

**ARTICLE VII. OPINIONS AND EXPERT TESTIMONY**

Rule	
701.	Opinion Testimony by Lay Witnesses.
702.	Testimony by Experts.
703.	Bases of Opinion Testimony by Experts.
704.	Opinion on Ultimate Issue.
705.	Disclosure of Facts or Data Underlying Expert Opinion.
706.	Court Appointed Experts.

**Rule 701. Opinion Testimony by Lay Witnesses.**

If the witness is not testifying as an expert, the witness' testimony in the form of opinions or inferences is limited to those opinions or inferences which are rationally based on the perception of the witness, and helpful to a clear understanding of the witness' testimony or the determination of a fact in issue, and not based on scientific, technical or other specialized knowledge within the scope of Rule 702.

**Comment**

F.R.E. 701 was amended, effective December 1, 2000, to clarify that testimony based on scientific, technical, or specialized knowledge is governed by F.R.E. 702, and not F.R.E. 701. The 2001 amendment to Pa.R.E. 701 is likewise aimed at clarifying that testimony based on scientific, technical, and specialized knowledge is governed by Pa.R.E. 702.

This rule is identical to F.R.E. 701 except for the deletion of the (a) and (b) divisions within the text of the rule. No substantive changes result from this deletion.

Pa.R.E. 701 is consistent with Pennsylvania law. See *Lewis v. Mellor*, 259 Pa. Super. 509, 393 A.2d 941 (1978) (adopting F.R.E. 701). Under *Lewis*, lay opinion may embrace the ultimate issue. See Pa.R.E. 704. The trial judge may exclude the opinion if the trial judge decides that it would not be helpful, or would confuse, mislead, or prejudice the jury, or would waste time. *Lewis*, 259 Pa. Super. at 523-24, 393 A.2d at 949.

**Official Note:** Adopted May 8, 1998, effective October 1, 1998; amended November 2, 2001; effective January 2, 2001.

*Committee Explanatory Reports:*

Final Report explaining the November 2, 2001, amendments published with the Court's Order at 31 Pa.B. (November 24, 2001).

**Source**

The provisions of this Rule 701 amended November 2, 2001, effective January 1, 2002, 31 Pa.B. 6381. Immediately preceding text appears at serial page (245777).

**Rule 702. Testimony By Experts.**

If scientific, technical or other specialized knowledge beyond that possessed by a layperson will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training or education may testify thereto in the form of an opinion or otherwise.

**Comment**

Pa.R.E. 702 differs from F.R.E. 702 in that the words “beyond that possessed by a lay person” have been added to make the rule consistent with Pennsylvania law. See *Commonwealth v. Dunkle*, 529 Pa. 168, 602 A.2d 830 (1992).

Adoption of Pa.R.E. 702 does not alter Pennsylvania’s adoption of the standard in *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923), which requires scientific evidence to have “general acceptance” in the relevant scientific community. See *Commonwealth v. Dunkle*, *supra*; *Commonwealth v. Nazarovitch*, 496 Pa. 97, 436 A.2d 170 (1981); *Commonwealth v. Topa*, 471 Pa. 223, 369 A.2d 1277 (1977). In 1993, the United States Supreme Court held that Frye was superseded in the federal courts by the adoption of F.R.E. 702. *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993). In *Grady v. Frito-Lay, Inc.*, \_\_\_\_\_ Pa.\_\_\_\_\_, 839 A.2d 1038 (2003), a majority of the Pennsylvania Supreme Court rejected the *Daubert* standard and affirmed the applicability of the *Frye* standard in the Pennsylvania state courts.

Pa.R.E. 702 does not change the Pennsylvania rule for qualifying a witness to testify as an expert. In *Miller v. Brass Rail Tavern, Inc.*, 541 Pa. 474, 480-81, 664 A.2d 525, 528 (1995), the Supreme Court stated:

The test to be applied when qualifying a witness to testify as an expert witness is whether the witness has any reasonable pretension to specialized knowledge on the subject under investigation. If he does, he may testify and the weight to be given to such testimony is for the trier of fact to determine.

Pa.R.E. 702 does not change the requirement that an expert’s opinion must be expressed with reasonable certainty. See *McMahon v. Young*, 442 Pa. 484, 276 A.2d 534 (1971).

Pa.R.E. 702 states that an expert may testify in the form of an “opinion or otherwise.” Much of the literature assumes that experts testify only in the form of an opinion. The language “or otherwise” reflects the fact that experts frequently are called upon to educate the trier of fact about the scientific or technical principles relevant to the case. See F.R.E. 702 advisory committee notes.

**Source**

The provisions of this Rule 702 amended April 1, 2004, effective May 10, 2004, 34 Pa.B. 2065. Immediately preceding text appears at serial pages (299641) to (299642).

**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.

**Comment**

Pa.R.E. 703 differs from F.R.E. 703 as discussed below. Pa.R.E. 703 is consistent with prior Pennsylvania case law.

F.R.E. 703 was amended on December 1, 2000, to add a balancing test that tilts against disclosure to a jury of otherwise inadmissible facts or data upon which an expert witness bases his or her opinion. In Pennsylvania, however, Pa.R.E. 705 requires an expert witness to testify as to the facts or data upon which the witness’s opinion is based, whether or not the facts or data would otherwise be admissible in evidence.

Historically, Pennsylvania courts limited the facts or data upon which an expert could base an opinion to those obtained from firsthand knowledge, or from substantive evidence admitted at trial. See, e.g. *Collins v. Hand*, 431 Pa. 378, 246 A.2d 398 (1968); *Murray v. Siegal*, 413 Pa. 23, 195 A.2d 790 (1963). In the case of *Commonwealth v. Thomas*, 444 Pa. 436, 282 A.2d 693 (1971), the Pennsylvania Supreme Court adopted a rule that allows a medical expert witness to offer an opinion that

is based, in part, on otherwise inadmissible hearsay, if it is of a type that is customarily relied on by the expert in the practice of the expert's profession.

Later case law expanded the evidential ruling in the *Thomas* case to various non-medical expert witnesses. See, e.g., *Steinhauer v. Wilson*, 336 Pa. Super. 155, 485 A.2d 477 (1984) (expert on construction costs); *Maravich v. Aetna Life & Casualty Co.*, 350 Pa. Super. 392, 504 A.2d 477 (1986) (fire marshal); *Kearns v. DeHaas*, 377 Pa. Super. 392, 546 A.2d 1226 (1988) (vocational expert); *In re Glosser Bros.*, 382 Pa. Super. 177, 555 A.2d 129 (1989) (tax accountant); *Commonwealth v. Bowser*, 425 Pa. Super. 24, 624 A.2d 125 (1993) (accident reconstruction expert).

Pa.R.E. 703 requires that the facts or data upon which an expert witness bases an opinion be "of a type reasonably relied upon by experts in the particular field . . ." Whether the facts or data satisfy this requirement is a preliminary question to be determined by the trial court under Pa.R.E. 104(a). If an expert witness relies on novel scientific evidence, Pa.R.C.P. No. 207.1 sets forth the procedure for objecting, by pretrial motion, on the ground that the testimony is inadmissible under Pa.R.E. 702, or Pa.R.E. 703, or both.

When an expert testifies about the underlying facts and data that support the expert's opinion and the evidence would be otherwise inadmissible, the trial judge, upon request shall or on his own initiative may instruct the jury to consider the facts and data only to explain the basis for the expert's opinion, and not as substantive evidence.

An expert witness cannot be a mere conduit for the opinion of another. Cases hold that it is error for an expert witness to relate the opinion of a non-testifying expert unless the witness has reasonably relied upon it, in part, in forming the witness's own opinion. See, e.g., *Foster v. McKeesport Hospital*, 260 Pa. Super. 485, 394 A.2d 1031 (1978); *Allen v. Kaplan*, 439 Pa. Super. 263, 653 A.2d 1249 (1995).

**Official Note:** Adopted September 11, 1998, effective October 1, 1998; September 11, 2003 Comment revised effective September 30, 2003.

#### Source

The provisions of this Rule 703 amended September 11, 2003, effective September 30, 2003, 33 Pa.B. 4784. Immediately preceding text appears at serial pages (285602) to (285603).

### Rule 704. Opinion on Ultimate Issue.

Testimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact.

#### Comment

Pa.R.E. 704 is substantively the same as F.R.E. 704(a) and is consistent with Pennsylvania law. F.R.E. 704(b) has not been adopted.

Under Pennsylvania law, the trial judge has discretion to allow lay opinion on the ultimate issue. The judge must balance the helpfulness of the testimony against its potential to cause confusion or prejudice. See *Lewis v. Mellor*, 259 Pa. Super. 509, 393 A.2d 941 (1978); Pa.R.E. 701 and its comment.

Pennsylvania law allows expert opinion testimony on the ultimate issue. See *Commonwealth v. Daniels*, 480 Pa. 340, 390 A.2d 172 (1978); *Cooper v. Metropolitan Life Ins. Co.*, 323 Pa. 295, 186 A. 125 (1936). As with lay opinions, the trial judge has discretion to admit or exclude expert opinions on the ultimate issue depending on the helpfulness of the testimony versus its potential to cause con-

fusion or prejudice. See *Kozak v. Struth*, 515 Pa. 554, 531 A.2d 420 (1987); *Commonwealth v. Brown*, 408 Pa. Super. 246, 596 A.2d 840 (1991).

Pa.R.E. 704 omits F.R.E. 704(b) which prohibits an expert from testifying with respect to whether the defendant in a criminal case did or did not have the mental state or condition constituting an element of the crime charged or of a defense thereto. When the Superior Court in *Lewis v. Mellor*, adopted F.R.E. 704 in 1978, it only contained part (a). F.R.E. 704(b) was added in 1984. The Pennsylvania Supreme Court has consistently held that expert psychiatric testimony is admissible to negate the specific intent to kill which is essential to first degree murder. See *Commonwealth v. Terry*, 513 Pa. 381, 521 A.2d 398 (1987); *Commonwealth v. Garcia*, 505 Pa. 304, 479 A.2d 473 (1984); *Commonwealth v. Walzack*, 468 Pa. 210, 360 A.2d 914 (1976).

### **Rule 705. Disclosure of Facts or Data Underlying Expert Opinion.**

The expert may testify in terms of opinion or inference and give reasons therefor; however, the expert must testify as to the facts or data on which the opinion or inference is based.

#### **Comment**

The text and substance of Pa.R.E. 705 differ significantly from F.R.E. 705. The Federal Rule generally does not require an expert witness to disclose the facts upon which an opinion is based prior to expressing the opinion. Instead, the cross-examiner bears the burden of probing the basis of the opinion. Pennsylvania does not follow the Federal Rule. See *Kozak v. Struth*, 515 Pa. 554, 560, 531 A.2d 420, 423 (1987) (declining to adopt F.R.E. 705, the Court reasoned that “requiring the proponent of an expert opinion to clarify for the jury the assumptions upon which the opinion is based avoids planting in the juror’s mind a general statement likely to remain with him in a jury room when the disputed details are lost.”) Relying on cross examination to illuminate the underlying assumption, as F.R.E. 705 does, may further confuse jurors already struggling to follow complex testimony. *Id.*

Accordingly, *Kozak* requires disclosure of the facts used by the expert in forming an opinion. The disclosure can be accomplished in several ways. One way is to ask the expert to assume the truth of testimony the expert has heard or read. *The Kroeger Co. v. W.C.A.B.*, 101 Pa. Cmwlth. 629, 516 A.2d 1335 (1986); *Tobash v. Jones*, 419 Pa. 205, 213 A.2d 588 (1965). Another option is to pose a hypothetical question to the expert. *Dietrich v. J.I. Case Co.*, 390 Pa. Super. 475, 568 A.2d 1272 (1990); *Hussy v. May Department Stores, Inc.*, 238 Pa. Super. 431, 357 A.2d 635 (1976).

The salient facts relied upon as the basis of the expert opinion must be in the record so that the jury may evaluate the opinion. See *Commonwealth v. Rounds*, 518 Pa. 204, 542 A.2d 997 (1988). The expert’s testimony regarding the facts or data on which the opinion is based is subject to Pa.R.E. 703.

### **Rule 706. Court Appointed Experts.**

Where the court has appointed an expert witness, the witness appointed shall advise the parties of the witness’ findings, if any. The witness may be called to testify by the court or any party. The witness shall be subject to cross-examination by each party, including a party calling the witness. In civil cases, the witness’ deposition may be taken by any party.

#### **Comment**

Pa.R.E. 706 differs from F.R.E. 706. Unlike the Federal Rule, Pa.R.E. 706 does not affect the scope of the trial court’s power to appoint experts. Pa.R.E. 706 provides only the procedures for obtaining the testimony of experts after the court has appointed them.

OPINION AND EXPERT TESTIMONY

**225 Rule 706**

Pennsylvania law provides for the appointment of experts in some instances. See 23 Pa.C.S.A. § 5104 (disputed paternity proceeding); Pa.R.C.P. 1515 & 1530(e) (in equity proceedings, court may appoint accountants and auditors as experts). In *Commonwealth v. Correa*, 437 Pa. Super. 1, 648 A.2d 1199 (1994), the Superior Court held that the trial court had inherent power to appoint an expert.

See also Pa.R.E. 614 (Calling and Interrogation of Witnesses By Court).

[Next page is 8-1.]

7-6

(299646) No. 349 Dec. 03

*Copyright © 2003 Commonwealth of Pennsylvania*