What is the Status of the "Inadmissible" Bases of Expert Testimony>

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WHAT IS THE STATUS OF "INADMISSIBLE" BASES OF EXPERT TESTIMONY?

I. INTRODUCTION

The Federal Rules of Evidence have broadened the scope of expert testimony. However, the departure from the common-law tradition has created ambiguity in the application of some of the federal rules. This Comment analyzes the application of Federal Rule of Evidence 703\(^1\) and its Wisconsin counterpart, section 907.03 of the Wisconsin Statutes.\(^2\)

Rule 703 permits an expert to base an opinion on inadmissible data "[i]f of a type reasonably relied upon by experts in the particular field."\(^3\) Courts have, however, interpreted "reasonable reliance" in different ways. Moreover, highly conflicting opinions exist as to how courts should treat the underlying inadmissible data.

This Comment begins with a brief look at the common-law practice preceding Rule 703, as well as the extensive use of expert testimony today. The determination of reasonable reliance and the treatment of inadmissible bases are then discussed, focusing on Wisconsin’s application of section 907.03. Finally, a framework for future application of section 907.03 is presented.

II. COMMON-LAW BACKGROUND

At common law, expert witnesses were permitted to state their opinions based on firsthand knowledge of the facts or based on facts in the trial record.\(^4\) When an expert based her opinion on facts in the trial record, the expert either attended the trial while witnesses testified or was asked a hypothetical question based on the evidence that had been, or would be, introduced at the trial.\(^5\) Consequently, experts were al-

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1. **Fed. R. Evid.** 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.
2. **Wis. Stat.** § 907.03 (1991-92). Section 907.03 is identical to **Fed. R. Evid.** 703.
3. **Fed. R. Evid.** 703.
5. *Id.*
allowed to formulate opinions based only on admissible evidence. The rationale for this common-law rule was based on a syllogism that Professor McElhaney has formed this way:

If an expert opinion was based on hearsay information, relating the opinion would be giving the jury hearsay in the insidious disguise of an expert opinion. Since hearsay is unreliable unless it fits within one of the exceptions to the hearsay rule, any opinion based on inadmissible hearsay was also fatally tainted.6

Furthermore, common-law courts reasoned that a jury could only rely upon facts in the record when evaluating issues at trial; therefore, if the expert based an opinion on facts not in evidence, the jury could have no basis for finding the expert's opinion to be true.7

Departing from the traditional rule, which permitted an expert to base an opinion solely on admissible evidence, some courts began to permit medical doctors to rely upon data outside of the trial record. The rationale for this departure was summarized by Justice Stevens in Sundquist v. Madison Railways Co.8

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.9

When the hearsay rule and its exceptions were codified in the Federal Rules of Evidence, the bases for expert testimony deemed reliable enough to be admitted into evidence were included as exceptions to the hearsay rule. Thus, the bases of expert testimony that gave rise to rule 703 are codified as hearsay exceptions in the federal rules. For example, medical reports, although hearsay, have been held to be trustworthy as a basis for a medical conclusion.10 As a result, a hearsay exception has been created for "[s]tatements made for purposes of medical diagnosis

7. Strong et al., supra note 4, § 15.
8. 197 Wis. 83, 221 N.W. 392 (1928).
9. Id. at 87, 221 N.W. at 393 (citing Leora v. Minneapolis, St. P. & S. Ste. M. Ry. Co., 156 Wis. 386, 395, 146 N.W. 520, 529, error dismissed, 235 U.S. 694 (1914)).
or treatment." In addition, business and government records often provide the raw data upon which experts' opinions are based. Rules 803(6) and 803(8) provide exceptions to the hearsay rule for business records and government records and reports. Thus, these exceptions allow introduction of evidence that typically forms the basis of expert opinions. Other hearsay exceptions that admit reliable information upon which an expert may base an opinion are Rules 803(17), which includes "[m]arket quotations, tabulations, lists, . . . or other published compilations, generally used and relied upon by the public or by persons in particular occupations," and 803(18), the learned treatise exception.

III. THE PROBLEM WITH EXPERT TESTIMONY

Article VII of the Federal Rules of Evidence has broadened the use of expert testimony. An expert witness may be qualified by "knowledge, skill, experience, training, or education" and need only "assist the trier of fact to understand the evidence or determine a fact in issue" in order to testify. As a result, "any minimally qualified practitioner of the expert discipline at issue is eligible to testify." This broad admissibility has led to extensive use of expert evidence, which requires careful scrutiny of the information a party presents through its expert witnesses.

The most obvious problem with experts is the "expert for hire." "An expert can be found to testify to the truth of almost any factual theory, no matter how frivolous, thus validating the case sufficiently to avoid

11. FED. R. EVID. 803(4) provides:
   The following are not excluded by the hearsay rule, even though the declarant is available as a witness: . . . 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.
12. FED. R. EVID. 803(6).
13. FED. R. EVID. 803(8).
14. FED. R. EVID. 803(17).
15. FED. R. EVID. 803(18).
16. FED. R. EVID. 702. The rule states that "[i]f 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." Id.
summary judgment and force the matter to trial." At trial, an expert may obfuscate otherwise simple matters, thus, misleading the jury and judges. Furthermore, not only is expert testimony often complex and difficult to comprehend, some expert opinions are just plain wrong.

Few studies exist about the use of experts in civil cases. One study, based on 529 civil trials that led to jury verdicts in California Superior Courts in 1985 and 1986, reported that experts testified in eighty-six percent of the trials. More importantly, in 6500 California civil jury trials from 1980 through 1985, nearly sixty percent of the expert witnesses who testified were witnesses "who testified in such cases at least two times over a six-year period." Furthermore, [f]or a particular appearance before a jury, the average number of times the same expert testified over a six-year period was 9.4. These statistics greatly underrepresent the experts' actual litigation experience:

They do not, for instance, include testimony in criminal trials or in civil trials in courts other than California State Superior Courts. More important, the numbers do not catch the many cases in which the same experts were consulted, wrote reports, or even testified in depositions, but failed to testify in court because the cases were settled or dismissed before trial.

Based on the California trials, Professor Samuel Gross points out that an expert witness is twice as likely to have testified in a similar case in the preceding six months as the attorney examining the witness is to have tried one.

Many experts, since they are paid to testify, become professional witnesses. They advertise their services and charge substantial fees for their "expert" opinions. The problem is an obvious one: "[e]xperts whose incomes depend on testimony must learn to satisfy the consumers who buy that testimony; those who do not will not get hired." In other words, an expert for hire is likely to testify to opinions and bases for the opinions as dictated by the party employing the expert.

19. Weinstein, supra note 18, at 482.
20. Id.
22. Id. at 1120.
23. Id.
24. Id.
25. Id.
26. Id. at 1131. Professor Gross provides examples of the types of advertisements run by professional witnesses in typical issues of the National Law Journal and Trial magazine.
27. Id. at 1132.
Both the bias and complexity, which is a part of most expert testimony, must be considered in applying evidentiary rules to expert testimony. In most cases, a jury must expend more time and effort to understand scientific testimony than lay testimony. The significant amount of courtroom time devoted to scientific testimony magnifies the risk that jurors will be unable to disregard the expert evidence. A juror who struggles to understand the information presented by an expert witness is likely to remember the information because of the time spent trying to comprehend the data. Furthermore, it is difficult enough for juries to evaluate admissible expert testimony; if inadmissible evidence is presented by a biased expert witness, the problem is compounded.

Although an expert's bias may be brought out during cross-examination, it is very important to monitor the information that an expert presents to the jury. Impeachment during cross-examination of a “professional witness,” by itself, is not sufficient to address the above-mentioned problems. Professional witnesses are not only elusive and evasive, they often couch their testimony in technical terms, all of which make impeachment difficult. In addition, highlighting an expert’s fee or the number of times the expert has testified at trials may not have the desired effect on a jury that is unfamiliar with the prevalence of “experts for hire.” In fact, this form of impeachment may even enhance the witness' credentials because the jury may be impressed with the expert's broad range of “expertise.” Few juries are aware of the existence of the professional expert “industry,” and a few impeaching questions at trial are not likely to educate jurors on the magnitude of the problem. Thus, giving expert witnesses too much latitude in presenting inadmissible evidence to the jury not only confuses jurors, but also leads to abuse. For this reason, trial courts must closely scrutinize the information a party attempts to present through its expert witnesses.


29. Id. at 605.

30. Id. The jury's “struggle to understand the information may enhance the depth of processing, and that greater depth should make the memory stronger. Similarly, increasing the temporal duration of exposure to a stimulus tends to solidify the memory of that stimulus.” Id.

31. See infra part V for discussion of this potential abuse.
IV. Federal Rule of Evidence 703

Federal Rule of Evidence 703, which is identical to section 907.03 of the Wisconsin Statutes, broadens the bases upon which an expert witness may testify. Not only is an expert permitted to state an opinion based on admissible facts and data, but also on inadmissible data "[i]f of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject." This phrase raises two significant questions. First, who determines reasonable reliance? Second, and even more important, to what extent, if at all, should the inadmissible facts or data be disclosed to the trier of fact?

A. Reasonable Reliance

The courts have taken two approaches in determining whether data is of a type reasonably relied on by experts in a particular field. The restrictive approach "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." Judge Weinstein distinguished this approach from the liberal approach in In re "Agent Orange" Product Liability Litigation. The plaintiffs in Agent Orange, Vietnam veterans and their families, sought to introduce expert affidavits based on forms filled out by the individual plaintiffs describing their medical history and exposure to Agent Orange. Attached to the forms filled out by the plaintiffs were checklists which allowed the individual plaintiffs "to identify any or all of a number of symptoms which they attribute[d] to their exposure to Agent Orange in Vietnam." Although the plaintiffs' experts contended that the affidavits were based on the kind of information a physician would require in rendering an opinion, the court excluded the expert affidavits because the underlying data were so "lacking in probative force and reliability that no reasonable expert could base an opinion on them."

One criticism of the restrictive view is that the question of reliability of the underlying bases is similar to an inquiry of whether the data meet

32. FED. R. EVID. 703; WIS. STAT. § 907.03 (1991-92).
34. Id.
35. Id. at 1235.
36. Id.
37. Id. at 1245.
a residual hearsay exception, which would make the data independently admissible. Because Rule 703 explicitly states that the underlying data may be inadmissible, this level of scrutiny is inconsistent with the rule's intent. Another criticism of this view is that a judge, who is not as familiar with the subject area as the expert witness, must evaluate the trustworthiness of the data. A judge may not be knowledgeable about the various scientific theories and data that form the bases for an expert’s opinion, yet under the restrictive approach, the judge must determine if the data are reliable.

In contrast, the liberal approach “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.” This approach is exemplified by In re Japanese Electronic Products Antitrust Litigation. In Japanese Products, the trial court applied a restrictive approach in determining reasonable reliance. The trial court did not consider “the affidavits submitted by the plaintiffs’ experts to the effect that the material upon which they relied in forming their opinions is of a type generally relied upon by experts in their respective fields as in any way determinative of the issue.” The Third Circuit held that the trial court erred in excluding the experts’ opinions on the ground that they were based on material not reasonably relied upon by the experts. The court stated, “The proper inquiry is not what the court deems reliable, but what experts in the relevant discipline deem it to be. . . . In substituting its own opinion as to what constitutes reasonable reliance for that of the experts in the relevant fields the trial court misinterpreted Rule 703.”

Wisconsin courts have taken the liberal approach in determining reasonable reliance. Generally, the determination consists of an inquiry of the expert witness as to whether other experts in the field rely upon the data that form the basis of the expert’s opinion. Brain v. Mann demonstrates the approach currently utilized in Wisconsin.

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38. Arnolds, supra note 6, at *8.
39. Id.
40. Agent Orange, 611 F. Supp. at 1244 (citing Arnolds, supra note 6, at *7).
42. Id. at 276 (quoting Zenith Radio Corp. v. Matsushita Elec. Indus., 505 F. Supp. 1125, 1325-26 (E.D. Pa. 1980)).
43. Id. at 278.
44. Id. at 276-77.
45. 129 Wis. 2d 447, 385 N.W.2d 227 (Ct. App. 1986).
In *Brain*, the trial court struck the testimony of the plaintiff's expert vocational rehabilitation specialist because the expert based his opinion on two surveys conducted and published by the Department of Health and Human Resources.\(^{46}\) The trial court, applying the restrictive approach, concluded that the data was both unreliable and prejudicial to the defendant.\(^{47}\) The court of appeals reversed, stating that "the trial court incorrectly focused on the statistical soundness of the surveys used by [the expert]."\(^{48}\) The court continued, "[t]he crucial factor . . . was [the expert's] uncontroverted testimony that these surveys were recognized source material upon which vocational rehabilitation consultants customarily rely in the ordinary course of their professional work."\(^{49}\)

In Wisconsin, data is deemed reliable if experts in the particular field rely on the data in forming their opinions.\(^{50}\) In fact, it appears it is not even necessary for the expert witness to state that her opinion is based on facts or data relied on by other experts in the field. In *Kolpin v. Pioneer Power & Light Co., Inc.*,\(^{51}\) an expert who relied on hearsay in forming his opinion was permitted to testify even though the expert "did not say the 'magic words'—'reasonably relied upon by experts in the field.'"\(^{52}\) The Wisconsin Supreme Court stated that the bases for the expert's opinion "clearly are of the type experts would rely on in formulating an opinion."\(^{53}\) *Kolpin* illustrates the laxness and proves the futility of the reasonable reliance standard in Wisconsin.

A major criticism of this approach is that any expert witness hired by a party to testify will state that her opinion is based on data reasonably relied on by experts in her field. As a result, any data that an expert bases an opinion on is of the type "reasonably relied upon" by other experts in her particular field, and the expert testimony is permitted. Thus, the main issue raised by the restrictive and liberal approaches is whether reasonable reliance is a decision for the judge or solely the province of the expert. The restrictive view obviously considers the reasonable reliance determination to be a decision for the judge. However, even under the liberal approach, reasonable reliance should not be solely determined by the expert. For example, in cases where there is conflict-

\(^{46}\) Id. at 457-58, 385 N.W.2d at 232.  
\(^{47}\) Id. at 458, 385 N.W.2d at 232.  
\(^{48}\) Id. at 459, 385 N.W.2d at 233.  
\(^{49}\) Id. at 459-60, 385 N.W.2d at 233.  
\(^{50}\) Id. at 461-62, 385 N.W.2d at 233-34.  
\(^{51}\) 162 Wis. 2d 1, 469 N.W.2d 595 (1991).  
\(^{52}\) Id. at 37, 469 N.W.2d at 609.  
\(^{53}\) Id.
ing expert evidence on the issue of reasonable reliance, the judge must decide whether to permit the expert testimony under either the liberal or the restrictive approach.\(^{54}\)

Wisconsin's liberal approach to determining reasonable reliance is not overly troublesome with regard to the expert's opinion. However, a liberal approach in allowing inadmissible data underlying the expert's opinion to reach the trier of fact is very problematic. If experts are permitted to testify in detail about the inadmissible bases of their opinions, any inadmissible information that a party wishes to present to the jury is likely to become a "basis" for the expert's testimony.\(^{55}\)

**B. Disclosure of Inadmissible Bases**

A great deal of debate has focused on the treatment of the inadmissible bases that underlie an expert's opinion. Neither the Federal Rules nor the advisory committee's notes to the Federal Rules address the question of how courts should treat the inadmissible bases of expert testimony. Federal Rule of Evidence 705\(^{56}\) and section 907.05\(^{57}\) of the Wisconsin Statutes explicitly provide that an expert may state her opinion without disclosing the underlying facts or data, unless the court requires otherwise.\(^{58}\) Thus, rule 703 and section 907.03 do not provide a license for experts to present to the jury every facet of the expert's rationale and analysis.

One side of the debate claims that full disclosure of the underlying data is appropriate because the trier of fact "cannot intelligently evaluate the worth of the expert's opinion unless the trier has the benefit of [the underlying data]" that forms the basis of the expert's opinion.\(^{59}\) Rule 703 has even been referred to as a quasi-hearsay exception, and some courts have received the underlying data as substantive evidence.\(^{60}\)

One justification for treating the inadmissible bases as hearsay excep-

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54. The judge must make this decision under Fed. R. Evid. 104(a), which states that preliminary questions concerning the admissibility of evidence shall be determined by the court.

55. The expert will simply testify that the inadmissible information is of a type that experts in the field reasonably rely upon.

56. Fed. R. Evid. 705.


58. Section 907.05 is identical to Rule 705: "The expert may testify in terms of opinion or inference and give reasons therefor without prior disclosure of the underlying facts or data, unless the judge requires otherwise. The expert may in any event be required to disclose the underlying facts or data on cross-examination."


60. Strong et al., supra note 4, § 324.2.
tions is that reasonable reliance by experts in the field adequately assures reliability.\textsuperscript{61}

Rule 703 is not, however, a hearsay exception. First, if the advisory committee to the Federal Rules of Evidence had intended the inadmissible bases of expert testimony to be hearsay exceptions, the exceptions would appear in Article VIII along with the other hearsay exceptions. Second, permitting full disclosure of an expert's underlying inadmissible bases could lead to serious abuse, especially in jurisdictions applying a liberal view of reasonable reliance. The underlying data, if inadmissible, does not provide the guarantees of trustworthiness present in the exceptions to the hearsay rule. The bases for an expert's testimony are very likely to be controlled by the party employing the expert, hardly an unbiased source.

Not all proponents of "full disclosure" argue that Rule 703 should be treated as a hearsay exception. Some argue that the underlying data are admissible for the limited purpose of informing the jury of the bases of the expert's opinion, but not as substantive evidence. A limiting instruction under these circumstances is, as Professor Rice puts it, a "pure fiction."\textsuperscript{62} He states that "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" is absurd.\textsuperscript{63} He further states that:

A limiting instruction in this instance is absurd not only because jurors are asked to do something completely illogical but also because jurors cannot follow this instruction; the expert can accept the underlying data as true, but the jurors cannot? Even the Advisory Committee to the Federal Rules of Evidence, in its notes to Federal Rule of Evidence 803(4), has acknowledged that this distinction is one "most unlikely to be made by juries."\textsuperscript{64}

Although the inadmissible bases of expert testimony are usually inadmissible for hearsay reasons, the bases may also be inadmissible for other evidentiary reasons. For example, Federal Rule of Evidence 407 prohibits the introduction of subsequent remedial measures to prove negligence or culpable conduct.\textsuperscript{65} If an expert reasonably relied on the subsequent remedial measure in forming her opinion, permitting full dis-


\textsuperscript{62} Id. at 585.

\textsuperscript{63} Id.

\textsuperscript{64} Id. (quoting Fed. R. Evid. 803(4) advisory committee note).

\textsuperscript{65} Fed. R. Evid. 407.
closure of the expert's underlying inadmissible bases would undermine Rule 407.

The opposite side of the debate argues against full disclosure of the underlying inadmissible bases of expert opinions. This view opposes the wholesale introduction of underlying data and supports the use of a limiting instruction if any of the data is mentioned by the expert. The underlying data may only be mentioned "for the limited purpose of demonstrating what data the expert relied upon." This is the more reasonable of the two views, especially since limiting instructions are ineffective in preventing a jury from accepting an expert's bases as substantive evidence even when "inadmissible" for that purpose.

V. Application of Section 907.03

The various approaches in determining reasonable reliance and differing views on how to treat the data underlying an expert's opinion have led to contradictory and often confusing results among the courts. The confusion is apparent when one looks at the cases applying section 907.03 of the Wisconsin Statutes.

The Wisconsin Court of Appeals' decisions in this area have been quite inconsistent. In *State v. Mann*, the court of appeals stated that "the hearsay rule is generally inapplicable to the facts or data upon which an expert witness bases his or her opinion; if the facts or data are of a type reasonably relied on by experts in the field, they need not themselves be admissible in evidence." In *Mann*, the court admitted an autopsy report prepared by a since-deceased physician because it was utilized by expert medical witnesses in forming their conclusions.

The most troublesome application of section 907.03 was in *Bagnowski v. Preway, Inc.*, in which the court of appeals referred to section 907.03 as "another hearsay exception." In *Bagnowski*, an expert firefighter relied on hearsay in forming his opinion of the cause of a fire. Citing to the third edition of *McCormick on Evidence*, the court stated

68. 135 Wis. 2d 420, 400 N.W.2d 489 (Ct. App. 1986).
69. *Id.* at 427, 400 N.W.2d at 492.
70. *Id.*
71. 138 Wis. 2d 241, 405 N.W.2d 746 (Ct. App. 1987).
72. *Id.* at 251, 405 N.W.2d at 751.
73. *Id.*
that an expert is competent to evaluate the reliability of hearsay statements; therefore, hearsay that an expert relies upon in forming her opinion is admissible.\textsuperscript{74} Considering the language used in \textit{Mann}, it is understandable why the court in \textit{Bagnowski} referred to section 907.03 as a hearsay exception.

Contrary results were reached in \textit{Condition of S.Y. v. Eau Claire County}\textsuperscript{75} and \textit{State v. Coogan},\textsuperscript{76} where the court of appeals held that an expert may not act as a conduit for inadmissible evidence.\textsuperscript{77} In \textit{Coogan}, an expert psychiatrist relied in part on inadmissible hypotically-refreshed testimony.\textsuperscript{78} The expert's opinion was admissible; however, the legally inadmissible data forming the basis of the expert's opinion was not.\textsuperscript{79}

In \textit{Coogan}, the court of appeals made reference to \textit{Nachtsheim v. Beech Aircraft Corp.},\textsuperscript{80} a significant decision in the application of Federal Rule of Evidence 703. In \textit{Nachtsheim}, the district court excluded testimony about an airplane crash which was inadmissible even though the plaintiff's expert relied on the data in forming his opinion.\textsuperscript{81} The Seventh Circuit upheld the district court's use of Federal Rule of Evidence 403\textsuperscript{82} to exclude the expert testimony regarding the plane crash.\textsuperscript{83} The court stated, "to say that Rule 703 permits an expert to base his opinion upon materials that would otherwise be inadmissible does not necessarily mean that material independently excluded by the court by reason of another rule of evidence will automatically be admitted under Rule 703."\textsuperscript{84}

The contradictory applications of section 907.03, evidenced by \textit{Mann} and \textit{Bagnowski} on the one hand, and \textit{S.Y.} and \textit{Coogan} on the other,

\textsuperscript{74} \textit{Id.} at 252, 405 N.W.2d at 751.
\textsuperscript{75} 156 Wis. 2d 317, 457 N.W.2d 326 (Ct. App. 1990) ("While experts may rely on inadmissible evidence in forming opinions, the underlying evidence is still inadmissible.").\textsuperscript{75}\textsuperscript{76} 153 Wis. 2d 320, 469 N.W.2d 836 (1991).
\textsuperscript{76} 154 Wis. 2d 387, 453 N.W.2d 186 (Ct. App. 1990), \textit{review denied}, 153 Wis. 2d li, 454 N.W.2d 806, (1990).
\textsuperscript{77} \textit{Id.} at 399, 453 N.W.2d at 190.
\textsuperscript{78} \textit{Id.} at 400, 453 N.W.2d at 190-91.
\textsuperscript{79} \textit{Id.}
\textsuperscript{80} 847 F.2d 1261 (7th Cir. 1988).
\textsuperscript{81} \textit{Id.} at 1270.
\textsuperscript{82} Fed. R. Evmd. 403 provides: "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence."
\textsuperscript{83} \textit{Nachtsheim}, 847 F.2d at 1271.
\textsuperscript{84} \textit{Id.} at 1270.
prompted a proposal to amend section 907.03. The Judicial Council of Wisconsin suggested renumbering section 907.03 to section 907.03(1) and adding a subsection, 907.03(2), which would read:

Where the facts or data underlying the expert opinion or inference are otherwise inadmissible in evidence but [are] of a type reasonably relied upon by such experts as provided in sub. (1), the judge, after an analysis of the considerations set forth in s. 904.03, may permit some or all of this information to be disclosed to the jury under this subsection or s. 907.05, for the limited purpose of establishing the basis for the expert’s opinion or inference.85

While the amendment to section 907.03 was under consideration, the Wisconsin Supreme Court decided *Kolpin v. Pioneer Power & Light Co., Inc.*,86 discussed in section IV.A. In *Kolpin*, the court clarified that the hearsay relied upon in forming the expert’s opinion was “admissible for the limited purpose of serving as a basis for the opinion.”87 In a footnote, the court stated that section 907.03 “is not to be confused with a ‘hearsay exception’. To do so would be to say the hearsay is admissible and can be used by any witness for the truth of the matter asserted.”88

Because *Kolpin* corrected Bagnowski's characterization of section 907.03 as “another hearsay exception,” the Wisconsin Supreme Court, on February 19, 1992, remanded the proposed amendment of section 907.03 to the Judicial Council for further consideration.89 Although the court in *Kolpin* clarified that section 907.03 is not a hearsay exception, the court did not make clear to what extent the underlying facts may be disclosed for the limited purpose of serving as a basis for the expert’s opinion. As discussed previously, a jury is not likely to distinguish testimony offered solely as a basis for the expert’s opinion from substantive evidence offered for the truth of the matter asserted. Furthermore, because Wisconsin takes such a liberal approach in determining data that are reasonably relied upon by experts, the potential for abuse of section 907.03 is substantial. The liberal approach in determining reasonable reliance, combined with full disclosure of the underlying bases, permits a party to present untrustworthy facts and data to the jury through the

86. 162 Wis. 2d 1, 469 N.W.2d 595 (1991).
87. Id. at 37, 469 N.W.2d at 609-10.
88. Id. at 37 n.10, 469 N.W.2d at 610 n.10.
89. In re the Amendment of the Rules of Evidence: Sec. 907.03, Stats. Wisconsin Supreme Court Order (Feb. 19, 1992).
guise of an expert witness. Arguably, a party could present her entire case through an expert’s testimony.

The most appropriate analysis in the application of section 907.03 was utilized in State v. Weber. The court of appeals recognized that section 907.03 admits only the expert’s opinion, not the inadmissible bases that support the expert’s opinion. In Weber, the trial court admitted the hearsay testimony of a medical expert who stated that the defendant told a resident at the state hospital that he was going to handle his legal case by acting “mentally ill” and looking “crazy.” The trial court reasoned that since medical experts routinely rely on hearsay information, the underlying hearsay data was both reliable and admissible. However, the court of appeals held that

Section 907.03 allows an expert to base an opinion upon data that constitute hearsay if the data are of a type reasonably relied upon. However, sec. 907.03 is not a hearsay exception. Hearsay data upon which the expert’s opinion is predicated may not be automatically admitted into evidence by the proponent and used for the truth of the matter asserted unless the data are otherwise admissible under a recognized exception to the hearsay rule.

Significantly, only Weber has addressed a court’s disclosure options with respect to the inadmissible data reasonably relied upon by experts. The court noted that sections 907.03, 907.05, and 904.03 permit the trial court several disclosure options, even though the data is inadmissible for the truth of the matter asserted:

The court may permit full disclosure of the inadmissible hearsay basis followed by a limiting instruction which informs the jury that the basis may not be used for its truth. The court may preclude any mention of the inadmissible hearsay basis during the proponent’s direct examination, allowing only the expert’s opinion that is founded upon it. Finally, the court may edit the inadmissible hearsay basis so that the jury is informed generally about its nature, but withhold the full details.

Subsequent to Weber, the court in Heyden v. Safeco Title Insurance Co., stated:

90. 174 Wis. 2d 98, 496 N.W.2d 762 (Ct. App. 1993).
91. Id. at 105, 496 N.W.2d at 766.
92. Id.
93. Id. at 106-07, 496 N.W.2d at 766 (citations omitted).
94. 174 Wis. 2d 98, 496 N.W.2d 762 (Ct. App. 1993).
95. Id. at 107 n.6, 496 N.W.2d at 766 n.6.
96. Id. See infra part VI for a discussion of these options.
97. 175 Wis. 2d 508, 498 N.W.2d 905 (Ct. App. 1993).
Absent extraordinary circumstances that call for the imposition of Rule 904.03, Stats. (exclusion of relevant evidence), a party calling an expert witness is entitled to have that witness explain the bases for his or her opinion; matters upon which an expert relies in formulating an opinion may be disclosed to the jury "as a basis for the opinion" even though Rule 907.03, Stats., does not permit those matters to be received as substantive evidence. The use of the term "extraordinary" is troublesome, but it should not be read as undercutting the options discussed in Weber. First, this language is dicta. Second, the underlying data in Heyden were insurance standards set out in a section of the Wisconsin Administrative Code, which were also admissible as substantive evidence. Third, Heyden did not cite, much less discuss, Weber's elaborate discussion of the disclosure options.

Thus far this discussion has focused on the admissibility of underlying data on direct examination of an expert. The situation is quite different when an expert witness is questioned by an adverse party. In Karl v. Employers Insurance, the plaintiffs moved a written report prepared by their family physician into evidence during the recross-examination of the defendants' expert psychiatrist. The defendants' expert stated that he "reviewed" the written reports of the plaintiffs' expert in forming his conclusions. The Wisconsin Supreme Court upheld the trial court's admission of the report, stating that facts relied on by the expert may be admitted for the limited purpose of impeachment and verbal clarity. If a party's expert relies on certain data, "fair play" requires that the opponent may show that the data relied on did not support the conclusions of the testifying expert, or that the data relied on contained information ignored by the testifying expert.

Karl does not address whether any portion of an expert's inadmissible bases is admissible by a proponent of the expert's testimony.

A similar conclusion was reached in Liles v. Employers Mutual Insurance. In Liles, the trial court refused to allow a letter written by a supervisor of a research institute to be introduced by the defendant dur-

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98. Id. at 522, 498 N.W.2d at 910 (emphasis added).
99. Id. at 521-22, 498 N.W.2d at 910.
100. 78 Wis. 2d 284, 254 N.W.2d 255 (1977).
101. Id. at 298, 254 N.W.2d at 261.
102. Id.
103. Id. at 300, 254 N.W.2d at 262 (citing Vinicky v. Midland Mut. Casualty Ins. Co., 35 Wis. 2d 246, 255, 151 N.W.2d 77, 82 (1967)).
104. 126 Wis. 2d 492, 377 N.W.2d 214 (Ct. App. 1985).
ing the cross-examination of the plaintiff's expert vocational rehabilitation counselor. The plaintiff's expert testified about the plaintiff's loss of future earning capacity, basing his testimony in part on the fact that there was a shortage of nursing positions. The letter offered into evidence by the defendant suggested that there was a shortage of nurses rather than a shortage of nursing positions. The court of appeals held that the trial court erred by refusing to allow cross-examination on the basis of the information in the letter because the plaintiff's expert indicated that information contained in the letter represented the type of information he received and customarily relied upon in arriving at an opinion as to loss of future earning capacity. The court concluded that even though the facts in the letter may have been inadmissible, section 907.03 permitted the defendant to request an opinion from the expert based on the facts because they were "of a type reasonably relied upon by experts in the particular field."

Karl and Liles correctly applied section 907.03. The danger that a party will introduce prejudicial, inadmissible evidence through an adverse expert witness is far less than the danger of abuse by permitting the same for the proponent of the expert witness. The concern that a party opposing an expert witness will use that expert as a conduit for inadmissible evidence is diminished because the expert's bias is toward the proponent of the expert witness, not the opponent.

VI. A FRAMEWORK FOR FUTURE APPLICATION OF SECTION 907.03

The judicial council note to the proposed amendment of section 907.03 suggested that trial judges apply the factors in section 904.03 of the Wisconsin Statutes in deciding whether to permit disclosure to the jury of the facts or data underlying the expert's opinion or inference, even though the underlying facts or data are not substantive evidence. The judicial council further notes that under this approach, a trial judge may address the underlying bases of an expert's testimony in several dif-

105. Id. at 504, 377 N.W.2d at 220.
106. Id. at 504-05, 377 N.W.2d at 220.
107. Id. at 505, 377 N.W.2d at 220.
108. Id. at 505-506, 377 N.W.2d at 221 (citation omitted).
109. Id. at 506, 377 N.W.2d at 221.
110. See infra part III for a discussion of this bias.
111. Wis. Stat. § 904.03 (1991-92). The statute reads, "[a]lthough relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." Id.
112. Id. § 907.03 judicial council's note to proposed amendment (1991).
different ways. First, the judge may permit the expert to disclose the
details of the inadmissible bases to the jury. If this option is chosen, a
limiting instruction must be given to inform the jury that the underlying
data may not be used for substantive purposes. Second, the judge
may limit disclosure to "a general reference to the source or nature of the
basis." This option presents a compromise between "the propo-
nent's interest in educating the jury about the expert's opinion and the
opponent's concern that the evidence will be misused." Finally, "the
trial court may preclude any mention at all of the inadmissible bases,
allowing only the expert opinion testimony that is predicated upon it." The Wisconsin Court of Appeals, in substance, adopted this construction
of the present version of section 907.03 in Weber.

This construction recognizes that limiting instructions are not effec-
tive in preventing juries from using the underlying inadmissible data for
substantive purposes. Trial judges must consider the factors in section
904.03 when determining whether or not to permit disclosure of the
inadmissible bases of an expert's testimony, keeping in mind that limit-
ing instructions are of little value in this instance. Furthermore, it is ap-
parent that while the court of appeals has recently correctly interpreted
and applied section 907.03, trial courts are still somewhat confused as to
how to treat the inadmissible data underlying an expert's opinion.

Professor Daniel Blinka, who is cited by the court in Weber, suggests a distinction in the types of hearsay on which experts base their
opinions and which the courts should consider in exercising their discre-
tion. "Bedrock hearsay" forms the common knowledge of experts in the
field: "Issues involving this form of hearsay will most often implicate
threshold determinations of the expert's qualifications, the relevance of
scientific evidence, and the expert's reasonable reliance on such ba-
ses." Full disclosure of bedrock hearsay is generally appropriate be-

115. 7 BLINKA, supra note 113, § 703.4, at 389.
117. 7 BLINKA, supra note 113, § 703.4, at 389.
118. Id.
119. 174 Wis. 2d 98, 107 n.6, 496 N.W.2d 762, 766 n.6 (Ct. App. 1993).
120. Note the trial court's application of § 907.03 in State v. Weber, 174 Wis. 2d 98, 496
N.W.2d 762 (Ct. App. 1993); S.Y. v. Eau Claire County, 156 Wis. 2d 317, 457 N.W.2d 326 (Ct.
App. 1993); and State v. Coogan, 154 Wis. 2d 387, 453 N.W.2d 186 (Ct. App. 1990).
121. 174 Wis. 2d at 107 n.6, 496 N.W.2d at 766 n.6.
122. 7 BLINKA, supra note 113, § 703.4, at 390. For examples of bedrock hearsay, see E.D.
Wesley Co. v. City of New Berlin, 62 Wis. 2d 668, 675, 215 N.W.2d 657, 661 (1974) (pamphlet
on torque reversal); State v. Pankow, 144 Wis. 2d 23, 37, 422 N.W.2d 913, 917 (Ct. App. 1988)
cause of the diminished risk that the jury will (or could) use the information for any purpose other than assessing the expert's qualifications and opinion testimony.123

The second type of hearsay on which an expert may base an opinion is "case specific hearsay".124 This form of hearsay includes data (e.g., a report from a party's attorney) that relates directly to the facts of a particular case. Trial courts should not permit full disclosure of this form of hearsay. Since limiting instructions are generally ineffective under these circumstances,125 it is this type of hearsay that poses the greatest danger of unfair prejudice if inadmissible evidence is presented to the jury. Therefore, trial courts must exercise scrutiny in deciding whether to give the jury any details of "case specific hearsay" that forms the basis for an expert's opinion.

VII. Conclusion

Both Federal Rule of Evidence 703 and section 907.03 of the Wisconsin Statutes permit an expert to base an opinion on facts or data that are not admissible in evidence. However, the rules do not provide or imply that these inadmissible facts may be introduced to the trier of fact by a proponent of the expert witness. "Accordingly, [w]hile Rule 703 permits an expert witness to take into account matters which are unadmitted and inadmissible, it does not follow that such a witness may simply report such matters to the trier of fact."126

A great deal of debate has surrounded the application of Federal Rule of Evidence 703. Specifically, courts have devised differing tests in determining reasonable reliance as well as developed conflicting views on the treatment of underlying inadmissible data. In adopting section 907.03, Wisconsin courts adopted the ambiguity inherent in Rule 703. Wisconsin courts should resolve this ambiguity in favor of stricter scrutiny of expert testimony, especially with respect to inadmissible evidence presented by an expert witness. Moreover, attorneys should be aware that the use of limiting instructions for the inadmissible bases is not automatic. Unless an objection is made, the inadmissible bases underlying an expert's testimony are admitted as substantive evidence.

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123. 7 BLINKA, supra note 113, § 703.4, at 390.
124. Id.
125. See supra part IV.B.
The judicial council note to the proposed amendment of section 907.03 and Professor Daniel Blinka suggest a framework trial courts should consider when applying section 907.03. Trial courts should distinguish bedrock hearsay from case-specific hearsay and consider the impact of disclosing inadmissible bases of expert testimony to the jury with the recognition that limiting instructions do not necessarily eliminate abuse or unfair prejudice. In addition, trial courts should consider section 904.03 in deciding whether to permit disclosure of any of the underlying inadmissible data. Thus, the abuse and unfair prejudice that has resulted from improper application of section 907.03 may be controlled by attorneys through timely objections and by trial courts through closer scrutiny.

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