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Experts, Judges, and Commentators: The Underlying Debate About an Expert's Underlying Data

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Experts, Judges, and Commentators: The Underlying Debate About an Expert's Underlying Data

by Ronald L. Carlson*

I. SIGNIFICANCE OF THE DIALOGUE

Debate concerning the limits of judicial power over expert witnesses remains active and in its early stages.[1] Commentators charting the course of judicial opinions observe that some of the modern regulatory proposals have yet to enlist official adoption.[2] Part of the problem may relate to recognition of questions. Courts will adjudicate critical issues only when they are made aware of them. The burden of calling attention to an expert's flawed bases falls squarely on trial lawyers who must make astute and incisive objections.[3]

In this formative period of legal development important decisions will be made. The future direction of courtroom control over the burgeoning onslaught of expert opinion[4] will be shaped in the years immediately

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1. It is significant that twenty years after the advent of the Federal Rules of Evidence, some of the most profound issues relating to experts remain unanswered by the courts. Professor Imwinkelried's article raises a number of these. *See infra* note 4.

2. JoAnne A. Epps, *Clarifying the Meaning of Federal Rule of Evidence 703*, 36 B.C. L. REV. 53, 64 (1994).

3. Ronald L. Carlson, *Getting a Grip on Experts*, 16 LITIGATION 36 (Summer 1990) [hereinafter Carlson, *Getting a Grip*].

4. Edward J. Imwinkelried, *Developing a Coherent Theory of the Structure of Federal Rule of Evidence 703*, 47 MERCER L. REV. 447 (1996) [hereinafter Imwinkelried, *Developing*]. For other references to the proliferation of expert testimony, see Ronald L.

ahead. For this reason, it is vital that the aforementioned debate continue. Positions previously advanced need to be refined and reiterated. Courts should be alerted to the issues. As judges become aware of significant questions—questions which are sometimes subtly lodged in the tangle of an appellate record—information about how to resolve them needs to be readily at hand.

Into this uncertain world Professor Imwinkelried's article comes, and it makes a worthwhile contribution. Imwinkelried's focus on Federal Rule of Evidence 703 is rightly directed. That rule, like no other, will control most of the future development of expert witness law. Rule 703 is at the core of significant inquiries which confront our courts. Can the expert's proponent formally introduce the hearsay reports upon which an expert relies to supply his courtroom opinion? Is a trial judge precluded from testing the credibility of the underlying data the expert used to reach her conclusions? Imwinkelried raises these questions, and they will be the targets of this commentary as well.

II. WIDE-OPEN ADMISSION OF JUNK CONCLUSIONS?

Much expert testimony is sound, reliable, and deserving of serious consideration by the trier of fact. For example, the DNA proof supplied by Dr. Robin Cotton in the O.J. Simpson murder trial springs immediately to mind. On the other hand, in many courtroom situations the expert's proof is simply bought and paid for. Trial lawyers see experts in the latter category as a growing breed. Moreover, the phenomenon of the "hired gun" expert is widely accepted as a regular, if unpleasant, fact of life.

Some of the sting can be taken from the expert who prostitutes himself. The damage inflicted by his flawed opinions can be marginalized by a carefully prepared and well-executed cross-examination. But how much more dangerous does the "jukebox" expert—the one who will resonate any tune for a fee—become when judicial controls are removed?

Consider the possibilities. A lawyer hires a willing expert, a medical doctor, and hands him the reports of other doctors X, Y, and Z in a personal injury case. The hired doctor reads the reports and feels he can rely upon them. If the local court has adopted the rule of wide-open introduction of an expert's foundation, the following scenario occurs. At trial, as the hired doctor gets ready to give his opinion, he eagerly

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Carlson, *Policing the Bases of Modern Expert Testimony*, 39 VAND. L. REV. 577 (1986) [hereinafter Carlson, *Policing*]; David L. Faigman, *Struggling to Stop the Flood of Unreliable Expert Testimony*, 76 MINN. L. REV. 877 (1992). In his text, Peter Huber asserted that much of this expert testimony is "junk science." PETER W. HUBER, GALILEO'S REVENGE: JUNK SCIENCE IN THE COURTROOM (1991).

admits that he relied upon the reports of X, Y, and Z to reach certain conclusions. The courtroom doctor presents his own conclusions, whereupon the proponent next moves that the reports of X, Y, and Z be received. The trial judge agrees. This accomplished, the "outside" reports are then tossed into the lap of the jury. An enterprising attorney has thus produced four experts for the price of one, with three of them insulated from cross-examination in the bargain.

In an era of ambitious and compliant experts, protective rules are needed to curb real and potential abuses. That is why some courts announce the following doctrine, in essence: The data upon which an expert says he relies are not admissible and may only be referred to in a summary manner on direct examination.[5] Underlying hearsay reports are not to be read in detail to the jury, nor are copies to be marked and published as exhibits.

A number of tribunals have recognized the need for such a rule. Courts in Florida,[6] Texas,[7] and California,[8] some of our largest states, follow it. Judicial decisions or statutes in places like Massachusetts,[9] New Jersey,[10] Virginia,[11] and Minnesota[12] embrace the wisdom of this approach. Vermont elevated it to constitutional status in criminal cases.[13] Thus, while most jurisdictions do not appear to have directly faced this critical issue, many which have done so adopt an exclusionary rule.[14] An exclusionary approach has also been embraced in a number of federal decisions.[15]

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5. Imwinkelried, *Developing, supra* note 4, at 462, 470.

6. State v. Williams, 549 So. 2d 1071 (Fla. Dist. Ct. App. 1989).

7. Beavers v. Northrop Worldwide Aircraft Servs., Inc., 821 S.W.2d 669 (Tex. Ct. App. 1991); First S.W. Lloyds Ins. Co. v. MacDowell, 769 S.W.2d 954 (Tex. Ct. App. 1989).

8. People v. Campos, 38 Cal. Rptr. 2d 113 (1995); Grimshaw v. Ford Motor Co., 174 Cal. Rptr. 348, 369 (1981). *See* People v. Nicolaus, 817 P.2d 893, 910 (Cal. 1991); Continental Airlines, Inc. v. McDonnell Douglas Corp., 264 Cal. Rptr. 779 (1989), *modified on other grounds,* 264 Cal. Rptr. 779 (1990).

9. Grant v. Lewis/Boyle, Inc., 557 N.E.2d 1136 (Mass. 1990); Commonwealth v. Kendall, 399 N.E.2d 1115 (Mass. App. Ct. 1980). *See* Department of Youth Servs. v. A Juvenile, 499 N.E.2d 812, 821 (Mass. 1986).

10. Hartman v. Yawger, 514 A.2d 545, 549 (N.J. Super. Ct. Law Div. 1986).

11. McMunn v. Tatum, 379 S.E.2d 908 (Va. 1989).

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

13. State v. Towne, 453 A.2d 1133 (Vt. 1982).

14. Slaaten v. Amerada Hess Corp., 459 N.W.2d 765, 767-68 (N.D. 1990); State v. Weber, 496 N.W.2d 762 (Wis. Ct. App. 1993). Kentucky has enacted a statute directed at this problem. KY. R. EVID. 703(b). So has Louisiana. LA. CODE EVID. ANN. art. 705 (West 1995).

15. Gong v. Hirsch, 913 F.2d 1269, 1273 (7th Cir. 1990); Marsee v. United States Tobacco Co., 866 F.2d 319, 323-24 (10th Cir. 1989); Nachtsheim v. Beech Aircraft Corp., 847 F.2d 1261 (7th Cir. 1988). *See* Carlson, *Policing, supra* note 4, at 584 n.25 (citing

Consistent with the theme of this article, the direction of the foregoing decisions should be followed and expanded upon. An exclusionary posture represents correct application of policy and law. Hearsay reports of nontestifying experts do not belong in a case's body of proof as substantive evidence.

III. ILLUSTRATING THE BASES

The last section of this article rejected from affirmative proof the inadmissible basis used by an expert to reach an opinion. Nor are those bases properly usable to "illustrate" the basis for the expert's conclusion. Sometimes lawyers argue that jurors should hear inadmissible evidence so that they can better assess the quality of the expert's opinion. The danger of misuse is too high. The argument should be resisted.

Recent human behavior research supports this conclusion. Participants in an experiment were exposed to unsubstantiated and secondhand information conveyed by means of an expert relating his background investigations to the jury. Mock juror simulations indicated that expert background hearsay was used to reach verdict decisions, in spite of judicial instructions to ignore the substantive facts asserted in the hearsay statements.[16] The results underline the need to reject the position of some courts. These courts admit hearsay information conveyed by an expert as long as the jury is instructed to ignore the facts asserted in the hearsay statement and use the information only for determining the weight to attribute to the expert's opinion.[17] In her research on expert hearsay, Regina Schuller addressed prior studies "which have focused on hearsay conveyed via a *nonexpert* witness."[18] Some of these have suggested that mock jurors' decisions are only minimally influenced by hearsay information.[19] How is the difference in result explained when an expert conveys the hearsay? Schuller raises the possibility that hearsay transmitted by an expert, as opposed to a lay witness, may carry convincing weight.[20]

> The oft-expressed concern that expert testimony will be overvalued by the jurors because of its "aura of scientific reliability and trustworthiness" (see Vidmar & Schuller, 1989) suggests that hearsay conveyed

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additional cases).

16. Regina A. Schuller, *Expert Evidence and Hearsay*, 19 LAW & HUMAN BEHAVIOR 345 (1995).

17. *See, e.g.*, United States v. Madrid, 673 F.2d 1114, 1118 n.4 (10th Cir.), *cert. denied*, 459 U.S. 843 (1982).

18. Schuller, *supra* note 16, at 348 (emphasis added).

19. *Id.*

20. *Id.* at 348-49.

> via an expert, as opposed to a nonexpert witness, may carry greater weight. The "paramessage" elements, such as prestige and expertise, that accompany the expert's "message" (Rosenthal, 1983) may lend greater credibility to the hearsay information.[21]

Will limiting instructions take care of the problem? Further studies tend to suggest that instructions can have just the opposite effect. "Taken in their entirety, these findings tend to suggest that the introduction of limiting instructions regarding hearsay information conveyed via expert testimony may either have little or no effect, or alternatively, may even backfire and enhance the impact of the hearsay information . . . ."[22]

In the Schuller study, "the secondhand information introduced via expert testimony was not independently admitted at trial."[23] The judge's final charge instructed the jury that these facts were not to be accepted as true unless established by other evidence presented at trial.[24] "Contrary to the research exploring juror sensitivity to hearsay conveyed via nonexpert witnesses, in the present study hearsay information conveyed via an expert witness did influence the decision process."[25]

Schuller readily concedes that this 1995 study is "subject to the usual limitations of juror simulations," and the author cites the need for continued research.[26] At the least, however, there is very little reason to back away from longstanding positions as a result of these most recent experimental findings.

Limiting instructions do not seem to prevent jurors from using inadmissible hearsay for the truth of the hearsay assertions and may even highlight the inadmisisble material. Imwinkelried has long been skeptical of the use of judicial instructions as a panacea for policing expert hearsay.[27] So has this author.[28] When the debate about expert underlying data began in earnest in 1984, its beginning was marked by a critique of jury instructions. Targeted were those admonitions by the trial court instructing the jury "to disregard the substantive effect of the nontestifying [expert's] report" but then advising that "the evidence will

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21. *Id.* at 349.
22. *Id.*
23. *Id.* at 351.
24. *Id.*
25. *Id.* at 359.
26. *Id.* at 359-60.
27. Edward J. Imwinkelried, *The Bases of Expert Testimony: The Syllogistic Structure of Scientific Testimony*, 67 N.C. L. REV. 1, 12 (1988).
28. Carlson, *Getting a Grip*, *supra* note 3, at 37.

nevertheless come in 'simply to illustrate the basis of the expert's opinion.'"[29] The 1984 article castigated this sort of limiting instructions.[30] "The weakness of this rationalization for courtroom reference to third party reports and conclusions, however, is clear."[31] Supporting reasons were supplied:

> [C]ivil litigants may argue that an out-of-court report should be admitted as an adjunct of the direct examination "simply to illustrate the basis for the expert's opinion, not as substantive evidence." The distinction will likely escape the jury, and the subterfuge should not be allowed to frustrate accepted hearsay policies. As in certain other areas of evidence law, it would be mythical to expect the jury simply to consider its illustrative effect and disregard its substantive content.[32]

The point has been reiterated on subsequent occasions,[33] leading to this conclusion: Underlying expert data must be independently admissible in order to be heard in full upon direct examination, and this principle applies whether the proponent offers details of the data as substantive evidence or simply to explain the basis for the expert's opinion. While this should provide the general approach, compelling circumstances may from time to time vary application of the rule of exclusion.[34]

IV. COMMENTATOR REACTIONS

The subject of this article has stirred productive reactions from a number of learned observers including, but not limited to, Imwinkelried, Epps, Rice, Lempert, Allen, Miller, and others. A recent Comment rehearses a number of current theories and posits a series of productive conclusions.[35] The author first recognizes that some authorities claim

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29. Ronald L. Carlson, *Collision Course in Expert Testimony: Limitations on Affirmative Introduction of Underlying Data*, 36 U. FLA. L. REV. 234, 244-45 (1984).

30. *Id.* at 245.

31. *Id.*

32. *Id.* at 245 n.44. Jury instructions can be highly effective in turning jurors away from improper practices in a number of contexts, but this area may not be one of them.

33. Ronald L. Carlson, *In Defense of a Constitutional Theory of Experts*, 87 NW. U. L. REV. 1182 (1993) [hereinafter Carlson, *In Defense*]; Carlson, *Getting a Grip, supra* note 3, at 38.

34. An escape clause appears in MINN. R. EVID. 703(b) barring an expert's hearsay basis generally but allowing in civil cases some judicial discretion to admit when good cause is shown and the underlying data is particularly trustworthy. The author of this article has proposed a similar provision. *See infra* note 69 and accompanying text.

35. *See generally* Roberta N. Buratti, Comment, *What is the Status of "Inadmissible" Bases of Expert Testimony?*, 77 MARQ. L. REV. 531 (1994). The author adverts to the

that full disclosure of the underlying data under Federal Rule of Evidence 703 is appropriate, then answers:

> 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.[36]

The author is also wary of limiting instructions as the remedy to protect against misuse of expert hearsay. There is apparent agreement with the view of the Wisconsin Court of Appeals which "recognizes that limiting instructions are not effective in preventing juries from using the underlying inadmissible data for substantive purposes."[37]

Finally, the Comment distinguishes between "bedrock hearsay" and case specific hearsay.[38] The former includes the common knowledge of experts in the field.[39] On the other hand, case specific hearsay relates directly to the facts of the particular case.[40] This might occur as when the courtroom expert collects reports from others about matters in litigation.

> Trial courts should not permit full disclosure of this form of hearsay. Since limiting instructions are generally ineffective under these circumstances, 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

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potential for abuse when courts embrace a wide-open approach to entry of expert hearsay. For other authorities concerned about the prospect of abuse, see Michael D. Wade, Counterpoint, *Should Michigan Rule of Evidence 703 be Revised?*, 70 MICH. B.J. 572 (1991). The point is illustrated in Carlson, *Getting a Grip*, *supra* note 3, at 38. For an able discussion of the issues explored in this Article, see Peter J. Rescorl, Comment, *Fed. R. Evid. 703: A Back Door Entrance for Hearsay and Other Inadmissible Evidence: A Time for a Change?*, 63 TEMP. L. REV. 543, 545-46 (1990).

36. Buratti, *supra* note 35, at 540.
37. *Id.* at 547.
38. *Id.*
39. *Id.*
40. *Id.* at 548.

> give the jury any details of "case specific hearsay" that forms the basis for an expert's opinion.[41]

Imwinkelried's thinking is consistent with this general thrust. While an expert should have free license to explain the general scientific theories she relies upon, reports by other technicians from distant offices about the instant case are the sort of case specific materials which are particularly subject to exclusion.[42] Imwinkelried's conclusion is sound when he says that judicial power should not be constricted in favor of trial by expert.[43] The expert's proponent does not have an absolute right to elicit a detailed description of technically inadmissible information upon which the expert opts to rely.[44] There is merit in Imwinkelried's observation that allowing experts to refer to corroborative opinions of other experts impinges upon the jury's power to pass on the reliability of expert evidence.[45] When a lawyer uses the testifying expert as a conduit for the opinions of out-of-court witnesses, the process denies the jury the right to see and assess the credibility of a faceless declarant.

V. GEORGIA APPLICATIONS

A. *The Hearsay Controversy*

Two principles of evidence law seem to be evolving as expert witness practice receives scrutiny from the appellate courts. First, an expert may state her opinion in a Georgia courtroom, even if the opinion is partly based upon out-of-court declarations of uncalled witnesses.[46] The courtroom conclusions of such an expert are not to be defeated by this sort of challenge: "Objection; opinion based upon hearsay." Next, what about the subsequent admissibility of the supportive out-of-court material? This might occur by way of either a detailed delineation from the testifying expert about the contents of hearsay reports she received or from reception of them as written exhibits. Georgia law seems abundantly clear that these underlying hearsay reports are barred from evidence by the hearsay rule.[47]

The twin propositions just propounded are not contradictory. As has been explained here and in other writings, inadmissible data which

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41. *Id.* Professor Daniel Blinka is identified as the author of the distinction between "bedrock" hearsay versus the inadmissible case specific kind.

42. Imwinkelried, *Developing*, *supra* note 4, at 479.

43. *Id.*

44. *Id.*

45. *Id.*

46. *See infra* note 55; Orkin Co. v. Macintosh, 215 Ga. App. 587, 452 S.E.2d 159 (1994).

47. Coastal Health Servs., Inc. v. Rozier, 176 Ga. App. 240, 335 S.E.2d 712 (1985).

supports an expert may be referred to in a cursory fashion on direct examination.[48] However, that does not automatically transport into evidence the documentary or oral hearsay reports upon which an expert elects to rely. Nor does it render the hearsay material competent to explain or illustrate the expert's opinion, at least on direct examination.[49]

Commentators like Milich have traced the course of Georgia law. In his 1995 treatise, Milich notes that while Georgia practice is in flux as to the first point mentioned in the foregoing paragraph of this Article, it seems clear that "an expert's opinion is not always prohibited simply because it is based in part on hearsay that is not otherwise before the court . . . ."[50] Recent cases confirm this approach. Consider this declaration from *WMI Urban Services, Inc. v. Erwin*:[51] "[A]n expert may state his opinion . . . even if the opinion is based in part on hearsay."[52] Other decisions are in accord,[53] prompting this passage contained in *Agnor's Georgia Evidence*: "There is a trend that seems to permit an expert to base his opinion on hearsay."[54]

What about the second proposition, that relating to admission or exclusion of the expert's underlying hearsay data? Milich comments that "any writings containing the opinions of witness[es] who will not testify are inadmissible, even if the testifying expert relied upon them in

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48. *See* Ronald J. Allen & Joseph S. Miller, *The Common Law Theory of Experts: Deference or Education?*, 87 NW. U. L. REV. 1131, 1134 (1993); Richard Lempert, *Experts, Stories, and Information*, 87 NW. U. L. REV. 1169, 1180 (1993).

49. *See* Carlson, *In Defense, supra* note 33, at 1183 n.4, 8. On cross-examination things are different. The cross-examiner is usually enitled to delve into the details of the hearsay report subject to the proponent bringing out related portions on redirect. *See* MINN. R. EVID. 703(b); People v. Campos, 38 Cal. Rptr. 2d 113 (1995); Liles v. Employers Mutual Ins., 377 N.W.2d 214 (Wis. Ct. App. 1985). In Georgia, a contrary approach may prevail. *See* Stouffer Corp. v. Henkel, 170 Ga. App. 383, 317 S.E.2d 222 (1984).

50. PAUL S. MILICH, GEORGIA RULES OF EVIDENCE 224 (1995). Milich makes the point elsewhere in his treatise that on direct examination an expert will normally supply the reasons for her opinion and in the typical case that may proceed without incident. *Id.* at 225. However, where a significant part of the expert's conclusions are drawn from hearsay reports, the dichotomy set forth in this article operates. The expert may identify hearsay reports as a contributing source, but may not read or recite their contents to the jury. Frequently the reports of out-of-court experts are full of case specific opinions and conclusions.

51. 215 Ga. App. 357, 450 S.E.2d 830 (1994).

52. *Id.* at 358, 450 S.E.2d at 831. *Compare* Loper v. Drury, 211 Ga. App. 478, 440 S.E.2d 32 (1993).

53. Blackburn v. State, 180 Ga. App. 436, 349 S.E.2d 286 (1986).

54. D. LAKE RUMSEY, JR., AGNOR'S GEORGIA EVIDENCE 223 n.5 (3d ed. 1993). This text notes that, in addition to this general trend, this has been the rule over many years for experts on market value as well as those on mental condition. *Id.* at 230, 234.

forming his opinion."[55] Distinctions need to be made among general scientific theories in the expert's field, knowledge acquired within the scope of a person's profession,[56] and case specific reports. The latter are subject to challenge. When these reports come from nontestifying experts and contain conclusions of uncalled witnesses, their exclusion is commanded by the hearsay rule. It makes little difference whether the hearsay is offered as substantive evidence for proof of its truth or only to explain the expert's opinion.[57]

Not all Georgia cases have been expansive in their examination of these issues. When factual patterns have presented opportunities for clarification of the law, courts have not always explored the conflicting positions which are competing for judicial attention. In *Brinks, Inc. v. Robinson*,[58] the appellate court approved introduction of clinical records containing notes of a specialist who did not testify at trial.[59] Recognition of the debate over the propriety of so doing is not signalled by the court.[60] In other cases, however, Georgia decisions have held that no rule of law mandates the admission of hearsay simply because a

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55. MILICH, *supra* note 50, at 226 n.13 (citing Stoneridge Prop., Inc. v. Kuper, 178 Ga. App. 409, 343 S.E.2d 424 (1986)). In a case which recognizes the dichotomy discussed in this Article, the statement by Milich is supported by Blackburn v. State, 180 Ga. App. 436, 437, 349 S.E.2d 286, 288 (1986) (witness stated his opinion was based partly on statements he received, and this was approved because "he did not repeat those statements"). Exclusionary decisions do not usually distinguish between hearsay admitted to explain the expert's opinion versus hearsay admitted as substantive evidence. Under either theory, the hearsay is excluded. *See* Coastal Health Servs., Inc. v. Rozier, 176 Ga. App. 240, 335 S.E.2d 712 (1985) (ombudsman report); Weksler v. Weksler, 173 Ga. App. 250, 325 S.E.2d 874 (1985); Giles v. Taylor, 166 Ga. App. 563, 305 S.E.2d 154 (1983). This is as it should be. *See supra* note 16 and accompanying text. Of course, where the reports of third parties not before the court are shown to come within a hearsay exception and a proper foundation is laid, they are admissible.

56. MILICH, *supra* note 50, at 223.

57. An objection to the hearsay should be sustained in both cases. *See supra* note 16 and accompanying text; *see also supra* note 55.

58. 215 Ga. App. 865, 452 S.E.2d 788 (1994).

59. *Id.* at 868, 452 S.E.2d at 791.

60. Admission of the notes of a physical therapist may have been error, in the view of the court, but it was harmless. "At worst the [physical therapist's] reports were merely cumulative and any error in admitting them was harmless." *Id.* at 868-69, 452 S.E.2d at 791. *See supra* note 55 (citing Georgia decisions disapproving backdoor hearsay). In *Brinks* the lack of expansive discussion of the expert hearsay issue may be understandable in view of other things demanding the court's attention. The court seems to have been concentrating on joinder issues. There was a concurring opinion which discussed joinder of parties as well as a dissent, and the court of appeals ultimately reversed the judgment below on misjoinder grounds.

testifying physician predicated opinions upon other nontestifying doctors' reports.[61]

B. *Judicial Curiosity About an Expert's Foundation*

When the courtroom expert relies on unadmitted data, the trial judge must decide whether this data is of a type reasonably relied upon by experts in the field. Only with this sort of foundation can the expert then proceed to propound scientific conclusions. How can counsel convince the judge to make an affirmative decision about allowing the expert's testimony? One way is to ask the witness whether other similar experts place reasonable reliance on the kind of material upon which the courtroom expert relied. A positive response moves the court toward introduction of the expert's opinion. At this point several courts impose a requirement that the trial judge make an independent assessment of the quality of the expert's underlying data.[62] Only after a finding that it is reliable can expert testimony be permitted. The trial judge must independently assess the reasonableness of relying on hearsay.

Imwinkelried describes this as the majority view in the United States.[63] The decision by the United States Supreme Court in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*[64] gave a boost to this position in federal courts. "*Daubert* contains a general mandate that judges [actively] police or screen the reliability of scientific testimony."[65]

"Georgia cases allowing an expert to express an opinion based on hearsay have not required that the hearsay be of the type 'reasonably relied upon' by experts in the particular field . . . ."[66] However, Milich sees that principle as a coming feature of Georgia law: "[I]t is likely Georgia courts will eventually employ such a requirement."[67] As local courts move to align state law with Federal Rule of Evidence 703, the judicial obligation to assure that the jury is exposed only to scientific evidence which is reliable increases.

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61. Stouffer Corp. v. Henkel, 170 Ga. App. 383, 317 S.E.2d 222 (1984). *See* Sticher v. State, 209 Ga. App. 423, 433 S.E.2d 660 (1993); Department of Human Resources v. Corbin, 202 Ga. App. 10, 413 S.E.2d 484 (1991) (when lab report relied on by expert contains opinions of third party, those portions of report are inadmissible hearsay).

62. Ronald L. Carlson, *Experts as Hearsay Conduits: Confrontation Abuses in Opinion Testimony*, 76 MINN. L. REV. 859, 872-73 (1992).

63. Imwinkelried, *Developing*, *supra* note 4, at 29.

64. 506 U.S. 914 (1993).

65. Imwinkelried, *Developing*, *supra* note 4, at 24.

66. MILICH, *supra* note 50, at 221.

67. MILICH, *supra* note 50, at 222.

C. *Clarification*

The sometimes uncertain posture of Georgia law suggests the need for statutory or rule enactment to guide judicial decisions. Current Federal Rule of Evidence 703 provides a worthwhile starting point. Adding a second provision to it in the pattern of Louisiana or Minnesota law would provide the requisite clarification.[68] A working draft for the additional provision might read something like this:

> In criminal cases, and generally in civil cases, underlying expert data must be independently admissible in order to be received upon direct examination. An expert's reliance on unadmitted data does not alone authorize introduction of the data. When good cause is shown in civil cases and the underlying information is particularly trustworthy, the court may admit the data under this rule to illustrate the basis for the expert's opinion. Nothing in this rule restricts admissibility of underlying expert data when inquired into on cross-examination.

The third sentence of this provision is not an invitation to trial judges to routinely admit case specific hearsay,[69] which is the sort of hearsay targeted by this proposal. Rather, the good cause exception is limited to compelling cases.

VI. CONCLUSION

Because of the proliferation of technical witnesses, courts should actively police the bases of modern expert testimony. With traditional sorts of experts who base their opinions largely upon personal knowledge or facts admitted at trial, little problem exists. But in a complex society where information comes from numerous sources and locations, difficulties increase. That which experts base their opinions upon can be flawed. The solution is for the trial judge, before testimony, to assess the reliability of the material upon which the expert relied.[70] As noted, with "ordinary" experts this review will often be cursory, but in areas of novel expert opinions it might be exhaustive. If the underlying data used by the expert is unreliable or contrived, the expert's opinions should be rejected as a matter of law.

On the other hand, many experts will testify based on solid information, even if that information is technically inadmissible under the

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68. *See supra* notes 12 and 14.

69. The distinction between expert theories and general scientific background material versus case specific reports is discussed at numerous points in this Article. *See supra* note 34 and accompanying text.

70. Carlson, *supra* note 62, at 872.

formal rules of evidence. This Article has addressed the issue of whether this underlying data becomes affirmative evidence in its own right; hearsay documents which are unauthenticated, save for reference to them by a courtroom expert, do not. The question of whether a courtroom expert's reliance on case specific reports of others automatically renders them admissible is easily answered. The answer is no. This observation applies with particular force to outside reports containing conclusions about the specific case in litigation. While the expert may use them to prepare her courtroom opinions, the hearsay rule bars detailed rendition of their contents or reception as exhibits unless they are traditionally authenticated. In criminal cases, the Confrontation Clause of the United States Constitution does the same.[71]

71. Carlson, *In Defense, supra* note 33, at 1182; Epps, *supra* note 2, at 64 n.52.