

USE OF HEARSAY TO BUTTRESS EXPERT TESTIMONY

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History of Expert Testimony

A. Common Law

Under the common law, experts were required to base their opinions on facts or information that were found in the trial record. This was accomplished by:

1. Expert's own first-hand knowledge of facts;
2. Experts attending trial while factual witnesses testified; or
3. Hypothetical questions directed to the expert.

The effect of this rule was that experts could base their opinions only on admissible evidence.

B. Modifications to Common Law

1. Taylor v. Monongahela Railway, 155 F.Supp. 601 (W.D.Pa. 1957), aff'd, 256 F.2d 751 (3d Cir. 1958) (court allowed doctor to form medical opinion based on laboratory reports that doctor had not authored).
2. United States v. Williams, 447 F.2d 1285 (5th Cir. 1971) cert. denied, 405 U.S. 954 (1972), (recognized expert testimony as a "widely-recognized exception" to the hearsay rule. Permitted expert to testify as to valuation of property based upon his investigation of documents and business records not themselves introduced into evidence).

C. Federal Rules of Evidence

Enacted into law by Congress on January 2, 1975 and became effective July 1, 1975. Four Rules address the use of expert testimony (see Rules 702, 703, 704, and 705).

II. **Federal Rule of Evidence 703:**

A. The Rule provides:

Basis 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 is 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.

B. Intent of Rule:

1. Notwithstanding express language of Rule, courts have not allowed experts to base opinions on reliable, but otherwise inadmissible evidence:
 - (1) Irrelevant evidence (Rule 402).
 - (2) Compromises and offers to compromise (Rule 408).
 - (3) Evidence of liability insurance (Rule 411).
 - (4) Subsequent remedial measures (Rule 407).
 - (5) Evidence violative of Constitutional Rights.
2. Rather, courts apply Rule to opinions of experts based on material generally excluded due to concerns over reliability:
 - (1) Hearsay. (Rule 801).
 - (2) Admissions of writings, recordings and photographs (Rules 1001 - 1008).

C. Role of Court:

It is the trial court's responsibility, pursuant to Rule 104(a), to make the preliminary determination whether the underlying facts and data upon which the expert bases an opinion are of a type reasonably relied upon by experts in the field. See, In re Japanese Electronic Products Liability Litigation, 723 F.2d 238 (3d Cir. 1983), rev'd on other grounds, 475 U.S. 574 (1986). In deciding whether the evidence is of a type "reasonably relied upon" by experts in the field, the courts differ over the test for reasonableness:

1. Liberal Approach:

Allows expert to determine whether evidence is reliable. Once Court finds material meets particular field's standard of reliability, expert may use that information as a basis of his opinion. Questions of reliability go to the weight of the evidence, not its admissibility. See, In re: Japanese Electronics Products, 723 F.2d 238 (3d Cir. 1983) rev'd on other grounds, 475 U.S. 574 (1986).

2. Strict Approach:

Experts cannot “reasonably rely” on anything which is not independently admissible as evidence. This approach views Rule 703 as merely a rule of convenience. See, Barrell of Fun, Inc. v. State Farm and Cas. Co., 739 F.2d 1028 (5th Cir. 1984).

D. Application of Rule 703:

1. Expansive:

(a) Some courts, in allowing an expert to rely upon hearsay in forming an opinion, will allow the expert to testify in detail with respect to the facts which helped form the basis of the opinion. See, Lewis v. Rego Co., 757 F.2d 66 (3d Cir. 1985) (trial court in products liability action should have permitted plaintiff to inquire on direct examination of expert witness regarding expert’s conversation with other expert, where expert’s opinion was based in part on conversation with other expert). See also, Stevens v. Cessna Aircraft, Co., 634 F.Supp. 137 (E.D. Pa. 1986), aff’d, 806 F.2d 252 (3d Cir. 1986) (expert’s testimony of statements made to him during investigation was admissible since the court found such statements routinely relied upon by experts in that field).

(b) Other courts allow the expert to testify as to the hearsay evidence, but with a cautioning instruction. See, Paddack v. Dave Christensen, Inc., 745 F.2d 1254 (9th Cir. 1984) (upon admission of such evidence, it becomes necessary for the court to instruct the jury that the hearsay evidence is to be considered solely as a basis for the expert’s opinion and not as substantive evidence).

2. Restrictive:

Some courts have allowed inadmissible evidence, such as hearsay, to be the basis of an expert’s opinion, but have prohibited the expert from testifying in detail on the facts that helped form his opinion. See, Marsee v. United States Tobacco Co., 866 F.2d 319 (10th Cir.) (trial court permitted expert to testify to his opinion based on hearsay data, but refused to admit hearsay evidence on grounds that it was unnecessary and unreliable).

3. Other:

Some courts have ruled that the expert cannot serve as a mere conduit for an extrajudicial source. As such, an expert is not permitted to simply repeat another's opinion or data without bringing to bear on its own expertise and judgement. See, Primavera v. Celotex Corp., 608 A.2d 515, 521 (Pa. Super. 1992).

III. Practical Considerations

A. Advantages:

1. Impossibility of presenting all information on which expert bases his opinion by way of live testimony. (Witnesses may be too numerous or unavailable).
2. Save time and money of placing a number of witnesses on the stand.
3. Faded memories of witnesses.
4. Avoid putting witness on stand who would make a bad impression (See, U.S. v. Rawlins, 862 F.2d 1282 (7th 1988 cert. denied, 490 U.S. 1074)).

B. Disadvantages:

1. Lose credibility by leaving entire opinion open to question for failing to have the basis of the facts presented to the jury.
2. Lose credibility in that the jury may feel the expert is hiding behind information the lawyer does not want them to hear directly.

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