Alabama Rules of Evidence

Article VII. Opinions and Expert Testimony

Rule 705.

Disclosure of facts or data underlying expert opinion.

The expert may testify in terms of opinion or inference and give reasons therefor without first testifying to 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.

Advisory Committee's Notes

Under preexisting Alabama law, as well as the common law nationally, an expert could not give an opinion before the jury was made privy to the facts upon which the opinion was based. See *Thompson v. Jarrell*, 460 So.2d 148 (Ala.1984) (holding that the facts known to the expert or hypothesized must be facts in evidence); *Hagler v. Gilliland*, 292 Ala. 262, 292 So.2d 647 (1974). Rule 705, like its identical federal counterpart, eliminates the requirement that the underlying facts or data be disclosed as a condition precedent to the expert's giving an opinion or other testimony. As a practical matter, this abandonment of the historic requirement is aimed primarily at the hypothetical question. See Fed.R.Evid. 705 advisory committee's note. The hypothetical question has been much criticized for its wordiness and for its allowing counsel to arbitrarily select facts and, thereby, to fashion a hypothesis that is one-sided. See E. Cleary, McCormick on Evidence § 16 (3d ed. 1984); 2 J. Wigmore, Wigmore on Evidence § 686 (Chadbourn Rev. 1979) (observing: "It is a strange irony that the hypothetical question, which is one of the few truly scientific features of the rules of evidence, should have become that feature which does most to disgust men of science with the law of evidence."); Judge Learned Hand, New York Bar Association Lectures on Legal Topics, 1921-1922 (characterizing the hypothetical question as "the most horrific and grotesque wen on the fair face of justice"); M. Ladd, *Expert Testimony*, 5 Vand.L.Rev. 414, 426 (1952).

It is left to the cross-examiner to elicit the facts or data on which the opinion is based, and the witness must, if asked, disclose such information. See *Polk v. Ford Motor Co*., 529 F.2d 259, 271 (8th Cir.), cert. denied, 426 U.S. 907 (1976) (holding that "[t]he weakness in the underpinnings of such opinions may be developed upon cross-examination and such weakness goes to the weight and credibility of the testimony"). The cross-examiner, of course, is under no obligation to bring out such facts or data and, indeed, may limit inquiry solely to facts or data that are unfavorable to the opinion. The right of the cross-examiner to bring out such facts or data will be fully realized only where liberal pretrial discovery is allowed. See Ala.R.Civ.P. 26(b)(4) (providing for discovery of facts known or opinions held by an opponent's expert); Ala.R.Crim.P. 18.1(d) (recognizing the right of the defense to inspect and copy any results or reports of physical or mental examinations or scientific tests or experiments).

The trial judge has the discretion to require a preliminary disclosure of the underlying facts in appropriate instances. See C. Gamble, McElroy's Alabama Evidence § 127.01(5)(e) (4th ed. 1991) (taking the position that "the matter of whether the expert should be required to

detail the data observed by him before stating his opinion should be committed in measurable degree to the discretion of the trial court"). This discretion would most often be exercised in those cases where the cross-examining party has been unable effectively to gain advance knowledge, particularly if not provided adequate discovery, sufficient to support an effective cross-examination. See *United States v. Lawson*, 653 F.2d 299, 301 (7th Cir.1981), cert. denied, 454 U.S. 1150 (1982). Compare Haw.R.Evid. 705; Idaho R.Evid. 705.

Despite the abandonment of the requirement that the facts be in evidence before an expert's opinion can be admitted, the committee contemplates that many lawyers calling an expert will continue to elicit the facts, on the belief that to do so will positively affect the weight the trier of fact will give to the opinion. See C. Gamble, McElroy's Alabama Evidence § 127.01(5)(e) (4th ed. 1991) ("Of course, the trial attorney normally will wish to elicit the facts from his expert witness prior to the giving of an opinion in order to bolster the witness's credibility in the eyes of the jury.").