#34(L) 7/18/64

Memorandum 64-45

Subject: Study No. 34(L) - Uniform Rules of Evidence (Evidence Code--Division 6--Witnesses)

Attached is the text of Division 6 (Witnesses). Also attached are the Commission's Comments for this Division. We do not plan to discuss the Comments at the July meeting. However, you will want to read them in connection with the statute, and we would appreciate it if you would mark on the attached copy any revisions you believe should be made in these Comments and turn it in to us at the July meeting.

Division 6 contains provisions from the printed tentative recommendations on (1) Witnesses, (2) Expert and Other Opinion Testimony, (3) General Provisions, and (4) Extrinsic Policies Affecting Admissibility. We received some comments on these tentative recommendations and they are attached as exhibits to this memorandum:

Exhibit I--Letter from office of District Attorney of Placer County

Exhibit II--Extract from letter from office of District Attorney of Alameda County

Other comments pertinent to this memorandum were received from the Special Committee of the Conference of California Judges. These comments are attached as Exhibit I to Memorandum 64-48.

These comments are considered in connection with the section of Division 6 to which they relate together with matters presented by the staff for Commission consideration.

GENERAL

Organization

Is the organization of this Division satisfactory?

Significance of changes in law

If retained in its present form, Division 6 will probably be the most controversial division of the Evidence Code. A number of drastic changes in existing law are made by this division: First, a party is permitted to impeach his own witness. We believe that this change can be justified. Second, use of a previous conviction of a witness for a crime is limited to crimes involving dishonesty (or deception) or veracity. We believe that this change can be justified. Third, use of a previous conviction of a witness who is the criminal defendant is not permitted unless the defendant has introduced evidence of his good character. This will for all practical purposes eliminate use of such convictions in criminal cases and will bring forth the united opposition of all law enforcement agencies. Fourth, a prior inconsistent statement offered to impeach a witness is substantive evidence. This change is actually made in the hearsay division, but it becomes much more significant when a party is permitted to impeach his own witness. We believe this change can be justified. Fifth, any party, whether or not adverse, can cross-examine a witness produced by another party. Wide-open cross-examination of adverse parties will be extremely controversial, but it is the elimination of the requirement that the witness be produced by the adverse party before leading questions can be put to the witness (unless the judge permits leading questions) that seems impossible to justify.

The staff believes that the net effect of all the changes listed above (and only the major changes are listed) will be to substantially change the existing trial practice. We believe that the total effect of these changes will arouse considerable opposition to our statute. We do not want to

discuss these matters in detail now, but we urge that you take this analysis into account as you consider the various policy questions that are hereinafter presented for your consideration.

COMPETENCY

Sections 700 and 701

We did not receive any comments on these sections. Both sections were previously approved by the Commission in the same form as they appear in the Evidence Code. Section 700 is Revised Rule (RURE) 7(1); Section 701 is RURE 17(1).

Section 702

This section is set out in the same form as previously approved by the Commission in RURE 19, except that:

(1) We have omitted RURE 19(3) because it is merely a specific application of Evidence Code Section 320(b).

(2) In Section 702, we have omitted the words "no trier of fact could reasonably find that" which appear before the word "unless" in RURE 19. These words are unnecessary in view of Evidence Code Section 403 (based on RURE 8(3)).

The office of the District Attorney of Alameda County comments on this section as follows:

> It is apparently contemplated that the trial judge at some point could decide that no trier of fact could accept the testimony of the witness and rule that such testimony is inadmissible. The power thus granted allows the trial judge to make his own finding of credibility and completely remove the evidence from the jury in their deliberations. [A]pparently the judge could do this by so instructing the jury following direct and cross-examination of the witness, or following direct examination only, or even ruling that the witness may not testify at all after hearing an offer of proof

> if one has been requested. Since this [section] applies to what would otherwise be relevant and material evidence it obviously gives the judge far greater power than he now exercises. . . . Current law, very carefully, and wisely we think, leaves the issues of credibility to the ultimate fact finder, the jury. . . .

Section 702, together with Section 403, restates existing California law. CODE CIV. PROC. § 1845. See the Comment to this section. The change in the RURE language may meet the objection. The staff suggests that no change be made in Section 702.

Section 703

This section appears in precisely the same form as RURE 42. The Judges' Committee, concurred in by the Judicial Council staff, suggests that this section should read as follows:

> The judge presiding at the trial of an action may not testify in that trial as a witness except as hereinafter specified. If a judge commences the trial of a case, and it thereafter appears to the judge that his testimony would be of importance--in civil cases he shall declare a mistrial and order the case assigned to another judge for trial; in criminal cases, he shall inform the parties of his information concerning the facts of the case and may then testify unless the defendant moves for a mistrial, in which case, the motion shall be granted, and the judge shall have the case assigned to another judge for trial.

Though the Judges' Committee apparently approves the policy of precluding a judge from testifying, it suggests that a party should not be placed in the position of having to object to the judge's testifying--i.e., the judge on his own motion should postpone or suspend the trial for the purpose of having it take place before another judge.

A further question raised in connection with this section is stated by the Judges' Committee as follows:

> If the judge does testify at a trial where a jury is not present, and the [criminal] defendant, for good and sufficient reasons of his own has not asked for a mistrial, may the defendant still raise the plea that he didn't have a fair trial on the grounds the judge was acting both as prosecutor, judge and jury?

The staff believes that both of these problems could be solved by simply deleting the requirement that a party must object to the judge's testifying. In civil cases, it would produce the same result suggested by the Judges' Committee in its alternative draft. So far as criminal cases are concerned, the language "he shall order the trial to be postponed or suspended and to take place before another judge" (existing language taken from CODE CIV. PROC. § 1883) was included in place of the URE direction to declare a "mistrial" specifically to avoid the problem raised by the Judges' Committee. Since a judge is presently permitted to testify in the trial of an action over which he presides, the staff believes that the prohibition contained in Section 703 would not produce significant problems in either civil or criminal cases.

Consideration should also be given to merely codifying existing law. See C.C.P. § 1883 at p. 623 of printed pamphlet on Extrinsic Policies. The problem that concerns the Judges is not presented by the existing statute.

Section 704

This section appears in the same form in which it was previously approved as RURE 43. The Judges' Committee raises a similar question in regard to jurors testifying as is raised in connection with Section 703 (Judge as Witness) and suggests a similar solution. For the same reasons suggested in connection with Section 703, the staff believes that no change need be made in this section. In this connection, it should be noted that Section

704 precludes a juror from testifying even without objection by a party, whereas Section 703 requires a party to object to the judge testifying.

In addition to suggesting the adoption of the recommendation by the Judges' Committee, the Judicial Council staff raises the following query:

> In cases where alternate jurors have been selected, would it not be possible to allow substitution of one of the alternates for the juror who wants to testify, particularly if none of the parties object to such substitution?

The staff recommends against the inclusion of language that would give this alternative to the judge for the reasons mentioned by several Commissioners during the discussion of the original approval of this rule, which substantially changes the existing California law, namely, that jurors form an identification with each other and have a tendency to resent an attack upon any one of their number. However, if the Commission desires to make some provision in this regard, the following language (as a substitution for the second sentence of subdivision (a) of Section 704) is suggested to accomplish this result:

> If the judge finds that the juror's testimony would be of importance:
> (1) He shall order the trial to be postponed or suspended and to take place before another jury; or
> (2) He may permit the juror to testify as a witness if he disqualifies such person as a juror and substitutes an alternate juror in his place.

Consideration should also be given to merely codifying existing law. See the text of Section 1883 in the printed pamphlet on Extrinic Policies at page 623.

OATH AND CONFRONTATION

Section 710

This section is exactly the same as RURE 18.

Section 711

This section restates without substantive change a portion of Section 1846 of the Code of Civil Procedure (Section 710 supersedes the remaining portion of Section 1846 that relates to the necessity for an oath).

EXPERT WITNESSES

Sections 720-723 (Expert Witnesses Generally)

No comments pertaining to these sections were received. (The pamphlet was not distributed in time to permit receipt of comments prior to the July meeting.)

Section 720 is the same as RURE 55.5. Consideration should be given to deleting subdivision (c) of Section 720 as unnecessary and undesirable in view of Evidence Code Section 320. Subdivision (c) merely invites unnecessary criticism.

Section 721 is the same as RURE 55.7; Section 722 is the same as RURE 58.5; Section 723 is the same as RURE 61. The staff has no questions to raise in connection with these sections.

Section 724 and Sections 730-733 (Court-appointed Experts)

These sections are intended to restate without substantive change existing Code of Civil Procedure Section 1871. The staff has no question to raise in connection with these sections, but the staff plans to review these sections to be sure we have made no change in existing law. These Evidence Code sections have not been previously considered by the Commission, but the Commission approved retention of existing law on that matter.

INTERPRETERS AND TRANSLATORS

Section 750

Insofar as this section relates to interpreters, its substance has been previously approved as RURE 17(2). Since this chapter has been expanded to include translators of writings, a translator is similarly treated in this section.

Section 751

Subdivision (a) of Section 751 perhaps should be revised to read:

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

Subdivision (a) restates the substance of Code of Civil Procedure Section 1884, but the language of subdivision (a) is broad enough to include not only persons who do not understand the English language, but also persons who are, for example, deaf or dumb. See Professor Degnan's study at 145-148.

Subdivision (b) of Section 751 incorporates the procedure for appointment and compensation of expert witnesses set out in Article 2 (commencing with Section 730). This procedure will replace the procedure provided by Section 1884 which authorizes the court to "summon any person, a resident of the proper county" to act as an interpreter, the summons being served with the same effect as a subpena. The staff does not believe that it is desirable to compel a person to serve as an interpreter in a judicial proceeding unless the person is to be compensated as provided in Article 2. However, consideration should be given to inserting "may" in place of the word "shall" in subdivision (b).

Section 752

This section is based in part upon existing Code of Civil Procedure Section 1863 (dealing with illegible or incomprehensible characters in a writing, as well as the foreign language question) and on Professor Degnan's recommendation in this regard (see his study at 145-148). The staff suggests the approval of this section for the same considerations applicable to Section 751. Consideration should be given to inserting "may" for "shall" in subdivision (b); a party might want to call his own witness.

Section 753

This section restates without substantive change existing Code of Civil Procedure Section 1885. It is discussed in Professor Degnan's study at pages 148-149. While there is some suggestion by Professor Degnan that the scope of this section might be expanded to include other disabilities that would necessitate the appointment of an interpreter, it is believed that the general scheme of Sections 751, 752, and this section (together with constitutional principles of due process and fair trial) will assure all protection necessary to be given a criminal defendant.

METHOD AND SCOPE OF EXAMINATION

Section 760

The definition of "direct examination" duplicates the language of existing Code of Civil Procedure Section 1845, which was approved by the Commission at the last meeting.

Sections 761, 771, and 775

These sections are considered together because they deal with the scope of cross-examination directly or with the examination of a witness as if under

cross-examination (Section 775). We did not prepare Comments to these sections, pending consideration of these sections by the Commission at the July meeting.

At the last meeting, the Commission made two far-reaching decisions regarding the examination of witnesses, both of which substantially change the existing California law. The first concerns the permissible scope of cross-examination. The Commission's decision in this regard, i.e., to permit "wide-open" cross-examination (the "English" rule) is reflected in the draft of Section 771. The effect of this change in existing law is of consequence not only in regard to the permissible scope of cross-examination of a witness, but also in regard to other sections dealing with re-examination (Section 773) and recall (Section 777) of witnesses. Until there is some experience with this rule, the exact effect of this change is not known.

The second important decision concerns allowing any party to cross-examine a witness. The effect of this change on existing law is found not only in the section dealing with the permissible scope of cross-examination (Section 771), but also carries over to the examination of parties under Section 775 (based on Code of Civil Procedure Section 2055). Indirectly, this decision also affects several other sections (for example, subdivision (b) of Section 768, dealing with the right to inspect a writing that is shown to a witness (presently restricted to adverse parties); Section 770, dealing with a party's right to inspect a writing used to refresh a witness' recollection (presently restricted to adverse parties); Section 773, dealing with re-examination of a witness (presently restricted to adverse parties)). It also necessitates the creation of a general section dealing with the problem of multiple parties represented by the same attorney (Section 763),

a principle presently recognized only in connection with examination by an adverse party under Section 2055 of the Code of Civil Procedure (see Gates v. Pendleton, 71 Cal. App. 752, 236 Pac. 365 (1925)).

It seems obvious that these decisions may have serious and unknown consequences in regard to the orderly conduct of a trial. Moreover, it would take very little imagination on the part of counsel to circumvent restrictions on the right of cross-examination where parties are represented by the same attorney. In other words, this particular change in regard to permitting cross-examination by any party appears to be serious enough--when considered with the many other changes made by this division--to jeopardize the prospect of successful passage of the Evidence Code. The only justification given in support of this rule appears to be that different parties must necessarily have different interests merely because they are different parties. The difference in interest is of no consequence, however, unless it is made a difference in legal interest in the action. If so made, they would then be considered adverse parties. Unless there is a difference in their legal interests it would seem far more reasonable to retain the existing law in each of the sections cited and to restrict the right of cross-examination (now expanded to include "any fact or matter relevant to the action") to adverse parties. The suggestion in this regard applies with equal force to Section 775 (CODE CIV. PROC. § 2055).

We strongly urge that the right of wide-open cross-examination (if this right is to be given) be restricted to adverse parties.

Section 762

The definition of "leading question" substantially duplicates the language of existing Code of Civil Procedure Section 2046 (omitting only

the alternative "or suggestive" question), which was approved by the Commission at the last meeting.

Section 763

This section is new, but its substance was approved at the last meeting.

Sections 765, 766, and 767

These sections reflect the action taken by the Commission at the last meeting and the substance of them has been approved.

Sections 768 and 769

These sections are based on the previously approved revision of Code of Civil Procedure Section 2054 and subdivision (1) of Rule 22. Hence, both sections have been approved in principle, but the language is new.

Section 770

We are preparing a separate study and memorandum on the difficult problems involved in this section. Hence, consideration of it is deferred until you have had an opportunity to study the material that will be presented in connection with this subject.

Sections 772 and 773

The substance of these two sections was considered and approved at the last meeting.

Section 774

This section is new. With respect to expert witnesses, it restates the existing statutory and case law; as to non-expert witnesses, it restates existing case law. See the Comment to this section. A similar section was contained in the draft prepared by the California Code Commission.

Sections 776 and 777

The substance of these sections was considered and approved at the last meeting.

CREDIBILITY OF WITNESSES

Section 780

As recast in language using terms defined in the Evidence Code, this section restates the existing California law as declared in several statutes and numerous decisions. See the Comment to this section.

Since the credibility of a witness may be affected by numerous factors not involving either an attack on or support of a witness' credibility, a general statement to this effect, consistent with existing law, seems peculiarly desirable. Thus, the demeanor of a witness while testifying affects his credibility, though it does not constitute either an attack on or support of his credibility. Section 780 is a general section in very broad language that retains the explicit statements presently found in several code sections. See, e.g., CODE CIV. PROC. §§ 1847, 2051.

Sections 781, 782, and 783

The substance of these sections is taken from the printed tentative recommendation. Section 781 is based on RURE 20(1); Section 782 is based on RURE 22(3); Section 783 is based on RURE 22(4).

Section 784

The substance of this section was previously approved by the Commission as RURE 21. If the Commission reaffirms its decision in regard to this section, it is planned to make a separate section out of subdivision (a) and a separate section out of subdivisions (b) and (c).

The two principal comments received in regard to the Commission's witnesses recommendation (see Exhibits I and II) concerned this section. Exhibit I, containing comments from the District Attorney of Placer County, presents a negative view toward what is now contained in subdivision (a) of Section 784.

> [T]he Commission . . . have pinpointed the truth of the situation when they state that it would be unfair to permit the accused to appear as a witness of blameless life by the simple device of the defendant not offering character testimony. This would unquestionably give aid and confort to the many who are guilty, for the protection of a very few. It seems quite illogical to me to say that a different standard should be used for judging a [criminal] defendant's testimony because the prior conviction is "highly prejudicial". This begs the question. Certainly any evidence which points to the defendant's guilt is "highly" prejudicial to his case. The true test should not be whether it is highly prejudicial, but whether such evidence would be of assistance to the jury in determining the truth. Such information could be of no less assistance in evaluating the defendant's testimony than in evaluating the testimony of any other witness.

The District Attorney of Alameda County comments that limitation of the types of convictions that can be used to impeach the credibility of a witness, including a criminal defendant, is "reasonably fair and logical. There is no doubt that showing a prior conviction that has nothing to do with dishonesty, particularly where it is the same as the offense charged, has a high potential for unfair prejudice to the defendant. The proposed change would put the attack on credibility precisely where it belongs, i.e., showing a history of dishonesty." The District Attorney continues by expressing his agreement with the elimination of the arbitrary distinction between misdemeanors and felonies--but only if the change in regard to the nature of the crime is also made. The third point contained in this comment is in substantial agreement with the comments of the District Attorney of Placer County. It is a cogent comment that goes to the heart of the

problem dealt with in subdivision (a) and should be read (see Exhibit II, page 3) before considering what action, if any, should be taken with respect to subdivision (a).

It is possible that there has been a misunderstanding of subdivision (a) of Section 784. Thus, the first two lines in the Alameda County District Attorney's comment regarding this subject are as follows:

> We definitely do not agree, however, with the proposal of the Commission to prevent the prosecution from impeaching a defendant who testifies. Under the proposed rule such impeachment would be available only if the defendant had previously " . . . introduced evidence of his character for honesty or veracity for the purpose of supporting his credibility."

This subdivision does not preclude the prosecution from impeaching a criminal defendant-witness. Rather, it precludes the prosecution from impeaching the credibility of a criminal defendant-witness with evidence of his prior conviction for a crime unless the condition specified occurs. This does not prevent impeachment on any other ground or with any other evidence so long as a criminal conviction is not used in the initial attack on the defendant-witness' credibility.

Probably, however, both district attorneys object to the policy expressed in this section, namely, that a criminal defendant who testifies in his own behalf should not for that reason alone be subjected to impeachment by evidence of his prior conviction for a crime. Properly considered for purposes of impeachment only, evidence of a prior conviction for a crime is but a specific instance of conduct bearing upon the witness' character. The crux of the problem, however, is that in a criminal case it is impossible to isolate the trier of fact sufficiently to avoid its drawing the inference of guilt of the crime charged merely upon a showing of a prior conviction, i.e., the "bad man" inference.

The only reasonable alternative to the scheme presently set forth in subdivision (a) of Section 784 is to delete this subdivision. This would leave the criminal defendant-witness open to an attack on his credibility by showing a prior conviction for a crime--precisely the same position faced by every other witness. The staff believes that sufficient protection has been given in the remainder of this section (which severely limits the types of convictions that may be shown and substantially changes the existing law) to warrant the deletion of subdivision (a). While it may be true that a cautionary instruction is ineffective to restrain the trier of fact from drawing the unwarranted inference of guilt--the motivating principle underlying the original inclusion of this subdivision--other situations that receive no special treatment similarly may have an equally deleterious effect upon a criminal defendant. The fault lies in the trier of fact's disregard of its duty, however, not in the rules relating to the admissibility of evidence. Hence, the staff recommends that subdivision (a) be deleted and that no procedural restriction be placed upon the use of prior convictions for the purpose of attacking the credibility of a criminal defendant-witness.

Even if subdivision (a) were deleted, the criminal defendant would have more protection than under existing law as far as prior felonies are concerned; under existing law, any prior felony may be shown.

The word "deception" has been substituted for "dishonesty" in subdivision (b) to narrow the types of crimes that may be used to attack the credibility of a witness. "Dishonesty" is ambiguous in meaning, as evidenced by the numerous different classes of crimes involving property. Thus, conviction of the witness for embezzlement would seem to have probative value as to his honesty and veracity, i.e., his truthtelling capabilities relevant to his

testimony at the hearing, whereas conviction for robbery, auto theft, larceny, and a host of other "property" crimes that easily could be considered not "dishonest" would seem to have little or no probative value as to credibility. Is this change acceptable to the Commission?

If the Commission determines to retain subdivision (a), we suggest that it be revised to read:

> (a) In a criminal action, evidence of the defendant's conviction for a crime is inadmissible for the purpose of attacking his credibility as a witness unless:
> (1) He has first introduced evidence of his character for honesty or veracity for the purpose of supporting his credibility;
> (2) He has sought to establish his own character for honesty or veracity by questions asked of witnesses for the prosecution; or
> (3) The nature or conduct of his defense is such as to involve imputations on the character for honesty or veracity of the prosecution or the witnesses for the prosecution.

Paragraph (1) set out above is already approved by the Commission. Paragraph (2) seems to be a logical and justifiable extension of the principle of paragraph (1) and might be already included by construction of paragraph (1) although that is not clear. Paragraph (3) seems to be a reasonable extension of the reasoning justifying the two previous paragraphs. If the defendant seeks to establish that the witnesses for the prosecution are not worthy of belief because of their bad character for truthtelling (including perhaps their convictions of crimes involving that trait of character), it seems reasonable that the trier of fact (in weighing the testimony of the witnesses for the prosecution against the testimony of the defendant) should know that the defendant is as bad as far as criminal convictions are concerned as the witnesses for the prosecution. The defendant should not be immune from a showing of his previous convictions that go to credibility when he is attacking the credibility of the witnesses for the prosecution.

This suggestion is consistent with a suggestion made concerning Section 1102 in the Second Supplement to Memorandum 64-48. The language is based on the English Criminal Evidence Act of 1898.

Section 785 and 786

The substance of these two sections was previously approved by the Commission as RURE 20(3) and 22(5).

Section 787

This section is the same as previously approved subdivision (2) of Rule 22, except that a new subdivision--subdivision (c)--has been added in the Evidence Code to cover the situation where a witness makes an inconsistent statement after he has given his testimony, i.e., an indirect confession of falsity of testimony. Since there could have been no opportunity to examine the witness concerning such a statement at the time he gave his testimony, it was thought that this might be a reasonable provision. Upon further consideration, however, we suggest that subdivision (c) be deleted. In connection with subdivision (c), note that the inconsistent statement is substantive evidence, that it may be offered by the party calling the witness who later made the inconsistent statement (when he was not under oath), and that the other party has no opportunity to cross-examine the witness concerning the inconsistent statement.

Section 788

This section is new. It is based on a rule previously appearing in the hearsay recommendation (pages 312-313) and is a substitute for previously approved subdivision (2) of Rule 20 (Witnesses recommendation at 713).

Evidence of good character (Section 785) and evidence of a prior consistent statement are the primary (if not the only) means of rehabilitating a witness whose credibility has been attacked. The Commission previously approved a specific rule in regard to procedural limitations upon the admissibility of evidence of good character (now reflected in Section 785). The Commission also approved in principle the matter set out in Section 788 as a hearsay exception. It is clear that the Commission intended to limit use of prior consistent statements to those that meet the requirements of the hearsay exception. Hence, it seems to be desirable to state a specific rule in regard to procedural limitations upon the admissibility of evidence of a prior consistent statement offered on the issue of credibility. This is the rule stated in Section 788. With specific procedural limitations stated in Section 785 (good character) and Section 788 (prior consistent statements), the vitality of a general proscription against the admissibility of evidence to support the credibility of a witness until his credibility had been attacked is vitiated. Hence, these two sections together supersede whatever effect might have been given to such a general proscription and avoids a serious ambiguity in meaning that was contained in this proscription, i.e., whether, for example, the production of contradictory evidence is an attack on credibility. Thus, the staff recommends approval of this section.

The staff has no other questions to present in connection with this division.

Respectfully submitted,

Jon D. Smock
Associate Counsel

VDS

PLACER COUNTY
Daniel J. Higgins
DISTRICT ATTORNEY

May 1, 1964

Honorable J. Frank Coakley
District Attorney of Alameda County
Courthouse
Oakland, California

Re: Rule 21 of the California Law Revision Commission's Recommendations on Article IV

Dear Mr. Coakley:

I am writing to you as head of the District Attorney's Association. I feel that it is imperative that you bring to the attention of all District Attorneys, as well as our legislative representatives, the Commission's Recommendations under Rule 21 of Article IV Witnesses.

Subdivision 2 of Rule 21 provides that: "In a criminal action or proceeding no evidence of the defendant's conviction for a crime is admissible for the purpose of attacking his credibility as a witness, unless he has first introduced evidence of his character for honesty or veracity for the purpose of supporting his credibility."

A discussion of the point by the Commission may be found in their March, 1964, publication beginning at Page 761. I think that they have pinpointed the truth of the situation when they say that it would be unfair to permit the accused to appear as a witness of blameless life by the simple device of the defendant not offering character testimony. This would unquestionably give aid and comfort to the many who are guilty, for the protection of a very few. It seems quite illogical to me to say that a different standard should be used for judging a defendant's testimony because the prior conviction is "highly prejudicial". This begs the question. Certainly any evidence which points to the defendant's guilt is "highly" prejudicial to his case. The true test should not be whether it is highly prejudicial, but whether such evidence would be of assistance to the jury in determining the truth. Such information could be of no less assistance in evaluating the defendant's testimony than in evaluating the testimony of any other witness. Further, as the Commission points

out, at Page 714 of the same booklet, "expanding opportunity for testing credibility is in keeping with the interest of providing a forum for full and free disclosure."

I hope that you will urge all of the District Attorneys and other interested parties to write to the Commission expressing their views on this matter.

Very sincerely,

DANIEL J. HIGGINS, DISTRICT ATTORNEY

L. J. DEWALD
Chief Deputy District Attorney

LJD:eu
cc: August Kettmann, Pres.
Calif. Peace Officer's Association
cc: California Law Revision Commission
cc: Governor Edmund "Pat" Brown