"Practical Inconvenience" or Conceptual Confusion: The Common-Law Genesis of Federal Rule of Evidence 703

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“Practical Inconvenience” or Conceptual Confusion: The Common-Law Genesis of Federal Rule of Evidence 703

Daniel D. Blinka†

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I. Introduction

Nearly one hundred years ago Learned Hand explored the use of expert witnesses at common law. Hand acknowledged that "good historical reasons" supported the use of expert testimony to educate jurors, but concluded that the common-law "method" of tapping expert knowledge was "an anomaly fertile of much practical inconvenience."\(^1\) Undoubtedly, Hand would have been equally chagrined by the Federal Rules of Evidence, but for different reasons. Although the federal rules eliminated much of the common law's "practical inconvenience," they simultaneously created a regime that unduly degrades the protection of exclusionary rules by threatening to give experts the power to determine what evidence the jury should hear.

Often overlooked by courts and commentators,\(^2\) Rule 703 is perhaps the oddest provision governing experts among the Federal Rules of Evidence. Enacted ostensibly to bring the law into conformity with how experts actually reach conclusions, Rule 703 fits uncomfortably with the myriad of exclusionary rules, such as those limiting hearsay or character evidence. Nor can it be easily squared with the doctrine of limited admissibility, which permits evidence to be received for some purposes but not others.

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1. Learned Hand, Historical and Practical Considerations Regarding Expert Testimony, 15 HARV. L. REV. 40, 40 (1901). Hand argued that expert witnesses should be scrapped in favor of an "advisory tribunal," composed of independent experts, who would have the final power to determine the esoteric issue. Id. at 56.

Hand wrote the article as a young lawyer with the help and encouragement of James Bradley Thayer, his evidence professor at Harvard. The article first appeared in the obscure Albany Medical Annals; thus, its first audience consisted of doctors, the largest pool of courtroom experts. GERALD GUNTHER, LEARNED HAND: THE MAN AND THE JUDGE 51, 60 (1994). The article's original version featured an attack on the "absurdities" of the common law, which Hand deleted from the version that appeared in the Harvard Law Review. Id. at 60.

Rule 703 allows experts to predicate opinions on two very different sources. First, experts can base their opinions on evidence that has been admitted into the record. Not surprisingly, allowing experts to utilize the same information as jurors has not stirred the slightest whisper of controversy. But experts can also base their opinions on a second type of evidence that cannot be considered by the jury—at least according to formal doctrine. Rule 703 permits experts to use inadmissible evidence, provided it is of a type reasonably relied upon by experts in the field in drawing inferences or opinions. The rule thus allows experts of all kinds to express conclusions and opinions that are predicated upon facts or data that are not, at least technically, before the jury.

Problems arise, however, when experts are called upon to explain how they reached a conclusion. What should be done with the experts' inadmissible bases? Does the experts' reliance validate the otherwise inadmissible information, thereby transforming it into admissible evidence? Conversely, should the court bar any mention of the tainted bases while permitting only the expert's testimony about the opinion? Or should the judge instruct the jury to consider the inadmissible bases for whatever bearing they have on the cogency of the expert's opinion testimony, but not for any other purpose? If the judge elects the latter course, what exactly does such an instruction mean? And if such limiting instructions are meaningless, is Rule 703 a device that allows a party to simply parade inadmissible evidence before the jury in direct contravention of the exclusionary rules?

Although academic lawyers and appellate courts are beginning to give Rule 703 the attention that it deserves, the rule's ambiguity has long festered in the trial courts. Indeed the belated attention paid to Rule 703 is perhaps best explained by the ease with which dubious jury instructions are used to paper over the rule's ambiguities. Doctrinal consistency is assured through the mechanism of a rank fiction; namely, that the jury will follow a largely meaningless instruction. More precisely, the consistency rests on the ambiguity of what is meant when we say that something is admitted into evidence.

4. Id.
5. Id.
6. See Epps, supra note 2, at 60-61; Imwinkelried, supra note 2, at 360.
The difficulty over Rule 703 is compounded by several related
developments. The Federal Rules of Evidence have influenced the law
of evidence enormously. Since the early 1970s nearly forty states have
enacted evidence codes based largely on the federal rules. Although
the various jurisdictions have added their own touches to the federal
model over the years, nearly all have followed the federal template with
respect to the critical rules governing relevancy, limited admissibility,
and expert evidence. Thus, the problem is national in scope. Moreover,
the Federal Rules of Evidence have dramatically affected trial practice
by creating forums that literally invite expert assistance in all shapes,
colors, and sizes. Indeed, it may be said without too much exaggeration
that the federal rules fostered (or at least nurtured) the explosion of the
expert witness industry. Courts have had trouble enough controlling
the kinds of admissible opinions offered by experts. Rule 703 compounds
the problem by explicitly allowing experts to use inadmissible evidence
to reach those opinions.

This Article has a number of objectives. Its primary purpose is to
explain the present controversy over Rule 703 and Rule 705 in light
of the rules' common-law antecedents. The federal rules reformed some
aspects of the common law but left the superstructure intact. Over the
last twenty years, Rules 703 and 705 have been interpreted as though
they swept away all common-law vestiges. It is time, then, to step
back and examine the evolution of expert evidence law over the last
hundred years. The historical record reveals the persistence of both
problems and solutions.

The thesis is that the common law's abhorrence of hearsay resulted
in arcane rules designed to force experts to heed the same exclusionary

7. Thirty-eight states have adopted rules of evidence based on the federal template, as
have military courts and the Commonwealth of Puerto Rico. See 21 CHARLES A. WRIGHT

8. Index & Tables, JACK B. WEINSTEIN ET AL., WEINSTEIN'S EVIDENCE T-1 to 184 (Supp.
1994).

Be Clarified, CRIM. JUST., Summer 1989, at 20, 22.

10. Rule 705 addresses the disclosure of the data underlying the expert's opinion. See
FED. R. EVID. 705 and discussion infra part III.D.4.

11. See GRAHAM C. LILLY, AN INTRODUCTION TO THE LAW OF EVIDENCE § 12.2, at 485-91
(2d ed. 1987).
rules that applied to lay witnesses and, of course, to the jury. The common law tailored a suit that fit lay witnesses but insisted that experts of considerably greater girth squeeze into the same size suit of clothes. Just as juries would base verdicts only on admissible evidence, experts would predicate opinions based only on admissible evidence. Rules requiring hypothetical questions and compelling experts to disgorge their personal knowledge ensured, in theory, that experts relied only on admissible evidence. In place by the 1890s, the highly formal common-law system sprouted numerous exceptions and inconsistencies because courtroom practice could not be completely reconciled with how experts conducted themselves outside of court or how lawyers prepared them to testify. In short, one size did not fit all. The common law attempted unsuccessfully to maintain doctrinal consistency while accommodating expert witnesses who did not fit easily into the doctrinal framework.

By the early 1960s expert evidence law badly needed retooling. The Federal Rules of Evidence reformed some of the glaring deficiencies in the common-law practice, but its innovations were implanted into the basic contours of the common law. Reform did not signal repudiation. In particular, the federal rules did not contemplate allowing experts to dump inadmissible evidence before juries or decide for themselves what jurors need to hear in order to appreciate the expert's opinion. There exists, then, an essential continuity between Rule 703 and common-law practice that is sometimes overlooked in celebrations over the supposed demise of the hypothetical question rule. Moreover, this Article emphasizes the intractable problems that arise because our legal system imposes standards of admissibility that conflict with how experts use evidence in their specialized practices. Although late nineteenth-century judges and commentators imposed a rigid formalistic solution that soon wilted under the hot lights of day-to-day trial practice, the same problems persist today under the federal rules. And it may be that modern solutions, especially the placebo of limited admissibility, are equally formalistic and unsatisfactory, albeit for different reasons.

Another purpose of this Article is to emphasize that evidence doctrine does not exist in an academic vacuum. Evidentiary rules are used daily by lawyers in courtrooms across the country. More attention should

12. The continuity extends as well to Rule 705. See discussion infra part III.D.4.
be paid to how trial lawyers employ evidentiary rules to place favorable information before the jury or block unfavorable evidence offered by the opponent. Courts and commentators may have been slow to see the issues, but Rule 703 has been an effective tool for circumventing exclusionary rules and presenting inadmissible evidence to juries. Problems under Rule 703 have not, however, arisen because nefarious trial lawyers subvert technically sound evidentiary doctrine through guile or ignorance. Trial lawyers will offer any and all evidence that favors their case. If judges are willing to allow experts to testify about inadmissible evidence subject only to an incomprehensible limiting instruction, trial lawyers will use this tool—or any other—to persuade the jury. Moreover, it is especially important that we confront the reality that some experts are spoon fed inadmissible evidence so that they can relate it to the jury along with their opinions.

The third objective of this Article is to confront the ambiguity over the distinction between admissible and inadmissible evidence. The common law took largely a bipolar exclusionary approach. Exclusionary rules, such as those governing hearsay or character evidence, regulated the flow of information to the jury. Evidence was either in or out; that is, the jury was either free to consider the evidence for any relevant purpose or the jury never heard about it. The common law was thus skeptical about admitting evidence for a limited purpose, fearing that the jury would disregard any restrictive instruction and use the evidence for whatever purpose it saw fit. Modern evidence is less stringently bipolar. Admissibility extends across an ever widening continuum. Greater faith in limiting instructions and, accordingly, the judge’s power to educate the jury reflects a reduced confidence in the efficacy of exclusionary rules. Unfortunately, inadequate attention is paid to the efficacy of the limiting instructions (Can juries actually draw the distinctions as explained by the judge?) or the costs of a game in which lawyers counter exclusionary rules by articulating some good reason for allowing the evidence any way.

Part II surveys the common-law rules on expert evidence. Parts II.B. and II.C. examine the instances when experts were permitted to testify and the rigid requirements that controlled the form that expert testimony took before the jury. These sections draw on authorities from the 1890s,

13. See infra notes 495-98.
when the common-law rules had crystallized into a highly elaborate formal system. Special attention is paid to what experts could tell the jury about their general theories (the "major premises") as well as the case-specific facts (the "minor premises") that supported their opinions in the particular case.

By the early 1960s serious rents had been torn in the common-law fabric, especially with regard to medical experts. Part II.D. examines the common law on the eve of the federal rules, focusing on three particular problems that later received special attention from the architects of the federal rules: (1) experts’ reliance on treatises, articles, and other published compilations; (2) the admissibility of statements made by patients to physicians; and (3) experts’ reliance on tests or reports prepared by others. Part II.D. also explores the common-law genesis of the idea of “expert validation” of inadmissible evidence, which figured prominently into the drafting of Rule 703.

Part III assesses expert evidence under Article VII of the federal rules. The primary emphasis is on the form that expert testimony takes at trial; that is, how far can the expert go in explaining the reasoning behind and bases for his opinions? Well-rehearsed issues about the reliability and validity of various expert theories, tests, and techniques are addressed only where necessary to illuminate the discussion on the form of expert testimony. Parts III.B. and III.C. closely examine how the federal rules affected the common law, relying extensively on the text of the rules and the Advisory Committee’s commentary. Part III.B. assesses how Article VII of the federal rules and several hearsay exceptions affected the admissibility of experts’ major premises; namely, the expert’s overarching theories along with the tests and techniques that apply those theories. Part III.C. shifts attention to the minor (case-specific) premises, which were also reshaped by a number of hearsay exceptions as well as Rules 703 and 705. In several cases the Advisory Committee justified the creation of new hearsay exceptions not only because it found such information sufficiently trustworthy, but because the Committee believed that limiting instructions were futile and ineffective. Moreover, the federal rules jettisoned the hypothetical question requirement in order to reduce the burden on the direct examiner to painstakingly demonstrate that the expert’s opinion rested on admissible

14. See discussion *infra* part II.D.
evidence; the intent was not to invite direct examiners to spill inadmissible evidence before juries. The argument then, is that, despite their crucial modifications of the common law, the drafters assumed that other parts would remain intact. In particular, they assumed that inadmissible evidence would remain inadmissible and that the direct examiner would not have license to parade excluded evidence before the jury guised as data to buttress the expert's opinion.

Part III.D. looks at the controversial operation of Rule 703 in state and federal practice. Three important issues are addressed. First, we examine the meaning of "inadmissibility" under Rule 703 together with its relation to the larger phenomena of "limited admissibility." Although its antecedents highlighted experts' use of hearsay, Rule 703 has been construed to reach all forms of inadmissibility, including restrictions on character evidence. Rule 703, then, has the potential to undo any exclusionary rule of evidence. Second, we look at the standard of the expert's "reasonable reliance" under Rule 703 which has been fused with limited admissibility to permit the introduction of otherwise inadmissible character and hearsay evidence (for example) for the ostensible purpose of evaluating only the strength of the expert's conclusions. Case law has at times muddied the distinction between two separate issues: What can the expert rely on in reaching conclusions and what should the jury be told about the expert's bases? The so-called "liberal approach" to reasonable reliance that gives experts wide latitude in determining what they themselves use to reach opinions is fully justified provided it does not intrude upon the judge's domain to control what the jury (as opposed to the expert) learns about the case-specific facts. This leads to the final problem of disclosure; that is, how much and under what circumstances should the jury be told about an expert's inadmissible basis, even where the expert reasonably relied upon it. The case law reveals a number of different approaches: (a) the "full use" option that transforms inadmissible evidence into admissible evidence through the healing power of expert validation; (b) the "limited use" option that discloses the information subject to an incomprehensible instruction; and (c) the exclusionary approach that permits the expert's opinion but precludes the direct examiner from disclosing the inadmissible bases before the jury.

Part III argues that Rules 703 and 705 require three distinct but related inquiries where experts rely on inadmissible bases. First, why is the
basis inadmissible under the rules? Second, do experts in the field rely on this type of inadmissible evidence? Third, should the bases be disclosed to the jury even if experts reasonably rely upon them? In most cases, the direct examiner should not be permitted to disclose the inadmissible evidence as a matter of course. Judges might, however, permit oblique or generic references that omit details about the inadmissible bases in appropriate cases. Detailed disclosure on direct examination is usually only appropriate where the evidence is sufficiently necessary and trustworthy to pass muster under the residual exceptions to the hearsay rule, a determination that might be assisted by the expert witness's own insights. Finally, consideration should be given to creating new hearsay exceptions that deal with recurring instances of reliable information used by experts which do not fit easily into existing exceptions. Thus, limited admissibility should not be allowed to erode the integrity of the exclusionary rules, turning trials into cynical games in which the proponent conjures up some illusory "legitimate" use that trumps an exclusionary rule, the judge instructs the jury accordingly, and we all pretend that the instruction works.

II. Conceptual Integrity and "Practical Inconvenience": The Common-Law Background

A. Introduction

In order to understand the operation of Rule 703, one must appreciate the common-law setting from which it developed. Rule 703, and Article VII of the Federal Rules of Evidence generally, represented a reaction to problems involving the use of experts.\textsuperscript{15} The common-law paradigm embraced two overriding priorities: expert testimony should be used only where necessary and expert opinions should be based only on admissible evidence. The result was a straightjacket that purchased doctrinal elegance at the cost of "practical inconvenience." Ultimately the allure of expert assistance and practical concerns involved in presenting expert testimony eroded the paradigm.

\textsuperscript{15} See discussion infra parts III.B-C.
This section undertakes a brief survey of the common-law paradigm governing expert testimony. Part II describes a world unfamiliar to those educated under the regime of the federal rules. The common law allowed expert evidence only where it was deemed necessary for the trier of fact. Moreover, the expert’s theories and practices were subject to stringent standards of reliability. Expert testimony was clearly the exception in a trial system heavily weighted in favor of lay witnesses who related their personal knowledge to lay jurors.

The premium on lay witnesses with firsthand knowledge also expressed the common law’s abhorrence of hearsay. Various rules rigidly policed the form of expert testimony, striving to ensure that the expert’s opinion was predicated on the very same information that a jury would later consider in reaching a verdict. In short, an expert’s opinion had to be based on admissible evidence, and to enforce this restriction, the common law relied on either the stilted mechanism of the hypothetical question or required experts to listen to the same testimony that the jury heard.

Although logically elegant, the common-law paradigm rested on a variety of fictions and compromises that undercut its efficacy. Modern society’s increasing reliance on expertise in most matters of life led inexorably to greater use of such specialized knowledge in the courtrooms. Eventually the doctrinally deft handling of expert hearsay succumbed not just to the reality of how experts reached their conclusions, but to the reality of how trial lawyers used rules of evidence in the courtroom.

B. Scope of Expert Testimony at Common Law

To a modern world comfortable with “paradigm shifts” and seemingly endless disagreements among experts, the common-law rules seem rather quaint and almost naive. Expert testimony was admissible only where necessary to educate the jury about esoteric subject matter that arose during the trial.

In his influential late nineteenth-century treatise, The Law of Expert Testimony, Henry Rogers duly observed that questions falling outside “the range of common experience” required “special knowledge” provided


by witnesses "skilled in the particular science, art or trade to which the question relates." 18 Conversely, expert testimony was excluded "where the subject-matter of inquiry is such that it may be presumed to lie within the common experience of all men of common education, moving in the ordinary walks of life." 19 In short, experts were welcome, but only where their assistance was deemed essential. 20

Underlying this rule was an epistemology that assigned the permissible scope of expert testimony to a middle region lying between the extremes of common sense and speculation. Dean Mason Ladd explained the common-law position with characteristic succinctness:

Stated in the negative, expert testimony is not admissible to prove or disprove matters within common knowledge as to which facts may be so described that the trier of fact may form a reasonable opinion themselves. Furthermore, the issue must be such that the expert may answer by giving an opinion that is a reasonable probability rather than conjecture or speculation. 21

The realm of common sense consisted of what all reasonable persons were said to know. 22 This included matters of common human experi-

18. Id. § 6, at 20.
19. Id. § 8, at 25.
20. See also William Foster, Expert Testimony—Prevalent Complaints and Proposed Remedies, XI HARV. L. REV. 169, 175-76 (1897-1898). Foster, a sitting judge, commented on contemporary criticisms of expert witness testimony. Reaffirming the common-law position that experts are permitted to testify only when necessary, Foster found support for this doctrine in the notion that the trier of fact should be afforded the best available evidence in making its decision and in the requirements of an "advanced civilization." Id. at 176.

There is no more certain test for determining when experts may be used than the common sense inquiry whether the untrained layman would be qualified to determine intelligently and to the best possible degree the particular issue without enlightenment from those having a specialized understanding of the subject involved in the dispute. Whenever the triers of fact are confronted with issues which cannot be determined intelligently on the basis of ordinary judgment and practical experience gained through the usual affairs of life, the benefit of scientific or specialized knowledge or experience may be provided by use of expert testimony.

Id. at 418-19; see also Faust F. Rossi, Modern Evidence and the Expert Witness, 12 LITIG., Fall 1985, at 18, 19 ("The expertise had to encompass matters sufficiently complex to be beyond the ken of the ordinary lay person. Yet it could not be so novel or speculative that it was not generally accepted within its recognized scientific or professional sphere.").

ence acquired through everyday living as well as subjects of general education. For example, lay jurors were (and still are) expected to detect liars and sort out conflicting testimony just by virtue of having lived long enough to qualify for jury duty. Jurors were also entrusted with the conscience of the community. The law of negligence made reasonableness an issue for the jury, which was in just as good a position as any single judge to gauge the community's standard of ordinary care.

Thus, it was unnecessary to call witnesses to prove facts that were beyond dispute or within the jury's common knowledge, a practice wisely followed by today's courts as well. In present terms, then, the realm of common knowledge is the collection of facts, data, and opinions that we expect an ordinary eighteen-year-old to know through education in the home, the schools, and the streets. And as a fall back, the judge can always take judicial notice and instruct the jury that it must accept an indisputable fact as established.

The law of evidence did not open the courthouse doors to every self-described expert who offered an opinion on a subject deemed outside the sphere of common knowledge. Expert testimony could not be predicated on conjecture or speculation. Rather, the expert had to provide the court with some assurance that the theory, test, or technique was reliable. The common law's vacillations on scientific and technical reliability are discussed further in the next section.

In summary, the necessity standard compelled the judge to police the jagged, ever-fluctuating borders between the realms of popular knowledge, reliable specialized knowledge (science and technology),

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23. Two additional considerations supported the view that jurors were the court's "lie detectors." First, there was little reason to believe that a judge was much better at the task than the average juror. Second, despite the legal system's occasional flirtations with scientific tests of credibility, it is generally conceded that experts can seldom provide direct help on this issue.

24. See, e.g., ROGERS, supra note 17, § 11 (opinions of witnesses, whether "professional or unprofessional," on a "theory of morals or duty" were inadmissible).

25. See FED. R. EVID. 201.

26. See, e.g., ROGERS, supra note 17, § 13 (stating that expert opinion may not be based on "speculative data"). As an example, Rogers discussed a Mississippi case in which the court excluded expert testimony in a bastardy case on the ground "that it was highly improbable that impregnation could be produced by the first act of coition." Id. (footnote omitted).

27. See discussion infra part II.C.
and speculation. The hazards of patrolling the borders were apparent from the start. Almost one-hundred years ago, treatise writers complained that the cases were inconsistent and admissibility was “exceedingly difficult to determine.” Moreover, the elegance of the common-law model camouflaged the doctrinal mischief wrought by the use of experts.

C. The Form of Expert Testimony at Common Law

The common law of evidence worked best in the simple case. Parties would call lay witnesses who recounted their first-hand observations. The lay jury would listen to the witnesses relate what they saw or heard, then weigh the competing testimony based upon common sense.

Expert witnesses greatly complicated even the simplest case by applying knowledge that was, by definition, beyond the grasp of the average lay juror. One expert might be difficult enough to understand, but the problem intensified when opposing experts clashed over the underlying scientific or esoteric subject matter. In short, who should the jury believe when the experts disagreed? And even more troubling was how the expert witness applied the specialized knowledge to the facts of the case; in particular, on what version of the facts did the expert rely?

In part for these reasons, Learned Hand concluded that the use of expert witnesses was “anomalous.” An expert was peculiar, reasoned Hand, because

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28. ROGERS, supra note 17, § 9.
29. Id. § 10, at 27.
30. Hand, supra note 1, at 50. Reviewing the earlier cases, Hand found that the anomaly arose because courts relied heavily on expert witnesses while the rules of evidence were evolving. Although experts did not fit comfortably with the principles underlying the rules of evidence, experts were simply too useful to be jettisoned; thus, experts survived as an “exception”:

The upshot of this examination [of the case law] seems to be that the use of experts as witnesses existed when the present exclusive rules of evidence were not yet developed or enforced; that as the rule excluding the opinions or conclusions of witnesses took form, the use of experts being established and convenient, remained unaffected when other opinion evidence disappeared. What I have called the ‘exception’ which expert evidence represents is therefore no more than a relic of the usage of an undeveloped age which had not so far differentiated witness from jury as rigidly to confine each to its function. The rise of expert testimony is no more than the gradual recognition of such testimony, amid the gradual definition of rules of evidence, as a permissible, because supposedly useful, archaism.

Id. at 50.
he is allowed to testify to his conclusion from the facts, which he has either himself observed or which are in evidence from the testimony of others. His position is only peculiar in that a common witness is forbidden to testify to conclusions, and the history of the origin of expert witnesses must necessarily be simply the history of the exception in his favor to the rule that witnesses shall testify only to facts and not to inferences.31

Put another way, lay witnesses simply related what they saw or heard on the date in question, but experts came perilously close to telling the jury how to decide a particular issue. Although Hand focused on the common law's opinion rule, his critique implicated the bases for the expert's opinion as well.32

Anticipating the modern conceptualization of expert evidence in terms of its "syllogistic structure,"33 Hand observed that all evidence problems resolve themselves into considerations of the "major premise" and the "minor premise." The major premise is the general knowledge that the jury uses in assessing what the witnesses have said about the particular facts (the minor premise).34 Expert testimony also implicated both premises. As we will see, the common law attempted to control the content and reliability of the major and the minor premises, issues that inevitably raised the ugly head of hearsay.

1. The Major Premises

Although jurors' own life experiences and general education comprise the major premises needed to resolve most factual issues, trial procedure has never concerned itself with the precise extent of any given jury's level of common knowledge.35 Lawyers probe the venire panel during

31. Id. at 43-44. Hand was reacting against the arcane distinction between fact and opinion. Sixty years later, McCormick railed against the same distinction in the first edition of his influential evidence treatise. CHARLES T. MCCORMICK, HANDBOOK OF THE LAW OF EVIDENCE § 11, at 22 (1st ed. 1954) [hereinafter MCCORMICK I].

32. Hand, supra note 1, at 40.

33. See Imwinkelried, supra note 2, at 353-54.

34. See Hand, supra note 1, at 51.

35. See Mansfield, supra note 22, at 397-98.
jury selection, but once impaneled, legal fictions determine what any given jury knows about general matters. As prime examples of common knowledge, Hand pointed to assessments of witness’s credibility and gauging the accuracy of admissions against interest.36

When necessary for the understanding of esoteric or specialized information, the common law permitted expert witnesses to supplement the jury’s reservoir of knowledge.37 On such issues, observed Hand, the expert “takes the jury’s place and contributes the major premise.”38 Hand feared, however, that when experts disagreed over which major premises applied, the lay jury would be left adrift over which to choose.39

As an example, Hand offered a hypothetical slander case involving an allegedly forged note where the parties each offered a different kind of expert.40 One party offered a handwriting expert who testified that where the “angle of inclination” is identical in two different handwriting samples, the same person wrote both.41 The other party, however, offered a doctor who described the symptoms of alcoholic tremors, which matched evidence about the party’s behavior, and further testified that a person with alcoholic tremors cannot even hold a pen.42 Thus, each party offered a different brand of science to make its point.43

Should a jury accept the major premises offered by the handwriting expert or those of the physician? Hand offered no answer, but cautioned that “the only important thing to notice is that the expert has taken the jury’s place if they believe him.”44 Hand’s ultimate solution was to scrap the use of expert witnesses and spare juries the onerous task of blindly deciding between dueling major premises.45

36. Hand, supra note 1, at 51. Both examples are still valid.
37. Id. at 55.
38. Id. at 51.
39. Id. at 52.
40. Id. at 51.
41. Hand, supra note 1, at 51.
42. Id. at 52.
43. Id. at 51-52.
44. Id. at 52.
45. Id. at 56.
Despite Hand's skepticism, the common law trusted the juries' ability to sort out conflicting major premises, but developed a variety of mechanisms to ensure that the experts offered reliable evidence. Elaborate rules stud the early cases concerning the precise verbal form that the expert's opinion had to take, the professional pedigree of the underlying theory, test, or technique, and the expert's qualifications.

Some cases sought to ensure reliability through the dubious device of requiring that opinions take certain verbal forms. More precisely, an expert was required to state an opinion to a requisite degree of certainty, literally wording his testimony in terms of "reasonable probabilities" instead of conjecture or speculation. The case law was replete with condemnations of witnesses who offered speculative possibilities in lieu of professional "certainty." Yet this procedure offered only thin protection at best. Experienced witnesses knew the preferred phrasing; thus, the verbal forms provided little assurance of reliability beyond the witness's glib insistence that his opinion was sufficiently certain. Verbal formalism, then, served as the surrogate for reliability.

Besides policing the verbal formulas used to describe opinions, courts also searched for objective criteria that gauged the prevailing state of the art. The Frye test equated reliability with general acceptance by the appropriate scientific or technical community. The Frye standard's

46. See generally Hand, supra note 1.
47. See generally Ladd, supra note 21, at 415, and cases cited therein.
48. Id. at 419.
49. See ROGERS, supra note 17, § 13, at 33-35.
50. As early as the 1820s medical experts warned other medical experts, usually without effect, to guard against overstating their findings while testifying. JAMES C. MOHR, DOCTORS AND THE LAW: MEDICAL JURISPRUDENCE IN NINETEENTH-CENTURY AMERICA 98 (1993). Mohr further observes that the absence of licensure requirements, the lack of formal medical training, and "deep-seated disagreements over what constituted effective health care" created a situation in which "[u]ntrained practitioners whom serious medical jurisprudents held in contempt were thus afforded an open and equal chance to persuade juries to cling to folk perceptions and superficial appearances over often arcane and difficult-to-explain scientific conclusions." Id. at 100. By the 1850s, courtroom confrontations between noisome medical experts had become a "major problem." Id. at 101.

deficiencies have been brilliantly and elaborately exposed for decades, but the test still retains widespread popularity.\textsuperscript{52}

Although the authorities were split over the imposition of rigid verbal formulas or requirements of general acceptance, all courts demanded a showing that the expert was qualified to testify.\textsuperscript{53} Just as the common-law judge ruled on the competency of lay witnesses to testify, the judge also decided whether the expert possessed adequate credentials to provide the necessary assistance. In effect, the resume served as a surrogate for the reliability of the expert’s testimony. Absent a stipulation to the witness’s qualifications, the direct examiner always began by eliciting the witness’s experience or education. Opposing counsel could conduct a "preliminary cross-examination" on the witness’s qualifications in the event that a serious question arose about his competence.\textsuperscript{54}

Judges had discretion in determining the expert’s competence to testify.\textsuperscript{55} An expert could qualify through experience or education. Ideally, an expert exhibited both. Where expertise turned primarily on the witness’s experiences, the critical concern was the fit between the facts of the case and the expert’s experiences.\textsuperscript{56}

Experts who qualified primarily through study were greeted with skepticism.\textsuperscript{57} Henry Rogers warned in \textit{Expert Testimony} that "a witness cannot testify as an expert on a particular matter when that particular matter does not pertain to his special calling or profession, and his knowledge of the subject of inquiry has been derived from study alone."\textsuperscript{58} Rogers also observed:

It is the doctrine of the courts that study of a matter without practical experience in regard to it may qualify a witness as an expert. . . . It

\textsuperscript{52} The literature on the \textit{Frye} test is enormous. \textit{See generally} Giannelli, \textit{supra} note 51. In the early 1950s McCormick advocated "general acceptance" as an appropriate criteria for taking judicial notice of the reliability of a test or technique, but criticized its applicability to "novel" scientific evidence, suggesting further that many courts followed what is today called the "relevancy" approach. \textit{McCormick I}, \textit{supra} note 31, § 170, at 363.

\textsuperscript{53} \textit{Rogers, supra} note 17, § 15.

\textsuperscript{54} \textit{Id.} § 17.

\textsuperscript{55} \textit{Id.} § 16.

\textsuperscript{56} \textit{Id.} § 18.

\textsuperscript{57} \textit{Id.} § 19, at 46.

\textsuperscript{58} \textit{Rogers, supra} note 17, § 19, at 46.
would be most unwise to recognize the principle that a person might qualify himself to testify as an expert in a particular case, merely by devoting himself to a study of the authorities for the purpose of giving such testimony, when such reading and study is not in the line of his special calling or profession.  

These passages reveal two primary concerns. First, parties might literally construct an expert witness by asking the person to read up on a certain subject solely for the purpose of offering favorable testimony. To be sure, this fear also reflected the courts' bitterly frustrating experience in sorting out qualified medical experts from the ranks of charlatans, schemers, and quacks—a truly hopeless task in a time where healers were not regulated by licensing requirements or subject to formal educational standards. Similarly, the courts also feared that such experts served merely as hearsay conduits. A witness who simply read about a subject might do little more than paraphrase ("parrot" or regurgitate are less polite ways to put it) what others have said or written. To a great extent, then, experts posed tremendous problems because they reeked of hearsay. Experts who qualified through personal experience presented fewer problems because their specialized knowledge was largely a composite of other firsthand experiences. But experts who learned through study—that is, what they had read in books, articles, or journals or had heard from others—formed their major premises primarily through hearsay. In his 1899 revision of Greenleaf on Evidence, John Henry Wigmore conceded that medical experts' qualifications arose from hearsay, but concluded that it was "absurd" to deny "judicial standing to such knowledge."

59. Id.

60. This practice is fully acceptable under the Federal Rules of Evidence. See 1 CHARLES TILFORD MCCORMICK, MCCORMICK ON EVIDENCE § 13, at 53-58 (John W. Strong et al. eds., 4th ed. 1992) [hereinafter MCCORMICK II].

61. See MOHR, supra note 50, at 99-100.

62. See ROGERS, supra note 17, § 19.

63. 1 SIMON GREENLEAF, A TREATISE ON THE LAW OF EVIDENCE § 430(L), at 529 (John Henry Wigmore ed., 16th ed. 1899) [hereinafter GREENLEAF ON EVIDENCE]. Wigmore opted for the pragmatic approach over the hypertechnical treatment of hearsay:

It will usually be the case that the medical or surgical witness has acquired the greater part of his knowledge of professional matters in general from hearsay,—both from the data recorded in books and journals and from his professional instructors. It would...
In short, experts created intractable hearsay problems; the only issue was how to handle the hearsay. Should the jury be directly exposed to the fruits of the study, or should the fruits be mashed into an unrecognizable pulp that represented a less serious affront to rules that ostensibly excluded hearsay?

The common law chose the pulp fiction. Summarizing the doctrinal landscape in the 1890s, Rogers distinguished between the "exact" and the "inexact" sciences. Books and articles in the exact sciences were admissible, but such writings were limited to "almanacs, astronomical calculations, tables of logarithms, mortuary tables for estimating the probable duration of life at a given age, tables of weights and measures, and of currency, chronological tables, interest tables, and annuity tables." Nor did this practice offend the hearsay rule. Some of this material provided a basis for judicial notice while other writings "received in evidence are not used strictly as evidence, but rather for the purpose of refreshing the memory of the court and the jury." (Undoubtedly, nineteenth-century jurors must have been relieved that their civic duty did not necessitate relearning logarithm tables in advance of trial.)

The inexact sciences, including medicine, received a far chillier reception. The majority rule in England and the United States flatly excluded the admissibility of books, journals, or articles as proof of their contents. The law closely guarded against subterfuges designed to circumvent the general rule of inadmissibility, particularly where the expert's qualifications were based on study as opposed to personal experience.

be absurd to deny judicial standing to such knowledge, because all scientific data must be handed down from generation to generation by hearsay, and each student can hope to test only a trifling fraction of scientific truth by personal experience.

Id. Further elaborating upon "judicial standing," Wigmore clearly distinguished between using the hearsay statement as a basis for the doctor's opinion from the "different question" of admitting the "hearsay statements themselves." Id. at 530.

64. ROGERS, supra note 17, § 163, at 391.
65. Id.
66. Id. § 163, at 393-94 (emphasis added).
67. Id. § 166, at 398. Rogers summarized English decisions as well as cases from California, Illinois, Indiana, Kansas, Maine, Maryland, Massachusetts, Michigan, Mississippi, New Hampshire, New York, North Carolina, Rhode Island, and Wisconsin as conforming to the majority rule. See id. §§ 167-173. Iowa and Alabama adhered to a majority position that allowed the witness to read from the treatise. Id. § 165.
On direct examination the expert could refresh his recollection by reading an authoritative treatise to himself, but any opinion testimony had to be the expert’s own conclusion, not that of the treatise writer.68 The expert was also permitted to “state the source” of any opinion based on study, but it was “improper . . . to testify what such work contains or says.”69

Cross-examination was similarly restricted.70 Impeachment by contradiction was permitted only where the witness referred during his testimony to a work that did not support his opinion: “In other words the authorities which an expert has been allowed to cite in his testimony may be put in evidence for the purpose of contradicting or discrediting him as to opinions expressed by him on their authority.”71 If the expert did not specifically cite a supporting work, the work could not be used to impeach his testimony.72 Moreover, some jurisdictions precluded even this truncated opportunity to impeach with contradicting treatises.73

Thus, the form of the evidence was critical. Whether on direct or cross-examination, lawyers could not evade the ban through the subterfuge of reading excerpts to the witness and asking whether he agreed. Indeed, Rogers dismissed such practices as “reprehensible.”74 The authorities were less consistent on the propriety of counsel reading from such works during argument, but England and a number of states banned this as well.75 Rogers clearly disapproved of lawyers reading from treatises because a contrary rule effectively nullified the books’ inadmissibility.76

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68. Id. § 162, at 390, § 177, at 409. Rogers observed that “a marked distinction exists between permitting a witness to refresh his memory by reference to an authority or writing, and the introduction of the writing itself in evidence.” Id. § 162, at 390.

69. Rogers, supra note 17, § 177, at 409.

70. Id. § 178, at 410.

71. Id. § 176, at 408.

72. Id.

73. See id. § 176, at 408 n.4 (citing Davis v. State, 38 Md. 15, 36 (1873) and State v. O’Brien, 7 R.I. 336, 338 (1862), cases in which treatises were excluded even for contradiction purposes).

74. Rogers, supra note 17, § 178, at 410.

75. Id. §§ 180-81.

76. Id. § 181, at 413. Rogers concluded that, in cases permitting the reading of treatises during argument, “counsel really obtains from it all the benefits of substantive evidence fortified by its ‘standard’ character.” Id.
Sound reasons supported the rule of inadmissibility. First, treatises in the inexact sciences often contained evanescent opinions which were changed with new research. In short, how could the court tell whether the book's opinions were current? Second, there was no practical way to distinguish the "result of original research" from more "speculative" compilations. Third, the books themselves were hearsay because the authors were not under oath or subject to cross-examination. Finally, books contained generalized statements that did not address the facts of a particular case, unlike the expert witness who was subject to examination. In sum, by filtering opinions in books through expert testimony they "lose their independent substantive character as books."

As we will see, as late as the 1950s little had changed. The law grudgingly acknowledged that much of an expert's qualifications "derived from inadmissible sources." However, jurors were not let in on the dirty secret. Instead, the expert testified as though his knowledge of the underlying theory or test sprang from personal knowledge and experience rather than hearsay. The hope was that "errors" in the background facts canceled each other out, producing a "reliable aggregate."

2. The Minor Premises

The common law did not confine expert witnesses to sterile lectures about their field of specialization, but expected that they would apply their expertise to the facts of the case in the form of opinions. To

77. Id. § 174, at 405.
78. Id.
79. ROGERS, supra note 17, § 174, at 405.
80. Id.
81. Id. (quoting WHARTON'S EVIDENCE § 665). In stating the rationale behind the rule, Rogers relied entirely on Wharton. Wharton's arguments are paraphrased and reordered here.
82. See discussion infra part II.D.1.
84. Id. at 438.
85. Hand, supra note 1.
use Learned Hand’s terminology, the expert not only supplied the major premises but also applied them to the minor premises.\textsuperscript{86} As outlined in the preceding section, the law of evidence cloaked the substantial hearsay problems posed by the major premises through the fiction that a qualified expert could testify as though he had personal knowledge of all the information and facts contained in countless books, articles, lectures, and discussions. In short, the expert’s reliance on at least some hearsay was inextricably bound up with the expert’s qualifications. Some accommodation with the hearsay rule was both essential and inevitable.

Far more serious was the evidentiary status of the case-specific information (i.e., Hand’s minor premises) relied upon by the expert in reaching his opinion. If reliance by experts on inadmissible hearsay was an inevitable part of their qualifications, this was not true of the case-specific information. After all, the rules of evidence closely and jealously controlled how and what the jury learned about the facts of the case.

The common-law rules subjected experts—at least in theory—to the same constraints as the jury. An expert’s opinion had to be predicated upon admissible evidence of the specific facts; it could not be based on inadmissible evidence.\textsuperscript{87} The court needed the expert’s assistance because the subject matter was beyond the ken of the average person, but the expert’s province lay only in applying his specialized knowledge to the particular facts. And the jury was just as capable as the expert in deciding what those case-specific facts were, particularly where they turned on issues of credibility.

The rationale was obvious, elegant, and logical. What good was the expert’s opinion, then, unless both the expert and the jury concurred in what was said or done in this specific case? The common law developed a series of procedural devices that policed the case-specific basis for the expert’s opinion. The rules distinguished opinions based on the expert’s personal knowledge from opinions based on assumed facts (i.e., hypotheticals).

\textsuperscript{86} Id.

\textsuperscript{87} Rogers, supra note 17, § 36; McCormick I, supra note 31, §§ 14-15.
Personal knowledge embraced those specific facts about which the expert had firsthand knowledge, such as a physician who conducted a personal examination of the patient’s physical condition. The expert’s personal knowledge did not embrace hearsay; that is, what others told the expert about what happened. In this sense, the expert served in a dual capacity, testifying as a lay witness about firsthand observations while at the same time assuming the role of expert by applying specialized knowledge to the mundane observations. To ensure that the expert’s opinion rested only on relevant personal observations, the rules required that the expert describe those observations before stating an opinion. Thus, Rogers proclaimed that it was improper to ask an expert “for an opinion based on facts which he has not given in evidence.” Nor did the law soften easily on this point. Even as late as the 1950s, McCormick reported that some courts still required the expert to disclose his personal knowledge before offering an opinion, although others left prior disclosure to the trial judge’s discretion.

The law was even less accommodating where the expert lacked personal knowledge. To ensure that the expert’s case-specific basis coincided with the jury’s version of the events, two procedures arose. First, the lawyers could supply the necessary information by asking the expert witness to assume the truth of certain facts—the hypothetical question. The assumed facts might consist of only a part of the evidence because counsel was entitled to frame the hypothetical based on “his theory of them.” Moreover, the assumed facts might include those in hot dispute, so long as there was evidence “tending” to prove them. Second, the expert could listen to the same testimony as the jury. Rules exempted expert witnesses from sequestration requirements and permitted them to be called after lay witnesses had testified, thus allowing the expert to take the witness stand after having listened to the same evidence.

88. Rogers, supra note 17, § 36, at 83 (an expert’s opinion was inadmissible if based on facts which he heard outside the courtroom and which he believed were credible).
89. Id. § 36, at 82.
91. Rogers, supra note 17, § 27, at 65.
92. Id. § 27, at 68.
as the jury. This did not, however, relieve the proponent of the burden of framing a hypothetical question. The hypothetical was still necessary to identify the precise bases for the expert's opinion, except where the lay testimony was undisputed or extremely brief.

Whether the expert listened to the testimony or was fed a version of the evidence by the lawyers, the assumed facts of the hypothetical question served several valuable doctrinal functions. First, by rigidly identifying the expert's minor premises as "assumptions," the rule flagged juries to the contingent nature of the expert's ultimate opinion and the juries' own responsibility for deciding what happened in the particular case. Reflecting worries about jury autonomy and an obeisance to a distinction between fact and opinion that are alien to modern law, Rogers explained that the expert must be given "'no occasion or opportunity to decide upon the evidence, or mingle his own opinion of the facts.'"

Second, and more importantly, the device ensured that the expert's opinion was based only on admissible evidence. Because the assumed facts preceded the expert's opinion, the judge and opposing counsel could immediately discern if the opinion to follow was fatally infected with inadmissible evidence.

93. Id. § 24, at 58-59.
94. Id. § 27, at 64.
95. Id. § 28, at 70 (noting it was "improper" for experts to base an opinion on "memory" where the prior testimony was not in "harmony" or "voluminous"). Rogers also observed that the jury must be apprised of the opinion's basis because its value turned, in part, on whether the opinion was based on "false assumptions or on existing facts." Id.
96. ROGERS, supra note 17, § 28, at 68-69 (quoting Fairchild v. Bascomb, 35 Vt. 398, 415 (1862)).
97. Only on cross-examination could a lawyer inquire into assumed facts that were not supported by the evidence. In theory, this line of cross-examination only tested the expert's skill or accuracy. ROGERS, supra note 17, § 33, at 79. The rigidity of the hypothetical question doctrine is further illustrated by the rule precluding an expert from taking into account the earlier opinion testimony of another expert witness. Writing over sixty years apart, both Dean Rogers and Professor McCormick clarified that a hypothetical question could not include the "opinions" of other experts. Id. § 30; MCCORMICK I, supra note 31, § 14, at 30-31. McCormick was particularly adamant. Although experts undoubtedly considered "previously expressed opinions of other experts" in rendering their own "private opinion," testifying to such opinions was an entirely different matter. Once on the witness stand, the expert was asked to assume the truth of the earlier opinions, "and if he does this his own opinion may then be but an academic echo." MCCORMICK I, supra note 31, § 14, at 31.
D. Hearsay and the Common-Law Conundrum on the Eve of the Federal Rules

As we have seen, under common-law practice expert witnesses offered opinions based on their own personal knowledge or on hypothetical facts offered by the attorneys. Ideally, all of the minor premises supporting the opinion rested on admissible evidence. The reality was something different. Courts resorted to a variety of compromises, fictions, and outright distortions to accommodate expert testimony, all of which placed enormous strain on the doctrinal superstructure. Courts experimented with rules of limited admissibility, ersatz hearsay exceptions, and nondisclosure of the basis of the experts’ opinion in an effort to reconcile trial practice with evidentiary doctrine. The end result was an unduly technical, cumbersome, crazy-quilt of ad hoc rules and doctrinal patchwork.

By the 1950s and 1960s the cases and commentators had identified three primary pressure points, and because all three were specifically addressed in the Federal Rules of Evidence, they provide an important perspective from which to appreciate the rationale underlying the new rules. The first was experts’ reliance on treatises, journals, professional standards, and the like in formulating opinions. Many of these cases involved medical experts, who raised a second recurring problem; namely, the evidentiary status of patients’ statements describing present or past symptoms or medical history. Finally, experts of all types increasingly relied on reports or test results which were usually prepared by other technicians, thus creating an additional layer of hearsay.

The discussion below examines each of these three areas and compares the views of two commentators: Charles McCormick in the first edition of his evidence handbook and Paul Rheingold, the author of an

99. See id.
100. See discussion infra part II.D.1.
101. See discussion infra part II.D.2.
102. See discussion infra part II.D.3.
103. MCCORMICK I, supra note 31, § 14, at 31.
in-depth article on expert medical witnesses.\textsuperscript{104} Writing in 1954 and 1962, respectively, their analyses capture the state of the law on the eve of the Advisory Committee’s work on the federal rules. More importantly, McCormick’s and Rheingold’s works greatly influenced the Advisory Committee’s approach to experts’ use of hearsay.

1. An Expert’s Reliance on Treatises, Journals, etc.

Since the nineteenth century it had been conceded that an experts’ qualifications more often than not rested on hearsay.\textsuperscript{105} In the first edition of his evidence treatise, in 1954, McCormick surveyed a doctrinal landscape that closely resembled the terrain scouted by Rogers in the 1890s.\textsuperscript{106} The courts escaped the hearsay straightjacket in several ways. The simplest approach pretended that the hearsay problem did not exist; thus, qualified experts intoned opinions that, while based on inadmissible hearsay, appeared to originate with the witness.

Another method was to expand the orbit of the expert’s personal knowledge to include scientific principles and facts as well as general medical knowledge, statistics, testing protocols, and other methodology.\textsuperscript{107} Inflating the experts’ personal knowledge accomplished two things. First, it conveniently, though illogically, evaded the hearsay problem. Second, it also liberated such experts from the strictures of the hypothetical question rule because an expert’s personal knowledge did not have to be presented as an assumed fact to the jury. However, the reclassification of this background hearsay as personal knowledge left an unresolved problem. Because experts were permitted to describe the personal knowledge that supported their opinions, did it follow that they could read from or paraphrase such texts?

As we have seen, late nineteenth-century law forbade such evasions.\textsuperscript{108} Evidence law in the mid-twentieth century was murkier. Judges and commentators unanimously agreed that experts could testify

\textsuperscript{104} Rheingold, \textit{supra} note 98.

\textsuperscript{105} \textit{See} 1 \textit{Greenleaf on Evidence, supra} note 63, \$ 430(I).

\textsuperscript{106} \textit{McCormick I, supra} note 31, \$ 14, at 30-31.

\textsuperscript{107} Rheingold, \textit{supra} note 98, at 486.

\textsuperscript{108} \textit{See} discussion \textit{supra} part II.C.1.
to opinions based “upon knowledge gained from books and treatises,” but vigorously disputed the form that such testimony could assume. McCormick observed that there was still no general hearsay exception for learned treatises. Narrow exceptions existed for the exact sciences: “market reports of current prices in journals used by the trade, recognized business registers and city directories, and mortality and annuity tables used by life insurance companies.”

To be sure, the common law evinced glacial change. McCormick contended that “[t]he disinterestedness and reliability of standard scientific treatises or authoritative works in any field of scholarship would seem equally to warrant their use before a jury as evidence of the truth of their statements.” Yet by 1954, only one court had accepted this argument while several other state statutes allowed treatises to prove “facts of general notoriety and interest.”

On cross-examination the expert could be impeached with contradicting authorities, but the treatise could only be read for the purpose of testing the soundness of the expert’s opinion and only where the witness conceded that the opinion—given on direct examination—was based in whole or in part on that authority. A substantial minority of courts further restricted such impeachment to instances where the expert cited the authority during the direct examination (as opposed to acknowledging during cross-examination that the opinion given on direct was predicated on the book or treatise).

In a 1962 article surveying the landscape of expert medical evidence, Rheingold laid out an approach that ultimately influenced the contours of Rule 703. Labeling his approach the doctrine of “expert valida-

110. Id. § 296, at 621 (“The courts generally, however, have declined to sanction a broad exception to the hearsay rule for standard treatises as such.” (footnote omitted)). Today, nearly thirty-six states recognize a general exception for learned treatises modeled upon, or inspired by, Federal Rule 803(18). Index & Tables, Weinstein, supra note 8, at T-136 to 139.
112. Id. § 296, at 621 (footnotes omitted).
113. Id. (quoting 6 John Henry Wigmore, Evidence § 1693). McCormick further observed that these statutes did not embrace medical or scientific treatises. Id. § 296, at 621 n.10.
114. Id. § 296, at 620.
115. Id. § 296, at 620 n.3.
116. Rheingold, supra note 98.
tion,"\textsuperscript{117} Rheingold argued that a doctor should be permitted "to rely in court upon what he has read and relied on in his private practice."\textsuperscript{118} Put another way, whatever information the doctor "routinely" relies on in practicing medicine was an appropriate basis for the doctor's opinion.\textsuperscript{119} The expert validation doctrine had its genesis, according to Rheingold, in Justice Oliver Wendell Holmes, Jr.'s decision in \textit{Finnegan v. Fall River Gas Works Co.}\textsuperscript{120} Moreover, it "spread from authoritative, standard treatises to journals, statistical records (including life expectancy tables), the results of experiments, and even to information on how to perform tests."\textsuperscript{121} Although praising this "simple concept" because it provided "the rationale for allowing reliance on many types of medical and nonmedical evidence that might otherwise be barred as hearsay,"\textsuperscript{122} Rheingold carefully noted that the courts disagreed on its rationale.\textsuperscript{123} Some justified the idea on "need," others enshrined it as a "hearsay exception," and some labeled it a device for refreshing recollection or disingenuously minimized the evidence as only "'amplifying' or 'corroborating' an opinion which the doctor already holds."\textsuperscript{124} Rheingold rooted expert validation in the reality of how doctors practiced medicine, especially their professional and ethical standards:

The simplest and most satisfactory solution to the various problems presented in this article, it is believed, lies in a policy of according to the physician \textit{free reliance} upon medical material which he believes to be germane to the opinion which he is asked to offer. As has been repeatedly pointed out, the expert is competent to ascertain the reliability of statements and reports of others and to use only what is relevant

\textsuperscript{117} \textit{Id.} at 531. "Expert validation" had been broached earlier by other commentators. \textit{See generally} Maguire & Hahesy, \textit{supra} note 83. McCormick also supported a version of expert validation. \textit{See infra} text accompanying notes 149-88.

\textsuperscript{118} Rheingold, \textit{supra} note 98, at 485.

\textsuperscript{119} \textit{Id.} at 486.

\textsuperscript{120} \textit{Id.} at 484.

\textsuperscript{121} \textit{Id.} at 486.

\textsuperscript{122} \textit{Id.} at 311, 34 N.E. 523 (1893).

\textsuperscript{123} Rheingold, \textit{supra} note 98, at 483-84 (footnotes omitted). As discussed in the following two subsections, parts II.D.2-3, expert validation extended to other kinds of hearsay, including statements and reports prepared by investigators or other technicians.

\textsuperscript{124} \textit{Id.} at 484.

\textsuperscript{125} \textit{Id.}

\textsuperscript{126} Rheingold concurred that none of this jumble was "particularly illuminating." \textit{Id.}
and trustworthy. The concept, simply put, is that the doctor validates what he uses. He follows a process scientifically ingrained: he analyzes what he hears, casts out what seems inaccurate, pulls together the rest and reaches an opinion and course of action.\footnote{125}

In short, the qualified medical expert could freely rely on anything the witness deemed appropriate. The doctor, not the judge, validated the bases.

Expert validation further implied that the doctor could describe the basis so that the jury better understood the expert’s conclusions. Rheingold rejected crabbed readings of Finnegan that barred disclosing the basis to the jury while tolerating the opinion testimony built upon it.\footnote{126} Doctors should be permitted to “paraphrase and perhaps read some parts directly if they happen to have the book along with them.”\footnote{127}

\begin{footnotes}
\item[125] Id. at 532 (footnotes omitted) (emphasis added).
\item[126] Rheingold, supra note 98, at 483. In particular, Rheingold quoted the following passage from Finnegan:

\begin{quote}
[Although it might not be admissible merely to repeat what a witness had read in a book, not itself admissible, still, when one who is competent on the general subject accepts from his reading as probably true, a matter of detail which he had not verified, the fact gains an authority which it would not have had from the printed page alone, and, subject, perhaps, to the exercise of some discretion, may be admitted.]
\end{quote}

Id. at 483 (quoting Finnegan v. Fall River Gas Works Co., 34 N.E. 523 (1893)). Rheingold disagreed with Maguire’s restrictive readings of Finnegan and National Bank of Commerce v. New Bedford, 56 N.E. 288 (1900), another Holmes opinion that mirrored Finnegan. See Maguire & Hahesy, supra note 83, at 437-38. Criticizing both Maguire and another commentator, Hughes, Rheingold argued:

\begin{quote}
Is there an ambiguity in Justice Holmes’ terse prose? Apparently there is, for Professor Maguire reads it as being as much a red light as a green one. The doctor may “rely” but he may not restate. When a Massachusetts evidence teacher, Hughes, gets to the case it is almost all red light. The case is a “blanket rejection of proof of underlying hearsay when offered in support of expert evidence.” Hughes says that while Holmes had in mind that a doctor could refer to what he read, he could not, under the guise of fortifying his opinion, read it into evidence. It is submitted that both professors have read Finnegan and National Bank too narrowly. They have constructed a dichotomy between mere reference and reading under the guise. But note that many gradations in use exist. What most doctors do in fact is something in between: they paraphrase and perhaps read some parts directly if they happen to have the book along with them. If they, or their counsel more likely, are seeking to create evidence, the judge will intercede; this is what Holmes meant by “discretion” . . . . Certainly it was not meant that the doctor should do no more than state the type of basis.
\end{quote}

Rheingold, supra note 98, at 483 n.51 (citations omitted).
\item[127] Rheingold, supra note 98, at 483 n.51.
\end{footnotes}
If lawyers attempted to "create evidence," the judge had the discretion to "intercede." Cases that allowed the doctor to render his opinion but precluded him from "recit[ing] the material deemed improper" manifested "a distrust for the jury which can be settled by proper instructions." There was but one "sensible" approach: "allow the basis if the opinion is allowed, and to strike the whole opinion if it lacks a proper basis." In short, free reliance meant free disclosure of the expert's basis to the jury subject only to a limiting instruction. Unfortunately, Rheingold offered no guidance on what such an instruction would say or how judges would detect when lawyers were attempting to create evidence.

2. Statements by Patients to Physicians

Statements made by patients to doctors formed a second flashpoint. In the late nineteenth century, the general rule was clear: experts' opinions could not be based on unsworn out-of-court statements. The rule was, however, inapplicable to treating physicians, who were permitted to testify to statements or narratives by the patient regarding conditions, symptoms, sensations, and feelings, whether past or present. Despite

128. Id. Rheingold further explained:

Another set of cases involve the situation where the medical authorities are directly (and often at length) read to the trier of the fact, either by the doctor in upholding his opinion or by the lawyer in examining his witness. A few decisions have upheld the practice, finding it no different from the common situation of reliance already discussed. But other courts have condemned the practice, distinguishing it from the Finnegan situation on the ground that here the book is virtually being made independent evidence. These views can be readily reconciled by a rule according discretion to the judge to refuse reliance where it is patently an attempt to introduce the book into evidence but to allow it where it is in fact merely being read to indicate basis.

129. Id. at 484-85 (footnotes omitted). Left unexplained is how the judge is to distinguish the one situation from the other, or what was meant by "refusing reliance." Did this mean that the opinion could not rest on the basis, or only that the basis could not be "disclosed" to the jury for the limited purpose of explaining the expert's reasoning?

130. Id. at 478.

131. Rogers, supra note 17, § 46.

132. Id. § 47, at 116.
this latitude, the treating doctor could not relate statements about the patient’s history or the cause of the injury. The exception’s justification turned on the treating doctor’s need for, and reliance upon, such statements in offering treatment. The cases split over whether non-treating physicians should be accorded the same latitude.

Writing in the 1950s, McCormick detected an environment more favorably disposed toward statements made by patients to treating physicians. A universal hearsay exception existed for a patient’s statements of presently existing conditions, including subjective symptoms, to a treating physician. Although some jurisdictions now extended the exception to past symptoms, only a minority included the patient’s history describing the general character or external source of the injury when pertinent to treatment.

Courts continued, however, to shun patients’ statements to non-treating physicians. Most did not permit statements describing the patient’s present pain or symptoms as substantive evidence. Non-treating physicians could base their opinions on such history along with their firsthand observations, but the patient’s statements themselves were “merely explanatory of the opinion.” And a minority of jurisdictions refused to allow a non-treating physician to disclose any inadmissible hearsay and further barred the doctor’s opinion when it was based only on “subjective” facts.

McCormick’s survey, then, revealed evidentiary rules that favored treating physicians not only by allowing their opinions, but also by permitting substantive use of a wide array of statements made to them.

133. Id. Wigmore concurred, recognizing that because the patient’s “life and death” turned on such statements, courts require “no stricter rule.” 1 GREENLEAF ON EVIDENCE, supra note 63, § 430(L), at 529. The statements could only be used to explain the doctor’s opinion unless the statements were admissible under some hearsay exception. Id. § 403(L), at 530.

134. ROGERS, supra note 17, § 47; see also 1 GREENLEAF ON EVIDENCE, supra note 63, § 162b, at 255-57.

135. MCCORMICK I, supra note 31, § 266, at 563.

136. Id. § 266, at 564. Foreshadowing federal Rule 803(4) (statements made for purposes of medical diagnosis or opinion), the minority that allowed the patient’s history describing the injury’s external cause or general character did not include statements of “fault.” Id.

137. Id. § 267, at 565.

138. Id.

139. Id. § 267, at 566.
by their patients. Non-treating physicians received a less favorable reception, but the law still permitted their opinions and most courts allowed disclosure of patients' statements as explanatory—although it was unclear what exactly such statements explained.

Where McCormick detected clearly emerging rules and grounds for optimism in 1954, Rheingold saw chaos and confusion in the law's handling of patients' statements to doctors in 1962. There was, according to Rheingold, "no simple consensus of courts allowing a physician, regardless of type, to rely on a patient's statements, regardless of type, for the stated, limited purpose of demonstrating the basis of his testimony." In trying to make sense of the cases, Rheingold looked at the type of doctor involved (treating or non-treating), the timing of the statement relative to the litigation, the declarant's motive in making the statement, the subject matter (present or past symptoms, history of the injury, etc.), and other factors. He found that the cases demonstrated a "diversity of rules" and proclaimed that those which restricted a doctor's "use of patient statements [were] out of step with reality and a divergence from sound medical practice." Rheingold closed by noting the anomaly that malpractice concerns compelled doctors and their assistants to take patient histories and rely upon them in treatment and diagnosis. Thus, it followed that "[i]f the courts were in fact to exclude the statements which they call improper, there would be virtually no medical evidence heard in court."
3. Reports and Tests Prepared by Technicians

The third flashpoint involved a doctor’s reliance on tests or reports prepared by others, such as laboratory technicians. Reflecting perhaps the simpler, relatively unspecialized nature of late nineteenth-century medical practice, Rogers lumped the statements of other physicians into the category of inadmissible hearsay that could not be used as a basis for a testifying physician’s opinion:

The rule is that an expert cannot be allowed to give his opinion based upon statements made to him by parties out of court and not under oath. His opinion to be admissible must be founded either on his own personal knowledge of the facts, upon facts testified to in court, or else upon an hypothetical question. Hence the opinion of a physician, called in consultation with the attending physicians, cannot be received if based upon declarations made to him by such physicians, or by the wife and nurse of the patient as to his previous symptoms or condition. It has never been held that a medical expert has the right to give in evidence an opinion based on information which he has derived from private conversations with third parties.

Thus, consulting physicians had to be called as witnesses to testify about their own personal knowledge or opinions.

Sixty years later McCormick argued that experts should be given wider latitude to testify to opinions based on inadmissible hearsay, especially “highly reliable” out-of-court statements that experts often used in their own practice. Examples included “a report of an examination by another physician, or hospital charts and records showing the symptoms, treatment and progress of a patient.” McCormick acknowledged that the common law permitted only experts with “firsthand knowledge” to “give his inferences or opinions positively and directly,

148. Rogers, supra note 17, § 46. Wigmore was a bit more tentative. He concurred that aside from professional texts and patient’s statements, medical experts could not predicate opinions on “hearsay information.” Wigmore noted, however, that “where the person is a nurse or other attendant, it would seem that the same necessity and propriety here demanded its admission.” The necessity and propriety apparently referred to the physician’s use of the patient’s statements in offering treatment. 1 Greenleaf on Evidence, supra note 63, § 430(L), at 529-30.
149. McCormick I, supra note 31, § 15, at 32.
150. Id.
rather than in the muffled, abstract form of an answer based on a hypothesis." He further conceded that "statements made by third persons" did not qualify as firsthand knowledge. Under the prevailing view, then, experts' opinions could be based on such third-party reports only where the proponent specified them as assumed factual predicates in a hypothetical, which also meant that the predicate had to be proven by admissible evidence. Moreover, the prevailing view appeared to control even where the third-party report "supplemented" the expert's personal observations.

Rankled by the prevailing view, McCormick advocated a contrary view found in several cases. Experts in "science" were presumed "competent to judge . . . the reliability of statements made to him by other investigators or technicians." He then offered the following proposal:

If the statements, then, are attested by the expert as the basis for a judgment upon which he would act in the practice of his profession, it seems that they should ordinarily be a sufficient basis even standing alone for his direct expression of professional opinion on the stand, and this argument is reinforced when the opinion is founded not only upon such reports but also in part upon the expert's firsthand observation. The data of observation will usually enable the expert to evaluate the reliability of the statement.

151. Id.
152. Id.
153. Id. McCormick explained that the prevailing view did not permit lawyers to skirt the issue by ignoring the hearsay problem and allowing the expert to testify to an opinion as if the third-party report was part of his firsthand knowledge:

The essential objection seems to be that since the question is not hypothetical in form, the jury is asked to accept as evidence the witness' inference, based upon some one [sic] else's hearsay assertion of a fact which is, presumably, not supported by any evidence at the trial and which therefore the jury has no basis for finding to be true.

Id.

155. Id.
156. Id. § 15, at 33. Professor McCormick argued that experts were as competent to determine the reliability of third-party reports as the judge and jury were to evaluate the credibility of lay witnesses on the stand.
157. Id.
McCormick's principal authority was *Sundquist v. Madison Rys. Co.*, a lawsuit that arose when a streetcar rear-ended plaintiff's automobile in Madison, Wisconsin. Although not physically injured, the plaintiff claimed that she had developed a nervous disorder. Over two months after the Wisconsin crash, the plaintiff fainted after hearing a clanging streetcar bell in Olympia, Washington. The very next evening she experienced paralysis. The plaintiff's suit claimed that the earlier car crash caused her paralysis.

In her case-in-chief, the plaintiff presented evidence from two doctors: the one who treated her in Wisconsin following the streetcar crash and a second doctor who attended to her paralysis in Washington. Both diagnosed the patient as suffering from "hysterical paralysis." The Washington doctor did not appear at trial; rather, the plaintiff was permitted to read his deposition to the jury. The defendant called doctors who disputed the causal connection, but the defendant's doctors

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158. 197 Wis. 83, 221 N.W. 392 (1928).
159. *Sundquist*, 221 N.W. at 392; see MCCORMICK I, supra note 31, § 15, at 33 nn.3-4.
161. *Id.* at 393.
162. *Id.*
163. *Id.*
164. *Id.*
165. *Sundquist*, 221 N.W. at 393. The court reviewed the doctors' testimony in the context of reviewing the sufficiency of the evidence.
166. 197 BRIEFS & CASES: WISCONSIN 83; *Sundquist v. Madison Rys. Co.*, No. 47, Record at 141 [hereinafter *Sundquist Record*].
had not "seen or treated" the plaintiff.\textsuperscript{167} The defendant argued that the Washington doctor's deposition

was not admissible because the doctor testified that he made his diagnosis of hysterical paralysis by the exclusion of other possible causes for plaintiff's condition, and that in so doing he relied upon the report of the result of examinations made by hospital technicians, such as are regularly made in modern hospitals, as well as upon the history of the case and what he found upon his examination of the plaintiff.\textsuperscript{168}

In short, the doctor's basis apparently consisted of the patient's statements (the history), his firsthand observations of her condition, and the reports prepared by hospital technicians. The defendant attacked the doctor's reliance on the reports because the technicians had not testified about "how the tests were made or that the result[s] of these tests were correctly recorded in these reports."\textsuperscript{169} Nevertheless, the trial court admitted the deposition, and the jury returned a verdict for the plaintiff.\textsuperscript{170}

The Wisconsin Supreme Court upheld the admissibility of the doctor's testimony.\textsuperscript{171} The court framed the issue with a rhetorical flourish that foreshadowed its holding: could a judge bar a doctor from testifying to a diagnosis where the physician "has actually used the result of those tests in a diagnosis and in the treatment of the plaintiff."\textsuperscript{172} The Wisconsin court declined to

shut its eyes to a source of information which is relied on by mankind generally in matters that involve the health and may involve the life of their families and of themselves—a source of information that is essential that the court should possess in order that it may do justice between these parties litigant.\textsuperscript{173}

Although the court declined to shut its eyes, it also observed that the jury had not been allowed to hear anything about reports because their "contents" had not been "disclosed."\textsuperscript{174} In closing, the court concluded:

\textsuperscript{167} Sundquist, 221 N.W. at 393.
\textsuperscript{168} Id.
\textsuperscript{169} Id.
\textsuperscript{170} Id.
\textsuperscript{171} Id.
\textsuperscript{172} Sundquist, 221 N.W. at 393.
\textsuperscript{173} Id.
\textsuperscript{174} Id.
In making a diagnosis for treatment, physicians must of necessity consider many things that do not appear in sworn proof on the trial of a lawsuit—things that mean much to the trained eye and touch of a skilled medical practitioner. This court has held that it will not close the doors of the courts to the light which is given by a diagnosis which all the rest of the world accepts and acts upon, even if the diagnosis is in part based upon facts which are not established by the sworn testimony in the case to be true.175

Before returning to McCormick's Sundquist-inspired rule, several points about the case need to be emphasized. First, Sundquist concerned only the admissibility of the doctor's diagnosis. Neither party placed the underlying reports into evidence nor were the contents disclosed to the jury.176 Thus, Sundquist is silent about the proponent's latitude to have the expert explain how he reached his conclusion, especially where some of the bases are inadmissible.177 Second, it would have been grossly impractical to have the technicians appear to testify. The trial was held in Dane County, Wisconsin, in the 1920's.178 The doctor treated the plaintiff in a hospital near Olympia, Washington.179 In a world blessedly ignorant of overnight delivery, fax machines, and red-eye flights, it was impractical to continue the trial so that the plaintiff could call the technicians to the stand or obtain the original reports, X-rays, etc. Finally, the doctor in Washington not only examined the plaintiff, but he also treated her based on his diagnosis.180 According to the court's language in Sundquist, the physician "actually used the result of those tests."181 Thus, the doctor was not intoning that he regularly relied upon this type of data in rendering diagnoses; rather, he had actually treated the plaintiff long before the inception of the litigation against the streetcar company.

175. Id.

176. Id. The court did not explain what it meant by "contents" or "disclosed to the jury." Thus, it is not clear whether the jury heard absolutely nothing about the reports, or whether the jury was told only that the doctor had relied on certain technical reports but nothing about the specific details of their contents.

177. Sundquist, 221 N.W. at 393.

178. Id.

179. My assumption is that the doctor from Washington treated her in a hospital near Olympia. See Sundquist Record, supra note 166, at 140.

180. Sundquist Record, supra note 166, at 140.

181. Id.
With this understanding of the Sundquist case, one can more easily appreciate McCormick's proposed rule. First, the proposal did not extend to experts in all fields but was deliberately confined to an "expert in science."\(^\text{182}\) Moreover, all the case law cited as supporting the rule involved medical experts (with one exception).\(^\text{183}\) Second, McCormick said almost nothing about disclosure.\(^\text{184}\) That is, he did not specify whether the expert could detail the third-party report during the direct examination for the limited purpose of explaining how he reached his conclusion.\(^\text{185}\) Rather, McCormick focused on the admissibility of the expert's opinion.\(^\text{186}\) The most that he said about disclosure was that the expert would have to "attest" that the hearsay statement was "the basis for a judgment upon which he would act in the practice of his profession."\(^\text{187}\) Third, McCormick limited the class of hearsay declarants to "investigators or technicians," which fell far-short of embracing all species of hearsay relied by expert witnesses.\(^\text{188}\)

Rheingold's 1962 article outlining expert validation tracked McCormick's analysis but with several important differences.\(^\text{189}\) Rheingold confined himself exclusively to medical experts, but his analysis went beyond McCormick's cryptic concern with statements made by other "investigators or technicians."\(^\text{190}\) The cases fell into three categories.

First, Rheingold looked at statements made by other doctors, nurses, or technicians.\(^\text{191}\) Although doctors commonly relied upon such hearsay in forming their opinions, "[t]he weight of the cases appears to deny the use of information gained from medical personnel."\(^\text{192}\) Auspiciously,

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182. MCCORMICK I, supra note 31, § 15, at 33.
183. Id. § 15, at 32-33 nn.1-4; see supra note 159 (discussing Schooler, which involved a geologist). All other cases noted involved physicians or psychiatrists.
185. Id.
186. Id.
187. Id.
188. Id.
189. Rheingold, supra note 98, at 505.
190. Id.
191. Id.
192. Id. Cited are cases involving "statements by fellow doctors, including attending doctors, consulting doctors, medical examiners, hospital superintendents, and others; statements by nurses;
however, Rheingold detected an emerging "trend toward medical reality" that permitted doctors to rely on such hearsay when testifying to their own opinions.\footnote{193} Both the medical need for the information and the "assumed reliability of medical personnel generally" outweighed the slight danger that the jury might hear erroneous information.\footnote{194}

The second area involved the results of medical tests performed or interpreted by others.\footnote{195} Most cases precluded the expert’s reliance on such hearsay as a proper basis for an opinion, but Rheingold caustically dismissed them as "encrusted" relics "of an old vintage."\footnote{196} In their stead, he enthusiastically offered Sundquist v. Madison Rys. Co.,\footnote{197} decided forty years earlier, as the leading example of a "strong minority of well-reasoned, scientifically accurate cases."\footnote{198}

The third source of hearsay involved "medical forms" or other "hospital records."\footnote{199} Again the cases were in gross disarray over the substantive admissibility of such records and the propriety of a doctor’s reliance on such information while testifying.\footnote{200} Summarizing the more recent cases, Rheingold concluded "that much secondhand medical information—drug sheets, diet notes, pulse and temperature charts and the like—is being relied upon in the course of medical testimony and is being sanctioned either through general admission of the document or through established propriety of the subsidiary information relied upon."\footnote{201}

\begin{footnotes}
\begin{enumerate}
\item statements by staffs at mental hospitals; and statements embodied in hospital records and in certificates of various sorts." \textit{Id.} (footnotes omitted).
\item \textit{Id.} at 506. Rheingold also observed that Wigmore had first detected this trend around 1940. \textit{Id.} (citing 3 \textit{JOHN HENRY WIGMORE, EVIDENCE} § 688, at 8).
\item Rheingold, \textit{supra} note 98, at 508.
\item \textit{Id.}
\item \textit{Id.} at 509.
\item 197 Wis. 83, 221 N.W. 392 (1928).
\item Rheingold, \textit{supra} note 98, at 509. Rheingold also criticized aberrant cases that had confused the expert’s reliance on the basis with its substantive use as evidence (which was improper absent a hearsay exception) as well as cases that required a production of "the tangible results of the test—graphs, plates or the like." \textit{Id.} at 511. Citing the opportunities to inspect such materials through pretrial discovery, Rheingold opposed production of the tangible results unless they were "readily producible." \textit{Id.}
\item \textit{Id.} at 512.
\item \textit{Id.} at 514.
\item \textit{Id.}
\end{enumerate}
\end{footnotes}
To bring order to such disparate bodies of case law, Rheingold recommended the principle of expert validation.²⁰² Courtroom practice should be harmonized with medical practice. Doctors should be permitted to testify to opinions based on the same kind of information they rely upon in their clinics or surgical theaters. Expert validation, then, represents a better overall approach that can be applied to any bases relied upon by a medical expert rather than the exasperatingly arbitrary distinctions that mark the chaotic case law.

III. Experts and the Federal Rules of Evidence

A. Introduction

The Advisory Committee that drafted the Federal Rules of Evidence labored from 1961 until the rules were enacted in the mid-1970s.²⁰³ Article VII consisted of six rules governing expert and opinion testimony. Although Congress substantially altered a number of rules during its review of the Advisory Committee's draft, it did not alter any part of Article VII.²⁰⁴

What impact, then, did the federal rules have on the common law of expert evidence? Or, to ask a slightly different question, why should we care about the common-law rules in light of Article VII? In one sense the federal rules offer a beguiling simplicity. Four short rules—Rules 702 through 705—appear to govern the complexities of expert evidence. The temptation is to dismiss the entire common-law backdrop or relegate it to a footnote that explains why the Advisory Committee made the decisions it did.

But this would be a mistake. Although the federal rules undoubtedly changed a number of important common-law rules,²⁰⁵ they did not

²⁰². Id. at 531-34. Rheingold's views on expert validation are set forth in more detail in the text accompanying notes 88-96.

²⁰³. See 21 WRIGHT & GRAHAM, supra note 7, § 5006.

²⁰⁴. In the wake of the John Hinckley insanity trial, Congress created Federal Rule of Evidence 704(b) in 1984. See H.R. REP. 1030, 98th Cong., 2d Sess. 230, reprinted in 2 MCCORMICK II, supra note 60, app. A, at 649. Rule 704(b) represents the only substantive change to Article VII since its approval by the Advisory Committee.

²⁰⁵. For example, Daubert v. Merrell Dow Pharmaceuticals, 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993) clarified that Rule 702 did away with the common law's Frye
supersede them in all respects. Nor did the text of the rules explicitly address all of the problems posed by the common-law rules. Shortly after the federal rules became effective, Professor James McElhaney thoughtfully summarized the relationship between Article VII and the common-law rules: "While organized in a system that superficially suggests they stand alone, the rules are actually a set of additions and modifications to the common law, and only make sense in that context." In short, Article VII, along with several critical hearsay exceptions, certainly altered the common-law foundation, but the drafters left a significant part of it intact. Moreover, the adjustments had unintended and unforeseen consequences. The Advisory Committee’s alchemy produced a strange brew, especially Rule 702’s warm embrace of expert assistance whenever helpful, Rule 703’s acceptance of expert opinions based even on inadmissible case-specific evidence, and Rule 705’s laissez-faire approach to disclosure.

The purpose of this section is to explain how Rules 702 through 705 affected the common law. Primary reliance is placed on the rules’ text as well as the corresponding Advisory Committee’s notes. Part III.C. will discuss some of the more salient problems that have arisen because of the drafters’ alchemy, particularly those involving Rule 703, and how the courts and rule-making authorities have responded to these issues.

B. The Major Premises:
Rule 702 and Rules 803(17) and 803(18)

Rule 702 governs when expert evidence may be admitted and the qualifications for expert witnesses. The rule states: “If scientific,
technical, or other specialized knowledge 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. 211 The rule departed from the common law in several dramatic ways. First, Rule 702 replaced the common law's necessity standard with one of "assistance" to the trier of fact, thus enabling experts to testify even on issues with which the jury had some familiarity. 212 No longer would courts ration expert testimony on a "need to know" basis. Second, Rule 702's assistance standard together with Rule 402's generous approach to relevancy sounded the death knell for the Frye standard, which purportedly limited scientific evidence to those theories and techniques that had gained general acceptance in the pertinent scientific community. 213

However, Rule 702 continued the common law's recognition that expertise can arise from skill and experience (hands-on training) as well as formal education and licensure requirements (books, lectures, and degrees). 214 Professor Edward Imwinkelried has argued persuasively that Rule 702 governs the expert's major premises, which are the theories or the techniques that the expert applies to the case-specific facts (i.e., the minor premises). 215 With respect to scientific experts, the major premises refer to a "validation technique, consisting in the formulation of hypotheses, followed by observation or experimentation to test the hypotheses." 216 And in most instances, the expert's knowledge of the major premises arises from hearsay sources.

211. Fed. R. Evid. 702.


213. Rule 402 provides that only relevant evidence is admissible. Relevancy is defined in Rule 401. Rule 702 mortally wounded Frye, but the victim lingered for nearly twenty years before dying in 1994. See Imwinkelried, supra note 2, at 356.


216. Imwinkelried, supra note 2, at 357.
As we have seen, the common law largely suppressed much of this hearsay. It recognized no general "learned treatise" exception, although some writings could be used for impeachment during cross-examination. Most of the hearsay bearing on the major premise was simply repackaged as the expert's personal knowledge and fed to the jury as the witness's original thoughts on the subject. Thus, courts tolerated explanations by qualified experts provided their testimony did not literally quote from other authorities; the witness was the only salient authority.

Rule 702 is silent on the disclosure of the expert's major premises. It provides that the expert can testify in the form of an opinion "or otherwise," which means that the expert can offer a "dissertation or exposition" on her area of expertise. But Rule 702 says nothing about whether the expert can explicitly refer to, or quote from, treatises, journals, lecture notes, and the like, or whether instead the expert must present the information as part of a repertoire of personal knowledge.

The Advisory Committee did not ignore the problem entirely. Rule 803(17) provides a hearsay exception for published compilations, such as market quotations, lists, or directories of various sorts. The compilations may be those "generally used and relied upon" by the lay public or experts in specific fields. In extending its reach to compilations widely used by the lay public, Rule 803(17) expanded the common-law rule, which had been narrowly geared toward experts, and demanded a level of reliability that approached judicial notice.

More importantly, the drafters created a hearsay exception for learned treatises, Rule 803(18). It permits the use of authoritative articles, books, or other writings as substantive evidence. The Advisory Committee recognized the trustworthiness of such writings, but expressed
concern that sophisticated, technical material might be misapplied or
misunderstood by lay persons.225

The rule’s mechanics reflect the drafters’ balance of specialized
trustworthiness with lay comprehension. First, the proponent must show
that the writing is a “reliable authority” either through testimony or
judicial notice.226 Thus, a qualified expert can lay a sufficient predicate
by acknowledging the writing’s reliability during direct examination.227
Moreover, a cross-examiner can confront opposing experts with such
writings regardless of whether they have relied upon the writings or
recognize their reliability.228 Second, to minimize the danger that
a lay jury might misunderstand or misuse the treatise, Rule 803(18)
requires an expert chaperon.229 The writing’s content must be brought
to the jury’s attention through an intermediary, the expert witness, whether
on direct or cross-examination.230

The expert chaperonage requirement attests to the Advisory Commit-
tee’s concerns about disclosure. Rule 803(18) forces lawyers to strain
the writing’s contents through the filter of expert testimony.231 The

225. FED. R. EVID. 803(18) advisory committee’s note.

226. FED. R. EVID. 803(18). The authority’s reliability presents a preliminary question
of admissibility for the trial judge under Rule 104(a). The judge must be convinced of the
writing’s reliability by a preponderance of the evidence, but is not bound by the rules of evidence
(except with respect to privileges) in so deciding.

227. FED. R. EVID. 803(18) advisory committee’s notes.

228. See id. The Advisory Committee stated:

The relevance of the use of treatises on cross-examination is evident. This use of
treatises has been the subject of varied views. The most restrictive position is that
the witness must have stated expressly on direct his reliance upon the treatise. A slightly
more liberal approach still insists upon reliance but allows it to be developed on cross-
examination. Further relaxation dispenses with reliance but requires recognition as
an authority by the witness, developable on cross-examination. The greatest liberality
is found in decisions allowing use of the treatise on cross-examination when its status
as an authority is established by any means.

Id. Rule 803(18) explicitly distinguishes between direct and cross-examination: on direct
examination the expert must have “relied” on the writing, but the cross-examiner need only
bring the writing “to the attention of an expert witness.” FED. R. EVID. 803(18).

229. See FED. R. EVID. 803(18) advisory committee’s notes.

230. Some state variants of federal Rule 803(18) do not require expert chaperonage. See,
e.g., WIS. STAT. ANN. § 908.03(18) (West 1993). For a full explanation of this statute, see

231. See FED. R. EVID. 803(18).
The rule expressly forbids receipt of the tangible writing as an exhibit. The written word is not allowed primacy; everything is oral in form. Whether the source is the expert's firsthand knowledge or the printed word, the jury hears only the spoken word. In its tangible form, the writing appears only in the hands of the lawyer or witness who reads from it, or perhaps as a demonstrative exhibit. The rule's mechanics virtually assure that parties will use brief excerpts from longer writings. Reading vast passages from a technical treatise risks stupefying the jury (and the judge, and the court reporter, and the lawyers) or inciting mutiny. Thus, the rule represents only a slight improvement over the common-law practice, but at least experts can actually quote from published sources and courts can dispense with the fictions concerning refreshed recollection or limiting instructions.

Rule 803(18) covers a wide array of expert literature, embracing any "published treatises, periodicals, or pamphlets on a subject of history, medicine, or other science or art." Concededly, the minimal reliability requirements are normally an easy threshold to achieve, but the rule is not coterminal with all of the hearsay that informs the expert's major premises. Information communicated orally obviously falls outside of the rule. Thus, what one researcher tells another, regardless of its validity and the declarant's status, is not within the sweep of Rule 803(18). Similarly, an expert's database or research hypotheses might be derived from sources that do not meet Rule 803(18)'s publication requirement.

In short, the learned treatise exception does not cover all sources of the expert's major premises. Gaps remain and, by default, the disclosure of inadmissible evidence relating to the expert's major bases is left to the judge's discretion under Rules 702 and 705. As we will see, Rule 705 allows the expert to testify to an opinion "and give reasons

232. Id.
235. The same probably holds for information communicated through computers. Thus, research and ideas exchanged over the Internet might not meet the "publication" requirement of Rule 803(18), unlike Rule 803(6) (records of regularly conducted activities) or Rule 803(8) (public reports and records), which explicitly embrace "data compilations."
236. See Imwinkelried, supra note 2, at 374 (assigning "epidemiological research data" to Rule 702).
therefor,”237 but this is hardly the same as allowing the expert to determine carte blanche what the jury should be told.

C. The Minor (Case-Specific) Premises: Rule 703, Rule 705, and Related Hearsay Exceptions

Case-specific bases pose two distinct but (by now) familiar problems. First, what can the expert rely upon in drawing an inference or forming an opinion? Put another way, what are the permissible bases of an expert’s opinion? Second, how much of this information should be related to the jury—the problem of disclosure. Rule 703 serves as the gatekeeper for determining the permissible case-specific bases for an expert’s opinion.238 However, it provides only the starting point for the analysis; other evidentiary rules, especially certain hearsay exceptions, are directly implicated by Rule 703.239 Moreover, disclosure is addressed, albeit imperfectly, in Rule 705.240 We will first address the extent of permissible bases under Rule 703 before turning to the analytically distinct problem of disclosure under Rule 705.

With beguiling clarity, Rule 703 states:

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.241

The Advisory Committee explained the rule’s seemingly straightforward approach to expert bases. An expert opinion can be predicated upon any of three possible sources.242 The first source consisted of the


238. See Imwinkelried, supra note 2, at 376. Professor Imwinkelried’s analysis is persuasive. In light of these articles, it is no longer productive to argue that Rule 703 has any direct application to the expert’s major premises.

239. See Fed. R. Evid. 803.


expert's firsthand observations, such as a personal examination by the treating physician.\textsuperscript{243} The second source, also derived from common-law practice, involved the expert who learned of the facts from a "presentation at the trial."\textsuperscript{244} The presentation could come from "the familiar hypothetical question" or by listening to other witness's testimony.\textsuperscript{245} The innovative third source represented a negation of the first two:

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.\textsuperscript{246}

Thus, there is a tidy correspondence between the three sources described by the Advisory Committee and the first sentence of Rule 703. The expert's bases may be those "perceived by" the expert (source #1), those "made known to the expert" at the trial (source #2), or those "made known to the expert" before the trial (source #3).\textsuperscript{247}

However, lurking beneath the surface of the rule are troublesome conflicts waiting to arise. For example, where does hearsay fit into the scheme? A quick glance at the rule suggests that hearsay is confined to source #3, but even a moment's reflection reveals that out-of-court statements arise in the other two sources as well. For example, a patient might describe past or present symptoms during a physical examina-

\textsuperscript{243} Id.
\textsuperscript{244} Id.
\textsuperscript{245} Id.
\textsuperscript{246} Id. The Advisory Committee's explanation continued:

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.

\textit{Id.} (emphasis added).

\textsuperscript{247} \textit{Fed. R. Evid.} 703 (emphasis added).
tion\textsuperscript{248} (source \#1) or the lawyer posing a hypothetical question might ask the expert to assume the truth of hearsay contained in reports or the testimony of other witnesses (source \#2). Thus, hearsay is not necessarily confined to the third source, but rather cuts across all three sources. Nor is the third source limited to hearsay statements, even though hearsay will inevitably comprise its greatest bulk.\textsuperscript{249}

In short, the Advisory Committee's seemingly straightforward description of the three sources masks Rule 703's complexity and its interaction with other evidentiary rules. More precisely, Rule 703 is calibrated along two different evidentiary axes which are reflected in the rule's two terse sentences. Although the first sentence addresses the source and timing of the expert's knowledge, the second sentence goes more to the heart of the whole problem; namely, the evidentiary status of the bases as "admissible" or "inadmissible" under the federal rules.\textsuperscript{250}

Cryptically encoded in Rule 703 is the simple truth that experts can base opinions on admissible as well as inadmissible evidence. Strangely, the rule refers to admissible evidence only in the negative, declaring that the underlying facts or data "need not be admissible in evidence," provided they are of a type reasonably relied upon by experts in the field.\textsuperscript{251}

The expert's reliance on admissible evidence is significant not only because it continued the common-law practice, but also because the Federal Rules of Evidence greatly expanded the boundaries of admissibility, especially through the creation of various hearsay exceptions. As we have already seen, Rule 803(18) (learned treatises) and Rule 803(17) (market reports, etc.) allowed for wider admissibility of the expert's

\textsuperscript{248} The text of Rule 703 describes the first source as those facts or data "perceived by" the expert, which the Advisory Committee equated with "firsthand observation." \textit{FED. R. EVID. 703 advisory committee's note.} Thus, the Committee apparently tracked the common-law approach to firsthand knowledge that normally excluded hearsay (e.g., statements by the patient to the treating physician).

\textsuperscript{249} In particular, the Advisory Committee uses the example of a physician's reliance on X-rays as well as "statements" by patients, relatives, etc. Interestingly, the Advisory Committee did not explain why X-rays are not among source \#1—the things "perceived by" the expert. \textit{See FED. R. EVID. 703 advisory committee's note.}

\textsuperscript{250} \textit{FED. R. EVID. 703.}

\textsuperscript{251} \textit{Id.}
major premises in hearsay form. But, a number of other exceptions addressed case-specific hearsay as well.

For example, Rule 803(6) substantially reformed the common law's crabbed treatment of "business records." Rule 803(6) broadly extends to the records of any "regularly conducted business activity," ranging from handwritten memoranda to computer files. Moreover, the rule embraces a broad array of information, from factual observations ("acts," "events," or "conditions") to the "opinions or diagnoses" of other declarants within the entity that produces the records. By including opinions and diagnoses, the drafters deliberately rejected prior case law that had refused to admit diagnostic entries. Thus, Rule 803(6) allows the factfinder to see the record and rely on the statements within it for the truth of the matter asserted.

Rule 803(4) dealt in a similarly generous fashion with a patient's statements. It provides: "Statements made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment." Rule 803(4) eradicated the discredited distinction between treating physicians and experts consulted solely for the purposes of testifying at trial. Statements made to a physician for

253. See Fed. R. Evid. 803(6) advisory committee's note.
254. Fed. R. Evid. 803(6). Rule 803(6) provides:

A memorandum, report, record, or data compilation, in any form, of acts, 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, unless the source of information or the method or circumstances of preparation indicate a 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.

Id.
255. See id.
256. Fed. R. Evid. 803(6) advisory committee's note.
257. See 2 McCormick II, supra note 60, §§ 277-78.
either purpose are admissible for the truth of the matter asserted.\textsuperscript{259} Moreover, Rule 803(4) extends not only to statements of present condition, but also to those describing past conditions and medical history, including the cause of the injury if reasonably pertinent to the diagnoses.\textsuperscript{260} Finally, Rule 803(4) is not limited to physicians; such statements might be made to any health-care giver for purposes of diagnoses or treatment.\textsuperscript{261}

What justified the expansive reach of Rule 803(4)? The Advisory Committee first pointed to the trustworthiness of such statements. Patients seeking treatment or diagnoses possessed a "strong motivation" to be truthful, regardless of whether they described present symptoms or their medical history.\textsuperscript{262} The Committee recognized, however, that such considerations carried much less force where the statements were made to an expert for purposes of testifying at trial.\textsuperscript{263} So what justified Rule 803(4)'s inclusion of trial consultants? The answer was simple but troubling: the futility of not including them. The Committee explained that "[c]onventional doctrine" excluded trial consultants from the reach of the common-law hearsay exception; yet "the expert was allowed to state the basis of his opinions, including statements of this kind."\textsuperscript{264} This distinction, it observed, "was one most unlikely to be made by juries."\textsuperscript{265} For this reason, the Committee rejected "the limitation."\textsuperscript{266}

Thus, Rule 803(4) is the product of two different rationales. Statements to treating physicians are admitted because of their trustworthiness, while those made to trial consultants are justified by the absence of viable alternatives. Oddly, the Advisory Committee argued that Rule 803(4)'s inclusion of trial consultants was "consistent" with Rule 703, but failed

\textsuperscript{259} Id.
\textsuperscript{260} Id.
\textsuperscript{261} FED. R. EVID. 803(4) advisory committee's note ("Under the exception the statement need not have been made to a physician. Statements [made] to hospital attendants, ambulance drivers, or even members of the family might be included.").
\textsuperscript{262} FED. R. EVID. 803(4) advisory committee's note.
\textsuperscript{263} Id.
\textsuperscript{264} Id.
\textsuperscript{265} Id.
\textsuperscript{266} Id.
to explain its conclusion.\textsuperscript{267} The only sensible interpretation is that the Committee believed that the kinds of statements embraced by Rule 803(4) were those reasonably relied upon by trial consultants in forming their opinions or diagnoses and which should be disclosed to the jury for use as substantive evidence, especially since it was futile to think that the jury would do anything else with them.\textsuperscript{268} Similar reasoning had justified the learned treatise exception found in Rule 803(18).\textsuperscript{269}

Despite the vast extension of "admissible" evidence on which experts can predicate opinions, Rule 703 also provides that such opinions can be based on inadmissible facts or data.\textsuperscript{270} Any exclusionary rule can render the evidence "inadmissible"; Rule 703 is not confined to hearsay.\textsuperscript{271} For example, an expert possessing firsthand knowledge of remedial measures taken after an accident might be barred by Rule 407 from describing the measures for the jury.\textsuperscript{272} The same holds for an expert who relies on character evidence as proof of propensity contrary to Rule 404.\textsuperscript{273} Most often, however, hearsay defects render the facts or data inadmissible.

In the spirit of \textit{Sundquist v. Madison Rys. Co.},\textsuperscript{274} Rule 703 recognizes that experts working in laboratories, hospitals, and clinics do not subscribe to courtroom evidence rules.\textsuperscript{275} Recognizing that some experts, such as doctors, frequently made "life-and-death decisions in reliance" on evidence which is technically inadmissible, the Advisory Committee concluded that trial practice must be brought "into line with the practice

\begin{itemize}
\item\textsuperscript{267} FED. R. EVID. 803(4) advisory committee's note. The Advisory Committee stated: "This position is consistent with the provision of Rule 703 that the facts on which expert testimony is based need not be admissible in evidence if of a kind ordinarily relied upon by experts in the field." \textit{Id.}
\item\textsuperscript{268} See 2 MCCORMICK II, supra note 60, § 278, at 249-52. It is not my purpose to debate the wisdom of Rule 803(4).
\item\textsuperscript{269} See FED. R. EVID. 803(18) advisory committee's note; see also supra text accompanying notes 223-30.
\item\textsuperscript{270} See FED. R. EVID. 703 advisory committee's note.
\item\textsuperscript{271} Id.
\item\textsuperscript{272} See FED. R. EVID. 407.
\item\textsuperscript{273} See infra text accompanying notes 389-407.
\item\textsuperscript{274} 197 Wis. 83, 221 N.W. 392 (1928); see supra text accompanying notes 158-81.
\item\textsuperscript{275} FED. R. EVID. 703 advisory committee's note.
\end{itemize}
of the experts themselves when not in court.” Accordingly, an expert’s opinion can be based on inadmissible facts of data provided they are of a type reasonably relied upon by experts in the field in rendering opinions or diagnoses. The rationale carries the crisp assurance of common sense. What is sufficient for “life-and-death” decisions in the hospital should suffice for the courtroom. Thus, the expert’s “validation, expertly performed and subject to cross-examination, ought to suffice for judicial purposes.” The Advisory Committee pointed to a “similar provision” in the California Evidence Code, but also relied on Rheingold’s article, *The Basis of Medical Testimony*, and Section 15 of McCormick’s treatise.

This authority did not, however, support a free-wheeling construction of Rule 703 that swept aside all parts of the common-law superstructure. Particularly, it retained the bias against allowing the proponent

276. Id.
277. Id.
278. Id. (emphasis added).
279. Id. California’s Evidence Code provides:

If a witness is testifying as an expert, his testimony in the form of an opinion is limited to such an opinion as is:

b. Based on matter (including his special knowledge, skill, experience, training, and education) perceived by or personally known to the witness or made known to him at or before the hearing, whether or not admissible, that is of a type that reasonably may be relied upon by an expert in forming an opinion upon the subject to which his testimony relates, unless an expert is precluded by law from using such matter as a basis for his opinion.

CAL. EVID. CODE § 801(b). California authority does not support the position that the proponent has the right to brandish inadmissible evidence before the jury. One commentator explained:

But the fact that the opponent is entitled to a limiting instruction does not authorize the proponent to disclose the contents of reports and other hearsay which the expert took into account in reaching his opinion. The value of the disclosure to the expert’s credibility may be too slight when compared with the risk that the jurors might be unable to abide by the instruction directing them not to consider the matters disclosed for the truth of the matter stated. The risk varies with the amount of details disclosed.

MIGUEL A. MENDEZ, CALIFORNIA EVIDENCE WITH COMPARISON TO THE FEDERAL RULES OF EVIDENCE 313 (1993) (footnote omitted).

280. FED. R. EVID. 703 advisory committee’s note. The Advisory Committee cited Rheingold’s article twice and McCormick’s treatise once, adopting the “validation” terminology employed by both.
281. Id.
to elicit inadmissible bases during the expert’s direct examination.\textsuperscript{282} Rheingold and McCormick had vigorously advocated the “expert validation” principle, but they did so in contexts decidedly narrower than Rule 703.\textsuperscript{283} Rheingold, it will be remembered, focused exclusively on testimony offered by physicians, i.e., medical doctors.\textsuperscript{284} He did not deal with chiropractors or dentists, much less engineers, psychologists, or economists. McCormick’s proposal was somewhat broader, but not by much. He addressed “investigators and technicians” working in various fields of “science.”\textsuperscript{285} But McCormick, like Rheingold, drew extensively from appellate cases that dealt with medical doctors.\textsuperscript{286} And many of the most irksome problems identified by both writers had already been addressed through other evidentiary reforms, such as the exceptions for learned treatises and statements made for purposes of medical diagnosis or treatment (Rules 803(18) and 803(4)).\textsuperscript{287}

Moreover, the Advisory Committee was as preoccupied with medical experts as Rheingold and McCormick. Most of its examples concerned physicians and medical-type evidence.\textsuperscript{288} Almost as an afterthought, the Advisory Committee added that Rule 703 offered “a more satisfactory basis for ruling upon the admissibility of public opinion poll evidence,” a rare type of proof confined largely to certain kinds of commercial cases.\textsuperscript{289}

In sum, despite Rule 703’s breadth, expert validation rested primarily upon the legal profession’s growing confidence in, and acquaintance with, one particular kind of expert witness—the medical doctor. More troubling, even the examples involving medical evidence involved information that (most often) would be fully admissible, except for “the expenditure of substantial time in producing and examining various authenticating witnesses.”\textsuperscript{290}

\textsuperscript{282} Id.
\textsuperscript{283} See MCCORMICK I, supra note 31; see also Rheingold, supra note 98.
\textsuperscript{284} Rheingold, supra note 98.
\textsuperscript{285} MCCORMICK I, supra note 31, § 15; see also supra note 134.
\textsuperscript{286} Id.
\textsuperscript{287} See supra text accompanying notes 223-36, 257-69.
\textsuperscript{288} See FED. R. EVID. 703 advisory committee’s note.
\textsuperscript{289} Id.
\textsuperscript{290} Id.
The Advisory Committee’s Note to Rule 703, then, raises a host of puzzling questions. Did the legal system’s experience with medical experts justify a general principle of expert validation? Did other rules eliminate the most glaring common-law problems, thus obviating the need for Rule 703? In particular, was expert validation defensible in light of the learned treatise exception (Rule 803(18)), which applies to expert treatises in all fields, or the exception for statements made for purposes of medical diagnosis (Rule 803(4)), which together addressed two of the most pressing common-law problems? And finally, had the Advisory Committee adequately considered the potentially lethal mix of Rule 703 with Rule 702’s beckoning of experts in all stripes, shapes, and colors? Under the new rules the stream of experts coming into the courtroom would soon become a torrent, and it was no longer clear what a judge could do to prevent the flood.

Rule 703’s scheme of expert validation did not, at least arguably, surrender all discretion to the expert witness. The inadmissible basis had to be of a type that was reasonably relied upon. To illustrate the rule’s application, and perhaps to suppress doubts that it offered no weapon against abuses, the Advisory Committee offered this example: “The [reasonable reliance] 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.” But how would a judge know when other experts had stepped beyond the bounds of reasonable reliance? In particular, what should a judge do when confronted by unrefuted expert testimony that the facts or data are of a type reasonably relied upon? Or, equally troubling, what happens when experts from opposing sides differ over whether their “field” reasonably relies upon the type of fact or data at issue? As the next section will reveal, both cases and commentators are split over the reasonable reliance test.

291. Id.

292. Id.

293. The Advisory Committee did not explain how it reached this conclusion; rather, it tersely cited Comment, Cal. L. Rev. Comm’n, Recommendation Proposing an Evidence Code 148-50 (1965).


295. See Imwinkelried, supra note 2.
The Advisory Committee's "accidentologist" or bystander statement example raises another interesting point. Not only did the Committee conclude that the bystander's statement could not be reasonably relied upon, but the flaw rendered inadmissible the expert's opinion as to the point of impact.\textsuperscript{296} Thus, an infected basis mortally wounds the opinion it supports. Neither the bad basis nor tainted opinion can be put before the jury.\textsuperscript{297}

But what about an inadmissible basis that was reasonably relied upon? Rule 703 explicitly admitted opinions drawn from inadmissible bases,\textsuperscript{298} but could the bases be disclosed to the jury for any purpose? Rheingold's conception of expert validation, limited as it was to medical experts, virtually equated reasonable reliance and disclosure; that is, the expert's reasonable reliance carried sufficient assurances that justified disclosure, especially because juries could not properly evaluate the opinion without knowing about how it was reached.\textsuperscript{299} Rule 703's text is silent on the question of disclosure; rather, the drafters apparently attempted to address all issues of disclosure in Rule 705.\textsuperscript{300}

Rule 705 is broadly entitled, \textit{Disclosure of Facts or Data Underlying Expert Opinion}, but the rule is neither limited to "facts or data" nor particularly clear on when or how they should be disclosed. The rule states: "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."\textsuperscript{301} Thus, the rule's taxonomy distills expert testimony into three

\begin{footnotes}
\item[296] FED. R. EVID. 703 advisory committee's note.
\item[297] \textit{Id.} Although the Advisory Committee did not elaborate upon its example, it seems to follow that the opinion should be struck only where the impermissible (and inadmissible) bases is critical to the opinion.
\item[298] \textit{Id.}
\item[299] Rheingold, \textit{supra} note 98, at 478; see also \textit{supra} text accompanying notes 116-30 (explaining Rheingold's approach). Rheingold emphasized that disclosure was necessary for the jury's proper evaluation of the opinion, but cautioned that "proper instructions" were needed. Rheingold, \textit{supra} note 98, at 478. He did not address the content of such instructions. McCormick was also silent on the disclosure issue. \textit{See} McCormick I, \textit{supra} note 31, \textsection 15.
\item[300] Although Rule 703's text is silent on disclosure, its accompanying Advisory Committee's Note reveals a great deal about how the drafters saw the interrelationship of Rule 703 and Rule 705. \textit{See} FED. R. EVID. 703 advisory committee's note.
\item[301] FED. R. EVID. 705.
\end{footnotes}
forms: (1) opinions and inferences; (2) the "reasons therefor"; and (3) the underlying "facts or data." 

Despite its apparent detail, Rule 705 fails to offer a comprehensive framework governing the timing or the manner in which the three forms are disclosed to the jury. Like overhearing only part of a conversation, the mandates in Rule 705 make little sense unless placed in context. Rule 705 represents part of a dialogue between the federal architects and the common-law disclosure rules; specifically, the drafters addressed the common-law rules governing hypotheticals and the expert's personal knowledge.

The first sentence of Rule 705 allows experts to testify to opinions and inferences, along with "reasons therefor," regardless of whether the expert has first testified to the "underlying facts or data" and subject to the trial judge's discretion to require "otherwise." The second sentence clarifies that, "in any event," the expert may be required to disclose the underlying facts or data during cross-examination. The phrase "in any event" most likely means that the cross-examiner is entitled to delve into the underlying bases regardless of whether the direct examiner has elicited such testimony from the expert.

Rule 705, then, worked two changes. First, experts with personal knowledge were freed from having to recount in tortuous detail all of the underlying bases before offering their opinion. Second, Rule 705 eliminated the requirement of a hypothetical question where the expert lacked personal knowledge.

To justify the rule, the Advisory Committee summed up decades of withering criticism that had been directed at the hypothetical question requirement. Often tortured, time-consuming exercises, hypothetical questions encouraged "partisan bias" by lawyers who capitalized on the requirement in order to "sum up" during the evidentiary stage of

302. Id.
303. Neither the rule nor the Advisory Committee defined "reasons" in a way that distinguishes them from opinions, inferences, or the underlying facts or data. See Imwinkelried, supra note 2, at 369.
304. FED. R. EVID. 705.
305. See id.
306. See id.
307. See FED. R. EVID. 705 advisory committee's note.
the trial. The drafters also pointed to similar rules relaxing hypothetical requirements in New York and other states. The Committee’s note further explained:

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 Committee did not define the terms “firsthand” and “secondhand,” but one could argue that such definitions were superfluous because the rule purportedly eliminated the need for such a distinction. However, it is not possible to write-off the distinction in light of the Advisory Committees’ remarks about how Rule 705 affected the disclosure of the three sources of expert opinion permitted by Rule 703: facts or data personally observed by the expert (source #1); facts or data made known to the expert at the hearing (source #2); and, facts or data made known to the expert “outside of court and other than by his own perception” (source #3).

As we have seen, Rule 703 continued the common-law practice of permitting experts to base opinions on their own personal knowledge (source #1), but the common law had also required that the experts recite their firsthand observations before testifying to their opinion. The Note to Rule 703 cryptically announced the elimination of the prior disclosure rule: “Whether he must first relate his observations is treated in Rule 705.”

Addressing source #2, the Committee observed that facts or data may be supplied to experts at the trial through hypothetical assumptions...
or by having experts listen to the testimony of other witnesses—again, both venerable common-law practices.\textsuperscript{314} Often, however, witnesses presented conflicting testimony. Thus, where experts acquired their facts or data by listening to conflicting witnesses at trial, the common law had also required hypothetical questions to identify on which version of events the expert relied.\textsuperscript{315} Again, the Committee cryptically announced the death of this requirement: "Problems of determining what testimony the expert relied upon . . . may be resolved by resort to Rule 705."\textsuperscript{316}

And how did Rule 705 affect source #3; namely, the "presentation of data to the expert outside of court and other than by his own perception"?\textsuperscript{317} The Advisory Committee did not explicitly address the issue, not even with another cryptic reference to Rule 705. Nor did Rule 705 or its accompanying note shed much light on the disclosure of source #3. True, the Committee eschewed any distinction between firsthand and secondhand knowledge, but this did not resolve very much.\textsuperscript{318} "Firsthand" pretty clearly refers to the expert's personal knowledge, but "secondhand" is perplexingly ambiguous.\textsuperscript{319} Although broad enough to cover the hearsay typically bound up with source #3, secondhand evidence could also be read narrowly to embrace just source #2: the hypothetical assumptions fed to experts by lawyers, or experts who learned what occurred by listening to witnesses testify. In short, neither the text of Rules 703 and 705 nor their Advisory Committee’s Notes provide much guidance on the disclosure, during direct examination, of inadmissible bases presented to the expert "outside of court."\textsuperscript{320}

However, there is no reason to believe that the Advisory Committee ignored the problem; rather, one should assume that the committee intended that the common-law practice precluding such disclosures during direct examination would continue. The Committee’s immediate concern

\begin{itemize}
  \item[314.] Id.; see supra text accompanying notes 91-93.
  \item[315.] See supra text accompanying note 94.
  \item[316.] FED. R. EVID. 703 advisory committee’s note.
  \item[317.] Id.
  \item[318.] Id.
  \item[319.] Id.
  \item[320.] Id.
\end{itemize}
was to justify changes in the common law, not to elaborate upon commonly accepted practices. In particular, the Advisory Committee defended Rule 705 against the charge that it was "essentially unfair" to saddle the cross-examiner with the burden "to bring out the supporting data." The "answer" was straightforward: the cross-examiner "is under no compulsion to bring out any facts or data except those unfavorable to the opinion." Moreover, the cross-examiner would gain "advance knowledge" of these bases through the discovery rules, a function that the "traditional foundation requirement" had performed "imperfectly."

Thus, Rule 705 primarily addressed outmoded rules that required experts to disgorge the underlying bases before testifying to the opinion itself. Under the earlier common law, this made sense because the opinion had to be predicated on admissible evidence, but the rule had become mired in sterile technicalities that rendered expert testimony tedious, dry, and uninformative. Put another way, the Advisory Committee focused on the expert's reliance on admissible evidence and the common law's compulsory disclosure rules as the primary problem.

The Committee paid less attention to the converse problem: the direct examiner's disclosure of the inadmissible bases that were "favorable" to the expert's opinion as now permitted by Rule 703. One could argue that the Committee assumed that disclosure during direct examination was adequately safeguarded by the combination of expert validation and limiting instructions. But this reading is difficult to reconcile with the Committee's disparaging comments about such limiting instructions in other contexts. The federal rules created hearsay exceptions for learned treatises and statements made for purposes of medical diagnosis or treatment in large part because limiting instructions were wholly

321. FED. R. EVID. 705 advisory committee's note.
322. Id. The remainder of the Note discusses the need for adequate discovery rules so that cross-examiners are aware, before trial, of the expert's bases.
323. Id.
324. Id.
325. See id.
326. FED. R. EVID. 705 advisory committee's note.
327. FED. R. EVID. 803(18).
328. FED. R. EVID. 803(4).
inadequate. Indeed, the Committee justified the extension of Rule 803(4) to non-treating physicians precisely because it believed in expert validation, but was also convinced that limiting instructions were useless. As the Committee put it, the distinction between the use of such statements as "substantive evidence" or as a "basis" for the expert's opinion "was one most unlikely to be made by juries."330

Therefore, it is reasonable to assume that the Committee did not foresee direct examiners freely eliciting inadmissible bases. Rather, the assumption was that direct examiners would not delve into the inadmissible bases; after all, Rule 705 already allowed the direct examiner to elicit the expert's opinions along with the "reasons therefor."331 Such an assumption would also explain why the Committee defended Rule 705 against charges that it unfairly burdened cross-examiners with the task of eliciting the supporting data. Finally, this assumption comports with the Committee's disparaging remarks about limiting instructions that purported to distinguish between substantive use and support of the expert's opinion.

D. Practice Under the Federal Rules

Lawyers and courts working with the federal rules have encountered a variety of problems over the last two decades. Nothing better exemplifies the intractable nature of some of these issues than Daubert v. Merrell Dow Pharmaceuticals.332 Why did it take nearly twenty years to determine that Rule 702 jettisoned the Frye general acceptance test in favor of a multi-factor approach linked to relevancy and helpfulness? Indeed, Rule 702 has served as a lightening rod for courts and commentators, attracting much more attention than Rule 703 or, certainly, Rule 705.333 Moreover, authorities often failed to distinguish between Rules 702 and 703.334 Professor Imwinkelried suggests that until Daubert there was

329. See discussion infra part III.D.1.
331. Fed. R. Evid. 705.
333. See supra note 2.
little urgency in distinguishing Rules 702 from 703 because many courts applied a generic test (general acceptance) to both the major and minor premises.335

_Daubert_ "shattered" the "congruence" because it called for trial judges to conduct searching inquiries into the reliability of the expert’s techniques and theories.336 Professor Imwinkelried has argued persuasively that the domains of Rules 702 and 703 are clearly distinct.337 Rule 702 governs the expert’s theories, methodology, and techniques in addition to any “research data” used to support the expert’s opinion.338 All of this information shares a common point; it embodies the expertise which is in turn applied to the case-specific facts. Rule 703, then, is narrowly confined to the “facts or data” relating to the dispute between the parties “in the particular case.”339

335. Imwinkelried, _supra_ note 2, at 362.

336. _Id_. at 363. Other commentators suggest that the congruence should be reinstated. Professor Epps argues that the _Daubert_ criteria should be applied to the expert’s case-specific bases under Rule 703. Epps, _supra_ note 2, at 83.


338. _Id_. at 367-69. The term “research data” refers to data found in other studies. Courts have split over whether research data should be scrutinized under Rule 702 or Rule 703. _Daubert_ seemingly resolves the split. See _id_. at 360.

339. FED. R. EVID. 703; see Imwinkelried, _supra_ note 2, at 372-73 (stating that “Rule 703 was never intended as the mechanism for supplying and regulating the scientific data underlying the expert’s opinion; its limited function is regulation of the input of the case-specific information that the expert is asked to evaluate”). Professor Imwinkelried advances four arguments in support of Rule 703’s hegemony over case-specific information. First, the text of Rule 703 refers to the facts or data “in the particular case.” Imwinkelried, _supra_ note 2, at 366. Second, this language must be placed in the context of Rules 702 and 705. _Id_. at 367-68. Rule 702 does not use the “particular case” language. _Id_. Rule 705 carefully distinguishes among the expert’s “opinions,” “reasons” for the opinion, and the “facts or data” supporting the opinion. _Id_. at 369. Moreover, Rule 705 obligates the direct examiner to elicit the expert’s opinions and “reasons therefor without first testifying to the underlying facts or data.” _Id_. A “broad construction” of “facts or data” thus would obliterate the procedural distinction between “reasons” and “facts or data” in Rule 705. _Id_. Third, the Advisory Committee’s note to Rule 703 also supports the narrow interpretation. _Id_. at 370. And fourth, the Court’s gloss in _Daubert_ supports restricting Rule 703 to case-specific information. _Id_. at 374. In conclusion, Professor Imwinkelried explained:

_Rule 702 will govern the issues of whether the witness qualifies as a scientific expert and whether all the essential steps in the witness’s scientific reasoning process have been validated; Rule 703 will control only the question of whether there is a proper source for the case-specific data to which the witness applies her general theory._

_Id_.
Unfortunately, the conclusion that Rule 703 is restricted to case-specific information does not make the rule any easier to understand. The difficulties arise, in large part, because Rule 703 has been severed from its common-law moorings, thereby raising at least three troublesome questions.

1. The Problem of Limited Admissibility

The cases and commentary addressing Rule 703 frequently invoke the doctrine of limited admissibility. Indeed much of the debate...
over Rule 703 is inextricably engrossed in the practice of introducing evidence (ostensibly) for limited purposes. Although recognized at common law, limited admissibility has become a central feature of the federal rules.\footnote{343. This is especially true of character evidence. See, e.g., FED. R. EVID. 404(b) (explicitly permitting the use of "other act" evidence to prove propositions other than "conduct in conformity to character").}

The twin cornerstones of the Federal Rules of Evidence are the related concepts of relevancy and limited admissibility of evidence. Rule 401 defines relevant evidence: 

"Relevant evidence’ means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence."\footnote{344. FED. R. EVID. 401.}

Rule 402 mandates that all relevant evidence is admissible unless otherwise provided by another rule or statute.\footnote{345. FED. R. EVID. 402.} The federal rules entrust the trial judge with broad discretion to exclude relevant evidence where it presents a danger of unfair prejudice or confusion.\footnote{346. 22 WRIGHT & GRAHAM, supra note 7, § 5214.} However, this balancing test is weighted heavily in favor of admissibility and against exclusion.\footnote{347. Id.} Thus, Rules 401 to 403 embody a clear preference for allowing the jury to see or hear information that bears on the case. Labeled by one commentator a principle of "assumptive admissibility,"\footnote{348. LILLY, supra note 11, § 2.4, at 33.} this inclusive approach is vividly evident in Rule 401.

The definition of relevant evidence set forth in Rule 401 requires only a nexus between the evidence and the proposition for which it is offered.\footnote{349. FED. R. EVID. 401.} Evidence is relevant if (1) it has any tendency to establish a proposition and (2) the proposition is one of consequence to the determination of the action or charge.\footnote{350. Id.} The "tendency" may be one rooted in formal logic or, more frequently, in the common experience of human beings. Put another way, relevancy is not an exclusively legal
construct, but one that involves a rational relationship between the evidence and the proposition it is offered to support. 351

The expansive nature of relevancy under Rule 401 virtually guarantees that most evidence will have some "tendency" to establish a number of different propositions. This principle of multiple admissibility is the product of the low threshold of relevancy combined with the nearly limitless capacity of the human imagination to link evidence (albeit sometimes tenuously) to a host of different propositions. 352 For example, evidence that a defendant shot the victim once is relevant to show both an intent to kill (the prosecution's theory) and the defense of accident. Undoubtedly, the prosecutor will argue that the single shot shows that the defendant coolly took careful aim while the defense will contend that it is equally consistent with an accidental discharge ("Surely the defendant would have fired more than once had he intended to kill the victim!"). Thus, each side is free to argue the competing inferences that favor their theories of the case.

Problems with the elastic nature of relevancy surface primarily where the law precludes the use of some of the relevant propositions that flow from the evidence. Thus, an item of evidence may have some tendency to show both propositions #1 and #2, but some other rule (substantive or evidentiary) might forbid the use of the evidence to show #1. Indeed Article IV of the Federal Rules of Evidence is replete with rules that allow evidence to be used for some purposes, but not others. 353 For example, Rule 407 permits evidence of subsequent remedial measures to prove propositions like ownership or control over the property, or

351. 22 WRIGHT & GRAHAM, supra note 7, § 5165, at 55-56.

352. The Supreme Court provided a fine illustration of such ingenuity in Daubert v. Merrell Dow Pharmaceuticals, 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993). The Court observed that the "phases of the moon" can give rise to alternative arguments of more or less validity:

The study of the phases of the moon, for example, may provide valid scientific "knowledge" about whether a certain night was dark, and if darkness is a fact in issue, the knowledge will assist the trier of fact. However (absent creditable grounds supporting such a link), evidence that the moon was full on a certain night will not assist the trier of fact in determining whether an individual was unusually likely to have behaved irrationally on that night.

Daubert, 509 U.S. at 591.

353. See FED. R. EVID. 401-412.
to impeach witnesses. But the remedial measure cannot, in theory, be used to prove negligence or culpability on the party who so acted.

Evidence that is permissible for one purpose but not for others raises the problem of limited admissibility. Rule 105 provides: "When evidence which is admissible as to one party or for one purpose but not admissible as to another party or for another purpose is admitted, the court, upon request, shall restrict the evidence to its proper scope and instruct the jury accordingly." The rule is beguilingly simple on its face but difficult to apply. Moreover, its operation is directly affected by Rule 401, defining relevancy, and Rule 103, which governs the timing and content of objections. Read in the context of these other rules, Rule 105 provides that evidence may be used for any relevant purpose unless its use is restricted (i.e., "limited") at the time that the evidence is received. A judge may limit the use of evidence sua sponte, upon the motion of the party offering it, or upon a "request" (or objection) by opposing counsel. A limiting instruction must be given "upon request" of any party. The judge has the discretion to determine whether it is feasible to allow the evidence's use for certain prescribed purposes. Put another way, the judge must assess the residual relevance of the evidence for the authorized purpose in light of the risk that a jury might misuse the evidence as proof of the "forbidden inference." And in nearly all cases the only guarantee against misuse is the force and cogency of the limiting instruction.

The limiting instruction, then, plays the Orwellian role of the "thought police" during the trial. The instruction is effectuated through the

354. FED. R. EVID. 407.
355. Id.; see 23 WRIGHT & GRAHAM, supra note 7, § 5285 (1980).
356. FED. R. EVID. 105.
357. FED. R. EVID. 103, 401.
358. See FED. R. EVID. 105.
359. Id.
360. See id.
assumption that the jury follows any and all instructions. This assumption is, however, a ruse that rests more upon wishful thinking and doctrinal necessity than proven experience. Moreover, trial lawyers are aware that limited admissibility sometimes fosters a shell game in which evidence is put before the jury for one purpose, but the proponent knows (or hopes) that the jury will draw the nearly irresistible "forbidden" inference. There is scant empirical support generally for the proposition that juries follow, or even comprehend, limiting instructions. The assumption necessarily remains uncontradicted because nearly all evidence to the contrary is incompetent and cannot be used to impeach the jury's verdict. Thus, the limiting instruction serves a dual function: it educates the jury to some degree and, more importantly, serves as the law's fictive model of how the jury "actually" analyzed the evidence.

Limited admissibility poses especially difficult problems where the distinction between the permissible and impermissible propositions are

363. Trial lawyers treat the rule as a rank fiction susceptible to manipulation. See, e.g., Stephen D. Easton, The Real World Rules of Evidence, PRAC. LITIGATOR, Jan. 1996, at 49, 59 (positing that in the "real world" of trial law "[limited admissibility] is a fantasy"). See also Rice, supra note 2, at 585; Epps, supra note 2, at 73 n.91 (suggesting "a creative attorney can point out in closing argument that the other side's case is indeed less substantial than it appears, emphasizing that much of the appealing evidence is of limited legal value").


Limited admissibility often guarantees that the jury will use the evidence improperly. Say the truck driver's bad driving record is inadmissible to show he was driving carelessly, but is admissible to show that his employer was negligent in entrusting him with a dangerous instrumentality. Put in traditional legal trappings, the limited instruction is merely hard to understand. Put in real English it becomes absurd. "Ladies and gentlemen of the jury, the truck driver’s bad driving record does not show he was driving carelessly. It only shows that his employer was careless for hiring such a bad driver."

Id. at 81-82.


technically abstruse or entirely illusory. For example, the difference between using a statement as proof of the matter asserted and using it to show only the declarant's state of mind probably exceeds the grasp of even the brightest lay juror. Evidence textbooks belabor the distinction for law students who may spend hours struggling to comprehend it with the assistance of study aids. Yet, the law presumes that a short instruction is all that the lay jury needs in order to properly understand the limited purpose for which the evidence is offered. And other distinctions may be even more diaphanous than the subtle workings of the hearsay rule.

Ordinarily the law of evidence is satisfied with the mechanism of the limiting instruction. In rare instances courts have gone to the extreme of requiring a written promise by the jury to use the evidence for only a limited purpose. Yet written promises serve only to provide a vivid reminder that the jury should afford the evidence special consideration. It is doubtful that they "teach" the jury anything about what it can or cannot do with the evidence.

Occasionally the courts have frankly acknowledged the fictive nature of limited admissibility and eschewed its use. One prime example is the admissibility of post-arrest statements by accomplices. The Supreme Court has explicitly rejected the idea of inter-locking confessions whereby post-arrest statements are introduced in multiple defendant trials ostensibly against only the person who made the particular statement. The Court recognized:

367. See, e.g., BLINKA, supra note 230, § 801.
368. Yates v. Evatt, 500 U.S. 391, 403, 111 S. Ct. 1884, 1892, 114 L. Ed. 2d 432, 448 (1991) (describing the "sound presumption of appellate practice" which holds "jurors are reasonable and generally follow the instructions they are given").
369. The premier example is, no doubt, the character rule. See text accompanying notes 389-407; see also Edward Imwinkelried, The Use of Evidence of an Accused's Uncharged Misconduct to Prove Mens Rea: The Doctrines Which Threaten to Engulf the Character Evidence Prohibition, 51 OHIO ST. L.J. 575 (1990).
372. See Richardson, 481 U.S. at 209-10; Cruz v. New York, 481 U.S. 186, 193-94, 107 S. Ct. 1714, 1719, 95 L. Ed. 2d 162, 172 (1987). For example, A and B are arrested for murder and A tells the police that B was the shooter and that he (A) was only the driver. In the meantime,
The rule that juries are presumed to follow their instructions is a pragmatic one, rooted less in the absolute certitude that the presumption is true than in the belief that it represents a reasonable practical accommodation of the interests of the state and the defendant in the criminal justice process.373

Such accomplice statements must be wholly excluded or redacted to eliminate any reference to the non-declarant/defendant, unless the statement is independently admissible against other defendants under a hearsay exception.374

The cases concerning post-arrest statements by accomplices are, however, distinct exceptions to a rule that favors the admissibility of evidence for limited purposes regardless of the efficacy of limiting instructions. And the general rule is frequently invoked where lawyers want to place otherwise inadmissible evidence before the jury for the alleged purpose of explaining the basis for an expert’s opinion.

2. Inadmissibility and Rule 703

The common law’s hypothetical question and personal knowledge doctrines primarily addressed the expert’s reliance on hearsay. But case law applying Rule 703 reveals that experts are now asked to validate more than hearsay; in particular, lawyers use experts in an attempt to evade the prohibitions against character evidence.375 The issue, then, is whether Rule 703’s reasonable reliance requirement is confined to hearsay or, instead, embraces any evidentiary disability.

The text of Rule 703 is broad and unambiguous: if the information is of a type reasonably relied upon by experts in forming opinions, “the

B tells the police that he saw A shoot the victim but that he (B) played only a peripheral role in the killing. In a joint trial, the rule of limited admissibility would operate to allow A’s statement to be used only against A and B’s statement only against B. However, the odds are great that a jury, or any reasonable human being, would commingle the statements and at some level use both statements against both defendants. See Lee v. Illinois, 476 U.S. 530, 106 S. Ct. 2056, 90 L. Ed. 2d 514 (1986) (bench trial for murder in which both the prosecutor and the judge intermingled the statements).

373. Richardson, 481 U.S. at 211.
374. Id.
facts or data need not be admissible in evidence.' Nothing in the rule’s text restricts the range of inadmissibility to hearsay problems. Thus, the plain meaning of Rule 703 supports the interpretation that expert validation can override virtually any exclusionary rule. More- ever, nothing else in Article VII suggests otherwise.

Nor does the Advisory Committee’s Note indicate that the drafters intended to restrict the field of inadmissibility. Concededly, the Advisory Committee’s analysis was directed exclusively at the hearsay problem, but this does not mean that the Committee limited Rule 703 to hearsay. After all, the common law had obsessed about the hearsay problem so it was reasonable to expect that the Advisory Committee would address the hearsay objection in its short note. The Note’s ambiguity, therefore, suggests nothing that would narrowly confine “inadmissibility” to hearsay defects.

The sparse commentary on Rule 703 does not provide a clear answer either. First, relatively little attention has been paid to Rule 703, especially in contrast to the many works devoted to Rule 702. Second, commentators tend to follow the case law, most of which raise hearsay issues; thus, they dwell more on the expert’s reasonable reliance and disclosure to the jury than the scope of inadmissibility. Although some authority restricts Rule 703 to hearsay problems, more often commentators assume that all kinds of inadmissibility are covered.

Notwithstanding potential ambiguity in the rule, the note, and the commentary, the case law clearly reveals that lawyers use Rule 703

376. FED. R. EVID. 703.
378. Imwinkelried, supra note 2, at 367 (discussing the need to read the rules in the context of one another).
379. See supra note 2.
380. See, e.g., 1 MCCORMICK II, supra note 60, § 15, at 65 (the “key language” in Rule 703 “consists of the words, ‘reasonably relied upon’ as further modified in the rule”).
381. See, e.g., Rice, supra note 2, at 588.
382. See, e.g., GRAHAM, supra note 334, § 703.1, at 112-13 (“For most but not all practical purposes, Rule 703 operates as the equivalent of an additional exception to the rule against hearsay. For all purposes, Rule 703 creates an exception to the Original Writing Rule, Rule 1002, and serves as an alternative method of satisfying the requirement of authentication.”); CHRISTOPHER B. MUELLER & LAIRD KIRKPATRICK, EVIDENCE § 7.12 (1995).
to reach all forms of inadmissibility. Furthermore, the case law has not manifested any design to limit inadmissibility to only certain species of evidentiary objections.

Hearsay remains, far and away, the most common disability. Courts frequently warn that experts must be more than hearsay conduits. Although hearsay covers any out-of-court statement offered for the truth of the matter asserted, courts are reluctant to allow expert witnesses to recount the opinions of nontestifying experts unless they serve as building blocks for the witness’s own conclusions. In cases involving medical experts, for example, courts have held that Rule 703 permits a testifying expert to predicate his opinion on diagnoses rendered by nontestifying medical experts. In sum, the cases permit reliance only on subsidiary opinions that support the testifying expert’s conclusions, but preclude reliance on those that are identical to the opinions offered by the testifying expert.

Rule 703 is also used to circumvent the general ban against propensity evidence under Rule 404(a). Two cases illustrate the difficulty.

383. See, e.g., United States v. Johnson, 54 F.3d 1150, 1156-62 (4th Cir.), cert. denied, 116 S. Ct. 266 (1995). In Johnson, a detective testified as an expert on the organization of a drug conspiracy by using an “organizational chart.” Id. at 1157. Affirming the district court, the Fourth Circuit expressed concern about the “Government’s practice of offering summary witness testimony and charts into evidence in federal drug prosecutions.” Id. at 1158.

384. Id.

385. FED. R. EVID. 801(3).

386. See O’Gee v. Dobbs House, Inc., 570 F.2d 1084, 1087 (2d Cir. 1978). The trial judge, Jack Weinstein, permitted the plaintiff’s expert, who had been specifically retained for purposes of litigation, to testify to double hearsay. Id. at 1088-89. Specifically, the doctor testified “not only to what O’Gee had told him about her condition and its genesis, but also to what O’Gee had told him that the other doctors had told her about her injuries.” Id. Upholding the decision to permit this testimony, the court pointed to both Rule 803(4) and the fact that the testifying expert had also relied on various medical reports and records that related to the plaintiff’s treatment history. Without citing Rule 703, the court cryptically noted that it was not deciding what “leeway extends to the kind of multiple hearsay that would have been present here in the absence of the doctors’ reports.” Id. at 1089. Interestingly, it was Judge Weinstein himself who later explicitly linked O’Gee to Rule 703. See In re “Agent Orange” Prod. Liab. Litig., 611 F. Supp. 1223, 1245-46 (E.D.N.Y. 1985), aff’d, 818 F.2d 187 (2d Cir. 1987). For an excellent discussion of O’Gee in the context of Rule 703, see Edward B. Arnolds, Federal Rule of Evidence 703: The Backdoor is Wide Open, 20 FORUM 1 (1984).

387. See Gong v. Hirsch, 913 F.2d 1269, 1273 n.3 (7th Cir. 1990) (collecting and discussing the cases).

388. Imwinkelried, supra note 341, at 263.

389. See FED. R. EVID. 404(a).
Nachtsheim v. Beech Aircraft Corp. involved a products liability action arising out of an air crash. To prove causation and the dangerous condition of the airplane, the plaintiff attempted to introduce evidence about the crash of an identical airplane which occurred one year after the crash under litigation. The trial judge excluded the evidence because there were too few "established" facts to justify any meaningful comparisons. With enviable alacrity and persistence, plaintiff's counsel then argued that his air crash expert should be permitted to testify about the later crash because the expert relied upon it in formulating his opinion. The trial judge allowed the expert's opinion, but precluded any mention of the subsequent crash. Affirming on both issues, the Seventh Circuit explained that Rule 703 permits an expert to rely on inadmissible evidence but does not guarantee its disclosure to the jury even for limited purposes.

For present purposes, the telling point is that Nachtsheim tacitly recognizes that Rule 703 must be harmonized with other exclusionary rules, such as the general proscription against propensity evidence. Nachtsheim also attests to the significance of carefully distinguishing among the three different issues raised by Rule 703: the scope of inadmissibility, the expert's reliance on such evidence, and what should be disclosed to the jury about such bases. A judge's resolution of the reliance and disclosure issues are directly related to the reasons why the evidence is inadmissible to start with.

Potential misuse of Rule 703 is dramatically shown in Henson v. Triumph Trucking, Inc., which involved a 1989 rear-end collision between the plaintiff's bus and the defendant's truck. The defendant contended that the plaintiff had fallen asleep while driving the bus due,
in part, to drowsiness brought on by the overuse of Xanax, an anti-anxiety drug that sometimes induces sleepiness.\textsuperscript{399} Not content with challenging the plaintiff's testimony about how much Xanax he had taken, the defendant introduced evidence that the plaintiff had misused other drugs in 1980, 1982, 1985, and 1988.\textsuperscript{400} The trial judge allowed the evidence on the theory that because the plaintiff "had misused prescription drugs in the past, he was probably presently misusing Xanax."\textsuperscript{401} The appellate court reversed.\textsuperscript{402} It was obvious that proving drug misuse in 1989 through proof of earlier drug misuse ran squarely afoul of Rule 404(a).\textsuperscript{403} However, the defense argued that the drug history was "admissible" under Rule 703.\textsuperscript{404} The appellate court conceded that it was "incontestable that physicians reasonably rely on clinical history in reaching conclusions."\textsuperscript{405} Nevertheless, two rationales precluded the introduction of the drug history under Rule 703. First, the jury did not require expert assistance "to understand the simple proposition that if a person has done something often before, it is more likely that it will have been done again."\textsuperscript{406} Second, if Rule 703 permitted parties to "'launder' character evidence, . . . the rule excluding character evidence will have been effectively eliminated."\textsuperscript{407}

\textit{Henson} clearly exemplifies some of the key problems with Rule 703. The character rules undisputedly barred the use of the drug history evidence yet it was conceded that physicians reasonably rely on clinical history in diagnosing maladies.\textsuperscript{408} Nevertheless, the court was plainly

\begin{itemize}
  \item \textsuperscript{399} \textit{Henson}, 884 P.2d at 192.
  \item \textsuperscript{400} \textit{Id}.
  \item \textsuperscript{401} \textit{Id}.
  \item \textsuperscript{402} \textit{Id}. at 193.
  \item \textsuperscript{403} \textit{Id}. at 192-93. Arizona's corresponding evidentiary rule is identical to Federal Rule 404(a). \textit{See} ARIZ. R. EVID. 404(a) (West 1996).
  \item \textsuperscript{404} \textit{Henson}, 884 P.2d at 193. Arizona has adopted an identical rule to Federal Rule 703. \textit{See} ARIZ. R. EVID. 703 (West 1996).
  \item \textsuperscript{405} \textit{Henson}, 884 P.2d at 193. One could argue, however, that the court framed the issue too broadly. Doctors rely on clinical history to treat patient's present symptoms. Less clear is whether doctors regularly use one clinical fact (e.g., the earlier drug use) to determine the existence of another historical fact, such as the driver's misuse of drugs on the night of the accident.
  \item \textsuperscript{406} \textit{Id}.
  \item \textsuperscript{407} \textit{Id}.
  \item \textsuperscript{408} \textit{Id}. at 192-93.
\end{itemize}
upset by the prospect that the character rules could be circumvented by laundering the evidence through an expert. Only one solution remained: permit the physician's opinion but preclude him from relating the drug history on which it rested.

The court's approach was pragmatic. Doctors use medical history for purposes of diagnoses and treatment; past occurrences are simply one factor in determining what to do with the patient at present. In court, however, the danger existed that the evidence of past drug misuse would be used to prove yet another historical fact: the driver's drug abuse on the night of the accident. Supported by common sense, the inference is nevertheless precluded by the law of evidence. Thus, the only practical way of accommodating the doctor's use of the evidence while maintaining the integrity of the evidence rules was to allow the opinion but to bar the proponent from disclosing this particular bases.

Rule 703, then, has the potential to undo any exclusionary rule of evidence. It is not enough, however, merely to note that the rule applies to evidence that is inadmissible for any reason. Rather, it must be recognized that the nature of the disability affects the issues of reasonable reliance and, most importantly, disclosure to the jury.

3. Reasonable Reliance

Rule 104(a) governs preliminary questions of admissibility. In the context of Rule 703, the judge determines whether the inadmissible

409. See Henson, 884 P.2d at 193.
410. Id. The physician testified that "more Xanax was used on August 27 than Henson admitted." Id.
411. See Fed. R. Evid. 404(a).
412. See Michael L. Seigel, A Pragmatic Critique of Modern Evidence Scholarship, 88 NW. U. L. REV. 995, 1017-19 (1994) (arguing that evidence law is too narrowly focused on the goal of determining objective historical truth and must consider other values, such as the acceptability of verdicts and the value of trial as "ritual and theater"). Since doctors rely on the evidence for a use proscribed by the legal system, introduction of the evidence creates a real danger that it will be "overvalued" by the jury. See 1 MCCORMICK II, supra note 60, § 15.
data is of a type that experts in the field reasonably rely upon in drawing opinions or inferences.\textsuperscript{415} The judge makes this determination by a preponderance of the evidence.\textsuperscript{416} Moreover, in deciding this question, the judge is not bound by any other rules of evidence, except those rules regarding privileges.\textsuperscript{417}

But how does a judge determine reasonable reliance? In particular, how much deference are experts entitled to on this issue? Can they self-define reasonable reliance in their respective fields or are there objective limits as to what an expert can rely on? The case law reveals two prevailing views on these issues which reflect the sparse options: the so-called “liberal” and “restrictive” approaches.

The liberal approach is “expert friendly.” In effect, reasonable reliance is equated with the custom or regular practice of experts in the field.\textsuperscript{418} Judges are not free, then, to develop their own criteria of reasonable reliance; it is the experts themselves who determine what they rely upon.\textsuperscript{419} What other experts do, or have done, is often the most important criterion. For example, in \textit{Baumholser v. Amax Coal Co.},\textsuperscript{420} a geologist testified about the results of a survey conducted by college students on damages caused by local blasting. Although unidentified flaws excluded the survey as substantive evidence, the geologist could rely on its findings because it was “uncontradicted and unrebutted” that

\begin{itemize}
\item \textsuperscript{415} See In re Paoli R.R. Yard PCB Litig., 35 F.3d 717 (3d Cir. 1994).
\item \textsuperscript{416} See generally Bourjaily v. United States, 483 U.S. 171, 107 S. Ct. 2775, 97 L. Ed. 2d 144 (1987).
\item \textsuperscript{417} Bourjaily, 483 U.S. at 178 (construing Rule 104(a), the Court held that the trial judge can properly consider the hearsay itself when deciding whether the foundation for a hearsay exception has been satisfied; the burden of proof for such preliminary facts is a preponderance of the evidence).
\item \textsuperscript{418} See Imwinkelried, supra note 341, at 265.
\item \textsuperscript{419} 1 McCormick II, supra note 60, § 15, at 65; In re Japanese Elec. Prods., 723 F.2d 238, 276-77 (3d Cir. 1983), rev’d, 475 U.S. 576, questioned by In re Paoli R.R. Yard PCB Litig. 35 F.3d 717 (3d Cir. 1994) (finding “legal error” where the trial judge “substituted its own views of reasonable reliance for those of the experts”). Judge Weinstein stated: “The more liberal view . . . allows the expert to base an opinion on data of the type reasonably relied upon by experts in the field without separately determining the trustworthiness of the particular data involved.” In re “Agent Orange” Prod. Liab. Litig., 611 F. Supp. 1223, 1244 (E.D.N.Y. 1985), aff’d, 818 F.2d 187 (2d Cir. 1987) (citation omitted).
\item \textsuperscript{420} 630 F.2d 550, 552 (7th Cir. 1980).
\end{itemize}
this survey was similar to one conducted by the Atomic Energy Commis-

The restrictive view demands more than customary practice, requiring
some showing that the facts or data are trustworthy. In short, the
judge does not blindly defer to expert practice. There is disagreement,
however, on the nature and extent of the indicia of trustworthiness.
Some authority looks to tort cases, where evidence of industry custom
is admissible but not dispositive of reasonableness. Other authority
frames trustworthiness exclusively in hearsay terms, thus reducing
reliability to an ill-defined search for an exception to the hearsay rule.
Neither the liberal nor the restrictive approach help very much when
the experts conflict over reasonable reliance or where the record is silent.
Occasionally, the cases reveal experts at war not just over the ultimate
opinions, but also over the kinds of information that "good" experts
reasonably rely upon. In addition, judges rely on judicial notice
to determine when experts can reasonably rely upon such information.

421. Id.; see also United States v. Lawson, 653 F.2d 299, 302 n.7 (7th Cir. 1981) (judicial
notice taken "that psychiatrists customarily use" such information as staff reports, interviews
with other physicians, and other background information in rendering diagnoses).

422. 1 MCCORMICK II, supra note 60, § 15, at 65; Imwinkelried, supra note 341, at 266.
Judge Weinstein summarized the restrictive view in this way: "The more restrictive view requires
the trial court to determine not only whether the data are of a type reasonably relied upon by
experts in the field, but also whether the underlying data are untrustworthy for hearsay or other
reasons." Agent Orange, 611 F. Supp. at 1244.

423. Imwinkelried, supra note 341, at 266.

424. See 1 MCCORMICK II, supra note 60, § 15, at 65 ("There is also a restrictive approach
to the effect that if the data would have been or was excluded from the record as hearsay and
can not meet a test of circumstantial trustworthiness for an exception to the hearsay rules,
the standard of Rule 703 is not met."). The problem with this approach is that if the excluded
"hearsay" does meet the standards for an exception (e.g., Rule 803(24)), it is then admissible
evidence and there is no need to worry about the expert's reasonable reliance on inadmissible
evidence.

425. See Agent Orange, 611 F. Supp. at 1245 (discussing In re Swine Flu Immunization
708 F.2d 502 (10th Cir. 1983)). In the Swine Flu case, the court excluded a doctor's opinion
because it was not based on sufficiently reliable information. Swine Flu, 508 F. Supp. at 903.
The underlying data involved statistics on diseases culled from various computer data bases
by medical clerks. Id. Although the medical expert "testified that epidemiologists would rely
on this type of data," two other experts disagreed. Id. at 904.

426. Agent Orange, 611 F. Supp at 1246 (excluding expert's opinion based on defective
bases: "The court takes judicial notice—based on hundreds of trials—that no reputable physician
relies on hearsay checklists by litigants to reach a conclusion with respect to the cause of their
Reasonable reliance has been a headache in toxic tort cases involving statistical data, but it is potentially a greater problem with social science-type experts, such as social workers, who conceivably consider all "relevant" evidence. Where does the judge draw the line between permissible and impermissible (i.e., reasonable and unreasonable) reliance in the softer sciences?

One must also consider the possible stakes in contests over reasonable reliance. In some cases the issue is outcome determinative, such as where the judge's finding that a basis is impermissible has a catastrophic domino-type effect on the proponent's case. The impermissible basis leads to the exclusion of the opinion which in turn tears fatal rents into the party's prima facie case. It would seem, however, that the stakes are less extreme in most other cases. A finding that a basis is impermissible might dent the expert's opinion, but often the expert will be able to point to other permissible bases that support her conclusions. Thus, in *Nachtsheim v. Beech Aircraft Corp.*, the air crash expert was permitted to offer his opinion about the airplane's defects despite the court's insistence that evidence of the subsequent plane crash was inadmissible under the "similar accidents" doctrine and that it could not be disclosed to the jury for a limited purpose under Rule 703.

Indeed, *Nachtsheim* illustrates that the liberal and restrictive approaches sometimes conflate several distinct issues. Both tests muddle the

afflictions" (citations omitted)); United States v. Lawson, 653 F.2d 299, 302 (7th Cir. 1981) (allowing opinion); Henson v. Triumph Trucking, Inc., 180 Ariz. 305, 307, 884 P.2d 191, 193 (Ct. App. 1994) (finding it "incontestable" that physicians reasonably rely on "clinical history").


428. See, e.g., *Lawson*, 653 F.2d at 302 n.7 (observing that psychiatrists customarily use virtually all of a patient's medical and life history in arriving at conclusions).


430. See *Agent Orange*, 611 F. Supp. at 1256-60.

431. 847 F.2d 1261 (7th Cir. 1988).

432. *Nachtsheim*, 847 F.2d at 1270 n.11. The *Nachtsheim* court focused on the disclosure issue; it is unclear whether the parties litigated the reasonable reliance issue. Nevertheless, it seems highly likely that even if the court had ruled that the expert could not reasonably rely on the evidence of the other crash, the opinion would have been adequately supported by the remaining bases, particularly the expert's study of the facts surrounding the crash being litigated.

433. See id. at 1261.
expert’s reliance with disclosure to the jury, giving scant attention to why the evidence was initially ruled inadmissible. Reasonable reliance cuts directly to the admissibility of the expert’s opinion; that is, what information does the expert need in order to reach a conclusion? Disclosure relates, however, to how much information the jury needs in order to assess the opinion. The liberal approach is both practical and justified, if limited to its proper sphere of allowing the expert to use the information he customarily relies upon in reaching an opinion. However, it is the judge, not the expert, who must control what the jury is told about the facts of the case, consistent with the rules of evidence.

4. Disclosure of the Experts’ Bases

What should the jury be told about the bases of the expert’s opinion? Where the bases consists of admissible evidence, there are no problems: the evidence is already before the jury for all relevant purposes, unless otherwise expressly restricted. For example, medical records admitted as records of regularly conducted activities may be considered for the truth of the matter asserted. Other act evidence admitted to show intent, motive, etc., can be used for these purposes by both the expert and the jury.

Disclosure of inadmissible bases has triggered much greater consternation among the courts and commentators who struggle to apply Rules 703 and 705. Three positions have emerged. First, one school views Rule 703 as transforming inadmissible evidence into admissible evidence through the miracle of expert validation. The second, more modest approach contends that Rule 703 permits disclosure of the inadmissible bases but only for the limited purpose of explaining the expert’s opinion. The third position stubbornly reminds us that inadmissible evidence under Rule 703 remains inadmissible; thus, the rule permits

434. FED. R. EVID. 803(6); see supra notes 252-55 and accompanying text.

435. In the case of other act evidence admitted for a limited purpose, such as showing intent, the admissibility is restricted to this use; that is, the expert cannot use it as proof of bad character without raising the inadmissibility problems addressed in the text that follows.

436. See, e.g., Walker J. Blakey, An Introduction to the Oklahoma Evidence Code: The Thirty-Fourth Hearsay Exception, 16 TULSA L.J. 1, 34 (1980); Rice, supra note 2, at 588.

437. See, e.g., Imwinkelried, supra note 341, at 267.
the expert’s opinion predicated on the inadmissible bases; yet disclosure, for any purpose, still rests with the discretion of the trial court.438

The first approach construes Rule 703 as creating admissible evidence through the agency of expert validation.439 Champions of this view occasionally label Rule 703 as a “hearsay exception,” thus reflecting the general preoccupation with bases rendered inadmissible solely because of hearsay defects.440 Professor Blakey, for example, contends that the rule created the “thirty-fourth hearsay exception” under the Oklahoma rules.441 The courts, too, occasionally label Rule 703 as a hearsay exception.442

Two primary arguments support the view that Rule 703 converts inadmissible into admissible evidence. First, there is a sense that expert validation provides sufficient guarantees of trustworthiness to warrant admissibility; in short, if it’s good enough for experts in the field, it should be good enough for the courts.443 The second reason sounds in desperation born of a lack of viable alternatives. Not only is it "logical" to enlighten the trier of fact about how the expert reached her conclusions, but it is fatuous to think that the evidence can be received for some other limited purpose.444

438. See, e.g., Carlson, Collision Course, supra note 2; Carlson, Policing, supra note 2.
439. See, e.g., Blakey, supra note 436, at 34; Rice, supra note 2, at 588.
440. See, e.g., Blakey, supra note 436, at 34; Rice, supra note 2, at 588.
442. E.g., Bagnowski v. Preway, Inc., 138 Wis. 2d 241, 251-52, 405 N.W.2d 746, 751 (Ct. App. 1987) (labeling the identical Wisconsin rule as “another hearsay exception”). The Wisconsin Supreme Court obliquely retracted the holding in Bagnowski by cryptically observing that Wisconsin’s Rule of Evidence 703 “is not to be confused with a ‘hearsay exception,’” but offered lower courts no further guidance on how such evidence should be handled. Kolpin v. Pioneer Power & Light Co., 162 Wis. 2d 1, 37 n.10, 469 N.W.2d 595, 610 n.10 (1991).
443. Rice, supra note 2, at 588; Blakey, supra note 436, at 34. Professor Rice argues, however, that validation embraces not only the expert’s customary reliance on the “kind” of information at issue, but whether the expert acquired the information in a manner “that is consistent with the profession’s standards.” Rice, supra note 2, at 589. Thus, the medical history checklists at issue in Agent Orange failed this part of Rice’s test. Id. at 589.
444. Professor Rice argues that “[a]dmitting an expert’s opinion, but not its basis, is illogical because one cannot accept an opinion as true without implicitly accepting the facts upon which the expert based that opinion.” Rice, supra note 2, at 585. He also refers to limiting instructions as “pure fiction.” Id.; see also Blakey, supra note 436, at 14, 34.
There are several major problems with the argument that Rule 703 creates admissible evidence. The text of the rule itself belies this conclusion by stating only that "the facts or data need not be admissible in evidence." If Rule 703 generates admissible evidence, the phrase "need not be admissible" is reduced to surplusage or an absurdity. At any rate, such a contorted construction must be avoided.

Nor does the Advisory Committee’s Note provide any compelling support for this position. More significantly, viewing Rule 703 as a "hearsay exception" focuses on just one facet of inadmissibility. What about the rules proscribing character evidence or evidence of subsequent remedial measures for certain purposes? What about evidentiary privileges? In short, neither the rule’s text nor its legislative history supports the argument that Rule 703 created a "blackhole" into which all evidence is sucked and transformed into admissible evidence based on an expert’s routine use of it in drawing inferences.

A second view of Rule 703 attempts to balance the jury’s need to fully assess the expert’s opinion with the integrity of the other exclusionary rules. The balance is struck by "admitting" the "inadmissible" bases for the limited purpose of explaining the expert’s opinion. The strength of this position rests in its apparent reasonableness (it seems like a just compromise) and the deeply entrenched acceptance of limited admissibility under federal rules’ practice. Moreover, limited admissibility has roots in some of the authority that inspired Rule 703.

445. FED. R. EVID. 703 (emphasis added). See Gong v. Hirsch, 913 F.2d 1269, 1273 (7th Cir. 1990) (“While Rule 703 entitles experts to base their opinion on such information, the rule does not address the admissibility of the underlying information.”).
446. See Imwinkelried, supra note 2, at 369-70.
447. Epps, supra note 2, at 64.
448. See id. at 66.
449. See, e.g., Imwinkelried, supra note 341, at 267 (summarizing this position as follows: "the information ought to be admitted; but the jury should be given a limiting instruction that they are to use the information only for the purpose of evaluating the quality of the expert’s reasoning process") (citation omitted).
450. See supra part III.D.1; see also Epps, supra note 2, at 80 n.117 (stating that “[t]he distinction between using evidence for all purposes and using it for a limited purpose is at the heart of Rule 105”).
451. Rheingold, for example, observed that “much that is technically hearsay is being admitted as basis statement today, not on any established exception to the rule, but by virtue of some sort of ad hoc exception for medical testimony, the right of the doctor to use technically incompetent evidence.” Rheingold, supra note 98, at 529.
There are, however, substantial problems with the limited admissibility approach. For one thing, there are grave difficulties with the technical requirements governing limited admissibility. Rule 105 provides that limiting instructions are given "upon request." A party's failure to request a limiting instruction at the time the evidence is admitted may mean that the jury is free to use it for any relevant purpose. Assuming that the inadmissible basis is favorable to the proponent, the proponent has little incentive to seek an instruction that limits the possible uses of the evidence. Thus, the opponent bears the burden of: (1) timely recognizing that the expert's basis is inadmissible for any number of reasons and (2) requesting a limiting instruction. Should the opponent fail to make a timely objection or move to restrict the use of the evidence, the bases is then admissible by virtue of the opponent's default.

Even more troubling is the content of such a limiting instruction. What would make sense to the jury? Several commentators who agree on little else dismiss such instructions as nonsense. Professor Rice, for example, supports the hearsay exception approach to Rule 703, in part because limiting instructions are "pure fiction." Professor Carl-

452. Rule 105, Limited Admissibility, reads: "When evidence which is admissible as to one party or for one purpose but not admissible as to another party or for another purpose is admitted, the court, upon request, shall restrict the evidence to its proper scope and instruct the jury accordingly." FED. R. EVID. 105.

453. 21 WRIGHT & GRAHAM, supra note 7, § 5065, at 330-31.

454. See Epps, supra note 2, at 72-73.

455. See 21 WRIGHT & GRAHAM, supra note 7, § 5065, at 328-30 (discussing the timing of objections and requests for limiting instructions). Some authority appears to assume that even though no one requests a limiting instruction, Rule 703 somehow automatically bestows a limited purpose on the "inadmissible bases." See, e.g., Epps, supra note 2, at 65, 72-73. The problem is exemplified by Wilson v. Merrell Dow Pharmaceuticals, Inc., 893 F.2d 1149, 1152-54 (10th Cir. 1990), where the court held that the experts could rely on certain charts that were inadmissible on hearsay grounds. The court observed that the hearsay was "admitted for the limited purpose of informing the jury of the basis of the expert's opinion and not for proving the truth of the matter asserted." Wilson, 893 F.2d at 1153. But the court also observed that the trial judge had not given a limiting instruction, an oversight that it blamed on the opponent, who had the "burden" of requesting it. Id. at 1153 n.5. The court did not explain how the evidence was "limited" without any instruction that restricted the use of the evidence.

456. Rice, supra note 2, at 585. Professor Rice explained:

Compounding the absurdity of the approach . . . is the court's allowing the expert to recite the underlying basis, and then instructing the jury not to accept the recited facts as true (even though the expert did), but to consider those facts only in assessing the value of the expert's opinion. This instruction is pure fiction; it cannot be done.
son, who rejects Rice's approach and supports the view that disclosure of inadmissible bases should be restricted during direct examination, also concludes that limiting instructions are "no cure." 457

Social science research supports the position that such instructions do not make much sense to lay jurors (or anyone else). Regina Schuller's recent study of the influence of "secondhand" information on jury decision-making cautiously suggests that such instructions are not helpful to juries (and are probably ignored). 458

Common sense alone exposes the absurdity of such instructions. In effect, we are telling jurors that they should use the evidence in assessing the persuasiveness of the expert's opinion, but that they cannot use the evidence for the same purpose that the expert did in the first place! What does it mean to tell the jury that the evidence is received solely as it bears on the weight to be given the expert's opinion and then preclude them from using it in the same way that the expert did? 459

Moreover, the content of the instruction must turn on why the evidence is inadmissible in the first place. In the hearsay context, the basis consists of an out-of-court statement that cannot be used for the truth of the matter asserted because none of over thirty hearsay exceptions apply. But what do we tell the jury about an expert who did rely on the statement for its truth? One possibility is as follows:

Ladies and Gentlemen of the jury. You have heard expert A testify that she relied on [describe statement] in arriving at her opinion. You may consider this statement only in assessing the credibility

Even if the instruction's distinction logically were possible, jurors likely would not be capable of performing such mental gymnastics.

Id. (footnotes omitted).

457. Carlson, Collision Course, supra note 2, at 246 n.49.


459. See, e.g., Wilson, 893 F.2d at 1153. The court admitted two charts, which were hearsay and otherwise excludable, for the limited purpose of fleshing out the grounds for the expert's opinions regarding the role of the drug Bendectin in causing birth defects. Id. However, the opponent raised the additional objection that the charts failed to take into account the timing of the patient's Bendectin consumption. Id. The court held that this flaw went to "weight" without offering any explanation of how this was to be done, given that the jury was not permitted to use the chart as substantive evidence anyway. Id. at 1154.
of A's opinion. You cannot use the statement as proof of [whatever is described in the statement] even though A herself used it for this purpose.

In short, we tell the jury to use the evidence in assessing the expert's opinion, but preclude the jury from using it for the very purpose that the expert did in reaching the conclusion. Rice and Carlson are correct: this is nonsense. 460

If limiting instructions are nonsensical in the hearsay context, what are we to do when dealing with even more diaphanous distinctions, such as the use of character evidence? As we have seen, limited admissibility allows parties to introduce evidence of other crimes, wrongs, or acts ostensibly to prove intent, knowledge, motive, etc., but in theory the evidence is not received for the forbidden propensity inference. 461 Critics correctly point out the considerable risk that limiting instructions are ineffective and likely to be ignored. 462 This risk is the same regardless of whether the other evidence stands alone or is filtered through an expert's testimony.

For example, in Henson v. Triumph Trucking, Inc., 463 the defendant, through an expert, offered evidence of the plaintiff's misuse of prescription medication in 1980, 1982, 1985 and 1988. 464 Defense counsel offered this evidence to support the expert's opinion that plaintiff had misused Xanx at the time of the 1989 accident. 465 Without question the evidence ran "afoul" of the character rule, but it was equally "incontestable" that physicians relied on such clinical history in rendering conclusions. 466 The court rejected the defendant's argument that Rule

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460. At best such instructions might affect the content of the proponent's closing argument. As one court reminded, in such cases the proponent cannot argue to the jury, "'See, we proved X through our expert witness, A.'" In re James Wilson Assocs., 965 F.2d 160, 173 (7th Cir. 1992). While this is true, it is doubtful that it makes much difference. Trial counsel can describe fact X, remind the jury that it was received only as it bears on the cogency of expert A's opinion, and then proceed with confidence that the jury will not grasp the meaningless distinction embroidered into the instruction.

461. See discussion supra part III.D.1.

462. E.g., Rice, supra note 2, at 585.


464. Henson, 884 P.2d at 192-93.

465. Id.

466. Id.
703 permitted experts to "'launder' character evidence." Opting for common sense over lawyerly legerdemain, the court trenchantly concluded: "We do not find edifying the proposition that character evidence is inadmissible unless an expert relies on the evidence in forming an opinion in a way that we forbid the trier from relying directly."

A third approach to Rule 703 controls the timing of, and the extent to which, inadmissible bases are disclosed to the jury. In effect, the restricted disclosure approach limits what the jury can be told about the expert's inadmissible bases, at least during the direct examination. Over a decade ago, Professor Carlson observed that "[c]ourts have not always appreciated the fine but important distinction between allowing an extra-record report to form a basis for courtroom opinion and permitting the whole of the report to come into evidence." Limiting instructions were ineffectual. The only solution was to recognize the judge's power to prune the expert's testimony itself, cutting back the expert's latitude to explain the bases for the opinion in great detail, regardless of their admissibility. Professor Carlson proposed that experts be restricted to identifying "the sources" for their conclusions during direct examination.

The restricted disclosure approach rests, in short, on distinguishing direct from cross-examination. Given the potential for mischief

467. Id. at 193.
468. Id.
469. See Carlson, Policing, supra note 2, at 583-86.
471. Carlson, Policing, supra note 2, at 584 (footnotes omitted). Carlson also pointed out that "many courts have understood the vice of free introduction of underlying data." Id.
472. See Carlson, Collision Course, supra note 2, at 246 n.49.
473. Carlson, Policing, supra note 2, at 585. Professor Carlson further explained that an expert whose opinion required extrinsic data may identify and briefly describe the supporting out-of-court document that gave rise to his conclusions. To go further and allow the admission of an unauthenticated writing into evidence or to permit the testifying expert to quote extensively from that writing violates accepted hearsay norms.
474. Id. at 583-86. Professor Carlson analogized Rule 703 to Rule 612, which governs the procedures where witnesses have refreshed their recollection with writings prior to, or during, their testimony.
created by Rule 703, the proponent may be foreclosed from disclosing more than the type or source of the inadmissible data during the direct examination. The cross-examiner is, however, allowed more latitude to explore the inadmissible bases in order to impeach the expert's opinion.

Some federal courts have adopted the restricted disclosure approach. In Nachtsheim v. Beech Aircraft Corp., the Seventh Circuit ruled that the trial judge had properly allowed an air crash expert to state his opinion without any reference to another (inadmissible) crash that he had also relied upon. Although Rule 703 permitted the expert to rely on the inadmissible other accident evidence, the court observed that "the rule does not indicate whether the expert may reveal to the jury the factual basis of his opinion if those facts are not independently admissible into evidence." Melding Rule 703 with Rule 403, the Seventh Circuit used what is labeled a "flexible-liberal approach": "If the expert opinion is allowed, 'the court may, in its discretion, allow the expert to reveal to the jury' the information gained from the expert's pretrial studies and investigations pursued in preparation for expressing an opinion." Thus, Rule 703 did not trump Rule 403. Trial judges retain the discretion to decide how much, if any, of the inadmissible bases should be disclosed to the jury.

475. See Baumholser v. Amax Coal Co., 630 F.2d 550, 553 (7th Cir. 1980).
476. 847 F.2d 1261 (7th Cir. 1988); see supra text accompanying notes 390-96.
477. Nachtsheim, 847 F.2d at 1270-71.
478. Nachtsheim, 847 F.2d at 1270 (footnote omitted).
479. Rule 705 did not figure into the court's analysis. Nachtsheim, 847 F.2d at 1270 n.12.
480. Nachtsheim, 847 F.2d at 1271 (quoting Baumholser v. Amax Coal Co., 630 F.2d 550, 553 (7th Cir. 1980) (internal quotations omitted)). In Baumholser the expert was allowed to offer an opinion on the damage caused by the defendant's blasting operations. Baumholser, 630 F.2d at 552. The opinion was based on an inadmissible survey conducted by college students under the expert's direction, but the "uncontradicted and unrebutted" record revealed that it was similar to one conducted by the Atomic Energy Commission; hence, it passed muster under Rule 703. Id. Nor was the court troubled by the expert's reliance on "double hearsay." The "discretion" language quoted above was taken from a 1957 case. The full quote from Baumholser is: "If the opinion is received, the court may, in its discretion, allow the expert to reveal to the jury the information gained during such [pretrial] investigations and studies. Wide latitude in cross-examination should be allowed." Id. at 553 (quoting Standard Oil Co. v. Moore, 251 F.2d 188, 222 (9th Cir. 1957)).
481. Nachtsheim, 847 F.2d at 1270-71.
Several years later the Seventh Circuit elaborated upon Nachtsheim in Gong v. Hirsh. The Gongs brought a medical malpractice action in federal court alleging that the defendant doctor had negligently prescribed the drug prednisone to treat Mr. Gong's chronic obstructive pulmonary disease. The resulting perforated ulcer allegedly forced Mr. Gong's premature retirement as an engineer. After Mr. Gong's subsequent death, his widow amended the complaint to allege that the negligence had caused his death as well. A jury returned a verdict for the defendant.

On appeal, the plaintiffs argued that the trial court erred in failing to submit to the jury a letter written by Mr. Gong's family physician, Dr. Schleinkofer. Schleinkofer's letter was addressed to a doctor at the medical department of Gong's employer and said, in part, that Gong "continued to work even with his poor health until, he had a perforated peptic ulcer due to prednisone in May, 1986." The trial judge ruled that the letter was not the kind of information reasonably relied upon by experts. Thus, Rule 703 precluded the expert from basing the opinion on this bit of information.

The Seventh Circuit affirmed on this issue, finding no abuse of discretion in the judge's decision to bar "the plaintiff's medical expert from reading from Dr. Schleinkofer's letter or otherwise stating that his opinion was based on the letter." But the court then observed that the judge could have reached the same result even if he had found reasonable reliance. Rule 703, explained the court, "does not auto-

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482. 913 F.2d 1269 (7th Cir. 1990).
483. Gong, 913 F.2d at 1271.
484. Id.
485. Id.
486. Id.
487. Id. at 1272.
488. Gong, 913 F.2d at 1272 (emphasis added).
489. Id. The district court cited four reasons for its concern about the letter's trustworthiness. First, Dr. Schleinkofer was not Gong's treating physician at the time he developed the ulcer. Id. at 1272. Second, the source of Dr. Schleinkofer's opinion was itself unknown. Id. Third, the purpose of the letter was to enable Gong to receive employment benefits. Id. Fourth, the letter was not part of Gong's medical chart for purposes of rendering care and treatment. Id.
490. Id. at 1273 (footnote omitted).
491. Id.
matically mean that the information itself is independently admissible in evidence."\textsuperscript{492} Moreover:

In \textit{Nachtsheim}, this court adopted the view that Rule 703 \textit{generally} permits experts to state the underlying basis of their opinions (if the information is of the type reasonably relied upon by experts), but that the underlying information still is subject to exclusion under the balancing test of Rule 403.\textsuperscript{493}

In short, the admissibility of the opinion does not automatically lead to the disclosure of the underlying bases.

Although dicta, the \textit{Gong} court's gloss on \textit{Nachtsheim} reminded trial judges that the amalgam of Rules 403, 703, and 705 imposes several different hurdles where lawyers try to expose the jury to inadmissible evidence through expert witnesses. First, it must pass the reasonable reliance test of Rule 703.\textsuperscript{494} Reasonable reliance is, however, a low threshold that rarely leaves trial judges in a sound position to overrule an expert's own judgment about what she relies upon. Such rulings also create needless headaches for appellate courts, particularly where the expert's opinion is admitted regardless of the judge's Rule 703 finding, as in \textit{Gong}. Thus, the importance of the second consideration: what the jury should be told about the bases for the expert's opinion. Usually, then, the only concern at stake is exposing the jury to information that is inadmissible through any other means. Skillful trial lawyers know that Rule 703's low reasonable reliance standard provides a broad avenue for exposing the jury to evidence that cannot be admitted for any number of reasons.\textsuperscript{495} Moreover, the admissibility of the expert's opinion usually does not turn on a particular bases; rather, Rule 703 serves as a convenient conduit for traversing what are otherwise insurmountable evidentiary barriers.\textsuperscript{496} The expert need only say that she reasonably

\textsuperscript{492} Id. (emphasis added) (citing Nachtsheim v. Beech Aircraft Corp, 847 F.2d 1261, 1270 (7th Cir. 1988)).

\textsuperscript{493} \textit{Gong}, 913 F.2d at 1273.

\textsuperscript{494} Id. at 1272.

\textsuperscript{495} Again, \textit{Gong} is illustrative. Besides the Rule 703 route, plaintiff's counsel also attempted unsuccessfully to admit the Schleinkofer letter through Rule 803(4) and to "impeach" Schleinkofer himself. See \textit{Gong}, 913 F.2d at 1274.

\textsuperscript{496} See, e.g., Rice, supra note 2, at 591 (stating that he shares Professor Carlson's concern that "courts may permit experts to dump large quantities of unscreened evidence into the record").
relies on this type of information. Limiting instructions are futile and meaningless. The most effective way of preventing inevitable abuses is to recognize that trial judges have the authority to bar disclosure to the jury of some or all of the inadmissible bases even if the information is of a type reasonably relied upon by experts. This is the lesson of Nachttsheim and Gong.497

Several state courts have also recognized that proponents should not be allowed to spill inadmissible evidence before the jury just because the expert relied upon it.498 In Henson v. Triumph Trucking, Inc.,499 discussed earlier, the Arizona Court of Appeals refused to permit a physician to support his opinion through evidence of prior drug abuse that flagrantly violated the character rule.500 When offered by the proponent during direct examination, Rule 703 served only to launder the inadmissible evidence.501 Wisconsin courts have explicitly drawn upon the Seventh Circuit’s lead in Nachttsheim and Gong. In State v. Weber,502 the Wisconsin Court of Appeals instructed that trial judges have three options when confronted by proponents who want to disclose inadmissible bases during the direct examination.503 Depending on the nature of the evidence and the likelihood that a jury might misuse the evidence, the judge can allow full disclosure (with a limiting instruction), partial disclosure identifying only the type or source of the information, or preclude any mention of the inadmissible evidence.504

497. The Seventh Circuit has applied Nachttsheim in several cases after Gong. See In re James Wilson, 965 F.2d at 172-73. In In re James Wilson the Seventh Circuit again reminded trial judges that Rule 703 should not be “used as a vehicle for circumventing the rules of evidence.” Moreover, “[t]he fact that inadmissible evidence is the (permissible) premise of the expert’s opinion does not make that evidence admissible for other purposes, purposes independent of the opinion.” Id. at 173; see also Finchum v. Ford Motor Co., 57 F.3d 526, 531-32 (7th Cir. 1995) (barring disclosure of an article on passenger restraints even though the expert relied upon it in forming his opinion).

498. See, e.g., CHARLES W. EHRRHARDT, FLORIDA EVIDENCE § 704.1, at 534-36 (1996 ed.) (compilation of authorities). He argues that Florida should follow the Nachttsheim approach. Id. at 536 n.18.


500. Henson, 884 P.2d at 192.

501. Id. at 193; see supra text accompanying notes 407-10.

502. 174 Wis. 2d 98, 496 N.W.2d 762 (Ct. App. 1993).

503. Weber, 496 N.W.2d at 766 n.6.

504. Id.
The Weber court noted, however, that cross-examiners have a considerably broader license to inquire into the bases in order to challenge the expert's opinions.505

Other states have eschewed case-law glosses in favor of rules that deviate from the federal versions of Rule 703 and 705.506 Some of the rules are designed to assure that the expert's opinion has a sufficient basis. Maine, for example, gives the opponent the right to voir dire the expert in the jury's absence to determine what facts or data support the expert's opinion.507 Upon a prima facie showing that the opinion does not have a "sufficient basis," the expert's opinion is excluded unless the proponent "first establishes the underlying facts or data."508 Other state rules, however, directly address the reliance/disclosure distinction. Minnesota provides that during direct examination the proponent can only elicit expert data that is "independently admissible."509 The exclusionary rule is subject to one tightly-woven exception: in civil cases, where good cause is shown and "the underlying data is particularly trustworthy," the evidence can be disclosed on direct examination "for the limited purpose of showing the basis for the expert's opinion."510 Cross-examination is not, however, restricted by this rule.511

Texas has codified an approach nearly identical to that set forth in Nachtsheim v. Beech Aircraft Corp.512 and Gong v. Hirsch.513 A detailed rule applicable in criminal cases gives opponents a voir dire right to determine if the expert's opinion is sufficiently supported.514 A separate subsection addresses the disclosure problem using the same approach taken by the Seventh Circuit:

505. Id.

506. See, e.g., DEL. R. EVID. 705; ME. R. EVID. 705; MINN. R. EVID. 705.

507. ME. R. EVID. 705(b).

508. Id. A similar provisions is also found in Rule 705(b) of the Delaware Uniform Rules of Evidence. DEL. R. EVID. 705. Florida has a rule that is substantially similar to the Maine rule. FLA. STAT. ch. 90.705(b) (1995); see EHRHARDT, supra note 498, § 705.1.

509. MINN. R. EVID. 703(b).

510. Id.

511. Id.; see PETER N. THOMPSON, MINNESOTA PRACTICE: EVIDENCE § 703.04 (2d ed. 1992).

512. 847 F.2d 1261 (7th Cir. 1988); see supra text accompanying notes 389-95.

513. 913 F.2d 1269 (7th Cir. 1990).

514. TEX. R. CRIM. EVID. 705(b)-(c).
(d) Balancing Test; Limiting Instructions. When the underlying facts or data would be inadmissible in evidence for any purpose other than to explain or support the expert's opinion or inference, the court shall exclude the underlying facts or data if the danger that they will be used for an improper purpose outweighs their value as explanation or support for the expert's opinion. If the facts or data are disclosed before the jury, a limiting instruction by the court shall be given upon request.515

Although the Texas civil rule is identical to the federal version of Rule 705, commentators on that state's evidence code conclude that trial judges have the same discretion to exclude or restrict inadmissible bases in civil cases as they do in criminal cases under the more detailed rule.516

IV. Conclusion

As we have seen, the common law rigidly policed expert testimony in a sometimes fruitless attempt to assure that experts heeded exclusionary rules, especially those regulating hearsay. The Federal Rules of Evidence did not scrap the common-law procedures, whatever their defects. Rules 702 through 705, together with several innovative hearsay exceptions relating to learned treatises and patients' statements to physicians, represent a reform—not a repudiation—of the common-law approach.517 Moreover, the Advisory Committee's disparaging comments about limiting instructions make it inconceivable that direct examiners have the right to spill inadmissible evidence before the jury ostensibly to better explain "where the expert is coming from."518 Henson v. Triumph Trucking, Inc.519 dramatically illustrates that lawyers can and will use Rule 703 to launder any form of inadmissible evidence subject only to incomprehensible limiting instructions.520 If one concedes that limiting instructions are futile, this leaves only two options: allow the jury to use the evidence

515. Tex. R. Crim. Evid. 705(d).
517. See discussion supra parts III.A-C.
518. See Fed. R. Evid. 803(4) advisory committee's note.
520. See supra text accompanying notes 399-411.
for the same purpose as the expert did (full use) or restrict disclosure to the jury.

The problem with the full-use approach is that there is no sensible stopping point. Rule 703 imposes a low threshold that seldom leaves the trial judge in a position to countermand the expert's insistence that he reasonably relies on some type of inadmissible information. Staring at a cold record armed with only an abuse of discretion standard of review, appellate courts can be reluctant to second-guess trial judges with holdings that are extremely fact intensive and, thus, of limited precedential value. Moreover, Rule 702 welcomes a broad range of experts yet demands only modest qualifications. Full disclosure thus creates an unacceptable risk of experts deciding for themselves what kind of evidence the jury should hear using dubious criteria that conflict with the exclusionary rules that govern the proof process. In short, full disclosure subordinates judges and the rules of evidence to experts with their own, often ill-defined, standards.

Nachtsheim and Gong reveal, however, that some courts are unwilling to abdicate their role of determining what information the jury will receive about the facts of the case. According to these cases, Rule 703 contemplates a clear distinction between what experts can rely upon in reaching conclusions and how much of this information can be disclosed to the jury.

The only sensible approach is one that distinguishes the expert's reliance—Rule 703—from the judge's authority to control disclosure—Rule 705. Plainly, Rule 703 reformed the common law. As the Advisory Committee proudly proclaimed, the rule imposes parity between the courtroom and the expert's laboratory or office; that is, whatever the expert normally relies upon in practice can be used as a basis for opinion testimony. Less obviously, Rule 703 not only "[brought the] judicial practice into line with the practice of the experts themselves when not in court," but also realigned judicial practice with the reality of


522. See Gong, 913 F.2d 1269; Nachtsheim, 847 F.2d 1261.

523. FED. R. EVID. 703 advisory committee's note.

524. Id.
how lawyers prepared experts to testify. Rule 703 blew away the fiction that experts learned about the case-specific bases by listening to garbled hypothetical assumptions or observing other witnesses testify. In reality, lawyers prime experts before they take the stand. In arriving at their opinions, experts read reports, interview witnesses, talk to lawyers, and rely on innumerable forms of evidence that are inadmissible for any number of reasons. But just because experts reasonably rely on such information does not a fortiori render it admissible or otherwise ripe for disclosure by the direct examiner.

Read together, then, Rules 703 and 705 require three discrete but related inquiries. First, why is the evidentiary basis inadmissible? For example, is the problem tied to hearsay, character evidence, authentication, etc. Under our adversarial system, opposing counsel is generally responsible for identifying the precise objection unless the judge intervenes sua sponte. Second, in light of the evidentiary disability,

525. See Robert F. Hanley, Preparing the Expert Witness in Rossi, supra note 233, at 155-70. In a separate essay, Professor Rossi explained the danger of misuse in blunt terms:

Is there not a lesson here for the trial lawyer? Assume she has a relevant document that she would like to get into evidence. But she cannot. It is hearsay not within any of the exceptions to the rule against hearsay. If offered directly, it will be rejected. What is to be done? Hire an expert. If the expert can give a favorable opinion based in part on the document and, if the expert’s reliance on the material is reasonable, the opinion will be allowed. The expert can also explain the basis for that opinion and, in doing so, may be allowed to describe the contents of the document. Would such a scenario violate the hearsay rule? The best evidence rule? Does it make any difference if our expert’s opinion was based solely and entirely upon the inadmissible document?

Rossi, supra note 233, ch. 3, at 81. Later in the same essay, Rossi summarized the potency of Rule 703:

The lesson for the trial lawyer is that Rule 703 is a potent weapon on several levels. It allows an opinion to be based on otherwise inadmissible, but “reliable,” data. It then, as most cases say, permits the jury to hear information normally considered improper evidence. By allowing one expert to recite the sources upon which he relied, it permits the one expert to substitute for other witnesses or documents that no longer need be presented.

Id. at 97.

526. Of course, if the basis is admissible the expert can rely on it without raising any perplexing issues about disclosure.

527. The proponent can, of course, offer the basis for a limited, admissible purpose in the first instance.
do experts in the field reasonably rely on this type of information? Many experts rely on what lawyers identify as hearsay, but propensity inferences might be as suspect in the expert’s field as they are in law. Thus, the type of evidence must include consideration of the inferences the expert draws.528 Third, should the inadmissible bases be disclosed to the jury even if the expert reasonably relied on it in rendering an opinion? Experts are in the best position to tell the judge what they do or do not reasonably rely upon, but the judge is in a better position to determine what the jury should hear, consistent with the exclusionary rules of evidence. Again, character evidence provides a good example. Even if a doctor customarily uses a propensity inference when making a diagnosis, the law of evidence has its own very good reasons for keeping the party’s background from the jury. A doctor might need this sort of information to prescribe a treatment plan, but at trial there is a danger that a jury might use it to punish the offender, a risk that is (one hopes) entirely absent in the doctor’s use of the information.529

Rule 705 distinguishes between disclosure during direct and cross-examination.530 On direct examination the expert is permitted to testify to an opinion and the “reasons therefor.”531 The expert may also describe facts or data that have been, or will be, admitted into evidence.532 The direct examiner cannot, however, elicit inadmissible case-specific data in the ordinary course. Normally, there should be no mention of such information. Where some reference is necessary in order to adequately explain the expert’s reasoning, the judge can allow an oblique reference to the type of information, but not any details. For example, an expert could indicate that she relied on “various reports” but could

528. In Henson v. Triumph Trucking, Inc., 180 Ariz. 305, 884 P.2d 191 (Ct. App. 1994), the driver’s past drug abuse was lumped into the category of “clinical history.” Henson, 884 P.2d at 193. One wonders, however, whether a treating physician would have been as willing as the defendant’s hired expert witness to jump to the conclusion that the driver misused Xanax based on his history of abuse. In short, the question is whether a doctor would base a diagnosis and predicate treatment—as opposed to courtroom testimony—on the drug history.

529. See 1 MCCORMICK II, supra note 60, § 188, at 793 (character when used as circumstantial evidence of conduct, “while typically being of relatively slight value, usually is laden with the dangerous baggage of prejudice, distraction, time consumption and surprise”).

530. FED. R. EVID. 705.

531. Id.

532. Id.
not quote or otherwise detail them during the direct examination. Thus, the judge can bar the expert from making any reference to inadmissible data or allow only a generic reference barren of any details that might be misused by the jury. Where the inadmissible data relates to something other than case-specific information, such as the expert's major premise, the judge might allow a more detailed recitation of the bases.\textsuperscript{533}

In contrast to the direct examiner, the cross-examiner has greater latitude to explore the expert's bases in order to test the soundness of the witness's opinions and reasoning.\textsuperscript{534} Tactically, one can expect that cross-examiners will elicit only those inadmissible bases that favor their party's cause. Moreover, disclosure during cross-examination does not carry the same risk that the expert, who was most likely retained by the direct examiner, is "laundering" inadmissible evidence. Although cross-examiners should have greater leeway, this falls short of carte blanche. Thus, cross-examiners can attack experts on the ground that they failed to consider certain information. However, where the expert's omission involves inadmissible evidence that the expert should have reasonably relied upon, the judge can restrict questions to the type of information as opposed to its details.\textsuperscript{535}

Finally, it is suggested that where a hearsay basis fails to qualify under one of the more commonly used exceptions, an expert's assistance might be used to help establish "equivalent circumstantial guarantees of trustworthiness" under the residual exceptions.\textsuperscript{536} The applicability

\textsuperscript{533} See Imwinkelried, supra note 2, at 369 (concerning "research data").

\textsuperscript{534} See 1 \textsc{McCormick} II, supra note 60, § 13, at 56-57.

\textsuperscript{535} \textit{Id}.

\textsuperscript{536} Rule 803(24) states:

A statement not specifically covered by any of the foregoing exceptions but having equivalent circumstantial guarantees of trustworthiness, if the court determines that (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence. However, a statement may not be admitted under this exception unless the proponent of it makes known to the adverse party sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet it, the proponent's intention to offer the statement and the particulars of it, including the name and address of the declarant.
of any hearsay exception is a preliminary question for the judge under Rule 104(a). In making such determinations, the judge is not bound by the rules of evidence and may even use the questioned hearsay itself in establishing the foundation. Thus, nothing precludes experts from advising judges about whether out-of-court statements possess the requisite trustworthiness. Of course the judge has the final say under Rule 104(a), but the expert might be able to supply helpful guidance to the judge. Nor is there anything iconoclastic about this suggestion. Experts already advise judges about whether a statement was made for purposes of diagnosis or opinion under Rule 803(4) or is sufficiently authoritative under the learned treatise exception, Rule 803(18).

We should also consider using our experience to create other hearsay exceptions akin to Rule 803(4) (statements to physicians) or 803(18) (learned treatises). True, the list of exceptions is presently cumbersome, but nothing precludes adding to the list. Some inflation has already occurred in cases that expansively construe “medical diagnosis or opinion” under Rule 803(4) as a general “health care provider” exception.

537. FED. R. EVID. 803(4).
539. It is suggested only that the expert might provide assistance on the trustworthiness issue. Other matters under the residuals, such as the statement’s materiality, its probative value, and the interests of justice are peculiarly in the judge’s province and fall outside the bounds of expert assistance.

540. See Rice, supra note 2, at 591. Professor Rice advocated using the residual exceptions as stop gap measures “until the Federal Rules of Evidence incorporate a new hearsay exception to accommodate specifically the new dimensions of the proposed practice under Rule 703.” Id. The “proposed practice” holds that “[i]f the judge properly screens expert opinions to ensure compliance with Rule 703’s expanded basis requirements, no justification exists for precluding the finder of fact from hearing and using those facts supporting the opinion to the same extent as the expert.” Id. at 590. My argument is that instead of another generic provision like Rule 703, we need specific exceptions like Rule 803(4).

541. FED. R. EVID. 803(4). See, e.g., 2 GRAHAM, supra note 334, § 803.4, at 418 (citing and discussing case law that extends the exception to “psychologists”). Wisconsin, for example, has construed “medical” in its counterpart to Rule 803(4) as reaching chiropractors and psychologists. See BLINKA, supra note 230, at 472.
These suggestions—barring disclosure of inadmissible bases during direct examination, making more creative use of the residual exceptions, and creating new expert-based exceptions where appropriate—take into account not just the text and history of federal rules, but also the way that lawyers use evidence in the courtroom. Moreover, it must be conceded that neither Rule 703 nor any single rule can hope to reconcile the practice of experts in all fields with the very different imperatives that apply in the courtroom. But what must be avoided is the cynical degradation of exclusionary rules through the unhappy, ill-advised marriage of experts and limited admissibility. In our trial system the judge determines what evidence the jury will see or hear. Nothing in the text or history of Rule 703 supports the view that the expert’s suzerainty extends to all aspects of his testimony. The expert may tell the jury about his opinions, reasoning, and bases, but only at the express permission of the judge—the ultimate arbiter.