meeting

#34 9/13/63

Memorandum 63-45

Subject: Study No. 34(L) - Uniform Rules of Evidence (Article VI. Rules 41-45, Extrinsic Policies Affecting Admissibility)

You have received for consideration at the September meeting a tentative recommendation relating to URE Article VI, Extrinsic Policies Affecting Admissibility. Although the Commission did not make decisions in regard to several of the rules in this article, the staff has prepared the tentative recommendation and made such revisions as appeared desirable in the light of the consultant's study and the existing California law. This memorandum will indicate which revisions are based on Commission action.

Rule 41.

The revised rule is based on the actions taken by the Commission at the August meeting.

The staff recommends that the references to an indictment be deleted from the rule. Attached to this memorandum as Exhibit 1 are Penal Code Sections 911, 924.1, 924.2, and 924.3. They appear as they should be amended in the light of the actions taken in regard to Rules 41 and 44. Under existing California law the grand juror's oath permits him to disclose the testimony of a witness examined before the Grand Jury when he is required to reveal it in the due course of judicial proceedings, but the oath and the related laws bind the grand juror to absolute secrecy concerning anything which any grand juror may have said or the manner in which any grand juror may have voted. Ex parte Sontag, 64 Cal. 525 (1884). The decision in the Sontag case is based in part on the location of the phrase "except when required in due course of judicial proceedings" between "will not" and "disclose the testimony of any witness". This location, says the court,

indicates that the exception applies only to disclosure of the testimony of a witness and does not apply to the other matters listed--what a grand juror may nave said or the manner in which a grand juror may have voted. Section 911 as contained on the Exhibit would be amended to indicate that the "except" clause applies to all the matters listed. Sections 924.1 - 924.3 have been amended to indicate that the grand juror is not bound to secrecy when testifying in an inquiry as to the validity of an indictment.

Under existing California law an indictment may be set aside only on the grounds specified in Penal Code Section 995, to wit: "where it is not found, endorsed, and presented as preseribed in this code" or "that the defendant has been indicted without reasonable or probable cause." Prior to 1911 indictments could be attacked because of the bias of a grand juror. People v. Bright, 157 Cal. 663 (1910). In 1911 the Penal Code was amended to eliminate attacks on indictments on this ground. People v. Kempley, 205 Cal. 441, 446-448 (1928). The proposed amendments to the Penal Code sections in the Exhibit and the proposed Rule 41 would create the implication that the law is being changed. The last sentence of Section 911, "I will present no person through malice, hatred or ill will ... or for any reward, or the promise or hope thereof", would provide a ground for attack on indictments because not "found...as prescribed in this code." It seems undesirable to create any implication that indictments may be attacked for "malice, hatred or ill will" of a grand juror by a rule of evidence. The staff suggests, therefore, that the reference to an indictment be deleted from Rule 41 and that the matter of setting aside indictments be left to the substantive law found in the appropriate sections of the Penal Code.

Rule 42.

The Commission approved the New Jersey revision of Rule 42. The New Jersey version, however, requires the judge to declare a mistrial. Existing California law permits the juege to order the trial postponed or suspended and to take place before another judge in those cases where it would be improper for iim to testify. We have revised Rule 42 to retain the existing California law in this regard.

Rule 43.

The first paragraph of Rule 43 is based on actions taken by the Commission at the August meeting. Revisions have been made in it similar to those made in Rule 42.

At the August meeting the Commission instructed the staff to consider Penal Code Section 1120 so that Rule 43 might be harmonized with its provisions. Penal Code Section 1120 requires a trial juror to disclose in open court the fact that he has personal knowledge respecting a fact in controversy in the case. If he reveals the fact of personal knowledge during the retirement of the jury, the jury must return into court. In either event, Section 1120 requires the juror to be sworn as a witness and examined in the presence of the parties. The Section does not make clear the purpose for this procedure. It may be to require that all of the evidence in the case be presented in open court before both the parties. However, it may be to permit an examination into the qualifications of the juror to continue as a juror. The annotations under the Section are not illuminating. None of the cases, however, holds that the examination referred to in Section 1120 is for the purpose of giving evidence in the cause. Practice, as evidenced by various appellate decisions indicates

that the examination may be for the purpose of permitting the judge to determine whether "good cause" exists for the court to order the juror discharged under Penal Code Section 1123. See People v. Young, 21 Cal. App.2d 423 (1937). Discharge of a juror and the substitution of an alternate juror, or the discharge of a jury and the impanelment of a new jury, under the provisions of Section 1123, does not constitute double jeopardy. In re Devlin, 139 Cal. App.2d 810 (1956).

In any event, it appears desirable to amend Section 1120 to make clear that the examination referred to is for the purpose of determining the juror's qualifications to continue as a juror. The staff recommends that Section 1120 be amended as indicated in the portion of the tentative recommendation relating to amendments and repeals of existing statutes.

Rule 46.

The rules pertaining to character evidence (other than character evidence for impeachment purposes) were passed over by the Commission at the last meeting. Rule 46 deals with character as an ultimate issue and not as circumstantial evidence of some other fact. Its function in the Uniform Rules is a little bit difficult to understand. The Uniform Law Commissioners wrote Rule 7 to wipe out all prior exclusionary rules. Apparently, they intended by Rule 7 to wipe out the exclusionary rules that had been developed in regard to evidence of character. In the entire context of the Uniform Rules, Article VI--Extrinsic Policies Affecting Admissibility--might well have been limited to those rules declaring various kinds of relevant evidence inadmissible for reasons of public policy. Professor Falknor regards this as the function of Article VI. 10 Rutgers L. Rev. 574(1956). Hence, Rule 46 appears redundant inasmuch as it declares what

Rule 7 already declares that "relevant evidence is admissible."

Nonetheless, the staff believes that Rule 46 is desirable to make clear that the judicially-created restrictions on the admissiblility of evidence to prove character have in fact been wiped out.

Rule 46 has been drafted so that it applies only when character is an ultimate issue. Another approach--perhaps more logical--would be to provide in Rule 46 that any relevant evidence is admissible to prove character, whether character is an ultimate issue in the cause or whether character is being proved as circumstantial evidence of conduct. Rules 47, 48 and 55, then, would restrict the types of evidence admissible to prove character when character is sought to be used as circumstantial evidence of conduct. Similarly, Rules 20-22 would restrict the kinds of evidence admissible to prove character for impeachment purposes.

Another drafting approach would be to delete Rule 46 entirely in reliance upon Rule 7. Rules 47,48 and 55, then, would function as exclusionary exceptions to Rule 7 (except that Rule 47 contains an admissibility provision that operates as an exception to Rule 45).

The Commission should consider which approach to the drafting of the character evidence rules should be followed. The draft of the character evidence rules and the tentative recommendation was made by the staff because it follows the format of the URE more closely and because the redundancy makes each separate rule somewhat more understandable.

The reasons for the redrafting of Rule 46 are for the most part in the comment. The words "any otherwise admissible evidence" have been used to avoid any implications that Rule 46 is a limitation on the provisions of Rule 7. We do not think that it was intended to be a limitation on Rule 7

and we have rewritten the rule to make it clear that it is not.

So far as the existing law is concerned, the comment is a fairly complete picture. Where the fitness of a parent is the ultimate issue, the courts go into specific acts to a considerable extent. The cases cited permit opinion evidence to be introduced on the issue of chastity where it is an ultimate issue. Reputation has been admitted on the issue of chastity and also on the issue of the fitness of a parent where these are ultimate issues. Where the issue is unfitness or incompetency of an employee, the cited case and others have held that reputation evidence is inadmissible and that specific acts indicating such unfitness or incompetency are admissible. It may be possible to distinguish the groups of cases upon the ground that the cases admitting reputation evidence are cases involving "moral" character, whereas the cases excluding such evidence, such as the Gier case, are cases involving non-moral character traits such as skill or competency to perform a particular type of work. There seems to be no reason, however, for a different rule in the two groups of cases. Therefore, Rule 46 imposes no limitations on the kinds of evidence admissible to prove character when it is an ultimate issue.

Rules 47, 48 and 55.

Rules 47, 48 and 55 pertain to character evidence which is offered as circumstantial evidence of conduct. At the August meeting, the Commission could not decide whether character evidence should be admissible at all on the issue of conduct or if it is, what kinds of evidence should be admissible to prove character. The Commission requested the staff to submit a report on the subject.

Concerning the relevancy of character evidence to prove conduct, Wigmore states:

> In point of human nature in daily experience, this [the relevancy of character to prove conduct] is not to be doubted. The character or disposition--i.e. a fixed trait or the sum of traits--of the person we deal with is in daily life always more or less considered by us in estimating the probabiltty of his future conduct. In point of legal theory and practice, the case is no different. A defendant is allowed to invoke his own good character to aid in the demonstration of his innocence; and the prosecution is allowed to use the opposite fact for the opposite purpose. The Courts have made it clear that a defendant's character is regarded as constantly having probative value on that question.... [1 Wigmore (3rd edit. 1940) 450.]

Of course, character evidence is circumstantial evidence. Moreover, it is weak circumstantial evidence. Hence, where certain kinds of evidence of character are apt to cause an undue confusion of issues, prejudice, or necessitate undue consumption of time, the courts have excluded the evidence. Certain fixed rules have been developed for determining when such evidence is inadmissible. Thus Code of Civil Procedure Section 2053 provides that evidence of the good character of a party is not admissible in a civil action. Evidence of the bad character of a criminal defendant is inadmissible unless he has introduced evidence of his good character. But in the absence of countervailing policies such as those just mentioned, it seems to be universally conceded that character evidence is admissible to prove conduct.

Cases can be readily imagined where such evidence would be extremely helpful in resolving conflicting stories. For example, if each party to an assault case contends that the other was the aggressor and that he was merely defending himself, it would be helpful to know that one of the

parties has a violent nature and is constantly picking fights and is a notorious liar besides, while the other is peace-loving, law-abiding and scrupulously honest.

The existing law relating to character as evidence of conduct is indicated in the comments to Rules 47, 48 and 55. The revisions of these rules are also explained in the comments.

Rules 49-51.

These rules were approved at the August meeting.

Rule 52.

The Commission directed the staff to redraft Rule 52 to provide that an offer of compromise is inadmissible to prove culpabllity unless accompanied by an express admission of some sort. The Commission also directed the staff to delete the phrase "in compromise or from humanitarian motives".

The rule has been revised to express the existing law as stated by the Supreme Court in People v. Forster, 58 Cal.2d 257 (1962). Wigmore is quoted with approval in the opinion as follows:

> Whether an offer to settle a claim by a partial or complete payment, amounts to an admission of the truth of the facts on which the claim is based, and is therefore receivable in evidence...is a simple one in its principle, though elusive and indefinite in its application; it is merely this, that a concession which is hypothetical or conditional only can never be interpreted as an assertion representing the party's actual belief, and therefore cannot be an admission; and, conversely, an unconditional assertion is receivable, without any regard to the circumstances which accompany it. [58 Cal.2d at 264.]

We think that the revised rule expresses the idea that admissions are admissible despite the offer in compromise rule better than would language indicating that an offer in compromise is inadmissible unless accompanied by

an express admission. The latter language would indicate that an offer in compromise is admissible to prove culpability when it is accompanied by an express admission. Thus, if during the course of compromise negotiations, a party admitted some incidental fact--such as the fact of injury, the amount of damage, etc.--the offer in compromise would be admissible on the issue of liability. The language used in the revised rule avoids this danger.

Subdivision 2 has been placed in the rule upon the recommendation of the Commission. It is based on the language of the New Jersey recommendation, but the language in the revised rule refers to the alleged crime as well as to a lesser crime while the New Jersey rule refers only to a lesser crime.

Rules 53 and 54.

These rules were approved at the August meeting.

Adjustments and repeals of existing statutes.

Most of the statutes identified by Professor Chadbourn as superseded in whole or in part by Article VI are contained in the tentative recommendation. There are, however, a few other statutes which should be considered by the Commission.

Code of Civil Procedure Section 1868 provides as follows:

> 1868. Evidence must correspond with the substance of the material allegations and be relevant to the question in dispute. Collateral questions must therefore be avoided. It is, however, within the discretion of the court to permit inquiry into collateral fact when such fact is directly connected with the question in dispute, and is essential to its proper determination, or when it affects the credibility of a witness.

Professor Chadbourn suggests that this statute is superfluous because of Rule 45. The staff did not suggest its repeal because it seems to

contain provisions more closely related to Rule 7.

Code of Civil Procedure Section 2044 provides:

> The court must exercise a reasonable control over the mode of interrogation, so as to make it as rapid, as distinct, as little annoying to the witness, and as effective for the extraction of the truth, as may be; but subject to this rule, the parties may put such pertinent and legal questions as they see fit. The court, however, may stop the production of further evidence upon any particular point when the evidence upon it is already so full as to preclude reasonable doubt.

In the study on Rule 45 Professor Chadbourn identified this rule as granting the judge a discretion similar to that granted by Rule 45. The staff did not suggest its repeal because it contains other provisions relating to the judge's control over the introduction of evidence.

Code of Civil Procedure Section 997 provides a procedure whereby a defendant may offer to allow judgment to be taken against him. If the plaintiff does not accept, but fails to recover a more favorable judgment than that offered by the defendant, the plaintiff can recover no costs. Penal Code Sections 1192.1-1192.4 provide a procedure whereby a defendant may offer to plead to a lesser degree of the crime charged. If the plea is not accepted, Section 1192.4 provides that the plea is deemed withdrawn and that evidence of the withdrawn plea is inadmissible in any proceeding of any nature.

The evidentiary portions of these statutes will be superseded by Rules 52 and 53; however, the staff has not recommended amendment of the sections because the evidentiary portions of the statutes appear to be integral parts of the procedures specified.

In the tentative recommendation, it is suggested that Section 657 of the Code of Civil Procedure be amended. Consideration should be given to revising subdivision 2 of Section 657 as set out on page 30 of the tentative recommendation to read: "2. Misconduct of the jury."

Respectfully submitted,

Joseph.B. Harvey
Assistant Executive Secretary

Memo. 63-45

EXHIBIT I

Penal Code

911. The following oath shall be taken by each member of the grand jury: "I will support the Constitution of the United States and of the State of California, and all laws made in pursuance thereof and in conformity therewith, will diligently inquire into, and true presentment make, of all public offenses against the people of this State, committed or triable within this county, of which the grand jury shall have or can obtain legal evidence. I will keep my own counsel, and that of my fellow grand jurors and of the government, and [~~will not~~], except when required in due course of judicial proceedings, will not disclose the testimony of any witness examined before the grand jury, nor anything which I or any other grand juror may have said, nor the manner in which I or any other grand juror may have voted on any matter before the grand jury. I will present no person through malice, hatred or ill will, nor leave any unpresented through fear, favor, or affection, or for any reward, or the promise or hope thereof; but in all my presentments I will present the truth, the whole truth, and nothing but the truth, according to the best of my skill and understanding, so help me God."

924.1. Every grand juror who, except when required [~~by a court~~] in due course of judicial proceedings, wilfully discloses any evidence adduced before the grand jury, or anything which he himself or any other member of the grand jury has said, or in what manner he or any other grand juror has voted on a matter before them, is guilty of a misdemeanor.

924.2. Each grand juror, except when testifying in an inquiry by a court as to the validity of an indictment, shall keep secret whatever he himself or any other grand juror has said, or in what manner he or any other grand juror has voted on a matter before them. Any court may require a grand juror to disclose the testimony of a witness before the grand jury, for the purpose of ascertaining whether it is consistent with that given by the witness before the court, or to disclose the testimony given before the grand jury by any person, upon a charge against such person for perjury in giving his testimony or upon trial therefor.

924.3. A grand juror cannot be questioned for anything he may say or any vote he may give in the grand jury relative to a matter legally pending before the jury, except for a perjury of which he may have been guilty in making an accusation or giving testimony to his fellow jurors, or except in an inquiry by a court as to the validity of an indictment.

STATE OF CALIFORNIA

# C A L I F O R N I A  L A W
# R E V I S I O N  C O M M I S S I O N

A TENTATIVE RECOMMENDATION

relating to

## The Uniform Rules of Evidence

## Article VI. Extrinsic Policies Affecting Admissibility

March 1964

California Law Revision Commission
School of Law
Stanford University
Stanford, California

LETTER OF TRANSMITTAL

To His Excellency Edmund G. Brown
Governor of California
and to the Legislature of California

The California Law Revision Commission was authorized by Resolution Chapter 42 of the Statutes of 1956 to make a study "to determine whether the law of evidence should be revised to conform to the Uniform Rules of Evidence drafted by the National Conference of Commissioners on Uniform State Laws and approved by it at its 1953 annual conference."

The Commission herewith submits a preliminary report containing its tentative recommendation concerning Article VI (Extrinsic Policies Affecting Admissibility) of the Uniform Rules of Evidence and the research study relating thereto prepared by its research consultant, Professor James H. Chadbourn, formerly of the U.C.L.A. Law School, now of the Harvard Law School. Only the tentative recommendation (as distinguished from the research study) expresses the views of the Commission.

This report is one in a series of reports being prepared by the Commission, each report covering a different article of the Uniform Rules of Evidence.

In preparing this report the Commission considered the views of a Special Committee of the State Bar appointed to study the Uniform Rules of Evidence.

This preliminary report is submitted at this time so that interested persons will have an opportunity to study the tentative recommendation and give the Commission the benefit of their comments and criticisms. These comments and criticisms will be considered by the Commission in formulating its final recommendation. Communications should be addressed to the California Law Revision Commission, School of Law, Stanford University, Stanford, California.

Respectfully submitted,

HERMAN F. SELVIN, Chairman

January 1964

TENTATIVE RECOMMENDATION OF THE CALIFORNIA

LAW REVISION COMMISSION

relating to

THE UNIFORM RULES OF EVIDENCE

Article VI. Extrinsic Policies Affecting Admissibility

The Uniform Rules of Evidence (hereinafter sometimes designated as "URE") were promulgated by the National Conference of Commissioners on Uniform State Laws in 1953.[1] In 1956 the Legislature authorized and directed the Law Revision Commission to make a study to determine whether the Uniform Rules of Evidence should be enacted in this State.

The tentative recommendation of the Commission on Article VI of the Uniform Rules of Evidence (Extrinsic Policies Affecting Admissibility), consisting of Rules 41 through 55, is set forth herein.

URE Rule 7 abolishes all disqualifications of witnesses and other exclusionary rules of evidence except to the extent that such disqualifications and exclusionary rules are provided in the URE. Some URE rules exclude evidence on the ground that it is unreliable--for example, Rules 62 through 66 exclude unreliable hearsay, and Rules 68 through 72 exclude documentary evidence if it is not properly authenticated or if there is better evidence available. Other rules, however, exclude evidence for reasons of public policy even though the evidence is relevant and reliable. Such rules are those of privilege, which exclude evidence in order to protect certain relationships or rights deemed important in the law. Article VI of the URE contains another group of rules that deals with questions of admissibllity or inadmissibility of evidence for reasons of

[1] A pamphlet containing the Uniform Rules of Evidence may be obtained from the National Conference of Commissioners on Uniform State Laws, 1155 East Sixtieth Street, Chicago 37, Illinois. The price of the pamphlet is thirty cents. The Law Revision Comiission does not have copies of this pamphlet available for distribution.

public policy.

Most of the rules in Article VI are exclusionary rules, Rules 41-45, 47-48, and 51-55. These rules provide exceptions to the general proposition stated in Rule 7 that all relevant evidence is admissible and all persons are competent witnesses. A few of the rules in this article--Rules 46, 49 and 50--provide for the admissibility of evidence. As Rule 7 provides that all relevant evidence is admissible, these rules are apparently intended to prevent courts from disregarding Rule 7 and holding the evidence mentioned in these rules inadmissible for reasons of public policy not appearing in the URE.

The Commission tentatively recommends that URE Rules 41-55, revised as hereinafter indicated,[2] be enacted as the law in California. The rules as revised will codify some California law. They will eliminate some anomalous provisions of existing California law, and they will generally improve the law of evidence in California.

In the material which follows, the text of each rule proposed by the Commissioners on Uniform State Laws is set forth and the amendments tentatively recommended by the Commission are shown in strikeout and italics. Each rule is followed by a comment setting forth the major considerations that influenced those recommendations of the Commission suggesting important substantive changes in the rule or in the corresponding California law.

---

[2]The final recommendation of the Commission will indicate the appropriate Code Section numbers to be assigned to the rules as revised by the Commission.

For a detailed analysis of the URE rules relating to privileges and the related California law, see the research study beginning on page 000. This study was prepared by the Commission's research consultant, Professor James H. Chadbourn, formerly of the U.C.L.A. Law School and now of the Harvard Law School.

RULE 41. EVIDENCE TO TEST A VERDICT OR INDICTMENT

Upon an inquiry as to the validity of a verdict or an indictment, evidence otherwise admissible 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 improperly influenced the verdict or indictment. No evidence [~~shall be received~~] is admissible to show the effect of [~~any~~] such statement, conduct, event or condition upon [~~the mind of~~] a juror [as] either in influencing him to assent to or dissent from the verdict or indictment or concerning the mental processes by which it was determined.

COMMENT

Rule 41 expresses existing California law which permits evidence to be received of misconduct by a trial jury and forbids the reception of evidence as to the effect of such misconduct on the jurors' minds. People v. Stokes, 103 Cal. 193, 196-97 (1894).

The rule has been revised, but it has not been changed in substance. The language added by the revision is technically unnecessary because Rule 7 provides that all relevant evidence is admissible. The revision makes clear, however, that the rule excludes only evidence of the effect of various occurrences on a juror's mind; it does not exclude evidence of the fact of such occurrences.

RULE 42. TESTIMONY BY THE JUDGE.

Against the objection of a party, the judge presiding at the trial may not testify in that trial as a witness. If the judge finds that his testimony would be of importance, he shall order the trial to be postponed or suspended and to take place before another judge.

COMMENT

Under existing California law, a judge may be called as a witness, but the judge may in his discretion order the trial postponed or suspended and to take place before another judge. Code Civ. Proc. § 1883. Rule 42, on the other hand, prohibits a judge from testifying if a party objects.

Rule 42 is based on the fact that examination and cross-examination of a judge-witness may be embarrassing and prejudicial to a party. By testifying as a witness for one party, a judge appears in a partisan attitude before the jury. Objections to his testimony must be ruled on by the witness himself. The extent of cross-examination may be limited by the fear of appearing to attack the judge personally. A party might be embarrassed to introduce impeaching evidence. For these and similar reasons, the Commission recommends the approval of Rule 42.

The second sentence has been added to continue the existing California procedure in those cases where the judge is called but cannot testify; however, under the existing law the judge acts in his discretion, under the revised rule the judge is required to order the continuance if he finds that his testimony would be of importance.

RULE 43. TESTIMONY BY A JUROR.

A member of a jury [~~sworn and empanelled in the trial of~~] trying an action, may not testify in that trial as a witness. If the judge finds that the juror's testimony would be of importance, he shall order the trial to be postponed or suspended and to take place before another jury.

This rule does not prohibit a juror from testifying as to matters covered by Rule 41 or as provided in Section 1120 of the Penal Code.

COMMENT

First paragraph. Under existing California law, a juror may be called as a witness, but the judge in his discretion may order the trial postponed or suspended and to take place before another jury. Code Civ. Proc. § 1883. Rule 43, however, prohibits a juror from testifying at all.

Unlike Rule 42, which prohibits a judge from testifying only if a party objects, Rule 43 prohibits testimony by a juror even though no objection is made. A juror-witness is in anomalous position. He (as juror) is required to weigh his own testimony (as witness) with complete impartiality. Manifestly, this is impossible. The adverse party, too, is placed in an embarrassing position. He cannot cross-examine in such a manner as to antagonize the juror. He cannot impeach for fear of antagonizing the juror. If he objects to the juror appearing as a witness, the juror may regard the objection as a personal reflection upon his character and veracity. For these reasons, the Commission recommends Rule 43 which prohibits a juror from testifying even though no objection is made.

The second sentence of the first paragraph has been added to preserve the existing California practice of continuing the case for trial before

another jury when it is necessary for a juror to testify and it would be improper to permit him to do so. Cf. Code Civ. Proc. § 1883.

Second paragraph. The second paragraph has been added to make clear that this rule does not prohibit a juror from testifying as to the occurrence of events likely to have improperly influenced a verdict. Therefore, under Rule 7, which provides that all persons are competent to testify, a juror is competent to testify as to the matters specified in Rule 41.

This paragraph together with Rule 7 will change the existing California law. URE Rule 44, which would have preserved existing California law in this regard, has been disapproved by the Commission. Under existing California law, a juror is incompetent to give evidence as to matters that might impeach his verdict. Siemsen v. Oakland etc. Ry., 134 Cal. 494 (1901). He is competent, however, to give evidence that no misconduct was committed by the jury after evidence has been given that there was misconduct. People v. Deegnan, 88 Cal. 602 (1891). By statute, a juror may give evidence by affidavit that a verdict was determined by chance. Code Civ. Proc. § 657. And the courts have held that an affidavit of a juror may be used to prove that another juror had personal knowledge of the case when such knowledge was denied on the voir dire examination. Williams v. Bridges, 140 Cal. App. 537 (1934).

No reason is apparent for permitting a juror to give evidence of certain kinds of misconduct and prohibiting him from giving evidence concerning others. A juror is the person most apt to know whether misconduct has occurred. Not to hear evidence as to misconduct from the jurors themselves may at times conceal the only evidence of misconduct that exists. The existing rule is a temptation to eavesdropping and similar undesirable

practices, as the only admissible evidence of misconduct in the jury room must come from those not authorized to be there.

The existing rule is based on an ancient common law precedent. Vaise v. Delaval, 1 T.R. 11 (1785). The reason given for the rule in that case--that the jurors should not be permitted to give evidence of their own crime of misconduct--is no longer apposite. The rule is now based on a fear that juries will be tampered with and their verdicts imperiled. Saltzman v. Sunset Tel. & Tel. Co., 125 Cal. 501, 505 (1899). But the peril to the verdict flows from the substantive rule permitting verdicts to be set aside for misconduct, not from the source of the evidence. If verdicts may be set aside for jury misconduct, it is absurd to deny access to the most reliable evidence of such misconduct. See criticism of existing rule in 8 Wigmore, Evidence (McNaughton rev. 1961) 697-701. Experience with the exception to the existing rule that permits jurors to impeach verdicts made by chance or by jurors who answer falsely on voir dire indicates that fears of jury tampering are unrealistic. Therefore, the Commission recommends that the rule forbidding a juror to give evidence of misconduct of the jury be repudiated.

Penal Code Section 1120 requires a juror who discovers that he has personal knowledge of the case being tried before him to declare that fact. The section requires the juror to be sworn as a witness and examined in the presence of the parties. Rule 43 has been revised to retain this method for determining whether a juror is qualified to continue to sit as a juror in the case.

RULE 44. TESTIMONY OF JURORS NOT LIMITED EXCEPT BY THESE RULES.

~~[These rules shall not be construed to (a) exempt a juror from testifying as a witness, if the law of the state permits, to conditions or occurrences either within or outside of the jury room having a material bearing on the validity of the verdict or the indictment, except as expressly limited by Rule 41; (b) exempt a grand juror from testifying to testimony or statements of a person appearing before the grand jury, where such testimony or statements are the subject of lawful inquiry in the action in which the juror is called to testify.]~~

COMMENT

URE Rule 44 is in the Uniform Rules of Evidence to make clear that Rule 43 does not prohibit a juror from testifying as to misconduct of the jury "if the law of the state permits". The Commission has revised Rule 43 to make clear that a juror may so testify. Hence, Rule 44 is no longer necessary and is disapproved. See comment to Rule 43.

RULE 45. DISCRETION OF JUDGE TO EXCLUDE ADMISSIBLE EVIDENCE.

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

COMMENT

Rule 45 expresses a rule recognized by statute and in several California decisions. See Code Civ. Proc. §§ 1868, 2044; Moody v. Peirano, 4 Cal. App. 411, 418 (1906) ("a wide discretion is left to the trial judge in determining whether [evidence] is admissible or not"); Adkins v. Brett, 184 Cal. 252, 258 (1920) ("The matter is largely one of discretion on the part of the trial judge").

The last clause has been deleted from the rule because surprise should not be a ground of inadmissibility. Surprise too frequently is the essential tool for uncovering the truth. The trial judge may protect a party from any unfairness by granting a continuance. Code Civ. Proc. § 595.

RULE 46. CHARACTER AS ULTIMATE ISSUE: MANNER OF PROOF.

~~[When a person's character or a trait of his character is in issue, is may be proved by]~~ Any otherwise admissible evidence, including testimony in the form of opinion, evidence of reputation, ~~[or]~~ and evidence of specific instances of a person's conduct, is admissible when offered to prove such person's character or a trait of his character and not to prove any fact other than such character or trait of character. ~~[subject, however, to the limitations of Rules 47 and 48.]~~

COMMENT

Rule 46 is technically unnecessary. URE Rule 7 declares that all relevant evidence is admissible. Hence, all of the evidence declared to be admissible by Rule 46 would be admissible anyway under the general provisions of Rule 7. Rule 46 is included in the revised rules, however, to forestall the argument that Rule 7 has not removed all judicially created restrictions on the forms of evidence that may be used to prove character or a trait of character when that character or character trait is an ultimate fact to be proved and not merely circumstantial evidence of conduct in conformity therewith.

The rule has been revised to make clear that it deals with evidence that is offered to prove a person's character or character trait only and not to prove character as circumstantial evidence of some other fact. The URE language, "in issue", did not make this limitation sufficiently clear. This revision has eliminated the need for the cross-reference to Rules 47 and 48, for those rules are concerned only with character as circumstantial evidence of conduct. The phrase "may be proved by" has been replaced by the words "is admissible" to avoid any implication that a person's burden of proof is

necessarily discharged by the introduction of any of the evidence described in the rule.

The revised rule seems to be generally consistent with existing California law; although the existing law is uncertain in some respects. Cases involving character as an ultimate issue may be found admitting opinion evidence (People v. Samonset, 97 Cal. 448, 450 (1893); People v. Wade, 118 Cal. 672 (1897)), reputation evidence (People v. Samonset, supra; Estate of Akers, 184 Cal. 514, 519-20 (1920)), and evidence of specific acts (Guardianship of Wisdom, 146 Cal. App.2d 635 (1956); Currin v. Currin, 125 Cal. App.2d 644 (1954); Guardianship of Casad, 106 Cal. App.2d 134 (1951)). However, cases may also be found excluding some kinds of evidence where particular traits are involved. For example, cases involving the unfitness or incompetency of an employee indicate that evidence of specific acts is admissible and evidence of reputation is not to prove such unfitness or incompetency. Gier V. Los Angeles C. & E. Ry., 108 Cal. 129 (1895).

The revised rule will eliminate the uncertainties in existing law and assure the admissibility of any evidence that is relevant to prove what the character in issue actually is.

RULE 47. CHARACTER TRAIT AS PROOF OF CONDUCT.

Subject to Rules 48 and 55, [~~when a trait~~] any otherwise admissible evidence of a person's character or a trait of his character is [~~relevant as tending~~] admissible when offered to prove his conduct on a specified occasion, [~~such trait may be proved in the same manner as provided by Rule 46,~~] except that [~~(a) evidence of specific instances of conduct other than evidence of conviction of a crime which tends to prove the trait to be bad shall be inadmissible, and (b)~~] in a criminal action or proceeding evidence of the defendant's character or a trait of [~~an accused's~~] his character [~~as tending to prove his guilt or innocence of the offense charged,~~] :

[~~(i)~~] (1) May not be excluded by the judge under Rule 45 if offered by the [~~accused~~] defendant to prove his innocence [~~, and~~] .

[~~(ii)~~] (2) Is inadmissible if offered by the prosecution to prove [~~his~~] the defendant's guilt [~~, may be admitted only after the accused~~] unless the defendant has previously introduced evidence of his [~~good~~] character to prove his innocence.

COMMENT

Character evidence to prove conduct generally. Rules 47, 48 and 55 are concerned with character evidence as circumstantial evidence of conduct. Although they recognize the relevancy of a person's character--propensity or disposition to engage in a certain type of conduct--to prove conduct in conformity with that character, they also recognize that such evidence is weak at best and may be highly prejudicial. Hence, these rules place substantial restrictions on the use of character evidence to prove conduct.

Kinds of character evidence admissible. Subject to certain restrictions, URE Rule 47 permits opinion evidence, reputation and crimes for which a

person has been convicted to be used as evidence of character when such character is relevant on the issue of a person's conduct. Under existing law, the admissibility of the various kinds of character evidence depends on the kind of case involved and the character trait sought to be proved.

Reputation evidence is the ordinary means sanctioned by the cases for proving character as circumstantial evidence of conduct. People v. Stewart, 28 Cal. 395 (1865). Rule 47, therefore, will not change the law insofar as reputation evidence is concerned.

Apparently opinion evidence is inadmissible generally. People v. Spigno, 156 Cal. App.2d 279 (1957). But there is recent authority for the admission of an expert psychiatric opinion that the defendant was not a sexual psychopath and hence unlikely to have violated Penal Code Section 288. People v. Jones, 42 Cal.2d 219 (1954). Rule 47 makes opinion evidence admissible. In this respect, Rule 47 declares the better rule. The opinions of those whose personal intimacy with a person gives them a first hand knowledge of that person's character are a far more reliable indication of that character than is reputation, which is little more than accumulated hearsay. Cf. 7 Wigmore, Evidence (3d ed. 1940) § 1986, pp. 165-172. The danger of collateral issues seems no greater than that inherent in reputation evidence. Abandonment of the existing rule, which excludes the most reliable form of character evidence and admits the least reliable, and the approval of the provision of Rule 47 admitting opinion evidence is, therefore, recommended.

Under URE Rule 47, evidence of specific acts to show character is inadmissible unless the evidence consists of convictions of crime. Under existing law, the admissibility of specific acts depends upon the nature of

the conduct sought to be proved. It is well settled that in a rape case, the defendant may show the unchaste character of the prosecutrix with evidence of prior voluntary intercourse in order to indicate the unlikelihood of resistance on the occasion in question. People v. Battilana, 52 Cal. App.2d 685 (1942); Valencia v. Milliken, 31 Cal. App. 533 (1916) (civil action for rape). On the other hand, in a homicide or assault case where the defense is self defense, evidence of specific acts of violence by the victim is inadmissible to prove his violent nature (and, hence, that the victim was the aggressor) unless the prior acts were directed against the defendant himself. People v. Soules, 41 Cal. App.2d 298 (1940); People v. Yokum, 145 Cal. App.2d 245 (1956). Yet it has been held that evidence of specific acts of violence by the defendant in an assault prosecution is admissible to prove his guilt after the defendant has opened the question by introducing evidence of his good character. People v. Hughes, 123 Cal. App.2d 767 (1954).

Where evidence of specific acts is excluded, the exclusion is because of the possibility of prejudice, undue confusion of the issues with collateral matters, unfair surprise, etc. The URE rule limits the collateral issues by restricting the evidence of specific acts to criminal convictions. Because the probative value of specific acts will vary considerably from case to case, Rule 47 has been revised to eliminate its fixed rule excluding evidence of specific acts other than criminal convictions. Thus, Rule 47 has been revised to reflect the California law as developed in the rape cases. Under the revised rule, evidence of specific acts is admissible to prove character as circumstantial evidence of conduct even though no crime or conviction is involved. The exclusion of such evidence is better left to

the discretion of the trial judge under Rule 45. The trial judge has adequate power under that rule to curb inquiry into collateral matters, and he has power to protect a party from unfair surprise by continuing the case so that the party may have an opportunity to meet the evidence against him.

Cases in which character evidence may be used to prove conduct. Rule 47 places no limit on the use of character evidence to prove conduct in civil cases. Under existing law, however, evidence of good character is inadmissible in a civil case unless that character has been attacked. Code Civ. Proc. § 2053. It is difficult to understand why the fear of collateral issues should preclude such evidence in civil cases when there is no similar restriction in criminal cases. The only possible distinction is that criminal cases are deemed more important; but this manifestly is not so. A defendant in a civil assault case will often have more at stake in the litigation than a defendant in a criminal assault case; yet his peaceable character is inadmissible in the civil case to show his innocence while it is admissible for that purpose in the criminal case. Similarly, a defendant in a civil case involving a charge of sexual misconduct often has more at stake than a defendant being tried in a criminal case for the same conduct; yet, in the civil case his character cannot be considered as evidence of his innocence while in the criminal case it can. Rule 47 will eliminate this restriction on the use of character evidence in civil cases. As the distinction in existing law between civil and criminal cases is based on no ascertainable policy, approval of Rule 47 is recommended in this regard.

Under existing law, a defendant in a criminal case may introduce evidence of his good character to show his innocence. People v. Stewart,

28 Cal. 395 (1865). Subdivision (1) of the revised rule assures the defendant that his right to introduce such evidence may not be impaired under the judge's discretionary authority to exclude evidence under Rule 45.

Subdivision (2) of the revised rule declares the existing California law that the prosecution may not introduce character evidence to show the defendant's propensity to commit the kind of crime charged unless the defendant has first introduced character evidence to prove his innocence. People v. McKelvey. 85 Cal. App. 769 (1927).

Rule 47

RULE 48. CHARACTER TRAIT FOR CARE OR SKILL--INADMISSIBLE TO PROVE QUALITY OF CONDUCT.

Evidence of a trait of a person's character with respect to care or skill is inadmissible as tending to prove the quality of his conduct on a specified occasion.

COMMENT

Rule 48 qualifies the rule expressed in Rule 47 by declaring that character evidence with respect to care or skill is inadmissible to prove that conduct on a specific occasion was either careless or careful, skilled or unskilled.

Rule 48 sets forth the well-settled California law. Towle v. Pacific Improvement Co., 98 Cal. 342 (1893). The purpose of the rule is to prevent collateral issues from consuming too much time and distracting the attention of the trier of fact from what was actually done on the particular occasion. Here, the slight probative value of the evidence balanced against the danger of confusion of issues, collateral inquiry, prejudice, etc. warrants a fixed exclusionary rule.

RULE 49. HABIT OR CUSTOM TO PROVE SPECIFIC BEHAVIOR.

Any otherwise admissible evidence of habit or custom is [~~relevant to an issue of behavior~~] admissible to prove conduct on a specified occasion [~~, but is admissible on that issue only as tending to prove that the behavior on such occasion conformed to~~] in conformity with the habit or custom.

COMMENT

Rule 49, like Rule 46, declares that certain evidence is admissible. Hence, the rule is technically unnecessary because Rule 7 declares that all relevant evidence is admissible. Nonetheless, the rule is desirable to assure that evidence of custom or habit--a regular response to a repeated specific situation--is admissible even where evidence of a person's character--his general disposition or propensity to engage in a certain type of conduct--is inadmissible. The language of the rule has been revised in the interest of simplicity and clarity.

The admissibility of habit evidence to prove conduct in conformity with the habit has long been established in California. Craven v. Central Pacific R.R., 72 Cal. 345 (1887); Wallis v. So. Pacific Co., 184 Cal. 662 (1921) (distinguishing cases holding character evidence as to care or skill inadmissible). The admissibility of evidence of the custom of a business or occupation is also well established. Hughes v. Pacific Wharf etc. Co., 188 Cal. 210 (1922) (mailing letter). However, under existing law, evidence of habit is admissible only if there are no eyewitnesses. Boone v. Bank of America, 220 Cal. 93 (1934). In earlier cases, the Supreme Court criticized the "no-eyewitness" limitation:

> This limitation upon the introduction of such testimony seems rather illogical. If the fact of the existence of habits of caution in a

> given particular has any legitimate evidentiary weight, the party benefited ought to have the advantage of it for whatever it is worth, even against adverse eye-witnesses; and if the testimony of the eye-witnesses is in his favor, it would be at least a harmless cumulation of evidence to permit testimony of his custom or habit. [Wallis v. So. Pacific Co., 184 Cal. 662, 665 (1921).]

The "no-eyewitness" limitation is undesirable. Eyewitnesses frequently are mistaken, and some are dishonest. The trier of fact should be entitled to weigh the habit evidence against the eyewitness testimony as well as all of the other evidence in the case. Hence, approval of Rule 47, which rejects the "no-eyewitness" limitation, is recommended.

Rule 49

RULE 50. OPINION AND SPECIFIC INSTANCES OF BEHAVIOR TO PROVE HABIT OR CUSTOM.

~~[Testimony in the form of opinion is admissible on the issue of habit or custom. Evidence of specific instances of behavior is admissible to prove habit or custom if the evidence is of a sufficient number of such instances to warrant a finding of such habit or custom.]~~

COMMENT

Rule 50 is unnecessary because Rule 7 declares that all relevant evidence is admissible. It does not appear necessary in the interest of clarity or to avoid undesirable implications of other rules. Hence, Rule 50 is disapproved.

RULE 51. SUBSEQUENT REMEDIAL CONDUCT.

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 not admissible to prove negligence or culpable conduct in connection with the event.

COMMENT

The rule stated above is well settled in existing California law. Helling v. Schindler, 145 Cal. 303 (1904). The admission of evidence of subsequent repairs to prove negligence would substantially discourage persons from making repairs after the occurrence of an accident. As the removal of hazards by repair of conditions causing accidents should be encouraged, not discouraged, public policy requires the approval of Rule 51.

RULE 52. OFFER TO COMPROMISE AND THE LIKE, NOT EVIDENCE OF LIABILITY.

(1) 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, is inadmissible to prove his liability for the loss or damage or any part of it. This rule [~~shall~~] does not affect the admissibility of evidence (a) of partial satisfaction of an asserted claim on demand without questioning its validity, as tending to prove the validity of the claim, or (b) of a debtor's payment or promise to pay all or a part of his pre-existing debt as tending to prove the creation of a new duty on his part, or a revival of his pre-existing duty, or (c) of any statement made unconditionally admitting any facts on which the claim is based.

(2) Evidence that the defendant in a criminal action or proceeding has offered to plead guilty to the alleged crime or to a lesser crime, as well as any conduct or statements made in negotiation thereof, is inadmissible to prove the crime.

COMMENT

Subdivision (1). Subdivision (1) expresses the existing California law. Code Civ. Proc. § 2078. Under the existing statute, an offer of compromise probably may not be considered as an admission even though admitted without objection. Scott v. Wood, 81 Cal. 398, 405-06 (1889). Under Rule 52, however, nothing prohibits the consideration of an offer or settlement on the issue of liability if the evidence is received without objection. This modest change in the law is desirable. An offer of compromise, like other incompetent evidence, should be considered to the

extent that it is relevant when it is presented to the trier of fact without objection.

The words "in compromise or from humanitarian motives" have been deleted so that the court need not inquire as to the motives of the offeror. Clause (c) has been added to make clear that admissions of fact made as part of a compromise offer or during settlement negotiations are inadmissible. People v. Forster, 58 Cal.2d 257, 263-267 (1962). Under clause (c), as under existing law, the admissiblity of a statement will depend on whether the statement is hypothetical or conditional or whether it is an unconditional assertion of fact. People v. Forster, 58 Cal.2d at 264 (1962).

Subdivision (2). Subdivision (2) is based on a similar provision recommended by the New Jersey Supreme Court Committee on Evidence. It is a logical and fair extension of the policy that prohibits the introduction of a withdrawn plea of guilty. See Pen. Code § 1192.4; People v. Ryan, 82 Cal. 617 (1890).

RULE 53. OFFER TO DISCOUNT CLAIM, NOT EVIDENCE OF INVALIDITY.

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, is inadmissible to prove the invalidity of the claim or any part of it.

COMMENT

Rule 53 stems from the same policy of encouraging settlement and compromise that is reflected in Rule 52. Rule 53, too, reflects existing California law. Dennis v. Belt, 30 Cal. 247 (1866); Anderson v. Yousem, 177 Cal. App.2d 135 (1960); Cramer v. Lee Wa Corp., 109 Cal. App.2d 691 (1952).

RULE 54. LIABILITY INSURANCE.

Evilence 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 as tending to prove negligence or other wrongdoing.

COMMENT

Rule 54 states a rule that is well settled in California. Roche v. Llewellyn Iron Works Co., 140 Cal. 563 (1903). The evidence might be inadmissible in the absence of Rule 54 because it is not relevant; but Rule 54 assures the inadmissiblity of the evidence because it is prejudicial.

RULE. 55 OTHER CRIMES OR CIVIL WRONGS

[~~Subject to Rule 47~~] Evidence that a person committed a crime or civil wrong on a specified occasion [,] is inadmissible to prove his disposition to commit crime or civil wrong as the basis for an inference that he committed [~~another~~] a crime or civil wrong on another specified occasion [,] unless he has previously introduced evidence of his character or a trait of his character to prove that he did not commit a crime or civil wrong. Nothing in this rule prohibits the admission of evidence that a person committed a crime or civil wrong [~~but, subject to Rules 45 and 48, such evidence is admissible~~] when relevant to prove some [~~other material~~] fact other than his disposition to commit crime or civil wrong, including absence of mistake or accident, motive, opportunity, intent, preparation, plan, knowledge or identity.

COMMENT

Rule 55 qualifies the rule stated in Rule 47 by providing that evidence of past crimes or torts is inadmissible to prove the commission of another crime or tort. Character evidence is weak evidence of conduct at best, and when the character evidence is of prior crimes or torts, the potential prejudice to the person accused of the wrong far outweighs whatever probative force the evidence may have.

The rule has been revised to make clear that its exclusionary rule no longer applies if the person accused of the wrong first introduces character evidence to show that he did not commit the alleged wrong. This was the probable meaning of the somewhat ambiguous reference to Rule 47

that has been deleted from the rule. The second sentence of the rule is probably unnecessary, but it is desirable to make clear that the evidence proscribed by the rule may be admissible when it is not offered as circumstantial evidence of conduct but as evidence of some other fact in issue.

The rule as revised is declarative of existing California law. People v. Albertson, 23 Cal.2d 550 (1944) (prior crime inadmissible); People v. Hughes, 123 Cal. App.2d 767 (1954) (prior assault admissible when defendant first introduced evidence of good character); Larson v. Larsen, 72 Cal. App. 169 (1925) (prior assault inadmissible in civil case); Shmatovich v. New Sonoma Creamery, 187 Cal. App.2d 342 (1960) (other auto accidents inadmissible); People v. David, 12 Cal.2d 639 (1939) (prior robbery admissible to show defendant's sanity and ability to devise and execute deliberate plan); People v. Morani, 196 Cal. 154 (1925) (prior abortion admissible to show operation not performed in ignorance of effect); People v. Lisenba, 14 Cal.2d 403 (1939) (prior crime admissible to show general criminal plan and absence of accident).

## AMENDMENTS AND REPEALS OF EXISTING STATUTES

Set forth below is a list of existing statutes relating to the extrinsic policies affecting admissibility which should be revised or repealed in light of the Commission's tentative recommendation concerning Article VI (Extrinsic Policies Affecting Admissibility) of the Uniform Rules of Evidence. The reason for the suggested revision or repeal is given after each section. References in such reasons to the Uniform Rules of Evidence are to the Uniform Rules as revised by the Commission.

In many cases where it is hereafter stated that an existing statute is superseded by a provision in the Uniform Rules of Evidence, the provision replacing the existing statute may be somewhat narrower or broader than the existing statute. In these cases, the Commission believes that the proposed provision is a better rule, although in a given case it be broader or narrower than the existing law.

### Code of Civil Procedure

Section 657 provides that misconduct of the jury may be proved by the affidavit of a juror if the misconduct involved consists of determining the verdict by chance. Under Rules 41 and 43, a juror is competent to give evidence of any misconduct; hence, the limitation on the kinds of misconduct that can be shown by a juror's affidavit should be removed from Section 657. So far as it is pertinent, the amended section would read:

> 657. The verdict may be vacated and any other decision may be modified or vacated, in whole or in part, and a new or further trial granted on all or part of the issues, on the application of the party aggrieved, for any of the following causes, materially affecting

the substantial rights of such party:

* * *

2. Misconduct of the jury; and [~~whenever any one or more of the jurors have been induced to assent to any general or special verdict, or to a finding on any question submitted to them by the court, by a resort to the determination of chance,~~] such misconduct may be proved by the affidavit of any one of the jurors;

* * *

Section 1883 provides:

1883. JUDGE OR A JUROR MAY BE WITNESS. The judge himself, or any juror, may be called as a witness by either party; but in such case it is in the discretion of the court or judge to order the trial to be postponed or suspended, and to take place before another judge or jury.

This section is superseded by Rules 42 and 43 and, therefore, should be repealed.

Section 2053 provides:

2053. EVIDENCE OF GOOD CHARACTER, WHEN ALLOWED. Evidence of the good character of a party is not admissible in a civil action, nor of a witness in any action, until the character of such party or witness has been impeached, or unless the issue involves his character.

This rule pertains to character evidence relating to both parties and witnesses. Insofar as it pertains to character evidence relating to parties, it is superseded by the provisions of Rules 46, 47, 48 and 55. Insofar as it relates to character evidence relating to witnesses, its subject matter is covered by Rules 20-22, which are the subject of another report by the Law Revision Commission. Therefore, the section should be repealed.

Section 2078 provides:

2078. COMPROMISE OFFER OF NO AVAIL. An offer of compromise is not an admission that anything is due.

This section is superseded by Rule 52 and should, therefore, be repealed.

Penal Code

Section 1120. This section requires a juror who discovers that he has personal knowledge of a fact in controversy in the case to disclose the same in open court. If he reveals such personal knowledge during the jury's retirement, the jury must return into court. The section then requires that the juror be sworn as a witness and examined in the presence of the parties.

The section does not make clear whether this examination in the presence of the parties is for the purpose of determining if "good cause" exists for the juror's discharge in accordance with Penal Code Section 1123 or whether this examination is for the purpose of obtaining the juror's knowledge as evidence in the case. Permitting a juror to testify as a witness in the case would be contrary to Rule 43. Therefore, Section 1120 should be amended to eliminate the ambiguity in its provisions and to provide assurance that the juror's examination is to be used solely to determine whether "good cause" exists for his discharge. The ammended section would read as follows:

> 1120. If a juror has any personal knowledge respecting a fact in controversy in a cause, he must declare the same in open court during the trial. If, during the retirement of the jury, a juror declare a fact which could be evidence in the cause, as of his own knowledge, the jury must return into court. In either of these cases, the juror making the statement must be sworn as a witness and examined in the presence of the parties in order that the court may determine whether good cause exists for his discharge as a juror.