INCREASING THE USEFUL INFORMATION PROVIDED BY EXPERTS IN THE COURTROOM: A COMPARISON OF FEDERAL RULES OF EVIDENCE 703 AND 803(18) WITH THE EVIDENCE RULES IN ILLINOIS, OHIO, AND NEW YORK

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I. INTRODUCTION

Litigation over the past fifty years has seen a dramatic increase in the use of expert testimony. Scientific and technological issues, often with significant social and economic consequences, are regularly being presented to fact finders for resolution.[1] These developments challenge the way scientific and other technological information is brought to the attention of fact finders. As scientific and other technological issues increase in complexity, we need flexible and responsive evidence rules to permit adequate education of fact finders.[2]

The Federal Rules of Evidence govern the presentation of expert testimony in the federal courts. Since their introduction in 1975, these rules also have influenced many state evidence codes, particularly as they deal with the expert arena.[3]

The Federal Rules represent a dramatic departure from the past by specifically rejecting common law constraints on the presentation of expert testimony.[4] The drafters of the Federal Rules of

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[1] Marc S. Klein, *After Daubert: Going Forward With Lessons from the Past*, 15 CARDOZO L. REV. 2219, 2220 (1994) [hereinafter *After Daubert*]. *See also generally* CARNEGIE COMM'N ON SCIENCE, TECHNOLOGY, AND GOV'T, SCIENCE AND TECHNOLOGY IN JUDICIAL DECISION MAKING: CREATING OPPORTUNITIES AND MEETING CHALLENGES (1993).

[2] Bert Black et al., *Science and the Law in the Wake of Daubert: A New Search for Scientific Knowledge*, 72 TEX. L. REV. 715, 786-88 (1994) [hereinafter *In the Wake of Daubert*]. *See also* Marc S. Klein, *Expert Testimony in Pharmaceutical Product Liability Actions*, FOOD DRUG COSM. L.J. 393, 394 (1990) (citing REPORT OF THE TORT POLICY WORKING GROUP ON THE CAUSES, EXTENT AND POLICY IMPLICATIONS OF THE CURRENT CRISIS IN INSURANCE AVAILABILITY AND AFFORDABILITY 35 (Feb. 1986) [hereinafter TORT POLICY WORKING GROUP]). The Tort Policy Working Group found that "[i]ncreasingly, juries are asked to make difficult decisions about highly complicated issues of science and medicine. Unfortunately, the personality and demeanor of expert witnesses often may be more critical in making such determinations than decades of evolving scientific and medical investigation and thought." *Id.* at 394 n.8 (citing TORT POLICY WORKING GROUP, at 62-63) (footnote omitted).

[3] *See infra* notes 115-20 and accompanying text.

[4] Edward B. Arnolds, *Federal Rule of Evidence 703: The Back Door is Wide Open*, 20 FORUM 1, 2-4 (1984) [hereinafter *The Back Door is Wide Open*]. *See also* notes 10-58 and accompanying text.

Evidence recognized that experts must be able to operate in the courtroom in much the same way as they do in their professional lives. To accomplish this objective, the Federal Rules of Evidence seek to maximize the information the expert may rely upon and a fact finder may receive. In this respect, the Federal Rules of Evidence have, indeed, revolutionized expert testimony.

Federal Rules of Evidence 703 and 803(18) broadly delimit the materials upon which experts may rely to formulate their opinions. Federal Rule of Evidence 703, the main vehicle governing the materials upon which testimony may be based, permits an expert to rely on otherwise inadmissible evidence "if of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject."[5] Most courts operating under this Rule permit experts to advise a fact finder of the facts or data which form the bases of their opinions.[6] The information is presented for the purpose of explaining the expert's reasoning. The information, however, rises no higher than the opinion itself; its discussion is germane only to the evaluation of the path the expert followed in reaching the conclusion.

Federal Rule of Evidence 803(18) also altered the common law by permitting experts to support their opinions by relying on texts and other publications they or other testifying experts consider authoritative in the field.[7] In that regard, passages, graphs, or charts may be read or presented to the fact finder as substantive evidence.[8] These so called "learned treatises" were a powerful impeachment tool under the common law, and they continue to be under Federal Rule of Evidence 803(18). The Federal Rules of Evidence have enhanced the role of these learned treatises in cross-examination by admitting passages from them as substantive evidence to contradict an expert's opinion.[9]

This Article traces the development of Federal Rule of Evidence 703 and 803(18) and examines their use in federal and state courts today. It then considers the interrelationship between these Rules and details the perils to the presentation of expert evidence where either or both of these Rules have not been adopted. The Article discusses the evidence rules in three jurisdictions—Illinois, Ohio, and New York—to illustrate that the retention of common

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5 FED. R. EVID. 703.

6 *See infra* notes 78-84 and accompanying text.

7 *See infra* notes 182-221 and accompanying text.

8 FED. R. EVID. 803(18).

9 *Id.*

law rules significantly limits the information provided to the fact finder. This results in the lowering of the quality of expert testimony and impairment of the fact finder's ability to evaluate the credibility of the expert's opinions. The Article concludes that the utility of expert testimony is maximized by using the evidence model implemented by the Federal Rules of Evidence.

II. DEVELOPMENT OF RULES WHICH PERMIT EXPERTS TO USE INFORMATION THEY COMMONLY REFER TO IN THEIR PROFESSIONAL PURSUITS

A. *Early Efforts to Relax the Common Law Restraints on Expert Evidence*

Traditionally, an expert could base opinions only on personal observations or information presented during trial.[10] When an expert could not base an opinion on such first-hand information, the provision of "facts" assumed in a hypothetical question helped to elicit the expert's opinion.[11] After an expert assumed the truth of these facts, he or she gave an opinion based on them.[12]

Hypothetical questions initially were thought to be "logical necessit[ies]."[13] Since the trier of fact ultimately made factual de-

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10 *See, e.g.*, Matteson v. N.Y. Central R.R., 35 N.Y. 487, 492 (1866) (expert testimony may be based on personal examination as well as facts established by other trial witnesses); Lippold v. Kidd, 269 P. 210, 212 (Or. 1928) ("[I]f the expert testifies to a conclusion based upon a premise with which he has become familiar through personal observation, the question which elicits from him the conclusion need not be a hypothetical one."). *See also* CHARLES T. MCCORMICK, HANDBOOK OF THE LAW OF EVIDENCE § 14, at 29-32 (1954) [hereinafter MCCORMICK'S HANDBOOK] (discussing the permissible bases of expert testimony).

11 McCormick noted that it was customary in many jurisdictions to have experts present during testimony and then "when the expert is himself called as a witness, simplify the hypothetical question by asking the expert to assume the truth of the previous testimony, or some specific part of it." MCCORMICK'S HANDBOOK, *supra* note 10, § 14 at 30 (citation omitted). *See also* Travelers Ins. Co. v. Drake, 89 F.2d 47, 50 (9th Cir. 1937) (stating that the hypothetical question "may be framed upon any theory of the interrogator, which can be reasonably deduced from the evidence"); Shaughnessy v. Holt, 86 N.E. 256, 258 (Ill. 1908) ("The proper practice is to state hypothetically the case which the attorney thinks has been proved and ask a question based upon such hypothetical case.").

12 Ryan v. People, 114 P. 306, 308 (Colo. 1911) (finding no error in use of hypothetical question where expert assumed truth of facts stated in hypothetical; whether or not they were true was a matter for the jury to decide).

13 2 JOHN HENRY WIGMORE, A TREATISE ON THE ANGLO-AMERICAN SYSTEM OF EVIDENCE IN TRIALS AT COMMON LAW [hereinafter WIGMORE ON EVIDENCE] § 686, at 812 (3d ed. 1940). *See also* MCCORMICK'S HANDBOOK, *supra* note 10, § 14 at 30 (proffering that the hypothetical question "evolved with perhaps more of logical rigor than of practicality"); Thomas v. Conemaugh Black Lick R.R., 133 F. Supp. 533, 542 (W.D. Pa. 1955), *aff'd*, 234 F.2d 429 (3rd Cir. 1956) (recognizing that hypothetical form of a

terminations, hypothetical questions were the vehicle through which experts told the fact finder about the information they used to form their opinions.[14] The hypothetical question also prevented an expert from drawing conclusions on disputed issues of fact.[15] Thus, a fact finder remained free to reject an expert's conclusion if it found fault with the assumed factual premises.[16]

By the 1930s, the hypothetical question had become a lightning rod for criticism by legal commentators and professional organizations:

> The hypothetical question, misused by the clumsy and abused by the clever, has in practice led to the intolerable obstruction of truth. In the first place, it has artificially clamped the mouth

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question is a "vital factor in giving clarity and meaning" to facts beyond the knowledge of laymen).

[14] *See Travelers*, 89 F.2d at 50. *See also* WIGMORE ON EVIDENCE, *supra* note 13, § 681 at 800. It therefore followed that the question "Upon all the testimony in the case, what is your opinion on a given point?" was objectionable because it would be impossible for the jury to determine the facts upon which the opinion was based. *Id.* (quotation omitted). Similarly, a hypothetical question which itself included expert opinion was improper. MCCORMICK'S HANDBOOK, *supra* note 10, §14 at 30-31. Hypothetical questions which required the witness to assume the truth of the testimony in favor of the plaintiff or defendant, or of several specified witnesses, were left to the discretion of the judge. WIGMORE ON EVIDENCE, *supra* note 13, at 801-02.

[15] STEWART RAPALJE, LAW OF WITNESSES § 294(1)-(2), at 492-94 (1887). *See also* Burens v. Indus. Comm'n, 124 N.E.2d 724, 727-28 (Ohio 1955) (expert may not make inference of fact in response to hypothetical question).

[16] WIGMORE ON EVIDENCE, *supra* note 13, § 672 at 792-95, § 673 at 795, § 676 at 797-98. *See also* Moyer v. Aetna Life Ins. Co., 126 F.2d 141, 144 (3d Cir. 1942) (establishing that expert opinion has no weight with the jury unless they found the facts assumed in the hypothesis were established by the proofs); Primrose v. Philadelphia Dressed Beef Co., 252 F. Supp. 595, 598 (E.D. Pa. 1965) (holding that trial judge properly explained to the jury that "they might reject the opinion of an otherwise qualified expert if they found 'that he was making an assumption you did not feel had been established by the weight or fair preponderance of the evidence'"); Shannon v. Kaylor, 211 S.E.2d 368, 371 (Ga. Ct. App. 1974) ("The truth of the facts assumed by a hypothetical question is a question for the determination of the jury, and it must determine whether the basis upon which the hypothetical question rests has been established.") (citing 31 AM.JUR. 2d, *Expert and Opinion Evidence* § 53, at 560 (1989)); Jones v. City of Caldwell, 116 P. 110, 113-12 (Idaho 1911) (no one can compel jury to accept expert's conclusion against their will); Griffith v. Thrall, 29 N.E.2d 345, 354 (Ind. Ct. App. 1940) (holding that expert opinion based on a hypothetical question containing facts which do not exist could not be proof of any question, because "[i]t is for the jury to determine finally whether the facts as stated in the hypothetical question have been established by a fair preponderance of the evidence, in determining what weight will be given to the testimony of such expert witness"); Haddad v. Jahn, 174 N.E.2d 136, 139 (Ohio Ct. App. 1960) ("The facts may be in dispute and, if so, it is the function of the jury to determine where the truth lies. If the jury finds that the facts stated in the hypothetical question are not supported by a preponderance of the evidence, the opinion of the expert is of no value and may be disregarded by the jury.").

> of the expert witness, so that his answer to a complex question may not express his actual opinion on the actual case. This is because the question may be so built up and contrived by counsel as to represent only a partisan conclusion. In the second place, it has tended to mislead the jury as to the purport of actual expert opinion. This is due to the same reason. In the third place, it has tended to confuse the jury, so that its employment becomes a mere waste of time and a futile obstruction.[17]

These commentators also recognized the tension between requiring the questioner to make the hypothetical "intolerably wordy" by reciting the relevant facts or allowing counsel to select facts which resulted in a "one-sided hypothesis."[18] Many evidence scholars advocated dispensing with the necessity of using the hypothetical, permitting the expert to explain the basis of the opinion and giving the cross-examiner greater latitude to explore the reasoning process behind the expert's opinion.[19]

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[17] WIGMORE ON EVIDENCE, *supra* note 13, § 686 at 812 (footnote omitted); MCCORMICK'S HANDBOOK, *supra* note 10, § 16 at 34-35. *See also* Barretto v. Akau, 463 P.2d 917, 921 (Haw. 1969) ("The major criticism of the use of the hypothetical question is that the expert's mouth is often clamped by the examiner's selection of the assumptions used in his question, strategically omitting those assumptions which could harm his case. The jury is consequently confused and misled as to what the expert's opinion really is.") (citation omitted); Ranieli v. Mutual Life Ins. Co. of America, 413 A.2d 396, 398 (Pa. Super. Ct. 1979) ("The expert's opinion is properly admissible to illuminate obscure and obtuse areas of knowledge. The hypothetical question should be employed to facilitate this end, focusing the witness' expertise onto the narrow issue under consideration; its purpose is not to further obfuscate the complex evidentiary labyrinth through which the finder of fact must carefully tread."); Rabata v. Dohner, 172 N.W.2d 409, 417-18 (Wis. 1969) ("Almost all courts which have approached the subject have concluded that the hypothetical question, although logically a useful method of separating the premises from the conclusions, is potentially, and in actuality, a dangerous device which can lead to slanted questions, jury fatigue, and obfuscation of the facts.").

[18] MCCORMICK'S HANDBOOK, *supra* note 10, § 16 at 36. *See also* Edmund M. Morgan, *Suggested Remedy For Obstruction Of Expert Testimony By Rules Of Evidence*, 10 U. CHI. L. REV. 285, 286 (1942) (suggesting that present rules of evidence suppress important data and "sanction the exclusion of relevant evidence") [hereinafter *Suggested Remedy*]. *See also* United States v. Sessin, 84 F.2d 667, 669 (10th Cir. 1936) (hypothetical question took one-half hour to propound because of length of plaintiff's medical history); Treadwell v. Nickel, 228 P. 25, 35 (Cal. 1924) (hypothetical question recorded in 83 pages of typewritten transcript). *But see* Decker v. Ramenofsky, 370 P.2d 258, 260 (Ariz. 1962) ("Of course, the trial court must use its discretion to prevent the abuse of the hypothetical question, and should interfere to prevent questions . . . using only such facts as are either intended or likely to mislead the jury.").

[19] MCCORMICK'S HANDBOOK, *supra* note 10, § 16, at 36; WIGMORE ON EVIDENCE, *supra* note 13, § 636, at 812-13; JOHN D. LAWSON, THE LAW OF EXPERT AND OPINION EVIDENCE REDUCED TO RULES 231-33 (1886); JOHN E. TRACY, THE HANDBOOK OF THE LAW OF EVIDENCE 209 (1952); JOHN M. MAGUIRE, EVIDENCE COMMON SENSE AND COMMON LAW 28 (1947) [hereinafter COMMON SENSE]. *But see* HENRY W. ROGERS, THE LAW OF EXPERT TESTIMONY § 54, at 110-11 (3d ed. 1941) ("While witnesses may, upon their

Commentators also complained that experts, who were expected to aid courts in resolving issues involving scientific or technical matters, often behaved as partisans.[20] Their testimony was shaped by the bias of the parties calling them.[21] Some commentators believed that this partisanship threatened to deprive courts of the balanced input necessary to accomplish the fact-finding process. Professor Edmund M. Morgan, for one, complained that "the medical expert [had] become a stench in the nostrils of upright judges."[22]

Thus, the first reform efforts[23] focused largely on the hypo-

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examination-in-chief, give the reasons upon which they base their opinions, they should never be allowed to go into details of the particular transaction. The fact that the opinion of an expert witness was not founded upon all the facts of the case goes to the weight of his testimony rather than to its competency or materiality. The expert's opinion cannot be elicited to supply the substantive facts necessary to support the conclusion; normally the plaintiff makes out his case by building one inference upon another.") (footnotes omitted).

20 2 EDMUND M. MORGAN, BASIC PROBLEMS OF EVIDENCE 197 (1954) [hereinafter MORGAN ON EVIDENCE]; WIGMORE ON EVIDENCE, *supra* note 13, § 563, at 644-47 (quotation omitted).

21 WIGMORE ON EVIDENCE, *supra* note 13, § 563, at 646; Morgan, *supra* note 18, at 292-93.

22 Morgan, *supra* note 18, at 293. Morgan believed that the problems of partisanship could be greatly reduced by "having the court appoint impartial experts who appear as witnesses for neither party but for the court, having the trier of fact informed that these experts have been thus appointed, and requiring partisan experts to act on adequate data and to submit their conclusions in writing to the scrutiny of the court and the parties." *Id.* Many of these ideas were incorporated into reform efforts spearheaded by the National Conference of Commissioners on Uniform State Laws and the American Law Institute. The Federal Rules of Evidence provide for court-appointed experts as well. *See* FED. R. EVID. 706. *See generally infra* note 30 and accompanying text.

23 The effort to improve the rules governing experts must be seen as part of a larger 20th-century movement to reform and make uniform the entire body of evidence rules. *See generally* 21 CHARLES A. WRIGHT & KENNETH W. GRAHAM, JR., FEDERAL PRACTICE AND PROCEDURE § 5005, at 61-92 (1977) [hereinafter WRIGHT & GRAHAM]. In 1892, the National Conference of Commissioners on Uniform State Laws held its first meeting and began drafting Uniform Acts to address particular issues of evidence. *Id.* § 5005, at 76. The American Law Institute was formed several years later in 1922. *Id.* at 77. In 1920, the Commonwealth Fund, one of the first charitable organizations, sponsored the Legal Research Committee to reform the laws of evidence. Barbara C. Salken, *To Codify Or Not To Codify—That Is The Question: A Study Of New York's Efforts To Enact An Evidence Code*, 58 BROOK. L. REV. 641, 654 (1992) [hereinafter *To Codify Or Not To Codify*]. In 1927, the committee issued its report urging the following five reforms: (1) admission of hearsay in the absence of a dispute over the facts the evidence was offered to prove; (2) restoration of the power of judges to comment on the weight of the evidence; (3) repeal of the Dead Man's Statute; (4) an exception to the hearsay rule for statements of deceased or insane people based on personal knowledge; and (5) a business records exception to the hearsay rule. WRIGHT & GRAHAM, *supra*, at 78. Implicit in the report was the notion that "a trial is the search for the truth and that the best way to get at the truth was to admit more evidence."

thetical question, though some efforts also were directed to minimizing expert partisanship. The National Conference of Commissioners on Uniform State Laws ("National Commissioners") adopted a Uniform Expert Testimony Act in 1937.[24] Section 9 of the Uniform Expert Testimony Act dispensed with the need to use the hypothetical question.[25] In its stead, the expert witness could advise the fact finder of the foundation for his or her opinion on direct examination, but would not be required to do so. The opinion's foundation, of course, could be explored during cross-examination.[26] Other provisions of the Uniform Expert Testimony Act addressed the partisanship issue by eliminating the ele-

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Salken, *supra*, at 654 (footnote omitted). In 1938, the American Bar Association Committee on Improvement in the Law of Evidence, chaired by Wigmore, issued a report endorsing the Commonwealth Fund Legal Research Committee report, as well as a broader "agenda for reform." *See also Report of the Comm. on Improvements in the Law of Evidence*, 63 A.B.A. REP. 583-84 (1938) [hereinafter *Report of Comm. on Improvements*]. For a thorough discussion of the movement for evidentiary reform, see generally WRIGHT & GRAHAM, *supra*, § 5005, at 61-92.

[24] UNIF. EXPERT TESTIMONY ACT (1937). The concept for the Uniform or Model Expert Testimony Act was conceived by the Committee on Medico-Legal Problems of the Section on Criminal Law of the American Bar Association. *Report of Committee on Model Expert Testimony Act*, 1936 HANDBOOK OF THE NAT'L CONF. OF COMMISSIONERS ON UNIFORM STATE LAWS AND PROC. 266 [hereinafter *1936 Proceedings*]. In the course of exploring ways to improve scientific methods used in crime detection, the Committee proposed the establishment of scientific agencies to better train investigators. *Id.* Recognizing problems in the area of expert testimony, the Committee observed, "if the law is to avail itself of scientific knowledge, it must devise adequate procedure to bring this knowledge to bear in administering justice." *Id.* The Committee drafted a Model Expert Testimony Act and presented it to the American Bar Association's Section on Criminal Law in 1935. *Id.* The Section on Criminal Law approved the proposed Act and referred the draft to the Executive Committee of the National Commissioners, which in turn referred it to their Uniform Torts and Criminal Law Acts Section for consideration. *Id.* at 267.

The National Commissioners published its first tentative draft of the Model Expert Testimony Act in 1936, *id.* at 269, and formally adopted a somewhat revised Uniform Expert Testimony Act in 1937. *Uniform Expert Testimony Act*, 1937 HANDBOOK OF THE NAT'L CONF. OF COMMISSIONERS ON UNIFORM STATE LAWS AND PROC. 337-48 [hereinafter *1937 Proceedings*].

[25] Section 9 provided:

> (*Examination of Experts*)—(1) An expert witness may be asked to state his inferences, whether these inferences are based on the witness' personal observation, or on evidence introduced at the trial and seen or heard by the witness, or on his technical knowledge of the subject, without first specifying hypothetically in the question the data on which these inferences are based. (2) An expert witness may be required, on direct or cross-examination, to specify the data on which his inferences are based.

UNIF. EXPERT TESTIMONY ACT § 9. The 1936 version of the rule precluded use of a hypothetical question unless "it has first been submitted in writing to the opposite party (or parties) and approved by the court." *1936 Proceedings*, *supra* note 24, § 11 at 279.

[26] *See* UNIF. EXPERT TESTIMONY ACT § 9; *1937 Proceedings*, *supra* note 24, at 346.

ment of surprise through controlled notice,[27] inspection and examination of the subject matter,[28] and the exchange of written reports.[29] The National Commissioners designed the reforms to help make the adversary system function better by allowing advanced knowledge of experts' identities and their views.[30] These reforms also provided the cross-examiner with an expanded role in the truth-seeking process.[31] The American Bar Association approved the Uniform Expert Testimony Act in 1938.[32]

The Uniform Expert Testimony Act failed as a popular piece of legislation, gaining acceptance only in South Dakota and Vermont.[33] However, it was reenacted when the American Law Institute ("ALI") formulated the more comprehensive Model Code of Evidence ("Model Code") in 1942.[34] The Model Code, like its

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27 *Id.* §§ 2-3.

28 *Id.* § 5.

29 *Id.* § 6.

30 These reforms had limited utility, in part, because of the liberal discovery provisions of the Federal Rules of Civil Procedure concerning pretrial disclosure of experts and the exchange of reports. FED. R. CIV. P. 26(b)(4). The Federal Rules of Evidence nevertheless provided for court-appointed experts. FED. R. EVID. 706. One commentator noted that the rule was rarely used in the pre-*Daubert* era. *In the Wake of Daubert*, *supra* note 2, at 795-96. The drafters seemed to have predicted this result:

> While experience indicates that actual appointment is a relatively infrequent occurrence, the assumption may be that the availability of the procedure in itself decreases the need for resorting to it. The ever-present possibility that the judge may appoint an expert in a given case must inevitably exert a sobering effect on the expert witness of a party and upon the person utilizing his services.

FED. R. EVID. 706 advisory committee's note.

One author's recent survey of the use of FED. R. EVID. 706 by active federal district court judges revealed that only 20% of those responding to the survey had appointed experts. JOE S. CECIL & THOMAS E. WILLGING, COURT-APPOINTED EXPERTS: DEFINING THE ROLE OF EXPERTS APPOINTED UNDER FEDERAL RULE OF EVIDENCE 706 7-8 (1993) [hereinafter COURT-APPOINTED EXPERTS]. The expertise most commonly sought was medical opinions in personal injury cases, engineering experts in patent and trademark cases and accounting experts in commercial cases. *Id.* at 9. Court-appointed experts may have value in highly technical cases. STEPHEN A. SALTZBURG ET AL., FEDERAL RULES OF EVIDENCE MANUAL 1133, 1204-05 (6th ed. 1994). In the main, however, the adversary system operates effectively through parties calling their own experts. *Id.* at 1204.

31 UNIF. EXPERT TESTIMONY ACT § 9 commentary.

32 The American Bar Association's Committee on Improvements in the Law of Evidence recommended the Uniform Expert Testimony Act for enactment at the Association's 1938 annual meeting. *Report of Committee on Improvements*, *supra* note 23, at 583-84. The organization's members then formally approved the Act. *Id.* at 856.

33 *List of Acts Showing the States Wherein Adopted*, 1953 HANDBOOK OF THE NAT'L CONF. OF COMMISSIONERS ON UNIFORM STATE LAWS 393-94 [hereinafter *1953 Proceedings*].

34 In 1938, the ALI lobbied the Carnegie Foundation for a grant to support work on a Model Code of Evidence. Shortly after the ALI received the grant in 1939, Mor-

predecessor, eliminated the necessity for the hypothetical question but did not prohibit its use:

> An expert witness may state his relevant inferences from matters perceived by him or from evidence introduced at the trial and seen or heard by him or from his special knowledge, skill, experience or training, whether or not any such inference embraces an ultimate issue to be decided by the trier of fact, and he may

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gan was named Reporter of the working group. WRIGHT & GRAHAM, *supra* note 23, § 5005 at 84-85. As Chief Consultant, Wigmore commented on proposed drafts, but he had no vote in the Advisory Committee and was not invited to attend meetings. John H. Wigmore, *The American Law Institute Code of Evidence Rules: A Dissent*, 28 A.B.A. L.J. 23 (1942) [hereinafter *A Dissent*]. Morgan and Wigmore could not agree on a conceptual approach to the Model Code. *Discussion of Code of Evidence Tentative Draft No. 1*, 17 A.L.I. PROC. 66-148 (July 1, 1939-June 30, 1940) [hereinafter *Tentative Draft No. 1*]. Wigmore advocated adoption of a code which embraced the following six postulates:

> *Postulate I. Objective.* The purpose of these formulations is not merely to re-state the rules of Evidence as they are, but as they *ought to be* and *can practicably be.* Nor is the purpose limited to selecting the best, or more recommendable rule, where there are two or more variant ones in different jurisdictions; for if sound policy demands, a rule may here be formulated that is not yet the law in any jurisdiction.
>
> But this formulation of an ideal set of rules is to be guided and limited by the *practical probability that the Bench and the Bar will accept and use* a rule here proposed.
>
> *Postulate II. Scope of Topics.* The rules here formulated will furnish a *complete code,* i.e. will cover all the topics, i.e. *all* that have commonly arisen in trials and that have resulted in a body of rulings in a majority of States.
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> *Postulate III. Terminology.* Although this Code is intended to be progressive and liberal, and to discard any crude shibboleths or irrational limitations now embodied in the rules of Evidence, yet in so doing it must endeavor, as a Code for practical use by practitioners, to avoid so far as possible the use of scientific generalizations *in terms and expressions which are complex, novel, and unfamiliar to Bench and Bar,* and which therefore do not on their face convey clearly their application to the every day situation which they seek to govern. Such terms, proper enough in a treatise, are out of place in a practical Code.
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> *Postulate IV. Details.* This Code, aiming as it does to become a practical guide in trials, must not be content with *abstractions,* but must *specifically* deal with all the *concrete rules, exemplifying the application of an abstraction,* that have been passed upon in a majority of jurisdictions; the Code specifically either repudiating or affirming these rules.
>
> *Postulate V. Repeal.* All changes of existing rule negativing some existing principle are to be *expressly stated* in the Code and not left to implication from the text.
>
> *Postulate VI. Comment.* Comment is to be reserved for interpretation of the text, and will not contain any statement *amounting to a rule of practice additional to the text.*

Id. Morgan and the committee agreed with all but the fourth postulate. *Tentative Draft No. 1, supra* at 70. They favored evidence rules stated in general terms as opposed to the detail of Wigmore's 544 page "pocket code." *Id.* at 74.

> state his reasons for such inferences and need not, unless the judge so orders, first specify, as an hypothesis or otherwise, the data from which he draws them; but he may thereafter during his examination or cross-examination be required to specify those data.[35]

Both the Uniform Expert Testimony Act and the Model Code recognized that an expert must be able to formulate an opinion based on materials reviewed outside of court; hence, the language that the expert could state an inference based on matters "perceived" or "seen or heard" by him or her.[36] Morgan, the ALI Reporter for the Model Code, argued that evidence rules that restricted an expert from basing an opinion on hearsay "interfere[d] particularly with the effective use of expert evidence."[37] Since Rule 503 of the Model Code admitted hearsay statements if the declarant was unavailable as a witness or present and subject to cross-examination, Morgan concluded that "it will always be possible to present the data upon which the expert bases his opinion."[38] The Model Code, however, ultimately required that the facts upon which the expert based an opinion be admitted in evidence.

Like its predecessor, the Model Code never captured the imagination of the organized bar and, for that reason, failed as a reform effort.[39] The Model Code made substantial modifications to traditional evidence rules, particularly as they impacted on the admission of hearsay evidence.[40] It also conferred significant discre-

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35 MODEL CODE OF EVIDENCE Rule 409 (1942) [hereinafter MODEL CODE].

36 *Id.* The Model Code also included many of same provisions as its predecessor Uniform Expert Testimony Act to combat expert bias. MODEL CODE 402-08, 410. *See supra* notes 27-32 and accompanying text.

37 *Suggested Remedy, supra* note 18, at 292.

38 *Id.* at 292 n.8.

39 The Model Code never caught on as a vehicle for reform. Substantively, it made significant changes to the hearsay rule. It also enhanced the power of the trial judge to control the adversary proceeding. Many practicing lawyers feared the significant discretion afforded jurists. *See generally* Herbert F. Goodrich et al., *Spotlight on Evidence*, 27 JUDICATURE 113 (1943) [hereinafter *Spotlight on Evidence*]; WRIGHT & GRAHAM, *supra* note 23, § 5005 at 87-88. Wigmore led the attack. Having been kept on the fringe of Morgan's ALI effort, Wigmore chastised the institute for not following his Six Postulates. *A Dissent, supra* note 34, at 23-28. Wigmore complained that the Model Code did not cover the entire body of evidence. *Id.* at 24-25. Interestingly, at the same time the ALI distributed the Model Code, Wigmore published the third edition of his own Code of Evidence. There are no substantive differences between the Model Code and Wigmore's Code. *See* JOHN HENRY WIGMORE, WIGMORE'S CODE OF EVIDENCE § 758-769 (3d ed. 1942) [hereinafter WIGMORE'S CODE OF EVIDENCE].

40 Even Morgan observed that some changes were "so radical as to shock the usual trial lawyer." *Spotlight on Evidence, supra* note 39, at 117.

tionary authority to judges over the admission of evidence.[41] These two reform efforts doomed the Model Code as a working evidence code, and no state enacted its provisions into law.

Efforts to reform the law of evidence continued as the 1950s approached, and the Model Code continued to have value in focusing those efforts. The Model Code was referred to the National Commissioners for study in 1949 as a "basis for the preparation of a uniform code of evidence."[42] After several years of review and study, the National Commissioners promulgated the Uniform Rules of Evidence ("Uniform Rules") in 1953.[43]

The Uniform Rules treated expert testimony in essentially the same way as had the Model Code. Uniform Rule of Evidence 56(2) provided:

> (2) If the witness is testifying as an expert, testimony of the witness in the form of opinions or inferences is limited to such opinions as the judge finds are (a) based on facts or data perceived by or personally known or made known to the witness at the hearing and (b) within the scope of the special knowledge, skill, experience or training possessed by the witness.[44]

Uniform Rule of Evidence 57 permitted a judge to require the expert to provide the underlying basis of an opinion as a condition to his or her testifying.[45] Uniform Rule of Evidence 58 eliminated the

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41 McCormick noted objections voiced by Texas lawyers over rules that proposed "too wide an expanse of [the court's] discretionary powers." *Id.* at 114.

42 *Report of the Special Committee on Uniform Rules of Evidence*, 1951 HANDBOOK OF THE NAT'L CONF. OF COMM'RS ON UNIFORM STATE LAWS AND PROC. 316 [hereinafter *1951 Proceedings*]. A partial draft was presented to the Committee of the Whole on September 14, 1941. *Id.* at 144-45.

43 *1953 Proceedings*, *supra* note 33, at 161. While the National Commissioners acknowledged the importance of the Model Code, they recognized that "its departures from traditional and generally prevailing common law and statutory law [were] too far-reaching and drastic for present day acceptance." *Id.* Hence, the objects of "acceptability and uniformity" were paramount. *Id.* By consulting with Morgan and others from the ALI, the National Commissioners increased the likelihood for consensus of their rules. Not only did the ALI appoint a committee which interfaced with the National Commissioners, but the National Commissioners solicited Morgan's views even before the appointment of the committee. *Id.* at 162.

44 UNIF. R. EVID. 56(2) (1953). The rule covered "both the expert who has personally observed the facts on which his opinion is based and the one who takes facts provided by others. In both cases, the new phrasing makes clear that the underlying facts are to be established at trial." *Report of the Rules of Evidence Study Commission*, 90 N.J.L.J. 277, 282 (1967) [hereinafter *1967 N.J. Study Commission*].

45 UNIF. R. EVID. 57 (1953). The National Commissioners considered this a "precautionary rule making it clear that if evidence in opinion form is given, the judge may require that the witness in the first instance give the data upon which his opinion is based." *Proceedings in Committee of the Whole*, 1953 NAT'L CONF. OF COMMISSIONERS ON UNIFORM STATE LAWS AND PROC. 126 [hereinafter *1953 Proceedings of Committee of the Whole*].

necessity for the hypothetical question.[46] While a few states did adopt the Uniform Rules, their greatest contribution to the law of evidence lay in their encouragement of further study and debate.[47]

During the 1960s, a minority of courts began to sanction expert reliance on information which itself might not be admissible.[48] This trend was inevitable, since it simply recognized that much of expert learning derives from contact with information outside the courtroom.[49] Dean John H. Wigmore succinctly stated

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46 UNIF. R. EVID. 58 (1953). The National Commissioners intended Rule 58 to diminish the "nuisance value of the practice in relation to hypothetical questions." While acknowledging the "logic" of the hypothetical, the drafters recognized it had become impractical and time consuming. *Id.* at 126.

Like the Uniform Expert Testimony Act and Model Code, the Uniform Rules addressed the bias of experts. Uniform Rule of Evidence 59 provided for court-appointed experts with input from the litigants. Though it did not preclude the parties from calling their own witnesses at their own expense, the rule was designed to restrict their use. In addition to providing for reasonable compensation of court appointed experts, the Uniform Rules also allowed the compensation paid to an expert employed by a party as a "proper subject of inquiry as relevant to his credibility and weight of his testimony." UNIF. R. EVID. 60. The fact that an expert was appointed by the court was also deemed relevant to the credibility and weight of his testimony. UNIF. R. EVID. 61.

47 Kansas and the Virgin Islands adopted the Uniform Rules verbatim. *Prefatory Note,* 1974 HANDBOOK OF THE NAT'L CONF. OF COMMISSIONERS ON UNIFORM STATE LAWS AND PROC., 913, 951a [hereinafter *1974 Proceedings*]. While California devoted serious study and review to the rules, it adopted a substantially similar evidence code in 1965. *Id.* at 913-14, 951a. New Jersey adopted most of the Uniform Rules of Evidence as well. *1967 N.J. Study Commission, supra* note 44, at 277. Utah adopted the Uniform Rules in 1971. WRIGHT AND GRAHAM, *supra* note 23, § 5005, at 92.

48 Carrington v. Civil Aeronautics Bd., 337 F.2d 913, 916 (4th Cir. 1964), *cert. denied,* 381 U.S. 927 (1965) (psychiatrist properly used documents concerning airman's medical history as "background for diagnosis" even though the materials were hearsay; "[i]n many fields of medicine, doctors are ill-prepared to reach a diagnosis unless they have an adequate history"); Jenkins v. United States, 307 F.2d 637, 641 (D.C. Cir. 1962) (agreeing with "the leading commentators that the better reasoned authorities admit opinion testimony based, in part, upon reports of others which are not in evidence but which the expert customarily relies upon in the practice of his profession") (footnote omitted); Taylor v. Monongahela Ry. Co., 155 F. Supp. 601, 604-05 (W.D. Pa. 1957), *aff'd,* 256 F.2d 751 (3rd Cir. 1958) (holding that an expert nontreating physician may rely on laboratory reports and patient history as basis for his opinion). McCormick discussed this trend in detail in his second edition. *See* EDWARD W. CLEARY, MCCORMICK'S HANDBOOK OF THE LAW OF EVIDENCE 34-36 (2d ed. 1972) [hereinafter MCCORMICK ON EVIDENCE].

49 2 JOHN HENRY WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 665(b), at 919 (Chadbourn ed., 1979) [hereinafter WIGMORE]. Another commentator agreed, stating:

> [a] requirement would be impossible of fulfillment which called for proof in court not only of the peculiar facts forming the basis of the immediate expert opinion, but also of all the more remote facts which the witness had considered when working out the method employed for reasoning his way through to that opinion.

COMMON SENSE, *supra* note 19, at 29.

this truth:

> No one professional man can know from personal observation more than a minute fraction of the data which he must treat every day as working truths. Hence a reliance on the *reported data of fellow scientists*, learned by perusing their reports in books and journals. The law must and does accept this kind of knowledge from scientific men.[50]

Reliance on hearsay information certainly is a matter of necessity for physicians as well as for valuation experts. Both professions make judgments based on the statements or reports of others.[51] Physicians regularly rely on medical records, reports, x-rays, and patient information when making a diagnosis.[52] Valuation experts, too, need information that is reflected in the reports of others.[53] McCormick found no fault with liberalizing evidence rules in that fashion, because it seemed "reasonable to assume that an expert in a science [was] competent to judge the reliability of statements made to him by other investigators or technicians."[54] It was his view, as well as that of other commentators, that rules forbidding experts from relying in court on the very materials they used in their professional lives significantly harmed an expert's value to the fact finder.[55]

In 1966, California adopted the first evidence code that per-

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50 WIGMORE, *supra* note 49, § 665(b), at 919 (emphasis in original).

51 H & H Supply Co. v. United States, 194 F.2d 553, 555-56 (10th Cir. 1952). In this condemnation proceeding, the Government's experts relied on hearsay to value plaintiff's leasehold interests in oil and gas leases. On appeal, the court found no error in the admission of the testimony because the hearsay was not offered for its truth, but rather to establish the bases of the conclusions. *Id.* at 555. *See also* Brown v. United States, 375 F.2d 310, 318 (D.C. Cir. 1966), *cert. denied*, 388 U.S. 915 (1967) ("We agree with the leading commentators that the better reasoned authorities admit opinion testimony based, in part, upon reports of others which are not in evidence but which the expert customarily relies upon in the practice of his profession.") (quotation omitted); Birdsell v. United States, 346 F.2d 775, 779-80 (5th Cir.), *cert. denied*, 382 U.S. 963 (1965) (concluding that physician may rely on hearsay for opinion as to sanity of criminal defendant, because "with the increased division of labor in modern medicine, the physician making a diagnosis must necessarily rely on many observations and tests performed by others and recorded by them; records sufficient for diagnosis in the hospital ought be enough for opinion testimony in the courtroom").

52 *See, e.g., Brown*, 375 F.2d at 318 (recognizing that in forming an opinion as to sanity, it may be necessary for doctor to rely on information derived from others).

53 *H & H Supply Co.*, 194 F.2d at 556 ("The rule is well established that an expert may testify as to value, though his conclusions are based in part, or even entirely, upon hearsay evidence."); United States v. Alker, 260 F.2d 135, 156 (3d Cir. 1958) (providing example of an expert relying on hearsay in valuation of stock).

54 MCCORMICK ON EVIDENCE, *supra* note 48, at 35-36.

55 *Id.* at 36. *See also generally* John M. Maguire & Jefferson E. Hahesy, *Requisite Proof of Basis for Expert Opinion*, 5 VAND. L. REV. 433 (1952); *Suggested Remedy*, *supra* note 18, at 292.

mitted experts to rely on information not received in evidence. Section 801 of the California Evidence Code provided:

> If a witness is testifying as an expert, his testimony in the form of an opinion is limited to such an opinion as is: . . . (b) Based on matter (including his special knowledge, skill, experience, training and education) perceived by or personally known to the witness or made known to him at or before the hearing, whether or not admissible, that is of a type that reasonably may be relied upon by an expert in forming an opinion upon the subject to which his testimony relates, unless an expert is precluded by law from using such matter as a basis for his opinion.[56]

Commentary appearing with this section noted that inadmissible evidence was not intended to form the basis of all expert testimony; rather, its use should be decided on a case-by-case basis.[57] The California Law Revision Commission noted that such inadmissible materials would be subject to the requirement that similarly-situated experts reasonably rely on them.[58]

B. The Effect of the Federal Rules of Evidence on Expert Testimony

The successful codification of the rules of evidence in most United States jurisdictions began with efforts to develop an evidence code for use in the federal courts beginning in 1961. That year, the Judicial Conference of the United States created a Special Committee to consider the promulgation of uniform evidence rules.[59] In 1962, the Special Committee concluded that uniform rules of evidence should be developed.[60] In March 1965, the United States Supreme Court announced the appointment of an Advisory Committee to oversee the project. This Advisory Committee drafted the proposed rules and released them for comment in 1969.[61]

After studying comments received from all segments of the bench and bar, the Advisory Committee forwarded a revised draft

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56 CAL. EVID. CODE § 801, *reprinted in* WIGMORE, *supra* note 49, § 665b, at 921 n.1.

57 WIGMORE, *supra* note 49, § 665b, at 922.

58 *Id.* § 665b, at 923.

59 PRELIMINARY DRAFT OF PROPOSED RULES OF EVIDENCE FOR THE UNITED STATES DISTRICT COURTS AND MAGISTRATES, 46 F.R.D. 161, 175-76 (1969) [hereinafter 1969 PRELIMINARY DRAFT]. That Committee's Preliminary Study of the Advisability and Feasibility of Developing Uniform Rules of Evidence for the Federal Courts was distributed to the legal profession for comment in 1962. The Committee requested submissions and suggestions no later than January 1, 1963. *Id.* at 177.

60 *Id.* at 176.

61 *See id.* at 161. Based on comments received from the bar, the Advisory Committee made changes and submitted a new draft to the Judicial Conference in October 1970. WRIGHT & GRAHAM, *supra* note 23, § 5006, at 100-01.

to the United States Supreme Court.[62] The Court returned the proposed rules to the Advisory Committee toward the end of that year for further study.[63] The Advisory Committee published the revised draft as well.[64] The Advisory Committee submitted a third draft to the Court and the Court, in turn, submitted the draft to Congress in November 1972.[65] Once in Congress, the respective House and Senate Committees debated and substantially revised the proposed rules.[66] These revised rules were passed by Congress and enacted into law on January 2, 1975. The Federal Rules of Evidence became effective July 1, 1975.[67]

The rules governing expert testimony remained largely unchanged throughout the drafting process.[68] Following California's lead, Federal Rule of Evidence 703 provided for expert testimony based on information not in evidence so long as the underlying "facts or data" were "of the type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject."[69] The Advisory Committee explained that the Rule was "designed to broaden the basis for expert testimony beyond that current in many jurisdictions and to bring the judicial practice into line with the practice of experts themselves when not in court."[70] The drafters believed the reasonable reliance requirement would preclude excessive reliance on hearsay.[71]

Some federal courts used the proposed rules to decide expert

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62 WRIGHT & GRAHAM, *supra* note 23, § 5006, at 101. *See also* REVISED DRAFT OF PROPOSED RULES OF EVIDENCE FOR THE UNITED STATES COURTS AND MAGISTRATES, 51 F.R.D. 315 (1971) [hereinafter 1971 PROPOSED DRAFT].

63 1971 PROPOSED DRAFT, *supra* note 62, at 316.

64 *Id.*

65 RULES OF EVIDENCE FOR THE UNITED STATES COURTS AND MAGISTRATES, 56 F.R.D. 183 (1972).

66 *See* WRIGHT AND GRAHAM, *supra* note 23, § 5006, at 102-09.

67 Pub. L. No. 93-595, 88 Stat. 1926 (1975).

68 JOHN W. STRONG, MCCORMICK ON EVIDENCE 647 (4th ed. 1992) [hereinafter MCCORMICK 4TH] (note by Federal Judicial Center).

69 Federal Rule of Evidence 703 provides:

> The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence.

FED. R. EVID. 703.

70 FED. R. EVID. 703 advisory committee's note. Because the rule eliminated the need for producing witnesses to authenticate documents, it functioned as a time-saving device as well. *Id.*

71 *Id. See also Emerging Problems Under the Federal Rules of Evidence*, 1983 A.B.A. SEC. OF LITIG. 204, 205 [hereinafter *Emerging Problems*].

issues even before the rules were enacted into law.[72] The Fifth Circuit, for example, permitted a valuation expert to rely on hearsay information. The court noted that such reliance was permitted by the "federal hearsay rule" as proposed in the 1969 preliminary draft.[73] Nevada, too, adopted rules modeled on the 1969 preliminary draft, while New Mexico and Wisconsin enacted evidence rules based on the November 1972 draft.[74]

Though little changed through the drafting process, the provisions dealing with expert testimony were hotly debated. Some bar representatives believed that Federal Rule of Evidence 703, in particular, was problematic. They feared that this Rule created an opportunity for substantial amounts of unadmitted hearsay being presented to the fact finder through expert testimony.[75] In reality, however, expert consideration of such information was, to a great extent, supported by prior practice.[76] One commentator correctly

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72 *See e.g.*, United States v. Williams, 447 F.2d 1285 (5th Cir. 1971), *cert. denied*, 405 U.S. 954 (1972).

73 *Id.* at 1291. The court recognized, however, that the underlying basis of the opinion was not offered for its truth. *Id.*

74 *To Codify Or Not To Codify*, *supra* note 23, at 658 n.121 (citation omitted).

75 Some members of the bar believed the rule created a back door for hearsay to be presented to the jury through expert opinion. *Emerging Problems*, *supra* note 71, at 204. In fact, during congressional subcommittee hearings, extensive modifications to the proposed rule were suggested. Under one version of the rule, the facts or data upon which an expert relied need not be admissible if: (a) they were otherwise admissible when authenticated by a testimonial sponsor; (b) they were of the type reasonably relied upon without authentication; and (c) the opinions formed were reasonably relied upon by those for whose benefit they were formed in making important decisions. Moreover, the court would retain the right to require the basis of the opinion to be admissible in evidence. *Hearings before the Subcommittee on Criminal Justice (Formerly Designated as Special Subcommittee on Reform of Federal Criminal Laws of the Committee on the Judiciary House of Representatives)*, 93rd Cong., 1st Sess. 230-33 (1973) [hereinafter *Hearings*].

The Committee of New York Trial Lawyers, too, disagreed with the addition of a new basis of expert testimony, believing it would be difficult to determine the type of data reasonably relied upon by experts. PROJECT OF THE COMMITTEE OF NEW YORK TRIAL LAWYERS, RECOMMENDATION AND STUDY RELATING TO THE ADVISORY COMMITTEE'S PRELIMINARY DRAFT OF THE PROPOSED FEDERAL RULES OF EVIDENCE 204 (June 1, 1970), *noted in* JACK B. WEINSTEIN ET AL., WEINSTEIN'S EVIDENCE § 703[01], at 703-9 (1994) [hereinafter WEINSTEIN'S EVIDENCE]. The Association of the Bar of the City of New York also maintained that the rule would lead to the use of unreliable data which would not be sufficiently exposed on cross-examination. ASSOCIATION 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 COURTS AND MAGISTRATES 68 (May 28, 1970), *noted in* WEINSTEIN'S EVIDENCE, *supra*, § 703[01], at 703-10.

76 In 1974, the National Commissioners reviewed the proposed Federal Rules of Evidence with an eye toward revising the Uniform Rules. *Proceedings in Committee of the Whole Revised Uniform Rules of Evidence*, 1974 NAT'L CONF. OF COMMISSIONERS ON UNIFORM STATE LAWS 3. In response to a complaint that experts should not be able to

observed that "[w]hen the federal cases antedating Rule 703 are analyzed, it is apparent that experts were allowed to base their opinions on hearsay in a number of situations."[77]

Since its passage, the most difficult issue presented by Federal Rule of Evidence 703 has been the extent to which experts may inform the fact finder of the content of the unadmitted evidence they are using to form their opinions. Federal Rule of Evidence 703 does not specifically provide for the disclosure of this information.[78] Moreover, strict application of hearsay principles and the right to confrontation in the criminal arena would keep such information from the fact finder.[79]

Federal Rule of Evidence 703 must, however, be read in tan-

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rely on hearsay, the Chairmen noted that such provision was "the law almost every place." *Id.*

77 WEINSTEIN'S EVIDENCE, *supra* note 75, § 703[01], at 703-10. *See also* United States v. Sims, 514 F.2d 147, 149 (9th Cir.), *cert. denied*, 423 U.S. 845 (1975) (stating that proposed Federal Rule of Evidence 703 merely codified the present law).

78 FED. R. EVID. 703.

79 *Federal Rules of Evidence: A Fresh Review and Evaluation*, 120 F.R.D. 299, 371 (1987) [hereinafter *A Fresh Review*] (Report of the ABA Committee on Rules of Criminal Procedure and Evidence, Criminal Justice Section). The Sixth Amendment of the United States Constitution provides: "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." U.S. CONST. amend. VI. The case of *Ohio v. Roberts* defined the standard the government must meet when offering hearsay in a criminal prosecution:

> In sum, when a hearsay declarant is not present for cross-examination at trial, the Confrontation Clause normally requires a showing that he is unavailable. Even then, his statement is admissible only if it bears adequate "indicia of reliability." Reliability can be inferred without more in a case where the evidence falls within a firmly rooted hearsay exception. In other cases, the evidence must be excluded, at least absent a showing of particularized guarantees of trustworthiness.

448 U.S. 56, 66 (1980).

Many courts have held that, despite confrontation concerns in the criminal context, an expert may recite the inadmissible facts upon which he relies. *See, e.g.*, U.S. v. Rollins, 862 F.2d 1282, 1293-94 (7th Cir. 1988), *cert. denied*, 490 U.S. 1074 (1989) (no Confrontation Clause violation where FBI agent was permitted to cite information gleaned from nontestifying individual because defendant had opportunity to cross-examine the witness); Reardon v. Manson, 806 F.2d 39, 43 (2d Cir. 1986), *cert. denied*, 481 U.S. 1020 (1987) (no violation of Confrontation Clause where defendant had opportunity to cross-examine toxicologist who testified about conclusions of chemists not shown to be unavailable); U.S. v. Lawson, 653 F.2d 299, 301-02 (7th Cir. 1981), *cert. denied*, 454 U.S. 1150 (1982) (no Confrontation Clause violation where expert psychiatrist described hearsay reports as basis of his opinion since criminal defendant had access to the hearsay information relied upon and had an adequate opportunity for cross-examination of the witness). *See also* State v. Lundstrom, 776 P.2d 1067, 1071-74 (Ariz. 1989) (psychologist was entitled to describe the opinion of a psychiatrist whom he consulted and reasonably relied upon; trustworthiness assured by reasonable reliance requirement, availability of limiting instructions, and disclosure requirements).

dem with Federal Rule of Evidence 705, which permits the disclosure of the underlying facts and data upon which an opinion is based during direct examination.[80] Clearly, the preference expressed in these Rules for disclosure argues in favor of giving a fact finder this information. Moreover, substantial support exists for the notion that an expert should be able to explain the significance of the sources consulted in formulating an opinion to ensure that the jury has a basis for properly evaluating the testimony.[81] Otherwise, the expert opinion would be left "unsupported with little way for the jury to evaluate its correctness."[82]

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80 Federal Rule of Evidence 705 provides:

> The expert may testify in terms of opinion or inference and give 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.

See Lewis v. Rego Co., 757 F.2d 66, 74 (3d Cir. 1985). In *Lewis*, the Third Circuit suggested that FED. R. EVID. 703 and 705 be read together when determining whether to permit the disclosure of the facts and data supporting an expert's opinion. In *Lewis*, plaintiffs brought a products liability action against the manufacturer of a propane cylinder's safety relief valve. In remanding the case for a new trial, the Third Circuit noted that plaintiffs should have been permitted to question their expert witness on direct examination about a conversation he had with a metallurgist. *Id.* at 74. The expert, Dr. Leonard, testified that he often "relie[d] in part on discussions with colleagues with similar technical backgrounds." *Id.* at 73. Because such conversations were the kind of material upon which experts generally based their opinions, the court relied upon FED. R. EVID. 703 to conclude that "inquiry concerning the conversation should have been permitted." *Id.* at 74.

The *Lewis* court found further support for its holding in FED. R. EVID. 705, stating, "[A]lthough it is not required that the bases for experts' opinion be disclosed before an opinion is given, the bases of an opinion may be testified to on direct examination and, if inquired into on cross-examination, must be disclosed." *Id. See also* United States v. Blood, 806 F.2d 1218, 1222 (4th Cir. 1986). In *Blood*, an IRS special agent testifying as an expert witness for the prosecution, read into the record portions of a previous tax court decision concerning the defendant. The defendant, who was on trial for tax evasion, argued unsuccesfully that the evidence was inadmissible because the government failed to establish that the defendant had received or read the printed decision. The Fourth Circuit rejected the argument on two grounds. First, the court found the evidence to be admissible under FED. R. EVID. 404(b) because the defendant had acted *pro se* and was aware of the final outcome of the tax court litigation. Second, the court concluded that "the decision was admissible under Federal Rule of Evidence 705 as an underlying basis in support of the agent's expert opinions. [The defendant's] actual receipt or possession of the decision is not a necessary foundation to admission of the decision under Rule 705." *Id.*

81 MCCORMICK 4th, *supra* note 68, at 372; SALTZBURG & MARTIN, *supra* note 30, at 1138; MICHAEL H. GRAHAM, HANDBOOK OF FEDERAL EVIDENCE § 703.1, at 641 (3d ed. 1991) [hereinafter GRAHAM'S HANDBOOK]; WEINSTEIN'S EVIDENCE, *supra* note 75, § 703[01] at 703-15. *See* Paul C. Giannelli & Edward Immwinkelried, SCIENTIFIC EVIDENCE § 5-5(c), at 151-52 (1993 and 1994 Supp.) (explaining different approaches to the issue). *See also infra* note 84 and accompanying text.

82 MCCORMICK 4th, *supra* note 68, § 324.3 at 372. As one court has noted:

Of course Federal Rule of Evidence 703 does not make an expert the "sole judge of the admissibility of the basic facts," nor does the information relied upon come into evidence.[83] Rather, the facts and data provided to the fact finder are for the *sole purpose* of explaining the reasoning behind the expert opinion.[84]

> Requiring the jury to be informed of the basis of the expert's opinion makes sense. The opinion would be irrelevant if grounded on facts found by the trier of fact not to exist in the particular case; but obviously the trier of fact cannot assess the validity of the assumed facts without knowing what they are.

Arkansas State Highway Comm'n v. Schell, 683 S.W.2d 618, 622 (Ark. Ct. App. 1985). *See also infra* note 84 and accompanying text.

[83] MCCORMICK 4th, *supra* note 68, § 324.3, at 372. McCormick's third edition advocated admission of such facts and data for their truth on the assumption the reasonable reliance requirement guaranteed a sufficient amount of trustworthiness. McCormick abandoned this position in the fourth edition. *See id. See also* Kurynka v. Tamarac Hosp. Corp., Inc., 542 So. 2d 412, 413 (Fla. Dist. Ct. 1989) (finding that trial court erred in admitting lab report into evidence, since "an expert's testimony may not be used merely to serve as a conduit to place otherwise inadmissible evidence before a jury"); Coulter v. Stewart, 642 P.2d. 602, 603 (N.M. 1982) (stating that "[w]hile experts may rely on hearsay under Rule 703, the hearsay itself is not admissible").

[84] Many federal and state courts adopt this view. *See, e.g.*, Engebretsen v. Fairchild Aircraft Corp., 21 F.3d 721, 728-29 (6th Cir. 1994) (ruling that trial court's admission of hearsay reports upon which expert relied for their substance was improper; such hearsay evidence is admissible only to explain the basis of expert's opinion); Gong v. Hirsch, 913 F.2d 1269, 1272-73 (7th Cir. 1990) (finding district court did not abuse its discretion by preventing plaintiff's medical expert from reciting letter not "of a type reasonably relied upon by experts;" when hearsay evidence is reasonably relied upon by expert, Federal Rule of Evidence 703 generally permits an expert to state the underlying basis of his opinion, subject to Federal Rule of Evidence 403); United States v. Ramos, 725 F.2d 1322, 1324 (11th Cir. 1984) (finding no abuse of trial court's discretion where hearsay statements regarding investigative checks made with New York agencies were admitted to show the basis of expert fraud examiner's opinion, and not for their truth); Paddack v. Dave Christensen, Inc., 745 F.2d 1254, 1261-62 (9th Cir. 1984) (reiterating that Federal Rule of Evidence 703 permits inadmissible evidence upon which an expert relies to be admitted only to explain the basis of the expert opinion); Fox v. Taylor Diving & Salvage Co., 694 F.2d 1349, 1356 (5th Cir. 1983) (noting that Federal Rule of Evidence 703 permits an expert to disclose hearsay only for the purpose of explaining the basis for his opinion); American Universal Ins. Co. v. Falzone, 644 F.2d 65, 66 n.1 (1st Cir. 1981) (holding that the state fire marshal's opinion relating to cause of fire was admissible despite expert's reliance on information from other fire marshals; in addition to being the type of evidence relied upon by experts, the testimony was offered to show the basis for the opinion, not for its truth); Brown Mechanical Contractors, Inc. v. Centennial Ins. Co., 431 So.2d 932, 944 (Ala. 1983) (letter received by city fire marshall from subcontractor did not "operate as hearsay evidence" because it was offered to show the basis of the expert's opinion); Hernandez v. Faker, 671 P.2d 427, 430 (Ariz. Ct. App. 1983) (interpreting Federal Rule of Evidence 703 to admit the facts or data for the limited purpose of showing the basis for the opinion); Jordan v. Dept. of Transp., 342 S.E.2d 482, 483-84 (Ga. Ct. App. 1986) (holding that in condemnation case, expert should have been permitted to use two executory contracts for different portions of plaintiff's property as basis for his opinion, noting that "'[t]hese may or may not be admissible as direct

The Federal Rules of Evidence, in our view, provide adequate safeguards against the back-door admission of hearsay evidence through expert testimony.[85] The Federal Rules of Civil Procedure provide ample avenues for discovering the bases of expert opinion, including the use of unadmitted or inadmissible evidence.[86] So armed, a party can challenge, in advance of or even at trial, whether an expert is reasonably relying on the material in forming his or her opinion.[87] During cross-examination, of course, an opposing party may mount challenges to the credibility of the under-

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proof of value, depending upon their nature, but they are generally admissible for showing the basis of the expert's opinion as to value for enabling the jury to evaluate its weight'") (quotation omitted); State v. Humphrey, 845 P.2d 592, 600 (Kan. 1992) (finding error where trial court barred expert psychiatrist's opinion because it was partially based on interviews with the defendant; the defendant's statement to the physician would not have been hearsay because it was offered to establish the basis of the expert's opinion, not to prove the truth of the matter stated); Roberts v. Tardif, 417 A.2d 444, 450 (Me. 1980) (no need to authenticate a 1967 X-ray report that was used primarily as the basis of the expert's opinion). *But see* People v. Nicolaus, 817 P.2d 893, 910 (Cal. 1991), *cert. denied*, 112 S. Ct. 3040 (1992) (holding that court correctly refused to admit journal articles and letters written by defendant and relied upon by expert into evidence; while an expert may rely on hearsay as a basis for his opinion, he may not testify on direct to the details of such matters); First Southwest Lloyd's Ins. Co. v. MacDowell, 769 S.W.2d 954, 958 (Tex. Ct. App. 1989) (following the advice of Professor Carlson in finding that while expert may generally state the basis for his opinion, to permit him to discuss such bases in detail would allow the affirmative admission of otherwise inadmissible matters). *See also* GRAHAM'S HANDBOOK, *supra* note 81, § 703.1 at 643 (suggesting that "for most but not all practical purposes, Rule 703 operates as the equivalent of an additional exception to the rule against hearsay").

85 *See* United States v. Sims, 514 F.2d 147, 149 (9th Cir. 1975) (finding the admission of expert testimony based on hearsay consistent with Rule 703, which was not yet controlling). The court stated: "We do not open the gates to a wholesale use of all types of hearsay in formulating expert opinions. We only approve the use of that type of information upon which experts may reasonably rely." *Id.*

86 FED. R. CIV. P. 26(a)(2) and (b)(4). One commentator concluded that judicial interpretation of FED. R. CIV. P. 26(b)(4)(A)(i) and (ii) has been superior to the language of the Rule itself by opening up discovery of testimonial experts. David S. Day, *Discovery Standards For The Testimonial Expert Under Federal Rule Of Civil Procedure 26(b)(4): A Twentieth Anniversary Assessment*, 133 F.R.D. 209, 242-43 (1990). This author correctly observed that "[d]iscovery of expert witnesses under the relevance standard will improve the chances for expeditious settlement, will enhance the ability of counsel to proceed vigorously and efficiently at trial and will avoid 'trial by surprise.'" *Id.*

87 FED. R. EVID. 104. The trial court, in its discretion, must determine whether particular information is of the type reasonably relied upon by experts in the field. Shatkin v. McDonnell Douglas Corp., 727 F.2d 202, 208 (2nd Cir. 1984) (affirming exclusion of economic expert testimony of plaintiff's lost support because it was not based on data not reasonably relied upon); Baumholser v. Amax Coal Co., 630 F.2d. 550, 553 (7th Cir. 1980) ("'It is for the trial court to determine, in the exercise of its discretion, whether the expert's sources of information are sufficiently reliable to warrant reception of the opinion.'") (quotation omitted).

lying facts and data.[88] A limiting instruction may also be used to advise the jury against evaluating the information except in the context of considering the coherence and solidity of the expert opinion.[89] Further, Federal Rule of Evidence 403 can be invoked to ensure that unfairly prejudicial information is withheld from the fact finder.[90]

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88 FED. R. EVID. 705. *See also* United States v. A & S Council Oil Co., 947 F.2d 1128, 1135 (4th Cir. 1991) (finding error where defendant was not permitted to fully explore the basis of government expert's testimony: "Rule 703 creates a shield by which a party may enjoy the benefit of inadmissible evidence by wrapping it in an expert's opinion; Rule 705 is the cross-examiner's sword, and, within very broad limits he may wield it as he likes."); Knightsbridge Marketing Services, Inc. v. Promociones y Proyectos, S.A., 728 F.2d 572, 576 (1st Cir. 1984) (finding testimony based on a combination of personal knowledge, experience in the hotel-booking business, facts obtained from defendant's hotel, and sources in Santo Domingo and the Dominican Republic satisfies Rule 703; "[t]he way to combat such evidence is by cross-examination, not claiming foul"); Arkansas State Highway Comm'n v. Schell, 683 S.W.2d 618, 622 (Ark. Ct. App. 1985) (emphasising that the cross-examiner bears the burden of establishing the inadequacy of the facts and data supporting the expert's opinion); Brunner v. Brown, 480 N.W.2d 33, 34-35 (Iowa 1992) (maintaining that the basis of the expert's opinion on cross is one of the safeguards in the use of hearsay in expert testimony). *But see The Back Door is Wide Open*, supra note 4, at 16 ("Cross-examination of the expert about the unreliability of the otherwise inadmissible data is . . . a minimal safeguard.").

89 SALTZBURG & MARTIN, *supra* note 30, at 1138. *See also* Norris v. Gatts, 738 P.2d 344, 349 n.4 (Ala. 1987) (quoting Rule 705, which provides for limiting instructions); *Engebretson*, 21 F.3d at 729 (opposing party is entitled to limiting instruction that the inadmissible materials may be considered only as a basis for the expert's opinion); *Sims*, 514 F.2d at 149-50 (citing necessity of limiting instruction to jury so that hearsay evidence upon which an expert relies is considered only "as a basis for the expert opinion and not as substantive evidence").

The efficacy of such a limiting instruction has been questioned. McCormick agreed that the limiting instruction will make no difference since "it is probably unrealistic to believe that the jurors will be able or willing" to follow them. MCCORMICK, 4th *supra* note 68, § 324.3 at 373. *See also The Back Door is Wide Open*, *supra* note 4, at 16 ("The efficacy of such a 'don't-think-about-pink-elephants' instruction is, of course, highly questionable."); Department of Corrections, State of Fla. v. Williams, 549 So. 2d 1071 (Fla. Dist. Ct. App. 1989).

In *Williams*, the court refused to permit the expert witness to reveal the contents of an affidavit executed by an unavailable witness upon which he relied. *Id.* at 1072 n.1. The court rejected the notion that an instruction limiting the jury to consider the affidavit as the basis for the expert's opinion rather than as substantive evidence would be sufficient. *Id.* Quoting Professor Carlson, the court agreed that "[t]he distinction will likely escape the jury, and the subterfuge should not be allowed to frustrate accepted hearsay policies. As in certain other areas of evidence law, it would be mythical to expect the jury simply to consider its illustrative effect and disregard its substantive content . . . ." *Id.*

90 SALTZBURG & MARTIN, *supra* note 30, at 1138. *See also Norris*, 738 P.2d at 349 (stating that while Federal Rule of Evidence 705 provides for expert to disclose on direct examination the basis for his opinion, adversary may request pretrial hearing to determine the reliability of the facts and data; the facts and data shall be excluded "if the danger that they will be used for an improper purpose outweighs their value as

While disclosure to the fact finder of the underlying basis for an opinion seems to have been anticipated by the Federal Rules of Evidence and the policies behind them, the debate as to the extent of this disclosure continues.[91] Professor Ronald L. Carlson is the leading advocate for the school that would forbid the detailed disclosure of otherwise inadmissible information by an expert. Carlson argues that routine detailed disclosure of inadmissible evidence violates hearsay principles as well as the Confrontation Clause of the Constitution in criminal cases.[92] Courts have not, he argues, "always appreciated the fine but important distinction between allowing an extra-record report to form a basis for courtroom opinion and permitting the whole of the report to come into evidence."[93]

In Carlson's view, while an expert may base his or her opinion on hearsay, the expert should not be permitted to describe the sources of the opinion to the fact finder in any depth on direct examination:

[A]n expert whose opinion required extrinsic data may identify

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support for the expert's opinion") (citation omitted); Myers v. American Seating Co., 637 So. 2d 771, 773-74 (La. Ct. App. 1994) (affirming trial court's exclusion of tape-recorded conversation between expert and former employee of defendant manufacturer in a product liability action since the "fact that the expert may base his opinion or inference on inadmissible evidence does not necessarily imply that the expert may relate such information to the jury"; that question is governed by Federal Rule of Evidence 403); People v. Robinson, 340 N.W.2d 631 (Mich. 1983) (explaining that expert rules governing disclosure of basis of opinion must be read together with Federal Rule of Evidence 403); First Southwest Lloyds Insurance Co. v. MacDowell, 769 S.W.2d 954, 958 (Tex. Ct. App. 1989) (identifying Federal Rule of Evidence 403 as a device to keep prejudicial data from the jury); *The Back Door is Wide Open, supra* note 4, at 18 ("The problem with relying upon Rule 403, of course, is that it leaves things largely to the discretion of the trial judge: good judge, good ruling; bad judge, bad ruling.").

91 *See generally, e.g.*, Ronald L. Carlson, *Collision Course In Expert Testimony: Limitations On Affirmative Introduction Of Underlying Data*, 36 U. FLA. L. REV. 234 (1984) [hereinafter *Collision Course*]; Ronald L. Carlson, *Policing the Bases of Modern Expert Testimony*, 39 VAND. L. REV. 577 (1986) [hereinafter *Policing the Bases*]; Ronald L. Carlson, *Experts as Hearsay Conduits: Confrontation Abuses in Opinion Testimony*, 76 MINN. L. REV. 859 (1992) [hereinafter *Experts as Hearsay Conduits*]; David L. Faigman, *Struggling to Stop the Flood of Unreliable Expert Testimony*, 76 MINN. L. REV. 877 (1992) [hereinafter *Struggling to Stop*]; Peter J. Rescorl, *Fed. R. Evid. 703: A Back Door Entrance For Hearsay And Other Inadmissible Evidence: A Time For Change?*, 63 TEMP. L. REV. 543 (1990) [hereinafter *Back Door Entrance For Hearsay*]; Paul R. Rice, *Inadmissible Evidence as a Basis for Expert Testimony: A Response to Professor Carlson*, 40 VAND. L. REV. 583 (1987) [hereinafter *Response to Professor Carlson*]; *The Back Door is Wide Open, supra* note 4.

92 *Policing the Bases, supra* note 91, at 584-85. Carlson argues that "when a prosecutor directs an expert called by the state to read from an underlying report prepared by another person, the defendant's constitutional right to confront the adverse witness is abridged." *Id.* at 584.

93 *Id.*

> and briefly describe the supporting out-of-court document that gave rise to his conclusions. To go further and allow the admission of an unauthenticated writing into evidence or to permit the testifying expert to quote extensively from that writing violates accepted hearsay norms.[94]

Once the expert identifies the sources of his or her conclusions during direct examination, the disclosure of inadmissible information should be complete.[95] The opposing attorney, of course, may bring out the basis of the opinion during cross-examination.[96]

Professor Paul R. Rice represents the polar opposite to Carlson. Rice argues that the facts and data upon which experts rely should be offered into evidence.[97] He notes that the reasonable reliance requirement of Federal Rule of Evidence 703 sufficiently guarantees the trustworthiness of the underlying information to satisfy hearsay concerns.[98] Rice criticizes Carlson for "judicial doubletalk" on this subject:[99]

> Admitting an expert's opinion, but not its basis, is illogical because one cannot accept an opinion as true without implicitly accepting the facts upon which the expert based that opinion. The value of any conclusion necessarily is tied to and dependent on its premise. Consequently, if in forming an opinion someone assumes that certain facts are true, the acceptance of that opinion necessarily involves the acceptance of those assumed facts. Compounding the absurdity of the approach supported by Professor Carlson is the court's allowing the expert to recite the underlying basis, and then instructing the jury not to accept the recited facts as true (even though the expert did), but to consider those facts only in assessing the value of the expert's opinion. This instruction is pure fiction; it cannot be done. Even if the instruction's distinction logically were possible, jurors would not be capable of performing such mental gymnastics.[100]

The debate over which of the these approaches to information

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94 *Id.*

95 *Id.*

96 *Id.* at 590-91.

97 *Response to Professor Carlson, supra* note 91, at 584.

98 *Response to Professor Carlson, supra* note 91, at 587-89. In his response to Carlson's views on confrontation, Rice counters that the Confrontation Clause is not violated when an expert recites the inadmissible underlying facts upon which he relies. *Id.* at 595. Citing *Roberts*, 448 U.S. at 66, Rice asserts that the use of hearsay is not limited to established exceptions to the hearsay rule, maintaining that the rule of unavailability is inapplicable when the benefit of trial confrontation is small. *Response to Professor Carlson, supra* note 91, at 595. *See also supra* note 79.

99 *Response to Professor Carlson, supra* note 91, at 584.

100 *Id.* at 585.

used by experts should be followed is of more than passing academic interest. In 1987, the Criminal Justice Section of the American Bar Association proposed revisions to Federal Rule of Evidence 703 in order to curb the introduction "of . . . unauthenticated background data" for its truth.[101] The proposed Rule would require that the facts and data underlying an expert's opinion normally be independently admissible.[102] As an exception to this general rule:

> Facts or data underlying an expert's opinion or inference that are not independently admissible may be admitted in the discretion of the court on behalf of the party offering the expert, if they are trustworthy, necessary to illuminate the testimony, and not privileged. In such instances, upon request their use ordinarily shall be confined to showing the expert's basis.[103]

As we noted, Federal Rule of Evidence 703 reflects an appropriate balance between the wholesale evidential receipt of information supporting an expert's opinion and the withholding of information from a fact finder that an expert believes is necessary to the expression of his or her opinion. Simply put, a fact finder should be able to hear the basis for an opinion expressed by a witness who is there solely to "assist the trier of fact to understand the evidence or to determine a fact in issue."[104] Further, since the information used has a reliability component that can be challenged in advance of or at trial, the benefit gained in simplicity and economy of presentation clearly outweighs the risk of systemic failure.[105]

In that regard, courts should not "abdicate their responsibility to review the data substantively, focusing on the qualifications of the expert and leaving to the jury the task of assessing the evidence."[106] In *Daubert v. Merrell Dow Pharmaceuticals, Inc.*,[107] the United States Supreme Court endorsed a procedure that requires

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101 *A Fresh Review*, *supra* note 79, at 371.

102 *Id.* at 369.

103 *Id.* at 370. Carlson's proposed rule is similar to that endorsed by the ABA Criminal Justice Section:

> (b) Nothing in this rule shall require the court to permit the introduction of facts or data into evidence on grounds that the expert relied on them. However, they may be received into evidence when they meet the requirements necessary for admissibility described in other parts of these rules.

Id. at 374.

104 FED. R. EVID. 702.

105 *See* cases cited *supra* notes 84-90.

106 *Struggling to Stop*, *supra* note 91, at 883.

107 113 S. Ct. 2786 (1993).

courts to take an active role in determining whether the methodology employed by the expert under Federal Rule of Evidence 702 is sufficiently reliable.[108] There, the *Daubert* Court identified peer review, publication, and general acceptance as some of the nonexhaustive criteria for determining if good science is being practiced.[109] Courts should use similar criteria when resolving questions of reliability presented by Federal Rule of Evidence 703.[110]

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108 *Id.* at 2796. *After Daubert, supra* note 1, at 2219-21.

109 *Daubert*, 113 S. Ct. at 2797. *See also* Zenith Radio Corp. v. Matsushita Elec. Indus. Co., Ltd., 505 F. Supp. 1313 (E.D. Pa. 1980), *rev'd*, 723 F.2d 238 (3d Cir. 1983), *rev'd on other grounds*, 475 U.S. 574 (1986). In *Zenith Radio Corp.*, an anti-trust case, the district court considered the appropriate use by expert witnesses of materials previously ruled inadmissible. The court described six factors to be considered in evaluating "reasonable reliance":

> 1. The extent to which the opinion is pervaded or dominated by reliance on materials judicially determined to be inadmissible, on grounds of either relevance or truthworthiness;
> 2. The extent to which the opinion is dominated or pervaded by reliance upon other untrustworthy materials;
> 3. The extent to which the expert's assumptions have been shown to be unsupported, speculative, or demonstrably incorrect;
> 4. The extent to which the materials on which the expert relied are within his immediate sphere of expertise, are of a kind customarily relied upon by experts in his field in forming opinions or inferences on that subject, and are not used only for litigation purposes;
> 5. The extent to which the expert acknowledges the questionable reliability of the underlying information, thus indicating that he has taken that factor into consideration in forming his opinion;
> 6. The extent to which reliance on certain materials, even if otherwise reasonable, may be unreasonable in the peculiar circumstances of the case.

Id. at 1330. The Court of Appeals rejected the trial judge's approach, holding that "[t]he proper inquiry is not what the court deems reliable, but what experts in the relevant discipline deem it to be." 723 F.2d at 276. In many ways, the Daubert opinion vindicated the lower court's ruling.

110 In re Paoli R.R. Yard PCB Litigation, 35 F.3d 717, 748 (3d Cir. 1994), *cert. denied*, 115 S. Ct. 1253 (1995) (finding that reasonableness requirement under Federal Rule of Evidence 703 is equivalent to Federal Rule of Evidence 702 reliability requirement—"there must be good grounds on which to find the data reliable"); United States v. Locasio, 6 F.3d 924, 938-39 (2d Cir. 1993), *cert. denied*, 114 S. Ct. 1645 (1994) (approving a flexible analysis using principles discussed in *Daubert* to determine whether expert should be permitted to rely on inadmissible evidence in forming opinions); Pennsylvania Dental Ass'n v. Medical Service Ass'n, 745 F.2d 248, 261-62 (3d Cir. 1984) (affirming a summary judgment order that discounted economist's affidavit because it expressed opinions based on unsupported facts—(pre-*Daubert* case)). *See generally* Michael H. Graham, *Expert Witness Testimony And The Federal Rules Of Evidence: Insuring Adequate Assurance Of Trustworthiness*, 1986 U. ILL. L.J. 43 (1986) (suggesting that courts use a restrictive test to determine whether source materials are reliable); Robert H. Rhode, *The Scope Of The Reasonable Reliance Requirement Of Federal Rule Of Evidence 703*, 1988 U. ILL. L.J. 1069 (1988) (suggesting that courts employ a liberal test and accept information as reliable under Federal Rule of Evidence 703 if

There is some evidence that this gatekeeping function is already being performed by courts.[111] In *United States v. Tranowski*,[112] for example, the Seventh Circuit reversed a conviction, finding that an astronomy chart relied upo: by an expert called by the Government had not been verified. Though the chart apparently was utilized for other astronomical purposes, it was not used to date photographs taken of the heavens. That issue was critical in determining the credibility of the defendant's alibi. The court recognized that since the chart's origin was unknown and its value in dating the photographs unverified, reasonable reliance by the expert had not been established.[113] In short, while a court should be cautious about precluding an expert from relying on particular information in forming his or her opinions, Federal Rule of Evidence 703 was intended to keep unreliable information from the fact finder and should be given effect.[114]

C. *The Adoption and Modification of Federal Rule of Evidence 703 by the States*

Unlike their predecessors, the Federal Rules of Evidence have proven to be enormously popular with the states. As of May 1, 1995, twelve states have adopted Federal Rule of Evidence 703 verbatim.[115] Another twenty-six states and Puerto Rico have through

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an expert testifies that such materials are used by similarly situated experts and there is some support for this position in the record).

111 *See, e.g., In re Paoli*, 35 F.3d at 741-50; Tyger Const. Co. Inc. v. Pensacola Construction Co., 29 F.3d 137, 142-43 (4th Cir. 1994), *cert. denied*, 115 S. Ct. 729 (1995) (finding an abuse of discretion to admit expert testimony based on "assumptions not supported by the record"); Christophersen v. Allied-Signal Corp., 939 F.2d 1106, 1113-14 (5th Cir. 1991), *cert. denied*, 503 U.S. 912 (1992) (concluding that expert reliance on facts and data must be shown to be reasonable or trial court is entitled to disregard expert affidavit based on such "unreliable" information); Slaughter v. Southern Talc Co., 919 F.2d 304, 306-07 (5th Cir. 1990) (affirming summary judgment where examination reports were so poorly prepared that it was not reasonable for an expert to rely on them); Soden v. Freightliner Corp., 714 F.2d 498, 503 (5th Cir. 1983) (statistics were not of the type reasonably relied upon the experts in the field; hence, expert could not base opinion on them). *See generally* MARK A. DOMBROFF, FEDERAL TRIAL EVIDENCE § 703, at 127-28 (8th ed. 1994).

112 659 F.2d 750 (7th Cir. 1981).

113 *Id.* at 755.

114 *See, e.g.*, United States v. Cox, 696 F.2d 1294, 1297 (11th Cir. 1983), *cert. denied*, 464 U.S. 827 (1983) (concluding that expert testimony that CIA had remanufactured guns from Russian discards was based on hearsay and was not reasonably relied upon by similarly-situated experts).

115 Arizona (ARIZ. R. EVID. 703); Idaho (IDAHO R. EVID. 703); Montana (MONT. R. EVID. 703); New Hampshire (N.H. R. EVID. 703); New Jersey (N.J. R. EVID. 703); New Mexico (N.M. R. EVID. 11-703); North Dakota (N.D. R. EVID. 703); Oregon (OR. R. EVID. 703); Utah (UTAH R. EVID. 703); Virginia (VA. R. EVID. 703); Washington

statute, judicial opinion, or evidence code embraced the principles of Federal Rule of Evidence 703 without substantive change.[116]

A number of states have followed Carlson's views and permit an expert to base an opinion on hearsay but forbid disclosure of the actual hearsay if the underlying data is not deemed trustworthy.[117] Both the Kentucky and Maryland evidence statutes limit disclosures of such information unless it is "trustworthy, necessary to illuminate testimony, and unprivileged."[118] In Michigan, the rules take a slightly different approach by allowing a court to require that "underlying facts or data essential to an opinion or inference be in evidence."[119]

(WASH. R. EVID. 703); Wisconsin (WIS. STAT. ANN. § 907.03). The evidence rules of these states are more fully described in 3 WEINSTEIN'S EVIDENCE, *supra* note 75, § 703[05] at 703-50-68.

116 Alaska (ALASKA R. EVID. 703); Arkansas (ARK. R. EVID. 703); Colorado (COLO. R. EVID. 703); Connecticut (endorsing the principles of Federal Rule of Evidence 703 in Donch v. Kardos, 177 A.2d 801, 803-04 (Conn. 1962) and State v. Cuvelier, 394 A.2d 185, 1892 (Conn. 1978)); Delaware (DEL. UNIF. R. EVID. 703); Florida (FLA. STAT. ch. 90.704); Georgia (City of Atlanta v. McLucas, 187 S.E.2d 560, 561 (Ga. Ct. App. 1972) (stating that expert's opinion, based partially on hearsay, goes to the weight and credibility of the testimony, not to its admissibility); Illinois (adopting Federal Rule of Evidence 703 in Wilson v. Clark, 417 N.E.2d 1322, 1327 (Ill.), *cert. denied*, 454 U.S. 836 (1981)); Iowa (IOWA R. EVID. 703); Indiana (IND. R. EVID. 703); Louisiana (LA. CODE EVID. ART. 703); Maine (ME. R. EVID. 703); Mississippi (MISS. R. EVID. 703); Missouri (MO. ANN. STAT. § 490.065(3)); Nebraska (NEB. R. EVID. 27-703); New York (People v. Sugden, 323 N.E.2d 169, 172-74 (N.Y. 1974)); Nevada (NEV. REV. STAT. tit. 4 § 50.285); North Carolina (N.C. R. EVID. 703); Oklahoma (OKLA. EVID. CODE § 2703); Pennsylvania (applying principles of Federal Rule of Evidence 703 in Commonwealth v. Thomas, 282 A.2d 693, 698-99 (Pa. 1971) (permitting expert medical witnesses to express opinions based upon reports of others not in evidence) and Steinhauer v. Wilson, 485 A.2d 477, 479 (Pa. Super. Ct. 1984) (allowing expert testimony of construction costs based on contractor estimates not in the record)); Puerto Rico (P.R. R. EVID. 56); Rhode Island (R.I. R. EVID. 703); South Carolina (S.C. R. CIV. P. 43(m)(2) and S.C. R. CRIM. P. 24(b)); South Dakota (S.D. R. EVID. 703); Tennessee (TENN. R. EVID. 703); Texas (TEX. R. EVID. 703); Vermont (VT. R. EVID. 703); West Virginia (W. VA. R. EVID. 703); and Wyoming (WYO. R. EVID. 703). Of course, California's evidence code predated Rule 703 and, in many respects, served as its model. *See supra* notes 56-58 and accompanying text.

117 For example, Hawaii's rule authorizes the court to "disallow testimony in the form of an opinion or inference if the underlying facts or data indicate a lack of trustworthiness." HAW. R. EVID. 703. *See also* Dept. of Youth Services v. A Juvenile, 499 N.E.2d 812, 821 (Mass. 1986) (stating that in Massachusetts, expert may state opinion based on facts or data not admitted into evidence "[i]f the facts or data are admissible and of the sort that experts in that specialty reasonably rely on").

118 MD. R. EVID. 5-703; KY. R. EVID. 703. Minnesota recently adopted a comparable rule. MINN. R. EVID. 703. In a product liability action, a defendant manufacturer's brochure apparently qualified as particularly trustworthy evidence under the rule. Hahn v. Tri-Line Farmers Co-op, 478 N.W.2d 515, 526 (Minn. Ct. App. 1991) (permitting an ergonomics expert to read to the jury from manufacturers brochures describing the product (augurs) at issue).

119 MICH. R. EVID. 703. *See* Mach v. General Motors Corp., 315 N.W.2d 561, 564-65

In sum, the federal courts and most states use Federal Rule of Evidence 703 as the template for the expression of expert opinions and their bases.[120] This Rule strikes a fair balance between the flexible use of information required for informed expert conclusions and the regulation and control of inadmissible information.

III. DEVELOPMENT OF RULES WHICH PERMIT EXPERTS TO PROVIDE INFORMATION FROM "LEARNED TREATISES" TO FACT FINDERS

A. *Early Efforts to Bring Learned Treatises into the Courtroom*

Under the common law, learned treatises and authoritative texts were inadmissible hearsay because their authors could not be cross-examined.[121] Because the authors were not present, one could not determine their reasoning processes, nor could one determine whether the authors still held those views.[122] Of course, the fact finder also could not evaluate the absent author's credibility.[123] Thus, under traditional legal tenets, an expert might obtain information from such works, but passages from the texts themselves were not admissible either during direct or cross-examination.[124]

Learned treatises, however, could be used to test the qualifications and credibility of experts.[125] In fact, in common law jurisdictions, learned treatises were essential tools used to test an expert's

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(Mich. Ct. App. 1982) (finding no error in wrongful death action, where trial court barred expert testimony based on facts not established in the record). Similarly, the rules of Kansas limit the basis of an expert's opinion to facts or data perceived by or made known to him "at the hearing." KAN. ST. REV. § 60-456 (b). *See also* Wesley v. State, 575 So. 2d 127, 129 (Ala. 1990) (enunciating that in Alabama, the information upon which an expert relies must be in evidence).

120 A few holdout states, like Ohio, limit the basis of expert testimony to admissible evidence. OHIO R. EVID. 703. *See, e.g.*, State v. Jones, 459 N.E.2d 526, 528 (Ohio 1984) (holding that it was not error for court to exclude expert testimony based on medical reports and records which were not prepared by expert and not admitted into evidence). For a more detailed discussion of Ohio law, see *infra* notes 269-317 and accompanying text.

121 Generella v. Weinberger, 388 F. Supp. 1086, 1089-90 (E.D. Pa. 1974). *See also* Note, *Learned Treatises And Rule 8-03(b)(18) Of The Proposed Federal Rules Of Evidence*, 5 VAL. U. L. REV. 126, 127-29 (1970) [hereinafter *Proposed Learned Treatise Rule*].

122 Marvin C. Holz, *Learned Treatises As Evidence In Wisconsin*, 51 MARQ. L. REV. 271, 273-74 (1967) [hereinafter *Learned Treatises In Wisconsin*].

123 Id. at 273.

124 Stottlemire v. Cawood, 215 F. Supp. 266, 268 (D.C. Cir. 1963); United States v. One Device, Etc., 160 F.2d 194, 198-99 (10th Cir. 1947).

125 Garfield Memorial Hospital v. Marshall, 204 F.2d 721, 728-29 (D.C. Cir. 1953). *See also* Note, *Learned Treatises*, 46 IOWA L. REV. 463, 466-67 (1961) [hereinafter *Learned Treatises*].

knowledge.[126] The permissible use of learned treatises for impeachment purposes under the common law varied from state to state. Some courts limited cross-examination to the specific texts relied upon by an expert.[127] Others allowed the use of a learned treatise for cross-examination when the expert either relied on it as a general authority or recognized it as authoritative.[128] Still others permitted learned treatises to be used so long as the text was established as authoritative by some expert or by judicial notice.[129] In many instances, the use of treatises during cross-examination was left to the discretion of the trial judge.[130]

The United States Supreme Court, in *Reilly v. Pinkus*,[131] ultimately settled the question of how such learned treatises could be used in the federal courts. That case concerned a postal stop order forbidding the use of the mails to advertise the effectiveness of Kelp-I-Dine[132]—a weight-control treatment. The trial court had prohibited cross-examination of the government's medical witnesses with statements taken from several medical texts.[133] The Court rejected such a narrow use of medical texts, reasoning:

> It certainly is illogical, if not actually unfair, to permit witnesses to give expert opinions based on book knowledge, and then deprive the party challenging such evidence of all opportunity to interrogate them about divergent opinions expressed in other

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126 Note, *Substantive Admissibility of Learned Treatises and the Medical Malpractice Plaintiff*, 71 Nw. U. L. Rev. 678, 682 (1976) [hereinafter *Substantive Admissibility*].

127 Woelfle v. Connecticut Mut. Life Ins. Co., 103 F.2d 417, 420 (8th Cir. 1939); E.I. DuPont De Nemours & Co. v. White, 8 F.2d 5, 6 (3d Cir. 1925); Western Union Tel. Co. v. Ammann, 296 F. 453, 454 (3d Cir. 1924); Lewandowski v. Preferred Risk Mut. Ins. Co., 146 N.W.2d 505, 508 (Wis. 1966).

128 *Marshall*, 204 F.2d at 728; Mutual Ben. Health & Acc. Ass'n v. Francis, 148 F.2d 590, 598 (8th Cir. 1945); City of St. Petersburg v. Ferguson, 193 So.2d 648 (Fla. Dist. Ct. App. 1967), *cert. denied*, 201 So. 2d 556 (1967); Ruth v. Fenchel, 21 N.J. 171, 121 A.2d 373 (N.J. 1956).

129 Yarn v. Ft. Dodge, D.M. & S.R. Co., 31 F.2d 717 (8th Cir. 1929), *cert. denied*, 280 U.S. 568 (1929); Generella v. Weinberger, 388 F. Supp. 1086, 1090 (E.D. Pa. 1974); Darling v. Charleston Community Memorial Hospital, 211 N.E.2d 253, 259 (Ill. 1965), *cert. denied*, 383 U.S. 946 (1966); Dabroe v. Rhodes Co., 392 P.2d 317, 321-22 (Wash. 1964).

130 The Eighth Circuit correctly observed:

> Whatever the correct rule may be, it is apparent that the scope of such cross-examination must necessarily be left to the good common sense and sound judgment of the trial court, whose rulings should be upheld unless they constitute a clear abuse of a sound judicial discretion.

Woelfle, 103 F.2d at 420.

131 338 U.S. 269 (1949).

132 *Id.* at 270-71.

133 *Id.* at 272-73.

reputable books.[134]

Since the texts in issue tended to refute the testimony of the government's experts, the trial court should have permitted cross-examination.[135] It made no difference to the Court that the experts being examined had not previously consulted these texts or otherwise relied upon them.

The Court in *Reilly v. Pinkus* clearly intended that attorneys use learned treatises to impeach opponent experts.[136] However, because the Court failed to clarify how to establish a treatise as authoritative,[137] some of the lower federal courts continued to condition their use either on the expert acknowledging the text as authoritative or reliance on it by the expert in testimony.[138] As a practical matter, the trial judge continued to control the use of treatises during cross-examination.[139]

Uncertainty surrounding the use of learned treatises clearly harmed the fact-finding process. Clever experts could evade cross-examination by disclaiming a text's authoritativeness.[140] So too, skillful examiners could make an expert appear evasive by eliciting

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134 *Id.* at 275.

135 *Id.* at 275-76.

136 *See id.*

137 *See, e.g.*, Dolcin Corp. v. Federal Trade Commission, 219 F.2d 742, 746 n.4 (D.C. Cir. 1954), *cert. denied*, 348 U.S. 981 (1955). *See also* Farmers Union Federated Coop. Ship. Ass'n v. McChesney, 251 F.2d 441, 445 (8th Cir. 1958) (noting that a medical witness who admittedly based his testimony on standard recognized authorities could be cross-examined on such authorities generally; however, the court placed no limitation on how the reliability of such authorities would be established).

138 United States v. Erdos, 474 F.2d 157, 162 (4th Cir.), *cert. denied*, 414 U.S. 876 (1973) ("Before allowing cross-examination from a treatise, however, it must be established that the book is known by the witness and is a generally respected authority in the relevant field.") (citation omitted); Lawrence v. Nutter, 203 F.2d 540, 542-43 (4th Cir. 1953) (interpreting *Reilly v. Pinkus* to use medical texts to cross-examine expert on treatises he recognizes as authoritative); Shaw v. Duncan, 194 F.2d 779, 782-83 (10th Cir. 1952) (interpreting *Reilly v. Pinkus* to preclude cross-examination of expert from text he had never read).

139 Bowers v. Garfield, 382 F. Supp. 503, 508 (E.D. Pa.), *aff'd*, 503 F.2d 1398 (3rd Cir. 1974) (finding harmless error where judge refused to allow party to read from text that expert regarded as authoritative because the expert disagreed with the proposed passage).

140 For example, an expert might recognize a medical text as "standard" but refuse to accept it as "authoritative." The fact that the expert may have followed the procedures recommended in the text was of no moment absent the magic word "authoritative." Even more difficult to reconcile was the expert who refused to recognize his own writings or texts in which his writings were published as authoritative. Jacober v. St. Peter's Medical Center, 128 N.J. 475, 483-84, 608 A.2d 304, 308-10 (N.J. 1992), *reconsideration granted by*, 130 N.J. 586 (1992). Abuse of this rule was illustrated in Jacober and led New Jersey's Supreme Court to adopt Federal Rule of Evidence 803(18) through judicial opinion. *See id.* at 314.

disclaimers to a pile of "unauthoritative" texts.[141] Such game playing made the fact finder the ultimate loser by depriving it of valuable information.

As already noted, the Model Code and the Uniform Rules represented efforts to modernize the presentation of expert testimony. Both efforts permitted the use of learned treatises on direct and cross-examination. Rule 529 of the Model Code, for example, permitted "a published treatise, periodical or pamphlet on a subject of history, science or art" to be received in evidence if either the court or a testifying expert found it to be sufficiently authoritative.[142] Comments to Rule 529 noted that the Rule was designed to eliminate the conflict surrounding the use of learned treatises during cross-examination.[143] The approach of the Model Code reflected the view that "[i]f such authorities are sufficient for the purpose of passing on knowledge to students and practitioners in . . . [their] fields, they should be sufficient in the courtroom."[144]

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141 *Id.* at 308-10.

142 Rule 529 of the Model Code provides:

> [a] published treatise, periodical or pamphlet on a subject of history, science or art is admissible as tending to prove the truth of a matter stated therein if the judge takes judicial notice, or a witness expert in the subject testifies, that the writer of the statement in the treatise, periodical or pamphlet is recognized in his profession or calling as an expert in the subject.

MODEL CODE 529.

Morgan commented on the proposed rule as follows:

> That has long been advocated by Mr. Wigmore, but the danger that has been suggested to us is that there will be a battle of the books if you do adopt this Rule. The answer to that is, of course, the answer Judge Hand made—the control of the trial judge.

Discussion of the Code of Evidence Tentative Draft No. 2, 18 A.L.I. PROC. 194-95 (July 1, 1940-June 30, 1941).

143 The comment highlighted the rule's purpose as follows:

> *a. Comparison with Existing Law.* Only a few courts receive the evidence made admissible by this Rule. The extent to which and the conditions under which a learned treatise may be used upon cross-examination are the subject of much conflict. The restrictions upon its use are in the last analysis based upon the reason that to permit the expert to be tested by the statements in a treatise is indirectly to get the content of the statement before the jurors who will use it as evidence of the truth of the matter stated. This Rule will eliminate all prohibitions upon the use of a treatise for purposes of cross-examination which would not equally apply to the use of testimony or proposed available testimony of another expert for the same purpose.

MODEL CODE 529, Comment.

144 Warren M. Dana, *Admission Of Learned Treatises In Evidence*, 1945 WIS. L. REV. 455, 458 (1945). This commentator noted the need for such a rule not only to bring probative information to the fact finder, but also to address attorney and expert abuse of learned treatises during cross-examination. *Id.* at 457-58.

This philosophical bent was evident in the deliberations by the National Commissioners when the Uniform Rules were promulgated a decade later.[145] Uniform Rule 63(31) closely followed the Model Code.[146] So too did the Commentary.[147] However, neither the Model Code nor the Uniform Rules gained acceptance for each lacked safeguards against the misuse of these texts.[148] Specifically, neither Code required that an expert introduce and/or explain the textual material to the fact finder.[149] In the absence of a learned intermediary, these texts—with their often esoteric and obtuse presentations—could easily mislead a fact finder rather than assist it.

Alabama was the first state to approve the use of learned treatises as substantive evidence in 1857—well before efforts to codify evidence rules regarding expert testimony.[150] In *Stoudenmeier v. Williamson*,[151] the Alabama Supreme Court permitted receipt of a medical treatise in evidence. The Alabama Supreme Court reasoned that such texts often provide important information to the fact finder, particularly where their content could be explained by the expert witness referring to them:

> We think that medical authors, whose books are admitted or proven to be standard works with that profession, ought to be received in evidence. Should such works be obscure to the un-

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145 UNIF. R. EVID. 63, Commissioner's Note.

146 UNIF. R. EVID. 63(31). The Model Code and Uniform Rules differed with respect to the method by which a treatise became admissible. The Uniform Rules required expert testimony that the treatise itself was a reliable authority. *Id.* Under the Model Code, the learned treatise was admissible following expert testimony that the writer of the text was recognized as an expert on the subject. MODEL CODE 529.

147 UNIF. R. EVID. 63(31), Commissioner's Note. The National Commissioner's approach to hearsay was far more conservative than the one advocated by the Model Code. Under the Model Code, hearsay evidence was admissible if it was relevant and the best evidence available. The National Commissioners believed that the probative value of hearsay depended not only on the availability of a witness, but on the circumstances under which the statement was made. In this respect, most of the hearsay exceptions merely codified present law. The drafters may have been alluding to the learned treatise exception when they acknowledged that they reconciled "lack of uniformity among the states with respect to a particular exception" by making a serious effort "to state the rule which seems more sensible." *Id.*

148 For example, although the New Jersey Study Commission recommended adoption of most of the Uniform Rules, it specifically declined to adopt Uniform Rule of Evidence 63(31). *Report of N.J. Study Comm'n*, *supra* note 44, at 283. Kansas, however, adopted the Uniform Rules in 1964 and, with them, the learned treatise provisions. KAN. STAT. ANN. § 60-460(cc).

149 Model Code 529; UNIF. R. EVID. 63(31).

150 Note, *Learned Treatises As Direct Evidence: The Alabama Experience*, 1967 DUKE L.J. 1169 (1967) [hereinafter *The Alabama Experience*].

151 29 Ala. 558 (1857).

> initiated, or should they contain technicalities, or phrases not understood by the common public, proper explanation should be offered lest the jury be thereby misled. That was done in this case. The opinions of physicians as experts, touching disease and the science of medicine, are, under all the authorities, admissible in evidence. If we lay down a rule which will exclude from the jury all evidence on questions of science and art, except to the extent that the witness has himself discovered or demonstrated the correctness of what he testifies to, we certainly restrict the inquiry to very narrow limits.[152]

Over a century went by before Wisconsin became the next state to permit the receipt of authoritative texts in evidence. The Supreme Court of Wisconsin, noting that it was increasingly more difficult to get experts willing to testify in malpractice cases, adopted Uniform Rule of Evidence 63(31) prospectively in *Lewandowski v. Preferred Risk Mutual Insurance Company.*[153]

Massachusetts[154] in the late 1940s and Nevada[155] in the mid-

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152 *Id.* at 567.

153 146 N.W.2d 505, 509 (Wis. 1966). That state's commentators welcomed relaxation of the common law rules. *Learned Treatises In Wisconsin, supra* note 122, at 287. *See also* Note, *Medical Treatises to be Admitted as Direct Evidence in Wisconsin*—Lewandowski v. Preferred Risk Mutual Ins. Co., 66 MICH. L. REV. 183, 189-90 (1968) [hereinafter *Medical Treatises in Wisconsin*].

154 The statute has changed only slightly since 1949, and currently provides:

> Statements of fact or opinion on a subject of science or art contained in a published treatise, periodical, book or pamphlet shall, insofar as the court shall find that the said statements are relevant and that the writer of such statements is recognized in his profession or calling as an expert on the subject, be admissible in actions of contract or tort for malpractice, error or mistake against physicians, surgeons, dentists, optometrists, hospitals and sanitaria, as evidence tending to prove said facts or as opinion evidence; provided, however, that the party intending to offer as evidence any such statements shall, not less than thirty days before the trial of the action, give the adverse party or his attorney notice of such intention, stating the name of the writer of the statements, the title of the treatise, periodical, book or pamphlet in which they are contained.

MASS. GEN. LAWS ANN. ch. 233, § 79C (West 1986).

155 The statute provided:

> 1. A statement of fact or opinion on a subject of science or art contained in a published treatise, periodical, book or pamphlet shall, in the discretion of the court, and if the court finds that it is relevant and that the writer of such statement is recognized in his profession or calling as an expert on the subject, be admissible in actions of contract or tort for malpractice, error or mistake against physicians, surgeons, dentists, optometrists, osteopathic physicians or surgeons, chiropractors, chiropodists, naturopathic physicians, hospitals or surgeons as evidence tending to prove the fact or as opinion evidence. 2. The party intending to offer as evidence any such statement shall, not less than 3 [three] days before the trial of the action, give the adverse party notice of such intention,

1950s also enacted statutes specifically authorizing the use of learned treatises as substantive evidence but only in medical malpractice cases.[156] The so-called "conspiracy of silence" in which physicians often engaged left plaintiffs with no live testimony on the issue of liability and served as the rationale for adopting these rules.[157] Both statutes recognized that these books could be abused, and they required advance disclosure to the other side before they could be introduced in evidence. In reality, these laws had little effect on the use of learned treatises as substantive evidence because they were narrowly interpreted.[158] During the period preceding adoption of the Federal Rules of Evidence, the federal courts and those in the overwhelming majority of states limited use of these learned treatises to cross-examination.[159]

Support for the admissibility of authoritative texts came from Wigmore and other commentators who consistently advocated the substantive use of learned treatises.[160] Wigmore argued that the

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> stating the name of the writer of the statement and the title of the treatise, periodical, book, or pamphlet in which it is contained.

NEV. REV. STAT. § 51.040 (Michie 1957).

Other states departed from the common law in approving affirmative use of historical works of deceased authors as evidence of "facts of general notoriety and interest." These statutes failed to adequately address the limitations on use of learned treatises, however, since they did not apply to medical or scientific texts or to the works of living authors. *Learned Treatises In Wisconsin, supra* note 122, at 271-72. *See, e.g.*, Bixby v. Omaha & C.B. Ry. & Bridge Co., 75 N.W. 182, 183-84 (Iowa 1898) (medical works cannot be read into evidence to show the symptoms of disease; their admission is not authorized by the statute admitting historical works or books of science or art as presumptive evidence of facts of general notoriety or interest); Eckleberry v. Kaiser Foundation Northern Hospitals, 359 P.2d 1090, 1092-93 (Or. 1961) (extracts from medical works and treatises may not be used as probative evidence of the truth of the statements contained therein; moreover, since these texts are inexact sciences, they are not covered by the statute concerning "facts of general notoriety and interest").

156 South Carolina also permitted the use of learned treatises in addition to expert testimony to address questions or sanity or poison. The relevant statute currently reads:

> In all actions or proceedings, civil or criminal, in which the question of sanity or insanity or the administration of poison or any other article destructive to life is involved and in which expert testimony may be introduced, medical or scientific works, or such parts thereof as may be relevant to the issues involved, shall be competent and admissible to be read before the court or jury, in addition to such expert testimony.

S.C. CODE ANN. § 19-5-410 (Law. Co-op. 1991).

157 William F. Kehoe, *Massachusetts Malpractice Evidentiary Statute—Success Or Failure*, 44 B.U. L. REV. 10, 11-13 (1964) [hereinafter *Massachusetts Malpractice Statute*].

158 *Id.* at 25-26.

159 Bowers v. Garfield, 382 F. Supp. 503, 507-08 (E.D. Pa. 1974).

160 JOHN HENRY WIGMORE, A TREATISE ON THE ANGLO-AMERICAN SYSTEM OF EVIDENCE TRIALS AT COMMON LAW, § 1690 at 635-36 (2d ed. 1923) [hereinafter WIGMORE

unavailability of the author was not critical, because learned treatises met the criteria for other exceptions to the hearsay rule: necessity and trustworthiness.[161] Wigmore recognized that the usual expert read and benefited from the works of colleagues.[162] Moreover, an author of a learned treatise could not be expected to regularly appear in court nor could courts compel such an appearance where the expert was beyond their jurisdiction.[163]

Texts also have proved to be trustworthy. So-called learned treatises are published in the open literature. Thus, while the author might express some bias, there is no apparent motive to misrepresent.[164] The author publishing such texts is well aware that the work is subject to peer review and criticism.[165] The "intellectual cross examination" of the scholarly process itself minimizes the danger that biased or inaccurate information will be provided.[166] Further, the author of the text is not distracted by the litigation process as the information is developed and published:[167]

2D]. Wigmore's Code of Evidence treated learned treatises as substantive evidence, as well. WIGMORE'S CODE OF EVIDENCE, *supra* note 39, Rule 165. *See also* EDWARD W. CLEARY, MCCORMICK'S HANDBOOK OF THE LAW OF EVIDENCE § 321, at 743 (2d ed. 1972) [hereinafter MCCORMICK 2D]; EDMUND M. MORGAN, BASIC PROBLEMS OF STATE AND FEDERAL EVIDENCE 318-20 (5th ed. 1976) [hereinafter MORGAN 5TH].

161 WIGMORE 2D, *supra* note 160, §§ 1691-92, at 638-39. *But see Proposed Learned Treatise Rule, supra* note 121. This author vigorously argued learned treatises should not be admitted as an exception to the hearsay rule because the requirements of necessity and trustworthiness were not satisfied. *Id.* at 135-37. The writer maintained that a demonstration of necessity required more than a showing of inconvenience. *Id.* at 144. The so-called trustworthiness of the treatise could be undermined if the jury misunderstood selected passages taken out of context or could not reconcile conflicting views. *Id.* at 145-147. The article concluded that use of learned treatises as substantive evidence should be permitted only when no better evidence was available. *Id.* at 148.

162 WIGMORE 2D, *supra* note 160, § 1691, at 638-39; MORGAN 5TH, *supra* note 160, at 319.

163 WIGMORE 2D, *supra* note 160, § 1691, at 639. After all, noted Wigmore, "[c]ostly litigation is the parasite of justice; and we pay too high a price when we refuse to accept our information from a competent source ready at hand." *Id.*

164 *Id. But see* Jack P. Lipton et al., *Rethinking the Admissibility of Medical Treatises as Evidence*, 17 AM. J. L. & MED. 209 (1991). These writers assert that the trustworthiness of medical treatises should not be assumed. *Id.* at 225-26. The quality of medical research may be marred because of fraud and dishonestly in medical research, inadequacies of physicians as researchers, social and financial pressures to publish, problems in the dissemination of medical knowledge, flaws in the editorial system, and professional self-regulation of the quality of medical treatises. *Id.* at 226. Assuming these concerns are valid, analysis of the treatises during discovery as well as effective cross-examination should expose the weaknesses in the evidence offered. *See supra* note 86 and accompanying text.

165 WIGMORE 2D, *supra* note 160, § 1691, at 639-40.

166 *Medical Treatises in Wisconsin, supra* note 153, at 188.

167 While the expert may have a bias in favor of a theory, "it is not a bias in favor of

> Logically, it would seem that a work written in the environment of science at a time when the writer's sole objective was to produce a qualitatively definitive work would be less susceptible than would an expert witness to the intrusions and diversions of the witness stand. At the time a treatise is written, its author presumably would have no interest in the outcome of a particular trial which at that time depends upon fate for its occurrence.[168]

Those who opposed evidential use of learned treatises argued that (1) because science is shifting, the texts may not be trustworthy;[169] (2) the fact finder will be confused by technical information contained in the texts;[170] (3) treatises may be used unfairly by taking passages out of context; (4) medical knowledge depends more on practice than on books;[171] (5) the trial would become a "battle of the books;"[172] and (6) since learned treatises rarely are based on the author's personal observations, they are themselves full of hearsay.[173]

Analysis shows that these complaints lack substance. Certainly, if the information compiled in a text is out of date, these facts can be brought to the attention of the fact finder in much the same way as if the text's author was there and testifying.[174] So too, our adversarial system is set up so that differing views can be presented and critiqued.[175] Some scientific and medical information is difficult to understand, but it is unlikely that a party would derive much

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a lawsuit or of an individual. Their statement is made with no view to a litigation or to the interests of a litigable affair." WIGMORE 2D, *supra* note 160, § 1691, at 639-40. If litigation bias were shown, the evidence could be withheld. *Id.* at 640.

168 Harry A. Swagart III, Comment, *Federal Rule Of Evidence Admitting Learned Treatises As Substantive Evidence May Be Of Significant Litigational Importance, Especially In Products Liability Suits*, 27 S.C. L. REV. 766, 769 (1976) [hereinafter *Learned Treatises in Product Liability Litigation*].

169 WIGMORE 2D, *supra* note 160, § 1690, at 636-37. This argument concerned the inexact sciences only. Writings related to the so-called exact sciences such as mortality tables and almanacs were considered admissible because they contained accepted and recognized constant facts. *Learned Treatises*, *supra* note 125, at 465-66.

170 *Proposed Learned Treatise Rule*, *supra* note 121, at 145. *See also* WIGMORE 2D, *supra* note 160, § 1690, at 637.

171 WIGMORE 2D, *supra* note 160, § 1690, at 638.

172 WEINSTEIN'S EVIDENCE, *supra* note 75, § 803(18)(01), at 803-370.

173 *Medical Treatises in Wisconsin*, *supra* note 153, at 187.

174 Jacober v. St. Peter's Medical Ctr., 128 N.J. 475, 608 A.2d 304, 315 (N.J. 1992) (stating that "once published, a text is open to ongoing scrutiny, criticism, and revision by other members of that discipline"). *See also The Alabama Experience*, *supra* note 150, at 1189 (in response to survey concerning learned treatises, Alabama practitioners noted that treatises must be established as standard and authoritative; if it were outdated, this requirement would not be met); Dana, *supra* note 144, at 460 (an author whose theories have been superseded will not meet the requirement of Model Code 529).

175 WEINSTEIN'S EVIDENCE, *supra* note 75, § 803(18)[01] at 803-371.

benefit from a treatise if the fact finder does not understand it.[176] After all, these texts and their contents could be explained by experts in court and, where appropriate, challenged by others. Obviously, the point of a trial is to provide useful information so the fact finder can perform its function.[177]

Several early English jurists are responsible for the often stated but certainly illogical conclusion that physicians and other scientists rarely rely on authoritative texts for their information.[178] In the modern world, no one could seriously dispute that scientists and physicians learn from authoritative literature in their fields.[179] A concern about a trial devolving into a "battle of the books" also needs little comment. Certainly where scientific or medical controversy exists, the fact finder will be faced with a "battle of the experts."[180]

Finally, it is undeniable that a learned treatise assimilates the views of others reflecting the modern trend in gathering and reporting data, but this is a strength not a weakness. Progress in science and medicine is based on incremental steps, and textbooks and scientific periodicals perform a service by gathering and reporting developing scientific information.[181]

B. *The Effect of the Federal Rules of Evidence on the Admission of "Learned Treatises"*

The authors of the Federal Rules of Evidence rejected these and similar arguments against the use of learned treatises and, instead, opted for the admission of passages from scientific, medical,

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176 WIGMORE 2D, *supra* note 160, § 1690, at 637. *See also* Dana, *supra* note 144, at 460-61 (suggesting that even under the Model Code, "the wise practitioner will see that the learned writings he wants to use in evidence will be clear and reasonably understandable to the layman, and that any parts not comprehendible by the layman are adequately interpreted by a qualified expert").

177 Lewandowski v. Preferred Risk Mutual Ins. Co., 146 N.W.2d 505, 509 (Wis. 1966) (finding that substantive admission of learned treatises "is but another example of accepting the scientific process in the search for truth instead of reliance upon the efficacy of an oath as a guaranty of trustworthiness").

178 Wigmore noted Chief Justice Tindall's comment in *Collier v. Simpson* that "[p]hysic depends more upon practice than law does" as the starting point for this view. WIGMORE 2D, *supra* note 160, § 1691 at 638 (citation omitted).

179 WIGMORE 2D, *supra* note 160, § 1690 at 638; WEINSTEIN'S EVIDENCE, *supra* note 75, § 803(18)(01), at 803-372; *Learned Treatises In Wisconsin*, *supra* note 122, at 274.

180 WEINSTEIN'S EVIDENCE, *supra* note 75, § 803(18)(01), at 803-371; *Learned Treatises in Product Liability Litigation*, supra note 168, at 770; MORGAN 5TH, *supra* note 160, at 319.

181 *The Alabama Experience*, *supra* note 150, at 189. Under the Federal Rules of Evidence, hearsay within hearsay is not inadmissible if each part of the combined statement fits within an exception to the hearsay rule. FED. R. EVID. 805.

and other authoritative texts.[182] Federal Rule of Evidence 803(18) permits "statements contained in published[183] treatises, periodicals or pamphlets on a subject of history, medicine or other science or art" to be received in evidence if the publication is established as a reliable authority.[184] This showing can be made through an expert

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182 Opponents to substantive use of learned treatises asked Congress to reject or otherwise modify the rule. Judge Clifford O'Sullivan of the Sixth Circuit surmised that the rule was the product of academics with little or no trial experience. He argued that judges would be unable to effectively resolve contests as to which books were "learned treatises." Letter from Judge Clifford O'Sullivan to Hon. James Harvey, Member of Congress (April 4, 1973) (reprinted in *Hearings*, *supra* note 75 at 10-20). Tennessee District Court Judge Robert M. McCrae, Jr., also predicted problems in determining what constituted a learned treatise. He submitted materials suggesting that there was no such thing as an authoritative textbook since their contents range from poor to excellent. Letter from Judge Robert M. McCrae, Jr. to Hon. William L. Hungate (August 30, 1973) *reprinted in Hearings*, *supra* note 75, at 330-31. Similarly, a Special Committee recommended replacing the words "relied upon him in direct examination" with "or relevant to such cross examination" in an apparent effort to limit use of learned treatise for impeachment. *Hearings*, *supra* note 75, at 120.

Similarly, one commentator critiqued the proposed rule because it lacked: (1) a mechanism to assist the jury in reconciling various interpretations of the same article; (2) adequate criteria to ensure that the witness was an expert in the field in which the text was offered; and (3) failed to differentiate between treatises and pamphlets. *See Proposed Learned Treatise Rule*, *supra* note 121, at 146-48.

On the other hand, the Committee on Federal Evidence and Procedure of the Association of Trial Lawyers of America ("ATLA") urged that the proposed rule did not go far enough in addressing the problems faced by plaintiffs in medical malpractice cases. Noting the difficulty plaintiffs encountered in obtaining expert testimony, ATLA complained the usefulness of the rule would be defeated by conditioning introduction of a learned treatise through an expert witness. ATLA recommended dispensing with this requirement. *See* Position Paper on Proposed Federal Rule of Evidence No. 803(18), *reprinted in Hearings*, *supra* note 75, at 136-37.

183 United States v. Jones, 712 F.2d 115, 121 (5th Cir. 1983) (confirming that the prior inconsistent testimony of a different government expert from a different trial is not a learned treatise under Federal Rule of Evidence 803(18)). Specifically, the Fifth Circuit stated:

> The learned treatise doctrine is confined to published works that have been subjected to widespread collegial scrutiny. It has never been extended to allow admission of the prior inconsistent testimony of another expert. The construction urged by the appellants is missing the element of trustworthiness that is inherent in the learned treatise exception. We decline to adopt it.

Id.

184 Federal Rule of Evidence 803(18) provides:

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

FED. R. EVID. 803(18).

called by that party, by the adversary, or appointed by the court. The court may also judicially recognize the treatise as reliable. Once recognized, passages from the text may be read to the jury during the direct testimony to support or bolster an expert's opinions.[185] The treatise may also be employed on cross-examination both for impeachment and as substantive evidence to contradict an expert's views.[186] Like Federal Rule of Evidence 703, the learned treatise rule has helped to expand the information presented for a fact finder's consideration.[187] An expert may now detail the scientific or other information used to support that person's opinions.[188] This is particularly apt because courts rightly have

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185 Relevant excerpts also may be presented in chart form for the jury's consideration. Alexander v. Conveyors & Dumpers, Inc., 731 F.2d 1221, 1228-29 (5th Cir. 1984) (noting that counsel was permitted to display photographic enlargements of relevant portions of safety code); United States v. Mangan, 575 F.2d 32, 48 n.18 (2d Cir. 1978) (suggesting that charts containing excerpts from learned treatises may be received in evidence where they had been fully explored with the expert; the last sentence of the rule is designed to prevent the jury from "rifling through a learned treatise and drawing improper inferences from technical language it might not be able properly to understand without expert guidance"), *cert. denied*, 439 U.S. 931 (1978); Rossell v. Volkswagen of America, 709 P.2d 517, 528-30 (Ariz. 1985) (finding no abuse of discretion when charts detailing effects of carbon monoxide levels on humans were provided to the jury to illustrate the basis of expert testimony), *cert denied*, 476 U.S. 1108 (1986).

186 *See generally* Edward J. Imwinkelried, *A Comparativist Critique Of The Interface Between Hearsay And Expert Opinion In American Evidence Law*, 33 B.C. L. REV. 1 (1991) [hereinafter *A Comparativist Technique*]; Edward J. Imwinkelried, *The "Bases" Of Expert Testimony: The Syllogistic Structure Of Scientific Testimony*, 67 N.C. L. REV. 1 (1988). Professor Imwinkelried argues that Federal Rule of Evidence 803(18) is nevertheless too conservative. Imwinkelried posits that expert testimony consists of two parts: (1) the major premise, i.e., the underlying scientific principle or theory upon which the opinion is grounded; and (2) the minor premise, i.e., the case specific data. *A Comparativist Technique*, *supra*, at 19-26. Unlike other common law countries, the United States limits evidence of the major premise to published and written material. Imwinkelried would allow experts greater latitude in this area. He advocates eliminating the requirement that the scientific information be written or published and allowing experts to discuss hearsay reports of another experts' research. On the other hand, he argues that the Federal Rules of Evidence go too far in relaxing the hearsay rule with respect to the expert's minor premise. *See id.* at 35.

187 George C. Pratt, *A Judicial Perspective On Opinion Evidence Under The Federal Rules*, 39 WASH. & LEE L. REV. 313, 321 (1982) [hereinafter *A Judicial Perspective*].

188 Experts may also refer to various government reports during the course of their scientific research. These government reports, of course, can be relied upon under Federal Rule of Evidence 703 in support of an expert opinion. They may also qualify as learned treatises under Federal Rule of Evidence 803(18) and as government evaluation reports under Federal Rule of Evidence 803(8)(C).

In *Kehm v. Procter & Gamble Manufacturing Co.*, the Eighth Circuit approved the receipt of several epidemiologic studies published by the Center for Disease Control, a federal agency, concerning tampons and their relationship to toxic-shock syndrome. Kehm v. Procter & Gamble Mfg. Co., 724 F.2d 613, 618-20 (8th Cir. 1983). The court there reasoned that these materials were the type of government reports that the

accorded significant weight to published scientific and medical literature when grappling with such questions. The federal district court in *Richardson v. Richardson-Merrell, Inc.*,[189] a pharmaceutical product liability case, for example, stressed the role of published scientific literature in resolving the question of whether Bendectin was responsible for birth defects in children whose mothers had taken the drug during their pregnancies. The *Richardson* court observed that the literature on that subject "collectively represents the sum of all that can be said to be scientifically 'known' of the matter . . . . [T]he 'literature' is to scientists both the ultimate authority as to and the most respected repository of scientific knowledge."[190] In short, the effective use of treatises gives the fact finder a better understanding of the issues in dispute, thus facilitating performance of its job.[191]

Only passages from "reliable authorit[ies]" may be received under this Rule.[192]

Federal Rules of Evidence anticipated would be received in evidence under an exception to the hearsay rule. The court stated:

> In the case at hand, the district court found that the CDC and state case studies employed procedures and methods widely accepted in the field of epidemiology . . . . [E]pidemiologists regularly rely on studies of this kind. Furthermore, we note the timeliness of the investigations, the special skill of the agencies conducting them, and their lack of any motive for conducting the studies other than to inform the public fairly and adequately.

Id. at 619.

Obviously, Federal Rule of Evidence 803(8)(C) provides another important potential source of information for experts. If the information is received under Federal Rule of Evidence 803(8)(C), it is in evidence and may be used for all purposes.

189 649 F.Supp. 799 (D.D.C. 1986), *aff'd*, 857 F.2d 823 (D.C. Cir. 1988), *cert. denied*, 493 U.S. 882 (1989).

190 *Id.* at 802. *See also generally* Barry L. Shapiro & Marc S. Klein, *Epidemiology in the Courtroom: Anatomy of an Intellectual Embarrassment*, 1 PHARICOEPIDEMIOLOGY 87-115 (Stanley A. Edlavitch ed., 1989).

191 Loven v. Texas, 831 S.W.2d 387, 395 (Tex. Ct. App. 1992) (stating that "[a] treatise will better communicate the basics of a particular subject to the jury than will an expert speaking extemporaneously"). Ann St. Ledger, *Modification of the Learned-Treatise Doctrine in New Jersey: A Necessary Reform in Medical Malpractice Litigation*, 98 DICK. L. REV. 765, 783 (1994) [hereinafter *Learned Treatise Rule in New Jersey*]. Because, realistically, it may have been difficult for the jury to disregard the substance of a learned treatise and to use it only for impeachment, the rule "enables the jury to function more effectively." *Id.*

192 Dawsey v. Olin Corporation, 782 F.2d 1254, 1265-64 (5th Cir. 1986) (ruling that because defendant's expert refused to acknowledge a manual published by the National Institute of Occupational Health and Safety as authoritative and plaintiff did not offer any additional testimony concerning the manual, the court properly excluded it under Federal Rule of Evidence 803(18)); Burgess v. Premier Corporation, 727 F.2d 826, 833-34 (9th Cir. 1984) (finding sufficiency in plaintiff's recognition of author as preeminent industry expert along with testimony that defendant required

> Such foundation is necessary to establish the trustworthiness of the treatise as viewed by professionals in that field. Learned treatises are considered trustworthy because "they are written primarily for professionals and are subject to scrutiny and exposure for inaccuracy, with the reputation of the writer at stake." Failure, therefore, to lay a foundation as to the authoritative nature of a treatise requires its exclusion from evidence because the court has no basis on which to view it as trustworthy.[193]

One of the questions that immediately comes to mind is what sort of materials will be received as authoritative under Federal Rule of Evidence 803(18). Certainly, medical texts are most commonly used under its auspices.[194] Courts have also found that Federal Rule of Evidence 803(18) permits the receipt of information from medical journal articles,[195] a published letter to the editor of a scientific journal,[196] safety codes,[197] an article from a trade maga-

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its salesman to read it and recommended it to investors to "substantiate the idea that the books were accepted authority").

193 Schneider v. Revici, 817 F.2d 987, 991 (2d Cir. 1987) (quotations omitted). *Schneider* was a medical malpractice action arising out of defendant's unconventional treatment of plaintiff's breast cancer. *Id.* at 988. On appeal following verdict for plaintiff, defendants argued that the court improperly excluded defendant's text on physiopathology. The reviewing court, however, agreed that defendant had failed to lay a proper foundation with his own witness. *Id.* at 991. Apparently, the defendant ignored the court's instruction to "get some expert to come in here and testify that it is a recognized treatise as the rule requires." *Id.*

In some instances, however, courts have found that an expert has inferentially conceded the authoritativeness of a report by recognizing the work as standard. *See, e.g.*, Jacober v. St. Peter's Medical Center, 128 N.J. 475, 485, 608 A.2d 304, 311 (N.J. 1992). When opposing counsel does not object to a report's use on cross-examination, the material may be admitted under Federal Rule of Evidence 803(18). Dawson v. Chrysler Corp., 630 F.2d 950, 961 (3d Cir. 1980). Similarly, when a witness regularly consults a particular magazine to keep up to date, a foundation for its reliability may be established. Allen v. Safeco Ins. Co. of America, 782 F.2d 1517, 1519-20 (11th Cir. 1986). Of course, a party does not concede the reliability of an article by listing it on a proposed trial exhibit list. Meschino v. North American Drager, Inc., 841 F.2d 429, 434 (1st Cir. 1988).

194 Wesley Kobylak, Annotation, *Treatises, Periodicals Or Pamphlets As Exception To Hearsay Rule Under Rule 803(18) Of The Federal Rules Of Evidence*, 64 A.L.R. FED. 971, 973 (1983); Annotation, *Medical Books Or Treatises As Independent Evidence*, 84 A.L.R. FED. 1338 (1987); Annotation, *Use of Medical Or Other Scientific Books Or Treatises In Cross-Examination Of Expert Witnesses*, 82 A.L.R. FED. 440 (1987).

195 Ward v. United States, 838 F.2d 182, 187 (6th Cir. 1988).

196 Conde v. Velsicol Chemical Corp., 804 F. Supp. 972, 990-92 (S.D. Ohio 1992).

197 Muncie Aviation Corp. v. Party Doll Fleet, Inc., 519 F.2d 1178, 1184 (5th Cir. 1975). The *Muncie* court set forth the rationale for treating safety codes as learned treatises as follows:

> In holding admissible advisory materials promulgated by a governmental agency, this court's decision is in accord with the modern trend of cases finding national safety codes representative of "a consensus of

zine,[198] a pamphlet published by the American Heart Association,[199] and a safety report prepared for use by a governmental agency.[200] However, articles from *Newsweek*,[201] warnings on over the counter drugs (even when published in the *Physicians Desk Reference*),[202] and written recommendations for a particular industry that have not been adopted[203] have been rejected by courts as unreliable authorities.

Courts have found that articles do not automatically qualify as reliable authorities simply because they are published in a reputable journal.[204] In *Meschino v. North American Drager, Inc.*,[205] for example, plaintiff sought to introduce information from two articles published in *Health Devices Magazine*. The trial judge declined to find that either article was a reliable authority within the meaning of Federal Rule of Evidence 803(18), and the Fifth Circuit sustained that judgment, stating:

[W]e would not accept plaintiff's argument that the contents of

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opinion carrying the approval of a significant segment of an industry" and offerable as exemplifying safety practices prevailing in the industry.

Id. at 1183 (quotation omitted). *See also* Alexander v. Conveyors & Dumpers, Inc., 731 F.2d 1221, 1229 (5th Cir. 1984) (noting that safety codes may under the proper circumstances be received as exhibits under Rule 803(24)); Johnson v. William C. Ellis & Sons Iron Works, Inc., 609 F.2d 820, 822 (5th Cir. 1980) (including American Standard Safety Code for Power Presses published by the American Standard Association as learned treatise); Frazier v. Continental Oil Co., 568 F.2d 378, 382-83 (5th Cir. 1978) (holding that National Fire Protection Association Code is learned treatise); Gordy v. City of Canton, Miss., 543 F.2d 558, 564 (5th Cir. 1976) (holding that National Electrical Safety Code is learned treatise).

198 Allen v. Safeco Ins. Co. of America, 782 F.2d 1517, 1519-20 (11th Cir. 1986) (finding that the lower court did not err in allowing counsel to read from *Fire Assoc. Investigator* articles).

199 Tart v. McGann, 697 F.2d 75, 77-78 (2d Cir. 1982).

200 Dawson v. Chrysler Corp., 630 F.2d 950, 960-61 (3d Cir. 1980) (considering reports on automobile crashworthiness prepared for the United States Department of Transportation by the Calspan Corporation).

201 O'Brien v. Eli Lilly & Co., 668 F.2d 704, 718-19 (3d Cir. 1981) (Higginbotham, J., dissenting) (chastising the majority for finding that a *Newsweek* article put plaintiff on notice of DES claim for purposes of statute of limitations when such article would not qualify as affirmative proof under Rule 803(18) or any other Federal Rule of Evidence); Baker v. Wade, 106 F.R.D. 526, 532 (N.D. Tex. 1985) (suggesting that "medical articles" from general news or science magazines such as *Time, Newsweek, Saturday Evening Post, Science News* and *The Homosexual Network Magazine* would not be sufficiently reliable and authoritative to qualify under Rule 803(18)), *rev'd on other grounds*, 769 F.2d 289 (5th Cir. 1985), *cert. denied*, 478 U.S. 1022 (1986).

202 In re Richardson-Merrell, Inc. Bendectin Products Liability Litigation, 624 F. Supp. 1212, 1230-32 (S.D. Ohio 1985), *aff'd*, 857 F.2d 290 (6th Cir. 1988), *cert. denied*, 488 U.S. 1006 (1989).

203 Grossheim v. Freightliner Corporation, 974 F.2d 745, 753-54 (6th Cir. 1992).

204 Zimmer v. State, 477 P.2d 971, 977 (Kan. 1970).

205 841 F.2d 429 (1st Cir. 1988).

> all issues of a periodical may be qualified wholesale under Rule 803(18) by testimony that the magazine was highly regarded. In these days of quantified research and pressure to publish, an article does not reach the dignity of a "reliable authority" merely because some editor, even a most reputable one, sees fit to circulate it. Physicians engaged in research may write dozens of papers during a lifetime. Mere publication cannot make them automatically reliable authority.[206]

Obviously, courts should be unwilling to let writings be transformed into learned treatises by the talismanic pronouncement of a testifying expert, although the literal language of Federal Rule of Evidence 803(18) would suggest such a result. As Federal Rule of Evidence 803(18) is further clarified, the issue of whether a writing is a reliable authority will likely be resolved with appellate deference being given to the trial judge's views.[207]

As a general proposition, Federal Rule of Evidence 803(18) should not be read by courts in such a way as to unduly involve them in judging the reliability of the art or science expressed in individual texts and treatises. Cross-examination should be relied upon to educate the fact finder as to just how reliable the writing and its sponsor are in this regard. Rather, courts should focus on the expressive vehicle employed by the author expert to determine whether the writing in question is a reliable authority.[208]

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206 *Id.* at 434. Of course, the publication may be considered as one factor in determining whether the article appearing within it is reliable. The authors and their reputations and training should be considered as well. The Fifth Circuit declined to recognize *Medical Surgical Nursing* as an authoritative medical text because it was authored by registered nurses. Hemingway v. Ochsner Clinic, 608 F.2d 1040, 1047 (5th Cir. 1979). The rules for determining what publications are reliable authorities are murky. It would appear, however, from the developing case law that articles published in a journal must independently be judged as reliable before their contents can be used. *See* Allen v. Safeco Ins. Co. of America, 782 F.2d 1517, 1519 & n.3 (11th Cir. 1986).

207 *Zimmer*, 477 P.2d at 977; State v. Jensen, 735 P.2d 781, 791 (Ariz. 1987).

208 The Supreme Court endorsed this approach in *Daubert*. On remand, the Ninth Circuit found that scientific testimony relied upon by plaintiffs failed to meet the *Daubert* test. Daubert v. Merrell Dow Pharmaceuticals, Inc., 43 F.3d 1311 (9th Cir. 1995). Of particular interest to the court was the inability of plaintiffs' experts to successfully subject their work to peer review and publication. *Id.* at 1318-19. While the court acknowledged that publication does not guarantee the correctness of the conclusions offered, it found publication attested to the methodology employed, stating:

> That the research is accepted for publication in a reputable scientific journal after being subjected to the usual rigors of peer review is a significant indication that it is taken seriously by other scientists, i.e. that it meets at least the minimal criteria of good science. (citations omitted) . . . Despite the many years the controversy has been brewing, no one in the scientific community—except defendant's expert—has deemed

Textbooks, treatises, original research articles, and review articles are usually prepared with sufficient rigor and care so that recognition by a testifying expert gives them sufficient reliability to qualify as authoritative.[209] Abstracts of unpublished studies, some letters to the editors of scientific journals and similar writings, on the other hand, may lack the rigor to qualify as reliable authorities under Federal Rule of Evidence 803.[210] Nevertheless, they may have sufficient reliability so that they may be considered by an expert in forming his or her opinion under Federal Rule of Evidence 703.[211]

There is a difference in permitting a text to speak for itself under Federal Rule of Evidence 803(18) and in playing a role in the formulation of an expert opinion, as permitted under Federal Rule of Evidence 703. A hearing should be held under Federal Rule of Evidence 104 where there is doubt as to the reliability of the authority.[212]

Federal Rule of Evidence 803(18) forbids the receipt of a learned treatise as a trial exhibit.[213] The prohibition is intended to

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> these studies worthy of verification, refutation or even comment. It's as if there were a tacit understanding that what's going on here is not science at all, but litigation.

Id. at 1318.

209 *See generally* WIGMORE 2D, *supra* note 160, § 1690, at 635-38.

210 Commonwealth v. Jackson, 585 A.2d 36, 39-40 (Pa. Super Ct.), *appeal denied*, 596 A.2d 155 (1991) (concluding that *Merck Manual*, a commercial publication abstracting scientific data not subject to review by the scientific community, does not qualify as a learned treatise); *see also Jensen*, 735 P.2d at 791 (finding no abuse of discretion where court refused to admit videotape concerning post trauma stress disorder as learned treatise); People v. Harbold, 464 N.E.2d 734, 747-48 (Ill. App. Ct. 1984) (ruling that Illinois learned treatise rule does not extend to unpublished population frequency statistics). *But see* Schneider v. Cessna Aircraft Co., 722 P.2d 321, 327-30 (Ariz. Ct. App. 1985) (relating to videotape concerning subject of teaching disorders which was used as an aid in teaching students qualified as learned treatise); Loven v. State, 831 S.W.2d 387, 395-96 (Tex. Ct. App. 1992) (same).

211 In re Japanese Electronics Product Antitrust Litigation, 723 F.2d 238, 282 (3d Cir. 1983); *In re Richardson-Merrell*, 624 F. Supp. at 1232. *See also A Judicial Perspective*, *supra* note 187, at 321.

212 United States v. Downing, 753 F.2d 1224, 1237 (3d Cir. 1985).

213 FED. R. EVID. 803(18). Nevertheless, inadvertent violations may be viewed as "harmless error." In *Dawson v. Chrysler Corp.*, the jury brought one of the pages from a learned treatise displayed in chart form into the jury room. Dawson v. Chrysler Corp., 630 F.2d 950, 961 (3d Cir. 1980). While the court acknowledged that the admission of the document was inconsistent with the rule, it found the error harmless. Since there was testimony concerning the publication and the chart, the exhibit was "merely duplicative of the testimony." *Id.* Similarly, if the complaining party provided the texts to the court, the objection may be deemed waived. Weise v. United States, 724 F.2d 587, 590 (7th Cir. 1984) (ruling that government waived error of judge's consideration of medical literature that was not introduced through expert testimony and was not reviewed by court as an exhibit when government attorney marked and pro-

prevent a fact finder from perusing the book without the assistance of the expert witness. Clearly, the Rule intended that information be received from such a text only when an expert is available to explain its meaning.[214] Federal Rule of Evidence 803 (18) also was designed to ensure that the fact finder would not give undue weight to the text during its deliberations.[215] However, in open court, an expert may display the text to the fact finder and read passages from it.[216] Moreover, visual display of the passages, charts, or pictures from the authority to the fact finder during the course of trial should be permitted despite some ambiguity in the Rule itself.[217]

The information contained in the learned treatise, of course, must be relevant to the issues in dispute to qualify for admission.[218] However, even where relevance is established, the evidence may still be excluded under the balancing test in Federal Rule of Evidence 403. At least one federal court has used this Rule to exclude

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vided the material to the court). There is probably no error where the disputed evidence was made available to the jury through other means. Tart v. McGann, 697 F.2d 75, 78 (2d Cir. 1982). *See also* Johnson v. William C. Ellis & Sons Iron Works, 609 F.2d 820, 823 n.1 (5th Cir. 1980) (marking learned treatise as exhibit is not inconsistent with Rule 803(18) because it is customary method of identification); Garbincius v. Boston Edison Co., 621 F.2d 1171, 1175 (1st Cir. 1980) (deciding harmless error where booklets on traffic, highway construction, and accident prevention were given to jury); Gordy v. City of Canton, Mississippi, 543 F.2d 558, 564 (5th Cir. 1976) (ruling that the fact that the jury took portions of the National Electrical Safety code into jury room was harmless error in light of other evidence of defendant's negligence). *But see* Dartez v. Fibreboard Corp., 765 F.2d 456, 465 (5th Cir. 1985) (concluding that medical articles should not have been admitted into evidence and given to jury).

214 FED. R. EVID. 803(18) advisory committee's note. *See also Dartez*, 765 F.2d at 465.

215 The last sentence of the rule was added to the 1971 revised draft. *See* 51 F.R.D. 315, 421 (1971). Its purpose was to reduce the psychological impact of the written word. *Id.* at 434.

216 Ward v. United States, 838 F.2d 182, 187 (6th Cir. 1988).

217 *See supra* note 185 and accompanying text.

218 Graham by Graham v. Wyeth Laboratories Div. of American Home Products Corp., 906 F.2d 1399, 1412-14 (10th Cir. 1990), *cert. denied*, 498 U.S. 981 (1990). The district court *sua sponte* redacted portions of a report printed in JAMA. The reviewing court agreed that the redaction was inconsistent with Rule 803(18) because it distorted and hid from the jury the true nature of the writing. The court could not redact portions of the treatise to eliminate irrelevant sections if the meaning of the text was altered. *See also* Ellis v. International Playtex, Inc., 745 F.2d 292, 306 (4th Cir. 1984) (in toxic shock case, medical journal properly excluded since it did not adequately bear on plaintiff's symptoms); Tart v. McGann, 697 F.2d 75, 78 (2d Cir. 1982) (noting that while trial judge apparently misunderstood application of Rule 803(18), the exclusion may have been proper given the marginal relevancy of the learned treatise to plaintiff's claim); Walker v. North Dakota Eye Clinic, Ltd., 415 F. Supp. 891, 894 (D.N.D. 1976) (not permitting the reading into evidence excerpt from article concerning combatant heterotropia when plaintiff suffered from incombatant heterotropia).

information from a text recognized as authoritative by an expert.[219]

Federal Rule of Evidence 803(18) clearly strikes the evidential balance in favor of the fact finder receiving information from such texts. We must, however, ensure that there is an adequate opportunity to review and challenge expert information contained in learned treatises.[220] The pretrial discovery process should provide for adequate prior notice of the intention to use learned treatises as well as the identity of them. It is our view that modern discovery rules provide adequate safeguards in this respect.[221]

C. *The Adoption and Modification of Federal Rule of Evidence 803(18) by the States*

A majority of states have adopted Rule 803(18) in either words or substance.[222] Others have restricted the conditions under which

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219 Schneider v. Revici, 817 F.2d 987, 991 (2d Cir. 1987). *But see* Shultz v. Rice, 809 F.2d 643, 647 (10th Cir. 1986) (finding no error for defense counsel to mention the lack of medical articles offered by plaintiff during closing argument in a malpractice case).

220 The Advisory Committee acknowledged the potential problem of unfair surprise. Although three members of the committee supported reasonable notice no later than the pretrial conference, the committee decided to address this problem in the advisory note. *Hearings, supra* note 75, at 290. The proposed language was never included. *Id.*

221 FED. R. CIV. P. 26(a)(2) and (b)(4). One commentator makes a similar observation:

> Only in situations where diligent preparation would not afford the desired protection should the court provide extra relief. For instance, in a particularly complex case, the offering party may be required to inform its opposition several days prior to trial of treatise evidence which is to be used; or during trial the court may grant the opposition a delay in which to prepare a defense against the same.

Learned Treatise in Product Liability Litigation, supra note 168, at 772 (footnote omitted).

222 Alaska (ALASKA R. EVID. 803(18)); Arizona (ARIZ. R. EVID. 803(18)); Arkansas (ARK. R. EVID. 803(18)); Delaware (DEL. UNIF. R. EVID. 803(18); Hawaii (HAW. R. EVID. 803(18)); Idaho (IDAHO R. EVID. 803(18)); Iowa (IOWA R. EVID. 803(18)); Kansas (KAN. R. EVID. 60-460(cc)); Kentucky (KY. R. EVID. 803(18)); Maryland (MD. R. EVID. 5-803(18)); Minnesota (MINN. R. EVID. 803(18)); Mississippi (MISS. R. EVID. 803(18)); Montana (MONT. R. EVID. 803(18)); Nevada (NEV. REV. STAT. TIT. 4, § 51.255 (adopting the preliminary draft of Rule 803(18)); New Hampshire (N.H. R. EVID. 803 (18)); New Jersey (N.J. R. EVID. 803(C)(18)); New Mexico (N.M. R. EVID. 11-803(R)); North Carolina (N.C. R. EVID. 803(18)); North Dakota (N.D. R. EVID. 803(18)); Oklahoma (OKLA. EVID. CODE § 2803(18)); Puerto Rico (P.R. R. EVID. 65 (R)); Rhode Island (R.I. R. EVID. 803(18)); South Dakota (S.D. R. EVID. 803(18)); Texas (TEX. R. CIVIL EVID. 803(18)); Utah (UTAH R. EVID. 803(18)); Vermont (VT. R. EVID. 803(18)); Virginia (VA. R. EVID. 803(18)); Virgin Islands (V.I. ST. FRE 803(18) and tit. 5, 932); Washington (WASH. R. EVID. 803(a)(18)); West Virginia (W. VA. R. EVID. 803(18)); Wisconsin (WIS. R. EVID. 908.03(18)); Wyoming (WYO. R. EVID. 803(18)).

See also Kirkpatrick v. State, 574 So. 2d 1025, 1028 (Ala. Crim. App. 1990) (In Alabama, a learned treatise, essay or pamphlet on a subject of science or art is admissi-

learned treatises may be used as substantive evidence. For example, Louisiana has limited affirmative use of such treatises to civil cases.[223] South Carolina admits books of science only under very limited circumstances, including when a question of sanity is posed.[224] Maine and Massachusetts have deleted the phrase "relied upon by him in direct examination," apparently restricting use of learned treatises to cross-examination.[225] In Nebraska, certain treatises prepared by indifferent parties are "presumptive evidence" of facts of general notoriety.[226]

Several states have addressed the use of learned treatises as demonstrative evidence and the receipt in evidence of passages, graphs, or charts taken from learned treatises. New Jersey's evidence rule explicitly permits graphs contained in learned treatises to be shown to the jury.[227] Colorado permits passages taken from learned treatises to be received as exhibits.[228] In New Hampshire, passages from learned treatises may be received as exhibits if the court finds that the "probative value of the statements outweigh their prejudicial effect."[229]

A number of states refuse to recognize Federal Rule of Evidence 803(18) and continue the common law practice of limiting the use of learned treatises to impeachment purposes only.[230] In

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ble as an exception to the hearsay rule provided that an expert on the subject testifies that it is a standard or trustworthy authority on the subject. Further, a properly authenticated treatise, regardless of whether it is introduced into evidence, can be used by a defendant on cross-examination to impeach or discredit an expert's testimony.), *aff'd*, 624 So. 2d 1116 (Ala. Crim. App. 1993); Ames v. Sears, Roebuck & Company, 514 A. 2d 352, 357 (Conn. App. Ct.) (In Connecticut, portions of a treatise that is recognized as authoritative by an expert and influenced or confirmed the expert's opinion may, in the exercise of the court's discretion, be admitted into evidence under the learned treatise exception to the hearsay rule.), *certif. den.*, 515 A.2d 378 (1986).

Mississippi and Virginia require disclosure during discovery of the learned treatises designated for use during direct examination of an expert. MISS. R. EVID. 803(18); VA. ST. § 8.01-401.1.

223 LA. R. EVID. 2803(18).

224 S.C. ST. § 19-5-410. However, scientific treatises may be used in the cross-examination of an expert so long as they are not considered as direct proof by the jury. Baker v. Port City Steel Erectors, Inc., 200 S.E.2d 681, 682 (S.C. 1973).

225 ME. R. EVID. 803(18); Commonwealth v. Sneed, 597 N.E.2d 1346, 1350-52 (Mass. 1992) (adopting proposed state rule concerning learned treatises).

226 NEB. ST. § 25-1218.

227 N.J. R. EVID. 803(c)(18).

228 COLO. R. EVID. 803(18).

229 N.H. R. EVID. 803(18).

230 Florida (Green v. Goldberg, 630 So. 2d 606, 609 (Fla. Dist. Ct. App. 1993) ("Under section 90.706, Florida Statutes (1991), authoritative publications can only be used during the cross examination of an expert and not to bolster the credibility of an expert or to supplement an opinion of the doctor which has already been

some states, a learned treatise may be used to impeach if an expert relies on it or recognizes it as authoritative.[231] In other states, impeachment using a learned treatise is permissible if it is established as authoritative by any means.[232] In California, an expert can be cross-examined on a learned treatise if he or she relied upon it in forming an opinion or if the publication has been admitted in evidence.[233]

IV. EXPERT TESTIMONY AND THE INTERACTION OF FEDERAL RULES OF EVIDENCE 703 AND 803(18)—A COMPARISON OF EVIDENCE RULES IN ILLINOIS, OHIO AND NEW YORK AND THE FEDERAL RULES OF EVIDENCE

A. *Overview*

Federal Rules of Evidence 703 and 803(18) are the major parts of a comprehensive scheme designed to allow experts to advise the fact finder of the bases for their opinions and to support or bolster their opinions by resort to the authoritative literature in their respective fields. Commentators have observed that Federal Rule of Evidence 803(18) should operate "in tandem with Rules 702 and 703."[234] When the Rules are used together, they permit experts to refer to a broad spectrum of information in reaching their opin-

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formed.")); Indiana (Miller v. Griesel, 297 N.E.2d 463, 472 (Ind. Ct. App. 1973) ("[I]t is recognized in Indiana that it is proper cross examination, in order to test the learning of a witness who testifies as an expert, to refer to books of approved authority upon the subjects under investigation"), *opinion superseded by*, 308 N.E.2d 701 (1974); Missouri (Kelly v. St. Luke's Hosp. of Kansas City, 826 S.W.2d 391 (Mo. Ct. App. 1992) (stating that medical article is inadmissible hearsay during direct examination of expert witness)).

231 New York (Labate v. Plotkin, 195 A.D.2d 444 (N.Y. App. Div. 1993) (enunciating that learned treatise may be use to impeach expert on work he recognizes as authoritative)); Ohio (Stinson v. England, 633 N.E.2d 532, 538-39 (Ohio 1994) (stating that learned treatise may be used to impeach expert witness who has relied upon the treatise or has acknowledged its authoritative nature)); Oregon (Eckleberry v. Kaiser Foundation Northern Hospitals, 359 P.2d 1090, 1092-93 (Or. 1960) (maintaining that scientific work may be used in cross-examination when witness has relied upon it in forming his opinion or is otherwise familiar with it; treatises may not be used as probative evidence)); Pennsylvania (Jones v. Constantino, 631 A.2d 1289, 1297 (Pa. Super. Ct. 1993) (holding that learned treatise on which expert relies or recognizes as a standard work in the field may be used for impeachment), *appeal denied*, 649 A.2d 673 (Pa. 1994)).

232 Georgia (State Highway Dept. v. Willis, 128 S.E.2d 351, 354 (Ga. Ct. App. 1962) (expert may be cross-examined through use of treatise so long as treatise is proven standard on the subject)); Illinois (Darling v. Charleston Community Memorial Hospital, 211 N.E.2d 253, 258-59 (Ill. 1965)); Michigan (MICH. R. EVID. 707); Tennessee (TENN. R. EVID. 618).

233 CAL. EVID. CODE § 721.

234 SALTZBURG & MARTIN, *supra* note 30, at 1433.

ions and conveying them to the fact finder.[235] As we have noted, Federal Rule of Evidence 703 is considerably broader than Federal Rule of Evidence 803(18) and allows an expert to reference virtually any type of information source provided that it is "of a type reasonably relied upon by experts in the particular field."[236]

Federal Rule of Evidence 803(18) acts as a powerful engine for truth by bringing mainstream thought on a subject into the courtroom. These learned treatises provide both a vehicle for attacking the veracity of information received under Federal Rule of Evidence 703 and for supporting an expert's opinion as well. Used together, these Rules provide the maximum amount of reasonably trustworthy information to the trier of fact.[237]

There are, however, a number of states, including many large jurisdictions, that have not adopted Federal Rule of Evidence 703, 803(18), or both.[238] In our view, the failure to adopt these rules in

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235 Michael M. Martin, *Significant Evidence Problems in Complex Litigation, Trial Evidence in the Federal Courts: Problems and Solutions in the '90's*, C829 ALI-ABA 257 at 35-36 (June 17, 1993).

236 FED. R. EVID. 703.

237 Ronald J. Allen & Joseph S. Miller, *The Common Law Theory Of Experts: Deference Or Education*, 87 NW. U. L. REV. 1131, 1133-41 (1993). The authors observe that there is a tension between deferring to the opinions of experts and fact finders being educated by them. The authors note that the preference of the common law is for education rather than deference. The use of Rule 703 and 803(18) together give experts a great deal of flexibility to express themselves. The authors suggest that permitting an expert to share with the fact finder facts and data not admitted into evidence under Rule 703 to explain the basis of the opinion "creates little more than a muddle." *Id.* at 1135. However, it seems to us that such a course does serve an important educating function for the fact finder. *But see generally* Ronald L. Carlson, *In Defense Of A Constitutional Theory Of Experts*, 87 NW. U. L. REV. 1182 (1993).

238 *See, e.g.*, California (adopting predecessor rule to FED. R. EVID. 703 (CAL. EVID. CODE § 801); failed to adopt federal learned treatise rule, but permits impeachment with a learned treatise if the witness relied on it or it was admitted into evidence (CAL. EVID. CODE § 721)); Illinois (People v. Ward, 338 N.E.2d 171, 176-77 (Ill. 1975) (adopting the substance of FED. R. EVID. 703); (Roach v. Springfield Clinic, 623 N.E.2d 246, 252-53 (Ill. 1993) (failing to adopt federal learned treatise rule)); Massachusetts (Department of Youth Serv. v. A Juvenile, 499 N.E.2d 812, 818-20 (Mass. 1986) (permitting the receipt of otherwise admissible evidence without foundation during expert testimony but rejecting Rule 703); MASS. GEN. LAWS ANN. ch. 233, § 79C (failing to adopt federal learned treatise rule generally but permits use of learned treatises in medical malpractice cases; texts can be introduced into evidence in such cases)); New York (People v. Sugden, 323 N.E.2d 169, 173 (N.Y. 1974) (adopted the substance of FED. R. EVID. 703); Serota v. Kaplan, 511 N.Y.S.2d 667, 668-69 (App. Div. 1987) (failing to adopt federal learned treatise rule)); Ohio (Ohio Rule of Evidence 703 does not permit the use of facts and data not in evidence by experts); Stinson v. England, 633 N.E.2d 532, 539 (Ohio 1994) (failed to adopt learned treatise rule)); Pennsylvania (Kearns v. DeHaas, 546 A.2d 1226, 1230-31 (Pa. Super. Ct. 1988) (suggesting that Pennsylvania courts have endorsed the principles of Rule 703, but failing to adopt federal learned treatise rule).

tandem has led to chaos in the presentation of expert testimony in those states and has caused courts in those jurisdictions to create several poorly thought-out devices for the receipt of expert evidence. A review of the rules for presentation of evidence in Illinois, Ohio, and New York help illustrate the problems created when states fail to adopt some or all of the innovations in expert testimony endorsed in the Federal Rules of Evidence.

B. Illinois

Illinois is one of a minority of states that has not adopted an evidence code. The state's evidence law continues to be judge made. Illinois has endorsed the policies reflected in Federal Rule of Evidence 703 and permits experts to base their opinions on inadmissible hearsay. The state, however, has not adopted the learned treatise rule—passages from authoritative texts may not be received as evidence.

The failure to adopt the policies reflected in Federal Rule of Evidence 803(18) has made it difficult for Illinois courts to determine how much information relied upon by an expert may be disclosed to the fact finder. In our view, this problem has needlessly complicated the presentation of expert testimony and has deprived Illinois fact finders of valuable information.

Prior to 1965, use of learned treatises in Illinois even for impeachment purposes was limited to texts upon which an expert expressly based his or her opinion.[239] In *Darling v. Charleston Community Memorial Hospital*,[240] however, the Illinois Supreme Court abandoned this approach and opted for a rule permitting the liberal use of treatises for impeachment purposes. The court explained:

> To prevent cross-examination upon the relevant body of knowledge serves only to protect the ignorant or unscrupulous expert witness. In our opinion expert testimony will be a more effective tool in the attainment of justice if cross-examination is permitted as to the views of recognized authorities, expressed in treatises or periodicals written for professional colleagues.[241]

Illinois courts, however, have not further expanded the use of learned treatises in the courtroom.

At about the time the Federal Rules of Evidence went into ef-

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[239] Ullrich v. Chicago City Ry., 106 N.E. 828, 829 (Ill. 1914); Bloomington v. Shrock, 110 Ill. 219 (1884).

[240] 211 N.E.2d 253 (Ill. 1965).

[241] *Id.* at 259.

fect, Illinois began expanding its view of the permissible bases of expert opinion. In *People v. Ward*,[242] the Illinois Supreme Court endorsed a policy similar to that of Federal Rule of Evidence 703 when it permitted expert testimony based on medical records not admitted in evidence.

Conflicts between the desire to liberalize the information sources upon which experts could rely and the restrictive learned treatise rule were apparent from the outset. In *Lawson v. G.D. Searle & Co.*,[243] plaintiff unsuccessfully sued a drug company claiming that an oral contraceptive, Envoid, caused his wife's death.[244] During the appellate process, plaintiffs complained that defendant's expert witness used certain studies and reports in forming his opinion. These studies, however, were never admitted as evidence. The Illinois Supreme Court rejected the complaint, finding that these studies were part of the mass of information that contributed to the witness's expertise.[245] Ironically, the court was comforted by the fact that the expert did not mention the reports by name nor did he recite the data contained in the reports to the fact finder as support for his conclusions.[246]

After Illinois formally adopted Federal Rule of Evidence 703 in *Wilson v. Clark*,[247] it remained an open question whether medical literature and other authoritative texts could be specifically referred to and discussed as one of the bases of an expert opinion. *Mielke v. Condell Memorial Hospital*[248] addressed this issue. In *Mielke*, the appellate court precluded plaintiff's expert from discussing his literature review about drug interactions between Gentamicin and Lasix. Specific reference to the literature was precluded because the authors of the articles were not available for cross-examination.[249] The appellate court recognized that an expert could base an opinion on such articles as well as identifying them as sources.[250] In the view of the appellate court, however, discussing the data contained in the articles represented an impermissible substantive use.[251]

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242 338 N.E.2d 171 (Ill. 1975).

243 356 N.E.2d 779 (Ill. 1976).

244 *Id.* at 780.

245 *Id.* at 786-87.

246 The court also suggested that use of these studies during cross-examination of the witness would have been appropriate. *Id.* at 786.

247 417 N.E.2d 1322 (Ill.), *cert. denied*, 454 U.S. 836 (1981).

248 463 N.E.2d 216 (Ill. App. Ct. 1984).

249 *Id.* at 224.

250 *Id.* at 226.

251 *See also* Walski v. Tiesenga, 381 N.E.2d 279, 283-84 (Ill. 1978) (holding that the

Mielke, however, did not end this debate. In 1986, the Illinois Supreme Court addressed the question of whether experts could disclose the bases of their opinions to the jury. In *People v. Anderson*,[252] defendant was convicted of a double homicide despite his insanity defense. The defendant complained that his expert was not permitted to explain the reasons why the defendant was insane. The trial court had limited the expert to telling the jury that his opinion was based on reports he had read.[253]

The Illinois Supreme Court acknowledged that neither *Wilson v. Clark* nor Federal Rule of Evidence 703 explicitly addressed the question of whether such facts could be provided to the jury.[254] The court concluded, however, that "the logic underlying rule 703 and this court's decision in *Ward* and *Wilson* compels the conclusion that an expert should be allowed to reveal the contents of materials upon which he reasonably relies in order to explain the basis of his opinion."[255] The court reasoned that since Federal Rule of Evidence 703 was designed to broaden the basis of expert testimony and to allow experts to function more naturally in the courtroom, "it would be both illogical and anomalous to deprive the jury of the reasons supporting that opinion."[256] The court believed that permitting an expert to offer such an explanation did not violate the hearsay rule because the evidence was not received for its truth, but, rather, for the purpose of explaining the expert's reasoning process.[257] The court required a limiting instruction advising the jury to consider such statements for this purpose only.[258]

After *People v. Anderson*, it appeared that experts would be permitted to reveal the contents of texts upon which they relied for their opinions. While the texts themselves would remain inadmissible,[259] they could be discussed so that the jury would understand

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Darling rule does not allow use of a learned treatise on cross-examination to be substantive evidence of the standard of care). *But see* Ohligschlager v. Proctor Community Hosp., 303 N.E.2d 392, 396 (Ill. 1973) (finding that while expert testimony is normally required to establish standard of care, manufacturers' instructions in this case were sufficiently reliable to be the exception to the rule).

252 495 N.E.2d 485 (Ill.), *cert. denied*, 479 U.S. 1012 (1986).

253 *Id.* at 487.

254 *Id.* at 488.

255 *Id.*

256 *Id.* at 489.

257 *Id.* at 489-90.

258 *Id.* at 490.

259 Plost v. Louis A. Weiss Memorial Hosp., 378 N.E.2d 1176, 1180 (Ill. App. Ct. 1978) (scientific works cannot be used as direct evidence). While Illinois has consistently refused to admit learned treatises for their truth, one court has suggested an exception might be made where exclusion would subject plaintiff to serious hardship.

the expert's reasoning process. In *Schuchman v. Stackable*,[260] however, the appellate court again refused to allow plaintiff's expert to "discuss certain textbooks and studies in support of his opinions." The court's reference to *Mielke* and to *Wilson* suggests that it believed the information was being offered for its truth.[261]

Several courts have followed the *Schuchman* ruling and incorrectly have barred experts from discussing medical literature despite it being the basis for their opinions.[262] Moreover, judicial efforts to distinguish the *Schuchman* ruling have added to the confusion. For example, in *Kochan v. Owens-Corning Fiberglass Corp.*,[263] a biostatistician and epidemiologist was permitted by the trial judge to discuss medical literature to demonstrate when the scientific community had first linked asbestos to several diseases. On appeal, defendant argued that this testimony was inadmissible under *Schuchman*.[264] While the appellate court correctly disagreed with this argument and permitted the testimony, its reasoning process was not comforting:

> We believe that *Schuchman* is limited to those situations where the expert is not using the content of the medical literature as a basis for his or her opinion but rather the expert is attempting to bolster his opinion by showing that other experts agree with him. The expert witness then becomes a conduit for bringing before the jury a number of opinions of other experts without incurring the cost of hiring such experts and without subjecting these other experts to cross-examination. Under these circumstances, it does not matter if the witness is an expert in the field for which he is called, but rather the only question is whether

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Fornoff v. Parke Davis & Co., 434 N.E.2d 793 (Ill. App. Ct. 1982). *See also* Alton v. Kitt, 431 N.E.2d 417, 425 (Ill. App. Ct. 1982) (finding that expert's reference to the *Physician Desk Reference* during direct testimony was not a violation of the hearsay rule because the expert had written portions of the text; it is not clear if the information was received substantively or as a basis for the opinion).

260 555 N.E.2d 1012 (Ill. App. Ct. 1990).

261 In a scathing dissent, Justice Chapman chastised the majority for ignoring the teachings of Anderson. He argued that there was no legitimate difference between use of learned treatises during cross-examination and as part of the basis of an expert's opinion because in both situations they were offered for non-substantive reasons. While falling short of advocating affirmative treatment of learned treatises, he recognized that this type of evidence was more reliable than other facts and data on which experts typically relied. *See id.* at 1026-40 (Chapman, J., dissenting).

262 Toppel v. Redondo, 617 N.E.2d 403, 405 (Ill. App. Ct. 1993) (finding no error where doctor "simply identified the article as one that he authored and at no point discussed or relied on the article during his testimony"); Weekley v. Industrial Comm'n, 615 N.E.2d 59, 63-64 (Ill. App. Ct. 1993) (affirming a court's exclusion of publications expert relied upon for his opinion on the basis of *Schuchman*).

263 610 N.E.2d 683 (Ill. App. Ct. 1993), *cert. denied*, 114 S. Ct. 1219 (1994).

264 *Id.* at 697.

the witness can read![265]

The court also suggested that the literature discussed in *Schuchman* was not essential to the expert's opinion. On the other hand, the court found the articles in *Kochran* were critical to establish when the defendant knew or should have known that asbestos caused disease.[266]

Schuchman and *Kochan* are not easily reconciled. It is difficult first to determine whether the information provided represents the foundation of an opinion or merely an effort to bolster it. What is the difference anyway? In short, despite the plain language of *People v. Anderson*, the circumstances under which experts may discuss authoritative texts in Illinois still remain unclear.[267]

At least one litigant has argued that Federal Rule of Evidence 803(18) should be adopted since it represents the logical extension of Rules 703 and 705.[268] Obviously, its adoption would serve to minimize the present confusion over the status of authoritative texts in Illinois courts. Unfortunately, the Illinois Supreme Court recently declined this invitation.[269] This failure to adopt Federal Rule of Evidence 803(18) as the law in Illinois not only has deprived the fact finder of useful information but will also, no doubt, contribute to the continuing confusion over how to apply the provisions of Federal Rule of Evidence 703 that Illinois has judicially endorsed.

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265 *Id.* at 697-98.

266 *Id.* at 699.

267 Charles F. Redden, *Limits on Admitting Learned Treatise*, 82 ILL. B.J. 186 (1994).

268 Roach v. Springfield Clinic, No. 73394, 1992 Ill. LEXIS 204 (Ill. Dec. 4, 1992), *superseded*, 623 N.E.2d 246 (Ill. 1993). Roach was a medical malpractice action arising out of the birth of a child with cerebral palsy. Following a defense verdict, plaintiffs appealed, claiming, among other things, that the medical treatise upon which their experts relied should have been admitted as substantive evidence. The Supreme Court disagreed, because the "admission of treatises as substantive evidence would undermine the foundation of the hearsay rule." *Id.* at *12. The Illinois Supreme Court specifically declined to adopt Rule 803(18). Nevertheless, the court made clear that experts could refer to such authorities on direct examination. *Id. See also* Costa v. Dresser Indus., 642 N.E.2d 898 (Ill. App. Ct. 1994) (noting that medical text may be offered to impeach witness or to illustrate the basis of expert opinion). The extent to which Roach remedied Schuchman is unclear, because the supreme court's opinion was withdrawn and modified on rehearing. The court's final opinion in the case dispensed with the learned treatise issue in short order. The court concluded that since plaintiffs failed to formally offer the treatises as substantive evidence during trial, the question of Illinois's adoption of Rule 803(18) was "purely academic." Roach v. Springfield Clinic, 623 N.E.2d 246, 254 (Ill. 1993).

269 *Roach*, 623 N.E.2d at 254.

C. Ohio

Unlike Illinois, Ohio has codified its rules of evidence. The Ohio Rules of Evidence were adopted in 1980, some five years after the passage of the Federal Rules of Evidence.[270] As we shall see, however, codification has done little to assure uniformity in the presentation of expert testimony. Nor have Ohio's rules substantially expanded the materials upon which expert witnesses may rely. As we approach the twenty-first century, expert testimony under the Ohio rules differs little from that under the common law. Ohio has no evidence counterparts to either Federal Rule of Evidence 703 or 803(18),[271] and its evidence code neither permits experts generally to rely on hearsay nor does it permit learned treatises to be used as evidence during either direct or cross-examination.[272]

Ohio's exclusion of learned treatises as substantive evidence is based on traditional hearsay objections—the potential for juror confusion and concerns regarding the accuracy and reliability of

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270 The Ohio Rules of Evidence became effective July 1, 1980, when the Ohio General Assembly failed to pass a resolution of disapproval after the rules had been submitted to that body by the Ohio Supreme Court. The Ohio House and Senate passed concurrent resolutions of disapproval of these rules after submission by the Ohio Supreme Court both in 1977 and 1978. Both of these submissions contained evidence rules identical to Federal Rules of Evidence 703 and 803(18). Paul C. Giannelli, *The Proposed Ohio Rules of Evidence: The General Assembly, Evidence and Rulemaking*, 29 CASE W. RES. L. REV. 16, 18-21 (1978); Richard S. Walinski and Howard Abramoff, *The Proposed Ohio Rules of Evidence: The Case Against*, 28 CASE W. RES. L. REV. 344, 388 app. A (1978); James C. Young, *Opinions and Expert Testimony*, 6 CAP. U. L. REV. 579, 587-88, 593 (1977); Thomas H. Pyper, Note, *The Roads Not Taken: Expert And Opinion Testimony Under the Ohio Rules Of Evidence*, 50 U. CIN. L. REV. 82, 90-93 (1981) [hereinafter *The Roads Not Taken*].

271 Stinson v. England, 633 N.E.2d 532, 538 (Ohio 1994).

272 The staff note accompanying Ohio Rule of Evidence 703 states that:

> [Under Federal Rule of Evidence 703, t]he third category is facts or data made known to the expert before the hearing. The federal rule expresses no limitations on the sources of the facts and no limitations upon the methods of making them known. Ohio has not recognized the third category.
>
> Federal Rule 703 also provides the facts or data, however perceived or made known, need not be admissible in evidence if they are of a type reasonably relied upon by experts in that field.
>
> Ohio R. Evid. 703 is in accord with Ohio law. Ohio has held that the hypothesis upon which an expert witness is asked to state his opinion must be based upon facts within the personal knowledge of the witness or upon facts shown by other evidence.

OHIO R. EVID. 703 staff note. As to the use of learned treatises, Ohio never adopted Federal Rule of Evidence 803(18). Thus, their use is governed by the common law, which in Ohio is restrictively interpreted to require the testifying expert to rely upon or recognize the text as "authoritative." *See Stinson*, 633 N.E.2d at 538.

the texts themselves.[273] Consistent with this rule, Ohio courts do not take judicial notice of facts in medical texts.[274]

While Ohio courts have recognized the value of learned treatises for impeachment purposes, the rules governing the scope of their use during cross-examination are unclear to this day. In *Bluebird Baking Co. v. McCarthy*,[275] it was first suggested that an expert could be tested during cross-examination "as to [the] claimed variance between [his] testimony and that contained in publications by writers of recognized skill and ability."[276] However, the court failed to provide any guidance concerning the criteria to be used in identifying such texts.

Several years later, Ohio's Supreme Court effectively limited cross-examination by use of learned treatises when it insisted that they be relied upon by the expert. The court there found that these learned treatises had little or no impeachment value, stating:

> It might have been proper, in cross-examination of [the expert], to question him as to the basis of his conclusions and even ask him whether those conclusions were based in any way on statements found in medical books or treatises. However, it is difficult to understand how inquiries with respect to statements in a particular book would be proper if it had not first been brought out that [the expert] based his conclusions in some way on statements in that book. If [the expert] denied that he had known about this particular book, it is difficult to see how his further cross-examination with regard to the book would be proper at all.[277]

In effect, the Ohio Supreme Court placed "a premium on medical illiteracy. The less the witness ha[d] read the less vulnerable he [was] to effective cross-examination."[278]

The Ohio Supreme Court appeared to be retreating from this restrictive cross-examination rule in *O'Brien v. Angley*[279] when it favorably cited the federal cases permitting broad impeachment of

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273 *See* OHIO R. EVID. 703 staff note; Piotrowski v. Corey Hosp., 173 N.E.2d 355, 360 (Ohio 1961).

274 Lambert v. Dally, 281 N.E.2d 857, 859 (Ohio Ct. App. 1972).

275 36 N.E.2d 801 (Ohio Ct. App. 1935).

276 *Id.* at 806.

277 Hallworth v. Republic Steel Corp., 91 N.E.2d 690, 694 (Ohio 1950).

278 Samuel S. Wilson, Note, *Medical Treatises As Evidence—Helpful But Too Strictly Limited*, 29 U. CIN. L. REV. 255, 260 (1960).

279 407 N.E.2d 490, 493 (Ohio 1980). Ohio appellate courts read *O'Brien* to confer broad discretion on the extent to which learned treatises might be used in cross-examination of an expert. Berlinger v. Mt. Sinai Medical Ctr., 589 N.E.2d 1378, 1383 (Ohio Ct. App. 1990), *dismissed mem.*, 569 N.E.2d 505 (Ohio 1991).

experts using learned treatises.[280] However, the court provided no guidance as to how one determined which texts would be viewed as authoritative.[281] Ultimately, the scope of cross-examination was left to the discretion of the trial judge.[282]

The Ohio Supreme Court recently used its "discretion" to permit the use of a learned treatise during the direct examination of an expert,[283] concluding "[t]hat a party may, during the direct examination of its expert witness, inquire . . . [as to] whether that expert agrees with the opinions expressed in the publications . . . [of] the adverse party's expert witness."[284]

Subsequent cases, however, suggest that even this ruling is limited to its facts. Just last year, in *Stinson v. England*,[285] the Ohio Supreme Court confirmed the restrictive rule that a learned treatise "may be employed only to impeach the credibility of an expert witness who has relied upon the treatise, or has acknowledged its authoritative nature."[286] The ruling was all the more surprising as the expert there frustrated cross-examination by denying that *Williams on Obstetrics* was an authoritative text.[287] In fact, *Williams on Obstetrics* is one of the most widely-recognized authorities in the field of obstetrics and gynecology.[288]

As we noted, Ohio was one of the few states that declined to adopt Federal Rule of Evidence 703.[289] While preliminary drafts of Ohio Rule of Evidence 703 were identical to the federal rule, the drafters ultimately declined to permit expert reliance on hear-

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280 *See* Dolcin Corp. v. FTC, 219 F.2d 742 (D.C. Cir. 1954), *cert. denied*, 348 U.S. 981 (1955). *O'Brien*, 407 N.E.2d at 493. The D.C. Circuit had followed *Reilly v. Pinkus*, which permitted liberal cross-examination of testifying experts. *Dolcin*, 219 F.2d at 746-47 (citing Reilly v. Pinkus, 338 U.S. 269 (1949)).

281 *See* DiMarco v. Bernstein, No. 54406, 1988 W.L. 112972 (Ohio Ct. App. Oct. 13, 1988), *overruled mem.*, 535 N.E.2d 312 (Ohio 1989).

282 *O'Brien*, 407 N.E.2d at 493.

283 Ramage v. Central Ohio Emergency Servs., Inc., 592 N.E.2d 828, 838 (Ohio 1992) (determining that the written material which was read to the witness was not introduced as substantive evidence).

284 *Id.*

285 633 N.E.2d 532 (Ohio 1994).

286 *Id.* at 539 (citations omitted).

287 *Id.*

288 An expert assessment by *Doody's Rating Service* asserts that the 19th Edition of *Williams on Obstetrics* should be read "in its entirely by all practitioners and residents in obstetrics/gynecology and family practice. The authors have done a superb job of merging a traditional textbook of obstetrics with a textbook of maternal/fetal medicine. In summary, this is one of the 'gold standard' textbooks of the discipline." DOODY'S RATING SERVICE: A BUYER'S GUIDE TO THE 250 BEST HEALTH SCIENCES BOOKS 74 (Anne V. Hennessy ed. 1994).

289 OHIO R. EVID. 703 staff note.

say.[290] Under Ohio Rule of Evidence 703, "the facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by him or admitted in evidence at the hearing."[291] An expert "perceives" facts or data through personal knowledge, observation, examinations, or testing.[292] Thus, Ohio Rule of Evidence 703 merely codified common law principles concerning expert testimony.[293] Indeed, the adoption of the Rule ensured the retention of the hypothetical question as the primary tool through which expert opinion would be elicited.[294]

Interpreted literally, Ohio Rule of Evidence 703 bars experts from relying on any type of hearsay, even where it is the kind of information upon which experts typically rely in their professional lives.[295] Since learned treatises represent classic hearsay, experts were, in effect, precluded from considering them in formulating their opinions. The irony of such a result is evident. Since authoritative texts often provided the background information that helped educate the witness in the first place, they were inevitably intertwined with his or her opinion.[296] Faced with this contradiction, Ohio jurists created an exception to their own evidence code, arguing that because learned treatises were "perceived by" an expert, they could be considered when forming an opinion under Ohio Rule of Evidence 703.[297]

As Ohio would have it, an expert could use and refer to the learned treatise as one basis for the opinion, but could not directly quote from or explain these materials during direct examination.[298] Ohio courts rationalized this result by creatively interpret-

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290 *The Roads Not Taken*, *supra* note 270, at 90.

291 OHIO R. EVID. 703.

292 State v. Roquemore, 620 N.E.2d 110, 116 (Ohio Ct. App. 1993); *The Roads Not Taken*, *supra* note 270, at 90-91.

293 Burens v. Industrial Comm'n, 124 N.E.2d 724, 727 (Ohio 1955) (holding that the hypothesis upon which an expert is asked to state an opinion must be based upon facts in the witness's own personal knowledge or upon facts shown by other evidence; expert may not infer facts).

294 Huffman v. Stone, 270 N.E.2d 347, 348 (Ohio), *cert. denied*, 404 U.S. 978 (1971). *See also* State v. Schell, 469 N.E.2d 999, 1005 (Ohio Ct. App. 1984) (trial court properly excluded expert testimony where hypothetical referred to facts not in evidence).

295 *See, e.g.*, State v. Jones, 459 N.E.2d 526, 528 (Ohio 1984) (finding that trial court was in error to admit "expert opinion testimony based on medical reports and records which were not prepared by the expert witnesses and not admitted in evidence"); State v. Chapin, 424 N.E.2d 317, 320-21 (Ohio 1981) (holding that expert witness may not base opinion on prior history, hospital records, clinic records, and high school records prepared by others).

296 Kane v. Ford Motor Co., 477 N.E.2d 662, 664 (Ohio Ct. App. 1984).

297 Steinfurth v. Armstrong World Indus., 500 N.E.2d 409, 411 (Ohio C.P. 1986).

298 *Kane*, 477 N.E.2d at 664. *See also* Hurley v. Connor, No. 47187, 1984 W.L. 4569,

ing their evidence rules:

> [I]t is clear that Evid. R. 702 and 703 contemplate a two-stage process for the admission of expert testimony. First, Evid. R. 702 requires that the *trial court* determine whether the witness is qualified to give an expert opinion. Necessarily, this determination requires that the scientific, technical or specialized opinion be reliable. Second, Evid. R. 703 mandates that the expert testimony *to be offered at trial* be based on either the personal perception of the expert or upon facts in the record. Accordingly, to the extent that the expert applies to the facts in evidence the scientific principle, theory, calculation, measurement or table—which have qualified the witness as an expert—such principle, theory, calculation, measurement or table need not be in evidence if the predicate facts are in evidence. We note that as a matter of practice, the first step may often overlap with the second stage.[299]

Such an interpretation, however, has its limits, and they were clearly illustrated in *Steinfurth v. Armstrong World Industries*.[300] There, an asbestos manufacturer objected to expert testimony regarding the state of the art because the opinion was based largely on the review of medical and scientific treatises published between 1890 and the early 1980s.[301] The trial court correctly recognized that testimony concerning the adequacy of defendants' warnings had to be based on a survey of the "available scientific and technological knowledge, customary practice and industry standards" during the relevant period.[302] In other words, the basis of the opinion was, by necessity, derived from otherwise inadmissible evidence. While the trial court permitted the expert opinion, it forbade the expert from explaining the existing literature or its meaning to the jury, noting that:

> Without the learned treatise rule . . . a state-of-the-art witness in Ohio is only permitted to state that he had reviewed the applicable literature and, with that background, to give his opinion as to when appropriate warnings of risks of harm should have been affixed to the defendant's products. Even the mentioning of the titles of the articles would preclude the defendants from having the opportunity of adequate cross-examination as to the

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at *2 (Ohio Ct. App. Mar. 22, 1984) (an expert may properly rely on pertinent medical literature for the basis of his opinion since it comprises facts and data "perceived by him" and also forms the basis of the expert's knowledge).

299 State v. Minor, 546 N.E.2d 1343, 1347 (Ohio Ct. App.) (citations omitted) (emphasis in original), *dismissed mem.*, 532 N.E.2d 1317 (Ohio 1988).

300 500 N.E.2d at 411.

301 *Id.* at 410.

302 *Id.* at 411.

> truth of the matters contained therein. It is apparent that the drafters of the Ohio Rules of Evidence intended to preserve inviolate a litigant's right to confrontation. They also were undoubtedly aware of how difficult it is for the average juror to grasp the fine distinction attorneys draw when admitting a piece of evidence when it is not offered for the truth contained therein but merely for the purpose that a statement was made. As a result, direct quotation is not permitted under the Ohio rules.[303]

The obvious difficulty of complying with these restrictive evidence rules has caused Ohio courts to increasingly depart from the plain language of Ohio R. Evid. 703.[304] In *Department of Mental Health v. Milligan*,[305] for example, an expert testifying for the state relied on an examination of the defendant, review of defendant's records, and conversations with other physicians and family members in determining whether confinement in a maximum security mental institution was necessary. Not surprisingly, the appellate court found that the expert impermissibly based his opinion on the statements of others. The court did, however, sustain the trial court's conclusions finding that no prejudice to the defendant had occurred, recognizing that:

> An examination of the testimony offered by [the expert] reveals the impossibility of distinguishing that testimony based on permissible grounds, *i.e.*, personal examination and medical records, from that testimony based on [the expert's] discussions with appellant's contacts. Nevertheless, in light of the fact that the majority of expert witnesses who testified on appellant's behalf based their opinion on precisely the same grounds, we fail to discern how any error in [the expert's] testimony was prejudi-

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303 *Id.* at 412.

304 *Compare* Yeager v. Riverside Methodist Hosp., 493 N.E.2d 559, 562 (Ohio Ct. App. 1985) (permitting expert to provide textbook examples of a certain type of fetal heart distress which would require intervention by physician under the proper standard of care) *with* State v. Robles, 583 N.E.2d 318, 321-22 (Ohio Ct. App. 1989), *overruled mem.*, 551 N.E.2d 1301 (Ohio 1990) (holding that population statistics compiled by the FBI may not be disclosed to the fact finder). Prior to the adoption of the Ohio Rules of Evidence, some of Ohio's appellate courts themselves began to question the common law and sought ways to skirt its requirements that the information relied upon by experts be admitted into evidence. Westfall v. American States Ins. Co., 334 N.E.2d 523, 526 (Ohio Ct. App. 1974) (expert witness may testify even though damages evidence is based entirely on hearsay). *See also* Masheter v. C.H. Hooker Trucking Co., 250 N.E.2d 621, 622 (Ohio Ct. App. 1969) (stating that to adopt a rule of law that "closes the courtroom door to the appraiser with a keen ear for the things which moves markets up and down would make as much sense as to close the courtroom to doctors who could not resurrect Louis Pasteur to first testify as to his original experiments").

305 530 N.E.2d 965 (Ohio Ct. App.), *dismissed mem.*, 532 N.E.2d 1317 (Ohio 1988).

cial to appellant.[306]

Similarly, in *Ratka v. Cleveland Builders Supply Co.*,[307] the appellate court closed its eyes to the fact that the expert there based his opinion on tests done by his assistants that were not admitted into evidence. However, a different appellate panel in *State v. Joseph*[308] concluded just the opposite. There, the court specifically precluded expert testimony based on test results obtained by a student employee of the expert. Adding to the chaos, still another appellate panel in *Brandt v. Benedict Enterprises, Inc.*,[309] permitted an expert to rely on an estimate provided by a contractor in determining the cost to repair certain property. The appellate court simply ignored the hearsay nature of the evidence and found that Ohio Rule of Evidence 703 permitted an expert to base his opinion on data "supplied" at the hearing.[310]

These irreconcilable results in the appellate courts led the Ohio Supreme Court to reconsider the permissible bases of expert testimony in *State v. Solomon*.[311] There, the sanity of a criminal defendant was in issue. The judge disallowed the testimony of two defense experts at the trial because one based his testimony on the review of police reports and hospital records, while the other based his opinion on the reports of other doctors.

The Ohio Supreme Court reversed the trial judge's finding that the experts violated Ohio Rule of Evidence 703 by relying on hearsay. The court crafted yet another rule to circumvent Ohio's restrictive evidence code, finding that "where an expert bases his opinion, in whole or in major part, on facts or data perceived by him, the requirement of Evid. R. 703 has been satisfied."[312] The rule announced in *Solomon* has become known as the "major part exception" to Rule 703.[313] Relying on *Solomon*, lower courts now consistently admit expert testimony based on otherwise inadmissible hearsay.[314]

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306 *Id.* at 969-70.

307 No. 55554, slip op. at 5 (Ohio Ct. App. Aug. 10, 1989). For a discussion of the *Ratka* decision, see Lawrence A. Glassmann, State v. Solomon: *The New Bases For Expert Testimony*, 20 N. KY. L. REV. 407, 413-14 (1993) [hereinafter *New Bases For Expert Testimony*].

308 1985 W.L. 8947 (Ohio Ct. App. July 24, 1985), Appeal No. C-840751.

309 Nos. C-890196 & C-890216, 1990 W.L. 103750 (Ohio Ct. App. July 25, 1990), *overruled mem.*, 565 N.E.2d 837 (Ohio 1990).

310 1990 W.L. 103750, at *3 (citation omitted).

311 570 N.E.2d 1118 (Ohio 1991).

312 *Id.* at 1120.

313 *New Bases For Expert Testimony, supra* note 306, at 418.

314 *See, e.g.*, Huebner v. Miles, 636 N.E.2d 348, 354 (Ohio Ct. App. 1993), *overruled*

The *Solomon* decision certainly has further complicated the expert testimony rules in Ohio. On the one hand, the decision represents a step forward, because it recognizes that experts rely on hearsay to formulate their opinions.[315] However, the opinion fails as an evidentiary guidepost because it does not explain how hearsay may be considered by the expert.[316] One commentator, lamenting these failings, complained:

> Aside from simply guessing, how will a court know the degree to which an expert has based his opinion on inadmissible evidence? Even if trying to answer truthfully, will an expert really be able to say with any precision how much weight he has given a particular piece of data in formulating his opinion? Finally what is a "major part?" More than fifty percent? Seventy-five percent? *Solomon* provides no guidance.[317]

Moreover, the *Solomon* court may have actually gone beyond the confines of FED. EVID. R. 703. At least that Rule requires that reliance on hearsay information be reasonable. Under *Solomon*, there is no such limitation on the hearsay component of an expert's opinion.[318]

Clearly, the rules of evidence concerning expert testimony are adrift in Ohio. Initially, the state opted for an evidence code that unduly restricted the use of relevant information by expert witnesses. As time passed, Ohio courts found that the rules were too restrictive. The Ohio courts, however, in addressing this problem, have judicially-legislated evidence rules that maximize uncertainty in the courtroom and complicate the task of the expert, lawyer, judge, and fact finder.

D. New York

Despite a thirty-year effort to adopt an evidence code, New York, like Illinois, remains a common law jurisdiction.[319] New York

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mem., 631 N.E.2d 164 (Ohio 1994) (expert opinion which relied upon field work conducted by employees is admissible, following Solomon); Lambert v. Goodyear Tire & Rubber Co., 606 N.E.2d 983, 992-93 (Ohio Ct. App.), *dismissed mem.*, 594 N.E.2d 625 (Ohio 1992) (holding that it was error to exclude expert opinion in a worker's compensation hearing which were based in whole or in major part on direct personal examinations of the appellant and on the CT scan report by other physicians); State v. Underwood, 598 N.E.2d 822, 827 (Ohio Ct. App. 1991) (the fact that an expert reviewed a report prepared by a colleague did not render the testimony inadmissible).

315 *Underwood*, 598 N.E.2d at 827-29.

316 *See New Bases For Expert Testimony*, *supra* note 306, at 418-19.

317 *Id.*

318 *Id.*

319 *To Codify or Not to Codify*, *supra* note 23.

has judicially recognized Federal Rule of Evidence 703 as the basis for expert testimony in New York.[320] Learned treatises, however, remain inadmissible hearsay.[321] Even the evidence code presently under consideration would bar use of authoritative texts as substantive evidence.[322]

New York courts traditionally approached expert testimony as a typical common law jurisdiction. Experts could rely on personal observations or examinations and other evidential facts brought forward in a hypothetical question.[323] Beyond the hypothetical, the expert had to have personal knowledge of any other facts upon which the opinion was based.[324]

The New York Civil Practice Law and Rules ("N.Y. Civ. Prac. L. & R.") and subsequent case law modified the common law approach.[325] After the N.Y. Civ. Prac. L. & R. went into effect, an expert was permitted but no longer required to identify the bases for his or her opinion during direct examination.[326] The cross-examiner now bore the burden of exploring the bases of the expert's opinion.[327]

New York's highest court, the Court of Appeals, soon recognized that experts could better assist the fact finder if they had greater freedom to rely on relevant information sources, acknowledging:[328]

> The limitations of the rule are apparent, for its rigid application discourages the professionally responsible [expert] from exploring sources of background information relevant and necessary to a sound medical opinion as to the defendant's sanity. The effect is to render the more thorough and thoughtful opinion inadmissible because [it is] not based *exclusively* upon observations of the defendant and facts in evidence.[329]

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320 People v. Sugden, 323 N.E.2d 169, 173 (N.Y. 1974).

321 People v. Feldman, 85 N.E.2d 913, 920 (N.Y. 1949).

322 A CODE OF EVIDENCE FOR THE STATE OF NEW YORK 234-35 (New York State Law Revision Commission 1991) [hereinafter 1991 Proposed N.Y.C.E.].

323 People v. Keough, 11 N.E.2d 570, 572 (N.Y. 1937). *See also* EDITH L. FISCH, FISCH ON NEW YORK EVIDENCE § 429, at 280-81 (2d ed. 1977) [hereinafter FISCH ON EVIDENCE]; JEROME PRINCE, RICHARDSON ON EVIDENCE §§ 369-371, at 345-49 (10th ed. 1973) [hereinafter RICHARDSON ON EVIDENCE].

324 People v. DiPiazza, 248 N.E.2d 412, 417 (N.Y. 1969); Weibert v. Hanan, 95 N.E. 688 (N.Y. 1911).

325 People v. DiPiazza, 248 N.E.2d at 417.

326 N.Y. CIV. PRAC. L. & R. 4515 (McKinney 1963).

327 Tarlowe v. Metropolitan Ski Slopes, Inc., 324 N.Y.S.2d 852 (N.Y. App. Div.), *rev'd and remanded*, 271 N.E.2d 515, 517 (N.Y. 1971).

328 People v. Stone, 315 N.E.2d 787, 790-91 (N.Y. 1974).

329 *Id.* (emphasis in original).

In *People v. Sugden*,[330] the Court of Appeals created a rule almost identical to Federal Rule of Evidence 703 when it adopted an evidence "policy which would allow an expert to base his opinion on material not in evidence, provided the data relied upon [was] of the kind ordinarily accepted by experts in the field."[331] The court recognized the need for effective cross-examination by holding that an expert could rely on otherwise inadmissible evidence if "it [was] of the kind accepted in the profession as reliable in forming a professional opinion" or the material relied upon "comes from a witness subject to full cross-examination [at] trial."[332] The *Sugden* rule essentially made Federal Rule of Evidence 703 the law of New York even before it was enacted as federal law.

Federal Rule of Evidence 703 had a significant influence on the *Sugden* decision and its progeny. The "touchstone" of the professional opinion test became reliability.[333] Once established, the expert could use the material even though it was inadmissible hearsay.[334] Indeed, the professional opinion test soon mirrored the reasonable reliance requirement of Federal Rule of Evidence 703.[335]

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330 323 N.E.2d 169 (N.Y. 1974).

331 *Id.* at 172.

332 *Id.* Professor Barry C. Scheck has suggested that though the "linguistics" of Fed. R. Evid. 703 and the Sugden rule are the same, federal and state court application of their principles is different: "If you are in the federal court everything is coming in, but if you are in the state court not so much of it is coming in." Barry C. Scheck, *Symposium: Comparing New York and Federal Evidence Law*, 11 TOURO L. REV. 107, 113 (1994). Scheck posits that the difference stems from the New York requirement that experts base their opinions on information regarded in the field as "reliable" as opposed to the reasonable reliance requirement of the federal rule. *Id.* at 115. He further queries whether after *Daubert*, reliable means the same thing as reasonably relied upon. *Id.* at 119. At least two federal courts answer this question in the affirmative, suggesting that federal and state courts should now be applying the same test. In re Paoli R.R. Yard PCB Litig., 35 F.3d 717, 748 (3d Cir. 1994); Christophersen v. Allied-Signal Corp., 939 F.2d 1106, 1113-14 (5th Cir. 1991), *cert. denied*, 503 U.S. 912 (1992).

333 Borden v. Brady, 461 N.Y.S.2d 497, 498 (N.Y. App. Div. 1983) (Yesawich, J., concurring).

334 *Id. See also* People v. Wilson, 489 N.Y.S.2d 690, 693 (N.Y. App. Div. 1987) (while Sugden relaxed the rules regarding the permissible basis of expert testimony "such material must necessarily be of the type reasonably relied on by experts in the field forming opinions or inferences on the subject").

335 Hambsch v. New York City Transit Auth., 469 N.E.2d 516, 517-18 (N.Y. 1984) (finding that expert opinion based on a conversation with a radiologist whose comments referenced an unknown study did not meet the requirement of the *Sugden* exception); Holshek v. Stokes, 122 A.D.2d 777, 779 (N.Y. App. Div. 1986) (holding that expert opinion concerning plaintiff's injuries was properly based on examination of plaintiff, X-ray and written report of another treating physician). *Compare* People v. Gupta, 450 N.Y.S.2d 124, 125 (N.Y. App. Div. 1982) (holding that expert testimony

While learned treatises satisfied the professional opinion test exception and could be used in formulating an expert opinion,[336] they remained independently inadmissible.[337] New York, however, had long permitted the limited use of such treatises during cross-examination. If the expert under examination either relied upon the text or recognized the treatise as authoritative,[338] such works could be used for impeachment purposes.[339]

New York courts have scrupulously applied this restrictive learned treatise rule. Experts in New York regularly block examination by refusing to acknowledge the authoritativeness of a text.[340] This restrictive view has even permeated discovery, with one court barring deposition questions designed to determine the texts that expert considered authoritative.[341] Instead, in the view

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identifying substance sold by defendant as morphine was properly grounded by comparison of results from the standard sample with three recognized authorities in the field of chemistry) *with* People v. Miller, 57 A.D.2d 668, 669 (N.Y. App. Div. 1977) (finding error in admission of opinion concerning nature of alleged controlled substance where expert did not personally perform the testing and offered no evidence concerning the accuracy of the standard as a reliable norm).

336 Comizio v. Hale, 165 A.D.2d 823, 824 (N.Y. App. Div. 1990) (finding that expert properly relied upon findings from an international study group known as the International Reflux Study Committee where the reliability of the group coordinator and the data compiled were adequately established); People v. DeZimm, 102 A.D.2d 633 (N.Y. App. Div. 1984) (holding that manual published by the Drug Enforcement Administration was accepted literature in the field and was therefore an adequate basis for expert opinion).

337 Egan v. Morse Dry Dock, 214 A.D. 226 (N.Y. App. Div. 1925); Pahl v. Troy City Ry., 81 N.Y.S. 46 (App. Div. 1903); McEvoy v. Lommel, 80 N.Y.S. 71, 73 (App. Div. 1903). *See, e.g.*, Ciaccio v. Housman, 411 N.Y.S.2d 524, 525 (N.Y. Sup. Ct. 1978) (holding that medical treatises are not admissible as affirmative evidence of the facts they contain); DeFalco v. Long Island College Hosp., 90 Misc. 2d 164, 167-68 (N.Y. Sup. Ct. 1977) (finding that defendant's acknowledgment of authority of ophthalmology text during cross-examination was not a substitute for expert medical proof and could not be used to establish the standard of care in a medical malpractice action).

338 Mark v. Colgate Univ., 53 A.D.2d 884, 886 (N.Y. App. Div. 1976); Hastings v. Chrysler Corp., 273 A.D. 292 (N.Y. App. Div. 1948).

339 *Feldman*, 85 N.E.2d at 920; *Hastings*, 273 A.D. at 292. *See also* FISCH ON EVIDENCE, *supra* note 323, § 431, at 283; RICHARDSON ON EVIDENCE, *supra* note 323, § 373, at 352.

340 *See* Walsh v. Staten Island Obstetrics & Gynecology Assocs., P.C., 193 A.D.2d 672, 673 (N.Y. App. Div. 1993) (finding that cross-examination of expert with medical article was improper since expert refused to admit the article's authoritativeness); Labate v. Plotkin, 195 A.D.2d 444, 445 (N.Y. App. Div. 1993) (same); Serota v. Kaplan, 127 A.D.2d 648, 650 (N.Y. App. Div. 1987) (finding that plaintiff's counsel impermissibly impeached defense expert through reference to medical textbook which was not conceded by the witness to be authoritative). *But see* Spiegel v. Levy, 201 A.D.2d 378, 378-79 (N.Y. App. Div. 1994) (finding that expert could not block cross-examination of medical article "by the semantic trick of announcing that he did not find the work authoritative" when he testified during direct examination that he agreed with "a lot of what they [the authors] had said").

341 Ithier v. Solomon, 59 A.D.2d 935 (N.Y. App. Div. 1977).

of that court, the expert should have been shown the text and asked the predicate question of whether he considered the text to be "authoritative."[342]

A review of reform efforts over the past decade and a half shows that New York has been unable to bring simplicity and predictability to its expert evidence rules despite its quick adoption of the essence of Federal Rule of Evidence 703. In 1976, the New York Law Revision Committee appointed a group of consultants to research and draft an evidence code.[343] The Commission intended to use the Federal Rules of Evidence to guide its efforts. It also was directed to take into account the New York common law as well as the California Evidence Code.[344] The 1979 draft of these rules recommended adoption of both Federal Rule of Evidence 703 and Federal Rule of Evidence 803(18) by New York.[345] Commentary to New York's proposed evidence rule 703 justified adoption of the rule as a restatement of the "holdings of recent New York decisions which permit expert opinion based upon reliable non-evidence data."[346] The commentary to proposed evidence rule 803(18) acknowledged that New York courts permitted limited use of learned treatises but welcomed a rule that would prevent the "expert under cross-examination from blocking admission of a learned treatise simply by refusing to acknowledge its authoritativeness."[347] This draft failed to win support with the bar because it proposed significant evidence changes analogous to the Federal Rules of Evidence and abandoned many of the judge-made evidence rules then in effect.[348]

The Commission conducted hearings on this failed evidence code and substantially revised it.[349] In March 1982, the Commission submitted the revised draft to the legislature in the form of a study bill.[350] In January 1983, a code of evidence virtually identical

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342 *Id.*

343 *Proceeding of the New York Law Revision Commission, A Code of Evidence for New York*, 1977 N.Y. LAW. REV. COMM'N REP. 10 [hereinafter 1977 N.Y.L.R.C. REPORT].

344 *Id.* at 13.

345 A CODE OF EVIDENCE FOR THE STATE OF NEW YORK (New York Law Revision Commission 1980) [hereinafter 1980 Proposed N.Y.C.E.]. The Commission's consultants completed a first draft in 1979, which West Publishing Company printed and distributed in 1980.

346 *Id.* at 152.

347 *Id.* at 199.

348 *To Codify or Not to Codify*, *supra* note 23, at 660.

349 *Report of the Law Revision Commission*, N.Y. LAW REV. COMM'N REF. 7-8 (1983) [hereinafter 1983 N.Y.L.R.C. Report].

350 *Id.* at 8.

to the study bill was presented to the New York Legislature.[351] The commentary to the new evidence rule 703 was expanded, but the rule remained unchanged.[352] However, the proposed learned treatise rule and its accompanying commentary were altered. The drafters deleted the last sentence of Federal Rule of Evidence 803(18), which provided that passages from learned treatises could be read into evidence but not received as exhibits, finding "no compelling reason to interfere with the trial court's normal discretionary power to control jury access to exhibits which constitute documentary evidence."[353] More importantly, the commentators also acknowledged the limitations imposed by the New York learned treatise rule as it then existed, recognizing that "[a]s a result of the application of the [present] rule, the trier of fact can be deprived of trustworthy evidence, as well as being confused by hearing evidence it could not use substantively."[354] The 1983 efforts to pass this evidence code died in committee.[355]

New York's most recent effort to enact an evidence code began in 1988 with the Commission's appointment of a working group.[356] The group this time sought to codify existing law as opposed to implementing substantive reform.[357] In 1990, the proposed code was introduced in the legislature as part of the Governor's program.[358] After a joint legislative-commission hearing on July 24, 1990, the working group made substantial modifications to its draft. The revision process now "was predicated upon a decision to continue present law unless there was good reason to change."[359] Hence, the revised bill submitted during the 1991-92 legislature session simply eliminated the learned treatise rule.[360]

Learned treatises were discussed in the commentary to the proposed evidence rule 806—the residual exceptions clause to the hearsay rule.[361] Under the New York proposed residual exceptions

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351 A CODE OF EVIDENCE FOR THE STATE OF NEW YORK (New York State Law Revision Commission 1982) [hereinafter 1982 Proposed N.Y.C.E.]. West Publishing Company distributed this draft as well. *Id.*

352 1983 N.Y.L.R.C. Report, *supra* note 349, at 8.

353 *Id.* at 251.

354 *Id.* at 250.

355 *To Codify or Not to Codify*, *supra* note 23, at 661.

356 1991 Proposed N.Y.C.E. *supra* note 322, at XVIII-XXI.

357 *Id.* at XVIII-XIX.

358 *Id.* at XVII.

359 *Id.*

360 *Id.* at 234-35.

361 *Id.*

rule, additional exceptions to the hearsay rule were to be permitted only where a court determined that the statement:

> (i) [I]s within a definable category of statements that possesses substantial guarantees of trustworthiness and that is separate and distinct from the categories set forth in [the other hearsay exceptions]; (ii) has substantial guarantees or trustworthiness; and (iii) there is substantial need for the statement to establish an essential part of the proponent's case.[362]

Commentary to proposed evidence rule 806 made it clear that the omission of the learned treatise exception was unrelated to the value of the rule itself.[363] Noting that "[t]he development of a learned treatise exception . . . might be appropriate under [proposed evidence rule 806]," [364] the drafters provided this insight into the codification process:

> [a]n exception for [a] learned treatise relied on or recognized as authoritative by a testifying expert was contained in the 1990 draft of the Code but was eliminated because it changed present law and the necessity for the change could not overcome the drafting presumption to continue existing law. The decision not to codify the exception for learned treatises had nothing to do with the reliability of learned or treatises or the desirability of such an exception.[365]

One commentator noted that rejection of the federal learned treatise rule should be viewed in the same context as other hearsay exceptions that the Federal Rules of Evidence had recognized, such as vicarious admissions and public investigative reports, but were not proposed by the working group.[366] Since each of these exceptions is ordinarily used by plaintiffs, the latest proposed code may simply reflect a bias toward civil defendants: "That bias can arguably be justified by a preference for live testimony or by a preference to retain existing New York law. But it should nonetheless be recognized as a bias, which leads to higher litigation costs for civil plaintiffs."[367] Whatever the reason, the learned treatise exception was eliminated.

The commentary to the proposed rules articulates significant reasons why the learned treatise exception should be recognized. However, current New York law clearly limits the effective use of

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362 *Id.* at § 806.
363 *Id.* at 234-35.
364 *Id.*
365 *Id.*
366 Daniel J. Capra, *Proposed New York Code (Part II)*, 203 N.Y.L.J. 3, 8 (1990).
367 *Id.*

learned treatises. As in Illinois and Ohio, New York's refusal to adopt the comprehensive approach to the presentation of expert testimony reflected in the Federal Rules of Evidence creates an atmosphere of uncertainty and limits the trustworthy information presented to fact finders.

V. CONCLUSION

The Federal Rules of Evidence have enjoyed genuine success in the courtroom. Their open approach to the presentation of expert testimony allows experts to be of maximum value to fact finders. These Rules permit experts to function in the courtroom as they do in their professional lives. Some concerns have been expressed about the introduction of hearsay evidence to the fact finder, but we believe that the threat posed to the integrity of the fact-finding process is small. Moreover, the receipt of unreliable evidence can be minimized by a diligent trial judge. Certainly, Federal Rules of Evidence 703 and 403 give the trial judge sufficient evidentiary control to protect the fact-finding process from the wholesale receipt of unreliable information.

Federal Rules of Evidence 803(18) makes a major contribution to the armamentarium available to the modern expert by permitting that witness to refer to significant medical literature to support his or her views. So too, these important sources can be used by the cross-examiner to challenge opinions expressed on direct examination. The expert under examination can no longer easily frustrate cross-examination by refusing to recognize mainstream medical texts. These texts now can be used if recognized by other qualified experts appearing during trial, and their contents may be read into evidence to contradict the witness.

The Federal Rules of Evidence offer another important virtue: uniformity. The Rules governing the presentation of expert testimony have been enthusiastically received by an overwhelming majority of the states. Standardizing the way that expert testimony is presented in American courts no doubt offers some real benefits to the judicial system.

Unfortunately, a relatively small number of states—but ones with large numbers of citizens—have declined to adopt some or all of the innovations in the presentation of expert testimony reflected in the Federal Rules of Evidence. Illinois, Ohio, and New York are emblematic of this minority. A review of the law surrounding the presentation of expert testimony in these jurisdictions demonstrates that each is paying a significant price for its failure to adopt

the federal model. Ohio, for example, has and will continue to pay a significant price in certainty by use of the "major part exception" engrafted by the Ohio Supreme Court onto Ohio Rule of Evidence 703.[368] As it now stands, the Ohio courts have, in effect, overruled the state's own evidence code by permitting experts to rely on some hearsay for their opinions.

In a real sense, Ohio is reliving history. The Federal Rules of Evidence evolved from concerns expressed by Wigmore and other commentators that the common law rules surrounding expert testimony were not sufficiently flexible to maximize the usefulness of experts to the fact finder.[369] Federal Rules of Evidence 703 addressed some of those concerns both by introducing flexibility in the methods for eliciting the expert opinion and improving the resources that could be addressed and used by that expert. Ohio ignored the past when it enacted its evidence code. However, its courts, struggling with evidence issues created by fact finders' increasing need for information, have begun to expand the scope of Ohio's evidence code in spite of its provisions. Thus, Ohio today is moving toward the more modern approach of Federal Rules of Evidence 703 by judicial rule-making typical of the common law. Ohio should not have to tolerate the uncertainty surrounding the slow and unpredictable course such judicial rule-making requires nor should its citizens have to wait another decade to benefit from the extensive mid-twentieth-century reform efforts in expert evidence law that are reflected in the Federal Rules of Evidence.

It is also evident that the states which have refused to accept the Federal Rules of Evidence in the expert arena recognize they are sacrificing the opportunity to use trustworthy information in their courts. In rejecting the learned treatise rule in New York, the working group designated to develop an evidence code stressed that the information contained in these sources was reliable.[370] It declined to propose such a rule simply because segments of the organized bar opposed the change.[371]

As we noted at the outset, expert testimony is increasing in importance as our disputes become more complex. The Federal Rules of Evidence give us the best evidence model for presenting and challenging expert information in the courtroom. States that have thus far failed to enact these evidence rules should reconsider

368 *See supra* note 310 and accompanying text.

369 *See supra* notes 160-68 and accompanying text.

370 *See supra* notes 362-64 and accompanying text.

371 *See supra* note 366 and accompanying text.

this course, at least to the extent that these rules impact the presentation of expert evidence. Adopting the Federal Rules of Evidence in the expert arena will guarantee the maximum receipt of information by fact finders and will provide for useful uniformity in this important area of evidence.