#34(L) 3/12/64

Memorandum 64-16

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

The Commission's tentative recommendation on expert and other opinion testimony is scheduled for approval for printing at the March meeting.

Attached is a copy of this tentative recommendation. Please mark any suggested revisions in the Comments on this extra copy and turn it in to the staff at the March meeting.

Also attached are:

Exhibit I (pink pages) - Comments of Northern Section of the State Bar Committee to Consider the Uniform Rules of Evidence

Exhibit II (yellow pages) - Comments of Southern Section of the State Bar Committee to Consider the Uniform Rules of Evidence

GENERAL MATTERS

Before considering a rule by rule analysis of the State Bar Committee comments, two matters of general interest should be considered:

(1) The Southern Section suggests that the use of the word "matter" in Rules 57 and 58 leaves something to be desired. No specific objection is raised to its use in the other rules. The Commission previously approved the use of a single, comprehensive term to be used uniformly throughout the rules and determined that the word "matter" more clearly covers the desired scope that any other word. Use of "facts" or "data" or the phrases "facts and data" or "facts or data" do not seem as appropriate as the word "matter," even though the latter does appear to be somewhat awkward in certain usage. Nonetheless, "matter" appears to be the most

suitable word to express the myriad of information intended to be included therein. Though no change is recommended, the Commission might consider the use of a more appropriate word or phrase.

(2) In light of the Commission's approval of Revised Rule 8, the staff plans to delete the phrase "if the judge finds" and words of similar import in every instance where they appear in the revised rules. (The phrase appears only in Rules 55.5(1) and 56(1), (2), and (3).)

ANALYSIS OF SPECIFIC RULES

The following is an analysis of the comments of the State Bar Committee, together with staff suggestions in regard to these rules:

Rule 55.5. Both the Northern and Southern Sections disapproved subdivision (3), which permits the judge to receive conditionally expert opinion testimony subject to the witness' qualifications being later supplied in the course of the trial. The reason for disapproval is stated by the Northern Section as follows:

> [T]his would codify and give express statutory sanction to a procedure which is bad practice and should be employed on the rarest of occasions. If the court has power to follow this practice under Section 2042 of the Code of Civil Procedure, there is no need to include it in Rule 55.5. By so doing, the impression might be readily gained that this is a practice which might regularly be properly followed.

In addition to its disapproval of subdivision (3), the Southern Section would insert the word "first" in subdivision (1) in the phrase "if the judge first finds that . . . ," thereby affirmatively requiring the qualifications of an expert to be shown before his testimony may be received.

Subdivision (3), as drafted by the Commission, restates in a separate subdivision relating to the qualification of an expert witness the identical discretion now given to the judge under Revised Rule 19 in regard to the

requisite personal knowledge of an ordinary lay witness. Both are based on the original URE Rule 19. Though the staff has no specific recommendation in regard to this subdivision, it should be noted that the State Bar Committee's reference to Section 2042, which deals with the judge's discretion in regard to the order of proof, probably is misleading since this is a section which will require consideration in connection with the comprehensive evidence statute; hence, if the judge does possess the discretion given him by subdivision (3), no harm is perceived in stating that discretion explicitly, as was done in Revised Rule 19.

The staff suggests that the word "may" in subdivision (1) be deleted and there be substituted therefor the words "is qualified to" in order to avoid the implication that an expert witness may testify whenever he has special knowledge, skill, experience, training, or education. Nowhere else in the rules is there stated the conditions under which expert testimony may be received; hence, the implication of this subdivision, unless modified as suggested, is that a qualified expert may testify whenever his testimony is relevant. The purpose of this rule, however, is merely to provide what the minimum requisites are for an expert to be qualified to testify as such.

Rule 56. The substance of this rule was approved by both the Northern and Southern Sections. The Northern Section disapproved the addition of the underscored language in the introductory clause of subdivision (1), reading "if the witness is not an expert witness or is an expert witness who is not testifying as an expert . . . ." In light of the Northern Section's disapproval of this language, the staff suggests the restoration of the original URE language. The addition of the underscored material adds nothing to the rule.

In connection with subdivision (2) of Rule 56, it should be noted that the special knowledge, skill, experience, training, or education possessed by an expert witness is comparable to subdivision (1)(a) of Rule 56, regarding the perception of the witness not testifying as an expert witness. With respect to the nonexpert witness, subdivision (1) goes on to state the conditions under which opinion testimony may be offered, i.e., when it is "helpful to a clear understanding of his testimony or to the determination of the fact in issue." No similar standard appears in subdivision (2) in regard to when an expert may give opinion testimony. The implication of this omission is that an expert may give opinion testimony whenever (a) it is within the scope of his special knowledge, skill, experience, training, or education, and (b) his evidence is relevant. The simple test of relevancy is considerably broader than the present California law in regard to the admissibility of expert testimony, which, simply stated, is limited to those situations where the facts in issue are beyond the competence of ordinary persons. The vice of the Tentative Recommendation, therefore, is that there is no express limitation placed upon when expert testimony may be given. Contrariwise, there is a limitation in subdivision (1)(b) as to when opinion testimony of a nonexpert witness may be given, namely, when it is helpful to a clear understanding of his testimony or to the determination of the fact in issue. This is the identical standard under the present law as to when expert opinion is admissible. The staff suggests that the substance of subdivision (1)(b) be added to subdivision (2) to clarify this ambiguity. Hence, the staff suggests that subdivision (2) be revised to read as follows:

(2) If the witness is testifying as an expert, his testimony [~~of the witness~~] in the form of [~~opinions or inferences~~] opinion is limited to such opinions as [~~the judge finds~~] are (a) [~~based on facts or data perceived by or personally known or made known to the witness at the hearing and~~] within the scope of [~~the~~] his special knowledge, skill, experience, [~~or~~] training, or education [~~possessed by the witness~~] and (b) are helpful to a clear understanding of his testimony or to the determination of the fact in issue.

The revision in subdivision (2)(a), substituting "his" for "possessed by the witness," is a suggested language change without affecting the substance of the rule.

In the first sentence of subdivision (3), the phrase "may be held inadmissible or may be stricken" says nothing more in substance than that the opinion of a witness may be "excluded." Hence, this sentence perhaps should be revised to read alternatively either: "The judge may exclude testimony in the form of opinion if it is based . . ." or "The opinion of a witness may be excluded if it is based . . . ." This language would conform to Revised Rule 45 in the Commission's tentative recommendation on extrinsic policies.

Rule 57. The Northern Section approved this rule as drafted. The Southern Section was unable to reach agreement on subdivision (2), stating that:

> A pointed objection was raised to Rule 57(2) which would seem to permit a witness to testify as to his opinion without any showing of the "matter" upon which his opinion was based. . . . The committee uniformly felt that there should be a sufficient foundation laid for the expert's opinion, not only as to his qualifications, but an adequate showing that the expert either had personal knowledge of the facts, or based his opinion upon assumed facts or hearsay or upon the opinions of others and that the trial judge should always require a showing of these foundational requirements before permitting an expert to express an opinion.

A clear distinction is drawn in the present California law between giving an opinion based upon personal observation of the facts upon which

the opinion is based and giving an opinion based upon assumed or other facts not personally observed by the witness. See discussion in the Study at pages 13 to 16 (requisite foundation where expert's opinion based upon personal observation) and pages 17 to 20 (requisite foundation where expert's opinion not based upon personal observation). Quotations pointing out this distinction as declared in the leading California case on this subject, Lemley v. Doak Gas Engine Company, 40 Cal. App. 146, 180 Pac. 671 (1919), are set out in the Study at 15 (personal observation) and 17 (no personal observation).

The Lemley case and the case cited in the Commission's Comment to Rule 57, Hart v. Olson, 68 Cal. App.2d 657, 157 P.2d 385 (1945), do stand for the proposition that a witness may state his opinion without first stating the facts on which it is based. However, both cases involved situations in which the witness had personally observed the facts upon which the opinion is based. No case has been found in which a witness not having personally observed the facts upon which his opinion is based was permitted to state his opinion without stating also the assumed facts upon which it is based by way of the hypothetical question. The suggestion of the Southern Section that "in the rules proposed by the Law Revision Commission there was a definite risk that the cross-examining party could be 'sandbagged' by a proponent of expert testimony who diabolically chose not to lay a solid foundation or show in some satisfactory way the basis upon which the expert reached his opinion" is thus well taken in regard to existing California law. To alleviate this problem, the Southern Section suggests that the rules should be "re-examined with the objective of rewriting them in such a way as to make the trial judge's waiving of any of the aforementioned requirements the exception rather than the rule."

The usual foundation required even in those cases where the witness has personally observed the facts upon which his opinion is based will disclose his personal knowledge and acquaintance with such facts. Hence, it does not seem to be an unreasonable requirement to recast the rules as suggested by the Southern Section to require that a witness first disclose either his personal observation of the matter upon which his opinion is based or disclose the facts assumed by him in arriving at his opinion before his examination concerning the opinion itself, unless the prerequisite showing is waived by the judge. Recasting Rule 57(2) in this light would not necessarily deter from the conditional elimination of the hypothetical question proposed in Rule 58. In this regard, Rules 57(2) and Rule 58 must be considered together since the second clause in Rule 58 states that "the witness may state his opinion and the reasons therefor without first specifying the matter on which it is based as a hypothesis or otherwise".

In light of the Southern Section's comment on this situation and the existing California law in this regard, the Commission should reconsider the deletion of subdivision (2)(a) from Rule 56, which deals with the requisite foundation, and should consider the following three alternatives in regard to Rule 57:

1. The rule might remain as presently drafted without revision, thereby eliminating any necessity for a preliminary showing concerning the matter upon which the opinion is based (without regard to whether the witness has personally observed or assumed facts upon which his opinion is based). This very likely would change the existing law in regard to the foundation required.

2. Rule 57(2) might be recast as suggested by the Southern Section to require the witness to be first examined concerning the matter upon which his opinion is based unless the judge waives this preliminary requirement. Suggested language to accomplish this result might be as follows:

> (2) Unless the judge determines otherwise, a witness before testifying in the form of opinion shall first be examined concerning the matter upon which his opinion is based.

3. A distinction might be drawn between opinion based upon personal observation and opinion based upon assumed facts, applying alternative (1) to personal observation and applying alternative (2) where there is no personal observation. Suggested language to accomplish this result might be as follows:

> (2)(a) Before testifying in the form of opinion based upon matter personally perceived by the witness, thejudge may require that the witness first be examined concerning the matter upon which the opinion is based.
>
> (b) Before testifying in the form of opinion based upon matter not personally perceived by the witness, the witness shall first be examined concerning the matter upon which the opinion is based unless the judge in his discretion waives this requirement.

The first alternative mentioned above probably is contrary to existing California law and does not receive the support of the Southern Section. The second alternative mentioned above would appear to be more in accord with existing California law and probably would meet the objections of the Southern Section. Among others, one problem with the third alternative is its difficulty of administration since most expert opinion is based partially upon observed facts and partially upon other facts. In effect, this might require some foundational showing in every case. In balance, it appears that the suggestion of the Southern Section is most appropriate and hence, alternative (2) is recommended for adoption.

Rule 57.5. Both the Northern and Southern Sections approved this rule as drafted.

The staff suggests that the word "expert" be deleted wherever it appears in this rule. The theory of opinion based in whole or in part upon the opinion or statement of another person and the right to examine that other person as if under cross-examination should not depend on whether the opinion expressed by the witness is as an expert witness or as a lay witness testifying in terms of opinion. Hence, this rule should deal with opinions expressed by any witness and not simply by an expert witness. Compare proposed Section 1272.8 on page 37 of the Commission's tentative recommendation on opinion testimony on value, damages, and benefits in eminent domain proceedings.

Rule 58. Both the Northern and Southern Sections approved this rule as drafted, except that the Southern Section disapproved the second portion of this rule insofar as it relates to and covers the identical matter covered in Rule 57(2).

Rule 58.5. The Southern Section disapproved this rule in its entirety. With respect to subdivision (1), the Southern Section suggests that the following might be more appropriate:

> An expert witness may be fully cross-examined as to his qualifications, the foundation for his opinion, the matter upon which it is based, and the reasons therefor.

The reason for this suggested revision as given by the Southern Section is that "it was the unanimous feeling that Rule 58.5(1) was objectionable because by negative implication it excluded cross-examining an expert as to his qualifications and any examination conducted by him. The committee was certain that the Law Revision Commission did not intend this result, but felt that the wording of the section could be improved."

It is believed that the revision suggested by the Southern Section fails to accomplish the result intended in that it, too, proports to be an exclusive basis for cross-examination. The staff believes that the objection taken to the present draft is well founded and suggests that subdivision (1) be revised as follows:

> (1) An expert witness may be fully cross-examined as to his qualifications, the reasons for his opinion, and the matter upon which it is based. He may be cross-examined on any other matter to the same extent as any other witness.

With respect to subdivision (2), the Southern Section expressed concern over the possibility that the subdivision as presently drafted might permit the admissibility in evidence of a publication which had been used as the basis for cross-examining a witness and suggests that the following language might better accomplish the desired purpose:

> For the purpose of testing the credibility of an expert opinion, an expert may be cross-examined in regard to a published treatise, periodical, or pamphlet on a subject of history, science, or art if he relied upon the publication or if he admits that the author of a particular publication is a generally recognized authority in the field or that the particular publication is recognized as authoritative in the field.

Here, too, the revision suggested by the Southern Section fails to accomplish the desired result of eliminating any possibility of construing the section as permitting the admissibility in evidence of the publication which had been used as the basis for cross-examining an expert. Nothing in the suggested revision prohibits the implication attributed to the present draft. In addition, the suggested revision is considerably broader in scope than the Commission's draft.

The staff does not see how subdivision (2) of this rule could be

construed in the manner suggested by the Southern Section. To tighten up this subdivision however, the Commission should consider whether the following should be added thereto: "Nothing in this subdivision shall be construed as making admissible in evidence a publication relied upon by an expert witness in forming his opinion."

The Commission also might consider whether the words "any publication" would be a more appropriate phrase than the limited term "a published treatise, periodical, or pamphlet" now used in subdivision (2).

Rules 59, 60 and 61. Both the Northern and Southern Sections approved the deletion of Rules 59 and 60 for the reasons given and approved Rule 61 as drafted.

Respectfully submitted,

Jon D. Smock
Associate Counsel

Memo 64-16

EXHIBIT I

February 26, 1964

California Law Revision Commission
School of Law
Stanford University
Stanford, California

Attention: Mr. John H. DeMoully

Gentlemen:

The Northern Section of the Committee to Consider Uniform Rules of Evidence met at 4:30 P.M. on February 25, 1964, to consider Article VII - Expert and Other Opinion Testimony.

Rule 55.5. Qualification As Expert Witness.

The chairman reported on this Rule. Mr. Bates expressed objection to paragraph (3) which provides that the judge may receive conditionally the testimony of a witness subject to the evidence of special knowledge, skill, etc. being later supplied in the course of the trial. It was Mr. Bates' position that this would codify and give express statutory sanction to a procedure which is bad practice and should be employed on the rarest of occasions. If the court has power to follow this practice under §2042 of the Code of Civil Procedure, there is no need to include it in Rule 55.5. By so doing, the impression might be readily gained that this is a practice which might regularly be properly followed.

After further discussion, the Committee voted to approve paragraphs (1) and (2) of Rule 55.5 and voted to disapprove paragraph (3) thereof.

Rule 56. Testimony In Form Of Opinion.

Mr. Liebermann reported on this Rule and after discussion, the Committee approved the Rule as revised by the Law Revision Commission except that the Committee recommended the elimination of the words "not an expert witness or is an expert witness who" which were added by the Law Revision Commission, on the ground that it appears to be redundant and confusing.

Rule 57. Statement Of Basis Of Opinion Or Inference.

Mr. Liebermann reported on this Rule and after discussion, the Committee voted approval of the Rule as revised by the Law Revision Commission.

Rule 57.5. Expert Opinion Based On Opinion Or Statement Of Another.

Mr. Liebermann reported on this Rule and after discussion, the Committee voted to approve the Rule.

Rule 58. Hypothetical Questions.

Mr. Abramson reported on this Rule and after discussion, the Committee voted to approve the Rule as revised by the Law Revision Commission.

Rule 58.5. Cross-examination Of Expert Witness.

Mr. Abramson reported on this Rule and after discussion, the Committee voted to approve the Rule.

Rule 59. Appointment Of Experts.

Mr. Parkinson reported on this Rule and after discussion, the Committee agreed with the proposal of the Law Revision Commission to delete this Rule on the grounds stated by the Commission.

Rule 60. Compensation Of Expert Witness.

Mr. Parkinson reported on this Rule and after discussion, the Committee agreed with the proposal of the Law Revision Commission to delete this Rule on the grounds stated by the Commission.

Rule 61. Credibility Of Expert Witness.

Mr. Parkinson reported on this Rule and after discussion, the Committee voted to approve the Rule as revised by the Law Revision Commission.

Sincerely yours,

Lawrence C. Baker, Chairman
State Bar Committee on
Uniform Rules of Evidence

Memo 64-16

EXHIBIT II

March 5, 1964

California Law Revision Commission
School of Law
Stanford University
Stanford, California

Attention: Mr. John H. DeMoully

Gentlemen:

The Southern Section of the Committee to Consider Uniform Rules of Evidence met on February 5 and March 2, 1964, to consider Article VII - Expert and Other Opinion Testimony. Present at the meeting were members Heggeness, Robinson, Schutzbank, Westbrook and Newell.

Rule 55.5. Qualification As Expert Witness.

The Southern Section agreed with the Northern Section's report. In addition, we would add the word "first" between the words "judge" and "finds" in the first line of subsection (1).

Rule 56. Testimony In Form Of Opinion.

This rule was approved by the Southern Section subject to a proviso applicable to Rules 56, 57, and 58 noted below.

Rule 57. Statement Of Basis Of Opinion Or Inference.

The Committee approved of Rule 57(1) but the Committee was not in agreement as to the advisability of adopting Rule 57(2).

Rule 57.5. Expert Opinion Based On Opinion Or Statement Of Another.

The Committee voted to approve this rule.

Rule 58. Hypothetical Questions.

This was approved subject to its relationship to Rule 57(2) as is noted herein.

Rule 58.5. Cross-Examination Of Expert Witness.

The Committee felt that the language of Rule 58.5 could be improved upon. It was the unanimous feeling that 58.5(1) was objectionable because by negative implication it excluded cross-examining an expert as to his qualifications and any examination conducted by him. The Committee

was certain that the Law Revision Commission did not intend this result, but felt that the wording of the section could be improved. For example, the Committee felt the following might be appropriate:

> An expert witness may be fully cross-examined as to his qualifications, the foundation for his opinion, the matter upon which it is based, and the reasons therefor.

In like fashion, the Committee felt that the language of 58.5(2) might be erroneously construed to permit the admissibility in evidence of a publication which had been used as the basis for cross-examining an expert. Therefore, the Committee felt that the following language might better accomplish the purpose desired:

> For the purpose of testing the credibility of an expert opinion, an expert may be cross-examined in regard to a published treatise, periodical or pamphlet on a subject of history, science, or art, if he relied upon the publication or if he admits that the author of a particular publication is a generally recognized authority in the field or that the particular publication is recognized as authoritative in the field.

Rule 59. Appointment Of Experts.

The Committee approved of the decision of the Law Revision Commission to delete this rule.

Rule 60. Compensation Of Expert Witness.

The Committee approved of the decision of the Law Revision Commission to delete this rule.

Rule 61. Credibility Of Expert Witness.

The Committee voted to approve this rule as revised by the Law Revision Commission.

As had been the situation in the February meeting of the Committee, there was an extended discussion and no unanimity of opinion concerning Rules 56, 57 and 58. The Committee was concerned about the fact that the Law Revision Commission had stricken certain language from Rule 56(2)(a) and had seemingly substituted therefor the word "matter." The reasons given by the Commission for so doing were adequate. However, it was the feeling of a majority of the Committee that the use of the word "matter" in Rules 57 and 58 left something to be desired. A pointed objection was raised to Rule 57(2) which would seem to permit a witness to testify as to his opinion without any showing of the "matter" upon which his opinion was

based. In the discussion, it was apparent that the members of the Committee were in uniform agreement as to the ultimate objective to be achieved by these rules but that their differences regarding these code sections were of emphasis not of substance. The Committee uniformly felt that there should be a sufficient foundation laid for the expert's opinion, not only as to his qualifications, but an adequate showing that the expert either had personal knowledge of the facts, or based his opinion upon assumed facts or hearsay or upon the opinions of others and that the trial judge should always require a showing of these foundational requirements before permitting an expert to express an opinion.

Secondly, as to "matter" as used by the Law Revision Commission, the Committee felt that testimony as to the matter upon which an opinion is based ordinarily should be required on direct examination but that the judge should have the discretion to waive this requirement upon the direct examination of the witness only if the trial judge were satisfied that the other side would not be prejudiced thereby. The Committee felt that in the rules proposed by the Law Revision Commission there was a definite risk that the cross-examining party could be "sandbagged" by a proponent of expert testimony who diabolically chose not to lay a solid foundation or show in some satisfactory way the basis upon which the expert reached his opinion (it should be noted that the same argument applies to the reasons for an expert's opinion).

Therefore, the Committee felt that Rules 56, 57, and 58 should be re-examined with the objective of rewriting them in such a way as to make the trial judge's waiving of any of the aforementioned requirements the exception rather than the rule.

Member Newell felt that Rules 56, 57, and 58 as worded by the Law Revision Commission were adequate to accomplish the objective and would approve of the rules as written.

Very truly yours,

S/

Robert M. Newell

RMN:em