#34(L) 7/16/64

Second Supplement to Memorandum 64-48

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

This supplement presents additional comments and suggestions concerning Division 9 (Extrinsic Policies).

Comments reviewed are from:

Exhibit I - Office of District Attorney of Alameda County

Staff of Judicial Council

Letter of Mr. Powers (attached as Exhibit II to First Supplement to Memorandum 64-47)

Section 1102

The staff suggests that consideration be given to revising this section to read:

1102. In a criminal action, evidence of the defendant's character or a trait of his character in the form of opinion or evidence of his reputation is not made inadmissible by Section 1101 if such evidence is:
(a) Offered by the defendant to prove his innocence.
(b) Offered by the prosecution ~~to prove the defendant is 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).
(c) Offered by the prosecution after (1) the defendant has personally or by his counsel asked questions of the witnesses for the prosecution with a view to establish his own good character or (2) the nature or conduct of the defense is such as to involve imputations on the character of the prosecutor or the witnesses for the prosecution.

Proposed subdivision (c) is based on the English Criminal Evidence Act of 1898 and seems to be a reasonable provision.

Section 1103

The office of the District Attorney of Alameda County (Exhibit I attached) points out that the defendant can show specific instances of the conduct of the

victim of the crime, but that the prosecution cannot meet this evidence by showing evidence of the defendant's conduct. Because we believe that this point has merit, we suggest that Section 1103 be revised as indicated below:

> 1103. (a) In a criminal action, evidence of the character or a trait of character (in the form of opinion, evidence of reputation, or evidence of specific instances of conduct) of the victim of the crime for which the defendant is being prosecuted is not made inadmissible by Section 1101 if such evidence is:
>
> ~~(a)~~ (1) Offered by the defendant to prove conduct of the victim in conformity with such character or trait of character.
>
> ~~(b)~~ (2) Offered by the prosecution ~~to meet evidence previously offered by the defendant under subdivision (a)~~ in rebuttal to evidence adduced by the defendant under paragraph (1).
>
> (b) If evidence offered by the defendant is admitted under subdivision (a), evidence of the character or a trait of character of the defendant (in the form of opinion, evidence of reputation, or evidence of specific instances of conduct) is not made inadmissible by Section 1101 when offered by the prosecution to prove conduct of the defendant in conformity with such character or trait of character.

Note that it is up to the defendant whether he wishes to turn the trial into a test of the character of the defendant and character of the victim of the crime. Thus, the revised section does not appear to be unfair to the defendant; but unless the section is revised as indicated, it appears to be unfair to the prosecution.

New Section Proposed by Mr. Powers

On page 2 of Exhibit II to the First Supplement to Memorandum 64-47, Mr. Powers points out that in his opinion it is a violation of due process of law to comment on the failure of the defendant to take the witness stand. He bases his opinion upon an analysis of the recent case of Hogan v. Malloy, decided by the U. S. Supreme Court in June 1964. He further states that "it will be a policy of our office that deputies in the future will not comment on the failure of a defendant to testify.

In People v. Bostick, 61 A.C. 343, 356-357 (May 1964), the California Supreme Court stated:

Defendant's Right to Refuse to Testify :

> [7] Defendant Pitts, as his sole point on appeal, contends that he was deprived of his right not to be a witness against himself, in violation of his rights under the Fifth and Fourteenth Amendments to the United States Constitution. He predicates this contention on the fact that the court instructed the jury that although a defendant need not testify, if he fails to testify, "the jury may take that failure into consideration as tending to indicate the truth" of such evidence as he could reasonably be expected to deny or explain because of facts within his knowledge, and on the further ground that the prosecuting attorney placed emphasis on the fact none of the defendants testified. He also points out that if he had taken the witness stand, evidence of his prior convictions, which otherwise would have been inadmissible, could have been brought to the attention of the jury. He concedes that all of these things are permissible under the provisions of section 13 of article I of the California Constitution (the so-called "Comment Rule"), and that the United States Supreme Court, in Adamson v. State of California, 332 U.S. 46 [67 S.Ct. 1672, 91 L.Ed. 1903, 171 L.R. 1223], held that the Fifth Amendment to the United States Constitution was not applicable to the several states, and was not made so by operation of the Fourteenth Amendment. But he urges that the United States Supreme Court is about to change its mind and reverse Adamson, and contends that we should so decide. He urges that there is a trend in the United States Supreme Court to hold that more and more of the prohibitions expressed in the Bill of Rights are controlling against the states by reason of the due process clause of the Fourteenth Amendment. He points to the fact that the higher court recently granted certiorari in Malloy v. Hogan, --U.S.--[--S.Ct. --, --L.Ed.2d--] (32 U.S.L. Week 3011) in which one of the questions is whether or not the Fifth Amendment privilege against self-incrimination should be made applicable to the states. He points to the concern of certain legal commentators (specifically, Charles T. McCormick, in his work on "Evidence") over the "Comment Rule." But he can point to no decision of the United States Supreme Court which has, as yet, overruled Adamson and he makes no argument that has convinced us that this court should take upon itself the prerogative of assuming that the higher court will reverse itself. Without such a base, his contention is without merit.

The U.S. Supreme Court has now reversed itself. We have not had an opportunity to make a careful analysis of what effect the Malloy case has on the right to comment on the failure of the defendant to explain the evidence in the case against him.

Mr. Powers points out that one of the two main barriers which face a defendant when he is deciding if he is to take the stand and testify is apparently removed--his failure to take the stand can not be used against him.

The remaining barrier under existing law--but not under the proposed Evidence Code--is that he may be impeached by prior convictions. Mr. Powers suggests that this barrier be removed by permitting the People to introduce prior convictions relating to the same class of crimes as that charged against the defendant in the pending action when such previous convictions bear a reasonable relationship with reference to the time when the priors were committed. He suggests that if his suggestion were adopted the decision of the defendant to testify or not to testify would have no effect on the evidence that would be admissible against him. In other words, the defendant would not refuse to testify because he did not want evidence of prior convictions to be introduced against him. Such evidence would be admissible whether or not he testifies.

It seems that there are several alternatives available to the Commission:

1. Adopt the suggestion of Mr. Powers and revise Section 1102 to read:

> 1102. (a) In a criminal action, evidence of the defendant's character or a trait of his character in the form of opinion or evidence of his reputation is not made inadmissible by Section 1101 if such evidence is:
>
> ~~(a)~~ (1) Offered by the defendant to prove his innocence.
>
> ~~(b)~~ (2) 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 paragraph (1).
>
> (b) In a criminal action, evidence of the defendant's character or a trait of his character in the form of evidence of his conviction for a crime [felony] substantially similar to the crime for which he is being prosecuted is not made inadmissible by Section 1101 if such conviction occurred within a reasonable time before the time of the alleged crime for which he is being prosecuted and the evidence is offered to prove conduct of the defendant in conformity with such character or trait of character.

2. Make revisions of the rules dealing with use of a prior conviction to attack the credibility of a witness (These various revisions are discussed in Memorandum 64-45.).

With respect to revised Section 1102, set out above, the following comments may be of assistance to the Commission. We have checked various sources of criminal statistics on the State level. We are confident from the information we received that there are not any statistics available that would be useful to the Commission in determining the extent to which convicted persons repeat the same crime. And we are advised that no such statistics are available on the national level or in other states.

The danger in allowing the credibility of the accused in a criminal case to be impeached by prior conviction lies in the tendency of juries to use the prior conviction as evidence of the fact that the accused committed the specific criminal act for which he is then being tried, and this in spite of the trial court's instructions to the contrary. Commenting upon the effect of proof of former conviction of the accused, Justice Willis, in State v. Granillo, 140 Cal. App. 707, 718, 36 P.2d 206, 211, stated:

> It is a matter of common experience and knowledge that once the average juror learns that the defendant has previously been convicted of a crime of the same class as that for which he is being tried, that juror will consciously or unconsciously consider and allocate to a type or class the man on trial, as distinguished from the admeasuring of his credibility as the witness on the stand; and this despite all instructions by the court, for the court may not, except by virtue of presumption, control the ordinary process of the human mind and its natural gravitation toward the ordinary and usual inferences or implications which flow from knowledge of an established fact.

The suggestion of Mr. Powers, at least, does not ignore the fact that the jury will use the evidence of a prior conviction as stated by Justice Willis.

On the other hand, the Commission has sought to eliminate this effect by providing in Evidence Code Section 784 that the use of a previous conviction is admissible only if it involves dishonesty or lack of veracity and the accused first introduced character evidence supporting credibility; and, under Evidence

Code Section 785, evidence of his good character is inadmissible unless evidence of his bad character (other than prior convictions) has been admitted for the purpose of attacking his credibility. Thus, for all practical purposes, the Commission has eliminated the use of prior convictions to impeach a defendant in a criminal case and has made inadmissible evidence of prior convictions of the type described by Mr. Powers.

Note that the suggestion of Mr. Powers would admit evidence of convictions that had nothing to do with honesty or veracity.

Section 1150

The staff of the Judicial Council recommends approval of this section in principle. However, instead of referring to misconduct of such a character "as is likely to have improperly influenced the verdict," the staff suggests that "perhaps it might be better to say 'having a material bearing on the validity of the verdict' (See, URE Rule 44, on Testimony of Jurors, which was rejected by the Commission as unnecessary, but which utilizes this quoted language)."

Sections 1152-1154

The staff of the Judicial Council recommends that the rule of People v. Forster not be changed. The Judicial Council staff states:

> It is somewhat questionable whether, as stated by the L.R.C. in its comment on Rule 52, admission in evidence of statements of fact made in the course of settlement negotiations would "prevent the complete candor that is most conducive to settlement." All the parties to such negotiations will normally avoid making any admission, or statement of fact, that has not already been disclosed to the other side through discovery or pretrial procedures.

In addition, we continue to receive comments on the Tentative Recommendation Relating to Evidence in Eminent Domain Proceedings. Typical of the comments on

the Forster case is the following received from a trial attorney with considerable experience in trying cases:

> With reference to Section 1273, I am in accord that offers to compromise or settle litigation are and should be inadmissible evidence. However, I cannot agree to making inadmissible admissions which are made during settlement negotiations. The rule stated in People v. Forster, 58 Cal.2d 257, under the facts and circumstances of that case, seems to be fair. This case in my experience has not prevented complete candor in settlement proceedings between the parties in condemnation actions. Settlements have neither failed nor been hindered because of the rule in the Forster case.

This statement was made in a letter dated July 9, 1964, by Mr. John N. McLaurin of the law firm of Hill, Farrer & Burrill of Los Angeles.

In a June 27, 1964 letter from Stephen W. Hackett, commenting on the eminent domain recommendation, the following statement is made:

> I disagree with the proposition that People v. Forester, 58 Cal. 2, 257, should be reversed in the matter of admissibility of statements of fact made during negotiations. Certainly, negotiations leading to settlement should be encouraged, and no one can deny the desirability of the public policy favoring the same. However, statements of fact that are relevant and material to a case, and not constituting concessions for the sake of argument during negotiations should be admissible in a condemnation proceeding, whether they are the product of the appraiser's investigation or emanate from the condemnor as statements of intended purpose, construction design, or the like. I would exclude the clause ". . . including any conduct or statements made in negotiations thereof . . ."

Respectfully submitted,

John H. DeMoully
Executive Secretary

EXHIBIT I

LETTER FROM OFFICE OF DISTRICT ATTORNEY OF ALAMEDA COUNTY
(Letter from D. Lowell Jensen, Dpty . Dist. Atty)

Rule 47, significantly changes current law in reference to the methodology of establishing character when it is relevant. The proposed Rule adds to the current method of proof of reputation, the ability to prove character by opinion evidence and in some cases by proof a specific instance of conduct. As to proof by opinion, we are of the opinion that the arguments for such a rule are essentially sound and outweigh the objections. However, we do not feel that the method of proving character by specific instances of conduct is essentially sound or fair. Under current law specific instances of conduct (usually misconduct) may always be shown where they have probative value in reference to some issue in the case. It would seem highly likely that a rule allowing acts to show character would enlarge the admissibility and generally in such a fashion as to be prejudicial. Jurors will undoubtedly be more interested in specific acts shown to them than in reputation or opinions of character and will be prone to use such proof for other aspects of the case regardless of instructions. Under the Proposed Rule we find another boon to the defendant. The defendant may prove the victim's character by reputation, opinion, and specific instances of conduct, whereas the prosecution may prove defendant's character (when he introduces it) only by reputation and opinion. The very common case of asserted self-defense in all types of cases from homicides to batteries is thus distinctly weighted in favor of the defendant. He can prove that his victim had a whole page of convictions whereas the prosecution may prove none even though the convictions are more numerous or more serious. The jury listens to proof that the victim has committed a number of batteries and hears nothing about specific acts of violence by the defendant even though he states he is a peaceful and quiet man. They naturally decide that the defendant has not been convicted of any violent crimes before or the D.A. would have proved it just like the defense did, all this though the defendant has a whole series of assaults with weapons. This is another situation where the rule should be the same for all witnesses, otherwise a very real unfairness may result in the trial. The argument that proof of acts of misconduct carries serious danger of prejudice is a good one, we we should surely not have a rule which allows such potential prejudice in weighing the testimony of a victim or a decedent and carefully protects against it when weighing the testimony of a defendant.

Thank you for the opportunity of comment on these proposals.

Very truly yours,

J. F. COAKLEY, District Attorney

By D. Lowell Jensen
D. Lowell Jensen
Deputy District Attorney

DLJ:dc