The Opinion Rule In California And Federal Courts: A Liberal Approach

> The border line between fact and opinion is often very indistinct, and the statement of a fact is frequently only an opinion of the witness.
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> —*Healy v. Visalia & Tulare Railroad Co.*[1]

> [The] classic formula [of the opinion rule], 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.
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> —*McCormick's Handbook of the Law of Evidence*[2]

I. INTRODUCTION

The traditional American rule is that opinion evidence per se is inadmissible.[3] In contrast, section 800[4] of the California Evidence Code permits lay witnesses to testify to opinions based on their personal knowledge and helpful to a clear understanding of their testimony. When an expert opinion would assist the trier of fact, section 801[5] of

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[1] 101 Cal. 585, 589, 36 P.125 (1894).

[2] E. CLEARY *et al.*, MCCORMICK'S HANDBOOK OF THE LAW OF EVIDENCE § 11, at 23 (2d ed. 1972) [hereinafter cited as MCCORMICK (2d ed.)].

[3] 7 WIGMORE, A TREATISE ON THE ANGLO-AMERICAN SYSTEM OF EVIDENCE IN TRIALS AT COMMON LAW § 1917 (3d ed. 1940) [hereinafter cited as WIGMORE (3d ed.)]; MCCORMICK (2d ed.), *supra* note 2, § 11.

[4] CAL. EVID. CODE § 800 (West 1968):

> If a witness is not testifying as an expert, his testimony in the form of an opinion is limited to such an opinion as is permitted by law, including but not limited to an opinion that is:
> (a) Rationally based on the perception of the witness; and
> (b) Helpful to a clear understanding of his testimony.

[5] CAL. EVID. CODE § 801 (West 1968):

> If a witness is testifying as an expert, his testimony in the form of an opinion is limited to such an opinion as is:
> (a) Related to a subject that is sufficiently beyond common experience that the opinion of an expert would assist the trier of fact; 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 that reasonably may be relied

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the Evidence Code permits expert witnesses to testify to opinions based on matter of a type that may be reasonably relied upon by an expert in the subject. The Federal Rules of Evidence[6] governing opinion[7] follow the same liberal pattern.[8]

This article first describes and distinguishes three categories of opinion testimony. The next section of the article discusses the history and rationale of the opinion rule and its American development into a rule of absolute exclusion. The article then analyzes the California and federal statutes governing admissibility of lay opinion. The final section of the article examines the means by which the California and federal statutes promote the reliability of expert opinion.

II. THREE CATEGORIES OF OPINION TESTIMONY

The traditional American opinion rule excludes all opinion testimony by lay witnesses on the assumption that fact and opinion are distinct and logically opposed.[9] The difficulty with applying this rule is that fact and opinion can only be distinguished in relative terms. All statements, however detailed, are to some degree conclusions of witnesses drawn from facts observed. For example, in an automobile collision case a witness might assert that the defendant was driving carelessly. The same witness might state instead that the defendant was driving fast on the wrong side of the road or that the defendant was driving in excess of the speed limit on the left side of a double yellow line. Each succeeding statement is less abstract and therefore in a sense more factual than the preceding statements.[10] But even the most concrete statements cannot exactly reproduce the facts. The California and federal statutes recognize that the distinction between fact and opinion is a matter of degree.

To distinguish and explain the California and traditional American rules this article divides opinion testimony[11] into three categories:

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upon by an expert in forming an opinion upon the subject to which his testimony relates, unless an expert is precluded by law from using such matter as a basis for his opinion.

[6]The FEDERAL RULES OF EVIDENCE are contained in 28 U.S.C. FED. R. EVID. 101 *et seq.* (1975).

[7]FED. R. EVID. 701-06.

[8]*See* FED. R. EVID. 701, 703-06, Advisory Comm. Notes.

[9]MCCORMICK (2d ed.), *supra* note 2, § 11, at 23; 7 WIGMORE (3d ed.), *supra* note 3, § 1919.

[10]MCCORMICK (2d ed.), *supra* note 2, § 11, at 25.

[11]Uncertain testimony is to be distinguished from opinion testimony. California courts have always allowed testimony in opinion form when the form merely indicates that witnesses are not absolutely certain about the facts they are testifying to. Lack of certainty goes to the weight of the testimony and not to its admissibility. *See e.g.*, People v. Gonzales, 68 Cal. 2d 467, 472, 439 P.2d 655, 658, 67 Cal. Rptr. 551, 554 (1968) (identity of person); Prior v. Diggs, 3 Cal. Unrep.

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(1) conjecture; (2) inferences drawn from primary facts susceptible to accurate description; and (3) impressions based on facts which cannot be verbalized. The article refers to these categories of opinion as conjecture, inference, and impression.

"Conjecture" refers to the speculations of a lay witness lacking personal knowledge or of an expert who bases an opinion on matter of a type upon which an expert may not reasonably rely. For example, if a defendant accused of stealing documents were to state that in his opinion his employer would have allowed him to take the documents, his testimony would be conjecture.[12]

"Inferences" are conclusions drawn by lay or expert witnesses from facts which the witnesses could completely and accurately relate to the trier of fact. For example, if a mechanic who had described in detail the damage done to a car, were to state further that the damage was caused by a violent impact, his testimony about the force of the collision would be inference.[13]

The last category of opinions, "impressions," are perceptions that cannot be fully described in terms of discrete facts. For example, a decedent's rationality may be at issue. If a witness who had observed the decedent were to describe in detail the decedent's words and actions, the trier of fact would not be able to accurately conclude that the decedent acted "irrationally."[14] The same words might also describe a person who was merely drunk, angry, silly, or impolite. In such cases witnesses are tongue-tied unless they are allowed to state their general impressions.

Unlike the traditional American rule regarding lay opinion, the California and federal statutes distinguish between the last two categories of opinion. All jurisdictions exclude conjecture, the first category of opinion, under the personal knowledge rule.[15] Jurisdictions

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565, 568, 31 P. 155, 156 (1892) ("didn't think" that certain articles belonged in a particular business); People v. Pena, 25 Cal. App. 3d 414, 431-32, 101 Cal. Rptr. 804, 814-15 (1st Dist. 1972) ("I wouldn't like to say for sure because I can't be sure" allowed); People v. Otis, 174 Cal. App. 2d 119, 126, 344 P.2d 342, 346 (1st Dist. 1959) (words to the effect of "As far as I could gather" allowed).

[12] People v. Pearson, 111 Cal. App. 2d 9, 29, 244 P.2d 35, 50 (2d Dist. 1952).

[13] Kroll v. Rasin, 96 Cal. App. 84, 88, 273 P. 820, 821 (1st Dist. 1928).

[14] Holland v. Zollner, 102 Cal. 633, 639, 36 P. 930, 932 (1894).

[15] MCCORMICK (2d ed.), *supra* note 2, § 10, at 20. Except to the extent that experts may give opinion testimony not based on personal knowledge, the personal knowledge rule applies to all witnesses. It requires that witnesses have a present recollection of an impression derived from the exercise of the witnesses' own senses. 2 WIGMORE (3d ed.), *supra* note 3, § 657, at 762. The rule is codified at CAL. EVID. CODE § 702 (West 1968):

> (a) Subject to Section 801 [relating to experts], the testimony of a witness concerning a particular matter is inadmissible unless he has personal knowledge of the matter. Against the objection of a party, such personal knowledge must be shown before the witness may

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adhering to the traditional American rule exclude inferences and impressions of lay witnesses as well. California and federal courts admit impressions of lay witnesses. In these jurisdictions the opinion rule is not one of exclusion but one of preference for testimony in its most concrete form.[16] This position recognizes that lay witnesses can only testify to some perceptions by stating their general impressions. While such a rule does not permit the admission of inferences, if trial courts admit evidence that is arguably an inference, their determinations are rarely reversed on appeal.[17]

The traditional American rule makes an exception for expert opinion. The test of admissibility is described by McCormick as one of strict necessity.[18] Courts in jurisdictions adhering to the traditional rule admit expert opinion if the proffering party first shows that a non-expert is incapable of drawing an informed conclusion from the facts to which the expert has testified. In contrast, California and federal courts readily admit expert opinion, whether inference or impression, if it satisfies the much less stringent requirement that it assist the trier of fact.[19]

III. HISTORY AND RATIONALE

English decisions first distinguished "facts" and "opinions" in the 1700's.[20] Courts required lay persons to testify from personal observation and not from opinion. As used in the early cases "opinion" referred to "conjectures." In essence courts were applying the personal knowledge rule, which excludes testimony not based on the witness' own perceptions.[21] Courts did not exclude any form of testimony regarding matter within the witness' personal knowledge.

Until the mid-eighteenth century, courts themselves called the experts or skilled witnesses to aid the trier of fact.[22] Then, in the late eighteenth century, each party began to hire its own experts.[23] Courts admitted the opinion of these witnesses under an exception to the personal knowledge rule. For example, in *Folkes v. Chadd*[24]

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testify concerning the matter.

(b) A witness' personal knowledge of a matter may be shown by any otherwise admissible evidence, including his own testimony.

[16] 3 J. WEINSTEIN & M. BERGER, WEINSTEIN'S EVIDENCE ¶ 701[02] (1975) [hereinafter cited as WEINSTEIN]. *See also* MCCORMICK (2d ed.), *supra* note 2, § 11, at 25.

[17] *See* Nolan v. Nolan, 155 Cal. 476, 480-81, 101 P. 520, 522 (1909).

[18] MCCORMICK (2d ed.), *supra* note 2, § 11, at 24 n.29.

[19] CAL. EVID. CODE § 801 (West 1968); FED. R. EVID. 702.

[20] 7 WIGMORE (3d ed.), *supra* note 3, § 1917, at 1.

[21] *See* note 15, *supra*.

[22] 7 WIGMORE (3d ed.), *supra* note 3, § 1917, at 3.

[23] *Id.* at 5.

[24] 99 Eng. Rep. 589, 590 (K.B. 1782).

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the court allowed an engineer called by the defendant to testify to the cause of a harbor's filling up. The engineer based his opinion on facts in evidence but not on personal knowledge. Lord Mansfield considered the evidence proper since it concerned a matter of science which only experts could understand. Courts reasoned that the helpfulness of the testimony and the guarantees of reliability provided by the experts' experience and education overcame possible dangers resulting from a partisan witness' lack of personal knowledge. Courts did not require expert opinion to be absolutely necessary to an understanding of the facts.

Until the early nineteenth century the American rule was the same as the English: only testimony not based on personal knowledge was considered opinion and excluded.[25] But as the American courts developed the skilled witness exception to the personal knowledge requirement, a rule excluding all lay opinion began to emerge.[26] The rationale for the skilled witness exception was that expert testimony, even if not based on personal knowledge, aided the trier of fact's understanding of the case. The courts extended this reasoning to limit the admission of lay opinion testimony; since a lay person, unlike an expert, had no special skill, lay opinion per se could not aid the jury and should never be admitted.[27] Thus, until the 1800's, American courts used "opinion" to mean testimony not based on personal knowledge. In the mid-nineteenth century they began to use "opinion" to mean "not fact" as though fact and opinion were logical opposites.

Many American courts went further and argued that not only did lay opinion not aid the jury, in fact, permitting such opinion usurped the jury's function.[28] Witnesses were to give facts and the jury was to draw the inferences and conclusions necessary to decide the case. The argument has superficial logic. The actual function of the jury is, however, to weigh the evidence and to reject any of it that is inadequately supported.[29] In the process of weighing and eliminating, the trier of fact, not the witness, draws the conclusions necessary to a decision.[30]

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[25] 7 WIGMORE (3d ed.), *supra* note 3, § 1917, at 8.

[26] *Id.* at 6-8.

[27] *Id.* at 8-10; MCCORMICK (2d ed.), *supra* note 2, at § 11. Wigmore catalogues some unjust results of applying the opinion rule as mandatory rule of exclusion. 7 WIGMORE (3d ed.), *supra* note 3, §§ 1918-29 (Supp. 1975).

[28] 7 WIGMORE (3d ed.), *supra* note 3, § 1920.

[29] *Id.*

[30] As a corollary to the jury function argument, opinions on the ultimate issue were considered especially objectionable. *Id.* at § 1921. But all opinion testimony which is relevant to the case has the potential of being a basis for the decision of the ultimate issue. Wells Truckways v. Cebrian 122 Cal. App. 2d 666, 674, 265 P.2d 557, 562 (4th Dist. 1954). Since opinions on the ultimate issue

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At the same time that American courts were developing the rule excluding all lay opinion, they began to limit the admission of expert opinion. Because they considered factual testimony superior to opinion testimony, the courts required that expert opinion be not only helpful but necessary to the trier of fact's understanding of the case.[31] They admitted expert opinion only if the subject were clearly beyond lay competence.

Courts in most jurisdictions gradually recognized that the traditional rule against opinion was illogical and impossible to apply.[32] They began to admit opinion in cases of practical necessity.[33] The present test of admissibility seems to be an even more liberal one of convenience or expedience.[34] Accordingly, the present majority common law application of the opinion rule is not vastly different from the California and federal position.[35] Jurisdictions adhering to the traditional American rule in theory only should explicitly adopt the California and federal position and avoid confusing, inaccurate language referring to the opinion rule as a rule of absolute exclusion.

IV. THE LAY OPINION RULE IN CALIFORNIA

California has never categorically excluded lay opinion either in theory or in practice.[36] As early as 1894 the California Supreme Court recognized that a so-called statement of fact is frequently only the opinion of a witness.[37] The court pointed out that impressions

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are indistinguishable from other opinions, the California and federal statutes admit both expert and lay opinion on the ultimate issue. CAL. EVID. CODE § 805 (West 1968); FED. R. EVID. 704. The testimony must, of course, meet the other requirements of admissibility.

[31] B. WITKIN, CALIFORNIA EVIDENCE § 408 (2d ed. 1966) [hereinafter cited as WITKIN (2d ed.)].

[32] MCCORMICK (2d ed.), *supra* note 2, § 11, at 24-25.

[33] *Id.* at 24, n.29.

[34] *Id.* at 25.

[35] *Id.*

[36] *See* 6 CAL. LAW REV. COMM'N REPORT, RECOMMENDATIONS, AND STUDIES 931-35 (1964). Although some California cases have used the traditional language of exclusion, these cases seem usually to be employing a convenient catch-all holding for a perfunctory affirmance of a lower court ruling. *See e.g.*, Nelson v. Sumida, 19 Cal. App. 171, 176, 124 P. 1053, 1055 (1st Dist. 1912). This author found only one California Supreme Court case which excluded lay opinion testimony without giving any other reason than that the witness' statement was a conclusion. Mah See v. North Am. Accident Ins. Co., 190 Cal. 421, 427, 213 P. 42, 44-45 (1923), *rev'd on other grounds by* Zuckerman v. Underwriters at Lloyds, London, 42 Cal. 2d 460, 267 P.2d 777 (1954). The witness had been asked if he knew that the deceased had been threatened on the part of certain tongleaders in Chinatown. The Supreme Court found that the question had been properly excluded as calling for three separate conclusions concerning the meaning of "threat," "tongleaders," and "on the part of." This article's analysis of California cases suggests that the court's ruling would have been more consistent with previous cases if it had been based on a finding that the question called for too vague an answer.

[37] Healy v. Visalia & T.R.R., 101 Cal. 585, 589, 36 P. 125 (1894).

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caused by external objects are not susceptible of exact reproduction in words. The opinion of the witness who has experienced them is the most efficient way to present these impressions to the jury.[38] Accordingly, California common law gave the trial court broad discretion[39] to admit lay opinion which was helpful to the jury.[40]

The helpfulness requirement mandates that witnesses "express themselves at the lowest possible level of abstraction."[41] It therefore differentiates between inferences and impressions. Inferences are excludable because they can be made more concrete.[42] For example, the mechanic in the introductory example could describe in sufficient detail the damage done to the auto so that an unskilled person could infer the violence of the impact. Because the mechanic's inference added nothing to the trier of fact's understanding, it did not satisfy the helpfulness requirement. A statement of impression, on the other hand, is helpful and admissible when the facts are too complex or too subtle for concrete expression.[43] For example, statements of identity, value, distance, time, and emotions are admissible as impressions.[44]

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[38] Accordingly, the *Healy* court allowed a fellow passenger's opinion on the possibility of the plaintiff's staying seated when their handcar left the track. *Id.*

[39] The court held that the trial court's discretion would not be reviewed unless its ruling had plainly worked injury. The court added that injury would not generally be found when a fair latitude had been allowed on cross examination. Nolan v. Nolan, 155 Cal. 476, 480-81, 101 P. 520, 522 (1909).

[40] An early case stated that the evidence must "enable persons not eyewitnesses to form an accurate judgment in regard to [the subject in issue]." Holland v. Zollner, 102 Cal. 633, 638, 36 P. 930, 931 (1894).

[41] People v. Hurlic, 14 Cal. App. 3d 122, 127, 92 Cal. Rptr. 55, 58 (2d Dist. 1971). Since statements made out of court must be admitted in the form uttered or not at all, the rationale of the opinion rule does not apply. It would be irrational to rigidly exclude out-of-court statements in opinion form if they are based on personal knowledge and deemed trustworthy or necessary by an exception to the hearsay rule. MCCORMICK (2d ed.), *supra* note 2, §§ 18, 35, 285; 3A J. WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 1041 (Chadbourn rev. 1970), 4 *Id.* at § 1053 (Chadbourn rev. 1972), 5 *Id.* at § 1447 (Chadbourn rev. 1974). *Contra*, WITKIN (2d ed.) *supra* note 31, § 461, at 424; B. JEFFERSON, CALIFORNIA EVIDENCE BENCHBOOK §§ 2.2, 3.5, 4.6, 5.4, 11.1, 13.1 (1972) [hereinafter cited as BENCHBOOK], *Id.* at § 10.1 (Supp. 1975).

[42] *See e.g.*, Redfield v. Oakland Consol. St. Ry., 112 Cal. 220, 226-27, 43 P. 1117, 1118-19 (1896) (negligence in operating street car with only one man on a given grade); Shafter v. Evans, 53 Cal. 32 (1878) (sufficiency of a corral to hold thirty-five cattle); Spolter v. Four Wheel Brake Service, 99 Cal. App. 2d 690, 695, 222 P.2d 307, 311 (1st Dist. 1950) (likelihood of having to replace new tire within two to three weeks); Stuart v. Dotts, 89 Cal. App. 2d 683, 687, 201 P.2d 820, 822 (1st Dist. 1949) (whether plaintiff was in cross walk when hit by auto); Kroll v. Rasin, 96 Cal. App. 84, 89, 273 P. 820, 821 (1st Dist. 1928) (whether damage to radiator caused by violent blow).

[43] People v. Hurlic, 14 Cal. App. 3d at 127, 92 Cal. Rptr. at 58.

[44] In 1894 the California Supreme Court gave a list of permissible topics:

> . . . questions of identity, handwriting, quantity, value, weight, measure, time, distance, velocity, form, size, age, strength, heat,

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Evidence Code section 800 codifies the previous California rule.[45] Federal rule 701[46] is substantially the same as the California statute.[47] The first step in both tests of admissibility is the requirement that lay witnesses base their opinions on personal observation. The second step of both tests is the requirement that the opinion be helpful. In addition, the California statute admits "such an opinion as is permitted by law."[48] This phrase preserves common law exceptions to the opinion rule. For example, an owner may testify to the value of property[49] and lay witnesses may testify to a person's sanity.[50]

> 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.

Holland v. Zollner, 102 Cal. 633, 638, 36 P. 930, 931 (1894). The California courts have applied the opinion rule in this manner at least since the *Holland* court allowed a witness' opinion that the decedent acted "irrationally."

[45] CAL. EVID. CODE § 800, Law Rev. Comm'n Comment (West 1968).

[46] FED. R. EVID. 701:

> If the witness is not testifying as an expert, his testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness and (b) helpful to a clear understanding of his testimony or the determination of a fact in issue.

[47] FED. R. EVID. 701, Advisory Comm. Note.

[48] CAL. EVID. CODE § 800 (West 1968), set out in note 4 *supra.*

[49] The opinion need not be helpful nor based on the witness' personal observation. *See e.g.*, Long Beach City High School Dist. v. Stewart, 30 Cal. 2d 763, 772-73, 185 P.2d 585, 590 (1947) (property taken for school); Windeler v. Scheers Jewelers, 8 Cal. App. 3d 844, 853, 88 Cal. Rptr. 39, 46 (1st Dist. 1970) (value of jewelry, owner: $1,463, jeweler: $50); Holmes v. Southern Cal. Edison Co., 78 Cal. App. 2d 43, 53, 177 P.2d 32, 37 (4th Dist. 1947) (value of house destroyed by fire).

Neither the cases nor the commentators explain the origin and rationale of this exception. Perhaps basic fairness mandates that owners be allowed to testify. Of course, the rule allows a person to give an outrageously high valuation. But the owner's opinion is not conclusive; the proper weight of such evidence as well as the resolution of conflicts between the testimony of an owner and of an expert is for the trier of fact. *See e.g.*, Windeler v. Scheers Jewelers, 8 Cal. App. 3d at 853, 88 Cal. Rptr. at 46. And as a general rule, the opinion is only as good as the reasons upon which it is based. *See e.g.*, Long Beach High School Dist. v. Stewart, 30 Cal. 2d at 773, 185 P.2d at 590.

The Third District Court of Appeal would restrict this exception when an owner testifies to the market value of real property. Sacramento & San Joaquin Drainage Dist. v. Goehring, 13 Cal. App. 3d 58, 65, 91 Cal. Rptr. 375, 379 (3d Dist. 1970). The court held that in such a case a landowner's testimony is subject to the same rules of admissibility as that of any other witness. The *Goehring* court relies on the California Evidence Code sections dealing with opinion evidence in eminent domain cases. CAL. EVID. CODE §§ 810-21 (West 1968). The decision may indicate that courts will further restrict the common law exception in other situations. Any justification for the rule is satisfied by not requiring the owner to hire an expert. If the owner's opinion is not based on personal observation or is very vague, it should not be accorded significant weight. Requiring the witness' opinion to satisfy California Evidence Code section 800 would align California law with the federal position and would enhance the reliability of the testimony.

[50] This exception is codified by California Evidence Code section 870. CAL.

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The California and federal rule of preference for testimony expressed in concrete terms promotes both judicial efficiency and a fair trial. Unlike the traditional American position which excludes all opinion, the rule of preference contains no incentive for lawyers to quibble over fine distinctions between fact and opinion or whether an opinion addresses the ultimate issue.[51] Instead, the California position relies on cross examination to guard against vague or conclusory opinion testimony.[52]

A second advantage of the California rule is that witnesses need not attempt tortuously detailed descriptions of phenomena which cannot be accurately verbalized except as impressions. This category of opinion evidence is the more readily admissible because many precedents exist for admitting a wide variety of impressions.[53]

Finally, the California rule vests wide discretion in the trial judge, the person best able to determine the usefulness of a witness' observations. Thus, admissibility of relevant evidence does not turn on fine definitional distinctions[54] but rather on the quality of the witness' observations.

V. ADMISSIBILITY OF EXPERT OPINION IN CALIFORNIA

As discussed above,[55] experts were originally employed by the court. When they became adversary witnesses, courts allowed them to give opinions under an exception to the personal knowledge rule. The rationale was that experts, because of training, skill, or experience, aided the trier of fact's understanding of the case. Later American courts developed the requirement that opinion evidence be admitted only when the facts of the case were beyond common experience.

The California test[56] of admissibility of expert opinion evidence[57]

EVID. CODE § 870 (West 1968). Section 870 eliminates the need for arguments concerning intimacy of acquaintance or distinguishing testimony as to sanity from testimony as to rationality of specific acts. Under Evidence Code section 870(c) anyone qualifying under Evidence Code section 800 to give an opinion may testify to a person's sanity. In other words, any opinion based on personal observation is admissible. Of course, a bare statement that a person is insane is not entitled to much weight without a statement of the reasons supporting the opinion. *In re* Dolbeer's Estate, 149 Cal. 227, 236, 86 P. 695, 699 (1906).

[51] *See* note 30, *supra*.

[52] Nolan v. Nolan, 155 Cal. 476, 480-81, 101 P. 520, 522 (1909); Healy v. Visalia & T.R.R., 101 Cal. 585, 590, 36 P. 125, 126 (1894).

[53] *See e.g.*, Holland v. Zollner, 102 Cal. 633, 36 P. 930 (1894). *See* WITKIN (2d ed.), *supra* note 31, §§ 392-404.

[54] *Cf.* 7 WIGMORE (3d ed.), *supra* note 3, § 1929, at 27.

[55] *See* text accompanying note 22 *supra*.

[56] The California and federal tests are substantially the same. *See* note 8, *supra*.

[57] This article assumes that expert testimony in opinion form can be distinguished from expert testimony in other forms. The Advisory Committee Notes to federal

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is stated in Evidence Code sections 720[58] and 801.[59] An expert's opinion is admissible if: (1) the subject is (a) "sufficiently beyond common experience" that (b) "the opinion . . . would assist the trier of fact;" (2) the expert is qualified by "special knowledge, skill, experience, training, or education;" (3) the opinion is based on matter "of a type that reasonably may be relied upon by an expert in forming an opinion . . . unless an expert is precluded by law from using such matter as a basis;" and (4) the matter is "perceived by or personally known to the witness or made known to him at or before the hearing . . . ."

The following sections of the article analyze this test of admissibility. The initial subsection discusses the two elements of the first requirement as a single test defining permissible topics of expert opinion. The discussion contrasts situations which not only permit but require expert opinion. The next subsection discusses the qualifications of experts. The final subsection examines the matter upon which an expert may base an opinion.

A. APPROPRIATE TOPICS FOR EXPERT OPINION

1. WHEN A EXPERT OPINION IS ADMISSIBLE

The only significant change in the admissibility of expert opinion in California since the nineteenth century has been a liberalization of the requirement that the subject of the testimony be beyond common experience.[60] Although the statute contains the requirement

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rule 702 indicate that the drafters clearly envisioned admitting expert testimony explaining scientific or technical principles as well as opinion testimony. Explanatory testimony equips the trier of fact to draw its own informed conclusions. The California Evidence Code distinguishes indirectly between forms of expert testimony. Evidence Code section 801 refers only to the admissibility of expert testimony in opinion form. No Evidence Code section sets out special requirements for the admissibility of non-opinion expert testimony other than the requirement of section 720 that the expert be qualified. This article deals with the use of opinion testimony in particular rather than expert testimony in general.

[58]CAL. EVID. CODE § 720 (West 1968):

> (a) 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. Against the objection of a party, such special knowledge, skill, experience, training, or education must be shown before the witness may testify as an expert.
> (b) A witness' special knowledge, skill, experience, training, or education may be shown by any otherwise admissible evidence, including his own testimony.

[59]CAL. EVID. CODE § 801, set out in note 5 *supra*.

[60]BENCHBOOK, *supra* note 41, § 29.4. Appellate courts have in rare instances applied the overly flexible common knowledge rule to reach improbable results. For example, one court found that the ordinary person knows how much

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that the subject be beyond common experience,[61] in practice, courts emphasize the requirement that the testimony assist the trier of fact. On the one hand, courts do not admit opinions on subjects unfamiliar to the lay person if they find that the testimony would not be of assistance.[62] On the other hand, courts find that any subject is beyond common experience if they believe that the opinion would aid comprehension.[63] Given the cases, a proper interpretation of the statute seems to be that any expert opinion testimony which would assist the trier of fact is by definition sufficiently beyond common experience to be admissible.[64]

The determination of whether expert opinion would assist the trier of fact depends on the facts of the case and the state of knowledge in the area.[65] Courts rarely find that a particular subject is always one for expert opinion. In a case involving a dormitory fire[66] one court noted that cases could be found both to support and to refute the proposition that expert evidence is admissible to prove the cause of a fire. A frequently cited Ohio case made the same point by asserting that there is no "rule of evidence concerning the opinion of witnesses which is peculiar to fences, highways, bridges, or steamboats, or to any other special subjects of investigation."[67]

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damage to the uvula and soft palate is to be expected in a tonsilectomy on a two year old child. Thomsen v. Burgeson, 26 Cal. App. 2d 235, 239, 79 P.2d 136, 138 (2d Dist. 1938). According to this reasoning, the lower court erred in directing the verdict in favor of the doctor on the ground that plaintiff did not offer expert opinion evidence. Such rulings are possible as long as the common knowledge rule is interpreted as a separate requirement of admissibility.

[61] The Federal Rules of Evidence do not have a similar common knowledge requirement. The Advisory Committee Note to federal rule 702 cites Ladd, *Expert Testimony*, 5 VAND. L. REV. 414 (1952) and suggests that the determination that a subject is beyond the common experience should be one factor bearing on the admissibility of expert testimony.

[62] *See* note 60, *supra*.

[63] There has been a proliferation of so-called experts testifying not only on esoteric topics of science and technology but also on such seemingly exoteric subjects as the operations needed to clean and maintain parking lots (Eger v. May Dept. Stores, 120 Cal. App. 2d 554, 558, 261 P.2d 281, 284 (2d Dist. 1953) and the obscenity of a night club act (People v. Newton, 9 Cal. App. 3d Supp. 24, 26, 88 Cal. Rptr. 343, 344 (App. Dep't Super. Ct. L.A. 1970)).

[64] *See* People v. Cole, 47 Cal. 2d 99, 103, 301 P.2d 854, 856 (1956). The suggested interpretation is in accord with the federal position. FED. R. EVID. 702:

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

[65] WEINSTEIN, *supra* note 16, ¶ 702[01]. *See* BENCHBOOK, *supra* note 41, § 29.4; WITKIN (2d ed.), *supra* note 29, §§ 408-10.

[66] Manney v. Housing Authority, 79 Cal. App. 2d 453, 460, 180 P.2d 69, 73 (1st Dist. 1947).

[67] Baltimore & O.R.R. v. Schultz, 43 Ohio St. 270, 1 N.E. 324, 332 (1885).

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2. WHEN EXPERT OPINION IS REQUIRED

Determining whether a court will allow expert opinion is quite different from determining whether failure to introduce expert opinion will result in a directed verdict or a nonsuit. Neither the cases nor the commentators offer much assistance to lawyers who want to know with certainty when they will be required to present expert testimony in order to establish a prima facie case. In *Liberty Mutual Insurance Co. v. Industrial Accident Commission*[68] the Supreme Court of California said that, as a general rule, the law requires expert testimony only in medical malpractice cases. The Third District Court of Appeal expanded this rule and held that experts must testify not only on medical malpractice questions but on all medical matters beyond common experience.[69]

A 1973 California Supreme Court case held that certain nonmedical cases may require expert opinion testimony as well. The case, *Miller v. Los Angeles Flood Control District*,[70] involved the negligence of a homebuilder. The defendant was granted a nonsuit because the plaintiff failed to produce expert testimony on building practices. The Supreme Court affirmed, holding that the standards and practices of the home construction industry were entirely beyond the experience of the average lay person. Unfortunately, the court couched its holding in general and ambiguous terms: when an issue is one within the knowledge of experts only, it is necessary for the plaintiff to introduce expert opinion evidence in order to establish a prima facie case.[71] In *Wright v. Williams*,[72] an attorney malpractice suit involving a specialist in maritime law, the Second District Court of Appeal affirmed a nonsuit on the ground that the plaintiff failed to sustain his burden of proof since he did not present expert

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[68] 33 Cal. 2d 89, 95, 199 P.2d 302, 307 (1948).

[69] Guarantee Ins. Co. v. Industrial Acc. Comm'n, 88 Cal. App. 2d 410, 413, 199 P.2d 12, 14 (3d Dist. 1948). Questions regarding the permanency of injuries involving nerve disorders, for example, usually require expert opinion testimony. Other medical questions do not require expert testimony because they are within common experience. For example, a person whose hand was severed at the wrist is not required to prove by expert testimony that the injury is permanent. *Accord*, Barham v. Widing, 210 Cal. 206, 216, 291 P.2d 173, 177 (1930) (average person knows that a dentist's needle should be sterilized); Haskins v. Howard, 181 Cal. App. 2d 338, 340, 5 Cal. Rptr. 128, 129 (1st Dist. 1960) (expert not needed to show permanent misalignment of jaw). Between the extremes, expert opinion testimony may or may not be necessary. Haskins v. Howard, 181 Cal. App. 2d at 340, 5 Cal. Rptr. at 129. Attorneys should make use of expert opinion testimony if a case involves a medical question about which reasonable minds could differ.

[70] Miller v. Los Angeles Flood Control Dist., 8 Cal. 3d 689, 505 P.2d 193, 106 Cal. Rptr. 1 (1973).

[71] 8 Cal. 3d at 702, 505 P.2d at 202, 106 Cal. Rptr. at 10. *See e.g.*, Putensen v. Clay Adams Inc., 12 Cal. App. 3d 1062, 91 Cal. Rptr. 319 (1st Dist. 1970).

[72] 47 Cal. App. 3d 802, 811, 121 Cal. Rptr. 194, 200 (2d Dist. 1975).

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opinion evidence.

From *Miller*, *Wright*, and the medical malpractice cases one can generalize that expert opinion testimony may be required in most cases involving professional malpractice. Both the *Miller* court and the *Wright* court distinguished instances of malpractice that are "so clear that a trier of fact may find professional negligence unaided by testimony of experts."[73] In the range of professional actions between the obviously negligent and the arguably prudent, attorneys should make use of expert opinion testimony. Beyond these cases an attorney cannot know with assurance when courts will require that they present expert opinion testimony in order to avoid a judgment of nonsuit or a directed verdict.

B. QUALIFICATION OF THE EXPERT[74]

The primary means of assuring the reliability of expert opinion is the requirement that the expert be qualified by special knowledge, skill, experience, training, or education.[75] The proponent of the opinion testimony may show the witness' qualifications by any otherwise admissible evidence including the expert's own testimony.[76]

The qualification of the expert is a question of fact to be determined by the judge.[77] The opponent of expert testimony may request the court's leave to conduct a voir dire examination of the expert to test his or her qualifications before the witness testifies.[78] Once a judge has determined that the expert is qualified, any further attack on the witness' qualifications goes only to the weight of the evidence.[79]

Expertise is measured against common knowledge rather than

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[73]The *Miller* court suggested that no expert is needed to show negligence in building a fireplace without a chimney. 8 Cal. 3d at 702 n.15, 505 P.2d at 202 n.15, 106 Cal. Rptr. at 10 n.15. The *Wright* court cited Moser v. Western Harness Racing Assn., 89 Cal. App. 2d 1, 200 P.2d 7 (1948) for the proposition that an attorney who failed to apply an elementary principle of corporation law would be negligent as a matter of law.

[74]The qualification of experts with specific credentials to testify in specific fact situations as well as the relative merits of various proposals to reform the so-called battle of experts are beyond the scope of this article. *See* WITKIN (2d ed.), *supra* note 31, §§ 406, 412.

[75]CAL. EVID. CODE § 720 (West 1968), set out in note 58 *supra.*

[76]CAL. EVID. CODE § 720(b) (West 1968), set out in note 58 *supra.*

[77]CAL. EVID. CODE § 405(a) (West 1968). California Evidence Code section 405 applies to determinations of expert qualifications under Evidence Code section 720. CAL. EVID. CODE § 405, Law Rev. Comm'n Comment.

[78]BENCHBOOK, *supra* note 41, § 29.3.

[79]Brown v. Colm, 11 Cal. 3d 640, 643, 522 P.2d 688, 690, 114 Cal. Rptr. 128, 130 (1974); *In re* Schulttig's Estate, 36 Cal. 2d 416, 424, 224 P.2d 695, 700 (1950).

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against the relative qualifications of other persons in the field.[80] A person qualified to give expert testimony need not be a specialist or be considered a noted authority by his or her colleagues. For example, one court found the owner of a motel to be sufficiently qualified to testify as an expert in eminent domain proceedings against real estate in the vicinity.[81]

Both the California Evidence Code[82] and the Federal Rules of Evidence[83] list qualifications which may combine to give a witness expertise. Although witnesses often qualify as experts because of their special education, experience alone may be sufficient. For example, in one case a laboratory technician without a college degree but with sixteen years of experience was allowed to testify to the nature of a chemical substance.[84]

Courts require that the qualifications of experts be specifically related to the particular subjects on which they are to testify.[85] For example, in a suit against a doctor, a hospital, and a manufacturer,[86] the plaintiff sought to show that a catheter had bent because of a defect in manufacture. The First District Court of Appeal affirmed a judgement of nonsuit in favor of the defendant manufacturer because no competent expert evidence was introduced.[87] The only expert testifying to the nature of the defect was the doctor who had inserted the catheter into the plaintiff. Although the doctor was an expert on the use of the catheter, he was not an expert on its chemical composition or tensile strength.

The expert's qualifications alone may not be sufficient to ensure reliability. It is well recognized that experts are not called as impartial scientists but as aids to partisan argument.[88] An expert's persuasiveness may depend more on courtroom manner than on credentials or on a good reputation among his or her colleagues.

To balance the partiality of expert witnesses, both the California Evidence Code[89] and the Federal Rules of Evidence[90] provide for

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[80] WITKIN (2d ed.), *supra* note 31, § 411.

[81] People *ex rel.* Dept. of Public Works v. Alexander, 212 Cal. App. 2d 84, 27 Cal. Rptr. 720 (5th Dist. 1963).

[82] CAL. EVID. CODE § 720 (West 1968), set out in note 58 *supra.*

[83] FED. R. EVID. 702 set out in note 64 *supra.*

[84] People v. Smith, 142 Cal. App. 2d 287, 298 P.2d 540 (2d Dist. 1956).

[85] 7 WIGMORE (3d ed.), *supra* note 3, § 1923, at 21. Wigmore framed the crucial question as, "On *this subject* can a jury from *this person* receive appreciable help?" (emphasis in the original); WEINSTEIN, *supra* note 16, ¶ 702[02]: "[The trial judge] must investigate the competence the particular proffered witness would bring to bear on the issues . . . ."

[86] Putensen v. Clay Adams, Inc., 12 Cal. App. 3d 1062, 91 Cal. Rptr. 319 (1st Dist. 1970).

[87] 12 Cal. App. 3d at 1081, 91 Cal. Rptr. at 331.

[88] *See* Annot., 38 A.L.R.2d 13, 21-22 (1950).

[89] CAL. EVID. CODE § 730 (West 1968).

[90] FED. R. EVID. 706.

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discretionary[91] court appointment of experts in civil or criminal actions on the court's motion or the motion of any party. Presumably this device can be used to obtain objective testimony. Attorneys may elicit from such experts the fact of their appointment by the court,[92] and this information may bolster the expert's credibility.

Neither the cases nor the commentators satisfactorily explain the courts' reluctance[93] to use their power to appoint expert witnesses. One analysis concludes that the courts are simply unfamiliar with the procedures involved.[94] Others suggest that court appointment of experts may run afoul of the protections provided by the adversary method of resolving legal conflicts. Thus, parties may be effectively deprived of the right to trial by jury because the jury will tend to be overly impressed by the court's expert.[95] Some fear that the court-appointed expert will do only a "routine" job.[96] Others argue that there is no such thing as an impartial witness because there are usually conflicting schools of thought on a subject.[97]

The arguments opposing the use of court-appointed experts are not entirely persuasive. Neither the California nor the federal statute provides that court-appointed experts be used to the exclusion of the parties' experts.[98] And attorneys are free to point out on cross examination any bias on the part of the court-appointed expert.[99] The federal statute provides that a judge need not allow an attorney to reveal that an expert is court-appointed if the judge fears that the jury will be overly impressed.[100] Although there is no analogous California provision, Evidence Code section 352,[101] which permits a

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[91] The power of the judge may not be entirely discretionary. The Second District Court of Appeal has held that equal protection requires in proper factual situations that courts appoint an expert to assist indigent defendants. Torres v. Municipal Court, 50 Cal. App. 3d 778, 123 Cal. Rptr. 553 (2d Dist. 1975). That right is guaranteed by statute in federal courts. 18 U.S.C. § 3006A(e) (1970).

[92] CAL. EVID. CODE § 722(a) (West 1968): "The fact of the appointment of an expert witness by the court may be revealed to the trier of fact." FED. R. EVID. 706(c): "In the exercise of his discretion, the judge may authorize disclosure to the jury of the fact that the court appointed the expert witness."

[93] WITKIN (2d ed.), *supra* note 31, § 425.

[94] Comment, *The Doctor in Court: Impartial Medical Testimony*, 40 S. CAL. L. REV. 728, 735 (1967) [hereinafter cited as *The Doctor in Court*].

[95] Louisell, Book Review, 45 CALIF. L. REV. 572 (1957), analyzing the REPORT OF THE SPECIAL COMMITTEE, ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK on New York's Impartial Medical Testimony Project. *See* WEINSTEIN, *supra* note 16, ¶ 706[01]; *The Doctor in Court*, *supra* note 94, at 731-34.

[96] WEINSTEIN, *supra* note 16, ¶ 706[01].

[97] *Id.*

[98] CAL. EVID. CODE § 733 (West 1968); FED. R. EVID. 706(d).

[99] *See* text accompanying note 131 *infra*.

[100] FED. R. EVID. 706(c), set out in note 92 *supra*.

[101] CAL. EVID. CODE § 352 (West 1968):

> The court in its discretion may exclude evidence if its probative value is substantially outweighed by the probability that its admis-

judge to exclude evidence likely to cause undue prejudice, provides the court with a method of suppressing the fact of an expert's appointment by the court.

C. MATTER UPON WHICH EXPERT OPINION MAY BE BASED

Both the California and federal statutes specify three possible sources of matter upon which experts may base their opinions:[102] (1) facts observed firsthand, (2) evidence presented at trial, and (3) matter made known to the expert outside the courtroom other than by personal perception.[103]

The first source of matter on which experts may base an opinion is personal knowledge. In this respect the expert opinion rule resembles the personal knowledge element of the lay opinion rule. The expert's personal knowledge, unlike the lay witness', also includes the skill, experience, and training which qualify him or her as an expert.

The second source of matter on which experts may rely in forming an opinion is matter presented to the expert at trial either through facts assumed in a hypothetical question or through the expert's seeing and hearing the evidence by attending the trial.[104] Both means of presenting matter have shortcomings. The latter poses the danger that the experts who rely on matter presented at trial may be asked to assume the truth of previous testimony which is itself unclear, in opinion form, or in conflict with other evidence. The former poses the danger that the hypothetical question may assume facts not supported by the evidence or may be skillfully designed to gloss over contradictory evidence. The question may also be lengthy and confusing to the trier of fact. And attorneys may engage in time consum-

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> sion will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury.

[102] CAL. EVID. CODE § 801(b) (West 1968), set out in note 5 *supra*; FED. R. EVID. 703:

> The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to him at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence.

[103] Personal observation and facts obtained at trial were permissible bases of expert opinion before the adoption of Federal Rule of Evidence 703. Testimony based on hearsay, on the other hand, was admissible only in a few situations. *See* NEW YORK TRIAL LAWYERS, RECOMMENDATIONS AND STUDY 201-04 (1970). According to Judge Weinstein's analysis of the federal cases, however, "the seemingly radical change imposed by Rule 703 may prove to be more apparent than real." WEINSTEIN, *supra* note 16, § 703[03]. Evidence Code section 801(b) codifies the previous California practice. CAL. EVID. CODE § 801(b), Law Rev. Comm'n Comment (West 1968).

[104] FED. R. EVID. 703, Advisory Comm. Notes. *See* WEINSTEIN, *supra* note 16, ¶ 703[02].

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ing debate over the adequacy of the question's premises. Thus, one critic has termed the hypothetical question "[an] intolerable obstruction of truth . . . misused by the clumsy and abused by the clever."[105]

The California and federal statutes enhance the reliability of opinions elicited by hypothetical questions and minimize confusion and time waste. The statutes enhance reliability by allowing full cross examination concerning the basis of an opinion.[106] The cross examiner may, for example, restate the question by using facts supporting a contradictory theory or by inserting omitted facts. The statutes minimize time waste by not requiring the proponent of opinion evidence to present the underlying data on which the expert bases an opinion before introducing the opinion itself.[107] Formerly, it was common for attorneys to propound lengthy and convoluted questions containing all the facts upon which the expert based his or her opinion. These questions are no longer necessary when no simple, fair, compromise statement of the facts exists.

The third source of information which the statutes permit experts to use in forming opinions is matter made known to them outside the courtroom other than by their personal observation. For example, doctors rely on this type of information when they base

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[105] 2 WIGMORE (3d ed.), *supra* note 3, § 686, at 812.

[106] CAL. EVID. CODE § 721 (West 1968):

> (a) Subject to subdivision (b), 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 (1) his qualifications, (2) the subject to which his expert testimony relates, and (3) the matter upon which his opinion is based and the reasons for his opinion.
>
> (b) If a witness testifying as an expert testifies in the form of an opinion, he may not be cross-examined in regard to the content or tenor of any scientific, technical, or professional text, treatise, journal, or similar publication unless:
>
> (1) The witness referred to, considered, or relied upon such publication in arriving at or forming his opinion; or
>
> (2) Such publication has been admitted in evidence.

FED. R. EVID. 705:

> The expert may testify in terms of opinion or inference and give his reasons therefor without prior disclosure of the underlying facts or data, unless the court requires otherwise. The expert may in any event be required to disclose the underlying facts or data on cross-examination.

[107] CAL. EVID. CODE § 802 (West 1968):

> A witness testifying in the form of an opinion may state on direct examination the reasons for his opinion and the matter (including, in the case of an expert, his special knowledge, skill, experience, training, and education) upon which it is based, unless he is precluded by law from using such reasons or matter as a basis for his opinion. The court in its discretion may require that a witness before testifying in the form of an opinion be first examined concerning the matter upon which his opinion is based.

FED. R. EVID. 705, set out in note 106 *supra*.

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opinions in part on medical treatises or on a patient's statement of medical history. The reliability of such matter is ensured by the requirement that the particular material be of a type that reasonably may be relied upon by an expert in the subject.[108] For example, a doctor may reasonably rely on a person's statement of medical history to make a diagnosis,[109] but a highway patrol officer may not reasonably rely entirely on the comments of bystanders to determine the cause of an accident.[110] Courts must decide on a case by case basis the permissibility of an expert's relying on hearsay in forming an opinion, since there are no detailed statutory rules listing all the matters upon which an expert may properly base an opinion.[111] Such a series of rules would be overly restrictive and impractical to apply.

The California and federal statutes do not require that the basis of the opinion be independently admissible under the hearsay or best evidence rules[112] as long as it is of a type that reasonably may be relied upon by an expert in the subject. In applying this general rule, attorneys should distinguish three situations. In the first situation the basis of the opinion is itself admissible in evidence. For example, a person's statement of present bodily condition made to a doctor is independently admissible under an exception to the hearsay rule.[113]

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[108]CAL. EVID. CODE § 801(b) (West 1968), set out in note 5 *supra*; FED. R. EVID. 703, set out in note 102 *supra*. In California the trustworthiness of a source of information is determined not just by experts in the subject but by the court. The testimony is inadmissible if the "expert is precluded by law from using such matter as a basis for his opinion." CAL. EVID. CODE § 801(b) (West 1968). The inadmissibility of opinions based on the results of lie detector tests is an example. Courts have found that lie detectors and "truth serum" have not gained sufficient standing and scientific recognition to justify their use as a basis of expert opinion evidence. People v. Wochnick, 98 Cal. App. 2d 124, 128, 219 P.2d 70, 72 (2d Dist. 1950). *See* People v. Thornton, 11 Cal. 3d 738, 763, 523 P.2d 267, 284, 114 Cal. Rptr. 467, 484 (1974); People v. Hones, 52 Cal. 2d 636, 653, 343 P.2d 577, 588 (1959). Federal rule 703 does not have a similar limiting clause. Commentators have raised the specter of the "accidentologist" and argued that Federal Rule of Evidence 703 is unclear on whether reliability is to be determined by experts or by the courts. *See* P. ROTHSTEIN, UNDERSTANDING THE NEW FEDERAL RULES OF EVIDENCE 82 (1973) (hereinafter cited as ROTHSTEIN]. The Advisory Committee Note to Federal Rule of Evidence 703 meets this criticism by suggesting that the opinion of an accidentologist based solely on the comments of bystanders would not satisfy the requirement of reasonable reliability. The Note cites the *California Law Revision Recommendations*. 7 CAL. LAW REV. COMM'N, REPORTS, RECOMMENDATIONS, AND STUDIES 148-50 (1965).

[109]*See* note 113 *infra*.

[110]*See* note 120 *infra*.

[111]CAL. EVID. CODE § 801, Law Rev. Comm'n Comment (West 1968).

[112]CAL. EVID. CODE § 801(b) (West 1968), set out in note 5 *supra;* FED. R. EVID. 703, set out in note 102 *supra*. In this respect the California and federal position is more liberal than that of many jurisdictions. WITKIN (2d ed.), *supra* note 31, § 408.

[113]CAL. EVID. CODE § 1250 (West 1968); FED. R. EVID. 803(3), (4).

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The statement is reasonably reliable matter upon which a doctor may base a diagnostic opinion.[114]

In the second situation the basis may be reasonably relied upon but may not be itself admissible in evidence. A doctor may base an opinion (and state that he or she does so) on a medical treatise[115] which has not been admitted into evidence. Similarly, in an eminent domain proceeding an expert may state that the basis of an opinion is a specific price paid for similar property in the vicinity.[116] The specific figure is not independently admissible as substantive evidence.[117] Courts will admit the opinions of the doctor and the expert on value because the experts base their opinions on matter that may be reasonably relied upon. The opinion testimony does not violate the hearsay and best evidence rules because the proponent of the evidence does not offer the bases of the opinions as substantive evidence.[118]

In the final situation the basis of the opinion is neither admissible under an exception to the hearsay rule[119] nor a source of information upon which an expert may reasonably rely. Courts will always exclude opinions based on such matter. A highway officer testifying on the cause of an accident may not give an opinion based solely on the observations of bystanders.[120] Similarly, an expert on the cause of a fire may not rely solely on the comments of on-the-scene wit-

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[114] People v. Wilson, 25 Cal. 2d 341, 348, 153 P.2d 720, 724 (1944).

[115] Brown v. Colm, 11 Cal. 3d 639, 643, 522 P.2d 688, 690, 114 Cal. Rptr. 128, 130 (1974); Healy v. Visalia & T.R.R., 101 Cal. 585, 592, 36 P. 125, 126 (1894).

[116] County of L.A. v. Faus, 48 Cal. 2d 672, 312 P.2d 680 (1957).

[117] Though the evidence is arguably nonassertive conduct and therefore not hearsay (*See* CAL. EVID. CODE § 1200, Comment — Senate Committee on Judiciary (West 1968)), its admissibility is governed by Evidence Code sections 810-22. These sections apply in condemnation proceedings; Evidence Code section 813 provides that value may only be shown by opinion testimony. The danger that the jury will misuse this evidence seems unavoidable. The danger is minimized by the requirement that the court give a limiting instruction. A trial court commits error if it fails to give the limiting instruction. *See e.g.*, County of L.A. v. Faus, 48 Cal. 2d at 676, 312 P.2d at 682-83; Palladine v. Imperial Farm Lands Ass'n, 65 Cal. App. 727, 756, 225 P. 291, 303 (2d Dist. 1924) *disapproved on other grounds by* Gagne v. Bertran, 43 Cal. 2d 481, 275 P.2d 15 (1954).

[118] *Cf.* People v. Brown, 49 Cal. 2d 577, 585, 320 P.2d 5, 11 (1958).

[119] A lower court commits error if the jury hears prejudicial, improper, unsworn testimony. In 1973 the Supreme Court of California found that the First District Court of Appeal erred in affirming a lower court's admission of testimony concerning a medical expert's consultations with fifty anonymous physicians. Witfield v. Roth, 10 Cal. 3d 874, 893, 519 P.2d 588, 603-04, 112 Cal. Rptr. 540, 555 (1973). In another case a police officer testified to the cause of an automobile accident and stated that his opinion was based partly on the statement of a bystander. The trial court erred when it admitted the bystander's statement over the objection of the opposing party. Buchanan v. Nye, 128 Cal. App. 2d 582, 585, 275 P.2d 767, 770 (2d Dist. 1954).

[120] Ribble v. Cook, 111 Cal. App. 2d 903, 906, 245 P.2d 593, 595 (1st Dist. 1952).

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nesses.[121] Nor are there hearsay exceptions under which these statements would be independently admissible as substantive evidence.[122]

Neither California Evidence Code section 802[123] nor Federal Rule of Evidence 705[124] requires disclosure upon direct examination of the reasons and supporting matter underlying expert opinion.[125] As noted above,[126] this approach minimizes confusion and time waste. Commentators have suggested, though, that this liberalized rule will result in the admission of inadequately supported expert opinion. These commentators envision that experts will be called, qualified as experts, asked for an opinion, and dismissed without any foundation being laid for their opinions.[127] Others protest that cross ex-

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[121] Behr v. Santa Cruz, 172 Cal. App. 2d 697, 709, 342 P.2d 987, 995 (1st Dist. 1959). *See e.g.*, Luque v. McLean, 8 Cal. 3d 136, 148, 501 P.2d 1163, 1171-72, 104 Cal. Rptr. 443, 451-52 (1972) (Articles in *Reader's Digest, Today's Health,* and *Consumer Bulletin* do not constitute matter that may reasonably be relied upon. Department of Health, Education, and Welfare statistical survey presents closer question); Board of Trustees v. Porini, 263 Cal. App. 2d 784, 794, 70 Cal. Rptr. 73, 80 (3d Dist. 1968) (psychiatrist not allowed to rely on dossier accumulated by lay third persons).

[122] Assuming, of course, that they do not qualify as spontaneous declarations or excited utterances.

[123] CAL. EVID. CODE § 802 (West 1968), set out in note 107 *supra.*

[124] FED. R. EVID. 705, set out in note 106 *supra.*

[125] The California Law Revision Commission Comment to Evidence Code section 802 indicates that the Commission thought disclosure would be mandatory in some instances. But the persuasiveness of the Commission's interpretation is debatable. First, the language of the statute is permissive rather than mandatory. Second, once the expert has been qualified, the adequacy of the basis of an opinion goes to its weight, not its admissibility.

The Comment cites two cases as authority for the proposition that underlying data must be revealed on direct examination in some cases: Eisenmayer v. Leonardt, 148 Cal. 596, 84 P. 43 (1906) and Lemley v. Doak Gas Engine Co., 40 Cal. App. 146, 180 P. 671 (1st Dist. 1919). The proposition is dicta in *Lemley.* And the *Eisenmayer* court could have reached the same result under the present statute by requiring on its own motion or upon objection of the opposing attorney, that the expert state the basis of his or her opinion before testifying to the opinion itself.

The Commission also felt that a preliminary foundation is required by Evidence Code section 350 which provides that evidence must be relevant and by Evidence Code section 403 which gives the proponent of the evidence the burden of producing evidence as to the existence of certain preliminary facts when relevancy is disputed. But an inquiry into the relevancy of an opinion is different from an inquiry into the adequacy of its basis. Relevancy is addressed by the requirements that the expert be qualified and that the opinion be helpful.

Federal Rule of Evidence 705 provides that "The expert may testify . . . without prior disclosure. . . ." The rule is clearly permissive. Both the California and federal statutes have been interpreted to provide that the basis of an expert opinion need not but may be disclosed before the expert testifies to the opinion itself. BENCHBOOK, *supra* note 41, § 29.5 (California); WEINSTEIN, *supra* note 16, ¶ 705[01] (federal).

[126] *See* text accompanying note 107 *supra.*

[127] One bar association suggested that an expert might be called, qualified as an orthopedic surgeon, and then examined:

> Q: Doctor, do you have an opinion based upon a reasonable degree of medical certainty as to the extent of permanent disability suf-

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aminers will have to rely on discovery rather than on their opponent's direct examination to determine the basis of expert witnesses' opinions. They believe that the cross examiner will be at an unfair disadvantage.[128] These fears are unfounded.

First, it is to the advantage of the attorney with a well-qualified expert to elicit the basis of the expert's opinion on direct examination.[129] If the expert does not testify from personal knowledge, the attorney should be especially diligent in bringing out the basis of an opinion. In such a case the proponent of the opinion testimony will not have the benefit on appeal of the presumption that an opinion based on personal knowledge is adequately supported.[130] A wise advocate will also bring out material that could later be used to impeach the expert so that the trier of fact will not be led to believe that the attorney is trying to conceal damaging information.

Secondly, courts allow a wide latitude on cross examination of expert witnesses.[131] The Second District Court of Appeal stated the rule:

> Once an expert offers his opinion . . . 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

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fered by the plaintiff as a result of this auto accident?
A: Yes.
Q: What is your opinion?
A: She is totally and permanently disabled.
Q: Thank you, doctor, that is all.

Weinstein commented wryly, "Congress found no objection to such brevity. Many judges would welcome it." WEINSTEIN, *supra* note 16, at 705-2.

[128] *Id.* at 705-1.

[129] Conversely, the attorney with a poorly qualified expert gains little from offering an opinion which is certain to be demolished on cross examination. The attorney's own credibility is likely to be destroyed in the process.

[130] *Cf.* Lumberman's Mut. Cas. Co. v. Industrial Acc. Comm'n, 29 Cal. 2d 492, 500, 175 P.2d 823, 828 (1946) (attending physician); Lemley v. Doak Gas Engine Co., 40 Cal. App. 146, 152-53, 180 P. 671, 674 (1st Dist. 1919) (fellow workman testifying as expert in workman's compensation case).

[131] CAL. EVID. CODE § 721 (West 1968), set out in note 106 *supra*. *See e.g.*, Brown v. Alfonso, 185 Cal. App. 2d 235, 238, 8 Cal. Rptr. 156, 158 (1st Dist. 1960); Covina Union High School Dist. v. Jobe, 174 Cal. App. 2d 340, 349, 345 P.2d 78, 84 (2d Dist. 1959). Evidence Code section 721(b) limits cross examination concerning the content of any "scientific, technical, or professional text, journal, or similar publication." Such material may not be inquired into on cross examination unless the witness "referred to, considered, or relied upon such publication in arriving at or forming his opinion" or the publication has been admitted into evidence. Federal rule 705 does not have a similar limitation. One commentator has suggested impeaching the credibility of experts by trapping them into "recognizing" outdated or nonexistent works as authorities in their field. ROTHSTEIN, *supra* note 108, at 348. Expert witnesses in federal courts should be coached to ask to inspect the cross examiner's proffered authorities and to emphasize that their familiarity with a work does not mean uncritical endorsement of it.

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> extent of his knowledge, the reasons for his opinion . . .; and . . . his qualifications. . . .[132]

The cross examiner may go beyond the scope of the direct examination in order to show what matter the expert actually relied upon.[133] Like the proponent of the testimony, the cross-examiner may base questions on matter not otherwise admissible in evidence.[134] For example, one California Supreme Court case allowed the cross examiner to inquire into precautions taken after defendant's aqueduct broke and flooded plaintiff's leasehold.[135] Although evidence of subsequent repairs is not admissible to show negligence or culpable conduct,[136] the court held that the question was proper to test the value of the expert's opinion. The court reasoned that the danger of prejudice was an unavoidable risk which was lessened by the right of the other party to a cautionary instruction. Only if the judge determines that the real purpose of the question is to get the substance of the inquiry before the jury as an evidentiary fact,[137] should he or she disallow it.

If cross examination reveals that an expert opinion is based in whole or in significant part on matter upon which an expert may not reasonably rely, Evidence Code section 803[138] provides that the testimony shall be stricken by the court upon objection or on its own motion. When an expert bases an opinion on a combination of proper and improper matter, the court may accept the testimony if it determines that the expert has not based the opinion "in significant part"[139] on improper material. For example, in a case involving

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[132] Hope v. Arrowhead & Puritas Waters, Inc., 174 Cal. App. 2d 222, 230, 344 P.2d 428, 433 (2d Dist. 1959).

[133] In a civil case a well-prepared attorney normally undertakes discovery instead of waiting until trial to assess the strengths and weaknesses of the opponent's experts.

[134] CAL. EVID. CODE § 721(a) (West 1968), set out in note 106 *supra.*

[135] Inyo Chemical Co. v. City of L.A., 5 Cal. 2d 525, 543-44, 55 P.2d 850, 858-59 (1936).

[136] CAL. EVID. CODE § 1151 (West 1968).

[137] *See* Whitfield v. Roth, 10 Cal. 3d 874, 895, 519 P.2d 588, 603, 112 Cal. Rptr. 540, 555 (1973). Eminent domain proceedings often involve a possibility of prejudice by inquiries on cross examination into specific figures which form the basis of an expert opinion but are not themselves evidence of value. *See* Huxtable & Matteon, *Trial Preparation and Trial,* in CALIFORNIA CONTINUING EDUCATION OF THE BAR: CONDEMNATION PRACTICE IN CALIFORNIA § 9.53 (M. Hunter & D. Ream eds., 1973).

[138] CAL. EVID. CODE § 803 (West 1968):

> The court may, and upon objection shall, exclude testimony in the form of an opinion that 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, if there remains a proper basis for his opinion, then state his opinion after excluding from consideration the matter determined to be improper.

[139] CAL. EVID. CODE § 803 (West 1968), set out in note 138 *supra.*

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a conspiracy to manufacture drugs, the police chemist based his opinion that the drug was LSD in part on statements made by an accomplice of the defendant and in part on an examination of the chemicals and equipment found on defendant's premises.[140] The appellate court upheld the trial court's admission of the opinion. It is doubtful that under Evidence Code section 801(b)[141] a chemist may rely on hearsay in forming an opinion of chemical analysis, but the court could properly accept the opinion upon determination that the expert did not base his opinion in significant part on the improper matter.[142]

As a third protection against inadequately supported expert opinion, Evidence Code section 804[143] provides that if an expert bases an opinion on the statement of another, the opponent of the evidence may call and examine such person as if he or she were an adverse witness.[144] Attorneys can accomplish the same result in federal courts under Federal Rule of Evidence 611(b) and (c).[145]

Finally, expert opinion evidence is not conclusive but may be refuted by any competent evidence including testimony as to the facts or lay opinion. Even in cases when expert opinion is necessary to a prima facie case, it is, with rare exceptions,[146] conclusive only in

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[140] People v. Aylwin, 31 Cal. App. 3d 826, 107 Cal. Rptr. 824 (1st Dist. 1973).

[141] CAL. EVID. CODE § 801(b), set out in note 5 *supra*.

[142] *But see* analysis of same case in BENCHBOOK, *supra* note 41, § 29.6 (Supp. 1975). Evidence Code section 803 protects the proponent of the expert opinion by providing that if, without relying on any improper matter, the expert can still state an opinion, the opinion must be admitted. The federal rules do not have a similar provision regarding exclusion and correction.

[143] CAL. EVID. CODE § 804 (West 1968):

> (a) 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 and examined by any adverse party as if under cross-examination concerning the opinion or statement.
>
> (b) This section is not applicable if the person upon whose opinion or statement the expert witness has relied is (1) a party, (2) a person identified with a party within the meaning of subdivision (d) of Section 776, or (3) a witness who has testified in the action concerning the subject matter of the opinion or statement upon which the expert witness has relied.
>
> (c) Nothing in this section 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.
>
> (d) An expert opinion otherwise admissible is not made inadmissible by this section because it is based on the opinion or statement of a person who is unavailable for examination pursuant to this section.

[144] The Law Revision Commission singled out this section as a significant change in the law governing expert opinion. Under prior law such persons were witnesses of the party calling them. Cal. Law Rev. Comm'n Recommendation, Comments on Division 7 CALIFORNIA EVIDENCE CODE (West 1968).

[145] WEINSTEIN, *supra* note 16, ¶ 703[03].

[146] The author is aware of only one instance in which scientific evidence is considered conclusively true. California Evidence Code section 890, *et seq.*, codifies

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the sense that the testimony of other experts is necessary to refute it. Triers of fact may reject the opinion of any expert witness which they find to be unreasonable.[147]

VI. CONCLUSION

The California and federal statutes create a presumption that the opinions of both lay and expert witnesses are admissible. The standard of admissibility is the liberal requirement that the opinion testimony be helpful. Implicit in the helpfulness requirement is a rule of preference for concrete testimony.

The reliability of opinion testimony is primarily ensured by the qualification of the witnesses. Lay witnesses must testify from personal knowledge. Expert witnesses must have special skills, experience, or training and must base their opinions on matter of a type which may reasonably be relied upon.

The opposing party has the burden of showing the inadequacy of both lay and expert opinion. This approach promotes judicial efficiency. The rule requires that courts not arbitrarily exclude reliable evidence or reverse judgments on the basis of unworkable distinctions between fact and opinion.

In California and federal courts proper objections to opinion testimony are made in terms of helpfulness or reliability. The bare objection that a witness' testimony is in opinion form or that an adversary's question calls for a conclusion is inappropriate.

Charity Kenyon

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the Uniform Act on Blood Tests to Determine Paternity. The tests must be conducted by experts qualified as examiners of blood types and, if all the experts agree on the results, the tests can only conclusively show that a particular person is not the father of a particular child. The trial court still has discretion to find that a given system of blood typing has not been generally accepted as reliable. Huntingdon v. Crowley, 64 Cal. 2d 647, 414 P.2d 382, 51 Cal. Rptr. 254 (1966).

[147] CAL. PENAL CODE § 1127(b) (West 1972) codifies the common law regarding the weight of opinion evidence. The code provides:

> When, in any criminal trial or proceeding, the opinion of any expert witness is received in evidence, the court shall instruct the jury substantially as follows:
>
> Duly qualified experts may give their opinions on questions in controversy at trial. To assist the jury in deciding such questions, the jury may consider the opinion with the reasons stated therefor, if any, by the expert who gives the opinion. The jury is not bound to accept the opinion of any expert as conclusive, but should give to it the weight to which they shall find it to be entitled. The jury may, however, disregard any such opinion, if it shall be found by them to be unreasonable.

The jury is instructed similarly in a civil case. BOOK OF APPROVED JURY INSTR. CIVIL 2.40 (West, 5th ed. 1969).

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