by a hostile force, or besieged by a hostile force, or is dead or is alive, made by an employee of the United States authorized by any law of the United States to make such report or record shall be received in any court, office, or other place in this State as evidence that such person is missing, missing in action, interned in a foreign country, captured by a hostile force, beleaguered by a hostile force, or besieged by a hostile force, or is dead or is alive.

1284. Evidence of a writing made by the public employee who is the official custodian of the records in a public office, reciting diligent search and failure to find a record, is not made inadmissible by the hearsay rule when offered to prove the absence of a record in that office.

Article 9. Former Testimony

1290. As used in this article, "former testimony" means testimony given under oath or affirmation in:

(a) Another action or in a former hearing or trial of the same action;

(b) A proceeding to determine a controversy conducted by or under the supervision of an agency that has the power to determine such a controversy and is an agency of the United States or a public entity;

in the United States;

(c) A deposition taken in compliance with law in another action; or

(d) An arbitration proceeding if the evidence of such former testimony is a verbatim transcript thereof.

1291. (a) Evidence of former testimony is not made inadmissible by the hearsay rule if the declarant is unavailable as a witness and:

(1) The former testimony is offered against a person who offered it in evidence in his own behalf on the former occasion or against the successor in interest of such person; or

(2) The party against whom the former testimony is offered was a party to the action or proceeding in which the testimony was given and had the right and opportunity to cross-examine the declarant with an interest and motive similar to that which he has at the hearing, except that testimony in a deposition taken in another action and testimony given in a preliminary examination in another criminal action is not made admissible by this paragraph against the defendant in a criminal action unless it was received in evidence at the trial of such other action.

(b) Except for objections to the form of the question which were not made at the time the former testimony was given, and objections based on competency or privilege which did not exist at that time, the admissibility of former testimony under this section is subject to the same limitations and objections as though the declarant were testifying at the hearing.

1292. (a) Evidence of former testimony is not made inadmissible by the hearsay rule if:

(1) The declarant is unavailable as a witness;

(2) The former testimony is offered in a civil action or against the prosecution in a criminal action; and

(3) The issue is such that the party to the action or proceeding in which the former testimony was given had the right and opportunity to cross-examine the declarant with an interest and motive similar to that which the party against whom the testimony is offered has at the hearing.

(b) Except for objections based on competency or privilege which did not exist at the time the former testimony was given, the admissibility of former testimony under this section is subject to the same limitations and objections as though the declarant were testifying at the hearing.

Article 10. Judgments

a crime punishable as

1300. Evidence of a final judgment adjudging a person guilty of a felony is not made inadmissible by the hearsay rule when offered in a civil action to prove any fact essential to the judgment unless the judgment was based on a plea of nolo contendere.

1301. Evidence of a final judgment is not made inadmissible by the hearsay rule when offered by the judgment debtor to prove any fact which was essential to the judgment in an action in which he seeks to:

(a) Recover partial or total indemnity or exoneration for money paid or liability incurred because of the judgment;

(b) Enforce a warranty to protect the judgment debtor against the liability determined by the judgment; or

the

(c) Recover damages for breach of warranty substantially the same as a warranty determined by the judgment to have been breached.

1302. When the liability, obligation, or duty of a third person is in issue in a civil action, evidence of a final judgment against that person is not made inadmissible by the hearsay rule when offered to prove such liability, obligation, or duty.

Article 11. Family History

1310. (a) Subject to subdivision (b), evidence of a statement by a declarant who is unavailable as a witness concerning his own birth, marriage, divorce, legitimacy, relationship by blood or marriage, race, ancestry, or other similar fact of his

family history is not made inadmissible by the hearsay rule, even though the declarant had no means of acquiring personal knowledge of the matter declared.

(b) Evidence of a statement is inadmissible under this section [redacted] the statement was made under circumstances such as to indicate its trustworthiness.

1311. (a) Subject to subdivision (b), evidence of a statement concerning the birth, marriage, divorce, death, legitimacy, race, ancestry, relationship by blood or marriage, or other similar fact of the family history of a person other than the declarant is not made inadmissible by the hearsay rule if the declarant is unavailable as a witness and:

(1) The declarant was related to the other by blood or marriage; or

(2) The declarant was otherwise so intimately associated with the other's family as to be likely to have had accurate information concerning the matter declared and made the statement (i) upon information received from the other or from a person related by blood or marriage to the other or (ii) upon repute in the other's family.

(b) Evidence of a statement is inadmissible under this section [redacted] the statement was made under circumstances such as to indicate its trustworthiness.

1312. Evidence of entries in family bibles or other family books or charts, engravings on rings, family portraits, engravings on urns, crypts, or tombstones, and the like, is not made inadmissible by the hearsay rule when offered to prove the birth, marriage, divorce, death, legitimacy, race, ancestry, relationship by blood or marriage, or other similar fact of the family history of a member of the family by blood or marriage.

1313. Evidence of reputation among members of a family is not made inadmissible by the hearsay rule if the reputation concerns the birth, marriage, divorce, death, legitimacy, race, ancestry, relationship by blood or marriage, or other similar fact of the family history of a member of the family by blood or marriage.

1314. Evidence of reputation in a community concerning the date or fact of birth, marriage, divorce, or death of a person resident in the community at the time of the reputation is not made inadmissible by the hearsay rule.

1315. Evidence of a statement concerning a person's birth, marriage, divorce, death, legitimacy, race, ancestry, relationship by blood or marriage, or other similar fact of family history is not made inadmissible by the hearsay rule if:

(a) The statement is contained in a writing made as a record of an act, condition, or event that would be admissible as evidence of such act, condition, or event under Section 1271;

(b) The statement is of a kind customarily recorded in connection with the act, condition, or event recorded in the writing; and

(c) The writing was made as a record of a church, religious denomination, or religious society.

1316. Evidence of a statement concerning a person's birth, marriage, divorce, death, legitimacy, race, ancestry, relationship by blood or marriage, or other similar fact of family history is not made inadmissible by the hearsay rule if the statement is contained in a certificate that the maker thereof performed a marriage or other ceremony or administered a sacrament and:

(a) The [redacted] was [redacted] a clergyman, civil officer, or other person authorized to perform the acts reported in the certificate by law or by the rules, regulations, or requirements of a church, religious denomination, or religious society; and

(b) The certificate was issued by [redacted] at the time and place of the ceremony or sacrament or within a reasonable time thereafter.

Article 12. Reputation and Statements Concerning Community History, Property Interests, and Character

1320. Evidence of reputation in a community is not made inadmissible by the hearsay rule if the reputation concerns an event of general history of the community or of the state or nation of which the community is a part and the event was of importance to the community.

1321. Evidence of reputation in a community is not made inadmissible by the hearsay rule if the reputation concerns the interest of the public in property in the community and the reputation arose before controversy.

1322. Evidence of reputation in a community is not made inadmissible by the hearsay rule if the reputation concerns boundaries of, or customs affecting, land in the community and the reputation arose before controversy.

1323. Evidence of a statement concerning the boundary of land is not made inadmissible by the hearsay rule if the declarant is unavailable as a witness and had sufficient knowledge of the subject, but evidence of a statement is not admissible under this section unless the statement was made under circumstances such as to indicate its trustworthiness.

1324. Evidence of a person's general reputation with reference to his character or a trait of his character at a relevant time in the community in which he then resided or in a group with which he then habitually associated is not made inadmissible by the hearsay rule.

Article 13. Dispositive Instruments and Ancient Writings

1330. Evidence of a statement contained in a deed of conveyance or a will or other writing purporting to affect an interest in real or personal property is not made inadmissible by the hearsay rule if:

(a) The matter stated was relevant to the purpose of the writing;

(b) The matter stated would be relevant to an issue as to an interest in the property; and

(c) The dealings with the property since the statement was made have not been inconsistent with the truth of the statement.

1331. Evidence of a statement is not made inadmissible by the hearsay rule if the statement is contained in a writing more than 30 years old and the statement has been since generally acted upon as true by persons having an interest in the matter.

Article 14. Commercial, Scientific, and Similar Publications

1340. Evidence of a statement, other than an opinion, contained in a tabulation, list, directory, register, or other published compilation is not made inadmissible by the hearsay rule if the compilation is generally used and relied upon as accurate in the course of a business as defined in Section 1270.

1341. Historical works, books of science or art, and published maps or charts, made by persons indifferent between the parties, are not made inadmissible by the hearsay rule when offered to prove facts of general notoriety and interest.

DIVISION 11. WRITINGS

Chapter 1. Authentication and Proof of Writings

Article 1. Requirement of Authentication

1400. Authentication of a writing means (a) the introduction of evidence sufficient to sustain a finding that it is the writing that the proponent of the evidence claims it is and that it was made or signed by the person the proponent of the evidence claims made or signed it or (b) the establishment of such facts by any other means provided by law.

1401. (a) Authentication of a writing is required before it may be received in evidence.

(b) Authentication of a writing is required before secondary evidence of its content may be received in evidence.

1402. The party producing a writing as genuine which has been altered, or appears to have been altered, after its execution, in a part material to the question in dispute, must account for the alteration or appearance thereof. He may

show that the alteration was made by another, without his concurrence, or was made with the consent of the parties affected by it, or otherwise properly or innocently made, or that the alteration did not change the meaning or language of the instrument. If he does that, he may give the writing in evidence, but not otherwise.

Article 2. Means of Authenticating and Proving Writings

1410. A writing is sufficiently authenticated to be received in evidence if there is any evidence sufficient to sustain a finding of the authenticity of the writing; and nothing in this article shall be construed to limit the means by which the authenticity of a writing may be shown.

1411. Except as provided by statute, the testimony of a subscribing witness is not required to authenticate a writing.

1412. If the testimony of a subscribing witness is required by statute to authenticate a writing and the subscribing witness denies or does not recollect the execution of the writing, the writing may be authenticated by other evidence.

1413. A writing may be authenticated by anyone who saw the writing executed, including a subscribing witness.

1414. A writing may be authenticated by evidence that:

(a) The party against whom it is offered has at any time admitted its authenticity; or

(b) The writing is produced from the custody of the party against whom it is offered and has been acted upon by him as authentic.

1415. A writing may be authenticated by evidence of the authenticity of the handwriting of the maker.

1416. A witness who is not otherwise qualified to testify as an expert may state his opinion whether a writing is in the handwriting of a supposed writer if the court finds that he has personal knowledge of the handwriting of the supposed writer. Such personal knowledge may be acquired from:

(a) Having seen the supposed writer write;

(b) Having seen a writing purporting to be the writing of the supposed writer and upon which the supposed writer has acted or been charged;

(c) Having received letters in the due course of mail purporting to be from the supposed writer in response to letters duly addressed and mailed by him to the supposed writer; or

(d) Any other means of obtaining personal knowledge of the handwriting of the supposed writer.

1417. The authenticity of handwriting, or the lack thereof, may be proved by a comparison made by the trier of fact with handwriting (a) which the court finds was admitted or treated as authentic by the party against whom the evidence is offered or (b) otherwise proved to be authentic to the satisfaction of the court.

1418. The authenticity of writing, or the lack thereof, may be proved by a comparison made by an expert witness with writing (a) which the court finds was admitted or treated as authentic by the party against whom the evidence is offered or (b) otherwise proved to be authentic to the satisfaction of the court.

1419. Where a writing sought to be introduced in evidence is more than 30 years old, the comparison under Section 1417 or 1418 may

be made with writing purporting to be authentic, and generally respected and acted upon as such, by persons having an interest in knowing whether it is authentic.

1420. A writing may be authenticated by evidence that the writing was received in response to a communication sent to the person who is claimed by the proponent of the evidence to be the author of the writing.

1421. A writing may be authenticated by evidence that the writing refers to or states facts that are unlikely to be known to anyone other than the person who is claimed by the proponent of the evidence to be the author of the writing.

Article 3. Acknowledged Writings and Official Writings

1450. The presumptions established by this article are presumptions affecting the burden of producing evidence.

1451. A certificate of the acknowledgment of a writing other than a will, or a certificate of the proof of such a writing, is prima facie evidence of the facts recited in the certificate and the genuineness of the signature of each person by whom the writing purports to have been signed if the certificate meets the requirements of Article 3 (commencing with Section 1181) of Chapter 4, Title 4, Division 2 of the Civil Code.

1452. A seal is presumed to be genuine and its use authorized if it purports to be the seal of:

(a) The United States or a department, agency, or public employee of the United States.

(b) A public entity in the United States or a department, agency, or public employee thereof.

(c) A nation recognized by the executive power of the United States or a department, agency, or officer thereof.

(d) A [redacted] a nation recognized by the executive power of the United States.

(e) A court of admiralty or maritime jurisdiction.

(f) A notary public within the United States or any state of the United States.

1453. A signature is presumed to be genuine and authorized if it purports to be the signature, affixed in his official capacity, of:

(a) A public employee of the United States.

(b) A public employee of any public entity in any state of the United States.

(c) A notary public within the United States or any state of the United States.

1454. A signature is presumed to be genuine and authorized if it purports to be the signature, affixed in his official capacity, of an officer, or deputy of an officer, of a nation or [redacted] a nation recognized by the executive power of the United States and the writing to which the signature is affixed is accompanied by a final statement certifying the genuineness of the signature and the official position of (a) the person who executed the writing or (b) any foreign official who has certified either the genuineness of the signature and official position of the person executing the writing or the genuineness of the signature and official position of another foreign official who has executed a similar certificate in a chain of such certificates beginning with a certificate of the genuineness of the signature and official position of the person executing the writing. The final statement may be made only by a secretary of an embassy or legation, consul general, consul, vice consul, consular agent, or other officer in the foreign service of the United States stationed in the nation, authenticated by the seal of his office.

public entity in

Chapter 2. Secondary Evidence of Writings

Article 1. Best Evidence Rule

1500. Except as otherwise provided by statute, no evidence other than the writing itself is admissible to prove the content of a writing. This section shall be known and may be cited as the best evidence rule.

1501. A copy of a writing is not made inadmissible by the best evidence rule if the writing is lost or has been destroyed without fraudulent intent on the part of the proponent of the evidence.

1502. A copy of a writing is not made inadmissible by the best evidence rule if the writing was not reasonably procurable by the proponent by use of the court's process or by other available means.

1503. (a) A copy of a writing is not made inadmissible by the best evidence rule if, at a time when the writing was under the control of the opponent, the opponent was expressly or impliedly notified, by the pleadings or otherwise, that the writing would be needed at the hearing, and on request at the hearing the opponent has failed to produce the writing. In a criminal action, the request at the hearing to produce the writing may not be made in the presence of the jury.

(b) Though a writing requested by one party is produced by another, and is thereupon inspected by the party calling for it, he is not obliged to introduce it as evidence in the action.

1504. A copy of a writing is not made inadmissible by the best evidence rule if the writing is not closely related to the controlling issues and it would be inexpedient to require its production.

1505. Secondary evidence of the content of a writing described in Section 1501, 1502, 1503, or 1504, other than a copy thereof, is not made inadmissible by the best evidence rule if the proponent does not have in his possession or under his control a copy of the writing. This section does not apply to a writing that is also described in Section 1506 or 1507.

1506. A copy of a writing is not made inadmissible by the best evidence rule if the writing is a record or other writing in the custody of a public employee.

1507. A copy of a writing is not made inadmissible by the best evidence rule if the writing has been recorded in the public records and the record or an attested or a certified copy thereof is made evidence of the writing by statute.

1508. Secondary evidence of the content of a writing described in Section 1506 or 1507, other than a copy thereof, is not made inadmissible by the best evidence rule if the proponent does not have in his possession a copy of the writing and could not in the exercise of reasonable diligence have obtained a copy.

1509. Secondary evidence, whether written or oral, of the content of a writing is not made inadmissible by the best evidence rule if the writing consists of numerous accounts or other writings that cannot be examined in court without great loss of time, and the evidence sought from them is only the general result of the whole; but the [redacted] discretion, may require that such accounts or other writings be produced for inspection by the adverse party.

court, in its

1510. A copy of a writing is not made inadmissible by the best evidence rule if the writing has been produced at the hearing and made available for inspection by the adverse party.

Article 2. Official Writings and Recorded Writings

1530. (a) A purported copy of a writing in the custody of a public employee, or of an entry in such a writing, is prima facie evidence of such writing or entry if:

public entity therein

(1) The copy purports to be published by the authority of the nation or state, or [redacted] in which the writing is kept;

(2) The office in which the writing is kept is within the United States [redacted] or within the Panama Canal Zone, the Trust Territory of the Pacific Islands, or the Ryukyu Islands, and the copy is attested or certified as a correct copy of the writing or entry by a public employee, or a deputy of a public employee, having the legal custody of the writing; or

(3) The office in which the writing is kept is not within the United States or any other place described in paragraph (2) and the copy is attested as a correct copy of the writing

or entry by a person having authority to make the attestation. The attestation must be accompanied by a final statement certifying the genuineness of the signature and the official position of (i) the person who attested the copy as a correct copy or (ii) any foreign official who has certified either the genuineness of the signature and official position of the person attesting the copy or the genuineness of the signature and official position of another foreign official who has executed a similar certificate in a chain of such certificates beginning with a certificate of the genuineness of the signature and official position of the person attesting the copy. The final statement may be made only by a secretary of an embassy or legation, consul general, consul, vice consul, consular agent, or other officer in the foreign service of the United States stationed in the nation in which the writing is kept, authenticated by the seal of his office.

(b) The presumptions established by this section are presumptions affecting the burden of producing evidence.

1531. For the purpose of evidence, whenever a copy of a writing is attested or certified, the attestation or certificate must state in substance that the copy is a correct copy of the original, or of a specified part thereof, as the case may be.

1532. (a) The official record of a writing is prima facie evidence of the content of the original recorded writing if:

(1) The record is in fact a record of an office of a state or nation or of any [redacted] and

(2) A statute authorized such a writing to be recorded in that office.

public entity therein;

(b) The presumption established by this section is a presumption affecting the burden of producing evidence.

Article 3. Photographic Copies of Writings

1550. A photostatic, microfilm, microcard, miniature photographic or other photographic copy or reproduction, or an enlargement thereof, of a writing is as admissible as the writing itself if such copy or reproduction was made and preserved as a part of the records of a business (as defined by Section 1270) in the regular course of such business. The introduction of such copy, reproduction, or enlargement does not preclude admission of the original writing if it is still in existence.

1551. A print, whether enlarged or not, from a photographic film (including a photographic plate, microphotographic film, photostatic negative, or similar reproduction) of an original writing destroyed or lost after such film was taken is as admissible as the original writing itself if, at the time of the taking of such film, the person under whose direction and control it was taken attached thereto, or to the sealed container in which it was placed and has been kept, or incorporated in the film, a certification complying with the provisions of Section 1531 and stating the date on which, and the fact that, it was so taken under his direction and control.

Article 4. Hospital Records

1560. (a) Except as provided in Section 1564, when a subpoena duces tecum is served upon the custodian of records or other qualified witness from a licensed or county hospital, state hospital, or hospital in an institution under the jurisdiction of the Department of Corrections in an action in which the hospital is neither a party nor the place where any cause of action is alleged to have arisen and such subpoena requires the production of all or any part of the records of the hospital relating to the care or treatment of a patient in such hospital, it is sufficient compliance therewith if the custodian or other officer of the hospital, within five days after the receipt of such subpoena, delivers by mail or otherwise a true and correct copy (which may be a photographic or microphotographic reproduction) of all the records described in such subpoena to the clerk of court or to the court if there be no clerk or to such other person as described in subdivision (a) of Section 2018 of the Code of Civil Procedure, together with the affidavit described in Section 1561.

(b) The copy of the records shall be separately enclosed in an inner envelope or wrapper, sealed, with the title and number of the action, name of witness and date of subpoena clearly inscribed thereon; the sealed envelope or wrapper shall then be enclosed in an outer envelope or wrapper, sealed, directed as follows:

(1) If the subpoena directs attendance in court, to the clerk of such court, or to the judge thereof if there be no clerk.

(2) If the subpoena directs attendance at a deposition or other hearing, to the officer before whom the deposition is to be taken, at the place designated in the subpoena for the taking of the deposition or at his place of business.

(3) In other cases, to the officer, body, or tribunal conducting the hearing, at a like address.

(c) Unless the parties to the proceeding otherwise agree, or unless the sealed envelope or wrapper is returned to a witness who is to appear personally, the copy of the records shall remain sealed and shall be opened only at the time of trial, deposition, or other hearing, upon the direction of the judge, officer, body, or tribunal conducting the proceeding, in the presence of all parties who have appeared in person or by counsel at such trial, deposition, or hearing. Records which are not introduced in evidence or required as part of the record shall be returned to the person or entity from whom received.

1561. (a) The records shall be accompanied by the affidavit of the custodian or other qualified witness, stating in substance each of the following:

(1) That the affiant is the duly authorized custodian of the records and has authority to certify the records.

(2) That the copy is a true copy of all the records described in the subpoena.

(3) That the records were prepared by the personnel of the hospital, staff physicians, or persons acting under the control of either, in the ordinary course of hospital business at or near the time of the act, condition, or event.

(b) If the hospital has none of the records described, or only part thereof, the custodian shall so state in the affidavit, and deliver the affidavit and such records as are available in the manner provided in Section 1560.

1562. The copy of the records is admissible in evidence to the same extent as though the original thereof were offered and the custodian had been present and testified to the matters stated in the affidavit. The affidavit is admissible in evidence and the matters stated therein are presumed true. When more than one person has knowledge of the facts, more than one affidavit may be made. The presumption established by this section is a presumption affecting the burden of proof.

1563. This article shall not be interpreted to require tender or payment of more than one witness and mileage fee or other charge unless there is an agreement to the contrary.

1564. The personal attendance of the custodian or other qualified witness and the production of the original records is required if the subpoena duces tecum contains a clause which reads:

"The procedure authorized pursuant to subdivision (a) of Section 1560, and Sections 1561 and 1562, of the Evidence Code will not be deemed sufficient compliance with this subpoena."

1565. If more than one subpoena duces tecum is served upon the custodian of records or other qualified witness from a licensed or county hospital, state hospital, or hospital in an institution under the jurisdiction of the Department of Corrections and the personal attendance of the custodian or other qualified witness is required pursuant to Section 1564, the witness shall be deemed to be the witness of the party serving the first such subpoena duces tecum.

1566. This article applies in any proceeding in which testimony can be compelled.

Chapter 3. Official Writings Affecting Property

1600. The official record of a document purporting to establish or affect an interest in property is prima facie evidence of the content of the original recorded document and its execution and delivery by each person by whom it purports to have been executed if:

(a) The record is in fact a record of an office of a state or nation or of any [redacted] and

public entity therein;

(b) A statute authorized such a document to be recorded in that office.

1601. (a) Subject to subdivisions (b) and (c), when in any action it is desired to prove the contents of the official record of any writing lost or destroyed by conflagration or other public calamity, after proof of such loss or destruction,

the following may, without further proof, be admitted in evidence to prove the contents of such record:

(1) Any abstract of title made and issued and certified as correct prior to such loss or destruction, and purporting to have been prepared and made in the ordinary course of business by any person engaged in the business of preparing and making abstracts of title prior to such loss or destruction; or

(2) Any abstract of title, or of any instrument affecting title, made, issued, and certified as correct by any person engaged in the business of insuring titles or issuing abstracts of title to real estate, whether the same was made, issued, or certified before or after such loss or destruction and whether the same was made from the original records or from abstract and notes, or either, taken from such records in the preparation and upkeeping of its plant in the ordinary course of its business.

(b) No proof of the loss of the original writing is required other than the fact that the original is not known to the party desiring to prove its contents to be in existence.

(c) Any party desiring to use evidence admissible under this section shall give reasonable notice in writing to all other parties to the action who have appeared therein, of his intention to use such evidence at the trial of the action, and shall give all such other parties a reasonable opportunity to inspect the evidence, and also the abstracts, memoranda, or notes from which it was compiled, and to take copies thereof.

1602. If a patent for mineral lands within this State, issued or granted by the United States of America, contains a statement of the date of the location of a claim or claims upon which the granting or issuance of such patent is based, such statement is prima facie evidence of the date of such location.

1603. A deed of conveyance of real property, purporting to have been executed by a proper officer in pursuance of legal process of any of the courts of record of this State, acknowledged and recorded in the office of the recorder of the county wherein the real property therein described is situated, or the record of such deed, or a certified copy of such record is prima facie evidence that the property or interest therein described was thereby conveyed to the grantee named in such deed.

1604. A certificate of purchase, or of location, of any lands in this State, issued or made in pursuance of any law of the United States or of this State, is prima facie evidence that the holder or assignee of such certificate is the owner of the land described therein; but this evidence may be overcome by proof that, at the time of the location, or time of filing, a pre-emption claim on which the certificate may have been issued, the land was in the adverse possession of the adverse party, or those under whom he claims, or that the adverse party is holding the land for mining purposes.

1605. Duplicate copies and authenticated translations of original Spanish title papers relating to land claims in this State, derived from the Spanish or Mexican Governments, prepared under the supervision of the Keeper of Archives, authenticated by the Surveyor-General or his successor and by the Keeper of Archives, and filed with a county recorder, in accordance with Chapter 281 of the Statutes of 1865-66, are receivable as prima facie evidence with like force and effect as the originals and without proving the execution of such originals.