

## Memorandum 64-11

Subject: Study No. 34(L) - Uniform Rules of Evidence (Article VI.  
Extrinsic Policies Affecting Admissibility)

## BACKGROUND

In preparing for printing the Commission's tentative recommendation on the above subject, the staff discovered one instance in which the existing law would be changed without apparent reason.

This change involves the permissible means of proving the character of the victim in a criminal case--i.e., the prosecutrix in a rape case or the victim in a homicide or assault case. Revised Rule 47(3) excludes specific instances of conduct to prove the character of the victim.

Although the Commission considered the question of the admissibility of specific instances of the defendant's conduct (and made evidence of this type inadmissible), Revised Rule 47 was approved without discussion of the permissible means of proving the character of the victim in a criminal case.

In addition to the following material, the present law in this regard is discussed in the tentative recommendation on pages 16-20 and in the research study at 10-13.

Consent in rape cases. It is well settled under the present California law that specific acts of intercourse by the prosecutrix with other persons, as well as prior acts of intercourse with the defendant himself, is admissible in a forcible rape case where the defense is consent. People v. Pantages, 212 Cal. 237, 297 Pac. 890 (1931); People v. Walker, 150 Cal. App.2d 594, 310 P.2d 110 (1957); People v. Battilana, 52 Cal. App.2d 685, 126 P.2d 923 (1942). The rationale for the admissibility of such specific acts is stated in the Battilana case as follows:

"Where, however, the defense rests on the fact of consent the character of the prosecutrix for unchastity is competent evidence as bearing on the probability of her consent to the act with which the defendant is charged, and the likelihood of her resisting the advances of any man, on the ground that it is more probable that an unchaste woman assented to such intercourse than one with strict virtue. . . ." [52 Cal. App.2d at 696.]

Forcible rape cases frequently involve little more than an accusation by the prosecutrix and a denial by the defendant; hence, the courts are solicitous in permitting the defendant to introduce evidence of any probative value, however slight. The argument against admissibility of such evidence is the same as is advanced against character evidence generally, i.e., raising collateral issues, confusing the jury, permitting the trier of fact to punish moral misconduct, etc. The dangers of admitting specific instances of unchastity, however, appear to be no greater than the similar dangers inherent in proof of character by general reputation. There appears to be no strong reason for changing the present law in this type of case.

Self-defense in homicide or assault cases. Where the defense of self-defense is raised in a homicide or assault case, the character of the victim is material for either or both of two purposes: (1) to show the defendant's reasonable apprehension of danger, in which case the defendant's prior knowledge of the victim's character is essential, and (2) to show that the victim was the aggressor in the encounter, in which case the defendant's knowledge of the victim's character is immaterial.

The present California law regarding the permissible means of proving the victim's character in these cases is somewhat confused because of a failure to distinguish between the purposes for which such evidence of character is offered. It is clear that evidence of the victim's reputation is admissible for either or both of the purposes mentioned (but if the

defendant has no prior knowledge of the victim's reputation, the evidence of reputation is limited to showing that the victim was the aggressor). People v. Lamar, 148 Cal. 564, 72 Pac. 178 (1906). The existing law as to reputation evidence would be continued under Revised Rule 47(3). It is equally clear that evidence of the victim's specific instances of conduct also is admissible under the existing law, though it is somewhat equivocal as to the precise situations in which such evidence is admissible. Thus, specific conduct of the victim directed against the defendant himself (such as threats of harm) may be shown for the purpose of demonstrating that the victim was the aggressor in the encounter, whether or not the defendant knew of the specific conduct involved. People v. Scoggins, 37 Cal. 676 (1869) (error to exclude specific conduct unknown to the defendant when offered only to show that the victim was the aggressor). Where the defendant knows of such prior conduct, the evidence is admissible to show also the defendant's reasonable apprehension of danger. People v. Carmichael, 198 Cal. 534, 246 Pac. 62 (1926). Where the specific conduct is directed against other persons, however, the evidence generally is excluded. People v. Henderson, 28 Cal. 466 (1865).

Where offered for the purpose of showing the defendant's reasonable apprehension of danger, exclusion of such evidence where the defendant has prior knowledge of the conduct seems unjustified. And, where offered for the purpose of showing that the victim was the aggressor, it would seem the evidence should be admitted. However, its probative value for the latter purpose is no greater than the probative value of evidence of the defendant's own conduct, already made inadmissible by the Commission. In

any event, it appears that the present law, however unclear in its application, would be changed by Rule 47(3) without apparent reason.

SUGGESTED REVISION OF REVISED RULE 47

To continue the existing law in regard to the admissibility of evidence of specific instances of conduct of a person other than the defendant in a criminal case, the staff recommends that Revised Rule 47(3) be revised to read as follows (suggested material underscored):

\* \* \* \* \*

(3) In a criminal action or proceeding, evidence of the character or a trait of character (in the form of opinion, [~~or~~] 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 inadmissible under this rule:

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

(b) When offered by the prosecution to meet evidence previously offered by the defendant under paragraph (a).

If the Commission determines to exclude such evidence, should not the Comment to this rule be revised to indicate the reason for changing the present law?

Respectfully submitted,

Jon D. Smock,  
Associate Counsel