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Of General Interest*****696 EXPERT WITNESS TESTIMONY IN SECURITIES CASES**

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Congress enacted the Private Securities Reform Act in 1995 to curb perceived abuses in securities class action litigation. The Reform Act requires proposed class representatives to satisfy certain higher standards in order to maintain such actions, including generally more stringent pleadings requirements. [FN1] Recently, Congress passed the Securities Litigation Uniform Standards Act of 1998 to stem the tide of securities class actions being filed in state court in reaction to these more stringent requirements. [FN2] That Act requires certain securities class actions to be adjudicated in federal court. The Uniform Act, however, generally applies to class actions concerning nationally traded securities. [FN3] Moreover, it is likely that state courts will remain a significant forum for securities actions because of the perceived more difficult standards for plaintiffs by Congress and the federal judiciary. [FN4] Securities cases present many complex trial issues for Michigan state courts, including the scope of permissible expert witness testimony.

Expert testimony in the securities area is particularly attractive because it is highly regulated, dominated by specialized terms, and is generally unfamiliar to jurors and many trial judges. However, securities cases pose the inherent risk of improperly usurping the role of the court to interpret and define the law. As recognized by the Second Circuit, "[w]ith the growth of intricate securities litigation over the past forty years, we must be especially careful not to allow trials before juries to become battles of paid advocates posing as experts on the respective sides concerning matters of domestic law." [FN5]

There is little Michigan authority considering the permissible scope of expert testimony in securities cases. The general analytical framework for expert witness testimony does not have clear and practical drawn lines. Indeed, some principles appear to be artificial and create uncertainty as to how they may be applied to, or impact upon, the highly technical area of the securities industry. Nonetheless, principles established in various Michigan court decisions suggest that such expert testimony is permissible when it concerns industry practice or is phrased in terms of factual circumstances within the expert's experience (such as that certain trading practices have had a particular result on the trading price of shares). Often whether such testimony is admissible is simply the product of the form of the question asked.

THE LEGAL LANDSCAPE

Permissible expert witness opinion testimony concerning the merits of a case is first defined by MRE 704, which is identical to Rule 704 of the Federal Rules of Evidence. Michigan Rule 704 provides that: "[t]estimony 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." Michigan courts have defined the ultimate issue of fact as questions that "concern

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legal definitions and the effects ascribed to the basic facts or combinations of basic facts as found." [FN6] However, Rule 704 generally is interpreted not to allow experts to offer opinions embodying legal conclusions or the ultimate question of liability. [FN7] The Sixth Circuit recently formulated the intended scope of Rule 704: "When the rules speak of an expert's testimony embracing the ultimate issue, the reference must be stating opinions that suggest the answer to the ultimate issue or that give the jury all the information from which it can draw inferences as to the ultimate issue." [FN8]

Michigan courts generally limit expert witness opinion testimony to avoid undue invasion of the province of both the jury and the judge.

Undue Invasion of Province of Jury

Michigan courts typically do not permit an expert to "tell the jury how to decide a *697 case." [FN9] Although the exact parameter of this rule is somewhat confused by the application of the courts, "where a jury is as capable as anyone else of reaching a conclusion on certain facts, it is error to permit a witness to give his opinion or interpretation of the facts because it invades the province of the jury." [FN10]

For example, recently in *Koenig v City of South Haven*, [FN11] the defendant was a government employee who claimed immunity from tort liability arising from a claim of malfeasance in the maintenance of a pier on Lake Michigan. The applicable statute, MSA 3.996(107)(2)(c), provides immunity for conduct that does not amount to "gross negligence." The statute defines "gross negligence" as conduct so "reckless as to demonstrate a substantial lack of concern for whether an injury results." The plaintiff's expert offered an opinion whether the defendant acted "so recklessly as to demonstrate a substantial lack of concern as to whether an injury resulted in this case." The Court of Appeals affirmed the trial court's ruling prohibiting the testimony as the opinion "could have unduly invaded the province of the jury because the determination of whether the individual defendants were grossly negligent constituted the primary question for jury resolution at trial." [FN12] According to the court, the "jury was fully competent to make this determination without the opinion of plaintiff's expert witness." [FN13]

Koenig reached this conclusion by relying upon the analysis in *People v Drossart*, [FN14] where the Court of Appeals held that expert testimony concerning such issues as "a party's negligence or nonnegligence, capacity or noncapacity to execute a will or deed, simple versus gross negligence, the criminal responsibility of an accused, or his guilt or innocence" was inadmissible because the jury is "as capable as anyone else of reaching a conclusion." [FN15] However, *Drossart* stated that expert opinion *698 on the ultimate issue to be decided by the jury is admissible "where the expert's particular training and experience in a special field of activity--such as the study of mental diseases--is largely unfamiliar to the jury." [FN16] Thus, a psychiatrist can opine on the ultimate issue of fact, the defendant's sanity, because it is not considered to invade the province of the jury. [FN17]

Contrary to the rule concerning the testimony of an expert witness regarding a defendant's sanity, Michigan courts have limited the permissible expert testimony concerning the "battered spouse syndrome" or postincident behavior condition of children. Such witnesses are not allowed to testify that the alleged victim in the case actually suffered from the syndrome or condition. [FN18] The difference in the treatment of such testimony versus the psychiatric testimony concerning sanity appears to be rooted in a concern regarding the reliability of the diagnosis of these syndromes and conditions. [FN19] However, even in these cases, the Supreme Court permitted the expert to testify concerning the factual circumstances of the syndrome or condition known to the expert based upon the expert's experience. In *People v Christel*, [FN20] expert testimony concerning "battered spouse syndrome" was admissible for the limited purpose of explaining "the uniqueness of specific behavior brought out at trial." [FN21] In *People v Peterson*, [FN22] the court held that "the prosecution may present evidence, if relevant and helpful, to generally explain the common postincident behavior of children who are victims of sexual abuse." [FN23]

Consistent with these opinions, Koenig recognized that, although opinions concerning whether the defendant acted negligently were inadmissible, opinions concerning the cause of an accident or the likely events surrounding an accident are admissible. [FN24]

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Michigan authority is consistent with federal decisions interpreting Rule 704 of the Federal Rules of Evidence. In *Berry v City of Detroit*, [FN25] the court determined that an expert could not opine whether the discipline policies of the Detroit Police Department were "deliberately indifferent" to the welfare of the city's citizens, which was the ultimate issue to be decided by the jury. [FN26] The Sixth Circuit stated that the expert's testimony would have been consistent with Rule 704, and not improperly invade the province of the jury, had the expert testified that discipline was lax and what he believed to be the consequences of lax discipline. [FN27]

Undue Invasion of the Province of the Judge

Michigan courts generally prohibit expert testimony opining the applicable law or the applicable legal standard. [FN28] Determining and enunciating the requirements or standards of the law is the exclusive province of the judge. [FN29] Moreover, such testimony is likely to confuse the jury. [FN30] Thus, an expert witness cannot testify about the applicable law of criminal responsibility for insanity, [FN31] the legal sufficiency of a document, [FN32] or the proper interpretation of the law. [FN33]

Consistent with federal cases, however, Michigan courts have permitted experts to testify concerning the ultimate issue with reference to the applicable legal terms, provided the legal standards are properly explained by the trial court or examining attorney as "there can be no danger of usurping the role of the trial judge with questions of law." [FN34]

DECISIONS CONCERNING EXPERT TESTIMONY IN SECURITIES CASES

The concern for unduly invading the province of the jury and the judge form the primary limitations on expert testimony in securities cases. The prevailing view of these decisions is that an expert cannot testify about the requirements of the securities laws or the meaning of particular terms set forth in the securities laws. These decisions have permitted expert opinion testimony concerning the practice in the securities industry and general factual circumstances within the expert's knowledge.

Reported Michigan decisions concerning the permissible scope of expert witness testimony in securities cases are few. The only notable decision is *People v Lyons*. [FN35] In *Lyons*, the defendant was charged with, inter alia, fraudulent practices under the Michigan Uniform Securities Act ("MUSA") [FN36] and failure to obtain a license as a broker, dealer or agent. The central issue was whether the investments at issue were "securities" under the MUSA. The trial court permitted the prosecution to introduce the testimony of a former auditor-investigator of the Michigan Corporations and Securities Bureau as an expert witness on securities law. The expert testified concerning the legal definition of a "security" under the MUSA and that the transactions at issue were securities within the meaning of the Act.

In dicta, the Court of Appeals stated that such testimony was inadmissible, citing the "general rule" that "courts will not permit even expert witness testimony on a question of domestic law because it is the exclusive responsibility of the trial judge to find and interpret the applicable law." [FN37] Moreover, the court expressed concern for jury confusion: "Allowing witnesses to testify as to questions of law invites jury confusion and the possibility that the jury will accept as law the witness's conclusion rather than the trial judge's instructions." [FN38]

Lyons is consistent with federal decisions. In *Molecular Technology Corp v Valentine*, [FN39] the Sixth Circuit found error in the trial court's decision to permit plaintiff's expert to testify concerning the requirements of various federal securities laws. Such testimony unduly invaded the province of the judge: "This court has repeatedly held that it is impermissible for a trial judge to delegate his duty to determine the law of the case to an expert." [FN40] The court also expressed its concern that expert opinion testimony about the requirements of the law will cause jury confusion concerning the applicable legal standards. [FN41]

Similarly, the Second Circuit in *United States v Scop*, [FN42] reversed a conviction of securities fraud because of

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inadmissible expert witness testimony that unduly invaded the province of both the judge and jury. *699 The expert was the chief investigator for the SEC regional office who testified that the defendants were participants in "fraudulent manipulation practices" and were "material participants," those terms comprising the ultimate legal issue to be decided by the jury. Applying principles recognized by Michigan courts, [FN43] the court ruled that such testimony was beyond the permissible scope of Rule 704 because the opinions embodied legal conclusions phrased in terms of inadequately explored legal criteria [FN44]--i.e., "[m]anipulation,' 'scheme to defraud,' and 'fraud' are not self-defining terms but rather have been the subject of diverse judicial interpretations." [FN45] In so ruling, the court indicated that had the expert, Whitten, phrased his testimony in terms of the factual circumstances within his expertise, rather than in the precise legal terms, the expert could have properly offered the same substantive opinion. The court stated:

"Had Whitten merely testified that controlled buying and selling of the kind alleged here can create artificial price levels to lure outside investors, no sustainable objection could have been made. Instead, however, Whitten made no attempt to couch the opinion testimony at issue in even conclusory factual statements but drew directly upon the language of the statute and accompanying regulations concerning "manipulation" and "fraud." In essence, his opinions were legal conclusions that were highly prejudicial and went well beyond his province as an expert in securities trading. Moreover, because his opinions were calculated to "invade the province of the court to determine the applicable law and to instruct the jury as to that law" ... they could not have been helpful to the jury in carrying out its legitimate functions." [FN46]

This holding is consistent with Michigan decisions that have prohibited the expert from testifying that the victim or defendant suffered from a certain syndrome or condition, but permit the expert to generally describe the condition or syndrome. [FN47] Further, it is consistent with Michigan cases which recognized that, while the expert may not testify that a defendant was negligent, the expert may testify concerning his opinion of the cause of an accident. [FN48]

Michigan courts also have long approved testimony about custom and practice in industry in order to evaluate conduct. [FN49] Consistent with those principles, federal courts have permitted expert witness testimony concerning the practice in the securities industry. In *Marx & Co, Inc v Diners' Club, Inc*, [FN50] the Second Circuit held that a securities law expert could testify about the practice in the industry for the steps needed to effectuate a registration statement. The court stated:

"This testimony concerned the practices of lawyers and others engaged in the securities business. Testimony concerning the ordinary practices of those engaged in the securities business is admissible under the same theory as testimony concerning the ordinary practices of physicians or concerning other trade customs: to enable the jury to evaluate the conduct of the parties against the standards of ordinary practice in the industry." [FN51]

The expert in *Diners' Club*, however, did not limit his testimony to the custom and practice in the industry, but also asserted impermissible opinions concerning the legal standards which he believed were derived from the parties' contract. Consistent with Michigan authority, [FN52] the *Diners' Club* court found that such testimony improperly invaded the province of the judge. [FN53] The court emphasized the distinction between permissible opinion testimony on custom and practice in the industry and impermissible opinion testimony on the applicable legal standards:

"In the securities law field ... there are areas in which the expert can testify he may testify how the bid and asked price of an over-the-counter security gets into the "pink sheets," how price stabilization works, or how a stock exchange specialist operates. But these examples have their counterparts in non-admissibility. The expert, for example, may tell the jury whether he thinks the method of trading was normal, but not, in our view, whether it amounted to illegal manipulation under Section 9 of the Securities Exchange Act of 1934. He may explain the nature of an option contract, or of a convertible preferred stock, but we doubt that he should be allowed to testify that under an option agreement one party or the other has acted unlawfully, or that a corporation should be held liable because through a recapitalization it changed the conversion ratio and that this was a breach of contract." [FN54]

Although expert witness testimony on securities industry practice is permissible, such testimony becomes inadmissible if the expert is asked to opine on the industry practice in the context of the particular facts of the case.

In *United States v Bilzerian*, [FN55] the defendant was charged with filing false Schedule 13D's based upon the fact that he indicated that the source of funds for the stock purchases was "personal funds." The funds were not the defendant's but were obtained through investors with whom the defendant had a profit-sharing and guarantee agreement through a series of trusts. The defense counsel sought to elicit the testimony of a securities expert that the phrase "personal funds," as generally understood in the securities industry, includes funds derived from loans of the type received by the defendant. The defense argued that such testimony would show the defendant's good faith. The Second Circuit affirmed the trial court's exclusion of the expert's testimony as the court found that the proffered testimony related directly to the issue of whether the defendant's actual Schedule 13D disclosures complied with the applicable legal requirements, and thus was an impermissible instruction governing law. [FN56] As in *Diners' Club*, the court focused upon the form of the questions asked of the expert:

"Although testimony concerning the ordinary practices in the securities industry may be received to enable the jury to evaluate a defendant's conduct against the standards of accepted practice ... testimony encompassing an ultimate legal conclusion based upon the facts of the case is not admissible, and may not be made so simply because it is presented in terms of industry practice. Several hypothetical questions posed to Mr. Spencer included the particular facts alleged in the indictment, blurring the line between testimony regarding industry practice and an opinion on the legality of defendant's conduct." [FN57]

Bilzerian, however, affirmed the admission of the testimony of the prosecution's expert witness concerning the general requirements of the Schedule 13D. The court reasoned that the testimony did not unduly invade the province of the judge because the expert did not give an opinion *700 as to whether the defendant violated the securities laws, but provided "general background" on federal securities regulation and the filing requirements of Schedule 13D. [FN58] Central to this holding is the fact that the trial court limited much of the expert's testimony to reading from the Schedule 13D and that the trial court instructed the jury that the testimony simply was for background and not an opinion as to what the law requires. [FN59]

Nonetheless, *Bilzerian* is inconsistent in its approach. Background testimony concerning the requirements of the federal securities laws necessarily suggests a certain interpretation of those laws--presumably one favorable to the prosecution. Just as the defense expert was prohibited from suggesting to the jury the applicable legal standard, the prosecution's expert similarly should have been precluded for suggesting the legal requirements. Background information concerning the requirements of the securities laws should come from the court in the terms of an instruction given to the jury at an appropriate juncture in the trial.

PERMISSIBLE SCOPE OF EXPERT TESTIMONY

The limitations Michigan courts have placed upon expert testimony clearly prohibit an expert witness in a securities case from testifying about the applicable legal standard or opining about his understanding of the legal terms that govern an action. However, the principles set forth in various Michigan decisions are consistent with federal decisions that have permitted expert testimony in securities cases concerning the custom and practice in the securities industry and factual circumstances that are within the witness's expertise. Therefore, the practitioner should consider the utility of such testimony and the best approach to framing the testimony to ensure its admissibility. Additionally, an argument can be made that, under certain circumstances, the expert also should be permitted to offer an opinion about the ultimate issue, provided the legal standards are adequately defined by the questioning attorneys or the court. However, such testimony is strongly challenged by concerns that the expert unduly invades the provinces of the judge and jury, and that the trial will become a battle of "paid advocates posing as experts." [FN60]

Testimony of Practices in the Securities Industry

An expert's testimony regarding the practice in the securities industry can assist the jury in understanding the business, the nature of the transaction, and the reasons behind a party's conduct. Such testimony generally should be admissible unless the questions are framed to encompass the ultimate legal conclusion. [FN61]

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For example, a plaintiff asserts securities fraud claims alleging that certain facts were omitted from the offering materials, prospectus, or public disclosures. The plaintiff's claims require a showing that the alleged omitted facts were "material." [FN62] Expert testimony concerning whether the omitted facts are "material" would likely be inadmissible. [FN63] An expert witness should be permitted to testify concerning the practice in the securities industry with respect to the disclosure of the facts in question. In other words, if the similar facts have been frequently omitted from offering materials in other unrelated transactions, then the expert should be permitted to testify about that practice. [FN64] Similarly, if a plaintiff is challenging the timing of a particular disclosure, an expert may be helpful in testifying that numerous unrelated companies made similar disclosures in a similar time frame.

Accordingly, rather than having the expert in *People v Lyons*, [FN65] testify that the investment at issue was a "security" under the Michigan Uniform Securities Act, the expert should have been permitted to testify--if such facts were available--that such investments are typically treated as "securities" in the securities industry.

In securities arbitrations, expert witnesses commonly are asked to opine whether the transactions at issue were "suitable"--i.e., the broker's recommendation was reasonably suited to the client's **investment objectives** and financial situation--or whether the account was improperly "churned"--i.e., excessively traded. While such testimony is regularly permitted in arbitration, where the rules of evidence do not apply, such testimony should not be generally permissible in court because:

- . It unduly evades the province of the jury by telling the jury how to decide the ultimate issue, and
- . It unduly evades the province of the judge as the expert necessarily defines legal terms that should only be defined by the judge. However, an expert could properly testify about general industry practices and standards concerning suitability or churning, but not whether the particular transactions at issue violate those standards.

The central challenge for the practitioner presenting such testimony is to form his or her questions to avoid encompassing the ultimate legal conclusion. The defense in *United States v Bilzerian*, [FN66] apparently asked *702 several hypotheticals that included the facts of the case which required the expert to offer an opinion based upon those facts as applied to the industry practice. The Second Circuit found such testimony to be inadmissible. [FN67] Questions limited to the expert's knowledge of the industry practice should not be objectionable.

One interesting aspect of such testimony is practical consequence on the province of the judge to determine and enunciate the law. Experts generally are prohibited from testifying about the applicable legal standards or the requirements of the law. [FN68] Industry "practice" in the securities area typically is established by lawyers advising clients about the requirements of the law. Indeed, federal courts have permitted lawyers to testify as an expert witness regarding such practices. [FN69] But this "practice" actually is the collective interpretation of the securities laws by lawyers. Testimony of this "practice" necessarily informs the jury of a certain portion of the legal community's determination of the applicable legal standards and requirements. Accordingly, while such testimony should be admissible, it may be subject to challenge. [FN70]

Testimony of Specialized Knowledge in the Securities Area

Courts generally permit experts to testify as to factual circumstances within their expertise, such as how an accident occurred [FN71] or the characteristics of a behavior or condition. [FN72] Similarly, expert testimony concerning factual circumstances in the securities industry also should be admissible. [FN73] Although similar to testimony concerning practice in the industry, this testimony differs because it concerns an observation (such as the movement of the market price of shares due to certain events), rather than knowledge of a practice, and an opinion as to whether such an observation applies to the facts of the case. Just as with testimony concerning the practice in the industry, the practitioner should be careful to avoid eliciting opinions on the ultimate legal question.

Thus, an expert witness could testify that based upon his or her experience in participating and observing the

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market, a certain event likely caused the decline in share price or that certain trading caused an artificial price for the shares. However, the expert most likely will not be permitted to testify that a party participated in "manipulation" or "fraud" as those terms are used in the securities laws. [FN74] Similarly, experts should be permitted to testify concerning the mechanics of the securities markets--such as trading shares in the "pink sheets" or the function and activity of market-makers in over-the-counter market--and whether a brokerage firm's activity conforms with his understanding. [FN75] But testimony that the brokerage firm violated various rules and regulations in the trading of stock is likely inadmissible.

Testimony on the Ultimate Legal Issue

Michigan courts permit psychiatrists to testify concerning whether a criminal defendant was legally insane. As long as the legal standards are properly explained by the trial court or examining attorney, [FN76] such testimony is permitted because the expert is testifying on a matter "largely unfamiliar to the jury." [FN77] An argument can be made that similar testimony should be permitted in the securities area.

Jurors generally are unfamiliar with the securities laws and the securities industry. Unlike the issue of whether conduct was negligent, issues concerning the disclosure obligations under the securities laws typically are beyond the experience of most jurors. Thus, one could argue that as long as the expert is not defining the applicable legal standards, but merely opining based upon the legal standards defined by the court, an expert witness should be able to testify about the ultimate question in the case. Accordingly, an expert should be able to opine whether an offering is exempt from registration, a fact is "material," a transaction was "suitable," or a disclosure is fraudulent.

There are several concerns regarding this argument. A psychiatrist's diagnosis of sanity is based upon his or her examination of the subject and his or her application of scientific/medical knowledge. The psychiatrist's opinion whether a defendant was legally sane is an analysis of the psychiatrist's diagnosis in terms of the defined legal standard. That analysis is scientific and beyond the knowledge of most jurors. However, an expert opining whether certain conduct violates the securities laws essentially is the expert's application of the facts he or she finds relevant to a legal standard defined by the court.

The fact-finding performed by the expert typically is not based upon an expertise similar to the diagnosis and scientific process of the psychiatrist. The expert in the securities case is "finding facts" in essentially the same manner as the jury--i.e., weighing the importance of various facts and the creditability of witnesses--and not through scientific/medical means. As such, this opinion testimony likely will be seen to impermissibly invade the province of the jury. [FN78] Thus, experts in securities cases proffering opinions on the ultimate issue in this matter offer little assistance to juries and instead risk reducing the proceeding to a "battle of paid advocates." [FN79] Indeed, such "testimony" is best left to the lawyers at closing argument.

Although the law in this area is somewhat unclear, Michigan courts may also determine that such opinion testimony unduly invades the province of the jury because standards such as "materiality" should be strictly left to the jury. As discussed above, [FN80] Michigan courts do not permit expert testimony on whether conduct was "negligent" because the jury is "fully competent to make this determination without the opinion of ... [an] expert witness." [FN81] Negligence generally is defined by Michigan courts as conduct that involves an "unreasonable risk of harm" [FN82] or breaches the duty of "reasonable care." [FN83] Materiality under the securities laws generally is defined as facts of which there "is a substantial likelihood that a reasonable shareholder would consider...important." [FN84] This standard is similar to the negligence standard of reasonableness, which likely *703 will be held to be in the exclusive province of the jury. [FN85]

CONCLUSION

One of the complex issues faced by state courts in securities cases is the use of expert witness testimony. Although there are few reported Michigan decisions concerning the use of expert witness testimony in securities

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cases, the principles set forth in various Michigan decisions suggest that experts can properly testify concerning the practice in the securities industry and factual circumstances within the expert's experience. However, the expert is not likely to be permitted to testify concerning the applicable legal standards or proffer an opinion that is a legal conclusion on the ultimate issue in the case.

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[FN1]. See, 15 USC 77z-1, 78u-4(a), 78u-4(b).

[FN2]. On November 3, 1998, President Clinton signed the Act, § 1260.

[FN3]. See, S. Hansen, "The Securities Litigation Uniform Standards Act of 1998," Securities & Commodities Regulation, Vol 32, No 6 (March 24, 1999).

[FN4]. *Id.*

[FN5]. *Marx & Co, Inc v Diners' Club, Inc*, 550 F2d 505, 511 (CA 2, 1977).

[FN6]. *People v Longuemire*, 87 Mich App 395, 398, 275 NW2d 12 (1978).

[FN7]. See, e.g., *Koenig v City of South Haven*, 221 Mich App 711, 725, 562 NW2d 509 (1997); *People v Drossart*, 99 Mich App 66 75, 297 NW2d 863 (1980); *Berry v City of Detroit*, 25 F3d 1342, 1353 (CA 6, 1994). See also Advisory Committee Note to Fed R Evid 704.

[FN8]. *Berry v City of Detroit*, 25 F3d 1342, 1353 (CA 6, 1994).

[FN9]. *Koenig v City of South Haven*, 221 Mich App 711, 725, 562 NW2d 509 (1997).

[FN10]. *People v Drossart*, 99 Mich App 66, 80 (1980). Accord *Koenig v City of South Haven*, 221 Mich App 711, 726, 562 NW2d 509 (1997).

[FN11]. 221 Mich App 711, 562 NW2d 509 (1997).

[FN12]. *Id.*, at 726.

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[FN13]. *Id.*, at 7267-27. The holding in *Koenig* is inconsistent with the Court of Appeals' holding in *Rouch v Enquirer & News of Battle Creek*, 184 Mich App 19 (1990), vacated on other grounds, 440 Mich 238, 487 NW2d 205 (1992), reh den, 440 Mich 1209, 488 NW2d 736 cert den, 507 US 967 (1993), reh den, 507 US 1047 (1993). In *Rouch*, the court affirmed the admissibility of testimony of a professor of journalism as to whether defendants engaged in a "pattern of negligence," defendants were "grossly negligent," the article at issue was privileged, and the article was "libelous." *Id.*, at 38-39. The court also approved the expert's testimony as to the perception of the "average reader." *Id.*, at 41. *Rouch* contradicts the reasoning of numerous Michigan decisions and has been questioned by certain authors. See, *Robinson, Longhofer & Ankers, Michigan Rules of Evidence*, § 704.2, pp 634-35.

[FN14]. 99 Mich App 66, 297 NW2d 863 (1980).

[FN15]. *Id.*, at 80. In *Koenig*, the court stated: "We concur with the trial court's concerns that the experts' testimony could have unduly invaded the province of the jury because the determination of whether the individual defendants were grossly negligent constituted the primary question for jury resolution at trial. The jury was fully competent to make this determination without the opinion of plaintiffs' expert witness." 221 Mich App at 726-27.

[FN16]. 99 Mich App at 80.

[FN17]. *Id.* *Koenig* distinguished its holding--that the expert could not opine as to whether the defendant's conduct was "grossly negligent"--with the Michigan Supreme Court's holding in *People v McClinton Robinson*, 417 Mich 231, 331 NW2d 226 (1983), where a medical expert witness was permitted to testify that the victim of defendant's attack received "grossly erroneous" treatment. In *McClinton*, the defendant's primary defense to a second-degree murder charge was that the victim received grossly negligent treatment. The Supreme Court held that such testimony was admissible because it was not an opinion on the guilt or innocence of the defendant, only the degree of medical care received by the victim. *Id.*, 234-35. The Court determined that the opinion "is not subject to challenge on the ground that the ultimate determination of guilt or innocence may well turn on whether that expert opinion is believed or disbelieved." *Id.* Thus, the expert's opinion is understood not to invade the province of the jury. See, *Koenig*, 221 Mich App at 727.

[FN18]. See, *People v Christel*, 449 Mich 578, 591, 537 NW2d 194, 201 (1995); *People v Peterson*, 450 Mich 349, 373, 537 NW2d 857, 868 (1995).

[FN19]. See *People v Peterson*, 450 Mich 349, 384, 537 NW2d 857, 868 (1995) (Cavanagh, J dissenting opinion).

[FN20]. 449 Mich 578, 537 NW2d 194 (1995).

[FN21]. 449 Mich at 591, 537 NW2d at 201.

[FN22]. 450 Mich 349, 537 NW2d 857 (1995).

[FN23]. 450 Mich at 373, 537 NW2d at 868.

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[FN24]. 221 Mich App at 726-27, 562 NW2d at 516.

[FN25]. 25 F3d 1342 (CA 6, 1994).

[FN26]. *Id.*, at 1353. See also, *Woods v Lecureux*, 110 F3d 1215, 1220- 21 (CA 6, 1997).

[FN27]. *Id.*

[FN28]. See, e.g., *People v Drossart*, 99 Mich App 66, 75-76, 297 NW2d 863 (1980).

[FN29]. See, e.g., *id.* See also *Berry v City of Detroit*, 25 F3d 1342, 1353 (CA 6, 1994) (expert cannot testify as to the meaning of "deliberate indifference" as it invades the province of the judge).

[FN30]. See, e.g., *People v Doan*, 141 Mich App 209, 214, 366 NW2d 593 (1985) ("an expert's opinion as to the applicable law of criminal responsibility or insanity is of no aid to the jury and could possibly confuse them in light of their duty to apply the law solely as explained by the judge at the end of the case."). See also *Berry v City of Detroit*, 25 F3d 1342, 1354 (CA 6, 1994).

[FN31]. *People v Doan*, 141 Mich App 209, 214, 366 NW2d 593 (1985); *People v Drossart*, 99 Mich App 66, 76, 297 NW2d 863 (1980).

[FN32]. *Roberts v Auto-Owners Insurance Co*, 135 Mich App 595, 600-01, 354 NW2d 271 (1983), *rev'd on other grounds*, 422 Mich 594 (1985).

[FN33]. *Id.*

[FN34]. *People v Drossart*, 99 Mich App 66, 77, 297 NW2d 863 (1980). The Advisory Committee Note to Federal Rule of Evidence 704 indicates that the Rule was not intended to permit testimony "phrased in terms of inadequately explored legal criteria." Federal courts have attempted to follow that difficult to apply limitation. See, *Graham*, *Handbook of Federal Evidence* (4th ed) § 704.1, pp 140-41 and authorities cited therein. See also, *Woods v Lecureux*, 110 F3d 1215, 1220 (CA 6, 1997).

[FN35]. 93 Mich App 35, 285 NW2d 788 (1979).

[FN36]. MCL 451.501 et seq.

[FN37]. 93 Mich App at 46, 285 NW2d at 793.

[FN38]. 93 Mich App at 47, 285 NW2d at 793.

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[FN39]. 925 F2d 910 (CA 6, 1991).

[FN40]. *Id.*, at 919.

[FN41]. *Id.*

[FN42]. 846 F2d 135 (CA 2, 1988).

[FN43]. See, *People v Drossart*, 99 Mich App 66, 77, 297 NW2d 863 (1980).

[FN44]. 846 F2d at 139-40.

[FN45]. *Id.*, at 140.

[FN46]. *Id.* (citations omitted).

[FN47]. See, *People v Christel*, 449 Mich 578, 591, 537 NW2d 194, 201 (1995); *People v Peterson*, 450 Mich 349, 373, 537 NW2d 857, 868 (1995).

[FN48]. *Koenig v City of South Haven*, 221 Mich App 711, 726-27, 562 NW2d 516 (1997).

[FN49]. See, e.g., *Owens v Allis Chalmers Corp*, 414 Mich 413, 422, 326 NW2d 372 (1982); *Braden v Workman*, 146 Mich App 287, 293, 380 NW2d 84 (1985).

[FN50]. 550 F2d 505 (CA 2, 1977).

[FN51]. *Id.*, at 509.

[FN52]. See, *Roberts v Auto-Owners Insurance Co*, 135 Mich App 595, 600- 01 (1983), *rev'd on other grounds*, 422 Mich 594 (1985).

[FN53]. 846 F2d at 509-10, 512.

[FN54]. *Id.*, at 512 (emphasis in original).

[FN55]. 926 F2d 1285 (CA 2, 1991).

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[FN56]. *Id.*, at 1294.

[FN57]. *Id.*, at 1295 (citation omitted).

[FN58]. *Id.*, at 1294.

[FN59]. *Id.*

[FN60]. *Marx & Co, Inc v Diners' Club, Inc*, 550 F2d 505, 511 (CA 2, 1977).

[FN61]. See, *supra*, notes 50-59 and accompanying text.

[FN62]. See, e.g., MCL 451.810(a)(2) (permitting recovery for offer to sell a security "by means of an untrue statement of material fact or any omission to state a material fact"); 15 USC 77k & 77l (providing a cause of action for statements containing "untrue statement of material fact or omitted" or having "omitted to state a material fact").

[FN63]. See, e.g., *People v Lyons*, 93 Mich App 35, 46, 285 NW2d 788 (1979) (finding inadmissible expert testimony that a certain investment was a "security" under the Michigan Uniform Securities Act); *United States v Scop*, 846 F2d 135, 139-40 (CA 2, 1988); *Marx & Co, Inc v Diners' Club, Inc*, 550 F2d 505, 509 (CA 2, 1977).

[FN64]. To qualify as a custom or practice, the expert must demonstrate that the omission has knowingly occurred frequently and it is generally understood to be the custom. See, *Braden v Werkman*, 146 Mich App 287, 293, 380 NW2d 84 (1985).

[FN65]. 93 Mich App 35, 285 NW2d 788 (1979).

[FN66]. 926 F2d 1285 (CA 2, 1991).

[FN67]. *Id.*, at 1294-95.

[FN68]. See, *supra*, notes 28 through 34 and accompanying text.

[FN69]. *United States v Scop*, 846 F2d 135, 139-40 (CA 2, 1988); *Marx & Co, Inc v Diners' Club, Inc*, 550 F2d 505, 509 (CA 2, 1977).

[FN70]. Cf *Charles Reinhart Co v Winiemko*, 444 Mich 579, 582 (1994) (proximate cause in a legal malpractice action alleging negligence during an appeal is an issue of law reserved for the court "because whether an appeal would have been successful intrinsically involves issues of law within the exclusive province of the judiciary").

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[FN71]. See, e.g., *Koenig v City of South Haven*, 221 Mich App 711, 726- 27, 562 NW2d 516 (1997).

[FN72]. See, *People v Christel*, 449 Mich 578, 591, 537 NW2d 194, 201 (1995); *People v Peterson*, 450 Mich 349, 373, 537 NW2d 857, 868 (1995).

[FN73]. See, *United States v Scop*, 846 F2d 135, 140 (CA 2, 1988).

[FN74]. See, *Id.*

[FN75]. See, *Marx & Co, Inc v Diners' Club, Inc*, 550 F2d 505, 512 (CA 2, 1977).

[FN76]. See, e.g., *People v Drossart*, 99 Mich App 66, 77, 297 NW2d 863 (1980).

[FN77]. 99 Mich App at 80, 297 NW2d at 870.

[FN78]. See, *supra*, notes 11 through 23 and accompanying text.

[FN79]. *Marx & Co, Inc v Diners' Club, Inc*, 550 F2d 505, 511 (CA 2, 1977).

[FN80]. See, *supra*, notes 11 through 23 and accompanying text.

[FN81]. *Koenig v City of South Haven*, 221 Mich App 711, 726-27, 562 NW2d 516 (1997).

[FN82]. *Schultz v Consumers Power Co*, 443 Mich 445, 449, 506 NW2d 175 (1993), *reh den*, 444 Mich 1202, 509 NW2d 156 (1993).

[FN83]. *Buczowski v McKay*, 441 Mich 96, 490 NW2d 330, *reh den*, 441 Mich 1202, 491 NW2d, 830 (1992).

[FN84]. *TSC Industries, Inc v Northway, Inc*, 426 US 438, 449 (1976); C. Moscow & H. Makens, *Michigan Securities Regulation* (2d ed), at 391-92.

[FN85]. See, e.g., *Koenig v City of South Haven*, 221 Mich App 711, 726- 27, 562 NW2d 516 (1997); *People v Drossart*, 99 Mich App 66, 80, 297 NW2d 863 (1980); *Berry v City of Detroit*, 25 F3d 1342, 1353 (CA 6, 1994).

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