#34 7/6/64

First Supplement to Memorandum 64-48

Subject: Study No. 34(L) - Uniform Rules of Evidence (Evidence Code--Division 9--Extrinsic Policies)

On April 28 we distributed the tentative recommendation on Extrinsic Policies to all persons on our mailing list. We requested comments not later than July 1. On July 6, we had received comments from only one source: The Special Committee of the Conference of California Judges. These comments are attached as Exhibit I (pink pages).

As Memorandum 64-48 indicates, we made no significant changes in the tentative recommendation when we drafted it as Division 9 of the Evidence Code.

The following is an analysis of the comments received on the tentative recommendation. Additional staff suggestions are also listed below.

Section 1100

No comments were received. In the last line of Evidence Code Section 1100 we inserted "a" before "trait." This is an error. The word "a" should be deleted; perhaps the word "such" should be substituted for the word "a."

Sections 1101-1103

The Conference of California Judges suggests a revision in the form of RURE 47 (Sections 1101, 1102, and 1103 of Evidence Code). They suggested the revision to simplify the Rule and to eliminate the double negatives. See Exhibit I (pages 3-4). The staff believes that the division of RURE 47 into three sections in the Evidence Code does much to simplify RURE 47. We object to the revision suggested by the Conference because it does not limit the prosecution to the same kinds of character evidence that the defendant may

use. However, we suggest that the Commission consider revising Section 1102(b) along the lines suggested by the Conference. The revised subdivision (see page 901 of Evidence Code) would read:

> (b) Offered by the prosecution ~~to prove the defendant's guilt if the defendant has previously introduced evidence of his character to prove his innocence~~ in rebuttal to evidence adduced by the defendant under subdivision (a).

If this revision is approved by the Commission, subdivision (b) of Section 1103 should be revised to conform.

Section 1104

No comments were received.

Section 1105

With reference to this section, the Conference Committee states:

> Our Committee is of divided opinion concerning the Commission's proposed Rule 49 [Section 1105]. Some of the members of the Committee believe that the admissible habit or custom evidence should be limited to acts done in regular course of business; some believe that the Commission's proposal is acceptable in its present form; and some believe such evidence should be admissible only in the absence of independent eye witnesses.

The staff believes that the case made for Section 1105 in the research study is persuasive. See printed pamphlet containing tentative recommendation on Extrinsic Policies at pages 663-667.

Section 1150

In order to avoid the split infinitive, the Conference Committee suggests that the word "improperly" should follow the word "likely" instead of the phrase "to have."

Sections 1152-1154

The Conference Committee disapproves the overruling of People v. Forster. (See the Commission's Comment to Section 1152.) Thus, the Conference Committee would delete the words "as well as any conduct or statements made in negotiation thereof" from Sections 1152 and 1154. It would seem that if this phrase is deleted from these sections, it also should be deleted from Section 1153.

A section similar to Sections 1152 and 1154 was included in the tentative recommendation on Opinion Testimony on Value, Damages, and Benefits. Several writers commenting on that tentative recommendation also objected to this change in existing law. One writer took the time to write us--even though this was the only provision of the entire Evidence-in-Eminent-Domain-Proceedings-Statute to which he objected. He states that he feels very strongly on the matter.

The staff takes no position on whether the language should be delet from Sections 1152 and 1154. However, we do believe that the Commission should consider what effect the language might have in a criminal case under Section 1153. Will a criminal defendant who makes a confession or admission be able to keep it out on the ground that in making the confession or admission he was in effect "offering to plead guilty to the alleged crime or to a lesser crime"?

Section 1155

No comments were received.

Section 1156

Evidence Code Section 1156 is based on C.C.P. § 1936.1 (enacted in 1965). We originally classified this section in the Evidence Code division on

Writings. After giving the matter further consideration, we concluded that the section is based on an extrinsic policy--that the records it covers should be excluded because their exclusion will promote the policy of encouraging the research and medical studies contemplated by the section. The Consultant suggests that the section be compiled in the Privileges Division, but we do not believe that it is a privilege section since the records are subject to discovery. Moreover, the Consultant suggests that the net result of the section may be to make the contents of the records subject to discovery where they might not otherwise have been had the section not been enacted. He doubts that the records and finding would be admissible (absent Section 1156) over an objection of hearsay, opinion, or conclusion.

We believe that we have compiled Code of Civil Procedure Section 1936.1 as Evidence Code Section 1156 without making any substantive change. HOWEVER, THE WORD "AND" AT THE BEGINNING OF THE THIRD LINE IN THE EVIDENCE CODE SECTION SHOULD BE CHANGED TO "OR" TO RETAIN THE LANGUAGE OF THE EXISTING STATUTE.

Section 1936.1 is set out on pages 193-194 of Professor Degnan's research study and is discussed on pages 194-195 of his research study.

Respectfully submitted,

John H. DeMoully
Executive Secretary

First Supp. to
Memo 64-48

EXHIBIT I

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF SOLANO

FAIRFIELD, CALIFORNIA

June 3, 1964

California Law Revision Commission
30 Crothers Hall
Stanford University
Stanford, California

Gentlemen:

Enclosed, herewith, please find eleven (11) copies of our report on the Law Revision Commission's tentative recommendations dealing with "Extrinsic Policies Affecting Admissibility". Please deliver a copy of said report to each member of the Commission.

For reasons previously explained to you, our report does not appear in a form employing strike-outs and italics. However, our comments are titled and separately stated.

Yours very truly,

LEONARD A. DIETHER, Chairman
Committee of the Conference of California Judges to Work with the California Law Revision Commission on Uniform Rules of Evidence.

BY: RAYMOND J. SHERWIN
Committee Member

rjs/mmf
Enclosures

REPORT OF THE SPECIAL COMMITTEE OF THE CONFERENCE OF CALIFORNIA JUDGES TO WORK WITH THE CALIFORNIA LAW REVISION COMMISSION ON THE STUDY OF UNIFORM RULES OF EVIDENCE RELATIVE TO:

EXTRINSIC POLICIES AFFECTING ADMISSIBILITY

The Committee approves the tentative recommendations of the Commission on all rules relative to Extrinsic Policies Affecting Admissibility not specifically mentioned herein.

RULE 41

EVIDENCE TO TEST A VERDICT

The Committee approves the Commission's recommendation except that on line four the word "improperly" should follow the word "likely" instead of the phrase "to have".

RULE 42

TESTIMONY OF THE JUDGE

The Committee recommends amending the Commission's draft to 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."

COMMENT:

The Committee believes that the onus of asking a judge for a mistrial should not be placed on either party in a civil case in circumstances where

the judge has knowledge of facts material to the case. However, in criminal cases a judge may not declare a mistrial without risking a successful plea of once in jeopardy, unless the defendant, himself, makes the motion for the mistrial. Hence, we recommend the difference in treatment.

We have a question as to the propriety of a judge testifying in any case over which he presides, including criminal cases, but the problem of double jeopardy on the one hand and suppressing evidence on the other has led us to make the foregoing recommendation.

There is another possible dilemma suggested by some of our committee. If the judge does testify at a trial where a jury is not present, and the 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? We suggest that these problems be given consideration by the Commission's staff.

RULE 43

TESTIMONY BY A JUROR

The Committee recommends that Rule 43 be amended to read as follows:

(1) A member of a jury, sworn and impanelled in the trial of an action, may not testify in that trial as a witness except as hereinafter specified. If the judge learns that a juror has knowledge of facts that would be of importance--in civil cases he shall declare a mistrial and order the case tried before a different jury; in criminal cases, the judge shall inform the parties of the juror's purported knowledge concerning the facts of the case and thereafter the juror may be permitted to testify unless the defendant moves for a mistrial, in which case the motion shall be granted and the case shall be ordered tried before a different jury.

(2) 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:

Our reasons for the proposed change in Rule 43 are the same as stated with respect to Rule 42. If this recommendation is followed, consideration should be given to appropriate amendment to Section 1120 of the Penal Code.

RULE 45

DISCRETION OF JUDGE TO EXCLUDE ADMISSIBLE EVIDENCE

COMMENT:

The Committee is of the opinion that the proposed Rule is capable of being construed to grant the judge wider discretion than would be acceptable to the Bar. Since most of said Rule's purposes can be accomplished in pre-trial and under other existing statutes and since proposed Rule 45 is so controversial that it might endanger acceptance of the whole proposed revision of the law of evidence, we recommend the reconsideration or deletion of Rule 45.

RULE 47

CHARACTER TRAIT AS PROOF OF CONDUCT

The Committee recommends that subdivisions (1), (2), and (3) be amended to read as follows:

(1) 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 if otherwise admissible, it shall not be excluded by this Rule:

(a) When offered by a defendant in a criminal action or proceeding to prove his innocence and when it consists of opinion or reputation evidence concerning the character of the defendant or a trait of his character;

(b) When offered by the prosecution in rebuttal to evidence adduced under subparagraph (a);

(c) In a criminal action or proceeding when offered by a defendant to prove the character or a trait of character of the victim of the crime, in which case it may consist of opinion evidence, evidence of reputation or evidence of specific instances of conduct;

(d) When offered by the prosecution in rebuttal to the evidence adduced by the defendant under subparagraph (c).

Subparagraph 4 will become subparagraph 2; and

Subparagraph 5 will become subparagraph 3.

COMMENT:

The Committee believes the foregoing amendment simplifies the Rule and eliminates the double negatives.

RULE 49

HABIT OR CUSTOM TO PROVE SPECIFIC BEHAVIOR

Our Committee is of divided opinion concerning the Commission's proposed Rule 49. Some of the members of the Committee believe that the admissible habit or custom evidence should be limited to acts done in regular course of business; some believe that the Commission's proposal is acceptable in its present form, and some believe such evidence should be admissible only in the absence of independent eye witnesses.

RULE 52

OFFER TO COMPROMISE

The Committee approves of the Commission's recommendations except that we recommend the deletion of the italicized portion of subdivision (1).

COMMENT:

It is our opinion that admissions of facts, even though made during negotiations for compromise, should be admissible in evidence as is now the case under California law.

RULE 53

OFFER TO DISCOUNT CLAIM

The Committee approves the recommendation of the Commission except that we believe the italicized portion should be deleted.

COMMENT:

The reason for this change is the same as stated under Rule 52.