34 8/7/64

First Supplement to Memorandum 64-46

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

Attached are the following comments received on the Commission's Tentative Recommendation on Expert and Other Opinion Testimony since the preparation of the principal memorandum:

Exhibit I--Special Committee of the Conference of California Judges
Exhibit II--Department of Public Works letter of July 21, 1964.

Because some of the matter contained in the printed pamphlet presently appears in Division 6 (Witnesses), reference to these Exhibits also is made in Memorandum 64-54, which discusses the pertinent portions of these Exhibits that relate to those sections now contained in the Witnesses Division.

The Comments received on the printed pamphlet are considered below in connection with the appropriate section of the Evidence Code covering the subject matter of the rules discussed in the comments.

Section 800

The Judges' Committee suggests the deletion of all of the matter contained after the word "testimony" in subdivision (b) of Section 800. The Committee notes that "the sentence in its present form is disjunctive and a literal application thereof would seem to authorize the offering of an opinion when completely unjustified." The comment appears appropriate to the phrase originally contained in the printed pamphlet--"or to the determination of the fact in issue"--if construed to mean the ultimate issue in the case. However, this was not the intent and the language presently

contained in Section 800 is intended to clarify that phrase as it previously was presented in the printed pamphlet. Whether the Judges' comment goes to the new language as well as that contained in the printed pamphlet is uncertain. In any event, the present draft reflects the existing law. See Comment to Section 800. If the present draft is still ambiguous, perhaps it could be clarified by revising Section 800 to read as follows:

> . 800. If a witness is not testifying as an expert, his opinions are limited to such opinions as are rationally based on the perception of the witness and are:
>
> (a) Helpful to a clear understanding of his testimony; or
>
> (b) Helpful to the determination of any disputed fact that is of consequence to the determination of the action.

Section 801

With respect to subdivision (a) of this Section, Mr. Powers, in a letter dated July 29, 1964, comments that subdivision (a) sets forth:

> a standard to be applied which, it is submitted, is not in accordance with case law of California, particularly as stated in People v. Cole 39 Cal.2d 99, 103. That court states the test is "sufficiently beyond common experience that the opinion of an expert would assist the trier of fact." This language is cited with approval in People v. Clay 227 Adv. Cal. App. 96, 103. If one were to apply the standard of Section 801 of the new Evidence Code to the facts as set forth in People v. Clay, it would appear doubtful that the expert in that case would even be able to qualify for his testimony.

Subdivision (a) is intended to state precisely the same rule as is presently followed in existing law. The staff believes that subdivision (a) is in accord with existing California law as expressed in the leading case, People v. Cole, supra. The staff believes that the reference to common training and education simply rounds out the reference to experience, particularly in comparison to the qualifications of an expert witness ("special knowledge, skill, experience, training, or education"). If it is desired to

revise this subdivision, it might be accomplished by simply omitting the words "the competence of persons of" so that the subdivision would read in full: "related to a subject that is beyond common experience, training, and education."

The Judges' Committee comments that "subdivision (b) of Section 801 of the Evidence Code is to be prefered over the language used in paragraph (b) of subdivision (2) of Rule 56," thereby approving the revised language in subdivision (b).

Section 802

The Department of Public Works raises a question in regard to subdivision (a) of this section. The Department suggests that this subdivision, considered together with subdivision (b) of Section 801, might be construed to permit inadmissible matters upon which an expert's opinion is based to be stated to the trier of fact under the guise that it is a reason for the expert's opinion. The matter is now covered by Section 803, which permits the judge to exclude opinion testimony based "in whole or in significant part on matter that is not a proper basis for such an opinion". To clarify the relationship of subdivision (a) of Section 802 and subdivision (b) of Section 801, the Department suggests that subdivision (a) be revised to read:

> (a) 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 such reasons or matters are otherwise inadmissible on direct examination.

Section 803

The Department of Public Works comments on this section as follows: "If it is true that the opinion is either wholly or significantly based on

improper matter, there is no reason why such an opinion should ever be admissible and not stricken, particularly where the section also provides that the witness may correct his opinion by eliminating the [im] proper consideration." The Department suggests that the mandatory "shall" should be substituted for the discretionary "may" in the first sentence of this section.

The unstated effect of the Department's suggestion would be to change the existing law. Under the existing law, "the question is addressed to the discretion of the trial court." People v. Lipari, 213 Cal. App.2d 485, 493, 28 Cal. Rptr. 808 (1963). See the Comment to Section 803.

Moreover, the discretionary rule presently reflected in Section 803 places the burden of objection precisely where it belongs--on the opponent of the evidence. This is the same, for example, as the burden placed upon the opponent of the evidence to demonstrate that the evidence is inadmissible because it falls within the hearsay rule. Thus, the staff believes that the Department's comment is in error in suggesting that Section 803 "shifts the burden of offering proper evidence from the proponent to the other party. The one who has put forth improper testimony whould bear the burden of correcting that testimony." Nothing is "shifted" by Section 803, since the opponent of the evidence always carries the burden of demonstrating its inadmissibility. Hence, the staff believes the section is correct as it stands.

Section 804

In connection with this section, the Judges' Committee comments that

"We do not think that the cases cited in the Commission's comments . . . . supports the proposition that the testimony of an expert may be based upon the opinion of another." The Committee suggests that the phrase "upon the opinion or" in subdivision (a) and "on the opinion or" in subdivisions (b) and (c) should be stricken from this section.

The cases mentioned in support of the existing section are Kelley v. Bailey, 189 Cal. App.2d 728, 11 Cal. Rptr. 488 (1961), and Hope v Arrowhead & Puritas Waters, Inc., 174 Cal. App.2d 222, 344 P.2d. 428 (1959). Both of these cases involve situations where a medical expert relied upon the opinions and statements of other medical experts not called as witnesses (except that in the Hope case the absent expert was later called by the court to appear as a witness "because some mention was made of his report"). The effect of both of these decisions is illustrated by the following excerpt from Kelly v. Bailey, 189 Cal. App.2d 728, 737, 11 Cal. Rptr. 488 (1961).

> It is argued that the court erred in receiving into evidence the opinion of Dr. Meyers who was not called to the witness stand. The defendant's witness, Dr. Fillerup, after diagnosing a moderate whiplash syndrome in plaintiff, sent him to Dr. Meyers who made a report to Dr. Fillerup which he used in his own studies of plaintiff's case; he also consulted with Dr. Meyers and thereby strengthened his own opinion of plaintiff's condition. Portions of this report were read to the jury over plaitiff's objection, viz: [the court then quotes portions of the report that were read to the jury, including "the findings here are typical of an old burned out Pott's disease, which is now quiescent. It is our impression that he sustained a contudion of his thoracic back in the accident . . . . We feel that he is recovering satisfactorily from this, and he will have no residual difficulty due to his injuries sustained in this accident"]. There was no error in this. Such a report stands on a parity with a patient's history of an accident and insuing injuries given to his physician. 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, if any.

These cases produce the same result in a medical setting as is intended to be accomplished by Section 804 in any setting. Moreover, it is of interest to note that the calling of the absent expert by the court produced precisely the same result indirectly as Section 804 produces directly, namely, the opportunity to cross-examine the absent expert. A reading of the Judges' Committee comments indicates that the Committee does not object to the effect of the section itself but rather suggests only the deletion of a reference to opinion. We believe t he quoted excerpt from the Kelly case supports the section as drafted as to the fact that the statement of the absent person includes statements in the form of opinion. Nevertheless, because of the broad definition of statement (see Section 225), which clearly would include either an oral or written opinion, the phrases suggested for deletion by the Judges' Committee could be deleted without substantive change in the effect of the section. At most, it would simply leave unstated and, perhaps, unclear that which is now stated explicitly.

The remaining comments in these Exhibits relate to sections presently appearing in Division 6 (Witnesses) and are considered in Memorandum 64-54.

Respectfully submitted,

Jon D. Smock
Associate Counsel

Exhibit II

STATE OF CALIFORNIA—HIGHWAY TRANSPORTATION AGENCY EDMUND G. BROWN, Governor

DEPARTMENT OF PUBLIC WORKS
DIVISION OF CONTRACTS AND RIGHTS OF WAY (LEGAL)
120 N STREET, SACRAMENTO

July 21, 1964

Mr. John H. DeMoully
Executive Secretary
California Law Revision Commission
Stanford, California 94304

Dear Mr. DeMoully:

Expert and Other Opinion Testimony

Your letter of July 1, 1964 requested that the Department of Public Works comment by August 3 on the tentative recommendations relating to Article VII of the Uniform Rules of Evidence on Expert and Other Opinion Testimony. As you know, the majority of litigation carried on by the Department of Public Works involves condemnation actions and the use of expert opinion and testimony in valuation and related specialized and scientific fields. The Department generally agrees with the tentative recommendation of the Law Revision Commission with regard to Article VII. We do, however, have four points on which we wish to submit comments for consideration by the Commission.

I

RULE 56. TESTIMONY IN THE FORM OF AN OPINION AND

RULE 57. STATEMENT OR BASIS OF OPINION

Rule 56(2)(b) provides that an expert may give an opinion based on matter even though such matter is not admissible, provided that such matter is of a type commonly relied upon by experts in forming an opinion on a subject to which the testimony relates.

Rule 57(1) provides that an expert may state on direct examination the reasons for his opinion and the matter upon which it is based. Taken together these provisions could well be construed as changing the time honored rule in condemnation case law or rule that inadmissible evidence of value may not be presented to a jury under the guise that it is a reason for the expert's opinion. (People v. LaMacchia, 41 Cal. 2d 738; City of Monterey v. Hanson, 214 Cal. App. 2d 794) This rule is extremely logical in condemnation cases,

since expert appraisers may investigate and consider many classifications of data which would operate to confuse and mislead a jury made up of laymen not sufficiently trained to give the data its proper weight. We believe that the sections must be correlated so that this logical rule in condemnation actions will not be destroyed or thwarted. We suggest that Rule 57, paragraph (1), be amended to read as follows:

> "(1) 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 such reasons or matters are otherwise inadmissible on direct examination."

Contrary to the Commission's comment, paragraph (1) of Rule 57 is not a restatement of C.C.P. Sec. 1872. The words "and the matter upon which it is based" are not contained in Sec. 1872. Therefore, these words added by the Commission necessitate an incorporation in the rule of what is admissible and what is inadmissible under present decisional and statutory law.

II

RULE 56(3). TESTIMONY IN THE FORM OF AN OPINION

The problem which is presented by this paragraph is the discretion which is permitted the court, where an opinion is clearly improper. The proposed section provides that the court may hold an opinion inadmissible or may strike the opinion if the court finds it to be, either in whole or in significant part, based on matter which is improper. If it is true that the opinion is either wholly or significantly based on improper matter, there is no reason why such an opinion should ever be admissible and not stricken, particularly where the section also provides that the witness may correct his opinion by eliminating the proper consideration.

This section should be corrected to read as follows:

> "The opinion of a witness ~~may~~ shall be held inadmissible or ~~may~~ shall be stricken if it 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 give his opinion after excluding from consideration the matter determined to be improper."

The rule giving the complete discretion to the trial court as to whether it should strike an improper opinion shifts the burden of offering proper evidence from the proponent to the other party. The one who has put forth improper testimony should bear the burden of correcting that testimony. As the section stands now, the party putting forth an expert who has based his opinion on improper testimony and therefore an improper opinion receives all of the benefits from such improper opinion with little or no detriment if the judge refuses to strike the opinion. In other words, the witness has an opinion which is based upon an improper reason or matter and the witness refuses to segregate and eliminate the improper part, thus leaving the jury with the instruction to disregard the improper amount without having any basis upon which to arrive at an intelligent verdict.

The inevitable result, if the discretionary rule is allowed to stand, will be a constant increase in court time consumed by motions for new trial and appeals. Under the discretionary rule, improper and infectious evidence is allowed to stay in the case with a prejudicial effect.

III

RULE 58.5. CROSS-EXAMINATION OF EXPERT WITNESS

Paragraph (2) of Rule 58.5 attempts to codify the common law rule of evidence in medical cases that a doctor may not be cross-examined on a medical book or treatise except where he has relied on such book or treatise to some extent in reaching his opinion. We do not quarrel with extending the medical treatise rule to other types of expert testimony. However, we are concerned with the use of the term "publication" in paragraph (2). The common meaning of the term "publication" includes not only books and treatises, but also anything that is "published or printed".

The common law rule was restricted to text books and treatises and did not extend to all other published or printed materials. As you know, expert witnesses in condemnation cases are cross-examined on many items of published or printed material to test the credibility of their opinions. Such published or printed documents include deeds, contracts of sale, zoning ordinances, building restrictions, etc. In another field, for example, in the case of Laird v. Matheron, 51 Cal. 2d 210, 219, an engineer testified that a handrail was constructed to standard engineering practices in Pasadena. On cross-examination he volunteered that this would be standard engineering practice anywhere in the world. It was held that it was therefore permissible to impeach him by cross-examination on the contrary provisions of the Los Angeles Building Code. Under the rule as drafted in 58.5, paragraph (2), a contrary result would be required. The Commission in its comment on subdivision (2) describes the California cases by referring to "books", but refers to the term "publication" when it describes the intent and effect of the new rule. Since there was no consideration in the Commission's comment, there is the possibility that the Commission may be inadvertently broadening the present common law rule of cross-examination of an expert on books or treatises. In a prior draft of this section the Commission limited the effect of this rule to "published treatise, periodical or pamphlet". It is our suggestion that subdivision (2) of Rule 58.5 be amended to read as follows:

> "(2) A witness testifying as an expert may not be cross-examined in regard to the content or tenor of any ~~publication~~ book, text, or treatise, unless he referred to, considered, or relied upon such publication in arriving at or forming his opinion."

IV

RULE 61. CREDIBILITY OF EXPERT WITNESS

In our letter to you of March 16, 1964, the Department of Public Works expressed its concern with proposed Sec. 1274.4(a), which is in substance the same as paragraph (1) of Rule 61. Paragraph (1) of Rule 61 allows the fact of the

appointment of an expert witness by the court to be revealed to the trier of fact as relevant to his credibility and the weight to be given his testimony.

We do not believe that the appointment of an expert witness by the court should have this added credibility and added weight over other witnesses produced by either party who may be better qualified to express an expert opinion. The Law Revision Commission in its comment states that subdivision (1) of Rule 61 codifies a rule recognized in California decisions, citing the cases of People v. Cornell, 203 Cal. 144 and People v. Strong, 114 Cal. App. 522. Our careful reading of these cases does not indicate that they support the proposition for which they are cited. The Cornell case merely held that it was not prejudicial error for the court to comment on an alienist appointed by the court. The Strong case merely held that there was no prejudicial injury or denial of due process to the defendant by the remarks of the court about the qualities of the court-appointed witness.

In contract to the cases cited by the Law Revision Commission, the case of People v. Van Wie, 72 Cal. App. 2d 227, was very critical of the judge's comment on the experts appointed by the court. In that case (page 236) the trial judge stated:

> "'The Court further desires to comment on the qualifications of the medical witnesses in this case. They are experts of the highest qualifications, and they were appointed by the Court, they are paid by the State, and they are absolutely under no compulsion to give any particular opinion on this sort of an issue.
>
> * * *
>
> "Appellant urges that the description of the experts ... went beyond the limits of fair comment and denied him a fair trial.
>
> * * *
>
> "... It is undoubtedly true that the court should not have stated that there was ample evidence on the issue, since the questions of credibility and

sufficiency are for the jury. ..."

In the case of People v. Lynch, 60 Cal. App. 2d 133, the opinion quoted the trial judge at page 144 as follows:

> "'... in the first place I consider him qualified to make this examination and express an opinion as an expert or specialist on the subject, and as I said before the law imposes upon me the necessity of appointing specialists as I have done here in this instance, to make an examination; and furthermore, I might state for your benefit, Mr. Lynch, as well as for the jury that I have had occasion to appoint Doctor Bailey on a large number of cases of this kind and there has never been any challenge to his competency--' ..."

The appellate court commented, at page 144:

> "We regard these declarations of the court as transcending the bounds of legitimate comment upon the evidence or the credibility of a witness. It amounted to an attempt upon the part of the court to testify as to the competency of the witness as an expert in his chosen line of medical practice. And it is vain to attempt to do away with the prejudicial effect of such assertions upon the part of the court by giving the instruction provided for in section 1127(b) of the Penal Code."

Not even the proposed model code of evidence on court-appointed witnesses goes as far as paragraph (1) of Rule 61 proposed by the Law Revision Commission. Criticism of the effect of the proposed Rule 61 is contained in the case of State v. Simpson, 64 S.E. 2d 561 (N.C.), at page 571:

> "The slightest intimation from a judge as to the credibility of a witness will always have great weight with the jury, and, therefore, we must be careful to see that neither party is

unduly prejudiced by an expression from the bench which is likely to prevent a fair and impartial trial."

The Department welcomes the opportunity to again comment on the Law Revision Commission's tentative recommendations. We would appreciate being advised of the date of the meeting at which the Commission will consider these comments, in order that we may be present to answer any questions of the Commission or staff and explain our comments.

Yours very truly,

Emerson W. Rhyner

EMERSON W. RHYNER
Deputy Chief Counsel