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## THE RIGHT TO SUBPOENA EXPERT TESTIMONY AND THE FEES REQUIRED TO BE PAID THEREFOR

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The problems involved in attempting to subpoena expert testimony lead us first to a consideration of what types of questions may be put to an expert. Then, there is the additional factor of privilege. The answers to the questions may be some form of privileged communication protected against revelation in court. The California cases have to some extent pursued both lines of inquiry.

In approaching the question of subpoenaing an expert witness, several variable factors must be borne in mind as to what type of testimony is desired. If it is ordinary observation testimony, it is axiomatic that it can be required from an expert just as it can be required from an ordinary witness in reasonably full possession of his faculties. If it is what might be called expert observation testimony, we have a slightly more complex situation. For example, if a physician has examined a patient and had an X-ray taken, the question of whether the patient has an aneurism is a question of observed fact even though it requires expert training to observe the fact, or possibly even to know what it is. Expert observations can also be reached by subpoena or on cross examination. It is in regard to expert opinion testimony that the greatest dearth of authority and the greatest amount of actual and potential uncertainty exists.

Expert opinion is the conclusion of someone trained in a particular field from facts observed by or presented to him. The expert training is needed both to understand the facts and to form the opinion. The prognosis of a physician, the opinion of a handwriting expert as to the identical authorship of two specimens, the property valuation of a real estate appraiser are, in their respective fields, examples of expert opinion.

A second line of inquiry that cuts across these questions is the question of the willingness or unwillingness of the expert to testify and which type of witness fee, ordinary or expert, he must be paid. He might be willing to give expert opinion evidence for the fee of an ordinary witness. He might be willing to do so only for an expert witness fee or he might be absolutely unwilling whatever fee was tendered him.

A third group of questions revolves about whether the expert is asked to give an impromptu opinion on the witness stand, possibly from data, real or hypothetical, just then submitted to him or is asked whether he has previously reached an opinion, which opinion the party subpoenaing him is trying to put in evidence. The opinion may or may not have been reduced to writing in the form of a report.

It is uniformly held in California that in addition to the statutory duty in Code of Civil Procedure section 2065<sup>1</sup> to answer legal and pertinent questions put to him, an expert may be asked specific facts that he has observed notwithstanding they involve expert testimony and that he discovered them by reason of this special training. Moreover, he need only be paid ordinary witness fees therefor.<sup>2</sup>

However, it is also held in California that an expert witness cannot be compelled to undertake an expert investigation for the purpose of qualifying himself to testify. It has been said that a party cannot impose this duty upon an unwilling witness. In *People v. Barnes*<sup>3</sup> a handwriting expert was asked for an impromptu opinion on the stand as to the possibly identical authorship of several specimens of handwriting, some of which he had never seen before. It was held he did not have to express an opinion. In *People v. Conte*<sup>4</sup> a physician was asked whether the stains on a piece of rock were blood. The doctor refused to testify without expert witness fees. It was held that since this could not be determined without a microscopic examination he did not have to undertake one.

The *Conte* case mentions the possible expense to the expert of this examination. The *Barnes* case simply says this duty cannot be imposed on an unwilling witness. A situation where expert witness fees were tendered and then the expert was asked and refused to undertake the examination has not arisen yet. In the *Conte* case the subpoenaing party moved that expert witness fees be awarded out of the county treasury. This was denied by the court.

On the question of witness fees there seems to be no general California statute providing for expert witness fees except Code of Civil Procedure, section 1871.<sup>5</sup> There are special situations in which statutory compensation

<sup>1</sup>§ 2065 (Deering 1953): "A witness must answer questions legal and pertinent to the matter in issue, though his answer may establish a claim against himself; but he need not give an answer which will have a tendency to subject him to punishment for a felony; nor need he give an answer which will have a direct tendency to degrade his character, unless it be to the very fact in issue, or to a fact from which the fact in issue would be presumed. But a witness must answer as to the fact of his previous conviction for felony unless he has previously received a full and unconditional pardon, based upon a certificate of rehabilitation."

<sup>2</sup>*City and County of San Francisco v. Superior Court of the City and County of San Francisco*, 37 Cal.2d 227, 231 P.2d 26, 25 A.L.R.2d 1418 (1951); *McClenahan v. Keyes*, 188 Cal. 574, 206 Pac. 454 (1922); *People v. Joseph Barnes*, 111 Cal.App. 605, 295 Pac. 1045 (1931); *People v. Conte*, 17 Cal.App. 771, 122 Pac. 450 (1912).

<sup>3</sup>111 Cal.App. 605, 295 Pac. 1045 (1931).

<sup>4</sup>17 Cal.App. 771, 122 Pac. 450 (1912).

<sup>5</sup>§ 1871 (Deering 1953): "Whenever it shall be made to appear to any court or judge thereof, either before or during the trial of any action or proceeding, civil, criminal, or juvenile court, pending before such court, that expert evidence is, or will be required by the court or any party to such action or proceeding, such court or judge may, on motion of any party, or on motion of such court or judge, appoint one or more experts to investigate and testify at the trial of such action or proceeding relative to the matter or matters as to which such expert evidence is, or will be required, and such court or judge may fix the compensation of such expert or experts for such services, if any, as such expert or experts may have rendered, in addition to his or their services as a witness or witnesses, at such amount or amounts as to the court or judge may seem reasonable.

of experts is provided. *Metropolitan Water District v. Adams*<sup>6</sup> was a condemnation by the water district. There was a partial abandonment by the plaintiff. The defense submitted a high cost bill for geodetic experts both for pretrial preparation and for testimony at the trial. The trial court disallowed both. The Supreme Court pointed out that Code of Civil Procedure section 1255a<sup>7</sup> governs the expenses of pretrial preparation in a condemnation abandonment. It is up to the trial court to determine "necessary expenses" and "reasonable attorney's fees" as provided by Code of Civil Procedure, section 1255a. The judgment was reversed and remanded to the trial court for a determination on these items. But as to the testimony at the trial, Code of Civil Procedure section 1871 governs. This code section authorizes the court to fix the compensation of court-appointed experts within reasonable limits. Expert witnesses produced by the parties to the action receive only the ordinary witness fee as expressly provided in Code of Civil Procedure section 1871.

Proceeding one step further, in the situation where the expert opinion has already been rendered and the subpoenaing party wishes to put the opinion in evidence, we have no California case on this point save those dealing with the privilege question. The *Barnes* case states:

" . . . where a doctor has made a medical examination of a party and has formed an opinion as to the physical injuries suffered he may be required to testify as to the opinion which he has formed, based upon the facts disclosed by such examination. . . ."<sup>8</sup>

It is to be noted that this proposition is not necessary to the decision in the *Barnes* case, the actual holding in the case being merely that a party cannot impose upon an unwilling expert witness the duty to make a scientific investigation for the purpose of forming and giving an expert opinion. For the broader proposition quoted above, the court relied on a Washington case, *State ex rel. Berge v. Superior Court of King County*,<sup>9</sup> wherein the court actually did approve the subpoenaing of an expert opinion. It involved a personal injury suit wherein the defendant hired a physician who, with the

<sup>6</sup>23 Cal.2d 770, 147 P.2d 6 (1944).

<sup>7</sup>§ 1255a (Deering 1953): "Plaintiff may abandon the proceedings at any time after filing the complaint and before the expiration of thirty days after final judgment, by serving on defendants and filing in court a written notice of such abandonment; and failure to comply with such section 1251 of this code shall constitute an implied abandonment of the proceeding. Upon such abandonment express or implied, on motion of any party, a judgment shall be entered dismissing the proceeding and awarding the defendants their costs and disbursements, which shall include all necessary expenses incurred in preparing for trial and reasonable attorney fees. These costs and disbursements, including expenses and attorney fees, may be claimed in and by a cost bill, to be prepared, served, filed and taxed as in civil actions; provided, however, that upon judgment of dismissal on motion of plaintiff, defendants, and each of them, may file a cost bill within thirty (30) days after notice of entry of such judgment; that said costs and disbursements shall not include expenses incurred in preparing for trial where the said action is dismissed forty days prior to the time set for the trial of the said action."

<sup>8</sup>111 Cal.App. 605, 610, 295 Pac. 1045, 1047 (1931).

<sup>9</sup>154 Wash. 144, 281 Pac. 335 (1929).

plaintiff's consent, examined her. Later, the plaintiff took the physician's deposition. At the trial, the latter testified, without objection, to the facts he had observed during his examination of the plaintiff. He was then asked on cross examination his opinion of the nature and extent of the plaintiff's injuries. He refused to answer. It was held he could be made to answer and was not entitled to more than ordinary compensation unless special services, other than attendance at the trial, were required. It is to be noted; first, that this was a five to four decision in the Washington Supreme Court; second, that the court said that the plaintiff who voluntarily submitted to examination by a physician employed by defendant could thereafter interrogate him as to his medical opinion without compensation other than ordinary witness fee. Then the court added an interesting qualification:

"This is not a case where the adverse party seeks to call a witness employed by the other party and interrogate him as to matters which require special preparation without the party calling him having in any matter cooperated."<sup>10</sup>

What the holding would be if the calling party had not cooperated, as in this case, by submitting to a medical examination by the expert witness, is hard to predict. Undoubtedly, as the court's dictum states and the California cases hold, the calling party cannot make the witness undertake an expert examination in order to answer the calling party's questions. But suppose the examination has already been made for the party who originally hired the witness and the calling party wishes to elicit the expert opinion which was formed as a result of this examination?

A fairly recent New York case, in 1947, takes a position squarely contra to the dictum in the *Barnes* case and the actual holding in the Washington case. The case, *People v. Thorpe*, ex rel. *Kraushur Bros. & Co.*,<sup>11</sup> involved a tax certiorari proceeding. A real estate appraiser had prepared an appraisal of the property in question for a previous owner. The expert was subpoenaed by the relator, who sought to elicit his opinion as to the value of the property. The witness declined to accept a fee and testify. It does not appear from the report of the case whether the fee was an ordinary one or an expert fee. In any case the witness' refusal to testify does not appear to have been on financial grounds as in some of the California cases. He stated that he did not wish to take part in the case.

The New York Court of Appeals held that while he could be required to testify like an ordinary witness as to what he had seen on the premises, he could not be compelled against his will to answer any questions connected with his experience and judgment as a real estate expert nor to give his opinion as an expert. The court found two lines of cases in the United States.

<sup>10</sup>*Id.* at 147-148, 281 Pac. 335 at 336.

<sup>11</sup>296 N.Y. 223, 72 N.E.2d 165 (1947).

1. Those states holding that a court could not compel expert testimony at all;

2. Those states where a court could compel expert opinions but even those states, the New York court observed, limit the opinions to those experts are able to give without a study of the the facts or other preparation.

California is listed as being in the second group, although no careful study is made of the California holdings. The *Conte* case in California and the *Berge* case in Washington are cited under group 2. The New York court goes on to say that the latter rule is quite unsatisfactory, that only the most eminent are competent to answer extempore and defend impromptu opinions on cross examination, but that no expert may without reflection on his professional ability confess ignorance; and that the better rule is not to compel a witness to give his expert opinion against his will.

The court of appeals' discussion of the unsatisfactory nature of impromptu opinions would have considerable bearing on the asking of hypothetical questions on cross examination. A hypothetical question might state a situation so intricate that only the most eminent could give an extempore opinion based on such a situation, or it might omit certain factors that any expert in that field has to know to render an opinion at all.

But the New York court apparently overlooked the fact that what was asked for in this case was not an impromptu opinion that could be rendered without study but a *repetition* of an opinion previously reached, presumably after full study. If conditions have changed so as to outdate the former opinion, the expert has only to say so on the witness stand.

After examining these cases from three states, it could be predicted that, in the absence of other considerations, the California courts would probably allow expert opinion testimony to be reached on subpoena or cross-examination if the opinion had been previously reached, as in an appraisal report already made. Probably only ordinary witness fees need be paid. The California cases point this way, and while the Washington case cited by our District Court of Appeals in the *Barnes* case does qualify its language by dictum, the qualification does seem to relate to a situation where the questions asked the expert witness require special preparation not already made. The fact of the expert witness called having previously cooperated with the calling party would probably not be regarded by the California courts as controlling in view of the California cases. The New York court's reasoning in its own case does not seem to apply to the very situation presented in the case.

The most important of the other considerations mentioned in the last paragraph is the question of privilege, particularly the attorney-client privilege. The attempt to place the expert's opinion in evidence may collide full tilt with some policy of the law against later revelation of a communication without the consent of the party for whose benefit the privilege exists. In *Webb*

*v. Francis J. Lewald Coal Co.*,<sup>12</sup> plaintiff was suing the City and County of San Francisco and the Lewald Coal Co. for damages due to shock when the City's street car and the company's coal truck collided in such a manner as to cause the truck to crash into the front of plaintiff's millinery store. Plaintiff, in order to aid her counsel in the preparation of her case, submitted to a physical examination by Dr. Joseph Catton, a neurologist. He reduced his conclusions to writing and delivered them to plaintiff's counsel, retaining a copy. Dr. Catton was not called at the trial but another physician testified. On cross-examination it was elicited from plaintiff that Dr. Catton examined her. Defendants thereupon subpoenaed him and asked him to produce his written report, which he refused to do. It appeared that Dr. Catton had never prescribed for or treated the plaintiff.

The trial court excused the witness on his own objection that he was entitled to satisfactory compensation. It appeared also that the witness alleged ethical objections. The trial court stated that it was up to the defendants to overcome his ethical scruples. But the witness was never returned to the stand. Defendants asserted serious prejudicial error.

On appeal, the Supreme Court, after discussing the physician-patient privilege,<sup>13</sup> and the patient-litigant exception thereto,<sup>14</sup> concluded that the testimony sought was covered by the privilege and then added that even if the testimony sought was not covered by the physician-patient privilege it was covered by the attorney-client privilege,<sup>15</sup> quoting approvingly "communica-

<sup>12</sup>214 Cal. 182, 4 P.2d 532, 77 A.L.R. 675 (1931).

<sup>13</sup>Calif. Code of Civ. Proc. § 1881(4) (Deering 1953): "A licensed physician or surgeon can not, without the consent of his patient, be examined in a civil action, as to any information acquired in attending the patient, which was necessary to enable him to prescribe or act for the patient; provided, however, that either before or after probate, upon the contest of any will executed, or claimed to have been executed, by such patient, or after the death of such patient, in any action involving the validity of any instrument executed, or claimed to have been executed by such patient, or after the death of such patient, in any action involving the validity of any instrument executed, or claimed to have been executed, by him, conveying or transferring any real or personal property, such physician or surgeon may testify to the mental condition of said patient and in so testifying may disclose information acquired by him concerning said deceased which was necessary to enable him to prescribe or act for such deceased; provided further, that after the death of the patient, the executor of his will, or the administrator of this estate, or the surviving spouse of the deceased, or if there be no surviving spouse, the children of the deceased personally, or, if minors, by their guardian, may give such consent, in any action or proceeding brought to recover damages on account of the death of the patient; provided further, that where any person brings an action to recover damages for personal injuries, such action shall be deemed to constitute a consent by the person bringing such action that any physician who has prescribed for or treated said person and whose testimony is material in said action shall testify; and provided further, that the bringing of an action, to recover for the death of a patient, by the executor of his will, or by the administrator of his estate, or by the surviving spouse of the deceased, or if there be no surviving spouse, by the children personally, or, if minors, by their guardian, shall constitute a consent by such executor, administrator, surviving spouse, or children or guardian, to the testimony of any physician who attended said deceased."

<sup>14</sup>*Ibid.*

<sup>15</sup>Calif. Code of Civ. Proc. § 1881(2) (Deering 1953): "An attorney can not, without the consent of his client, be examined as to any communication made by the client to him, or his advice given thereon in the course of professional employment; nor can an attorney's secretary, stenographer, or clerk be examined, without the consent of his employer, concerning any fact the knowledge of which has been acquired in such capacity."

tions between an attorney and the agent of his client are also entitled to the same protection from disclosure as those passing directly between the attorney and his client." The Supreme Court expressly reserved ruling on the question of compelling an expert to testify without consent or compensation.

Twenty years later, in 1951, Dr. Catton again appeared in the reports in *City and County of San Francisco v. Superior Court of City and County of San Francisco*.<sup>16</sup> A personal injury plaintiff sued the City and County and the Western Pacific Railroad Company. At the request of plaintiff's attorneys, Dr. Catton gave the plaintiff a neurological and psychiatric examination. It appeared from Dr. Catton's deposition that there was no physician-patient relationship between him and the plaintiff, that he did not advise or treat the plaintiff, and that the sole purpose of the examination was to aid plaintiff's attorneys in the preparation of the case and that he was the agent of the attorneys. Dr. Catton refused to answer questions as to the plaintiff's condition on the grounds, among others, of the physician-patient and the attorney-client privilege. The City and County sought mandamus in the Supreme Court to compel the Superior Court to order Dr. Catton to answer the questions.

Mandamus was denied. The Supreme Court disapproved certain grounds of decision in the earlier *Webb*<sup>17</sup> case relative to the scope of the physician-patient privilege and the patient-litigant exception.<sup>18</sup> However, it went on to say that though the sought-for testimony was not covered by the physician-patient privilege, it was covered by the attorney-client privilege,<sup>19</sup> and that Dr. Catton was an intermediate agent for communication between the plaintiff and his attorneys. The court discussed the public policy behind the statutes, the requirement that the communication be intended to be confidential, and the types of agents that might be involved, such as interpreters, messengers, etc. Moreover, the Supreme Court held that it did not matter whether it was the attorney's or the client's agent or both. The attorney's agent is the client's sub-agent. Any form of agency employed or set in motion by the client is within the privilege.

This holding naturally gives rise to certain interesting questions. An attorney often engages or deals with certain other types of agents, such as investigators, appraisers, etc. Would their opinions be similarly privileged? For example, an appraiser's report. The appraiser may not be precisely an intermediate agent for communication between the client and his attorney. But he is certainly an agent whose services are necessary to make any communication between client and attorney intelligible when the communication relates to the value of the client's property. In the *City and County* case, the court states that if the plaintiff had described his physical condition directly

<sup>16</sup>37 Cal.2d 227, 231 P.2d 26, 25 A.L.R.2d 1418 (1951).

<sup>17</sup>See note 12 *supra*.

<sup>18</sup>See note 13 *supra*.

<sup>19</sup>See note 15 *supra*.

to his attorney that, certainly, is privileged even though a client is not listed in Code of Civil Procedure section 1881(2),<sup>20</sup> which lists only a secretary, stenographer, or clerk. Might it not be similarly said that since, if a client tells his attorney the value of the client's property, that is privileged, when he does so through the medium of an appraiser whom he has hired to value it, the latter communication should be equally privileged? To describe the condition of his body to the attorney the client needs the services of a physician. By a parity of reasoning, to tell the attorney the value of his property the client needs the services of an appraiser. Should not the appraiser's report and the physician's report both be privileged?

Certainly the same reasons of policy which the Supreme Court considered in this case would equally govern, namely, that the absence of the privilege would convert the attorney habitually and inevitably into a mere informer for the benefit of the opponent.

To end any possible uncertainty in regard to the various types of agent and the various types of report that an attorney might require in the service of his client, Assembly Bill 572 was introduced as part of the 1953 State Bar Program.<sup>21</sup> The introduction in the Assembly was by Mr. Fleury. The bill reads in part as follows:

*"An act to amend Section 1881 of the Code of Civil Procedure, relating to confidential communications.*

*"The people of the State of California do enact as follows:*

**"SECTION 1.** Section 1881 of the Code of Civil Procedure is amended to read:

"1881. There are particular relations in which it is the policy of the law to encourage confidence and to preserve it inviolate; therefore, a person can not be examined as a witness in the following cases:

\* \* \*

"2. An attorney can not, without the consent of his client, be examined as to any communication made by the client to him, or his advice given thereon in the course of professional employment; nor can an attorney's secretary, stenographer, [or] clerk or any other person employed or engaged by such attorney in connection with the client's business be examined, without the consent of [his employer] *the client*, concerning any fact the knowledge of which has been acquired in such [capacity] *employment or engagement*, and if any person, other than the opposing party or his counsel or representative is present, at the request of either the attorney or his client, at a conference between the attorney and his client, neither such person nor the attorney or client can be examined without the consent of the client as to any statement or communication made in such conference by any of the parties thereto or as to any advice given by the attorney to the client; nor can an attorney's working papers, including, but without limitation, witness statements, investi-

<sup>20</sup>*Ibid.*

<sup>21</sup>XXVII State Bar Journal (May-June, 1952) 190 *et seq.*

*gator's reports, appraiser's reports, medical, scientific, economic or other reports, made for the attorney in preparation of or in connection with a trial, be examined without the consent of the client.*

\* \* \* 1922

The bill failed of passage<sup>23</sup> but, in redrafted form, will undoubtedly appear later before the Legislature.<sup>24</sup>

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<sup>22</sup>Italics and lined-out words appear in the proposed bill. Matter in brackets denotes strike out.

<sup>23</sup>The writer obtained the following information from the Office of the Legislative Counsel:

"The Final Calendar of Legislative Business for the Regular Session 1953 shows only the following entries concerning this bill:

Jan. 12—Read first time. To print.

Jan. 15—From printer. To committee.

June 10—From committee without further action."

June 10 was the day of final adjournment. The Committee referred to is the Assembly Judiciary Committee, Assemblyman Caldecott, Chairman.

<sup>24</sup>See comment on this in XXVIII State Bar Journal (July-August, 1953) 265.