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# Examination of Expert Witnesses in North Carolina

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# EXAMINATION OF EXPERT WITNESSES IN NORTH CAROLINA

WALKER J. BLAKEY

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## EXAMINATION OF EXPERT WITNESSES IN NORTH CAROLINA†

WALKER J. BLAKEY‡

*The 1981 enactment by the North Carolina General Assembly of sections 8-58.12 through 8-58.14 of the North Carolina General Statutes and recent decisions by the North Carolina Supreme Court have made it easier to introduce expert testimony in North Carolina courts but have made the underlying theory of expert testimony far more complicated. North Carolina law now resembles the provisions under the Federal Rules of Evidence which abolish the requirements that the basis of the expert's opinion be stated, that the expert's opinion be based upon facts in evidence, and that hypothetical questions be used. The abolition of these requirements has created "de facto" exceptions to the rule against hearsay. Professor Blakey briefly describes how these exceptions will work under the federal rules and then examines the similar exceptions created by the North Carolina statutes and case law.*

### I. INTRODUCTION

The adoption by the North Carolina General Assembly of a bill with the slightly misleading<sup>1</sup> title of "An Act to Eliminate the Hypothetical Question"<sup>2</sup> is the latest in a series of recent developments<sup>3</sup> that have made it easier to introduce expert testimony in North Carolina courts. These developments reflect a general change in the way courts and lawyers throughout the country

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This article draws upon work supported by the North Carolina Law Center and upon work published in Blakey, *An Introduction to the Oklahoma Evidence Code: Relevancy, Competency, Privileges, Witnesses, Opinion, and Expert Witnesses*, 14 TULSA L.J. 227 (1978) and Blakey, *An Introduction to the Oklahoma Evidence Code: The Thirty-Fourth Hearsay Exception, Information Relied Upon as a Basis for Admissible Expert Opinion*, 16 TULSA L.J. 1 (1980). The author received assistance with that earlier work from Katharine Hershey, now a member of the Washington Bar; Katherine McArthur, now a member of the North Carolina and Georgia Bars; Mary E. Lee, now a member of the North Carolina Bar; James R. Wear, now a member of the Colorado Bar; and Charles Gary Hampton, now a member of the North Carolina Bar.

1. See *infra* Part III-A.

2. Law of June 11, 1981, ch. 543, 1981 N.C. Sess. Laws 816 (codified at N.C. GEN. STAT. §§ 8-58.12 to -58.14 (1981)).

3. These developments include the relaxation of some of the worst features of the ultimate issue rule, see *infra* notes 16-19 and accompanying text, and the development of a sensible procedure to permit at least some expert witnesses to rely upon "inherently reliable" out-of-court information. See *infra* Part V. Furthermore, in 1977 North Carolina adopted by statute a hearsay exception for learned treatises and other documents based upon Federal Rule of Evidence 803(18). Law of July 1, 1977, ch. 1116, 1977 N.C. Sess. Laws 1404 (codified at N.C. GEN. STAT. § 8-40.1 (1981)).

view expert testimony. An increased confidence in the general value of expert testimony has been accompanied by a corresponding impatience with illogical restrictions on its introduction.<sup>4</sup> Courts and legislatures have responded by abolishing many restrictions on expert testimony.<sup>5</sup>

One of the strongest examples of this trend is presented by those portions of the Federal Rules of Evidence that deal with expert testimony.<sup>6</sup> Twenty-three states have adopted similar provisions as parts of their own evidence codes.<sup>7</sup> The North Carolina "Act to Eliminate the Hypothetical Question" (the "Act") is based largely upon, and incorporates language from, Federal Rules of Evidence 702 and 705.<sup>8</sup> The combination of this statute with recent decisions by the Supreme Court of North Carolina brings the North Carolina law of expert witness examination into a position which is strikingly similar to that adopted by the Federal Rules of Evidence.

The Act itself adopts almost all of the language and ideas of Federal Rules of Evidence 702 and 705 concerning the qualifications of expert witnesses and the forms in which expert testimony may be presented.<sup>9</sup> Nothing in the Act corresponds to Federal Rule of Evidence 703, which describes the types of facts that may be used as the basis of an expert's opinion and the means by which the expert may learn of those facts, but recent decisions<sup>10</sup> by

4. See FED. R. EVID. 702 & 705 advisory committee notes, in Rules of Evidence for United States Courts and Magistrates, 56 F.R.D. 183, 282-86 (1972) [hereinafter cited as Federal Advisory Committee's Notes]; C. McCORMICK, LAW OF EVIDENCE §§ 16, 17 (E. Cleary 2d ed. 1972).

5. See C. McCORMICK, *supra* note 4, § 16; 3 J. WEINSTEIN & M. BERGER, WEINSTEIN'S EVIDENCE ¶¶ 702[06], 703[05], 704[03], 705[02] (1981).

6. FED. R. EVID. 702 & 705.

7. Four states had already adopted evidence codes containing such provisions prior to the creation of the Federal Rules of Evidence. CAL. EVID. CODE §§ 801-805 (West 1966); KAN. STAT. ANN. §§ 60-456 to -458 (1976); N.J. STAT. ANN. § 2A:84A, Rules 56-58 (West 1976); 9B UTAH CODE ANN. Rules of Evidence 56-58 (1977). Nineteen additional states adopted such provisions as part of evidence codes based upon the Federal Rules of Evidence. These states are Alaska, Arizona, Arkansas, Colorado, Delaware, Florida, Hawaii, Maine, Michigan, Minnesota, Montana, Nebraska, Nevada, New Mexico, North Dakota, Oklahoma, Washington, Wisconsin, and Wyoming. See 3 J. WEINSTEIN & M. BERGER, *supra* note 5, ¶¶ 702[06], 703[05], 704[03], 705[02]. Two states, Ohio and South Dakota, adopted evidence codes based upon the Federal Rules of Evidence but rejected the federal reforms concerning expert witnesses. *Id.*

8. The Act, as codified, provides:

§ 8-58.12. There shall be no requirement that expert testimony be in response to a hypothetical question.

§ 8-58.13. 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.

§ 8-58.14. Upon trial 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 an adverse party requests, otherwise, in which event the expert will be required to disclose such underlying facts or data on direct examination or voir dire before stating the opinion. The expert may in any event be required to disclose the underlying facts or data on cross-examination.

N.C. GEN. STAT. §§ 8-58.12 to -58.14 (1981) (citations omitted).

9. See *infra* Parts II and III.

10. See *State v. Franks*, 300 N.C. 1, 265 S.E.2d 177 (1980); *Booker v. Duke Medical Center*, 297 N.C. 458, 256 S.E.2d 189 (1979); *State v. Wade*, 296 N.C. 454, 251 S.E.2d 407 (1979). See also *infra* Parts V-A & V-C.

the Supreme Court of North Carolina adopt procedures similar to those of the federal rule for the examination of at least some expert witnesses. The one major point upon which present North Carolina law apparently falls substantially short of the reforms achieved by the federal rules is the retention of the irrational rule<sup>11</sup> that purports to forbid opinion testimony upon the ultimate issue to be decided by the jury because such testimony supposedly usurps the function of the jury.<sup>12</sup> Federal Rule of Evidence 704 abolishes any such restriction on otherwise admissible opinion testimony. It could be argued that some of the language of the new North Carolina statutes is broad enough to achieve the same result. The comments by the draftsmen of the federal rules suggest that the language of rule 702 permitting expert testimony if it will "assist the trier of fact . . . to determine a fact in issue," which North Carolina adopted almost verbatim,<sup>13</sup> might be enough to abolish the ultimate issue rule by itself<sup>14</sup> and that the more specific language of Federal Rule of Evidence 704 was proposed merely "to allay any doubt on the subject."<sup>15</sup> Nevertheless, it appears more likely that North Carolina will continue to follow some form of the ultimate issue rule until some new statute or rule specifically abolishes it. Recent decisions by the North Carolina Supreme Court, however, have reduced the amount of harm done by the ultimate issue rule.<sup>16</sup> An interpretation of that rule which required some experts to give opinions on causation in artificial "could or might" language<sup>17</sup> has been replaced by an interpretation<sup>18</sup> that permits an expert to state his actual opinion.<sup>19</sup>

11. See 7 J. WIGMORE, EVIDENCE §§ 1920, 1921 (J. Chadbourn 1978); C. McCORMICK, *supra* note 4, § 12. The rule invites decisions that can be described with Professor Callahan's phrase, "one is inclined to say they were not decided but perpetrated." C. CALLAHAN, ADVERSE POSSESSION 69 (1961) (describing certain decisions on adverse possession).

12. See 1 H. BRANDIS, BRANDIS ON NORTH CAROLINA EVIDENCE, SECOND REVISED EDITION OF STANSBURY'S NORTH CAROLINA EVIDENCE § 126 (1982).

13. See § 2 of the Act, *supra* note 8. The only change from FED. R. EVID. 702 is the omission of the final two words of the federal rule "or otherwise." This omission does not change the meaning of the language borrowed from the federal rule.

14. See Federal Advisory Committee's Notes, *supra* note 4, at 284-85.

15. *Id.* at 284.

16. *State v. Brown*, 300 N.C. 731, 733, 268 S.E.2d 201, 202-03 (1980); *State v. Sparks*, 297 N.C. 314, 325, 255 S.E.2d 373, 380-81 (1979); *State v. Wilkerson*, 295 N.C. 559, 568-71, 247 S.E.2d 905, 910-12 (1978).

17. See, e.g., *Patrick v. Treadwell*, 222 N.C. 1, 21 S.E.2d 818 (1942); *J.M. Pace Mule Co. v. Seaboard Air Line Ry.*, 160 N.C. 252, 75 S.E. 994 (1912); *Summerlin v. Carolina & N.W. Ry.*, 133 N.C. 550, 45 S.E. 898 (1903); 1 H. BRANDIS, *supra* note 12, § 137 n.55.

18. *Mann v. Virginia Dare Transp. Co.*, 283 N.C. 734, 747-48, 198 S.E.2d 558, 567-68 (1973); *Taylor v. Boger*, 289 N.C. 560, 565, 223 S.E.2d 350, 353 (1976). See 1 H. BRANDIS, *supra* note 12, § 137; *Lowery v. Newton*, 52 N.C. App. 234, 240-41, 278 S.E.2d 566, 571-72 (1981). See also *supra* cases cited at note 16.

19. The court has failed, however, to forbid the use of the "could or might formula." See *supra* cases cited at notes 16 & 18. A party who uses that formula is taking a risk that its evidence will be inadequate to support a finding in its favor. See 1 H. BRANDIS, *supra* note 12, § 137 n.57. An ambiguous "could or might" statement ought to be regarded with suspicion, but because of the history of the "could or might" formula in North Carolina such testimony is likely to be treated as if it were a positive statement of causation unless the surrounding evidence makes it clear that it is not. Therefore, whenever an expert who says "could or might" actually means only "could or might" the opposing party should conduct a cross-examination designed to point out the weakness of the expert's opinion.

Although adoption of a North Carolina Evidence Code<sup>20</sup> based upon the Federal Rules of Evidence<sup>21</sup> would offer an opportunity to abolish the ultimate issue rule and to solve several other problems that remain under the present North Carolina rules,<sup>22</sup> there are some points upon which the existing North Carolina case law is clearer than the corresponding federal rules.<sup>23</sup> Therefore, the best possible system would be a combination of the federal rules and the North Carolina cases.

This article will briefly describe the model of expert witness examination created by the Federal Rules of Evidence and then discuss the corresponding features of existing North Carolina law.

## II. THE FEDERAL MODEL

### A. Overview

Federal Rules of Evidence 701 through 706 are based upon a philosophy that opinion testimony should be available whenever it would be useful to the trier of fact.<sup>24</sup> These rules restate the requirements for the use of lay and expert opinion testimony and for the qualifications of expert witnesses in terms that carefully avoid creating any artificial barriers to the introduction of useful opinion testimony. They also abolish several long-standing requirements that would limit the use of opinion testimony. Rule 704 abolishes any requirement forbidding (or limiting) opinion testimony on ultimate issues. Rule 703 abolishes the requirement that the expert's opinion be based upon facts proven by the evidence and allows the expert to base his opinion on facts that may not even be admissible in evidence. Rule 705 makes the disclosure of the underlying facts or data upon which an opinion is based discretionary, and thereby abolishes the requirement that hypothetical questions must be used in examining an expert who is giving an opinion based upon facts not within his personal knowledge.

Federal rules 703 and 705 also require a number of changes in prior practice that they do not spell out but that follow logically from the changes that are stated in those rules. They create new exceptions to standard rules of evidence, including three exceptions to the rule against hearsay. There is a major hearsay exception under rule 705, which may allow an expert to base an opin-

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20. See Blakey, *Moving Towards An Evidence Law of General Principles: Several Suggestions Concerning an Evidence Code for North Carolina*, 13 N.C. CENT. L.J. 1, 2-3 (1981) for a description of the work of the North Carolina Study Committee on the Laws of Evidence and Comparative Negligence on a proposed North Carolina Evidence Code.

21. See *id.* at 8-9 and Patrick, *Toward a Codification of the Law of Evidence in North Carolina*, 16 WAKE FOREST L. REV. 669 (1980).

22. North Carolina needs a general hearsay exception for statements of medical histories such as FED. R. EVID. 803(4). See 1 H. BRANDIS, *supra* note 12, § 161 nn.11 & 14. North Carolina also needs to eliminate doubts about whether experts other than physicians may rely upon "inherently reliable" out-of-court information and to clarify what kinds of information can be "inherently reliable." See *infra* Part V.

23. See *infra* Parts III-A & V-A.

24. Federal Advisory Committee's Notes, *supra* note 4, at 282; 3 J. WEINSTEIN & M. BERGER, *supra* note 5, ¶ 702[01].

ion upon facts that need never be introduced into evidence. There is another significant hearsay exception under rule 703, which permits an expert to base an opinion upon facts that may not be admissible in evidence except in explanation of that opinion. Finally, there is a minor exception under rule 705, which permits an expert witness to talk about facts that are not within his personal knowledge without the use of hypothetical questions. All three are exceptions to the hearsay rule, but the larger two exceptions are also exceptions to requirements such as authentication and the best evidence rule.<sup>25</sup>

### B. *Use of Opinion Testimony*

Rule 701 provides that a lay witness may testify to an opinion if it is based on personal knowledge and is "helpful to a clear understanding of his testimony or the determination of a fact in issue." The effect of this provision is that even a lay opinion should be admitted if it is useful. This permits both "shorthand statements of facts" that the witness cannot be expected to break down into the actual facts he had observed and any other opinion that has enough value to be useful.<sup>26</sup>

Expert opinion and other expert testimony may be used under rule 702 whenever "scientific, technical, or other specialized knowledge" would "assist the trier of fact to understand the evidence or to determine a fact in issue." The expert is not required to base his opinion on personal knowledge.<sup>27</sup> Under rule 702, any witness "qualified as an expert by knowledge, skill, experience, training or education" may testify if the evidence meets the helpfulness standard. This definition is farreaching; an "expert" may be an otherwise quite ordinary person whose experience gives him knowledge concerning some matter involved in the trial.<sup>28</sup>

Under rule 704, opinion testimony that is otherwise admissible cannot be

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25. See generally McElhaney, *Expert Witnesses and the Federal Rules of Evidence*, 28 MERCER L. REV. 463 (1977).

Some readers may find it helpful to use a metaphor taken from childhood fairy tales to explain what these Federal Rules of Evidence actually do. I find it useful to call the three different exceptions created by rules 703 and 705 the "Three Bears" exceptions. Rule 705 creates both a "Big Bear" exception and a "Baby Bear" exception. Under the tiny "Baby Bear" exception the trial judge has discretion to permit an expert witness to refer directly, rather than hypothetically, to facts supporting his opinion that are proven by other evidence but that are not within the expert's personal knowledge. This is a tiny hearsay exception to solve a tiny but real hearsay problem. Common law practice would have compelled the expert to refer to such facts only as hypothetical possibilities. Under the "Big Bear" exception the trial judge has similar discretion to permit such an expert to state and explain an opinion based upon facts that are not only not within his personal knowledge but that are also not proven by any of the evidence in the record. This is an enormous exception. The most important exception, however, is the "Middle Bear" exception created by rule 703 under which facts that are not in evidence and which may not be otherwise even admissible in evidence may be used by an expert as the basis of an opinion if they are "of a type reasonably relied upon by experts in the particular field." In any particular situation two or three of these exceptions may overlap each other, and it is necessary to be very careful in identifying which exceptions apply where. I find the "Three Bears" device helpful in sorting out these exceptions.

26. Federal Advisory Committee's Notes, *supra* note 4, at 281.

27. See FED. R. EVID. 702; Federal Advisory Committee's Notes, *supra* note 4, at 282.

28. Federal Advisory Committee's Notes, *supra* note 4, at 282.

excluded because it embraces "an ultimate issue to be decided by the trier of fact." In order to be admissible at all, an opinion must be offered through either a lay person with personal knowledge of the facts or an expert witness with special qualifications, and must be helpful to the trier of fact.<sup>29</sup> There is no reason why such an opinion should be excluded or restated because it deals with a question the jury (or other factfinder) must ultimately decide.<sup>30</sup> This provision does not mean that meaningless opinions on the issues to be tried are now admissible. They are excluded by the requirement that opinions must be helpful to the trier of fact.<sup>31</sup>

### C. Three Related Changes

Rules 705 and 703 make major changes both in the methods that may be used to examine expert witnesses and in the kinds of opinions and other information that may be introduced through the testimony of expert witnesses. These changes do not prohibit any prior methods of examination, such as the use of hypothetical questions, and in many situations trial lawyers will continue to use the old procedures because they appear to be the best procedures with which to present the particular evidence in their case. It should also be pointed out that the requirements abolished by rules 705 and 703 frequently were either ignored or treated as useless formalities in many cases tried under the common law.<sup>32</sup> Nevertheless, the means by which rules 705 and 703 achieve the abolition of these requirements involve the creation of radically new theories concerning the nature and purpose of expert testimony. These new theories lead to some totally new problems.

Rules 705 and 703 consist largely of sweeping provisions that reject prior requirements far more clearly than they explain what new requirements will now exist. Despite their vagueness, or perhaps in part because of it, the new Federal Rules of Evidence dealing with expert witnesses were an immediate success. Smith and Henley wrote in 1976: "Recent trial experience under the new rules indicates that this approach is much simpler, takes much less time, and promotes a much more orderly presentation of evidence."<sup>33</sup>

Nevertheless, it would have been better if these rules had spelled out more clearly how they were to work. Thus, rule 703 should have explained the circumstances in which an expert who is permitted to base an opinion on "inadmissible" data will also be permitted to refer to the data in his testimony in order to explain the opinion. Rule 703 does not make any sense unless the expert can refer to inadmissible data,<sup>34</sup> but the rule should have dealt with the

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29. FED. R. EVID. 701 & 702.

30. See *supra* notes 11 & 12 and accompanying text.

31. Federal Advisory Committee's Notes, *supra* note 4, at 282.

32. See 3 J. WEINSTEIN & M. BERGER, *supra* note 5, ¶ 703[01]. See also Maguire & Hahesy, *Requisite Proof of Basis for Expert Opinion*, 5 VAND. L. REV. 432 (1952); Rheingold, *The Basis of Medical Testimony*, 15 VAND. L. REV. 473 (1962).

33. Smith & Henley, *Opinion Evidence: An Analysis of the New Federal Rules and Current Washington Law*, 11 GONZAGA L. REV. 692, 697 (1976).

34. See McElhane, *supra* note 25, at 482-83.



problem. The Supreme Court of North Carolina did spell out exactly these circumstances when it announced a similar rule in *State v. Wade*.<sup>35</sup> The North Carolina rule provides that the expert may refer to inadmissible but "inherently reliable" information for the limited purpose of showing the basis for the expert's opinion.<sup>36</sup>

### 1. Abolition of the Requirement that the Basis for the Expert's Opinion Be Stated

Rule 705 permits an expert witness to give an opinion "without prior disclosure of the underlying facts or data." The effect of this provision is to permit an expert witness simply to state his opinion without stating the facts upon which it is based and without the use of a hypothetical question. This form of testimony may be used "unless the court requires otherwise," but rule 705 does not suggest any standard to guide the trial court in deciding whether to "require otherwise." The discussion below suggests some circumstances in which the trial court might be persuaded to use this power,<sup>37</sup> but the draftsmen did not intend for the trial judge automatically to require that the basis for the opinion be shown even when the opposing party objects to the absence of foundation for an opinion.<sup>38</sup>

If the trial court does not require the basis to be shown, each of the parties must decide whether to bring it out in their examination of the witness. If the party calling the witness does not bring out the basis on direct examination of the witness, the opposing party may bring it out on cross-examination. But if neither party chooses to bring out the basis for an opinion, the testimony of a qualified expert may consist of nothing more than a naked statement of his opinion.<sup>39</sup> This probably will not occur very often. Rule 705 does not prohibit

35. 296 N.C. 454, 251 S.E.2d 407 (1979).

36. *Id.* at 462, 251 S.E.2d at 412.

37. See *infra* Part II-C(2).

38. McElhaney argues:

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 timesaving 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.

McElhaney, *supra* note 25, at 489. Louisell and Mueller agree:

The phrasing of the Rule suggests that this kind of to-the-point presentation should be routinely allowed. To be sure, the Rule allows the trial judge to "require otherwise"; however, the sense of the provision is that he should not so require as a practice, but should do so only where he finds particular facts, peculiarly important in the individual case, which indicate a special need to develop the foundation first.

3 D. LOISELL & C. MUELLER, FEDERAL EVIDENCE § 400, at 707 (1979).

39. See *infra* notes 84 & 85 and accompanying text for a widely used hypothetical illustration of such testimony. It is clear that the draftsmen of the Federal Rules of Evidence intended to create the possibility of such testimony. The Advisory Committee wrote: "If the objection is made that leaving it to the cross-examiner to bring out the supporting data is essentially unfair, the answer is that he is under no compulsion to bring out any facts or data except those unfavorable to the opinion." Federal Advisory Committee's Notes, *supra* note 4, at 286.

either the use of hypothetical questions or the introduction of other testimony explaining the basis of the expert's opinion. The parties will usually choose to introduce evidence showing the basis for expert opinions in order to persuade the judge or jury to believe or disbelieve those opinions.

It is possible under rule 705, however, that a judge or jury might be asked to decide a disputed question on the basis of unexplained assertions by expert witnesses. Proponents of rule 705 might argue that this frequently did happen under common law procedures except that, instead of being denied explanations, judge and jury were buried under explanations that they could not understand.<sup>40</sup> This was especially apt to be true if it was necessary to use a hypothetical question in order to ask the expert to state an opinion based upon facts of which he did not have personal knowledge. Rule 705 attempts to solve the problem of excessive and incomprehensible evidence concerning expert opinion by abolishing (unless the court requires otherwise) the requirement that the party offering the expert must "make a record" during the trial showing the basis for the opinion.<sup>41</sup>

Rule 705 abolishes only the requirements that the basis for an expert opinion be stated and not the requirement that there be a basis for the opinion. Rule 705 creates several problems, however, with the questions of when and how the actual existence of an adequate basis must be shown. The provision in rule 705 authorizing the admission of an expert opinion without any revelation of its basis must be read as applying to both questions of admissibility and sufficiency. Whenever an expert opinion has been introduced without any inquiry into the basis for that opinion, the court must presume that an adequate basis exists unless evidence disproving the basis is introduced. A trial judge who is unwilling to presume the existence of a basis for a particular expert opinion may exercise his discretion to require the party offering the opinion to prove a basis when the opinion is offered, but if an expert opinion is admitted without evidence proving its basis, the existence of an adequate basis must be presumed (in the absence of contrary evidence). Any other reading of rule 705 would turn that rule into a trap for those who rely upon it.

The problems grow even more difficult in cases in which one party attempts to offer an expert opinion without showing a basis, and the other party does wish to dispute the adequacy of the basis. The trial judge could exercise his discretion under rule 705 and require the party offering the expert to show the existence of an adequate basis whenever the opposing party objects to an expert opinion. It seems unlikely that it could ever be error to require that the basis be shown, and it certainly never could be prejudicial error. Nevertheless, it is clear that the draftsmen of rule 705 did not intend for the trial court to require the basis for an expert opinion to be shown whenever the opposing party objected. Rule 705 gives the trial court, not the opposing party, the discretion to require that the basis be shown. Clearly, the draftsmen of rule 705

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40. C. McCORMICK, *supra* note 4, § 16; 3 J. WEINSTEIN & M. BERGER, *supra* note 5, ¶ 705[01]; 2 J. WIGMORE, EVIDENCE, 686 (3d ed. 1940).

41. *See supra* note 39.

contemplated that in at least some cases the opposing party should be required to do something more than merely object to an expert opinion in order to require that a basis be shown. In such cases the opposing party will be required to point out a particular problem in order to raise the question of the adequacy of the basis.

The opposing party may question the adequacy of the basis in four different ways. First, the opposing party has an automatic right to attack the adequacy of the basis through cross-examination of the expert, and if cross-examination shows that the basis is inadequate, the opinion will be stricken from the record. This method of attack cannot be used, however, until the opinion has already been introduced. Second, the opposing party may seek to keep the expert opinion from ever being introduced by requesting that the trial judge exercise his discretion under rule 705 to order the party offering the expert opinion to lay a foundation for that opinion by showing a basis for it. Third, the opposing party may ask the court to exercise its general discretion and allow a voir dire examination. Fourth, the opposing party may file a pre-trial motion to exclude the expert testimony.

To make effective use of any of the first three methods of attack, the opposing party must already recognize the questionable aspect of the basis for the expert's opinion. It is unlikely that the trial judge will order either a demonstration of the basis for the opinion or a voir dire of the expert unless the opposing party can show that there is likely to be something questionable about the basis for the opinion. Apparently, the opposing party will be expected to prepare its attacks through pretrial discovery.<sup>42</sup> A party who does prepare through pretrial discovery of the expert's possible basis will also be able to use the fourth method of attack—a pretrial motion to exclude improper opinion testimony.

It seems clear that the burden of persuading the court that there is an adequate basis for an expert opinion remains with the party who offers the opinion as evidence. The burden of raising a bona fide question about the adequacy of that basis, however, apparently has been shifted to the party seeking to oppose the introduction of that opinion. This might be more accurately described as a "burden of discovery" than as a burden of coming forward. In a case in which the opposing party can justify its failure to conduct adequate discovery, the trial court probably should exercise its discretion to require that the basis for an expert opinion be shown by the party offering the opinion.<sup>43</sup>

Of course, a party offering an expert opinion probably will want to offer evidence concerning some parts of the basis for that opinion, rather than to offer a naked opinion without any supporting basis. The disclosure of part of the basis raises the question whether the *entire* basis of the opinion must now

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42. See Federal Advisory Committee's Notes, *supra* note 4, at 286; 11 J. MOORE & H. BENDIX, MOORE'S FEDERAL PRACTICE § 705.10 at VII-70 (2d ed. 1982); 3 J. WEINSTEIN & M. BERGER, *supra* note 5, ¶ 705[01]. Nevertheless, Weinstein and Berger warn that in criminal cases "an attorney will be less likely to have sufficient advance knowledge for effective cross-examination." *Id.*

43. See 3 J. WEINSTEIN & M. BERGER, *supra* note 5, ¶ 705[01], at 705-10.

be shown. The same question arises whenever the opposing party exercises its right to explore the basis of the opinion on cross-examination. It could be argued in both situations that there should come a point at which so much information about the basis of the opinion has been introduced that the hearsay exception which allows an expert to base an opinion on facts that have not been introduced into evidence should disappear, and the party offering the opinion should be required to introduce all the evidence that would have been required under prior practice. After all, this exception is merely a logical consequence of the provision in Federal Rule of Evidence 705 that authorizes the admission of some opinions "without prior disclosure of the underlying facts or data."

Nevertheless, this hearsay exception will probably be held to continue in effect even after substantial disclosure of the basis for the expert's opinion. The Federal Advisory Committee's Note to Federal Rule of Evidence 705 seems to assume that the supporting data need not be brought out even if the cross-examiner brings out data "unfavorable to the opinion."<sup>44</sup> The rule does set a limitation on the extent to which an expert will be allowed to base an opinion on facts not in evidence. It is the discretion of the trial court to require disclosure. Partial disclosure of the basis may lead the trial court to order full proof of facts adequate to support the opinion. The trial court should take care, however, not to exercise that discretion in an unfair manner. Counsel should be given notice that the court has decided to require proof of the basis for an opinion and should be afforded a full opportunity to introduce such proof.

Professor McElhaney assumes that a hearsay exception under rule 705 will allow an expert to base an opinion on facts not introduced into evidence in many cases in which there is substantial discussion of some parts of the basis for an expert's opinion. He writes:

The real advantage of Rule 705 is that it permits the 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.<sup>45</sup>

## 2. Abolition of the Requirement that a Hypothetical Question Be Used When an Expert Witness Does Not Have Personal Knowledge of the Facts upon Which His Opinion is Based

Rule 705 creates a minor hearsay exception that permits an expert witness to refer to the facts upon which his opinion is based without the use of a hypothetical question. The rule does not say this. It does not even use the term "hypothetical question." But the rule and the Federal Advisory Committee's

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44. Federal Advisory Committee's Notes, *supra* note 4, at 285-86.

45. McElhaney, *supra* note 25, at 488. *See also id.* at 488 n.96; 3 J. WEINSTEIN & M. BERGER, *supra* note 5, ¶ 705[01].

Note<sup>46</sup> to the rule make sense only if rule 705 permits an expert to refer directly to facts to which he previously could refer only hypothetically. Of course, the examining party can still use a hypothetical question if he wishes.<sup>47</sup> Furthermore, the trial court's discretion to require that the basis for an opinion be shown would appear to include discretion to require the use of a hypothetical question.<sup>48</sup>

McElhaney suggests that the abolition of the requirement that the basis be disclosed will permit the use of partial hypotheticals and other partial revelations of the basis of an expert opinion.<sup>49</sup> The common law requirement that all such questions must be fair<sup>50</sup> still applies because rule 702 requires all expert testimony to be helpful. If, however, the trial court permits the expert to be examined without a full disclosure of the basis for his opinion, it may be difficult for the trial court to tell when such a question is unfair. Once again the opposing party will have to be prepared to explain to the court what is wrong with the expert's testimony.<sup>51</sup>

### 3. Abolition of the Requirement that the Expert's Opinion Be Based Upon Facts in Evidence

Rule 703 authorizes an expert to base his opinion on facts in the case itself that he has either "perceived" or had "made known to him at or before the hearing." He may base his opinion upon facts that are not in evidence if they are "of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject."

Rule 703 creates two new problems. The first problem is determining when a particular piece of information relied upon by an expert is "of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject." Professor McElhaney points out the difficulty of transferring a standard of decision from some other field into the courtroom:

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

46. Federal Advisory Committee's Notes, *supra* note 4, at 285-86.

47. 3 D. LOUISELL & C. MUELLER, *supra* note 38, § 400. Weinstein and Berger argue that the trial court does have authority under relevancy rules to exclude hypothetical questions that are "confusing or repetitious or unnecessary." 3 J. WEINSTEIN & M. BERGER, *supra* note 5 ¶ 705[01], at 705-07.

48. D. LOUISELL & C. MUELLER, *supra* note 38, § 400, at 712; J. WEINSTEIN & M. BERGER, *supra* note 5, ¶ 705[01], at 705-06.

49. McElhaney, *supra* note 25, at 488.

50. C. McCORMICK, *supra* note 4, § 14. See 3 D. LOUISELL & C. MUELLER, *supra* note 38, § 400; *id.* at 716 n.14.

51. See text accompanying notes 41-43 *supra*.

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.<sup>52</sup>

Therefore, it is the trial judge who must decide when the expert's reliance on information not in evidence is so reasonable that he should be permitted to base his testimony upon it. Once again, if the expert is not required to explain the basis for his opinion under rule 705, it may be difficult for the trial court to discover even the fact that the expert is relying on information not in evidence. And once again the opposing party must be prepared through discovery to point out to the trial court what the expert is doing.<sup>53</sup>

The second problem is the extent to which reliance by the expert on information not in evidence makes such information usable in the trial itself. All that rule 703 purports to do is to authorize the use of an opinion based upon such information.<sup>54</sup> Any dispute about the correctness of that opinion, however, surely will require a discussion of the information upon which it is based.<sup>55</sup> Therefore, federal rule 703 must authorize another hearsay exception that permits testimony about facts otherwise inadmissible as evidence. It is generally argued that this is a limited use exception,<sup>56</sup> but since the limited use is to support the expert's opinion, McElhaney is correct when he calls federal rule 703 "virtually a major new exception to the hearsay rule."<sup>57</sup>

### III. NORTH CAROLINA ABOLISHES ANY REQUIREMENT THAT A HYPOTHETICAL QUESTION BE USED IN THE EXAMINATION OF AN EXPERT WITNESS

#### A. *Optional Use of Hypothetical Questions.*

House Bill 394<sup>58</sup> is titled "An Act to Eliminate the Hypothetical Question," but it did not "eliminate" the hypothetical question. Any attorney who is questioning an expert witness may use any hypothetical question that he would have been permitted to use under prior law.<sup>59</sup> The statute does, however, give an attorney the option to ask for an expert opinion without using a hypothetical question even though prior law would have required its use.

52. McElhaney, *supra* note 25, at 486. See S. SALTZBURG & K. REDDEN, FEDERAL RULES OF EVIDENCE MANUAL 466-67 (3d ed. 1982).

53. See *supra* text accompanying notes 41-43.

54. See McElhaney, *supra* note 25, at 481-82; S. SALTZBURG & K. REDDEN, *supra* note 52, at 467.

55. See S. SALTZBURG & K. REDDEN, *supra* note 52, at 467.

56. See McElhaney, *supra* note 25, at 482 n.83; S. SALTZBURG & K. REDDEN, *supra* note 52, at 467; J. MOORE & H. BENDIX, *supra* note 42, § 705.10, at VII-73. But see Blakey, *An Introduction to the Oklahoma Evidence Code: The Thirty-Fourth Hearsay Exception, Information Relied Upon as a Basis for Admissible Expert Opinion*, 16 TULSA L.J. 1, 34-40 (1980).

57. McElhaney, *supra* note 25, at 481.

58. Enacted as Law of June 11, 1981, ch. 543, 1981 N.C. Sess. Laws 816 (codified at N.C. GEN. STAT. §§ 8-58.12 to -58.14 (1981)). See *supra* note 8 for the provisions of the Act.

59. Dean Brandis argues that the trial judge should have discretion to prevent the voluntary use of hypotheticals whenever, as in the case of hypotheticals of great length, they constitute "professionally competent abuse of the hypothetical." 1 H. BRANDIS, *supra* note 12, § 137 n.43.

The statute was a response to widespread dissatisfaction with the use of hypothetical questions. These questions can be used successfully when the circumstances of the case are such that simple and clear hypothetical questions are possible. Far more often, however, the hypothetical question is an incomprehensible formality that completely conceals the expert's thinking. As Dean Brandis pointed out, "Very long hypotheticals are well calculated to confuse—or lose—any jury lacking the courage and common sense to disregard everything except the general drift of the answer."<sup>60</sup> Although some of the problems caused by hypothetical questions may be blamed on inadequate preparation by counsel, better preparation will not cure the basic problems with the use of hypothetical questions. Dean Brandis also commented, "In the construction of a hypothetical question, the grossest ineptitude and the most skilled precision can produce results which if not equally erroneous, are nevertheless equally ridiculous."<sup>61</sup> McCormick concluded:

The hypothetical question is an ingenious and logical device for enabling the jury to apply the expert's scientific knowledge to the facts of the case. Nevertheless, it is a failure in practice and an obstruction to the administration of justice. If we require that it recite all the relevant facts, it becomes intolerably wordy. If we allow, as most courts do, the interrogating counsel to select such of the material facts as he sees fit, we tempt him to shape a one-sided hypothesis.<sup>62</sup>

McCormick<sup>63</sup> and Brandis<sup>64</sup> supported Wigmore's proposal<sup>65</sup> that the use of hypothetical questions be made optional unless the trial judge requires that one be used. Federal Rule of Evidence 705 adopts this idea of judicial discretion.<sup>66</sup> The North Carolina statute is based, in part, upon federal rule 705, but it does not follow the portion of the federal rule that gives the trial judge discretion to require the use of a hypothetical question. Instead, it gives the option to examining counsel, who cannot be required to use a hypothetical question.<sup>67</sup> The statute provides: "There shall be no requirement that expert testimony be in response to a hypothetical question."<sup>68</sup> The North Carolina statute also deprives the trial judge of some of the discretion that the federal rule entrusts to him with respect to prior disclosure of the facts upon which an expert's opinion is based. Some discretion is given to the adverse party, who may decide that "the expert will be required to disclose such underlying facts or data on direct examination or voir dire before stating the opinion."<sup>69</sup> Under this system, examining counsel may need to be prepared to do every-

60. *Id.*

61. 1 D. STANSBURY, NORTH CAROLINA EVIDENCE § 137 n.2 (H. Brandis rev. 1973).

62. C. MCCORMICK, *supra* note 4, § 16, at 36.

63. *Id.* at 36-37.

64. 1 H. BRANDIS, *supra* note 12, § 137 n.43.

65. 2 J. WIGMORE, EVIDENCE § 686 (J. Chadbourn rev. 1979).

66. *See supra* note 47.

67. *But see* 1 H. BRANDIS, *supra* note 12, § 137 n.42. *See also* Ayscue, *More Evidence—The Hypothetical Question Comes Under Attack*, 32 B. NOTES, July-Aug. 1981, at 7,9.

68. N.C. GEN. STAT. § 8-58.12 (1981).

69. N.C. GEN. STAT. § 8-58.14 (1981).

thing that would be necessary to lay the foundation for a hypothetical question, but he then can ask the expert witness for an opinion without using a hypothetical question.

*B. Examining Expert Witnesses Without Hypothetical Questions*

Prior law required a hypothetical question to be used when the expert witness did not have personal knowledge of the facts to which his opinion applied. The new statute does not explain what procedure is to be substituted for a hypothetical question, but it would appear that the expert will simply be permitted to give his opinion and to state the facts upon which the opinion is based even though he has only a hearsay knowledge of the facts that are not within his personal knowledge. This would be a violation of the rule against hearsay, but the new statute should be read as creating a minor hearsay exception for statements by an expert about facts that are in evidence but not within his personal knowledge. This small hearsay exception should be carefully distinguished from the much more important exception recognized in *State v. Wade* that will permit an expert to discuss some facts that are not even in evidence.<sup>70</sup>

The North Carolina statute does not change prior law with respect to the facts that may be used as the basis for an expert's opinion. North Carolina law permits an expert witness to rely upon three kinds of facts: (1) information within the expert's personal knowledge; (2) other information furnished to the expert that is not within his personal knowledge but which satisfies the "inherent reliability" standards of *State v. Wade*, *Booker v. Duke Medical Center*,<sup>71</sup> and *State v. Franks*,<sup>72</sup> and (3) other relevant information that has been introduced into evidence.<sup>73</sup> One effect of the recent decisions by the Supreme Court of North Carolina in *Wade*, *Booker*, and *Franks*, which permit some expert witnesses to base opinions upon facts not within their personal knowledge but found to be "inherently reliable," is to reduce the number of cases in which a hypothetical question would be necessary even under prior law.

The hearsay exception created by section 1 of the new statute only applies to facts that are already in evidence and that, therefore, could have been included in a hypothetical question if one had been used. How does an expert learn what particular facts are in evidence and, therefore, the facts that may be used as a basis for his opinion under this new hearsay exception? The North Carolina statute does not deal with this question, but logic suggests that it would certainly be proper for the expert to base his opinion upon either testimony he had heard<sup>74</sup> or a transcript he had read. Even an oral summary of other testimony may be a proper basis for his testimony.<sup>75</sup>

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70. See *infra* Part V-A.

71. 297 N.C. 458, 256 S.E.2d 189 (1979).

72. 300 N.C. 1, 265 S.E.2d 177 (1980).

73. 1 H. BRANDIS, *supra* note 12, §§ 136, 137.

74. See *id.* § 137 & nn.58 & 59.

75. See Comment, *Expert Medical Testimony: Differences Between the North Carolina Rules*



C. *Avoiding Irrational Restrictions on the Form of Testimony*

The goal of the draftsmen of the Federal Rules of Evidence was to permit expert witnesses to testify in the same manner they would use in discussing a problem in their own offices or laboratories.<sup>76</sup> An expert stating his own opinion in his own words is very likely to violate two rules that have sometimes been applied to expert testimony: the rule previously followed by the North Carolina courts forbidding positive statements of causation in hypothetical testimony and the supposed rule forbidding opinion testimony based upon other opinion testimony. Neither rule should have been applied to even hypothetical testimony, and they certainly should not be applied to testimony given without the use of hypothetical questions.

The rule forbidding positive statements of causation testimony in hypothetical testimony and requiring statements that an event merely "could or might" cause a result<sup>77</sup> has been undercut by the decision of the Supreme Court of North Carolina in *Mann v. Virginia Dare Transportation Co.*<sup>78</sup> An expert witness should be permitted to make as strong a statement of causation as he is able to make.

There is not, never has been, and never could be an actual rule forbidding expert opinions to be based upon other opinions.<sup>79</sup> The cases in which such a rule is announced are either aberrations or ones in which the statements about opinions based upon opinions are dicta.<sup>80</sup> Opinion testimony is frequently

*and Federal Rules of Evidence*, 12 WAKE FOREST L. REV. 833, 837 (1976) (following a suggestion in P. ROTHSTEIN, UNDERSTANDING THE NEW FEDERAL RULES OF EVIDENCE 81 (1973)).

76. Federal Advisory Committee's Notes, *supra* note 4, at 283.

77. See 1 H. BRANDIS, *supra* note 12, § 137; *supra* cases cited at note 17.

78. 283 N.C. 734, 747-48, 198 S.E.2d 558, 567-68 (1973). See *supra* note 19. See also Taylor v. Boger, 289 N.C. 560, 565, 223 S.E.2d 350, 353 (1978); Lowery v. Newton, 52 N.C. App. 234, 240-41, 278 S.E.2d 566, 571-72 (1981).

79. See 2 J. WIGMORE, EVIDENCE § 682 (J. Chadbourn rev. 1979).

It is sometimes said that "an opinion of an expert cannot be based upon opinions expressed by other experts"; but this is unsound . . . [T]he basis for a hypothetical opinion may be either data observed or data inferred, and that inferred data presented by expert testimony may equally well become a part of the basis for a hypothetical question; e.g. (as in the case cited) a fireman may testify to coal in the furnace, and a chemist may testify, hypothetically on the burning of coal, that the gas generated would be carbon monoxide, and then another expert may be asked what would be the effect of an explosion of carbon monoxide on starch dust in the oven room. There is no mysterious logical fatality in basing "one expert opinion upon another"; it is done every day in business and in applied science.

*Id.* at 956-57 (footnote omitted).

80. Brandis summarizes the North Carolina authorities as follows:

It has been said, in broad terms, that an expert may not base his opinion upon the opinion of another expert; but it seems that, in fact, when the other opinion was before the jury, it was allowed to become the basis for assumptions in hypothetical questions. It would seem that it may now be included in the basis for an opinion, though hypotheticals are no longer necessary.

1 H. BRANDIS, *supra* note 12, § 136 (footnotes omitted). Brandis goes on to point out how often opinions of other persons have been used in North Carolina as the basis for assumptions in hypothetical questions. *Id.* at n.22.

There are two North Carolina cases that do state a rule against opinion based upon the opinion of another expert, but in each case the statement was dictum. In both *State v. David*, 222 N.C. 242, 22 S.E.2d 633 (1942), and *State v. Hamilton*, 16 N.C. App. 330, 192 S.E.2d 24 (1972), there

used as evidence to prove the facts required as a basis for expert opinions.<sup>81</sup> The only logical problem with such testimony is the possible ambiguity as to whether the expert is assuming that the opinion was merely stated or that the fact stated is actually true. A lawyer preparing a hypothetical question should eliminate any ambiguity, but it is not a real danger. An expert witness who states that he is relying upon an opinion of another is surely assuming both the existence of the opinion and its truth, and he should be so understood.

#### IV. DISCLOSURE OF UNDERLYING FACTS OR DATA UNDER THE NORTH CAROLINA STATUTE

##### A. *The Adverse Party Has Power to Require Prior Disclosure*

Under Federal Rule of Evidence 705 there is a possibility that expert opinion testimony may be introduced without the facts or data upon which the opinion is based having been disclosed to the jury or judge. The adverse party always has a right (under both Federal Rule of Evidence 705 and the North Carolina statute) to bring out the underlying facts or data on cross-examination; but if the opinion is already in evidence, the adverse party may not find it worthwhile to bring out the foundation for the opinion.<sup>82</sup> This is a radical change from prior law under which the basis of an expert opinion was considered an essential foundation necessary to prove the correctness of that opinion.<sup>83</sup> Under the new procedure, unless the basis is required to be shown, an expert opinion can stand on its own without any disclosed basis. There must still be a basis in fact, but that basis may not appear in the evidence introduced into the record. The Subcommittee on the Proposed Rules of Evidence of the Colorado Bar Association objected to this change during the congressional debates on the adoption of the Federal Rules of Evidence and offered the following illustration:

The proposed rules require no foundation to be admitted on which the expert based his opinion. Your committee feels that it is absolutely essential that a foundation be required before an expert opinion be admitted. Otherwise, once any expert has been qualified as such he could offer his opinion on any matter with no reasons to support that opinion. For example, one can envision the following dialogue immediately after the expert had been qualified as an orthopedic surgeon:

Q. Doctor, do you have an opinion based upon a reasonable degree of medical [ce]rtainty as to the extent of permanent disability suffered by the plaintiff as a result [of] this automobile accident?

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were far more serious problems with the procedure used than the use of opinion evidence as a basis for the assumptions in the hypothetical questions. In both *David* and *Hamilton* the other expert's opinion was not included in the hypothetical, and in *Hamilton* the other expert's opinion was not even in evidence. The procedures under review in those two cases might be permissible under Federal Evidence Rule 703 or the "inherently reliable" hearsay exception of *Wade*, but they were clearly unacceptable under then existing North Carolina law.

81. See 1 H. BRANDIS, *supra* note 12, § 136 n.22.

82. See 10 J. MOORE & H. BENDIX, *supra* note 42, § 705.10, at VII-72.

83. *United States v. Santarpio*, 560 F.2d 448 (1st Cir.), *cert. denied*, 434 U.S. 984 (1977).

A. Yes.

Q. What is your opinion?

A. She is totally [and] permanently disabled.

Q. Thank you, doctor, that is all.<sup>84</sup>

In fact, it is unlikely that very many plaintiffs' attorneys would be willing to stop at that point. Weinstein and Berger, however, quote the statement by the Colorado subcommittee and then comment, "Congress found no objection to such brevity. Many judges would welcome it."<sup>85</sup> Professor McElhaney has suggested, perhaps more realistically, that the "real advantage of Rule 705 is that it permits the streamlining of hypothetical questions" so that a questioner can be "far more selective than before in choosing the contents of hypothetical questions."<sup>86</sup>

Under the federal rule, the examining attorney is entitled to decide whether his client's case can best be presented without a full explanation of the facts upon which the expert's opinion is based. The trial judge can require more complete disclosure, but the judge is unlikely to do so unless the adverse party comes forward with some good reason to require such prior disclosure.<sup>87</sup> Under the North Carolina statute, the adverse party has an absolute right to require that the expert disclose the "underlying facts or data on direct examination or voir dire before stating the opinion."<sup>88</sup> This change is not very important unless it means that the adverse party now has the discretion vested in the trial judge under the federal rule to decide whether the party offering the expert's opinion must make the full proof of the basis that was required at common law. Should the North Carolina statute be interpreted to give that power to the adverse party, the statute will have a much smaller impact than federal rule 705. A party offering expert opinion testimony would usually be required by the adverse party to do everything necessary to lay a foundation for a hypothetical question at common law, even though the examining party need not ask a hypothetical question. It appears more likely, however, that the statute will be interpreted as giving the adverse party only a right to some prior disclosure from the expert himself. In that event it appears that the trial judge would have discretion to decide if full proof should be required. Of

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84. *Hearings Before the Subcomm. on Criminal Justice (Formerly Designated as Special Subcomm. on Reform of Federal Criminal Laws) of the House Comm. on the Judiciary on Proposed Rules of Evidence*, 93rd Cong., 1st Sess. 353, 355-56 (Supp. 1973) (correspondence of William B. Miller, executive director, Colorado Bar Association).

85. 3 J. WEINSTEIN & M. BERGER, *supra* note 5, ¶ 705[01], at 705-1 to -2. Louisell and Mueller comment on this same illustration: "It is precisely this kind of testimony which Rule 705 envisions, and modern decisions recognize as much." 3 D. LOUISELL & C. MUELLER, *supra* note 38, § 400, at 707 (footnote omitted). McElhaney suggests that the illustrated testimony may be longer than the Federal Rules of Evidence require and offers a shorter version:

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.

McElhaney, *supra* note 25, at 480.

86. McElhaney, *supra* note 25, at 488.

87. See *supra* authorities cited at notes 38 & 42.

88. N.C. GEN. STAT. § 8-58.14 (1981).

course, if it did begin to appear that there were no adequate basis for an opinion, the party offering the opinion would be required to show that a basis did exist.<sup>89</sup> Adverse parties will not always exercise their right to require disclosure, perhaps because they do not think such disclosure will help their case, or perhaps to avoid similar demands that they prove the basis for their experts' opinions. Nevertheless, it seems likely that there will be more unnecessary proof of facts that the jury cannot understand under the North Carolina statute than there would be under the Federal Rules of Evidence.

### B. *The Form of Disclosure of Underlying Facts or Data*

Under the procedure adopted by the North Carolina statute, an expert witness must be able to explain the basis for his opinion by stating the facts upon which he relies even though some or all of those facts are not within his personal knowledge. This form of testimony will seem perfectly natural to the expert and to many attorneys, but under prior law it would have been a violation of the rule that even an expert witness could not describe things known to him only through hearsay.<sup>90</sup> The statute must be read as creating a new, small hearsay exception to circumvent this prior law. This procedure is not, however, a hearsay exception that can be used to introduce the facts relied upon as substantive evidence. The expert's description of facts outside his personal knowledge is not admissible as substantive evidence that those facts are true. If it is necessary to prove those facts, other evidence must be introduced.

This requirement is an important, and potentially confusing, difference between this small hearsay exception and the broader, more important exception for opinions based upon "inherently reliable" hearsay recognized under *Wade*, *Booker*, and *Franks*. Under the rule enunciated in *Wade* the expert's description of "inherently reliable" hearsay also is not admitted as substantive evidence,<sup>91</sup> but the opinion based upon "inherently reliable" hearsay is admissible as substantive evidence,<sup>92</sup> and no additional evidence is necessary to support it. Under the minor exception, however, the expert may refer to facts that do not qualify as "inherently reliable" hearsay, but evidence must be introduced to prove that those facts are true.

### C. *Disclosure of the Basis of Expert Opinions in Depositions*

It has been suggested that the words "upon trial," with which G.S. 8-58.14 begins, restrict the manner in which a deposition of an expert witness must be taken to be admissible at trial, requiring that during the taking of the deposition the basis for the opinion must be brought out before the opinion itself.<sup>93</sup> Osborne Ayscue states, "Failure of counsel to do this may result in exclusion

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89. See 3 D. LOUISELL & C. MUELLER, *supra* note 38, § 400 at 708-09; Ayscue, *supra* note 67, at 9.

90. C. McCORMICK, *supra* note 4, §§ 14-15.

91. State v. Wade, 296 N.C. 454, 462-64, 251 S.E.2d 407, 412 (1979).

92. *Id.*

93. Ayscue, *supra* note 67, at 9.

of the deposition testimony with the witness unavailable to testify live."<sup>94</sup> It is clear that an opinion given in a deposition in which the expert's basis is not explained is not admissible over objection. If a basis were given somewhere in the deposition, however, the trial court should be able to admit the explanation first and then the opinion, regardless of the order in which they were given at the deposition. Therefore, there is no reason to believe that a rigid rule has been created concerning the order of deposition testimony.

V. NORTH CAROLINA PERMITS EXPERT OPINIONS TO BE BASED UPON  
"INHERENTLY RELIABLE" HEARSAY EVEN IF THAT HEARSAY IS  
NOT INDEPENDENTLY ADMISSIBLE INTO EVIDENCE

A. Introduction

There is no provision in the new North Carolina statute that corresponds to Federal Rule of Evidence 703. All questions concerning what facts may be used as the basis for expert opinions and how those facts are to be proved are controlled by the common law of North Carolina. The common-law rules that have been recognized in recent decisions by the Supreme Court of North Carolina are, however, surprisingly similar to the new rules contained in federal rule 703.

It is frequently convenient to draw a sharp distinction between the usual common-law rules regarding expert witnesses and the new federal rules, but many common-law courts recognized that expert witnesses could be more useful in the courtroom if they were permitted to bring with them the approaches to evidence they used in making decisions outside the courtroom.<sup>95</sup> North Carolina courts frequently had allowed two kinds of experts—appraisers<sup>96</sup> and physicians—to make sensible use of out-of-court information, but a series of inconsistent decisions on the use of out-of-court information by physicians had created such confusion that no one could say when North Carolina would permit use of out-of-court information by experts.

In 1979, in *State v. Wade*,<sup>97</sup> the Supreme Court of North Carolina began to clarify the North Carolina rules. In that case the court announced two important principles. First, the court ruled that "[a] physician, as an expert witness, may give his opinion, including a diagnosis," which may be based upon "information supplied him by others, including the patient, if such information is inherently reliable even though it is not independently admissible into evidence."<sup>98</sup> Second, the court held that "[i]f his opinion is admissible the expert may testify to the information he relied on in forming it for the purpose

94. *Id.*

95. See note 32 *supra*.

96. See *State Highway Comm'n v. Conrad*, 263 N.C. 394, 139 S.E.2d 553 (1965); *Board of Transp. v. Lyckan Dev. Co.*, 53 N.C. App. 511, 281 S.E.2d 84 (1981). See also *Annot.*, 12 A.L.R.3d 1064 (1967).

97. 296 N.C. 454, 251 S.E.2d 407 (1979).

98. *Id.* at 462, 251 S.E.2d at 412.

of showing the basis of the opinion."<sup>99</sup>

Under *Wade* the expert's testimony concerning inadmissible information is not admitted as substantive evidence,<sup>100</sup> but the opinion based upon that evidence clearly is admitted as substantive evidence, and the "inadmissible" information can be used to show that the opinion is correct.<sup>101</sup> That is all a party offering such expert testimony needs in order to make his case. The North Carolina rules announced in *Wade* are actually clearer on these points than federal rule 703, which merely provides that an expert may use inadmissible facts "of a type reasonably relied upon by experts in the particular field," leaving all questions about the extent to which the expert may explain his use of such facts to be worked out at a later time by the courts.<sup>102</sup>

Although *Wade* was the first step in clarifying the confused North Carolina law, a great deal of uncertainty remained. Part of this uncertainty was caused by the facts in *Wade*, which made an extremely strong case for permitting the expert to explain the basis of his opinion. The expert in *Wade* was a psychiatrist who had treated defendant<sup>103</sup> and who had been prevented from describing the conversations with defendant<sup>104</sup> upon which he based his opinion that defendant was incapable of distinguishing right from wrong on the night he killed his wife and two children and stabbed himself.<sup>105</sup> Although it was clear that the conversation involved in that case satisfied the "inherent reliability" standard adopted in *Wade*, it was not clear whether there would be many other cases in which the out-of-court information relied upon by expert witnesses would satisfy that standard.<sup>106</sup>

Another major cause of uncertainty about the effect of *Wade* was the background of prior decisions against which it was decided. *Wade* did not state that it was overruling any prior cases.<sup>107</sup> Instead, it purported to reconcile the prior decisions.<sup>108</sup>

### B. *The Confusion Prior to Wade*

The law of North Carolina prior to *Wade*<sup>109</sup> was extremely confused on

99. *Id.*

100. *Id.* at 464, 251 S.E.2d at 412.

101. *Id.* at 463-64, 251 S.E.2d at 412. Furthermore, this procedure will overcome not only hearsay objections to "inherently reliable" evidence but also objections based upon requirements for authentication or the best evidence rule. This has not been directly decided in the North Carolina cases, but the "inherently reliable" test would not be very useful in cases such as *State v. Jackson*, 302 N.C. 101, 273 S.E.2d 666 (1981) (test by assistant), and *State v. Jones*, 54 N.C. App. 482, 283 S.E.2d 546 (1982) (tests, charts, and records produced by other persons), unless it could be used to solve the authentication problems involved in the use of records prepared by others.

102. See McElhaney, *supra* note 25, at 482-83.

103. 296 N.C. at 456, 251 S.E.2d at 408.

104. *Id.* at 457-58, 251 S.E.2d at 408-09.

105. *Id.* at 458, 251 S.E.2d at 409.

106. See Note, *Evidence—State v. Wade—Expert Testimony and the Dual Reliability Test*, 58 N.C.L. Rev. 1161 (1980).

107. See 296 N.C. at 462, 251 S.E.2d at 412. But see 1 H. BRANDIS, *supra* note 12, § 136 n.27.

108. 296 N.C. at 462, 251 S.E.2d at 412.

109. 296 N.C. 454, 251 S.E.2d 407 (1979).

the question whether an expert witness could base an opinion on facts that were neither in evidence nor within the expert's personal knowledge. The decisions of the Supreme Court of North Carolina on this question were in hopeless conflict.<sup>110</sup> These decisions not only took apparently irreconcilable positions; they failed to discuss the question whether any of the apparently inconsistent prior decisions were being overruled.<sup>111</sup>

All of the leading North Carolina cases on this issue deal with testimony by doctors or psychiatrists.<sup>112</sup> In many jurisdictions, the statements involved in some of these cases would have been admissible in evidence through a hearsay exception for statements made to a doctor for the purpose of obtaining treatment.<sup>113</sup> Under the Federal Rules of Evidence, this exception has been expanded to include statements made either for the purpose of medical treatment or solely for the purpose of medical diagnosis.<sup>114</sup>

In 1957, in *Penland v. Bird Coal Co.*,<sup>115</sup> the Supreme Court of North Carolina held that the opinion testimony of a physician was admissible despite the physician's reliance in whole or in part "on statements made to him by the patient, if those statements [were] made . . . in the course of professional treatment and with a view of effecting a cure, or during an examination made for the purpose of treatment and cure."<sup>116</sup> The court also held that the physician might testify to such statements for the limited purpose of showing the basis of his opinion.<sup>117</sup> Apparently this was the first time the North Carolina Supreme Court had been called upon to decide either question,<sup>118</sup> and the

110. See Note, *Expert Medical Opinion Evidence in North Carolina: In Search of a Controlling Precedent*, 8 N.C. CENT. L.J. 267 (1977); Note, *Evidence—State v. Wade—Expert Testimony and the Dual Reliability Test*, 58 N.C.L. REV. 1161 (1980).

111. 1 H. BRANDIS, *supra* note 12, § 136 n.25.

112. See *infra* cases cited at notes 115, 122, 126, 135 & 146 and accompanying text.

113. See C. McCORMICK, *supra* note 4, § 292.

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

115. 246 N.C. 26, 97 S.E.2d 432 (1957).

116. *Id.* at 31, 97 S.E.2d at 436.

117. *Id.*

118. The current edition of STANSBURY at the time *Penland* was decided was the 1946 first edition. It contained this statement with respect to opinion testimony by expert witnesses: "The witness may not base his opinion on facts related to him by the subject whose condition he is testifying about, or by any other person, even though such person be another expert." D. STANSBURY, NORTH CAROLINA EVIDENCE § 136, at 269 (1st ed. 1946) (footnotes omitted). There were numerous broad statements in the opinion of the North Carolina Supreme Court that were in general accord with that statement by Stansbury, but none of those cases dealt with a doctor's use of his patient's statements as a basis for his diagnosis. See, e.g., *Spivey v. Newman*, 232 N.C. 281, 59 S.E.2d 844 (1950). In the one case in which it may have been presented, *State v. Alexander*, 179 N.C. 759, 103 S.E. 383 (1920), the court did not reach a decision on that issue. In that case an expert witness testifying that in his opinion defendant was insane at the time he committed the crime was forbidden to repeat statements defendant had made to the expert concerning his "past life". The court upheld the exclusion of such statements on the doubtful scientific theory that they would be of no help in determining whether the defendant was insane. *Id.* at 765, 103 S.E. at 386. See also *State v. Wade*, 296 N.C. 454, 459, 251 S.E.2d 407, 410 (1979).

In *Moore v. Summers Drug Co.*, 206 N.C. 711, 175 S.E. 96 (1934), the court had permitted a doctor to repeat his deceased patient's statements about when he had first felt pain around his heart. That result could be described as an enormous stretching of the existing North Carolina hearsay exception for statements of an existing physical condition. See *Tucker v. Blackburn*, 28 N.C. App. 455, 457, 221 S.E.2d 755, 756-57 (1976). It also could be described, however, as a possible basis for a hearsay exception for all statements of a past mental or physical condition "by

court cited no North Carolina authority on those questions.<sup>119</sup> The rules adopted by the court were, however, already in force in a substantial minority of other American jurisdictions,<sup>120</sup> and the court supported its decision with citations to national authorities.<sup>121</sup>

Nevertheless, in two similar cases decided in 1963 and 1967 the court announced decisions that appeared to be in conflict with its holdings in *Penland*. It was impossible to determine whether the court intended to overrule *Penland* or to distinguish it, because the court did not cite or discuss *Penland* in either decision. *Seawell v. Brame*<sup>122</sup> might easily have been distinguished from *Penland*. In that case the court ordered a new trial because the physician who had treated plaintiff had been permitted to give an opinion on the cause of plaintiff's illnesses based in part upon information received from plaintiff's wife, plaintiff's former employee, and other members of plaintiff's family.<sup>123</sup> Clearly, nothing in *Penland* required that an expert must be permitted to base an opinion on out-of-court statements by third persons. The opinion in *Seawell* declared,<sup>124</sup> however, that an expert's opinion must either be based entirely upon personal knowledge or "upon an assumed state of facts supported by evidence and recited in a hypothetical question."<sup>125</sup>

It would have been much more difficult to distinguish *Todd v. Watts*<sup>126</sup> from *Penland*. In *Todd* a new trial was ordered because the doctor who had treated plaintiff had been permitted to testify that in his opinion plaintiff had sustained certain injuries as a result of an automobile accident.<sup>127</sup> The doctor had no personal knowledge that the accident had occurred<sup>128</sup> but had been told about it by plaintiff when he took her medical history.<sup>129</sup> *Todd* could have been distinguished from *Penland* on the basis of a distinction between the

a patient to a physician made for the purpose of diagnosis and treatment," and the first edition of STANSBURY pointed out that possibility. D. STANSBURY, NORTH CAROLINA EVIDENCE § 161, at 338 (1st ed. 1946). See also 1 H. BRANDIS, *supra* note 12, § 161 nn.11-14. In *State v. David*, 222 N.C. 242, 22 S.E.2d 633 (1942), the supreme court had decided that an expert witness could not use information from another expert as the basis of opinion testimony when that information had not been incorporated in a hypothetical question in which he was asked to assume that the jury found that information to be true. *Id.* at 253-57, 22 S.E.2d at 639-42.

119. The court did cite two cases that recognized the existence of the North Carolina hearsay exception for statements of present physical condition, *Bryant v. Burns-Hammond Constr. Co.*, 197 N.C. 639, 150 S.E. 122 (1929), and *Martin v. P.H. Hanes Knitting Co.*, 189 N.C. 644, 127 S.E. 688 (1925).

120. C. McCORMICK, HANDBOOK OF THE LAW OF EVIDENCE § 266 nn.4-5 (1st ed. 1954); Annot., 51 A.L.R.2d 1051, 1057 (1957); 130 A.L.R. 977 (1941); Annot., 65 A.L.R. 1217, 1222 (1930).

121. 246 N.C. at 31, 97 S.E.2d at 436.

122. 258 N.C. 666, 129 S.E.2d 283 (1963).

123. *Id.* at 669-71, 129 S.E.2d at 286-88.

124. *Id.* at 671, 129 S.E.2d at 287-88.

125. The court in *Seawell* quoted the language from the first edition of STANSBURY, quoted at the beginning of note 118 *supra*, but there was no issue in the case involving the use of statements by the patient himself. See 1 D. STANSBURY, NORTH CAROLINA EVIDENCE § 136 n.71 (H. Brandis rev. 1973).

126. 269 N.C. 417, 152 S.E.2d 448 (1967).

127. *Id.* at 419-21, 152 S.E.2d at 450-51.

128. *Id.* at 420, 152 S.E.2d at 451.

129. *Id.* at 419-20, 152 S.E.2d at 450.



kinds of information the two doctors had been given by their patients.<sup>130</sup> Some courts have drawn a distinction between permitting doctors to rely upon patients' statements about past symptoms and allowing doctors to rely upon patients' statements concerning the external causes of their injuries.<sup>131</sup> *Penland* involved past symptoms,<sup>132</sup> while the reference to the accident in *Todd* was a reference to an external cause. In neither *Penland* nor *Todd*, however, did the court draw any such distinction, and Chief Justice Parker, dissenting in *Todd*, argued that *Penland* was inconsistent with the result in *Todd*.<sup>133</sup> Thus, the decision in *Todd* created great uncertainty about whether *Penland* had been overruled.<sup>134</sup>

In 1974 and 1975 the court decided two cases that further increased the confusion in North Carolina case law. In *State v. DeGregory*<sup>135</sup> the court confronted a situation in which an expert witness, who had testified on behalf of the State that defendant was not insane,<sup>136</sup> had been invited to base his opinion upon both his examination of defendant "and any other information contained in [defendant's] official record of which [he was] the custodian and had available to [him]."<sup>137</sup> The court upheld the conviction based upon this expert testimony on two grounds. One ground was that defendant had not been prejudiced even if the expert should not have been permitted to base his opinion on out-of-court information.<sup>138</sup> The second ground, however, was that it was in fact proper for the expert to base his opinion upon information contained in the patient's official hospital record.<sup>139</sup> This was a broader view of the function of expert opinion testimony than the North Carolina Supreme Court had ever before taken. The opinion quoted with approval from an opinion of the United States Court of Appeals for the Fifth Circuit:

[A]n expert witness who is available for cross-examination at the trial may use such records as the basis of an opinion without the propo-

130. Brandis, *Survey of North Carolina Case Law, Evidence*, 45 N.C.L. REV. 934, 950-51 (1967); Note, *Evidence—Expert Testimony—Physician's Opinion Based on Patient's Statements*, 46 N.C.L. REV. 960, 965-66 (1968).

131. C. McCORMICK, *supra* note 4, § 292, at 691-92.

132. 246 N.C. at 29-30, 97 S.E.2d at 434-35.

133. 269 N.C. at 421-23, 152 S.E.2d at 451-52 (Parker, C.J., dissenting).

134. Brandis, *supra* note 130, at 951; Note, *supra* note 130 at 966-76; D. STANSBURY, NORTH CAROLINA EVIDENCE § 136, at 105 (2d ed. Supp. 1970).

135. 285 N.C. 122, 203 S.E.2d 794 (1974).

136. *Id.* at 128, 203 S.E.2d at 799.

137. *Id.* at 128-29, 203 S.E.2d at 799. The question and the opinion of the court both seem to refer to some sort of file of written records prepared by hospital staff persons, but it is not clear that the expert restricted himself to such written information. The expert referred to "information furnished me by members of my staff" *id.* at 131, 203 S.E.2d at 800-01, and also testified, "I have some general knowledge of the circumstances surrounding the crime with which Karl DeGregory is charged." *Id.*

138. *Id.* at 134, 203 S.E.2d at 802-03. The court argued that some of the expert's statements indicated that his opinion was "based strictly on his own personal observation of defendant." *Id.* at 134, 203 S.E.2d at 802. This argument is unpersuasive. Not only does it appear unwise to attempt to read into the transcript of the expert's testimony a standard that was not applied at trial, but the defendant had no opportunity to make use of that standard either on cross-examination or in argument to the jury.

139. *Id.*

ment having to call every person who made a recorded observation. [Citations omitted.] With the increased division of labor in modern medicine, the physician making a diagnosis must necessarily rely on many observations and tests performed by others and recorded by them; records sufficient for diagnosis in the hospital ought to be enough for opinion testimony in the courtroom.<sup>140</sup>

In *DeGregory* the court appeared to adopt a view of expert opinion testimony potentially as broad as Federal Rule of Evidence 703.<sup>141</sup> “[A]n expert witness has wide latitude in gathering information and may base his opinion on evidence not otherwise admissible.”<sup>142</sup> The opinion suggested that “information within the personal knowledge of an expert” should not be considered to be limited to “knowledge *derived solely* from matters personally observed.”<sup>143</sup> The supreme court cited three North Carolina cases in support of this argument.<sup>144</sup> One of these was *Penland*, which was discussed as if there had never been any question of its being overruled by *Todd*.<sup>145</sup> *Todd* was neither cited nor discussed.

In 1975 the court considered a fact situation very similar to *DeGregory* in *State v. Bock*.<sup>146</sup> In this case, however, the testimony of defendant's expert had been excluded.<sup>147</sup> One of the reasons for its exclusion was that it was based upon information not in evidence that the psychiatrist expert witness had obtained from defendant, his family, and his friends.<sup>148</sup> It might have been possible to distinguish this out-of-court information from the out-of-court records upon which the State's psychiatrist was permitted to rely in *DeGregory*, but the court made no effort to distinguish the two cases. *DeGregory* was not cited. Instead, *Todd* and *Penland* were both cited,<sup>149</sup> but *Penland* was construed to permit the use of statements made to a “physician” as a basis for expert opinion only if the statement had been made during an examination for the purpose of treatment.<sup>150</sup> Thus, relying on *Penland*, the court held that testimony by the psychiatrist based upon information given to him during an examination conducted for the purpose of testifying as a witness was inadmissible.<sup>151</sup>

In 1976 Dean Brandis looked at this group of cases and wrote, “Since no case has been overruled and no thorough judicial attempt to reconcile these various decisions has been made, this writer can only conclude that there is at

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140. 285 N.C. at 134, 203 S.E.2d at 802 (brackets in original) (quoting *Birdsell v. United States*, 346 F.2d 775, 779-80 (5th Cir.), cert. denied, 382 U.S. 963 (1965)).

141. See Note, *Expert Medical Opinion Evidence in North Carolina: In Search of a Controlling Precedent*, 8 N.C. CENT. L.J. 267, 285 (1977).

142. 285 N.C. at 132, 203 S.E.2d at 801.

143. *Id.* (emphasis in original).

144. *Id.* at 132-33, 203 S.E.2d at 801-02.

145. *Id.* at 132, 203 S.E.2d at 801.

146. 288 N.C. 145, 217 S.E.2d 513 (1975).

147. *Id.* at 154, 217 S.E.2d at 519.

148. *Id.* at 162, 217 S.E.2d at 524.

149. *Id.* at 162-63, 217 S.E.2d at 524.

150. *Id.*

151. *Id.* at 163, 217 S.E.2d at 524.

hand a convenient precedent for the next decision, whatever its tenor may be."<sup>152</sup> Three years later, however, when the Supreme Court of North Carolina finally undertook in *State v. Wade*<sup>153</sup> the task of reconciling the prior cases and creating a sensible rule for North Carolina, Dean Brandis qualified his earlier conclusion with a statement that *Wade* "has now, to a considerable extent, clarified the rule."<sup>154</sup>

### C. Application of the "Inherently Reliable" Test

*Wade* adopted an excellent system to permit the use of expert opinions based upon "inherently reliable" information even if that information was not independently admissible evidence. The opinion in *Wade* apparently was intended to provide the "universally applicable rule"<sup>155</sup> that had been absent from prior North Carolina cases. But several features of that opinion left room for doubt about whether the "inherently reliable" test of *Wade* would apply to all cases in which an expert witness might reasonably wish to base an opinion on reliable information not in evidence. *Wade* did not expressly overrule any prior cases<sup>156</sup> or state a general rule to determine when evidence was inherently reliable. Indeed, *Wade* did not state that the "inherently reliable" test would apply to testimony by experts other than physicians. Furthermore, the great strength of the facts<sup>157</sup> supporting the result in *Wade* created uncertainty<sup>158</sup> about what other kinds of evidence might satisfy the *Wade* test.

It would have been possible to argue that the "inherently reliable" test was a more demanding standard than the corresponding test under Federal Rule of Evidence 703, which permits experts to base opinions upon inadmissible evidence if the evidence is "of a type reasonably relied upon by experts in the particular field." A close reading of three cases in which the Supreme Court of North Carolina applied the test in 1979, 1980 and 1981, however, reveals that the court has been using the "inherently reliable" test as if it were exactly the same as the federal "reasonably relied upon" test. In these cases, "inherently reliable" means "reasonably relied upon by experts in the particular field."

This article proposes that these cases have correctly interpreted the "inherently reliable" test and that any other interpretation would bring back the inconsistency and confusion of the decisions prior to *Wade*. Indeed, it is possible to argue that a "reasonably relied upon" test is exactly the interpretation the Supreme Court of North Carolina intended when it adopted the "inher-

152. 1 D. STANSBURY, NORTH CAROLINA EVIDENCE § 136 (H. Brandis rev. Supp. 1976).

153. 296 N.C. 454, 251 S.E.2d 407 (1979).

154. 1 D. STANSBURY, NORTH CAROLINA EVIDENCE § 136 (H. Brandis rev. Supp. 1979).

155. 296 N.C. at 460, 251 S.E.2d at 412.

156. Dean Brandis points out that *Wade* and *State v. Franks*, 301 N.C. 1, 265 S.E.2d 177 (1980), do appear to overrule *Todd v. Watts*, 269 N.C. 417, 152 S.E.2d 448 (1967), although neither case cites *Todd*. 1 H. BRANDIS, *supra* note 12, § 136 n.27.

157. See *supra* text accompanying notes 103-05.

158. See Note, *Evidence—State v. Wade—Expert Testimony and the Dual Reliability Test*, 58 N.C.L. REV. 1161, 1172-74 (1980).

ently reliable" test in *Wade*. The adoption of the test clearly was intended to be a response not only to the facts of *Wade* but also to the confusion of prior case law. That confusion clearly demanded a consistent rule. Once some experts are permitted to base their opinions on reliable inadmissible evidence, logic and fairness require that all experts be permitted to base their opinions on similarly reliable inadmissible evidence. The confusion of the pre-*Wade* North Carolina cases was largely a product of attempts to avoid that truth.

In three post-*Wade* cases, *Booker v. Duke Medical Center*,<sup>159</sup> *State v. Franks*,<sup>160</sup> and *State v. Jackson*,<sup>161</sup> the court upheld the use of hearsay as the basis of a physician's opinion, but in none of these cases did the court attempt to state a general theory for determining when evidence is "inherently reliable." In *Jackson* the court did not even use that term. Nevertheless, the three cases strongly support a broad interpretation of the "inherently reliable" test as generally equivalent to the "reasonably relied upon by experts in the particular field" test of Federal Rule of Evidence 703.

In *Booker* the court held that both medical information given by one doctor to another about a common patient and statements made by that patient were "inherently reliable." Chief Justice Sharp wrote:

Finally, we do not think the hearing commissioner erred in allowing Dr. Currin to base his opinion in part on a medical history he obtained from the other treating physician and from Booker himself. . . .

. . .

Statements made by a patient to his physician for the purposes of treatment and medical information obtained from a fellow-physician who has treated the same patient are "inherently reliable" within the meaning of these rules. *State v. Wade*, 296 N.C. at 462-63, 251 S.E.2d at 412; *State v. DeGregory*, 285 N.C. 122, 134, 203 S.E.2d 794, 802 (1974).<sup>162</sup>

The strong facts<sup>163</sup> supporting the result in *Wade* had created uncertainty<sup>164</sup> concerning the kinds of evidence that would qualify as "inherently reliable." The decision in *Booker* expanded the known scope of the "inherently reliable" test in three ways. First, it rejected the possibility<sup>165</sup> that only evidence which combined several different assurances of reliability could qualify as "inherently reliable." Second, it demonstrated that a statement made by an ordinary patient for the purpose of treatment would qualify.

159. 297 N.C. 458, 256 S.E.2d 189 (1979).

160. 300 N.C. 1, 265 S.E.2d 177 (1980).

161. 302 N.C. 101, 273 S.E.2d 666 (1981).

162. 297 N.C. at 479, 256 S.E.2d at 202.

163. See *supra* text accompanying notes 103-05.

164. See Note, *supra* note 158, at 1172-74.

165. *Wade* left open this possibility. *Id.* The court in *Booker* concluded that statements made by a patient to his physician for purposes of treatment, and medical information obtained from fellow physicians who had treated the patient were "inherently reliable" without further investigation. 297 N.C. at 479, 256 S.E.2d at 202.

Third, it demonstrated that information given by one physician to another would qualify.

The physician who supplied information to the testifying physician in *Booker* had, of course, no desire to promote his own health as a motive that would support his reliability. The court clearly was assuming that the very process of fact gathering carried out by experts such as physicians was a sufficient basis for a finding of "inherent reliability." It was undoubtedly in support of this point that the court cited *State v. DeGregory*<sup>166</sup> as well as *Wade*. The inherent reliability of records used by physicians in making a diagnosis does not depend upon whether the patient was receiving treatment or merely being diagnosed. *DeGregory* itself was a case in which a nontreating psychiatrist testified on the basis of his own interviews and records made by others during a diagnostic commitment of the defendant.<sup>167</sup>

In *State v. Franks*<sup>168</sup> the court took a major step forward. It held that the "inherently reliable" standard could be satisfied by statements made to a psychiatrist who was *not* treating the person who made the statements.<sup>169</sup> In *Wade* the court had found two grounds for holding that defendant's statements to his psychiatrist were "inherently reliable."<sup>170</sup> First, they were statements made by a patient to a treating doctor for the purpose of treatment.<sup>171</sup> That alone would be enough to qualify the statements for admission as substantive evidence in many jurisdictions<sup>172</sup> and under Federal Rule of Evidence 803(4).<sup>173</sup> Second, the *Wade* court found

a sufficient indication of the reliability of these statements in the nature of Dr. Maloney's entire examination. This examination . . . was a thorough, carefully designed attempt to gain an understanding of defendant's state of mind. Dr. Maloney did not rely for his conclusions on any one statement by defendant or on any particular fact he disclosed. Instead he took into account the entirety of what defendant said together with his own interpretation and analysis of it and the objective manifestations that accompanied it. The assertion of *State v. Alexander* . . . that "[c]onversation with one alleged to be insane is, of course, one of the best evidences of his present state of mind" is still true. Conversation, and its interpretation and analysis by a trained professional, is undoubtedly superior to any other method the courts have for gaining access to an allegedly insane defendant's mind. When it is conducted with the professional safeguards present here, it provides a sufficient basis for the introduction of an expert diagnosis into evidence.<sup>174</sup>

166. 285 N.C. 122, 203 S.E.2d 794 (1974).

167. *Id.* at 131, 203 S.E.2d at 801.

168. 300 N.C. 1, 265 S.E.2d 177 (1980).

169. *Id.* at 9, 265 S.E.2d at 182.

170. 296 N.C. at 462, 251 S.E.2d at 412.

171. *Id.*

172. See C. McCORMICK, *supra* note 4, § 292.

173. 4 J. WEINSTEIN & M. BERGER, *supra* note 5, ¶ 803(4)[01].

174. 296 N.C. at 463, 251 S.E.2d at 412 (quoting *State v. Alexander*, 179 N.C. 759, 765, 103 S.E. 383, 386 (1920)) (citation omitted).

In *Franks*, a psychiatrist who had examined defendant after the trial judge referred defendant to Dorothea Dix Hospital testified for the State.<sup>175</sup> The court held that the psychiatrist's opinion, which was based upon his conversations with Franks, satisfied the test of *Wade* because he had obtained his information in a "thorough and professional" diagnostic examination.<sup>176</sup>

In 1981 the court reaffirmed in *State v. Jackson*<sup>177</sup> its commitment to *DeGregory* by upholding the use by a nontreating<sup>178</sup> psychiatrist of the results of a test that may have been conducted by an assistant. The court stated that "a diagnostic opinion is not incompetent even if based on information obtained from others."<sup>179</sup> The effect of this decision was to reaffirm that the kinds of professional information normally used by such experts qualify as "inherently reliable," although the court did not use the term "inherently reliable" and cited only *DeGregory*.

#### D. Three Questions About the "Inherently Reliable" Test

The present state of the North Carolina case law leaves unanswered a great many questions about the scope of the "inherently reliable" test. Three issues that may need to be resolved are: (1) whether the test applies to opinions of experts other than physicians; (2) whether the test applies to information from persons who are not patients; and (3) whether the test applies to opinions based upon statements by a patient to a nontreating physician when that patient offers the physician's opinion. The remainder of this article will attempt to demonstrate that the Supreme Court of North Carolina has already answered the first two questions affirmatively and that those two answers support an affirmative answer to the third question.

##### 1. Does the "Inherently Reliable" Test Apply to Opinions of Experts Other than Physicians?

Although the cases in which the Supreme Court of North Carolina has discussed the "inherently reliable" test all involved testimony by physicians,<sup>180</sup> the court has established in two different ways that the test can be applied to testimony by experts who are not physicians. First, the court has already permitted a real estate appraiser<sup>181</sup> and an auditor to give opinions based upon

175. 300 N.C. at 12-13, 265 S.E.2d at 184.

176. *Id.* at 13, 265 S.E.2d at 184.

177. 302 N.C. 101, 273 S.E.2d 666 (1981).

178. The facts of *Jackson* were nearly identical to *DeGregory*. Defendant had been committed to Dorothea Dix Hospital for a competency evaluation. *Id.* at 103, 273 S.E.2d at 669. At trial the prosecution tried to suggest that its psychiatrist, who had interviewed defendant during that commitment, was a treating physician, Record at 212-13, *Jackson*, but the facts introduced did not support such a characterization of the relationship between the psychiatrist and the defendant, Record at 210-17, and the court properly decided the case without referring to this evidence.

179. 302 N.C. at 110, 273 S.E.2d at 673.

180. See *State v. Franks*, 300 N.C. 1, 265 S.E.2d 177 (1980); *Booker v. Duke Medical Center*, 297 N.C. 458, 256 S.E.2d 189 (1979); *State v. Wade*, 296 N.C. 454, 251 S.E.2d 407 (1979).

181. *State Highway Comm'n v. Conrad*, 263 N.C. 394, 139 S.E.2d 553 (1965). See also *Board of Transp. v. Lyckan Dev. Corp.*, 53 N.C. App. 511, 281 S.E.2d 84 (1981).

inadmissible hearsay of a kind that such experts normally use. The case involving opinions of an auditor, *State v. Louchheim*,<sup>182</sup> was decided one month before *Wade*.

Second, the "inherently reliable" test has been applied by the court, expressly in *Booker* and impliedly in *DeGregory* and *Jackson*, to data used by physicians that was furnished to them by persons who were not their patients. The justification for treating as "inherently reliable" the medical history repeated by a fellow physician in *Booker*,<sup>183</sup> entries in the patient's record made by others in *DeGregory*,<sup>184</sup> and a test that may have been conducted by an assistant in *Jackson*<sup>185</sup> is that each was a part of the expert's normal and relatively reliable process. Much of the information used by auditors, appraisers, and other experts is equally reliable for use as a part of the basis for their opinions.

## 2. Does the "Inherently Reliable" Test Apply to Information from Persons Who Are Not Patients?

It should be clear from the foregoing discussion that the court has frequently held that statements by persons who were not patients could be used if they satisfied the "inherently reliable" test. In the cases involving the appraiser<sup>186</sup> and the auditor<sup>187</sup> there was, of course, no patient; but even in cases involving patients and physicians, such as *Booker*, *DeGregory*, and *Jackson*, some or all of the inherently reliable information did not come from the patient.<sup>188</sup> All of these cases strongly support the conclusion reached by the court in *State v. Franks*<sup>189</sup> that a statement made by a patient need not be made for the purpose of treatment in order to be "inherently reliable." These cases call for a reconsideration of the portions of *Seawell v. Beame*<sup>190</sup> and *State v. Bock*<sup>191</sup> which hold that it is improper for a physician to base an opinion upon information received outside the courtroom from a patient's family or friends. If treatment is involved, family and friends would seem to have nearly as strong a motive to tell the truth as the patient himself.<sup>192</sup> Even

182. 296 N.C. 314, 250 S.E.2d 630 (1979).

183. 297 N.C. at 478-79, 256 S.E.2d at 202.

184. 285 N.C. at 130-31, 203 S.E.2d at 800-01.

185. 302 N.C. at 110, 273 S.E.2d at 672-73. See also *State v. Jones*, 54 N.C. App. 482, 283 S.E.2d 546 (1981).

186. *State Highway Comm'n v. Conrad*, 263 N.C. 394, 139 S.E.2d 553 (1965).

187. *State v. Louchheim*, 296 N.C. 314, 250 S.E.2d 630 (1979).

188. See *supra* notes 183-85 and accompanying text.

189. 300 N.C. 1, 265 S.E.2d 177 (1980).

190. 258 N.C. 666, 129 S.E.2d 283 (1963). See *supra* text accompanying notes 122-25.

191. 288 N.C. 145, 217 S.E.2d 513 (1975). See *supra* text accompanying notes 146-51.

192. The court recognized this fact in *Wade* with respect to the limited situation of "one unable to speak for himself as, for example, when a parent communicates a small child's condition to a physician." 296 N.C. at 461 n.5, 251 S.E.2d at 411 n.5. See also 1 H. BRANDIS, *supra* note 12, § 136 n.26. The situation described cries out for the application of the "inherently reliable" test to the parent's statements, but it is highly unlikely that a parent would feel any weaker compulsion to tell the truth in order to assist the treatment of a child or spouse who could speak for himself.

if treatment is not involved, the proper question is whether the physician collects and uses such statements as a part of a reasonable and reliable procedure.

3. Does the "Inherently Reliable" Test Apply to Opinions Based upon Statements to a Nontreating Physician When that Patient Offers the Physician's Opinion?

It might appear surprising that there should be a question about the applicability of the "inherently reliable" test to testimony by a nontreating physician offered by the patient himself. The Supreme Court of North Carolina held in *State v. Franks*<sup>193</sup> that a nontreating physician could testify on the basis of such statements if they were made in the course of a "thorough and professional" diagnostic examination.<sup>194</sup> The court also has upheld similar testimony by a nontreating<sup>195</sup> psychiatrist based in part upon statements by the patient-defendant in *State v. DeGregory*<sup>196</sup> and *State v. Jackson*<sup>197</sup> without discussing the point.

Nevertheless, in 1981 in *State v. Duvall*,<sup>198</sup> the court of appeals upheld the exclusion of testimony by a psychiatrist offered by defendant because the record did not indicate that the psychiatrist "was treating defendant as a regular patient with a view towards treatment or cure."<sup>199</sup> The court went on to say, "If medical advice is sought merely for the purpose of defense at trial, the assumption of inherent truthfulness of the information given to the doctor is absent."<sup>200</sup> *Franks*, *Booker*, and *DeGregory* were not cited or discussed. Instead, the court of appeals relied upon *Wade* and two pre-*Wade* cases, *State v. Bock*<sup>201</sup> and *Ward v. Wertz*.<sup>202</sup> *Franks*, *Booker*, and *DeGregory* were not cited by defendant,<sup>203</sup> but if they had been cited the court of appeals would have had to decide whether they overruled the portion of *Bock* which held that statements made to a physician could not be used as a basis for expert opinion unless they were made for the purpose of treatment.

The conflict between *Bock* and *Franks*, *Booker*, *DeGregory*, and *Jackson* must be resolved. The proper resolution is to admit expert opinions based upon diagnostic examinations on an even-handed basis. If opinions based upon statements made during a diagnostic interview are admissible on behalf of the state, they should also be admissible on behalf of the defendant.

Expert opinions based upon diagnostic statements made as part of a

193. 300 N.C. 1, 265 S.E.2d 177 (1980).

194. *Id.* at 9, 265 S.E.2d at 182.

195. See *supra* notes 167 & 178 and accompanying text.

196. 285 N.C. 122, 130-31, 203 S.E.2d 794, 800-01 (1974).

197. 302 N.C. 101, 109-10, 273 S.E.2d 666, 672-73 (1981).

198. 50 N.C. App. 684, 275 S.E.2d 842, *rev'd on other grounds*, 304 N.C. 557, 284 S.E.2d 495 (1981).

199. *Id.* at 698, 275 S.E.2d at 854.

200. *Id.*

201. 288 N.C. 145, 217 S.E.2d 513 (1975); see *supra* text accompanying notes 146-51.

202. 20 N.C. App. 229, 201 S.E.2d 194 (1973).

203. See Defendant Appellant's Brief at 30-36, *State v. Duvall*.



“thorough and professional” medical examination cannot be distinguished from “inherently reliable” statements made to auditors and appraisers. The purpose of admitting such opinions is to make the best use of expert witnesses by permitting them to use the methods of collecting information that they would normally use. General reliability is ensured by the professional methods used.

It should be kept in mind that in a majority of jurisdictions a description of the medical history of a patient given to a physician for the purpose of treatment is now admissible for substantive use under an independent hearsay exception.<sup>204</sup> In those jurisdictions the only statements of medical history that are admitted for the limited use permitted by *Wade* are statements not made for the purpose of the treatment.<sup>205</sup> Furthermore, many jurisdictions are following the Federal Rules of Evidence<sup>206</sup> and adopting a complete hearsay exception for even those diagnostic statements.<sup>207</sup> Dean Brandis argues persuasively that North Carolina ought to adopt a hearsay exception permitting substantive use of statements made for the purpose of treatment.<sup>208</sup> Similarly, North Carolina ought to permit at least nonsubstantive use of diagnostic statements as the basis of expert opinion.

North Carolina cannot follow both the rule in *Bock* and the rule in *Franks, Booker, DeGregory, and Jackson* without returning to the confusion that preceded *Wade*. Instead, we must recognize that the “inherently reliable” test announced in *Wade* is essentially the same as the “reasonably relied upon” test of Federal Rule of Evidence 703. Both *Wade* and the federal rule rest upon the same insight into the greater usefulness that expert witnesses will be able to offer if they are allowed to bring their normal professional methods into the courtroom. Both tests should set the same standard and reach the same result.

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204. See 4 J. WEINSTEIN & M. BERGER, *supra* note 5, ¶ 803(4)[02]; Annot., 37 A.L.R.3d 778, 801-02 (1971).

205. C. MCCORMICK, *supra* note 4, § 293.

206. FED. R. EVID. 803(4); see 4 J. WEINSTEIN & M. BERGER, *supra* note 5, ¶ 803(4)[01].

207. See 4 J. WEINSTEIN & M. BERGER, *supra* note 5, ¶ 803(4)[02].

208. 1 H. BRANDIS, *supra* note 12, § 161.