

Rule 703. Bases of Opinion Testimony by Experts

(a) 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.

(b) Underlying expert data must be independently admissible in order to be received upon direct examination; provided that when good cause is shown in civil cases and the underlying data is particularly trustworthy, the court may admit the data under this rule for the limited purpose of showing the basis for the expert's opinion. Nothing in this rule restricts admissibility of underlying expert data when inquired into on cross-examination.

(Amended effective January 1, 1990.)

Committee Comment - 1989

The rule represents a fresh approach to the question of expert testimony--one which more closely conforms to modern realities. Consistent with existing practice the expert can base an opinion on firsthand knowledge of the facts, facts revealed at trial by testimony of other witnesses, or by way of hypothetical questions. The rule also permits the opinion to be based on data or facts presented to the witness prior to trial. The sufficiency of facts or data in establishing an adequate foundation for receiving the opinion is subject to a two-part test:

- 1. are these facts and data of a type relied upon by experts in this field when forming inferences or opinions on the subject;*
- 2. is this reliance reasonable?*

In explanation the United States Supreme Court Advisory Committee stated:

... (A) physician in his own practice bases his diagnosis on information from numerous sources 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. (citations omitted)

Supreme Court Advisory Committee Note.

The requirement that the facts or data be of a type reasonably relied upon by experts in the field provides a check on the trustworthiness of the opinion and its foundation. In determining whether the reliance is reasonable, the judge must be satisfied that the facts and data relied on by the experts in the field are sufficiently trustworthy to ensure the validity of the opinion. The sufficiency of the foundation for the opinion testimony could be treated as a preliminary question under Rule 104.

*The rule is aimed at permitting experts to base opinions on reliable hearsay and other facts that might not be admissible under these rules of evidence. Obviously, a prosecution witness could not base an opinion on evidence that had been seized from a defendant in violation of the Fourth or Fifth Amendments. The application of the "fruit of the poisonous tree doctrine" would mandate such a result. See *Wong Sun v. United States*, 371 U.S. 471, 83 S.Ct. 407, 9 L.Ed.2d 441 (1963). Similarly, where state policy considerations require that certain matters not be admitted at trial,*

the state policy should not be thwarted by allowing the same evidence to come in the "back door" in the form of an expert's opinion. See, e.g., Minnesota Statutes 1974, sections 595.02 and 169.121.

This rule deals with the adequacy of the foundation for the opinion. Rule 705 determines the timing and necessity for establishing the foundation at trial. Great emphasis is placed on the use of cross-examination to provide the trier of fact with sufficient information to properly assess the weight to be given any opinion.

Although an expert may rely on inadmissible facts or data in forming an opinion, the inadmissible foundation should not be admitted into evidence simply because it forms the basis for an expert opinion.

In civil cases, upon a showing of good cause, the inadmissible foundation, if trustworthy, can be admitted on direct examination for the limited purpose of establishing the basis for the opinion. See generally Carlson, Policing the Bases of Modern Expert Testimony, 39 Vand.L.Rev. 577 (1986); Federal Rules of Evidence: A Fresh Review and Evaluation, ABA Criminal Justice Section, Rule 703 and accompanying comment, 120 F.R.D. 299, at 369 (1987).

In criminal cases, the inadmissible foundation should not be admitted. Admitting such evidence might violate the accused's right to confrontation. See State v. Towne, 142 Vt. 241, 453 A.2d 1133 (1982).