#34 12/16/63

Memorandum 63-56

Subject: Study No. 34(L) - Uniform Rules of Evidence (Article VII. Expert and Other Opinion Testimony)

You will receive with this memorandum a tentative recommendation relating to Expert and Other Opinion Testimony (Rules 56-61). Place the tentative recommendation in your loose-leaf binder entitled Uniform Rules of Evidence as Revised to Date. File this memorandum in your acco binder relating to Expert and Other Opinion Testimony.

Inference. The Commission instructed the staff at the November meeting to either delete the references to "inference" or to add the word in the places where it does not appear so that the terminology of the rules would be uniform. We decided to delete the word as unnecessary.

Rule 56. The Commission instructed the staff to write a comment reflecting the Commission's intent with regard to subdivision (2), although some Commissioners believed its language confined the expert to his own knowledge and other Commissioners believed it did not. The comment indicates that sometimes it does and sometimes it doesn't.

We have uncovered another problem in connection with Rule 56, however. We discovered the problem while reading the cases relating to proposed Rule 57.7. The problem is this: Unlike subdivision (1), subdivision (2) gives no clue as to the subjects in regard to which expert opinion is admissible. Subdivision (1) says that lay opinion is admissible when it is "helpful" to an understanding of the witness' testimony or to the determination of the matter in issue. Under subdivision (2), expert opinion may be admissible on any matter so long as the expert meets the qualifications of clauses (a) and (b). Under existing law, however,

expert opinion is not admissible on all matters. Generally, the cases seem to indicate that the basis for receiving expert opinion is the same as that for receiving lay opinion--it would be helpful to a clear understanding of the expert's testimony or to the determination of the fact in issue.

See, for example, People v. Cole, 47 Cal.2d 99, 103 (1956):

> Although courts have not always used the same language, the decisive consideration in determining the admissibility of expert opinion evidence is whether the subject of inquiry is one of such common knowledge that men of ordinary education could reach a conclusion as intelligently as the witness or whether, on the other hand, the matter is sufficiently beyond common experience that the opinion of an expert would assist the trier of fact.

And Wells Truckways, Ltd. v. Cebrian, 122 Cal. App. 2d 666, 677 (1954):

> Assuming, therefore, the qualifications of the witness to relate the opinions expressed, the only question remaining is whether the witness was possessed of sufficient facts and information to express those opinions, whether the evidence was of such a character as to indicate the necessity of and require an interpretation for the benefit of the jury, whether it was proper and necessary to an enlightened consideration and a correct disposition of the ultimate issue, and whether or not the facts sought to be shown by the expert were matters of such common knowledge as to preclude the admission of expert testimony.

Wigmore agrees with the above statements of the rule. See generally, 7 Wigmore, Evidence 1-26 (3d ed. 1940).

> The sum of the history is, then, that . . . wherever inferences and conclusions can be drawn by the jury as well as by the witness, the witness is superfluous; and that thus an expert's opinion is received because and whenever his skill is greater than the jury's, while a lay opinion is received because and whenever his facts cannot be so told as to make the jury as able as he to draw the inference. [7 Wigmore, Evidence 10 (3d ed. 1940).]

Wigmore, however, would abandon the opinion rule as an exclusionary rule of evidence and would substitute therefor a rule permitting a witness to express his opinion even though the jury is as capable of drawing the inference, subject to the trial judge's discretion to exclude opinion testimony because "merely cumulative or of undue personal weight." 7 Wigmore, Evidence § 1929, p.28

In the annotations to C.C.P. § 1870 may be found cases applying the rule and holding expert opinion inadmissible on certain subjects. Sometimes other reasons are given, such as "usurping the function of the jury", "opinion on an ultimate issue", etc. But, as Wigmore points out, such reasons amount to no more than that the expert is no more qualified to draw the conclusion than is the jury. A recent example is Martindale v. City of Mountain View, 208 Cal. App.2d 109 (1962), in which an objection was sustained to a question asked of a safety engineer whether a particular railroad crossing was hazardous to motorists attempting to cross the tracks.

Although I have found no case attempting to explain why some experts are permitted to rely on statements of others and some experts are not, I think that the principle under discussion may afford an explanation. It may be that the courts believe that a jury is fully as competent to weigh the statements of witnesses to an auto accident, for example, as is the expert police officer who is called to testify as to the point of impact. He is in no better position to weigh the physical facts in the light of the other statements than is the jury itself; but he is better able to form an opinion as to what the physical facts themselves indicate. Thus, he may give opinion evidence to the jury only on the basis of physical facts observed--not on the basis of those facts plus the statements of witnesses. Conversely, the courts may believe that a physician is in a better position to weigh the physical facts observed in the light of the case history recited than the jury is; hence, he is permitted to give an opinion based both on his observations and on the statement of case history. Or, the courts may believe that an expert appraiser is better able to evaluate the statements made to him than the jury would be.

If this is the reason that some experts may rely on statements made by others while some experts are confined to their own observations, and if the Commission wishes to retain existing law, perhaps subdivision (2) should be modified to include the requirement that expert opinions be limited to those that are helpful to a clear understanding of the witness' testimony or to the determination of the fact in issue.

In any event, subdivision (2) at present is not clear. It does not include the requirement of existing law; but neither does it clearly reject the principle of existing law. If a change is to be made, it should be done clearly so that there is no mistake as to the meaning. The comment at the present time indicates that the existing law is not being changed.

Rule 57.7. This rule was considered at the November meeting but neither approved nor disapproved. Action was deferred pending a report from the staff indicating the extent to which courts limit the matters upon which an expert can rely as a basis for his testimony. The Commission wished to know whether courts exclude expert testimony on the ground that it is based on incompetent matters only if it is based on evidentially incompetent matters.

The courts apparently apply different rules to different kinds of expert testimony. So far as expert opinion as to the point of impact of a collison is concerned, the expert witness must base his opinion upon his own observations only. He cannot rely on the statements of others. Ribble v. Cook, 111 Cal.App.2d 903. And this rule is not based entirely upon the fact that the statements relied on are hearsay. In Hodges v. Severns, 201 Cal. App.2d 99 (1962), an expert was permitted to base an opinion upon his observations and statements of witnesses. The respondent

sought to justify the ruling on appeal on the ground that the witnesses' statements were admissible, but the court reversed because the admissibility of the statements "would not affect the admissibility of the officer's opinion as to the point of impact, since he cannot base an opinion upon statements of others, hearsay or not." 201 Cal. App.2d at 108.

Expert opinion may be stricken, too, because it is based upon factors that are too prejudicial or against public policy. For example, in People v. Wochnick, 98 Cal. App.2d 124 (1950), it was held that expert testimony based upon a lie detector test is inadmissible.

If the expert testimony is based on a comparison between certain objects, apparently there must be some rational connection between the objects before the expert testimony becomes admissible. For example, in Roscoe Moss Co. v. Jenkins, 55 Cal. App.2d 369 (1942), the plaintiff recovered a judgment for having drilled a well for the defendant. The trial court ordered a new trial and the plaintiff appealed. The order granting the new trial was reversed. The defendant's defense was based on the ground that the well was not drilled properly. It was the defendant's theory that if the well had been drilled properly its water production would have been substantially higher. The defendant produced an expert well tester who testified that the well's production should have been substantially higher and his testimony was based upon a comparison of the well in question with a near by well that was drilled shortly after the well in dispute. The latter well, however, was a much deeper well than the well in dispute and had other points of dissimilarity. The appellate court said "We do not believe that this testimony should have been before the jury at all. No sufficient foundation was laid for a comparison of the two wells."

The similarity between the Jenkins case and the property valuation cases is apparent. In the property valuation cases, opinions based on other sales that are not comparable are also excluded.

In some cases it appears that expert opinions have been stricken because there is no rational basis for the opinion. In People v. Lewis, 158 Cal. 185 (1910), a physician was asked to express an opinion as to the feeblemindedness of the Chinese defendant. The physician had lived in China for a few years and claimed to be able to determine the feeblemindedness of Chinese from their exterior appearence. An objection to this testimony was sustained.

A variety of cases can be found in which opinions have been held inadmissible because they are speculative. In Long v. Cal.-Western States Life Insurance Co., 43 Cal.2d 871 (1955), the issue was whether the insured had committed suicide. The testimony of a ballistics expert, based on experiments, that the death was accidental was excluded because it was speculative and conjectural. This, too, is the reason given for excluding opinions of value based on profits derived from real property. People v. Dunn, 46 Cal.2d 539 (1956); San Diego Land etc. Company v. Neal, 88 Cal. 50 (1891). In Eisenmayer v. Leonardt, 148 Cal. 596 (1906), an expert's opinion as to the value that certain stock would have had had it been issued was excluded as speculative.

On the other hand expert opinions have been held admissible even though based on hearsay or on the statements of others when it is apparent that experts in the particular field rely upon such matters. The most familiar example is that of the physician. In Kelley v. Bailey, 189 Cal. App.2d 728 (1961), a doctor gave an opinion based in part on a report and

analysis of an X-ray from another doctor who did not appear as a witness. It was held that no error was committed in receiving this opinion. The appellate court explained that such a report stands on a parity with a patient's history of an accident and ensuing injuries. It is admissible not as independent proof of the facts but as a part of the information upon which the physician based his diagnosis and treatment. Similarly expert opinion as to the market value of a particular commodity may be based on inquiries made of others, commercial circulars, correspondence, or telegrams, market quotations or reports, price lists, prices current, or the facts of relevant sales known to the witness. Glantz v. Freedman, 100 Cal. App. 611, 614 (1929); Betts v. Southern California Fruit Exchange, 144 Cal. 402, 409 (1904).

No statement of an underlying principle which would explain the results in the above cases has been found. Apparently, the courts have determined in particular cases and in regard to particular kinds of expert testimony what an opinion may rationally be based upon. The general rule has been reiterated over and over that expert opinions must be based either on facts personally observed or on hypotheses that find support in the record. George v. Bekins Van and Storage Company, 33 Cal.2d 834 (1949). But it is apparent that in some instances the matters personally observed may be statements of other persons (including inadmissible hearsay) and in other cases such matters may not be statements of others (whether or not admissible hearsay). In some cases, an opinion may not be based on matters personally observed where there is no rational connection between the matter observed and the opinion given or where any such connection is speculative and conjectural.

Perhaps the uniform principle--if there is one--is that an expert may base his opinion upon matters that the court believes experts in the particular field should be permitted to rely on. In some fields experts may properly rely on reports of other experts, on statements of persons concerned, etc., and in other fields experts may not rely upon such matters. It may be, too, that the courts have decided these questions on the basis of whether the particular kind of opinion would be helpful to the court if based upon such data. See discussion under Rule 56.

The question to be answered by the Commission is whether there should be some rule such as Rule 57.7.

Amendments and Repeals. The amendment and repeal of the sections listed were not considered by the Commission at the last meeting. The comments are self-explanatory.

Respectfully submitted,

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REVISED SCHEDULE OF DEADLINES IN STUDY OF UNIFORM RULES OF EVIDENCE

Subject Matter	Tentative Recommendation Sent to State Bar Committee	Receive Comments from State Bar Committee	Tentative Recommendation Approved for Printing	Tentative Recommendation Available in Printed Form	General Comments Reviewed	Final Action Taken
Art. VIII--Hearsay	Sent	Received	Approved	Available	March 1964 Meeting	April 1964 Meeting
Art. IX--Authentication	Sent	Received	Approved	Feb. 1, 1964	March 1964 Meeting	April 1964 Meeting
Art. V--Privileges	Sent	Nov. 1, 1963	Jan. 1964 Meeting	May 1, 1964	July 1964 Meeting	July 1964 Meeting
Art. VI--Extrinsic Policies	Sent	Dec. 5, 1963	Jan. 1964 Meeting	April 1, 1964	June 1964 Meeting	June 1964 Meeting
Art. IV--Witnesses	Sent	Jan. 5, 1963	Jan. 1964 Meeting	April 1, 1964	June 1964 Meeting	June 1964 Meeting
Art. II--Judicial Notice	Sent	Feb. 5, 1964	Feb. 1964 Meeting	April 1, 1964	July 1964 Meeting	July 1964 Meeting
Art. VII--Expert and Other opinion Testimony	Jan. 5, 1964 (December Meeting)	March 5, 1964	March 1964 Meeting	May 1, 1964	July 1964 Meeting	July 1964 Meeting
Art. I--General Provisions	Feb. 5, 1964 (January Meeting)	March 5, 1964	March 1964 Meeting	May 1, 1964	July 1964 Meeting	July 1964 Meeting
Art. III--Presumptions	March 5, 1964 (February Meeting)	April 5, 1964	April 1964 Meeting	July 1, 1964	August 1964 Meeting	August 1964 Meeting

Revised: December 1, 1963

Review of Existing Code Provisions

First Portion of Research Study Received -- March 1, 1964

Begin work on Review of Existing Code Provisions -- March 1964 meeting

Additional portion of Research Study Received -- April 1, 1964

Final Portion of Research Study Received -- May 1, 1964

Complete work on Review of Existing Code Provisions
and prepare tentative recommendation - - - - June 1964 meeting

Tentative Recommendation ready to distribute to
State Bar Committee- - - - - - - - - - - - - - July 5, 1964

Receive Comments of State Bar Committee - - - - Sept. 1, 1964

Final Action by Commission - - - - - - - - - - Sept. 1964

Final Recommendation (New Evidence Code and Comments)

Begin work -- July 1964 meeting

Approve for printing -- September 1964 meeting

Ready to print -- October 15, 1964

Pamphlet

Available in printed form -- January 1965

Preprinted Bill

Available -- December 1, 1964