

Alabama Rules of Evidence

Article VII. Opinions and Expert Testimony

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 in order for the opinion or inference to be admitted. 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

[Amended 8-15-2013, 3ff. 10-1-2013.]

Advisory Committee's Notes

Experts may acquire the facts, upon which they base their opinions and testimony, by firsthand observation. This would be exemplified by a treating physician who is called to testify. *Armstead v. Smith*, 434 So.2d 740 (Ala.1983); *Jones v. Keith*, 223 Ala. 36, 134 So. 630 (1931). However, experts historically have been exempted from the requirement of possessing firsthand knowledge; indeed, experts are the only witnesses so exempted. The common law has recognized the familiar hypothetical question as a primary source from which the expert could gain a knowledge, albeit secondhand, of the facts. *Alabama Power Co. v. Robinson*, 447 So.2d 148 (Ala.1983). Under Rule 703, two additional sources exist for the facts upon which the expert's opinion may be based. First, the expert may attend the trial and there be made privy to the facts upon which his or her testimony is to be based. This means of being furnished the facts, insofar as not requiring a hypothetical question, is new to Alabama practice. See *Porter v. State*, 135 Ala. 51, 33 So. 694 (1903); *Gunter v. State*, 83 Ala. 96, 3 So. 600 (1888). Rule 703 also provides, however, that the facts may be made known to the expert outside the trial or hearing at which the expert is testifying. This includes data presented to the expert by means other than personal perception, such as through the opinions, records, or reports of others.

Rule 703 leaves unaffected the preexisting Alabama law requiring that the facts or data relied upon by the expert, and gotten by the expert other than by firsthand knowledge, generally must be admitted into evidence. See C. Gamble, *McElroy's Alabama Evidence* § 127.01(5) (4th ed. 1991). An expert generally may not, for example, base an opinion upon inadmissible hearsay. *Ex parte Wesley*, 575 So.2d 127 (Ala.1990). See also *T.G.S. v. D.L.S.*, 608 So.2d 743 (Ala.Civ.App.1992); C. Gamble, *McElroy's Alabama Evidence* § 100.01 (4th ed.

1991). Rule 703 is taken verbatim from Fed.R.Evid. 703, but it omits that portion of the federal rule providing that an expert may base an opinion upon inadmissible evidence if it is of a type reasonably relied upon by experts in the particular field in forming opinions. See Fed.R.Evid. 703. However, it should be emphasized that the Alabama case law generally precluding an opinion based upon the unadmitted records or reports of others does recognize exceptions. See, e.g., *Ex parte Wesley*, 575 So.2d 127, 129 (Ala.1990) (acknowledging such exceptions); *Sidwell v. Wooten*, 473 So.2d 1036 (Ala.1985) (expert allowed to give opinion as to value based at least in part upon hearsay); *Jackson v. State*, 412 So.2d 302 (Ala.Crim.App.1982) (permitting coroner to base opinion as to cause of death at least partially upon unadmitted toxicologist's autopsy report). See also C. Gamble, *McElroy's Alabama Evidence* § 130.01 (4th ed. 1991).

Advisory Committee's Notes to Amendment to Rule 703 Effective October 1, 2013

Rule 703 has been amended by adding a second and third sentence to the former rule. The two new sentences are taken verbatim from Rule 703 of the Federal Rules of Evidence and make the Alabama Rule identical to its federal counterpart. The amendment abandons the traditional common-law rule that required information upon which an expert relied in forming an opinion to be admitted into evidence, but which also recognized exceptions. See *Swanstrom v. Teledyne Continental Motors, Inc.*, 43 So. 3d 564, 579 (Ala. 2009) (noting such exceptions and modifications); 1 C. Gamble & R. Goodwin, *McElroy's Alabama Evidence* § 127.02(5) (6th ed. 2009) ("Alabama's rule, precluding expert testimony based on inadmissible facts or data has ... been judicially breached in certain situations."). Cf. *Johnson v. Nagle*, 58 F. Supp. 2d 1303, 1358 n.46 (N.D. Ala. 1999) (describing Alabama law as "confusing").

Abandonment of the common-law rule does not mean that expert opinions based on otherwise inadmissible evidence will be automatically admitted. As amended, the second sentence of Rule 703 provides: "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 in order for the opinion or inference to be admitted." The phrase "reasonably relied upon" allows an expert to base an opinion on information not admitted into evidence only if other experts in the field normally and customarily rely on such information in forming opinions, and only if such reliance is reasonable. See *United States v. Steed*, 548 F.3d 961, 975 (11th Cir. 2008) ("Rule 703, however, is not an open door to all inadmissible evidence disguised as expert opinion.' ... [U]nder the Rule, 'a law enforcement officer testifying as an expert witness may rely on information he received from other people if such sources of information were regularly relied upon by experts in his field.'" (citations omitted)); *Moore v. Ashland Chem., Inc.*, 126 F.3d 679, 691 (5th Cir. 1997) ("In determining the preliminary question of whether reliance by the expert is reasonable, the party calling the witness must satisfy the court, both that such facts, data or opinions are of the type customarily relied upon by experts in the field and that such reliance is reasonable.").

In many cases the result reached under the amended rule will be the same as under common-law rule. For example, Alabama courts recognized an exception to the common-law rule that allowed admission of expert opinion testimony based on hearsay if the hearsay was ""customarily relied on by experts and likely to be trustworthy...."" *Swanstrom v. Teledyne Continental Motors, Inc.*, 43 So. 3d at 579 (emphasis omitted). The amendment is consistent

with this exception. Hearsay that is not trustworthy would not satisfy the "reasonably relied upon" requirement of the amended rule.

The last sentence of Rule 703 is identical to the sentence added to Federal Rule 703 by amendment in 2000, and it has been added for the same reason—to emphasize that when an expert reasonably relies on otherwise inadmissible information to form an opinion the underlying information is not admissible simply because the expert's opinion is admissible. The advisory committee's notes accompanying the 2000 amendment to Federal Rule 703 provide an explanation of how the amendment to the federal rule should be interpreted, which applies equally to the amendment to Ala. R. Evid. 703.

"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 [Ala. R. Evid.] 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.

"The amendment governs only the disclosure to the jury of information that is reasonably relied on by an expert, when that information is not admissible for substantive purposes. It is not intended to affect the admissibility of an expert's testimony. Nor does the amendment prevent an expert from relying on information that is inadmissible for substantive purposes.

"Nothing in this Rule restricts the presentation of underlying expert facts or data when offered by an adverse party. See [Ala. R. Evid.] 705. Of course, an adversary's attack on an expert's basis will often open the door to a proponent's rebuttal with information that was reasonably relied upon by the expert, even if that information would not have been discloseable initially under the balancing test provided by this amendment. Moreover, in 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.

"This amendment covers facts or data that cannot be admitted for any purpose other than to assist the jury to evaluate the expert's opinion. The balancing test provided in this amendment is not applicable to facts or data that are admissible for any other purpose but have not yet been offered for such a purpose at the time the expert testifies.

"The amendment provides a presumption against disclosure to the jury of information used as the basis of an expert's opinion and not admissible for any substantive purpose, when that information is offered by the proponent of the expert. In a multi-party case, where one party proffers an expert whose testimony is also beneficial to other parties, each such party should be deemed a 'proponent' within the meaning of the amendment."

Fed. R. Evid. 703 (Advisory Committee's Notes).

Note from reporter of decisions: The order amending Rule 404(a), Rule 405(a), Rule 407, Rule 408, Rule 412, Rule 510, Rule 608(b), Rule 703, Rule 801(d), Rule 803(6), Rule 804(b), and Rule 1103, Ala. R. Evid., and adopting Rule 902(11) and (12), Ala. R. Evid., and the Advisory Committee's Notes to the amendment or adoption of these rules, effective October 1, 2013, is published in that volume of *Alabama Reporter* that contains Alabama cases from ____ So. 3d.