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By John C. Mitchell\*

# Opinion, Expert Testimony Rules Have Major Impact on State Law

## INTRODUCTION

The rules contained in Article VII, "Opinion and Expert Testimony," of the Proposed Nebraska Rules of Evidence (hereinafter "Nebraska Rule[s]," "Nebraska proposal" or the "Rule[s]") are for the most part identical to the Proposed Federal Rules of Evidence (hereinafter "Federal Rule[s]" or "federal proposal") 701-706. The impact of these Rules on Nebraska law and practice is, at times, major and such impact is the topic of this article.

## RULE 701

Rule 701 is the only rule contained in Article VII which completely reflects the existing law of Nebraska. It maintains the position that "if the witness is not testifying as an expert, his testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based upon the perceptions of the witness, and (b) helpful to a clear understanding of his testimony on the determination of a fact in issue."

## RULE 702

Rule 702, "Testimony by Experts," may not be significantly different than prior Nebraska law.

The Nebraska Supreme Court in *McNaught v. New York Life Insurance Co.*<sup>1</sup> stated:

Expert testimony is proper and competent concerning matters involving special knowledge, science, or skill upon subjects not

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1. 143 Neb. 220, 12 N.W.2d 108 (1943).

within the realm of the ordinary experience of jurors, and which requires special research, experience and study to understand.<sup>2</sup>

In a later statement, the court in *Kohler v. Ford Motor Co.*<sup>3</sup> commented:

To warrant the use of expert testimony . . . two elements are required. First, the subject of the inference must be so distinctively related to some science, profession, business or occupation as to be beyond the ken of the average layman, and second, the witness must have such skill, knowledge or experience in that field or calling as to make it appear that his opinion or inference will probably aid the trier in his search for truth.<sup>4</sup>

The Federal Advisory Committee note to Federal Rule 702 stated:

The rule is broadly phrased. The fields of knowledge which may be drawn upon are not limited merely to the "scientific" and "technical" but extend to all "specialized" knowledge. Similarly, the expert is viewed, not in a narrow sense, but as a person qualified by "knowledge, skill, experience, training or education."

The rules stated in the above Nebraska cases seem to limit or imply limitations as to the type of experts that qualify which are greater than the limitations set out by Rule 702. The proposed Rule would eliminate that distinction.

Similarly, the proposed Rule allows an expert witness to testify if his testimony will "assist" the trier of fact. The *McNought* case restricted testimony to those areas that were "not within the realm of the ordinary experience of jurors."<sup>5</sup> Such a statement could be construed as saying that an expert cannot testify if his expert testimony would only "assist" the jurors' understanding. The proposed Rule would do away with such a suggested construction.

The language of Rule 702 meriting the closest consideration is the statement that a qualified expert witness "may testify . . . in the form of an opinion or otherwise" (emphasis added). The meaning, and therefore the significance, of "or otherwise" is unlimited and warrants imaginative consideration. It would at least assumably include the use of demonstrative evidence, the conducting of experiments and the exposition of principles relevant to the issues.

### RULE 703

Proposed Rule 703 would have limited impact on present Nebraska law. The underlying intent of the rule is probably ex-

2. *Id.* at 229, 12 N.W.2d at 113.

3. 187 Neb. 428, 191 N.W.2d 601 (1971).

4. *Id.* at 439, 191 N.W.2d at 608, quoting C. McCORMICK, HANDBOOK OF THE LAW OF EVIDENCE § 13 at 28 (2d ed. 1970).

5. 143 Neb. at 229, 12 N.W.2d at 113.

pressed best by the Federal Advisory Committee's note to Federal Rule 703. The Committee stated:

Facts or data upon which expert opinions are based may, under the rule, be derived from three possible sources. The first is the firsthand observation of the witness, with opinions based thereon traditionally allowed. A treating physician affords an example. Rheingold, *The Basis of Medical Testimony*, 15 *Vand. L. Rev.* 473, 489 (1962). Whether he must first relate his observations is treated in Rule 705. The second source, presentation at trial, also reflects existing practice. The technique may be the familiar hypothetical question or having the expert attend the trial and hear the testimony establishing the facts. Problems of determining what testimony the expert relied upon, when the latter technique is employed and the testimony is in conflict, may be resolved by resort to Rule 705. The third source contemplated by the rule consists of presentation of data to the expert outside of court and other than by his own perception. In this respect the rule is designed to broaden the basis for expert opinions beyond that current in many jurisdictions and to bring the judicial practice into line with the practice of the experts themselves when not in court. Thus 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. Rheingold, *supra*, at 531; McCormick, § 15. A similar provision is California Evidence Code § 801(b).

The rule also offers a more satisfactory basis for ruling upon the admissibility of public opinion poll evidence. Attention is directed to the validity of the techniques employed rather than to relatively fruitless inquiries whether hearsay is involved. See Judge Feinberg's careful analysis in *Zippo Mfg. Co. v. Rogers Imports, Inc.*, 216 *F. Supp.* 670 (S.D.N.Y. 1963). See also Blum et al., *The Art of Opinion Research: A Lawyer's Appraisal of an Emerging Service*, 24 *U. Chi. L. Rev.* 1 (1956); Bonyng, *Trademark Surveys and Techniques and Their Use in Litigation*, 48 *A.B.A.J.* 329 (1962); Zeisel, *The Uniqueness of Survey Evidence*, 45 *Cornell L.Q.* 322 (1960); Annot., 76 *A.L.R.2d* 919.

If it be feared that enlargement of permissible data may tend to break down the rules of exclusion unduly, notice should be taken that the rule requires that the facts or data "be of a type reasonably relied upon by experts in the particular field." The language would not warrant admitting in evidence the opinion of an "accidentologist" as to the point of impact in an automobile collision based on statements of bystanders since this requirement is not satisfied. See Comment, *Cal. Law Rev. Comm'n, Recommendation Proposing an Evidence Code 148-150* (1965).

As the Federal Advisory Committee notes, the third source of

information for the experts' opinion (that is, data presented to the expert outside of the courtroom) is the significant change.

Nebraska law will not be substantially affected in that credence has been given to the principle previously by the Nebraska Supreme Court. In *Houghton v. Houghton*,<sup>6</sup> the court held that the testimony of a doctor as to blood tests was admissible even though the doctor did not personally perform the test, where the doctor stated that the blood test was done in a normal procedure by experienced people working under his direction and the doctor relied upon their record.

The proposed Rule 703, when accompanied by proposed Rule 702, would seem to greatly magnify the use of an expert in all types of cases.

#### RULE 704

Proposed Rule 704 appears on the surface to make a substantial change in Nebraska law.

In *Stillwell v. Schmoker*,<sup>7</sup> the court stated:

As we said in *Danner v. Walters*, 154 Neb. 506, 48 N.W.2d 635: "One of the objections most frequently raised against the admission of expert opinion testimony is that the opinion offered invades the province of the jury. This objection is indeed the basis of the general rule of evidence that the testimony of witnesses must be confined to concrete facts perceived by the use of their senses as distinguished from opinions and conclusions deducible from evidentiary facts. In many cases it is asserted as a broad general rule, often assumed to be an inflexible rule of law, that while an expert may be permitted to express his opinion, or even his belief, he cannot give his opinion upon the precise or ultimate fact in issue before the jury, which must be determined by it. See, 20 Am. Jur., Evidence, § 782, p. 653, and cases cited under note 16 thereof; *Neal v. Missouri P. Ry. Co.*, 98 Neb. 460, 153 N.W. 492; *Gross v. Omaha & C.B. Street Ry. Co.*, 96 Neb. 390, 147 N.W. 1121, L.R.A. 1915A 742.<sup>8</sup>

The change in Nebraska law is limited, however, in that the general rule expressed by the court in *Stillwell* has not been considered an invariable one.

The Nebraska Supreme Court in *Petracek v. Haas O.K. Rubber Welders, Inc.*<sup>9</sup> stated the following with reference to the "general rule":

6. 179 Neb. 275, 137 N.W.2d 861 (1965).

7. 175 Neb. 595, 122 N.W.2d 538 (1963).

8. *Id.* at 599-600, 122 N.W.2d at 541.

9. 176 Neb. 438, 126 N.W.2d 466 (1964).

This however is not an invariable rule. In *McNaught v. New York Life Ins. Co.*, on motion for rehearing, 143 Neb. 220, 12 N.W. 2d 108, a departure is contained. It is there stated: "It is not a valid objection to the evidence of an expert that the answer covers the whole ground the jury are to decide, if the case is one to be wholly resolved by such evidence." See, also, *Medelman v. Stanton-Pilger Drainage Dist.*, 155 Neb. 518, 52 N.W.2d 328; *Brown v. Globe Laboratories, Inc.*, 165 Neb. 138, 84 N.W.2d 151.<sup>10</sup>

It has always been recognized in Nebraska that under ordinary circumstances, expert opinion evidence is to be considered and weighed by triers of fact like any other testimony.<sup>11</sup> If the jury is capable of performing its duties, it seems consistent to allow expert testimony as to the ultimate issue also.

#### RULE 705

Proposed Rule 705 would allow an expert to "testify in terms of opinion or inference and give his reasons therefor without prior disclosure of the underlying facts or data, unless the judge requires otherwise. The expert may in any event be required to disclose the underlying facts or data on cross-examination."

The Rule thus gives value to the experts' opinion based on the foundation that has been laid as to his expertise. The burden lies on the cross-examiner to discover the underlying facts or data and the negate or mitigate the probative value of the opinion.

In its comment to Federal Rule 705, the Federal Advisory Committee noted:

The hypothetical question has been the target of a great deal of criticism as encouraging partisan bias, affording an opportunity for summing up in the middle of the case, and as complex and time consuming. Ladd, *Expert Testimony*, 5 Vand. L. Rev. 414, 426-527 (1952). While the rule allows counsel to make disclosure of the underlying facts or data as a preliminary to the giving of an expert opinion, if he chooses, the instances in which he is required to do so are reduced. This is true whether the expert bases his opinion on data furnished him at secondhand or observed by him at firsthand.

The elimination of the requirement of preliminary disclosure at the trial of underlying facts or data has a long background of support. In 1937 the Commissioners on Uniform State Laws incorporated a provision to this effect in their Model Expert Testimony Act, which furnished the basis for Uniform Rules 57 and 58, Rule 4515, N.Y. CPLR (McKinney 1963) provides:

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10. *Id.* at 446, 126 N.W.2d at 470.

11. *Lansman v. Department of Rds.*, 177 Neb. 119, 128 N.W.2d 569 (1964); *Department of Rds. v. Dillon*, 175 Neb. 444, 122 N.W.2d 223 (1963); *In re Dumbier's Estate*, 170 Neb. 541, 103 N.W.2d 797 (1960).

“Unless the court orders otherwise, questions calling for the opinion of an expert witness need not be hypothetical in form, and the witness may state his opinion and reasons without first specifying the data upon which it is based. Upon cross-examination, he may be required to specify the data . . . .”

See also California Evidence Code, section 802; Kansas Code of Civil Procedure, §§ 60-456, 60-457; New Jersey Evidence Rules 57, 58.

If the objection is made that leaving it to the cross-examiner to bring out the supporting data is essentially unfair, the answer is that he is under no compulsion to bring out any facts or data except those unfavorable to the opinion. The answer assumes that the cross-examiner has the advance knowledge which is essential for effective cross-examination. This advance knowledge has been afforded, though, imperfectly, by the traditional foundation requirement. Rule 26(b)(4) of the Rules of Civil Procedure, as revised, provides for substantial discovery in this area, obviating in large measure the obstacles which have been raised in some instances to discovery of findings, underlying data, and even the identity of the experts. Friedenthal, *Discovery and Use of an Adverse Party's Expert Information*, 14 *Stan. L. Rev.* 455 (1962).

These safeguards are reinforced by the discretionary power of the judge to require preliminary disclosure in any event.

Reference should be made to section 25-12,117 of Nebraska's Uniform Composite Reports as Evidence Act.<sup>12</sup> The statutes therein provide and require that notice be given if a written report covered by the Act is to be used in trial and that the report be furnished to the adverse party or at least be made available for his use.

### RULE 706

Proposed Rule 706, as to court appointed experts, would express specific provisions in this area which, for the most part, have not been considered by Nebraska statutes<sup>13</sup> or case law.

Subsection (a) requires the parties to make application while allowing the judge to move on his own accord when he feels the necessity exists. It contains the fairness of allowing the parties to show cause why an expert should not be appointed while placing the final decision with the trial judge.

12. NEB. REV. STAT. § 25-12,117 (Reissue 1943).

13. *But see* NEB. REV. STAT. §§ 29-1804.11 (authorizing the county board to fix compensation for, *inter alia*, expenses for experts necessary for the public defender to represent his clients), 29-1804.12 (authorizing appointed counsel representing an indigent felony defendant to apply for reasonable expenses), 29-1920 (taxing reasonable costs of indigent defendants against the prosecuting authority).

Subsection (b) of the proposed Rule deletes from the language of Federal Rule 706 any reference to cases involving just compensation under the fifth amendment for obvious reasons. The Nebraska Rule also varies from the Federal Rule in that the Nebraska Rule provides that compensation for a court-appointed witness be provided by the parties in equal portions in all civil cases rather than in "such proportions . . . as the judge directs." The source of compensation in criminal cases remains the same as that stated in the Federal Rule.

Subsection (b) further provides that an expert is entitled to "reasonable compensation." As to what measure should be used, various criminal cases provide that the judge determine the amount of compensation by use of the standard set out in *United States v. Pope*.<sup>14</sup> It was there held that the rate of compensation for defendant's witness be determined by the fair and reasonable charge in the locality in which the services were rendered and testimony given. Various Nebraska civil cases<sup>15</sup> exist to the effect that a witness who testifies as an expert on a subject requiring special knowledge and skill is, in the absence of special contract, entitled only to the statutory fee.<sup>16</sup>

In *Hefti v. Hefti*<sup>17</sup> it was stated:

"There is . . . no provision in the law for the payment of expert witness fees. The expert witnesses are therefore allowed the usual and lawful witness fee, and no more. *Main v. Sherman County*, 74 Neb. 155." In that connection, only the usual and lawful witness fee for the physician involved should be assessed as costs herein, as provided by section 33-139, R.R.S. 1943.<sup>18</sup>

It seems unrealistic to limit the compensation paid to experts to the statutory fee paid to ordinary witnesses. A reasonable and ordinary fee determined by the judge seems to be the logical answer.

The standard used in *United States v. Pope*<sup>19</sup> is suggested as an appropriate means to measure the rate of compensation in all cases.

Subsections (c) and (d) of the proposed Rule 706 cover areas

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14. 251 F. Supp. 234 (D. Neb. 1966).

15. *Anderson v. Department of Rds.*, 184 Neb. 467, 168 N.W.2d 522 (1969); *Hefti v. Hefti*, 166 Neb. 181, 88 N.W.2d 231 (1958).

16. NEB. REV. STAT. § 33-139 (Reissue 1968).

17. 166 Neb. 181, 88 N.W.2d 231 (1958).

18. *Id.* at 183, 88 N.W.2d at 233, quoting *Ulaski v. Morris & Co.*, 106 Neb. 782, 786, 184 N.W. 946, 947 (1921).

19. 251 F. Supp. 234 (D. Neb. 1966).

on which past Nebraska cases have been silent. Said sections provide as follows:

(c) **Disclosure of Appointment.** In the exercise of his discretion, the judge may authorize disclosure to the jury of the fact that the court appointed the expert witness.

(d) **Parties' Experts of Own Selection.** Nothing in this rule limits the parties in calling expert witnesses of their own selection.