

EXAMINERS' ANALYSIS OF QUESTION NO. 2

The court should overrule all of Paul's objections. Pursuant to MRE 703,

"The facts or data in the particular case upon which an expert bases an opinion or inference shall be in evidence. This rule does not restrict the discretion of the court to receive expert opinion testimony subject to the condition that the factual bases of the opinion be admitted in evidence thereafter."

1. The Expert's Experience, Training, and Education Are Not Facts and Data Particular to the Case.

MRE 703, by its terms, applies to "facts or data in the particular case," not the expert's qualifications pursuant to MRE 702 to offer opinion testimony in general. "[B]ecause MRE 703 addresses only the facts or data 'in the particular case,' neither the current rule nor the proposed amendment requires independent proof of the sources of knowledge that qualify the witness as an expert in the first instance." Special Order entered October 10, 2000, 463 Mich 1212-1217, 1214 (2000) (Committee Report and Staff Comment amending MRE 703. MRE 703 revisions adopted March 25, 2003, effective September 1, 2003. 467 Mich xcv [2003]). Moreover, the court already determined the expert had sufficient experience, training, and education. It is within the expert's personal knowledge for him to testify to those qualifications in order to put them "in evidence," if necessary.

2. The Court May Conditionally Allow the Expert's Testimony Under MRE 703 Provided Denise Calls Wilma as a Witness.

As expressly stated in MRE 703, the court has discretion to allow the expert's testimony subject to the condition that

MRE 703 differs from FRE 703 because MRE 703 expressly requires that the facts and data on which the expert relies "be in evidence." FRE 703, in contrast, does not require that facts or data be in evidence or even admissible, provided they are "the kind of facts or data" on which experts in the particular field "would reasonably rely."

Denise must call Wilma as a witness before the case is submitted to the jury. Denise cannot rely on the former testimony exception under MRE 804, because that exception applies only to unavailable witnesses, and the parties agree that Wilma is available to testify at trial.

3. The Certified Hospital Record Is An Exception to Hearsay As Record of Regularly Conducted Activity Pursuant to MRE 803(6) .

MRE 803(6) excepts from hearsay:

"Records of Regularly Conducted Activity. A memorandum, report, record, or data compilation, in any form, of acts, transactions, occurrences, events, conditions, opinions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness, or by certification that complies with a rule promulgated by the supreme court or a statute permitting certification, unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness. The term "business" as used in this paragraph includes business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit."

At least for purposes of ascertaining the hospital diagnosis, the hospital submission contains the regularly recorded entries of each medical provider or other employee rendering a hospital service to Paul during the course of his stay. Paul's objection to the record is not that the entries were not made at or near the time in question, that they lacked trustworthiness, or that they otherwise were not a record of regularly conducted activity, his only objection was that the particular surgeon who recorded the diagnosis is unavailable for cross-examination at trial. But MRE 803(6) allows any custodian of the record or other qualified witness to testify at trial or through a certification, which is what has occurred here. The certified hospital record is a "record ... of ... transactions [and] diagnoses, made at or near the time by ... a person with knowledge [and] kept in the course of a regularly conducted business activity ... as shown by ... certification that complies with a rule promulgated by the supreme court ... per-

mitting certification." Thus, while hearsay, it falls within a recognized exception and is admissible.

4. The Certified Hospital Record Is Self-Authenticating Under MRE 902.

The hospital record does not require authentication under MRE 901 because it is self-authenticating. Pursuant to MRE 902, as amended, "extrinsic evidence of authenticity is not required with respect to . . . Certified Records of Regularly Conducted Activity." MRE 902(11). In order to be self-authenticating, the record (1) must be admissible under MRE 803(6); and (2) accompanied by a sworn declaration that it was made at or near the time of the occurrence, kept in the course of the regularly conducted business activity and that it was the regular practice of the business activity to make the record. In addition, before offering it into evidence, the offering party must have given the adverse party advance notice and made the record and sworn declaration available for inspection.

Because all of the foregoing occurred in this case, the record is self-authenticating. It is immaterial that the hospital surgeon is now deceased or that Paul decided against inspecting it, as long as he was given the opportunity. The sworn declaration can be made by the hospital's records custodian or other qualified person, *id.*, which is what has occurred here.