

STATE OF CALIFORNIA

CALIFORNIA LAW REVISION COMMISSION

TENTATIVE RECOMMENDATION AND A STUDY

relating to

The Uniform Rules of Evidence

Article VII. Expert and Other Opinion Testimony

March 1964

CALIFORNIA LAW REVISION COMMISSION
School of Law
Stanford University
Stanford, California

NOTE

This pamphlet begins on page 901. The Commission's annual reports and its recommendations and studies are published in separate pamphlets which are later bound in permanent volumes. The page numbers in each pamphlet are the same as in the volume in which the pamphlet is bound. The purpose of this numbering system is to facilitate consecutive pagination of the bound volumes.

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TENTATIVE RECOMMENDATION AND A STUDY

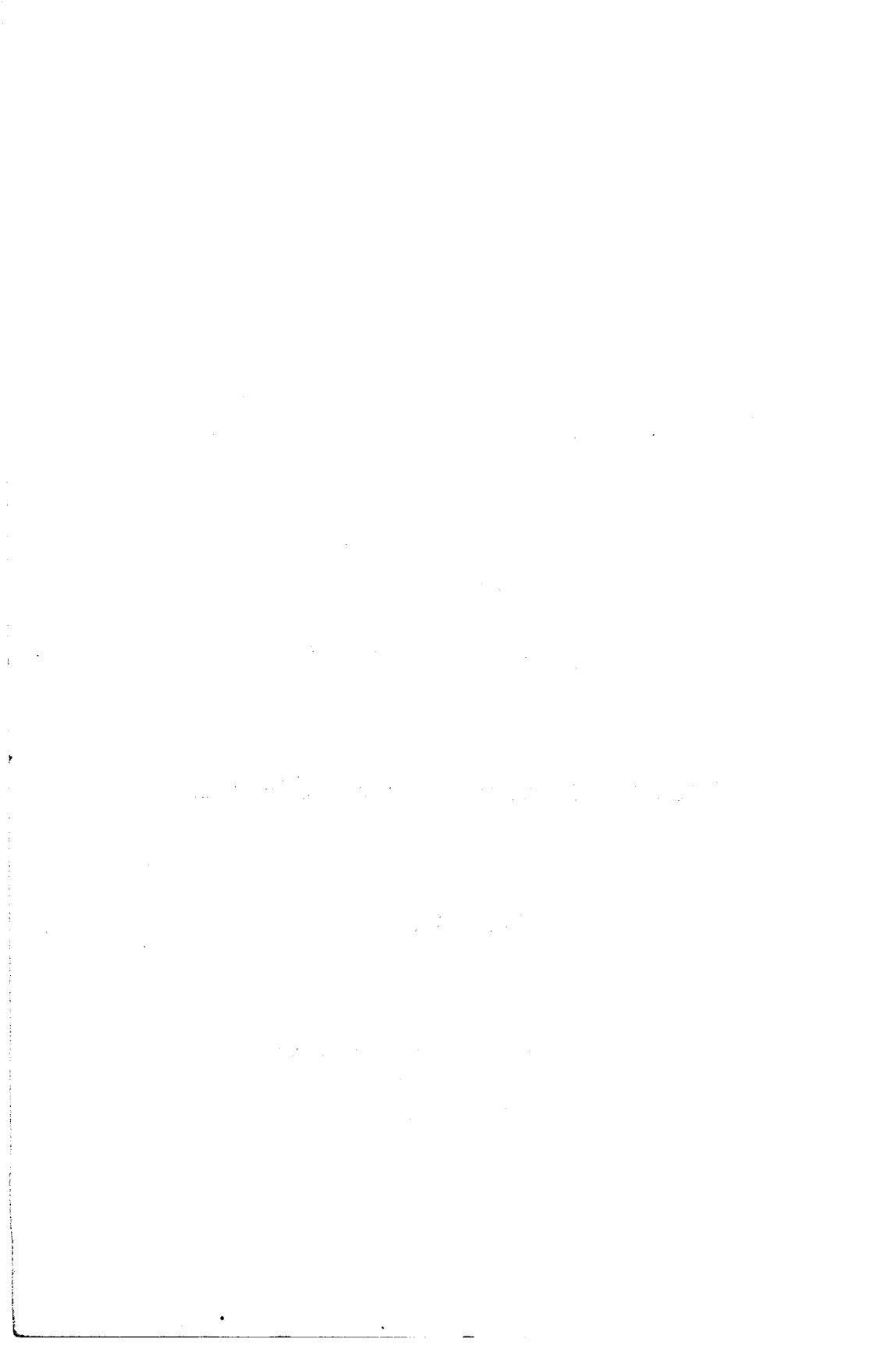
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CALIFORNIA LAW REVISION COMMISSION

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March 1964

To HIS EXCELLENCY, EDMUND G. BROWN
Governor of California
and to the Legislature of California

The California Law Revision Commission was authorized by Resolution Chapter 42 of the Statutes of 1956 to make a study "to determine whether the law of evidence should be revised to conform to the Uniform Rules of Evidence drafted by the National Conference of Commissioners on Uniform State Laws and approved by it at its 1953 annual conference."

The Commission herewith submits a preliminary report containing its tentative recommendation concerning Article VII (Expert and Other Opinion Testimony) of the Uniform Rules of Evidence and the research study relating thereto prepared by its research consultant, Professor James H. Chadbourn of the Harvard Law School. Only the tentative recommendation (as distinguished from the research study) expresses the views of the Commission.

This report is one in a series of reports being prepared by the Commission on the Uniform Rules of Evidence, each report covering a different article of the Uniform Rules.

In preparing this report the Commission considered the views of a Special Committee of the State Bar appointed to study the Uniform Rules of Evidence.

This preliminary report is submitted at this time so that interested persons will have an opportunity to study the tentative recommendation and give the Commission the benefit of their comments and criticisms. These comments and criticisms will be considered by the Commission in formulating its final recommendation. Communications should be addressed to the California Law Revision Commission, School of Law, Stanford University, Stanford, California.

Respectfully submitted,

JOHN R. McDONOUGH, JR.
Chairman

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TENTATIVE RECOMMENDATION OF THE CALIFORNIA LAW REVISION COMMISSION

relating to

THE UNIFORM RULES OF EVIDENCE

Article VII. Expert and Other Opinion Testimony

BACKGROUND

The Uniform Rules of Evidence (hereinafter sometimes designated as the "URE") were promulgated by the National Conference of Commissioners on Uniform State Laws in 1953.¹ In 1956 the Legislature directed the Law Revision Commission to make a study to determine whether the Uniform Rules of Evidence should be enacted in this State.

The tentative recommendation of the Commission on Article VII of the Uniform Rules of Evidence is set forth herein. This article, consisting of Rules 56 through 61, relates to expert and other opinion testimony.

As used in this article, an "opinion" of a witness is an inference or conclusion of the witness drawn from certain data that he has observed or that has been related to him. Tyree, *The Opinion Rule*, 10 RUTGERS L. REV. 601, 603 (1956). Article VII of the URE sets forth in some detail the rules governing the admissibility of this kind of evidence. In contrast, no clear statement of the law governing the admissibility of opinion evidence can be found in existing California statutes. Existing statutes do recognize that opinions are admissible under some circumstances (see CODE CIV. PROC. §§ 1845, 1870(9), 1872), but the conditions of admissibility have been left almost entirely for the courts to determine. In some instances, the decisional law governing opinion testimony is fairly clear; in other instances, there are conflicting decisions and the law is uncertain.

The Commission, therefore, tentatively recommends that URE Article VII, revised as hereinafter indicated, be enacted as the law in California.²

¹ A pamphlet containing the Uniform Rules of Evidence may be obtained from the National Conference of Commissioners on Uniform State Laws, 1155 East Sixtieth Street, Chicago 37, Illinois. The price of the pamphlet is 30 cents. The Law Revision Commission does not have copies of this pamphlet available for distribution.

² The final recommendation of the Commission will indicate the appropriate code section numbers to be assigned to the rules as revised by the Commission.

REVISION OF URE ARTICLE VII

In the material that follows, the text of each rule proposed by the Commissioners on Uniform State Laws is set forth and the amendments tentatively recommended by the Commission are shown in strike-out and italics. New rules are shown in italics. Each rule is followed by a Comment setting forth the major considerations that influenced the recommendation of the Commission and explaining those revisions that are not purely formal or otherwise self-explanatory. For a detailed analysis of the various rules and the California law relating to expert and other opinion testimony, see the research study beginning on page 923.

Rule 55.5. Qualification as Expert Witness

RULE 55.5. *(1) A person is qualified to testify as an expert if he has special knowledge, skill, experience, training, or education sufficient to qualify him as an expert on the subject to which his testimony relates.*

(2) Evidence of special knowledge, skill, experience, training, or education may be provided by the testimony of the witness himself.

(3) In exceptional circumstances, the judge may receive conditionally the testimony of a witness, subject to the evidence of special knowledge, skill, experience, training, or education being later supplied in the course of the trial.

Comment

Proposed Rule 55.5 is new. It is based on URE Rule 19, which has been revised to delete the material relating to the foundation necessary to qualify a person as an expert witness. See *Tentative Recommendation and a Study Relating to the Uniform Rules of Evidence (Article IV. Witnesses)*, 6 CAL. LAW REVISION COMM'N, REP., REC. & STUDIES 701, 711 (1964).

Subdivision (1). Subdivision (1) requires that a person offered as an expert witness have special knowledge, skill, experience, training, or education sufficient to qualify him as an expert on the particular matter. This subdivision states existing law. CODE CIV. PROC. § 1870(9).

The judge must be satisfied that the proposed witness is an expert. *People v. Haeussler*, 41 Cal.2d 252, 260 P.2d 8 (1953); *Pfingsten v. Westenhaver*, 39 Cal.2d 12, 244 P.2d 395 (1952); *Bossert v. Southern Pac. Co.*, 172 Cal. 504, 157 Pac. 597 (1916); *People v. Pacific Gas & Elec. Co.*, 27 Cal. App.2d 725, 81 P.2d 584 (1938). The judge's determination that a witness qualifies as an expert witness is binding on the trier of fact, but the trier of fact may consider the witness' qualifications as an expert in determining the weight to be given his testimony. *Pfingsten v. Westenhaver*, 39 Cal.2d 12, 244 P.2d 395 (1952); *Howland v. Oakland Consol. St. Ry.*, 110 Cal. 513, 42 Pac. 983 (1895); *Estate of Johnson*, 100 Cal. App.2d 73, 223 P.2d 105 (1950).

Subdivision (2). This subdivision states that the requisite special qualifications required of an expert witness may be provided by the

witness' own testimony. This is the usual method used to qualify a person as an expert.

Subdivision (3). This subdivision provides that the judge may receive testimony conditionally, subject to the necessary foundation being supplied later in the trial. This provision is merely an express statement of the broad power of the judge under Code of Civil Procedure Section 2042 with respect to the order of proof. Unless the foundation is subsequently supplied, the judge should grant a motion to strike or should order the testimony stricken from the record on his own motion. The introductory phrase is intended to suggest that the discretionary power to depart from established practices should be sparingly exercised.

Rule 55.7. Testimony of Expert Witness

RULE 55.7. *A person who is qualified to testify as an expert may testify:*

(1) To any matter of which he has personal knowledge to the same extent (including testimony in the form of opinion) as a person who is not an expert.

(2) To any matter of which he has personal knowledge if such matter is within the scope of his special knowledge, skill, experience, training, or education.

(3) Subject to Rule 56, in the form of opinion upon a subject that is within the scope of his special knowledge, skill, experience, training, or education.

Comment

Proposed Rule 55.7 has been added to this article to clarify any ambiguity that may exist with respect to the type of testimony permitted a person who is qualified to testify as an expert.

Subdivision (1). Subdivision (1) permits an expert witness to testify to any matter to the same extent as an ordinary witness not testifying as an expert. Thus, as to those matters that are outside the scope of his special expertise, the expert witness is treated the same in all respects as an ordinary witness. In such cases, the witness is, of course, not testifying as an expert.

Subdivisions (2) and (3). These subdivisions relate to those matters as to which an expert witness may testify within the scope of his special expertise. Generally speaking, expert testimony is required for either or both of two reasons. First, the facts involved in a particular lawsuit may be beyond the competence of ordinary persons, and expert testimony is needed to translate these special facts into language that can be readily understood by the trier of fact. Chemical properties of particular substances are an example of such special facts that may not be within the competence of persons of common experience. Second, expert testimony also may be required to interpret common facts whose significance to the particular litigation cannot be fully appreciated

without the aid of expert testimony. Thus, the color of a paint chip or the shape of a fragment of glass recovered at the scene of an accident may have significance to an expert with respect to the type of vehicle involved that cannot be appreciated by the trier of fact without the aid of expert testimony. Subdivisions (2) and (3) cover both of these situations.

Subdivision (3) does not specify the precise matters upon which an expert's opinion may be based; the subdivision merely indicates that an expert may testify in the form of opinion upon a subject that is within the scope of his special expertise. See generally Revised Rule 56, subdivisions (2) and (3), and the Comment thereto, *infra*. The matter upon which an expert's opinion is based, however, will affect the way in which the direct examination of the expert is conducted. Thus, when an expert witness testifies from his personal knowledge of the facts, data, or other matter upon which his opinion is based, there is no necessity that his examination be conducted through hypothetical questions designed to elicit specific details concerning the basis for his opinion. Nor are hypothetical questions necessarily required when the expert bases his opinion in part upon otherwise inadmissible hearsay. See *People v. Wilson*, 25 Cal.2d 341, 153 P.2d 720 (1944). On the other hand, where an expert witness testifies in the form of opinion based upon assumed facts not personally known to him, it may be essential to examine the expert by using hypothetical questions. The assumed facts must be stated as an hypothesis upon which the opinion is based in order to permit the trier of fact to weigh the opinion in the light of its findings as to the existence or nonexistence of the assumed facts. See *Lemley v. Doak Gas Engine Co.*, 40 Cal. App. 146, 180 Pac. 671 (1919) (hearing denied). It is largely in the discretion of the judge to control the extent to which the hypothetical nature of the assumed facts need to be shown, i.e., the extent to which the examiner's questions need be classically "hypothetical" in form. *Graves v. Union Oil Co.*, 36 Cal. App. 766, 173 Pac. 618 (1918). See also *Estate of Collin*, 150 Cal. App.2d 702, 310 P.2d 663 (1957) (hearing denied).

Rule 56. Testimony in the Form of An Opinion

RULE 56. (1) If the witness is not testifying as an expert, his testimony in the form of opinions or inferences is are limited to such opinions or inferences as the judge finds are:

- (a) may be Rationally based on the perception of the witness ; and
- (b) are Helpful to a clear understanding of his testimony or to the determination of the fact in issue.

(2) If the witness is testifying as an expert, testimony of the witness in the form of opinions or inferences 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 (b) within the scope of the special knowledge, skill, experience or training possessed by the witness.

(2) *If the witness is testifying as an expert, his opinions are limited to such opinions as are:*

(a) *Related to a subject that is beyond the competence of persons of common experience, training, and education; 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 under the decisional or statutory law of this State such matter may not be used by an expert as a basis for his opinion.*

(3) *Unless the judge excludes the testimony he shall be deemed to have made the finding requisite to its admission. The opinion of a witness may be held inadmissible or may 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.*

(4) *Testimony in the form of opinions or inferences. An opinion that is otherwise admissible under these rules is not objectionable because it embraces the ultimate issue or issues to be decided by the trier of the fact.*

Comment

Three matters of general application in this rule and elsewhere in this article on expert and other opinion testimony should be noted. *First*, the phrase "if the judge finds" and words of similar import have been deleted as being unnecessary in light of Rule 8.³ *Second*, the word "opinion" is used consistently in the revised rules in place of the URE phrase "opinions or inferences." The single word "opinion" embraces the same matters that would be covered by the longer phrase and includes all opinions, inferences, conclusions, and other subjective statements made by a witness. *Third*, the word "matter" is uniformly used in these revised rules instead of the URE phrase "facts and data." It is not entirely clear, for example, that the URE phrase is sufficiently broad to encompass such matters as a witness' knowledge, experience, and other intangibles upon which an opinion may be based. Thus,

³ Rule 8 is the subject of a separate study and recommendation by the Commission. The rule as contained in the URE is as follows:

RULE 8. Preliminary Inquiry by Judge. When the qualification of a person to be a witness, or the admissibility of evidence, or the existence of a privilege is stated in these rules to be subject to a condition, and the fulfillment of the condition is in issue, the issue is to be determined by the judge, and he shall indicate to the parties which one has the burden of producing evidence and the burden of proof on such issue as implied by the rule under which the question arises. The judge may hear and determine such matters out of the presence or hearing of the jury, except that on the admissibility of a confession the judge, if requested, shall hear and determine the question out of the presence and hearing of the jury. But this rule shall not be construed to limit the right of a party to introduce before the jury evidence relevant to weight or credibility.

"matter" is more suitable than "facts and data" to assure that every conceivable basis for an opinion is included.

Subdivision (1). This subdivision deals with the opinion testimony of a witness who is not testifying as an expert. Paragraph (a) permits such a witness to give his opinion only if the opinion is based on his own perception. This is a restatement of 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). Paragraph (b) permits the witness to give such opinions as "are helpful to a clear understanding of his testimony or to the determination of the fact in issue." This, too, is a restatement of existing California law. See the Study, *infra* at 931-935.

Subdivision (2). Subdivision (2) deals with opinion testimony of a witness testifying as an expert; it sets the standard for admissibility of such testimony. Although the language of the URE subdivision has been changed, much of its substance is retained in the subdivision as revised.

Paragraph (a) of this subdivision relates to *when* an expert may give his opinion upon a subject that is within the scope of his expertise. It provides a rule substantially the same as the 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. See *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).

Paragraph (b) of this subdivision deals with the difficult problem of stating 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 be-

cause 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 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); *People v. Dunn*, 46 Cal.2d 639, 297 P.2d 964 (1956) (speculative or conjectural data); *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 witnesses; and it seems likely that the jury would be as able to evaluate the statements of others in light of the physical facts, as interpreted by the officer, as would the officer himself.

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 paragraph (b) of subdivision (2), which states a general rule that is applicable whenever expert opinion is offered on a given subject.

Paragraph (b) provides that 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 decisional or statutory 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 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). The revised subdivision 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, the rule stated in paragraph (b) 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.*, CODE CIV. PROC. § 1845.5 (valuation expert in eminent domain cases). The revised rule 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.

Subdivision (3). Under subdivision (3) of the revised rule, 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 ---, ---, 34 Cal. Rptr. 368, 375-376 (1963), and cases cited therein. If a witness' opinion is stricken because of reliance upon improper considerations, subdivision (3) will assure the witness the opportunity to express his opinion after excluding from his consideration the matter determined to be improper.

Subdivision (4). Subdivision (4) of the revised rule provides that opinion evidence is not inadmissible simply because it relates to an ultimate issue. This subdivision is declarative of existing law even though some of the older cases indicated that an opinion could not be received on an ultimate issue. *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).

Rule 57. Statement of Basis of Opinion

RULE 57. (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.*

(2) ~~The judge may require that a witness~~ Before testifying in terms the form of an opinion ~~or inference~~, the witness shall first be ~~first~~ examined concerning the ~~data~~ matter upon which the opinion ~~or inference~~ is ~~founded~~ based unless the judge in his discretion dispenses with this requirement.

Comment

Subdivision (1). Subdivision (1) of the revised rule, together with subdivision (1) of Proposed Rule 58.5, *infra*, is a restatement of the provisions of Code of Civil Procedure Section 1872.

Subdivision (2). This subdivision requires a witness to give the basis for his opinion before stating it, but also permits the judge in his discretion to dispense with this requirement. 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. *Eisenmayer v. Leonardt*, 148 Cal. 596, 84 Pac. 43 (1906); *Lemley v. Doak Gas Engine Co.*, *supra*. No California case has been found in which a witness was permitted to state his opinion based on facts not observed by him without also specifying, either generally or in detail, the assumed facts upon which his opinion is based, *i.e.*, stating such facts hypothetically for the purpose of allowing the trier of fact to weigh the applicability of the opinion in light of the existence or nonexistence of such facts. See *Lemley v. Doak Gas Engine Co.*, *supra*. Under revised subdivision (2), the requirement that the facts upon which an opinion is based must be stated before giving an opinion is tempered with the discretionary authority of the judge to dispense with this requirement in appropriate cases.

Rule 57.5. Expert Opinion Based on Opinion or Statement of Another

RULE 57.5. (1) 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 as a witness by the adverse party and examined as if under cross-examination concerning the subject matter of his opinion or statement.

(2) Nothing in this rule 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.

(3) An expert opinion otherwise admissible is not inadmissible because it is based on the opinion or statement of a person who is unavailable as a witness.

Comment

Proposed Rule 57.5 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 Revised Rule 56 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. And, 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.

Proposed Rule 57.5 will permit 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.

Rule 58. Hypothesis For Expert Opinion Not Necessary

~~RULE 58. Questions calling for the opinion of an expert witness need not be hypothetical in form unless the judge in his discretion so requires; but the witness may state his opinion and reasons therefor without first specifying data on which it is based as an hypothesis or otherwise; but upon cross examination he may be required to specify such data.~~

Comment

The Commission disapproves URE Rule 58 because it fails to differentiate between the varying bases upon which expert opinion may be founded, some of which may require the use of hypothetical questions. See discussion of this distinction in the Comment to Proposed Rule 55.7, *supra*. Where an expert's opinion is based upon his personal knowledge, the judge should have no discretion to require that his examination be conducted only by hypothetical questions; the witness' testimony within the scope of his special expertise is no different in

form from the testimony of any other witness. On the other hand, where an expert's opinion is based upon facts assumed by him to exist, it must be made clear from his testimony that the facts upon which his opinion is based are only assumed to exist. Hence, examination of the expert witness by hypothetical questions may be essential, it being in the judge's discretion to regulate the extent to which the hypothetical nature of the assumed facts needs to be shown in the form of the questions asked. *Graves v. Union Oil Co.*, 36 Cal. App. 766, 173 Pac. 618 (1918). See *Estate of Collin*, 150 Cal. App.2d 702, 310 P.2d 663 (1957) (hearing denied). Thus, the form of the expert's testimony and the questions asked of him will necessarily depend upon whether or not his opinion is based upon facts known to him. See Revised Rule 56(2) and the Comment thereto, *supra*.

The last clause of URE Rule 58 has been deleted because cross-examination of an expert witness is covered in Proposed Rule 58.5, *infra*.

Rule 58.5. Cross-Examination of Expert Witness

RULE 58.5. (1) *Subject to subdivision (2), a witness testifying as an expert may be cross-examined to the same extent as any other witness and, in addition, may be fully cross-examined as to his qualifications and as to the subject to which his expert testimony relates.*

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

Comment

Subdivision (1). This subdivision restates the substance of the last clause of Code of Civil Procedure Section 1872 and supersedes the last clause of URE Rule 58. This subdivision states the existing California law. "Once an expert offers his opinion, however, he exposes himself to the kind of inquiry which ordinarily would have no place in the cross-examination of a factual witness. The expert invites investigation into the extent of his knowledge, the reasons for his opinion including facts and other matters upon which it is based (Code Civ. Proc., § 1872), and which he took into consideration; and he may be 'subjected to the most rigid cross examination' concerning his qualifications, and his opinion and its sources [citation omitted]." *Hope v. Arrowhead & Puritas Waters, Inc.*, 174 Cal. App.2d 222, 230, 344 P.2d 428, 433 (1959).

In addition to permitting full cross-examination of an expert witness in regard to his qualifications as an expert and such matters as the reasons for any opinion expressed and the matters upon which it is based, subdivision (1) of the proposed rule provides that an expert witness may be cross-examined to the same extent as any other witness. In this respect, the substance of Revised Rules 20-22 is made applicable to expert witnesses. See *Tentative Recommendation and a Study Relating to the Uniform Rules of Evidence (Article IV. Witnesses)*; 6 CAL. LAW REVISION COMM'N, REP., REC. & STUDIES 701, 713-721 (1964).

Subdivision (2). Subdivision (2) clarifies a matter concerning which there is considerable confusion in the California decisions. It is at least clear that an expert witness may be cross-examined in regard to the same books relied upon by him in forming or arriving at his opinion. *Lewis v. Johnson*, 12 Cal.2d 558, 86 P.2d 99 (1939); *People v. Hooper*, 10 Cal. App.2d 332, 51 P.2d 1131 (1935). Dictum in some decisions indicates that the cross-examiner is strictly limited to such books as those relied upon by the expert witness. *Baily v. Kreutzmann*, 141 Cal. 519, 75 Pac. 104 (1904). Other cases, however, suggest that the cross-examiner is not thus limited, and that an expert witness may be cross-examined in regard to any books of the same character as the books relied upon by the expert in forming his opinion. *Griffith v. Los Angeles Pac. Co.*, 14 Cal. App. 145, 111 Pac. 107 (1910). See *Salgo v. Leland Stanford etc. Bd. Trustees*, 154 Cal. App.2d 560, 317 P.2d 170 (1957); *Gluckstein v. Lipsett*, 93 Cal. App.2d 391, 209 P.2d 98 (1949) (reviewing California authorities). There may be a limitation on the permissible scope of such cross-examination, however, restricting the cross-examiner to the use of such books as "are not in harmony with the testimony of the witness." *Griffith v. Los Angeles Pac. Co.*, *supra*. Language in several earlier cases indicated that the cross-examiner also could use books to test the competency of an expert witness, whether or not the expert relied upon books in forming his opinion. *Fisher v. Southern Pac. R.R.*, 89 Cal. 399, 26 Pac. 894 (1891); *People v. Hooper*, 10 Cal. App.2d 332, 51 P.2d 1131 (1935). More recent decisions indicate, however, that the opinion of an expert witness must be based either generally or specifically upon books before the expert can be cross-examined concerning them. *Lewis v. Johnson*, 12 Cal.2d 558, 86 P.2d 99 (1939); *Salgo v. Leland Stanford etc. Bd. Trustees*, 154 Cal. App.2d 560, 317 P.2d 170 (1957); *Gluckstein v. Lipsett*, 93 Cal. App.2d 391, 209 P.2d 98 (1949). The conflicting California cases are gathered in Annot., 60 A.L.R.2d 77 (1958).

Subdivision (2) of Proposed Rule 58.5 limits the cross-examiner to those publications that have been referred to, considered, or relied upon by the expert in forming his opinion. If an expert has relied upon a particular book, it is necessary to permit cross-examination in regard to that book to show whether the expert correctly read, interpreted, and applied the portions he relied on. Similarly, it is an important adjunct of cross-examination technique to question an expert witness as to those publications referred to or considered by him in forming his opinion. An expert's reasons for not relying upon particular publications that were considered by him may reveal important information bearing upon the credibility of his testimony. However, a broader rule—one that would permit cross-examination on works not referred to, considered, or relied upon by the expert—would permit the cross-examiner to place the opinions of absentee authors before the jury without the safeguard of cross-examination. Although the court would be required upon request to caution the jury that the statements read are not to be considered evidence of the truth of the propositions stated, there is a danger that at least some jurors might rely on the author's statements for this purpose. Yet, the statements in the book might be based on inadequate background research, might be subject to unexpressed qualifications that would be applicable in the case before the

court, or might be unreliable for some other reason that could be revealed if the author were subject to cross-examination. Therefore, such statements should not be permitted to be brought before the jury under the guise of testing the competence of another expert.

Rule 59. Appointment of Experts

RULE 59. If the judge determines that the appointment of expert witnesses in an action may be desirable, he shall order the parties to show cause why expert witnesses should not be appointed; and after opportunity for hearing may request nominations and appoint one or more such witnesses. If the parties agree in the selection of an expert or experts, only those agreed upon shall be appointed. Otherwise the judge may make his own selection. An expert witness shall not be appointed unless he consents to act. The judge shall determine the duties of the witness and inform him thereof at a conference in which the parties shall have an opportunity to participate. A witness so appointed shall advise the parties of his findings, if any, and may thereafter be called to testify by the judge or any party. He may be examined and cross-examined by each party. This rule shall not limit the parties in calling expert witnesses of their own selection and at their own expense.

Comment

URE Rule 59 has been disapproved because the existing California law relating to the appointment of expert witnesses is superior to the comparable provisions of the URE contained in Rules 59 and 60. CODE CIV. PROC. § 1871; see the Study, *infra* at 946-949.

Rule 60. Compensation of Expert Witnesses

RULE 60. Expert witnesses appointed by the judge shall be entitled to reasonable compensation in such sum only as the judge may allow. Except as may be otherwise provided by statute of this state applicable to a specific situation, the compensation shall be paid (a) in a criminal action by the [county] in the first instance under order of the judge and charged as costs in the case; and (b) in a civil action by the opposing parties in equal portions to the clerk of the court at such time as the judge shall direct, and charged as costs in the case. The amount of compensation paid to an expert witness not appointed by the judge shall be a proper subject of inquiry as relevant to his credibility and the weight of his testimony.

Comment

URE Rule 60 has been disapproved because the existing California law relating to the appointment and compensation of expert witnesses is superior to the comparable provisions of the URE contained in Rules 59 and 60. CODE CIV. PROC. § 1871; see the Study, *infra* at 946-949.

The last sentence of Rule 60 has been restated in Revised Rule 61, *infra*.

Rule 61. Credibility of Expert Witness

RULE 61. (1) The fact of the appointment of an expert witness by the judge may be revealed to the trier of ~~the facts~~ *fact* as relevant to the credibility of such witness and the weight of his testimony.

(2) *The compensation and expenses paid or to be paid to an expert witness not appointed by the judge is a proper subject of inquiry as relevant to his credibility and the weight of his testimony.*

Comment

Subdivision (1) of Revised Rule 61 states a rule recognized in the California decisions. *People v. Cornell*, 203 Cal. 144, 263 Pac. 216 (1928); *People v. Strong*, 114 Cal. App. 522, 300 Pac. 84 (1931).

The substance of subdivision (2) of Revised Rule 61 originally appeared in the URE as the last sentence of Rule 60. It is a restatement of the existing California law applicable in condemnation cases. CODE CIV. PROC. § 1256.2. Whether the California law in other fields of litigation is as stated in Revised Rule 61 is uncertain. At least one California case has held that an expert could be asked whether he was being compensated, but could not be asked the amount of the compensation. *People v. Tomalty*, 14 Cal. App. 224, 111 Pac. 513 (1910). However, the decision may have been based on the discretionary right of the trial judge to curtail collateral inquiry.

In any event, the rule enunciated in Section 1256.2 and in Revised Rule 61 is a desirable rule. The tendency of some experts to become advocates for the party employing them has been recognized. 2 WIGMORE, EVIDENCE § 563 (3d ed. 1940); Friedenthal, *Discovery and Use of an Adverse Party's Expert Information*, 14 STAN. L. REV. 455, 485-486 (1962). The jury can better appraise the extent to which bias may have influenced an expert's opinion if it is informed as to the amount of his fee—and, hence, the extent of his obligation to the party calling him.

AMENDMENTS AND REPEALS OF EXISTING STATUTES

Set forth below are three provisions in the Code of Civil Procedure that should be revised or repealed in light of the Commission's tentative recommendation concerning Article VII (Expert and Other Opinion Testimony) of the Uniform Rules of Evidence. The reason for the suggested revision or repeal is given after each section. References to the Uniform Rules of Evidence are to the Uniform Rules as revised by the Commission.

Section 1256.2 provides:

1256.2. In any condemnation proceeding, either party shall be allowed to question any witness as to all expenses and fees paid or to be paid to such witness by the other party.

This section should be repealed. It is superseded by Rule 61(2).

Subdivision 9 of Section 1870 should be revised to read:

1870. ~~FACTS WHICH MAY BE PROVED ON TRIAL:~~ In conformity with the preceding provisions, evidence may be given upon a trial of the following facts:

* * * * *

9. The opinion of a witness respecting the identity or handwriting of a person, when he has knowledge of the person or handwriting; ~~his opinion on a question of science, art, or trade, when he is skilled therein;~~

The deleted language of subdivision 9 of Section 1870 is superseded by the provisions of Rule 56.

Section 1872 provides:

1872. Whenever an expert witness gives his opinion, he may, upon direct examination, be asked to state the reasons for such opinion, and he may be fully cross-examined thereon by opposing counsel.

This section should be repealed. It is superseded by Rules 57(1) and 58.5(1).



A STUDY RELATING TO THE UNIFORM RULES OF EVIDENCE—EXPERT AND OTHER OPINION TESTIMONY *

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* This study was made at the request of the California Law Revision Commission by Professor James H. Chadbourn, formerly of the U.C.L.A. Law School, now of the Harvard Law School. The opinions, conclusions, and recommendations contained herein are entirely those of the author and do not necessarily represent or reflect the opinions, conclusions, or recommendations of the Law Revision Commission.

INTRODUCTION

The California Law Revision Commission has been authorized to make a study to determine whether the law of evidence in this State should be revised to conform to the Uniform Rules of Evidence drafted by the National Conference of Commissioners on Uniform State Laws and approved by it at its 1953 annual conference.¹

The present study, made at the request of the Law Revision Commission, is directed to the question whether California should adopt the provisions of the Uniform Rules of Evidence (hereinafter sometimes designated as the "URE") relating to expert and other opinion testimony—i.e., Rules 56 through 61 and other related provisions of the Uniform Rules. The study undertakes both to point up what changes would be made in the California law of evidence if these URE provisions were adopted and also to subject these provisions to an objective analysis designed to test their utility and desirability. In some instances, modifications of the provisions of the Uniform Rules are suggested. The problem of incorporating these provisions of the Uniform Rules into the California codes is also discussed. Similar studies of the other Uniform Rules are contemplated.

¹ Cal. Stats. 1956, Res. Ch. 42, p. 263.

The Uniform Rules are the subject of the following law review symposia: *Institute on Evidence*, 15 ARK. L. REV. 7 (1960-61); *Panel on Uniform Rules of Evidence*, 8 ARK. L. REV. 44 (1953-54); *Symposium—Minnesota and the Uniform Rules of Evidence*, 40 MINN. L. REV. 297 (1956); *Comment, A Symposium on the Uniform Rules of Evidence and Illinois Evidence Law*, 49 NW. U. L. REV. 481 (1954); *The Uniform Rules of Evidence*, 10 RUTGERS L. REV. 479 (1956); Chadbourn, *The "Uniform Rules" and the California Law of Evidence*, 2 U.C.L.A. L. REV. 1 (1954).

See also Brooks, *Evidence*, 14 RUTGERS L. REV. 390 (1960); Cross, *Some Proposals for Reform in the Law of Evidence*, 24 MODERN L. REV. 32 (1961); Gard, *Why Oregon Lawyers Should Be Interested in the Uniform Rules of Evidence*, 37 ORE. L. REV. 287 (1958); Levin, *The Impact of the Uniform Rules of Evidence on Pennsylvania Law*, 26 PA. B. ASS'N Q. 216 (1955); McCormick, *Some High Lights of the Uniform Evidence Rules*, 33 TEXAS L. REV. 559 (1955); Morton, *Do We Need a Code of Evidence?*, 38 CAN. B. REV. 35 (1960); Nokes, *Codification of the Law of Evidence in Common-Law Jurisdictions*, 5 INT. & COMP. L. Q. 347 (1956); Nokes, *American Uniform Rules of Evidence*, 4 INT. & COMP. L. Q. 48 (1955).

The Uniform Rules also have been scrutinized by committees appointed by the Supreme Courts of New Jersey and Utah. See REPORT OF THE COMMITTEE ON THE REVISION OF THE LAW OF EVIDENCE TO THE SUPREME COURT OF NEW JERSEY (1955) and FINAL DRAFT OF THE RULES OF EVIDENCE (1959), the report of the Utah Committee on the Uniform Rules of Evidence. A Commission appointed by the New Jersey Legislature also has studied the Uniform Rules. See REPORT OF THE COMMISSION TO STUDY THE IMPROVEMENT OF THE LAW OF EVIDENCE (1956). In 1960, the New Jersey Legislature enacted a revised version of the Privileges Article of the Uniform Rules and granted the New Jersey Supreme Court the power to adopt rules dealing with the admission or rejection of evidence. N.J. Laws 1960, Ch. 52, p. 452 (N.J. REV. STAT. §§ 2A:84A-1 to 2A:84A-49). Following this enactment, the New Jersey Supreme Court appointed another committee to study the Uniform Rules. The report of this committee in 1963 (REPORT OF THE NEW JERSEY SUPREME COURT COMMITTEE ON EVIDENCE (March 1963)) contains a comprehensive analysis of the Uniform Rules and many worthy suggestions for improvements.

The new evidence article in the Kansas Code of Civil Procedure, enacted in 1963, following a report by the Kansas Judicial Council (see *Recommendations as to Rules of Civil Procedure, Process, Rules of Evidence and Limitations of Actions* in KANSAS JUDICIAL COUNCIL BULLETIN (Nov. 1961)), is substantially the same as the Uniform Rules. See Kan. Laws 1963, Ch. 303, Art 4, §§ 60-401 through 60-470, pp. 670-692.

Because the rules relating to expert and other opinion testimony are closely integrated, they are not discussed in numerical sequence. Rather, related rules are gathered together under subject matter headings that are considered appropriate for the problems discussed.

In considering these rules, it should be kept in mind that Rule 7² proclaims, *inter alia*, that "all relevant evidence is admissible" except "as otherwise provided in these Rules." (Emphasis added.) Thus, it is contemplated that where the Uniform Rules are adopted, all pre-existing exclusionary rules would be superseded. Only the Uniform Rules would be consulted as the exclusive source of law excluding relevant evidence. If nothing in the Uniform Rules permits or requires the exclusion of an item of relevant evidence, it is to be admitted, notwithstanding any pre-existing law which required its exclusion,³ for Rule 7 wipes from the slate all prior exclusionary rules. The slate remains clean, except to the extent that some other rule or rules write restrictions upon it.

² Rule 7 of the Uniform Rules provides: "Except as otherwise provided in these Rules, (a) every person is qualified to be a witness, and (b) no person has a privilege to refuse to be a witness, and (c) no person is disqualified to testify to any matter, and (d) no person has a privilege to refuse to disclose any matter or to produce any object or writing, and (e) no person has a privilege that another shall not be a witness or shall not disclose any matter or shall not produce any object or writing, and (f) all relevant evidence is admissible."

³ However, evidence inadmissible on constitutional grounds would, of course, remain so under the Uniform Rules. The comment on Rule 7 states: "Illegally acquired evidence may be inadmissible on constitutional grounds—not because it is irrelevant. Any constitutional questions which may arise are inherent and may, of course, be raised independently of this rule."

EXPERT AND OTHER OPINION TESTIMONY—GENERALLY

Rules 56 to 61, constituting Article VII of the Uniform Rules of Evidence, deal with expert and other opinion testimony. The text of these rules is as follows:

RULE 56. *Testimony in Form of Opinion.*

(1) If the witness is not testifying as an expert his testimony in the form of opinions or inferences is limited to such opinions or inferences as the judge finds (a) may be rationally based on the perception of the witness and (b) are helpful to a clear understanding of his testimony or to the determination of the fact in issue.

(2) If the witness is testifying as an expert, testimony of the witness in the form of opinions or inferences 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 (b) within the scope of the special knowledge, skill, experience or training possessed by the witness.

(3) Unless the judge excludes the testimony he shall be deemed to have made the finding requisite to its admission.

(4) Testimony in the form of opinions or inferences otherwise admissible under these rules is not objectionable because it embraces the ultimate issue or issues to be decided by the trier of the fact.

RULE 57. *Preliminary Examination.* The judge may require that a witness before testifying in terms of opinion or inference be first examined concerning the data upon which the opinion or inference is founded.

RULE 58. *Hypothesis for Expert Opinion Not Necessary.* Questions calling for the opinion of an expert witness need not be hypothetical in form unless the judge in his discretion so requires, but the witness may state his opinion and reasons therefor without first specifying data on which it is based as an hypothesis or otherwise; but upon cross examination he may be required to specify such data.

RULE 59. *Appointment of Experts.* If the judge determines that the appointment of expert witnesses in an action may be desirable, he shall order the parties to show cause why expert witnesses should not be appointed, and after opportunity for hearing may request nominations and appoint one or more such witnesses. If the parties agree in the selection of an expert or experts, only those agreed upon shall be appointed. Otherwise the judge may make his own selection. An expert witness shall not be appointed unless he consents to act. The judge shall determine the duties of the witness and inform him thereof at a conference in which the parties shall have an opportunity to participate. A witness so appointed shall advise the parties of his findings, if any, and may thereafter be called to testify by the judge or any party.

He may be examined and cross-examined by each party. This rule shall not limit the parties in calling expert witnesses of their own selection and at their own expense.

RULE 60. *Compensation of Expert Witnesses.* Expert witnesses appointed by the judge shall be entitled to reasonable compensation in such sum only as the judge may allow. Except as may be otherwise provided by statute of this state applicable to a specific situation, the compensation shall be paid (a) in a criminal action by the [county] in the first instance under order of the judge and charged as costs in the case, and (b) in a civil action by the opposing parties in equal portions to the clerk of the court at such time as the judge shall direct, and charged as costs in the case. The amount of compensation paid to an expert witness not appointed by the judge shall be a proper subject of inquiry as relevant to his credibility and the weight of his testimony.

RULE 61. *Credibility of Appointed Expert Witness.* The fact of the appointment of an expert witness by the judge may be revealed to the trier of the facts as relevant to the credibility of such witness and the weight of his testimony.

The following distinctions may prove helpful in evaluating these rules.

Distinction Between Opinion Rule and Knowledge Rule

The requirement that a witness must possess personal knowledge stems from a common law tradition having its roots in medieval law.¹ Thus for many centuries it has been required that a witness who testifies to a fact which can be perceived only by the senses must have had an opportunity to perceive and must have actually perceived the fact.²

Wigmore³ and other scholars⁴ have pointed out that in the 17th and 18th centuries such judges as Coke and Mansfield made a practice of referring to a prohibition against the statement by a witness of his so-called "opinion." Scholarly researches (drawing upon such sources as, for example, Dr. Samuel Johnson's famous "Dictionary") make it clear, however, that in 17th-18th century usage this term "opinion" meant a statement not based upon knowledge.⁵ In these centuries the rule against opinions was, therefore, merely an alternative statement of the rule requiring knowledge.⁶

Today, however, the term "opinion" is used in a different sense. As McCormick points out, we "use the word as denoting a belief, inference or conclusion without suggesting that it is well- or ill-founded."⁷

¹ MCCORMICK, EVIDENCE § 11 (1954) [hereinafter cited as MCCORMICK].

² MCCORMICK § 10.

³ 7 WIGMORE, EVIDENCE § 1917 (3d ed. 1940) [hereinafter cited as WIGMORE].

⁴ MCCORMICK § 11; KING & PILLINGER, OPINION EVIDENCE IN ILLINOIS (1942).

⁵ MCCORMICK § 11.

⁶ Code of Civil Procedure Section 1845 seems to use the term "opinion" in the 17th-18th century sense of a statement not based on knowledge. The section states that a witness must testify from knowledge except "in those few express cases in which his opinions or inferences . . . are admissible." In thus stating the admissibility of opinion testimony as an exception to the knowledge requirement, the section suggests that opinion testimony is a statement not based on knowledge.

⁷ MCCORMICK § 11.

That is to say, although a given statement is based upon thorough knowledge and cerebration, it may nevertheless be proper in the current usage of the term to classify such statement as "opinion."

In modern times, therefore, the "knowledge" rule and the "opinion" rule deal with different subject matters; the one rule is no longer a mere alternative statement of the other. This is manifested in the Uniform Rules. Thus, the "knowledge" requirement is set forth as follows in Rule 19: "As a prerequisite for the testimony of a witness on a relevant or material matter, there must be evidence that he has personal knowledge thereof" The "opinion" rule—Rule 56—sets forth *further* prerequisites for the testimony of a witness. These prerequisites, however, are different from those of the "knowledge" rule. To be sure, an offered item of testimony must pass the gauntlet of both rules to become admissible. It is, however, perfectly possible that an offered item may fully satisfy the "knowledge" rule and yet run afoul of the "opinion" rule. For example, suppose an eyewitness to a collision between P's car and D's car is offered to testify that "D was reckless." The testimony offered is, of course, inadmissible. However, the vice in the offer is not want of knowledge (*i.e.*, an infraction of Rule 19); rather, the inadmissibility results from the "opinion" rule (Rule 56) and from that alone.

On the other hand, if a witness proposes to testify that "D was driving 40 miles per hour," and it appears that the witness was locked in a soundproof, windowless room at the time of the collision, but claims to be possessed of powers of extrasensory perception, the offered testimony does not meet the "knowledge" requirement. This being so, there is no necessity to inquire whether the requirements of the "opinion" rule are or are not met.⁸

The above remarks are offered to point out preliminarily that whatever the scope of Rule 56 may be, the rule does not affect in any way the "knowledge" rule (Rule 19) to which Rule 56 is clearly subject.

Distinction Between Statements of "Fact" and of "Opinion"—A Difference in Degree, Not a Dichotomy

Later in this study, there is occasion to refer to cases applying the "opinion" rule.⁹ Typically, such cases use the expressions "statements of facts" and "statements of opinion." Preliminarily, it is well to repeat the point that has often been made about these expressions, namely, that the difference between the two classes of statements is not a dichotomy, but is a mere difference in degree. McCormick elucidates this point in the following passage:

This classic formula ["that witnesses generally must give the 'facts' and not their 'inferences, conclusions, or opinions'"], based as it is on the assumption that "fact" and "opinion" stand in contrast and hence are readily distinguishable, has proven the clumsiest of all the tools furnished the judge for regulating the examination of witnesses. It is clumsy because its basic assumption

⁸ If the inquiry were made, however, it would be found that under Rule 56(1)(a) only such inferences or opinions of the witness as "may be rationally based on [his] perception" are admissible. Inferences based on so-called "extrasensory" perception scarcely meet the Rule 56(1)(a) requirement.

⁹ *E.g.*, see the text, *infra* at 933.

is an illusion. The words of the witness by no possibility can "give" or recreate the "facts," that is, the objective situations or happenings about which the witness is testifying. Drawings, maps, photographs, even motion pictures, would be only a remote and inaccurate portrayal of those "facts" and how much more distant approximations of reality are the word pictures of oral or written testimony. There is no conceivable statement however specific, detailed and "factual," that is not in some measure the product of inference and reflection as well as observation and memory. The difference between the statement, "He was driving on the left-hand side of the road" which would be classed as "fact" under the rule, and "He was driving carelessly" which would be called "opinion" is merely a difference between a more concrete and specific form of descriptive statement and a less specific and concrete form. The difference between so-called "fact," then, and "opinion," is no difference between opposites or contrasting absolutes, but a mere difference in degree with no recognizable line to mark the boundary. [Footnote omitted.]¹⁰

¹⁰ MCCORMICK § 11.

LAY OPINION TESTIMONY

Rule 56(1)

Subdivision (1) of Rule 56 deals with lay "testimony in the form of opinions or inferences," stating the conditions under which such testimony is admissible.

In California today, much lay "testimony in the form of opinions or inferences" is admitted.¹ On the other hand, such testimony often is excluded.² What criterion is applied in California to determine what to accept and what to exclude? How, if at all, does the Rule 56 criterion differ?

In *Holland v. Zollner*,³ which was an action to set aside a deed for alleged incompetence of the grantor (one Holland), a Mrs. French testified that she met Holland at a health resort; she then described his conduct as follows:

That at table he behaved peculiarly; would grab all the milk in reach, and drink four or five glasses of it in succession as quickly as he could; would eat enormously at times, and then scarcely at all; would throw food offered him away; push things across the table. Was at times irritable to his wife and daughter, and at others unnaturally pleasant and agreeable, and at times would look so wild that his eyes would almost stand out of his head. Would shovel food into his mouth, and swallow it without chewing it. That on one occasion witness spoke to him, whereupon he stared, and looked so wild that she left, and was glad to get away; and other testimony tending in the same direction.⁴

Counsel for plaintiff then asked Mrs. French this question: "What was the appearance of this man at that time with reference to his being rational or irrational?" Defendant's objection having been overruled, the witness answered: "Irrational." Upon appeal, it was held that the court did not err in overruling the defendant's objection. The court reasoned as follows:

As a general rule the opinions of non-expert witnesses are not admissible in evidence. They must state facts and not opinions deduced from the facts, leaving to the jury, whose province it is, to draw the proper inference from the facts when stated.

To this general rule there are a number of exceptions, as clearly defined and as thoroughly established as the rule itself. One only of these exceptions need be mentioned here; it is as follows: "The opinions of ordinary witnesses derived from observation are admissible in evidence, when, from the nature of the subject under

¹ See cases collected in MCBAIN, CALIFORNIA EVIDENCE MANUAL §§ 195-201 (1945) [hereinafter cited as MCBAIN]. See also McCoid, *Opinion Evidence and Expert Witnesses*, 2 U.C.L.A. L. REV. 356 (1955) [hereinafter cited as McCoid].

² See cases collected in MCBAIN §§ 192-194. See also McCoid.

³ 102 Cal. 633, 36 Pac. 930 (1894).

⁴ *Id.* at 635-636, 36 Pac. at 931.

investigation, no better evidence can be obtained.” [Citation omitted.]

It is said the exception quoted applies to questions of identity, handwriting, quantity, value, weight, measure, time, distance, velocity, form, size, age, strength, heat, cold, sickness, and health; questions also concerning various mental and moral aspects of humanity such as disposition and temper, anger, fear, excitement, intoxication, veracity, general character, etc. [Citation omitted.]

The reason underlying the exception is that, from the very nature of the subject in issue, it cannot be stated or described in such language as will enable persons not eyewitnesses to form an accurate judgment in regard to it. [Citation omitted.]

The paucity of language, and the incompetency of witnesses to describe graphically the photograph left upon the mind by observed facts, renders every effort to convey to a jury an adequate conception of the ultimate fact futile except by announcing the conclusion in their own minds.

A witness may describe a person as having gray hair, a wrinkled face, an uncertain gait, and by such other facts as indicate advanced years, and a jury, from such statement, could determine nothing as to his exact age, beyond the conclusion that he was an old man; yet the witness who has detailed all the facts of which he was capable can give an opinion as to the age of the man he has described, which is almost exactly the truth.

We identify men. We cannot tell how, because expressions of the face, gestures, motions, and even form, are beyond the power of accurate description. Love, hatred, sorrow, joy, and various other mental and moral operations, find outward expression, as clear to the observer as any fact coming to his observation, but he can only give expression to the fact by giving what to him is the ultimate fact, and which, for want of a more accurate expression, we call opinion.

To say that a man acts *rational* or *irrational* is but to describe an outward manifestation drawn from observed facts. It is the last analysis, the ultimate fact, deduced from evidentiary facts coming under observation, but so transitory and evanescent as to be like drunkenness, easy of detection, and difficult of explanation.

Such conduct is not so much a matter of judgment as of observation. The conclusion is reached not as a sequence of knowledge in reference to occult mental conditions, but as a result of observed facts patent to all, concerning which the non-expert is as competent to judge as the trained specialist.

No one will doubt but the facts in relation to the conduct of Holland were admissible in evidence, and that could the witnesses have explained every look, gesture, expression, and motion, it would have been competent to do so.

All that the exception we have quoted seeks to do is, in such cases, by reason of the impossibility of giving form to all these varied manifestations, to permit the witness from necessity to produce the result of the manifestation as a whole.⁵

⁵ *Id.* at 637-639, 36 Pac. at 931-932.

The pith of this reasoning seems to be that, in order to portray in its entirety the whole picture that was in the mind of Mrs. French, it was absolutely necessary to permit her to state her inference (or opinion or conclusion) that Holland was "irrational." Although she could (and did) specify some items and aspects of Holland's conduct which contributed to her mental picture, it was absolutely impossible for her to specify and describe *all* of the factors that entered into her overall mental impression. This being so, in order for Mrs. French to state *all* of her knowledge, it was essential to let her state part of it by the term "irrational," that term thereby covering those parts of her knowledge which were incapable of specification and description.

The case illustrates what McCormick calls the "older formula" or the test of "strict necessity" as the criterion for permitting the witness to state his inference (or opinion or conclusion).⁶ Under this formula, the witness (as in the case above) must specify details and circumstances up to the point beyond which further specification is impossible. If his knowledge has not been exhausted by this process of itemization, he may then complete the portrayal of his knowledge by expression in terms of opinion. This view, says McCormick, is today the "orthodox" view of most appellate courts. McCormick then observes that:

The actual practice in the trial of cases is becoming, if indeed it has not always been, far more liberal than the older formulas, and might more accurately be reflected in a formula which would sanction the admission of opinions on grounds of "expediency" or "convenience" rather than "necessity." [Footnote omitted.]⁷

In keeping with McCormick's suggestion, the criterion of Rule 56(1) is not "strict necessity," but "helpfulness." Under Rule 56(1), the test to be applied is this: Is the testimony in the form of opinion or inference "helpful to a clear understanding of [the testimony of the witness] or to the determination of the fact in issue"?

Is it clear, then, that by adopting Rule 56, California law would be changed by shifting from the criterion of "necessity" to the criterion of "helpfulness"? This would be clear only if it could be confidently stated that California appellate courts have consistently adhered to the formula of "strict necessity." That, however, cannot be said. Neither the results of the cases nor the language used in deciding them indicates that California courts have consistently stated and applied the formula of "strict necessity."⁸ Indeed, in 1909, in *Nolan v. Nolan*⁹ (a case which, in subsequent years, has been frequently cited¹⁰), the Supreme Court summarized the "opinion" rule in a formula which is diametrically opposed to the "necessity" formula.

It is further insisted by appellants that the court erred to their injury in overruling their objections to certain questions propounded to plaintiff and to his daughter Mrs. O'Neil as follows:—

⁶ MCCORMICK § 11.

⁷ *Ibid.*

⁸ See MCBAIN §§ 192-201. See also MCCOY.

⁹ 155 Cal. 476, 101 Pac. 520 (1909).

¹⁰ *People v. Wilson*, 25 Cal.2d 341, 349, 153 P.2d 720, 725 (1944); *Norman v. Tully*, 149 Cal. App.2d 530, 534, 308 P.2d 875, 878 (1957); *Whitfield v. Debrincat*, 50 Cal. App.2d 389, 396, 123 P.2d 591, 594 (1942); *Dobbie v. Pacific Gas & Elec. Co.*, 95 Cal. App. 781, 792, 273 Pac. 630, 635 (1928).

"Q. (Asked of plaintiff) Is this note not your own property?"

"A. It is.

"Q. (Asked of Mrs. O'Neil) Did you ever own it (the note)?"

"A. I never did.

"Q. Do you know who owns it?"

"A. My father does."

* * * * *

It is argued against the first three questions that they were improper, in calling for the opinion or conclusion of the witness and not for the facts. . . . Upon the first proposition the industry of counsel has collated numerous cases where appellate courts have discussed the impropriety of permitting the opinion of witnesses to be substituted for facts in cases not calling for expert evidence. A review of these cases would not be profitable. Each one depends upon its own particular circumstances. Of course, there is no general rule of evidence which permits a witness to substitute opinions for facts. Such a rule would lead to the utter confusion and confounding of the administration of justice. The true rule is simple and, so far as this state is concerned, well established: to permit, or to refuse to permit, such questions is a matter resting largely in the discretion of the trial court, which discretion will not here be reviewed unless it is made plain that the court's ruling in admitting the evidence has worked an injury. Generally speaking, the admission of the answer to such a question cannot work an injury where a fair latitude upon cross-examination is allowed, for under such cross-examination the facts are certain to be adduced. It will be found frequently that an appellate tribunal upholds the rulings of the trial court in sustaining an objection to such questions, but the cases are far less numerous where it has felt compelled to reverse the inferior tribunal for permitting them.¹¹

Accepting as sound the above statement of the "true rule" in California, it requires no argument to show that the "helpfulness" principle of Rule 56 is in accord with this "true rule."¹²

In the excerpt above quoted, the court emphasizes that, when the trial court exercises its discretion and permits the witness to state his conclusion without the supporting facts, this can rarely cause injury because the facts can be brought out on cross-examination. This, of course, would also be true under Rule 56. Rule 57 states the following as an additional rule of discretion:

The judge may require that a witness before testifying in terms of opinion or inference be first examined concerning the data upon which the opinion or inference is founded.

The particular discretion thus specified is no doubt included in the general discretion described in the excerpt from the *Nolan* case, *supra*.

¹¹ *Nolan v. Nolan*, 155 Cal. 476, 480-481, 101 Pac. 520, 522 (1909).

¹² Code of Civil Procedure Section 1870(10) makes admissible "the opinion of an intimate acquaintance respecting the mental sanity of a person." The adoption of Rule 56 would eliminate the necessity for determining the troublesome question of who is an "intimate acquaintance" in this sense. See *McBaine* § 200.

Conclusion and Recommendation

It seems clear that California does not adhere to a criterion of "strict necessity" in determining the admissibility of "opinion" testimony by lay witnesses. Actually, California appears to follow closely the "helpfulness" principle expressed in Rule 56—a scheme clearly superior to what McCormick terms the "orthodox" view. It is recommended that subdivision (1) of Rule 56 be approved.

EXPERT TESTIMONY

Rule 56(2)

Subdivision (2) of Rule 56 provides:

(2) If the witness is testifying as an expert, testimony of the witness in the form of opinions or inferences 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 (b) within the scope of the special knowledge, skill, experience or training possessed by the witness.

There is a fundamental difference between the basis for receiving testimony in the form of opinions or inferences from a nonexpert under Rule 56(1) and the basis for receiving such testimony from an expert witness under Rule 56(2). Thus, under Rule 56(1), the nonexpert witness must possess knowledge based upon perception, whereas under Rule 56(2), it is sufficient for expert testimony that the "facts or data" are "made known to [the expert witness] at the hearing." There is, however, nothing new in this distinction. That such distinction is presently drawn in California is lucidly explained in the following opinion of Mr. Justice Dooling:

The growth of the rule excluding opinion evidence and the development of the two well recognized exceptions to the rule are learnedly traced by Dean Wigmore The two instances in which the opinions of witnesses are permitted in evidence are: 1. The opinions of experts are admitted in matters which are not within the common experience of men so that the special knowledge of a person of skill and experience in the particular field may enable him to form an opinion, where men of common experience would not be able to do so. [Citations omitted.] 2. The opinions of nonexpert witnesses are admitted as a matter of practical necessity when the matters which they have observed are too complex or too subtle to enable them accurately to convey them to court or jury in any other manner. [Citations omitted.]

For a nonexpert to be competent to give an opinion under the second exception he must be testifying about facts that he has personally observed; but the expert in any case proper for the reception of expert testimony may give his opinion, although he did not personally observe the facts, basing his opinion upon the facts testified to by other witnesses put to him in the form of hypothetical questions. [Citations omitted.] The ultimate question to be determined in every case in which expert testimony is tendered is whether the case is one outside of the common experience of men so that a person of training and experience by reason of his superior knowledge is better able to reach a conclusion from the facts. If the case is one for expert testimony this is so not because the expert has witnessed the facts, but because he is qualified by reason of his special knowledge to form an opinion on the

facts while the ordinary juror is not. It is a confusion of the two exceptions to the rule excluding opinion evidence to make the reception of expert testimony dependent upon the fact that the expert has been a personal witness to the facts.¹

As just pointed out, the conditions for receiving the nonexpert's inferences and opinions (*i.e.*, conditions (a) and (b) of Rule 56(1)) differ from the conditions for receiving the expert's inferences and opinions (*i.e.*, conditions (a) and (b) of Rule 56(2)). Moreover, in order to determine which set of conditions is applicable to a given situation, it is necessary to determine whether in that situation "the witness is testifying as an expert" (as in Rule 56(2)) or "is not testifying as an expert" (as in Rule 56(1)).

The Uniform Rules do not spell out the criterion for determining when a witness is testifying as a layman and when as an expert. However, Rule 402 of the American Law Institute's Model Code of Evidence did state the requisites for testifying as an expert:

A witness is an expert witness and is qualified to give expert testimony if the judge finds that to perceive, know or understand the matter concerning which the witness is to testify requires special knowledge, skill, experience or training, and that the witness has the requisite special knowledge, skill, experience or training.

As it is observed in the Comment on the Model Code rule, this is merely a restatement of the "well settled law." The Uniform Rules no doubt omit this Model Code provision because of an intent to refer to established law as to what is and is not proper as expert testimony and because the general principle of established law in this regard is thought to be too well known and accepted to require statement in the Uniform Rules.

Assuming the above analysis is sound, Rule 56(2) would, if adopted in California, incorporate by reference the large body of law that now exists relating to the occasions that are appropriate for expert testimony and the persons who are experts.² Because no change in this law seems to be involved, the many precedents in this regard are not discussed in this study.

Foundation Necessary for Expert's Opinion When Expert Possesses Knowledge Based on Observation

Suppose the principal issue in a case is: What was the cause of X's death? Suppose, further, that this issue must be resolved on the basis of expert evaluation of data discovered in a post-mortem examination of X's body.

What foundation is necessary as the basis for the expert opinion of a doctor who performed the autopsy? Under Rule 19, the doctor's expertise must be established, because that rule provides that, "as a prerequisite for the testimony of a witness on a relevant or material matter, there must be evidence that he has personal knowledge thereof, or experience, training or education if such be required." Furthermore, under Rule 56(2)(a), it must be shown that the doctor's opinion will

¹ *Manney v. Housing Authority*, 79 Cal. App.2d 453, 459-460, 180 P.2d 69, 73 (1947).

² See cases collected in MCBAIN §§ 202-205 and 207-208. See also McCom.

be "based on facts or data perceived by or personally known [to him]."

Thus, the requisite foundation will consist of a series of questions and answers to establish the doctor's status as an expert and to establish that he performed an autopsy on X's body. (Here, there is, of course, nothing new in the Uniform Rules.)

Having established the doctor's qualifications and the fact that he performed the autopsy, may the questioner then move directly to the question, "What in your opinion was the cause of X's death?" or is it necessary by way of further foundation preliminary to this question to bring out in detail the various discoveries of the post-mortem examination upon which the doctor will base his opinion? Of course, the detailed findings of the autopsy may be brought out, and tactically, it may be wise to do so. For example, if the doctor is to give his opinion that strangulation was the cause of death, it would be both simple and expedient to have him first state that he discovered congestion in the windpipe. The present question, however, is not whether this may be done or whether it is good trial tactics to do it.³ Rather, the question is whether upon objection of insufficient foundation the further specification is *required*.

In *Lemley v. Doak Gas Engine Co.*,⁴ which was a wrongful death action, the decedent (who was employed by defendant as a machinist's helper) met his death under the following circumstances:

The defendant company was engaged in the manufacture of internal combustion gas engines. On the day of the accident, certain engines were being tested as to horse-power, one of them being the engine which caused the accident. The manner of testing was as follows: "A two by four scantling about ten feet long was placed under the fly-wheel of the engine, and an employee was directed to exert an upward force on the end of the scantling, away from the engine. The scantling came in contact with the fly-wheel and necessarily retarded the same. Whether or not the requisite power was developed was determined by the amount of resistance the wheel could withstand. During a part of the day this engine was tested by a leather belt applied around the fly-wheel. The engine had been tested all day. The accident occurred late in the afternoon. The test was being performed by James E. Downie, a machinist employed by the defendant company. The fly-wheel had on several occasions during the day become heated. Lemley, the deceased, was a helper to Downie, the machinist, and was assisting in testing the engine. The deceased was instructed by Downie to hold the scantling against the fly-wheel of the engine while Downie went outside to inspect the exhaust pipe. While the deceased was applying this pressure the fly-wheel broke into many pieces, and a piece struck Lemley on the head, causing his death."⁵

The plaintiff called Downie. He testified to the circumstances outlined above. Then he was asked this question: "Will you state to the jury what, in your opinion, caused that fly-wheel to break?" Defendant

³ See CAL. CODE CIV. PROC. § 1872: "Whenever an expert witness gives his opinion, he may, upon direct examination, be asked to state the reasons for such opinion" (Emphasis added.)

⁴ 40 Cal. App. 146, 180 Pac. 671 (1919).

⁵ *Id.* at 151, 180 Pac. at 673-674.

objected on the ground, *inter alia*, of no proper foundation. The objection was overruled and Downie answered: "I think the heat done it."⁶

Upon appeal, the defendant argued that "the facts upon which the opinion was based should have been stated to the jury so that the jury could judge as to the existence of such facts and be able to value the opinion accordingly."⁷ Relying upon a passage in *Greenleaf*,⁸ the court distinguished the foundation which is required when an expert testifies on the basis of facts personally observed by him and when he testifies on the basis of facts not so observed. In referring to the former situation, the court stated that "where the witness has personal observation of the facts upon which he bases his opinion, these facts can be stated by him upon his direct examination *or upon his cross-examination* as the observed facts upon which he bases his opinion."⁹ The court observed finally that, since defendant could have *cross-examined* Downie fully as to the basis for his opinion, defendant, having failed to do so, is in no position to complain.

Thus, where expert testimony is to be based upon the personal observation of the expert, the only preliminaries required are establishing his qualifications and his observation. There is no further requirement that the details of his observation be stated upon his direct examination. As applied to the hypothetical case above, this means that the direct examiner, having established the doctor's qualifications and that he performed the autopsy, could then move directly to the principal question respecting the cause of death without first having the doctor specify the basis for his opinion.¹⁰

The Uniform Rules give the court discretion as to whether to require that a specification of data precede the expression of the opinion based thereon. Rule 57 so provides in these terms:

RULE 57. Preliminary Examination. The judge may require that a witness before testifying in terms of opinion or inference be first examined concerning the data upon which the opinion or inference is founded.

Nothing is said in the *Lemley* case, *supra*, which negates the existence of such discretion. It may well be, therefore, that Rule 57 is a fair statement of the rule or practice (or both) which prevails in California today.

Foundation Necessary for Expert's Opinion When Expert Does Not Possess Personal Knowledge

In California today, if an expert not possessed of personal knowledge of the facts in issue is to be examined, the examination must be by questions hypothetical in form. As is said in *Lemley v. Doak Gas Engine Co.*:¹

⁶ *Id.* at 151-152, 180 Pac. at 674.

⁷ *Id.* at 152, 180 Pac. at 674.

⁸ 1 GREENLEAF, EVIDENCE 559 (16th ed. [by Wigmore] 1899).

⁹ 40 Cal. App. 146, 152-153, 180 Pac. 671, 674 (1919). (Emphasis added.)

¹⁰ See also *Lumbermen's Mut. Cas. Co. v. Industrial Acc. Comm'n*, 29 Cal.2d 492, 500, 175 P.2d 823, 828 (1946) ("Where an expert witness, such as a medical witness, bases his scientific opinion on his observation, such as an attending or treating physician observing his patient, he need not state the reasons for his opinion—the facts upon which they are based—to render his opinion competent and probative evidence.")

¹ 40 Cal. App. 146, 152-153, 180 Pac. 671, 674 (1919).

[W]here [an expert] . . . witness testifies by stating his inferences from facts *not personally observed by him*, it is necessary, for the sake of the jury in dealing with his testimony, that the data on which he bases his inference be specified by him and stated as assumed or hypothetical. . . . [If] he has not had any personal observation of the facts and forms his opinion merely upon testimony listened to or upon other intimations of the facts, it would be impossible for the jury, merely from his statement of opinion, to know what were the data for the opinion. It would therefore be necessary for him, in stating his opinion, not only to specify the data for it . . . but to specify them hypothetically, i.e., as only assumed by him to exist. This is for the purpose of allowing the jury to reject the opinion as having no application to the facts of the case where the jury finds that the hypothetical facts upon which it is based do not exist. Thus, the necessity for stating the data hypothetically arises because the witness has no personal knowledge of them, and because it cannot be known, before the jury's retirement, what data they will find to be facts and therefore what opinions are applicable to the case as found by the jury.

Logically, there is the need stated above for the hypothetical question. In practice, however, this form of question has been, as the Uniform Commissioners state in the Comment on Rule 58, "grossly abused." Echoing the same thought, Judge Learned Hand has referred to the hypothetical question as "the most thorific and grotesque wen upon the fair face of justice."² The most common abuses have been undue length and complexity of hypothetical questions³ and undue slanting of the hypothesis.⁴

² NEW YORK BAR ASS'N LECTURES ON LEGAL TOPICS (1921-1922).

³ See *Treadwell v. Nickel*, 194 Cal. 243, 266, 228 Pac. 25, 35 (1924), referring to a hypothetical question covering 83 typewritten pages and an objection thereto covering 14 pages. See also *Guardianship of Jacobson*, 30 Cal.2d 312, 323, 182 P.2d 537, 544 (1947), referring to a hypothetical question of 40 pages.

⁴ See *Estate of Dolbeer*, 149 Cal. 227, 243-244, 86 Pac. 695, 702 (1906), in which the court spoke as follows:

The witnesses were skilled alienists, it may be conceded, but the evidence thus adduced of one who has never seen the person and who bases his opinion upon the facts given in a hypothetical question is evidence the weakest and most unsatisfactory. Such questions themselves are always framed with great particularity to meet the views of the side which presents the expert. They always eliminate from consideration the countervailing evidence which may be of a thousand-fold more strength than the evidence upon which the question is based. They are astutely drawn, and drawn for a purpose, and that purpose never is the presentation of all the evidence. It is never to present the fair and accurate view, but the purpose always is to frame a question such that the answer will announce a predetermined result. This kind of expert testimony, given under such circumstances, even the testimony of able and disinterested witnesses, as no doubt these were, is in the eye of the law of steadily decreasing value. The remedy can only come when the state shall provide that the courts and not the litigants shall call a disinterested body or board of experts who shall review the whole situation and then give their opinion with their reasons therefor to the court and jury regardless of the consequences to either litigant. So and so only can it be hoped to remove the estimate of infirmity which attaches at the present time to this kind of evidence. In the case at bar the hypothetical question presented to these experts eliminated all the facts overwhelmingly proved in favor of Miss Dolbeer's sanity, bore with emphasis upon and threw into prominence trifling circumstances, and contained many statements not justly borne out by the evidence itself. It thus presented a portrait of Miss Dolbeer's life and mind absolutely lacking in vraisemblance. All perspective was eliminated, all proportion destroyed, and the picture was as untrue to the original as is a fantastic and distorted shadow cast by a flickering and uncertain light a false portrayal of the reflected object.

Wigmore strikes telling blows in condemning these abuses:

Its abuses have become . . . obstructive and nauseous It is a logical necessity, but a practical incubus It is a strange irony that the hypothetical question, which is one of the few truly scientific features of the rules of Evidence, should have become that feature which does most to disgust men of science with the law of Evidence.

The hypothetical question, misused by the clumsy and abused by the clever, has in practice led to intolerable obstruction of truth. In the first place, it has artificially clamped the mouth of the expert witness, so that his answer to a complex question may not express his actual opinion on the actual case. This is because the question may be so built up and contrived by counsel as to represent only a partisan conclusion. In the second place, it has tended to mislead the jury as to the purport of actual expert opinion. This is due to the same reason. In the third place, it has tended to confuse the jury, so that its employment becomes a mere waste of time and a futile obstruction. [Footnote omitted.] ⁵

Having leveled these criticisms against the hypothetical question as known in practice today, Wigmore is ready with a proposal to reform the practice. This proposal is accepted by and embodied in Rule 58.

To illustrate the proposal, suppose an issue in a case is the cause of X's death. The issue must be determined from the conditions revealed by X's dead body. No autopsy was performed. The body was embalmed by an undertaker and then cremated. At the trial, the undertaker testifies for the plaintiff, describing the condition of the body in detail with reference to abrasions, fractures, ruptured organs, presence and absence of foreign bodies, congested parts of the body, and the like. Next, plaintiff calls John Smith. Defendant stipulates John Smith's qualifications as an expert medical doctor. The examination of John Smith then proceeds as follows:

Q. Doctor, do you have an opinion as to the cause of X's death?

A. Yes.

Q. Is your opinion based on facts or data perceived by you?

A. No.

Q. Is your opinion based on facts made known to you at this trial?

A. Yes.

Q. Please state your opinion.

(Defendant objects on the ground of inadequate foundation.

Objection overruled.)

A. Strangulation.

Under Rule 58, the overruling of the defendant's objection would, it seems, be proper. That rule provides as follows:

RULE 58. *Hypothesis for Expert Opinion Not Necessary.*

Questions calling for the opinion of an expert witness need not be hypothetical in form unless the judge in his discretion so requires, but the witness may state his opinion and reasons therefor without

⁵ 2 WIGMORE § 686. See also the critical literature referred to in MCCORMICK § 13, at 28 n.1.

first specifying data on which it is based as an hypothesis or otherwise; but upon cross examination he may be required to specify such data.

Wigmore argues as follows in behalf of the principle of Rule 58:

What is to be the future of the hypothetical question? *Must the Hypothetical Question go*, as a requirement?

* * * * *

No partial limitation of its use seems feasible, by specific rules. Logically, there is no place to stop short; practically, any specific limitations would be more or less arbitrary, and would thus tend to become mere quibbles.

How can the extirpating operation be performed? By exempting the offering party from the *requirement* of using the hypothetical form; by according him the *option* of using it,—both of these to be left to the trial Court's discretion; and by permitting the opposing party, *on cross-examination*, to call for a hypothetical specification of the data which the witness has used as the basis of the opinion. The last rule will give sufficient protection against a misunderstanding of the opinion, when any actual doubt exists.

The foregoing proposals, be it understood, represent a mere practical rule of thumb. They do violence to theoretical logic. But in practice they would produce less actual misleading of the jury than the present complex preciosities. After all, the only theoretical object of the hypothetical question . . . is to avoid misunderstanding; and "if the salt have lost its savor, wherewith shall it be salted? It is thenceforth good for nothing but to be cast out and trodden under foot of men." The present proposal does not tread under foot the hypothetical question, but merely transfers its function to the hands of the cross-examiner.⁶

Wigmore's proposal was supported by the American Law Institute and became a feature of the Model Code;⁷ it is supported by the Commissioners on Uniform State Laws and is a feature of both the Model Expert Testimony Act and the Uniform Rules of Evidence;⁸ it is supported by McCormick;⁹ and it has been quoted with apparent approval on at least one occasion by a California District Court of Appeal.¹⁰

Conclusion and Recommendation

The present California law appears to be generally in accord with the principles of the Uniform Rules in regard to expert testimony. The Uniform Rules appear to be superior in those areas where the present law is out of harmony with these principles. Hence, it is recommended that Rules 57 and 58, and subdivision (2) of Rule 56, be approved.

⁶ 2 WIGMORE § 686. (Italics in original.)

⁷ MODEL CODE Rule 409.

⁸ See UNIFORM RULE 58 Comment.

⁹ MCCORMICK § 16.

¹⁰ Estate of Collin, 150 Cal. App.2d 702, 714-715, 310 P.2d 663, 671 (1957).

OPINION ON ULTIMATE ISSUE

Rule 56(4)

Many decisions in California¹ and elsewhere² have announced a rule to the effect that a witness is not allowed to express his opinion upon an ultimate issue in a case. The rationale for the rule is said to be that such testimony "'usurps the function' or 'invades the province' of the jury."³

Because of the ambiguity of the expression "ultimate issue," the precise scope of the rule has never been defined and is probably incapable of exact definition. Moreover, the rule has never been consistently enforced, for, as McCormick points out, all courts "disregard the supposed rule, usually without explanation as to why it should not be applied, when value, sanity, handwriting and identity are in issue."⁴ Finally, the reasons assigned for the rule, if taken literally, are absurd—"empty rhetoric," as Wigmore says.⁵

Despite the looseness with which the doctrine is phrased, the inconsistencies in its application, and the fallacy of the rationale advanced in its support, it may yet possess a solid core of sense. That is to say, it does seem to make sense to the extent that it prevents such questions as, "Who should win this case?" and questions approximate to this in their overall coverage.

The Uniform Rules, however, depend upon other mechanisms to preclude such broadside questions. Thus, the dogma of "opinion on an ultimate issue" is, in terms, abrogated by Rule 56(4), which provides as follows:

(4) Testimony in the form of opinions or inferences otherwise admissible under these rules is not objectionable because it embraces the ultimate issue or issues to be decided by the trier of the fact.

What, then, are the substitute safeguards which may operate to prevent the all-inclusive question?

Lay opinion is admissible under 56(1) only when "helpful." In applying this standard of helpfulness, the trial judge may, of course, rule that a given lay opinion is not helpful because stated in terms that are too broad. So far as expert opinion is concerned, the trial judge could exclude overly broad statements as statements the "probative value [of which] is substantially outweighed by the risk . . . [of] misleading the jury," since by Rule 45 the court possesses discretion to exclude such statements.

In sum, then, the Uniform Rules substitute discretion of the court for the shibboleths which speak in terms of automatic exclusion of opinion on ultimate issues.

¹ See McCoid, *Opinion Evidence and Expert Witnesses*, 2 U.C.L.A. L. REV. 356, 359-362 (1955).

² MCCORMICK § 12, at 25-26.

³ MCCORMICK § 12, at 26.

⁴ *Ibid.*

⁵ 7 WIGMORE § 1920.

This substitution, however, would (at least in California) seem merely to effect a change in verbal formulas. It would not involve any substantive changes, because the modern view in California of the "ultimate issue" rule seems to be that all the rule really amounts to is a canon of discretion. Witness the following expressions taken from two recent cases:

We believe, therefore, that there is no hard and fast rule that experts may not be asked questions that coincide with the ultimate issue in the case, and that the true rule is that admissibility depends on the nature of the issue and the circumstances of the case, there being a large measure of discretion involved. We believe further that the modern tendency is against making a distinction between evidentiary and ultimate facts as subjects of expert opinion.⁶

"It is certainly contrary to the unmistakable trend of authority to exclude expert opinion testimony merely upon the ground that it amounts to an opinion upon ultimate facts. The modern tendency is to make no distinction between evidential and ultimate facts subject to expert opinion. The courts consider that it is more important to get to the truth of the matter than to quibble over distinctions in this regard which are in many cases impracticable."⁷

Conclusion and Recommendation

Given the probability of effecting no substantive change in the modern California view of the "ultimate issue" rule, Rule 56(4) is recommended for approval.

⁶ *People v. King*, 104 Cal. App.2d 298, 304, 231 P.2d 156, 160 (1951).

⁷ *Wells Truckways, Ltd. v. Cebrian*, 122 Cal. App.2d 666, 678, 265 P.2d 557, 564-565 (1954).

FINDINGS BY THE COURT

Rule 56(3)

Rule 56(1) and (2) contain conditions limiting the admissibility of nonexpert and expert opinion evidence. Rule 56(3) provides as follows:

(3) Unless the judge excludes the testimony he shall be deemed to have made the finding requisite to its admission.

Rule 56(3) seems to be unnecessary because of Rule 1(8), which provides:

(8) "Finding of fact" means the determination from proof or judicial notice of the existence of a fact. A ruling implies a supporting finding of fact; no separate or formal finding is required unless required by a statute of this state.

Many URE rules other than Rule 56 require findings by the judge of certain matters as conditions for admitting testimony (*e.g.*, exceptions to the hearsay rule). These rules rely on cross-reference to Rule 1(8) for the proposition that a ruling admitting the evidence implies the requisite findings. No reason is perceived, therefore, why a special statement is desirable in Rule 56. To include such statement there while omitting it elsewhere might be a source of confusion.

Conclusion and Recommendation

Because of the possible confusion that may be engendered by including the surplusage expressed in subdivision (3) of Rule 56, disapproval of this subdivision is recommended.

COURT-APPOINTED EXPERTS

Rules 59 and 60 Are Exceptions to the General Policy of the URE

As stated in the Prefatory Note to the Uniform Rules,⁸ the "general scheme" of the rules is "to deal primarily with problems of admissibility of evidence." Therefore, as a "substantial variation from the Model Code approach," the Uniform Rules omit "procedural rules which are . . . not within the scope of the general scheme," such as "rules relating to the saving of exceptions, comment on the evidence by the judge and control of the judge over trial procedure."

The Prefatory Note states that there is, however, one exception to the policy outlined in the preceding paragraph. That exception is "the inclusion [in the Uniform Rules] of rules for the appointment by the court of expert witnesses and payment of their compensation." The rules referred to are Rules 59 and 60.

The Comment on Rule 59 gives the reasons which motivated the Uniform Commissioners to depart from their general scheme by including Rules 59 and 60 in the Uniform Rules:

Rules 59 and 60 are in the same procedural category as comment by the judge on the evidence and the general control of the judge over the trial. ((See Model Code Rule 105.) But because of the urgent necessity, generally acknowledged, of correcting abuses in the use of expert testimony, the rules have been incorporated here to call attention to the desirability of getting them included in the procedural law either as a part of these rules or by separate statutory enactment.

The "urgent necessity" to which the Comment refers is not present in California, nor has it been present since the year 1925. In that year, the Legislature enacted Code of Civil Procedure Section 1871, which contains in the following terms the basic principles of Rules 59 and 60:

Whenever it shall be made to appear to any court or judge thereof, either before or during the trial of any action or proceeding, civil, criminal, or juvenile court, pending before such court, that expert evidence is, or will be required by the court or any party to such action or proceeding, such court or judge may, on motion of any party, or on motion of such court or judge, appoint one or more experts to investigate, render a report as may be ordered by the court, and testify at the trial of such action or proceeding relative to the matter or matters as to which such expert evidence is, or will be required, and such court or judge may fix the compensation of such expert or experts for such services, if any, as such expert or experts may have rendered, in addition to his or their services as a witness or witnesses, at such amount or amounts as to the court or judge may seem reasonable.

⁸ UNIFORM RULES, *Prefatory Note* (1953).

In all criminal and juvenile court actions and proceedings such compensation so fixed shall be a charge against the county in which such action or proceeding is pending and shall be paid out of the treasury of such county on order of the court or judge. In any county in which the procedure prescribed herein has been authorized by the board of supervisors, on order by the court or judge in any civil action or proceeding, the compensation so fixed of any medical expert or experts shall also be a charge against and paid out of the treasury of such county. Except as above otherwise provided, in all civil actions and proceedings such compensation shall, in the first instance, be apportioned and charged to the several parties in such proportion as the court or judge may determine and may thereafter be taxed and allowed in like manner as other costs.

Nothing contained in this section shall be deemed or construed so as to prevent any party to any action or proceeding from producing other expert evidence as to such matter or matters, but where other expert witnesses are called by a party to an action or proceeding they shall be entitled to the ordinary witness fees only and such witness fees shall be taxed and allowed in like manner as other witness fees.

Any expert so appointed by the court may be called and examined as a witness by any party to such action or proceeding or by the court itself; but, when called, shall be subject to examination and objection as to his competency and qualifications as an expert witness and as to his bias. Such expert though called and examined by the court, may be cross-examined by the several parties to an action or proceeding in such order as the court may direct. When such witness is called and examined by the court, the several parties shall have the same right to object to the questions asked and the evidence adduced as though such witness were called and examined by an adverse party.

The court or judge may at any time before the trial or during the trial, limit the number of expert witnesses to be called by any party.⁹

Comparison of Section 1871 and Rules 59 to 61

There are some differences of detail between Code of Civil Procedure Section 1871 and Uniform Rules 59 to 61. The most important differences appear to be the following:

Power of parties to require judge to appoint their chosen expert. Under Rule 59, if "the parties agree in the selection of an expert or experts, only those agreed upon shall be appointed." No such restriction, it seems, binds the court under Section 1871.

Calling experts other than those appointed by the court. Rule 59 does not "limit the parties in calling expert witnesses of their own selection and at their own expense." On the other hand, the

⁹ See also Penal Code Section 1027, regarding court appointment of experts on the issue of sanity in criminal cases, and Welfare and Institutions Code Section 5504, regarding such appointment in sexual psychopathic hearings.

It may be that the inspiration for such legislation was the statement by the Court in *Estate of Dolbeer*, 149 Cal. 227, 243-244, 86 Pac. 695, 702 (1906), quoted in note 4, *supra* at 940.

final paragraph of Section 1871 provides that the "court or judge may at any time before the trial or during the trial, limit the number of expert witnesses to be called by any party."

Compensation in criminal actions. Under Rule 59, the compensation of experts appointed by the court is to be paid by the county and is to be charged as costs in the case. Section 1871 contains a similar provision, omitting, however, any direction that the expert's fee is chargeable as costs.

Compensation in civil actions. Under Rule 60, the compensation of experts appointed by the court is apportioned to the parties equally and is payable to the clerk, and thereafter taxable as costs. Section 1871 differs in that the apportionment is "in such proportion as the court or judge may determine."

Credibility of experts. Rules 60 and 61 contain the following two provisions respecting credibility: (1) "The amount of compensation paid to an expert witness not appointed by the judge shall be a proper subject of inquiry as relevant to his credibility and the weight of his testimony" (Rule 60), and (2) "The fact of the appointment of an expert witness by the judge may be revealed to the trier of the facts as relevant to the credibility of such witness and the weight of his testimony" (Rule 61). Neither of these matters is expressly mentioned in Section 1871. California case law, however, indicates that: (1) The fact that an expert has been employed and paid by a party may be shown to impeach him. The court may, however, preclude inquiry as to the amount paid.¹⁰ (2) It is not error to appoint the expert in the presence of the jury, since "the jury should be informed in order to determine . . . what weight [should] be given to his expert observations or opinions."¹¹

Conclusion and Recommendation

The following conclusions are offered respecting the foregoing discussion in regard to court-appointed experts:

- (1) In proposing the Uniform Rules for adoption in California, it is neither necessary nor desirable to include provisions respecting the appointment and compensation of experts, since such provisions are incompatible with the general scheme of the Uniform Rules. Moreover, the matter of appointment and compensation of experts is adequately covered in Code of Civil Procedure Section 1871.
- (2) No amendment of Section 1871 is desirable. In those respects concerning the appointment and compensation of experts in which Section 1871 differs from Rules 59 and 60, the provisions of the present law appear to be superior to those of the Uniform Rules.

¹⁰ *People v. Tomalty*, 14 Cal. App. 224, 235, 111 Pac. 513, 517 (1910).

¹¹ *People v. Cornell*, 203 Cal. 144, 146-147, 263 Pac. 216, 217 (1928). The principle of Rule 61 seems to be implicit in the language quoted. See also *People v. Strong*, 114 Cal. App. 522, 300 Pac. 84 (1931).

- (3) The provisions of Rule 60, last sentence, and of Rule 61 are meritorious provisions falling within the general scheme of the Uniform Rules.

It is, therefore, recommended that the last sentence of Rule 60 and all of Rule 61 be approved for adoption in California, and that Rule 59 and all but the last sentence of Rule 60 be disapproved.

INCORPORATING RULES 56 TO 61 INTO CALIFORNIA LAW

Assuming Rules 56 to 61 are revised as recommended, and are enacted as thus revised, the following adjustment in California code provisions would be in order:

Code of Civil Procedure Section 1870, subdivisions 9 and 10, provide that the following are admissible:

9. The opinion of a witness respecting the identity or handwriting of a person, when he has knowledge of the person or handwriting; his opinion on a question of science, art, or trade, when he is skilled therein;

10. The opinion of a subscribing witness to a writing, the validity of which is in dispute, respecting the mental sanity of the signer; and the opinion of an intimate acquaintance respecting the mental sanity of a person, the reason for the opinion being given.

In view of the general rule set forth in subdivision (1) of Rule 56, Section 1870(9) and (10) would seem to be superfluous. Repeal of Section 1870(9) and (10) is, therefore, recommended.

Code of Civil Procedure Section 1872 provides:

Whenever an expert witness gives his opinion, he may, upon direct examination, be asked to state the reasons for such opinion, and he may be fully cross-examined thereon by opposing counsel.

Uniform Rule 57 covers the same ground. Hence, Section 1872 should be repealed.

The following provisions should be left intact:

Code of Civil Procedure Section 1871 (appointment of experts by the court)

Code of Civil Procedure Section 1256.2 (in condemnation proceedings, either party may question any witness as to fees and expenses paid or to be paid to the witness)

Penal Code Section 1027 (appointment of alienists upon plea of not guilty by reason of insanity)

Penal Code Section 1127b (charge to jury on expert testimony).

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