THE CIRCUIT COURT FOR
THE THIRD JUDICIAL CIRCUIT OF MICHIGAN
DETROIT

WILLIAM J. GIOVAN
JUDGE

(313) 224-5430

July 11, 2002

Corbin R. Davis, Clerk
Michigan Supreme Court
P.O. Box 30052
Lansing, MI 48909

Re: Proposed Amendment to MRE 703

Dear Mr. Davis:

The Court has received a comment on the proposed amendment to MRE 703 in a letter dated June 12, 2002, from James K. Robinson of Cadwalader, Wickersham & Taft of Washington, D.C., former Assistant Attorney General of the United States. Because of Mr. Robinson's eminence in the field of evidence, I feel compelled to respond to some of what he says, for fear that it will be accepted solely on the basis of his considerable expertise.

Respectfully, I suggest that several contentions made in the letter are incorrect and, if I may, I will identify them and respond to each.

1. If Michigan were to revert to the pre-Rule 703 approach of requiring that expert opinions must be based entirely on facts and data independently admissible in evidence, it would be the only jurisdiction in the United States to adopt such an approach.

That is not true. We can start with our own neighbor, the State of Ohio. Ohio Rule of Evidence 703 reads as follows:

> The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by him or admitted in evidence at the hearing.

That, of course, is the common law rule. Ohio, evidently, never made the mistake of adopting Federal Rule 703 in the first place.

RECEIVED
JUL 12 2002
CORBIN R. DAVIS
CLERK SUPREME COURT

The 1996 Edition of Weinstein's Evidence says that 27 states adopted a rule 703 identical to the federal rule. It lists another 11 states, including Michigan, that adopted variations of the federal rule. That leaves twelve states that adopted no version of the federal rule. So those twelve, presumably, follow the common law rule, which, of course, is nothing more than the common sense notion that expert opinion must be based on facts in evidence. Michigan would be in plenty of good company if we should return to the common law rule, which would be the effect of adopting the Advisory Committee's recommendation for amending MRE 703. And we cannot exclude the possibility, of course, that other states will return to the former practice as well.

2. The second sentence of the extant MRE 703 was not intended to give trial judges the discretion to exclude opinions that are not based on facts in evidence.

The present rule says:

Rule 703: Bases of Opinion Testimony by Experts

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

Mr. Robinson says that the second sentence affords no authority to the judge to exclude an opinion not based on facts in evidence. Instead, he says, it was intended to give courts the discretion to require that facts underlying an opinion "be actually placed in evidence so that it could be examined by the trier of fact in evaluating the bases for the expert's opinion and the evidentiary weight to give the opinion."

I suggest that the proffered meaning is contradicted by (1) the language of the rule itself, (2) the provisions of another rule, (3) the existence of the fundamental right of cross-examination and, (4) independently verifiable proof of the intent.

Let's start with the rule itself. Its name is *Bases* of Opinion Testimony by Experts. A basis is a foundation. Bases and foundations deal are prerequisites for the admission of evidence, and the rule defines what is required as a foundation before an opinion may be received. The rule doesn't concern "testing" an expert's opinion; it speaks about what is required as a *basis* for an opinion. Accordingly, the intent of the second sentence of the rule is to give the court discretion to require that underlying facts be actually in evidence as a prerequisite of an expert opinion.

The words used are that the court can require that the facts "be in evidence." If the facts are going to be in evidence, there is no need to restrict the purpose of the facts for a "testing" function. To give the words the meaning ascribed by Mr. Robinson, one must take the position that the words "be in evidence" do not really mean what they literally say; which, of course, is always a bad start when one is interpreting language. The position must be that the words "be in evidence" really means only that the court can force *disclosure* of the underlying facts, which is something different than being admitted under the rules of evidence.

If that is the meaning, which party is it that can force disclosure of the facts on which the expert relies? It is, of course, the opposing party. But that right is already available under the fundamental right of cross-examination. Is it even remotely possible that the rule intends to say that this right is a matter of discretion for the court? It isn't.

If the purpose of the second sentence is to allow forced disclosure of the underlying inadmissible facts, moreover, there is no explanation for what would be redundant language in both the Michigan and federal rules 705:

Rule 705 Disclosure of Facts or Data Underlying Expert Opinion

> The expert may testify in terms of opinion or inference and given reasons therefor without prior disclosure of the underlying facts or data, unless the court requires otherwise. *The expert may in any event be required to disclose the underlying facts or data on cross-examination.* (Emphasis supplied.)

Of course the expert can be required to disclose the inadmissible underlying facts by the opponent, and the right doesn't depend on any discretion of the trial judge. The right would exist with or without the second sentence of Rule 705, which, as the Advisory Committee report suggests, was included out of an abundance of caution.

Certainly no one will argue that the second sentence of MRE 703 intends to give to the judge *personally* the right to require disclosure of the underlying facts for the purpose of "evaluating" the expert opinion. It's not the judge's case. The dispute is that of the parties, and the right of cross-examination belongs to the opposite party. And the right to require the underlying facts to be in evidence as a condition of receiving the opinion, exercised through the discretion of the trial judge, is what is granted with the second sentence of MRE 703.

Mr. Robinson's current letter is not the first attempt to convince the Court that the second sentence of MRE 703 was not intended to give the trial judge the authority to exclude an opinion

based on hearsay. In 1987 he was a member of an *ad hoc* committee of three who submitted alternate proposals to amend MRE 703, one of which provided:

> **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 [~~him~~] the expert at or before the hearing. If of 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; however, the court may require that underlying facts or data essential to an opinion or inference be in evidence, to demonstrate the basis for the expert's opinion or inference.

Then, as now, the argument was that the court's discretion was to permit the hearsay facts to be disclosed in order to evaluate the expert's opinion. The Court declined to adopt the proffered amendment.

Mr. Robinson's colleagues on the *ad hoc* committee have apparently taken a different view of the second sentence of MRE 703 since then. One of them, John D. O'Hair, has signed the majority report of the Advisory Committee regarding Rule 703. The third member of the *ad hoc* committee was Professor John W. Reed, who is also a member of the Advisory Committee, and who, although dissenting from the majority recommendation, suggested in his minority statement that the remedy for any abuse of Rule 703 lies in the existing discretion of the court to require the foundation facts to be in evidence as a condition of receiving the opinion. His statement says, in part:

> I submit that the better mechanism for dealing with those problems is the trial judge's discretion and control; and that authority, in this context, is conferred by the second sentence of present MRE 703, which provides:
>
> > The court may require that underlying facts or data essential to an opinion or inference be in evidence.
>
> In short, it is better to impose the requirement that foundation facts be in evidence only in cases of abuse of the process than to reach those cases by means of provision that imposes unnecessary requirements on all expert opinion witnesses, both those who abuse and those who do not. (Advisory Committee Report, page 13.)

If all of the foregoing is not enough, there is eyewitness testimony. Judge James L. Ryan, presently of the United States Court of Appeals for the Sixth Circuit, had the distinction of being both a member of the original committee that proposed the Michigan Rules of Evidence, and later a Justice of the Supreme Court that adopted the rules. Judge Ryan has stated in public on more than one occasion that it was he and Justice Charles L. Levin who went through the committee proposal line by line, debating each rule and making changes where deemed appropriate, including the changes to Rule 703. I have earlier had the occasion to ask Judge Ryan to confirm whether the intent of the second sentence of MRE 703 was the same as is represented herein. He said that it was. You can ask him.

3. The problems created by Rule 703 should be corrected by adopting the newly amended federal version of the rule.

Mr. Robinson's letter correctly identifies the critical juncture we face:

> MRE 703 has long been in need of reform. The Michigan Supreme Court now has an opportunity squarely to address an important policy question concerning the permissible bases for expert opinion testimony and how to limit the exposure of otherwise inadmissible information to the jury through the back door of MRE 703.

First I must agree with the general proposition that, other things equal, it is preferable to have the same evidence rule in state and federal courts. Our present evidence rules, however, already differ from the federal rules in many significant respects. More important, however, is that we are only in our present difficulty because of our limited acceptance of Rule 703's innovation, i.e., that expert opinion could be based on facts never proved. The problems generated by the rule have caused the federal jurisdictions to amend it a bare 25 years after it was enacted (the blink of an eye in the history of evidence law), and it would be a serious mistake for Michigan to copy the federal amendment, which does not cure the problem it purports to address, and in some ways aggravates it.

The announced purpose of the federal amendment was to stop the practice of routinely allowing the inadmissible factual bases of opinions to be themselves disclosed to the fact finder, as revealed by the first sentence of the federal committee note to the amendment:

> Rule 703 has been amended to emphasize that when an expert reasonably relies on inadmissible information to form an opinion or inference, the underlying information is not admissible simply because the opinion or inference is admitted.

But the protection that the federal amendment purports to give with one hand is snatched back by the other. FRE 703, with its recent amendment, provides:

> **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 of 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 <u>in order for the opinion or inference to be admitted</u>. <u>Facts or data that are otherwise inadmissible shall not be disclosed to the jury by the proponent of the opinion or inference unless the court determines that their probative value in assisting the jury to evaluate the expert's opinion substantially outweighs their prejudicial effect</u>.

If the intended effect of the amendment is to keep out inadmissible foundation facts even when the opinion based on them is admitted, it falls short. When exactly does the probative value of disclosing the inadmissible foundation facts outweigh their prejudicial effect? The rule does not say whose probative value is being considered. Certainly, however, the rule cannot be speaking of the probative value to the opponent of the opinion because, as we have seen, the opponent *always* has the right to force disclosure of the underlying facts and without regard to any balancing test or discretion by the court.

Accordingly, the probative value that the amendment speaks of must necessarily be the value to the *proponent* of the opinion, the only other possibility. And that probative value is supposed to be the value in assisting the jury to evaluate a party's own expert's opinion. Let's see if I have this right. The rule is intended to minimize disclosure of inadmissible facts, but the rule nevertheless contemplates allowing the proponent to disclose the inadmissible facts in order to fortify one's own expert's opinion. One can be assured, given this indulgence, that the proponents of opinions based on hearsay will be *eager* to fortify their opinions with the hearsay.

The Committee comment to the amendment aggravates the matter by observing that sometimes the proponent of the opinion might wish to disclose inadmissible foundation facts in order to "remove the sting" from the opponent's anticipated attack, and further says that the trial judge should consider that factor in a positive way in applying the balancing test. One can be sure, given this indulgence, that the proponents of opinions based on hearsay will be *eager* to "remove the sting" by getting the inadmissible facts before the fact finder. The supreme irony here is that, although the federal amendment was designed to fortify the exclusion of inadmissible foundation facts, that very inadmissibility is seen as a reason for *disclosing* them.

Another contradiction is found in the portion of the rule comment which says that if the inadmissible information is admitted under the balancing test, the trial judge must give a limiting instruction upon request, informing the jury that the inadmissible facts cannot be considered for their truth. Let's first recall that obeying the instruction is an impossibility. The United States constitution says so. *Bruton v United States*, 391 US 123, 88 S Ct 1620, 20 L Ed 2nd 476 (1968). At page 129 of *Bruton* the court said:

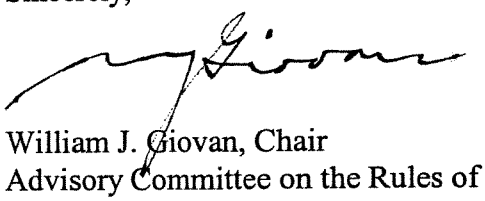
> That dissent in [*Delli Paoli v United States*] challenged the basic premise of Delli Paoli that a properly instructed jury would ignore the confessor's inculpation of the nonconfessor in determining the latter's guilt. 'The fact of the matter is that too often such admonition against misuse is intrinsically ineffective in that the effect of such a nonadmissible declaration cannot be wiped from the brains of the jurors. The admonition therefore becomes a futile collocation of words and fails of its purpose as a legal protection to defendants against whom such a declaration should not tell.' 352 U.S., at 247, 77 S.Ct . At 302. The dissent went on to say, as quoted in the cited note in Jackson, 'The Government should not have the windfall of having the jury be influenced by evidence against a defendant which, as a matter of law, they should not consider but which they cannot put out of their minds.' *Id*, at 248, 77 S.Ct. At 303. To the same effect, and also cited in the Jackson note, is the statement of Mr. Justice Jackson in his concurring opinion in *Krulewitch v United States*, 336 U.S. 440, 453, 69 S.Ct. 716, 723, 93 L.Ed. 790: 'The naive assumption that prejudicial effects can be overcome by instructions to the jury***all practicing lawyers know to be unmitigated fiction.***'

But it is worse than that. Besides being an instruction that cannot be obeyed, it is one that, in this circumstance, is false. The instruction tells the jury that the inadmissible evidence is not being disclosed for its truth. Remember, however, that we are speaking in this instance of inadmissible foundation facts offered by the *proponent* of the opinion; and the proponent, in this scenario, is *always* offering the inadmissible facts for their truth. The proponent has no interest in "testing" its own expert's opinion and is never indifferent to the truth of the foundation facts because if those facts are false, the expert's opinion is worthless. Contrary to the judge's instruction, the proponent of the expert opinion is always offering the inadmissible foundation facts for their truth.

Those who wrote and adopted the amendment to the federal rule, I am sure, are persons of intellect and experience; otherwise, they would not occupy the positions they hold. I can only account for the inconsistent result as being a compromise between those practitioners who wanted to rectify Rule 703's decimation of the rule against hearsay, and those who have grown accustomed to the laxity that the rule has afforded.

I suggest that Michigan, by adopting the original recommendation of the Advisory Committee, should re-join the ranks of those states who have recognized all along that Rule 703 was a mistake.

Sincerely,



William J. Giovan, Chair
Advisory Committee on the Rules of Evidence

WJG:jc

cc: James K. Robinson, Esq.
Prof. John W. Reed
Hon. John D. O'Hair
Hon. James L. Ryan
Michigan Lawyers Weekly