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Expert Witnesses and the Federal Rules of Evidence

Brainerd Currie was already a legend when he came to Duke from the University of Chicago. I was a third-year law student then and took his course in Conflicts in the spring of 1962 — a dazzling intellectual display centered around the hard practicalities of complex litigation. But Currie was more than just a great teacher and scholar.

Too busy to take a vacation ("How can you talk about taking a trip to Europe, McElhaney? I'm too busy to go to Europe, and you're going to be practicing."), he had time to talk with us after class; to drink a cup of coffee or eat lunch with his students.

He took a personal interest in my litigation career, typing a letter of recommendation on his old office machine to a famous trial lawyer for whom he thought I should work. He did it without being asked because he thought it would be more valuable than taking a new graduate course in Trial Advocacy.

I was flattered and touched — I still am. Even though I teach Conflicts as well as Evidence, it seems more than appropriate to dedicate this article on the practicalities of litigation to his memory.

By James W. McElhaney*

A casual reading of the Federal Rules of Evidence[1] gives the impression that not much of the familiar practice concerning expert witnesses has been changed. That impression is wrong. Nearly everything is affected by the six short rules which comprise Article 7, Opinions and Expert Testimony, and by three exceptions to the hearsay rule found in Article 8.

This deceptive simplicity is a product of the terse style of the Federal Rules, overlaid on the complex set of common-law principles of evidence governing expert testimony. Those principles must be thoroughly understood in order to appreciate what the Federal Rules accomplish.

While organized in a system that superficially suggests they stand alone, the rules are actually a set of additions and modifications to the common law, and only make sense in that context. The Federal Rules are not a complete code. They do not purport to settle every question, explain every procedure or establish every norm. By themselves, the Federal Rules of Evidence tell less about how evidence is offered and admitted than the Federal Rules of Civil Procedure tell about the procedure of trying cases.

Most of the departures from the familiar practice of examining expert witnesses were thoughtful proposals made by the original drafters of the rules and were virtually untouched in the long legislative process.[2] But, as

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1. Pub. L. No. 93-595 (Jan. 2, 1975), 88 Stat. 1929, *codified at* 28 U.S.C.A.
2. Article 7, Opinions and Expert Testimony, contains six rules. Rules 701, 702, 703 and

close examination will show, not every change was advertent, nor was every problem solved.

A Hypothetical Case

The easiest way to see what the Federal Rules do to the examination of experts is to test them against a set of facts. The case is a simple one, with only one or two twists in it to help it yield as much as possible:

Price vs. Daniels

A diversity action is brought in Federal District Court by Jon Price, who claims that he received a severe head injury in an automobile collision caused by the negligence of the defendant, Mr. William Daniels. Shortly after the accident occurred, Mr. Price went to see his family doctor, Harold Griffin, M.D., complaining of headaches and a strange jerking in his left hand. Realizing Mr. Price's symptoms might well mean a serious neurological injury, Dr. Griffin referred him to a specialist in neurology, Dr. Carlington Young, and sent Dr. Young all his notes from his original physical examination.

Dr. Young conducted a thorough physical and neurological examination of Mr. Price. In addition to objective tests, this involved taking a complete history from Mr. Price, including details of his present symptoms, their onset and severity as well as information concerning the automobile accident. Mr. Price explained he had struck his head against the post on the side of Mr. Daniels' car while riding as a passenger.

In accordance with his usual practice, Dr. Young also sent blood and urine samples to a local laboratory, Med-Test, Inc., where two technicians, Ms. Lotta Beakers and Mr. Ronald Hogan, conducted tests which showed no abnormalities. The results were sent back to Dr. Young in the ordinary fashion.

As part of the total medical work-up, Dr. Young sent Mr. Price to the local hospital, where he was administered an electro-encephalogram by another neurologist, Dr. Herman, and an X-ray examination of the head by a radiologist, Dr. Blum. Following these physical tests, Dr. Young decided to rule out any possibility of a psychiatric cause of Mr. Price's symptoms. Accordingly, he sent Mr. Price to a psychiatrist, Dr. Karen Schuler, who spent a number of hours with Mr. Price. She sent Dr. Young a careful evaluation, which essentially indicated that Jon Price was suffering from no psychiatric disorders.

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704 were not changed by Congress and were not the subject of floor debate. Rules 705 and 706 were the subjects of minor stylistic alterations: "judge" was changed to "court" in both 705 and 706, and "his" and "cases" were changed to "its" and "civil actions and proceedings," respectively, in Rule 706. These rules were not the subject of floor debate, either, even though there was disagreement about the rules in subcommittee hearings.

A useful synopsis of the legislative history of each rule is contained at the beginning of each section of J. WEINSTEIN & M. BERGER, WEINSTEIN'S EVIDENCE (1975).

Taking his own findings and all the other evaluations into account, Dr. Young went ahead with his course of treatment, which, unfortunately, was only partially successful. When he was contacted by Mr. Price's lawyer, Dr. Young said that he would be willing to testify in the upcoming trial and that in his opinion Mr. Price was suffering from a serious brain injury which was quite difficult to treat and might well be at least partially disabling for the rest of his life. Moreover, he was of the opinion that the condition was caused directly by the automobile accident.

Mr. Price's lawyer was pleased, since by that time it was evident that the defendant, while admitting that the collision took place and that the plaintiff was a passenger in his car, denied the nature, cause and severity of Mr. Price's injuries. To strengthen the case, Mr. Price's lawyer thought it would be helpful to consult a nationally prominent expert, Dr. Herman Willis, who examined Mr. Price, similarly took his medical history, reviewed all the files and supported Dr. Young's conclusions in every respect.

But on the eve of trial, complications set in. Dr. Young, the treating expert, suffered from a massive stroke and died. Mr. Price has had to find a new neurologist, a singularly unimpressive witness who, moreover, is reluctant to testify except in a most perfunctory fashion.

The practical question for Mr. Price's lawyer is painfully obvious: May Dr. Willis, the nationally recognized expert who did not treat Mr. Price, nevertheless be called on to supply the testimony that the unfortunate Dr. Young might have given — or will he be limited to a supplementary role in a case which has suddenly changed dramatically? In this situation, the common-law rules governing expert testimony present a confusing maze. While the case surely may be tried, it will be long and difficult, particularly against determined opposition.

THE COMMON-LAW RULES

Hearsay

The most striking problem is that Dr. Willis is not a treating doctor. Almost everything he knows about Mr. Price is hearsay from one source or another. Furthermore, he is unable to provide the necessary foundations to establish whatever exceptions to the hearsay rule might be available.

A good starting point is Mr. Price's medical history. Take, for the moment, just that part which was related to Dr. Willis by Mr. Price himself. There is the familiar exception to the hearsay rule concerning present body conditions.[3] Under this rule, a statement of *present* feelings or symptoms — as for example, "I am having a terrible pain in my left arm," is admissible as an exception to the hearsay rule.[4] It does not matter to whom the

3. MCCORMICK ON EVIDENCE §291 (2d ed., Cleary ed. 1972). All citations to MCCORMICK below refer to this edition.

4. *See, e.g.*, Fidelity Service Ins. Co. v. Jones, 280 Ala. 195, 191 So. 2d 20 (1966); Fagan v. Newark, 78 N.J. 294, 188 A.2d 427 (1963).

remark is made, whether to a treating physician or a mere bystander; the objection that the remark might be self-serving goes to the weight rather than to the admissibility of the evidence.[5] Involuntary exclamations of pain have an even greater claim to admissibility, since they are not considered hearsay at all[6] and hence have no need for any exception to the hearsay rule to make them admissible. Groans, grimaces, cries of pain and the like which are, in fact, involuntary are not filtered through the conscious thought processes of the declarant and are therefore not identified as out-of-court statements offered to prove the truth of the matters asserted. To the extent that they may actually be hearsay — that is, deliberately feigned rather than truly involuntary[7] — that possibility may be explored on cross-examination of the witness who testifies to the groans or cries. It is perfectly proper to ask the witness if he thought the person was feigning in any fashion, since the psychological disposition of someone — as in whether he appeared serious or joking — is one of those areas where lay opinions are traditionally permitted.[8]

But, unfortunately, none of these rules are of any help to the testimony of Dr. Willis. When Dr. Willis examined Mr. Price, he was in no particular pain, and the intermittent jerking in his left hand did not occur during the visit. Mr. Price was not even able to twitch, except to imitate for Dr. Willis what sometimes occurs involuntarily.

The next logical exception to the hearsay rule to consider is what is sometimes called the "treating doctor" exception.[9] It is reasoned, perhaps more out of necessity than sound logic, that when one consults a doctor or

5. It has been suggested that trial courts have the discretion to exclude statements on the basis that they were, from all of the surrounding circumstances, obviously manufactured evidence. McCORMICK ON EVIDENCE §291 at 690.

6. Note, *Medical Testimony and the Hearsay Rule*, 1964 WASH. U. L.Q. 192, 194.

7. An involuntary nervous or muscular reaction is not hearsay, since it is not a statement offered to prove the truth of the matter asserted. On the other hand, feigned involuntary reactions are conscious efforts to communicate to others. They are "statements," and are considered hearsay. In other words, feigned bodily reactions are assertive conduct intended to transmit an idea to another just as surely as nodding "yes" in response to a question.

Half way between these two concepts is non-assertive conduct. Non-assertive conduct is deliberate activity that was not done to convey an idea but that is offered in evidence to prove the unspoken assumption on which the activity rested. This sounds complicated as the dickens, but only because it is in abstract terms. A sea captain inspects a ship and then boards it with his family. If his actions are later offered to prove the seaworthiness of the vessel, they are considered non-assertive conduct. The captain did not *tell* anyone the ship was seaworthy, but his actions are now being used for that purpose. Under the analysis of Wright v. Doe d. Tatham, Exchequer Chamber, 1837. House of Lords, 1838. 7 Ad. and El. 313, 5 Cl. and F. 670, this is inadmissible hearsay.

If the motive of our hapless captain was to convince a recalcitrant crew that the ship was safe, then, of course, it would be *assertive* conduct, excludable as hearsay even in those jurisdictions which, like the Federal Rules of Evidence, do not recognize non-assertive conduct as hearsay. See Rule 801(a) and the accompanying Advisory Committee Note.

8. Horn v. State, 12 Wyo. 80, 73 P. 705 (1903).

9. McCORMICK ON EVIDENCE §292.

other "practitioner of the healing arts" to be treated, he wants to be cured.[10] This, it is claimed, gives the patient — the out-of-court declarant — a strong motive to tell the truth to the doctor. Accordingly, there is an exception to the hearsay rule for matters of medical history related to a doctor consulted for the purpose of treatment.[11] In many jurisdictions, perhaps the majority,[12] this is only a partial exception to the hearsay rule,[13] which results in a rather strange limiting instruction, perhaps even more incomprehensible and incapable of being followed by the jury than usual. Under this rule, a treating doctor is permitted to repeat medical history given to him or her. It is not admissible "to prove the truth of the matter asserted," but rather to "explain" the opinion of the doctor.[14] This limitation seems to lack even the superficial logic pertaining to other statements which are admitted to prove they were said but not to prove they were true.[15] This is so because the doctor *is* permitted to rely on the statement and the "treating doctor" exception permits the doctor to testify to his actual opinion, on which the jury is then entitled to rely.

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10. Goldstein v. Sklar, 216 A.2d 298 (Me. 1966).

11. Meaney v. United States, 112 F.2d 538 (2d Cir. 1940); Peterson v. Richfield Plaza, 252 Minn. 215, 89 N.W.2d 712 (1958). *Contra,* Brewer v. Henson, 96 Ga. App. 501, 100 S.E.2d 661 (1957).

12. MCCORMICK ON EVIDENCE §292 at 691. While this was "probably" the majority in 1972, when the latest edition of *McCormick* was published, a number of states have already adopted the Federal Rules of Evidence and more are actively considering them. All of the old "nose counts" on this and other questions are changing.

13. Goldstein v. Sklar, 216 A.2d 298 (Me. 1966).

14. Traveler's Ins. Co. v. Smith, 448 S.W.2d 541 (Tex. Civ. App. 1969). There a doctor was permitted to testify that his deceased patient told him he was moving some heavy equipment when he suddenly had severe pain. This was held admissible to "explain" the doctor's opinion that moving the equipment caused damage to the deceased's heart, but was not admissible to prove that he moved the equipment.

15. Imagine the instruction you might try to give in the *Traveler's Ins. Co.* case, 448 S.W.2d 541 (Tex. Civ. App. 1969), note 14, *supra.* If you were trying to help a jury understand its function, you would probably not ask them to accept the doctor's opinion with its assumptions but reject those assumptions themselves. On the other hand, it is important to ask for the limiting instruction. Without it, there is evidence which the jury can use to decide that the plaintiff's decedent actually moved the heavy equipment. When there is no other evidence of causation, failure to request the limitation would prevent a directed verdict.

The whole process could be simplified if the limiting instruction could be waived, even though the objection concerning the restricted admissibility was preserved on the record. In this way the right to a directed verdict could be saved in a proper case without cluttering the trial with a meaningless instruction, the principal effect of which is to confuse or, worse, underscore damaging testimony.

In a minority of jurisdictions before the Federal Rules of Evidence, statements of medical history to a treating doctor were complete exceptions to the hearsay rule. There, and under the Federal Rules, they are admissible to prove the truth of the matter asserted, even as to matters of causation, as long as the statements are germane to treatment. Cestero v. Ferra, 110 N.J. Super. 264, 265 A.2d 387 (1970). But if the statements have no bearing on treatment, they are not admissible, since the basis for their reliability, the desire to be cured, is no longer present. Pinter v. Parsecian, 92 N.J. Super. 392, 223 A.2d 635 (1966).

But once again, this is small comfort. Dr. Willis was not a treating doctor.

In some jurisdictions, a doctor does not need to be consulted solely for the purpose of treatment in order to qualify for the exception. In a Wisconsin case,[16] a psychiatrist was consulted, at the instance of the plaintiff's attorney, for both treatment and testimony. Rejecting the argument that this fatally tainted the doctor's testimony, the Wisconsin Supreme Court reasoned that the dual purpose of consultation went to the weight rather than the admissibility of the testimony, affirming a verdict for the plaintiff which amounted to her medical expenses.[17] Similarly, in a Washington case,[18] an eye doctor who was not consulted for treatment based his diagnosis in part on answers to questions concerning the contents of certain eye charts and other tests. Relying on the testimony of the doctor that the plaintiff could not appreciate the medical significance of his answers, the Washington court concluded that the doctor's findings were admissible.[19] One way to consider this case is as if it did not involve hearsay at all. Since the testimony of the doctor was that the person being tested could not appreciate the significance of his verbal responses, they were not clouded by the reasoning process of the out-of-court declarant. Thus they do not seem to share the problems of hearsay at all, and should not require an exception to the hearsay rule to make them admissible.

But this does not help Dr. Willis, either. None of the medical history questions he asked during his work-up called for answers which were incomprehensible to Mr. Price. Furthermore, he was not consulted partly to treat and partly to testify, but rather simply to testify.

You may conclude that this problem is unfair; an unlikely twist of events concocted to put the common-law rules of evidence in a bad light. Very well, let us bring back Dr. Young, as easily as we disposed of him in the first place. Even after we have breathed life into him again, he will not fare much better under the hearsay rule than Dr. Willis. Certainly he is a treating doctor and qualifies for that exception to the hearsay rule. But see what else he faces:

Dr. Young did not reach his conclusions alone. He relied on the reports and diagnoses of two medical technicians, another neurologist, a radiologist, Mr. Price's family doctor and a consulting psychiatrist. All of that is hearsay, inadmissible under the treating doctor exception. Must Mr. Price then call everyone remotely connected with the final diagnosis to testify

16. Ritter v. Coca-Cola Co. (Kenosha-Racine) Inc., 24 Wis. 2d 157, 128 N.W.2d 439 (1964).

17. In *Ritter*, the plaintiff drank from a bottle of Coke which allegedly contained the torso and tail of a decomposed mouse. The next day she consulted a lawyer, and later that same day went to see a doctor, who conducted physiological and chemical tests and determined she had suffered no physical injuries. Two weeks later she consulted the psychiatrist, who later testified at the trial. The verdict was $2,500.

18. Hinds v. Johnson, 55 Wash. 2d 325, 347 P.2d 828 (1959).

19. *Id.* at ___, 347 P.2d at 830.

about what they saw and did? Fortunately not.

One of the exceptions to the hearsay rule is an ancillary sort of rule which many jurisdictions recognize. Under it, the results of simple, standardized laboratory tests are in effect admissible in evidence.[20] A treating doctor is permitted to rely on them in giving an expert opinion without rendering the opinion hearsay and without having to testify hypothetically. This is particularly so when the laboratory tests are of the sort that do not form the core of the opinion or do not show the thing itself in issue,[21] as would otherwise routine blood groupings when they are offered on the issue of paternity.[22] Thus it seems the reports of Ms. Beakers and Mr. Hogan can come into evidence without having to call them to testify.

But that is really not much help, either. Certainly it is an advantage not to have to call every laboratory technician who had anything to do with the case. Otherwise, litigation would be impossible. But the hematology and urinalysis in this case were useful only in their negative sense. Some alternative diagnoses were set to rest simply because these tests failed to show anything out of the ordinary. In other words, they helped rule out remote possibilities, but were of no help whatever in choosing between the major probabilities concerning Mr. Price's condition. The reports which did that came from Dr. Herman, the neurologist who conducted the electro-encephalogram, Dr. Blum, the radiologist, Dr. Schuler, the psychiatrist, and Dr. Griffin, Mr. Price's family doctor.

Recall that Dr. Young is alive again and able to testify as the treating doctor. He has now been called to the stand on Mr. Price's behalf. As a fact witness to what he saw, heard and did, Dr. Young may testify to his own observations and actions. Well enough. The treating doctor exception to the hearsay rule will let him repeat the medical history given to him by Mr. Price to the extent that what he was told was helpful in forming his medical opinion; that is, those matters which are called "pathologically germane."[23] Furthermore, Dr. Young will be able to testify that he referred Mr. Price to some other doctors. But will Dr. Young be able to tell the judge and jury the results of the other doctors' evaluations? No, they are hearsay.[24] They are statements made out of court offered to prove the truth

20. *E.g.*, Sundquist v. Madison Rys. Co., 197 Wis. 83, 221 N.W. 392 (1928).

21. *E.g.*, Taylor v. Monongahela Ry., 155 F. Supp. 601 (D. Pa. 1957); Town of Framingham v. Department of Public Utilities, 355 Mass. 138, 244 N.E.2d 281 (1969).

22. The use of blood groupings in paternity cases has sparked a considerable amount of scholarly writing. See, *e.g.*, Comment, *"Blood Will Tell!,"* 1 MER. L. REV. 266 (1950); Krause, *Scientific Evidence and the Ascertainment of Paternity*, 5 FAM. L.Q. 252 (1971); Ross, *The Value of Blood Tests as Evidence*, 71 HARV. L. REV. 466 (1958).

23. See note 15, *supra*, on the limited use of this evidence.

24. Equitable Life Assur. Soc. v. Kazee, 257 Ky. 803, 79 S.W.2d 208 (1935), represents the majority rule. There is, however, a respectable minority of jurisdictions which permit experts to *rely* on the opinions of others even though they go beyond standard laboratory reports and the like. *See, e.g.*, Schooler v. State, 175 S.W.2d 664 (Tex. Civ. App. 1943); Sutherland v. McGregor, 383 S.W.2d 248 (Tex. Civ. App. 1964). The effect of the minority

of the matters asserted.

Since Dr. Young's final diagnosis was based on all these other evaluations, his final conclusions themselves may not be received into evidence. Does this mean Mr. Price may not prove his case? No. Fortunately, there is an escape from the tension created by the operation of the hearsay rule, but it is tortuous, time-consuming and confusing. The escape route is called the hypothetical question.

Perhaps the easiest way to understand what a hypothetical question is and why it is required, is to look more closely at the function of expert witnesses.

The Opinion Rule

Ordinarily, the law insists that witnesses testify in the language of perception. That is, they must say only what they saw, heard, felt, touched, tasted or did.[25] Whatever inferences or conclusions can be drawn from these observations are left up to the jury, not the witness. The theory behind this rule is enticing: The witness should tell what happened and let the jury decide what it means. The theory is fine. It is only in application that it causes any difficulty.[26] The first problem is that only severely disturbed people customarily talk in the language of perception.[27] In normal discourse, opinions lurk everywhere.[28] The judicial responses to this reality have been on several levels. One of them is to apply the opinion rule only to in-court statements.[29] It is a rule which properly has no application to statements made outside of court and offered, for example, as exceptions to the hearsay rule, although one will occasionally find courts so smitten with the theory behind the opinion rule that they will even apply it to out-of-court statements.[30] Another response to the difficulty in expressing only perceptions is to allow the trial court wide latitude in enforcing the rule against opinions. There are very few decisions reversing trial courts

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rule is not to admit the hearsay opinions, but rather to permit the witness to use the information as part of the basis for his own opinion even if the information is not admissible in evidence. This is very much like federal rule 703.

25. J. WALTZ, CRIMINAL EVIDENCE 298-300 (1975).

26. J. MAGUIRE, EVIDENCE: COMMON SENSE AND COMMON LAW 23-27 (1947).

27. I am endebted to Irving Younger, Samuel S. Leibowitz Professor of Trial Technique, Cornell University, for the following example:

> "How are you feeling?"
>
> "Well, I moved my bowels at 7:30 this morning. My temperature is 98.6 degrees, my respiration is 16 per minute, my pulse is running about 76 to 78 when resting and my blood pressure is 130 over 70."

28. "How are you feeling?"
"Fine."

29. MCCORMICK ON EVIDENCE §18.

30. *E.g.*, Philpot v. Commonwealth, 195 Ky. 555, 242 S.W. 839 (1922). The majority view is contrary; it admits statements which qualify as exceptions to the hearsay rule even though they are in opinion form. *See, e.g.*, Wells v. Burton Lines, 228 N.C. 422, 45 S.E.2d 569 (1947).

for permitting opinions in violation of the rule.[31]

Beyond the difficulty of expression is the problem that most matters thought to be objective observations are, to some extent at least, expressions of opinion. In many situations, what is obviously an opinion is the only useful testimony a witness can give. As Professor Waltz observes, what else can the witness say besides, "I smelled smoke"?[32]

Furthermore, there is a catalog of opinions that lay witnesses are permitted to give, including those concerning weights,[33] measures,[34] speed,[35] time,[36] sobriety,[37] sanity[38] and other common matters, when an opinion is the only useful form of testimony anyone could expect, or when it is an acceptable shorthand rendition of more basic observations that can be adequately explored on cross-examination.[39]

But the rule against opinions does not apply to expert witnesses.[40] They are called for the very purpose of interpreting data that the jurors cannot understand by themselves. Expert witnesses are permitted to do this whether or not they have any first-hand factual data about which to testify in the trial.[41] In other words, an expert witness is an explainer, whether he explains his own observations or someone else's.

Hypothetical Questions

Understanding the interpretative role of the expert witness explains the distinction which requires hypothetical questions. When the expert is explaining his own observations as, for example, a treating doctor who testifies to his own tests and examinations and the resulting diagnosis, he is permitted to give his opinion on his observations in a straightforward fashion.[42] The non-fact expert — the one who explains the meaning of other witnesses' testimony — must answer hypothetical questions.[43] The purpose behind this rule is to prevent an expert from giving the impression, even

31. "[E]xcept in extreme cases, where we can see that harm is done, all such matters are in the discretion of the trial judge." Central R. Co. of New Jersey v. Monahan, 11 F.2d 212, 214 (2d Cir. 1926).

32. J. WALTZ, THE NEW FEDERAL RULES OF EVIDENCE 108 (1975); Waltz, *The Uses of Non-Medical Expert Information in Civil Litigation*, 48 CHI. BAR. REC. 15 (1966).

33. Hardy v. Merrill, 56 N.H. 227 (1875) (dicta). The case contains an interesting list of permissible lay opinions at page 241.

34. Gardner v. Metropolitan St. Ry., 223 Mo. 389, 122 S.W. 1068 (1909).

35. St. Louis-San Francisco Ry. v. Fox, 359 P.2d 710 (Okla. 1961).

36. State v. McDaniel, 39 Ore. 161, 65 P. 520 (1901).

37. Hall v. Young, 218 Ark. 348, 236 S.W.2d 431 (1951).

38. Mason v. United States, 402 F.2d 732 (8th Cir. 1968), *cert. denied*, 394 U.S. 950 (1969).

39. MCCORMICK ON EVIDENCE §11 at p. 25.

40. J. WALTZ, CRIMINAL EVIDENCE 300 (1975).

41. 7 J. WIGMORE, EVIDENCE §1917 (3d ed. 1940). All citations to WIGMORE below refer to this edition.

42. MCCORMICK ON EVIDENCE §14.

43. *Id.*

inadvertently, that he believes the facts on which his opinion is based.[44]

Actually, instead of being a point of distinction between fact and non-fact witness experts, the hypothetical question was intended to put the two on an equal footing. The common-law rule, which still applies in many jurisdictions, requires that *any* expert — either a fact witness or a mere explainer — give the reasons for his opinion before testifying to the opinion itself.[45] With the fact witness expert, the process is simple: first testify to the observations and then explain what they mean. Imposing the same process on the expert who merely interprets data requires a compensatory mechanism, the hypothetical question. It is designed to set forth what is being explained without the witness' saying whether he believes what he is explaining actually took place. But, in what seems to be an unavoidable pattern in the law of evidence, a sensible-sounding theory causes a nearly hopeless morass in real life.

It is virtually impossible to state *all* the bases for an opinion. Accordingly, some states left it to the cross-examiner to determine what the

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44. *Cf.* 2 J. WIGMORE, EVIDENCE §672.

45. Whether the witness is a fact witness expert or a non-fact witness expert, the bases come before the opinion. This permits the fact-finders to disregard an opinion — no matter how logically unassailable — if they do not believe the facts on which it is based. The requirement that the bases come first is designed to help the fact-finders in sorting things out.

Logically, Wigmore's justification for the hypothetical question goes to the requirement that the bases come first, not that they must be hypothetical:

> The key to the situation, in short, is that there may be two distinct subjects of testimony — premises, and inferences or conclusions; and that the tribunal must be furnished with the means of rejecting the latter if upon consultation they determine to reject the former, *i.e.* of distinguishing conclusions properly founded from conclusions improperly founded.
>
> That this is the orthodox and accepted theory of the hypothetical question in our law may be gathered from the following passages, in which the principle is indicated in one or another aspect.

Id. at 793.

Wigmore then attacks a "False Theory; 'Usurping the Province of the Jury.' " *Id.* at §673. "Usurping the province of the jury" is an unfortunate hyperbole, rightly derided. It is the justification for the silly "ultimate issue" rule, of which Wigmore is also critical. 7 J. WIGMORE, EVIDENCE §1920.

The term, unfortunate in apparent scope and emotional content, does describe why the bases for an opinion must be *hypothetical* in form: to prevent experts from implicitly testifying to the truth of facts on which they have no first hand information.

While the danger of "usurpation" logically explains the requirement of hypothetical bases, Wigmore's attack still makes some sense. Abolishing the hypothetical question will not mislead the jury, as long as it can be shown through cross-examination or some other method that the opinion is based on hearsay or assumptions and not first-hand knowledge.

To sum it up, Wigmore is caught in his own analysis. The logic of the common law's requirement of hypothetical questions makes sense. The assumed need for it does not. In other words, Wigmore should have attacked the basis — the need to protect the jury — rather than the opinion itself.

opinion rested on,[46] while others continued the rule more strictly, requiring that the principal bases, at least, be stated before the opinion itself.[47]

This brings us back to the Price case. Dr. Young, you will remember, was brought back to life in an attempt to simplify the case. But now it is evident why not much was accomplished. Because the urinalysis and hematology were mere ancillary, standard laboratory tests, the technicians, Ms. Beakers and Mr. Hogan, may be dispensed with in any event. But although Dr. Young was the treating physician and may testify to what Mr. Price told him about the medical history of his complaints, Dr. Young and Dr. Willis are in exactly the same situation with respect to the findings of the other experts. Since they both rely on these opinions in forming their own conclusions, they are faced with explaining data supplied by others.

The awkwardness of the hypothetical question, which is required in such instances, caused courts to search for ways to avoid it. They came up with at least three. The first was to allow the expert to listen to the evidence during the trial and assume it all to be true without forcing the questioner to recapitulate it.[48] This method is generally permissible if the evidence on which the expert relies is not in substantial dispute.[49] It works well enough if you can find an expert willing to sit through an entire trial. The second method was to create hearsay exceptions, especially for doctors who were consulted for the purpose of treatment.[50] The chief effect of these exceptions is to allow the partial non-fact expert to be treated as if he were a completely fact witness expert. The third device was simply to ignore the hearsay problems with standardized tests, which are only peripheral to the opinion.[51]

Obviously enough, none of these rules solves the problem for either Dr. Willis or Dr. Young. Whichever of them testifies, a hypothetical question will be required. Is that so bad?

Not in itself. The real rub lies in establishing the bases for the opinion. Since no hearsay exception is available to permit these witnesses to testify to the findings and opinions of the other experts consulted, these must be established by independent evidence. The other experts, on whose opinions our diagnosticians relied, must be called to testify themselves. The logistical difficulties alone are significant.

One of the problems this creates is the order in which witnesses are called to the stand. Since it was thought that the jury might believe something was true merely because it was recited in a hypothetical question, it is typically required that all of the facts assumed in the hypothetical must

46. McCORMICK ON EVIDENCE § 14 at 31 n. 78.

47. *See generally* McCORMICK ON EVIDENCE §14.

48. 2 J. WIGMORE, EVIDENCE §681.

49. "Two obvious requirements are that the assumed facts must be clear to the jury and must not be conflicting." McCORMICK ON EVIDENCE §14 at 32.

50. See text at note 9, *supra*.

51. See text at note 20, *supra*.

be established by independent evidence *before* the question is asked. Thus, it is objectionable for a hypothetical question to "assume facts not in evidence."[52] Fortunately, this rule is tempered with the discretion of the trial court to allow the question even though it does assume facts not yet testified to, if the questioner promises to prove the missing elements by "connecting up later."[53]

This "connecting up later" ploy — an after-acquired foundation — carries its own special problems. It is easy to make the promise and then not carry it out. In effect, the promise leads the judge to suspend ruling on an objection until after all the evidence is in, when the objection can be reasserted. If some element is still missing, the proponent must recall witnesses who may have been excused or else risk not only a ruling that the hypothetical question and its response be stricken from the record but perhaps a directed verdict as well.

Assuming all this is settled with Dr. Willis, Dr. Young or both, there is an additional difference between the two. Even though they would have to give their opinions in response to hypothetical questions, it would be permissible to show that Dr. Young actually undertook treatment of Mr. Price.[54] Conversely, it would also be permissible to show, on either direct or cross-examination, that Dr. Willis was consulted merely for the purpose of testifying.[55]

The opinion rule, with its exceptions and the progeny it has helped produce in the list of hearsay exceptions is just the starting point in the common-law treatment of expert witnesses. In addition, there is a group of customs, procedures and rules that has grown up around the examination of experts.

Expert Qualification

The first step to take when you call on expert to testify is to establish two things: (1) that the matter on which he will testify is one in which expert testimony can help the jury, and (2) that this particular expert is qualified to do that.[56] In some jurisdictions, additional matters are claimed to be necessary to a proper foundation, such as establishing that this

52. Barnett v. State Workmen's Compensation Comm'r, 172 S.E.2d 698 (W. Va. 1970).

53. Gibson v. Healy Brothers & Co., 109 Ill. App. 2d 342, 248 N.E.2d 771 (1969).

54. The "treating doctor" status of Dr. Young is relevant in two ways: first, to show how Dr. Young got some of the data on which he relies, and second, as reflecting on the weight to be given his opinion.

55. His being consulted only for the purpose of testimony obviously goes to the weight of the testimony and is a proper matter for cross-examination. Furthermore, it is error to prohibit cross-examination on the fee paid to an expert witness for testifying, since this reflects on bias. State v. Clarkson, 58 N.M. 56, 265 P.2d 670 (1954).

56. Wigmore's famous test is, "On *this subject* can a jury from *this person* receive appreciable help?" 7 J. WIGMORE, EVIDENCE §1923 at 21 (emphasis in original).

witness actually used his expert skill and training in reaching his opinion.[57] This, however, is actually a repetition of the requirement that the problem be one on which the witness can help this jury.

Typically, only the second point — the qualifications of this expert — receives any attention. Medicine,[58] ballistics,[59] fingerprinting,[60] handwriting identification,[61] physics,[62] engineering[63] and many other fields are so well established that their value is self-evident; it is unnecessary even to ask the court to take judicial notice that the field is one which will be helpful to the jury. On the other hand, there are borderline situations. Some jurisdictions, for example, while recognizing that economics is a legitimate field, refuse to permit economists to testify to the damages in wrongful death cases,[64] holding in essence that the opinion is likely to mislead the jury. "Accidentology," on the other hand, is not always recognized as a legitimate field.[65] All of this means that when a litigator is dealing with a new field, such as suicidology, he must be careful not only to select an expert with impeccable qualifications but also to establish the validity of the field itself.[66]

57. In Deaver v. Hickox, 81 Ill. App. 2d 79, 224 N.E.2d 468 (1967), the court was able to create seven "different" requirements all adding up to Wigmore's simple formulation.

58. 2 JONES ON EVIDENCE §423 (5th ed., S. Gard ed. 1958). All citations to JONES below refer to this edition.

59. *Id.*, §435 at 827.

60. *Id.*, §435 at 828 n. 16.

61. 3 JONES ON EVIDENCE §597. In addition to being a proper subject matter for expert testimony, handwriting identification is typically one of those matters in which lay opinions are admitted if a foundation of sufficient familiarity with handwriting in question is shown. *See, e.g.*, Bennett v. Cox, 167 Ga. 843, 146 S.E. 835 (1929). Moreover, where there is a known exemplar for comparison, many cases hold that it is permissible for the jurors themselves to compare it with the questioned writing. *See, e.g.*, Brandon v. Collins, 267 F.2d 731 (2d Cir. 1959).

62. *See, e.g.*, United States v. Stifel, 433 F.2d 431 (6th Cir. 1970), *cert. denied*, 401 U.S. 994 (1970), in which the trial court admitted expert testimony concerning neutron activation analysis, and the appellate court affirmed.

63. 2 JONES ON EVIDENCE §430A.

64. Barnes v. Smith, 305 F.2d 226 (10th Cir. 1962). "Considering the nature of the testimony offered and the necessity of calculating future unknowables and broadly applying the general to the specific, the statistical expertise of the witness had little to offer the jury relevant to the pecuniary value of this boy's life." *Id.* at 232. Other courts, however, have admitted expert economist testimony of the value of a human life. See Har-Pen Truck Lines, Inc. v. Mills, 378 F.2d 705 (5th Cir. 1967).

65. Trial courts seem to be affirmed whether they admit or exclude the testimony of an "accidentologist." Although some objections to the expert testimony were sustained, the testimony generally was admitted in Rhynard v. Filori, 315 F.2d 176 (8th Cir. 1963). It was excluded in Krizak v. W.C. Brooks & Sons, Inc., 320 F.2d 37 (4th Cir. 1963), although the court recognized that the trial court might have permitted greater latitude.

66. See People v. Milone, ___ Ill. App. 3d ___, 356 N.E.2d 1350 (1976), in which the prosecution had laid a thorough foundation for "bite mark" identification by forensic dentists. The trial court's ruling admitting the testimony was sustained even though the reliabil-

As with any foundation, it is possible for the opponent to stipulate that the witness is qualified to give opinion testimony. This stipulation process is one of the trial games which beginning litigators must learn. When you call an impressively qualified expert, your opponent may offer to stipulate to his qualifications. This is usually done in a gracious-sounding fashion, suggesting that it will save time for the jury. Usually, the real reason for offering such a stipulation is to keep the jury from hearing how well qualified the witness really is, especially when the opponent plans to call his own expert who is perhaps less well qualified. The tactical problem this creates for the proponent of the first witness is obvious: how to turn down a stipulation which the jury feels was offered in their interest? One response is to agree to accept the stipulation if it means that the opponent is agreeing that everything the witness says is correct, and if not, then the jury will need to hear the qualifications of each expert in order to tell which is to be accepted.[67]

After the witness has been qualified, it is customary in many jurisdictions to ask the court for a ruling that he be recognized as an expert and permitted to testify to his opinions.[68] Before that ruling is given, the opposition should have the opportunity to conduct a voir dire examination of the witness on his qualifications. As with many such procedures, it is discretionary[69] on the part of the trial court to permit or deny voir dire examination of a witness. It is a useful device to know, since it is far more effective to destroy a foundation before the testimony in chief is given, thus preventing its being heard by the jury, than to allow the jury to hear the testimony and subsequently attempt to undercut it in cross-examination. On the other hand, it is usually wise to ask for a voir dire examination of a witness only when there is a reasonable opportunity to show that a prima facie foundation is faulty. If the attack fails and the judge rules that the objections raised on voir dire go only to the weight and not the admissibility of the evidence, there is the strong likelihood that the jury will misconstrue the ruling of the court. They may well feel that the court has ruled that the attack was without merit rather than feeling that the court has said that the opinion may not be of much value, but it is not so bad that it should be kept from the jury, a more accurate interpretation of such a ruling.[70]

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ity of bite marks for identification (as opposed to excluding identification) was contested at trial.

67. See R. KEETON, TRIAL TACTICS AND METHODS 57 (2d ed. 1973).

68. J. MCELHANEY, EFFECTIVE LITIGATION: TRIALS, PROBLEMS AND MATERIALS 61 (1974).

69. Convincing the trial court to exercise its discretion in your favor is usually not difficult. There are, however, trial judges who are not familiar with the term *voir dire* except as it relates to the examination of prospective jurors. *Cf.* J. MCELHANEY, EFFECTIVE LITIGATION: TRIALS, PROBLEMS AND MATERIALS 17 (1974). You may find it useful, therefore, to refer to it in more pedestrian terms: "Your honor, may I examine the witness in aid of objection?"

70. See McElhaney, *Trial Notebook — Steps in Introducing Exhibits*, 1 LITIGATION 55, 56, 64 (No. 1, 1975).

Magic Words

After the witness has testified to his qualifications, the opponent has had an opportunity to be heard, and the court has ruled on the issue, the next step is to establish the bases for the opinion, either through the testimony of the expert himself or by posing a hypothetical question.

Are we finally ready for the opinion itself? Not quite. There is a custom, which is prevalent in most jurisdictions, to establish an additional point before the expert opinion is received. It goes like this: "Taking those matters into account, do you have an opinion, based on a reasonable degree of medical probability (or certainty), as to the cause of Mr. Price's condition?" The *natural* response to this question is to give the opinion. But that is not what the question asks for. It asks whether the witness has an opinion to a reasonable degree of probability or certainty. These are the magic words invariably put to experts,[71] and the proper response is not to give the opinion until it is established that it is one held to this degree of certainty or probability. Accordingly, careful litigators educate their expert witnesses to answer the magic words "yes" or "no" before testifying to the opinion.

The reason for asking this question is something on which various jurisdictions disagree. In some states it is thought to be a necessary foundation for the receipt of any expert opinion.[72] In other states, it is only required to establish causation of the plaintiff's condition in personal-injury actions.[73] Whatever its underpinnings — foundation or causation — its use has been so uncritically widespread that trial lawyers have even devised means to cover all ensuing opinions with a broad introductory question.[74]

Finally, our expert, either the revived Dr. Young or the venerable Dr. Willis, is ready to testify — not to what either of them actually thinks about Mr. Price's condition, but rather to tell about some imaginary person like him. From this deliberately mythical and stultified assemblage of testimony a jury will eventually be asked to draw a reasoned conclusion.

THE FEDERAL RULES OF EVIDENCE

The difference between the common-law approach and what is possible under the Federal Rules of Evidence is startling. Just to make it obvious

71. J. MCELHANEY, EFFECTIVE LITIGATION: TRIALS, PROBLEMS AND MATERIALS 61 (1974).

72. *See* Strohm v. N.Y.L.E. & W.R.R., 96 N.Y. 305 (1884). *See generally* Note, *Expert Opinions*, 18 BROOKLYN L. REV. 224, 240-241 (1952).

73. *See* Musslewhite, *Medical Causation Testimony in Texas*, 23 SW. L.J. 622 (1969).

74. Professor James W. Jeans, University of Missouri-Kansas City School of Law, suggested the following blanket question at the Regional Session of the National Institute of Trial Advocacy, held at the University of Oregon School of Law, Eugene, Oregon, December 4-11, 1976: "Doctor, I am going to ask you for a number of opinions during the course of your testimony. In each instance, will you please give the jury only those opinions which you hold to a reasonable degree of medical probability?"

how profound the changes are, let us return to the Price case again and put Dr. Young out of the way one more time. It is the plaintiff's case in chief. Only one medical witness is called to the stand: Dr. Willis, the non-treating expert. Here is his *entire* testimony on direct examination:

> **Q.** Dr. Willis—I take it you are a medical doctor, is that correct?
>
> **A.** Yes, I am. I specialize in the field of neurology, which is treatment of disorders of the brain and nervous system.
>
> **Q.** Are you familiar with the medical condition of Mr. Jon Price?
>
> **A.** Yes, I am.
>
> **Q.** Would you tell us about it, please?
>
> **A.** Certainly. Jon Price hit his head on the side post of an automobile in which he was riding on January 5, 1976. That blow to the head caused a tear in the tissue of his brain, which formed a small scar as it healed. Because of that scar on his brain, he has a form of epilepsy. At times which cannot be predicted, his left hand and arm twitch and jerk uncontrollably. Unfortunately, there is no way to operate on his injury, and in his case, medication has been ineffective.
>
> **Q.** Can you tell us, Doctor, how long this condition will last?
>
> **A.** I am afraid it will be with him the rest of his life.
>
> **Q.** Thank you, Doctor, no further questions.

Under the Federal Rules, that testimony is admissible, complete, and in proper form. No other witnesses need be called.

Rule 701 — Opinion Testimony by Lay Witnesses

Unlike the common-law opinion rule, the Federal Rules make no attempt to catalog, even in a representative fashion,[75] the sorts of lay opinions which are admissible. Instead, in a stroke of delightful lucidity, it lists two criteria: First, the opinion must be "rationally based on the perception of the witness" and second, it must be "helpful to a clear understanding of his testimony or the determination of a fact in issue."

Rule 702 — Testimony by Experts

Because it is short, and because it will be helpful to take a close look at some of its language in context, here is Rule 702 in its entirety:

75. A few of the Federal Rules of Evidence do have representative listings. Examples are Rule 404(b) (when other crimes, wrongs or acts may be used), Rule 407 (when subsequent remedial measures may be used) and Rule 411 (when liability insurance may be shown).

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

The most obvious point is that the federal rule, like the common law, sees experts as professional explainers. Furthermore, the rule avoids any hierarchy of experts. Degrees of qualifications are left to the finder of facts; the test for recognition as an expert is appealing in its directness, tracking Wigmore's assertion that the only test was whether this witness can help a jury on this subject.[76]

So far the rules seem almost pedestrian in their predictability: Like Rule 704, abolishing the irksome "ultimate issue" rule, which itself is no longer an issue in most jurisdictions,[77] Rules 701 and 702 offer refreshing simplicity but seemingly hold no surprises.

But Rule 702 may do more than even its drafters bargained for. It says that an expert may testify "in the form of an opinion or otherwise." Just what does that language mean? The Advisory Committee Note gives a little help:

> Most of the literature assumes that experts testify only in the form of opinions. The assumption is logically unfounded. The rule accordingly recognizes that an expert on the stand may give a dissertation or exposition of scientific or other principles relevant to the case, leaving the trier of fact to apply them to the facts.[78]

The drafters, then, wanted to free experts from the stylized procrustean bed of opinions in the standard form. This, of course, has been a widespread practice for years. The "dissertation" has been typical in the testimony of experts, either before or after the opinion itself. Less familiar to some litigators is the suggestion to do away with the formal opinion altogether.

A natural implication of this rule and the Advisory Committee's Note apparently escaped the drafters altogether: The magic words seem to have been abolished. Interestingly, it is a change that escaped the critics of the new simplicity of the Federal Rules. The Colorado Bar Association complained that it would be possible to obtain an opinion from an orthopedic surgeon in the following fashion, after the witness had been qualified as an expert:

> **Q.** Doctor, do you have an opinion based upon a reasonable

76. See note 56, *supra*.

77. McCORMICK ON EVIDENCE §12 at 27.

78. Advisory Committee Note to Rule 702, FEDERAL RULES OF EVIDENCE FOR UNITED STATES COURTS AND MAGISTRATES 80 (West Pub. Co. Pamphlet 1975), hereinafter cited as WEST'S FEDERAL RULES.

degree of medical certainty as to the extent of permanent disability suffered by the plaintiff as a result of this automobile accident?

A. Yes.

Q. What is your opinion?

A. She is totally permanently disabled.

Q. Thank you doctor, that is all.[79]

Permitting the witness to testify "in the form of an opinion or otherwise," as suggested by the Advisory Committee Note, means that these opponents of change might have made the examination of this witness even shorter:

Q. Doctor, would you tell us about the plaintiff's condition, please?

A. Yes. She is totally permanently disabled.

Q. Thank you, doctor, that is all.

But is it all that easy? Recall that there is no real consensus about why the magic words are used. If, as in some jurisdictions, their purpose is to insure that the jury will have only solid opinions to evaluate, and the question, "Do you have an opinion based on a reasonable degree of scientific certainty?" is a mere customary foundation, then the language of Rule 702 would seem to dispense with the magic words. On the other hand, if this phraseology is used to insure that there will be a sufficiency of the evidence on the issue of causation in personal injury cases, something more than evidence law is involved. In that situation, the magic words will continue to be a convenient way to ask for opinions in a form that will survive a motion for a directed verdict, even though it would be possible to establish the necessary "reasonable degree of certainty" in other fashions, as in evaluating the testimony as a whole.

Rule 703 — Bases of Opinion Testimony by Experts

Perhaps the most striking change anywhere in the Federal Rules is contained in Rule 703. Here is the whole rule:

> 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 him 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.

79. *Hearings before the Special Subcomm. on Reform of Fed. Crim. Laws of the House Committee on the Judiciary*, 93d Cong., 1st Sess., on Proposed Rules of Evidence, Serial No. 2, at 355-356 (Supp. 1973); *quoted in* 3 J. WEINSTEIN & M. BERGER, WEINSTEIN'S EVIDENCE ¶¶ 705 [01], 705-2 (1975).

The first sentence of this rule tracks the common law fairly closely. The usual way for an expert to become informed about the facts or data he will explain is to obtain them before the trial. The other way for an expert to become aware of facts is to learn them during the trial. Under the common law, the principal use of this technique was to simplify hypothetical questions; the expert heard the testimony and was asked to assume it was true without having it repeated in a hypothetical question.[80] Unlike the common law, however, Rule 703 does not restrict this technique to situations where the facts on which he relies are undisputed.[81] So the first sentence, while simplifying traditional practice, makes no giant leaps.

Rather it is the second sentence which makes a radical departure from the common law. The facts or data on which the expert relies need not be admissible in evidence if they are reasonably relied upon by experts in the field of forming their inferences or opinions.

The Advisory Committee's argument for this new provision looks persuasive:

> [A] physician in his own practice bases his diagnosis on information from numerous sources and of considerable variety, including statements by patients and relatives, reports and opinions from nurses, technicians, and other doctors, hospital records and X-rays . . . . The physician makes life-and-death decisions in reliance upon them. His validiation, expertly performed and subject to cross-examination, ought to suffice for judicial purposes.[82]

The logic of the common law was a tightly closed syllogism in direct opposition to the Advisory Committee's thinking. If an expert opinion was based on hearsay information, relating the opinion would be giving the jury hearsay in the insidious disguise of an expert opinion. Since hearsay is unreliable unless it fits within one of the exceptions to the hearsay rule, any opinion based on inadmissible hearsay was also fatally tainted.

Like the limited exception to the hearsay rule for the results of standardized laboratory tests that are only tangential to the opinion, Rule 703 permits implicit hearsay in expert opinions. But it goes much further. It is virtually a major new exception to the hearsay rule. It is no longer

80. See text at note 48, *supra.*

81. This might be thought to be an unwise change, since MCCORMICK ON EVIDENCE §14 at 32 says "two obvious requirements are that the assumed facts must be clear to the jury and must not be conflicting."

The logic supporting this change is found not in Rule 703, but in Rule 705, discussed in the text following note 93, *infra.* Since hypothetical questions are no longer required and Rule 705 contemplates exploring the bases for an opinion on cross-examination, it is obviously not necessary that the facts be not conflicting. In other words, if hypothetical questions are not required, it would make no sense to keep a rule which was designed to keep hypothetical questions clear to the jury.

82. WEST'S FEDERAL RULES at 81-82.

necessary to prove the opinions and diagnoses of other experts upon which the opinion being introduced rests. Of course, the rule itself does not say a witness may repeat the information he received from these "reliable" sources.[83] In that respect, this is not a true hearsay exception, admitting the information for all purposes. That hardly matters. The purpose for calling such a witness is to get his opinion. And this rule permits us to have it without the necessity of proving the bases of the opinion by independent testimony. In the Price case, it is Rule 703 which permits either Dr. Young or Dr. Willis to testify without bothering to call Dr. Griffin, Dr. Herman, Dr. Blum or Dr. Schuler to the stand. We can even let Dr. Young go to his final rest — even though he was the treating doctor. While it would probably be helpful to have his findings and records admitted, they need not even qualify as business records[84] for Dr. Willis, the testifying expert, to take them into account.

In short, the case may be tried with one expert witness instead of five or six. This permits litigators to plan trials on the basis of effective factual presentation. The emphasis can be on choosing witnesses who are needed to explain things satisfactorily to the jury's understanding, rather than on parading witness after witness to lay a complex foundation for a simple opinion. To put it another way, the foundation for the opinion of a non-fact witness expert — one who merely explains — is virtually the same as the foundation for the opinion of a fact witness expert who explains what he personally observed.

Thus Rule 703 creates a revolution in the logistics of expert testimony.

One problem implicit in the language of Rule 703 is whether opinions may be based on other opinions, a practice which was theoretically forbid-

83. Rule 705, however, does: "The expert may in any event be required to disclose the underlying facts or data on cross-examination." Presumably the cross-examiner is entitled to a limiting instruction when "inadmissible," "reliable" information is disclosed on cross-examination. Otherwise, Rule 703 would be a pious fraud.

A request for such an instruction would be a mistake in all but the most unusual situations. Unless the inadmissible underlying data somehow proved another disputed fact, the instruction would only serve to confuse the jury and underscore the unwanted testimony.

It is interesting, however, that the complete exception to the hearsay rule for statements made to doctors consulted for diagnosis or treatment was created in part to avoid such a meaningless instruction. In the Advisory Committee Note to Rule 803(4), it was asserted that "while these statements were not admissible as substantive evidence (under the conventional doctrine), 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. The rule accordingly rejects the limitation." WEST'S FEDERAL RULES at 110.

Another way to put it is that the Federal Rules eliminated the limiting instruction for traditional bases of expert opinions, but created new bases which apparently still require limiting instructions. *Le plus ça change, le plus la même chose?* No. It takes more digging than the average litigator is likely to do in order to come up with an instruction which no one liked anyway.

84. Rule 803(6).

den in some states[85] and consequently clogged trials with unnecessary quibbling over whether the findings of another expert were facts or opinions. In theory, at least, a trial should break down altogether under this rule when there are dependent opinions from two or more different experts. The Price case supplies a simple example. Assume that Dr. Willis is of the opinion that Mr. Price has brain damage only if there is no underlying psychological disorder which might be the cause of his condition. The psychiatrist, Dr. Karen Schuler, is of the opinion that there is no such disorder. Dr. Willis is not a psychiatrist and cannot reach this conclusion on his own.

The question is whether Rule 703 solves this problem, too. To put it another way, do reasonably reliable "facts or data" include opinions? The answer is not clear from the language itself. Since this is a statute that is in "derogation of the common law," it could be argued that the usual canon of strict construction should cause courts to read the rule so that opinions are not included in the term.

But there are two effective counter-arguments. The first is that this restrictive reading would be inconsistent with the general scheme of the Federal Rules and the liberality of Rule 703 in particular. The second argument is that the drafters felt certain that opinions were included.[86] Certainly, the opinions of other experts are the sorts of things which may be considered reasonably reliable in the field, and an expert is unlikely to make the distinction, if there really is one, between data and opinion coming from a reliable source.

One question which is raised by Rule 703 is who determines what is reasonably reliable in the field: the witness or the judge?

A plain reading of the rule suggests that the norms of the field control. The test is whether the facts or data are of "a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject." One can easily imagine how the proponent of an opinion would go about laying a proper foundation, should the basis for the opinion be challenged:

> **Q.** In forming your opinion, Doctor Willis, did you rely on anything other than your examination of Mr. Price?
>
> **A.** Yes, I did. I studied his complete medical file.
>
> **Q.** What did this include?
>
> **A.** Let's see — the notes of his family physician, Dr. Griffin, the medical file compiled by the late Dr. Young, which included his own findings, the electro-encephalogram report, the cranial X rays, Dr. Schuler's psychiatric report and the results of all the laboratory tests.

85. Zelenka v. Industrial Comm'n, 165 Ohio St. 587, 138 N.E.2d 667 (1956); American Hoist and Derrick Co. v. Chicago, M., St. P. & P. R., 414 F.2d 68 (6th Cir. 1969).

86. See quotation in text at note 82, *supra*.

> **Q.** Can you tell us, Doctor Willis, whether it is customary and reasonable for experts in the field of neurology to rely on such information in making professional judgments?
>
> **A.** Certainly. We have to depend on each other. It would be literally impossible to do everything yourself. For example, I do not have the slightest idea how to do the biochemical tests in a simple urinalysis. Relying on other experts is actually more dependable than doing it yourself.
>
> **Q.** Thank you, Doctor.

This all seems plausible enough — just what is contemplated by the rule. But the Advisory Committee Note raises some doubt, suggesting that the question of reasonableness is a judicial standard.

> If it be feared that enlargement of permissible data may tend to break down the rules of exclusion unduly, notice should be taken that the rule requires that the facts or data "be of a type reasonably relied upon by experts in the particular field." The language would not warrant admitting in evidence the opinion of an "accidentologist" as to the point of impact in an automobile collision based on statements of bystanders, since this requirement is not satisfied.[87]

The drafters' facile hypothetical problem hardly puts the issue to rest. What about a policeman gathering information from bystanders, from which he forms an opinion about the speed of a moving vehicle (assuming his competence in the field)? Would his disinterest make his evaluation of the bystanders' accounts any more reliable?[88] What if the opinion were

87. WEST'S FEDERAL RULES at 82.

88. This hypothetical situation bears considerable resemblance to the facts in a famous case, Johnson v. Lutz, 253 N.Y. 124, 170 N.E. 517 (1930). There a police report which contained information from bystanders was offered into evidence under the business-record exception to the hearsay rule. The New York Court of Appeals held that this information was not admissible, since the individual with first-hand information had no "business duty" to report to the policeman who prepared the record in question.

Thus did Johnson v. Lutz attack one of the "hearsay within hearsay" problems and create the "business duty" rule, which has been widely adopted. *See* MCCORMICK ON EVIDENCE §310 at 726.

Rule 805 provides that "[h]earsay included within hearsay is not excluded under the hearsay rule if each part of the combined statements conforms with an exception to the hearsay rule provided in these rules." The Federal Rules would accordingly reach the same result as the New York court did in a decision after Johnson v. Lutz. Confronted with a business record which contained information from an individual who had no business duty to report, but which amounted to an admission, the record was admitted. In other words, there were two hearsay problems, each of which was solved by a different exception. Kelly v. Wasserman, 5 N.Y.2d 425, 158 N.E.2d 241, 185 N.Y.S.2d 538 (1959).

The business-record exception of the Federal Rules, Rule 803(6), does not contain the Johnson v. Lutz "business duty to report" requirement as such. It, however, would not admit statements contained in business records if "the source of information or the method or circumstances of preparation indicate lack of trustworthiness." Dean Read has argued that

based in part on measured skid marks, in part on the severity of the resultant damage and in part on the accounts of these nameless bystanders? Surely policemen sometimes have to make life-and-death decisions on the information they gather from bystanders. Remember, that was part of the drafters' rationale for this rule.[89]

If the example of the policeman does not seem near enough to the borderline to make this a close question for you, what about the emergency room doctor who acts on information from an ambulance driver? Such information would seem to be precisely what the drafters contemplated as being within the rule.[90] But what happens if the doctor's information comes from a policeman or, better yet, a bystander?

The point is that what is reasonably reliable "in forming opinions or inferences upon the subject" depends entirely on the situation. In an emergency, it is the best information obtainable at the time. It is a good test if the question is whether an individual acted reasonably in the emergency. But is that any basis for forming a deliberate decision on contested facts in a subsequent trial when the issue is not whether the expert acted properly under the circumstances, but rather what actually happened? The desire of the drafters to free expert opinions from rigid common-law restrictions is completely understandable. The method they choose, however, is seductively simple in appearance and may prove hard to administer in a number of settings.

Return to the emergency room doctor. We will assume that he decided a man who was brought in was suffering from a heart attack. His decision was based, in part, on the reports of others — bystanders who carried the man into the hospital and who now cannot be found. Heart attack (more properly, a myocardial infarction) is an issue. We will not dodge the evidence question by letting any of the subsequent laboratory reports be definitive on the issue. Blood enzyme analyses, electro-cardiogram results and the like are all beautifully ambiguous. Yet the issue must be decided. Whether we make the test of reasonableness one for the judge or for the expert may easily decide whether the evidence comes in and, in turn, whether the case will go to the jury. Here are two (more might be constructed) alternative rulings for the judge:

1. "Under Rule 104(a), questions concerning 'the admissibility of evidence are to be decided by the *court*. . . .'[91] That means me.

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this amounts to the same limitation. *See* Read, *The Business Records Exception: Something Less Than Revolutionary*, 2 LITIGATION 25, 52 (No. 1, 1975).

89. See quotation in text at note 82, *supra*.

90. See quotation in text at note 82, *supra*.

91. Rule 104(a): "Preliminary questions concerning the qualifications of a person to be a witness, the existence of a privilege, or the admissibility of evidence shall be determined by the court, subject to the provisions of subdivision (b). In making its determination it is not bound by the rules of evidence except those with respect to privileges."

> While the expert's testimony is helpful on the issue, I think it is unreasonable to rely on rank hearsay from unidentified bystanders. The evidence is excluded."
>
> 2. "Certainly, I must decide the foundational question under Rule 104(a). What I am to decide is not whether I think it is reasonable to rely on such information, but whether I find the profession in question thinks it reasonable to do so. While I personally would not rely on this information, the Federal Rules defer to the standards of the profession of the expert witness, outside of gross extremes, which are not presented here. Any objection to the basis for this expert opinion may be shown on cross-examination, and goes to the weight the jury should give the opinion, but does not affect its admissibility. The evidence is admitted."

By choosing the hypothetical case of an accidentologist relying on bystanders, the drafters muddied the distinction between these two positions. The accidentologist case can be viewed either as an example of the first line of reasoning, or as one of the "gross extremes" alluded to in the second.[92]

Of course, we can make the problem go away, or at least appear to do so. First, instances in which the judge finds that it is unreasonable to rely on certain facts or data despite what the experts in the field say are bound to be infrequent. Second, the problem is not likely even to be perceived in the heat of trial. Third, it can be obscured by a little intellectual dishonesty even if it is seen and argued by counsel. All the trial court has to do is determine that the data is not considered reliable in the field. Fourth, even if it is carefully preserved for appeal, it is the sort of question likely to be labeled as harmless error by a sympathetic appellate court.

But all of that seems unfair, especially when the question can be put to rest satisfactorily. Rules of evidence are guidelines for determining what sorts of information fact-finders ought to take into account. They are themselves norms of reliability. What other fields regard as reliable ought to concern us. We should consider their norms in assessing our own. But the standards of reliability in any particular field must take into account the special situation in which it arises. A medical doctor making an emergency diagnosis at the scene of an accident will not use the same standards of reliability as he did in the research laboratory he left just before starting home. Trials are supposed to provide an opportunity for calm deliberation, appropriately taking longer to review events than the events themselves may have taken to transpire. The standard of reasonableness that the judge should apply is the judicial one, looking at the expert's field for guidance but not for ultimate decision.[93]

92. There is a third possibility in the Advisory Committee's murky analysis. This could be an example of an instance in which the information was not even recognized by the field.

93. Perhaps the drafters felt that by recognizing a field as a helpful one, the internal

Despite the side issues in the interpretation of Rule 703, its principal thrust is straightforward enough. A rule which seems quite simple on its face, relating to how experts can get the information about which they testify, actually makes a great change in the theory underlying the examination of expert witnesses. It creates, in effect, a new exception to the hearsay rule. More than just affecting what is admissible, it also radically simplifies conduct of expert testimony.

Rule 705 — Disclosure of Facts or Data Underlying Expert Opinion

Logically, Rule 703 gives some hint of what is to come in Rule 705, another provision which looks unremarkable on its face.

> The expert may testify in terms of opinion or inference and give his reasons therefor without prior disclosure of the underlying facts or data, unless the court requires otherwise. The expert may in any event be required to disclose the underlying facts or data on cross-examination.

In two sentences, Rule 705 abolishes the requirement for hypothetical questions without even mentioning them by name. Thus the casual reader of the rules must remember that the hypothetical question was a means for requiring that the bases for an opinion be stated in advance of the opinion itself.

This rule is consistent with the provision of Rule 703 that the bases for an opinion need not be admissible in evidence. It would hardly make sense to provide that and then require that the expert assume the truth of those inadmissible facts as he listens to them recited in a hypothetical question.

Obviously, Rule 705 does more than merely do away with the requirement for hypothetical questions. It also permits the fact witness expert to go straight to the opinion without having to recite the bases for the opinion. That is a major change from traditional practice. While Rule 703 may be thought of as simplifying the foundation for an opinion *before* the expert testifies, Rule 705 simplifies the testimony itself.

Before going any further, observe: Rule 705 does not abolish hypothetical questions. The trial court may, in its discretion, still require them. Unless the court requires hypotheticals, they are optional with examining counsel.

Most litigators know that the hypothetical question has been under sustained attack by evidence scholars for years.[94] They have argued that

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standards of reliability used by the field were given tacit approval for judicial purposes. But does that follow? Is it necessarily true that a witness whose *analysis* is helpful will also use standards of proof suitable for trials?

94. Some of Wigmore's best invective is saved for the hypothetical question: "Its abuses have become so obstructive and nauseous that no remedy short of extirpation will suffice. . . . The hypothetical question, misused by the clumsy and abused by the clever, has in practice led to intolerable obstruction of truth. In the first place, it has artificially clamped the mouth of the expert witness, so that his answer to a complex question may not express his actual opinion on the actual case. This is because the question may be so built up and

the hypothetical question misleads the jury by calling for opinions which might be far different from those which would be given on the facts themselves. Moreover, most writers have never been happy about a device which offers such a marvelous opportunity to make a succinct final argument in the middle of the trial.[95]

For this very reason it is likely that Rule 705 will not get the attention it deserves from litigators. The chances are that trial lawyers who have developed the art of using hypothetical questions effectively will ignore the option given them by the rule. Even from a purely tactical standpoint, that would probably be a mistake.

The common-law requirement for expert opinions was that every major basis had to be testified to in advance of the opinion itself. In the usual case, an expert opinion is far more persuasive if the jury can see that the expert has a good reason for it. It helps to show that the witness is a thoughtful, knowledgeable individual. It makes sense to keep enough of the preliminary facts, whether hypothetical or not, to help the jury understand the opinion.

On the other hand, the requirement of the common law made hypothetical questions too long, even though courts were not always strict about enforcing the rule calling for every major basis of the opinion in advance. The real advantage of Rule 705 is that it permits a streamlining of hypothetical questions. They no longer need to be stiff and stylized. As long as they are not misleading, there is no reason why an examiner cannot be far more selective than before in choosing the contents of hypothetical questions.[96]

Rule 705 also has some difficulties for litigators. The rule makes it far more likely that the jury will hear an opinion which ultimately turns out to be inadmissible because it is not based on either admissible or "reasonably reliable" information, as permitted by Rule 703. The effect of the common-law procedure was to screen expert opinions before they were heard. Now, unless the trial court requires otherwise, that screening process is delayed until cross-examination. This is not necessarily bad. After

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contrived by counsel as to represent only a partisan conclusion. In the second place, it has tended to mislead the jury as to the purport of actual expert opinion. . . . In the third place, it has tended to confuse the jury, so that its employment becomes a mere waste of time and a futile obstruction." 2 WIGMORE, EVIDENCE §686 at 812.

95. Obviously, the hypothetical question permits counsel to assemble all the data needed for a helpful opinion in the most convincing order possible. Occasionally some lawyers virtually run wild with this process and create questions which contain obviously improper statements. An extreme example is contained in Ingram v. McCuiston, 261 N.C. 392, 134 S.E.2d 705 (1964).

96. If the bases are not required in advance, it surely is not improper to list some of them, as long as the list is not unfairly selective. Obviously, one antidote for unfair selectivity is the power of the trial court to govern the general conduct of the trial, rule 102. Perhaps cross-examination is an even more effective remedy. Exposing unfairness is often more devastating than preventing it in the first place.

all, it is the procedure used for most other evidence except confessions and other exceptional matters, unless the opposing counsel takes some active steps in advance.[97]

The lesson for the careful litigator is to keep on his toes. Rules 703 and 705 contemplate that trial lawyers will know the bases for expert opinions in advance of trial by having used ordinary means of discovery. This is a position which reflects current academic thought; complete discovery is felt to be good, just as forum-shopping is thought to be bad. At the same time, there is a growing concern among thoughtful practitioners that exhaustive discovery may do more harm than good; one of its undeniable effects is to cause considerable delay.[98]

Rules 703 and 705 do not "de-escalate discovery." They make it even more important. Cautious lawyers may make it a custom to ask for voir dire examinations of expert witnesses, perhaps outside the presence of the jury, because of the impossible task of "unringing the bell" with a meaningless jury instruction to disregard previous testimony, should it turn out to be inadmissible. The other way to deal with the problem is to ask the trial court to require hypothetical questions, retreating from the advances of the Federal Rules. This backward step is not likely to be attractive to federal district judges, whose crowded dockets can be eased by the time-saving aspects of Article 7. Since both the voir dire examination and the hypothetical question are now discretionary with the trial court, it seems probable that they will only be imposed by the court when the opposing counsel asserts on the good-faith basis of full discovery that the opinion about to be offered will ultimately be inadmissible.

Hearsay

Article 8 contains the definition of hearsay, the general rule prohibiting its admission and two rules, which contain a total of 29 exceptions,[99] listing

97. Delaying the screening process sometimes creates serious problems, variously described as "rebagging the cat," "unringing the bell" and "squeezing the toothpaste back into the tube." Telling a jury to disregard something they have just heard is about as effective as telling someone not to think of pink elephants.

For this reason, the common law has evolved several tools to deal with the problem. The first is the motion in limine, a process which permits a ruling on evidence before it is introduced. In criminal practice this is often called a motion to supress. The second is the voir dire examination of witnesses. See text at note 69, *supra*. Functionally, the hypothetical question is a third pre-screening mechanism, while the mistrial is an after-the-fact antidote.

When dealing with confessions, a "Miranda hearing," named after Miranda v. Arizona, 384 U.S. 436 (1966), is held outside the presence of the jury.

98. See Ehrenbard, *Cutting Discovery Costs Through Interrogatories and Document Requests*, 1 LITIGATION 17 (No. 2, 1975).

99. Twenty-nine exceptions are listed, but there are actually only 28. The reason is the legislative process. As Professor Waltz explains it, "In doing all of this, neither of the two houses nor their conference committee detected that subdivision 804(b)(5) was identical to 803(24) and thus entirely superfluous." Waltz, *Present Sense Impressions and the Residual Exceptions: A New Day for "Great" Hearsay?*, 2 LITIGATION 22, 23 (No. 2, 1975).

when hearsay is admissible. Some of these exceptions directly affect expert testimony.

Like the common law, the Federal Rules make statements concerning present bodily conditions — no matter to whom made — an exception to the hearsay rule. Closely associated with that rule is the exception which admits statements of past bodily conditions — medical history. Here is the federal version of that rule:

> **Rule 803 — Hearsay Exceptions; Availability of Declarant Immaterial.** The following are not excluded by the hearsay rule, even though the declarant is available as a witness:
>
> . . . .
>
> (4) Statements for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment.

Just as with some of the rules in Article 7, a close reading of this rule and the Advisory Committee's Note suggests that this provision goes much further than the common-law exception for statements of medical history, even though this result may not have been entirely understood by the drafters.

Relevant medical histories are an exception to the hearsay rule if they are "made for the purposes of medical diagnosis or treatment." The most obvious effect of this language is that it frees this hearsay exception from the requirement that the statement be made directly to a treating doctor. The Advisory Committee Note points out that the statement may be made to "hospital attendants, ambulance drivers, or even members of the family."[100] Thus the test for admissibility is the purpose for which the statement was made, not to whom it was said. The Advisory Committee suggests that the reason for this exception — that a person seeking medical treatment is likely to tell the truth out of a desire to be cured — applies equally to statements not made directly to a doctor. The proposition makes perfectly good sense — the sort of reform one would expect.

But there is an additional change made by this language. The rule says the statement may be made for the purpose of "medical diagnosis *or* treatment." Does this mean that a medical history given to a doctor who is consulted for the purpose of diagnosis and *testimony* is also admissible under this exception to the hearsay rule? It does.

While it might be unwarranted to read too much into a simple "or" without other evidence of the intention to make such a major change in the common law, the Advisory Committee Note helps considerably:

> Conventional doctrine has excluded from the hearsay exception, as not within its guarantee of truthfulness, statements to a physician consulted

100. Advisory Committee Note to Rule 803(4), WEST'S FEDERAL RULES at 110.

> only for the purpose of enabling him to testify. . . . The . . . rule 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.[101]

The first point the Advisory Committee makes is clear enough: The nontreating-doctor limitation on the medical-history rule is abolished. But its second statement makes little sense. Under Rule 703, an opinion may be admitted even though the bases are not. Where, then, is the need to make a medical history given to a nontreating doctor admissible? It seems far more rational to defend this change on the basis of simplicity. Why make a distinction to exclude testimony which is not likely to be misleading to jurors? They can see how motive in giving a medical history can affect its reliability. On the other hand, the motive for telling the truth is gone when you deal with statements of medical history made to a doctor who is consulted only for diagnosis and testimony.

Somewhat more puzzling is the interpretation of this language by one of the drafters, Dean Mason Ladd, in Ladd and Carlson's *Cases and Materials on Evidence.* Discussing the identical language, he said, "Proposed Federal Rule 803(4) goes no further than the Model Code or Uniform Rules and limits statements given by a patient for diagnostic *and* treatment purposes."[102] Dean Ladd's interpretation seems unwarranted. While it could be argued that diagnosis should be construed to mean evaluation for the purpose of seeking treatment, the Advisory Committee Note is in disagreement. Furthermore, the House Committee on the Judiciary assumed that statements made to nontreating physicians would be admissible: "After giving particular attention to the question of physical examination made solely to enable a physician to testify, the Committee approved Rule 803(4) as submitted to Congress."[103]

The effect of this new provision on the Price case is impressive. If Dr. Willis merely examines Mr. Price and listens to his medical history, he will be permitted to testify to what Mr. Price tells him, as long as it is "reasonably pertinent to diagnosis." The rule will help nontreating doctors be more effective witnesses. Interestingly, it will also encourage actual examination and interview of parties by the testifying doctor. If Dr. Willis merely got his information from Mr. Price's medical files, he would be able to base his opinion on that information, since it is reasonably reliable in the field. He would not, however, be able to testify to it without a limiting instruction, because it would be hearsay. The information he gets directly from Mr. Price, however, falls in this exception to the hearsay rule and would be admitted for all purposes. This exception is what permitted Dr. Willis

101. *Id.*

102. M. LADD & R. CARLSON, CASES AND MATERIALS ON EVIDENCE 952 (1972).

103. *Report of House Committee on the Judiciary to Rule 803(4),* WEST'S FEDERAL RULES at 110.

to testify that Mr. Price received a head injury while riding as a passenger in a car on January 5, 1976, since all that information was reasonably pertinent to Dr. Willis' diagnosis.

Another problem which has complicated medical testimony is the limited scope of information which is admissible under the business-records statutes.[104] Many such statutes admitted only records of "acts or events." In turn, some jurisdictions construed this language to exclude opinions or diagnoses in hospital records.[105] Rule 803(6) puts this persistent problem to rest by admitting records of "acts, events, conditions, opinions, or diagnoses."[106] This further simplifies the proof in the Price case, even though this information is no longer necessary to make a prima facie case because of the other changes in the rules.

So far we have looked at *Price vs. Daniels* primarily from the plaintiff's viewpoint. It seems appropriate to see what the rules do for the defendant's counsel, who shortly must rise to cross-examine. Traditionally, one of the most effective means for impeaching an expert witness is to show that his opinion is out of line with established writings in the field.

To do this, the cross-examiner must lay a proper foundation. Because this form of impeachment is similar to impeaching with a prior inconsistent statement, it usually must be shown that the witness being impeached relied on the authority in forming his opinion, or at least regards it as authoritative in the field.[107] Many expert witnesses, particularly doctors, have sufficient legal information to make this foundation difficult to establish:

Q. Doctor, are you familiar with *Gray's Anatomy*?
A. Yes, I am.
Q. It is one of the leading texts in the field, isn't it?
A. No, sir, it is not.
Q. You mean you do not regard this book as authoritative?
A. That is correct.

Rule 803(18) solves this very neatly. It makes learned treatises admissible in evidence as an exception to the hearsay rule. But it is no longer

104. Most jurisdictions have adopted business-records statutes, many of them modeled after or variations of the statute originally proposed by the Legal Research Committee of the Commonwealth Fund, chaired by Professor Edmund M. Morgan. See Read, *The Business Records Exception: Something Less Than Revolutionary*, 2 LITIGATION 25 (No. 1, 1975).

105. The problem has been the subject of frequent litigation. Some states — for example, Texas — admit some diagnoses in hospital records and exclude others, based on a hierarchy of reliability. See Loper v. Andrews, 404 S.W.2d 300 (Tex. 1966), discussed in Note, 21 SW. L.J. 176 (1967). A listing of the principal federal cases (which show a split on the admissibility of opinions in hospital records) is in the Advisory Committee Note to Rule 803(6), WEST'S FEDERAL RULES 114-115.

106. The Advisory Committee Note repeats this important step. WEST'S FEDERAL RULES at 115.

107. *See* MCCORMICK ON EVIDENCE §321.

necessary to have them authenticated by a hostile witness. As long as some expert witness in the field testifies that it is a reliable authority, or if the court takes judicial notice of its prominence (as it would in the case of *Gray's Anatomy*), it can be used to impeach any expert during the trial. Like witnesses being impeached with prior inconsistent statements, the witness being impeached with a treatise must have the treatise called to his attention on cross-examination.

The drafters were not content with limiting the use of learned treatises to impeachment. Accordingly, the rule permits expert writings to be used affirmatively as well:

> **803(18) Learned treatises.** To the extent called to the attention of an expert witness upon cross-examination or relied upon by him in direct examination, statements contained in published treatises, periodicals, or pamphlets on a subject of history, medicine, or other science or art, established as a reliable authority by the testimony or admission of the witness or by other expert testimony or by judicial notice. If admitted, the statements may be read into evidence but may not be received as exhibits.

Not only does this simplify the foundation for a traditional means of impeachment and do away with a meaningless limiting instruction to the jury that the treatise may not be considered to prove that its contents are true, but it also admits them affirmatively.

The rule, however, does not view learned treatises as a substitute for expert witnesses, even though they may be authenticated by judicial notice. They are admissible only "to the extent called to the attention of an expert witness upon cross-examination or relied upon by him in direct examination."

Probably the most important effect of this rule is to simplify the cross-examination and impeachment of expert witnesses. It might, therefore, seem appropriate to have it appear in Article 7, Opinions and Expert Testimony, or Article 6, Witnesses. But because the rule is framed as an exception to the hearsay rule, it is tucked away in the middle of Article 8, awaiting discovery by the thorough reader.

CONCLUSION

The Federal Rules of Evidence change not only how expert witnesses are examined, but also what is admitted in evidence. That raises an interesting question about their applicability in diversity cases and other actions governed by state substantive law. Under *Erie*,[108] state cases tried in federal courts are supposed to be decided under state law. As developed by *Guaranty Trust Co. v. York*[109] and *Byrd v. Blue Ridge Rural Electric Coop-*

108. Erie R.R. v. Tompkins, 304 U.S. 64 (1938).
109. 326 U.S. 99 (1945).

erative, Inc.,[110] the *Erie* doctrine means that federal procedural rules which affect outcome must also yield to state law.

This apparently simple test was clouded in *Hanna v. Plumer*.[111] In that case the issue was whether service of process permitted by Rule 4(d)(1) of the Federal Rules of Civil Procedure was applicable in a diversity case when that service would not have been effective to initiate an action under state law. Faced with the specter of the Federal Rules of Civil Procedure becoming totally inapplicable in diversity cases — since most procedural rules are ultimately outcome-determinative — the Supreme Court took a fuzzy step back from a pure outcome test.

Does the same problem exist with rules of evidence? In 1960, the Fifth Circuit wrestled with the problem in *Monarch Insurance Co. v. Spach*.[112] That was an action against an insurer for a fire loss. The insurance company had taken the written statement of the plaintiff's president concerning the claim, but did not give him a copy. Under a Florida statute, that omission made the document inadmissible. The Fifth Circuit held that the trial court's refusal to admit the document when offered by the defense was error. The court reasoned that since there were unused procedures which might have been available for admitting the document or its contents, it was not outcome-determinative to admit it more directly — a tortured path to the conclusion that it was error to refuse to admit the document itself. The Fifth Circuit said that a court "must have the capacity to regulate the manner by which cases are to be tried and facts are to be presented."[113]

Because of the need to protect the integrity of the Federal Rules of Evidence, like the policy implicit in *Hanna v. Plumer*, it is reasonable to anticipate that the Supreme Court will strain, as did the Fifth Circuit in *Monarch Insurance*, to find that challenged rules of evidence are not really outcome-determinative.

But someday the case must arise when a party will be able to survive a motion for a directed verdict solely because of evidence admissible under the Federal Rules but inadmissible under state law. It could happen in the Price case. All we have to do is let the plaintiff die, as easily as we did his first physician, Dr. Young. Now suppose that the only evidence available to establish that the cause of Mr. Price's injuries was the automobile collision comes from a statement of medical history given to the nontreating expert witness, Dr. Willis. The evidence is admissible under Rule 803(4), but is clearly inadmissible under state law.[114] What happens?

One argument is that the *Erie* doctrine does not apply to the Federal Rules of Evidence at all. Under the Rules of Decision Act, "[t]he laws of

110. 356 U.S. 525 (1958).
111. 380 U.S. 460 (1965).
112. 281 F.2d 401 (5th Cir. 1960).
113. *Id.* at 411.
114. See generally the discussion at note 11, *supra*.

the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States in cases where they apply."[115] *Erie* abolished the tradition of federal common law. There is no room for such a notion under the Rules of Decision Act. The Federal Rules of Civil Procedure were promulgated by the Supreme Court under the Rules Enabling Act, which provides that

> The Supreme Court shall have the power to prescribe by general rules, the forms of process, writs, pleadings and motions, and the practice and procedure of the district courts of the United States in civil actions . . . .
> Such rules shall not abridge, enlarge or modify any substantive right . . . .[116]

The Federal Rules of Civil Procedure, then, do not enjoy the position of supremacy occupied by acts of Congress. Thus they must yield to state law in appropriate cases. But while the Federal Rules of Evidence were originally promulgated by the Supreme Court under the Rules Enabling Act, they were reviewed and eventually made law by Act of Congress.[117] Does that settle the issue?

Perhaps not. Congress was particularly solicitous of state law in dealing with the rules. Rule 302, Competency, Rule 501, Privileges, and Rule 601, Presumptions, all defer to state law when there is "an element of a claim or defense as to which State law supplies the rule of decision." What does this mean: that Congress meant to defer to state law only in these areas, or that it attempted to defer to state law in all the situations it was able to identify?

What the Supreme Court will do is difficult to predict. For some of its members, the desired solution would be to abolish diversity jurisdiction altogether, which would tend to make the problem disappear. Whether it will ever face the issue is uncertain. Cases like our variation of *Price vs. Daniels* will be rare, leaving litigators with the expectation that the Federal Rules of Evidence will be available to modernize nearly every aspect of the examination of expert witnesses in federal courts.

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115. 28 U.S.C.A. §1652 (1966).
116. 28 U.S.C.A. §2072 (Supp. 1976).
117. See note 1, *supra*, and accompanying text.