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## EXPERT AND OTHER OPINION TESTIMONY

MASON LADD\*

The improvement of the law in the area of opinion evidence is in the forefront today, both in respect to testimony in terms of inference upon the part of lay witnesses and in the use of expert testimony. In this era of scientific advancement it is reasonable to expect that the use of expert testimony, where scientific knowledge will aid in the proper solution of litigated cases, will be much greater in the future. This trend is enhanced by the increasing use of demonstrative evidence. While much evidence classified as real or demonstrative evidence, does not involve the use of opinion testimony, a very substantial part of it is connected with the opinion of experts and its usefulness is dependent upon expert testimony. The greater use of models, charts, diagrams, X-ray films and photographs may serve well in producing a better understanding of facts involving scientific matters and enable the expert to demonstrate his opinion upon these matters much more effectively than by words alone. These effective devices will have a marked influence upon the methods of examining experts and will tend to reduce the use of the long and complicated hypothetical question. Chapter VII of the Uniform Rules on opinion testimony expresses the best of modern thinking upon this subject and should receive wide acceptance. There is a great deal of variation in different jurisdictions in respect to opinion testimony, some rigidly restricting its use almost to the confines of the eighteenth and nineteenth centuries.

Fortunately, Minnesota through judicial decision and by statute has taken a forward looking position and there will be nothing strange or novel in the Uniform Rules when they are considered by members of the bench and bar of this state. They will give authoritative sanction to developments which are already taking place and in many situations will provide but a clear, concise statement of concepts now a part of the law of Minnesota.

As the purpose of this article is to consider the Minnesota law in comparison with the Uniform Rules, the discussion will be arranged in the order of the sections and their several divisions appearing under Chapter VII entitled, Expert and Other Opinion Testimony.

### TESTIMONY IN THE FORM OF OPINION. RULE 56

During the nineteenth century the exclusion of opinion evidence from a lay witness was carried beyond reason in this country and

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even today many courts in their effort to confine a witness to a statement of fact have precluded a witness from effectively narrating what he knows.<sup>1</sup> There is perhaps no more frequent objection given in court to questions asked to lay witnesses than the objection that a question calls for the opinion and conclusion of the witness. The fine line between testimony in terms of opinion and fact is often difficult to draw and because of this the rule of evidence has been subject to great abuse.<sup>2</sup> Historically it was designed to prevent a witness from expressing his speculations or persuasions about matters of which he had no personal knowledge.<sup>3</sup> Just as the hearsay rule precludes a witness from testifying to what he heard others say, the opinion rule limits testimony to facts rather than what the witness thought about the facts. The rule developed into a technical limitation upon the kind of language which a witness would be permitted to use in expressing facts which he had personally perceived. Nevertheless, it was recognized that many facts could be related only in terms of opinion, and it became common everywhere to permit testimony in terms of inference by lay witnesses upon such subjects as identity, resemblances, color, odor, conduct, feeling and other matters about which it was difficult for a witness to express himself factually.<sup>4</sup>

#### (1) *Testimony of Lay Witnesses*

Division (1) of Rule 56 seeks to eliminate the refinements involved in determining the distinction between fact and inference or opinion, it makes basic the requirement that the testimony of a witness be founded upon personal knowledge. It provides, "If the witness is not testifying as an expert his testimony in the form of opinions or inferences is limited to such opinions or inferences as the judge finds (a) may be rationally based on the perception of the witness and (b) are helpful to a clear understanding of his testimony or to the determination of the fact in issue." Judicial decision

1. See 7 Wigmore, *Evidence* §§ 1917-19 (3d ed. 1940), Ladd, *Model Code of Evidence*, 27 Iowa L. Rev. 213, 215-20 (1942), Model Code of Evidence, Rules 329, 332-39 (1942), Handbook, National Conference of Judicial Councils 114, 116-20 (1942) in which a resumé of the history of evidence is presented considering the developments of the nineteenth century.

2. Dean Wigmore states that "It is impossible to confine witnesses to some fancied realm of 'knowledge' or 'fact' and to forbid them to enter the domain of 'opinions' or inferences. There are no such contrasted groups of certain and uncertain testimony, and there never can be." 7 Wigmore, *Evidence* §§ 1919 at 16 (3d ed. 1940). See also McCormick, *Some Observations upon the Opinion Rule and Expert Testimony*, 23 Texas L. Rev. 109-21 (1945), Ladd, *Expert Testimony*, 5 Vand. L. Rev. 414, 415-17 (1952).

3. 7 Wigmore, *Evidence* §§ 1917-19 (3d ed. 1940).

4. For a summary digest and collection of cases see 7 Dun. Dig. § 3315 (3d ed. 1952).

in Minnesota, to a considerable extent, has shifted to the new concept permitting testimony to be given in terms of inference or opinion when facts cannot otherwise be described adequately or easily. The case of *Lestico v. Kuehmer* involved an action to recover for personal injuries arising from an automobile accident.<sup>5</sup> When remanding the case for new trial on other grounds, the court made suggestions in respect to erroneous rulings in which there had been too great a restriction upon testimony claimed to call for the conclusion of a witness. The trial court excluded a question asking defendant if he had observed where his car had made a sudden turn from his examination of the tire marks after the accident. The question was excluded as calling for a conclusion but on appeal it was held that the question was proper because it plainly asked for a fact within the personal observation of the witness. The court regarded the essence of the question to involve a statement of fact and pointed out that the problem is to distinguish between the mental process which is a mere conclusion and one which represents an expression of observed facts in terms of inference. The court stressed the same point presented in division (1)(a) of Uniform Rule 56 which requires that the statement be based upon the perception of the witness.

If the testimony is based upon personal perception the opinion exclusion should be restricted to those cases where testimony in terms of inference would not be helpful to a clear understanding or better determination of the issues. The trial court necessarily is given a wide discretion in the application of the opinion rule.<sup>6</sup> The earlier Minnesota cases were much stricter as is indicated by the case of *Sowers v. Dukes*, in which the action of the trial court was approved in excluding testimony that a certain fence was inadequate to turn stock because this was not a matter involving science or skill.<sup>7</sup> Verbal description of the fence would be difficult and testimony that the fence was so broken down that it would not turn or hold cattle would seem to be proper testimony in terms of inference. In the case of *Hathaway v. Brown* the trial court was reversed for allowing a witness to state that he thought two men could not have had a certain conversation without his hearing it.<sup>8</sup> The court felt, because the witness had stated the facts and circumstances, that the expression of the inference was an invasion of the province of the jury. The language used was but a different way of saying that

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5. 204 Minn. 125, 283 N. W. 122 (1938).

6. *Greenberg v. Holfeltz*, 69 N. W. 2d 369 (Minn. 1955).

7. 8 Minn. 23 (1862).

8. 22 Minn. 214 (1875).

the men did not make the statements while he was present, which would have been proper. The jury had the duty of determining whether the statement had been made and were as free to decide the issue under either form of expression of the witness. These cases are representative of the time during which they were decided. Lay witnesses are permitted to express an opinion that an individual was drunk although he could have otherwise described his conduct,<sup>9</sup> that a blow struck upon a building by the accused before a quarrel sounded like a blow from a piece of iron<sup>10</sup> and everywhere a lay witness, after testifying to the observations upon which his opinion is based, may express an opinion as to the sanity or mental capacity of a person whom he has observed.<sup>11</sup> In a multitude of cases in which the line between fact and inference has been drawn it is doubted if the triers of fact would have reached a different evaluation of the testimony, whatever form of communication was used as long as the witness was testifying from personal perception. This is the position of the Uniform Rules.

Closely associated with expression of facts in terms of inference is the statement of the facts as the impression of the witness. Illustrative of these expressions are, "I think," "I believe," "my impression is," "I cannot be positive, but I think," "to the best of my recollection," or "it is my understanding." The admissibility of testimony accompanied by such limitations involves the same fundamental issue to be considered when permitting the witness to testify in terms of inference, namely, is the witness speaking from his personal knowledge or is his testimony only a mental speculation. Not infrequently such precautionary statements may strengthen the testimony because they indicate that the witness does not want to overstate the facts. On the other hand, such statements may indicate that his recollection is poor which would weaken the testimony but not exclude it. Only when it appears that the witness has not personally perceived the matter about which he testifies will the testimony be excluded.<sup>12</sup>

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9. *State v. Jones*, 126 Minn. 45, 147 N. W. 822 (1914).

10. *State v. Lucy*, 41 Minn. 60, 42 N. W. 697 (1889).

11. *Hartz v. Hoff*, 237 Minn. 313, 54 N. W. 2d 784 (1952), *Sullivan v. Brown*, 225 Minn. 524, 31 N. W. 2d 439 (1948), *Cunningham v. Fegan*, 219 Minn. 80, 17 N. W. 2d 85 (1944).

12. See *Lovejoy v. Howe*, 55 Minn. 353, 356, 57 N. W. 57, 58 (1893). The requirement of perception of a witness is most frequently considered in connection with hearsay. A witness is not giving hearsay testimony when he has observed personally the matters about which he testifies. He is thus able to be cross-examined to test the accuracy of his testimony and the completeness of his expression about the things he observed. The same testing process is available when a witness gives his testimony in terms of inference if the witness has perceived the matters to which inquiry has been directed. The opportunity

A difference should be pointed out between the Uniform Rules and the Model Code of Evidence of the American Law Institute. The results are much the same and wide discretion is given to the trial judge. The Model Code Rule 401 accepted testimony of a lay witness in terms of inference or opinion generally unless the court excluded it because it was felt that the testimony could be better stated factually. Uniform Rule 56(1) assumes that the witness will give his testimony factually but permits him to testify in terms of opinions or inferences when the court finds that the witness has perceived and when it will be more helpful to clear understanding. The rule is in accord with the judicial trend in the Minnesota cases and will improve the application of the principles now well recognized.

(2) *The Testimony of an Expert*

Uniform Rule 56(2) provides that, "If the witness is testifying as an expert, testimony of the witness in the form of opinions or inferences is limited to such opinions as the judge finds are (a) based on facts or data perceived by or personally known or made known to the witness at the hearing and (b) within the scope of the special knowledge, skill, experience or training possessed by the witness."

The Rule assumes that if a witness testifies as an expert he will be first qualified, otherwise it would not appear that he possessed the learning required to testify. There is no express provision for this but if the witness testifies as an expert he must have the background required under subdivision (b) set out above. Rule 8 under the general provision vests in the court the authority to determine the qualification of a person to be a witness which includes an expert witness.

The Rule requires that the expert witness base his testimony upon facts personally perceived by or known to him or made known to him at the hearing. This provision takes care of the expert who is expressing his opinion based upon his personal observations which would be the situation when a doctor testifies in respect to a patient under his care, or when an engineer does so in respect to plans or construction work about which he has personal knowledge. This phase of the Rule must be considered in connection with Rule 58 by which it is unnecessary for him to specify the data before ex-

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to cross-examine eliminates the danger of improper evaluation of testimony in terms of inference when it is first shown that the witness is testifying as to matters personally perceived. Rule 19 of the Uniform Rules requires that a witness must testify from his personal knowledge of relevant or material matters only.

pressing his opinion. On cross-examination he may be required to specify such data but it is not made a condition for giving expert testimony. This Rule is contrary to the law of many states which requires the expert to relate the facts upon which his opinion is founded before he expresses his opinion. Ordinarily an expert would state observations before expressing his opinion as this would give weight to the opinion when expressed. Moreover the narration of factual data by the expert who has personal knowledge also introduces into the record evidence which is necessary if other experts are to testify who do not have personal knowledge but are called to give the benefit of their learning when asked their opinions through hypothetical questions. The Rule does not disregard the importance of a factual foundation but simply provides more latitude as to the time when it may be given. It eliminates quibbling as to whether there is sufficient foundation when the expert with personal knowledge expresses his opinion. Inasmuch as any omitted data may be brought out upon cross-examination if considered material there is no danger in the application of the Rule.

The part of the Rule which permits the expert to express an opinion upon facts made known to him at the hearing opens the door to the use of hypothetical questions as provided in Rule 58. It permits the expert witness to give his opinion upon facts about which he has no personal knowledge when it is desired to obtain the benefit of his expert judgment. The use of such experts presupposes that evidence of the facts upon which his opinion is based has otherwise been introduced into the record of the trial. The Rule does not prescribe how the facts shall be made known to the witness at the hearing but leaves this to the discretion of the trial judge. In the Minnesota case of *Piche v. Halvorson* error was claimed because a medical expert was permitted to testify upon the question of the plaintiff's disability although he had not examined the plaintiff in the accident.<sup>13</sup> The court held that a sufficient foundation was laid by showing that he was present in court during the trial, and had heard all of the testimony including that of another physician who had attended the plaintiff for his injuries resulting from the accident. The court approved his testimony which was based upon an assumption that the evidence stated and heard was true, whether it was true was, of course, a question for the jury. If some of the facts were doubted, counsel could question their effect by use of hypothetical questions.

The Uniform Rules do not attempt to define what may be the

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13. 199 Minn. 526, 272 N. W. 591 (1937).

subject of expert testimony. They provide that if a witness is testifying as an expert, he may testify within the scope of the professional knowledge, skill, experience or training which he possesses. When expert testimony is admissible is a matter upon which the trial court has wide discretion depending upon the aid which one with special knowledge or experience could give to the jury.<sup>14</sup> If the issue involves a matter of common knowledge about which inexperienced persons are capable of forming a correct judgment, there is no need for expert opinion. There are many matters, however, about which the triers of fact may have a general knowledge, but the testimony of experts would still aid in their understanding of the issues.<sup>15</sup> The tendency today is to broaden the use of experts wherever their testimony will throw greater light upon the issue in dispute. In the recent case of *Swanson v. LaFontaine* an action was brought to recover for injuries sustained in a fall resulting from the plaintiff's efforts to avoid being struck by the hood of the defendant's automobile which was blown off from the parked vehicle by a high wind.<sup>16</sup> The issue was whether the hood of the car had been securely locked, and the plaintiff called an expert witness, a foreman of the automobile repair shop of a dealer in cars of the same make as the one in question, whose testimony was excluded. An offer of proof was made that he would have testified that it would be impossible for the wind to remove the hood without damaging the locking attachment if the hood had been properly latched. The trial court was reversed on the ground that the testimony might have aided the jury in determining the truth of the fact issues because of the value of the knowledge and experience of the expert as an aid to the jury in their fact finding function. In complicated matters involving highly scientific understanding expert testimony is necessary for a decision upon the issues. In other cases it is a supplemental aid to the triers of fact who might otherwise decide the case on the basis of their own understanding.<sup>17</sup> In all cases it is a matter for the triers

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14. *Palmer v. Order of United Commercial Travelers*, 191 Minn. 204, 253 N. W. 543 (1934).

15. For discussion see, *Morris, The Role of Expert Testimony in the Trial of Negligence Issues*, 26 *Texas L. Rev.* 1 (1947).

16. 238 Minn. 460, 57 N. W. 2d 262 (1953). The court there said, *Id.* at 469, 57 N. W. 2d at 268, "Since the testimony would likely have aided the jury in determining the truth of the fact issues involved here, we think that this type of testimony was admissible." This case approved the earlier case of *Lestic v. Kuehner*, 204 Minn. 125, 283 N. W. 122 (1938).

17. The case of *Woyak v. Konieske*, 237 Minn. 213, 54 N. W. 2d 649 (1952), discusses this problem extensively, and distinguishes between the different Minnesota decisions. While some of the distinctions may be questioned, the opinion clearly shows the tendency for greater liberality upon subject matter which the jury might decide alone, but would be aided by the testimony of experts.



to accept or reject the opinion of the experts in performing their duties in rendering a verdict.

A recent federal case, *Een v. Consolidated Freightways*, serves as a warning that a proper specific objection must be urged if it is claimed that an issue does not involve proper subject matter for expert testimony.<sup>18</sup> A deputy sheriff, qualified as an expert from his experience in investigating accidents, was permitted to express his opinion as to the point of impact upon the highway from the position of the cars after the collision although he did not see the accident occur. The objection urged to a question calling for this opinion was that it was "incompetent, irrelevant, immaterial, calling for speculation, guess, and conjecture," obviously "invading the province of the jury," calling for a conclusion.<sup>19</sup> The trial court wrote an extensive opinion ably discussing whether the question raised a proper issue for expert testimony.<sup>20</sup> The appellate court avoided this issue and affirmed the decision on the ground that the proper objection had not been made. The court stated that there had been no question raised as to the qualification of the witness and that the objection urged did not state that the question propounded was an improper subject for expert testimony. While the trial court seemed to understand what counsel had meant by the objection urged, it was not enough to raise the question when presented on appeal. Although the decision does seem unnecessarily technical, it is important in pointing out that the real question is whether or not the subject matter of the inquiry involves the kind of an issue which is the subject for expert testimony.

### (3) *Ruling by the Judge*

Subsection (3) of Rule 56 provides that, "Unless the judge excludes the testimony he shall be deemed to have made the finding requisite to its admission." This is important in connection with both subsections (1) and (2) of the same rule because it eliminates cumbersome preliminary findings and assumes that conditions are fulfilled unless the judge excludes the testimony.

### (4) *Opinion Evidence on Ultimate Facts*

Rule 56(4) provides that, "Testimony in the form of opinions or inferences otherwise admissible under these rules is not objectionable because it embraces the ultimate issue or issues to be decided by the trier of the fact." This deals with a problem that has

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18. 220 F. 2d 82 (8th Cir. 1955).

19. *Id.* at 87.

20. *Een v. Consolidated Freightways*, 120 F. Supp. 289 (D. N.D. 1954).

harrassed the courts for many years. When the expert opinion involved the same issue which the jury was to decide, the objection was commonly urged that the question invaded the province of the jury. Therefore, to get around this objection it was customary to ask the questions of the expert in the form of a mythical inquiry as to what their opinion would be in an analogous situation from which the jury could infer that it applied in the same way to the issue in the case being tried. In a roundabout way the jury became informed of the expert's opinion in application to the particular case. In the leading case of *Grismore v. Consolidated Products Co.*, the question was presented as to whether the feeding of certain poultry food caused the death of the plaintiff's turkeys.<sup>21</sup> Counsel after narrating hypothetically what had been done in feeding turkeys a product known as "E Emulsion" and other relevant facts, asked the expert witness to say in his opinion what caused the turkeys to die. The question was objected to as calling for an ultimate fact and as invading the province of the jury. The witness answered the question, which was permitted by the court, stating that in his opinion it was caused from the feeding of this buttermilk product. Conceivably counsel could have asked less direct questions, but the jury needed to know what he thought caused the turkeys to die. The jury was not compelled to accept his opinion but was entitled to know what it was on the only issue in the case. In an extensive opinion the Iowa Court concluded that the trial court was right in permitting the question and that the jury was entitled to know what the expert thought about the issue to be decided, namely, what caused the death of the turkeys. This ably written opinion over ruled by name six Iowa decisions and innumerable other cases in which the courts had engaged in an intellectual verbal struggle to determine what was and what was not an ultimate fact and indulged in imaginary reasons why such questions could not be asked.

Minnesota at a much earlier date adopted the position of the court in the *Grismore* case which is in direct accord with Uniform Rule 56(4). In *Jones v. Burgess* an action was brought to recover damages for fraudulent representations claimed to have been made by the defendant's agents in the sale of a stallion to the plaintiffs.<sup>22</sup> The defendant contended that the horse belonged to the alleged agent and that there was no sale from them to the plaintiff. Error was urged in allowing the alleged agent to testify that he was "working for" the defendant in selling the horse. The decision was

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21. 232 Iowa 328, 5 N. W. 2d 646 (1942).

22. 124 Minn. 265, 144 N. W. 954 (1914).

affirmed and the opinion expressed the view that courts are rightfully breaking away from the rule that excludes this type of opinion evidence. In the case of *State v. Cox* there was a prosecution for rape.<sup>23</sup> Illicit relations were admitted and the issue involved the question of consent. A doctor, who examined the girl a few hours after the incident, was permitted, over the defendant's objection, to state that in his opinion the intercourse had not been voluntary on the part of the girl. On appeal the case was affirmed, the court stating "An expert witness who gives an opinion embracing an ultimate fact which the jury is to determine does not invade the province of the jury any more than an eyewitness who testifies to a decisive fact. The modern tendency is to make no distinction between evidential and ultimate facts subject to expert opinion."<sup>24</sup> Since in many cases the Minnesota court has permitted opinion evidence bearing directly upon the issue to be determined by the jury, further discussion upon the point is unnecessary.

#### PRELIMINARY EXAMINATION. RULE 57

This Rule provides that "The judge may require that a witness before testifying in terms of opinion or inference be first examined concerning the data upon which the opinion or inference is founded." It includes both lay witnesses and experts. It is an important section because otherwise a witness is permitted to testify in terms of opinion or inference without first stating the factual data upon which it is based. The requirement of statement of facts before expressing an opinion is left to the discretion of the trial judge. The judge may require a factual statement first to be sure that the witness is testifying about matters which he has perceived. Also the factual evidence would disclose whether the inference was properly justified. In other words, it may have been pure mental speculation unrelated to a factual background.

In connection with this rule the dangers of overworking the opinion objection should be considered. Sometimes when an objection to a question because it would permit testimony in terms of opinion or inference is sustained, a new question is put calling for a terse statement of facts which are much more damaging than the opinion would have been. Likewise, an attorney who uses a question calling for testimony in terms of inference should first carefully consider whether a question calling for a purely factual answer would not be more effective in influencing the jury. Rule 57 gives

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23. 172 Minn. 226, 215 N. W 189 (1927).

24. *Id.* at 230, 215 N. W at 191.

the judge a discretion in determining whether factual data will be required and is closely associated with the application of Rule 56(1) as it relates to lay witnesses and Rule 58 as it relates to experts.

#### HYPOTHESES FOR EXPERT OPINION NOT NECESSARY. RULE 58

There are few subjects in the law of evidence that have received more criticism than hypothetical questions.<sup>25</sup> There are some situations in which their use is needed. When super-experts are called to give the benefit of their special learning upon the subject involved although they have had no personal contact with the persons or other matters involved in the litigation, hypothetical questions afford the most common, and usually the only, method by which the testimony may be presented. Facts proved by other testimony may be open to diverse opinions among those learned in the science, and may require the aid of specialists beyond those who have personally perceived the facts. Unless the super-expert had, or is given, the opportunity to make personal observations, the only method of eliciting his opinion is to assume the facts hypothetically and ask his opinion in respect to them. Also, where there is a dispute as to the basic facts, hypothetical questions may be asked presenting both aspects of the disputed facts for separate opinions based upon the assumption that either statement of the facts may be true. The triers of fact would then know the expert's opinion regardless of which assumed factual situation they resolved to be true. Often the expert who had perceived and narrated the facts is examined hypothetically so as to express his opinion upon their different aspects to show their relative significance. The use of hypothetical questions provides a logical and natural procedure through which scientific inquiry may be made. The Uniform Rules do not abolish them, but rather leave to the judge the discretion of determining when they should be re-required. Otherwise counsel are at liberty to use them in their own discretion. The Rule presupposes that most questions will not be in hypothetical form when directed to the expert but recognizes their propriety and in fact their necessity in some situations.

The recent developments pertaining to demonstrative evidence are sure to have a significant effect in eliminating excessive use of

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25. Dean Wigmore states that "Its abuses have become so obstructive and nauseous that no remedy short of extirpation will suffice. It is a logical necessity, but a practical incubus; and logic must here be sacrificed." 2 Wigmore, *Evidence* § 686 at 812 (3d ed. 1940). See also McCormick, *Some Observations upon the Opinion Rule and Expert Testimony*, 23 *Texas L. Rev.* 109, 128-30 (1945); Ladd, *Expert Testimony*, 5 *Vand. L. Rev.* 414, 425-27 (1952). For further discussion of this Rule see companion articles by DeParcq at p. 332, and Geer and Adamson at 360.

hypothetical questions and also in enabling the expert to present his scientific knowledge in a much more understandable form. By the use of models, diagrams, X-rays, photographs and experiments, the expert is able to explain in an understandable way conclusions which when expressed by words alone are very difficult to comprehend. The expert in the same manner may show the different possibilities arising under disputed evidence of basic facts by pointing out on the exhibit factors which would call for different conclusions. Demonstrative evidence like all other evidence may be subject to abuse, but their greater use in a proper way provides one of the best means of creating real understanding of an expert's testimony by the triers of fact.<sup>26</sup>

The objections to hypothetical questions are well illustrated in a California case<sup>27</sup> cited by Dean McCormick in his very ably written article upon opinion testimony.<sup>28</sup> This case involved one hypothetical question which extended over 83 pages of the reporter's transcript followed by an objection covering 14 pages. Lengthy hypothetical questions often prepared in advance of trial, are surely difficult for attorneys to formulate, for experts to comprehend and for the jury to understand.<sup>29</sup>

Uniform Rule 58 provides, "Questions calling for the opinion of an expert witness need not be hypothetical in form unless the judge in his discretion so requires, but the witness may state his opinion and reasons therefor without first specifying data on which it is based as an hypothesis or otherwise, but upon cross examination he

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26. Ladd, *Demonstrative Evidence and Expert Opinion*, 1956 Wash. U. L. Q. 1.

27. *Treadwell v. Nickel*, 194 Cal. 243, 228 Pac. 25 (1924).

28. McCormick, *Some Observations upon the Opinion Rule and Expert Testimony*, 23 Texas L. Rev. 109 (1945).

29. See Ladd, *Expert Testimony*, 5 Vand. L. Rev. 414, 427 (1952), "With lengthy questions often written in advance and read to the super-expert, the witness must have a super understanding as well as superior knowledge if he is to comprehend in one mental operation the entirety of what has been asked so as to give any answer. What the jury thinks is hard to tell. If their previous experience in the trial has not left them in a state of awe and bewilderment, the long hypothetical question will do so. Surely more direct simple questioning is preferable. The breakup of the long question into several shorter questions could remedy this. It is not required that every hypothesis be included within each question. If counsel avoid overstatement and ask questions containing a fair and dispassionate hypothetical presentation of the evidence relied upon as sustaining their theory of the proof, the hypothetical question can better perform its intended function. There is at least some value in hypothetical questions. If not, the last two and a half centuries of trials in which this type of expert testimony is used have been wasted effort accomplishing no more than to demonstrate legalistic skills of the clever and the learned of the legal profession. Some may feel this is the case. Surely there is room for improvement and there ought to be the same urge in this direction that brought about the great reform in the rules of procedure during the last twenty years."

may be required to specify such data." It does not seek to eliminate the hypothetical question but leaves its use to determination by counsel in the case unless the court in its discretion in an appropriate situation would require the matter to be presented hypothetically. Furthermore the Rule does not attempt to designate the length or the manner in which hypothetical questions may be asked. There are a multitude of decisions by the Minnesota court on this subject. Some of them seem to require too much in that all facts must be included within the hypothetical question.<sup>30</sup> If some facts are omitted, the cross examiner can easily show through his own hypothetical questions the effect of additional or omitted facts. A series of shorter hypothetical questions is believed far superior to an attempt to make a single question all inclusive. Questions making hypothetical assumptions which find no support in the evidence are of course objectionable as being outside of the record.

The Uniform Rule assumes that a great amount of expert testimony will be introduced without the use of hypothetical questions. No artful or refined language is required of the expert. He may give a firm opinion if such represents his belief without coupling it with a statement of the various conceivable possibilities which often destroy the effect of his real convictions. The Minnesota court in a leading case, *Donnelly v. St. Paul City Ry.*, at a fairly early date refused to recognize the fine distinction sometimes sought to be drawn between asking an expert whether certain causes might produce certain results, and asking him whether in his opinion they did produce such results.<sup>31</sup> In this case involving a personal injury, the court permitted the witness to be asked the question "What would you say in your opinion, was the cause of her condition?" This involved not only a question upon an ultimate fact but permitted a frank opinion in a firm form which the jury could accept or not, depending upon their own determination. Rule 58 upon hypothetical questions should be well received by the Minnesota Bar as it represents the modern view today and states in a very concise form concepts in accord with the trend of judicial decisions in the state.<sup>32</sup>

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30. A hypothetical question need not contain any particular number of facts. *Independent School Dist. No. 35 v. A. Hedenberg and Co.*, 214 Minn. 82, 7 N. W. 2d 511 (1943). While the Minnesota court has regarded it to be error to ask hypothetical questions which are not all inclusive in the statement of facts, they have frequently held such error insufficient to justify reversal. *Lee v. Minneapolis Street Ry.*, 230 Minn. 315, 41 N. W. 2d 433 (1950); *Roberts v. DeKalb Agricultural Ass'n*, 229 Minn. 188, 38 N. W. 2d 189 (1949).

31. 70 Minn. 278, 73 N. W. 157 (1897). See also *Piche v. Halvorson*, 199 Minn. 526, 272 N. W. 591 (1937).

32. 2 Wigmore, Evidence § 686 (3d ed. 1940).

## APPOINTMENT OF EXPERTS. RULE 59

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

This is a completely new rule and would change the law of Minnesota.<sup>33</sup> In fact it would change the law of most if not all states. It goes to the very heart of the problems and the abuses in expert testimony. It has the support of the learned Dean Wigmore and is in substance the same as provided in the Uniform Expert Testimony Act of the National Conference of Commissioners on Uniform State Laws in 1937. That act was approved by a committee of the American Bar Association on Improvement of the Law of Evidence in 1938. In a more elaborate statement it was included in Chapter V of the American Law Institute's Model Code of Evidence. The Uniform Rule is quite similar to Rule 28 of the new Federal Rules of Criminal Procedure.<sup>34</sup>

Rule 59 does not need much explanation but further comments will be made to emphasize its features. It does not require the appointment of expert witnesses by the court in all cases. As indicated under Rule 58 this rule does not eliminate the use of hypothetical questions or the ordinary examination of expert witnesses with which the Bar is familiar, but rather provides an additional method of presenting expert testimony. The rule provides that appointment of experts by the court shall be made only in actions where the judge regards it to be desirable. In many cases where expert testimony is used the rule in all probability would not be employed.

33. For further discussion of this rule see companion articles by DeParcq at 334, and Geer and Adamson at 360.

34. Federal Rule cited *infra* note 37

However, in the sanity cases and on many other medical matters, as well as in the cases generally involving opinion upon complicated issues where the facts themselves are known only through scientific investigation, this provision should be a real service to the bench and bar. It should cause greater respect by the public for the judicial system and eliminate the distrust created by the battle of partisan experts. The greatest aid would be to the jury who would have the benefit of carefully thought out non-partisan testimony in a form which they could understand since the opinion would be based upon personal perception. It is fair to the litigants who may agree in the selection of the experts since in the event of agreement only those agreed upon shall be appointed. Otherwise the judge may make his own selection with the benefit of nominations by the parties. No expert is compelled to serve without his consent. The judge shall inform the experts of their duties at a conference in which the parties have an opportunity to participate, and the parties shall be advised of the findings. Thus this rule is consistent with the present trend today toward pre-trial examination and discovery before trial.

The value of the rule to the experts is its consistency with scientific determinations of matters regularly made by scientists in considering similar problems not involved in litigation. It would permit clinical examination, for example, in case of persons whose sanity is involved in litigation. It would give the expert the opportunity to make mental tests and to study the person in question over a period of time in order to observe the existence of conditions and conduct so important in formulating an opinion. The appointed expert always would have the opportunity of personal perception and knowledge about the data upon which their opinions would be based. There would be no obligation felt by them to satisfy the desires of the parties because they would be witnesses of the court. The rule gets away from the fear that the court would always appoint the same experts regularly who might not be satisfactory, because the parties can agree upon the experts they want or suggest nominations if they cannot agree. The Uniform Rules do not go into the more elaborate provisions of the Model Code of Evidence in respect to the mechanics providing an opportunity to the appointee for perception and examination as these matters are left to the implied powers of the judge when he instructs the experts upon their duties. Rule 59 is a simple, short statement of a method of obtaining and using expert testimony which should commend itself to anyone who is really concerned with a just decision in court trials.



## COMPENSATION OF EXPERT WITNESSES. RULE 60

This Uniform Rule is broader than the present Minnesota statute but is similar in that it gives the judge the discretion to fix amount of the fee which will be charged as costs rather than fix some arbitrary fee applicable to all cases. Uniform Rule 60 provides that, "Expert witnesses appointed by the judge shall be entitled to reasonable compensation in such sum only as the judge may allow. Except as may be otherwise provided by statute of this state applicable to a specific situation, the compensation shall be paid (a) in a criminal action by the (county) in the first instance under order of the judge and charged as costs in the case, and (b) in a civil action by the opposing parties in equal portions to the clerk of the court at such time as the judge shall direct, and charged as costs in the case. The amount of compensation paid to an expert witness not appointed by the judge shall be a proper subject of inquiry as relevant to his credibility and the weight of his testimony." In criminal trials it makes the county or other designated unit of government responsible for costs of experts. This seems better for state use than Rule 28 of the Federal Rules of Criminal Procedure which provides for payment out of such funds as may be provided by law, because there may not be any provision otherwise provided by law for such payment. If, however, the Uniform Rules are adopted by the supreme court through its rule making power rather than by legislative enactment, it would be better to have legislation providing for payment because of doubt as to the authority of the court to create a financial obligation upon the county. The apportionment of cost of experts when appointed by the court appears to be a necessary part of the rule. It also provides that the fee thus determined shall be charged as cost in the case.

The last sentence of this rule permits inquiry as to the amount of compensation paid to an expert not appointed by the judge as an element to consider in determining the credibility of the expert and the weight to be given to his testimony. This is within the general rule that interest or bias of a witness may be shown to test credibility. Recently the Pennsylvania court in the case of *Reed v. Philadelphia Transportation Co.* had this problem before it as the key issue on appeal and reversed the trial court from refusing to permit adverse counsel to cross-examine in respect to the fees which a medical expert was to be, or had been, paid.<sup>35</sup> This is the leading case upon the subject and the court in conclusion stated, "The amount of an expert's fees, whether stipulated in advance of a trial or determinable

35. 171 Pa. Super 60, 65, 90 A. 2d 371, 373 (1952). The Grutski case, *Grutski v. Kline*, 352 Pa. 401, 43 A. 2d 152 (1945), is criticized by the court.

in the future, has a direct and vital bearing upon his credibility, his interest, bias, or partisanship, and the rule of the *Grutski* and cognate cases should be liberally applied. The ruling of the court constituted reversible error."<sup>36</sup>

The most significant contribution of Rule 60 is believed to be the provision for reasonable competition of experts. It will surely be an improvement in many states in which the amount fixed in the statutes is so small that it cannot be actually regarded as compensation at all. It should help eliminate some of the resistance of medical experts to appear in court trials.

#### CREDIBILITY OF APPOINTED EXPERT WITNESS. RULE 61

This Rule is significant and is the reverse of the position taken in the last sentence of the preceding rule. It provides that, "The fact of the appointment of an expert witness by the judge may be revealed to the trier of the facts as relevant to the credibility of such witness and the weight of his testimony." The fact that the expert witness or witnesses are appointed by the court without direct responsibility to either party is designed to obtain an impartial consideration and opinion upon the facts in issue. This will give weight to the testimony of court appointed experts. Either or both parties may call experts of their own selection when they question the correctness of the conclusions of the appointed experts. There is surely nothing objectionable about having the jury know the whole situation if it is to have the best opportunity possible to resolve the dispute. If one or both of the parties call other experts they will have full opportunity to present their observations and opinions, and any new light upon the issue may be considered and compared with the testimony of the court appointed experts in an effort to arrive at a just solution of the controversy.

#### CONCLUSION

An effort has not been made to comment upon and cite all of the cases on opinion and expert testimony in comparing the Minnesota law and the Uniform Rules. This would serve little purpose and only selected cases representing generally the position of Minnesota law have been used. From the study it appears that Minnesota would not have nearly as long a way to go as many states in adopting the Rules. Development of the law in this state has been on the whole forward-looking with many supreme court decisions establishing the best of modern thought upon evidence. Testimony upon the ultimate fact in issue which has involved so much confusion

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36. *Ibid.*

and disagreement in some states seems not to be a problem in Minnesota. It appears that there has been less flexibility in the method of using hypothetical questions than in some states but even upon this subject there has never been the demand that questions be put hypothetically or upon some imaginary premise as appears to be a requirement in some jurisdictions. The trend seems to be the same as elsewhere in the enlargement of issues upon which expert testimony may be used. This is certain to gain momentum as reliable expert knowledge and experience makes available more types of expert testimony to assist the triers of fact with matters upon which there is a common knowledge by people generally. Also the use of photographs, models, graphs, charts and other demonstrative exhibits are commonly employed in Minnesota as a means by which experts may better communicate to the triers of fact the application and validity of their technical knowledge. The provisions for appointment of experts by the court would be new to Minnesota, but the carefully drawn Rules ought to appeal to the Bench and the Bar of the state. Through some of the many Lawyer's Institutes held here, the value of this provision could be considered to inform the profession of its benefits. It should be emphasized that court appointed experts would be used only in those cases where the kind of issues and the type of expert testimony contemplated are so demanding as to render this procedure desirable. The provision differs from the new Federal Rules of Criminal Procedure in that if the parties agree upon the selection of the experts the court must use those whom they have chosen.<sup>37</sup> The simplicity and conciseness of the Rules are very appealing and should result in early recognition of their value. Any proposal that is new meets the normal resistance to any kind of a change. If the study of the Rules does no more than cause a review by the Bar of the law of evidence as it is and what it might be, it will have served a most useful purpose. It is hoped that their study will accomplish even more and that careful examination of the Uniform Rules will result in their adoption.

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<sup>37</sup> Rule 28 of the Federal Rules of Criminal Procedure provides, "The court may order the defendant or the government or both to show cause why expert witnesses should not be appointed, and may request the parties to submit nominations. The court may appoint any expert witnesses agreed upon by the parties, and may appoint witnesses of its own selection. An expert witness shall not be appointed by the court unless he consents to act. A witness so appointed shall be informed of his duties by the court 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, and may thereafter be called to testify by the court or by any party. He shall be subject to cross-examination by each party. The court may determine the reasonable compensation of such a witness and direct its payment out of such funds as may be provided by law. The parties also may call expert witnesses of their own selection."