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Louisiana Code of Evidence Article 703: Is It a Hidden Exception to the Hearsay Rule?

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I. INTRODUCTION

Expert witnesses may be found in all walks of life: from the mobile home repairer[1] or the termite inspector[2] to the doctor or technologist.[3] The available spectrum of expert testimony gives practicing attorneys an arsenal of tools to use against their opponents. "Shopping" for experts is the norm rather than the exception; it is now commonplace for an attorney to proffer an expert who is willing to support the attorney's cause.[4] Likewise, an opposing party, faced with the prospect of having to discredit the adversary's expert, will find another qualified expert to render a suitable contradictory opinion. This type of trial strategy makes it necessary for attorneys to find expert witnesses who will render reliable opinions. More importantly, this trial technique presents experts as de facto advocates, beyond mere presenters of knowledge and expertise.

In fact, the notion that experts are often used as advocates was accepted by jurists and scholars more than a century ago. Justice Grier of the United States Supreme Court wrote in 1858, "[E]xperience has shown that opposite opinions of persons professing to be experts may be obtained to any amount . . . ."[5] Lord Chief Justice Campbell charged

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1. *See* Aaron v. Bankers & Shippers Ins. Co., 475 So. 2d 379 (La. App. 1st Cir. 1985) (a mobile home repairer was qualified as an expert to testify regarding damage to a mobile home in transit based solely on his seven years experience in the field).

2. *See* Hebert v. Broussard, 450 So. 2d 1038 (La. App. 1st Cir. 1984) (a termite inspector with twenty-five years experience in the field was qualified as an expert to testify to the presence of termite damage to a house).

3. *See* Department of Health and Human Resources v. Rice, 482 So. 2d 873 (La. App. 2d Cir. 1986) (an expert in the field of paternity testing was allowed to give his interpretation of the results of a paternity test despite the fact he was not a medical doctor).

4. For the practicing attorney, a listing of technical experts may be found in The Directory of Expert Witnesses in Technology which is a compilation of about 9,000 self-designated experts in fields ranging from chemistry and civil engineering to physics and energy technology. The ABA Journal reviews the book as a "useful source of potential experts for law firms with a substantial amount of high-technology litigation." Robert P. Bigelow, *Directory of Expert Witnesses in Technology*, 71 A.B.A. J. 74, 76 (Aug. 1985) (book review).

5. William L. Foster, *Expert Testimony—Prevalent Complaints and Proposed Remedies*, 11 Harv. L. Rev. 169, 169 (1898) (citing Winans v. New York & Erie RR., 21 How. 88, 101 (1858)).

a jury concerning expert testimony in an 1856 murder trial by stating, "It is . . . indispensable to the administration of justice that a witness should not be turned into an advocate, nor an advocate into a witness."[6] There is a conflict between the desired goal of insuring the reliability of expert opinions and the consequences of experts acting as de facto advocates. Surely the impact of experts as advocates influences the integrity of the judicial system. Moreover, this impact is a debatable one which is subject to abuse by the proponents of experts. Especially today, with the increasing role of experts in the courtroom, insuring the reliability of expert testimony is of compelling importance.

This comment will discuss the reliability of expert testimony as it relates to the Louisiana Code of Evidence article 703. First, this comment will briefly review the Louisiana Code of Evidence articles relating to expert opinion testimony. Second, the comment will illustrate how some facts and data upon which experts rely are unreliable, thereby rendering untrustworthy the subsequent opinions based on those facts and data. Third, the comment will discuss the ambiguity of the reasonable reliance test of the Louisiana Code of Evidence article 703 which opens the door to two opposing interpretations. This comment will suggest the restrictive interpretation is preferable because it provides the most adequate method of insuring the reliability of expert opinions. Fourth, the comment will look at how Louisiana courts have interpreted Article 703 in light of the ambiguity. And lastly, this comment will suggest that "basis testimony" be admitted as substantive evidence only if the restrictive interpretation is uniformly employed by Louisiana courts.

II. Louisiana Code of Evidence and Expert Testimony

First, a brief summary of the code articles relating to expert testimony is necessary. One of the objectives of the Louisiana Code of Evidence is to insure the reliability of expert testimony. According to the scheme of the code, the expert must be properly qualified; the opinion must be "helpful" to the trier of fact;[7] the opinion must be

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6. *Id.* at 170 (quoting Lord Chief Justice Campbell in his charge to the jury in a famous murder trial held in England in 1856).

7. Louisiana Code of Evidence article 702 states: "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."

An expert's opinion will be helpful when it will "assist the trier of fact." This occurs "[w]henever the triers of fact are confronted with issues which cannot be determined intelligently on the basis of ordinary judgment and practical experience . . . ." Mason Ladd, *Expert Testimony*, 5 Vand. L. Rev. 414, 418 (1952).

Mere experience is sufficient to qualify a person as an expert. *See* Belk v. Montgomery Ward & Co., 501 So. 2d 1008 (La. App. 2d Cir. 1987) (a man with only a high school

legally relevant to a fact in issue;[8] and, the basis of the opinion must pass the reasonable reliance test of Article 703.[9] Additionally, there is a possibility the basis of the opinion must comply with the test formulated by the court in *Frye v. United States*.[10] All of the above tests are preliminary matters for the court to decide.[11]

This comment is specifically concerned with Louisiana Code of Evidence article 703 which permits experts to base their opinions on

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degree was qualified as an expert in lawn mower design because he had worked in the mowing business since 1952 and had been previously qualified as an expert by other courts).

Additionally, the judge has discretion to decide whether a witness is qualified, and this decision is subject to review using the abuse of discretion standard. *See* Doyle v. Picadilly Cafeterias, 576 So. 2d 1143 (La. App. 3d Cir. 1991); Hebert v. Belk Constr. Co., Inc., 499 So. 2d 1079 (La. App. 3d Cir.), *writ denied*, 501 So. 2d 198 (1986); Dawsey v. Olin Corp., 782 F.2d 1254 (5th Cir. 1986).

8. Louisiana Code of Evidence article 401 states: "'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence."

Louisiana Code of Evidence article 403 states: "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, or waste of time." *See In re* "Agent Orange" Prod. Liab. Litig., 611 F. Supp. 1223, 1255 (D.C.N.Y. 1985), *aff'd*, 818 F.2d 187 (2d Cir. 1987), *cert. denied*, 487 U.S. 1234, 108 S. Ct. 2898 (1988) ("Any decision to allow or exclude evidence under [Federal] Rule 403 must be based on a detailed analysis of the specific facts of the case at hand . . . .").

There is also a danger of misleading and confusing the jury with highly technical expert testimony in complex toxic tort and products liability litigation because of "[a] false aura of scientific infallibility, coupled with low probative value" that occasionally accompanies this type of evidence. *Id.* at 1256.

9. Louisiana Code of Evidence article 703 states: "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 a particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence."

10. 293 F. Supp. 1013 (D.C. Cir. 1923). Under the *Frye* test, the court must ask whether the expert, in reaching his conclusion, used well-founded methodology which has gained general scientific acceptance in the field. There is some question whether the Louisiana Code of Evidence adopts the *Frye* test. For example, under the Federal Rules of Evidence, after which Louisiana's code is modeled, the U.S. Supreme Court has yet to rule on whether the Federal Rules of Evidence abolish *Frye*. *See* Randolph N. Jonakait, *The Supreme Court, Plain Meaning, and the Changed Rules of Evidence*, 68 Tex. L. Rev. 745 (1990). However, in Adams v. Chevron U.S.A., Inc., 589 So. 2d 1219, 1223 (La. App. 4th Cir.), *writ denied*, 592 So. 2d 414 (1991), after listing the relevant code articles used to determine admissibility of expert testimony and the *Frye* test, the court stated, "We adopt those standards as appropriate for evaluating the admissibility of expert testimony under Louisiana law."

11. Louisiana Code of Evidence article 104(A) states: "Preliminary questions concerning the competency or qualification of a person to be a witness, the existence of a privilege, or the admissibility of evidence shall be determined by the court . . . ."

otherwise inadmissible hearsay "if of a type reasonably relied upon by experts" in a given field.[12] Whether or not expert bases are disclosed to the jury is addressed by Article 705.[13] Disclosure of an expert's underlying facts on direct examination is permissible[14] and often necessary[15] because the jury needs enough information to properly weigh the credibility of the expert.[16] Consequently, the jury may hear otherwise inadmissible hearsay in the form of "basis testimony."

III. UNRELIABILITY OF THE UNDERLYING FACTS AND DATA

At first glance, experts appear to be reliable witnesses. An expert who is properly qualified carries a degree of authority and credibility that is unsurpassed in any other type of witness.[17] However, when an

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12. *See* La. Code Evid. art. 703, *supra* note 9.

13. Louisiana Code of Evidence article 705(A) states: "In a civil case, the expert may testify in terms of opinion or inference and give his reasons therefor *without prior disclosure of the underlying facts or data, unless the court requires otherwise.* The expert may in any event be required to disclose the underlying facts or data on cross-examination." (emphasis added).

Because this comment is concerned with the "facts and data" underlying the expert's opinion rather than the expert's "reasons" for the opinion, a distinction needs to be made. Take, for example, a wrongful death case where the plaintiff will only present circumstantial evidence. The time of death must be established before 11:00 p.m. in order to prove the defendant was the one who caused the death. The plaintiff calls a medical expert who was "told" that the victim ate pizza at 7:00 p.m. on the night of the murder. The expert's *conclusion* (the opinion) is that the victim died between 8:00 p.m. and 11:00 p.m. which places the defendant at the scene. His *reasons* for the opinion are that because the stomach stops digesting food immediately upon death and because the victim had only digested five percent of the food when the autopsy was performed, the victim must have died three to four hours after eating. However, the main *fact* that formed the basis of the opinion was that the victim ate at 7:00 p.m. This fact is hearsay. Under Article 705, the expert need not disclose this fact unless the court requires otherwise. But, the credibility of the opinion turns on whether this fact is known and believed by the jury.

14. Note that the judge may require the expert to disclose the underlying facts and data on direct examination under Article 705. *See supra* note 13.

15. Charles T. McCormick, *Evidence* § 324.3, at 372 (J. Strong 4th ed. 1992) ("The expert should as a general matter be allowed to disclose to the trier of fact the basis of his or her opinion, because otherwise the opinion is left unsupported with little way for the jury to evaluate its correctness."). *See also* Doyle v. Piccadilly Cafeterias, 576 So. 2d 1143, 1152 (La. App. 3d Cir. 1991) ("Nor do we find that the trial court erred in allowing [the expert] to testify as to projected lost future earnings and future medical expenses. [The expert] explained all the underlying facts and assumptions on which he based his opinions and he also explained the basis of his calculations. . . . The credibility of this testimony . . . was a matter for the jury to weigh.").

16. McCormick, *supra* note 15, § 324.3, at 372.

17. Moreover, the weight accorded to the expert opinion depends on the expert's qualifications. *See* Arceneaux v. Daggett, 594 So. 2d 1001, 1005 (La. App. 3d Cir.) ("The importance placed upon expert testimony is largely dependent on the expert's qualifications and facts that form the basis of his or her opinion."), *writ denied*, 597 So. 2d 1029 (1992).

expert bases an opinion on unreliable data, the subsequent opinion will be untrustworthy. According to Article 703, an expert may rely on facts and data which are either perceived by him personally or made known to him by another source. These underlying facts and data may be inadmissible hearsay evidence if the expert reasonably relies upon the data.

In re "Agent Orange" Product Liability Litigation[18] provides an example of how expert opinions may be based on unreliable hearsay evidence. The toxic tort controversy arose out of the government's use of the defendants' herbicide during the Vietnam war. The plaintiffs (veterans exposed to the herbicide, their wives, and their children) alleged that as a result of exposure to the toxic herbicide, they suffered numerous maladies, ranging from miscarriages and birth defects to baldness. The defendants, seven manufacturers of Agent Orange, moved for summary judgment on the ground the plaintiffs did not establish a causal link between their product and the adverse health problems alleged.[19] The motion was granted.

The plaintiffs unsuccessfully countered the motion by producing two properly qualified physicians. The first expert, without examining any of the plaintiffs or their medical records, based his opinion (that Agent Orange did have a causal connection with the plaintiffs' symptoms) upon "checklists" formulated by the individual plaintiffs attesting to their own symptoms.[20] In the expert's final analysis, he concluded Agent Orange must have caused the plaintiffs' health problems only if 1) the plaintiffs were telling the truth, and 2) there were no other causes of the health problems.[21] The court criticized the logic underlying the expert's conclusion by stating, "One need hardly be a doctor of medicine to make the statement that if X is a possible cause of Y, and if there is no other possible cause of Y, X must have caused Y."[22] More significantly, the court excluded the opinion based on Federal Rule of Evidence 703 because "no reputable physician relies on hearsay checklists by litigants to reach a conclusion with respect to the cause of their afflictions."[23] The second expert relied on the same checklists to form his opinion. However, he also based his opinion on the plaintiffs' military and medical records to determine the extent of their exposure to Agent

18. 611 F. Supp. 1223 (D.C.N.Y. 1985). Federal cases will be used as persuasive authority in this comment because Fed. R. Evid. 703 is the verbatim equivalent of La. Code Evid. art. 703.

19. *Id.* at 1229.

20. *In re "Agent Orange"*, 611 F. Supp. at 1235.

21. *Id.* at 1237.

22. *Id.* at 1238.

23. *Id.* at 1246 (citing U.S. v. Downing, 753 F.2d. 1224, 1238 n.18 (3d Cir.), *aff'd*, 780 F.2d 1017 (1985)).

Orange.[24] Again, the court excluded the opinion of the second expert because the bases were unreliable.[25]

If an expert's underlying data is unreliable, the subsequent opinion based on that data will likely be untrustworthy. However, Louisiana Code of Evidence article 703 is designed to protect against the risk of unreliable expert opinions with the reasonable reliance test. In the sections that follow, this comment will discuss this test, the application of the test in both federal and Louisiana jurisprudence, and the potential problems with each interpretation.

IV. The Reasonable Reliance Test of Article 703

Assuming an expert is qualified,[26] the opinion is deemed helpful to the trier of fact,[27] it passes the relevancy test,[28] and possibly the *Frye* test,[29] the bases of the opinion must comply with the reasonable reliance test of Louisiana Code of Evidence article 703.[30] Because Article 703 allows experts to base their opinions on facts not supported by the record[31] and on otherwise inadmissible data, the reasonable reliance test is necessary to safeguard against the use of untrustworthy basis testimony by experts in forming opinions. The rule recognizes experts are the most competent to judge the reliability of facts and data which give rise to an expert opinion.[32] The test also assumes experts will not rely on untrustworthy data in their professional practices, much less for use at trial in light of their competent professional judgment.

The words "reasonably rely," however, are ambiguous for two reasons. First, as a general matter, if ten "small time" experts customarily rely on certain data in forming opinions on the subject, and the two leading experts in the field rely on other data in forming the same opinions, what is reasonable reliance? Second, who makes the determination of what type of data is reasonably relied upon by experts, the experts in the field or the court? Courts have developed two views, one

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24. *Id.* at 1247.

25. *Id.* at 1248. Also, the court excluded the opinion based on Fed. R. Evid. 403. *Id.* at 1256.

26. *See supra* note 7.

27. *Id.*

28. *See supra* note 8.

29. *See supra* note 10.

30. *See* La. Code Evid. art. 703, *supra* note 9.

31. *See* Baunam v. Centex Corp., 611 F.2d 1115, 1120 (5th Cir. 1980) ("The record indicates that these sources, *while not at all in evidence*, are of the type reasonably relied upon by certified public accountants . . . and did not render the testimony unreliable.") (emphasis added).

32. McCormick, *supra* note 15, § 15, at 64-65.

liberal and one restrictive, in applying the reasonable reliance test.[33] Both approaches present difficulties.

A. The Liberal Approach

The liberal interpretation of Article 703 supports the view that the court should give deference to the expert, at least on the issue of whether experts in a given field rely on the type of data used by the testifying expert. Once the bases are found to meet the "type" requirement, the underlying data is presumed reliable; thus, the standard of Article 703 is met. The justification is that the expert is more capable of judging whether experts in the field rely on a certain type of data, especially in specialized areas of science and technology, than the judge, who is simply ill-equipped to make such determinations.[34] Consequently, judicial inquiry into the matter becomes unnecessary, thereby maximizing judicial efficiency.[35]

In re Japanese Electronic Products Antitrust Litigation[36] provides an example of how one court liberally construed Federal Rule of Evidence 703. There the U.S. Third Circuit Court of Appeals found that the district court erred in excluding an economic expert's report revealing the major disparity between the prices of Japanese television sets sold in the United States and the prices of the same sets sold in Japan. The court interpreted Rule 703 liberally when it noted, "The proper inquiry is not what the court deems reliable, but what experts in the relevant discipline deem it to be."[37] The mere existence of the expert's affidavit asserting that other experts in the field rely on the type of data used was sufficient.[38]

The court in *Christophersen v. Allied-Signal Corp.*,[39] a more recent U.S. Fifth Circuit case, also liberally interpreted Federal Rule of Evidence 703, even though the opinion of the plaintiffs' expert was ultimately excluded in the wrongful death action. In *Christophersen*, the plaintiffs

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33. *Id.* at 65.

34. *Id.*

35. Since the admissibility of expert testimony is a judicial function under Louisiana Code of Evidence article 104(A), Article 703, if liberally construed, would necessarily lessen the burden on the judiciary to determine the admissibility of the opinion testimony because experts are given deference on the determination of what *type* of data is normally relied upon.

36. 723 F.2d 238 (3d Cir. 1983), *rev'd on other grounds*, 475 U.S. 574, 106 S. Ct. 1348 (1985).

37. *Id.* at 276.

38. *Id. See also* Peteet v. Dow Chemical Co., 868 F.2d 1428, 1432 (5th Cir.) ("In making this determination, the trial court should defer to the expert's opinion of what data they find reasonably reliable."), *cert. denied*, 439 U.S. 935, 110 S. Ct. 328 (1989).

39. 939 F.2d 1106 (5th Cir. 1991), *cert. denied*, 112 S. Ct. 1280 (1992).

proffered Dr. Miller as an expert to establish causation between the cancer which caused Christophersen's death and the chemicals used to manufacture nickel/cadmium batteries at the plant where Christophersen worked. Dr. Miller based his opinion almost exclusively on the affidavit of an employee of the plant. The district court found the affidavit was incomplete because it lacked any facts indicating the type of fumes emitted by the plant or the type to which Christophersen was exposed.[40] The court also found the affidavit was inaccurate because it overstated the length of Christophersen's exposure to the chemicals.[41] On rehearing *en banc*, the Fifth circuit affirmed the district court's exclusion of the opinion by questioning Dr. Miller's underlying facts and data based on the affidavit. However, the court stated:

> We do not of course say that Rule 703 requires that all facts and data underlying the opinion must relate perfectly to the record facts. As we have pointed out, only when the facts and data are critically inaccurate or incomplete, *as determined by what other experts would or would not be willing to base opinions upon*, would the facts and data lack the necessary requisites of Rule 703.[42]

Although the liberal interpretation of Article 703 is efficient, it is not without its faults. First, by giving the expert the discretion to determine what data is reasonable to rely upon, the judicial role of determining admissibility will be hampered. Article 104(A) is based on the premise that the court, as a neutral figure, has the function of regulating the reliability of evidence which will reach the ears of unsophisticated jurors.[43] Moreover, this function is not discretionary; Article 104(A) states that "the admissibility of evidence *shall* be determined by the court."[44] The most significant and perhaps the most damaging manifestation of this problem occurs when an expert is employed solely for the purpose of testifying.[45] In that instance, the biased expert will testify that the data meets the "type" requirement of Article 703, the court will give deference to the expert on the question of what data is customarily relied upon by other experts, and the opinion will be ad-

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40. *Id.* at 1113.

41. *Id.*

42. *Id.* at 1115 (emphasis added).

43. *See* the Official Comment (d) to Louisiana Code of Evidence article 104(A) which states: "The final sentence of paragraph A is based on the recognition that most of the rules of evidence are intended to regulate the quality and reliability of evidence reaching the untrained juror, not the court."

44. *See* La. Code Evid. art. 104(A), *supra* note 11 (emphasis added).

45. McCormick, *supra* note 15, § 15, at 65. It is not always the case that an expert is employed solely for the purpose of testifying. For example, a lay witness in a case may be qualified as an expert based on his experience once he takes the stand.

mitted into evidence without further inquiry into the reasonableness of the expert's use of the data. This is not to suggest the expert will intentionally lie about the reasonableness of the reliance; however, the employed expert does have a monetary interest in advocating the position of his employer which necessarily makes the expert biased.

The root of the problem is that courts employing the liberal approach fail to probe into the circumstantial trustworthiness of the underlying facts and data because the reasonable reliance test assumes that if the expert reasonably relies on a certain type of data, the opinion is sufficiently reliable for admissibility. However, the relevant question is: were the circumstances surrounding the acquisition of the data such that there is a substantial likelihood the data is reliable for the purpose of admitting the opinion into evidence? This inquiry forms the basis for all hearsay exceptions.[46] For example, the dying declaration exception[47] assumes the chances of a person lying about the causes of his present trauma while consumed by the belief of immediate death are slim. So, given the then existing physical trauma of the declarant and his belief of impending death, the court will admit the utterance even though it is hearsay because the circumstances indicate its reliability. If an expert is allowed to testify to the basis of the opinion without a guarantee of the circumstantial trustworthiness of the bases, otherwise inadmissible hearsay will be heard by the jury.

As a result of the court's failure to inquire into the circumstantial trustworthiness of the expert's bases, another problem arises. By allowing experts the discretion to determine if the type of data is reasonably relied upon by other experts, courts using the liberal approach run the risk of the expert replacing the role of the fact-finder. Take, for example, the case of *Parmelle v. Marietta Michoud*.[48] In *Parmelle*, the defendant's expert relied on the plaintiff's medical records from prior hospitalizations to form the opinion that the plaintiff was not injured in a slip and fall accident. Although the court noted these records were not admissible under any hearsay exception, the appellate court liberally interpreted Article 703 to find the reports were improperly excluded by the trial court. One of the two medical reports in *Parmelle* included nurses'

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46. All hearsay exceptions require a certain degree of circumstantial trustworthiness. For example, Louisiana Code of Evidence article 804(B)(6) states that a hearsay statement will be admissible "[i]n a civil case, [when] a statement [is] not specifically covered by any of the foregoing exceptions if the court determines that considering *all pertinent circumstances in the particular case the statement is trustworthy* . . . ." (emphasis added).

47. According to Louisiana Code of Evidence article 804(B)(2) the dying declaration exception applies when "[a] statement [is] made by a declarant while believing that his death was imminent, concerning the cause or circumstances of what he believed to be his impending death."

48. 566 So. 2d 441 (La. App. 4th Cir. 1990).

notes.[49] Although nurses' notes are probably trustworthy and the physician reasonably relied on them, the physician, in effect, made a credibility judgment about the trustworthiness of the nurses. The point is that the reasonable reliance test in some instances will allow experts to make credibility judgments which are better left to the jury.

The liberal interpretation of Article 703 is beneficial to the judiciary because it takes the burden of analyzing sometimes highly technical expert opinions off of the judges and places it on the people who know the subject matter best—the experts. However, there is a trade-off. Not only might the expert supplant the judicial function of determining admissibility, but the expert might also occupy the role of the fact-finder. Whether the liberal interpretation of Article 703 is the best way to handle expert testimony may be a matter of policy: do we want experts to have such broad discretion in the courts today? There is an alternative approach to interpreting Article 703.

B. The Restrictive Approach

The restrictive approach is another method courts use to determine whether the standard of Article 703 is met.[50] This method requires that the judge, not the expert, make an independent determination of the reliability of the expert's underlying data.[51] Unlike the liberal approach, this approach assumes that even though the data meets the "type" requirement of Article 703, the data may be unreliable.

It seems illogical to say experts will purposefully form opinions in their professional capacities based on unreliable data, especially when the consequences of erroneous conclusions in the "real world" would be devastating. In fact, this is the justification behind the reasonable reliance test. However, an attorney's use of expert opinions based on unreliable data may have more of an impact in the courtroom than in the expert's day-to-day practices. This is especially true in instances where the expert's opinion does not bear on the protection of life or the prevention of life threatening conditions or when the opinions are formed at the attorney's direction.

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49. *Id.* at 445.

50. McCormick, *supra* note 15, § 15, at 66 ("On balance the restrictive approach is preferable.").

51. Under the restrictive approach, an expert's reliance on certain data will be reasonable if two questions are answered in the affirmative: 1) Is it the practice of experts in the given field to rely on this type of data?, and 2) Is it reasonable for *this* expert to rely on *this* data? *Id.* at 65 n.10. These two inquiries have been described as the "kind" and the "manner of acquisition" distinction. *See* Paul R. Rice, *Inadmissible Evidence as a Basis for Expert Opinion Testimony: A Response to Professor Carlson*, 40 Vand. L. Rev. 583, 589 (1987). So, not only must the data rise to the level of general expert acceptance, but it must also be gathered in such a way to assure its trustworthiness.

For example, an automobile mechanic forms an opinion that his customer needs a new transmission based on the customer's description of the car's behavior over the past few days and a cursory inspection of the car. Now, take the same mechanic, the same opinion, the same customer and add a products liability dispute against the manufacturer involving a large amount of money; one can easily see the more significant impact of the opinion based partly upon hearsay in court.

If the bases of the opinion in the above example meet the "type" requirement, a liberal reading of Article 703 would allow the opinion into evidence, assuming all the other evidentiary requirements were met. However, with a restrictive interpretation, an additional inquiry into the circumstantial trustworthiness of the underlying facts would be necessary which may render the opinion inadmissible.

Several courts have employed the restrictive approach.[52] In *Barrel of Fun, Inc. v. State Farm Fire & Casualty Co.*,[53] the court applied the restrictive approach to exclude the results of a voice stress analysis test used to determine whether the insured committed arson. After analyzing the unreliability of this form of lie detector analysis, the court stated, "Because we hold today that PSE evidence, whether in the form of raw data or expert opinion interpreting or extrapolating upon that data, is inherently suspect, Rule 703 cannot, standing alone, provide an avenue for its admission."[54] The court in *Barrel of Fun* independently analyzed the reliability of the voice stress test and found the expert's opinion based solely upon it should be excluded because an expert could not possibly reasonably rely on such unreliable data. A negative implication from this reasoning is a determination of reasonable reliance by the *court* under this approach will be a determination of the reliability of the underlying data. Consequently, the court in *Barrel of Fun* restrictively interpreted Rule 703.

A problem with the restrictive approach is that some expert opinions will be excluded even though the data meets the "type" requirement.[55]

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52. *See* Soden v. Freightliner Corp., 714 F.2d 498, 505 (5th Cir. 1983); United States v. Esle, 743 F.2d 1465 (11th Cir. 1984); *In re* "Agent Orange" Prod. Liab. Litig., 611 F. Supp. 1223 (D.C.N.Y. 1985).

53. 739 F.2d 1028 (5th Cir. 1984).

54. *Id.* at 1033.

55. McCormick, *supra* note 15, § 15, at 66. A primary assumption made by courts who employ the restrictive approach is that an expert's underlying facts and data are unreliable if they are not of a type relied upon by experts in the field. However, in reaching this conclusion, courts do evaluate the circumstantial trustworthiness of the basis testimony when they restrictively construe Rule 703. For example, in *Soden*, 714 F.2d at 503, the court stated:

> [W]e conclude that [the statistics] were not shown to be of a type reasonably relied upon by experts in his field, and thus the district court did not abuse

The effect of this does not comport with the language of Article 703. The article uses the phrase "[i]f of a *type* reasonably relied upon by experts in a particular field . . . ."[56] The rule expressly speaks to the "type" requirement; it says nothing about an independent evaluation of the data's circumstantial trustworthiness by the court. However, Article 703 does not, by itself, permit the wholesale introduction of expert testimony into evidence because of the other barriers to admissibility, such as the qualification of the expert and the helpfulness and relevancy of the opinion.[57] For example, in *Christophersen*,[58] the court stated, "If, taking all considerations into account, a court finds that the potential for prejudice substantially outweighs the probative value, the court may opt to exclude the testimony."[59] So, it really makes no difference that expert opinions could be excluded under this approach even when the "type" requirement is met, because other evidentiary requirements also render opinions meeting the "type" requirement inadmissible.

Although the restrictive approach requires the court to make an additional inquiry into the circumstantial trustworthiness of the expert's underlying facts and data which could preclude the trier of fact from considering some expert opinions, there is an advantage. The underlying facts and data and the subsequent expert opinion will be sufficiently reliable for the purpose of admissibility. Since insuring the reliability of evidence is an objective of the code, the restrictive approach is a better way to interpret Article 703 than the liberal approach.

V. LOUISIANA'S POSITION

Like the federal circuits,[60] the Louisiana appellate courts appear to be unsettled as to which approach is preferable. For example, in *Adams v. Chevron U.S.A.*,[61] the fourth circuit court of appeal held the trial court erred in excluding the testimony of the plaintiffs' expert. Adams

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> its discretion in excluding any opinion dependent on them. First, the statistics on which Hutton relied were prepared strictly in anticipation of litigation and were based on information received from a sister company. They were not part of a published study and were not even made available to the appellees . . . .

By taking the above circumstances into account, the court restrictively construed Federal Rule of Evidence 703. Moreover, one cannot necessarily exclude the possibility that a manufacturing expert does customarily rely on statistics indicating the frequency of accidents involving the manufacturer's product.

56. *See* La. Code Evid. art. 703, *supra* note 9 (emphasis added).

57. *See supra* notes 7-8 and accompanying text.

58. Christophersen v. Allied-Signal Corp., 939 F.2d 1106 (5th Cir. 1991).

59. *Id.* at 1112.

60. For a discussion on the split among the federal circuits as to which approach to apply, see *In re* "Agent Orange" Prod. Liab. Litig., 611 F. Supp. 1223, 1243-45 (D.C.N.Y. 1985).

61. 589 So. 2d 1219 (La. App. 4th Cir. 1991).

was injured at sea while he was transferred from a sea vessel to an offshore rig. The plaintiffs offered the testimony of a sea captain who had nearly thirty years of experience in the field of transporting offshore workers.[62] The court found that the sea captain was qualified, that he relied upon data customarily relied upon by other experts, that he used well-founded methodology, and that his opinion was relevant. The court adopted the *Christophersen*[63] court's liberal construction of Federal Rule 703 and stated, "By reference to the four inquiries established in the *Christophersen* case, we find . . . the record indicates that the facts upon which Captain Torrence relied were the same type which would have been relied on by other experts in the field . . . ."[64] Consequently, the court found the expert should have been allowed to testify to his opinion under the liberal reading of Article 703.

In *Malmay v. Sentry Insurance Co.*,[65] a wrongful death action, the third circuit court of appeal allowed the plaintiff's expert to base his opinion on accounting records prepared by the deceased's accountant, income tax returns, and interviews with the accountant.[66] Although some of these otherwise hearsay documents and statements were not in the record, the court determined the opinion was permissible because economic experts ordinarily rely on accounting records to form opinions concerning economic loss. Although accounting records fit the type requirement of Article 703, it is not at all clear that *this* expert's reliance on *these* records was reasonable. The court might have found, after a deeper inquiry, that this accountant was sympathetic to the plaintiffs' claims; thus, the accountant had an incentive to lie to the expert. Consequently, the court's use of the liberal approach allowed the expert's opinion into evidence.

However, there is language in *Willie v. American Casualty Co.*,[67] a first circuit case, indicating a restrictive interpretation of Article 703. In *Willie*, the plaintiff was abducted and shot in the parking lot of a shopping center. She offered the testimony of a security expert to show the shopping center failed to provide adequate security measures. The expert used police incident reports, attesting to the high crime in the area, to form his opinion. The court held it was permissible for the expert to testify to his opinion based on the reports. After the court asserted that much deference should be given to experts' opinions as to what is customarily relied on in the field, it stated:

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62. *Id.* at 1223.
63. Christophersen v. Allied-Signal Corp., 939 F.2d 1106 (5th Cir. 1991).
64. *Adams*, 589 So. 2d at 1224.
65. 550 So. 2d 366 (La. App. 3d Cir. 1989).
66. *Id.* at 370.
67. 547 So. 2d 1075 (La. App. 1st Cir. 1989), *writ denied*, 584 So. 2d 678 (1991).

> We believe that it was reasonable to rely on the inadmissible reports to form an expert opinion as to the level of criminal activity at [the shopping center]. While every statement on every police report may not have been true, the reported numbers and types of crimes at a location is probably the best . . . indicator of the kinds and frequency of criminal acts actually occurring.[68]

Here, the court analyzed the contents of the reports and determined they were trustworthy, at least to the extent the expert could rely on them. This is a restrictive reading of Article 703 regardless of whether the court allowed the expert to testify to his opinion. And, most importantly, the bases were deemed trustworthy *by the court*, not by the expert.

The Louisiana Supreme Court has not yet spoken on the issue. However, in light of the different approaches taken by the circuits, Louisiana should adopt a uniform method to interpret Article 703 to make the outcome of litigation more predictable. As noted previously, the restrictive approach is better and should be Louisiana's method of interpreting Article 703.[69] Both interpretations, however, necessitate different treatments of the basis testimony once the opinion is admitted. This issue will be discussed next.

VI. Should Article 703 Act as Another Exception to the Hearsay Rule?

The Louisiana Code of Evidence has thirty-four exceptions to the hearsay rule.[70] Four, found in Article 801, are treated as non-hearsay. The others are expressly stated in Articles 803 and 804. Under Article 705,[71] the expert may state the facts and data upon which the opinion is based on direct examination if ordered by the court even if the bases are not in the record or are otherwise inadmissible for hearsay reasons. This is in order that the fact-finder may properly evaluate the credibility

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68. *Id.* at 1079.

69. *See supra* notes 50-60 and accompanying text.

70. The justification behind the hearsay rule is well founded in the Anglo-American system of justice. Credibility is based upon a witness' perception, memory, and ability to truthfully and accurately convey the testimony to the trier of fact. Personal presence is the key factor in determining the existence of these criteria since the witness' demeanor bears heavily on credibility. Because a hearsay declarant is absent, he may not be tested for credibility; subsequently, hearsay declarations may not be accepted for their truth. However, if hearsay evidence has a sufficient degree of trustworthiness, indicated by the circumstances surrounding the utterance or compilation of the data, hearsay will be admitted into evidence under one of the exceptions. Additionally, failure to object to otherwise inadmissible hearsay will constitute a waiver unless the evidence appears unreliable in the particular case. McCormick, *supra* note 15, §§ 244-245.

71. *See supra* note 13.

of the opinion. To what extent these bases are admissible is a question warranting discussion here.

The justification is sound for limited admissibility of basis testimony under the liberal approach because the approach simply does not provide the adequate assurances of reliability all hearsay exceptions encompass.[72] Necessarily, the judge should give the jury a limiting instruction to accept the basis testimony as mere support for the opinion, and not for the truth. Some commentators have drawn an analogy between the Federal Rules of Evidence 612[73] and 703 to support this view.[74] Just as a writing used to refresh a witness' failed memory is not admissible as substantive evidence, basis testimony is also inadmissible without a limiting instruction.[75] Out-of-court documents used by witnesses under Rules 612 and 703 will carry little value with regard to reliability because they have not been properly authenticated[76] and they fall within the definition of hearsay[77] which necessarily gives rise to a presumption of unreliability.[78]

Conversely, under the restrictive approach, the court will inquire into the circumstantial trustworthiness of the expert's bases. If the bases are deemed unreliable by the court, the expert could not possibly reasonably rely on the data. However, if the court finds the data is trustworthy, the expert's reliance is reasonable. Thus, the justification for limited admissibility disappears. The inquiry into the reliability will assure a sufficient degree of trustworthiness—the same degree of reliability all hearsay exceptions require. Therefore, if one agrees with the restrictive interpretation of Article 703, it follows that Article 703 should be a back-door exception to the hearsay rule. Consequently, the basis testimony should be admitted as substantive evidence when the court

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72. *See supra* notes 46-47 and accompanying text.

73. *See* Fed. R. Evid. 612. When a witness testifies to loss of memory on direct examination, the examiner may allow the witness to read from the document to refresh his memory. Having read the writing, the witness may testify to its contents. The writing need *not* be admissible into evidence under Rule 612. However, the cross-examiner may choose to introduce the document into evidence. The same is true under Rule 703. The expert may identify the out-of-court document on direct examination and base his opinion on it. And, Rule 705 allows the cross-examiner to delve into the contents of the document.

74. Ronald L. Carlson, *Policing the Bases of Modern Expert Testimony*, 39 Vand. L. Rev. 577, 583 (1986).

75. *Id.* at 583-84.

76. The requirement of authentication is found in Louisiana Code of Evidence article 901(A) which states: "The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims."

77. The definition of hearsay is found in Louisiana Code of Evidence article 801(C). It states: "'Hearsay' is a statement, other than the one made by the declarant while testifying at the present trial or hearing, offered in evidence to prove the truth of the matter asserted."

78. Carlson, *supra* note 74, at 583-84.

determines the expert reasonably relies on the underlying facts and data.

The Louisiana Legislature has indicated it opposes limited admissibility of hearsay evidence having a sufficient degree of trustworthiness.[79] The Louisiana Code of Evidence has an express hearsay exception for those statements having the requisite level of reliability tested by the circumstances surrounding the utterance. The exception is found in Article 804(B)(6).[80] Although it is narrower than its federal counterparts,[81] the express nature of the exception provides a clear message: limited admissibility is discouraged when the circumstances surrounding the statement make the statement as reliable as any other statement admitted under one of the hearsay exceptions. In light of this message, basis testimony should be admitted as substantive evidence when the circumstances guarantee the trustworthiness. Under the restrictive interpretation of Article 703, circumstantial trustworthiness of basis testimony is tested by the court.

Support for full admissibility may be derived from the fact that Article 703 already acts as an exception to the original writing rule[82] and the requirement of authentication.[83] When an expert relies on writings subject to the original writing rule or the authentication requirement and the writing is not properly in evidence, the effect of the expert's reliance on the writing is that the two rules are evaded. The rules are then satisfied by the expert's reasonable reliance upon the document and subsequent testimony to its contents as basis testimony.

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79. McCormick, *Evidence* § 15, at 38-41 (E. Cleary 3d ed., 1984) (McCormick makes this assertion about the Federal Rules of Evidence 803(24) and 804(b)(5). I have applied McCormick's point to the Louisiana Code of Evidence article 804(b)(6).).

80. *See supra* note 46.

81. *See* Fed. R. Evid. 803(24) and 804(b)(5).

82. Michael H. Graham, *Expert Witness Testimony and the Federal Rules of Evidence: Insuring Adequate Assurance of Trustworthiness*, 1986 U. Ill. L. Rev. 43, 66 (1986). The original writing rule is found in Louisiana Code of Evidence article 1002. It states: "To prove the content of a writing, recording, or photograph, the original writing, recording, or photograph is required, except as otherwise provided by this Code or other legislation." The rule only applies when a writing is offered into evidence for its truth. *See* Official Comment (b) to La. Code Evid. art. 1002. However, in the case of a summary witness, or a conduit expert, Article 703 will not act as an exception to the original writing rule when the witness, "has gone to only one hearsay source and seeks merely to summarize the content of that source . . . ." United States v. Williams, 431 F.2d 1168, 1172 (5th Cir. 1970) (quoting Government's petition for rehearing, pp. 3-4), *rev'd on other grounds*, 447 F.2d 1285 (5th Cir. 1971), *cert. denied*, 405 U.S. 954, 92 S. Ct. 1168 (1972). But, "if the witness has gone to many sources—although some or all be hearsay in nature—and rather than introducing mere summaries of each source he uses them all, along with his own professional experience, to arrive at his opinion, that evidence is regarded as evidence in its own right . . . ." *Id.* at 1172. In footnote 6 of the opinion, the court accepts the government's petition as an accurate statement of the law.

83. Graham, *supra* note 82. *See also* La. Code Evid. art. 901(A), *supra* note 76.

Moreover, Article 703 is not subject to the requirement of firsthand knowledge.[84] The purpose of Article 703 is to enable experts to rely on otherwise inadmissible data provided the data is "of a type reasonably relied upon by other experts." Given the purpose of Article 703, which is to expand the types of data experts rely upon to render opinions, the view that Article 703 could act as another hearsay exception is a plausible one and consistent with the other articles in the code relating to expert opinion testimony. And, if Article 703 acts as a hearsay exception, the basis testimony should carry substantive weight just like all other exceptions to the hearsay rule.

Additionally, as a practical matter, the jury may be incapable of following the limiting instruction that would accompany the liberal approach.[85] The consequence is the jury giving substantive weight to basis testimony despite the limiting instruction. Once the opinion is admitted with a limiting instruction, it is quite difficult for the jury to accept the opinion as true without automatically accepting the bases as true,[86] especially if the expert himself accepts the basis as true for purposes of rendering the opinion.[87] Moreover, even if jurors could distinguish between accepting a statement for its truth and accepting a statement as mere support for an opinion, "jurors likely would not be capable of performing such mental gymnastics."[88]

Courts giving a liberal reading to Article 703 do not inquire into the circumstantial trustworthiness of the basis testimony. The inquiry is not needed because of the expert's reasonable reliance on the data. Without this inquiry, the jury should not be allowed to accept the bases as true even though they may in fact be true. Otherwise, the hearsay rule would be violated. But with a restrictive interpretation of Article 703, the circumstantial trustworthiness of the underlying facts and data will be tested by the *court*. Therefore, the basis testimony should be admitted as substantive evidence. And, with the majority of Louisiana courts interpreting Article 703 liberally which requires a limiting instruction and the increasing use of expert testimony in the courts today, the problem of jurors not understanding and following the limiting instruction is magnified.

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84. The requirement of firsthand knowledge is found in Louisiana Code of Evidence article 602. The pertinent part states: "A witness may not testify to a matter unless evidence is introduced to support a finding that he has personal knowledge of the matter. *This Article is not subject to the provisions of Article 703, relating to opinion testimony by expert witnesses.*" (emphasis added).

85. Rice, *supra* note 51, at 585.

86. *Id.*

87. *Id.*

88. *Id.*

Furthermore, courts sometimes fail to make the distinction between Article 703 and other hearsay exceptions.[89] For example, in *Bryan v. John Bean Division*,[90] the U.S. Fifth Circuit Court of Appeals restrictively interpreted Federal Rule of Evidence 703 to exclude the opinion of the plaintiff's expert in a products liability dispute. While referring to Rule 703 the court stated, "Like all exceptions to the hearsay rule the full disclosure of the source underlying a testifying expert's opinion depends upon the two critical factors of necessity and trustworthiness."[91] The same reference to Rule 703 as a hearsay exception occurred in *United States v. Williams*.[92] There the court stated, "Expert witness testimony is a widely-recognized exception to the rule against hearsay testimony."[93] Just because some courts label Rule 703 as a hearsay exception does not mean it is one. However, the very fact that courts refer to Rule 703 as an exception indicates Rule 703 is so close to an exception that it may very well function as one.

However, a potential problem accompanies this position. In short, a party's entire case could be presented through a biased expert under the disguise of basis testimony.[94] Moreover, Article 704[95] makes this argument more plausible because experts may testify to an ultimate issue that should be decided by the jury.[96] The possibility of this happening will be slim when facts are in the record to support the expert's opinion. When the opinion is derived from data not in the record which tend to prove a fact at issue, a suggested solution to lessen the significance of the problem is to limit the expert's use of data not in the record to data which is otherwise unavailable under the definition found in Article 804(A).[97] The opposing party, however, should have notice and opportunity to attack the expert's use of the unavailable data to comply with the notice requirement of Article 804(B)(6).[98] The availability re-

89. Graham, *supra* note 82, at 66 n.112.

90. 566 F.2d 541 (5th Cir. 1978).

91. *Id.* at 545.

92. 447 F.2d 1285 (5th Cir. 1971), *cert. denied*, 405 U.S. 954, 92 S. Ct. 1168 (1972).

93. *Id.* at 1290.

94. Rice, *supra* note 51, at 592.

95. Louisiana Code of Evidence article 704 states: "Testimony in the form of an opinion or inference otherwise admissible is not to be excluded solely because it embraces an ultimate issue to be decided by the trier of fact . . . ."

96. Rice, *supra* note 51, at 592 n.33.

97. *Id.* at 592. *See* Louisiana Code of Evidence article 804(A) for a definition of unavailability.

98. Under Louisiana Code of Evidence article 804(B)(6), a statement is admissible "if the court determines that considering all pertinent circumstances in the particular case the statement is trustworthy, and the proponent of the evidence has adduced or made a reasonable effort to adduce all other admissible evidence to establish the fact to which the proffered statement relates and the proponent of the statement makes known in writing

quirement would serve as a deterrent for abuse of expert basis testimony by attorneys who are inadequately prepared or who lack sufficient evidence and who try to present their cases through a biased expert.

VII. CONCLUSION

The articles in the Louisiana Code of Evidence relating to expert opinion testimony are designed to regulate the reliability of this form of evidence. The reasonable reliance test of Article 703 is specifically concerned with the reliability of the expert's underlying facts and data which form the basis of the opinion by providing a safeguard against the jury considering opinions based on unreliable hearsay. But, the reasonable reliance test is subject to differing interpretations.

The liberal approach gives the expert the discretion to determine whether the data the expert relied upon is the kind other experts in the field use to form similar opinions. The court does not inquire into the circumstantial trustworthiness of the data because it is assumed experts are more qualified to evaluate the reliability of the data than either the judge or the jury. Under the restrictive approach, not only must the data meet the "type" requirement, but also the judge must make an additional inquiry into the circumstantial trustworthiness of the data. The restrictive interpretation is preferable because it will adequately assure that the facts and data forming the basis of expert opinions are reliable enough for the jury to consider, rather than taking the expert's word for it.

The Louisiana circuits are not in agreement as to which approach to use. Necessarily, the Louisiana Supreme Court should rule on this issue to provide a uniform system to interpret Article 703 to make the outcome of litigation more predictable. However, if Louisiana adopts the restrictive method, Article 703 should act as another exception to the hearsay rule.

Courts should allow the basis testimony to be heard by the jury for its truth under the restrictive approach because first, the restrictive approach will adequately assure the reliability of basis testimony. If so, limited admissibility of data having a sufficient degree of circumstantial trustworthiness is discouraged by the code. Second, Article 703 acts as an exception to other evidentiary rules such as the original writing rule, the requirement of authentication, and the requirement of first-hand knowledge. Third, jurors will have difficulty following limiting instructions. It follows, then, that expert bases should not have limited admissibility if the restriction is too difficult to implement. Fourth, when

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to the adverse party and to the court his intention to offer the statement and the particulars of it . . . sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet it."

courts fail to distinguish between Article 703 and other hearsay exceptions, Article 703 functions as a hearsay exception; thus, Article 703 should be treated like one. By limiting the expert's use of data not already in the record to data meeting the definition of unavailability under Article 803(A), the possibility of any abuse of expanded admissibility will be reduced.

On a final note, expert opinions are an invaluable form of testimony. That is why this comment encourages full admissibility of basis testimony. Expert testimony is distinguished from all other forms of evidence because experts hold a monopoly over their knowledge, skill, and experience. But, like all other forms of evidence, expert opinions and their bases need to be sufficiently reliable to insure the integrity of the judicial system. This objective can be accomplished by the restrictive interpretation of Louisiana Code of Evidence article 703.

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