

Louisiana Law Review

Volume 36 | Number 1

The Federal Rules of Evidence: Symposium

Fall 1975

Opinion and Expert Evidence Under the Federal Rules

Herman Edgar Garner Jr.

Repository Citation

Herman Edgar Garner Jr., *Opinion and Expert Evidence Under the Federal Rules*, 36 La. L. Rev. (1975)

Available at: <https://digitalcommons.law.lsu.edu/lalrev/vol36/iss1/11>

This Article is brought to you for free and open access by the Law Reviews and Journals at LSU Law Digital Commons. It has been accepted for inclusion in Louisiana Law Review by an authorized editor of LSU Law Digital Commons. For more information, please contact kreed25@lsu.edu.

OPINION AND EXPERT EVIDENCE UNDER THE FEDERAL RULES

The Anglo-American judicial system has placed great emphasis on obtaining the best evidence possible to aid the trier of fact in the determination of disputed issues.¹ Accordingly, courts, including those in Louisiana, traditionally banned receipt of opinion testimony, requiring instead more reliable factual testimony.² However, strict application of the ban against opinion evidence has proved undesirable and has resulted in judicial exceptions to circumvent the rule.³ Congress recently codified most of these exceptions in the Federal Rules of Evidence;⁴ hence the new Rules should serve to admit more opinion evidence than traditionally was allowed, while still providing safeguards to prevent any undue prejudice that might result from its admission. The Rules reflect an analytical approach to admissibility that insists that opinion evidence be received only from one who is both trustworthy and knowledgeable, and that it be helpful to the trier of fact.⁵ The accuracy of opinion testimony additionally is vouchsafed by the relevancy requirements of the Federal Rules⁶ and by the opposing party's right of cross-examination.⁷ This comment will examine the content and

1. J. WIGMORE, EVIDENCE §§ 650-70 (1st ed. 1904) [hereinafter cited as 1 WIGMORE].

2. *E.g.*, State v. Pascal, 147 La. 634, 85 So. 621 (1920); State v. Brooks, 39 La. Ann. 817, 2 So. 498 (1887).

3. Examples of modifications developed to circumvent the harshness of the opinion rule are allowance of opinion based on a test of strict necessity, and permitting opinion when it is convenient to the fact finder or serves as a shorthand rendition of the facts. C. MCCORMICK, HANDBOOK OF THE LAW OF EVIDENCE § 10 (2d ed. 1972) [hereinafter cited as MCCORMICK].

4. FED. R. EVID. 701-06 (1975).

5. See Comment, *Lay Opinion Testimony in Mississippi*, 43 MISS. L. J. 705 (1972).

6. FED. R. EVID. 403: "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." See Comment, *Determining Relevancy: Article IV of the Federal Rules of Evidence*, 36 LA. L. REV. 70 (1975).

7. FED. R. EVID. 611(b): "Cross-examination should be limited to the subject matter of the direct examination and matters affecting the credibility of the witness. The court may, in the exercise of discretion, permit inquiry into additional matters as if on direct examination." See Comment, *Article VI of the Federal Rules of Evidence: Witnesses*, 36 LA. L. REV. 99 (1975).

underlying policy of the Federal Rules on opinion evidence, and will briefly discuss their relationship to the prevailing rules of Louisiana evidence law.⁸

Lay Opinion

An opinion is a belief, inference, or impression held by a witness about an issue in question.⁹ Courts have generally discouraged use of opinion evidence because it is less positive than strictly factual testimony and because it may unduly influence the fact finder.¹⁰ Accordingly, courts regularly prohibited witnesses from giving personal opinion as early as the seventeenth or eighteenth century.¹¹ English courts generally demanded that witnesses testify only as to "what they see and hear,"¹² but allowed statements of opinion that were based upon the personal knowledge of the witness.¹³ Anglo-American courts, however, went further and excluded all "opinion," receiving only testimony of "fact."¹⁴

8. Treatment of Louisiana evidence law will be suggestive and illustrative, rather than exhaustive, since the primary focus of this article is the content and policy of the Federal Rules on opinion evidence. See Comment, *Competent Opinions and Privileges*, 21 LOYOLA L. REV. 422 (1975).

9. Opinion is to be distinguished from personal knowledge of fact. See BLACK'S LAW DICTIONARY 1224 (4th ed. 1968); Note, 2 LA. L. REV. 378 (1940).

10. J. RICHARDSON, DOCTORS, LAWYERS AND THE COURTS § 13.1 (1965) [hereinafter cited as RICHARDSON]; 3 J. WIGMORE, EVIDENCE § 1920 (1st ed. 1904) [hereinafter cited as 3 WIGMORE].

11. For detailed discussions of the history of the opinion rule, see MCCORMICK § 10; J. WEINSTEIN & M. BERGER, COMMENTARY ON RULES OF EVIDENCE FOR THE UNITED STATES COURTS AND MAGISTRATES ¶ 701[01] (1975) [hereinafter cited as WEINSTEIN & BERGER]; Ladd, *Expert Testimony*, 5 VAND. L. REV. 414 (1952) [hereinafter cited as Ladd].

12. MCCORMICK § 11 at 23 n.21.

13. The knowledge requirement was "a way of stating the personal perception requirement now expressed in Rule 602." WEINSTEIN & BERGER ¶ 701[01] at 701-04; MCCORMICK § 10.

14. See WEINSTEIN & BERGER ¶ 701[01] at 701-01. Louisiana is in substantial agreement with the traditional rule. LA. R.S. 15:463 (1950) states: "Except as otherwise provided in this Code, the witness can testify only as to facts within his knowledge, and neither as to any recital of facts heard by him, nor as to any impressions or opinion that he may have." Louisiana courts have complied with the rule expressed in the statute since early in the state's judicial history. *E.g.*, *McConnell v. New Orleans*, 15 La. Ann. 410 (1860); *Zeringue v. White*, 4 La. Ann. 301 (1849); *Mechanic's & Trader's Bank v. Walton*, 7 Rob. 451 (1844); *Fleming v. Hill*, 17 La. 1 (1841); *Ingram v. Croft*, 7 La. 82 (1834). Louisiana courts now permit witnesses to draw natural inferences from the event in question and testify to them in court. *E.g.*, *State v. Kirklin*, 283 So. 2d 713 (La. 1973); *State v. Winstead*, 204 La. 366, 15 So. 2d 793

The theoretical distinction between fact and opinion leads to confusion in the courts and is criticized severely by scholars.¹⁵ The criticism is grounded upon two bases. First, critics argue that, as a practical matter, distinguishing between fact and opinion is difficult. All statements are products of observation and interpretation,¹⁶ and a witness's environment influences both the manner and content of his testimony.¹⁷ Persons who are accustomed to speaking in the form of opinion cannot be expected to exclude, while testifying, logical conclusions drawn from their observations of an event. For example, most people can identify a speeding car, even though they do not have the mechanical tools to establish the car's speed as a fact. Nevertheless, a rigid application of the traditional opinion rule would preclude such testimony.¹⁸ A second criticism of the rule barring lay opinion testimony is that the rule represents an unnecessary deference to the jury

(1943); *State v. Cole*, 161 La. 827, 109 So. 505 (1926). The allowance of natural inferences by the witness has been termed "non-expert state of mind evidence" by a commentator in another state with a similar rule. McCormick, *Opinion Evidence in Iowa*, 19 DRAKE L. REV. 245, 250 (1970). In addition, Louisiana courts have permitted lay opinion in a number of cases based upon the criteria of trustworthiness, knowledge, and helpfulness. *See, e.g.*, *State v. Skipper*, 284 So. 2d 590 (La. 1973) (lay opinion allowed to identify spots as blood); *State v. McCranie*, 192 La. 163, 187 So. 278 (1939) (opinion as to handwriting allowed); *Arthur v. McConnell*, 286 So. 2d 499 (La. App. 2d Cir. 1973) (lay opinion on disability allowed in workmen's compensation case when medical evidence was in conflict); *State Dep't of Hwys v. Hunt*, 219 So. 2d 602 (La. App. 1st Cir. 1969), *as amended* 255 La. 513, 231 So. 2d 563 (1970) (opinion allowed to determine valuation of property taken by expropriation); *Evangeline Parish Police Jury v. Deville*, 247 So. 2d 258 (La. App. 3d Cir. 1971) (opinion allowed to determine property value); *Fidelity & Cas. Co. v. Aetna Life & Cas. Co.*, 244 So. 2d 255 (La. App. 3d Cir. 1971) (lay witness allowed to give opinion as to speed).

15. MODEL CODE OF EVID. rule 401 (1942); UNIFORM RULE OF EVID. 56(1) (1953); Spies, *Opinion Evidence*, 15 ARK. L. REV. 105 (1960); Tyree, *The Opinion Rule*, 10 RUTGERS L. REV. 601 (1956).

16. MCCORMICK § 11.

17. "Impressions or sensations caused by external objects are not susceptible of exact reproduction or description in words, nor do they affect every individual alike, and the judgment or opinion of the witnesses by whom they have been experienced is the only mode by which they can be presented to the jury." A. MUNDO, THE EXPERT WITNESS § 1 (1938) [hereinafter cited as MUNDO]. *See* RICHARDSON §§ 13.1-13.2.

18. Of course in practice, lay witnesses may testify to the speed of an automobile since the courts do not rigidly apply the traditional rule. Comment, *Competent Opinions and Privileges*, 21 LOYOLA L. REV. 422, 434 nn.122-23 (1975).

system. Most commentators believe that juries are fully capable of attaching due weight to opinion testimony, and that when such evidence is helpful and based on a competent foundation, it should be admitted.¹⁹

Faced with a general rule that effectively excluded much testimony regardless of its probable helpfulness or accuracy, several states adopted rules that relaxed the prohibition against lay opinion testimony.²⁰ Federal Rule 701²¹ follows these rules, allowing lay opinion testimony if it is "(a) rationally based on the perception of the witness and (b) helpful to a clear understanding of his testimony or the determination of a fact in issue."²² The first requirement of Rule 701 restricts the witness's testimony to matters within his personal knowledge and observation and thereby increases its reliability.²³ The requirement reduces the possible prejudicial effect opinion testimony may have by requiring as a condition of admissibility that it rest upon a competent foundation. The second requirement, that opinion evidence is admissible only when it is helpful to the fact finder's determination of truth, further guards against the admission of inappropriate or unnecessary opinion testimony.²⁴ The requirement is analogous to a

19. See, e.g., MCCORMICK § 12; 1 WIGMORE § 557.

20. E.g., CAL. EVID. CODE § 800 (1966); KAN. CODE OF CIV. PROC. § 60-456(a) (1964); N.J. STAT. ANN. 2A:84A, Rule 56(1) (Supp. 1969). Professor Wigmore had long urged such an approach. 3 WIGMORE § 1919. See also Ladd at 416. Louisiana has followed this trend by allowing lay witnesses to testify as to their natural inferences. See discussion and cases in note 14, *supra*.

21. FED. R. EVID. 701 provides: "If the witness is not testifying as an expert, his testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness and (b) helpful to a clear understanding of his testimony or the determination of a fact in issue." Although couched in different language, the Federal Rule does not appear to differ radically from those rules presently applied in Louisiana. In spite of LA. R.S. 15:463 (1950), which bars admission of opinions or impressions by a lay witness, Louisiana courts, treating the testimony as an exception to the statute, permit witnesses to testify as to natural inferences, provided they are competent, LA. R.S. 15:461 (1950), and the testimony is relevant, LA. R.S. 15:465 (1950). E.g., *State v. Lewis*, 288 So. 2d 324 (La. 1974); *State v. Kirklin*, 283 So. 2d 713 (La. 1973); *State v. Winstead*, 204 La. 366, 15 So. 2d 793 (1943).

22. FED. R. EVID. 701.

23. FED. R. EVID. 701, Adv. Comm. Note; WEINSTEIN & BERGER ¶ 701[02] at 701-11.

24. Wigmore believed that the true rationale of the opinion rule was judicial economy, rather than fear of invading the province of the jury. He favored prohibiting superfluous testimony. 3 WIGMORE §§ 1918, 1924.

relevancy requirement because it bars admission of opinion testimony which is prejudicial, confusing, misleading or time-wasting.²⁵ The requirement of "helpfulness" is less demanding than a standard that permits introduction of opinion evidence only when it is strictly "necessary"²⁶ for determination of the issue.

Congress has expressed renewed confidence in the jury system by the passage of Federal Rule 701, since the jury must now determine the relative weight to be given lay opinion evidence in relation to strictly factual testimony on a given issue. However, the Rule requires that the trial judge initially distinguish between helpful, well-founded opinion²⁷ and opinion that is either irrelevant or untrustworthy, and that he admit the former and exclude the latter.²⁸

Expert Testimony

Admissibility of Expert Testimony

Parties have traditionally relied on the opinions of expert witnesses to help establish facts that were too complex, specialized, or technical for lay witnesses to explain, and such testimony is allowed as an exception to the general ban against opinion evidence.²⁹ Federal Rule 702 retains this

25. See text of FED. R. EVID. 403 at note 6, *supra*.

26. "Necessity as a standard for permitting opinions and conclusions has proved too elusive and too unadaptable to particular situations for purposes of satisfactory judicial administration." FED. R. EVID. 701, Adv. Comm. Note. Therefore convenience is adopted as the judicial standard. See also MCCORMICK § 11; WEINSTEIN & BERGER ¶ 701[02] at 701-13. The necessity test allows the admission of opinion testimony only if essential to the determination of fact.

27. For discussion of the validity of opinion testimony based on well-founded observations, see MCCORMICK § 11; RICHARDSON § 13.1.

28. "Basically, Rule 701 is a rule of discretion. It replaces the orthodox rule of exclusion with a rule that requires the trial judge, on the basis of the posture of the particular case before him, to decide whether concreteness, abstraction or a combination of both will be most effective in enabling the jury to ascertain the truth and reach a just result." WEINSTEIN & BERGER ¶ 701[02].

29. MCCORMICK § 13. LA. R.S. 15:464 (1950) provides: "On questions involving a knowledge obtained only by means of a special training or experience the opinions of persons having such special knowledge are admissible as expert testimony." In Louisiana expert opinion has at times been allowed. *Jones v. Bryant*, 283 So. 2d 307 (La. App. 4th Cir. 1973); *Gage v. St. Paul Fire & Marine Ins. Co.*, 282 So. 2d 147 (La. App. 3d Cir. 1973) (to establish a standard of ordinary care and skill in medical malpractice cases); *Watkins v.*

practice³⁰ by allowing expert testimony, opinion or otherwise, whenever the expert's answer "will assist the trier of fact to understand the evidence or to determine a fact in issue."³¹ By this express provision, Congress demonstrated its belief that such evidence is desirable, and at times actually necessary to the fact-finding process.

Rule 702 allows factual or opinion testimony by a qualified expert only if the testimony will be helpful to the trier of fact in its attempt to understand complex trial issues. Experts are free to give factual testimony on the debated issue, but must comply with additional requirements before being allowed to express their opinions. Consistently with the other federal opinion provisions, Rule 702 requires that the expert be competent³² and that his testimony be helpful.³³ Additionally, it must appear that expert testimony would be helpful or desirable in the particular case. In deciding whether expert opinion testimony will be helpful to the trier of fact, the trial judge must determine whether the issue in question is capable of adequate illumination by factual testimony.³⁴ If it is, opinion testimony of the expert on that issue would clearly not be more helpful than factual testimony within the

Sheppard, 278 So. 2d 890 (La. App. 1st Cir. 1973) (to determine standards of care in attorney malpractice cases); Lafayette Airport Comm'n v. Roy, 265 So. 2d 459 (La. App. 3d Cir. 1972), *cert. denied*, 262 La. 1159, 266 So. 2d 444 (1972) (to estimate the market value of property); *In re Lomm*, 195 So. 2d 416 (La. App. 4th Cir. 1967), *cert. denied*, 250 La. 541, 197 So. 2d 81 (1967) (to fix attorney's fees).

30. FED. R. EVID. 702: "If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise."

31. *Id.*

32. Competence of the witness under Rule 701 is insured by its requirement that his testimony be "rationally based on . . . perception." FED. R. EVID. 701.

33. Professor Ladd stated the rule: "There is no more certain test for determining when experts may be used than the common sense inquiry whether the untrained layman would be qualified to determine intelligently and to the best degree the particular issue without enlightenment from those having a specialized understanding of the subject involved in the dispute." Ladd at 418. See MUNDO § 3; 2 M. PLANIOL, CIVIL LAW TREATISE, pt. 1, nos. 20-21 at 14 (11th ed. La. St. L. Inst. transl. 1959); 3 WIGMORE § 1923.

34. Usually the subjects which require expert illumination, so that expert testimony will aid the fact finder, are those in which technical skills and expertise are necessary to fully appreciate the import of the evidence. MCCORMICK § 13; MUNDO § 4; 1 WIGMORE § 555.

meaning of Rule 702. For example, expert opinion testimony as to whether a party was walking fast should be rejected since the subject matter is easily understood by the jury and admission of the testimony would be both prejudicial and time-wasting.³⁵

In addition to assuring itself that outside expert testimony is desirable the court must determine whether the particular witness tendered is qualified to give testimony as an expert.³⁶ The courts and the Federal Rules recognize the value of a "skilled witness" in a trial.³⁷ Skilled witnesses are not necessarily experts by virtue of formal education or training, but demonstrate special ability in their particular area of expertise. For example, a landowner may be qualified to testify as an expert regarding land prices although he lacks formal education or training in real estate valuation.³⁸ The Rules reflect a broad standard for testing the qualifications of an expert witness, recognizing that knowledge, skill, and expertise may be gained by experience and training as well as by formal education.³⁹ This broad view is consistent with Congress's respect for the value of expert evidence and should result in increased admissibility of expert testimony. Since there is no precise formula to use in qualifying an expert, and since qualification must necessarily turn upon the particular expertise of each potential expert witness, the trial judge has considerable discretion in determining

35. *E.g.*, *Collins v. Zediker*, 421 Pa. 52, 218 A.2d 776 (1966). Expert evidence introduced where it is unnecessary is prejudicial because it gives the witness the aura of an expert, when the issue is actually understandable without the aid of an expert.

36. LA. R.S. 15:466 (1950) provides: "The test of the competency of the expert is his knowledge of the subject about which he is called to express an opinion, and before any witness can give evidence as an expert his competency so to testify must have been established to the satisfaction of the court." Louisiana jurisprudence insists that the expert's qualifications be established prior to the trial. *E.g.*, *State v. Maney*, 242 La. 223, 135 So. 2d 473 (1962). For lengthy discussions on the requirement of qualifying the expert witness, see MCCORMICK § 13; 1 WIGMORE §§ 560-61; McCormick, *Opinion Evidence In Iowa*, 19 DRAKE L. REV. 245, 256 (1970).

37. *E.g.*, *Bratt v. Western Air Lines*, 155 F.2d 850, 853-54 (10th Cir. 1946), *cert. denied*, 329 U.S. 735 (1946); 1 WIGMORE § 555; Ladd at 421; FED. R. EVID. 702, Adv. Comm. Note. The Louisiana view is substantially the same. *E.g.*, *State v. Normandale*, 174 La. 835, 141 So. 851 (1932); *State v. Dreher*, 166 La. 924, 118 So. 85 (1928), *cert. denied*, 278 U.S. 641 (1928).

38. Ladd at 421; FED. R. EVID. 702, Adv. Comm. Note.

39. FED. R. EVID. 702, Adv. Comm. Note.

whether the witness is qualified before allowing his testimony.⁴⁰

If the witness is qualified as an expert, opposing counsel may use various other provisions of the Federal Rules to lessen the impact of his testimony. Each particular aspect of the expert's testimony is subject to the requirement that it be helpful⁴¹ and not prejudicial or time-wasting.⁴² Furthermore, an opposing attorney may attack the credibility or the conclusions of an expert on cross-examination⁴³ and may question the bases of an expert's opinion;⁴⁴ however, doubts as to the credibility of the witness so raised should go to the weight to his testimony rather than its admissibility.⁴⁵

Bases of Opinion Testimony By Experts

Traditionally, experts have been required to base their opinions given in court either on firsthand knowledge or evidence introduced at the trial.⁴⁶ As a matter of practice, experts customarily study treatises, reports and other data prepared by others in the field for use as a foundation for their own opinion. For example, in the field of medicine, doctors rely upon the assertions of nurses, technicians, and others before reaching a decision. Courts often prohibited such testimony⁴⁷ as a violation of the ban against hearsay

40. Louisiana cases demonstrate a broad range of judicial discretion in determining whether a witness has qualified as an expert. *E.g.*, *State v. Nicolosi*, 228 La. 65, 81 So. 2d 771 (1955); *Carvell v. Winn*, 154 So. 2d 788 (La. App. 3rd Cir. 1963), *cert. denied*, 245 La. 61, 156 So. 2d 603 (1963).

41. FED. R. EVID. 702.

42. *Id.* 403.

43. "The cross-examination of skilled and expert witnesses, if undertaken, should be directed to (a) showing a lack of qualification, (b) a motivating interest, (c) error in the observed or assumed facts, (d) error in conclusions or opinions, and (e) specific impeachment, i.e. previous contradictory or inconsistent statements or writings, or lack of general credibility." F. BUSCH, *LAW AND TACTICS IN JURY TRIALS* § 396 (1949).

44. See the discussion of FED. R. EVID. 703 in text at note 46, *infra*.

45. RICHARDSON § 13.5.

46. *E.g.*, *Equitable Life Assur. Soc. v. Kazee*, 257 Ky. 803, 79 S.W.2d 208 (1934); *Sykes v. Norfolk & Western R.R.*, 200 Va. 559, 106 S.E.2d 746 (1959).

47. Professor McCormick explained that "[T]he essential objection seems to be that the jury is asked to accept as evidence the witness' inference, based upon someone's hearsay assertion of a fact which is, presumably, not supported by any evidence at the trial and which therefore the jury has no basis for finding to be true." MCCORMICK § 15. However, as Professor Ladd demonstrates, there are numerous examples where courts allowed such evi-

evidence since the expert's opinion was based on out of court assertions.

Congress, recognizing that expert testimony predicated on secondary source material is sufficiently trustworthy and, if helpful, should be admitted, expanded the possible sources of information upon which the expert may rely to establish his opinion.⁴⁸ Federal Rule 703⁴⁹ provides that an expert may rely on facts or data "reasonably relied upon by experts in the particular field"⁵⁰ as well as on firsthand knowledge and evidence introduced at the trial. Although this Rule should result in increased admission of expert opinion,⁵¹ the courts must critically evaluate the material relied on by an expert to determine if it is in fact the kind of data reasonably used by other experts in the field.⁵² An additional guarantee of trustworthiness is cross-examination⁵³ by opposing counsel, who may question the credibility of the witness's sources.

Rule 703 may infringe upon an accused's constitutional right to confront the witnesses against him.⁵⁴ The United States Supreme Court has recognized that "hearsay problems

dence. Ladd at 422. While the traditional rule did retain some support, De-Para, *Law, Science, and the Expert Witness*, 24 TENN. L. REV. 166, 170-71 (1956), most scholars attacked the rule as being contrary to customary practice. *E.g.*, 1 WIGMORE § 687; Maguire & Hahey, *Requisite Proof of Basis for Expert Opinion*, 5 VAND. L. REV. 432 (1952).

48. FED. R. EVID. 703, Adv. Comm. Note. Under the Rule doctors can now testify relying on extrajudicially obtained data. Rheingold, *The Basis of Medical Testimony*, 15 VAND. L. REV. 473, 489 (1962).

49. FED. R. EVID. 703 provides: "The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to him at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible as evidence." The Louisiana rule is similar. *State v. Fallon*, 290 So. 2d 273 (La. 1974); *State v. Austin*, 282 So. 2d 711 (La. 1973).

50. FED. R. EVID. 703.

51. The best example of the practical effect of Rule 703 is the admissibility of public opinion polls. While some courts have excluded surveys as hearsay, the modern trend, which is reflected in the Federal Rule, is to overrule a hearsay objection and admit the testimony provided proper polling techniques were used, and subject to the relevancy rules. *See Zippo Mfg. Co. v. Rogers Import, Inc.*, 216 F. Supp. 670 (S.D.N.Y. 1963); WEINSTEIN & BERGER 703[03] at 703-20; Powell & Burns, *A Discussion of the New Federal Rules of Evidence*, 8 GONZAGA L. REV. 1, 17 (1972).

52. To avoid prejudice, the trial judge should rule upon the validity of such a basis before the witness actually offers the testimony.

53. FED. R. EVID. 611(b) text at note 7, *supra*.

54. U.S. CONST. amend. VI. *See also Pointer v. Texas*, 380 U.S. 400 (1965).

are to an extent constitutional problems."⁵⁵ However the current approach to the hearsay problem recognizes exceptions to the general prohibition if the out of court assertion is both trustworthy and necessary.⁵⁶ As a practical matter, an expert's reliance on information supplied to him by people not available at trial is necessary to prevent the calling of the original sources, a practice which would prove to be quite time-consuming, if not actually impossible. An opposing attorney has the right to question the basis of an expert's opinion,⁵⁷ and this right should serve to insure the reliability of the testimony. Since the Federal Rules otherwise allow evidence based upon the assertions of parties not available at trial,⁵⁸ Federal Rule 703 appears not to violate the sixth amendment.

Although the method of Rule 703 is not universally acclaimed,⁵⁹ it offers a system by which experts can give their opinions without answering lengthy hypothetical questions or attending the entire trial. Furthermore, the scheme of the Federal Rules provides adequate safeguards against possible harmful effects by insisting on relevant testimony and cross-examination of the witness.

55. Greer, *The Confrontation Guarantee and Related Problems*, 30 LA. L. REV. 651, 653 (1970). See also *Bruton v. United States*, 391 U.S. 123 (1968); *Douglas v. Alabama*, 380 U.S. 415 (1965); *Pointer v. Texas*, 380 U.S. 400 (1965).

56. Often the hearsay may appear so inherently reliable because of the surrounding circumstances that the requirement of necessity is removed. See Comment, *Hearsay Evidence and the Federal Rules: Article VIII*, 36 LA. L. REV. 159, 162 (1975).

57. "One suggestion made to the Advisory Committee was that the adverse party be free to extend his cross-examination by calling the author of opinions relied upon by adverse experts and examining them as if under cross-examination. This proposal has merit and should be permitted under Rule 611(b) and 611(c). To be fully effective, the pretrial conference order should require an exchange of prospective expert reports that are sufficiently detailed to apprise the opponent of who may need to be called." WEINSTEIN & BERGER ¶ 703[03] at 703-20.

58. See FED. R. EVID. 803(18), 804(13); Comment, *Hearsay Evidence and the Federal Rules: Article VIII*, 36 LA. L. REV. 159, 176 (1975).

59. One group of attorneys believes that Federal Rule 703 "would open too wide a door to the receiving of unreliable testimony and prevent effective cross-examination as to the validity of the underlying data." Assoc. of the Bar of the City of New York Committee on the Federal Courts Report with Respect to the Proposed Rules of Evidence for the United States District Court and Magistrates 68 (May 28, 1970) as quoted in WEINSTEIN & BERGER ¶ 703[01].

Opinion as to the Ultimate Issue

Federal Rule 704⁶⁰ adopts the most marked change from prior opinion evidence rules by allowing experts to testify as to the ultimate factual issue. The traditional rule, which prohibited such testimony, developed because of a firm conviction that it is the exclusive duty of the fact-finder to determine issues of fact. Courts believed that an expert's expression on ultimate issues would carry undue weight and would in practical effect be determinative of such issues.⁶¹ However, the ultimate issue rule has proved difficult to apply, and the validity of its rationale has been questioned.⁶² Distinguishing between testimony as to ultimate issues of fact, which is now allowed in a majority of jurisdictions,⁶³ and testimony as to ultimate issues of law, which is prohibited,⁶⁴ is even more troublesome. Others have a more basic objection to the very rationale of the rule and consider expert testimony without allowing an expert to state his conclusions unacceptable.⁶⁵

60. FED. R. EVID. 704 provides: "Testimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact." The Rule follows a contemporary trend discarding the traditional prohibition of testimony as to the ultimate issue. *E.g.*, *People v. Wilson*, 25 Cal. 2d 341, 153 P.2d 720 (1944); *Clifford-Jacobs Forging Co. v. Industrial Comm'n*, 19 Ill. 2d 236, 166 N.E. 2d 582 (1960); *Dowling v. L.H. Shattuck, Inc.*, 91 N.H. 234, 17 A.2d 529 (1941); *Schweiger v. Solbeck*, 191 Or. 454, 230 P.2d 195 (1951). *See also* MCCORMICK § 12. Louisiana seems to be moving towards the admission of expert opinion on the ultimate issue. *E.g.*, *Steinberg v. Indemnity Ins. Co.*, 364 F.2d 266 (5th Cir. 1966); *Gage v. St. Paul Fire & Marine Ins. Co.*, 282 So. 2d 147 (La. App. 3d Cir. 1973). *But see* *State v. Chevallier*, 213 La. 528, 35 So. 2d 135 (1948); *State v. Borde*, 209 La. 905, 25 So. 2d 736 (1946); *Robin v. Associated Indemn. Co.*, 260 So. 2d 118 (La. App. 3d Cir. 1972).

61. *See* cases discussed in Ladd at 422.

62. Brinton, *The Proposed Federal Rules of Evidence: Pointing the Way to Needed Changes in Illinois*, 5 JOHN MARSHALL J. 242, 249 (1972) [hereinafter cited as Brinton]; Ladd at 423-24; FED. R. EVID. 704, Adv. Comm. Notes. Judge Weinstein lists four reasons for the failure of the ultimate issue rule: (1) practical impossibility of distinguishing between ultimate and non-ultimate fact, (2) difficulty of witness attempting to express self without reaching the ultimate issue, (3) doubtful rationale of the rule, and (4) futile judicial effort to distinguish between testimony on ultimate facts, which was allowed, and testimony on an issue of law, which was prohibited. WEINSTEIN & BERGER ¶ 704[01] at 704-4-5.

63. *See* MCCORMICK § 12.

64. WEINSTEIN & BERGER ¶ 704[01] at 704-4-5.

65. "It is rewarding to see that the drafters have put to rest the rather

Critics believe that juries are capable of assigning proper relative weight to expert testimony and are not unduly swayed by such evidence;⁶⁶ they further claim that the enforcement of this rule deprives the court of useful testimony.⁶⁷ Faced with either excluding useful information or changing their established rules, many jurisdictions have abolished or modified the ultimate issue rule⁶⁸ and expanded the permissible area of testimony to permit expert opinion as to the ultimate question.⁶⁹

While Rule 704 is more permissive than the traditional view, Congress did not sanction the unrestricted expression of expert opinion upon the ultimate issue. As is the case with any expert testimony, to be admissible under the federal scheme, the opinion must be helpful⁷⁰ to the trier's determination of fact or appreciation of the evidence and the expert must be appropriately qualified.⁷¹ Obviously testimony that wastes time or is irrelevant is not helpful and is inadmissible.⁷² Although at least one commentator prefers closer safeguards,⁷³ the necessity for compliance with the general rules on expert testimony and relevancy should serve as an effective check against the possible harm done by an expression as to the ultimate issue while avoiding the undesirable aspects of the prior rule.

meaningless and nonsensical objection: 'I object—that is the ultimate question.' What is an expert present to answer, if not one of the ultimate questions? If he is truly an expert and is needed because of the average juror, then he must of necessity tread in the area of the ultimate questions." Brinton at 249.

66. *E.g.*, MCCORMICK § 12; Note, *Opinion Testimony "Invading the Province of the Jury,"* 20 U. OF CINN. L. REV. 484, 488 (1951).

67. FED. R. EVID. 704, Adv. Comm. Note; Comment, *Major Changes Under the Proposed Federal Rules of Evidence—Part II,* 37 TENN. L. REV. 759, 765 (1970).

68. *E.g.*, *People v. Wilson*, 25 Cal. 2d 341, 153 P.2d 720 (1944); *Clifford-Jacobs Forging Co. v. Industrial Comm.*, 19 Ill. 2d 236, 166 N.E.2d 582 (1960); *Dowling v. L.H. Shattuck, Inc.*, 91 N.H. 234, 17 A.2d 529 (1941); *Schweiger v. Solbeck*, 191 Ore. 454, 230 P.2d 195 (1951). *See also* MCCORMICK § 12.

69. *E.g.*, CALIF. EVID. CODE § 805; KAN. CODE OF CIV. PROC. § 60-456(d); N.J. EVID. RULE 56(3); UNIFORM RULES OF EVID. 56(4) (1953).

70. FED. R. EVID. 702, text at note 30, *supra*.

71. *See* FED. R. EVID. 703, text at note 49, *supra*.

72. "The basic approach to opinions, lay and expert, in these rules is to admit them when helpful to the trier of fact." FED. R. EVID. 704, Adv. Comm. Note.

73. *See* WEINSTEIN & BERGER ¶ 704[01] at 704-10.

Disclosure of Facts Underlying Expert Opinion

In most jurisdictions, including Louisiana, experts are required to state the factual basis of their testimony before actually giving their opinion.⁷⁴ Perhaps the sharpest criticism of the traditional rules of opinion evidence was directed against the courts' rigid application of this rule.⁷⁵ The purpose of the rule was to prevent an expert's reliance on statements or observations made by others outside of the court, and a failure to place the factual basis of an opinion into the record prior to the recitation of the opinion resulted in a successful hearsay objection.⁷⁶

While open disclosure of an expert's factual foundation is a laudable goal, it forces the expert to attend the entire trial to hear the facts on which he may base his testimony or to have the issue put to him in the form of a hypothetical question.⁷⁷ Hypothetical questions are objectionable for two reasons. First, they are time consuming;⁷⁸ second, they allow a skillful advocate to plead his case while questioning the witness by framing his question in a favorable light.⁷⁹

In response to these criticisms, model acts⁸⁰ and, eventually, Federal Rule 705⁸¹ disclaimed the earlier rule requiring

74. *E.g.*, *United States v. American Tobacco Co.*, 399 F. Supp. 957 (D.C. Ky. 1941); *Mangione v. Snead*, 173 Md. 33, 195 A. 329 (1937); *Burns v. Fisher*, 132 Mont. 26, 313 P.2d 1044 (1957). LA. R.S. 15:465 (1950) provides: "Every expert witness must state the facts upon which his opinion is based." *Accord*, *Dixie Pipeline Co. v. Barry*, 227 So. 2d 1 (La. App. 3rd Cir. 1969), *cert. denied*, 255 La. 145, 220 So. 2d 731 (1970); *Prejean v. Trinity Universal Ins. Co.*, 210 So. 2d 395 (La. App. 3rd Cir. 1968); *cert. denied*, 252 La. 476, 211 So. 2d 334 (1968).

75. Critics include MCCORMICK § 14 and Ladd at 426.

76. The persuasiveness of the argument is weakened by the position reflected in Rule 703, which permits the expert to testify in reliance upon facts and data reasonably relied on by other experts in his field. See the discussion in text beginning at note 46, *supra*.

77. MCCORMICK § 14.

78. One scholar noted a single hypothetical question addressed to a neurologist which lasted 35 minutes. Brinton at 244. *See also* *Treadwell v. Nickel*, 194 Cal. 243, 228 Pac. 25 (1924) (question stretched over 83 pages of reporter's transcript and prompted a fourteen page objection).

79. *See* MCCORMICK § 16; 1 WIGMORE § 672 at 767; Ladd at 426-27.

80. MODEL EXPERT TESTIMONY ACT § 9; MODEL CODE OF EVID. rule 409; UNIFORM RULES OF EVID. 58 (1953). For state codifications to the same effect, *see* CALIF. EVID. CODE § 802; KAN. CODE OF CIV. PROC. §§ 60-456, 60-457; N.J. EVID. RULES 57, 58.

81. "The expert may testify in terms of opinion or inference and give his

that an expert's testimony be based solely on facts disclosed in the record, and authorized expert opinion without this requirement. In framing Rule 705, Congress sought to safeguard trustworthiness while simultaneously relaxing the earlier rule which virtually forced the use of hypothetical questions. Under the new Rule, trustworthiness is protected in two ways: first, the judge may force a revelation of an expert's sources,⁸² and second, an opposing attorney has the right to learn the sources through cross-examination.⁸³ Because of the broad federal right of discovery in civil cases,⁸⁴ an opposing attorney normally will be familiar with the qualifications and planned testimony of an expert when he takes the stand, and will prepare his cross-examination accordingly. Since the discovery right in criminal cases is less expansive than in civil suits,⁸⁵ a judge, where necessary, should utilize his discretionary power to require an expert to identify the factual basis of his opinion and thus avoid surprise.⁸⁶

Court-Appointed Experts

While recognizing the necessity for expert testimony, commentators have indicated that its use occasionally results in a battle of experts;⁸⁷ juries may have difficulty reconciling two qualified yet opposing views. To avoid possible bias by one party's expert, courts, including those in Louisiana, began to utilize their inherent power to appoint experts,⁸⁸ a procedure sanctioned by Federal Rule 706.⁸⁹

reasons therefor without prior disclosure of the underlying facts or data, unless the court requires otherwise. The expert may in any event be required to disclose the underlying facts or data on cross-examination." FED. R. EVID. 705.

82. *Id.* Rule 705 appears in direct conflict with LA. CODE CRIM. P. art. 772, which forbids comment on the evidence by the judge. However, a Louisiana judge applying such a rule might make his order at side bar without the jury being aware that it was made. The Rule does not appear to create problems in the civil trial context, since most civil cases are heard without a jury.

83. FED. R. EVID. 705. *See also* MCCORMICK § 14.

84. F.R.C.P. 26(b)(4) outlines the federal discovery procedure which grants opposing parties the opportunity to discover the names of adverse experts, the subject matter of the witness's testimony, and the substance of the planned statements.

85. For example, the Louisiana Code of Criminal Procedure does not provide for discovery of an opposing expert's testimony.

86. *See* WEINSTEIN & BERGER ¶ 705[01] at 705-09; FED. R. EVID. 705, Adv. Comm. Note.

87. MCCORMICK § 17; RICHARDSON § 13.11.

88. *Danville Tobacco Assoc. v. Bryant-Buckner Assoc., Inc.*, 333 F.2d 202,

At least one authority claims that the court appointment of expert witnesses violates the parties' right to trial by jury⁹⁰ because an expert who bears court approval unduly influences a jury. Sensitive to the problems of undue influence, Congress, in adopting the Federal Rule, provided that the judge has discretion⁹¹ in determining whether to reveal the appointive status of the expert. The court's judicious exercise of its discretion should prevent any charge that undue significance was attached to the expert's testimony.

Other scholars have criticized the availability of court-appointed experts, claiming it is impossible to obtain a truly neutral expert.⁹² However, a biased expert may be unmasked

208-09 (4th Cir. 1964), *cert. denied*, 387 U.S. 907 (1967); *Scott v. Spanger Bros. Inc.*, 298 F.2d 928, 930 (2d Cir. 1962); Sink, *The Unused Power of a Federal Judge to Call His Own Expert Witness*, 29 S. CAL. L. REV. 195 (1956). Louisiana has codified this inherent judicial power in LA. R.S. 15:425, 23:1121-22, 37:1284 (1950); LA. CODE CIV. P. arts. 192, 373, 375, 1551. While the court's power to call experts is unquestioned, most courts have been reluctant to exercise this power because of: (1) a belief that such witnesses would not be neutral, (2) the dangers inherent in random selection when there are two distinct schools of thought, (3) the possibility that it will impede the conduct of the trial, (4) implications of lack of court neutrality, (5) lapse of time between the accident and the appointment of experts, and (6) the possibility that the selectors will be subject to economic pressures. Note, 40 S. CAL. L. REV. 728, 731-34 (1967).

89. FED. R. EVID. 706 provides: "The court may on its own motion or on the motion of any party enter an order to show cause why expert witnesses should not be appointed, and may request the parties to submit nominations. The court may appoint any expert witnesses agreed upon by the parties, and may appoint expert witnesses of its own selection. An expert witness shall not be appointed by the court unless he consents to act. A witness so appointed shall be informed of his duties by the court in writing, a copy of which shall be filed with the clerk, or at a conference in which the parties shall have the opportunity to participate. A witness so appointed shall advise the parties of his findings, if any; his deposition may be taken by any party, and he may be called to testify by the court or any party. He shall be subject to cross-examination by each party, including a party calling him as a witness . . . (c) *Disclosure of appointment.* In the exercise of its discretion, the court may authorize the disclosure to the jury of the fact that the court appointed the expert witness."

90. Levy, *Impartial Medical Testimony—Revisited*, 34 TEMPLE L. Q. 416, 424-25 (1961). This argument lacks persuasiveness in a civil trial context in Louisiana, because most civil trials are conducted without juries in Louisiana.

91. FED. R. EVID. 706. *Accord*, UNIFORM RULES OF EVID. 61. However, both § 8 of the Uniform Expert Testimony Act and MODEL CODE OF EVID. rule 407 require the judge to reveal the court-appointed status of the expert witness to the jury.

92. For example, members of the American Trial Lawyers Association

by skillful cross-examination.⁹³ Also, under Federal Rule 706(d) the parties retain the right to call their own expert witnesses⁹⁴ to challenge testimony and opinion given by the court's expert. With such protections guaranteeing the trustworthiness of the testimony, the Rule should serve to protect the legal interest of both parties.

Conclusion

The Federal Rules on opinion evidence represent a trend of admitting such evidence as may be helpful and reliable. To be admitted, opinion evidence must be offered by a competent witness, possessing knowledge of the facts and impressions about which he is testifying. Furthermore, the offered evidence must be helpful to the ascertainment of truth. This analytical approach, when combined with the protection offered by the new relevancy rules, and buttressed by effective cross-examination, should enable the parties to litigate their claims without excluding essential evidence simply because it is opinion. However, federal courts must closely guard the rights of the defendant in criminal trials since encroachment upon the jury's province has constitutional implications. Recognizing the necessity of judicious exercise of discretion on the part of the trial judge, the Federal Rules of Evidence appear to strike a proper balance between admissibility and reliability in the area of opinion evidence.

Herman Edgar Garner, Jr.

were opposed to Rule 706 because they believed that the court would be unable to find a physician willing to testify against another doctor. See WEINSTEIN & BERGER ¶ 706[01] at 706-02-04.

93. FED. R. EVID. 611(b) text at note 7, *supra*.

94. FED. R. EVID. 706(d): "Nothing in this rule limits the parties in calling expert witnesses of their own selection."