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Memorandum 64-88

Subject: Study No. 34(L) - Uniform Rules of Evidence (Preprint Senate Bill No. 1--Division 9)

Attached are two copies of the revised Comments to Division 9. Mr. Edwards is responsible for checking these Comments. Please mark any revisions you believe should be made on one copy of the Comments.

Respectfully submitted,

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Executive Secretary

DIVISION 9. EVIDENCE AFFECTED OR EXCLUDED BY EXTRINSIC POLICIES

CHAPTER 1. EVIDENCE OF CHARACTER, HABIT, OR CUSTOM

§ 1100. Manner of proof of character

Comment. Section 1100 provides that reputation evidence, qualified opinion testimony, and evidence of specific instances of conduct may be used to prove a person's character or a trait of his character. The section applies whenever such character is material, whether it is sought to be proved as circumstantial evidence of conduct in conformity therewith, as a basis for impeaching or supporting a witness' testimony, or as an ultimate fact in issue. Its effect is substantially limited, however, by other sections restricting the use of character evidence for particular purposes. For example, Section 787 provides that evidence of specific instances of conduct--unless they have resulted in criminal convictions--are not admissible for the purpose of attacking a witness' credibility. Sections 788-790 contain other restrictions on the use of character evidence that is relevant to the issue of credibility. Sections 1101-1104 substantially limit the extent to which character evidence may be used as circumstantial evidence of conduct. Thus, the Evidence Code permits Section 1100 to be applied without restriction only when character or a trait of character is an ultimate fact in dispute in the action.

Section 1100 is technically unnecessary. Section 351 declares that all relevant evidence is admissible. Hence, all of the evidence declared to be admissible by Section 1100 would be admissible anyway under the general provisions of Section 351. Section 1100 is included in the Evidence Code, however, to forestall the argument that Section 351 has not removed all judicially created restrictions on the forms of evidence that may be used to prove character or a trait of character.

Section 1100 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. Wade, 118 Cal 672, 50 Pac. 841 (1897); People v. Samonset, 97 Cal. 448, 450, 32 Pac. 520, 521 (1893)), reputation evidence (Estate of Akers, 184 Cal. 514, 519-520, 194 Pac. 706, 708-709 (1920); People v. Samonset, supra), and evidence of specific acts (Guardianship of Wisdom, 146 Cal. App.2d 635, 304 P.2d 221 (1956); Currin v. Currin, 125 Cal. App.2d 644, 271 P.2d 61 (1954); Guardianship of Casad, 106 Cal. App.2d 134, 234 P.2d 647 (1951)). However, cases may also be found excluding some kinds of evidence where particular traits are involved. For example, in cases involving the unfitness or incompetency of an employee, evidence of specific acts is admissible to prove such unfitness or incompetency, while evidence of reputation is not. E.g., Gier v. Los Angeles Consol. Elec. Ry., 108 Cal. 129, 41 Pac. 22 (1895). Section 1100 eliminates the uncertainties in

existing law and assures the admissibility of any evidence that is relevant to prove what the character in issue actually is.

Section 1100 is based on Rule 46 of the Uniform Rules of Evidence.

§ 1101. Evidence of character to prove conduct

Comment. Section 1101 is concerned with evidence of a person's character--i.e., his propensity or disposition to engage in a certain type of conduct--that is offered as a basis for an inference that he behaved in conformity with that character on a particular occasion. Section 1101 is not concerned, however, with evidence of character offered on the issue of the credibility of a witness; the admissibility of such evidence is determined under Sections 786-790. Nor is Section 1101 concerned with evidence offered to prove a person's character when that character is itself in issue; the admissibility of evidence offered to prove character as an ultimate fact--and not as circumstantial evidence of some other fact--is determined under Section 1100.

Civil cases. Section 1101 excludes evidence of character to prove conduct in civil cases. Character evidence is of slight probative value and may be very prejudicial. It tends to distract the trier of fact from the main question of what actually happened on the particular occasion. It subtly permits the trier of fact to reward the good man and to punish the bad man because of their respective characters despite what the evidence in the case shows actually happened. Because of the danger of abuse of this kind of evidence, the confusion of issues, collateral inquiry, prejudice, and the like, Section 1101 makes character evidence inadmissible to prove conduct in civil cases.

Section 1101 states what is the general rule under existing law. CODE CIV. PROC. § 2053 (superseded by EVIDENCE CODE § 1101)("Evidence of the good character of a party is not admissible in a civil action . . . ."); Deevy v. Tassi, 21 Cal.2d 109, 130 P.2d 389 (1942)(assault; evidence of defendant's bad character for peace and quiet held inadmissible); Vance v. Richardson, 110 Cal. 414, 42 Pac. 909 (1895)(assault; evidence of defendant's good character for peace and quiet held inadmissible); Van Horn v. Van Horn, 5 Cal. App. 719, 91 Pac. 260 (1907)(divorce for adultery; evidence of defendant's and the nonparty-corespondent's good character held inadmissible). Under existing law, however, there may be an exception to this general rule: Existing law may permit evidence to be introduced of the unchaste character of a plaintiff to show the likelihood of her consent to an alleged rape. Valencia v. Milliken, 31 Cal. App. 533, 160 Pac. 1006 (1916)(civil action for rape; error, but nonprejudicial, to limit evidence of unchaste character of plaintiff to issue of damages). The Evidence Code has no such exception for civil cases. But see EVIDENCE CODE § 1103.

Criminal cases. Section 1101 states the general rule that evidence of character to prove conduct is inadmissible in a criminal case. Sections 1102 and 1103 state exceptions to this general principle. See the Comment to Section 1102.

Evidence of misconduct to show fact other than character. Subdivision (b) of Section 1101 is probably unnecessary, but it is desirable to make it clear that Section 1101 does not prohibit the admission of evidence of misconduct when it is offered as evidence of some other fact in issue (i.e., motive, common scheme or plan, preparation, intent, knowledge, identity or absence of mistake or accident) and not as circumstantial evidence of other misconduct (i.e., disposition to commit crime or engage in misconduct).

Subdivision (b) codifies existing California law. People v. Lisenba, 14 Cal.2d 403, 94 P.2d 569 (1939)(prior crime admissible to show general criminal plan and absence of accident); People v. David, 12 Cal.2d 639, 86 P.2d 811 (1939)(prior robbery admissible to show defendant's sanity and ability to devise and execute deliberate plan); People v. Morani, 196 Cal. 154, 236 Pac. 135 (1925)(prior abortion admissible to show that operation was not performed in ignorance of effect and, hence, to show necessary intent). See discussion in CALIFORNIA CRIMINAL LAW PRACTICE 491-498 (Cal. Cont. Ed. Bar 1964).

Evidence of character offered on issue of credibility. Section 1101 is not concerned with evidence of character offered on the issue of the credibility of a witness. The admissibility of such evidence relating to credibility is determined under Sections 786-790. Subdivision (c) of Section 1101 makes this clear.

§ 1102. Opinion and reputation evidence of character of criminal defendant to prove conduct

Comment. Section 1101 states the general rule that character evidence is not admissible to prove a disposition to commit a crime or to engage in misconduct. Sections 1102 and 1103 state exceptions to this general rule. These exceptions apply only in criminal cases.

Sections 1102 and 1103. Under Section 1102, the accused in a criminal case may introduce evidence of his good character to show his innocence of the alleged crime--provided that the trait of character to be shown is involved in the charge made against him. This codifies existing law. People v. Chrisman, 135 Cal. 282, 67 Pac. 136 (1901). Sections 1101 and 1102 make it clear that the prosecution may not, on its own initiative, use character evidence to prove that the defendant had the disposition to commit

the crime charged; but, if the defendant first introduces evidence of his good character to show the likelihood of innocence, the prosecution may meet his evidence by introducing evidence of the defendant's bad character to show the likelihood of guilt. This also codifies existing law. People v. Jones, 42 Cal.2d 219, 266 P.2d 38 (1954) (prosecution for sexual molestation of child; error to exclude expert psychiatric opinion that defendant was not a sexual psychopath); People v. Stewart, 28 Cal. 395 (1865)(murder prosecution; error to exclude evidence of defendant's good character for peace and quiet); People v. Hughes, 123 Cal. App.2d 767, 267 P.2d 376 (1954)(assault prosecution; evidence of defendant's violent nature held admissible after introduction of evidence showing his good character for peace and quiet). See CALIFORNIA CRIMINAL LAW PRACTICE 489-490 (Cal. Cont. Ed. Bar 1964).

Likewise, under Section 1103, the defendant may introduce evidence of the character of the victim of the crime where the conduct of the victim in conformity with his character would tend to exculpate the defendant; and, if the defendant introduces evidence of the bad character of the victim, the prosecution may introduce evidence of the victim's good character. This codifies existing law. People v. Hoffman, 195 Cal. 295, 311-312, 232 Pac. 974, 980 (1925)(murder prosecution; evidence of victim's good reputation for peace and quiet held inadmissible when defendant had not attacked reputation of victim); People v. Lamar, 148 Cal. 564, 83 Pac. 993 (1906)(murder prosecution; error to exclude evidence of victim's bad character for violence offered to prove victim was aggressor and defendant acted in self-defense); People v. Shea, 125 Cal. 151, 57 Pac. 885 (1899)(rape prosecution; error to

exclude evidence of the prosecutrix's unchaste character offered to prove the likelihood of consent); People v. Fitch, 28 Cal. App.2d 31, 81 P.2d 1019 (1938)(murder prosecution; evidence of victim's good character for peace and quiet held admissible after defendant introduced evidence of victim's violent nature). See also Comment, 25 CAL. L. REV. 459 (1937).

Thus, under Sections 1102 and 1103, the defendant in a criminal case is given the right to introduce character evidence that would be inadmissible in a civil case. Since his life or liberty is at stake in the criminal trial, the defendant should not be deprived of the right to introduce evidence even of such slight evidential value as character evidence. As the prosecution has the burden of proving guilt beyond a reasonable doubt, evidence of the character of the defendant or the victim--though weak--may be enough to raise a reasonable doubt in the mind of the trier of fact concerning the defendant's guilt; and, as other persons are not directly involved in the litigation, the danger of prejudice is minimal.

Kinds of character evidence admissible to prove conduct under Sections 1102 and 1103. There are three kinds of evidence that might be offered to prove character as circumstantial evidence of conduct: Evidence as to reputation; opinion evidence as to character; and evidence of specific acts indicating character. The admissibility of each of these kinds of evidence when character is sought to be proved as circumstantial evidence of conduct under Sections 1102 and 1103 is discussed below.

Reputation evidence is the ordinary means sanctioned by the cases for proving character as circumstantial evidence of conduct. WITKIN, CALIFORNIA EVIDENCE § 125 (1958). See People v. Fair, 43 Cal. 137 (1872). Both Sections 1102 and 1103 codify the existing law permitting character to be proved by reputation.

There is recent authority for the admission of opinion evidence to prove character as circumstantial evidence of conduct. People v. Jones, 42 Cal.2d 219, 266 P.2d 38 (1954)(error to exclude expert psychiatric opinion that the defendant was not a sexual psychopath and, hence, unlikely to have violated Penal Code Section 288). Apparently, however, opinion evidence is inadmissible generally. See People v. Spigno, 156 Cal. App.2d 279, 319 P.2d 458 (1957)(full discussion of the Jones case); CALIFORNIA CRIMINAL LAW PRACTICE 489-490 (Cal. Cont. Ed. Bar 1964).

Both Sections 1102 and 1103 permit character to be proved by opinion evidence. The opinions of those whose personal intimacy with a person gives them a firsthand 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. See 7 WIGMORE, EVIDENCE § 1986 (3d ed. 1940). The danger of collateral issues seems no greater than that inherent in reputation evidence. The existing rule excludes the most reliable form of character evidence and admits the least reliable; abandonment of this rule in favor of admitting opinion evidence under certain circumstances in criminal cases is, therefore, recommended.

Under existing law, the admissibility of evidence of specific acts to prove character as circumstantial evidence of conduct depends upon the nature of the conduct sought to be proved. Evidence of specific acts of the accused is excluded as a general rule in order to avoid the possibility of prejudice, undue confusion of the issues with collateral matters, unfair surprise, and the like. Thus, it is usually held that evidence of specific acts by the defendant is inadmissible to prove his guilt even though the defendant has opened the question by introducing

evidence of his good character. See discussion in People v. Gin Shue, 58 Cal. App.2d 625, 634, 137 P.2d 742, 747-748 (1943). Evidence of specific acts of violence to prove defendant's character was held admissible after introduction of evidence of defendant's good character in People v. Hughes, 123 Cal. App.2d 767, 267 P.2d 376 (1954); but the holding in that case may be explained on the basis of cases holding that evidence of specific acts of misconduct is admissible to rebut a defendant's direct testimony denying any prior misconduct of the kind alleged. People v. Westek, 31 Cal.2d 469, 190 P.2d 9 (1948). On the other hand, it is well settled that in a rape case, for example, 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. Shea, 125 Cal. 151, 57 Pac. 885 (1899); People v. Benson, 6 Cal. 221 (1856); People v. Battilana, 52 Cal. App.2d 685, 126 P.2d 923 (1942). However, 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. Yokum, 145 Cal. App.2d 245, 302 P.2d 406 (1956); People v. Soules, 41 Cal. App.2d 298, 106 P.2d 639 (1940). But see People v. Carmichael, 198 Cal. 534, 548, 246 Pac. 62, 68 (1926)(if defendant had knowledge of victim's statement evidencing violent nature, the statement was material and might have had an important bearing upon his plea of self-defense"); People v. Swigart, 80 Cal. App. 31, 251 Pac. 343 (1926). See also Comment, 25 CAL. L. REV. 459, 466-469 (1937).

Section 1102 codifies the general rule under existing California law which precludes evidence of specific acts of the defendant to show character as circumstantial evidence of his innocence or of his disposition to commit the crime with which he is charged. See, however, Section 1101(b)(use of evidence of specific acts of defendant to prove motive, plan, etc.) and the Comment thereto.

Section 1103 permits both the defendant and the prosecution to use evidence of specific acts of the victim of the crime to prove the victim's character as circumstantial evidence of his conduct. In this respect, the section appears to harmonize conflicting rules found in existing law, although the existing law is not entirely clear.

§ 1103. Evidence of character of victim of crime to prove conduct

Comment. See the Comment to Section 1102.

§ 1104. Character trait for care or skill

Comment. Section 1104 places a further limitation on the use of character evidence. Under Section 1104, 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, except to the extent permitted by Sections 1102 and 1103.

Section 1104 codifies well-settled California law. Fowle v. Pacific Improvement Co., 98 Cal. 342, 33 Pac. 207 (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, and the like, warrants a fixed exclusionary rule.

Section 1104 is substantially the same as Rule 48 of the Uniform Rules of Evidence.

§ 1105. Habit or custom to prove specific behavior

Comment. Section 1105, like Section 1100, declares that certain evidence is admissible. Hence, Section 1105 is technically unnecessary because Section 351 declares that all relevant evidence is admissible. Nonetheless, Section 1105 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 admissibility of habit evidence to prove conduct in conformity with the habit has long been established in California. Wallis v. Southern Pac. Co., 184 Cal. 662, 195 Pac. 408 (1921)(distinguishing cases holding character evidence as to care or skill inadmissible); Craven v. Central Pac. R.R., 72 Cal. 345, 13 Pac. 878 (1887). The admissibility of evidence of the custom of a business or occupation is also well established. Hughes v. Pacific Wharf & Storage Co., 188 Cal. 210, 205 Pac. 105 (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, 29 P.2d 409 (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. Southern Pac. Co., 184 Cal. 662, 665, 195 Pac. 408, 409 (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, Section 1105 rejects the "no-eyewitness" limitation.

CHAPTER 2. OTHER EVIDENCE AFFECTED OR EXCLUDED BY EXTRINSIC POLICIES

§ 1150. Evidence to test a verdict

Comment. Section 1150 codifies existing California law which permits evidence of misconduct by a trial juror to be received but forbids the reception of evidence as to the effect of such misconduct on the jurors' minds. People v. Stokes, 103 Cal. 193, 196-197, 37 Pac. 207, 208-209 (1894). Section 1150 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.

Section 1150 is somewhat similar to Rule 41 of the Uniform Rules of Evidence.

§ 1151. Subsequent remedial conduct

Comment. Section 1151 codifies well settled California law. Helling v. Schindler, 145 Cal. 303, 78 Pac. 710 (1904); Sappenfield v. Main Street etc. R.R., 91 Cal. 48, 27 Pac. 590 (1891). The admission of evidence of subsequent repairs to prove negligence would substantially discourage persons from making repairs after the occurrence of an accident. Section 1151 does not prevent the use of evidence of subsequent remedial conduct for the purpose of impeachment in appropriate cases. See Pierce v. J. C. Penney Co., 167 Cal. App.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.

Section 1151 is the same as Rule 51 of the Uniform Rules of Evidence.

§ 1152. Offer to compromise and the like

Comment. Section 1152, like the existing California law, declares that compromise offers are inadmissible to prove liability. CODE CIV. PROC. § 2078 (superseded by EVIDENCE CODE § 1152). Because of the particular wording of the existing statute, an offer of compromise probably may not be considered as an admission even though admitted without objection. See Tentative Recommendation and a Study Relating to the Uniform Rules of Evidence (Article VI. Extrinsic Policies Affecting Admissibility), 6 CAL. LAW REVISION COMM'N, REP., REC. & STUDIES 601, 675-676 (1964). See also Scott v. Wood, 81 Cal. 398, 405-406, 22 Pac. 871, 873 (1889). Under Section 1152, however, nothing prohibits the consideration of an offer of 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, "as well as any conduct or statements made in negotiation thereof," make it clear that statements made by parties during negotiations for the settlement of a claim may not be used as admissions in later litigation. This language will change the existing California law under which certain statements made during settlement negotiations may be used as admissions. People v. Forster, 58 Cal.2d 257, 23 Cal. Rptr. 582, 373 P.2d 630 (1962). The rule excluding offers is based upon the public policy

in favor of the settlement of disputes without litigation. The same public policy requires that the statements made during the settlement negotiations be inadmissible. The rule of the Forster case that permits such statements to be admitted places a premium on the form of the statement: If the statement is "assuming I was negligent for the purposes of these negotiations," the statement is inadmissible; but if the statement is "all right, I was negligent; let's talk about damages," the statement is admissible. The rule of the Forster case is repudiated because it prevents the complete candor between the parties that is most conducive to settlement.

Section 1152 is somewhat similar to Rule 52 of the Uniform Rules of Evidence.

§ 1153. Offer to plead guilty or withdrawn plea of guilty by criminal defendant

Comment. Section 1153 is consistent with existing California law. Under existing law, evidence of a rejected offer to plead guilty to the crime charged or to a lesser crime is inadmissible. PENAL CODE § 1192.4; People v. Wilson, 60 Cal.2d 139, 155-156, 32 Cal. Rptr. 44, 54-55, 383 P.2d 452, 462-463 (1963); People v. Hamilton, 60 Cal.2d 105, 113-114, 32 Cal. Rptr. 4, 8-9, 383 P.2d 412, 416-417 (1963). Likewise, a plea of guilty, later withdrawn, is inadmissible under existing law. People v. Quinn, 61 Cal.2d ___, 39 Cal. Rptr. 393, 393 P.2d 705 (1964).

The language of Section 1153 is based on a similar provision recommended by the New Jersey Supreme Court Committee on Evidence, REPORT OF THE NEW JERSEY SUPREME COURT COMMITTEE ON EVIDENCE 98-99 (March 1963).

§ 1154. Offer to discount a claim

Comment. Section 1154 stems from the same policy of encouraging settlement and compromise that is reflected in Section 1152. Except for

the language "as well as any conduct or statements made in negotiation thereof," Section 1154 reflects existing California law. Dennis v. Belt, 30 Cal. 247 (1866); Anderson v. Yousem, 177 Cal. App.2d 135, 1 Cal. Rptr. 889 (1960); Cramer v. Lee Wa Corp., 109 Cal. App.2d 691, 241 P.2d 550 (1952). The significance of the quoted language is indicated in the Comment to Section 1152.

Section 1154 is based on Rule 53 of the Uniform Rules of Evidence.

§ 1155. Liability insurance

Comment. Section 1155 codifies a rule that is well settled in California. Roche v. Llewellyn Iron Works Co., 140 Cal. 563, 74 Pac. 147 (1903). But see Causey v. Cornelius, 164 Cal. App.2d 269, 330 P.2d 468 (1958)(criticizing the present rule). The evidence might be inadmissible in the absence of Section 1155 because it is not relevant; but Section 1155 assures its inadmissibility.

Section 1155 is the same as Rule 54 of the Uniform Rules of Evidence.

§ 1156. Records of medical study of in-hospital staff committee

Comment. Section 1156 restates without substantive change and supersedes Code of Civil Procedure Section 1936.1 (enacted in 1963).