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Evidence Code: Opinions and Expert Testimony

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FLORIDA LAW REVISION COUNCIL

PRELIMINARY WORKING DRAFT

Evidence Code

Opinions and Expert Testimony

Charles W. Ehrhardt, Reporter

The ideas and conclusions set forth herein, including the draft of proposed legislation, have not been seen or approved by the Florida Law Revision Council. This material is being circulated to members of the bench and the bar for the purpose of eliciting comments and suggestions for improvement. Any communication concerning this project should be sent in writing to the Law Revision Council, Holland Building, Room 346, Tallahassee, Florida 32304.

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INTRODUCTION

For several years, the Florida Law Revision Council has studied and considered the desirability and need for statutory adoption of most of the basic rules of evidence. At first, the Council carefully explored and received advice on the obvious threshold questions of whether the rules of evidence are appropriate for codification and, if so, whether this should be accomplished through legislative enactment or through court rules.

The need for codification has long been accepted by leading scholars in the field of evidence, see Morgan, Forward, A.L.I. Model Code of Evidence 6 (1942); Ladd, A Modern Code of Evidence, 27 Iowa L. Rev. 213, 214 (1942); McCormick, Evidence, xi (1954), and there is a clearly developing trend throughout the United States toward this effort, "Public discussion must concern itself with the merits, means and objectives of codifying the entire law of evidence.....Failure to do so is more than a failure in semantics-it is a failure in vision." Papale, Editorial: Reflections on the Proposed Louisiana Code of Evidence, 12 Loyola L. Rev. 51, 53 (1965-66). Growing caseloads continue to put strains on the time of trial judges and attorneys and on their ability to "find the Law" in the rapidly increasing number of reported cases. The pace of modern litigation does not allow the luxury of hours spent in the law library finding cases to support the many basic rules of evidence.

The need to aid bench and bar in the trial of lawsuits is

accompanied by a corollary need for uniformity within the state. Many of those urging the Council to undertake this project were motivated by a lack of uniformity in the application of the case law of evidence. Even those who have become comfortable with the present sources of evidence law must concede that uniformity does not now exist throughout the state.

The debate over whether the enactment of a comprehensive code of evidence should be accomplished by legislation or by court rules will continue, see, Green, To What Extent May Courts Under the Rule-Making Power Prescribe Rules of Evidence?, 26 A.B.A. J. 482 (1940). The point was debated before adoption of the Federal rules by the Supreme Court, and several states have faced the issue, see Cal. Stat. Ann., Evidence, §§1-1605(1966); N.J. Stat. Ann. §§2A:66-81 through 2A:66-84; Kan. Stat. Ann. §§60-401 through 60-470 (1964); also see Note, Evidence Law in Wisconsin: Towards a More Practical, Rational and Codified Approach, 1970 Wisconsin L. Rev. 1178.

Florida's division of authority between the Legislature and the Supreme Court with respect to substantive law and procedural law would make the promulgation of a code of evidence impossible without the cooperation of these two branches of government. Fla. Const. Art. V, Sec. 2 (1972 revision). Questions of substance vs. procedure have been debated for years, and no one has ever been able to draw a clear dividing line. More important, even if a line could be drawn the substance and procedure of the law of evidence are often too interwoven to be separated. A code of evidence must contain both substance and procedure, so its promulgation must be

a cooperative effort between the Legislature and the Supreme Court. The Law Revision Council must find the avenue of cooperation between these branches of government which will allow the enactment of rules of evidence free from doubts concerning the constitutional authority of either the Court or the Legislature to promulgate this hybrid of substance and procedure.

In summary, the Council is attempting to draft an organized, orderly, statutory expression of the law of evidence, based on the opinions of our state courts and supplemented where necessary by the decisions of the Federal courts and those of our sister states. The Council recoginzes that an evidence code cannot provide a clear answer to every question that may arise, and the courts will still be left with the job of interstitial development; but a code can provide the basic structure of the law of evidence. Members of the bench, the bar and the Legislature have been asked to help. Until its final recommendation to the Legislature the Council will continue to analyze and examine the tentative drafts. The Council solicits written comments from lawyers, judges, teachers, bar groups, and anyone else interested in the law of evidence.

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REPORTER'S INTRODUCTORY MEMORANDUM

Submitted herewith is the Preliminary Working Draft of the section of the Florida Code of Evidence dealing with Opinion.

This section is one of the eleven that will be included in the Code. The outline under which the Reporter is preparing the Preliminary Working Draft is:

Section 90.100	General Provisions
Section 90.200	Judicial Notice
Section 90.300	Presumptions
Section 90.400	Relevancy
Section 90.500	Privileges
Section 90.600	Witnesses (Competency, Impeachment, Character, Refreshing Recollection, etc.)
Section 90.700	Opinions and Expert Testimony
Section 90.800	Hearsay
Section 90.900	Authentication and Identification
Section 90.1000	Contents of Writings, Recordings and Photographs (Best evidence rule, Summaries, etc.)
Section 90.1100	Applicability of Code

The selection of the first three sections (Judicial Notice, Relevancy and Opinion) for submission was on the sole basis that these sections were the first three which were completed in Preliminary Working Draft form.

The provision authorizing court-appointed experts and the provision allowing the court discretion to permit an expert to testify regarding his opinion without using a hypothetical question are the major changes from the existing Florida law in the draft of Opinion. The Reporter has included a few of the provisions, although he is not certain that they are desirable.

It is hoped that the discussion and comment which will result from the circulation of this portion of the Preliminary Working Draft will lead to the proper resolution of whether the various provisions should be included in the Code. Without the inclusion of these provisions in this draft, the necessary discussion would not occur.

The remaining sections of this Preliminary Working Draft will be submitted as soon as they are completed. The present plans of the Reporter are that their submission will be by October 1973.

OK

OPINIONS AND EXPERT TESTIMONY

Section 90.701 Opinion Testimony of Lay Witnesses.

If a witness is not testifying as an expert, his testimony when testifying to what he perceived may be in the form of inference and opinion, ~~only~~ when:

(1) the witness cannot readily and with equal accuracy and adequacy communicate what he has perceived to the trier of fact without testifying in terms of inferences or opinions, and his use of inferences or opinions will not mislead the trier of fact to the prejudice of the objecting party, and

(2) the opinions and inferences do not require a special knowledge, skill, experience or training.

COMMENT

The common law general rule is that lay witness must testify to facts which they observed and are not permitted to testify in terms of inferences or opinions based upon those facts. Jones v. State, 44 Fla. 74, 32 So. 793 (1902). Courts have permitted exceptions to this

general rule when (1) the facts upon which the opinion or inference is based cannot otherwise be made intelligible, or (2) the opinion is of a condition that cannot be reproduced and made comprehensible to the trier of the facts by description. Opinion evidence as to such things as distance, time, size, weight, form, and identity has usually been admitted by the Courts. See Evidence in Florida, The Florida Bar Continuing Legal Edu. § 4.30 The Opinion Rule.

This section retains the traditional objective of putting the trier of fact in possession of an accurate reproduction of the event, while permitting the witness to testify in language more characteristic of ordinary conversation. The Comment to Model Code of Evidence Rule 401 explains:

> Where a witness is attempting to communicate the impressions made upon his senses by what he has perceived, any attempt to distinguish between so-called fact and opinion is likely to result in profitless quibbling. Analytically no such distinction is possible. The English common law does not attempt to prevent a witness from describing his experiences in terms including inferences. If he hasn't the skill or exerience required for drawing inferences, he will not be allowed to state them. His inferences, when received may not be worth much, but they can do no harm. The court will not permit them to be given more weight than the basis upon which they are built will sustain, and that basis can be uncovered on cross-examination if the judge has not required that it be given in advance.

Federal Rule of Evidence 701 achieves an effect similar to this rule, although it is left to implication that

lay witnesses are permitted to testify in terms of inferences and opinion. Provisions similar to this section are found in Calif. Evid. Code §800; Kansas Code of Civ. Pro. §60-456(a); New Jersey Evid. Rule 56(1).

The extent to which lay witnesses have been permitted to testify in terms of opinions and inferences in Florida courts is not clear. In South Venice Corp. v. Caspersen, 229 So. 2d 652 (Fla. 2nd Dist. 1969) the appellant contended that the trial court had erred in admitting into evidence the opinion testimony of a layman that an island was located in a bay. The court stated that it was unable to find any Florida case directly on point but said that generally the admission of opinion by non-expert witnesses is largely within the discretion of the trial judge. However the court avoided a direct ruling by holding that there was sufficient testimony and evidence to support the verdict without reference to this opinion testimony. In another case, Scott v. Barfield, 202 So. 2d 591, 594 (Fla. 4th Dist. 1967), the court stated that when the testimony of the lay witness "enters into that of opinion or supposition, it invades the province of the jury." Florida cases were found which sanction the admissibility, or define, in general terms, circumstances under which a non-expert witness may testify in terms of inferences and opinion. Many cases have held that ordinary witnesses may testify concerning specific situations; e.g., speed and distance, identity, mental condition.

Although the effect of this section may be a liberalization of the circumstances under which non-experts may testify in terms of inferences and opinion, the purpose of the section is to de-emphasize the fact-opinion distinction in order to give the trier of fact a more complete and accurate reproduction of the event.

Section 90.702 Testimony by Experts. If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion.

COMMENT

Whether the situation is a proper one for the use of expert testimony is to be determined on the basis of whether it will assist the trier of fact. "There is no more certain test for determining when experts may be used than the common sense inquiry whether the untrained layman would be qualified to determine intelligently and to the best possible degree the particular issue without enlightenment from those having a specialized understanding of the subject involved in the dispute." Ladd, Expert Evidence, 5 Vand. L. Rev. 414, 418 (1952). If the issue involves a matter of common knowledge about which the ordinary layman would be capable of forming a correct judgment, expert testimony is not admissible. If the triers of fact have a general knowledge of a matter, but an expert's testimony would aid their understanding of the issue, it would be admissible. The

Florida courts are in substantial accord with this position. "The opinion of an expert should be excluded where the facts testified to are of a kind that do not require any special knowledge or experience in order to form a conclusion, or are of such character that they may be presumed to be within the common experience of all men moving in ordinary walks of life." Mills v. Redwing Carriers, Inc., 127 So. 2d 453, 456 (Fla. 2nd Dist. 1961).

The fields of knowledge that may be drawn upon are not limited merely to the scientific or technical but extend to all specialized knowledge. Included within the scope of the rule are such "skilled" witnesses as bankers or land-owners testifying to land values, as well as more formally trained persons such as physicians and architects.

Since much of the criticism of expert testimony has centered on the hypothetical question, it seems wise to encourage the use of expert testimony in non-opinion forms when counsel believes the trier can itself draw the requisite inference. The expert may give a dissertation or an explanation of scientific or other principles relevant to a case, leaving the trier of fact to apply these principles to the facts. The use of opinion is not abolished, however, and it will continue to be permissible for the expert to take the further step of suggesting the inference which should be drawn from applying the specialized knowledge to the facts.

The Advisory Committee's Note to Federal Rule of Evidence 702 states that "When opinions are excluded, it is because they are unhelpful and therefore superfluous and a waste of time." Although Florida courts generally speak in terms of "an invasion of [the] jury's province," when excluding expert testimony, such decisions are based on whether the jury is competent to make its own deductions without hearing the expert. See Smaglick v. Jersey Ins. Co., 209 So. 2d 475 (Fla. 4th Dist. 1968). Consequently, the rule in this section should not alter the circumstances under which an expert's testimony will be excluded.

The definition of an expert is similar to that of Section 90.231 of the Florida Statutes and of Florida Rule of Civil Procedure 1.390 which define an expert as "one possessed of special knowledge or skill about the subject upon which he is called to testify." See Fed. Rule of Evid. 702.

OK

Section 90.703 Opinion on Ultimate Issue - Testimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact.

COMMENT

Many cases contain prohibitions against allowing witnesses to express opinion on ultimate issues on the grounds that to do so would invade the province of the jury. This rule has been criticized as being unduly restrictive, difficult of application, and generally serving only to deprive the trier of fact of useful information. 7 Wigmore, Evidence §§1920, 21 (3rd ed. 1940); McCormick, Evidence § 12 (2nd ed. 1972). Although some early Florida cases seemingly follow this older "ultimate issue" exclusionary rule; the Florida Supreme Court in North v. State, 65 So. 2d 77, 88 (Fla. 1952), in allowing a physician to express his opinion as to the cause of the bruises and contusions on the victim's throat, adopted the position stated in 20 Am. Jr. 654, Evidence § 782:

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

Ck this McCormick cite right

This view has prevailed in Florida. See Gifford v. Galaxie Homes of Tampa, Inc., 223 So. 2d 108, 111 (Fla. 2nd Dist. 1969), where, in permitting expert testimony that a ramp was not constructed and maintained according to reasonably safe construction and engineering standards of the community, it was further reasoned:

> It is still the sole province of the jury to accept or reject the testimony of the expert witness, regardless of how respectable and qualified that witness may be, and the jury is in no wise bound by the expert's conclusions, any more than it is bound by the testimony of any other witness.

The abolition of the "ultimate issue" exclusionary rule does not admit all opinion testimony. Section 90.701 prohibits opinions and inferences of a lay witness when the witness lacks the knowledge, skill, experience, or training to rationally form such opinions, and permits the exclusion of opinions of a lay witness when the lay witness can just as adequately and accurately relate what he has perceived without testifying in terms of inferences and opinions. Section 90.702 limits expert opinion testimony to circumstances where the trier of fact will be assisted by such testimony in understanding the evidence or determining a fact in issue. Section 90.403 provides for exclusion of evidence for waste of time.

These sections, together with section 90. 706, which permits the judge to require disclosure of facts or data underlying an expert's opinion, afford ample assurance that

the admission of opinions which would merely tell the jury what result to reach will be excluded. In addition, an opinion phrased in terms of inadequately explored legal criteria where there was not a sufficient foundation to show expertise in determining the legal effect of the facts could be excluded. The question, "Did T have capacity to make a will?" could be excluded, while the question, "Did T have sufficient mental capacity to know the nature and extent of his property and the natural objects of his bounty and to formulate a rational scheme of distribution?" would be allowed. See generally, Morris, The Role of Expert Testimony in the Trial of Negligence Issues, 26 Texas L. Rev. 1, 10-23 (1947).

For similar provisions see Uniform Rule 56(4); Calif. Evid. Code § 805; Kansas Code of Civ. Pro. § 60-456(d); New Jersey Evidence Rule 56(3); Fed. Rule Evid. 704.

Debate b/c it's procedural?

should have to submit to a ∆'s medical exam — a separate rule?

should this be included? yes

change by rule so change the appropriate court

suggestion to the rules committee Fla Bar?

Furnish reports

need either new Rule

Section 90.704 Court Appointed Experts.

(1) Appointment. If the court determines that the appointment of expert witnesses in an action is desirable, it may on its own motion or on the motion of any party, WITH OPPORTUNITY TO BE HEARD enter an order to show cause why expert witnesses should not be appointed, and may request the parties to submit nominations. If the parties agree in the selection of an expert or experts, the court shall appoint only those agreed upon. Otherwise the court may make its own selection. The court shall not appoint an expert witness unless he consents to act. A witness so appointed shall be informed of his duties by the court in writing, a copy of which shall be filed with the clerk, or at a conference in which the parties shall have opportunity to participate. A witness so appointed shall advise the parties of his findings, if any; his deposition may be taken by any party, and he may be called to testify by the court or any party. He shall be subject to cross-examination by each party, including a party calling him as a witness.

~~If~~ any additional step that is necessary?

(2) Compensation. Expert witnesses appointed by a court shall be entitled to reasonable compensation in such sum as the court may allow. Except as may be otherwise provided by statute, the compensation is payable from funds which may be provided by law in criminal cases and cases involving just compensation for the taking of property, and, in other civil cases, shall be paid by the parties in such proportion and at such time as the court directs, and thereafter charged in like manner as other costs.

(3) Disclosure of Appointment. In the exercise of its discretion, the court may authorize the disclosure to the jury of the fact that the court appointed the expert witness.

(4) Parties' Experts of Own Selection. This section does not limit the parties in calling expert witnesses of their own selection.

COMMENT

The practice of shopping for experts, and the reluctance of many reputable experts to involve themselves in litigation have been matters of deep concern. These problems are

particularly acute in the field of medicine. This section provides for the judge and jury an impartial expert to aid them in the difficult job of reconciling conflicting expert opinion. The very existence of the right of the judge to call on impartial expert witnesses may deter partisan experts from presenting misleading findings or inflated damage claims which may be exposed at trial. While experience indicates that actual appointment is a relatively infrequent occurrence, Myers, "The Battle of the Experts:" A New Approach to an Old Problem in Medical Testimony, 44 Nebraska L.Rev. 539 (1965), the assumption may be made that the availability of the procedure in itself decreases the need for resorting to it.

The following arguments have been made against the court appointed expert system: (1) A truly impartial expert may be difficult to obtain and (2) the jury may be conditioned to uncritical acceptance of the expert's opinion. While these are valid objections, it is felt that the availability of court appointed experts produces a net improvement in the judicial process. For a discussion of several plans that have been put into operations, see Myers, "The Battle of the Experts:" A New Approach to an Old Problem in Medical Testimony, supra.

This procedure is in essence that recognized in Florida Rule of Criminal Procedure 3.210 providing for the appointment by the court of disinterested qualified experts if the issue

of the defendant's sanity is raised. The procedure for the taking of an expert's deposition is set forth in detail in Florida Rule of Civil Procedure 1.390.

Section 90.705 Bases of Opinion Testimony by Experts:

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

COMMENT

Facts or data upon which expert opinion are based may be derived from three possible sources: (1) Firsthand observation of the witness, (2) presentation of evidence at the trial, and (3) presentation of data to the expert outside of court and other than by his own perception The first two sources reflect existing practice. Inclusion of the third source is designed to broaden the basis of expert opinion beyond that currently allowed and to bring the judicial practice into line with the practice of the experts themselves when not in court. Thus, a physician in his own practice bases his diagnosis on information from numerous sources and of considerable variety, including statements by patients and relatives, reports and opinions of nurses, technicians, and other doctors, hospital records, and X-rays. The reasonableness of experts' reliance on this data may be questioned on cross-examination.

This section also offers a satisfactory basis for a ruling upon the admissibility of public opinion poll evidence. Attention is directed to the validity of the techniques employed rather than to relatively fruitless inquiries whether hearsay is involved. See Zippo Mfg. Co. v. Rogers Imports, Inc., 216 F. Supp. 670 (S.D.N.Y. 1963).

Although Florida case-law does not speak in terms similar to the language in this section, in at least one situation the effect is that of substantial accord. Numerous Florida cases uphold the admissibility of opinion evidence by a treating physician based, at least partially, on information supplied to him by the patient. Steiger v. Massachusetts Cas. Ins. Co., 253 So. 2d 882 (Fla. 3rd Dist. 1971); Raydel Ltd. v. Medcalfe, 162 So. 2d 910 (Fla. 3rd Dist. 1964), quashed on other grounds 178 So. 2d 569.

If it is feared that enlargement of permissible data may tend to break down the rules of exclusion unduly, notice should be taken that the section requires that the facts or data "are of a type reasonably relied upon by experts in the particular subject."

This section is the same as Fed. Rule Evid. 703. A similar provision is contained in Calif. Evid. Code § 801(b).

Section 90.706 Disclosure of Facts or Data Underlying Expert Opinion. Unless otherwise required by the court, an expert may testify in terms of opinion or inferences and give his reasons therefor without prior disclosure of the underlying facts or data. Upon cross-examination he may be required to specify such facts or data.

COMMENT

This section eliminates the requirement of preliminary disclosure at the trial of underlying facts or data. Counsel is allowed to make disclosure of the underlying facts or data as a preliminary to the giving of an expert opinion, if he chooses, but the instances in which he is required to do so are reduced. This is true whether the expert bases his opinion on data furnished him secondhand, or observed by him firsthand.

The change which this section represents was prompted by the criticism which has been leveled at the use of the hypothetical question. As was stated in 2 Wigmore, Evidence § 686 (3rd ed. 1940):

> The hypothetical question, misused by the clumsy and abused by the clever, has in practice led to intolerable obstruction of truth. In the first place, it has artificially clamped the mouth of the expert witness, so that his answer to a complex question may not express his actual opinion on the actual case. This is because the question may be so built up and contrived by counsel as to represent only a partisan conclusion. In the second place, it has tended to

mislead the jury so as to purport of actual expert opinion. This is due to the same reason. In the third place, it has tended to confuse the jury, so that its employment becomes a mere waste of time and a futile obstruction.

The cross-examiner has the opportunity to bring out the supporting data, if he should so desire. It is assumed that the cross-examiner has the advance knowledge that is essential for effective cross-examination. The judge also has the discretionary power to require preliminary disclosure.

The rule of this section is in conflict with current law in Florida. In Nat Harrison Associates, Inc. v. Byrd, 256 So. 2d 50, 53 (Fla. 4th Dist. 1971) it was stated that:

> The facts submitted to the expert in the hypothetical question propounded on direct examination must be supported by competent substantial evidence in the record at the time the question is asked or by reasonable inferences from such evidence . . . . Adherence to this form for the direct examination of an expert prevents the expert from expressing an opinion based on unstated and perhaps unwarranted factual assumptions concerning the event; facilitates cross examination and rebuttal; and fosters an understanding of the opinion by the trier of fact.

The elimination of the requirement of preliminary disclosure has a long backgound of support. See Honigman, The Hypothetical Question Meets Its Answer, 36 Mich. S.B.J. No. 11 at 12 (1957). In 1937 the Commissioners on Uniform State Laws incorporated a provision to this effect in their Model Expert Testimony Act, which furnished the basis for Uniform Rules 57 and 58. For similar provisions see Calif. Evid. Code § 802; Kansas Code of Civ. Pro. §§ 60-456, 60-457; New Jersey Evidence Rules 57,58, Rule 4515, New York C.P.L.R. (McKinney 1963), Fed. Rule Evid. 705.