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Memorandum 64-84

Subject: Study No. 34(L) - Uniform Rules of Evidence (Preprint
Senate Bill No. 1--Division 7)

Attached are two copies of the revised Comments to
Division 7. Mr. Selvin 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 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

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." 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 901, 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 states to when an expert may give his opinion upon a subject that is within the scope of his expertise.

It codifies 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. 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 reasonably 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); 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).

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. Section 802 supersedes and restates without substantive change a portion of Code of Civil Procedure Section 1872.

Although Section 802 (like its predecessor, Code of Civil Procedure Section 1872) provides that a witness may state the basis for his opinion on direct examination, it is clear that, in some cases, a witness is required to do so in order to show that his opinion is applicable to the action before the court. 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 in order to show that the witness has some basis for forming an intelligent opinion and to permit the trier of fact to determine the applicability of the opinion in light of the existence or nonexistence of such facts. Eisenmayer v. Leonardt, 148 Cal. 596, 84 Pac. 43 (1906); Lemley v. Doak Gas Engine Co., supra. The recodification of the provisions of Code of Civil Procedure Section 1872 in Evidence Code Section 802 will not affect the rules set forth in these cases, for they are based essentially on the requirement that all evidence must be shown to be applicable--or relevant--to the action. EVIDENCE CODE §§ 350, 403.

§ 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 ____,
 ____, 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. Although several older cases indicated that an opinion could not be received on an ultimate issue, more recent cases have repudiated this rule; hence, this subdivision is declarative of existing law. 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).

Article 2. Opinion Testimony in Eminent Domain Cases

§ 830. Opinion testimony in eminent domain cases

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

Article 3. Opinion Testimony on Particular Matters

§ 870. Opinion as to sanity

Comment. Section 870 provides a special rule regarding the admissibility of opinion testimony concerning a person's sanity. 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 of a person whose sanity is in question are permitted to testify in the form of an opinion regarding his sanity. 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 a person's normal behavior, 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. The inclusion of subdivision (a) in Section 870 thus assures that an intimate acquaintance is qualified to give an opinion concerning a person's sanity.

Under subdivision (b), as under existing law, a subscribing witness is permitted to testify in the form of an opinion concerning the 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 conditions of Section 800 sufficiently to testify in the form of an opinion concerning the signer's 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). Hence, an explicit statement of the qualification of a subscribing witness to testify in the form of an opinion as to the signer's sanity is included in subdivision (b).

Subdivision (c) of Section 870 provides that a witness who meets the requirements of Section 800 or 801 is qualified to testify in the form of an opinion as to the sanity of a person. This assures that a witness who is otherwise qualified to testify in the form of an opinion--either as a lay witness under Section 800 or as an expert witness under Section 801--is not precluded from expressing an opinion as to the sanity of a person merely because he is not an intimate acquaintance or a subscribing witness. Of course, the fact that a witness fails to meet any of the conditions specified in Section 870 does not disturb the present rule that permits a casual acquaintance to testify to a person's rational or irrational appearance or conduct--to relate the witness' observations without resorting to the expression of an opinion on sanity per se. See Pfingst v. Goetting, 96 Cal. App.2d 293, 215 P.2d 93 (1950).

CHAPTER 2. BLOOD TESTS TO DETERMINE PATERNITY

§ 890. Short title

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

§ 891. Interpretation

Comment. Section 891 is identical with 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 with and supersedes Code of Civil Procedure Section 1980.4.

§ 894. Compensation of experts

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

§ 895. Determination of paternity

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

§ 896. Limitation on application in criminal matters

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

§ 890 § 894
§ 891 § 895
§ 892 § 896
§ 893