Majority Report of Michigan Supreme Court Advisory Committee on the Rules of Evidence, re Proposed MRE 703, August, 2000, (Pages re-numbered from original report)

MRE 703. Bases of Opinion Testimony by Experts

The Committee recommends that MRE 703 be amended as follows:

> **Rule 703. Bases of Opinion Testimony by Experts**.
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> The facts or data in the particular case upon which the expert bases an opinion or inference ~~may be those perceived by or made known to the expert at or before the hearing~~ SHALL BE IN EVIDENCE. ~~The court may require that underlying facts or data essential to an opinion or inference 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.

The Committee believes that the amendment to Rule 703 is necessary to restore the rule against hearsay in the many cases in our courts that involve testimony by experts. Originally intended as a measure to obviate insubstantial tactical obstructions to the admission of expert opinion, Rule 703 has in practice decimated the hearsay rule, has given expert witnesses undeserved prominence in the trial process, and has increased the cost of litigation.

A historical perspective of the rule may be useful. Before the advent of the Federal Rules of Evidence and FRE 703, the law generally forbade the giving of an expert opinion question if it was based on assumptions of facts that were not in evidence, thereby depriving the fact finder of the opportunity to determine the truth of the foundation of the opinion. McCormick, Evidence (4th Ed) §15. This was the longstanding rule in Michigan as well. White v Bailey, 10 Mich 155 (1862); O'Dowd v Linehan, 385 Mich 491; 189 NW2d 333 (1971).

There was nothing unsound about that rule of law. The finder of fact has no basis on which to accept an expert opinion without the ability to weigh, by competent evidence, the truth of the facts on which the opinion is grounded. Where the underlying facts are in dispute, it is for the parties to establish those facts that are essential to the opinions of their experts.

That much seems obvious. Nevertheless, the foundation requirement sometimes seemed to be an inconvenient impediment to the admission of expert opinion. The classic example of a seeming hypertechnical objection occurred when the witness was a treating physician who could not give a diagnosis or prognosis because it was based in part on say, an x-ray report, the contents of which had not been independently admitted in evidence.

That the authors of FRE 703 had this scenario in mind in drafting the rule seems evident from this excerpt from the original federal Advisory Committee Note to FRE 703:

> Facts or data upon which expert opinions are based may, under the rule, be derived from three possible sources.
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> The third source contemplated by the rule [after mention of personal knowledge and the hypothetical question] consists of presentation of data to the expert outside of court and other than by his own perception. In this respect the 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.

As might be expected, however, the rule eventually adopted as part of the Federal Rules of Evidence did not limit itself to treating physicians as witnesses, nor to data used to make life and death decisions: The rule applies to all experts and to all data "reasonably relied upon:"

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> 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.

It seems unlikely that the rule, besides allowing the admission of an expert opinion without independent proof of foundation facts, also contemplated that the underlying hearsay facts would themselves be admissible under the rule. The federal Advisory Committee note to the impending amendment to FRE 703 says as much. In any event, there is even more reason to suppose that Michigan's version of Rule 703, adopted in 1978 by the Michigan Supreme Court, did not contemplate that inadmissible opinion foundation facts would themselves be admissible at the option of the party offering the expert opinion. Our rule says:

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> 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. The court may require that underlying facts or data essential to an opinion or inference be in evidence.

The Supreme Court omitted reference to data "reasonably relied upon" by experts and instead, in the second sentence of the rule, gave discretion to the trial judge to exclude the expert opinion altogether unless its foundation facts are in evidence. After all, whether or not those facts are the kind reasonably relied on by experts, they might govern the outcome of the case. It seems unlikely that a court that went that far to insure the integrity of an expert opinion at the same time intended that inadmissible foundation facts would be per se admissible at the option of the party offering the opinion on the sole basis that the expert relied on the facts in arriving at an opinion.

Whether or not the Michigan and federal rules so intended originally, the current practice, supported by decided cases, openly allows the proponent of an expert opinion to admit testimony by the expert about all facts and data on which the expert has relied, without any requirement of independent proof of the facts under the rules of evidence. It is an everyday occurrence in Michigan courtrooms that the early part of an expert's testimony consists of an exhaustive recitation of the facts relied on by the expert, ordinarily those most favorable, of course, to the offering party. Some of those facts might be taken from testimony in the case, but more often they have been gleaned from multiple documentary sources that are not in evidence; including, for example, depositions and statements of parties and witnesses, and even the reports of other hired experts.

The cases decided in Michigan have generally supported the practice. Three decisions of the Supreme Court have either held or suggested that under MRE 703 a testifying expert, besides being authorized to rely on hearsay foundation facts in rendering an opinion on an insanity defense, may testify to those facts at the instance of the party calling the witness. People v Dobben, 440 Mich 679; 488 NW2d 726 (1992); People v Pickens, 446 Mich 298; 521 NW2d 797 (1994); People v Webb, 458 Mich 265; 580 NW2d 884 (1998). A complicating factor, however, is that the Court in all three cases was also construing MCL 768.20(a)(6); MSA 28.1043(1)(6), a statute having its own provisions about the testimony of an examining psychiatrist regarding the insanity defense in criminal prosecutions. That is to say, the underlying facts might have been properly admitted without MRE 703. Which, of course, is not to say that the Court would have reached a different construction of the rule in another context.

Several Court of Appeals decisions reach similar results. Swanek v Hutzel Hospital, 115 Mich App 254; 320 NW2d 234 (1982); People v James Robinson, 417 Mich 661; 340 NW2d 631 (1983) (evidence deemed more prejudicial than probative, however); People v Haggart, 142 Mich App330; 370 NW2d 345 (1985), app den, 426 Mich 876; People v Caulley, 197 Mich App 177; 494 NW2d 853 (1992). In another case, however, Koenig v South Haven, 221 Mich App 711; 562 NW2d 509 (1997), the court reached a result consistent with a more restricted view of MRE 703, though without adverting to the rule,

by not allowing an expert to testify to the content of a newspaper article that he had used in forming his opinion.

If any of the foregoing cases seem innocuous in terms of admitting hearsay, we need only look to some federal authorities to envision where the practice under Rule 703 could lead. In United States v Affleck, 776 F2d 1451 (CA 10, 1985), a charge of securities fraud, the government's expert witness, an accountant, testified about whether the defendant's solvency was misrepresented to investors. The expert was permitted to recount conversations with persons interviewed, including former accountants, the defendant's employees, and a trustee in bankruptcy. The court held that such conversations were admissible under FRE 703 over defendant's hearsay objections as being the kind of information reasonably relied on by accountants. The information, the court said, was used only to explain the basis of the opinion and not to prove the truth of the out-of-court statements, as the trial judge had instructed the jury.

Of like effect was United States v Ramos, 725 F2d 1322 (CA 11, 1984). In a charge of making a false statement in application for a passport, the expert was a "Miami fraud examiner" who was permitted under FRE 703 to testify about information obtained by "investigative checks" with New York agencies regarding the authenticity of the birth certificate presented by the defendant. The hearsay statements were admitted "to show the basis of the opinion as an expert and not for the truth of the assertions."

What may be an extreme example of admitting hearsay by its bootstraps under the authority of Rule 703 occurs in United States v Rollins, 862 F2d 1282 (CA 7, 1988). At issue in that case was the government's contention that the term "t-shirts" was a code word for cocaine. The government's "expert," an FBI narcotics agent, had never heard the term used that way before. Nevertheless, the court said that it was permissible under Rule 703 for the agent to testify that an informant told him that "t-shirts" meant cocaine, in support of his own opinion that "t-shirts" meant cocaine; which opinion, of course, was based on what the informant told him.

The facility with which evidence can be admitted under Rule 703 even though it would otherwise be inadmissible is by now so well recognized, evidently, that the device can be openly promoted in professional treatises. In Federal Trial Evidence, (James Publishing Co., 1992 ed), p.129, the author offers the following among tactical considerations regarding Rule 703:

> 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.

The current practice under Rule 703 makes a nullity, of course, of MRE 707, "Use of Learned Treatises for Impeachment," which generally prohibits the use of such sources as substantive evidence. If an expert can recite all of the data on which an opinion is based, then the expert need only "rely" on whatever treatise, periodical, pamphlet or other form of hearsay that a resourceful litigant may wish to get before the trier of fact. By this device the opposing experts, between them, can and often do import virtual libraries of hearsay into the courtroom.1

1Not involved here is the use of treatises and other writings for legitimate nonhearsay purposes, such as to establish the state of the art or the feasibility of design in an industry. Fletcher v Ford Motor Co., 128 Mich App 823; 342 NW2d 285 (1983).

The largesse afforded by Rule 703 has consequences that go beyond the admission of a great deal of hearsay. If an expert is empowered to deliver a version of the facts that does not carry with it the inconvenience of observing the rules of evidence, such a witness is a powerful weapon in the litigation arsenal. Perhaps that is why there seem to be so many more kinds of experts than there were formerly. And to realize their full potential, expert witnesses must be as thoroughly familiar with the facts as they are with the principles of their fields of expertise. This phenomenon significantly expands the time needed to prepare for trial, and to be examined and cross-examined at trial, all of which significantly increases the expenses of litigation.

The Federal Advisory Committee on Evidence Rules recognized abuses that have occurred
under the rule and adopted the now-imminent amendment to FRE 703:

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> 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 IN ORDER FOR THE OPINION OR INFERENCE TO BE ADMITTED. IF THE FACTS OR DATA ARE OTHERWISE INADMISSIBLE, THEY SHALL NOT BE DISCLOSED TO THE JURY BY THE PROPONENT OF THE OPINION OR INFERENCE UNLESS THEIR PROBATIVE VALUE SUBSTANTIALLY OUTWEIGHS THEIR PREJUDICIAL EFFECT.

In our view that amendment does not go far enough to cure what has happened to the rule against hearsay. It would allow the proponent of an expert opinion to elicit otherwise inadmissible foundation facts when "their probative value substantially outweighs their prejudicial effect." The federal committee says that in such circumstance the disclosure to the jury should be cured by an 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. Advisory Committee Report, p. 91.

Instructions that ask juries to ignore what they have heard are generally considered ineffective. In this instance, however, the added difficulty is that the instruction is illogical. The message of the cautionary instruction is that the jury must take the foundation facts for the sole purpose of testing the expert's opinion, and not for the truth of the facts themselves. But the circumstance under discussion is one where the inadmissible foundation facts are introduced by the proponent of the opinion, and over the objection of the opponent. And in eliciting foundation facts it is never the purpose of the proponent to "test" his own expert's opinion. Because they are foundation facts, they are always offered on the basis that they are true. Otherwise, the expert's opinion is worthless. Accordingly, the probative value of the evidence can never outweigh the prejudicial effect, for the probative value to the party who offers the evidence *is* the prejudicial effect. The instruction to the jury is self-contradictory and incapable of being obeyed.

We note as well that part of the Advisory Committee's comment on the amendment which says that the proponent's anticipation of an attack on inadmissible foundation facts is a factor that works in favor of allowing the proponent to admit them:

> [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. Advisory Committee Report, p. 92.

But the very purpose of the amendment to FRE 703 is not to allow the jury to hear the inadmissible foundation facts. Yet at the same time, the very inadmissibility of those facts is regarded as a consideration in favor of disclosing them. The contradictions presented by the federal amendment exist, we submit, because it does not reach the

fundamental flaw that inheres in both the federal and Michigan versions of Rule 703, i.e., the grant of authority to decide disputed issues and the substantive rights of parties on the basis of facts that are never proved. We believe that it is time to frankly acknowledge that the well-intentioned innovation of Rule 703 has proved to be unworkable and that we should return to the former practice, which required nothing more than that litigants who make assertions in court be required to prove them.

We note, moreover, that the principal consideration announced by the original federal Advisory Committee in proposing Rule 703 was the elimination of the inconvenience of calling authenticating witnesses for business and medical records. In that connection it should be noted that this report contains recommendations for amendments to MRE 803(6) and MRE 902, which together provide for the admission of business records by the certification of the custodian, as is similarly provided in the impending amendments to the Federal Rules of Evidence. In any event, the utility of medical records for establishing foundation facts was already largely advanced at the same time that Rule 703 was promulgated, when the Federal Rules of Evidence and their state counterparts simultaneously enlarged the scope of the business record exception in Rule 803(6) to include opinions and diagnoses among the elements admissible in those records. Nevertheless, even if this Committee's proposed amendment to Rule 703 should carry some residual inconvenience in proving foundation facts from time to time, we submit that it will be a small price to pay for the restoration of the rule against hearsay in cases involving expert testimony.

It is true, as noted above and as the appended minority statements correctly observe, that the second sentence of the existing rule grants the trial court the discretion to require that foundation facts be in evidence as a condition of receiving an expert opinion. Experience shows, however, that free reference to unproved foundation facts is so much taken for granted that the cited provision is virtually ignored in actual practice. Indeed, it seems to us that in People v Webb, supra, the trial court's attempt to do precisely what the rule appears to authorize was brushed aside as error by the Supreme Court itself. While it does not appear that the trial judge in Webb specifically cited the rule provision, he did forbid the defendant's psychiatric expert from testifying about facts contained in
documents reviewed before trial. Although holding that the error was harmless because the psychiatrist managed to testify to the facts in spite of the judge's ruling, the Supreme Court said:

> Since MRE 703 allows an expert to offer an opinion on the basis of facts made known to the expert before the hearing, or perceived by the expert at the hearing, we conclude that the trial court's rulings, had they been strictly complied with, would have improperly limited Dr. Watson's testimony. People v Webb, supra, 278.[2]

2 As noted earlier, the Court held that the historical data would also have been admissible by virtue of a statute relating to an examining psychiatrists testimony regarding the defense of insanity.

The Committee believes that the practice under discussion is so pervasive that any attempt to change it courtroom by courtroom would be ineffective and highly irregular in result. Our choice of a remedy is to amend Rule 703 to affirmatively state that the factual bases of expert opinion must be in evidence, rather than to merely eliminate the rule. Otherwise, the purpose of the amendment could be obscure. But amending the rule in this fashion, we believe, requires certain precautions.

The first of these is our inclusion of a second sentence in the amended version which makes explicit that requiring the bases of expert opinion to be "in evidence" does not eliminate the discretion of the court to receive an expert opinion conditionally, e.g., subject to the proof of foundation facts at a later time, as is frequently done for the convenience of witnesses or other considerations regarding the order of proofs. The Committee recognizes that such authority is already given to the trial court in MRE 104(b), "Relevancy conditioned on fact," and, indeed, there was some contention in Committee deliberations that the second sentence of the proposed amendment is superfluous. Nevertheless, the Committee concluded that the second sentence is necessary to avoid an overly restrictive reading of the amendatory language.

Second, in 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.