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Opinions and Expert Testimony

John W. Reed

The rules in Article VII of the new Michigan Rules of Evidence, with two significant exceptions, are identical with the corresponding federal rules. Article VII, especially in the federal version, has been thought to effect a significant liberalization of the opinion rules. Indeed, I have heard and read alarmist statements to the effect that the rules regarding expert opinion permit courts to transfer some of the fact-finding process to experts. Though exaggerated, there is at least a grain of truth there.

Opinion testimony is now more freely admitted and plays a much larger role in dispute settling than it did only a generation ago. Partly as a consequence of the increasing complexity of facts in controversy and an increase in technical and scientific questions, experts are virtually indispensable if court and jury are to comprehend. Also, more generous use of opinion is a consequence of a general, if not unanimous, perception that jurors are more sophisticated than previously and can distinguish and evaluate opinion as separate from the underlying facts better than when the rule against opinion came into being long ago. In addition, it is difficult to draw lines between fact and opinion, particularly in the area of lay opinion. When a lay witness, while trying to state something as best he can, uses opinion language—e.g., some adjectives or adverbs—he may be told, "That is opinion, you cannot testify that way." The witness does not know what to say next; his tongue is tied. Indeed, that is often the very reason the objection is interposed.

In the aggregate the new rules represent very little change from current Michigan case law on the subject. Nevertheless, they support the slant toward greater willingness on the part of the courts to receive opinions of all kinds.

Rule 701 governs the use of lay opinion. It provides, in essence, that the lay person may testify in the form of opinion or inference if his testimony is rationally based on his own perception and is helpful to the trier of fact. For example, testimony would still be excluded from an individual who says that he was in his backyard, heard the screeching of tires out front, heard the crash, ran around the house, and saw one car over against the curb "that had been hit by the other car backing out of the driveway." The witness does not know what happened; he does not have firsthand knowledge. He simply has seen the positions of the cars and their condition. He is not better able than the jurors to draw conclusions from the debris. He does have firsthand knowledge of the debris and can testify to that. May he then go ahead and testify to his inferences—that the one must have backed into the side of the other? MRE 701 states in clause (b) that the opinion testimony must be "helpful to a clear understanding of . . . [the] testimony or the determination of a fact in issue." Surely in the preceding example every court will determine that the evidence is not helpful.

The impact statement following Rule 701 in the proposed rules noted that the rule is essentially consistent with existing Michigan law and practice. One word should be emphasized, however: "helpful." As in MRE 702 where the word is "assist," the test of admissibility is whether the opinion will help. Previously, the test of admissibility of expert opinion was often put in terms of whether the testimony in the form of opinion was "necessary" in order that the witness could communicate or the juror could understand. If a relatively inarticulate witness offered to describe a room as being "a mess," he might be allowed to testify in those

terms if he was unable to break down his observations into elements such as torn drapes, pictures askew, and an overturned sofa. He could testify in that opinionated form in order to communicate what he knew. Rule 701 does not insist on necessity—that the witness be feebleminded and without alternative form of communication in order to be permitted to express opinion. The evidence is admissible if it is "helpful" to a clear understanding.

In the expert opinion area, doctors for example have long been permitted to testify to the likelihood of permanence of plaintiff's disability because only a doctor can provide that information. The fact finder needs the expert to interpret the data. But Rule 702, like 701, is phrased in terms not of need but of help, of assistance, in communicating and understanding. Rule 702 authorizes the reception of expert opinion if the court "determines that recognized scientific, technical, or other specialized knowledge will assist the trier of fact" Together, MRE 701 and 702 condition the courts to be more receptive to opinion testimony.

Who is an expert? Rule 702 contemplates a greater than average knowledge about a subject matter. The credentials may consist of knowledge, skill, experience, training, or education, and the threshold is low. It is relatively easy to qualify a witness as an expert, leaving the judgment of weight for the jury.

Under Rule 703, the facts or data upon which an expert bases his opinion or inference may be made known to him in any of several ways. They may be "perceived by or made known to him at or before the hearing." The expert need not base his opinion on his own perception. He may obtain his data from some other source. The data may even be made known to him at the hearing by a hypothetical question or by listening to the witnesses.

The second sentence of Rule 703 as proposed (but not adopted) followed the federal rule in providing that the underlying data need not be admissible if it is of a type reasonably relied upon by experts in the

particular field in forming opinions or inferences upon the subject. Thus, for example, the orthopedic surgeon may reach a conclusion as to what is wrong with plaintiff's leg based in part on the radiologist's report which is not otherwise admissible at trial for lack of foundation. The surgeon may testify in reliance on the report since he and other orthopedists would rely on it. Rule 703 as promulgated, however, made the matter discretionary with the court: "The court may require that underlying facts or data essential to an opinion or inference be in evidence." It would appear that unless the court requires it, the data need not be in evidence. One suspects that where an opinion is virtually dispositive of the case, the court probably will insist that the bases on which the opinion is founded be presented in evidence. Thus, the trial counsel must be prepared to present the underlying data in admissible form. Being prepared to do so and in the interest of more persuasive advocacy, he may as well introduce that proof. In any event, he cannot afford to rely on the hope that the judge will not require the underlying data. Rule 703 is a slight change from prior practice, but much closer to present practice than the federal version.

Rule 704, making it unobjectionable that the opinion embraces an ultimate issue in the case, represents no change in existing practice with respect to experts. There is some question, however, about whether Rule 704 changes the rule as applied to lay opinion. Ordinarily, lay persons may not express opinions on so-called ultimate issues. But consider a case of intoxication. The basic facts are that the defendant had the odor of alcohol on his breath, he was staggering, he was thick of speech, his eyes were watery, and so on. A lay witness can testify to those facts, of course. Most courts, however, would also let the witness say, "He appeared to me to be intoxicated." Assume then such testimony in a dramshop case where the issue is whether the customer was intoxicated when served. Rule 704 makes unavailing the objection that intoxication hap-

pens to be an ultimate issue in the case. It may be that under Rule 701 the testimony is inadmissible because it is not "helpful"; but it would not be objectionable on the ground that it is an ultimate issue in the case.

Rule 705, regarding disclosure of the facts underlying an expert's opinion, is also an embodiment of existing law in Michigan. Consider the following possibility: a party puts his medical witness on the stand, and the court, under Rule 702, finds him an expert.

- Q. Doctor, have you looked at the plaintiff's medical record in this case?
- A. Yes.
- Q. Do you have an opinion as to whether his disability is permanent?
- A. Yes, I do.
- Q. What is that opinion?
- A. It is permanent.
- Q. Thank you, Doctor. Your witness.

The adversary now has the choice to dismiss the witness with no cross-examination, suggesting that his opinion is of no importance, or cross-examine him with respect to the bases of his opinion, thus entering a minefield. In theory Rule 705 permits the direct examination set forth, but it is poor advocacy. An expert is ordinarily not much better than the clarity with which he indicates to the jury how he reached his results. Merely to offer a bald opinion like the one above, even though contemplated as a possibility under 705, seems most unwise.

Rule 706 provides for court-appointed experts, a novelty in Michigan practice. The court may appoint an expert on motion of the parties, but it may do it also on its own motion. The expert may be called to testify by the court or by either party, and he or she is subject to cross-examination by either party, whether called by the court or by one of the parties. Compensation may be taxed against the parties in civil cases or paid out of the state funds in certain criminal

situations. Under Rule 706(d) the parties may still call experts of their own selection, thus preserving the right of a party to have his own witnesses. But Rule 706(c) rather reduces the value of that right, permitting the court in its discretion to authorize disclosure to the jury of the fact that one of these witnesses is the court's witness. Undoubtedly, that disclosure will enhance the credibility of the court's witness in relation to the parties' witnesses. Rule 706 represents an erosion of the adversary system, but it erodes an area in which the system has been subject to a lot of criticism (the "hired gun" expert). Whether courts actually appoint expert witnesses under the rule, the potential power to do so may cause trial lawyers to be more conservative in their choices of forensic experts. That, many would argue, is a salutary result of the rule.