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IS REVISED EXPERT WITNESS RULE 703 A CRITICAL MODERNIZATION FOR THE NEW CENTURY?

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I. INTRODUCTION

On December 1, 2000, a revised Federal Evidence Rule 703 will take effect, unless changed in the interim. Rule 703 will impose a duty upon trial judges to restrict wholesale introduction into evidence of expert background data, the stuff upon which an expert witness relies. The revised rule supplies critically needed improvements in the area of expert

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testimony law. Accordingly, it is imperative that the careful work of the Federal Evidence Rules Advisory Committee not be undone.

When the evidence rules were originally drafted, the architects of the Federal Rules of Evidence expanded the range of individuals allowed to propound opinions. This was the thrust of Rule 702.[1] In that rule, a liberal definition of "expert" was embraced. The next rule in the set, Rule 703, provided some balance. While it clarified the right of an expert to utilize hearsay information in order to formulate opinions, it imposed quality standards on that information. Only data reasonably relied upon by experts in the field at large would be considered adequate to support the opinions of a trial witness.[2] An expert witness could not base conclusions on arcane or outdated material.

Reliance upon solid, reliable information was necessary. Once this foundation requirement was satisfied, an expert witness was allowed to give her opinion in court. However, a question still remained. What became of the expert's background data? Could it be formally moved into evidence? In a medical case, what if the background data consisted of letters from multiple physicians to the trial doctor, analyzing a plaintiff's claim. Perhaps none of the "outside" doctors appeared in court. Did their letters nonetheless qualify as exhibits and come into evidence?

Allowing transformation of such written hearsay into trial proof introduces the strong possibility of abuse. By these means, all manners of raw and unexpurgated hearsay could be dumped into the record. To counteract the tendencies of some courts to allow this practice, the Federal Rules Advisory Committee took decisive action in 1998. It formulated an amendment of Rule 703 which would bar the wholesale introduction into evidence of an expert's background data.[3]

The pendency of this rule modification raises understandable questions. Was alteration of the original rule needed? Had the prior rule been abused? Did Rule 703, as originally drafted and promulgated, create a hidden device for opportunistic practitioners to circumvent the laws against hearsay? Did it spawn confusion in the minds of many judges and lawyers? For reasons developed in this Article, the answer to each of these important questions is "yes."

How did the disarray created by the original rule, sought to be set right by the Evidence Rules Advisory Committee, develop? Part II of this Article traces the evolution of Rule 703. It identifies the confusion spawned by the current provision. In Part III, misapplication of appropriate doctrines is identified in specific cases. Numerous trial court decisions illustrate the need for guidance in the field of expert witness law, as do the

1. *See* FED. R. EVID. 702.
2. *See id.* at 703.
3. *See id.* advisory committee's note.

appellate opinions in Part IV. Commentators have called for reforms and their views are reflected in Part V. The Article concludes with the proposition that when trial judges properly perform their gatekeeping function, they will order the details of an expert's underlying data to remain undisclosed. This is also the conclusion of the federal rule drafters.

II. THE EVOLUTION OF AMERICAN EXPERT WITNESS LAW

The Federal Rules of Evidence became effective twenty-five years ago.[4] As a part of Article VII, the framers wisely included a rule which governed the type of information upon which an expert could ground his or her conclusions.[5] Formulating courtroom opinions was important business, in the view of the drafting committee.[6] Accordingly, they decided that a witness would not be able to speculate simply on the strength of flimsy or incomplete information.[7] Rather, the witness who gave expert opinions was required to utilize only data which other experts would reasonably take into account when producing scientific conclusions.[8]

The rule drafters embraced a prudent philosophy. An expert's opinion had to be well-supported and scientifically sound. Rule 703 occupied a central position among the expert witness rules, and it became a linchpin in the development of modern opinion testimony law. The rule imposed a duty upon proponents of scientific or technical evidence to show the court, over objection, that their expert utilized scientifically reliable, credible data in developing opinions. Rule 703, Bases of Opinion Testimony by Experts, as originally promulgated and as presently constituted, provides:

> 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.[9]

Utilizing this provision, lawyers realized that material any expert used to reach conclusions could be studied by the expert prior to trial. When it came time to testify in court, the underlying data did not have to be lodged in the trial record. Information consulted by the witness could be reviewed in advance and was not required to be independently admissible. The

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4. *See id.*
5. *See id.*
6. *See id.*
7. *See id.*
8. *See id.*
9. FED. R. EVID. 703.

expert's out-of-court study of a medical situation or a scientific process at issue in the case was sufficient.

Suppose the medical condition of a person or the validity of a process were key questions in litigation. The trial expert could scrutinize the involved person or process directly and combine the learning gained from such hands-on study with reports of other experts who had accomplished a similar review. Although the latter experts might not be called for testimony, conclusions emanating from this mix of methodologies would be admissible through the trial expert. She could disclose the details of her own examination, reflect that she had also relied upon reports of others, and announce her conclusions. That reports of others could form part of the mix is evident from the original Advisory Committee's 1975 Note, affirming that a source of expert opinion might be the "presentation of data to the expert outside of court and other than by his own perception."[10]

After a settling-in period, courts adjusted to the new approach. Experts utilized reliable hearsay sources when formulating courtroom opinions. By 1999, most judges applied this part of Rule 703 appropriately. There were only occasional episodes to the contrary which had to be set aright by appellate tribunals.[11] For the most part, production in court of the testifying expert's conclusions went smoothly. Rule 703 had the salutary effect envisioned by its framers of bringing "judicial practice into line with the practice of the experts themselves when not in court."[12]

Meanwhile, the second feature of the rule was going awry.[13] Confusion abounded when judges were asked to determine whether the raw data upon which an expert relied was itself admissible. Clearly, the testifying expert's conclusions were competent. But could the hearsay, particularly written hearsay in the form of a nontestifying doctor's report, be transmitted to the jury?

The problem became acute when a testifying expert based a major portion of his or her findings upon reports of others. Uncertainty clouded the question of whether out-of-court reports of nontestifying experts were fully admissible simply because the in-court expert relied upon them.

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10. *Id.* advisory committee's note.

11. Trial courts may allow expert opinion based upon nonrecord material, as long as the expert's reliance upon the material is reasonable. The decision in Peabody Coal Co. v. Office of Workers' Compensation Programs., 165 F.3d 1126 (7th Cir. 1999), makes this clear. The opinion states: "Rule 703 of the Federal Rules of Evidence is explicit that the materials on which an expert witness bases an opinion need not be admissible, let alone admitted, in evidence, provided that they are the sort of thing on which a responsible expert draws in formulating a professional opinion." *Id.* at 1128. The court adds the comment that the opposing party should have the chance to review the expert's underlying materials, preferably prior to trial. *See id.* at 1129.

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

13. *See* FED. R. EVID. 703.

Could the proponent of the courtroom expert cause the trial witness to quote conclusions contained in out-of-court documents and sources?

III. CONFUSION AND ABUSES

After Rule 703 became effective in 1975, lawyers who called experts to the stand expanded the scope of their testimony. Instead of simply having their courtroom expert assert his or her opinions based upon the expert's own personal examination of a person or process, the presentation was often broadened. The trial witness frequently invoked the names of others, perhaps prominent in the field, who had participated in the evaluation process. The witness' testimony also might have referenced the fact that these other experts supplied reports.

In a medical case, for example, a doctor called on behalf of the plaintiff would perhaps testify that two other physicians had diagnosed the patient, even though they were not to be called as trial witnesses. Initially, the plaintiff's attorney might carefully avoid asking the trial witness to read from the reports of the nontestifying doctors. However, after eliciting details of the witness' own treatment of the patient, as well as the fact that the testifying doctor looked at third party reports, a critical juncture was often reached. It was here that an enterprising plaintiff's attorney might offer the hearsay reports of the outside, nontestifying experts as evidence. The proffer would sound something like this: "Your honor, since the doctor on the stand has referenced the fact that Doctors A and B also worked on this case, we submit their reports as exhibits." This would almost certainly occur when conclusions ratifying the opinion of the plaintiff's trial doctor were included in the hearsay documents. When this step was taken, many lawyers and judges became confused. Could a successful objection be made to the proffer, the opposing lawyer might wonder? From the judge's perspective, should such an objection be sustained?

Cases abound which illustrate the presence of judicial uncertainty in this situation. In *United States v. Tran Trong Cuong*,[14] a doctor was indicted in federal court for dispensing prescription drugs for other than legitimate medical purposes.[15] He was convicted on 127 counts.[16] During the trial, the government called a medical expert who had reviewed charts of patients treated by the defendant doctor.[17] The witness gave his opinion that narcotics prescribed by the defendant would do limited medical good

14. 18 F.3d 1132 (4th Cir. 1994).
15. *See id.* at 1133.
16. *See id.*
17. *See id.* at 1135.

and such drugs would lead to addiction.[18] In his view, the medications did not supply appropriate care by a family physician.[19]

The witness also testified as to the qualifications of another physician, Dr. Stevenson.[20] Dr. Stevenson had reviewed records on a number of the patients, and prepared a report.[21] He did not testify in person.[22] However, the government's trial doctor told the jury that Dr. Stevenson's findings were in agreement with his own.[23] This was done over the objection of the defendant.[24] The Court of Appeals referred to the doctor who testified: "When asked if his conclusions were contrary to those of Dr. Stevenson, the witness responded, 'No. My findings were essentially the same.'"[25]

The appellate court reversed.[26] The court held that the trial judge had misapplied appropriate doctrines respecting admission of the trial expert's underlying information.[27] While the trial witness could testify that he reviewed Dr. Stevenson's report and that he relied upon it in reaching his opinion, he could not quote its conclusion.[28] It was error to allow this without calling Dr. Stevenson to the stand.[29] To do otherwise subjects the defendant to the testimony of a witness whom he cannot cross-examine.[30] Further, "Dr. MacIntosh [the government's trial witness] bolstered his testimony by claiming that an outstanding doctor, who is also a lawyer and president of the Medical Society [Dr. Stevenson], agrees with him."[31]

Rule 703 does not permit such circumventions. The court observed that even though an expert witness may base his opinion on underlying information, "it does not follow that the otherwise inadmissible information may come into evidence just because it has been used by the expert in reaching his opinion."[32] The Court of Appeals set forth a vigorous conclusion:

> MacIntosh's testimony as to Stevenson's findings and his credentials was given in an effort to convince the jury of the accuracy and reliability of MacIntosh's opinions, and also to

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18. *See id.*
19. *See id.*
20. *See id.*
21. *See id.*
22. *See id.* at 1143.
23. *See id.* at 1135.
24. *See id.*
25. *Id.* at 1143.
26. *See id.* at 1144.
27. *See id.* at 1143-44.
28. *See id.* at 1143.
29. *See id.*
30. *See id.*
31. *Id.*
32. *Id.* at 1144.

> put before the jury Stevenson's opinion as to the defendant's actions without subjecting Stevenson to cross-examination. This is unfair to the defendant as it denies his fundamental right to cross-examination and is an improper use of expert testimony.[33]

In another federal court, the trial judge permitted back door hearsay.[34] A medical malpractice action involved a claim that the doctor failed to inform the plaintiff that she had cancer.[35] A defense expert who appeared for the doctor bolstered his courtroom opinion by referring to letters received from other prominent doctors.[36] The expert was asked if his testimony was consistent with the opinions of the doctors who had supplied letters, and the expert replied "yes, very much so."[37] A judgment in favor of the defendant doctor was reversed on appeal.[38] The letters from nontestifying doctors enhanced the credibility of the defendant's trial expert, and they were pure hearsay.[39] Adding to the prejudice was the strategy of defense counsel in closing argument.[40] Counsel for the defendant reminded the jury several times that the opinion of the defense expert was consistent with the other physicians who provided letters.[41] The appellate court observed: "[D]efense counsel's tactic simultaneously conveyed hearsay testimony to the jury and improperly bolstered [the courtroom expert's] credibility."[42]

Likewise, state courts have not been immune from the need to correct trial errors committed in the admission of an expert's underlying data. In *Kim v. Nazarian*,[43] the defendants were sued for medical malpractice.[44] A radiologist was accused of negligence in reading Linda Sung Hee Kim's X-rays.[45] The X-rays disclosed an abnormal region in her hip, plaintiff

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33. *Id.*
34. *See* Hutchinson v. Groskin, 927 F.2d 722 (2d Cir. 1991).
35. *See id.* at 723.
36. *See id.* at 724.
37. *Id.* at 725.
38. *See id.* at 726.
39. *See id.* at 725.
40. *See id.*
41. *See id.*
42. *Id.* Compounding the problems in this case, it was unclear how much the trial witness actually relied on the letters in the formulation of his own opinion. *See id.* at 726. Rather, the proponent of the expert appeared to use the documents in an attempt to prove that other experts agreed with the defense doctor's prognosis. *See id.*
43. 576 N.E.2d 427 (Ill. App. Ct. 1991).
44. *See id.* at 429 (defendants were Gordon R. Nazarian, M.D., and Lake County Radiology Associates, S.C.).
45. *See id.* (plaintiffs were Bong Jin Kim and Young Sil Kim, parents of Linda Sung Hee Kim).

contended, which went undetected by the defendant doctor.[46] The defense attorney made an opening statement wherein he referred to a defense expert who would explain that the X-rays appeared normal.[47] The testimony would be that there was no negligence involved in reading them. Defendants' attorney added that this defense witness' testimony should be accepted because he reviewed his opinion with several other radiologists.[48] As it turned out, these "other radiologists" did not appear at trial to provide testimony.[49]

When the case for the defense was presented, the expert, who was referred to in the opening statement, testified and asserted that Linda's condition looked completely normal on the X-rays.[50] He was then asked by the direct examiner: "In finalizing your opinion, did you consult with various other radiologists in your department?"[51] When the witness answered yes, the following occurred:

> Q. And did any of the doctors you consulted indicate there was any abnormality on these films?
> A. None of them saw any abnormality.[52]

Through this methodology, the opinions of nontestifying doctors were placed before the jury. The authors of the out-of-court opinions, opinions which were damaging to the plaintiffs, were able to "speak" through the conduit of the trial witness.

In addition to the foregoing testimony, an additional defense expert was asked whether he consulted others.[53] He said he passed Linda's radiologies on to one of his partners, another radiologist.[54] The defense attorney continued:

> Q. And what were you told by that radiologist as to what his interpretation was?
> A. He thought it was normal.[55]

The force of such evidence was to undercut plaintiffs' position that

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46. *See id.*
47. *See id.* at 430.
48. *See id.*
49. *See id.*
50. *See id.* at 432.
51. *Id.*
52. *Id.* Even though some facts can be adduced for the limited purpose of explaining the basis for the expert's opinion, this does not include simply parroting the corroborative opinions solicited from nontestifying colleagues.
53. *See id.* at 431.
54. *See id.* at 432.
55. *Id.* at 431.

Linda's X-rays revealed an abnormality. Procedurally, the plaintiffs had filed a motion in limine prior to trial to have the trial court prevent defendant's experts from testifying to the opinions of other nontestifying doctors with whom they consulted regarding Linda's X-rays.[56] The trial court denied this motion in limine.[57] Further, upon trial of the case, the court overruled an objection when the direct examiner took up the topic of consultation by a defense expert with others.[58] After the objection by the plaintiffs was rejected, witness examination continued.[59] In response to a question by the direct examiner, the expert told the court and jury: "The other radiologists [with whom I consulted] felt that the films were normal."[60]

After the jury returned a defense verdict, the plaintiff appealed.[61] The appellate court wisely reversed.[62] Several important points were made.[63] "Rule 703 does not create an exception to the rule against hearsay," said the court.[64] After all, the provision is part of Article VII of the evidence rules which relates to opinion testimony, not article VIII governing hearsay.[65] Also, Rule 703 does not allow "an expert's testimony to simply parrot the corroborative opinions solicited from nontestifying colleagues . . . . The party who is unable to cross-examine the corroborative opinion of the expert's colleague . . . will likely be prejudiced."[66] The court added: "Moreover, defendants' attorney highlighted the corroborative testimony in his opening statement, and he also emphasized in his closing argument that more experts agreed with defendants' position than with the plaintiffs.'"[67] The improperly admitted testimony was prejudicial and reversible error.[68] Accordingly, the plaintiffs were entitled to a new trial.[69]

Preventing trial judges from misapplying Rule 703 is a subject which has come up in other decisions. To be sure, it has reached appellate tribunals in contexts similar to *Nazarian*, cases wherein the trial expert

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56. *See id.* at 430.
57. *See id.*
58. *See id.* at 431.
59. *See id.*
60. *Id.*
61. *See id.* at 433.
62. *See id.* at 435.
63. *See id.* at 433.
64. *Id.*
65. *See* FED. R. EVID. 703.
66. *Kim*, 576 N.E.2d at 434.
67. *Id.* at 435. Again, as in the *Hutchinson* case, a reliance question clouded the issue, in addition to the problem of admission of hearsay. 927 F.2d at 725; *see also* Wingo v. Rockford Mem'l Hosp., 686 N.E.2d 722, 730 (Ill. App. Ct. 1997).
68. *See Kim*, 576 N.E.2d at 434.
69. *See id.*

invoked the bolstering opinions of hearsay declarants. In a variation on this pattern, sometimes the expert on the stand reads to the jury some of the findings and conclusions from reports of "outside" doctors. Finally, the hearsay sometimes takes documentary form when the trial witness is shamelessly used as a conduit for written reports of nontestifying experts, and they are introduced as exhibits. The vice in all of these formats is the same: exposure of the trier of fact to hearsay reports which are untested by cross-examination.

For example, in California, the issue in *People v. Campos*[70] was whether Jose Campos was mentally ill.[71] He contended that he was not, and he wanted out of state prison.[72] The state claimed he was a mentally disordered offender.[73] A jury trial addressed the issue.[74] A psychiatrist with the Department of Mental Health was the only witness called by the state to testify concerning the mental condition of Campos.[75] The psychiatrist based her opinion on her personal treatment of the prisoner as well as reports prepared by Department of Corrections and Department of Mental Health professionals who evaluated Campos.[76] The psychiatrist testified that these reports, prepared by nontestifying professionals, were consistent with her diagnosis of Campos.[77] They agreed with her opinion that he was a mentally disordered offender, she said.[78]

The trial court erred when it allowed the psychiatrist to testify that the written evaluations of others confirmed the trial expert's opinion that Campos was mentally ill.[79] The conclusion of these nontestifying experts was inadmissible hearsay.[80] However, an expert witness may not, on direct examination, reveal the content of reports prepared or opinions expressed by nontestifying experts.[81]

In addition to oral testimony, outside written reports were received in evidence against Campos.[82] The trial court erred by admitting these documents authored by nontestifying experts.[83] The rule which allows an expert to state the reasons upon which an opinion is based may not be used

70. 38 Cal. Rptr. 2d 113 (Cal. Ct. App. 1995).
71. *See id.* at 113.
72. *See id.*
73. *See id.* at 114.
74. *See id.*
75. *See id.*
76. *See id.*
77. *See id.*
78. *See id.*
79. *See id.*
80. *See id.* at 115.
81. *See id.* at 114.
82. *See id.* at 115.
83. *See id.*

as a vehicle to bring before the jury incompetent exhibits.[84] Were the law otherwise, doctors who testify as to the basis for their opinion could turn a generally appropriate rule into a channel through which testifying doctors could place the reports of innumerable out-of-court doctors before the jury.[85]

A Florida trial court's decision to admit an uncorroborated laboratory report simply because a defense expert relied upon it resulted in reversal.[86] Nobody involved in the testing, which the report reflected, appeared as a witness in a medical malpractice case.[87] However, the proponent of the report argued on appeal that the report was properly received in evidence because it was one of the bases for their expert's opinion.[88] The District Court of Appeals explained why it reversed a verdict for the defendant: "[A]n expert's testimony may not be used merely to serve as a conduit to place otherwise inadmissible evidence before a jury."[89]

In criminal cases, misapplication of the rule can result in destruction of constitutional rights. In *State v. Towne*,[90] a prosecution expert in psychiatry testified in a Vermont trial that he had consulted with a top New Mexico psychiatrist.[91] The issue was whether the defendant was criminally responsible or insane.[92] When asked whether the nontestifying New Mexico expert agreed with the prosecution doctor's opinion that the defendant was mentally competent, the state's witness replied: "I would say that [the New Mexico psychiatrist] is in concurrence with my opinion in this case."[93]

On appeal from the conviction, the Vermont Supreme Court was not misled by the prosecution's justification that the outside evidence simply illustrated the basis for the opinion of the trial expert.[94] Rather, the court suggested that using one expert to slide the opinion of another into evidence violated sound evidence law principles which barred hearsay.[95] Moreover, the Vermont witness' recitation of the New Mexico doctor's opinion violated the defendant's Sixth Amendment right to confront adverse witnesses.[96] Like the outside doctor who could not be cross-

84. *See id.*
85. *See id.*
86. *See* Kurynka v. Tamarac Hosp. Corp., 542 So. 2d 412, 413 (Fla. 4th DCA 1989).
87. *See id.*
88. *See id.*
89. *Id.*
90. 453 A.2d 1133 (Vt. 1982).
91. *See id.* at 1134.
92. *See id.*
93. *Id.*
94. *See id.* at 1135.
95. *See id.*
96. *See id.* at 1136.

examined in *Tran Trong Cuong*,[97] opinions of the New Mexico doctor were introduced in a way that protected him from cross-examination.[98] This denial of confrontation resulted in an abridgment of defendant's constitutional rights.[99] Since no cross-examination could be had of the New Mexico doctor, admission of his opinion was fatal to the conviction.[100]

A common thread runs through all of these cases. In each, there was an erroneous decision by a trial judge to admit "consultation" testimony.[101] This is testimony from a trial witness who either relies upon or consults an outside expert, after which the proponent of the trial witness tries to introduce the facts, findings, or conclusions of that outside expert.[102] In each case the court permitted the trial witness to recite the findings of another expert, even though this latter person did not testify.[103] Sometimes the court received documents from a third party expert as well.[104] In each case, the practices identified here created reversible error.[105]

Frequently, courts of appeal have reached the right result and have overturned judgments below, but only after considerable struggle.[106] Lacking guidance from the text of original Rule 703, appellate tribunals had to "go it alone" in divining the correct disposition of an expert's background data.[107] Notwithstanding the lack of express advice in Rule 703 or its underlying Advisory Committee Note, courts have forthrightly reversed where erroneous decisions in lower courts required it.[108]

Reversal has occurred in both civil and criminal cases.[109] These appellate rulings affirm the proposition that, standing alone, the fact that the trial witness consulted with an outside expert is insufficient to support introduction of that outside expert's hearsay.[110] The benefits of positive guidelines for the trial bench in these difficult situations seems apparent. Rule 703 as originally promulgated did not embrace any distinct advisory

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97. *See supra* notes 14-30 and accompanying text.
98. *See Towne*, 453 A.2d at 1136.
99. *See id.*
100. *See id.*
101. *See* United States v. Tran Trong Cuong, 18 F.3d 1132 (4th Cir. 1994); Hutchinson v. Groskin, 927 F.2d 722, 725 (2d Cir. 1991); Kim v. Nazarian, 576 N.E.2d 427, 428-29, 435 (Ill. App. Ct. 1991); *Towne*, 453 A.2d at 1135.
102. *See* cases cited *supra* note 101.
103. *See* cases cited *supra* note 101.
104. *See Campos*, 38 Cal. Rptr. 2d at 115; *Kurynka*, 542 So. 2d at 413.
105. *See Campos*, 38 Cal. Rptr. 2d at 115; *Kurynka*, 542 So. 2d at 413.
106. *See* cases cited *supra* notes 101, 104.
107. *See* cases cited *supra* notes 86, 101.
108. *See* cases cited *supra* notes 86, 101.
109. *See, e.g., supra* notes 14 & 34 and accompanying text.
110. *See* cases cited *supra* notes 101, 104.

respecting this problem.[111] The new rule does so. Evidence that this is needed comes from cases wherein trial judges erred in admitting underlying hearsay.[112] The decisions cited in this Part underline the advisability of clear direction for the bench and bar in the complex field of admissibility of expert witness foundations.[113] Trial judges have sometimes been misled.[114] Appellate correction has been required.[115] Absent regulatory guideposts, repetition of the problem seems certain.

IV. APPELLATE DIRECTIONS

Misapplication of the rules has not been the exclusive province of selected trial court decisions. A handful of appellate opinions have also taken wrong turns.[116] In *Lewis v. Rego Co.*,[117] a products liability action was brought against a manufacturer of a valve, seeking recovery in connection with the explosion of a propane cylinder.[118] The plaintiff called an expert in physical metallurgy to give his opinion that the defective valve was the cause of the incident.[119] The expert had discussed the case with another metallurgist, and wanted to relate the other expert's conclusion.[120] That conclusion apparently agreed with the opinion of the trial witness as to causation.[121] Objection to the out-of-court discussion between these two experts was sustained.[122] The court of appeals said this exclusion of evidence should not have happened: "Inquiry concerning the conversation should have been permitted."[123]

Lewis has been cited by commentators as reflective of cases which demonstrate the willingness of some courts to admit inadmissible hearsay.[124] While later cases suggest this approach is unsound, there was a special circumstance at play in the *Lewis* litigation.[125] In fairness, it is to be noted that the trial court had allowed an expert to relate the findings of

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111. *See* cases cited *supra* notes 86, 101.
112. *See* cases cited *supra* notes 101, 104.
113. *See* cases cited *supra* notes 101, 104.
114. *See* cases cited *supra* notes 101, 104.
115. *See* cases cited *supra* notes 101, 104.
116. *See infra* notes 117 & 130 and accompanying text.
117. 757 F.2d 66 (3d Cir. 1985).
118. *See id.* at 66.
119. *See id.* at 71.
120. *See id.* at 72.
121. *See id.*
122. *See id.* at 73-74.
123. *Id.* at 74.
124. *See* Pamela Bucy, *The Poor Fit of Traditional Evidentiary Doctrine and Sophisticated Crime: An Empirical Analysis of Health Care Fraud Prosecutions*, 63 FORDHAM L. REV. 383, 409 (1994).
125. 757 F.2d at 74.

a nontestifying expert at the behest of one party, then barred the other side from bringing out further and different conclusions authored by the same nontestifying expert.[126] The trial court allowed the defense to elicit information about this outside witness' views but did not allow the plaintiff to do so.[127] This was error.[128] The scales were not balanced, and the plaintiff was unfairly prejudiced.[129] This factor perhaps prompted some of the decisional language broadly approving recitation by trial witnesses of conclusions from outside experts.

Another decision from the same circuit permitted the witness on the stand to recite information gathered from "outside" sources. In *Stevens v. Cessna Aircraft Co.*,[130] the trial judge allowed a physician to quote from interviews he had with third parties, after the physician stated his opinion.[131] An airplane crash killed the pilot.[132] Cessna Aircraft was sued over a claimed design defect.[133] The manufacturer countered with the accusation that the crash resulted from pilot error, not a defective aircraft.[134] The defense physician had interviewed friends and associates of the pilot.[135] He concluded the pilot was under a great deal of stress in his personal life, and this stress caused errors while in flight that precipitated the crash.[136] To substantiate his position, the doctor repeated for the jury key portions of his interviews with the pilot's acquaintances.[137] He also played tapes of the conversations.[138] The jury returned a verdict for Cessna.[139] The appeals court affirmed in an unpublished opinion.[140] In doing so, it would appear that the court allowed untested hearsay to tip the balance in favor of one party.

To the extent that the immediately foregoing cases reflect a "let it all in" philosophy, they are out of step with modern trends.[141] Fortunately, a large and growing number of federal court of appeals decisions take a

126. *See id.*
127. *See id.*
128. *See id.*
129. *See id.*
130. 634 F. Supp. 137 (E.D. Pa.), *aff'd*, 806 F.2d 252 (3d Cir. 1986).
131. *See id.* at 140.
132. *See id.* at 138.
133. *See id.* at 139.
134. *See id.*
135. *See id.* at 140.
136. *See id.*
137. *See id.*
138. *See id.*
139. *See id.* at 140-41.
140. *See* Cessna Aircraft Co. v. Stevens, 806 F.2d 252 (3d Cir. 1986).
141. *See infra* notes 143-58 and accompanying text.

contrary view.[142] Opinions from the Second,[143] Fourth,[144] Seventh,[145] Eighth,[146] and Ninth[147] Circuits make the point. Many state court decisions are in accord. Prominent cases drawn from Florida,[148] Texas,[149] California,[150] Massachusetts,[151] New Jersey,[152] North Dakota,[153] Wisconsin,[154] Virginia,[155] and other states[156] follow a careful, exclusionary

142. *See infra* notes 143-46 and accompanying text.

143. *See, e.g.*, Hutchinson v. Groskin, 927 F.2d 722 (2d Cir. 1991). Not all of the cases from each of the individual circuits listed here will take the exclusionary approach reflected in the highlighted cases. In some circuits, the line of authority has not been completely consistent. The author has included decisions from selected circuits which seem to clearly reject wholesale admission of underlying data as affirmative evidence.

144. *See, e.g.*, United States v. Tran Trong Cuong, 18 F.3d 1132 (4th Cir. 1994).

145. *See, e.g.*, *In re* James Wilson Assocs., 965 F.2d 160, 172-73 (7th Cir. 1992) (explaining that an expert is normally allowed to explain the facts underlying his opinion, but not if the expert is "being used as a vehicle for circumventing the rules of evidence"); Gong v. Hirsch, 913 F.2d 1269, 1272-73 (7th Cir. 1990) (holding that the district court did not abuse its discretion in prohibiting plaintiff's medical expert from relying on a statement made by a doctor who was not the treating physician at the time of decedent's illness and who had no personal knowledge of the decedent's illness); United States v. Tomasian, 784 F.2d 782, 786 (7th Cir. 1986) ("Rule 703 does not sanction the simple transmission of hearsay; it only permits an expert opinion based on hearsay.").

146. *See, e.g.*, Pelster v. Ray, 987 F.2d 514, 526-27 (8th Cir. 1993) (holding that an expert may not rely on hearsay statements to prove the truth of the statements themselves); Boone v. Moore, 980 F.2d 539 (8th Cir. 1992) (stating that an expert may not use inadmissible evidence to prove the truth of the matter asserted, but may use such evidence to indicate what information and material he relied on in forming an expert opinion); United States v. Grey Bear, 883 F.2d 1382, 1392-93 (8th Cir. 1989) ("We are persuaded that FED. R. EVID. 703 does not permit an expert to circumvent the rules of hearsay by testifying that other experts, not present in the courtroom, corroborate his views.").

147. *See, e.g.*, United States v. 0.59 Acres of Land, 109 F.3d 1493, 1496 (9th Cir. 1997) (holding that when an expert uses inadmissible evidence in forming an opinion, that evidence may not be admitted to explain the expert's opinion without a limiting instruction).

148. *See, e.g.*, State v. Williams, 549 So. 2d 1071, 1072 (Fla. 5th DCA 1989) (noting that an expert may not be used as a conduit for otherwise inadmissible hearsay).

149. *See, e.g.*, First Sw. Lloyds Ins. Co. v. MacDowell, 769 S.W.2d 954, 958 (Tex. 6th App. 1989) (suggesting that while an expert may make general and cursory reference to hearsay basis, to permit him to discuss such basis in detail on direct is improper).

150. *See, e.g.*, People v. Nicolaus, 817 P.2d 893, 910 (Cal. 1991) (stating that an expert "may not under guise of reasons bring before the jury incompetent hearsay evidence") (quoting People v. Coleman, 695 P.2d 189, 203 (Cal. 1985)). *See also supra* note 70 and accompanying text.

151. *See, e.g.*, Grant v. Lewis/Boyle, Inc., 557 N.E.2d 1136, 1139 (Mass. 1990) (holding that a physician's expert witness reports were inadmissible because they relied on the reports of other physicians).

152. *See, e.g.*, Hartman v. Yawger, 514 A.2d 545, 549 (N.J. Super. Ct. Law Div. 1986) (stating that an end run around the hearsay rule is not warranted).

153. *See, e.g.*, Slaaten v. Amerada Hess Corp., 549 N.W.2d 765, 768 (N.D. 1990) (stating that the fact that an exhibit is a document upon which expert relied upon does not make the document admissible).

154. *See, e.g.*, State v. Weber, 496 N.W.2d 762, 766-67 (Wis. 2d Ct. App. 1993) (explaining

approach when faced with the potential introduction of inadmissible background material used by an expert. Rule enactments have changed state rules as well. Minnesota[157] and Louisiana[158] have revised their state formulations of local expert testimony rules to address the problems disclosed in this Article.

A 1997 decision reflects the view of several federal courts that are

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that hearsay data upon which an expert formulates an opinion is not admissible as evidence unless it falls under a recognized hearsay exception).

155. *See, e.g.*, Todd v. Williams, 409 S.E.2d 450, 451-52 (Va. 1991) (holding that a physician's use of two absent physicians' opinions to bolster his own opinion was inadmissible hearsay); McMunn v. Tatum, 379 S.E.2d 908, 912 (Va. 1989) (excluding hearsay opinions that expert relied on).

156. *See generally* Sims v. Safeway Trails, Inc., 764 S.W.2d 427, 429 (Ark. 1989); Thorne v. U-Haul of Metro D.C., Inc., 580 A.2d 672, 675 (D.C. 1990); Myers v. American Seating Co., 637 So. 2d 771, 774 (La. 1st Ct. App. 1994); Bruflat v. Mister Guy, Inc., 933 S.W.2d 829, 833 (Mo. Ct. App. 1996); Borden v. Brady, 461 N.Y.S.2d 497-98 (N.Y. App. Div. 1983); Ake v. State, 778 P.2d 460, 468 (Okla. Crim. App. 1989); State v. Martinez, 899 P.2d 1302, 1309 (Wash. Ct. App. 1995). As mentioned in connection with the analysis of selected federal circuits, not all of the decisions in each state may consistently follow a single view. The decisions highlighted here are those which reject wholesale admission of an expert's admission basis.

For cases prior to 1986, see Ronald L. Carlson, *Policing the Bases of Modern Expert Testimony*, 39 VAND. L. REV. 577, 584 n.25 (1986). *But see* Brunner v. Brown, 480 N.W.2d 33, 34 (Iowa 1992) ("Experts who make their living from various authenticating sources, and on which they often make life-and-death decisions, may be reasonably relied upon for judicial purposes.").

The extent of an expert's disclosure is a central focus of attention in numerous courts. The issue is present in both civil and criminal cases. In criminal law, how far can a prosecution expert go in invoking reports or opinions, when appearing as a trial witness, of nontestifying experts? The case of *State v. Barrett*, 445 N.W.2d 749 (Iowa 1989), raises this issue. A pathologist testified that a decedent was killed, and did not commit suicide. *See id.* at 751. On redirect examination he was asked whether any other forensic pathologists with whom the witness had discussed the case gave him any reason to disregard his opinion that the death was a homicide. *See id.* Over the defendant's hearsay objection, the expert said no, "his colleagues had not caused him to change his opinion." *Id.* In accord with the earlier Iowa case of *State v. Judkins*, the Iowa rule does not allow one expert witness to state that other experts also subscribe to the witness' stated conclusion. 242 N.W.2d 266, 267-68 (Iowa 1976). The *Barrett* court did not consider the error to be reversible, however. 445 N.W.2d at 754.

In *Brunner*, the court limited the sweep of *Barrett*. 480 N.W.2d at 33. After observing that Rule 703 provides a broadened factual basis for expert testimony, the court added that it is "silent on the question of whether the underlying hearsay itself is admissible." *Id.* at 35. In general, the court approves admission of hearsay statements related to an expert by other persons, but nonetheless approved exclusion of the hearsay basis in this case because the sources would be witnesses at the trial. *See id.* at 34, 37.

The Georgia position is summarized by Paul Milich, in Georgia Rules of Evidence 226 n.13 (1995), wherein Milich makes the point that "any writings containing the opinions of witness[es] who will not testify are inadmissible, even if the testifying expert relied upon them in forming his opinion."

157. *See* MINN. STAT. § 703(b) (1998).

158. *See* LA. CODE EVID. ANN. art. 705 (West 2000); *see also* KY. REV. STAT. ANN. § 703(b) (Michie 1998); MD. CODE ANN., EVID. § 5-703 (1999).

alert to their duty to police the bases of modern expert testimony. In *United States v. 0.59 Acres of Land*,[159] the Court of Appeals reversed because inadmissible evidence was bootstrapped into the record through a valuation witness in a property condemnation case.[160] The hearsay included a tax assessor's opinion of property value, a letter from a homeowner expressing her lay opinion on the subject, and an "unscientific" homeowner survey on the effect of electromagnetic fields on property value.[161] The survey "was prepared by a non-witness of unknown qualifications in violation of Rule 703 and would not meet the *Daubert* standards for scientific evidence. It is third-hand inadmissible hearsay."[162] Suggesting that there is some outside evidence which might never be admitted in connection with an expert's testimony, the court ordered a new trial.

In re James Wilson Associates[163] was a case where the trial judge properly excluded testimony emanating primarily from a nontestifying engineer.[164] The engineer had been retained by the trial witness, an architect.[165] "The architect could use what the engineer told him to offer an opinion within the architect's domain of expertise, but he could not testify for the purpose of vouching for the truth of what the engineer had told him—of becoming in short the engineer's spokesman."[166] Judge Posner explained that an expert is permitted to testify to an opinion formed on the basis of information that is handed to him, but that does not render the underlying evidence independently admissible.[167] "[T]he judge must make sure that the expert isn't being used as a vehicle for circumventing the rules of evidence."[168] The court concluded that it is improper to use an expert witness as a screen against cross-examination of the expert's nontestifying source.[169]

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159. 109 F.3d 1493 (9th Cir. 1997).

160. *See id.* at 1495-96.

161. *See id.*

162. *Id.* at 1496. Generally, the approach of allowing otherwise inadmissible evidence to "illustrate" the expert's opinion is the one followed by this court, although the opinion points out that the evidence rules do not specifically provide for the admission of the expert's inadmissible basis. *See id.*

163. 965 F.2d 160 (7th Cir. 1992).

164. *See id.* at 172.

165. *See id.*

166. *Id.* at 173.

167. *See id.* at 172.

168. *Id.* at 173 (citing Gong v. Hirsch, 913 F.2d 1269, 1272-73 (7th Cir. 1990)).

169. *See id.* The decision observes that in explaining his opinion an expert witness normally is allowed to explain the facts underlying it, even if they would not be independently admissible. *See id.* at 172-73. This situation is not one of those cases allowing disclosure, however.

A district court opinion from the same circuit sharply recognizes the issue identified in this Article. In *Kay v. First Continental Trading, Inc.*, 976 F. Supp. 772 (N.D. Ill. 1997), the plaintiff's

That numerous state court decisions have moved in this direction is evidenced by cases identified in Part III of this Article, as well as opinions like *State v. Weber*.[170] Weber claimed he was mentally ill at the time he committed his crimes.[171] In opposition, the state produced the testimony of a psychiatrist.[172] An important part of his testimony related a conversation the psychiatrist had with a resident at a state mental hospital.[173] The resident's statements suggested Weber was faking mental illness.[174] "In overruling Weber's hearsay objection, the trial court noted that medical experts routinely rely on hearsay information. . . . Thus, the trial court reasoned that the underlying hearsay data upon which a medical expert relies is admissible."[175]

The appellate court resoundingly disagreed, stating that Wisconsin Statute section 907.03, which is identical to Rule 703, is not a hearsay exception.[176] "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."[177] Although the trial court correctly recognized that Rule 703 allowed the state's psychiatrist, Dr. Fosdahl, to offer an opinion based in part upon hearsay data that was otherwise inadmissible, the court erred in its apparent belief that the statute also permitted the underlying hearsay data to be admitted as evidence.[178]

> While Dr. Fosdahl was clearly permitted under [Rule 703] to rely upon the statement for his ultimate opinion as to Weber's mental responsibility, the state was obliged to qualify the statement under some exception to the hearsay rule before the statement itself could be admitted into evidence and used substantively for the truth of the matter asserted.[179]

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effort to have an expert relate random conversations he had with colleagues was rebuffed. *See id.* at 774. The court pointed out the danger in unrevised Rule 703 which enables an expert's opinion to be based upon facts or data which need not be admissible in evidence. *See id.* The unrevised rule "creates an obvious potential for the use of such opinions as a vehicle for creating a 'back door' hearsay exception." *Id.*

170. 496 N.W.2d 762 (Wis. Ct. App. 1993).
171. *See id.* at 765.
172. *See id.*
173. *See id.* at 766.
174. *See id.*
175. *Id.*
176. *See id.*; *see also* FED. R. EVID. 703.
177. *Weber*, 496 N.W.2d at 766.
178. *See id.* at 767.
179. *Id.*

In *State v. Martinez*,[180] the expert on the stand was an arson expert.[181] He testified for the defense that a furnace caused a fire, not arson.[182] Although the expert developed his opinion at length, the trial court ruled that he could not testify regarding statements others had made to him during his investigation.[183] The ruling was upheld on appeal.[184] "Allowing [the expert] to testify to the opinions of third parties regarding the condition of the furnace could have been misleading because the jury would have been likely to construe this as substantive evidence."[185]

V. COMMENTATORS

Perceptive commentary has recognized the importance of the issue isolated in this Article. Leading evidence writer Edward J. Imwinkelried made a pointed observation:

> [T]he decision in *Daubert* spotlighted Rule 702. However, in truth, another statute, Rule 703, has been the most controversial aspect of the expert testimony provisions in the Federal Rules. . . . Although it has been more than two decades since the Federal Rules of Evidence took effect in 1975, many thorny questions about the interpretation of Rule 703 persist.[186]

He identifies as one of the issues the question of whether the expert's proponent may formally introduce any technically inadmissible information which the expert reasonably relies upon.[187] He adverts to an analysis which distinguishes general scientific theories which an expert has studied from case specific information imparted to an expert from another person.[188] When the expert tries to recite the latter information to the jury

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180. 899 P.2d 1302 (Wash. Ct. App. 1995).

181. *See id.* at 1308.

182. *See id.*

183. *See id.*

184. *See id.* at 1309.

185. *Id.* The trial court ruled that the expert could not testify regarding statements others made to him during the investigation of the facts "if the person was not a witness at trial." *Id.* at 1308. *Cf.* Brunner v. Brown, 480 N.W.2d 33, 33 (Iowa 1991). The *Martinez* court noted that while trial courts may allow disclosure of underlying facts or data, courts have been reluctant to allow the use of evidentiary rules as a mechanism for admitting otherwise inadmissible evidence as an explanation of the expert's opinion. 899 P.2d at 1309.

186. Edward J. Imwinkelried, *Developing a Coherent Theory of the Structure of Federal Rule of Evidence 703*, 47 MERCER L. REV. 447, 449 (1996) (footnotes omitted). *See generally* ROGER C. PARK ET AL., EVIDENCE LAW 497 (1998) (discussing the law of evidence as applied in American trials).

187. *See* Imwinkelried, *supra* note 186, at 470.

188. *See* Imwinkelried, *supra* note 186, at 471.

over a hearsay objection, several authorities urge exclusion.[189] Imwinkelried remarks: "That argument has great merit."[190]

Robert A. Sachs has studied the problem in products liability actions.[191] An important issue in such cases generally concerns whether a jury will hear evidence of other accidents involving the same or similar product.[192] In every product liability case where "other accident" evidence arises, the ruling of the court on this issue has a potentially dramatic effect on the outcome of the case.[193] It is pivotal proof, and for this reason is admitted into evidence, if at all, under strict evidentiary guidelines. Many cases exclude this sort of testimony.[194] But can a clever practitioner make an end run around these rules by simply having an expert reference all manner of details concerning prior accidents, along the way to expressing his opinion that a product is dangerous?[195] What about reporting in precise detail the hearsay complaints of consumers who have had difficulty with the product?[196] Sachs refers to the "wide open" view which allows into evidence any supporting data used by an expert, a view which diminishes the role of the judge and makes the expert sort of a thirteenth juror.[197] He then supplies his own rejoinder:

> Some of us, however, are not comfortable with an expert's "assumption of the role of superfactfinder and thirteenth juror" nor with the proposed "diminished role" for the court, nor are we in favor of creating a hearsay exception which would permit an expert to act as a conduit for whatever hearsay or otherwise inadmissible evidence is sought to be placed before the jury. This is particularly true with regard to the question of an expert relating to the jury information about the occurrence of other accidents. The stakes are too high, the probative value too low, and the likelihood of unfair prejudice too great.[198]

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189. *See* Imwinkelried, *supra* note 186, at 472 (referring to state courts in California, Kentucky, and Minnesota).

190. *Id.* at 476.

191. Robert A. Sachs, *"Other Accident" Evidence in Product Liability Actions: Highly Probative or an Accident Waiting to Happen?*, 49 OKLA. L. REV. 257 (1996).

192. *See id.* at 257.

193. *See id.* at 257-58.

194. *See id.* at 258.

195. *See id.* at 285.

196. *See id.*

197. *See id.* at 287.

198. *Id.* (footnotes omitted); *see also* James W. Diehm, *Protecting Criminal Defendants' Rights When the Government Adduces Scientific Evidence*, 22 CAP. U.L. REV. 85, 87-88 (1993) (expressing concern that the application of Rule 703 in criminal trials can deny criminal defense counsel adequate opportunity for effective cross-examination).

The study of prior accidents by Sachs is a reminder that inadmissible data used to support an expert opinion is not always hearsay but can be evidence which is blocked by other evidentiary rules. In drafting exclusionary revisions to Federal Evidence Rule 703, the Advisory Committee wisely did not tie the rule of exclusion simply to one form of underlying proof, that is, hearsay.

Professor L. Timothy Perrin identifies one of the abuses which prompted the need to reevaluate Rule 703:

> The "liberal thrust" of the Federal Rules' treatment of expert testimony [as originally written] reaches its zenith in Rule 703. Rule 703 allows consideration by experts of not only matters that have not been introduced into evidence, but also of matters that are inadmissible. Like Rule 704, this expansion has resulted in unforeseen and unintended abuses, most significantly the use of the expert as a "conduit" of hearsay.[199]

Recognition of the problem confronting trial judges under current law was well stated by Charles J. Walsh and Beth S. Rose:

> Since its passage, the most difficult issue presented by Federal Rule of Evidence 703 has been the extent to which experts may inform the fact finder of the content of the unadmitted evidence they are using to form their opinions. Federal Rule of Evidence 703 does not specifically provide for the disclosure of this information. Moreover, strict application of hearsay principles and the right to confrontation in the criminal arena would keep such information from the fact finder.[200]

Walsh and Rose go on to observe that there is a general preference in the federal rules for disclosure, requiring careful attention to the subject of the extent of this disclosure.[201] Some commentators favor a limited rule permitting the expert to identify outside sources she used to form opinions but forbidding detailed disclosure of the contents of otherwise inadmissible information.[202]

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199. L. Timothy Perrin, *Expert Witness Testimony: Back to the Future*, 29 U. RICH. L. REV. 1389, 1401 (1995) (footnotes omitted).

200. Charles J. Walsh & Beth S. Rose, *Increasing the Useful Information Provided by Experts in the Courtroom: A Comparison of Federal Rules of Evidence 703 and 803(18) with the Evidence Rules in Illinois, Ohio, and New York*, 26 SETON HALL L. REV. 183, 200 (1995) (footnotes omitted).

201. *See id.* at 201.

202. *See id.* at 205.

On the other hand, Walsh and Rose prefer allowing the trier of fact to hear the basis for an opinion, perhaps accompanied by a limiting instruction to simply consider the inadmissible information for the purpose of evaluating the "coherence and solidity of the expert opinion."[203] Such an instruction is favored by a number of courts.[204] However, many commentators disagree with the efficacy of limiting instructions of this kind.[205] Directing jurors to listen to the expert's inadmissible information but not to treat it as substantive evidence is self-defeating. Empirical studies demonstrate that juries use expert background hearsay to reach jury decisions, in spite of judicial instructions to ignore the substantive nature of facts asserted in the hearsay statements.[206] A compelling persuasive effect occurs when an expert is permitted to cite hearsay sources which buttress his opinions, dramatically influencing the jury.

The grave risk that jurors will misuse the testimony as substantive proof has been widely recognized.[207] Professor Paul Rice views a limiting instruction as judicial double-talk. He identifies commentators who favor free admission of expert background data,[208] but then insist that the jury be instructed that the evidence is to be considered for the limited purpose of evaluating the expert's opinion.[209] Rice spots a hole in this approach. "Not

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203. *Id.* at 204.

204. *See* Wingo v. Rockford Mem'l Hosp., 686 N.E.2d 722, 730 (Ill. App. Ct. 1997) ("Rule 703 does not create an exception to the rule against hearsay because the underlying facts or data are admitted not for their truth, but for the limited purpose of explaining the basis of an expert's opinion."). Some otherwise rightly decided cases have fallen into the "illustrate the bases" trap. *See, e.g.*, Engebretsen v. Fairchild Aircraft Corp., 21 F.3d 721, 730 (6th Cir. 1994). To routinely admit hearsay and follow it with a limiting instruction permits circumvention by indirection, and allows a loophole to swallow the rule against hearsay. *See id.*

205. *See* Edward J. Imwinkelried, *The "Bases" of Expert Testimony: The Syllogistic Structure of Scientific Testimony*, 67 N.C. L. REV. 1, 12 (1988); Paul R. Rice, *Inadmissible Evidence as a Basis for Expert Opinion Testimony: A Response to Professor Carlson*, 40 VAND. L. REV. 583, 584-85 (1987); *see also* Ronald L. Carlson, *Collision Course in Expert Testimony: Limitations on Affirmative Introduction of Underlying Data*, 36 U. FLA. L. REV. 234, 244-45 (1984); Ronald L. Carlson, *Experts as Hearsay Conduits: Confrontation Abuses in Opinion Testimony*, 76 MINN. L. REV. 859, 872 n.65 (1992).

206. *See* Regina A. Schuller, *Expert Evidence and Hearsay*, 19 LAW & HUMAN BEHAVIOR 345 (1995), *reported in* Ronald L. Carlson, *Experts, Judges, and Commentators: The Underlying Debate About an Expert's Underlying Data*, 47 MERCER L. REV. 481, 484 n.16 (1996).

207. In CHRISTOPHER MUELLER & LAIRD KIRKPATRICK, FEDERAL EVIDENCE 687 (2d ed. 1994), the point is made that the hearsay rule means that hearsay statements made to an expert "are not admissible as proof of what they assert unless they fit some hearsay exception, and it means that they will be excluded if admitting them brings too much risk that they will be misused as substantive evidence." The authors conclude: "It seems especially appropriate to restrict direct examination by the calling party, but to allow the cross-examiner greater latitude." *Id.* at 689.

208. *See* Joanne Epps, *Clarifying the Meaning of Federal Rule of Evidence 703*, 36 B.C. L. REV. 53, 72-73 (1994).

209. *See id.*

explained by [these commentators], however, is how evidence, the truth of which cannot even be considered by the jury, is supposed to be used to assess the value of a conclusion [by an expert] premised on an assumption of truth."[210]

Professor Perrin takes a similar position:

> [J]urors are asked to do the impossible. They are told to consider the hearsay, not for its truth, but only as the basis of the experts opinion. No one truly believes jurors (or anyone else for that matter) are capable of making that subtle distinction. Instead, jurors consider the hearsay even when the evidence is regarded as too unreliable for admission as substantive evidence.[211]

Courts have also recognized the futility of delivering the sort of instruction described here.[212] Certainly, such an instruction should be the exception and not the routine. There may be pressing occasions when this sort of jury instruction is justified. However, a superior approach is to simply embrace clear rules of inclusion and exclusion regarding the expert's underlying data.

VI. PROGRESS AND REVISION: NEW RULE 703

The Federal Advisory Committee on Evidence Rules met on April 6 and 7, 1998, in New York City and approved three proposed amendments to the Federal Rules of Evidence. On May 1, 1998, the rule amendments were sent to the Standing Committee on Rules of Practice and Procedure of the Judicial Conference of the United States.[213] It was recommended that Rule 703 be amended to emphasize that when an expert relies on inadmissible information to form an opinion, it is the opinion and not the information that is admitted in evidence. The new rule would read as follows, with the added language which limits introduction of the expert's background data located at the end of the rule:

> Rule 703. Bases of Opinion Testimony by experts
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> The facts or data in the particular case upon which an expert bases an opinion or inference may be those

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210. Paul R. Rice, *The Allure of the Illogic: A Coherent Solution for 703 Requires More than Redefining "Facts or Data,"* 47 MERCER L. REV. 495, 500 (1996). Rice concludes that there should be a hearsay exception for Rule 703 material. *See id.*

211. Perrin, *supra* note 199, at 1403.

212. *See, e.g.*, State v. Williams, 549 So. 2d 1071 n.1 (Fla. 5th DCA 1989).

213. 119 S. Ct. No. 1, Ct. R-273 (1998).

> 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 *in order for the opinion or inference to be admitted. If the facts or data are otherwise inadmissible, they shall not be disclosed to the jury by the proponent of the opinion or inference unless their probative value substantially outweighs their prejudicial effect.*[214]

In a report to the chair of the standing committee, Judge Fern Smith who headed the evidence committee, clearly identified the problem studied in this Article. Judge Smith wrote:

> Under current law, litigants can too easily evade an exclusionary rule of evidence by having an expert rely on inadmissible evidence in forming an opinion. The inadmissible information is then disclosed to the jury in the guise of the expert's basis. The proposed amendment imposes no limit on an expert's opinion itself. The existing language of Evidence Rule 703, permitting an expert to rely on inadmissible information if it is of the type reasonably relied upon by experts in the field, is retained. Rather, the limitations imposed by the proposed amendment relate to the disclosure of this inadmissible information to the jury.[215]

Under the proposed amendment, the otherwise inadmissible information cannot be disclosed to the jury unless its probative value in

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214. *Id.* at Ct. R-295 (emphasis added). On April 12 and 13, 1999, the Federal Advisory Committee made a modest language alteration in the final sentence of the proposed rule, changing the last sentence to read: "Facts or data that are offered solely to assist the jury in evaluating an expert's opinion shall not be disclosed to the jury by the proponent of the opinion or inference unless the court determines that their probative value for that purpose substantially outweighs their prejudicial effect." *Id.* Unless changed in the interim, the rule takes effect on December 1, 2000.

215. *Id.* at Ct. R-274. That guidance is sorely needed on this issue is borne out by trial court decisions rejecting the efforts of lawyers to run inadmissible material into the record, followed by appeals of adverse decisions on the point, as well by trial court decisions which had to be reversed on appeal because of errors in the admission of expert hearsay. Several of these cases have been identified in this Article. *See supra* notes 101 & 104 and accompanying text.

Confusion is also present in some instances regarding a related issue. In some courts, whether a trial judge will admit or exclude underlying hearsay depends upon whether the source is available. Some trial courts apparently admit the underlying hearsay data only if the source is scheduled to be a trial witness. In other courts, an exactly opposite rule holds sway. A trial judge may refuse to admit the hearsay when the source is scheduled to be a trial witness. In the latter courts, if the source for an expert's opinion will appear and provide testimony from the witness stand, recitation of the source's hearsay by the expert is barred. *See supra* note 185.

assisting the jury to evaluate the expert's opinion substantially outweighs the prejudicial effect of the information.[216] The Advisory Committee's Note supplies advice on how the new provision is to the administered: "The amendment provides a presumption against disclosure to the jury of otherwise inadmissible information used as the basis of an expert's opinion or inference, where that information is offered by the proponent of the expert."[217]

In cases where the judge rules against full introduction of underlying data, modest identification of her sources of information may be made by the expert. Professor Daniel J. Capra explains how this works:

> When the probative value of the information in assessing the expert's basis is substantially outweighed by the risk that the jury will misuse the information despite a limiting instruction, then the trial court should permit only a general reference to the information. For example, with the arson expert, the trial court might permit the expert to testify that he interviewed police officers and bystanders, without allowing the expert to specifically disclose what he was told by them. If limitation to a general reference is not enough to control the risk of misuse relative to the probative value of the information, then the trial court should allow the expert's opinion but prohibit an elicitation of the inadmissible information as part of the basis of that opinion.[218]

Importantly, the cross-examiner who is protected by the rule can waive its safeguards. The Advisory Committee's Note makes the point: "Nothing in this Rule restricts the presentation of underlying expert facts or data when offered by an adverse party."[219] This approach is in keeping with prudent state revisions of Rule 703. For example, the Minnesota rule, as amended, bars the wholesale introduction of an expert's underlying data on direct examination, then provides as follows: "Nothing in this rule restricts the admissibility of underlying expert data when inquired into on cross-examination."[220] In Louisiana, the rule in criminal cases provides that "every expert witness must state the facts upon which his opinion is based,

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216. *See supra* note 214 and accompanying text.

217. 119 S. Ct. No. 1, Ct. R-297 advisory committee's note. This author's views are cited in the advisory committee's note. *See id.*

218. Daniel Capra, *The Daubert Puzzle*, 32 GA. L. REV. 699, 780 (1998); *see also* FED. R. EVID. 403. Capra's indication of how revised Rule 703 would operate appears to obviate constitutional concerns in criminal cases, by and large. *See* Ronald L. Carlson, *In Defense of a Constitutional Theory of Experts*, 87 NW. U. L. REV. 1182, 1183 (1993).

219. 119 S. Ct. No. 1, Ct. R-297.

220. MINN. R. EVID. 703(b); *see also* MUELLER & KIRKPATRICK, *supra* note 207 (discussing the propriety of a special rule for cross-examiners).

provided, however, that with respect to evidence which would otherwise be inadmissible such basis shall only be elicited on cross-examination."[221]

Self-serving, bolstering, and corroborative assertions from hearsay sources, when sought to be invoked by a trial expert on his own behalf, are barred under the new federal proposal. However, legal policy allows an opposing party to force disclosure of an expert's underlying facts on cross-examination. This is consistent with practice under Federal Evidence Rule 612. Rule 612 controls procedure when a witness refreshes his memory from a writing prepared by himself or another. Suppose a witness experiences a failure of memory during direct examination. When the witness accomplishes the refreshing process on the witness stand in front of a jury, there is consensus that the underlying document does not come into evidence merely because it refreshed recollection. Introduction options belong to the cross-examiner, not to the proponent of a witness who needed to look at a document in order to provide direct testimony.[222]

The overall plan of the revised rule is sound and is in keeping with current United States Supreme Court trends. The proliferation of experts and their descent upon the court has been well-documented.[223] Junk science abounds, and the unscientific presentations of "for hire" experts threaten the credibility of the many skilled professionals who testify. By the time the Federal Rules of Evidence had their twenty-year anniversary, it was time for the Supreme Court to take hold of expert testimony in federal trials. The Court did so in three major decisions in the 1990s.[224] Refining the rules, the Court imposed a reliability standard on experts in the case of *Daubert v. Merrell Dow Pharmaceuticals, Inc.*,[225] requiring trial judges to ask whether there was testing of the expert's methodology, the error rate, peer review, and the level of scientific acceptance.[226] These are factors which a judge should weigh when admitting or excluding scientific proof.

After *Daubert*, questions like whether combining Tylenol and alcohol causes liver damage, the impact on the body of breast implants, and whether Benedictin causes birth defects were resolved under the *Daubert* standard. Left open in *Daubert* was the issue of the finality of a trial court's decision to admit or exclude scientific evidence. A 1997 decision, *General Electric Co. v. Joiner*,[227] addressed this issue. In Georgia, a plaintiff sued over his workplace exposure to chemical PCBs, claiming

221. LA. CODE EVID. ANN. art. 705 (West 1998).
222. *See* Carlson, *supra* note 156, at 583-84; Imwinkelried, *supra* note 186, at 475-76.
223. *See* Imwinkelried, *supra* note 186, at 447-48; *see also* Carlson, *supra* note 156, at 577-78.
224. *See infra* notes 225, 227, 240 and accompanying text.
225. 509 U.S. 579 (1993).
226. *See id.* at 593-94.
227. 522 U.S. 136, 138-39 (1997).

they promoted his cancer.[228] The case was removed to federal court where the defense moved for summary judgment.[229] Plaintiff responded with the depositions of experts who testified that PCBs and derivative substances can promote cancer, and opined that the plaintiff's condition was likely caused by these chemicals.[230] The trial court apparently disagreed. Among other findings, the United States District Court found the alleged link between PCBs and small-cell lung cancer speculative. The court felt that the testimony to the contrary did not rise above subjective belief.[231] The District Court concluded that four epidemiological studies on which the plaintiff relied were not a sufficient basis for the expert's opinion. Their testimony was inadmissible. Summary judgment was granted.[232]

The Eleventh Circuit reversed, holding that the District Court had erred in excluding the expert testimony.[233] The Supreme Court was faced with difficult questions. To what extent is a trial court's judgment on such a matter binding? Is a trial court required to honor an expert's assertions that his conclusions are sound, or is there a "gatekeeping" function to screen scientific evidence and independently determine its relevance and reliability?[234]

Chief Justice Rehnquist observed that "while the Federal Rules of Evidence allow district courts to admit a somewhat broader range of scientific evidence than would have been admissible under *Frye*, they leave in place the 'gatekeeper' role of the trial judge in screening such evidence."[235] The Eleventh Circuit had criticized the fact that the trial judge drew different conclusions from the research than did each of the experts.[236] The Supreme Court held that the Eleventh Circuit failed to give the trial judge's ruling the deference it deserved.[237] The correct standard is whether the judge abused his discretion in excluding scientific evidence, said the Court.[238] "[T]he District Court did not abuse its discretion."[239]

In 1999, the impetus to exclude expert testimony when such proof is at the margins of modern technology gained momentum when the Court decided *Kumho Tire. Co. v. Carmichael.*[240] The gatekeeping function of

228. *See id.* at 139.
229. *See id.* at 140.
230. *See id.*
231. *See id.*
232. *See id.*
233. *See id.*
234. *See id.* at 141.
235. *Id.* at 142.
236. *See id.* at 141.
237. *See id.* at 143.
238. *See id.* at 146.
239. *Id.* at 147.
240. 119 S. Ct. 1167 (1999).

trial judges to make certain that the expert's conclusions are based on scientific principles applies broadly when experts are offered as witnesses.[241] It applies not only to scientific proof but also to testimony based on technical or other specialized knowledge.[242]

In the *Kumho Tire* case, the right rear tire of a minivan blew out, causing a severe accident.[243] In the plaintiff's action against Kumho Tire Company, an expert testified that a defect in the tire's manufacture or design caused the blow-out.[244] Kumho Tire moved the District Court to exclude the expert's testimony on the ground that his methodology failed reliability requirements.[245] The expert relied primarily upon skill and experience-based observations, as opposed to scientific theories.[246] Nonetheless, *Daubert* applied and the Court made no distinction between scientific knowledge on one hand, and technical or other specialized knowledge on the other.[247]

The expert's testimony was required to pass a standard of evidentiary reliability.[248] Important questions include the following. Has his technique been tested? Has it been subjected to peer review and publication? What is the error rate? Is the principle generally accepted? In the view of the Court, none of these *Daubert* factors supported the expert's testimony.[249] The expert was properly excluded by the district judge.[250]

The policing function imposed on the judiciary by revised Rule 703 is consistent with these current Supreme Court directions. Admittedly, the recent Supreme Court cases focus on a different problem. The trilogy of *Daubert*, *Joiner*, and *Kumho Tire* address a party's need to make a foundational showing that the expert's opinions are based upon reliable theories under Federal Evidence Rule 702.[251] However, the overarching objective of this line of authority is to ensure that the jury is exposed only to reliable expert testimony.[252] Revised Rule 703 advances a similar objective. The rule endeavors to ensure that reliable and probative information comes before the trier of fact on one hand, and to minimize the

241. *See id.* at 1176.
242. *See id.* at 1174-76.
243. *See id.* at 1171.
244. *See id.*
245. *See id.* at 1172.
246. *See id.*
247. *See id.*
248. *See id.* at 1176.
249. *See id.* at 1176-77.
250. *See id.* at 1179.
251. *See supra* notes 225, 227, 240 and accompanying text.
252. *See id.*

risk of prejudice resulting from the jury's potential misuse of the information on the other.[253]

New Rule 703 does not answer all of the questions, nor should it.[254] It prevents disclosure to the jury when the expert's basis is prejudicial, but does not spell out the circumstances when this might occur. Rather, the drafting committee adopted a prejudice-balancing formula which appears to be a blend of Federal Evidence Rules 403 and 609. Under it, the proponent of disclosure will have the burden of demonstrating that the probative value of the information in assessing the expert's opinion substantially outweighs its prejudicial effect. Only after an affirmative decision is made on this issue will other steps be addressed. The objecting party may request and secure a limiting instruction informing the jury that the underlying information must not be used for substantive purposes.[255]

When the judge performs her gatekeeping function, what kind of material will be barred from exposure to the trier of fact? When will the details of an expert's underlying data remain undisclosed? As noted, the rule leaves this in the hands of the trial court, subject to the presumption against disclosure. Presumably things such as bolstering conclusions from other experts, hearsay from bystanders at an accident scene which do not qualify under any hearsay exception, and proof of other remote crimes in criminal cases when they do not come under the "other crimes" exception are the sorts of materials which cannot be laundered through an expert. One case cited earlier in this Article suggested that there is some underlying evidence which might never be admitted in connection with an expert's testimony.[256] Another advises trial judges to exclude reference to

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253. *See* 119 Ct. Ct. No. 1, Ct. R-296-97.

254. The new rule offers no distinctions between underlying facts versus underlying opinions. Some courts have endeavored to do this. *See, e.g.*, Thorne v. U-Haul of Metro D.C., Inc., 580 A.2d 672 (D.C. 1990) (holding that medical testimony by non-specialist doctor about findings of specialist admissible because they were simple, routine observations, not the specialist's conjectural, complex diagnosis); *see also* C.S.I. Chemical Sales, Inc. v. Mapco Gas Products, Inc., 557 N.W.2d 528 (Iowa Ct. App. 1996) (information from other experts admissible, but not recitation of material from them which simply corroborates the trial witness). Again, the choices made by the Advisory Committee were sound. In the area of expert testimony, it is difficult to know where fact ends and opinion starts.

255. What has been criticized in this Article has been the regular admission of prejudicial hearsay, followed by the pious incantation of a limiting instruction. *See supra* notes 204, 212 and accompanying text. The Federal Evidence Advisory Committee's proposal does not envision such an unwholesome procedure. Rather, with the presumption against disclosure to the jury, injection of expert hearsay should be the exception, not the rule. The delivery of an instruction will certainly not be routine, as is the case in some courts today, because of restrictions on the introduction of underlying data. Accordingly, only on limited occasions will a special instruction be needed.

256. *See supra* note 159 and accompanying text.

outside sources when it is apparent that the trial expert is being used as a screen against cross-examination of the expert's nontestifying source.[257]

Exclusion of this sort of prejudicial and untrustworthy information is best left to case-by-case delineation in the courts.[258] Meanwhile, the Advisory Committee has provided a workable framework within which judges may operate.

VII. CONCLUSION

With its presumption against disclosure to the jury of otherwise inadmissible information used as the basis of an expert's opinion, the Federal Advisory Committee has spoken. It has spoken wisely. This Article has identified numerous situations where trial courts were confused or misled in the application of unrevised Rule 703. Costly errors occurred. Appellate correction was needed. With the advent of the new rule, the miscalculations identified here should end.

Experts were originally viewed as impartial specialists who came to trials to explain technical concepts to triers of fact. Over time, experts became advocates for the side which hired them. The practice of providing opinions for hire changed the impression of experts from one of respected professionals to, in several cases, that of mercenaries and prostitutes.[259]

The growth of the expert testimony business into a cottage industry prompted reform proposals.[260] It ultimately became clear that a "let it all in" philosophy was inadequate for modern conditions. One aspect of this philosophy was the ability of experts to expose the trier of fact to raw and unexpurgated hearsay. This has now been curtailed. The Federal Evidence Rules Advisory Committee has struck a blow against wide-open admission of otherwise inadmissible information. The limitations suggested by the committee are sound. They will help to restore expert witness practice to a respected sector of the litigation process.

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257. *See supra* note 163 and accompanying text.

258. That there are prevalent efforts to use Rule 703 as a conduit for back door hearsay is evidenced by the cases cited in this Article. *See supra* notes 14-90, 117-30, 159-80.

259. *See* Perrin, *supra* note 199, at 1389, 1469.

260. *See* David Faigman, Commentary, *A Response to Professor Carlson: Struggling to Stop the Flood of Unreliable Expert Testimony*, 76 MINN. L. REV. 877 (1992). Professor Faigman warns: "Experts are conduits not only for hearsay but for a wide variety of unreliable and inaccurate information." *Id.* at 889; *see also In re* Air Crash Disaster at New Orleans, 795 F.2d 1230 (5th Cir. 1986) (advocating an adherence to the deferential standards for review of decisions, but cautioning judges to look closely at experts who supplement their salaries by testifying and spend substantially all of their time consulting).