#34 7/17/64

Memorandum 64-46

Subject: Study No. 34(L) - Uniform Rules of Evidence (Evidence Code--Division 7--Opinion Testimony and Scientific Evidence)

Attached is text of Division 7 relating to opinion testimony and scientific evidence. Also attached are the Commission's Comments for this Division. We do not plan to discuss these comments at the July meeting. However, we would appreciate it if you would mark on the attached copy any revisions you believe should be made in the comments and turn it in to us at the meeting.

Comments from interested persons on the tentative recommendation in the printed pamphlet will be reviewed at a subsequent meeting. The pamphlet was not distributed in time to permit receipt of comments in time for the July meeting. One comment was received that raises a question of policy that is considered below in connection with Section 802. Other questions are raised by the staff in this memorandum.

Organization

Is the organization of this division satisfactory?

Section 800

This section appeared in the printed pamphlet as subdivision (1) of Rule 56. Section 800 is in precisely the same language as previously approved by the Commission except that subdivision (b) has been revised to insert the phrase "or to the determination of any disputed fact that is of consequence to the determination of the action" in place of the phrase "or to the determination of the fact in issue." The reason for this change is that the

Commission has consistently avoided using the term "in issue" throughout the Evidence Code because of the ambiguity in its meaning. Does the Commission approve this change?

Section 801

This section appears in the same form in which it was previously approved as subdivision (2) of Rule 56 except that the defined term "rule of law" has been substituted for "decisional or statutory law of this State" in subdivision (b).

Section 802

This section is in substantially the same form as previously approved by the Commission as Rule 57. Mr. Lawrence Baker, Chairman of the Northern Section of the State Bar Committee, raises a question of policy in regard to this section [Rule 57]:

> In reviewing the printed tentative recommendation and study on Article VII (Expert and Other Opinion Testimony), I find that in the original tentative recommendation of the Law Revision Commission, Rule 57, Section (1) provided in part that a witness testifying in terms of an opinion may state, on direct examination, the matter upon which the opinion is based. Section (2) of Rule 57 provided that the judge might require the witness to be first examined concerning the matter upon which the opinion is based. As so worded, the State Bar Committee approved Rule 57.
>
> I find now that Rule 57 provides in part that an opinion witness may state, on direct examination, the matter upon which his opinion is based. Section (2) now provides that before testifying in the form of an opinion the witness shall first be examined concerning the matter upon which the opinion is based, unless the judge, in his discretion, dispenses with this requirement. I have difficulty in avoiding the view that there is some inconsistency in these two subdivisions.

You will recall that there was considerable discussion and much difference of opinion in connection with the approval of Rule 57 in the form set out in the printed pamphlet. Under existing law, when a witness is testi-

fying in the form of an opinion that is based upon his personal observation of the facts, the witness is permitted to express his opinion without specifying the matter upon which it is based. Lemley v. Doak Gas Engine Co., 40 Cal. App. 146, 180 Pac. 671 (1919)(hearing denied). See Professor Chadbourn's discussion in the printed pamphlet at 937-939. On the other hand, if a witness has no personal knowledge of the matter upon which his opinion is based, his examination must be conducted in such a fashion that the matter upon which the opinion is based is stated to the trier of fact for the purpose of weighing the applicability of the opinion in light of the existence or nonexistence of the basis for the opinion as found by the trier of fact. See discussion in Lemley v. Doak Gas Engine Co., supra, and Professor Chadbourn's discussion in the printed pamphlet at 939-942.

The thrust of this section as presently drafted would be to substantially change the existing law in regard to the necessity of stating the matter upon which an opinion is based before a witness is permitted to express an opinion. Subdivision (a) of Section 802, standing alone, restates without substantive change existing Section 1872 of the Code of Civil Procedure, which is discretionary in form. On the other hand, subdivision (b) of Section 802 states a rule that is applicable under the present law only to examination of witnesses who express an opinion based upon matter about which they have no personal knowledge.

The staff believes that subdivisions (a) and (b) are inherently inconsistent as suggested by Mr. Baker and believes that the inconsistency should be remedied by striking all of subdivision (b) and retaining as Section 802 only the language that presently appears in subdivision (a).

Section 803

This section restates without substantive change the previously approved matter appearing as subdivision (3) of Rule 56.

Section 804

This section is the same as previously approved Rule 57.5. There is one question in regard to this section that the Commission should consider.

This section grants to a party the right to call as a witness and examine as if under cross-examination a person upon whose statement or opinion an expert witness at the hearing has relied. In many respects, this grants a right to a party that is similar to a party's right to examine an adverse party under existing Code of Civil Procedure Section 2055. However, Section 804 as presently drafted spells out none of the detail in regard to the examination and cross-examination of a person who is called as a witness under its terms. It is believed that the intended effect of subdivision (a) is as stated in the following alternative subdivision (a). The question to be decided is whether the detailed statement contained in this alternative subdivision (a) should be included in the statute. The staff makes no recommendation in this regard other than to present the alternative for your consideration.

> (a) If a witness testifying as an expert testifies that his opinion is based in whole or in part upon the opinion or statement of another person, such other person may be called as a witness and examined by any party to the action. If such other person is called as a witness by any party other than the party first calling the expert witness:
>
> (1) He may be examined as if under cross-examination at any time during the presentation of evidence by the party calling the witness concerning the subject matter of his opinion or statement.
>
> (2) The party calling such person is not bound by his testimony, and his testimony may be rebutted by the party calling him by other evidence.
>
> (3) He may be cross-examined by each party to the action in such order as the judge directs, but parties who are represented by the same attorney shall be deemed to be a single party.

One further question may be raised in connection with this section and without regard to whether the suggested alternative is accepted or rejected: If the Commission affirms its decision to permit wide open cross-examination, should a party who calls a person mentioned in Section 804 be limited to examination as if under cross-examination "concerning the subject matter of his opinion or statement" or should such examination be permitted as to "any fact or matter relevant to the action"? The alternative language suggested is taken from the new section defining the scope of cross-examination generally (Section 771). See Memorandum 64-45.

Section 805

This section is substantially the same as the matter previously approved as subdivision (4) of Rule 56.

Section 830

This section restates Code of Civil Procedure Section 1845.5 without substantive change.

Section 870

This section substantially restates existing subdivision 10 of Section 1870 of the Code of Civil Procedure. You will recall that the Commission determined to defer taking any action on subdivisions 9 and 10 of Section 1870 (except to recommend the deletion of the last clause in subdivision 9--see printed pamphlet at 921) until Professor Degnan had completed his research study. Professor Degnan discusses these subdivisions in Part VI of his study at pages 149-151. His conclusion (p. 151) is as follows:

> The remainder of subdivision (9) and all of subdivision (10) should also be repealed. This is not because they are not accurate enough as statements of admissibility, but because when coupled with the language which they qualify they are made to appear as exceptions to a strict rule against opinion. No such rule presently

> exists. Indeed, it began to disappear before the turn of the century. California cases early came to acceptance of an important qualification, that the opinion rule was of necessity subject to exception when the sense perceptions of the witness could not accurately portray to the jury the conclusions which those perceptions produced in the mind of the witness. [Citations] Both cases give lists of admissible lay opinion far broader in scope than those provided in subdivisions (9) and (10).

We have not included the remainder of subdivision 9 in this division because any reasonable statement of a person's qualification to give an opinion as to the identity of another necessarily would duplicate the precise conditions of admissibility stated in Section 800. However, we have restated all of subdivision 10 because it is not entirely clear that the persons presently mentioned in subdivision 10 would necessarily meet the qualifications expressed in Section 800. Thus, for example, the mere fact that the witness was a subscribing witness to a writing, the validity of which is in dispute, that was signed by the person whose mental sanity is in question would not necessarily insure his qualification to express an opinion concerning the sanity of the signer under the conditions specified in Section 800. It is almost inconceivable, however, that an intimate acquaintance could not satisfy the conditions of Section 800 (unless the Court were to narrowly construe Section 800 so as to preclude any expression of opinion concerning mental sanity).

The staff believes that the inclusion of Section 870 would continue without substantive change the existing law regarding the expression of opinion as to the mental sanity of a person, i.e., it would be an express limitation upon Section 800 so as to preclude nonexperts from expressing an opinion as to mental sanity unless they met the conditions specified in Section 870. See Commission Comment to Section 870. If the Commission

desires to continue the existing law without change, the staff suggests the approval of Section 870. On the other hand, if the Commission desires to permit other nonexperts to express an opinion concerning the mental sanity of a person, the staff suggests that there be added a subdivision (c) (or, alternatively, to substitute the suggested subdivision (c) for all of subdivision (a)) to read as follows:

(c) The witness meets the requirements specified in Section 800.

The staff recommends against the only remaining alternative of deleting Section 870.

Sections 890-896

These sections recodify the Uniform Act on Blood Tests to Determine Paternity that is presently contained in Code of Civil Procedure Sections 1980.1-1980.7. Minor word changes have been made to conform the language of these sections to definitions contained in the Evidence Code.

The staff has no other matters to raise in connection with this division.

Respectfully submitted,

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Associate Counsel

DIVISION 7. OPINION TESTIMONY AND SCIENTIFIC EVIDENCE

CHAPTER 1. EXPERT AND OTHER OPINION TESTIMONY

Article 1. Expert and Other Opinion Testimony Generally

800. Opinion testimony by lay witness.

800. If a witness is not testifying as an expert, his opinions are limited to such opinions as are:

(a) Rationally based on the perception of the witness; and

(b) Helpful to a clear understanding of his testimony.

801. Opinion testimony by expert.

801. If a witness is testifying as an expert, his opinions are limited to such opinions as are:

(a) Related to a subject that is sufficiently beyond common experience that the opinion of an expert would assist the trier of fact; and

(b) Based on matter (including his special knowledge, skill, experience, training, and education) perceived by or personally known to the witness or made known to him at or before the hearing, whether or not admissible, that is of a type commonly relied upon by experts in forming an opinion upon the subject to which his testimony relates, unless a rule of law precludes such matter from being used by an expert as a basis for his opinion.

802. Statement of basis of opinion.

802. A witness testifying in the form of an opinion may state on direct examination the reasons for his opinion and the matter upon which it is based, unless a rule of law precludes such reasons or matter from being used as a basis for his opinion.

803. Opinion based on improper matter.

803. The judge may, and upon objection shall, exclude testimony in the form of an opinion that is based in whole or in significant part on matter that is not a proper basis for such an opinion. In such case, the witness may then state his opinion after excluding from consideration the matter determined to be improper.

804. Opinion based on opinion or statement of another.

804. (a) If a witness testifying as an expert testifies that his opinion is based in whole or in part upon the opinion or statement of another person, such other person may be called and examined as if under cross-examination concerning the subject matter of his opinion or statement by any adverse party.

(b) Nothing in this section makes admissible an expert opinion that is inadmissible because it is based in whole or in part on the opinion or statement of another person.

(c) An expert opinion otherwise admissible is not inadmissible because it is based on the opinion or statement of a person who is unavailable for cross-examination pursuant to this section.

805. Opinion on ultimate issue.

805. Testimony in the form of an opinion that is otherwise admissible under this article is not objectionable because it embraces the ultimate issue to be decided by the trier of fact.

Article 2. Opinion Testimony in Eminent Domain Cases

830. Opinion testimony in eminent domain cases.

830. In an eminent domain proceeding, a witness otherwise qualified may testify with respect to the value of the real property, including any improvements situated thereon, or the value of any interest in the real property to be taken, and he may testify on direct examination as to his knowledge of the amount paid for comparable property or property interests. In rendering his opinion as to the highest and best use and market value of the property sought to be condemned, the witness shall be permitted to consider and give evidence as to the nature and value of the improvements and the character of the existing uses being made of the properties in the general vicinity of the property sought to be condemned.

[Note: The recommendation on opinion testimony in eminent domain and inverse condemnation proceedings would add a number of sections to this article in lieu of Section 830.]

Article 3. Opinion Testimony on Particular Matters

870. Opinion as to sanity.

870. A witness may state his opinion as to the sanity of a person when:

(a) The witness is an intimate acquaintance of the person whose sanity is in question;

(b) The witness was a subscribing witness to a writing, the validity of which is in dispute, signed by the person whose sanity is in question or

(c) The witness is qualified under Section 800 or 801 to testify in the form of an opinion.

CHAPTER 2. BLOOD TESTS TO DETERMINE PATERNITY

890. Short title.

890. This chapter may be cited as the Uniform Act on Blood Tests to Determine Paternity.

891. Interpretation.

891. This act shall be so interpreted and construed as to effectuate its general purpose to make uniform the law of those states which enact it.

892. Order for blood tests in civil actions involving paternity.

892. In a civil action in which paternity is a relevant fact, the court may upon its own initiative or upon suggestion made by or on behalf of

any person whose blood is involved, and shall upon motion of any party to the action made at a time so as not to delay the proceedings unduly, order the mother, child, and alleged father to submit to blood tests. If any party refuses to submit to such tests, the court may resolve the question of paternity against such party or enforce its order if the rights of others and the interests of justice so require.

893. Tests made by experts.

893. The tests shall be made by experts qualified as examiners of blood types who shall be appointed by the court. The experts shall be called by the court as witnesses to testify to their findings and shall be subject to cross-examination by the parties. Any party or person at whose suggestion the tests have been ordered may demand that other experts, qualified as examiners of blood types, perform independent tests under order of the court, the results of which may be offered in evidence. The number and qualifications of such experts shall be determined by the court.

894. Compensation of experts.

894. The compensation of each expert witness appointed by the court shall be fixed at a reasonable amount. It shall be paid as the court shall order. The court may order that it be paid by the parties in such proportions and at such times as it shall prescribe, or that the proportion of any party be paid by the county, and that, after payment by the parties or the county or both, all or part or none of it be taxed as costs in the action. The fee of an expert witness called by a party but not appointed by the court shall be paid by the party calling him but shall not be taxed as costs in the action.

895. Determination of paternity.

895. If the court finds that the conclusions of all the experts, as disclosed by the evidence based upon the tests, are that the alleged father is not the father of the child, the question of paternity shall be resolved accordingly. If the experts disagree in their findings or conclusions, the question shall be submitted upon all the evidence.

896. Limitation on application in criminal matters.

896. This chapter applies to criminal actions subject to the following limitations and provisions:

(a) An order for the tests shall be made only upon application of a party or on the court's initiative.

(b) The compensation of the experts shall be paid by the county under order of court.

(c) The court may direct a verdict of acquittal upon the conclusions of all the experts under the provisions of Section 895; otherwise, the case shall be submitted for determination upon all the evidence.

DIVISION 7. OPINION TESTIMONY AND SCIENTIFIC EVIDENCE

§ 800. Opinion testimony by lay witness.

Comment. This section states the conditions under which a witness may testify in the form of an opinion when the witness is not testifying as an expert. Except for minor language changes, this section is the same as subdivision (1) of Rule 56 of the Uniform Rules of Evidence. Subdivision (a) of Section 800 permits such a witness to give his opinion only if the opinion is based on his own perception. This restates a requirement of existing California law, Stuart v. Dotts, 89 Cal. App.2d 683, 201 P.2d 820 (1949). See discussion in Manney v. Housing Authority, 79 Cal. App.2d 453, 459-460, 180 P.2d 69, 73 (1947). Subdivision (b) permits the witness to give such opinions as "are helpful to a clear understanding of his testimony or to the determination of any disputed fact that is of consequence to the determination of the action." This, too, is a restatement of existing California law. See Tentative Recommendation and a Study Relating to the Uniform Rules of Evidence (Article VII. Expert and Other Opinion Testimony), 6 CAL. LAW REVISION COMM'N REP., REC. & STUDIES 931-935 (1964).

§ 801. Opinion Testimony by expert.

Comment. Section 801 deals with opinion testimony of a witness testifying as an expert; it sets the standard for admissibility of such testimony. It is based on subdivision (2) of Rule 56 of the Uniform Rules of Evidence.

Two matters of general application in this section and elsewhere in this article on expert and other opinion testimony should be noted. First, the word "opinion" is used consistently in this article to include all opinions.

inferences, conclusions, and other subjective statements made by a witness. Second, the word "matter" is uniformly used throughout this article to encompass facts, data, and such matters as a witness' knowledge, experience, and other intangibles upon which an opinion may be based. Thus, every conceivable basis for an opinion is included within this term. Use of these inclusive terms avoids unnecessary and lengthy repetition.

Subdivision (a) of Section 801 relates to when an expert may give his opinion upon a subject that is within the scope of his expertise. It provides a rule substantially the same as the existing California law, namely, that expert opinion is limited to those subjects that are beyond the competence of persons of common experience, training, and education. See People v. Cole, 47 Cal.2d 99, 103, 301 P.2d 854, 856 (1956). For examples of the variety of subjects upon which expert testimony is admitted, see WITKIN, CALIFORNIA EVIDENCE §§ 190-195 (1958).

Subdivision (b) states a general rule in regard to the permissible bases upon which the opinion of an expert may be founded. The California courts have made it clear that the nature of the matter upon which an expert may base his opinion varies from case to case. In some fields of expert knowledge, an expert may rely on statements made by and information received from other persons; in some other fields of expert knowledge, an expert may not do so. For example, a physician may rely on statements made to him by the patient concerning the history of his condition. People v. Wilson, 25 Cal.2d 341, 153 P.2d 720 (1944). A physician may also rely on reports and opinions of other physicians. Kelley v. Bailey, 189 Cal. App.2d 728, 11 Cal. Rptr. 448 (1961); Hope v. Arrowhead & Puritas Waters, Inc., 174 Cal. App.2d 222, 344 P.2d 428

(1959). An expert on the valuation of real or personal property, too, may rely on inquiries made of others, commercial reports, market quotations, and relevant sales known to the witness. Betts v. Southern Cal. Fruit Exchange, 144 Cal. 402, 77 Pac. 993 (1904); Hammond Lumber Co. v. County of Los Angeles, 104 Cal. App. 235, 285 Pac. 896 (1930); Glantz v. Freedman, 100 Cal. App. 611, 280 Pac. 704 (1929). On the other hand, an expert on automobile accidents may not rely on the statements of others as a partial basis for an opinion as to the point of impact, whether or not the statements would be admissible evidence. Hodges v. Severns, 201 Cal. App.2d 99, 20 Cal. Rptr. 129 (1962); Ribble v. Cook, 111 Cal. App.2d 903,. 245 P.2d 593 (1952). See also Behr v. County of Santa Cruz, 172 Cal. App.2d 697, 342 P.2d 987 (1959)(report of fire ranger as to cause of fire held inadmissible because it was based primarily upon statements made to him by other persons).

Likewise, under existing law, irrelevant or speculative matters are not a proper basis for an expert's opinion. See Roscoe Moss Co. v. Jenkins, 55 Cal. App.2d 369, 130 P.2d 477 (1942)(expert may not base opinion upon a comparison if the matters compared are not reasonable comparable); People v. Luis, 158 Cal. 185, 110 Pac. 580 (1910)(physician may not base opinion as to person's feeble-mindedness merely upon the person's exterior appearance); People v. Dunn, 46 Cal.2d 639, 297 P.2d 964 (1956)(speculative or conjectural data); Long v. Cal.-Western States Life Ins. Co., 43 Cal.2d 871, 279 P.2d 43 (1955)(speculative or conjectural data); Eisenmayer v. Leonardt, 148 Cal. 596, 84 Pac. 43 (1906) (speculative or conjectural data). Compare People v. Wochnick, 98 Cal. App.2d 124, 219 P.2d 70 (1950)(expert may not give opinion as to the truth or falsity of certain statements on basis of lie detector test), with People v. Jones,

42 Cal.2d 219, 266 P.2d 38 (1954)(psychiatrist may consider an examination given under the influence of sodium pentathol--the so-called "truth serum"--in forming an opinion as to the mental state of the person examined).

The variation in the permissible bases of expert opinion is unavoidable in light of the wide variety of subjects upon which such opinion can be offered. In regard to some matters of expert opinion, an expert must, if he is going to give an opinion that will be helpful to the jury, rely on reports, statements, and other information that might not be admissible evidence. A physician in many instances cannot make a diagnosis without relying on the case history recited by the patient or on reports from various technicians or other physicians. Similarly, an appraiser must rely on reports of sales and other market data if he is to give an opinion that will be of value to the jury. In the usual case where a physician's or an appraiser's opinion is required, the adverse party also will have its expert who will be able to check the data relied upon by the adverse expert. On the other hand, a police officer can analyze skid marks, debris, and the condition of vehicles that have been involved in an accident without relying on the statements of bystanders; and it seems likely that the jury would be as able to evaluate the statements of others in the light of the physical facts, as interpreted by the officer, as would the officer himself. It is apparent that the extent to which an expert may base his opinion upon the statements of others is far from clear. It is at least clear, however, that it is permitted in a number of instances. See Young v. Bates Valve Bag Corp., 52 Cal. App.2d 86, 96-97, 125 P.2d 840, 846 (1942), and cases therein cited. Cf. People v. Alexander, 212 Cal. App.2d 84, 27 Cal. Rptr. 720 (1963).

§ 801

It is not practical to formulate a detailed statutory rule that lists all of the matters upon which an expert may properly base his opinion, for it would be necessary to prescribe specific rules applicable to each field of expertise. This is clearly impossible; the subjects upon which expert opinion may be received are too numerous to make statutory prescription of applicable rules a feasible venture. It is possible, however, to formulate a general rule that specifies the minimum requisites that must be met in every case, leaving to the courts the task of determining particular detail within this general framework. This standard is expressed in subdivision (b) of Section 801, which states a general rule that is applicable whenever expert opinion is offered on a given subject.

Under subdivision (b), the matter upon which an expert's opinion is based must meet each of three separate but related tests. First, the matter must be perceived by or personally known to the witness or must be made known to him at or before the hearing at which the opinion is expressed. This requirement assures the expert's acquaintance with the facts of a particular case either by his personal perception or observation or by means of assuming facts not personally known to the witness. Second, and without regard to the means by which an expert familiarizes himself with the matter upon which his opinion is based, the matter relied upon by the expert in forming his opinion must be of a type commonly relied upon by experts in forming an opinion upon the subject to which the expert's testimony relates. In large measure, this assures the reliability and trustworthiness of the information used by experts in forming their opinions. Third, an expert may not base his opinion upon any matter that is declared by the constitutional, statutory, or decisional law

of this State to be an improper basis for an opinion. For example, the statements of bystanders as to the cause of a fire may be considered reliable for some purposes by an investigator of the fire, particularly when coupled with physical evidence found at the scene, but the courts have determined this to be an improper basis for an opinion since the trier of fact is as capable as the expert of evaluating such statements in light of the physical facts as interpreted by the expert. Behr v. County of Santa Cruz, 172 Cal. App.2d 697, 342 P.2d 987 (1959).

The rule stated in subdivision (b) thus permits an expert to base his opinion upon reliable matter, whether or not admissible, of a type normally used by experts in forming an opinion upon the subject to which his expert testimony relates. In addition, it provides assurance that the courts and the Legislature are free to continue to develop specific rules regarding the proper bases for particular kinds of expert opinion in specific fields. See, e.g., Section 830 (recodifying Code of Civil Procedure Section 1845.5, which deals with valuation experts in eminent domain cases). Subdivision (b) thus provides a sensible standard of admissibility while, at the same time, it continues in effect the discretionary power of the courts to regulate abuses, thereby retaining in large measure the existing California law.

§ 802. Statement of basis of opinion.

Comment. Subdivision (a) supersedes and restates without substantive change a portion of Code of Civil Procedure Section 1872.

Subdivision (b) requires a witness to give the basis for his opinion before stating it, but also permits the judge in his discretion to dispense with this requirement. Under existing California law, a witness testifying from his

personal observation of the facts upon which his opinion is based need not be examined concerning such facts before testifying in the form of opinion; his personal observation is a sufficient basis upon which to found his opinion. Lumbermen's Mut. Cas. Co. v. Industrial Acc. Comm'n, 29 Cal.2d 492, 175 P.2d 823 (1946); Hart v. Olson, 68 Cal. App.2d 657, 157 P.2d 385 (1945); Lemley v. Doak Gas Engine Co., 40 Cal. App. 146, 180 Pac. 671 (1919)(hearing denied). On the other hand, where a witness testifies in the form of opinion not based upon his personal observation, the assumed facts upon which his opinion is based must be stated. Eisenmayer v. Leonardt, 148 Cal. 596, 84 Pac. 43 (1906); Lemley v. Doak Gas Engine Co., supra. No California case has been found in which a witness was permitted to state his opinion based on facts not observed by him without also specifying, either generally or in detail, the assumed facts upon which his opinion is based, i.e., stating such facts hypothetically for the purpose of allowing the trier of fact to weigh the applicability of the opinion in light of the existence or nonexistence of such facts. See Lemley v. Doak Gas Engine Co., supra. Under subdivision (b), the requirement that the facts upon which an opinion is based must be stated before giving an opinion is tempered with the discretionary authority of the judge to dispense with this requirement in appropriate cases.

§ 803. Opinion based on improper matter.

Comment. Under Section 803, as under existing law, an opinion may be held inadmissible or may be stricken if it is based wholly or in substantial part upon improper considerations. Whether or not the opinion should be held inadmissible or stricken will depend in a particular case on the extent to which the improper considerations have influenced the opinion. "The question is addressed to the discretion of the trial court." People v. Lipari, 213 Cal. App.2d 485, 493, 28 Cal. Rptr. 808, 813-814 (1963). See discussion in City of Gilroy v.

Filice, 221 Cal. App.2d ___, ___, 34 Cal. Rptr. 368, 375-376 (1963), and cases cited therein. If a witness' opinion is stricken because of reliance upon improper considerations, the second sentence of Section 803 assures the witness the opportunity to express his opinion after excluding from his consideration the matter determined to be improper.

§ 804. Opinion based on opinion or statement of another.

Comment. Section 804 is designed to provide protection to a party who is confronted with an expert witness who is relying on the opinion or statement of some other person. See the Comment to Section 801 for examples of opinions that may be based on the statements and opinions of others. In such a situation, a party may find that cross-examination of the witness will not reveal the weakness in his opinion, for the crucial parts are based on the observations or opinions of someone else. Under existing law, if that other person is called as a witness, he is the witness of the party calling him and, therefore, that party may not subject him to cross-examination.

The existing law operates unfairly, for it unnecessarily restricts meaningful cross-examination. Hence, Section 804 permits a party to extend his cross-examination into the underlying bases of the opinion testimony introduced against him by calling the authors of opinions and statements relied on by adverse witnesses and cross-examining them concerning the subject matter of their opinions and statements.

§ 805. Opinion on ultimate issue.

Comment. Section 805 provides that opinion evidence is not inadmissible simply because it relates to an ultimate issue. This subdivision is declarative of existing law even though several older cases indicated that an opinion could not be received on an ultimate issue. People v. Wilson, 25 Cal.2d 341, 349-350,

153 P.2d 720, 725 (1944); Wells Truckways, Ltd. v. Cebrian, 122 Cal. App.2d 666, 265 P.2d 557 (1954); People v. King, 104 Cal. App.2d 298, 231 P.2d 156 (1951).

§ 830. Opinion testimony in eminent domain cases.

Comment. This section recodifies and supersedes Code of Civil Procedure Section 1845.5.

§ 870. Opinion as to sanity.

Comment. Section 870 provides a special rule regarding the admissibility of lay opinion testimony as to the mental sanity of a person. It is based on and supersedes subdivision 10 of Code of Civil Procedure Section 1870.

Under subdivision (a) of Section 870, as under the existing California law, intimate acquaintances are permitted to testify in the form of an opinion regarding the mental sanity of a person whose sanity is in question. See Estate of Rich, 79 Cal. App.2d 22, 179 P.2d 373 (1947). Because intimate acquaintances have the opportunity to observe and to become familiar with the person whose sanity is in question, they are uniquely qualified to express an opinion concerning that person's sanity. A person who is intimately acquainted with another probably would satisfy the requirements of Section 800 sufficiently to be able to express an opinion concerning that person's sanity even without Section 870. However, this is not entirely clear. Thus, the inclusion of Section 870 not only makes it quite clear that an intimate acquaintance is qualified to give an opinion concerning a person's sanity, but it also precludes testimony in the form of an opinion on this issue by nonexperts who are not intimate acquaintances. This limitation on Section 800 in regard to the

narrow issue of mental sanity preserves intact a distinction drawn in the existing California law between the types of persons who are competent to testify in the form of an opinion concerning a person's sanity. In thus restating the existing law, Section 870 does not disturb the present rule that permits persons who are only casual acquaintances to testify as to a person's rational or irrational appearance or conduct--testimony relating the witness' observations without resorting to the expression of an opinion per se. See Pfingst v. Goetting, 96 Cal. App.2d 293, 215 P.2d 93 (1950).

Under subdivision (b), as under existing law, a subscribing witness is permitted to testify in the form of an opinion concerning the mental sanity of the signer of a writing the validity of which is in dispute. Unlike an intimate acquaintance, a subscribing witness might not be able to satisfy the literal conditions of Section 800 sufficiently to testify in the form of an opinion concerning the signer's mental sanity. However, it is the duty of a subscribing witness to have his "attention drawn to and [to note] the mental capacity" of the signer. Estate of McDonough, 200 Cal. 57, 251 Pac. 916 (1926) (validity of will).

§ 890. Short title.

Comment. Section 890 is identical to and supersedes Code of Civil Procedure Section 1980.1.

§ 891. Interpretation.

Comment. Section 891 is identical to and supersedes Code of Civil Procedure Section 1980.2.

§ 892. Order for blood tests in civil actions involving paternity.

Comment. Section 892 is based on and supersedes Code of Civil Procedure Section 1980.3, which is restated in this section without substantive change.

§ 893. Tests made by experts.

Comment. Section 893 is identical to and supersedes Code of Civil Procedure Section 1980.4.

§ 894. Compensation of experts.

Comment. Section 894 is identical to and supersedes Code of Civil Procedure Section 1980.5.

§ 895. Determination of paternity.

Comment. Section 895 is identical to and supersedes Code of Civil Procedure Section 1980.6.

§ 896. Limitation on application in criminal actions.

Comment. Section 896 is based on and supersedes Code of Civil Procedure Section 1980.7, which is restated in this section without substantive change.