

#34(L)

12/11/63

Memorandum 63-60

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

At the December meeting, the Commission should approve for printing the tentative recommendation relating to Article VI (Extrinsic Policies Affecting Admissibility). We have already sent you a copy of this tentative recommendation and it should be filed in your loose-leaf binder entitled "Uniform Rules of Evidence as Revised to Date."

We enclose another copy of this tentative recommendation. Please mark your suggested changes in the language of the comments on this copy prior to the meeting and turn it in to the staff at the meeting. These comments can then be taken into account when the tentative recommendation is prepared for the printer.

We received comments from the Northern Section of the State Bar Committee (Exhibit I--blue sheet). We did not receive any comments from the Southern Section. You will note from Exhibit I that the Northern Section is in general agreement with the Commission on this tentative recommendation except for two matters.

The following is a section by section analysis of the State Bar Committee's comments, together with two staff comments.

Rules 41 and 43.

The State Bar Committee objects to Rules 41 and 43 insofar as they eliminate the prohibition against testimony by a juror to impeach a verdict. The reason for the objection is stated in paragraph 1 of Exhibit I. See also the comment to the second paragraph of Rule 43 on pages 7-8 of the tentative recommendation.

If it is desired to accept the suggestion of the State Bar Committee, it is suggested that the following revisions be made in this article:

First, revise the last sentence of Rule 43 to read: "This rule does not prohibit a juror from testifying [~~as-to-matters-severed~~] to the extent permitted by Rule 41 or as provided in Section 1120 of the Penal Code.

Second, revise Rule 41 to read (only changes from previously approved rule are shown):

(1) Upon an inquiry as to the validity of a verdict, 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. No evidence is admissible to show the effect of such statement, conduct, condition, or event [~~ex-conditions~~] upon a juror either in influencing him to assent to or dissent from the verdict or concerning the mental processes by which it was determined.

(2) A juror may testify as a witness to, or may make an affidavit concerning, 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 only in the following cases:

(a) To prove that no such statement was made, or that no such conduct, condition, or event occurred, after evidence has been given that such a statement was made or that such conduct, condition, or event occurred.

(b) To prove that any one or more of the jurors may have been induced to assent to or dissent from the verdict by a resort to the determination of chance.

(c) To prove that a juror had personal knowledge of a fact in controversy in the case when such knowledge was denied on the voir dire examination.

(3) As used in this section, "verdict" means a general or special verdict or a finding on any question submitted to the jury by the court.

Rule 47.

The State Bar Committee "believes that Rule 47 as proposed goes a little too far in excluding character evidence in rape cases and cases of self-defense. If the Commission agrees, Rule 47 could be revised to read (with changes from Rule 47 as previously approved shown by strikeout and underlining):

(1) Except as provided in this rule, evidence of a person's character or a trait of his character is inadmissible when offered to prove his conduct on a specified occasion. [~~except-that~~]

(2) In a criminal action or proceeding, evidence of the defendant's character or a trait of his character in the form of opinion or evidence of his reputation is not inadmissible under this rule:

(a) If offered by the defendant to prove his innocence; and such evidence, when offered by the defendant, may not be excluded by the judge under Rule 45.

(b) If offered by the prosecution to prove the defendant's guilt and the defendant has previously introduced evidence of his good character to prove his innocence.

(3) In a criminal action or proceeding, evidence of the character or a trait of character (in the form of opinion or evidence of reputation) of the victim of the crime for which the defendant is being prosecuted is not inadmissible under this rule:

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

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

[~~(2)~~] (4) Nothing in this rule prohibits the admission of evidence that a person committed a crime, civil wrong, or other act when relevant to prove some fact (such as motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident) other than his disposition to commit such acts.

[~~(3)~~] (5) Nothing in this rule affects the admissibility of evidence offered to support or impair the credibility of a witness.

Note that the new subdivision (3) will not permit evidence of specific instances of conduct to be shown, nor will it permit evidence of character of the victim to be shown to prove conduct in civil cases. See the comment on pages 14-20 of the tentative recommendation for a statement of the existing law.

Rule 51.

Rule 51 does not affect the use of evidence of subsequent repairs where appropriate to impeach a witness. Thus, in Inyo Chemical Co. v. Los Angeles, 5 C.2d 525, 543, 55 P.2d 850 (1936), an action for damages sustained by the breaking of the defendant city's aqueduct, defendant's maintenance engineer testified that he had previously inspected the area and it was his

opinion at the time that no overhead or underground drainage was necessary. On cross-examination, he was asked whether he had authorized construction of many spillways after the break. It was held, though clearly improper on the issue of negligence, the questions were properly allowed "for the purpose of weakening the testimony of defendant's expert witness by showing he had subsequently changed his opinion as to the necessity of drainage."

In Daggett v. Atchison etc. Ry. Co., 48 C.2d 655, 662, 313 P.2d 557 (1957), the defendant's safety engineer had expressed an opinion that a former signal was the safest type, and was impeached by evidence that defendant after the accident changed to a different type. A similar situation was presented in Laird v. Mather, 51 C.2d 210, 331 P.2d 617 (1958).

In Pierce v. Penney Co., 167 C.A.2d 3, 334 P.2d 117 (1959), it was held that a nonexpert witness who testified concerning his observations but who had nothing to do with the making of the changes, could not be impeached by evidence of subsequent repairs because they did not involve any conduct on his part.

Accordingly, it is suggested that the Comment to Rule 51 be revised by adding the following additional paragraph:

This rule does not prevent the use of evidence of subsequent remedial conduct for the purpose of impeachment in appropriate cases. See Pierce v. Penney Co., 167 C.A.2d 3, 334 P.2d 117 (1959) for a good analysis of the California cases on impeachment by use of evidence of subsequent remedial conduct.

You may want to read the Pierce case prior to the meeting.

Although the staff recommends that no change be made in Government Code Section 830.5(b), you should know that this subdivision provides:

(b) The fact that action was taken after an injury occurred to protect against a condition of public property is not evidence that the public property was in a dangerous condition at the time of the injury.

You will recall that this subdivision was added to the dangerous conditions statute to overrule some cases that indicated that the happening of the accident was evidence that the property was in a dangerous condition in cases involving public entities. No similar rule was applied in cases involving private land owners or occupiers.

Respectfully submitted,

John H. DeMouilly
Executive Secretary

EXHIBIT I.

November 27, 1963

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

Attention: Mr. John H. DeMouilly

Gentlemen:

The Northern Section of the Committee to Consider Uniform Rules of Evidence met on November 19 and 26, 1963, to consider Article VI--Extrinsic Policies Affecting Admissibility.

The Northern Section approves the action taken by the Law Revision Commission with respect to all of the rules contained in this Article except as follows:

1. The Committee disapproves of the action of the Commission on rules 41 and 43 in eliminating the prohibition against testimony by a juror to impeach a verdict. The Committee would revise these rules so as to set forth the present California law which prohibits such testimony except in cases where the verdict was reached by lot or chance and where a juror has been untruthful on the voir dire. The Committee recognizes that it is difficult to pierce the logic of the argument in favor of the rule as proposed by the Commission, particularly as set forth in the dissenting opinion of Mr. Justice Peters in Sopp v. Smith, 59 A.C. 19. On the other hand, the Committee believes that the proposed rule, as a practical matter, would open the door to attempts to impeach every verdict. The temptation would be great to send investigators to talk to each juror after every verdict in an effort to find evidence to impeach it. In this respect, the Committee disagrees with Mr. Justice Peters' opinion that stability of verdicts would not be impaired. The Committee, therefore, favors the rule as set forth in the majority opinion in Sopp v. Smith.

2. The Committee believes that rule 47 as proposed goes a little too far in excluding character evidence in rape cases and cases of self-defense.

Sincerely yours,

s/

Lawrence C. Baker, Chairman
State Bar Committee on
Uniform Rules of Evidence