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First Supplement to Memorandum 63-50

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

This supplement presents additional material relating to Article VII.

PROPOSED RULE 57.5.

The staff presents for Commission consideration the following rule which is not contained in the URE:

RULE 57.5. OPINION BASED ON OPINION OR STATEMENT OF ANOTHER.

If a witness testifying in terms of an opinion 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. Nothing in this rule makes admissible an opinion that is inadmissible because it is based in whole or in part on the opinion or statement of another person.

The rule set out above is taken from the 1963 bill relating to evidence in eminent domain proceedings. The Commission did not recommend this bill to the Legislature in 1963, but the Commission has considered and approved the insertion of such a section in the evidence-in-eminent-domain-proceedings bill. The staff believes that the principle is sound and should be extended to all opinion testimony.

The 1963 evidence-in-eminent-domain-proceedings bill also contained another provision:

If the court finds that the opinion of a witness as to the amount to be determined under subdivision 1, 2, 3 or 4 of Section

1248 is inadmissible, or if such opinion is stricken, because it is based in whole or in part upon incompetent facts or data, the witness may then give his opinion as to such amount after excluding from consideration the facts or data determined to be incompetent.

The staff does not recommend that a comparable provision be included in the URE rules, but notes the provision for Commission consideration. We do not recommend this provision because it seems unlikely that a court would apply a different rule. If the Commission wishes to include the substance of the above provision in the URE, the following may serve as a basis for discussion:

(1) If the opinion of a witness is held to be inadmissible or is stricken because the judge finds that it is based in whole or in part on incompetent facts or data, the witness may then give his opinion after excluding from consideration the facts and data determined to be incompetent.

(2) Nothing in this rule (a) makes an opinion inadmissible, or (b) makes admissible an opinion which is not otherwise admissible. Subdivision (2) may be unnecessary, but it makes clear that subdivision (1) does not permit a witness to express an opinion that is not otherwise admissible and also makes clear that subdivision (1) is not an independent ground for exclusion of an opinion.

RULE 58.

If the policy of Rule 58 is acceptable, consideration should be given to revising Rule 58 to read as follows:

RULE 58. [~~HYPOTHESIS-FOR-EXPERT-OPINION-NOT-NECESSARY~~]

HYPOTHETICAL QUESTIONS.

Unless the judge in his discretion so requires, questions calling for the opinion of an expert witness need not be hypothetical.

in form [~~unless the judge in his discretion so requires, but~~];
and, subject to Rule 57, the witness may state his opinion and
the reasons therefor without first specifying the facts and
data on which it is based as a hypothesis or otherwise [~~+but~~
~~upon cross-examination he may be required to specify such data~~].

The proposed revised rule makes clear that it is subject to Rule 57.
The last clause is deleted because the matter of cross-examination is
covered by proposed Rule 58.5. The net effect of Revised Rule 58 (set
out above) is to abolish the requirement of the hypothetical question,
unless the judge otherwise requires.

Respectfully submitted,

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