CASE SUMMARIES

Bruce v. Astrue

W's opinion testimony concerning H's ability to work improperly disqualified.
Bruce v. Astrue (9th Cir. 2009) 557 F.3d 1113
Pregerson, Cir. J.
FACTS: H's application for SSI benefits was denied and that decision was affirmed by the Dist. Ct. W testified at hearing before ALJ that H was injured in 1997 and that accident had negatively affected his ability to work. She testified that, at least twice per week, he refused to leave the bedroom, bathe, and eat, because of his severe depression. She explained that on most days he lies down during the day for a rest. In finding that H was capable of making an adjustment to other unskilled jobs existing in significant numbers in the national economy, the ALJ disregarded W's testimony because she wasn't "knowledgeable in the medical and/or vocational fields and thus is unable to render opinions on how the claimant's impairments impact his overall abilities to perform basic work activities."

Court of Appeals reversed.

HELD: W's opinion testimony concerning H's ability to work improperly disqualified.

"'In determining whether a claimant is disabled, an ALJ must consider lay witness testimony concerning a claimant's ability to work.' [Citations.] Such testimony is competent evidence and '••cannot•• be disregarded without comment.' [Citation.] If an ALJ disregards the testimony of a lay witness, the ALJ must provide reasons 'that are germane to each witness.' [Citation.]. Further, the reasons 'germane to each witness' must be specific…. '[T]he ALJ, not the district court, is required to provide ••specific•• reasons for rejecting lay testimony[.]'" (Id. at p. 1115.)

The Court explained that lay witness lay testimony may be introduced to show the severity of a claimant's impairments and how it affects his ability to work:

"'[F]riends and family members in a position to observe a claimant's symptoms and daily activities are competent to testify as to [his] condition.'" (Id. at p. 1116.)

"A lay person, … though not a vocational or medical expert, [is] not disqualified from rendering an opinion as to how [a person's] condition affects his ability to perform basic work activities…. [E]vidence provided by lay witnesses may be used to show 'the severity of [a claimant's] impairment(s) and how it affects [the claimant's] ability to work')." (Id. at p. 1116.)
EV2011.2 OpEv 881.00

People v. DeSantis

Lay person permitted to give opinion of own mental condition.
People v. DeSantis (1992) 2 Cal.4th 1198, 9 Cal.Rptr.2d 628, 831 P.2d 1210
Mosk, J.
FACTS: At D's murder trial, accomplice (A) testified against D pursuant to plea bargain. Court ruled that D could not admit A's alleged statement that A had trouble remembering things "'because of his brain cells.'" D wished to admit statement to show A's memory impaired.

HELD: A's alleged statement admissible, but error harmless due to voluminous evidence re A's mental condition, poor memory and poor perception of reality, which D put in record to impeach.

"... '[T]here is no logical reason why qualified lay witnesses cannot give an opinion as to mental condition less than sanity' [citation] or to similar cognitive difficulties." (Id. at p. 1228.)
EV2011.2 OpEv 460.00

Marriage of Dick

Expert testimony on domestic law is usually inadmissible.
In re Marriage of Dick (1993) 15 Cal.App.4th 144, 18 Cal.Rptr.2d 743
Woods (Arleigh), P.J. DCA2
FACTS: In a dissolution action involving issue of whether a nonresident alien H could be a resident for purposes of dissolution, W sought to call expert on immigration law to testify to the requirements and significance relating to entrance into U.S. of a person of H's circumstances. Trial ct. refused to permit expert to testify and found that H was a resident for dissolution purposes. W appealed and Court of Appeal affirmed.

HELD: Whether to admit expert testimony is largely within discretion of trial ct.

"Although strict application has been criticized, the general rule is that expert testimony on domestic law is usually inadmissible." (Id. at p. 157.)

In this case, since issue of H's nonimmigrant status was not dispositive of question of residence, proposed expert testimony could have been found to be tangential, cumulative or otherwise unnecessary.
FL2013.2 CmPr 666.00

Ewing v. Northridge Hosp. Med. Center [Ewing II]

If psychotherapist actually believes/predicts a patient poses serious risk of inflicting grave bodily injury on another, it's not material that the belief/prediction was premised on information derived from patient's relative.
Ewing v. Northridge Hosp. Med. Center [Ewing II] (2004) 120 Cal.App.4th 1289, 16 Cal.Rptr.3d 591
Boland, J. DCA2
FACTS: Mental patient murdered his ex-girlfriend's new boyfriend (V) then killed himself day after discharge from Northridge Hosp. Med. Center. V's parents sued Northridge for wrongful death, alleging psychotherapist employed by the hospital was aware patient had threatened to kill V but failed to take steps to warn him and a law enforcement agency of the risk of harm.

Trial ct. granted Northridge's motion for nonsuit after parents' opening statement. It found: (1) expert evidence required to establish the exception to immunity codified at Civ. Code §43.92, and parents failed to designate expert, and (2) because the threat of risk posed by patient was communicated to the psychotherapist by patient's father, not by the patient himself, V's parents could not prevail. Parents appealed and Court of Appeal reversed.

HELD: If psychotherapist actually believes or predicts patient poses serious risk of inflicting grave bodily injury upon another, it's not material that the belief or prediction was premised on information derived from patient's relative.

"[W]hen the communication of a serious threat of grave physical harm is conveyed to the psychotherapist by a member of the patient's family, and is shared for the purpose of facilitating the

patient's evaluation or treatment, it is irrelevant that the family member himself is not a patient of the psychotherapist. If a psychotherapist actually believes or predicts a patient poses a serious risk of inflicting grave bodily injury upon another, it is not material that the belief or prediction was premised, in some measure, on information derived from a member of the patient's family." (Id. at p. 1293.)
NOTES: See also, *Ewing v. Goldstein [Ewing I]* (2004) 120 Cal.App.4th 807, 15 Cal.Rptr.3d 864, ABC EVI Card Priv 842.00 [SJ reversed where communication to therapist by patient's father of patient's threat to kill or cause grave bodily injury to V raised triable issue concerning therapist's duty to warn V].
EV2011.2 Priv 843.00

People v. Johnson

Credibility or truthfulness of witness improper subject of expert testimony.
People v. Johnson (1984) 38 Cal.App.3d 1, 112 Cal.Rptr. 834
Friedman, Acting P.J. DCA3
FACTS: At trial for murder and other felonies, court excluded Ds expert testimony of psychologist re witnesses' ability to accurately "perceive, recall and relate." Ds argued experts may testify re capacity of others. Court of Appeal disagreed and held testimony inadmissible.

"'[E]xpert opinion is admitted in order to inform the jury of the effect of a certain medical condition upon the ability of the witness to tell the truth-not in order to decide for the jury whether the witness was or was not telling the truth on a particular occasion.'" (Id. at p. 7.)
NOTES: See *People v. Bledsoe* (1984) 36 Cal.3d 236, 203 Cal.Rptr. 450, 681 P.2d 291, ABC EVI Card OpEv 195.00 [opinion of rape trauma syndrome is inadmissible to prove person was raped].
COMMENTS: Courts are more willing to admit expert testimony concerning problems with eyewitness examinations, especially when challenging eyewitness examinations where there is little or no corroboration available. (See, e.g., *People v. McDonald* (1984) 37 Cal.3d 351, 208 Cal.Rptr. 236, 690 P.2d 709, ABC EVI Card OpEv 073.00 [error to exclude a psychologist/expert witness' testimony re psychological aspects of an eyewitness' identification].)
EV2011.2 OpEv 139.00

Jordan v. Great Western Motorways

Lay person properly permitted to testify to condition of another's health, based upon own observations.
Jordan v. Great Western Motorways (1931) 213 Cal. 606, 2 P.2d 786
Waste, C.J.
FACTS: At PI trial, lay witness testified re injuries P suffered following collision. Supreme Ct. held evidence admissible.

"Lay witnesses having the requisite opportunity for observation may testify as to the health of another." (Id. at p. 612.)
EV2011.2 OpEv 174.00

Lay P properly permitted to testify re speed of vehicles.
Jordan v. Great Western Motorways (1931) 213 Cal. 606, 2 P.2d 786
Waste, C.J.
FACTS: At PI trial, P, a passenger in one D's car, testified over objection re estimates of speed of vehicles in collision. Supreme Ct. held evidence admissible.

"A person having the opportunity to observe the speed of a moving vehicle is qualified to give his opinion as to such speed, and his previous experience or lack of experience goes to the weight rather than to the competency of the testimony." (Id. at p. 612.)
NOTES: (1) Accord, *Hastings v. Serleto* (1943) 61 Cal.App.2d 672, 690, 143 P.2d 946 (DCA 2):

"[T]he law recognizes a very broad and liberal rule in the reception of opinion experts from non-experts as to the rate of speed at which street cars or motor vehicles are traveling."

(2) But see *Kline v. Santa Barbara Etc. Ry. Co.* (1907) 150 Cal. 741, 90 P. 125 [error not to strike witness' testimony that street car was moving at "an unpardonable high rate of speed," just prior to accident].
EV2011.2 OpEv 183.00

People v. Malgren

Dog trainer who had no academic training qualified as expert based upon occupational experience.
People v. Malgren (1983) 139 Cal.App.3d 234, 188 Cal.Rptr. 569
Scott, Acting P.J. DCA1
FACTS: See Facts discussed on ABC EVI Card Hear 062.00. D claimed trainer did not qualify as expert for purposes of establishing foundation for admission of evidence of dog tracking. Although trainer had no academic training in "canine psychology" or related subjects, Court of Appeal held he qualified based upon "many years of occupational experience as a dog trainer." (Id. at p. 239.)
EV2011.2 OpEv 239.00

L.A. City High School Dist. v. Rodriguez

Lay owner of land in vicinity, familiar with local land values, should have been permitted to render opinion re FMV of subject property.
L.A. City High School Dist. v. Rodriguez (1955) 135 Cal.App.2d 760, 287 P.2d 871
Shinn, P.J. DCA2
FACTS: P school dist. condemned D's land. At trial, D offered testimony of her son-in-law (E) re FMV of her property. E was carpet layer by trade, lived in vicinity of D's property, owned similar property, was familiar with property values in area, owned other property which he was considering subdividing, had talked to many land owners in area, followed sales of property and was familiar with growth and development in area. He was neither broker nor real estate appraiser. Trial ct. sustained objection to his giving opinion re FMV of D's property. As trial ct. also excluded D's testimony, D had no evidence re value and trial ct. instructed jury to accept P's value. Court of Appeal reversed, holding exclusion of testimony prejudicial error. Although E not professional appraiser, he possessed requisite degree of knowledge to permit him to testify re property's FMV.

"One does not have to be a so-called expert to be competent to express an opinion as to the

value of real property, nor is it necessary that he be engaged in business as a broker or as a professional appraiser.... 'If a witness, by reason of his skill, learning, or technical training, understands the adaptability of the lands in question for a particular purpose, and the demand for land for such purpose, he may state the market value of the land, although he may be entirely unacquainted with the other elements which would be considered by different buyers competing for the same property. On the other hand, if the witness has knowledge of the market values of the lands, even though he possesses no technical skill, training, or ability, he may state the market value. The different elements considered by the witnesses in giving their opinions as to market value may be inquired into upon cross-examination, and if, upon such cross-examination, it appears to the court that the witness' testimony is based upon improper consideration, or upon what is usually termed as speculative only, it should be stricken from the record or withdrawn from the consideration of the court or the jury.' All the authorities agree with this statement of the rule.... 'It is sufficient that [the witness] possess a fair knowledge of the property acquired and know the values for which similar properties in the immediate vicinity were sold in the market.' [Citations.]... Owners of land in the vicinity, familiar with the character of the land in question frequently have a better idea of land values than strangers who are engaged in the business of selling land [citations]." (Id. at pp. 767-768.)
EV2011.2 OpEv 105.00

McCleery v. City of Bakersfield

That witness has not testified before as expert is factor to weigh when considering qualifications, but insufficient not to qualify.
McCleery v. City of Bakersfield (1985) 170 Cal.App.3d 1059, 216 Cal.Rptr. 852
Ivey, J., by assign. DCA5
FACTS: Officer (O) investigating disturbance call saw man walking toward him make motion to shiny object on waist band. O shot and killed man. Object was a shiny belt buckle. In resulting lawsuit, city (D) attempted to call expert (E) who had 16 years of experience on police force and had investigated 1,000 shootings involving officers. Although D never put E on stand to attempt to qualify him, trial ct. indicated that it did not think E qualified as expert or that his opinion was relevant, as reasonableness of O's actions was issue for jury. Court of Appeal disagreed:

"A court should not exclude one from testifying because he has never testified before. If this were the practice of all courts, there would be no experts. On the other hand, the court should not disregard the factor entirely. When a proposed expert has not qualified before, the court should take a closer look at his qualifications; however, primary reliance should not be placed on the fact that this will be his first time on the witness stand. To do so would deprive the court and the parties of valuable testimony of qualified experts." (Id. at p. 1066.)

Further, that E's testimony would involve very issue before jury not a bar to his testimony, as it would have been of assistance to jurors.
COMMENTS: On the other hand, the mere fact that a witness has qualified as an expert in another court should not automatically mean that s/he is deemed to be qualified as an expert on the same issue in other courts. The court has wide discretion in determining whether to permit a witness to testify as an expert. Many times, courts will permit under-qualified people to testify, especially in court trials, as to exclude them would adversely affect the client, who probably had nothing to do with hiring them. Their lack of qualifications or knowledge is then deemed to go to the weight given to their testimony. Even though their opinion was totally disregarded by the court, they can now

state that they have qualified as an expert in court. The fact that they were permitted to testify as an expert once before does not make them any more qualified to do so the second (or third) time around.
EV2011.2 OpEv 023.00

Naples Restaurant, Inc. v. Coberly Ford

Salesman for product may qualify as witness on value of product; need not be employed full-time as appraiser or have special training in appraisal.
Naples Restaurant, Inc. v. Coberly Ford (1968) 259 Cal.App.2d 881, 66 Cal.Rptr. 835
Fleming, J. DCA2
FACTS: P sued D car dealer in fraud for selling it a Ford Thunderbird (T-Bird) as new for $4,728, when it had been stolen, driven 400 miles and missing parts replaced by D. D defended by alleging that actual FMV of car when sold was $5,095, therefore P not damaged. P sought to introduce testimony of car salesman (E) as expert witness on FMV of T-Birds. E had sold cars for 9 years, including Fords for 5 years. He was then selling Chryslers, a brand competing with T-Birds. Trial ct. sustained objection to E's qualifications. Verdict for D. Court of Appeal held exclusion of testimony prejudicial error. Although E not employed full-time as appraiser nor had taken any special classes in appraisal, he could still qualify, since he was employed in industry, was actively engaged in selling comparable, competitive cars and was likely to have an informed opinion re FMV of competitor's cars. E thus met first requirement as expert, namely capacity.

"[T]he witness was a salesman and not a professional appraiser, but the sources of expert opinion on value are not restricted to those who make its determination a full-time occupation. [Citation.] No special training or occupation is necessary to qualify a witness to estimate values. [A] salesman for a product may qualify as a witness on the value of that product. [Evid. Code §801.]" (Id. at p. 884.)

Likewise, E satisfied second element for qualification as expert, namely observation and knowledge of subject on which opinion sought. Trial ct. in effect held that since E no longer sold Fords, he was incompetent to render opinion re their FMV. Court too narrowly defined class of articles about which witness could express opinion as expert.
EV2011.2 OpEv 029.00

Marriage of Rosen

Error to value goodwill by taking just one year of earnings, especially where income from practice is volatile.
In re Marriage of Rosen (2002) 105 Cal.App.4th 808, 130 Cal.Rptr.2d 1
Fybel, J. DCA4
FACTS: H was an attorney working out of his house doing exclusively indigent criminal appeals for which the state paid him $65 to $75/hr. W filed for dissolution 10/96. H's average ••gross•• income for years 1988 through 1996 was $162,000. His ••net•• income was volatile: 1992: $72,667; 1993: $101,067; 1994: $71,362 and 1995: $139,610.

W's expert (E) valued goodwill in H's law practice by following method:

Net income: $139,610

Plus depreciation: $4,369
Minus return on net worth
at 10% ($1,850)
Minus "reasonable
compensation": ($100,000)
Excess earnings: $42,000

Trial ct. adopted this amount as H's goodwill. On cross-examination, E admitted it was possible he should have averaged H's income. Had he done so, there would have been zero excess earnings. H appealed and Court of Appeal reversed.

HELD: Excess earnings must be based on a comparison of the practitioner's average net income over a period reasonably illustrative of the current rate of earnings; cannot simply take highest amount.

Court of Appeal applied the methodology set forth *in In re Marriage of Garrity & Bishton* (1986) 181 Cal.App.3d 675, 226 Cal.Rptr. 485, ABC CFL Card BuIn 101.01. This required that calculation be based on "'a practitioner's ••average•• annual net earnings (before income taxes) by reference to any period that seems reasonably illustrative of the current rate of earnings.'" (In re Marriage of Rosen, supra, 105 Cal.App.4th at p. 820.) Since H's income was volatile and since averaging his income over the last few years would have resulted in zero goodwill: "A reasonable trier of fact could not help but conclude the expert chose to use [husband's] net income from 1995—one of [husband's] highest earning years—solely to inflate the value of goodwill." (Ibid.)

W then argued that E's valuation justified because H's annual income for the years 1988 through 8/96 was $162,270/yr. Although trial ct. found that H's business had average cash flow of $162,000.00/yr., that amount was H's ••gross income•• for those years. That was irrelevant to the excess earnings method, which requires use of average ••net•• income.

The Court of Appeal agreed with Calif. Society of Certified Public Accountants that reasonable compensation may also be based upon """"the cost of hiring a nonowner outsider to perform the same average amount that other people are normally compensated for performing similar services"""—the "'similarly situated professional'" standard. Expert testimony, amicus curiae argues, would be helpful in determining which approach (the "'average salaried person'" or the "similarly situated professional") is appropriate under the facts of a case and in applying the relevant approach to determine reasonable compensation.

Court of Appeal reversed and directed trial ct. to enter judgment of zero goodwill.
COMMENT: The amicus curiae agreed with the Court of Appeal that the wife's expert's methodology was incorrect and that the trial court should have been reversed for adopting it. However, it also sought to have the opinion depublished, which request was denied.

The opinion will be cited to attack any expert who utilizes salary surveys when determining compensation for goodwill. However, to do so would be to misread it. The Court of Appeal agreed that salary surveys, properly used, can be of value. The problem is that in the hands of less capable experts, they are often misused. The practice of using national surveys or even statewide surveys with broad categories and relatively low numbers of respondents to opine as to reasonable compensation for specific practices has long been suspect. Although the Court stated: "We do not disapprove of compensation surveys as a general matter. We realize they can be useful when used properly," it also required that the surveys be "relevant" to the practice to which they are being applied. That has always been the law.

This case requires that the opinion of the expert be based on either statistically valid surveys that are relevant to the practice being valued and/or other admissible evidence.

Although the expert replied "no" to the question of whether he had conducted a survey or

performed any kind of study of lawyer compensation in Southern California, such a "private survey" would probably have also been inadmissible, had he done one. (See Korsak v. Atlas Hotels, Inc. (1992) 2 Cal.App.4th 1516, 3 Cal.Rptr.2d 833, ABC CFL Card BuIn 287.00.)
FL2013.2 BuIn 312.01

Goodwill computation may not be based on H's postseparation income.
In re Marriage of Rosen (2002) 105 Cal.App.4th 808, 130 Cal.Rptr.2d 1
Fybel, J. DCA4
FACTS: See Facts discussed on preceding card. W also argued that H was given the opportunity to provide his current income to her expert, "but he refused to cooperate."

Court of Appeal held this didn't matter, as it couldn't be considered for this purpose anyway:

"[The practitioner husband's] income after the [date of separation] is irrelevant for valuing goodwill because [husband's] law practice must be valued as of the date of separation, not the date of trial." (Id. at p. 821.)
FL2013.2 BuIn 311.00

May not determine reasonable compensation for excess earnings method by reference to national surveys.
In re Marriage of Rosen (2002) 105 Cal.App.4th 808, 130 Cal.Rptr.2d 1
Fybel, J. DCA4
FACTS: See Facts discussed on preceding cards. Court of Appeal agreed with H that E's testimony concerning "reasonable compensation" was conjecture and could not be used in forming an expert's opinion on goodwill value. E testified that he did not have any particular knowledge of lawyer compensation, other than what he had learned from valuations he had performed. He was not familiar with a law practice like H's. He did not conduct a survey or perform any kind of study of lawyer compensation in Southern California. Rather, he relied entirely upon two surveys of compensation (the Altman Weil survey and the Robert Morris survey), neither of which was shown to be a statistically accurate sample of lawyer compensation, pertained to lawyer compensation in Southern California, or had any particular relevance to H's law practice.

From these surveys, E concluded, based on his "judgment," that reasonable compensation for a replacement attorney would be $100,000. E did a rough average of numbers from the surveys and then concluded that, based on that hourly rate and the surveys that there was a range of $125,000 to $67,000, the middle of which was $100,000. The Court of Appeal was not impressed:

"[Wife's] expert might just as well have plucked the $100,000 figure from thin air. We do not disapprove of compensation surveys as a general matter. We realize they can be useful when used properly. But, we question whether a ••national•• survey of lawyer compensation (such as the Altman Weil survey), even if statistically sound, is a proper basis for offering an opinion on average lawyer compensation in ••Southern California.•• (See Evid. Code §801 (b).) We also question whether the Altman Weil survey is applicable to [husband's] law practice, which consists almost exclusively of handling state-funded criminal appeals. The expert though did not hold himself to the compensation figures in the Altman Weil survey, but turned to another survey. We believe the Robert Morris survey is inapplicable to a sole practitioner lawyer, such as [husband], who does not have officers or directors. [Wife's] expert then used his own 'judgment' to come up with a compensation figure based upon the numbers in these two surveys, even though he admitted he did not have any particular knowledge about lawyer compensation and did not know of any attorney with a law practice like [husband's]. In essence, [wife's] expert did nothing more than pick $100,000

because it was about halfway between $125,000 and $67,000. Those two numbers bear no particular materiality to the issue of reasonable compensation in this case." (Id. at p. 822.)
NOTES: (1) The Court of Appeal substantially modified its opinion after receipt of an Amicus Brief from the Calif. Society of Certified Public Accountants and somewhat softened its criticism of the use of surveys to determine reasonable compensation.

(2) See *In re Marriage of Ackerman* (2006) 146 Cal.App.4th 191, ABC CFL Card BuIn 329.00 wherein the American Medical Association's Physician's Socioeconomic Statistics survey, which showed the nationwide total revenue, the professional expenses, and the net income of self-employed surgeons, was found to be useful as a baseline to establish compensation under the "similarly situated professional" standard because the expert was able to relate the information in the survey to an analysis of the practice.
FL2013.2 BuIn 313.01

Court properly adjusted Kelly Blue Book value of car by deferred maintenance.
In re Marriage of Rosen (2002) 105 Cal.App.4th 808, 130 Cal.Rptr.2d 1
Fybel, J. DCA4
FACTS: At start of trial, court indicated its intention to value parties' vehicles using midrange (median) Kelley Blue Book without accessories. Wife's counsel then indicated that W's Nissan had significant mechanical problems. She testified to the problems and trial ct. reduced value of her car by approximately $5,100 from median value. H was awarded his car at median value. H appealed and Court of Appeal affirmed.

HELD: Court properly adjusted Kelley Blue Book value of car by deferred maintenance.

"Considering the testimony of the Nissan's problems and the cost to repair the transmission, the trial court did not err in assigning the Nissan a value of $5,100." (Id. at p. 828.)
NOTES: The Kelley Blue Book is available online at no cost at www.kbb.com.
FL2013.2 CmPr 804.01

People v. Sandoval

Defense expert testimony on marital relations and "make-up consensual sex" in spousal rape case would not have aided jury in understanding the concept nor in determining wife's credibility.
People v. Sandoval (2008) 164 Cal.App.4th 994, 79 Cal.Rptr.3d 634
Cantil-Sakauye, J. DCA3
FACTS: At trial for spousal rape with force (Pen. Code §262 (a)(1)), corporal injury to a spouse (Pen. Code §273.5 (a)), felony false imprisonment (Pen. Code §236), and criminal threats (Pen. Code §422), defense counsel offered long-time psychology professor (E) as an expert on marital relations and sex. E admitted to DA that she had never qualified to testify in court on marital relations and sex, and had "never been asked to serve as one." She had served as a consultant on such in a civil case and 3 criminal cases, all for the defense. She had previously qualified as a defense expert on eyewitness accuracy and interrogations and confessions. E had reviewed preliminary hearing transcript and D's statement to police. She planned to testify about couples, conflict and sex, and the theory colloquially referred to as "make-up sex," which she described as a "phenomena of sex being more arousing after a fight in some circumstances," as a pattern of behavior and why it occurs.

Defense counsel argued E's opinion was relevant to the issue of consent and D and wife's pattern

of interaction. DA argued E's testimony not outside scope of common knowledge and experience and that she lacked expertise.

Trial ct. precluded the testimony, finding it would not assist the jury "in any way," that it was not beyond the jury's common experience and not relevant to any defense. Court noted E had never qualified as an expert in marital relations and sex. D appealed from conviction and Court of Appeal affirmed.

HELD: Defense expert testimony on marital relations and "make-up consensual sex" in spousal rape case would not have aided jury in understanding the concept nor in determining wife's credibility.

D argued E's testimony akin to child sexual abuse accommodation syndrome (CSAAS), which Court of Appeal rejected:

"First, the evidence was not proffered to rehabilitate the complaining witness; it was offered to explain her consent and to bolster her recantation at trial. Second, the proffered evidence did not relate to any behavior of the complaining witness, subsequent to the criminal conduct, that was inconsistent with the crime. Finally, the defense identified no myth or misconception held by the jury that needed to be addressed. Defense counsel's argument was simply that not everyone may be aware of make-up sex. As the Attorney General argues, the concept of 'make-up' sex was within the common knowledge and experience of the jurors, was not relevant to the issue of consent and would not have assisted the jury on the issue of consent. We conclude the proffered expert testimony would not have assisted the jury in understanding the concept of make-up consensual sex. Nor would it have assisted the jury in determining the complaining witness's credibility—the primary issue at trial. There was simply no need for expert testimony." (Id. at p. 1002.)

Court also noted trial ct.'s statement that E had never qualified before to testify on marital relations and sex, particularly make-up sex, was simply part of court's observation that the testimony would not assist the trier of fact, and court did not abuse its discretion in excluding the testimony. D's constitutional claims likewise lacked merit.
EV2011.2 OpEv 861.00

Sargon Enterprises, Inc. v. USC

Trial court acted within its discretion in excluding opinion testimony that P company would have become extraordinarily successful had USC completed the clinical testing to which parties had contracted.
Sargon Enterprises, Inc. v. USC (2012) 55 Cal.4th 747, 149 Cal.Rptr.3d 614, 288 P.3d 1237
Chin, J.
FACTS: Dental implant company (P) with net profits of $101,000 in 1998 sued USC for breach of a contract it had with USC to clinically test a new implant P had patented. P sought damages for lost profits beginning in 1998, from $200 million to over $1 billion. P claimed it would have become a worldwide leader in the dental implant industry and made many millions a year in profit had the contract not been breached. Following evidentiary hearing, trial ct. excluded as speculative the proffered testimony of P's expert (E) as to the lost profits.

Jury found USC breached the contract and awarded P $433,000 in compensatory damages. P appealed. Court of Appeal found trial ct. erred in excluding the testimony. Supreme Ct. reversed Court of Appeal.

HELD: Trial court acted within its discretion in excluding opinion testimony that P company would have become extraordinarily successful had USC completed the clinical testing to which

parties had contracted.

"[T]he trial court has the duty to act as a 'gatekeeper' to exclude speculative expert testimony. Lost profits need not be proven with mathematical precision, but they must also not be unduly speculative. Here, the court acted within its discretion when it excluded opinion testimony that the company would have become extraordinarily successful had the university completed the clinical testing." (Id. at p. 753.) (See Evid. Code §801, Evid. Code §802, *Daubert v. Merrell Dow Pharmaceuticals, Inc.* (1993) 509 U.S. 579.)

(1) Expert testimony must not be speculative, and (2) lost profit damages must not be speculative.

Substantive law regarding lost profits, though not at issue, was relevant to help define the type of matter on which an expert may reasonably rely. To the extent E relied on data not relevant to the measure of lost profit damages, trial ct. acted within its discretion to exclude the testimony. Thus, although the issue is the admissibility of expert testimony, Court considered the law of lost profits to the extent relevant.

Trial ct. did not make any ruling that was irrational or arbitrary. Supreme Ct. found that, "[i]ndeed, the court could hardly have exercised its discretion more carefully." (*Sargon Enterprises, Inc. v. USC, supra*, 55 Cal.4th at p. 776.) Trial ct. also excluded the expert testimony for proper reasons. It properly found the methodology was too speculative for the evidence to be admissible. The trial ct. and Supreme Ct. agreed E's market share approach would be appropriate in a proper case: "An expert might be able to make reasonably certain lost profit estimates based on a company's share of the overall market. But [the expert here] did not base his lost profit estimates on a market share [plaintiff] had ever actually achieved. Instead, he opined that [plaintiff's] market share would have increased spectacularly over time to levels far above anything it had ever reached. He based his lost profit estimates on that hypothetical increased share." (Ibid.)

Supreme Ct. discussed E's testimony in great detail. It noted testimony was speculative in its primary analysis as well as in other ways. E assumed P, which had virtually no marketing or research and development departments, would have developed such departments to permit it to compete with the Big Six implant companies, all of which had large ones. He assumed one of the Big Six would fall out of that group, and P would replace it. He assumed the Big Six would have taken no steps to contend with their new competitor, P. All of these factors also support the trial ct.'s exclusion of the testimony.

"World history is replete with fascinating 'what ifs.' What if Alexander the Great had been killed early in his career at the Battle of the Granicus River, as he nearly was? . . . Many serious, and not-so-serious, historians have enjoyed speculating about these what ifs. But few, if any, claim they are considering what ••would•• have happened rather than what ••might•• have happened. Because it is inherently difficult to accurately predict the future or to accurately reconstruct a counterfactual past, it is appropriate that trial courts vigilantly exercise their gatekeeping function when deciding whether to admit testimony that purports to prove such claims." (Id. at p. 771.)

Court of Appeal had found the exclusion a flat prohibition on lost profits in any case involving a revolutionary breakthrough in an industry—Supreme Ct. noted other avenues might exist to show lost profits.

FL2013.2 BuIn 343.00

Sargon Enterprises, Inc. v. USC [Sargon II]

Supreme Ct. determined the trial ct. ruled correctly, thus foreclosing, as law of the case, further action in the trial ct. on lost profit damages.

Sargon Enterprises, Inc. v. USC [Sargon II] (2013) 215 Cal.App.4th 1495, 156 Cal.Rptr.3d 372
Johnson, J. DCA2

FACTS: Sargon Enterprises, Inc. appealed judgment in breach of contract action against the University of Southern California (USC) arising out of a clinical trial of Sargon's dental implant under study at USC. In earlier appeal, Court of Appeal reversed as an abuse of discretion the trial ct.'s eve-of-trial exclusion of the trial testimony on lost profit damages of Sargon's principal expert witness (E). Supreme Ct. granted review and reversed, concluding the trial ct. acted within its discretion in excluding the evidence, and remanded. (*Sargon Enterprises, Inc. v. USC* (2012) 55 Cal.4th 747, ABC CFL Card BuIn 343.00.)

On remand, Sargon submitted a supplemental brief arguing that the Supreme Ct. announced a new rule of evidentiary procedure, and asked this court to remand the matter to the trial ct. for a new trial to permit Sargon to present lost profit damages in conformity with the new standard. USC requested dismissal of its cross-appeal. Court of Appeal affirmed judgment of the trial ct., and dismissed USC's cross-appeal.

HELD: Supreme Ct. determined the trial ct. ruled correctly, thus foreclosing, as law of the case, further action in the trial ct. on lost profit damages.

The law of the case doctrine was the legal principle governing whether P here could seek retrial of lost profits. Supreme Court in Sargon did not create a new standard, but applied "already extant evidentiary principles to [the expert's] testimony and concluded the trial court did not abuse its discretion in excluding his opinion. After evaluating the threshold of evidence needed to establish lost profits damages under [Evid. Code §801 and Evid. Code §802], the court stated, 'We now apply these principles of this case,' and found that '[t]o the extent the expert relied on data that is not relevant to the measure of lost profit damages, the trial court acted within its discretion to exclude the testimony' because it was not based upon matters that was a type that may reasonably be relied on by an expert, citing Evidence Code section 801, subdivision (b). (*Sargon, supra*, 55 Cal.4th at pp. 775, 776.)" (*Sargon Enterprises, Inc. v. USC [Sargon II], supra*, 215 Cal.App.4th at pp. 1505-1506.)

Sargon also found that the trial ct. properly found E's testimony too speculative because he did not base his lost profit estimates on any market share Sargon actually achieved. Ultimately, "[The expert's] reasoning was circular." (Id. at p. 1506.)

Sargon, by entering into the stipulated judgment, elected not to challenge the trial ct.'s rulings excluding its evidence of lost profits which was not derived from E's lost profits theory.

Result in Sargon was law of the case and governed the further conduct of this case: Supreme Ct. determined the trial ct. ruled correctly, thus foreclosing further action in the trial ct. on lost profit damages.

"Where an appellate court states in its opinion a principle of law necessary to the decision, that principle becomes law of the case and must be adhered to in all subsequent proceedings." (Ibid.)
FL2013.2 BuIn 344.00

People v. Stuller

Qualification for testimony re fingerprint comparison may be based solely upon training and experience, with no particular degree required.
People v. Stuller (1970) 10 Cal.App.3d 582, 89 Cal.Rptr. 158
Kerrigan, J. DCA4
FACTS: At sex crimes trial, DA had police ID technician (W) who was held qualified in 3 prior felony cases, trained by FBI and made more than 10,000 previous fingerprint IDs testify re comparison of D's fingerprints with those found at scene. D argued W lacked qualifications to testify as expert. Court of Appeal held testimony admissible, as W's lack of university degree had no bearing on his expertise.
EV2011.2 OpEv 068.00

Westbrooks v. Cal.

Expert not permitted where matter within common experience of jurors.
Westbrooks v. Cal. (1985) 173 Cal.App.3d 1203, 219 Cal.Rptr. 674
Abbe, J. DCA2
FACTS: Officers put out flares to warn that bridge collapsed at night, in storm. Driver drove truck around flares, ignored officer with flashlight yelling and whistling, and was killed. At wrongful death trial, court did not allow D state's expert to testify about how people see, hear and perceive things, and their reactions to them. Purpose was to show that ordinary, prudent driver would have stopped. Court of Appeal held testimony inadmissible.

"The proffered testimony was in the form of an opinion by the expert on a matter that is within the common experience of lay jurors. If the jurors would be able to draw a conclusion from the facts testified to as easily and as intelligently as the expert, the opinion testimony of the expert is not admissible." (Id. at p. 1210.)
EV2011.2 OpEv 276.00

RELEVANT STATUTES

CODE OF CIVIL PROCEDURE

Code of Civil Procedure §2034.210
Demand for simultaneous exchange of expert witness information

After the setting of the initial trial date for the action, any party may obtain discovery by demanding that all parties simultaneously exchange information concerning each other's expert trial witnesses to the following extent:

(a) Any party may demand a mutual and simultaneous exchange by all parties of a list containing the name and address of any natural person, including one who is a party, whose oral or deposition testimony in the form of an expert opinion any party expects to offer in evidence at the trial.

(b) If any expert designated by a party under subdivision (a) is a party or an employee of a party, or has been retained by a party for the purpose of forming and expressing an opinion in anticipation of the litigation or in preparation for the trial of the action, the designation of that witness shall include or be accompanied by an expert witness declaration under Section 2034.260.

(c) Any party may also include a demand for the mutual and simultaneous production for inspection and copying of all discoverable reports and writings, if any, made by any expert described in subdivision (b) in the course of preparing that expert's opinion. (Ad Stats 2004, C182)

Code of Civil Procedure §2034.220
Demand for exchange of expert trial witness information w/out leave of court; timing

Any party may make a demand for an exchange of information concerning expert trial witnesses without leave of court. A party shall make this demand no later than the 10th day after the initial trial date has been set, or 70 days before that trial date, whichever is closer to the trial date. (Ad Stats 2004, C182)

Code of Civil Procedure §2034.230
Form of demand; contents

(a) A demand for an exchange of information concerning expert trial witnesses shall be in writing and shall identify, below the title of the case, the party making the demand. The demand shall state that it is being made under this chapter.

(b) The demand shall specify the date for the exchange of lists of expert trial witnesses, expert witness declarations, and any demanded production of writings. The specified date of exchange shall be 50 days before the initial trial date, or 20 days after service of the demand, whichever is closer to the trial date, unless the court, on motion and a showing of good cause, orders an earlier or later date of exchange. (Ad Stats 2004, C182)

Code of Civil Procedure §2034.240
Service of demand

The party demanding an exchange of information concerning expert trial witnesses shall serve the demand on all parties who have appeared in the action. (Ad Stats 2004, C182)

Code of Civil Procedure §2034.250
Protective order; motion; good cause

(a) A party who has been served with a demand to exchange information concerning expert trial witnesses may promptly move for a protective order. This motion shall be accompanied by a meet and confer declaration under Section 2016.040.

(b) The court, for good cause shown, may make any order that justice requires to protect any party from unwarranted annoyance, embarrassment, oppression, or undue burden and expense. The protective order may include, but is not limited to, one or more of the following directions:

(1) That the demand be quashed because it was not timely served.

(2) That the date of exchange be earlier or later than that specified in the demand.

(3) That the exchange be made only on specified terms and conditions.

(4) That the production and exchange of any reports and writings of experts be made at a different place or at a different time than specified in the demand.

(5) That some or all of the parties be divided into sides on the basis of their identity of interest in the issues in the action, and that the designation of any experts as described in subdivision (b) of Section 2034.210 be made by any side so created.

(6) That a party or a side reduce the list of employed or retained experts designated by that party or side under subdivision (b) of Section 2034.210.

(c) If the motion for a protective order is denied in whole or in part, the court may order that the parties against whom the motion is brought, provide or permit the discovery against which the protection was sought on those terms and conditions that are just.

(d) The court shall impose a monetary sanction under Chapter 7 (commencing with Section 2023.010) against any party, person, or attorney who unsuccessfully makes or opposes a motion for a protective order under this section, unless it finds that the one subject to the sanction acted with substantial justification or that other circumstances make the imposition of the sanction unjust. (Ad Stats 2004, C182)

Code of Civil Procedure §2034.260
Written exchange; contents

(a) All parties who have appeared in the action shall exchange information concerning expert witnesses in writing on or before the date of exchange specified in the demand. The exchange of information may occur at a meeting of the attorneys for the parties involved or by a mailing on or before the date of exchange.

(b) The exchange of expert witness information shall include either of the following:

(1) A list setting forth the name and address of any person whose expert opinion that party expects to offer in evidence at the trial.

(2) A statement that the party does not presently intend to offer the testimony of any expert witness.

(c) If any witness on the list is an expert as described in subdivision (b) of Section 2034.210, the exchange shall also include or be accompanied by an expert witness declaration signed only by the attorney for the party designating the expert, or by that party if that party has no attorney. This declaration shall be under penalty of perjury and shall contain:

(1) A brief narrative statement of the qualifications of each expert.

(2) A brief narrative statement of the general substance of the testimony that the expert is expected to give.

(3) A representation that the expert has agreed to testify at the trial.

(4) A representation that the expert will be sufficiently familiar with the pending action to submit to a meaningful oral deposition concerning the specific testimony, including any opinion and its basis, that the expert is expected to give at trial.

(5) A statement of the expert's hourly and daily fee for providing deposition testimony and for consulting with the retaining attorney. (Ad Stats 2004, C182)

Code of Civil Procedure §2034.270
Demand for production of reports and writings

If a demand for an exchange of information concerning expert trial witnesses includes a demand for production of reports and writings as described in subdivision (c) of Section 2034.210, all parties shall produce and exchange, at the place and on the date specified in the demand, all discoverable reports and writings, if any, made by any designated expert described in subdivision (b) of Section 2034.210. (Ad Stats 2004, C182)

Code of Civil Procedure §2034.280

Supplemental expert witness list

(a) Within 20 days after the exchange described in Section 2034.260, any party who engaged in the exchange may submit a supplemental expert witness list containing the name and address of any experts who will express an opinion on a subject to be covered by an expert designated by an adverse party to the exchange, if the party supplementing an expert witness list has not previously retained an expert to testify on that subject.

(b) This supplemental list shall be accompanied by an expert witness declaration under subdivision (c) of Section 2034.260 concerning those additional experts, and by all discoverable reports and writings, if any, made by those additional experts.

(c) The party shall also make those experts available immediately for a deposition under Article 3 (commencing with Section 2034.410), which deposition may be taken even though the time limit for discovery under Chapter 8 (commencing with Section 2024.010) has expired. (Ad Stats 2004, C182)

Code of Civil Procedure §2034.290
Demands not filed with court; retention of originals and proofs of service

(a) A demand for an exchange of information concerning expert trial witnesses, and any expert witness lists and declarations exchanged shall not be filed with the court.

(b) The party demanding the exchange shall retain both the original of the demand, with the original proof of service affixed, and the original of all expert witness lists and declarations exchanged in response to the demand until six months after final disposition of the action. At that time, all originals may be destroyed unless the court, on motion of any party and for good cause shown, orders that the originals be preserved for a longer period.

(c) Notwithstanding subdivisions (a) and (b), a demand for exchange of information concerning expert trial witnesses, and all expert witness lists and declarations exchanged in response to it, shall be lodged with the court when their contents become relevant to an issue in any pending matter in the action. (Ad Stats 2004, C182)

Code of Civil Procedure §2034.300
Exclusion of expert witness opinion from evidence, bases for

Except as provided in Section 2034.310 and in Articles 4 (commencing with Section 2034.610) and 5 (commencing with Section 2034.710), on objection of any party who has made a complete and timely compliance with Section 2034.260, the trial court shall exclude from evidence the expert opinion of any witness that is offered by any party who has unreasonably failed to do any of the following:

(a) List that witness as an expert under Section 2034.260.

(b) Submit an expert witness declaration.

(c) Produce reports and writings of expert witnesses under Section 2034.270.

(d) Make that expert available for a deposition under Article 3 (commencing with Section 2034.410). (Ad Stats 2004, C182)

Code of Civil Procedure §2034.310
Calling expert not designated on list; conditions

A party may call as a witness at trial an expert not previously designated by that party if either of the following conditions is satisfied:

(a) That expert has been designated by another party and has thereafter been deposed under Article 3 (commencing with Section 2034.410).

(b) That expert is called as a witness to impeach the testimony of an expert witness offered by any other party at the trial. This impeachment may include testimony to the falsity or nonexistence of any fact used as the foundation for any opinion by any other party's expert witness, but may not include testimony that contradicts the opinion. (Ad Stats 2004, C182)

Code of Civil Procedure §2034.410
Deposition of listed expert witness

On receipt of an expert witness list from a party, any other party may take the deposition of any person on the list. The procedures for taking oral and written depositions set forth in Chapters 9 (commencing with Section 2025.010), 10 (commencing with Section 2026.010), and 11 (commencing with Section 2028.010) apply to a deposition of a listed trial expert witness except as provided in this article. (Ad Stats 2004, C182)

Code of Civil Procedure §2034.420

Deposition of listed expert witness, place of

The deposition of any expert described in subdivision (b) of Section 2034.210 shall be taken at a place that is within 75 miles of the courthouse where the action is pending. On motion for a protective order by the party designating an expert witness, and on a showing of exceptional hardship, the court may order that the deposition be taken at a more distant place from the courthouse. (Am Stats 2008, C303)

Code of Civil Procedure §2034.430
Experts to which section applies

(a) Except as provided in subdivision (f), this section applies to an expert witness, other than a party or an employee of a party, who is any of the following:

(1) An expert described in subdivision (b) of Section 2034.210.

(2) A treating physician and surgeon or other treating health care practitioner who is to be asked during the deposition to express opinion testimony, including opinion or factual testimony regarding the past or present diagnosis or prognosis made by the practitioner or the reasons for a particular treatment decision made by the practitioner, but not including testimony requiring only the reading of words and symbols contained in the relevant medical record or, if those words and symbols are not legible to the deponent, the approximation by the deponent of what those words or symbols are.

(3) An architect, professional engineer, or licensed land surveyor who was involved with the original project design or survey for which that person is asked to express an opinion within the person's expertise and relevant to the action or proceeding.

(b) A party desiring to depose an expert witness described in subdivision (a) shall pay the expert's reasonable and customary hourly or daily fee for any time spent at the deposition from the time noticed in the deposition subpoena, or from the time of the arrival of the expert witness should that time be later than the time noticed in the deposition subpoena, until the time the expert witness is dismissed from the deposition, regardless of whether the expert is actually deposed by any party attending the deposition.

(c) If any counsel representing the expert or a nonnoticing party is late to the deposition, the expert's reasonable and customary hourly or daily fee for the time period determined from the time noticed in the deposition subpoena until the counsel's late arrival, shall be paid by that tardy counsel.

(d) Notwithstanding subdivision (c), the hourly or daily fee charged to the tardy counsel shall not exceed the fee charged to the party who retained the expert, except where the expert donated services to a charitable or other nonprofit organization.

(e) A daily fee shall only be charged for a full day of attendance at a deposition or where the expert was required by the deposing party to be available for a full day and the expert necessarily had to forgo all business that the expert would otherwise have conducted that day but for the request that the expert be available all day for the scheduled deposition.

(f) In a worker's compensation case arising under Division 4 (commencing with Section 3201) or Division 4.5 (commencing with Section 6100) of the Labor Code, a party desiring to depose any expert on another party's expert witness list shall pay the fee under this section. (Am Stats 2008, C303)

Code of Civil Procedure §2034.440
Expert deposition fees, travel expenses

The party designating an expert is responsible for any fee charged by the expert for preparing for a deposition and for traveling to the place of the deposition, as well as for any travel expenses of the expert. (Ad Stats 2004, C182)

Code of Civil Procedure §2034.450
Fee tender

(a) The party taking the deposition of an expert witness shall either accompany the service of the deposition notice with a tender of the expert's fee based on the anticipated length of the deposition, or tender that fee at the commencement of the deposition.

(b) The expert's fee shall be delivered to the attorney for the party designating the expert.

(c) If the deposition of the expert takes longer than anticipated, the party giving notice of the deposition shall pay the balance of the expert's fee within five days of receipt of an itemized statement from the expert. (Ad Stats 2004, C182)

Code of Civil Procedure §2034.460
Service and tender of fee requires party to produce expert

(a) The service of a proper deposition notice accompanied by the tender of the expert witness fee described in Section 2034.430 is effective to require the party employing or retaining the expert to produce the expert for the deposition.

(b) If the party noticing the deposition fails to tender the expert's fee under Section 2034.430, the expert shall not be deposed at that time unless the parties stipulate otherwise. (Ad Stats 2004, C182)

Code of Civil Procedure §2034.470
Motion for order setting expert compensation where unreasonable

(a) If a party desiring to take the deposition of an expert witness under this article deems that the hourly or daily fee of that expert for providing deposition testimony is unreasonable, that party may move for an order setting the compensation of that expert. Notice of this motion shall also be given to the expert.

(b) A motion under subdivision (a) shall be accompanied by a meet and confer declaration under Section 2016.040. In any attempt at an informal resolution under Section 2016.040, either the party or the expert shall provide the other with all of the following:

(1) Proof of the ordinary and customary fee actually charged and received by that expert for similar services provided outside the subject litigation.

(2) The total number of times the presently demanded fee has ever been charged and received by that expert.

(3) The frequency and regularity with which the presently demanded fee has been charged and received by that expert within the two-year period preceding the hearing on the motion.

(c) In addition to any other facts or evidence, the expert or the party designating the expert shall provide, and the court's determination as to the reasonableness of the fee shall be based on, proof of the ordinary and customary fee actually charged and received by that expert for similar services provided outside the subject litigation.

(d) In an action filed after January 1, 1994, the expert or the party designating the expert shall also provide, and the court's determination as to the reasonableness of the fee shall also be based on, both of the following:

(1) The total number of times the presently demanded fee has ever been charged and received by that expert.

(2) The frequency and regularity with which the presently demanded fee has been charged and received by that expert within the two-year period preceding the hearing on the motion.

(e) The court may also consider the ordinary and customary fees charged by similar experts for similar services within the relevant community and any other factors the court deems necessary or appropriate to make its determination.

(f) Upon a determination that the fee demanded by that expert is unreasonable, and based upon the evidence and factors considered, the court shall set the fee of the expert providing testimony.

(g) The court shall impose a monetary sanction under Chapter 7 (commencing with Section 2023.010) against any party, person, or attorney who unsuccessfully makes or opposes a motion to set the expert witness fee, unless it finds that the one subject to the sanction acted with substantial justification or that other circumstances make the imposition of the sanction unjust. (Ad Stats 2004, C182)

Code of Civil Procedure §2034.610
Motion to augment, amend expert witness list; timing

(a) On motion of any party who has engaged in a timely exchange of expert witness information, the court may grant leave to do either or both of the following:

(1) Augment that party's expert witness list and declaration by adding the name and address of any expert witness whom that party has subsequently retained.

(2) Amend that party's expert witness declaration with respect to the general substance of the testimony that an expert previously designated is expected to give.

(b) A motion under subdivision (a) shall be made at a sufficient time in advance of the time limit for the completion of discovery under Chapter 8 (commencing with Section 2024.010) to permit the deposition of any expert to whom the motion relates to be taken within that time limit. Under exceptional circumstances, the court may permit the motion to be made at a later time.

(c) The motion shall be accompanied by a meet and confer declaration under Section 2016.040. (Ad Stats 2004, C182)

Code of Civil Procedure §2034.620
Leave to augment or amend; conditions

The court shall grant leave to augment or amend an expert witness list or declaration only if all of the following conditions are satisfied:

(a) The court has taken into account the extent to which the opposing party has relied on the list of expert witnesses.

(b) The court has determined that any party opposing the motion will not be prejudiced in maintaining that party's action or defense on the merits.

(c) The court has determined either of the following:

(1) The moving party would not in the exercise of reasonable diligence have determined to call that expert witness or have decided to offer the different or additional testimony of that expert witness.

(2) The moving party failed to determine to call that expert witness, or to offer the different or additional testimony of that expert witness as a result of mistake, inadvertence, surprise, or excusable neglect, and the moving party has done both of the following:

(A) Sought leave to augment or amend promptly after deciding to call the expert witness or to offer the different or additional testimony.

(B) Promptly thereafter served a copy of the proposed expert witness information concerning the expert or the testimony described in Section 2034.260 on all other parties who have appeared in the action.

(d) Leave to augment or amend is conditioned on the moving party making the expert available immediately for a deposition under Article 3 (commencing with Section 2034.410), and on any other terms as may be just, including, but not limited to, leave to any party opposing the motion to designate additional expert witnesses or to elicit additional opinions from those previously designated, a continuance of the trial for a reasonable period of time, and the awarding of costs and litigation expenses to any party opposing the motion. (Ad Stats 2004, C182)

Code of Civil Procedure §2034.630
Sanctions for unsuccessful motion or opposition; substantial justification, other circumstances

The court shall impose a monetary sanction under Chapter 7 (commencing with Section 2023.010) against any party, person, or attorney who unsuccessfully makes or opposes a motion to augment or amend expert witness information, unless it finds that the one subject to the sanction acted with substantial justification or that other circumstances make the imposition of the sanction unjust. (Ad Stats 2004, C182)

Code of Civil Procedure §2034.710
Leave to submit late expert witness information; motion; timing

(a) On motion of any party who has failed to submit expert witness information on the date specified in a demand for that exchange, the court may grant leave to submit that information on a later date.

(b) A motion under subdivision (a) shall be made a sufficient time in advance of the time limit for the completion of discovery under Chapter 8 (commencing with Section 2024.010) to permit the deposition of any expert to whom the motion relates to be taken within that time limit. Under exceptional circumstances, the court may permit the motion to be made at a later time.

(c) The motion shall be accompanied by a meet and confer declaration under Section 2016.040. (Ad Stats 2004, C182)

Code of Civil Procedure §2034.720
Leave to submit tardy information; conditions

The court shall grant leave to submit tardy expert witness information only if all of the following conditions are satisfied:

(a) The court has taken into account the extent to which the opposing party has relied on the absence of a list of expert witnesses.

(b) The court has determined that any party opposing the motion will not be prejudiced in maintaining that party's action or defense on the merits.

(c) The court has determined that the moving party did all of the following:

(1) Failed to submit the information as the result of mistake, inadvertence, surprise, or excusable neglect.

(2) Sought leave to submit the information promptly after learning of the mistake, inadvertence, surprise, or excusable neglect.

(3) Promptly thereafter served a copy of the proposed expert witness information described in Section 2034.260 on all other parties who have appeared in the action.

(d) The order is conditioned on the moving party making the expert available immediately for a deposition under Article 3 (commencing with Section 2034.410), and on any other terms as may be just, including, but not limited to, leave to any party opposing the motion to designate additional expert witnesses or to elicit additional opinions from those previously designated, a continuance of the trial for a reasonable period of time, and the awarding of costs and litigation expenses to any party opposing the motion. (Ad Stats 2004, C182)

Code of Civil Procedure §2034.730
Unsuccessful motion or opposition re tardy information; sanction; substantial justification

The court shall impose a monetary sanction under Chapter 7 (commencing with Section 2023.010) against any party, person, or attorney who unsuccessfully makes or opposes a motion to submit tardy expert witness information, unless it finds that the one subject to the sanction acted with substantial justification or that other circumstances make the imposition of the sanction unjust. (Ad Stats 2004, C182)

EVIDENCE CODE

Evidence Code §720
Expert witnesses: foundation for qualification

(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. (Ad Stats 1965, C 299)

Law Revision Commission Comments

This section states existing law as declared in subdivision 9 (last clause) of Code of Civil Procedure Section 1870, which is superseded by Sections 720 and 801.

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).

Against the objection of a party, the special qualifications of the proposed witness must be shown as a prerequisite to his testimony as an expert. With the consent of the parties, the judge may receive a witness' testimony conditionally, subject to the necessary foundation being supplied later in the trial.

See Evidence Code Section 320. Unless the foundation is subsequently supplied, however, the judge should grant a motion to strike or should order the testimony stricken from the record on his own motion.

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 (1962); 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). See Evidence Code Sections 405 and 406 and the Comments thereto.

Evidence Code §721
Expert's cross-examination

(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 or her qualifications, (2) the subject to which his or her expert testimony relates, and (3) the matter upon which his or her opinion is based and the reasons for his or her opinion.

(b) If a witness testifying as an expert testifies in the form of an opinion, he or she 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 any of the following occurs:

(1) The witness referred to, considered, or relied upon such publication in arriving at or forming his or her opinion.

(2) The publication has been admitted in evidence.

(3) The publication has been established as a reliable authority by the testimony or admission of the witness or by other expert testimony or by judicial notice.

If admitted, relevant portions of the publication may be read into evidence but may not be received as exhibits. (Am Stats 1997, C892)

Law Revision Commission Comments

Under Section 721, a witness who testifies as an expert may, of course, be cross-examined to the same extent as any other witness. See Chapter 5 (commencing with Section 760). But, under subdivision (a) of Section 721, as under existing law, the expert witness is also subject to a somewhat broader cross-examination: "Once an expert offers his opinion, however, he loses 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. Section 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). The cross-examination rule stated in subdivision (a) is based in part on the last clause of Code of Civil Procedure Section 1872.

Subdivision (b) clarifies a matter concerning which there is considerable confusion in the California decisions. It is at least clear under existing law that an expert witness may be cross-examined in regard to those books on which he relied 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). Dicta in some decisions indicate that the cross-examiner is strictly limited to the books relied on by the expert witness. See, e.g., Baily v. Kreutzmann, 141 Cal. 519, 75 Pac. 104 (1904). Other cases, however, suggest that an expert witness may be cross-examined in regard to any book of the same character as the books on which he relied 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). (Possibly, the cross-examiner is restricted under this view 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 could use books to test the competency of an expert witness, whether or not the expert relied on 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 on 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).

If an expert witness has relied on a particular publication in forming his opinion, it is necessary to permit cross-examination in regard to that publication in order to show whether the expert correctly read, interpreted, and applied the portions he relied on. Similarly, it is important to permit an expert witness to be cross-examined concerning those publications referred to or considered by him even though not specifically relied on by him in forming his opinion. An expert's reasons for not relying on particular publications that were referred to or considered by him while forming his opinion may reveal important information bearing upon the credibility of his testimony. However, a rule permitting cross-examination on technical treatises not considered by the expert witness would permit the cross-examiner to utilize this opportunity not for its ostensible purpose--to test the expert's opinion--but to bring before the trier of fact the opinions of absentee authors 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 text might be based on inadequate background research, might be subject to unexpressed qualifications that would be applicable to 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, subdivision (b) does not permit cross-examination of an expert witness on scientific, technical, or professional works not referred to, considered, or relied on by him.

If a particular publication has already been admitted in evidence, however, the reason for subdivision (b)--to prevent inadmissible evidence from being brought before the jury--is inapplicable. Hence, the subdivision permits an expert witness to be examined concerning such a publication without regard to whether he referred to, considered, or relied on it in forming his opinion. Cf. Laird v. T. W. Mather, Inc., 51 Cal.2d 210, 331 P.2d 617 (1958).

The rule stated in subdivision (b) thus provides a fair and workable solution to this conflict of competing interests with respect to the permissible use of scientific, technical, or professional publications by the cross-examiner.

Evidence Code §722
Appointment of expert witness

(a) The fact of the appointment of an expert witness by the court may be revealed to the trier of fact.

(b) The compensation and expenses paid or to be paid to an expert witness by the party calling him is a proper subject of inquiry by any adverse party as relevant to the credibility of the witness and the weight of his testimony. (Ad Stats 1965, C 299)

Law Revision Commission Comments

Subdivision (a) of Section 722 codifies 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).

Subdivision (b) of Section 722 restates the substance of Section 1256.2 of the Code of Civil Procedure. Section 1256.2, however, applies only in condemnation cases, while Section 722 is not so limited. It is uncertain whether the California law in other fields of litigation is as stated in Section 722. At least one California case has held that an expert could be asked whether he was being compensated but that he 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 722 is a desirable rule. The tendency of some experts to become advocates for the party employing them has been recognized. 2 Wigmore, Evidence, Section 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 of the amount of his fee--and, hence, the extent of his possible feeling of obligation to the party calling him.

Evidence Code §723
Limitation on number of expert witnesses

The court may, at any time before or during the trial of an action, limit the number of expert witnesses to be called by any party. (Ad Stats 1965, C 299)

Law Revision Commission Comments

Section 723 restates the substance of and supersedes the last sentence of Section 1871 of the Code of Civil Procedure.

Evidence Code §730
Court may appoint expert

When it appears to the court, at any time before or during the trial of an action, that expert evidence is or may be required by the court or by any party to the action, the court on its own motion or on motion of any party may appoint one or more experts to investigate, to render a report as may be ordered by the court, and to testify as an expert at the trial of the action relative to the fact or matter as to which the expert evidence is or may be required. The court may fix the compensation for these services, if any, rendered by any person appointed under this section, in addition to any service as a witness, at the amount as seems reasonable to the court.

Nothing in this section shall be construed to permit a person to perform any act for which a license is required unless the person holds the appropriate license to lawfully perform that act. (Am Stats 1990, C 295)

Law Revision Commission Comments

Section 730 restates the substance of and supersedes the first paragraph of Section 1871 of the Code of Civil Procedure.

Evidence Code §731
Paying for experts

(a)(1) In all criminal actions and juvenile court proceedings, the compensation fixed under Section 730 shall be a charge against the county in which the action or proceeding is pending and shall be paid out of the treasury of that county on order of the court.

(2) Notwithstanding paragraph (1), if the expert is appointed for the court's needs, the compensation shall be a charge against the court.

(b) In any county in which the superior court so provides, the compensation fixed under Section 730 for medical experts appointed for the court's needs in civil actions shall be a charge against the court. In any county in which the board of supervisors so provides, the compensation fixed under Section 730 for medical experts appointed in civil actions, for purposes other than the court's needs, shall be a charge against and paid out of the treasury of that county on order of the court.

(c) Except as otherwise provided in this section, in all civil actions, the compensation fixed under Section 730 shall, in the first instance, be apportioned and charged to the several parties in a proportion as the court may determine and may thereafter be taxed and allowed in like manner as other costs. (Am Stats 2012, C470)

Law Revision Commission Comments

Section 731 restates the substance of and supersedes the second paragraph of Section 1871 of the Code of Civil Procedure.

Evidence Code §732
Examination of expert

Any expert appointed by the court under Section 730 may be called and examined by the court or by any party to the action. When such witness is called and examined by the court, the parties have the same right as is expressed in Section 775 to cross-examine the witness and to object to the questions asked and the evidence adduced. (Ad Stats 1965, C 299)

Law Revision Commission Comments

Section 732 restates the substance of and supersedes the fourth paragraph of Section 1871 of the Code of Civil Procedure. Section 732 refers to Section 775, which is based on language originally contained in Section 1871. Section 775 permits each party to the action to object to questions asked and evidence adduced and, also, to cross-examine any person called by the court as a witness to the same extent as if such person were called as a witness by an adverse party.

Evidence Code §733
Additional experts

Nothing contained in this article shall be deemed or construed to prevent any party to any action from producing other expert evidence on the same fact or matter mentioned in Section 730; but, where other expert witnesses are called by a party to the action, their fees shall be paid by the party calling them and only ordinary witness fees shall be taxed as costs in the action. (Ad Stats 1965, C 299)

Law Revision Commission Comments

Section 733 restates the substance of and supersedes the third paragraph of Section 1871 of the Code of Civil Procedure.

Evidence Code §780
Trier of fact: bases for determining witness credibility

Except as otherwise provided by statute, the court or jury may consider in determining the credibility of a witness any matter that has any tendency in reason to prove or disprove the truthfulness of his testimony at the hearing, including but not limited to any of the following:

(a) His demeanor while testifying and the manner in which he testifies.

(b) The character of his testimony.

(c) The extent of his capacity to perceive, to recollect, or to communicate any matter about which he testifies.

(d) The extent of his opportunity to perceive any matter about which he testifies.

(e) His character for honesty or veracity or their opposites.

(f) The existence or nonexistence of a bias, interest, or other motive.

(g) A statement previously made by him that is consistent with his testimony at the hearing.

(h) A statement made by him that is inconsistent with any part of his testimony at the hearing.

(i) The existence or nonexistence of any fact testified to by him.

(j) His attitude toward the action in which he testifies or toward the giving of testimony.

(k) His admission of untruthfulness. (Ad Stats 1965, C 299)

Law Revision Commission Comments
Section 780 is a restatement of the existing California law as declared in several sections of the Code of Civil Procedure, all of which are superseded by this section and other sections in Article 2 (commencing with Section 785) of this chapter. See, e.g., Code Civ.Proc. Sections 1847, 2049, 2051, 2052, 2053.

Section 780 is a general catalog of those matters that have any tendency in reason to affect the credibility of a witness. So far as the admissibility of evidence relating to credibility is concerned, Section 780 is technically unnecessary because Section 351 declares that "all relevant evidence is admissible." However, this section makes it clear that matters that may not be "evidence" in a technical sense can affect the credibility of a witness, and it provides a convenient list of the most common factors that bear on the question of credibility. See Davis v. Judson, 159 Cal. 121, 128, 113 Pac. 147, 150 (1910); La Jolla Casa de Manana v. Hopkins, 98 Cal.App.2d 339, 346, 219 P.2d 871, 876 (1950). See generally Witkin, California Evidence, Sections 480-485 (1958). Limitations on the admissibility of evidence offered to attack or support the credibility of a witness are stated in Article 2 (commencing with Section 785).

There is no specific limitation in the Evidence Code on the use of impeaching evidence on the ground that it is "collateral". The so-called "collateral matter" limitation on attacking the credibility of a witness excludes evidence relevant to credibility unless such evidence is independently relevant to the issue being tried. It is based on the sensible notion that trials should be confined to settling those disputes between the parties upon which their rights in the litigation depend. Under existing law, this "collateral matter" doctrine has been treated as an inflexible rule excluding evidence relevant to the credibility of the witness. See, e.g., People v. Wells, 33 Cal.2d 330, 340, 202 P.2d 53, 59 (1949), and cases cited therein.

The effect of Section 780 (together with Section 351) is to eliminate this inflexible rule of exclusion. This is not to say that all evidence of a collateral nature offered to attack the credibility of a witness would be admissible. Under Section 352, the court has substantial discretion to exclude collateral evidence. The effect of Section 780, therefore, is to change the present somewhat inflexible rule of exclusion to a rule of discretion to be exercised by the trial judge.

There is no limitation in the Evidence Code on the use of opinion evidence to prove the character of a witness for honesty, veracity, or the lack thereof. Hence, under Sections 780 and 1100, such

evidence is admissible. This represents a change in the present law. See People v. Methvin, 53 Cal. 68 (1878). However, the opinion evidence that may be offered by those persons intimately familiar with the witness is likely to be of more probative value than the generally admissible evidence of reputation. See 7 Wigmore, Evidence, Section 1986 (3d ed. 1940).

Evidence Code §801
Experts' opinions

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 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. (Ad Stats 1965, C 299)

Law Revision Commission Comments

Section 801 deals with opinion testimony of a witness testifying as an expert; it sets the standard for admissibility of such testimony.

Subdivision (a), which states ••when•• an expert may give his opinion upon a subject that is within the scope of his expertise, codifies the existing rule that expert opinion is limited to those subjects that are beyond the competence of persons of common experience, training, and education. 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, Sections 190-195 (1958).

Subdivision (b) states 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 extrajudicial 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 because 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's 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 feeblemindedness merely upon the person's exterior appearance); 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 pentothal--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 bystanders; and it seems likely that the jury would be as able to evaluate the statements of others in the light of the physical facts, as interpreted by the officer as would the officer himself. It is apparent that 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, 126 P.2d 840, 846 (1942), and cases therein cited. Cf. People v. Alexander, 212 Cal.App.2d 84, 27 Cal.Rptr. 720 (1963).

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

Under subdivision (b), 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 that reasonably may be relied upon by experts in forming an opinion upon the subject to which his 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 constitutional, statutory, or decisional 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 rule stated in subdivision (b) thus permits an expert to base his opinion upon reliable matter, ••whether or not admissible••, of a type that may reasonably be used in forming an opinion upon the subject to which his expert testimony relates. In addition, it 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., 3 Cal.Law Revision Comm'n, Rep., Rec. & Studies, Recommendation and Study Relating to Evidence in Eminent Domain Proceedings at A-1 (1961). Subdivision (b) 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.

Evidence Code §802
Reason and basis for opinions

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. (Ad Stats 1965, C 299)

Law Revision Commission Comments
Section 802 restates the substance of and supersedes a portion of Section 1872 of the Code of Civil Procedure. Section 802, however, relates to all witnesses who testify in the form of opinion, while Section 1872 relates only to experts.

Although Section 802 (like its predecessor, Code of Civil Procedure Section 1872) provides that a witness ••may•• state the basis for his opinion on direct examination, it is clear that, in some cases, a witness is ••required•• to do so in order to show that his opinion is applicable to the action before the court. Under existing law, 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 in order to show that the witness has some basis for forming an intelligent opinion and to permit the trier of fact to determine the applicability of the opinion in light of the existence or nonexistence of such facts. Eisenmayer v. Leonardt, 148 Cal. 596, 84 Pac.43 (1906); Lemley v. Doak Gas Engine Co., 40

Cal.App. 146, 180 Pac. 671 (1919) (hearing denied). Evidence Code Section 802 will not affect the rule set forth in these cases, for it is based essentially on the requirement that all evidence must be shown to be applicable--or relevant--to the action. Evidence Code Sections 350, 403. But under Section 802, as under existing 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., supra. However, the court may require a witness to state the facts observed before stating his opinion. In this respect Section 802 codifies the existing rule concerning lay witnesses and, although the existing law is unclear, probably states the existing rule as to expert witnesses. See Tentative Recommendation and a Study Relating to the Uniform Rules of Evidence (Article VII. Expert and Other Opinion Testimony), 6 Cal.Law Revision Comm'n, Rep., Rec. & Studies 901, 934 (lay witness), 939 (expert witness) (1964).

Evidence Code §803
Improper basis of opinion

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. (Ad Stats 1965, C 299)

Law Revision Commission Comments
Under Section 803, 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 259, 271-272, 34 Cal.Rptr. 368, 375-376 (1963), and cases cited therein. If a witness' opinion is stricken because of reliance upon improper considerations, the second sentence of Section 803 assures the witness the opportunity to express his opinion after excluding from his consideration the matter determined to be improper.

Evidence Code §804
Opinion or statement of another as basis of opinion

(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. (Ad Stats 1965, C 299)

Law Revision Commission Comments
Section 804 is designed to provide protection to a party who is confronted with an expert witness who relies on the opinion or statement of some other person. (See the Comment to Section 801 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. 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.

The existing law operates unfairly, for it unnecessarily restricts meaningful cross-examination. Hence, Section 804 permits 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 examining them as if under cross-examination concerning the subject matter of their opinions and statements. See the Comment to Evidence Code Section 1203.

Evidence Code §805
Opinion which embraces the ultimate issue

Testimony in the form of an opinion that is otherwise admissible is not objectionable because it embraces the ultimate issue to be decided by the trier of fact. (Ad Stats 1965, C 299)

Law Revision Commission Comments
Although several older cases indicated that an opinion could not be received on an ultimate issue, more recent cases have repudiated this rule. Hence, this section is declarative of existing law. 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).

Evidence Code §810
Application of Article

(a) Except where another rule is provided by statute, this article provides special rules of evidence applicable to any action in which the value of property is to be ascertained.

(b) This article does not govern ad valorem property tax assessment or equalization proceedings. (Am Stats 1980, C 381)

Senate Legislative Committee Comments--1978 Amendment
Section 810 defines the scope of this article. This article expressly applies only to the determination of the value of property in eminent domain and inverse condemnation proceedings. However,

nothing in this article precludes a court from using the rules prescribed in this article in valuation proceedings to which the article is not made applicable, where the court determines that the rules prescribed are appropriate. See In re Marriage of Folb, 53 Cal.App.3d 862, 868-71, 126 Cal.Rptr. 306, 310-12 (1975).

Comment--1980 Amendment
Section 810 is amended to remove the limitation on application of this article to eminent domain and inverse condemnation proceedings. This article does not attempt to determine market value and does not apply the eminent domain definition of market value to other cases; it is limited to procedural rules for determining market value, however defined.

This articles [sic] applies to any action or proceeding in which the value of real property, or real and personal property taken as a unit, is to be determined. See Section 811 and Comment thereto ("value of property" defined). See also Sections 105 and 120 ("action" includes action or proceeding). These cases include, but are not limited to, the following:

(1) Eminent domain proceedings. See, e.g., Code Civ .Proc. Section 1263.310 (measure of compensation is fair market value of property taken).

(2) Inheritance taxation. See, e.g., Rev. & Tax. Code Sections 13311, 13951 (property taxed on basis of market value).

(3) Preach of contract of sale. See, e.g., Civil Code Sections 3306, 3307 (damages for breach of real property contract based on value of property).

(4) Mortgage deficiency judgments. See, e.g., Code Civ.Proc. Sections 580a, 726 (judgments calculated on fair market value or fair value of property).

(5) Gift taxation. See, e.g., Rev. & Tax. Code Section 15203 (gift tax computed on market value of property).

(6) Fraud in the purchase, sale, or exchange of property. See, e.g., Civil Code Section 3343 (measure of damages includes damages based on actual value of property).

(7) Other cases in which no statutory standard of market value or its equivalent is prescribed but in which the court is required to make a determination of market value, such as marriage dissolution. See, e.g., In re Marriage of Folb, 53 Cal.App.3d 862, 126 Cal.Rptr. 306 (1975).

This article applies only where market value is to be determined, whether for computing damages and benefits or for any other purpose. In cases involving some other standard of value, the rules provided by this article are not made applicable by statute.

The introductory proviso of subdivision (a) ensures that, where a particular provision requires a special rule relating to value, the special rule prevails over this article. By virtue of subdivision (b), property tax assessment and equalization proceedings, whether judicial or administrative, are not subject to this article. They are governed by a well-developed and adequate set of rules that are comparable to the Evidence Code rules. See, e.g., Rev. & Tax. Code Sections 402.1, 402.5 (valuation and assessment rules); Rev. & Tax. Code Section 1606, 1609, 1609.4, 1636-1641 (equalization

proceedings); Cal.Admin. Code, Tit. 18 (public revenues regulations).

Nothing in this section is intended to require a hearing to ascertain the value of property where a hearing is not required by statute. See, e.g., Rev. & Tax. Code Sections 14501-14505 (Inheritance Tax Referee permitted but not required to conduct hearing to ascertain value of property).

Evidence Code §811
Property value

As used in this article, "value of property" means market value of any of the following:

(a) Real property or any interest therein.

(b) Real property or any interest therein and tangible personal property valued as a unit. (Am Stats 1980, C 381)

Law Revision Commission Comment--1975 Amendment

Section 811 is amended to conform to the numbering of the Eminent Domain Law.

Section 811 makes clear that this article as applied to eminent domain proceedings governs only evidence relating to the determination of property value and damages and benefits to the remainder. This article does not govern evidence relating to the determination of loss of goodwill (Code Civ.Proc. Section 1263.510).

The evidence admissible to prove loss of goodwill is governed by the general provisions of the Evidence Code. Hence, nothing in this article should be deemed a limitation on the admissibility of evidence to prove loss of goodwill if such evidence is otherwise admissible.

Section 811 Senate Legislative Committee Comment--1978 Amendment

Section 811 is amended to make clear the limited application of this article. This article applies only where market value of real property, an interest in real property (e.g., a leasehold), or tangible personal property is to be determined, whether for computing damages and benefits or otherwise. This article does not apply to the valuation of intangible personal property that is not an interest in real property, such as goodwill of a business; valuation of such property is governed by the rules of evidence otherwise applicable. However, nothing in this article precludes a court from using the rules prescribed in this article in valuation proceedings to which the article is not made applicable, where the court determines that the rules prescribed are appropriate. See Comment to Section 810.

Section 811 Senate Legislative Committee Comment--1980 Amendment

Subdivision (b) of Section 811 is amended to include personal property only when valued together with real property. The effect of this amendment is to limit the scope of the evidence of market value provisions to actions involving real property or real and personal property combined. See Section 810 (article provides rules applicable to action in which "value of property" to be ascertained). Actions involving personal property alone are governed by general law, including the

general rules of evidence prescribed in this code, although where appropriate the court may look to the special rules prescribed in this article.

Evidence Code §812
Market value

This article is not intended to alter or change the existing substantive law, whether statutory or decisional, interpreting the meaning of "market value," whether denominated "fair market value" or otherwise. (Am Stats 1978, C 294)

Law Revision Commission Comment--1975 Addition

Section 812 is amended to conform to the numbering and terminology of the Eminent Domain Law.

Section 812 Senate Legislative Committee Comment--1978 Amendment

Section 812 is amended to take into account the limited application of this article. See Section 811 and Comment thereto.

Evidence Code §813
Opinion testimony of value

(a) The value of property may be shown only by the opinions of any of the following:

(1) Witnesses qualified to express such opinions.

(2) The owner or the spouse of the owner of the property or property interest being valued.

(3) An officer, regular employee, or partner designated by a corporation, partnership, or unincorporated association that is the owner of the property or property interest being valued, if the designee is knowledgeable as to the value of the property or property interest.

(b) Nothing in this section prohibits a view of the property being valued or the admission of any other admissible evidence (including but not limited to evidence as to the nature and condition of the property and, in an eminent domain proceeding, the character of the improvement proposed to be constructed by the plaintiff) for the limited purpose of enabling the court, jury, or referee to understand and weigh the testimony given under subdivision (a); and such evidence, except evidence of the character of the improvement proposed to be constructed by the plaintiff in an eminent domain proceeding, is subject to impeachment and rebuttal.

(c) For the purposes of subdivision (a), "owner of the property or property interest being valued" includes, but is not limited to, the following persons:

(1) A person entitled to possession of the property.

(2) Either party in an action or proceeding to determine the ownership of the property between the parties if the court determines that it would not be in the interest of efficient administration of justice to determine the issue of ownership prior to the admission of the opinion of the party. (Am Stats 1980, C 381)

Law Revision Commission Comment--1978 Amendment

Paragraph (3) is added to Section 813(a) to make clear that where a corporation, partnership, or unincorporated association owns property being valued, a designated officer, regular employee, or partner who is knowledgeable as to the value of the property may testify to an opinion of its value as an owner, notwithstanding any contrary implications in City of Pleasant Hill v. First Baptist Church, 1 Cal.App.3d 384, 82 Cal.Rptr. 1 (1969). The designee may be knowledgeable as to the value of the property as a result of being instrumental in its acquisition or management or as a result of being knowledgeable as to its character and use; the designee need not qualify as a general valuation expert. Compare Section 720 (qualification as an expert witness). Nothing in Section 813 affects the authority of the court to limit the number of expert witnesses to be called by any party (see Section 723) or to limit cumulative evidence (see Section 352).

The phrase "value of property," as used in this section, is defined in Section 811.

Section 813 Senate Legislative Committee Comment--1980 Amendment

Paragraph (2) of Section 813(a) is amended by make [sic] clear that either spouse may testify as to the value of community property since both spouses are the owners. In addition, paragraph (2) authorizes either spouse to testify as to the value of the separate property of the other spouse as well as to his or her own separate property. This authority may be useful in cases under the Family Law Act where the character of the property is in dispute as well as in other cases requiring valuation where the nonowning spouse may be a more competent valuation witness than the owning spouse.

Subdivision (c) of Section 813 is amended to make clear that a person claiming to be an owner may testify as an owner in litigation over title. Such litigation may arise, for example, between a buyer and seller concerning title to and value of real property under a contract of sale, or between a landlord and tenant concerning characterization and value of property as trade fixtures.

Evidence Code §814

Basis of witness' opinion

The opinion of a witness as to the value of property is limited to such an opinion as is based on matter perceived by or personally known to the witness or made known to the witness at or before the hearing, whether or not admissible, that is of a type that reasonably may be relied upon by an expert in forming an opinion as to the value of property, including but not limited to the matters listed in Sections 815 to 821, inclusive, unless a witness is precluded by law from using such matter as a basis for an opinion. (Am Stats 1980, C 381)

Senate Legislative Committee Comment--1975 Addition

Section 814 is amended to delete the listing of particular matters constituting fair market value that an expert may rely on in forming an opinion as to the value of property. This listing is unnecessary. See Code Civ.Proc. Section 1263.320 (fair market value).

It should be noted that the definition of fair market value contained in Section 1263.320(a) omits the phrase "in the open market" since there may be no open market for some types of special purpose properties such as schools, churches, cemeteries, parks, utilities, and similar properties. The fair market value of these properties is covered by Section 1263.320(b). Within the limits of this article, fair market value may be determined by reference to matters of a type that reasonably may be relied upon by an expert in forming an opinion as to the value of property including, but not limited to, (1) the market data (or comparable sales) approach, (2) the income (or capitalization) method, and (3) the cost analysis (or production less depreciation) formula. See the Comment to Section 1263.320.

Section 814 Senate Legislative Committee Comment--1980 Amendment

Section 814 is amended to make technical changes. While the value of property may be determined by reference to matters listed in Sections 815 to 821 where appropriate, an opinion as to value may also be based on any other matter that satisfies the general requirements of Section 814. See, e.g., City of Los Angeles v. Retlaw Enterprises, Inc., 16 Cal.3d 473, 486 n. 8, 546 P.2d 1380, 1388 n. 8, 128 Cal.Rptr. 436, 444 n. 8 (1976) (price trend data admissible); People ex rel. Dep't of Transp. v. Southern Pac. Transp. Co., 84 Cal.App.3d 315, 325, 148 Cal.Rptr. 535, 541 (1978) (replacement cost of land as opposed to improvement admissible); South Bay Irr. Dist. v. California-American Water Co., 61 Cal.App.3d 944, 980, 133 Cal.Rptr. 166, 191 (1976), (capitalization based on nonrental income admissible); Redevelopment Agency v. Del-Camp Inv., Inc., 38 Cal.App.3d 836, 842, 113 Cal.Rptr. 762, 766-67 (1974). (capitalization based on gross rentals admissible); People ex rel. Dep't of Pub. Works v. Home Trust Inv. Co., 8 Cal.App.3d 1022, 1026, 87 Cal.Rptr. 722, 724 (1970) (noncomparable sales admissible in appropriate circumstances).

Evidence Code §815

Price of sale or contract to sell

When relevant to the determination of the value of property, a witness may take into account as a basis for an opinion the price and other terms and circumstances of any sale or contract to sell and purchase which included the property or property interest being valued or any part thereof if the sale or contract was freely made in good faith within a reasonable time before or after the date of valuation, except that in an eminent domain proceeding where the sale or contract to sell and purchase includes only the property or property interest being taken or a part thereof, such sale or contract to sell and purchase may not be taken into account if it occurs after the filing of the lis pendens. (Am Stats 1978, C 294)

Senate Legislative Committee Comment--1978 Amendment

The amendments to Section 815 are technical and clarifying only; they make no substantive change.

Evidence Code §816
Comparable sales prices

When relevant to the determination of the value of property, a witness may take into account as a basis for his opinion the price and other terms and circumstances of any sale or contract to sell and purchase comparable property if the sale or contract was freely made in good faith within a reasonable time before or after the date of valuation. In order to be considered comparable, the sale or contract must have been made sufficiently near in time to the date of valuation, and the property sold must be located sufficiently near the property being valued, and must be sufficiently alike in respect to character, size, situation, usability, and improvements, to make it clear that the property sold and the property being valued are comparable in value and that the price realized for the property sold may fairly be considered as shedding light on the value of the property being valued. (Ad Stats 1965, C 1151)

Evidence Code §817
Rental value and lease terms

(a) Subject to subdivision (b), when relevant to the determination of the value of property, a witness may take into account as a basis for an opinion the rent reserved and other terms and circumstances of any lease which included the property or property interest being valued or any part thereof which was in effect within a reasonable time before or after the date of valuation, except that in an eminent domain proceeding where the lease includes only the property or property interest being taken or a part thereof, such lease may not be taken into account in the determination of the value of property if it is entered into after the filing of the lis pendens.

(b) A witness may take into account a lease providing for a rental fixed by a percentage or other measurable portion of gross sales or gross income from a business conducted on the leased property only for the purpose of arriving at an opinion as to the reasonable net rental value attributable to the property or property interest being valued as provided in Section 819 or determining the value of a leasehold interest. (Am Stats 1978, C 294)

Law Revision Commission Comment--1978 Amendment

Subdivision (a) of Section 817 is amended to add the limitation that a lease of the subject property is not a proper basis for an opinion of value of the property after the filing of the lis pendens in an eminent domain proceeding. This is comparable to a provision of Section 815 (sale of subject property). Nothing in subdivision (a) should be construed to limit the use of leases created after filing of the lis pendens to show damages to the property, such as those authorized by Klopping v. City of Whittier, 8 Cal.3d 39, 500 P.2d 1345, 104 Cal.Rptr. 1 (1972).

Subdivision (b) limits the extent to which a witness may take into account a lease based on gross sales or gross income of a business conducted on the property. This limitation applies only to valuation of the real property or an interest therein, or of tangible personal property, and does not apply to the determination of loss of goodwill. See Section 811 and Comment thereto; Code Civ.Proc. Section 1263.510 and Comment thereto.

The phrase "value of property," as used in this section, is defined in Section 811.

Evidence Code §818
Rental terms and value of comparable property

For the purpose of determining the capitalized value of the reasonable net rental value attributable to the property or property interest being valued as provided in Section 819 or determining the value of a leasehold interest, a witness may take into account as a basis for his opinion the rent reserved and other terms and circumstances of any lease of comparable property if the lease was freely made in good faith within a reasonable time before or after the date of valuation. (Ad Stats 1965, C 1151)

Evidence Code §819
Capitalization of rental value of land

When relevant to the determination of the value of property, a witness may take into account as a basis for his opinion the capitalized value of the reasonable net rental value attributable to the land and existing improvements thereon (as distinguished from the capitalized value of the income or profits attributable to the business conducted thereon). (Ad Stats 1965, C 1151)

Evidence Code §820
Improvements

When relevant to the determination of the value of property, a witness may take into account as a basis for his opinion the value of the property or property interest being valued as indicated by the value of the land together with the cost of replacing or reproducing the existing improvements thereon, if the improvements enhance the value of the property or property interest for its highest and best use, less whatever depreciation or obsolescence the improvements have suffered. (Ad Stats 1965, C 1151)

Evidence Code §821
Property improvements in the vicinity of the subject property

When relevant to the determination of the value of property, a witness may take into account as a basis for his opinion the nature of the improvements on properties in the general vicinity of the property or property interest being valued and the character of the existing uses being made of such properties. (Ad Stats 1965, C 1151)

Evidence Code §822
Matters not a proper basis for opinion

(a) In an eminent domain or inverse condemnation proceeding, notwithstanding the provisions of Sections 814 to 821, inclusive, the following matter is inadmissible as evidence and shall not be taken into account as a basis for an opinion as to the value of property:

(1) The price or other terms and circumstances of an acquisition of property or a property interest if the acquisition was for a public use for which the property could have been taken by eminent domain.

The price or other terms and circumstances shall not be excluded pursuant to this paragraph if the proceeding relates to the valuation of all or part of a water system as defined in Section 240 of the Public Utilities Code.

(2) The price at which an offer or option to purchase or lease the property or property interest being valued or any other property was made, or the price at which the property or interest was optioned, offered, or listed for sale or lease, except that an option, offer, or listing may be introduced by a party as an admission of another party to the proceeding; but nothing in this subdivision permits an admission to be used as direct evidence upon any matter that may be shown only by opinion evidence under Section 813.

(3) The value of any property or property interest as assessed for taxation purposes or the amount of taxes which may be due on the property, but nothing in this subdivision prohibits the consideration of actual or estimated taxes for the purpose of determining the reasonable net rental value attributable to the property or property interest being valued.

(4) An opinion as to the value of any property or property interest other than that being valued.

(5) The influence upon the value of the property or property interest being valued of any noncompensable items of value, damage, or injury.

(6) The capitalized value of the income or rental from any property or property interest other than that being valued.

(b) In an action other than an eminent domain or inverse condemnation proceeding, the matters listed in subdivision (a) are not admissible as evidence, and may not be taken into account as a basis for an opinion as to the value of property, except to the extent permitted under the rules of law otherwise applicable. (Am Stats 2000, C948)

Law Revision Commission Comments

2000—Subdivision (a)(1) of Section 822 is amended to delete the special exception relating to property appropriated to public use, in reliance on general evidentiary principles. See, e.g., Section 823 ("Notwithstanding any other provision of this article, the value of property for which there is no relevant, comparable market may be determined by any method of valuation that is just and equitable."); see also Code Civ. Proc. §1263.320(b) (fair market value). Thus, evidence of an acquisition that is otherwise inadmissible under subdivision (a)(1) may, in an appropriate case, be admissible under Section 823 if a private market is lacking, e.g., the acquisition involves a special purpose property such as a school, church, cemetery, park, utility corridor, or similar property.

The new exception added to subdivision (a)(1) is intended to apply in an eminent domain or inverse condemnation proceeding that relates to a public agency's acquisition or taking of all or any part of a water system owned by a water company.

Subdivision (c) is deleted as obsolete.

Senate Legislative Committee Comment--1980 Amendment

Section 822 is amended to limit the application of subdivision (a) to eminent domain and inverse condemnation cases despite the general expansion of this article to cover real property valuation cases generally. See Sections 810 and 811 and Comments thereto. The introductory portion of subdivision (a) is also amended to make clear that subdivision (a) regulates only the bases for an opinion of value admissible in evidence; it does not purport to prescribe rules and regulations governing the practice of the appraisal profession outside of expert testimony in a case.

Subdivision (b) is added to make clear that the exclusion of the matters listed in subdivision (a) in eminent domain and inverse condemnation cases does not imply that those matters are admissible in other cases. The rules governing admissibility in other cases of matters listed in subdivision (a) are found in Section 814 and in the general Evidence Code rules relating to relevance, prejudice, and the like.

Law Revision Commission Comment--1978 Amendment

Subdivision (c) of Section 822 is amended to incorporate a provision formerly found in Revenue and Taxation Code Section 4986(b). Unlike the former provision, subdivision (c) does not provide for a mistrial for mention of the amount of taxes which may be due. Whether such mention is grounds for a mistrial is governed by the general principles of court discretion to declare a mistrial when evidence has been presented which is inadmissible, highly prejudicial, and cannot be corrected by an admonition to the jury.

Subdivision (d) does not prohibit a witness from testifying to adjustments made in sales of comparable property used as a basis for an opinion. Merced Irrigation Dist. v. Woolstenhulme, 4 Cal.3d 478, 501-03, 483 P.2d 1, 16-17, 93 Cal.Rptr. 833, 848-49 (1971).

Section 822 does not prohibit cross-examination of a witness on any matter precluded from admission as evidence if such cross-examination is for the limited purpose of determining whether a witness based an opinion in whole or in part on matter that is not a proper basis for an opinion; such cross-examination may not, however, serve as a means of placing improper matters before the trier of fact. See Evid. Code Section 721, 802, 803.

The phrase "value of property," as used in this section, is defined in Section 811.

Evidence Code §823
Just and equitable method of valuation

Notwithstanding any other provision of this article, the value of property for which there is no relevant, comparable market may be determined by any method of valuation that is just and equitable. (Am Stats 1992, C 7)

Evidence Code §824
Procedures for valuation

(a) Notwithstanding any other provision of this article, a just and equitable method of determining the value of nonprofit, special use property, as defined by Section 1235.155 of the Code of Civil Procedure, for which there is no relevant, comparable market, is the cost of purchasing land and the reasonable cost of making it suitable for the conduct of the same nonprofit, special use, together with the cost of constructing similar improvements. The method for determining compensation for improvements shall be as set forth in subdivision (b).

(b) Notwithstanding any other provision of this article, a witness providing opinion testimony on the value of nonprofit, special use property, as defined by Section 1235.155 of the Code of Civil Procedure, for which there is no relevant, comparable market, shall base his or her opinion on the value of reproducing the improvements without taking into consideration any depreciation or obsolescence of the improvements.

(c) This section does not apply to actions or proceedings commenced by a public entity or public utility to acquire real property or any interest in real property for the use of water, sewer, electricity, telephone, natural gas, or flood control facilities or rights-of-way where those acquisitions neither require removal or destruction of existing improvements, nor render the property unfit for the owner's present or proposed use. (Ad Stats 1992, C 7)

Evidence Code §870
Opinion as to sanity

A witness may state his opinion as to the sanity of a person when:

(a) The witness is an intimate acquaintance of the person whose sanity is in question;

(b) The witness was a subscribing witness to a writing, the validity of which is in dispute, signed by the person whose sanity is in question and the opinion relates to the sanity of such person at the time the writing was signed; or

(c) The witness is qualified under Section 800 or 801 to testify in the form of an opinion. (Ad Stats 1965, C 299)

Law Revision Commission Comments

Subdivisions (a) and (b) restate the substance of and supersede subdivision 10 of Section 1870 of the Code of Civil Procedure. Subdivision (c) merely makes it clear that a witness who meets the requirements of Section 800 or Section 801 is qualified to testify in the form of an opinion as to the sanity of a person. Section 870 does not disturb the present rule that permits a witness to testify to a person's rational or irrational appearance or conduct, even though the witness is not qualified under Section 870 to express an opinion on the person's sanity. See Pfingst v. Goetting, 96 Cal.App.2d 293, 215 P.2d 93 (1950).

Evidence Code §1416
Opinion as to handwriting

A witness who is not otherwise qualified to testify as an expert may state his opinion whether a writing is in the handwriting of a supposed writer if the court finds that he has personal knowledge of the handwriting of the supposed writer. Such personal knowledge may be acquired from:

(a) Having seen the supposed writer write;

(b) Having seen a writing purporting to be in the handwriting of the supposed writer and upon which the supposed writer has acted or been charged;

(c) Having received letters in the due course of mail purporting to be from the supposed writer in response to letters duly addressed and mailed by him to the supposed writer; or

(d) Any other means of obtaining personal knowledge of the handwriting of the supposed writer. (Ad Stats 1965, C 299)

Law Revision Commission Comments

Section 1416 is based on Code of Civil Procedure Section 1943 as amended in the code revisions of 1901. Cal.Stats. 1901, Ch. 102, Section 481, p. 247. See the Comment to Section 1414.