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Paul R. Rice

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The Allure of the Illogic: A Coherent Solution for Rule 703 Requires More Than Redefining “Facts or Data”

by Paul R. Rice*

I. INTRODUCTION

In his article entitled *Developing A Coherent Theory of the Structure of Federal Rule of Evidence 703*,¹ Professor Imwinkelried proposes a theory for the interpretation of Rule 703.² He argues that a restrictive interpretation of the terms “facts or data” in Rule 703 would resolve the conflicts that have plagued that Rule. Professor Imwinkelried’s proposal would exclude research data and other background facts from the definition of “facts or data.” By his interpretation, when an expert is testifying to an opinion based on facts that have not been proven at the trial the expert witness may only rely on unproven case-specific facts—facts directly related to the cause of action. While I disagree with

* Professor of Law, The Washington College of Law, The American University. Marshall University (B.B.A., 1965); West Virginia University (J.D., 1968); Yale University (L.L.M., 1970).

I would like to express my appreciation to Patrick McAvoy, my Dean’s Fellow, for his superb editorial assistance.

1. Edward J. Imwinkelried, *Developing a Coherent Theory of the Structure of Federal Rule of Evidence 703*, 47 MERCER L. REV. 447 (1996).

2. *Id.* at 450. Rule 703 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.

FED. R. EVID. 703.

his interpretation of the scope of the terms "facts or data," that disagreement is unimportant to the serious problem with Rule 703 that should be addressed in a "coherent" theory. That problem is a deeper, more fundamental flaw in the logic of Rule 703 which Professor Imwinkelried passingly acknowledged, but chose to ignore.³ This is the inconsistency in allowing expert witnesses to rely on facts that are not before the jury (both case-specific facts and scientific or background facts), and then pretending that those facts are not being accepted for truth when the jury accepts and relies upon the expert witness' conclusions.

Twitted by Professor Imwinkelried for having "been content to discuss [this] individual issue[], without endeavoring to develop a coherent theory of the structure of Rule 703,"⁴ I would like to take this opportunity to further open myself to his criticism by advancing that narrow issue again and, hopefully, demonstrating that his "coherent" theory misses the point.

Professor Imwinkelried first argues that the validity of the scientific basis of expert witness testimony should be governed by Rule 703 because it was designed for that purpose.⁵ After all, the Rule is entitled "Basis of Expert Witness Testimony."⁶ While I personally agree that the basis of expert testimony should be controlled by the rule bearing that title, Rule 703 establishes a standard for judicial screening of an expert witness' basis only for facts or data, and that standard is applicable only when the facts or data considered by the expert in arriving at his conclusion are *not part of the factual record* before the jury.⁷ Perhaps this is why the Supreme Court concluded that Rule 702, not Rule 703, controls the scientific basis of expert testimony.⁸

3. Imwinkelreid, *supra* note 1, at 475.

4. Imwinkelried, *supra* note 1, at 450.

5. Imwinkelried, *supra* note 1, at 452-54.

6. FED. R. EVID. 703.

7. Under Rule 703 the presiding judge must make a determination that the inadmissible evidence relied upon was "of a type reasonably relied upon by experts in the particular field." FED. R. EVID. 703.

8. In *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 113 S. Ct. 2786 (1993), the Court expressly held that scientific experts' opinions are screened through the filter of the term "scientific" in Rule 702. 113 S. Ct. at 2795. This, of course, was acknowledged by Professor Imwinkelried. Imwinkelried, *supra* note 1, at 449. Rejecting the "general acceptance" standard established in *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923) (addressing the admissibility of the systolic blood pressure deception test—the lie detector tests—the court established the test of "general acceptance in the particular field in which it belongs.") the Court instructed trial judges to independently assess the reliability of scientific expert testimony, by employing the scientific expertise they have never possessed, to evaluate scientific principles they have never understood! 113 S. Ct. at 2795.

Throughout the remainder of his article, Professor Imwinkelried identifies many of the disputes that exist about the interpretation of Rule 703, and explains how limiting the expert's reliance on inadmissible "facts or data" to "case-specific" facts or data, resolves those disputes. I believe that his limited interpretation of "facts or data" is unjustified. But more importantly, in focusing on those terms, he has lost sight of the more fundamental problem of the Rule's illogic. Before examining this disagreement and identifying the problem, however, the underlying rationale of Rule 703 should be clear.

II. THE PREMISES FOR RULE 703

Under the common law, the concept of logical relevance required that experts base their opinion testimony only on evidence introduced at trial.⁹ Stated differently, the expert had to give an opinion based on facts known to the jury in order to assist the jury as the sole and independent finder-of-facts. If the expert were permitted to rely on evidence that the jury did not hear, the expert's role would no longer be solely to assist the jury in understanding relevant technical and scientific principles and interpreting the evidence to which those principles should be applied. The expert would become an independent finder-of-facts.¹⁰

The Advisory Committee of the Federal Rules of Evidence recognized that in many cases experts have access to reliable hearsay that informs their professional judgment. Even though the evidence may be inadmissible hearsay, opinions premised on the evidence may still prove helpful to the finder of fact because the expert has used her special skills in assessing the reliability of the information and has determined that the evidence is reliable enough for use in forming her opinion. The Committee explained:

The opinion in *Daubert* did not address how nonscientific expert witness opinion testimony is to be judicially screened. Presumably, this standard will be logical relevance balanced against potential unfair prejudice—the standard of "helpfulness" that is implicit in the Rule 702 requirement that the testimony "assist the trier of fact."

9. As 1 MCCORMICK ON EVIDENCE § 15, at 24 (J. Strong, 4th ed. 1992) explains:

The essential reason in support of this view seemed to be that the jury was asked to accept as evidence the witness' inference, based upon someone's hearsay or upon other inadmissible facts which were presumably not supported by any evidence at the trial and which therefore the jury had no basis for finding to be true.

10. Paul R. Rice, *Inadmissible Evidence As A Basis for Expert Opinion Testimony: A Response to Professor Carlson*, 40 VAND. L. REV. 583, 586-88 (1987).

The third source [of information employed by expert witnesses] contemplated by the rule consists of presentation of data to the expert outside of court and other than by his own perception. In this respect the rule is designed to broaden the basis for expert opinions beyond that current[ly permitted] in many jurisdictions and to bring the judicial practice into line with the practice of the experts themselves when not in court.¹¹

While the Committee recognized that these sources of information would usually be admissible, the costs of laying the foundation for admission would often involve "substantial time in producing and examining various authenticating witnesses."¹² Therefore, the Committee concluded, that when experts, like physicians, "make[] life-and-death decisions in reliance upon [this evidence], [their] validation, expertly performed and subject to cross-examination, ought to suffice for judicial purposes."¹³ As the California Revision Commission, whose work the Advisory Committee relied upon, explained:

It is not practical to formulate a detailed statutory rule that lists all of the matters upon which an expert may properly base his opinion, for it would be necessary to prescribe specific rules applicable to each field of expertise. This is clearly impossible; the subjects upon which expert opinion may be received are too numerous to make statutory prescription of applicable rules a feasible venture. It is possible, however, to formulate a general rule that specifies the minimum requisites that must be met in every case, leaving to the courts the task of determining particular detail within the general framework.¹⁴

Therefore, the Committee premised Rule 703 on the belief that if experts, consistent with the general practices in their field, employ special skills to evaluate the reliability of evidence and are willing to form opinions based on that assessment, the courts should not require more for the admissibility of those opinions.¹⁵ The only requirement

11. See FED. R. EVID. 703 Advisory Committee's Note (discussed in 56 F.R.D. 183, 283 (1973)).

12. *Id.*

13. *Id.*

14. CAL. EVID. CODE § 801 (West 1995).

15. As explained by the Ninth Circuit in *United States v. Sims*, 514 F.2d 147, 149 (9th Cir. 1975): "Years of experience teach the expert to separate the wheat from the chaff and to use only those sources and kinds of information which are of a type reasonably relied upon by similar experts in arriving at sound opinions on the subject." Also, MCCORMICK ON EVIDENCE § 15, at 24 (J. Strong, 4th ed. 1992) explains:

This view is justified on the ground that an expert in a science is competent to judge the reliability of statements made to him by other investigators or technicians. He is just as competent indeed to do this as a judge and jury are to

explicitly stated in the Rule for the use of extra-judicial facts or data is that they be "of a type reasonably relied upon by experts in the particular field."¹⁶

This "reasonable reliance" requirement left at least two questions for the courts to resolve. First, how should the trial judges determine "reasonable reliance"? Second, how does the expert's reliance on this otherwise inadmissible evidence effect the status of that evidence? Does the acceptance of the opinion for its truth make the underlying facts admissible for truth as well? I will address the issues in reverse order.

III. UNDERLYING FACTS OR DATA: THE ILLOGIC OF IT ALL

Without debating the wisdom of Rule 703, my thesis is simply that the practice the Rule sanctions has logical implications for the evidence acted upon. If we allow an expert to testify to a conclusion that is premised on the belief of a certain fact (for example, an aeronautical expert testifies that an airplane crash was not caused by pilot error, basing the opinion in part on an FAA finding that certain defective parts were used in the maintenance of the plane), the jury's acceptance of and reliance upon that opinion necessarily involves the acceptance of the truth of its factual basis.¹⁷ Therefore, in a previous article I argued that the jury's *reliance upon* the expert's conclusion necessarily involved the jury's acceptance of the truth of the underlying facts.¹⁸ To preserve the independent fact finding role of the jury, I advocated the admission, for truth, of that underlying evidence.¹⁹ I did so, however, only with

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

MCCORMICK ON EVIDENCE § 15, at 24 (J. Strong, 4th ed. 1992).

16. FED. R. EVID. 703.

17. It is important to my argument that the jury has arrived at its conclusion through the expert's opinion—having reached a conclusion because the expert said it was the conclusion to reach. If the jury only used the expert's opinion for guidance—independently arriving at the same conclusion from the admissible evidence in the record—the jury will not necessarily have used the expert's opinion, and therefore, its factual basis for evidentiary purposes. My argument is premised on the belief that because of the elevated importance given by lay jurors to scientific opinions, the risk of the jury giving primary evidentiary importance to expert opinions is too significant to ignore.

18. Rice, *supra* note 10, at 587-91.

19. *Id.*

the understanding that standards should be in place to ensure that the expert has *applied her expertise* in assessing the reliability of the otherwise inadmissible evidence and can explain to the jury the reasons for her conclusion that it is trustworthy.²⁰

Professor Imwinkelried, quoting from an article by Professor Epps,²¹ characterized my position as "liberal" and "fearsome."²² Perhaps it is. The anxiety it spawns, however, is the logical product of the unrestrained liberality of Rule 703, not the quixotic views of this author. Professor Epps, and perhaps Professor Imwinkelried, advocates following the conventional approach of permitting the expert to detail the inadmissible basis of her opinion, but instructing the jury that the evidence may be considered only for the limited purpose of evaluating the expert's opinion—not as substantive proof.²³ Not explained by either Epps or Imwinkelried, 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 premised on an assumption of truth.

Professor Imwinkelried, again quoting Professor Epps, noted that not a single case has adopted the Rice view.²⁴ Sadly, I must acknowledge that this is true. Perhaps this is because the proposal is too fearsome. However, it may also be due to the fact that the Federal Rules of Evidence do not explicitly provide for the admissibility of this evidence.²⁵ Separating the body from the head of expert witness' opinions

20. *Id.*

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

22. Imwinkelried, *supra* note 1, at 475.

23. Epps, *supra* note 21, at 72-73.

24. Imwinkelried, *supra* note 1, at 475.

25. While the existing residual exceptions in Rules 803(24) and 804(b)(5) could be the vehicles through which this evidence is admitted, entrenched practices against admitting such evidence guarantee that these exceptions will seldom be employed. These rules are identical and provide that the hearsay rule does not exclude the following types of evidence:

A statement not specifically covered by any of the foregoing exceptions but having equivalent circumstantial guarantees of trustworthiness, if the court determines that (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence. However, a statement may not be admitted under this exception unless the proponent of it makes known to the adverse party sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet it, the proponent's intention to offer the statement and the particulars of it, including the name and address of the declarant.

is an accepted practice in our jurisprudence, beginning under the common law with medical experts testifying to patients' statements of medical history and causation that were not admissible for truth.²⁶ This practice was carried forward into the public records exception in Rule 803(8)(C) of the Federal Rules of Evidence which admits factual findings in government agency reports based on evidence not otherwise admissible.²⁷ The jury, however, is not allowed to consider that same evidence for its truth.²⁸ This history of course only makes the perpetuation of the practice under Rule 703 judicially acceptable because it is

FED. R. EVID. 803(24); FED. R. EVID. 804(b)(5).

26. Under the common law, medical doctors were permitted to recite what patients had stated to them about their medical histories and causes of their problems if history and causation were crucial to the doctors' diagnosis and to an understanding of the doctors' treatment. The jury, however, was instructed that it could not accept those statements for their truth even though crucial to the doctor's conclusions. See PAUL R. RICE, EVIDENCE: COMMON LAW AND FEDERAL RULES OF EVIDENCE § 5.02[E][1][a][ii], at 520 (2d ed. 1990); Annotation, *Admissibility of Physician's Testimony as to Patient's Statements or Declarations, Other Than Res Gestae, During Medical Examination*, 37 A.L.R. 3d 778 (1971). It was explained to the jury that the statements were only being repeated so that the jury could assess the weight to be given to the doctor's testimony.

27. FED. R. EVID. 803(8)(c).

28. See *Zenith Radio Corp. v. Matsushita Elec. Indus. Co.*, 505 F. Supp. 1125, 1145-46 (E.D. Pa. 1980).

Furthermore, we do not believe that the drafters envisioned that 803(8)(C) would result in the admission of all the exhibits and data that might accompany a given staff report. As we see it, the drafters of 803(8)(C) were motivated by a variation on the theme underlying all hearsay exceptions—that circumstantial guarantees of trustworthiness are provided by the presumption that governmental officials will perform their duties faithfully. Accordingly, they were agreeable to the receipt into evidence of governmental agency findings. We do not perceive, however, that the drafters intended to piggyback the whole administrative proceeding on top of the trial. To do so would permit vast amounts of time to be spent addressing the admissibility of exhibits which are but excess baggage with no direct bearing on the issues at trial.

Conceptually, we believe this result is consistent with the principles of F.R.E. 703, under which an expert's opinion, based in part on inadmissible evidence, is admissible even though the underlying data is not admissible for its truth. We sense a reluctance on the part of the courts to permit the underlying data unless it is independently admissible [W]e adhere to the view that, unless independently admissible, the exhibits do not come along as "excess baggage."

familiar and comfortable.²⁹ It does not make the practice any more logical.

In the codification of the hearsay exception for statements of medical diagnosis or treatment in Rule 803(4) of the Federal Rules of Evidence,³⁰ this illogical practice of severing the opinion from its basis was partially resolved. Under Rule 803(4), patients' statements of medical history and causation are now *admissible for truth* when pertinent to the medical diagnosis or treatment sought.³¹ This rule eliminates the common law requirement of the patient's desire for treatment and relaxes the standard of admissibility. Under the common law, the statements of medical history and causation had to be "crucial" to the doctor's diagnosis and treatment before they could be repeated by the physician to explain the diagnosis and treatment. Under Rule 803(4), the statements need only be "pertinent" to the diagnosis.

Although this relaxation of the standards has diminished the inherent reliability of the statements, they are still thought to be reliable enough to be heard and considered by the jury for their truth when related by the medical expert who heard and evaluated them. I am proposing that something comparable be done under Rule 703 for all expert witnesses whose testimony may now incorporate otherwise inadmissible evidence.³² If the expert employs special expertise in assessing the reliability of the evidence, and demonstrates to the presiding judge the reason for a conclusion that those statements are sufficiently trustworthy, surely this will provide an assurance of reliability equal to

29. I do not suggest that the current practice under Rule 703 were consciously borrowed from the common law. The evolution of the law is not always so conscious. The long-standing palatability of this practice, however, does explain current judicial attitudes and academic proposals under Rule 703. The history under the hearsay exception for statements for medical diagnosis and treatment lend "analogical support" to my analysis of Rule 703. Imwinkelried, *supra* note 1, at 476.

30. FED. R. EVID. 803(4).

31. *Id.*

32. In the Epps article cited by Professor Imwinkelried, Epps, *supra* note 21, at 63 n.47, the author criticized this analogy to Rule 803(4) and its common law precursor, arguing that the admission of the doctor's testimony was premised on reliability stemming from the patient's desire for treatment, not the doctor's ability to assess their reliability and her reliance upon them. In her words, "[i]f the statements fit within the Rule, they are all admissible, whether or not the doctor relied on them in coming to an opinion." Epps, *supra* note 21, at 63 n.47. In Epp's view, "[t]he analogy to Rule 803(4) is alluring but ultimately imperfect." *Id.* This conclusion is curious. My analogy to Rule 803(4) was solely for the purpose of illustrating how the illogical practice of separating the medical expert's opinion from its basis has been resolved by making the basis admissible for its truth. The reasons why statements of medical history or causation are considered sufficiently reliable—patient desire for treatment or physician capacity to evaluate reliability—were irrelevant to the point being made.

statements made by individuals who consult doctors solely for the purpose of obtaining diagnoses only for use in litigation.³³

While my proposal to admit for truth otherwise inadmissible evidence is expansive, it is also restrictive in that it establishes limits on the inadmissible evidence upon which an expert may rely. As the application of the expert's skills to assess the reliability of otherwise inadmissible evidence justifies the expanded use of that evidence, conversely, the absence of any focused assessment by the expert justifies the opposite conclusion. An expert should not be permitted to rely on inadmissible evidence simply because it is of a generic "type" reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject. Absent an evaluation of that specific evidence by the expert, the expert should be treated like any other witness relating inadmissible hearsay directly or indirectly through his opinions.

This brings us to the question of how "reasonable reliance" should be determined. Professor Imwinkelried and I agree that this must be through judicial screening, but we disagree on the nature of the judicial filter.

IV. THE JUDICIAL SCREENING FUNCTION

Professor Imwinkelried explored the various approaches taken by the courts: (1) the intrusive screening apparently envisioned in *Daubert*;³⁴ (2) the abdication to the testifying expert's pronouncement that this type of information is "reasonably" or "regularly" relied upon by experts in his field of specialization—possibly a generic assessment that ignores the specific evidence; and (3) the compromise that presumes reasonableness from customary practice, but gives the judge the power to reject that practice if the presumption is rebutted.³⁵ Imwinkelried argues that the standard for judicial screening is tied to the fundamental questions of

33. The Advisory Committee's Note to Rule 803(4) seems to support the broad conclusion that sanctioned expert reliance should make inadmissible evidence admissible. Addressing the common law practice of excluding from the hearsay exception statements to a physician consulted only for the purpose of enabling him to testify, while letting the physician use such statements as a basis for his testimony, the Committee stated:

While these statements were not admissible as substantive evidence, the expert was allowed to state the basis of his opinion, including statements of this kind. The distinction thus called for was one most unlikely to be made by juries. [Rule 803(4)] accordingly rejects the limitation. This position is consistent with the provision of Rule 703 that the facts on which expert testimony is based need not be admissible in evidence if of a kind ordinarily relied upon by experts in the field.

34. See *supra* note 8, at 2795.

35. Imwinkelried, *supra* note 1, at 466-67.

the scope of Rule 703 and in particular the terms "facts or data."³⁶ I disagree. Judicial screening under Rule 703 is limited to facts or data not otherwise admissible. While the focus of screening must surely include an assessment of whether the evidence is customarily employed by particular types of experts, (so that there is some assurance that the experts are adept at assessing its reliability) the fundamental issue is the reliability of the source of that data, which at the very minimum, is a straightforward hearsay issue. The judicial screening here is no different than under any of the delineated hearsay exceptions when the presiding judge considers all factors bearing on the reliability of the evidence.

The standard of reasonableness in Rule 703, and consistency with all other instances when hearsay is presented to the finder of facts, require a fact specific assessment that insures a minimum level of reliability. "Reasonably relied upon" requires that the expert's reliance be demonstrated as grounded in reason—a reasoned assessment of the reliability of the specific facts or data. Such screening also seems implicit in Rule 703, which justifies the use of otherwise inadmissible evidence on the ground that experts have the ability, through training and experience, to assess its reliability. Implicit in this premise is a requirement that the presiding judge demand a demonstration by the expert that she has employed her expertise and assessed the reliability of the evidence at hand. Without this assurance, the premise of Rule 703 is lost.³⁷

This demonstration of reliability, along with the availability of the expert for examination in the presence of the jury, allows the conclusion that the evidence introduced through the expert is as reliable as evidence admitted under the delineated exceptions in Rules 803 and 804. Therefore, the evidence should be admitted for truth. At the very minimum, this assurance guarantees a sufficient basis for the in-court exploration of the strengths and weaknesses of the evidence so that the jury can make an independent assessment of reliability.

Because of the entrenched nature of practices relating to the factual basis of expert witness testimony, a solution to this problem is unlikely absent revisions to the Federal Rules of Evidence. An explicit hearsay exception setting forth the standards guaranteeing trustworthiness

36. Imwinkelried, *supra* note 1, at 468-69.

37. In Rice, *supra* note 10, at 588-91, I argued that this assessment of reliability must focus on the particular evidence at hand rather than the generic type of evidence that it represents. Therefore, assessment of reliability must encompass not only the generic type (for example, a psychiatrist relying on interviews with siblings), but also the context of those interviews and the manner in which the evidence was acquired in this case (examinations by the psychiatrist herself, or a trained psychologist the psychiatrist has relied upon, rather than interviews conducted by a paralegal).

needs to be enacted. In addition, Rule 703 must be changed to clarify the evidentiary status that the otherwise inadmissible factual basis acquires once the judge has determined it to be trustworthy under the new hearsay exception. To that end, the following proposals are advanced.³⁸

Proposed Rule 703. Basis of Opinion Testimony by Experts³⁹

(a) Scientific principles and methodologies employed.⁴⁰

(b) Factual basis of opinion. 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.~~⁴¹ The facts or data need not have been proven beforehand, however, in the absence of admissible proof, a specific demonstration of reliability must be made of otherwise inadmissible hearsay statements pursuant to Rule 803(5). Evidence that is inadmissible on grounds other than reliability, may not be relied upon by an expert witness if disclosure of that evidence would be inconsistent with the purpose of rule excluding it.

Proposed Rule 803. Hearsay Exceptions; Availability of Declarant Immaterial⁴²

38. These proposals were developed in my Advanced Evidence seminar last year. In that seminar, students sitting as an evidence rules advisory committee, re-evaluated the entire evidence code and proposed comprehensive revisions that will be published in a forthcoming law review article.

39. New material is underlined. Deleted material is indicated by an overstrike.

40. In a future article, a proposed standard for the screening of scientific evidence will be proposed under this section of Rule 703 consistent with the view that a rule entitled "Basis of Expert Testimony" should control the whole basis—scientific and factual.

41. Language deleted from this rule and moved to new Rule 803(5), Statements Employed in Expert Testimony.

42. Contrary to the assertion of Professor Epps, *supra* note 21, at 68 n.69, I did not support the imposition of a "requirement that the hearsay declarant be unavailable" in my Vanderbilt piece. To the contrary, when noting that imposing a requirement of unavailability could address the potential problem of parties using the expert opinion testimony to conceal marginal evidence, I did not support this solution for a number of reasons:

First, . . . the probability of a party's employing such a tactic is remote. Second, if a party attempts to establish his factual case exclusively through an expert's

The following are not excluded by the hearsay rule, even though the declarant is available as a witness:

....
(5) Statement Employed in Expert Testimony. A statement employed by an expert in arriving at a conclusion offered by that expert at trial, to the extent that (a) the statement is of a type reasonably relied upon by experts in a particular field in forming opinions or inferences upon the subject, and (b) the expert has demonstrated to presiding judge a basis for concluding that the statement possesses substantial guarantees of trustworthiness.

Under these proposals, the expert may rely on evidence that is otherwise inadmissible *only* if the reliability of that evidence has been demonstrated to the presiding judge under the new hearsay exception in Rule 803(5). Once that demonstration has been made, the expert's opinion becomes relevant to the case that the jury is to decide because the basis of the opinion has become admissible. Above this threshold, questions about reliability will go to weight rather than admissibility.

V. "FACTS OR DATA"—THE BROAD VIEW AND THE NARROW VIEW—VARIATIONS ON THE SAME ILLOGICAL THEME

Professor Imwinkelried believes the key to resolving debates about the scope and interpretation of Rule 703 is the narrow construction of the terms "facts or data" (consistent with the minority view among the courts).⁴³ Professor Imwinkelried's approach includes only case-specific information rather than the research data underlying the expert reasoning applied to those case-specific facts.⁴⁴ To bolster this conclusion, he argues, correctly in my opinion, that the use of the terms "facts or data" in Rule 703 requires a construction consistent with the construction of the same terms in Rule 705.⁴⁵

testimony when independent evidence in fact is available, the judge or jurors naturally will become suspicious and, thus, view the expert's testimony with greater caution. Third, a party's failure to produce available evidence is the fair subject comment by the opposition in its closing argument. Fourth, and most important, the expert's availability for cross-examination about her biases and the basis of her opinion should apprise the jury sufficiently of the unreliability of that basis.

Rice, *supra* note 10, at 593.

43. Imwinkelried, *supra* note 1, at 451.

44. *Id.* at 454.

45. *Id.* at 455.

He argues that the structure of Rule 705 “strongly suggests that . . . ‘facts or data’ denotes case-specific information” because: (1) “on its face, the first sentence of the statute allows the expert to state the ‘reasons’ for her opinion without stating underlying ‘facts or data;’” and (2) “interpreting ‘facts or data’ as including all the research data virtually drains ‘reasons’ of any possible meaning” because “most components of the expert’s reasoning would be subsumed under [the terms].”⁴⁶

While his interpretation of the language in Rule 703 may be correct, his conclusion that an interpretation of “facts or data” as meaning anything other than case-specific facts would “virtually drain ‘reason’ of any possible meaning”⁴⁷ is not. Even if the terms “facts or data” encompass research data, the first part of Rule 705 requires that the expert opinion, when offered, be accompanied by “reasons therefore.” To the extent that “reasons” includes background research and other scientific data, that “data” is an exception to the general rule making disclosure on direct examination of the expert discretionary with the proponent. As a consequence, this guards against “bald” conclusions regardless of the breadth of the interpretation given to “facts or data.” It requires the expert to give an opinion with a synthesis of the case-specific facts and scientific principles underlying them—leaving the specific details for later exploration. For example, in the hypothetical involving the aeronautical engineer, the engineer could testify that the accident was caused by mechanical failure (the opinion), and that due to mechanical failure the plane rapidly lost altitude and descended in a spiralling motion (the reason). This testimony would be allowed without detailing the mechanical flaws found in the plane’s instruments, the evidence proving the existence of those flaws, and principles of physics and aeronautical engineering that compelled the conclusion that those flaws led to the plane’s fatal performance.

Finally, Professor Imwinkelried argues that if the term “facts or data” incorporates scientific principles as well as case-specific evidence, then “the expert could therefore [offer his opinion and] withhold any description of those components on direct examination.”⁴⁸ Consequently, “the result would be that the entire direct examination could be a witness’s bald assertion . . .”⁴⁹ As explained above, this conclusion is not reasonable, but even if it were, by his interpretation the expert would be permitted to give conclusions with no factual, case-specific basis offered in support. Imwinkelried does not address how, in a

46. *Id.*

47. *Id.*

48. *Id.*

49. *Id.*

coherent theory, a conclusion bald from lack of factual support is any more helpful to an independent finder-of-facts under Rule 702 than that same conclusion bald from the absence of scientific basis.

As a practical matter, bald assertions by expert witnesses pose little problem for two reasons. First, Rules 703 and 705 do not operate in a vacuum. The proponent of the expert's opinion will have to show that the opinion is logically relevant under Rules 401 and 402 before it will be "helpful" to the jury. This requires a demonstration that the expert has applied his expertise to facts that are relevant to the case at hand.⁵⁰ In addition, the presiding judge's newly acquired screening responsibilities under *Daubert* will require some disclosure of both the case-specific facts and the scientific data relied upon.

The second reason bald assertions by expert witnesses pose little problem is that common sense dictates that both the case-specific details and the underlying scientific principles and data be laid before the jury in order to make the testimony convincing. Moreover, the rules of discovery in civil cases will serve to discourage litigants from offering bald expert conclusions for which there is little support because the Rules guarantee that the opponent will discover the deficiencies in the expert's basis and analysis and will expose them on cross-examination.⁵¹

Regardless of whether a broad or narrow interpretation is given to the term "facts or data," the reality of the illogical practice under Rule 703 of separating expert opinions from their bases is not affected. Expert witnesses continue to play the role of the super-fact-finder, hearing

50. See *Christophersen v. Allied-Signal Corp.*, 939 F.2d 1106, 1114-15 (5th Cir. 1991), *cert. denied*, 112 S. Ct. 1280 (1992) (Expert testimony was excluded on relevance grounds because its factual basis was not consistent with the case at hand.); *Cunningham v. Rendezvous, Inc.*, 699 F.2d 676, 678 (4th Cir. 1983) (Expert drew conclusions about the cause of a ship sinking based on hypotheses that were flatly inconsistent with the evidence presented at the trial.); *Merit Motors, Inc. v. Chrysler Corp.*, 569 F.2d 666, 673 (D.C. Cir. 1977) (Summary judgment granted because plaintiff's expert made unsupported assumptions about the nature of the automotive market that was inconsistent with the reality of a market dominated by two forces—Ford and General Motors.).

51. While parties may not wish to exercise their option under Rule 705 by offering expert opinions without a statement of the underlying facts or data, some federal trial judges have begun to follow the practice of requiring experts to state their opinions without underlying facts or data being elicited—requiring that the basis be explored initially on cross-examination and thereafter on redirect. This practice seems both unfair and ill-advised. It is unfair because it separates the presentation of the opinion from the exploration of its basis. It is ill-advised because it saves no judicial time—what normally occurs on direct examination is shifted to redirect examination, which in turn necessarily expands the final examination on recross.

evidence that others may not hear and offering conclusions as a *fait accompli*.⁵²

VI. CONCLUSION

Professor Imwinkelried's proposal to limit the meaning of the term "facts or data" is not a panacea for all of the problems of Rule 703. The illogical practice of severing the expert opinion from its basis is neither addressed nor changed by limiting the definition of these terms. Rule 703 permits expert witnesses to rely on inadmissible evidence, but provides no guidance to judges on how and for what purpose this expanded basis should be incorporated into the trial. If experts are permitted to rely on otherwise inadmissible evidence, standards should be in place for ensuring that the reliability of that evidence has been assessed by the expert and explained to the jury. These guarantees of reliability in place, the otherwise inadmissible evidence should be admissible for truth.

52. Rice, *supra* note 10, at 586.

