Excluding Hearsay From Expert Witnesses With MRE 703

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MRE 703. BASES OF OPINION TESTIMONY BY EXPERTS

The facts or data in the particular case upon which an expert bases an opinion or inference shall be in evidence. This rule does not restrict the discretion of the court to receive expert opinion testimony subject to the condition that the factual bases of the opinion be admitted in evidence thereafter.

I. How Did We Get Here? - The History of MRE 703.

A. The Common Law Rule.

Prerequisites for expert testimony:

***O'Dowd v Linehan*, 385 Mich 491, 509-510 (1971):**

"1. There must be an expert.

* * *

2. There must be facts in evidence which require or are subject to examination and analysis by a competent expert.

* * *

3. Finally, there must be knowledge in a particular area that belongs more to an expert than to the common man."

B. Reasons for the Rule.

1. Expert opinion is irrelevant if the facts on which it is based do not exist.

2. The fact-finder must be able to resolve the underlying disputed facts in order to decide whether the expert opinion is valid.

C. The Inconvenience of the Original Rule.

D. The Federal Innovation.

1. Original FRE 703. 1975

Rule 703. 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 the expert at or before the hearing. If a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence.

2. The rationale of original FRE 703.

"[T]he rule is designed to broaden the basis for expert opinions beyond that current in many jurisdictions 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 and of considerable variety, including statements by patients and relatives, reports and opinions from nurses, technicians and other doctors, hospital records, and X-rays. Most of them are admissible in evidence, but only with the expenditure of substantial time in producing and examining various authenticating witnesses. The physician makes life-and-death decisions in reliance upon them. His validation, expertly performed and subject to cross-examination, ought to suffice for judicial purposes." Federal Advisory Committee Note to FRE 703.

E. The Abuses of the Rule.

1. Federal Cases

***United States v Ramos*, 725 F2d 1322 (CA 11, 1984)**

In a charge of making a false statement in an application for a passport, a "Miami fraud examiner" testifies about conversations with New York authorities about the authenticity of the records.

***United States v Affleck*, 776 F2d 1451 (CA 10, 1985)**

In a charge of securities fraud, the accountant who gives opinion that the defendant made misrepresentations testifies to his conversations with former accountants and employees of the defendant.

***United States v Rollins*, 862 F2d 1282 (CA 7, 1988)**

In a narcotics prosecution, FBI agent testifies to an informant's statement that "T-shirts" means cocaine, in support of his own opinion that "T-shirts" means cocaine.

2. The Dead Giveaway:

Federal Trial Evidence (James Publishing Co., 1992, p. 129):

"Remember, a witness testifying as an expert under this rule may rely upon matters in the formulation and presentation of his opinions which are not admissible themselves, but which are also the type of information upon which experts normally rely in their field of expertise. As a result, when you are dealing with evidence that is not otherwise admissible, consider whether by giving it to your expert you will be able to have it presented to the jury through his opinions."

3. The Michigan Experience.

a. The Original Michigan adaptation of Rule 703:

MRE 703. Bases of Opinion Testimony by Experts

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b. Reasons for the Michigan version.

c. The subsequent practice in Michigan.

1. The hearsay rule was nonexistent.
2. There was a proliferation of experts and their expense.
3. The fundamental character of the trial was altered.

F. The Federal Remedy -

1. As amended, December 1, 2000

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(As Amended , December 1, 2011)

Rule 703. Bases of an Expert

An expert may base an opinion on facts or data in the case that the expert has been made aware of or personally observed. If experts in the particular field would reasonably rely on those kinds of facts or data in forming an opinion on the subject, they need not be admissible for the opinion to be admitted. But if the facts or data would otherwise be inadmissible, the proponent of the opinion may disclose them to the jury only if their probative value in helping the jury evaluate the opinion substantially outweighs their prejudicial effect.

2. The limiting instruction.

"When information is reasonably relied upon by an expert and yet is admissible only for the purpose of assisting the jury in evaluating an expert's opinion, a trial court applying this Rule must consider the information's probative value in assisting the jury to weigh the expert's opinion on the one hand, and the risk of prejudice resulting from the jury's potential misuse of the information for substantive purposes on the other. The information may be disclosed to the jury, upon objection, only if the trial court finds that the probative value of the information in assisting the jury to evaluate the expert's opinion substantially outweighs its prejudicial effect. If the otherwise inadmissible information is admitted under this balancing test, the trial judge must give a limiting instruction upon request, informing the jury that the underlying information must not be used for substantive purposes. *See* Rule 105. In determining the appropriate course, the trial court should consider the probable effectiveness or lack of effectiveness of a limiting instruction under the particular circumstances." Federal Advisory Committee Report, p. 91.

3. The last resort - "Removing the Sting"

"[I]n some circumstances the proponent might wish to disclose information that is relied upon by the expert in order to 'remove the sting' from the opponent's anticipated attack, and thereby prevent the jury from drawing an unfair negative inference. The trial court should take this consideration into account in applying the balancing test provided by this amendment." Federal Advisory Committee Report, p. 92.

II. The Michigan Amendment

A. The amended rule - Effective September 1, 2003

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B. Both sentences of the amended rule are arguably redundant.

1. The first sentence of the rule merely restates the common law.

2. The second sentence of the rule mirrors MRE 104(B):

Rule 104 Preliminary Questions

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(B) *Relevancy conditioned on fact*. When the relevancy of evidence depends upon the fulfillment of a condition of fact, the court shall admit it upon, or subject to, the introduction of evidence sufficient to support a finding of the fulfillment of the condition.

C. What is NOT required by MRE 703 - Establishing the expert's credentials or expertise by nonhearsay, the qualification of an expert being governed by MRE 702.

"The facts or data *in the particular case* on which an expert basis an opinion or inference shall be in evidence." MRE 703.

Excerpt from Michigan Advisory Committee Report, August, 2000, p. 12.

"[I]n the same vein, we emphasize that the facts or data that must be in evidence to support an expert opinion are the facts or data 'in the particular case,' as the rule states. As is perhaps obvious, the rule is not intended to require independent proof of the literature, studies, experiments, etc. that qualify a witness as an expert in the first instance."

D. The amended rule should revive the prohibition of MRE 707 against using learned treatises as substantive evidence:

MRE 707 Use of Learned Treatises for Impeachment

To the extent called to the attention of an expert witness upon cross-examination, statements contained in published treatises, periodicals, or pamphlets on a subject of history, medicine, or other science or art, established as a reliable authority by the testimony or admission of the witness or by

other expert testimony or by judicial notice, are admissible for impeachment purposes only. If admitted, the statements may be read into evidence but may not be received as exhibits

III. Subsequent Applications of MRE 703

People v. Unger, 278 Mich App 210 (2008). Rule not violated.

In Re Micheau, (CA #305467, March 15, 2012). Expert opinion properly admitted.

Collier v. Liberty Mutual Ins Co, (CA #310633, March 25, 2014). Expert testimony properly excluded when based upon inadmissible medical journals.

People v. Fackelman, 489 Mich 515 (2011):

Reference to conclusions of non-testifying psychiatrist by prosecutor was a denial of defendant's right to confrontation under the 6th Amendment.

However !!! – The opinion misconstrues the language of MRE 703:

"B. EVIDENTIARY ERRORS

There are other reasons why the use of Dr. Shahid's report at defendant's trial was improper. First, MRE 703 provides that "[t]he facts or data in the particular case upon which an expert bases an opinion or inference shall be in evidence." (Emphasis added.) This rule permits "an expert's opinion only if that opinion is based exclusively on evidence that has been introduced into evidence in some way other than through the expert's hearsay testimony." 468 Mich xcv, xcvi (staff comment to the 2003 amendment of MRE 703).

It is undisputed that both Dr. Mistry and Dr. Balay reviewed Dr. Shahid's report in making their determinations regarding defendant's mental state. Indeed, Dr. Balay specifically testified that Dr. Shahid's report constituted a "big part" of her opinion. It is understandable why the testifying doctors would rely heavily on Dr. Shahid's report, given that he was the only doctor to evaluate defendant shortly after the offense. Thus, the facts and data documented in his report provided distinctive insight into defendant's state of mind at the time of the offense. Because the facts and data in Dr. Shahid's report were essential to the testifying experts' opinions, they were required to have been admitted into evidence under MRE 703.

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The evidentiary errors that occurred at defendant's trial compounded the prejudice caused by the violation of his right of confrontation. In contravention of the mandate in MRE 703 that the report be "in evidence," and in spite of the fact that a juror, whose curiosity was understandably piqued by the frequent references to Dr. Shahid's report, expressly requested to see the "reports that the attorneys were speaking of and the doctors were speaking [of] too," the jury was never allowed to examine the report for itself." (*Fackelman*, p. 534-535)

IV. Comparing Right of Confrontation With MRE 703.

Williams v. Illinois, __US__, 132 S.Ct. 2221, 183 L.Ed.2d 89 (2012)

"We now conclude that this form of expert testimony does not violate the Confrontation Clause because that provision has no application to out-of-court statements that are not offered to prove the truth of the matter asserted. When an expert testifies for the prosecution in a criminal case, the defendant has the opportunity to cross-examine the expert about any statements that are offered for their truth. Out-of-court statements that are related by the expert solely for the purpose of explaining the assumptions on which that opinion rests are not offered for their truth and thus fall outside the scope of the Confrontation Clause. Applying this rule to the present case, we conclude that the expert's testimony did not violate the Sixth Amendment.

As a second, independent basis for our decision, we also conclude that even if the report produced by Cellmark had been admitted into evidence, there would have been no Confrontation Clause violation. The Cellmark report is very different from the sort of extrajudicial statements, such as affidavits, depositions, prior testimony, and confessions, that the Confrontation Clause was originally understood to reach. The report was produced before any suspect was identified. The report was sought not for the purpose of obtaining evidence to be used against petitioner, who was not even under suspicion at the time, but for the purpose of finding a rapist who was on the loose. And the profile that Cellmark provided was not inherently inculpatory. On the contrary, a DNA profile is evidence that tends to exculpate all but one of the more than 7 billion people in the world today. The use of DNA evidence to exonerate persons who have been wrongfully accused or convicted is well known. If DNA profiles could not be introduced without calling the technicians who participated in the preparation of the profile, economic pressures would encourage prosecutors to forgo DNA testing and rely instead on older forms of evidence, such as eyewitness identification, that are less reliable. See *Perry v. New Hampshire*, 565 U.S. ___, 132 S.Ct. 716, 181 L.Ed.2d 694 (2012). The Confrontation Clause does not mandate such an undesirable development. This conclusion will not prejudice any defendant who really wishes to probe the reliability of the DNA testing done in a particular case because those who participated in the testing may always be subpoenaed by the defense and questioned at trial." (p. 2229)

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