

#34(L)

9/4/64

Memorandum 64-63

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

The division on opinion testimony was revised prior to printing to reflect the action taken by the Commission at the August meeting.

We have received no additional comments on this division, but have two matters to raise for Commission consideration.

1. At the August meeting, the Commission approved a revision to subdivision (a) of Section 801. If the Commission approves an alternative draft for Section 721 along the lines suggested in the memorandum on the witnesses division (Memorandum 64-62, p.), subdivision (a) of Section 801 may be unnecessary.

2. Section 804 permits an adverse party to examine as if under cross-examination a person upon whose opinion or statement an expert witness has relied. A similar provision in the hearsay evidence division permits such examination of certain hearsay declarants. See Section 1203. Both sections are based upon the premise that a party calling such witnesses should not be limited in his examination to the usual rules governing direct examination. The rule stated in Section 1203, however, contains a limitation in subdivision (b) that denies the right to examine as if under cross-examination any declarant who is (1) a party, (2) an agent, partner or employee of a party, (3) a person for whose benefit the action is prosecuted or defended, or (4) a witness who has testified in the action. A modification of the precise language in subdivision (b) of Section 1203 is suggested in the memorandum on the hearsay evidence division (Memorandum 64-66, p.) to solve a different problem. The policy question raised in

connection with Section 801, however, is whether a similar limitation ought to be stated in Section 801. The situations would appear to be identical and ought to be treated in a consistent manner. Under the present draft of Section 801, there is nothing that prohibits a party from calling and examining his own expert as if under cross-examination if another expert, either his own or his opponent's, has relied upon his opinion or statement. Hence, we suggest that a new subdivision be added to Section 801 to read substantially as follows:

Unless the party seeking to cross-examine the person upon whose opinion or statement the expert witness has relied has the right apart from this section to cross-examine such person in the action, this section is not applicable if the person upon whose opinion or statement the expert witness has relied is (1) a party, (2) an agent or employee of a party, (3) a person united in interest with a party or for whose immediate benefit the action is prosecuted or defended, or (4) a witness who has testified in the action.

Respectfully submitted,

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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.