Expert Witnesses Under Rnles 703 and 803(4) of the Federal Rnles of Evidence: Separating the Wheat from the Chaff

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I. INTRODUCTION

Expert witnesses present a strange, yet fascinating mix of contradictions and absurdities to modern American litigation. They are disparaged in one breath for their collective ethical vacuum and in the next breath are revered as essential to every case for their unique ability to assist the lawyer and persuade the jury. Even the drafters of the Federal Rules of Evidence, in their notes, praise experts as necessary for "[a]n intelligent evaluation of facts"[1] at one point and shortly thereafter condemn "the venality of some experts."[2]

Despite the drafters' apparent reservations, however, the Federal Rules take an unmistakably favorable view of experts, eliminating many of the traditional restrictions placed on expert witness testimony consistent with the "liberal thrust" of the Rules as a whole.[3] Nowhere is that more evident than in rule 703,[4] which removes the common law requirement that experts base their opinions on matters within their personal knowledge or matters already admitted into evidence.[5] Rule 703 empowers experts to rely upon inadmissible facts or data, provided that the information is reasonably relied upon by other experts in the field when forming opinions on the same subject matter.[6] The drafters premised the expansion of permissible expert bases on the special skill and experience of the expert witness: "[h]is validation, expertly performed and subject to cross-

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1. FED. R. EVID. 702 advisory committee's note. The note provides, in pertinent part: "An intelligent evaluation of facts is often difficult or impossible without the application of some scientifie, technical, or other specialized knowledge. Thc most common sourcc of this knowledge is the expert witness . . . ." *Id.*

2. FED. R. EVID. 706 advisory committce's note. The note provides, in pertinent part: "The practice of shopping for experts, the venality of some experts, and thc reluctance of many reputable experts to involve themselves in litigation, have been matters of deep concern." *Id.*

3. *See* FED. R. EVID. 704(a) advisory committee's note (indicating that expert opinion which "embraces an ultimate issue" is not objectionable, contrary to the former rule); FED. R. EVID. 705 (stating that an expert may give an opinion before disclosing the basis, subject to the court's discretion); Daubert v. Merrell Dow Pharms., Inc., 509 U.S. 579, 587-88 (1993) (holding that rule 702 did not adopt the common law "general acceptance test").

4. FED. R. EVID. 703; *see also infra* text accompanying note 26 (text of rule 703).

5. Zenith Radio Corp. v. Matsushita Elec. Indus. Co., 505 F. Supp. 1313, 1322 (E.D. Pa. 1980); 3 JACK B. WEINSTEIN & MARGARET A. BERGER, WEINSTEIN'S EVIDENCE ¶ 703[1], at 703-07 (Joseph M. McLaughlin ed., 1996).

6. *See* FED. R. EVID. 703.

examination, ought to suffice for judicial purposes."[7] Or, as one court described rule 703's approach: "Years of experience teach the expert to separate the wheat from the chaff and to use only those sources and kinds of information which are of a type reasonably relied upon by similar experts in arriving at sound opinions on the subject."[8]

Rule 803(4)[9] of the Federal Rules of Evidence expanded the common law as well.[10] It admits hearsay statements that are reasonably pertinent to medical treatment *or diagnosis*,[11] thus opening the door to statements made to doctors and others in preparation for their testimony.[12] This modification resulted from the drafters' conclusion that jurors were unlikely to make the subtle distinction between statements admitted under rule 703 for the sole purpose of explaining the expert's opinion and the substantive use of the same statements for the truth of the matter asserted.[13] In short, the drafters suspected that the jury could not separate the wheat from the chaff, and they expanded the rule accordingly. Statements admitted under the expanded portion of rule 803(4) derive their reliability largely from the same source as rule 703: the expert's professional validation of the statements.[14]

That these provisions share the same rationale is unremarkable except for the fact that they do not receive the same treatment by the drafters of the Federal Rules. Instead, statements made for medical diagnosis are admissible for their truth, while statements reasonably relied upon by other experts are admissible only as support for the expert's opinion.[15] The evidentiary doors opened by these rules have eased the burden on litigators presenting expert testimony[16] and have

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7. *Id.* advisory committee's note.

8. United States v. Sims, 514 F.2d 147, 149 (9th Cir. 1975). *Sims* was decided on April 2, 1975, about three months before the effective date of the Federal Rules of Evidence. Nevertheless, the court cited rule 703 in its opinion and claimed its approach was "[f]ully consistent" with rule 703 and "follow[ed] the spirit of the Federal Rules of Evidence." *Id.*

9. FED. R. EVID. 803(4); *see also infra* text accompanying note 56 (text of rule 803(4)).

10. *See* FED. R. EVID. 803(4) advisory committee's note (stating that the rule modifies "[c]onventional doctrine" by admitting statements made to enable the expert to testify).

11. *See* FED. R. EVID. 803(4).

12. *See id.* advisory committee's note; Morgan v. Foretich, 846 F.2d 941, 950 (4th Cir. 1988) (noting that rule 803(4) eliminated the distinction between doctors consulted for treatment and those consulted only for diagnosis) (quoting United States v. Iron Shell, 633 F.2d 77, 83 (8th Cir. 1980)).

13. *See* FED. R. EVID. 803(4) advisory committee's note ("The distinction thus called for was one most unlikely to be made by juries.").

14. *Cf.* United States v. Joe, 8 F.3d 1488, 1494 & n.5 (10th Cir. 1993) (indicating that rule 803(4) requires only reasonable reliance by the physician for admission); Gong v. Hirsch, 913 F.2d 1269, 1274 n.4 (7th Cir. 1990) ("[A] fact reliable enough to serve as the basis for a diagnosis is also reliable enough to escape hearsay proscription.") (quoting 4 JACK B. WEINSTEIN & MARGARET A. BERGER, WEINSTEIN'S EVIDENCE ¶ 803(4)[01], at 803-146 (1988)).

15. Robert P. Mosteller, *Child Sexual Abuse and Statements for the Purpose of Medical Diagnosis or Treatment*, 67 N.C. L. REV. 257, 261-62 (1989).

16. *See* Edward B. Arnolds, *Federal Rule of Evidence 703: The Back Door Is Wide Open*, 20 FORUM 1, 18 (1984) ("[Rule 703] promotes judicial efficiency by doing away with the necessity of calling many foundation witnesses.").

contributed to a substantial increase in the use of expert witnesses at trial.[17] At the same time, however, the liberalized rules have been abused by zealous advocates.[18] Lawyers and experts have used the open door of rule 703 as a "back door" exception to the hearsay rule[19] and have treated rule 803(4) as a broad, residual exception to the hearsay rule.[20] In the midst of this tension, judges have struggled to apply rules 703 and 803(4), leaving a trail of uncertainty and even confusion in their wake. Courts have disagreed on many aspects of the two rules, largely as a result of differing perspectives on the appropriate role of the judge, jury, and expert.

In Part II of this Article, the language and legislative history of rules 703 and 803(4) will be carefully examined, as well as the judicial interpretation of the rules.[21] Federal courts have reached conflicting interpretations of rule 703's requirements and have parted company over the proper standard for admitting statements pertinent only to medical diagnosis under rule 803(4). Part III will scrutinize the roles of expert witnesses, lawyers, and jurors under rules 703 and 803(4) and will raise important questions about their roles.[22] Should experts, as paid partisans, be trusted to validate the inadmissible facts or data on which they rely under the rules? Are lawyers capable of effectively cross-examining the hearsay statements admitted under rules 703 and 803(4)? Is the jury capable of understanding and following the judge's instructions under rule 703? All of these safeguards, in one context or another, fail adequately to protect the jury from unreliable evidence.

In Part IV the focus will shift to the available alteruatives to rules 703 and 803(4), including the approaches of the many states that reject or modify the federal approach.[23] This Part will demonstrate that many of these alternatives are better equipped to deal with the matters addressed by rules 703 and 803(4) than are their federal counterparts. Finally, in Part V, legislative and judicial solutions to the problems that are inherent in the current approaches will be proposed. The proposed changes promote the trustworthiness of the out-of-court statements admitted under both rules and bring much-needed coherence and clarity to the rules.[24]

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17. *See* Michael D. Green, *Expert Witnesses and Sufficiency of Evidence in Toxic Substances Litigation: The Legacy of Agent Orange and Bendectin Litigation*, 86 NW. U. L. REV. 643, 669 & n.123 (1992) (identifying liberalization of the Federal Rules of Evidence as one of the causes of the increase of expert testimony; stating that the numbers of experts regularly testifying in Cook County, Illinois, increased 1540% between 1974 and 1989); Faust F. Rossi, *Modern Evidence and the Expert Witness*, LITIG., Fall 1985, at 18, 18 (indicating that the increase in experts is at least partly the result of liberality of the Federal Rules of Evidence).

18. *See* Ronald L. Carlson, *Experts, Judges, and Commentators: The Underlying Debate About an Expert's Underlying Data*, 47 MERCER L. REV. 481, 483 (1996) ("In an era of ambitious and compliant experts, protective rules are needed to curb real and potential abuses.").

19. *See* Arnolds, *supra* note 16, at 11-12.

20. *Cf.* Mosteller, *supra* note 15, at 257-58 (discussing the expansive use of rule 803(4)).

21. *See infra* notes 71-205 and accompanying text.

22. *See infra* notes 206-85 and accompanying text.

23. *See infra* notes 286-419 and accompanying text.

24. *See infra* notes 420-517 and accompanying text.

II. RULES

Any critical analysis of a rule must begin with the rule itself.[25] Hence, this Part undertakes an examination of the language and legislative history of rules 703 and 803(4). The rules are poorly drafted in that they leave critical questions unanswered and create an internal inconsistency by treating identical situations quite differently. However, the deficiencies are deeper than mere bad drafting. The more fundamental problems are sloppy, imprecise analysis and application of the rules by federal courts, and dangerously flawed expectations of those who must live with the rules, including expert witnesses, judges, lawyers, and jurors. Each of these concerns will be fully discussed in turn; but first, the rules themselves will be carefully scrutinized.

A. The Language and Legislative History of Rules 703 and 803(4)

1. Rule 703

Rule 703 of the Federal Rules of Evidence provides as follows:

> 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.[26]

The rule makes two important points: (1) expert witnesses may base their opinion on three types of information—facts or data of which they have personal knowledge; material that is presented at trial; and secondhand information given to the expert outside the courtroom; and (2) expert witnesses may use inadmissible evidence as the basis of their opinion, provided that it is reasonably relied upon by other experts in the field.[27] Rule 703 applies only to "[t]he facts or data in the particular case."[28] In other words, it controls the case-specific information upon which experts rely in forming their opinions and does not apply

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25. HENRY J. FRIENDLY, BENCHMARKS 202 (1967) (quoting Justice Felix Frankfurter's "threefold imperative" regarding statutory interpretation: "(1) Read the statute; (2) read the statute; (3) read the statute!"); *see* Bread Political Action Comm. v. Federal Election Comm'n, 455 U.S. 577, 580 (1982) ("Statutory construction 'must begin with the language of the statute itself.'") (quoting Dawson Chem. Co. v. Rohm & Haas Co., 448 U.S. 176, 187 (1980).

26. FED. R. EVID. 703.

27. *Id.*

28. *Id.*

to the.expert's methodology.[29] Yet, even here there is uncertainty about which matters are governed by rule 702 and which are governed by rule 703.[30]

The expansion of the permissible expert bases in rule 703 was an attempt to modernize expert witness practice. The drafters recognized that experts often rely on secondhand information in their own practices and even make "life-and-death" decisions based on such data. As a result, they sought to conform the Federal Rules of Evidence to the experts' own, real life practices.[31] The broadening of the rule, permitting reliance on inadmissible matters, is tempered by the "reasonably relied upon" requirement.[32] The advisory committee specifically pointed to that language to allay fears that "enlargement of permissible data may tend to break down the rules of exclusion unduly."[33] The advisory committee, however, did not provide any specific guidance regarding the appropriate interpretation of the phrase "reasonably relied upon." Instead, it provided as an illustration of unreasonable reliance the example of an "accidentologist" who, in forming an opinion on the point of impact in a car accident, relied on the statements of bystanders.[34] This example arguably suggests that the reasonableness requirement includes some measure of trustworthiness.[35]

Rule 703 changed the law in many jurisdictions by broadening the permissible bases of an expert's opinion.[36] Unfortunately, however, the drafters left a gaping hole in the rule by what they did not say. The rule does not address whether the inadmissible evidence reasonably relied upon by the expert can or should be disclosed to the jury, and if so, under what circumstances.[37] The advisory committee's note avoids the question as well. It makes no reference to the status of the inadmissible facts or data used by the expert in forming an opinion in the case.[38]

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29. *See* Edward J. Imwinkelried, *Developing a Coherent Theory of the Structure of Federal Rule of Evidence 703*, 47 MERCER L. REV. 447, 454-57 (1996).

30. *See id.* at 451-52 (describing the two views of rule 703's scope: one that applies the rule to research data used by the expert with regard to the general theory used by the expert and the other that limits the rule to only case-specific facts or data).

31. *See* FED. R. EVID. 703 advisory committee's note.

32. *See* United States v. Affleck, 776 F.2d 1451, 1457 (10th Cir. 1985) (indicating that reasonable reliance is one of rule 703's safeguards).

33. FED. R. EVID. 703 advisory committee's note.

34. *See id.*

35. *See* Michael H. Graham, *Expert Witness Testimony and the Federal Rules of Evidence: Insuring Adequate Assuranee of Trustworthiness*, 1986 U. ILL. L. REV. 43, 75 (concluding that example of "accidentologist" indicates that rule 703's reasonableness requirement includes both customary reliance and a showing of more trustworthiness than ordinary hearsay statements possess).

36. FED. R. EVID. 703 advisory committee's note.

37. *See* FED. R. EVID. 703; Gong v. Hirsch, 913 F.2d 1269, 1273 (7th Cir. 1990).

38. *See* FED. R. EVID. 703 advisory committee's note.

Rule 705,[39] on the other hand, is promisingly entitled: "Disclosure of Facts or Data Underlying Expert Opinion,"[40] but it too ultimately fails to provide the answer. Like rule 703, it makes two points: (1) expert witnesses may state their opinions before they disclose the underlying facts or data (subject to the court's discretion); and (2) expert witnesses must disclose their basis if asked to do so on cross-examination.[41] The disclosure requirement on cross-examination is simply a matter of adversarial fairness; it does not reveal anything about the right of the party calling the expert to disclose during direct examination inadmissible evidence relied upon by the expert. The first point, however, does suggest some "right" to disclose the underlying facts or data.[42] The advisory committee's note to rule 705 picks up on that point and provides the most helpful insight thus far into the admissibility question:

> While the rule [rule 705] *allows counsel to make disclosure* of the underlying facts or data as a preliminary to the giving of an expert opinion, if he chooses, the instances in which he is required to do so are reduced. This is true whether the expert bases his opinion on data furnished him at secondhand or observed by him at firsthand.[43]

Undoubtedly, this statement supports the disclosure of inadmissible facts or data relied on by an expert. Yet, the statement addresses the expert's kind of knowledge (first or secondhand) and not the admissible or inadmissible status of the facts. Obviously, many secondhand statements on which experts rely are admissible hearsay. The comment thus fails to provide any definitive answer. More significant, however, is the statement's failure to give any insight into the standard or method of disclosing the facts or data.

The absence of any lucid guidance from rules 703 and 705 has left courts with only the general structure of the rules as a guide. Thus, when confronted with inadmissible evidence that has been reasonably relied upon by an expert, courts have either ignored the issue altogether or they have turned to rule 403, allowing the expert to disclose the information to the jury if its probative value is not substantially outweighed by dangers of unfair prejudice, confusion of the issues, or waste of time.[44] Any prejudice or confusion caused by the evidence, however,

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39. FED. R. EVID. 705. Rule 705 provides: "The expert may testify in terms of opinion or inference and give reasons therefor without first testifying to 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." *Id.*

40. FED. R. EVID. 705.

41. *Id.*

42. *See* STEVEN GOODE & OLIN GUY WELLBORN III, COURTROOM EVIDENCE HANDBOOK 186 (Student ed. 1995) ("Although not explicitly mentioned in rule 705, it is clear that an expert may ordinarily disclose the facts and data that underlie his opinion.").

43. FED. R. EVID. 705 advisory committee's note (emphasis added).

44. *See, e.g.*, Christophersen v. Allied-Signal Corp., 939 F.2d 1106, 1112 (5th Cir. 1991) ("Rule 403 serves a general screening function for otherwise admissible evidence."); Nachtsheim v. Beech Aircraft Corp., 847 F.2d 1261, 1270-71 (7th Cir. 1988) (stating that the underlying information on which experts rely is subject to exclusion under the rule 403 balancing test). Rule 403 provides: "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless

is frequently ameliorated by giving the jury a limiting instruction under rule 105.[45] The judge instructs the jury that it is to consider the facts or data used by the expert only as the basis of the expert's opinion, an aid to evaluate the impact of the opinion, and not for the truth of the matter asserted.[46] The instruction is premised on the assumption that the jury can, and will, follow it.[47]

Yet, the drafters evidence their own skepticism of the jury's capacity to follow the limiting instruction. In the advisory committee's note to rule 803(4) appears this amazing comment:

> Conventional doctrine has excluded from the hearsay exception, as not within its guarantee of truthfulness, statements to a physician consulted only for the purpose of enabling him to testify. While these statements were not admissible as substantive evidence, the expert was allowed to state the basis of his opinion, including statements of this kind. *The distinction thus called for was one most unlikely to be made by juries.* The rule accordingly rejects the limitation.[48]

This remark is perplexing. It gives more guidance on the admission of the expert's basis under rule 703 than can be found in all of the expert witness rules combined, yet it is buried within the hearsay rule. The clear import of the note is that the advisory committee intended, or at least expected, that the expert's basis under rule 703 would be disclosed to the jury, accompanied by a limiting instruction.

The committee's note is also inaccurate. In the last sentence of its commentary, the advisory committee concludes: "This position [expanding rule 803(4) to include diagnosis] is consistent with the provision of rule 703 that the facts on which expert testimony is based need not be admissible in evidence if of a kind *ordinarily* relied upon by experts in the field."[49] The committee's description of the standard in rule 703 is incorrect. The standard is "reasonably relied upon,"[50]

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presentation of cumulative evidence." FED. R. EVID. 403.

45. *See, e.g.*, Engebretsen v. Fairchild Aircraft Corp., 21 F.3d 721, 729 (6th Cir. 1994) (indicating that an adverse party is entitled to a limiting instruction explaining to the jury that the inadmissible evidence relied upon by an expert under rule 703 cannot be considered for its truth); Paddack v. Dave Christensen, Inc., 745 F.2d 1254, 1261-62 (9th Cir. 1984) ("Upon admission of such evidence [under rule 703], it . . . becomes necessary for the court to instruct the jury that the hearsay evidence is to be considered solely as a basis for the expert opinion and not as substantive evidence.").

46. *See infra* note 265 and accompanying text (illustrating limiting instructions under rule 703).

47. *See, e.g.*, Francis v. Franklin, 471 U.S. 307, 324 n.9 (1985) ("The Court presumes that jurors . . . attend closely [to] the particular language of the trial court's instructions and strive to understand, make sense of, and follow the instructions given them."); United States v. Affleck, 776 F.2d 1451, 1458 (10th Cir. 1985) (stating that the court cannot assume that the jury will disregard instructions given to them under rule 703). *See generally* Richardson v. Marsh, 481 U.S. 200, 206 (1987) (stating that there is an "almost invariable assumption" that the jury will follow limiting instructions). Chief Justice Traynor wrote: "[W]e must assume that juries for the most part understand and faithfully follow instructions." ROGER J. TRAYNOR, THE RIDDLE OF HARMLESS ERROR 73-74 (1970).

48. FED. R. EVID. 803(4) advisory committee's note (emphasis added).

49. *Id.*

50. FED. R. EVID. 703.

not "ordinarily relied upon" and the difference is substantial.[51] A standard that only measures industry custom involves simple nose counting. Presumably, reasonableness requires more. Most significantly, reasonableness should require that the material has some measure of reliability.[52] Ironically, many federal judges have similarly failed to make this important distinction when applying rules 703 and 803(4).

Yet, the advisory committee's note to 803(4), for all of its shortcomings, contains a disarmingly candid admission that the jury "is most unlikely" to make the distinction between hearsay admitted as the basis of the expert's opinion and hearsay admitted for its truth.[53] This statement is undoubtedly true[54] and yet it presents an unavoidable dilemma regarding the value of the limiting instruction as a safeguard against jury misuse of the expert's basis under rule 703. The committee fails to explain why the jury's perceived incompetence is sufficient to support an exception to the rule against hearsay. The drafters' seemingly impulsive response to a complex problem is unsatisfying and it raises a multitude of unanswered questions, including: Why not always admit the expert's basis for the truth? Why not simply create a new hearsay exception for matters relied upon by experts?[55] The drafters chose to take neither of those steps, leaving rule 803(4) in conflict with rule 703.

2. Rule 803(4)

Rule 803(4) of the Federal Rules of Evidence provides as follows:

> Statements made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment [are not excluded by the hearsay rule].[56]

The rule focuses on three aspects of a hearsay statement: the statement's purpose,[57] context,[58] and usefulness.[59] Historically, statements describing the

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51. *See* Graham, *supra* note 35, at 75 (noting that reliance is reasonable under rule 703 only if it is customary and the facts are more trustworthy than ordinary statements).

52. *See id.*

53. FED. R. EVID. 803(4) advisory committee's note.

54. *See infra* notes 255-69 and accompanying text.

55. JOHN W. STRONG ET AL., EVIDENCE CASES AND MATERIALS 796 (1995). The authors query whether the rationale for extending rule 803(4) means that "statements received under rule 703 to support the basis of the expert's opinion are also substantively admissible? If not, what is the justification for the difference in treatment?" *Id.* One commentator has proposed a new hearsay exception for the expert's otherwise inadmissible basis. *See* Paul R. Rice, *The Allure of the Illogic: A Coherent Solution for Rule 703 Requires More Than Redefining "Facts or Data"*, 47 MERCER L. REV. 495, 505-06 (1996).

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

57. *See id.* The statement must have been made for the purpose of either medical diagnosis or treatment to satisfy the rule. *See id.*

58. *See id.* The statement must relate to any of the following three areas: (1) medical history; (2) past or present symptoms; or (3) the cause or external source of the patient's problem. *See id.* The drafters' inclusion of statements concerning past symptoms and causation

declarant's present bodily condition and made for the purpose of obtaining medical treatment have been excepted from the hearsay rule "in view of the patient's strong motivation to be truthful."[60] Rule 803(4) expands the scope of the common law exception to include medical histories, past symptoms, and statements of causation, provided that they satisfy the "reasonably pertinent" standard. However, the rules' most dramatic expansion is the inclusion of statements made for purposes of medical diagnosis alone.[61] Neither the rule nor the advisory committee's note provides any notion of the heightened reliability of statements made for medical diagnosis, other than the fact that experts ordinarily rely on them in forming opinions.[62] The rule is not clear regarding how the "reasonably pertinent"[63] requirement should be applied to statements for diagnosis, or the extent to which, if any, that application should differ from the "reasonably relied upon" language of rule 703.[64] At the very least, however, the rule suggests that treatment and diagnosis are independent bases for admission. A statement made solely for purposes of diagnosis, if reasonably pertinent for that purpose, should satisfy the rule, regardless of whether the patient was motivated to obtain treatment at the time.

Rule 803(4) is limited to "medical" treatment or diagnosis,[65] although the statements need not be made to the doctor to come within the exception.[66] The advisory committee noted that the rule might encompass statements to "hospital

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constitutes an expansion of the traditional reach of the exception based on the belief that the patient's motivation to be truthful extended just as much to these matters as to present symptoms. *See id.* advisory committee's note.

59. FED. R. EVID. 803(4). The statement must not only be made for the proper purpose and be limited to the appropriate subject matter, but also it must be "reasonably pertinent to diagnosis or treatment." *Id.* That is, the statement must be useful to the doctor in his work.

60. *Id.* advisory committee's note.

61. FED. R. EVID. 803(4); *see id.* advisory committee's note; ERIC D. GREEN & CHARLES R. NESSON, PROBLEMS, CASES, AND MATERIALS ON EVIDENCE 484-85 (2d ed. 1994) ("The extension of rule 803(4) to cover statements made to nontreating physicians purely for the purpose of diagnosis in preparation for testifying at trial is one of the most radical extensions of the Federal Rules.").

62. *See* FED. R. EVID. 803(4) advisory committee's note; Mosteller, *supra* note 15, at 262 ("[T]he Advisory Committee Note provides no affirmative explanation for why . . . statements to medical experts should be substantively received."). Professor Mosteller identified four "plausible reasons why statements offered to medical experts would be received for their truth." *See id.* at 263. The reasons are: (1) "[P]rocedural rules governing the discovery of opinions by such experts give a special guarantee of their reliability since such statements will be more thoroughly tested by the adversary process than others"; (2) medical experts are particularly well trained and skilled professionals; (3) plenty of medical experts are available to each side to test any medical opinion and any underlying statements; (4) medical science is a "hard" science, thus more precise than many fields certified as appropriate for admission under rule 702. *See id.* Unfortunately, none of these justifications provides a consistently valid basis upon which to distinguish medical experts from all other experts.

63. FED. R. EVID. 803(4); *see id.* advisory committee's note.

64. FED. R. EVID. 703.

65. *See* FED. R. EVID. 803(4).

66. *Id.* advisory committee's note.

attendants, ambulance drivers, or family members."[67] To what extent, however, the rule applies to statements made to nonphysicians such as psychologists or social workers is unclear. Neither the rule nor the notes that accompany it sheds any light on that question. In addition, statements of fault are excluded from the rule because they are not reasonably pertinent to treatment or diagnosis.[68] The doctor does not need to know "who did it," only "what happened."[69]

Rules 703 and 803(4) are troubling because they seem to arbitrarily give greater recognition to one kind of hearsay (statements for medical diagnosis) than to another identical kind of hearsay (inadmissible facts or data relied on by experts) with no apparent reason for distinguishing between them. It is particularly troublesome because the two rules are so closely linked. Cases involving statements made for diagnosis under 803(4) almost always involve rule 703.[70] Thus, proposals to change one necessarily implicate the other because they represent opposite sides of the same issue—the jury's ability (or inability) to understand and follow limiting instructions. These procedures also arise in the same context—the information used by experts to form opinions.

B. Federal Court Treatment of Rules 703 and 803(4)

Not surprisingly, the uncertainty of the language and legislative history of rules 703 and 803(4) has wreaked havoc in the decisions of federal judges charged with construing and applying the rules. Federal courts have struggled to find a coherent, consistent approach to rules 703 and 803(4) and their decisional trail is far from clearly marked.

1. Rule 703

a. *United States v. Sims* and the "Liberal Approach"

From the very beginning, rule 703 received vastly divergent treatment by federal courts. In *United States v. Sims*,[71] the Ninth Circuit Court of Appeals considered the recently enacted, but not yet effective, rule 703.[72] In *Sims*, the defendant appealed from a conviction for forging and fraudulently negotiating United States treasury checks. The jury found that the defendant, a self-employed tax preparer, had "arranged to have the United States Treasury mail a number of

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67. *Id.*

68. *See id.* ("Statements as to fault would not ordinarily qualify [as reasonably pertinent].").

69. United States v. Iron Shell, 633 F.2d 77, 84 (8th Cir. 1980).

70. *See, e.g.*, *In re* Paoli R.R. Yard PCB Litig., 35 F.3d 717, 762 (3d Cir. 1994) (addressing hearsay statements under rules 703 and 803(4)); Gong v. Hirsch, 913 F.2d 1269, 1271-74 (7th Cir. 1990); *In re* "Agent Orange" Prod. Liab. Litig., 611 F. Supp. 1223, 1246-47 (E.D.N.Y. 1985), *aff'd*, 818 F.2d 187 (2d Cir. 1987).

71. 514 F.2d 147 (9th Cir. 1975).

72. *Id.* at 149. *Sims* was decided on April 2, 1975, and the Federal Rules of Evidence became effective on July 1, 1975. *See id.*

his clients' tax refund checks directly to him" and subsequently negotiated the checks at a liquor store.[73]

The defendant claimed insanity. He alleged that he acted out of a sincere belief that God was guiding him, leaving him incapable of complying with the law or appreciating the "wrongfulness" of his conduct.[74] He presented testimony from a psychologist and psychiatrist in support of his claim.[75]

In response the government called its own psychiatrist who testified that defendant's alleged "religious fanaticism" was not delusional and that there was no evidence to support defendant's insanity claim.[76] The psychiatrist based his opinion on his personal examination of the defendant, other psychiatric reports, and interviews with government attorneys and IRS agents.[77] The expert disclosed at trial that the interviews with IRS agents had revealed that the defendant had been in some difficulty with the law before 1971, thus casting doubt on the defendant's contention to the contrary.[78] The defendant objected to the disclosure because it was hearsay, and it had not been made available before trial.[79]

The appellate court's analysis focused almost exclusively on the special ability of the expert to assess the reliability of the statements on which he based his opinions and the need for the court to defer to the expert's assessment.[80] The court stated:

> The rationale in favor of the admissibility of expert testimony based on hearsay is that the expert is fully capable of judging for himself what is, or is not, a reliable basis for his opinion. . . . In a sense, the expert synthesizes the primary source material—be it hearsay or not—into properly admissible evidence in opinion form.[81]

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73. *Id.* at 147-48.

74. *Id.* at 148. The defendant claimed to believe that those who interfered with his efforts "brought down the wrath of God in the form of California earthquakes." *Id.* Thus, his claimed delusion was that the California earthquakes were God's retribution against the IRS investigators who had interfered with his divinely guided course of conduct. *See id.*

75. *Id.* The testimony of defendant's two experts was "inconclusive on the ultimate issue of legal insanity." *Id.*

76. *Id.*

77. *Id.*

78. *See id.* Although it is unclear from the Ninth Circuit's opinion, the defendant apparently claimed that his aberrational behavior all started after 1971. Yet, the government's psychiatrist revealed at trial that IRS agents told him the defendant had been investigated for "'alleged irregularities' prior to 1971." *Id.* Presumably, the defendant claimed that his fraudulent conduct was not ongoing but was limited to that period of delusion caused by his "religious fanaticism." Siguificantly, the information was revealed on cross-examination in response to the following question: "Is it a fact . . . that at least from the facts we know, that Mr. Sims had been practicing as a tax preparer, according to information you have, for at least ten years before he had any difficulty with the law?" *Id.*

79. *Id.*

80. *See id.* at 149. The court concluded that its approach to rule 703 "respects the functions and abilities of both the expert witness and the trier of fact." *Id.*

81. *Id.* According to the court, the expert's experience enables him "to use only those sources and kinds of information which are of a type reasonably relied upon by similar experts in arriving at sound opinions on the subject." *Id.*

The court, rather than independently assessing the reliability of the expert's hearsay basis, left that responsibility to the expert, finding that "it seems logical" the expert would get information from the agents.[82] The court did not indicate whether the government's expert actually testified that he reasonably relied upon the information.[83]

This decidedly liberal approach to rule 703, which makes the expert the arbiter of admissible evidence in place of the judge, represents one end of the spectrum.[84] In *Sims*, the hearsay statements admitted through the expert do not have external indicia of reliability. The expert, retained to testify that the defendant was not insane, was patently biased in favor of the government, as were the IRS agents whose investigation had resulted in the charges being filed. If the agent's statements had been recorded in an official report, for example, the statements would have been excluded under the public records exception because of their lack of trustworthiness under the circumstances in which they were made.[85] Moreover, the assertion that defendant had been in trouble with the law before 1971 is an objectively verifiable fact. Proof of that fact could have been adduced through the testimony of a witness at trial who was subject to cross-examination.

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82. *Id.* ("[W]e should . . . leave to the expert the assessment of the reliability of the statements on which he bases his expert opinion.").

83. *See id.* Remarkably enough, the court relied on its own sense of logic instead of evidence adduced at the trial below as the basis for its finding of reasonable reliance. *See id.*

84. Arnolds, *supra* note 16, at 6-9. When Arnolds wrote his article in 1984 he identified the liberal approach as the majority approach among federal circuits. *See id.* at 8.

85. *See* FED. R. EVID. 803(8)(B). The public records exception explicitly forecloses the admission of "matters observed" by law enforcement personnel in a criminal case because of the adversarial relationship between the police and suspects and confrontation concerns. *See id.* advisory committee's note.

The deferential reading of rule 703 in *Sims* does not stand alone. It has been joined by similarly deferential courts from the First,[86] Third,[87] Fifth,[88] Sixth,[89] Seventh,[90] and Tenth Circuits.[91] Many of these decisions share at least three significant characteristics. First, they typically examine the expert's basis for "customary reliance" rather than "reasonable reliance." For example, the Seventh Circuit in *United States v. Lundy*[92] found that a fire investigator appropriately relied on the statements of many of the people involved in a fire based on the industry custom. *Lundy* stated the standard as follows: "[H]earsay and third-party observations that are of a type *normally* relied upon by such an expert in the field are properly utilized by an expert in developing an expert opinion."[93] In *Lundy* the appellate court found it "uncontroverted" that interviews with witnesses are a standard investigatory technique in cause and origin inquiries.[94] The court in *International Adhesive Casting Co. v. Bolton Emerson International, Inc.*[95] plainly stated that under rule 703 "reasonableness is measured against the facts

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86. *See, e.g.*, International Adhesive Coating Co. v. Bolton Emerson Int'l, Inc., 851 F.2d 540, 544-45 (1st Cir. 1988) (finding that "reasonableness" under rule 703 is measured against the normal practice of experts in the field).

87. *See, e.g.*, Lewis v. Rego, Co., 757 F.2d 66, 73-74 (3d Cir. 1985) (ruling that an expert's conversations with a nontestifying expert should have been admitted at trial because it was the "material on which experts in the field base their opinions" with no independent analysis of the trustworthiness of the statements); *In re* Japanese Elec. Prod. Antitrust Litig., 723 F.2d 238, 277 (3d Cir. 1983) ("[T]he proper inquiry is not what the court deems reliable, but what experts in the relevant discipline deem it to be."), *rev'd on other grounds sub nom.* Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574 (1986); Stevens v. Cessna Aircraft Co., 634 F. Supp. 137, 142-43 (E.D. Pa. 1986) (admitting hearsay statements to defendant's expert in aeronautical medicine because "such statements were *routinely* relied upon by experts") (emphasis added).

88. *See, e.g.*, Peteet v. Dow Chem. Co., 868 F.2d 1428, 1432 (5th Cir. 1989) (stating that under rule 703 "the trial court should defer to the expert's opinion of what data they find reasonably reliable"); Greenwood Utils. Comm'n v. Mississippi Power Co., 751 F.2d 1484, 1495 (5th Cir. 1985) (stating that deference should be given to the expert's view of what is reasonably relied upon in the field).

89. *See, e.g.*, Mannino v. International Mfg. Co., 650 F.2d 846, 851-53 (6th Cir. 1981) (reversing the trial court's refusal to allow the plaintiff's expert to rely on hearsay material, the court stated: "great liberality is allowed the expert in determining the basis of his opinions under rule 703").

90. *See, e.g.*, United States v. Lundy, 809 F.2d 392, 395-96 (7th Cir. 1987) (upholding expert's reliance on statements of witnesses to a fire in forming an opinion on the cause and origin of the fire because such hearsay statements are "normally relied upon by an expert in the field").

91. *See, e.g.*, United States v. Farley, 992 F.2d 1122, 1125 (10th Cir. 1993) (holding that expert psychologist properly repeated statements of child victim of abuse during his testimony because "[r]ule 703 would allow the expert to testify regarding the information, even if the evidence would not otherwise be admissible"); United States v. Affleck, 776 F.2d 1451, 1456-58 (10th Cir. 1985) (holding statements by the defendant's employees were the type typically relied on by a professional accountant, and thus, were properly admitted under rule 703).

92. 809 F.2d 392 (7th Cir. 1987).

93. *Id.* at 395 (emphasis added).

94. *Id.* at 395-96.

95. 851 F.2d 540 (1st Cir. 1988).

or data upon which experts in the particular field normally rely."[96] Reducing the "reasonably relied upon" language of rule 703 to a mere measurement of normal practices removes an important protection against disclosing to the jury unreliable facts or data.

The second characteristic of these cases—deference to the expert's opinion of reasonable reliance—exacerbates that concern. The most notable example of court deference is the Third Circuit's opinion in *In re Japanese Electronic Product Antitrust Litigation*,[97] in which the court concluded: "The proper inquiry is not what the court deems reliable, but what the experts in the relevant discipline deem it to be."[98] The Sixth Circuit, in *Mannino v. International Manufacturing Co.*,[99] stated the principle even more broadly: "Great liberality is allowed the expert in determining the basis of his opinions under rule 703. Whether an opinion should be accepted is not for the trial judge. That is for the finder of fact."[100] In both cases the appellate courts reversed the trial judges for substituting their judgment for the experts who testified, claiming that in doing so they usurped the role of the jury.[101]

The third shared trait is the failure to address in any meaningful way the disclosure of the expert's basis to the jury. In each case the courts seem to operate under an unwritten assumption that the basis can be disclosed if "reasonably relied upon." *United States v. Farley*[102] is particularly instructive. In *Farley*, the court upheld a psychologist's reliance on statements by the child victim of a sexual assault—based solely on the expert's own testimony of the appropriateness of the reliance.[103] The court concluded: "Therefore, Rule 703 would allow the expert to testify regarding the information, even if the evidence would not otherwise be admissible."[104] Of course, as noted in the earlier discussion of the language and legislative history of rule 703, the court's conclusion is demonstrably false.[105] At best, rule 703 does not preclude admission of the basis.[106] At the same time, however, rule 403 requires a balancing of the statement's probative value and prejudicial effect before disclosure.[107]

In summary, the cases adopting the so-called "liberal" approach are characterized by their unyielding faith in experts and the factfinder. The expert

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96. *Id.* at 544-45; *see also Affleck*, 776 F.2d at 1456-58 (admitting use of hearsay statements under rule 703 because they were the type "typically relied on"); Stevens v. Cessna Aircraft Co., 634 F. Supp. 137, 142-43 (E.D. Pa. 1986) (allowing expert's use of hearsay based on finding that such statements "were routinely relied upon by experts").

97. 723 F.2d 238 (3d Cir. 1983), *rev'd on other grounds sub nom.* Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574 (1986).

98. *Id.* at 276.

99. 650 F.2d 846 (6th Cir. 1981).

100. *Id.* at 853.

101. *See Japanese Elec. Prods. Antitrust Litig.*, 723 F.2d at 277; *Mannino*, 650 F.2d at 853.

102. 992 F.2d 1122 (10th Cir. 1993).

103. *See id.* at 1125.

104. *Id.*

105. *See supra* notes 34-35, 49-52 and accompanying text.

106. *See* FED. R. EVID. 703 & advisory committee's note.

107. *See* FED. R. EVID. 403.

is specially trained and thus knows best what information is helpful or unhelpful in forming opinions in the expert's field. Meanwhile, the jury can be trusted to use the information in evaluating the expert's opinion only and not as substantive evidence.

b. The Fifth Circuit: A Case Study of Confusion

The deferential approach of *United States v. Sims* and the others stands in stark contrast to the stricter approach espoused by a substantial body of authority. In some instances, the divergent lines of decisions stand side-by-side in the same circuit. The United States Court of Appeals for the Fifth Circuit is illustrative. A chart of five Fifth Circuit decisions on rule 703 between 1984 and 1991 resembles a game of ping-pong as the court has bounced back and forth between competing points of view.

In 1984 the court decided *Barrel of Fun, Inc. v. State Farm Fire & Casualty Co.*[108] involving the admissibility of expert testimony based on a psychological stress evaluation ("PSE").[109] The court concluded that PSE was not generally accepted in the scientific community and that opinions of the expert based on PSEs were therefore inadmissible.[110] The PSE, which formed the basis of the expert's opinion that the store owner had "prior knowledge of and authorized the setting of the fire,"[111] should have been excluded under rule 703 because when assessing the reliability of the expert's opinion "the trustworthiness of the underlying data is not irrelevant."[112]

The next year the court decided *Greenwood Utilities Commission v. Mississippi Power Co.*[113] and, while recognizing that the inquiry under rule 703 involves both relevance and reliability, the court stated that "deference ought to be accorded to the expert's view" of the reasonable reliance question.[114] As if to remove any doubt that it was adopting a more liberal view, the court cited to the Third Circuit's opinion in *In re Japanese Electronic Products Antitrust Litigation.*[115]

In the 1987 case of *Viterbo v. Dow Chemical Co.*,[116] the court reverted to its former ways, finding that it must examine the reliability of the expert's sources

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108. 739 F.2d 1028 (5th Cir. 1984).

109. *Id.* at 1029. *Barrel of Fun* was initiated when State Farm refused to pay a claim under a fire insurance policy for a music store owned by plaintiff based upon alleged arson. *See id.* The owner of the store took a psychological stress evaluation administered by the Louisiana state fire marshal's office and allegedly failed the test. The trial court admitted testimony about the PSE from witnesses called by State Farm. *See id.* at 1030.

110. *See id.* at 1033.

111. *Id.* at 1030.

112. *See id.* at 1033 (quoting A.B.A. Sec. Litig. 208, Emerging Problems Under the Federal Rules of Evidence (1st ed. 1983)).

113. 751 F.2d 1484 (5th Cir. 1985).

114. *See id.* at 1495.

115. *See id.*

116. 826 F.2d 420 (5th Cir. 1987).

under rule 703 and in the process showing no interest in deferring to anyone.[117] The court concluded that the reliance by plaintiff's expert on the plaintiff's oral history, some animal studies, and medical tests conducted by the expert lacked reliability.[118] The court's analysis turned not on the practices of other similarly situated experts, but on the court's own careful analysis of the three bases.[119]

Less than seven months later, in *Peteet v. Dow Chemical Co.*,[120] the Fifth Circuit changed directions again finding that the "reasonably relied upon" determination of rule 703 required "the trial court [to] defer to the expert's opinion of what data they [sic] find reasonably reliable."[121] The court cited to *Greenwood Utilities* and *In re Japanese Electronic Products Antitrust Litigation* in support of its construction of rule 703.[122] Not surprisingly, the court held that the expert's bases were appropriately relied upon.[123]

Finally, in 1991, the Fifth Circuit, sitting en banc, decided *Christophersen v. Allied-Signal Corp.*,[124] in which plaintiff's expert opined that prolonged exposure to nickel and cadmium had caused plaintiff to contract cancer.[125] The majority vigorously criticized the expert's bases as being critically inaccurate and incomplete and upheld the trial judge's exclusion of the expert's opinion.[126] The court essentially followed *Viterbo*'s lead and held that "an opinion based totally on incorrect facts" ultimately fails to help the jury, the basic requirement for admission under the rules.[127]

This brief review demonstrates the wide variety of approaches (even within the same circuit) and the frequent relationship between the court's approach and the ultimate outcome. It also reveals basic misperceptions about the role of rule 703 in evaluating the expert's opinion. In the three "restrictive" cases, *Barrel of Fun*, *Viterbo*, and *Christophersen*, the court used rule 703 as a means to test the reliability of the expert's methodology. In *Viterbo*, for example, the court failed to address the admissibility of the expert's underlying facts, and instead simply proceeded to criticize the expert's approach to forming an opinion.[128] *Barrel of Fun* and *Christophersen* similarly transform rule 703 into a test of expert methodology while ignoring the more fundamental inquiry mandated by the rule.[129] Although the results in each case are defensible, the basis for exclusion in each case should have been rule 702, and not rule 703.[130] One consequence of

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117. *Id.* at 424 ("Without more than credentials and a subjective opinion, an expert's testimony that 'it is so' is not admissible."); *see id.* at 422 ("Rule 703 . . . requires courts to examine the reliability of [the expert's] sources.").

118. *See id.* at 423-24.

119. *See id.*

120. 868 F.2d 1428 (5th Cir. 1989).

121. *Id.* at 1432.

122. *See id.*

123. *See id.* at 1434.

124. 939 F.2d 1106 (5th Cir. 1991).

125. *See id.* at 1109.

126. *See id.* at 1114-16.

127. *See id.* at 1114.

128. *See Viterbo*, 826 F.2d at 422-24.

129. *See Christophersen*, 939 F.2d at 1111; *Barrel of Fun*, 739 F.2d at 1033-34.

130. *See* Imwinkelried, *supra* note 29, at 454-57.

this imprecise analysis is uncertainty about the appropriate standard for courts when applying rule 703.

c. The "Restrictive Approach"

While the Fifth Circuit decisions show some intra-circuit confusion about the standard under rule 703, the frequently cited opinion *In re "Agent Orange" Product Liability Litigation*,[131] shows internal conflict. After reviewing the liberal and restrictive approaches to the rule, Judge Weinstein adopted an approach to rule 703 that included elements of both strands of authority. *In re "Agent Orange"* was decided on defendants' motions for summary judgment. In forming their opinions on what had caused plaintiffs' alleged ailments, plaintiffs' experts did not review the medical records of the plaintiffs or personally examine the plaintiffs.[132] Instead, they relied upon a checklist of symptoms completed by the plaintiffs to assist the experts to prepare to give testimony at depositions and trial.[133] The court accepted the restrictive view that it "may not abdicate its independent responsibilities to decide if the [expert's] bases meet minimum standards of reliability,"[134] but "deference ought to be accorded to the expert's view that experts in his field reasonably rely upon such sources of information."[135] In this case, however, the court held that deference was not appropriate because it was beyond real dispute that "no reputable physician relies on hearsay checklists by litigants to reach a conclusion with respect to the cause of their afflictions."[136] The Second Circuit affirmed the court's ruling,[137] excluding the checklists and the opinions based thereon.[138] Despite the court's belief that it was taking the restrictive approach, some have subsequently identified *In re "Agent Orange"* as a third approach, mid-way between the "restrictive" and the "liberal." The court's assertion that deference is appropriate suggests some blending of the two lines of analysis.

The restrictive, or, perhaps quasi-restrictive approach, seemingly represents the current trend among federal courts of appeals. This line of cases recognizes that rule 703 was not intended to be used as an "end run" around the hearsay rule[139]

131. 611 F. Supp. 1223 (E.D.N.Y. 1985), *aff'd*, 818 F.2d 187 (2d Cir. 1987).
132. *Id.* at 1243.
133. *Id.* at 1246.
134. *Id.* at 1245.
135. Greenwood Utils. v. Mississippi Power Co., 751 F.2d 1484, 1495 (5th Cir. 1985).
136. *In re "Agent Orange"*, 611 F. Supp. at 1246.
137. *In re* "Agent Orange" Prod. Liab. Litig., 818 F.2d 187 (2d Cir. 1987).
138. *In re "Agent Orange"*, 611 F. Supp. at 1256.
139. *See, e.g., In re* James Wilson Assocs., 965 F.2d 160, 173 (7th Cir. 1992) (Under rule 703, "the judge must make sure that the expert isn't being used as a vehicle for circumventing the rules of evidence."); Gong v. Hirsch, 913 F.2d 1269, 1272-73 (7th Cir. 1990) (Rule 703 was held to deny admissibility to a non-treating physician's letter describing plaintiff's physical condition because it was merely a conclusory statement and not the type of information reasonably relied upon by experts.).

and that expert witnesses deserve "careful consideration."[140] Moreover, they impose a reliability requirement on inadmissible facts or data relied upon by the expert[141] although the requirement is often stated quite modestly, such as "minimum standards of reliability."[142] The underlying facts or data are unreasonable if they are "fundamentally unsupported"[143] by the record, or "of such little weight"[144] that they are unhelpful.

Frequently the reliability analysis is the end of the analytical line for "restrictive courts." If the inadmissible facts or data are sufficiently reliable, they constitute a proper basis for the expert's opinion and may be fully disclosed to the jury. If the facts or data are not adequately reliable, they may not be disclosed, and the expert's opinion must find adequate support elsewhere. A few federal courts, however, have explicitly adopted a two step analysis.[145] For example, the Seventh Circuit, in *Nachtsheim*, recognized that the rules left unanswered the question of the admission of the expert's unadmitted or inadmissible basis.[146] The court held that while rule 703 generally permits experts to state the underlying basis of their opinions (if the information is of a type reasonably relied upon by experts), the underlying information is still subject to exclusion under rule 403's balancing test.[147] These courts agree that the inadmissible facts or data are disclosed to help the jury evaluate the expert's opinions and not for their truth.[148] A limiting instruction is available, if requested, to ensure that the evidence is not overly valued by the jury.[149]

The trend of federal courts toward a somewhat more restrictive interpretation of rule 703 undoubtedly has been influenced by the Supreme Court's recent opinion in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*[150] Although *Daubert*

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140. University of R.I. v. A.W. Chesterton Co., 2 F.3d 1200, 1218 (1st Cir. 1993) ("Rule 703 requires the trial court to give 'careful consideration' to any inadmissible facts upon which the expert will rely, in order to determine whether reliance is 'reasonable.'"); International Adhesive Coating Co. v. Bolton Emerson Int'l, 851 F.2d 540, 545 (1st Cir. 1988) (Under rule 703, "[t]his reasonableness determination is 'a matter requiring the District Court's careful consideration.'").

141. *See, e.g.*, *Gong*, 913 F.2d at 1272-73 (Under rule 703 a court must inquire into the trustworthiness of the expert's basis.).

142. *See In re* Paoli R.R. Yard PCB Litig., 35 F.3d 717, 748 (3d Cir. 1994) (quoting *In re "Agent Orange"*, 611 F. Supp. at 1245).

143. *See* Viterbo v. Dow Chem. Co., 826 F.2d 420, 422 (5th Cir. 1987).

144. *See id.*

145. *See, e.g.*, Engebretsen v. Fairchild Aircraft Corp., 21 F.3d 721, 729 (6th Cir. 1994) (Materials relied on by an expert "should not be admitted if the risk of prejudice substantially outweighs their probative value."); Nachtsheim v. Beech Aircraft Corp., 847 F.2d 1261, 1270-71 (7th Cir. 1988) (Expert may not reveal to jury inadmissible factual basis of his opinion when the court determines that the risk of prejudice substantially outweighs the probative value.).

146. *See Nachtsheim*, 847 F.2d at 1270-71.

147. *See id.*

148. *See Engrebretsen*, 21 F.3d at 729; United States v. Farley, 992 F.2d 1122, 1125 (10th Cir. 1993); Boone v. Moore, 980 F.2d 539, 542 (8th Cir. 1992); Paddack v. Dave Christensen, Inc., 745 F.2d 1254, 1262 (9th Cir. 1984).

149. *See supra* note 45 and accompanying text.

150. 509 U.S. 579 (1993).

concerned the proper construction of rule 702,[151] the court announced an active role for the judge as "gatekeeper" when confronted with expert witness testimony.[152] Some courts have taken *Daubert*'s "gatekeeper" requirement to mean that the judge may no longer defer to expert witnesses under the Federal Rules, but instead has the responsibility to "separate the wheat from the chaff."[153] The clearest and perhaps most significant example of those courts is the Third Circuit's decision in *In re Paoli Railroad Yard PCB Litigation*,[154] wherein the court reversed the widely cited *In re Japanese Electronic Products Antitrust Litigation*[155] and found that the judge's role under rule 703 is to ensure that there are "good grounds on which to find the data reliable."[156] This is the same test adopted by the Supreme Court in *Daubert* in construing rule 702's reliability requirement. In applying the test to medical testimony offered by plaintiffs, the court found that the "good grounds" test required either a personal examination of the patient by the doctors, or a review of the patient's medical records by the doctor. No other circuit has yet adopted the "good grounds" standard for rule 703. Since *Daubert*, courts have reached varying interpretations about what the Supreme Court's "gatekeeper" analogy means for trial judges.[157]

d. Rule 403

Despite the unifying nomenclature often used to describe the approach of *Christophersen*, *In re "Agent Orange" Product Liability Litigation*, and *In re Paoli Railroad Yard PCB Litigation* and the other "restrictive" decisions,[158] there is substantial diversity even within this approach. Two factors primarily account for the diversity. First, the many different areas of expertise, each with varying practices and standards, make uniform application of rule 703 quite difficult, if not impossible.[159] Judges must apply the amorphous "reasonably relied upon" standard of rule 703 to a constantly expanding array of experts. The use of a fact-sensitive test naturally leads to a lack of uniformity.

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151. *See id.* at 587-98.

152. *See id.* at 589 n.7.

153. *See* Joiner v. General Elec. Co., 78 F.3d 524, 537 (11th Cir. 1996) (Smith, J., dissenting) (Under *Daubert* the "trial court must separate the wheat from the chaff."); Estate of Sinthasomphone v. City of Milwaukee, 878 F. Supp. 147, 152 (E.D. Wis. 1995) ("The Supreme Court has expressed its faith in the ability of district judges to separate the wheat from the chaff.").

154. 35 F.3d 717 (3d Cir. 1994).

155. *See supra* notes 97-98 and accompanying text (discussing *In re* Japanese Elec. Prod. Antitrust Litig. 723 F.2d 238 (3d Cir. 1983), *rev'd on other grounds sub nom.* Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574 (1986)).

156. *In re Paoli*, 35 F.3d at 748.

157. *See* Isely v. Capuchin Province, 877 F. Supp. 1055, 1066 (E.D. Mich. 1995) ("[U]nder *Daubert*, the Court perceives its role . . . as being a 'screener' of expert testimony, similar to its role under [rule 104(b)]."); *cf. Daubert*, 509 U.S. at 592 (noting judge's responsibility under rule 104(a)).

158. *See* 3 WEINSTEIN & BERGER, *supra* note 5, ¶ 703[3], at 703-32 to 703-38.

159. *See* Soden v. Freightliner Corp., 714 F.2d 498, 502-03 (5th Cir. 1983) (noting that under rule 703 courts must analyze expert's underlying facts or data on a case-by-case basis).

Second, the reliance by some courts on rule 403's balancing test[160] to decide whether to admit the basis leaves the admissibility decision within the considerable discretion of the trial court, and reduces the scrutiny given the judge's decision on appeal. *Daubert* recognized that rule 403 has a unique role when expert testimony is offered because it is often more misleading than other evidence.[161] However, the balancing of the probative value of the expert's basis against the risks of unfair prejudice or confusion is not quantifiable, and trial courts regularly fail to give much insight into their thought processes.[162] Even the standard itself is slippery, causing more than one trial judge to apply the wrong standard.[163] Nevertheless, even when applied properly, rule 403 constitutes a rule of admission.[164] That is, it requires the opponent of the evidence to show that the unfair prejudice substantially outweighs its probative value, a difficult burden indeed. Thus, even when invoked by a party, rule 403 is the advocate's last line of defense against admission, and it is so over-used that some commentators have labeled it the "garbage can" of evidence.[165]

Moreover, the fact that a trial court improperly admits or excludes evidence under rule 403 is not reversible on appeal as long as the trial court did not act irrationally.[166] The standard of review of rule 403 decisions is extremely deferential, leading one circuit court to announce: "[O]nly rarely—and in extraordinarily compelling circumstances—will we, from the vista of a cold appellate record, reverse a district court's . . . judgment concerning the relative weighing of probative value and unfair effect."[167] As is the case with most evidentiary issues, the advocate's best, and perhaps only meaningful opportunity to address rule 703 issues is before the trial judge. The absence of clear and helpful standards under rule 703 impairs the consistency and predictability of trial court rulings on the use and admission of inadmissible evidence relied upon by experts.

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160. *See supra* notes 145-49 and accompanying text (identifying examples of courts that apply rule 403 to expert's basis).

161. *See* Daubert v. Merrell Dow Pharms., Inc., 509 U.S. 579, 595 (1993).

162. Holbrook v. Lykes Bros. S.S. Co., 80 F.3d 777, 786 (3d Cir. 1996) (The trial court should artieulate its balancing analysis under rule 403, but the fact that it failed to do so is not per se reversible error.).

163. *See* Emigh v. Consolidated Rail Corp., 710 F. Supp. 608, 612 (W.D. Pa. 1989) ("[W]hen the underlying source is so unreliable as to render it more prejudicial than probative" it is "inadmissible under rule 403."). The correct standard, of course, is whether probative value is substantially outweighed by dangers of unfair prejudice or confusion of the jury. *See* FED. R. EVID. 403.

164. CHRISTOPHER B. MUELLER & LAIRD C. KIRKPATRICK, EVIDENCE 193 (1995) ("By authorizing admission only where the probative value is 'substantially outweighed' by the listed competing considerations, the Rule is designed to favor admissibility.").

165. *See* EDWARD J. IMWINKELRIED & TIM HALLAHAN, IMWINKELRIED AND HALLAHAN'S CALIFORNIA EVIDENCE CODE ANNOTATED 31 (2d ed. 1995) ("[J]udges consider [rule 403] the 'garbage can' of the Evidence Code.").

166. *See Holbrook*, 80 F.3d at 786.

167. Newell P.R., Ltd. v. Rubbermaid Inc., 20 F.3d 15, 21 (1st Cir. 1994) (quoting Pinkham v. Burgess, 933 F.2d 1066, 1071 (1st Cir. 1991) (omission in original)).

2. Rule 803(4)

Courts have faced similar struggles applying rule 803(4)'s provision that allows into evidence statements that are reasonably pertinent to medical diagnosis. The most significant disagreement in this context has focused on the "reasonably pertinent" requirement, leaving at least two still unresolved questions: (1) Are statements made to an expert to prepare the expert to testify admissible under 803(4) if they merely satisfy the "reasonable reliance" requirement of rule 703?; and (2) Are statements of identity made by a victim of sexual abuse to a doctor "reasonably pertinent" to treatment or diagnosis?

a. *United States v. Iron Shell*

One of the first cases to construe rule 803(4) was *United States v. Iron Shell*,[168] wherein the government offered the testimony of Dr. Mark Hopkins regarding his examination of nine-year-old Lucy.[169] The examination took place about two hours after Lucy was allegedly attacked by the defendant, Iron Shell. During the examination Lucy described the attack for Dr. Hopkins, and at trial the prosecution sought admission of Lucy's hearsay statements under rule 803(4) because she was unable to testify competently about what had happened.[170] The trial court admitted the hearsay statements, over the defendant's objection, and the Eighth Circuit affirmed the ruling on appeal.[171]

In doing so, the appellate court adopted a two-part test for rule 803(4): "first, is the declarant's motive consistent with the purpose of the rule; and second, is it reasonable for the physician to rely on the information in diagnosis or treatment."[172] The court upheld admission of Lucy's statements because (i) her statements were consistent with a treatment motivation, (ii) she was nine years old, and thus, unlikely to fabricate her allegations, and (iii) Dr. Hopkins testified that most doctors would have sought the same history from Lucy, and the information obtained from Lucy was helpful to the doctor in conducting the examination.[173]

The "motivation prong" of *Iron Shell*'s test has proven controversial among federal courts. The most fundamental issue it raises is whether rule 803(4) incorporates a treatment motivation for statements related to both treatment and diagnosis, or only treatment. As noted earlier, the plain language of the rule contains no requirement that the diagnosis sought by the declarant be for purposes of treatment.[174] The rule admits statements made for treatment *or* diagnosis. Moreover, the advisory committee's note suggests that the reasonable reliance requirement is sufficient to ensure the reliability of the hearsay

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168. 633 F.2d 77 (8th Cir. 1980).
169. *Id.* at 81-82.
170. *See id.* at 82.
171. *Id.* at 82, 85.
172. *Id.* at 84.
173. *See id.*
174. *See* FED. R. EVID. 803(4).

statements.[175] Based upon this straightforward interpretation of rule 803(4), many federal courts that have addressed the issue have applied only the second prong—the reasonable reliance test—to hearsay statements under 803(4).[176]

b. *United States v. Madoch*

The potential danger presented by the coalescence of rules 703 and 803(4) is illustrated by a very recent decision from the United States District Court for the Northern District of Illinois, *United States v. Madoch.*[177] The government charged Madoch with, inter alia, aiding others, including her husband, to fraudulently obtain tax refunds.[178] In defense of the charges, Madoch presented expert testimony from a psychiatrist who was prepared to opine that defendant lacked the requisite specific intent to commit the alleged offenses.[179]

The expert based her opinions on information obtained from several examinations of the defendant, the first of which took place more than a year after the indictment.[180] The defendant revealed to the expert, in the course of giving her history, that she had been subjected to physical and emotional abuse from her husband and "had been in a pattern of abusive situations throughout her life."[181] The government sought to exclude defendant's "self-reported history,"[182] but the district court overruled the objections, relying on both rules 703 and 803(4).[183]

The court based its ruling under rule 803(4) on a clear and seemingly logical four part analysis:

> (1) "[T]here is no difference between the test for the admissibility of statements used for the purposes of medical diagnosis under rule 803(4) and rule 703."[184]
>
> (2) Rule 703 allows experts to base their opinions on inadmissible facts or data, provided they are reasonably relied upon by others similarly situated.[185]
>
> (3) "[F]acts regarding Defendant's alleged history of abuse . . . are reasonably relied upon by psychological experts in diagnosing a patient."[186]

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175. *See id.* advisory committee's note (stating that the admission of statements made for medical diagnosis "is consistent with the provision of rule 703 that the facts on which expert testimony is based need not be admissible in evidence if of a kind ordinarily relied upon by experts in the field").

176. *See supra* note 14 and accompanying text.

177. 935 F. Supp. 965 (N.D. Ill. 1996).

178. *See id.* at 966-68.

179. *See id.* at 967.

180. *See id.* at 967-68. The second examination of the defendant took place less than a week before trial was scheduled to commence, and the expert's report about the second examination was dated the same day as the first day of trial. For unrelated reasons, the trial was continued for several months. *See id.* at 967.

181. *Id.* at 967.

182. *Id.* at 972.

183. *See id.* at 973-74.

184. *Id.* at 973 (citing Gong v. Hirsch, 913 F.2d 1269, 1274 n.4 (7th Cir. 1990)).

185. *See id.*

186. *Id.*

(4) Therefore, defendant's statements relied upon by the expert that were required to make a medical diagnosis of the defendant may be admissible under rules 803(4) and 703.[187]

This analysis turns the rule against hearsay on its head. It takes a liberal view of rule 703 (using customary reliance instead of reasonable reliance) and it applies that standard to rule 803(4), resulting in the substantive admission of untested and unreliable hearsay statements. The court failed to evaluate the trustworthiness of the history given by the defendant. Yet, the defendant gave the history and revealed the alleged abuse while under indictment for tax fraud and facing imprisonment.[188] The statements flunk the most basic trustworthiness inquiry. The hearsay risks are not in any way reduced; they are instead magnified because of the circumstances. Meanwhile, the prosecution, unable to cross-examine the expert about the truth of the statements, was put in the position of calling the pertinent fact witnesses (if they were available) to rebut defendant's allegations. The defendant, of course, was totally insulated from cross-examination about her claims, and was able to present her defense free from adversarial testing.

The failure of the district court in *Madoch* to consider the trustworthiness of the statements is arguably contrary to established precedent in the Seventh Circuit. In *Gong v. Hirsch*[189] the court excluded a statement in a letter written by plaintiff's doctor for plaintiff's employer because of the "obvious concern over the trustworthiness" of the statement.[190] Nevertheless, for the court in *Gong* the circumstances under which the statement was made went to the reliance issue. The court held that the doctor's letter, which expressed a patient's conclusion about the correct medical diagnosis, was not an appropriate basis for a medical opinion about the plaintiff.[191] The merging of the trustworthiness requirement with the "reasonably pertinent" requirement of rule 803(4) fails to provide an adequate safeguard against the admission of unreliable hearsay statements. No

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187. *See id.* at 973-74.

188. *Id.* at 967-68. The litigation context poses such a significant motivation to fabricate that three exceptions to the hearsay rule exclude statements made under those circumstances. *See* FED. R. EVID. 803(6) (excluding business records if they lack trustworthiness) & advisory committee's note (alluding to concerns about the motivation of a declarant who is preparing to litigate, instead of preparing to do business); FED. R. EVID. 803(8) (excluding public records that lack trustworthiness) & advisory committee's note (identifying the motivation of the declarant as an important factor in deciding trustworthiness); FED. R. EVID. 804(b)(3) (requiring sufficient corroborative evidence to clearly indicate the trustworthiness of exculpatory statements made against the declarant's interest). Courts have not only failed to evaluate the trustworthiness of pre-trial statements, but also statements made after conviction. In *United States v. Brown*, 891 F. Supp. 1501 (D. Kan. 1995), the court granted the defendant's motion for a new trial based "on newly discovered" evidence that the defendant suffered from battered women's syndrome. *See id.* at 1510. The "evidence" was discovered *after her conviction. See id.* at 1503. Yet, the court did not make any reference to concerns about the reliability of the defendant's post-conviction statements. *See id.* at 1507-08.

189. 913 F.2d 1269 (7th Cir. 1990).

190. *See id.* at 1272-73.

191. *See id.* at 1274.

traditional exception to the hearsay rule relies solely on the person receiving the statement to supply the heightened trustworthiness needed.[192]

c. *United States v. Renville* and Its Progeny

The Eighth Circuit, since *Iron Shell*, has continued to require both reasonable reliance and a treatment motivation under rule 803(4),[193] although with varying levels of rigor. Despite its more restrictive interpretation of 803(4), however, it has expansively interpreted what statements are pertinent to treatment in the context of allegations of child sexual abuse. In *United States v. Renville*[194] the Eighth Circuit held that statements to a doctor by the child victim of sexual abuse, which identified the abuser, satisfied rule 803(4) as long as the abuser was a family member.[195] The court's rationale in *Renville* was that full treatment of an abused child necessarily depends on identifying the attacker. If the wrongdoer is a family member, the child will need to be removed from the home and the therapy required may vary.[196] Of course, courts have traditionally refused to admit statements of fault under rule 803(4) because they are not reasonably pertinent to treatment or diagnosis,[197] and rule 803(4) continues this prohibition.[198] Statements of fault are typically motivated by interests other than the patient's desire to obtain treatment. Nevertheless, almost every federal court confronted with the issue since *Renville* has followed that court's precedent and admitted statements of identity by children.[199] The *Renville* decision has been steadily expanded by courts far beyond its original limits. Perhaps the most

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192. *See* Paul R. Rice, *Inadmissible Evidence as a Basis for Expert Opinion Testimony: A Response to Professor Carlson*, 40 VAND. L. REV. 583, 588 (1987); *cf.* FED. R. EVID. 803(1) (admitting present sense impressions because of contemporaneousness); FED. R. EVID. 803(2) (admitting excited utterances because of their spontaneity and circumstances); FED. R. EVID. 803(3) (admitting statements because of their contemporaneousness); FED. R. EVID. 803(6) (admitting business records because of their routine preparation and the use of the records in the conduct of the business).

193. *See* United States v. Longie, 984 F.2d 955, 959 (8th Cir. 1993); United States v. Renville, 779 F.2d 430, 436 (8th Cir. 1985).

194. 779 F.2d 430 (8th Cir. 1985).

195. *See id.* at 436.

196. *See id.* at 437-38.

197. *See, e.g.*, United States v. Pollard, 790 F.2d 1309, 1312-13 & n.1 (7th Cir. 1986) (excluding statement of patient blaming arresting officer for twisting arm). The advisory committee's note following rule 803(4) provides the following example: "a patient's statement that he was struck by an automobile would qualify but not his statement that the car was driven through a red light." FED. R. EVID. 803(4) advisory committee's note. Prior to the adoption of rule 803(4) many jurisdictions excluded all statements about the cause of the injury, not just statements of fault, under this exception. *See, e.g.*, Aetna Life Ins. Co. v. Quinley, 87 F.2d 732, 734 (8th Cir. 1937) (excluding statements of cause of injury).

198. *See* FED. R. EVID. 803(4) advisory committee's note.

199. *See, e.g.*, United States v. Tome, 61 F.3d 1446, 1451 (10th Cir. 1995); United States v. Yazzie, 59 F.3d 807, 812-13 (9th Cir. 1995); United States v. Longie, 984 F.2d 955, 959 (8th Cir. 1993); United States v. Balfany, 965 F.2d 575, 579 (8th Cir. 1992); United States v. George, 960 F.2d 97, 99 (9th Cir. 1992).

improbable leap was taken by the Tenth Circuit, in *United States v. Joe*,[200] when that court extended *Renville* to apply to adult victims of domestic sexual abuse.[201] The court concluded: "All victims of domestic sexual abuse suffer emotional and psychological injuries, the exact nature and extent of which depend on the identity of the abuser."[202] Thus, without recognizing any differences between the cognitive capacity of adults and children and without any recognition of the lack of trustworthiness of statements of fault, the court held that the adult victim's statements to her doctor identifying the defendant as her abuser were reasonably pertinent to proper treatment by the doctor.[203]

The decision in *Renville* has also led to the frequent admission of statements by children to psychologists and even clinical social workers as statements made for purposes of "medical diagnosis" under 803(4).[204] The pertinence of the abuser's identity is not in the treatment of physical injuries, but for the treatment of emotional and psychological injuries and for preventive treatment. These problems are treated most often by psychologists or social workers, forcing federal courts to address the admissibility of statements made to them under rule 803(4). Most courts have admitted such statements pursuant to the same requirements that apply to medical doctors based on the advisory committee's note that statements under 803(4) do not have to be made to a physician and the substantial need for such statements.[205] The failure to limit the expansion of rule 803(4) threatens to circumvent the hearsay rule by admitting hearsay statements that do not share the heightened trustworthiness normally required before hearsay is admitted.

III. CHARACTERS

In rules 703 and 803(4) two significant parts of the law of evidence intersect: expert opinion testimony and hearsay.[206] One's approach to the proper treatment of the expert's use of hearsay turns largely on one's perspective of the relative capabilities of experts, lawyers, jurors, and judges. The drafters of rule 803(4)

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200. 8 F.3d 1488 (10th Cir. 1993).

201. *See id.* at 1494-95.

202. *Id.* at 1494.

203. *See id.* at 1494-95.

204. *See, e.g.*, United States v. Yellow, 18 F.3d 1438, 1442 (8th Cir. 1994) (admitting statements to a psychologist); United States v. Newman, 965 F.2d 206, 210 (7th Cir. 1992) (admitting statements to a psychologist: "[t]he rationale [of rule 803(4)] applies as forcefully to a clinical psychologist as to a physician, and warrants us in reading 'medical' broadly"); Morgan v. Foretich, 846 F.2d 941, 949 n.17 (4th Cir. 1988) ("[S]tatements to psychiatrists or psychologists are admissible under 803(4) the same as statements to physicians."); United States v. DeNoyer, 811 F.2d 436, 438 (8th Cir. 1987) (admitting statements made to social worker under rule 803(4)).

205. *See, e.g., Morgan*, 846 F.2d at 949 n.17.

206. *See* Edward J. Imwinkelried, *A Comparativist Critique of the Interface Between Hearsay and Expert Opinion in American Evidence Law*, 33 B.C. L. REV. 1, 4, 5 (1991) (noting the struggle of American courts trying to answer questions of expert testimony and hearsay).

expanded the traditional hearsay exception because of a distrust of jurors,[207] while rule 703 and the expert witness rules in general display an unwavering trust in them.[208] Both rules rest on the expert's professional competence to separate the wheat from the chaff.[209] Rule 703, meanwhile, places on lawyers the responsibility to reveal weaknesses in an expert's basis by means of cross-examination or the presentation of contrary evidence.[210]

In this section, the role of experts, lawyers, and juries under rules 703 and 803(4) will be examined in the hope of developing realistic expectations of them. This Part will close with an analysis of the responsibility of the drafters of the rules in light of the evidentiary policies achieved by the current rules.

A. Experts: Sifting with a Partisan Filter

1. Built-in Partisanship

The very nature of the adversary system inexorably pushes experts to be partisans of the party who hired them.[211] It starts with the selection process. Lawyers shop for the "best" expert, seeking the person who communicates well, looks the part, and will adamantly support the lawyer's position.[212] A lawyer is likely to value the partisan support of an expert more than professional independence when hiring such a witness.[213] The proliferation of expert witness referral services makes finding an expert who will espouse the party's position easier than ever.[214]

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207. *See* FED. R. EVID. 803(4) advisory committee's note (noting that expansion of common law hearsay exception was because of jury's inability to distinguish between hearsay evidence offered for its truth and hearsay evidence offered as the expert's basis).

208. *See supra* notes 45-47 and accompanying text (discussing role of limiting instruction under rule 703).

209. *See, e.g.*, United States v. Sims, 514 F.2d 147, 149 (9th Cir. 1975) (relying on experts' ability to separate the wheat from the chaff under rule 703); United States v. Madoch, 935 F. Supp. 965, 972-73 (N.D. Ill. 1996) (relying on expert under rule 803(4)).

210. *Cf.* FED. R. EVID. 705 advisory committee's note.

211. *Cf.* Samuel R. Gross, *Expert Evidence*, 1991 WIS. L. REV. 1113, 1114.

212. *See id.* at 1130. In two separate surveys of lawyers, almost half of the participants admitted to shopping for experts. *See* Anthony Champagne et al., *Expert Witnesses in the Courts: An Empirical Examination*, 76 JUDICATURE 5, 7 (1992) (Forty-nine percent of lawyers responding interviewed several experts before selecting one.); Daniel W. Shuman et al., *An Empirical Evaluation of the Use of Expert Witnesses in the Courts—Part II: A Three City Study*, 34 JURIMETRICS J. 193, 202 (1994) (Forty-three percent of lawyers responding acknowledged that they shopped for experts.).

213. *See* Champagne et al., *supra* note 212, at 7-8 (noting that 86% of lawyers responding to survey identified the adamancy of the expert's support for the party's position as important or very important in selecting an expert versus only 7% who considered the impartiality of the expert when employing experts).

214. *See* L. Timothy Perrin, *Expert Witness Testimony: Back to the Future*, 29 U. RICH. L. REV. 1389, 1411-12 (1995) (noting the broad array of expert referral services available); *see also* Trower v. Jones, 520 N.E.2d 297, 299 (Ill. 1988) (stating that there has been a "proliferation of expert 'locator' services").

Moreover, lawyers pay expert witnesses for their services.[215] The financial aspect of expert witness practice has a pervasive influence on both sides of the relationship.[216] The lawyer expects cooperation from the expert and "good results" (i.e., a favorable outcome at trial).[217] Meanwhile, the expert is motivated to please the lawyer so that the lawyer will hire the expert again.[218] In addition, the expert, unlike lay witnesses, is motivated to spend time as a participant in the litigation, whether preparing to testify as a witness or assisting the lawyer in preparing to examine the opposing expert.[219] The expert becomes an essential member of the trial team; an advocate of the party's position. One expert witness described the role of an expert as "the cleanup hitter in the lineup. [Experts] neatly put the case together, tie up the loose ends, conveying its essence and meaning to the jury."[220]

The position of the expert as a paid partisan poses very real dangers of abuse under rules 703 and 803(4) because courts rely on the professional independence of experts. Nevertheless, several courts and commentators have concluded that "a fact reliable enough to serve as the basis for a diagnosis is also reliable enough to escape hearsay proscription."[221] That view, however, fails to take into account the substantial differences between the position of experts in civil and criminal litigation and experts outside litigation.

2. Hired Guns v. Investigators and Participants

The provision in rule 703 expanding the expert's permissible bases rests on the premise that all experts rely on second and thirdhand information in their own disciplines and may even make significant decisions based upon such information.[222] Rule 803(4) excepts statements made for medical diagnosis on substantially similar grounds.[223] Information that is good enough for experts to rely on outside the courtroom is sufficiently reliable to be admitted inside the

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215. *See* Gross, *supra* note 211, at 1129.

216. *See* Richard A. Epstein, *Judicial Control over Expert Testimony: Of Deference and Education*, 87 NW. U. L. REV. 1156, 1162-63 (1993) ("[T]he close working relationship between experts and their clients threatens objectivity and neutrality, resulting in serious damage to the trial system.").

217. *See* Champagne et al., *supra* note 212, at 7; *cf.* Gross, *supra* note 211, at 1146.

218. *See* Gross, *supra* note 211, at 1132.

219. *See id.* at 1138.

220. JACK V. MATSON, EFFECTIVE EXPERT WITNESSING 125 (1990).

221. *See* 4 WEINSTEIN & BERGER, *supra* note 5, ¶ 803(4)[1], at 803-154.

222. *See* FED. R. EVID. 703 advisory committee's note.

223. *See* FED. R. EVID. 803(4) advisory committee's note. In *United States v. Joe*, the United States Court of Appeals for the Tenth Circuit concluded that the only requirement under rule 803(4) is that the statement was "reasonably relied on by the physician in treatment or diagnosis" under the "plain langnage" of the rule. *See* United States v. Joe, 8 F.3d 1488, 1494 (10th Cir. 1993).

courtroom.[224] They are vastly different worlds,[225] however, and today it is all-too-common for an expert to be retained by a party for the sole purpose of testifying about a particular issue at trial. The hired expert comes to the litigation having no familiarity with the underlying facts or circumstances of the case. Instead, the expert must collect at least some information from others by interviewing participants, reviewing reports, or reading depositions. Experts in this position are subject to manipulation by the lawyer both in terms of the information they obtain and the preconceived notions of the case transmitted to them by the lawyer. Moreover, the expert's own work in the case—tests conducted, physical evidence analyzed—may be tainted by the expert's predisposition to reach an opinion favorable to the expert's employer.[226]

Of course, not all experts come to litigation as "hired guns." To the contrary, some experts participate in litigation because of their prior involvement. These witnesses are often hybrid fact/expert witnesses because they have some firsthand information about the case. For example, in a product liability case, the defendant may call one of its in-house engineers to testify about the design and development of the product based upon the expert's participation in that process. In a lawsuit arising from a car accident, the plaintiff may call the investigating police officers to testify about their findings, or the treating physician to testify about his treatment and diagnosis of the plaintiff.

In each of these situations the expert's basis consists substantially of firsthand information. The engineer participated in the design and testing of the product; the police officer examined the physical evidence at the scene; and the treating doctor examined and interviewed the plaintiff. To the extent experts rely on matters within their personal knowledge, the "reasonably relied upon" requirement of rule 703 does not apply. The expert's personal observations have heightened reliability because they are subject to cross-examination about their

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224. *See* 4 WEINSTEIN & BERGER, *supra* note 5, ¶ 803(4)[1], at 803-154.

225. The difference in the two worlds may be demonstrated most clearly by comparing the use of hearsay by a practicing doetor or paramedic in the field as envisioned by the advisory committee to the use of the same evidence at trial. Professor McElhaney described the drafters' scenario as follows:

> There is a paramedic kneeling over an unconscious man in the middle of the street, trying to decide whether to treat for heart attack or diabetic shock. A bystander tells the paramedic that the man's son said he clutched at his chest as he passed out. The paramedic is not going to rule on a hearsay objection before he decides what to do. Of course not. It is an emergency, and he takes the best information he can get. But a trial is a deliberative process that takes time and contemplation. It is not a street corner emergency.

James W. McElhaney, *Trial Notebook: Fixing the Expert Mess*, 20 LITIG., Fall 1993, at 53, 55.

226. *See* Gross, *supra* note 211, at 1138-41 (1991). Professor Gross notes that not only do expert witnesses "generally eome on the scene after the events have occurred and the issues have been drawn," but also has the unique power "to create new evidence in the form of expert opinions." *Id.* at 1140. In forming opinions the "expert can decide where to look and by what means, what research to conduct, which people to eonsult, which studies to consider, which methodology to use, and so forth." *Id.* The problem is not simply the expert's lack of firsthand knowledge, of course, but instead is the fact that much of the expert's underlying information "will come from the attorney who hired [the expert]—hardly an unbiased source." *Id.* at 1141.

accuracy. Moreover, the expert obtained the information and performed the work without the pervasive influence of litigation.

The expert who investigates or participates in an event stands in stark contrast to the expert retained for litigation. Information given or obtained by one with an eye toward litigation is suspect and should be viewed with skepticism.[227] On the other hand, experts retained by a party because of work completed before litigation and in the normal course of the expert's activities are less likely to have been improperly motivated, and thus, at least in this specific aspect, can be greeted with greater trust.

In the context of rules 703 and 803(4) this dichotomy has special significance. The investigator/participant expert has some pre-existing grounding in the facts of the case and is less subject to manipulation than the "hired gun." Experts who must rely totally on the hiring lawyer for information or who obtain all of their information in preparation for deposition or trial will, of necessity, form opinions with information tainted by the prospect of litigation and the shading that accompanies the adversarial process.[228] Thus, even though a testifying expert relies upon the same kind of evidence that experts in the same field typically rely upon, the change in circumstances may substantially reduce the value of the evidence. Although this principle has occasionally been recognized as an important reliability factor by courts applying rules 702,[229] 703, and 803(4),[230] it has all too frequently been ignored.[231]

Two cases discussed earlier, *United States v. Sims*[232] and *United States v. Madoch*,[233] are illustrative. Both courts failed to take note of the patent "litigation bias" on the part of the expert psychiatrists in each case and admitted hearsay statements made to the experts under rule 703 (*Sims*)[234] and 803(4) (*Madoch*).[235] The results in *Sims* and *Madoch* are particularly inexplicable in light of the rationale in each case—that the experts' experience and specialized knowledge enabled the experts to separate the reliable from the unreliable in forming their

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227. *See supra* note 226 and accompanying text.

228. *See* Gross, *supra* note 211, at 1140-41.

229. *See, e.g.*, Daubert v. Merrell Dow Pharms., Inc., 43 F.3d 1311, 1317-18 (9th Cir. 1995) (identifying importance of the experts' development of theories about the causal nexus between the drug, Bendeetin, and limb reduction defects in the context of the litigation in determining their lack of reliability).

230. *See, e.g.*, United States v. Tran Trong Cuong, 18 F.3d 1132, 1143-44 (4th Cir. 1994) ("Reports specifically prepared for purposes of litigation are not, by definition, 'of a type reasonably relied upon by experts in the particular field.'"); *In re* "Agent Orange" Prod. Liab. Litig., 611 F. Supp. 1223, 1247 (E.D.N.Y. 1985) (noting importance of experts' motivation in assessing reliability of medical checklists obtained from plaintiffs in preparation for experts' testimony), *aff'd*, 818 F.2d 187 (2d Cir. 1987).

231. *See, e.g.*, United States v. Joe, 8 F.3d 1488, 1494-95 (10th Cir. 1993); United States v. Sims, 514 F.2d 147, 149-50 (5th Cir. 1975) (failing to address under rule 703 expert's motivation to assist government when assessing expert's basis); United States v. Madoch, 935 F. Supp. 965, 972-73 (N.D. Ill. 1996) (failing to address bias under rule 803(4)).

232. 514 F.2d 147 (9th Cir. 1975); *see supra* notes 71-83 and accompanying text.

233. 935 F. Supp. 965 (N.D. Ill. 1996); *see supra* notes 177-88 and accompanying text.

234. *See Sims*, 514 F.2d at 149.

235. *See Madoch*, 935 F. Supp. at 973.

expert opinions.[236] An expert motivated by self-interest can not be blindly trusted to use only reliable information in forming expert opinions. Moreover, both courts overlooked the fact that in each case the information also came from persons predisposed by the litigation—the defendant in *Madoch* and the investigating IRS agent in *Sims*. Although the *type* of information relied upon by the experts in *Sims* and *Madoch* may correspond to the standard practice of psychiatrists, the *context* in which it was obtained (and used) destroys the reasonableness of its use in those cases.[237]

Of course, investigator/participant experts may also use evidence that is not reliable and may have impure motivations when they testify. The engineer who is employed by the defendant has an obvious bias in favor of her employer. The doctor who treated the injured plaintiff may be motivated to cooperate with the plaintiff's lawyers if the doctor has an ongoing relationship with plaintiff's lawyers or would like to develop one, even though the doctor is engaged in "doctor work." Furthermore, the lack of reliability of the evidence may not be the result of any adversarial taint, but may be because the expert is in the habit of using information that the Rules of Evidence consider unreliable, such as the officer's use of post-accident statements by bystanders.[238] For the police officer these statements may be one of the few pieces of information available in the rush to prepare a report. The trial, however, is a "deliberative process," which can and should be more selective in the information given to the factfinders.

B. Lawyers: Cross-Examining Inadmissible Hearsay

The drafters not only expanded the permissible bases for expert opinions in rule 703,[239] but also in rule 705 they eliminated the common law requirement that experts must disclose their bases before giving their opinions.[240] These two changes "place the full burden of exploration of the facts and assumptions underlying the testimony of an expert witness squarely on the shoulders of opposing counsel's cross-examination."[241] This "heavy burden" placed on the

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236. *See Sims*, 514 F.2d at 149; *Madoch*, 935 F. Supp. at 973.

237. For an example of a court which recognized this distinction, see *United States v. Skodnek*, 896 F. Supp. 60, 65 (D. Mass. 1995). In *Skodnek* the court ruled that the defendant's expert, a psychiatrist, could not disclose statements made by the defendant to the expert about the offenses and other matters. *See id.* The statements were made to the psychiatrist after the charges were filed. *See id.*

238. *Cf.* FED. R. EVID. 703 advisory committee's note (Rule 703 "would not warrant admitting in evidence the opinion of an 'accidentologist' as to the point of impact in an automobile collision based on statements by bystanders.").

239. *See supra* notes 5-6 and accompanying text.

240. *See* FED. R. EVID. 705.

241. Smith v. Ford Motor Co., 626 F.2d 784, 793 (10th Cir. 1980) (quoting Michael H. Graham, *Discovery of Experts Under Rule 26(b)(4) of the Federal Rules of Civil Procedure: Part One, An Analytical Study*, 1976 U. ILL. L. REV. 895, 897); *see also* University of R.I. v. A.W. Chesterton Co., 2 F.3d 1200, 1218 (1st Cir. 1993) ("In the interests of efficiency, the Federal Rules of Evidence deliberately shift the burden to the cross-examiner to ferret out whatever empirical deficiencies may lurk in the expert opinion."); Bryan v. John Bean Div. of FMC Corp., 566 F.2d 541, 545 (5th Cir. 1978) ("[T]he onus of eliciting the bases of the

cross-examiner is made all the more difficult by two obvious truths: (1) hearsay evidence can not be cross-examined in any meaningful way,[242] and (2) the jury is likely to consider the hearsay evidence for its truth, even if instructed by the judge to the contrary.[243]

Expert wituesses are commonly cross-examined about their factual bases.[244] When the expert relies on secondhand information the lawyer will attempt to force the expert to admit that the expert lacks personal knowledge and will attempt to show the resultant uncertainty of the expert's bases and opinions.[245] The cross-examiner will point out any underlying facts ignored by the expert or any facts contrary to the ones relied on by the expert.[246] The lawyer may probe the circumstances under which the expert received the underlying information (for example, from the hiring lawyer in preparation for trial) and thereby implicitly criticize the reliability of the information. These tactics may bring some success in undermining the expert's opinion. Undoubtedly, if the jury decides that the expert's opinion is based on bad information, it will conclude that the expert gave a bad opinion, under the "garbage in, garbage out" principle.[247] However, the opposite is true as well. If the jury finds the expert credible, they are likely to believe the information relied on by the expert and consider it for its full value.[248] More significant is the concern that the jury will

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opinion is placed on the cross-examiner [by rule 705]."); Polk v. Ford Motor Co., 529 F.2d 259, 271 (8th Cir. 1976) (Under rule 705, "the weakness in the underpinnings of such [expert] opinions may be developed upon cross-examination and such weakness goes to the weight and credibility of the testimony."); Michael H. Graham, *Expert Witness Testimony and the Federal Rules of Evidence: Insuring Adequate Assurance of Trustworthiness*, 1986 U. ILL. L. REV. 43, 69.

242. *See* United States v. Reyes, 18 F.3d 65, 69 (2d Cir. 1994) ("The principal vice of hearsay evidence is that it offers the opponent no opportunity to cross examine the declarant on the statement that establishes the declared fact."); Frazier v. Continental Oil Co., 568 F.2d 378, 382 (5th Cir. 1978) ("The primary reason for excluding hearsay evidence is the lack of opportunity to test the truth of such evidence through cross-examination.") (citing CHARLES T. MCCORMICK, MCCORMICK ON EVIDENCE § 245, at 583 (2d ed. 1972)).

243. *See infra* notes 256-79 and accompanying text.

244. PETER L. MURRAY, BASIC TRIAL ADVOCACY 346 (1995) ("Experts are frequently cross-examined with reference to the factual basis on which their opinions are based.").

245. JAMES W. MCELHANEY, MCELHANEY'S TRIAL NOTEBOOK 511 (3d ed. 1994) (Cross-examiner should emphasize "that the expert has no firsthand knowledge . . . ."); *see* STEVEN LUBET, MODERN TRIAL ADVOCACY 210 (1993) ("[E]xpert's testimony may be nndermined . . . by challenging its factual underpinnings . . . .").

246. MURRAY, *supra* note 244, at 346-47 (explaining that expert's opinion can be weakened by showing that faet relied on is untrue or that expert failed to consider a fact); LUBET, *supra* note 245, at 206-07 (noting that expert's opinion is vulnerable to attack if expert "failed to conduct essential tests or procedures, or . . . neglected to consider all significant factors").

247. *See* United States v. Burgess, 691 F.2d 1146, 1155 (4th Cir. 1982) (upholding jury instruction that "experts, and particularly medical experts, are dependent upon information that they receive in taking a history from the patient" sueh that if the patient gives false information, the experts' opinions can be flawed in reliance on the "garbage in, garbage out" principle).

248. Rice, *supra* note 192, at 585 ("[I]f in forming an opinion someone assumes that certain facts are true, the acceptance of that opinion necessarily involves the acceptance of those assumcd facts.").

consider the hearsay statements recited by the expert independent of its evaluation of the expert's opinion.

The hearsay rule exists specifically because of the long held belief that juries are not able to evaluate competently statements that are made without the oath, contemporaneous cross-examination, and the opportunity to observe the demeanor of the declarant.[249] Exceptions to the hearsay rule have been developed for out-of-court statements that are particularly trustworthy. Statements that have heightened guarantees of trustworthiness reduce the utility of cross-examination. Thus, when out-of-court statements are disclosed to the jury under rule 703 and the statements are not particularly trustworthy, the opponent of the evidence is stripped of his greatest need: the opportunity to cross-examine the declarant. For instance, in *United States v. Sims*, the statement by the IRS agents about the defendant's pre-1971 troubles with the law was not subject to cross-examination.[250] No questions to the government's expert could shed light on whether the underlying statement was true. Although the expert may be cross-examined concerning the appropriateness of his reliance on the hearsay, the evidence itself cannot be effectively impeached because the expert is not the declarant. Similarly, in *United States v. Madoch*, the expert's reliance on his patient's claim that she had been subjected to a pattern of abuse in her marriages was beyond real scrutiny without calling those alleged to have been involved in the abuse and questioning the victim.[251] Under rule 803(4) the potential problem is exaggerated because the opponent may be unable to cross-examine the expert inasmuch as the patient's statements to the doctor could be admitted through anyone who heard them, or a document in which they were recorded.[252] In a similar vein, a number of courts have recognized that inadmissible facts or data admitted under rule 703, though technically not hearsay, have the same force and effect as hearsay.[253] These realities demand a cautious approach to rules 703 and 803(4), especially in light of the limited utility of the limiting instruction.

C. Jurors: Straining to Follow the Limiting Instruction's "Futile Collocation of Words"[254]

Rules 703 and 705 express unshakable confidence in the adequacy of cross-examination of the expert in large part because of the limited purpose for which

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249. *See* FED. R. EVID. Article VIII advisory committee's note; 5 WEINSTEIN & BERGER, *supra* note 5, ¶ 800, at 800-10 to 800-14.

250. *See* United States v. Sims, 514 F.2d 147, 148 (9th. Cir. 1975); *supra* notes 71-83 and accompanying text (discussing *Sims*).

251. United States v. Madoch, 935 F. Supp. 965 (N.D. Ill. 1996); *see supra* notes 177-88 and accompanying text (discussing *Madoch*).

252. *See* Mosteller, *supra* note 15, at 262.

253. *See, e.g.*, Bryan v. John Bean Div. of FMC Corp., 566 F.2d 541, 545 (5th Cir. 1978) (noting that expert's basis must satisfy requirements of trustworthiness and necessity applicable to all exceptions to the hearsay rule); United States v. Skodnek, 896 F. Supp. 60, 65 (D. Mass. 1995) ("Rule 703 . . . is essentially another exception to the hearsay rule."); MCCORMICK, *supra* note 242, § 324.3, at 541 (listing Rule 703 as a "quasi-hearsay exception").

254. *See* Delli Paoli v. United States, 352 U.S. 232, 247 (1957); *infra* text accompanying note 259 (reproduction of full quote).

the expert's basis is admitted. If the drafters had concluded that the jury would in all likelihood consider the expert's underlying facts or data for their truth, presumably they would have either created an exception to the hearsay rule for such matters, or would have excluded the hearsay altogether. In fact, in rule 803(4), the drafters pragmatically expanded a hearsay exception for the very reason that the jury would consider the expert's hearsay basis for its truth anyway.[255] Nevertheless, despite the drafters' uncertain faith in the jury's ability and willingness to follow a limiting instruction under rule 703, the drafters relied upon its efficacy.

Long ago the conundrum of the limiting instruction was recognized by no less an authority than Judge Learned Hand. He wrote that the limiting instruction is a "recommendation to the jury of a mental gymnastic which is beyond, not only their powers, but anybody's else."[256] On another occasion, Judge Jerome Frank called the limiting instruction "a kind of judicial lie."[257] Somewhat more recently, the dissenting judge in *Delli Paoli v. United States*[258] explained the fundamental shortcoming of the limiting instruction this way:

> The fact of the matter is that too often such admonition against misuse is intrinsically ineffective in that the effect of such a nonadmissible declaration cannot be wiped from the brains of the jurors. The admonition therefore becomes a futile collocation of words and fails of its purpose as a legal protection to defendants against whom such a declaration should not tell.[259]

These intuitive indictments of limiting instructions are supported by the available social science research. The limited data available suggests that the jury focuses not on compliance with the technical evidentiary rules supplied by the judge, but on arriving at the correct verdict,[260] and that the "jurors cognitively organize the testimony into a coherent whole or 'story.'"[261] Thus, the jury will

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255. *See* FED. R. EVID. 803(4) advisory committee's note; O'Gee v. Dobbs Houses, Inc., 570 F.2d 1084 (2d Cir. 1978) (seeming to acknowledge the futility of the limiting instruction under rule 703).

256. Nash v. United States, 54 F.2d 1006, 1007 (2d Cir. 1932).

257. *See* United States v. Grunewald, 233 F.2d 556, 574 (2d Cir. 1956) (The limiting instruction "undermines a moral relationship between the courts, the jurors, and the public; like any other judicial deception, it damages the decent judicial administration of justice.").

258. 352 U.S. at 247 (Frankfurter, J., dissenting).

259. *Id.*

260. *See* Sharon Wolf & David A. Montgomery, *Effects of Inadmissible Evidence and Level of Judicial Admonishment to Disregard on the Judgments of Mock Jurors*, 7 J. APPLIED SOC. PSYCHOL. 205 (1977). A more reeent study involving 121 undergraduate psychology students led the researcher to conclude that the participants disregarded the inadmissible evidence and followed the judge's instruction only if they thought it would be unfair to use the evidence. *See* Kerri L. Pickel, *Inducing Jurors to Disregard Inadmissible Evidence: A Legal Explanation Does Not Help*, 19 L. & H. BEHAV. 407, 421-22 (1995).

261. Regina A. Schuller, *Expert Evidence and Hearsay: The Influence of "Secondhand" Information on Jurors' Decisions*, 19 L. & H. BEHAV. 345, 349 (1995) (citing Naney Pennington & Reid Hastie, *Evidence Evaluation in Complex Decision Making*, 51 J. PERSONALITY & SOC. PSYCHOL. 242, 242-58 (1986)). Schuller's study specifically involved expert reliance on secondhand information under rule 703. *See id.* at 351. For a critique of Schuller's study, see Ronald L. Carlson, *Experts, Judges and Commentators: The Underlying Debate About an Expert's Underlying Data*, 47 MERCER L. REV. 481, 484-86 (1996).

likely be unable and unwilling to ignore evidence that fits into their story and assists in their deliberations.[262]

The limiting instruction is not only next to impossible for the jury to follow, but it may also backfire.[263] The risk of the judge's admonition backfiring under rule 703 is particularly high because of the likely content of the instruction. For example, in *United States v. Affleck*,[264] the Tenth Circuit approvingly quoted the trial judge's instruction to the jury as follows:

> [The government's expert] referred to various things that others had told him out of court and not under oath. Those matters, as I am sure you know, are hearsay. The only reason they were received and allowed in his testimony is because I have found that those are the type of subjects that may be relied upon by an accountant in forming opinions of the kind that Mr. Norman [the expert] testified to you about. And they are to be used by you, not for the truth of what was contained in them but in evaluating Mr. Norman's testimony and the opinions that he gave in determining whether those opinions have validity or don't have validity.[265]

The instruction given in *Affleck* arguably makes matters worse instead of better. Besides drawing the jury's attention to the forbidden use of the evidence, the instruction bolsters the reliability of the evidence in the jury's eyes because of the judge's imprimatur. The judge proclaims his finding that the "hearsay" statements were properly relied on by the expert.[266] A judge's finding of admissibility under rule 104(a) should not be announced to the jury in this context because of the substantial risk that it will unnecessarily confuse the jury's task of separating the wheat from the chaff.[267] In *Affleck*, the judge, by his instruction, strongly implies to the jury that the evidence is worthy of belief.

Secondly, the mantra repeated by the judge not to use the statements "for the truth of what was contained in them" is incomprehensible to the typical lay juror. The judge gave the jury no guidance in how to use the evidence and no way to distinguish between the proper and improper use of it.[268] What is the difference between using the statements "for the truth of what was contained in them" and

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262. *See* Schuller, *supra* note 261, at 349-50 ("[A]ttempts to alter the meaning of one piece of evidence are likely to be accompanied by changes in the jurors' interpretation of other evidence.").

263. *See* Pickel, *supra* note 260, at 423 (concluding that "in some circumstances a legal explanation may backfire"); Wolf & Montgomery, *supra* note 260, at 205-19. The quest of the limiting instruction has been characterized as trying to "unring a bell" or trying to "remove cream from coffee" or telling a boy to "go to a corner and not think of elephants." Michael H. Graham, *Evidence and Trial Advocacy Workshop: Curative, Cautionary, and Limiting Instructions*, 17 CRIM. L. BULL. 147, 149 (1981).

264. 776 F.2d 1451 (10th Cir. 1985).

265. *Id.* at 1458.

266. *See id.*

267. *Accord* United States v. Clement, 747 F.2d 460, 462 (8th Cir. 1984) ("Ideally, a judge's comments should aid the jury in 'separat[ing] the wheat from chaff,' . . . and in 'facilitat[ing] the application of law to factual findings.'") (citing and quoting from United States v. Tello, 707 F.2d 85, 90 (4th Cir. 1983)).

268. *See* United States v. Reyes, 18 F.3d 65, 71-72 (2d Cir. 1994) (holding that limiting instructions given by trial judge were inadequate in part because they "did not clearly explain the difficult mental task of considering information for one purpose but not for another").

using the statements in determining whether the expert's opinions have validity? The distinction is one that greatly perplexes advanced law students (as well as practicing lawyers and judges) even after intensive instruction and analysis in an "Evidence" course.[269] One conclusory statement at the end of a trial (or even at the time that the evidence is introduced) is woefully inadequate to achieve proper consideration of the basis.

Despite all of these concerns, federal courts have typically ignored the quandary of the limiting instruction altogether. Instead, time and again they have reflexively recited the familiar refrain: "we assume that the jury followed the limiting instruction."[270] That response is particularly unfortunate under rule 703. The limiting instruction in this context is even more difficult to follow than normal because the proper use of the inadmissible evidence is so closely related to the improper use. A juror who determines that one expert's opinion is credible is most unlikely to limit her consideration of the facts or data relied upon by the expert. Rather, the juror will quite naturally accept both the facts used by the expert, and the opinion itself and will do so in violation of the limiting instruction.[271]

The dilemma presented by the limiting instruction under rule 703 is most pronounced when a party offers through an expert factual evidence that goes to the heart of the contested issues in the case. For example, in *In re Melton*,[272] a civil commitment proceeding, attorneys for the District of Columbia presented expert psychiatric testimony that Tommy Lee Melton constituted a danger to others.[273] That conclusion was based in part on the statement of Melton's mother that Tommy Lee had punched her in the nose, which the expert was allowed to repeat to the jury[274] despite Melton's objections that the statement was hearsay.[275] The mother did not testify and was not subject to cross-examination.[276]

The court of appeals did confront the limited utility of the limiting instruction given to the jury:

> To tell the jurors that they are to consider the testimony about the punch as a basis for the expert's finding of dangerousness, but not with respect to

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269. The author's experience on this point is similar to that of other Evidence professors. *See* Edward J. Imwinkelried, *A Comparativist Critique of the Interface Between Hearsay and Expert Opinion in American Evidence Law*, 33 B.C. L. REV. 1, 33 (1991) ("Even after several hours of class discussion devoted exclusively to the definition of hearsay, law students find it difficult to make [the] distinction.").

270. *See, e.g.*, *Affleck*, 776 F.2d at 1458 ("It cannot be assumed that the jury disregarded [the limiting instructions]."); *supra* note 47.

271. *See* Rice, *supra* note 192, at 585.

272. 597 A.2d 892 (D.C. 1991) (en banc).

273. *See id.* at 894, 896. Mr. Melton was diagnosed as a paranoid schizophrenic and was the subject of this civil commitment proceeding. *Id.* After a jury trial he was found likely to injure himself or others, and thus, was committed to the custody of a hospital. The District of Columbia Court of Appeals reversed. *See In re* Melton, 565 A.2d 635 (D.C. 1989). On rehearing en banc, the court of appeals reversed the appellate panel and affirmed the trial court judgment. *In re Melton*, 597 A.2d at 894.

274. *See In re Melton*, 597 A.2d at 895.

275. *See id.* at 900.

276. *See id.*

> whether Mr. Melton punched his mother, may call for mental gymnastics which only the most pristine theoretician could perform. We suspect that the reaction of that elusive individual, the reasonable person, would be that you cannot believe that the testimony about the punch tends to show that Melton is dangerous unless you first believe that he aetually punched his mother. Since the expert apparently believed that he punched her, the jury was likely to believe it too. The distinction sought to be made may therefore become "ephemeral."[277]

Despite this rare and insightful discourse, however, the court ultimately refused to find an abuse of discretion.[278] It did take care to point out that the trial court could have required the government to call the mother as a witness, subject to cross-examination, before allowing the expert to disclose her statement.[279] Obviously, that would have eliminated both concerns about the statement because no limiting instruction would have been necessary, the declarant would have been cross-examined by Melton, and the expert would not have needed to rely on her hearsay statement.

The limited utility of the limiting instruction and the risk that it will backfire combine to place trial counsel in an untenable position under rule 703. On the one hand, counsel may object and request a limiting instrnction, thus preserving the objection and the opportunity to urge the jury during closing argument to limit its consideration of the evidence, but risking that the instruction will backfire and cause heightened attention to the evidence. On the other hand, counsel may forego the instruction, waiving any potential error and allowing the evidence to be admitted for its truth, and hoping that the jury does not attach any special significance to it. Neither option is particularly attractive.

D. Rulemakers: Searching for Coherence

The drafters of the Federal Rules of Evidence readily recognized the likelihood that jurors would fail to appreciate the distinction between out-of-court statements offered for their truth and such statements offered for a different purpose and would fail to comply with the judge's limiting instruction under rule 703.[280] That reality led the drafters to expand the medical treatment exception to the hearsay rule to include a person's statements that are reasonably pertinent to medical diagnosis.[281] Thus, rule 703 and 803(4) stand in opposition to each other. Facts or data relied on by an expert under rule 803(4) are admitted for their truth,[282] while under rule 703 the expert's basis is admitted as support or as explanation of the expert's opinion.[283] As a fundamental matter, this disparate treatment is bad evidentiary policy.

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277. *See id.* at 907 (citations omitted).

278. *See id.* at 908. The court did note, however, the perplexing nature of the problem under rule 703. Mclton's ultimate lack of success is at least partly due to his failure to raise at trial concerns about the efficacy of the limiting instruction. *See id.* at 906.

279. *See id.* at 907.

280. *See* FED. R. EVID. advisory committee's notes.

281. *See* FED. R. EVID. 703 & 803(4) advisory committee's notes.

282. Mosteller, *supra* note 15, at 261-62.

283. *See supra* text accompanying note 46.

Moreover, the advisory committee's failure to identify a more substantial rationale for the exception, such as some heightened trustworthiness of the statements, has left trial and appellate judges without guidance regarding the standard under rule 803(4). Is the motivation of the declarant an essential factor or is the reasonableness of the expert's reliance the only test? The split among the circuits[284] is the direct result of the advisory committee's failure to reconcile the common law treatment of statements to doctors and the Federal Rules' adoption of rule 703.

Not only is rule 803(4) the outcome of bad policy and bad drafting by the drafters, but it has also resulted in the admission of bad evidence. Those courts that have applied the rule 703 test of "reasonably relied upon" to statements under rule 803(4) have admitted statements without finding any heightened guarantee of trustworthiness in the statements.[285] Accordingly, rules 703 and 803(4) stand in need of revision to take into account the pervasive partisanship of experts, the difficulty lawyers face when cross-examining inadmissible evidence relied upon by experts, the "mental gymnastics" required of jurors to understand and follow the limiting instruction, and the need for clear, consistent rules so that judges can apply them in a predictable and fair manner.

IV. ALTERNATIVES

A. Alternatives to Federal Rule of Evidence 703

Not surprisingly, rules 703 and 803(4) have proven to be controversial among judges and commentators and even states deciding whether to adopt the federal rules. Perhaps the intensity of the controversy can be measured by the substantial number of states which have chosen not to adopt one or both of the rules and by the substantial number of alternative approaches to the rules adopted by states or proposed by commentators. In general terms, there are five alternatives available for dealing with the inadmissible facts or data relied upon by an expert witness under rule 703: (1) Admit the facts or data for the truth of the matter asserted; (2) Permit full disclosure of the facts, subject to a limiting instruction telling the jury that they may only consider the facts or data as lending credibility to the expert's opinion, and not for the truth of the matter asserted; (3) Allow the expert to describe the information relied upon, but not to reveal the contents of the facts or data unless they are found to be sufficiently trustworthy; (4) Exclude

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284. *Compare* United States v. Iron Shell, 633 F.2d 77, 84 (8th Cir. 1980) (adopting two-part test under rule 803(4), which first focuses on the declarant's motivation) *with* United States v. Joe, 8 F.3d 1488, 1494 & n.5 (10th Cir. 1993) (Rule 803(4) requires reasonable reliance by a doctor and nothing else.); Gong v. Hirsch, 913 F.2d 1269, 1273-74 & n.4 (7th Cir. 1990) (holding that rule 803(4) contains the same requirement as rule 703—the expert's reasonable reliance); Morgan v. Foretich, 846 F.2d 941, 950 (4th Cir. 1988) (purporting to apply *Iron Shell's* two-part test, but glossing over the motivation of the four-year-old declarant).

285. *See, e.g., Joe*, 8 F.3d at 1494-95 & n.5; United States v. Madoch, 935 F. Supp. 965, 973 (N.D. Ill. 1996).

the inadmissible facts or data as well as any opinion based upon them; and (5) Adopt a subject matter approach that treats civil and criminal cases differently, enforcing a stricter standard in the criminal context.

1. Admit the Facts or Data for Their Truth

The most radical alternative is to admit the underlying facts or data for their truth, transforming rule 703 into an exception to the hearsay rule. As such, the evidence would take on an independent character which could be used in confronting other witnesses, introduced into evidence to satisfy an element of a prima facie case, and exploited during closing arguments. Thus, it would have all the benefits of any piece of substantive evidence. Professor Rice has argued for this interpretation of rule 703 for three reasons: (1) any other approach would materially alter the role of the expert in today's litigation without justification because at common law an expert could only rely on facts in the record;[286] (2) the reasonable reliance standard built into rule 703 meets the traditional standards for a hearsay exception, and should be treated accordingly;[287] and (3) the limiting instruction is a legal fiction, which the jury cannot possibly follow under rule 703.[288] Of course, opposing counsel would have ample opportunity to vigorously cross-examine the expert. Any problems with the expert's basis would go to the weight of the evidence, and not its admissibility.[289]

This approach has some merit. First, the jury needs to hear in detail the evidence that forms the expert's opinion before it may accept the opinion as true,[290] and necessity is a prominent factor in most hearsay exceptions.[291] An opinion without identifiable support is typically not very persuasive. Rice's approach would make available to the jury the facts or data reasonably relied upon by the expert. Second, this approach would eliminate the confusion that

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286. *See* Rice, *supra* note 192, at 587.

287. *Id.* at 587-88 ("This standard satisfies the traditional test for exceptions to the hearsay rule: that the circumstances of the out-of-court utterance adequately assure reliability in terms of both the accuracy of the declarant's perception and memory and the sincerity with which the declarant recited what he perceived and remembered."). In a more recent article, Professor Rice has proposed the adoption of an additional exception to the hearsay rule admitting those statements reasonably relied upon by an expert and possessing "substantial guarantees of trustworthiness." *See* Rice, *supra* note 55, at 506.

288. *Id.* at 585.

289. *Id.* at 588 ("Because the expert's screening creates a presumption that a sufficient threshold of reliability exists, the direct assessment of those surrounding circumstances in the judicial proceeding would shift from the judge, as a question of admissibility, to the jury, as a question of the weight to be given to the information and, ultimately, to the opinion.").

290. *Id.* at 585 ("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.").

291. *See* Sabatino v. Curtiss Nat'l Bank, 415 F.2d 632, 636 (5th Cir. 1969) ("There are two basic tests for all exceptions to the hearsay rule: (1) The evidence must be necessary to a proper consideration of the case and (2) it must exhibit an intrinsic probability of trustworthiness."); Dallas County v. Commercial Union Assurance Co., 286 F.2d 388, 395-96 (5th Cir. 1961) (reviewing the prominence of necessity as a requisite for admission).

accompanies the traditional limiting instruction. Telling the jury that they may consider the evidence only as support for the expert's opinion, and not for its truth, makes little sense to most commentators, let alone typical members of the jury.[292] Due to the unlikelihood that the jury will be able to limit its consideration of the evidence, rule 703 has had the practical effect of a hearsay exception already, and Rice's approach is simply a logical extension of that reality.[293] Finally, in support of this approach, at least in civil cases, the opposition is well-equipped through the Federal Rules of Civil Procedure to unearth the facts or data that a testifying expert will rely upon in court.[294] If opposing counsel believes that the facts or data are particularly untrustworthy, then he will have ample opportunity to elucidate this to the jury. If the evidence is relatively trustworthy, then the hearsay concerns practically disappear.

For the most part, however, the rationale behind this approach is not convincing. Even prior to the adoption of the Federal Rules of Evidence, some courts permitted experts to rely on inadmissible evidence when forming an opinion, and this evidence was subject to the same set of limiting instructions that are in effect in most courts today.[295] Moreover, Rice's argument that there are no apparent reasons or justifications for allowing the expert to rely on facts not in the record ignores the reality that experts often rely on data that would not be admissible in court.[296] Most significantly, though, Rice's argument that the reasonable reliance standard satisfies the reliability component of most hearsay exceptions is demonstrably false. The exceptions to the hearsay rule found in rules 803 and 804(b) are predicated upon the circumstances surrounding the declaration. It is the declarant's state of mind or the circumstances surrounding the statement's utterance that makes these statements reliable, not a third party's professional validation.[297] As shown above, testifying experts are becoming a proliferate profession. They get paid a significant sum of money to testify for the party who hires them. Expert testimony is powerful evidence for a party, and allowing otherwise inadmissible evidence to become admissible simply because the expert relied on it when forming his opinion would sanctify these facts or data, making an unwarranted intrusion on the hearsay bar.

A final concern is a constitutional one: such a rule would likely violate defendants' Sixth Amendment right to confront their accusers in criminal cases.

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292. *See supra* notes 256-77 and accompanying text.

293. *See* United States v. Skodnek, 896 F. Supp. 60, 65 (D. Mass. 1995) ("Rule 703 . . . is essentially another exception to the hearsay rule.").

294. *See* FED. R. EVID. 705 advisory committee's note.

295. *See* United States v. Sowards, 339 F.2d 401, 402 (10th Cir. 1964) ("As a general Rule, an expert may testify as to hearsay matters, not to establish substantive facts, but for the sole purpose of giving information upon which the witness relied in reaching his conclusion as to value.").

296. *See* FED. R. EVID. 703 advisory committee's note ("In this respect the rule is designed to broaden the basis for expert opinions beyond that current in many jurisdictions and to bring the judicial practice into line with the practice of the experts themselves when not in court.").

297. *See* Rice, *supra* note 192, at 588 ("Unlike other established hearsay exceptions codified in Rules 803 and 804(b), under which the judge assesses a statement's reliability based on the circumstances surrounding its utterance, the reliability justifying admission under the proposed Rule 703 exception would be based on a third party's out-of-court assessment.").

The Supreme Court in *Ohio v. Roberts*[298] announced a two-part test for the Confrontation Clause: (a) necessity (meaning that the hearsay declarant must be unavailable); and (b) reliability.[299] Reliability can be inferred where the declarant's statement falls within a firmly rooted hearsay exception, otherwise the statement must be excluded absent particularized guarantees of trustworthiness.[300] The reliability of the statement and the unavailability of the declarant will of course depend on the facts of each case. What can be stated with a good deal of certainty, however, is that otherwise inadmissible data which forms the basis of an expert's opinion is not a firmly rooted exception to the rule excluding hearsay. In assessing which statements are firmly rooted, the Supreme Court in *White v. Illinois*[301] pointed to three factors to consider: (1) the age of the exception; (2) its presence within the Federal Rules of Evidence; and (3) its popularity among the states.[302] Using the guidelines set forth in *White*, hearsay statements forming the basis of an expert's opinion are unlikely to be considered firmly rooted because the exception, if adopted, would be new; such statements have not been treated by the Federal Rules of Evidence as a hearsay exception; and the approach is not adopted by any state.

2. Disclose the Unadmitted Basis if Properly Relied upon by the Expert

The second alternative is to allow the otherwise inadmissible facts or data to be presented to the jury unadulterated, if the probative value of the expert's basis is not substantially outweighed by the danger of unfair prejudice under rule 403. If admitted, the evidence is subject to a limiting instruction (if requested) that the hearsay is only to be considered by the jury to evaluate the strength of the expert's opinion, and not for the truth of the matter asserted.[303] In general terms, this is the approach taken by most federal and state courts and has been discussed at some length in Part II.[304] Yet, it would be overly simplistic to suggest that this is one uniform approach. Federal courts take widely disparate positions under rule 703.[305] They all agree, however, that the evidence is not substantive and does not advance a party's prima facie case, unless the opposing party fails to request a limiting instruction.

The critical inquiry under this approach is whether the expert's reliance on the unadmitted data was appropriate. If the expert appropriately relied on the facts or data, then it may be disclosed to the jury on direct examination. Several states,

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298. 448 U.S. 56 (1980).
299. *Id.* at 65-66.
300. *Id.* at 66.
301. 502 U.S. 346 (1992).
302. *Id.* at 355-56 n.8.
303. Engebretsen v. Fairchild Aircraft Corp., 21 F.3d 721, 729 (6th Cir. 1994); United States v. Farley, 992 F.2d 1122, 1125 (10th Cir. 1993); Boone v. Moore, 980 F.2d 539, 542 (8th Cir. 1992); Paddack v. Dave Christensen, Inc., 745 F.2d 1254, 1262 (9th Cir. 1984).
304. *See supra* notes 131-57 and accompanying text.
305. *Compare supra* notes 71-107 and accompanying text *with* notes 131-57.

including Hawaii,[306] Minnesota,[307] Missouri,[308] and Tennessee,[309] have simply added a trustworthiness or reliability requirement to rule 703, precluding reliance on unadmitted facts or data that are unreliable.[310] The Missouri statute provides a typical example of this approach:

> The facts or data in a particular case upon which an expert bases an opinion or inference may be those perceived by or made known to him at or before the hearing and must be of a type reasonably relied upon by experts in the field in forming opinions or inferences upon the subject and must be otherwise reasonably reliable.[311]

In applying this elevated standard, the court in *Leake v. Burlington Northern Railroad Co.*[312] found that the trial court committed error in admitting the opinion of a rehabilitation expert who based his opinion on unreliable hearsay evidence from his employer.[313] One Missouri court has noted that the trustworthiness requirement "engages the independent responsibility of the trial judge to decide if the foundational facts meet the minimum standards of reliability."[314] Explicitly giving the judge the responsibility to make an independent determination of the trustworthiness of the expert's inadmissible basis before admitting the expert's opinion based thereon[315] is an important step in the right direction. Expert opinions based on unreliable facts or data are not likely to be helpful to the jury.

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306. HAW. R. EVID. 703.

307. MINN. R. EVID. 703(b).

308. MO. REV. STAT. § 490.065(3) (Supp. 1996).

309. TENN. R. EVID. 703. Rhode Island, while not adopting a trustworthiness requirement, did modify rule 703 to emphasize the "reasonably relied upon" provision in the rule. The Rhode Island Rule states that if the facts or data relied upon by the expert are the "type reasonably *and customarily* relied upon by experts in the particular field" then the information "shall be admissible without testimony from the primary source." R.I. R. EVID. 703 (emphasis added).

310. HAW. R. EVID. 703 (adding to the federal version of rule 703 the following sentence: "The court may, however, disallow testimony in the form of an opinion or inference if the underlying facts or data indicate lack of trustworthiness."); MINN. R. EVID. 703(b) (adding to Federal Rule of Evidence 703 a trustworthiness requirement in civil cases before the underlying data may be admitted on direct examination); TENN. R. EVID. 703 (adding to rule 703 a sentence worded similarly to the Hawaii version, but requiring the judge to "disallow testimony" based on untrustworthy facts or data).

311. MO. REV. STAT. § 490.065(3).

312. 892 S.W.2d 359 (Mo. Ct. App. 1995).

313. *Id.* at 364. The trial court in *Leake* permitted defendant's expert to testify to a statement made by defendant's rehabilitation offer suggesting that plaintiff was malingering. *Id.* The court noted that the defendant could have called its rehabilitation officer as a witness and avoided the problem altogether. *Id.*

314. Wulfing v. Kansas City S. Indus., Inc., 842 S.W.2d 133, 152 (Mo. Ct. App. 1992) (A judge has "independent responsibility . . . to decide if the foundational facts meet the minimum standards of reliability as a condition of the admissibility of the opinion."); *see also* McCall v. Wilder, No. 03A01-9312-CVC-00455, 1994 Tenn. App. LEXIS 377, at *16 (July 11, 1994) (Under the Tennessee version of rule 703, the court must "look carefully at the reliability of the underlying source of the expert's opinion.").

315. *See infra* notes 432-37 and accompanying text (proposal to add trustworthiness requirement to rule 705).

Yet, these state rules fail to direct any attention to the admission of the basis itself; instead they simply focus on the expert's methodology. This eliminates one of Professor Rice's concerns about the approach under rule 703 in that this approach allows full disclosure of the expert's bases. If the basis is unreliable, the expert's opinion must be excluded, unless, of course, the expert has an adequate independent basis to support the opinion. Unfortunately, these state variations have tended to not substantially affect the courts' treatment of the expert's underlying bases. The "minimum standards of reliability" test quoted above, for example, is identical to the test espoused by federal courts adopting the "restrictive approach."[316]

Rule 403 is the primary defense to the disclosure of inadmissible hearsay under this approach. The party can argue that although relevant, the probative value of the evidence is substantially outweighed by the danger of unfair prejudice, and thus should not be presented to the jury.[317] Nevertheless, like the federal courts, these states have rarely used rule 403 to preclude disclosure of an expert's basis. For example, in *Everett v. Town of Bristol*,[318] a Vermont trial court admitted highly inflammatory prejudicial evidence against the plaintiff, Everett, as the basis for its expert's opinion.[319] The plaintiff sued the city for negligence after she fell on a city step and hurt her ankle. The defendant argued that it wasn't the plaintiff's fall on the town steps that caused her injuries, and called an expert who testified that plaintiff's injuries were a result of somatoform pain disorder. As a basis for his opinion, he related to the jury a series of events in plaintiff's life, including that:

> [P]laintiff had a terrible relationship with her alcoholic father; that she was raped as a teenager; that there were allegations of a lesbian relationship with a commanding officer while she was in the army; that she was discharged from the army because she was unsuitable; that she married a man in Italy who broke her jaw, causing a miscarriage; that the man followed her back to the United States and killed her mother; that her second husband was a "swinger and a bisexual" who liberally prescribed drugs for her to which she became addicted; that her second husband ran off with her best friend; and that she [was] now married for the third time.[320]

The trial court admitted the expert's recitation of these facts as the basis of his opinion. The Vermont Supreme Court ruled that although basis testimony is admissible on direct examination subject to a limiting instruction, not all basis testimony is admissible, because rule 703 "is not a 'backdoor' to circumvent [the evidence code]."[321] The court ruled that the trial court abused its discretion under rule 403 by admitting the "highly inflammatory" personal history as basis

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316. *See In re* "Agent Orange" Prod. Liab. Litig., 611 F. Supp. 1223, 1246 (E.D.N.Y. 1985), *aff'd*, 818 F.2d 187 (2d Cir. 1987).

317. The rule provides: "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." FED. R. EVID. 403.

318. 674 A.2d 1275 (Vt. 1996).

319. *Id.* at 1276-77.

320. *Id.*

321. *Id.* at 1277.

testimony, saying that any probative value to the issues in the case was "clearly outweighed by danger of unfair prejudice to the plaintiff."[322]

Everett demonstrates one of the problems with reliance on rule 403 as a means of excluding the facts or data relied upon by an expert. Rule 403 has traditionally been invoked as a last ditch effort by attorneys. As such, it typically carries very little weight with trial courts who have become desensitized to rule 403 arguments. In *Everett*, the trial court did not preclude even the most egregious facts from being disclosed,[323] and thus, it may not be the best vehicle for dealing with this dilemma.

3. Permit the Description of the Unadmitted Basis, but Prohibit Disclosure of the Contents Unless Some Additional Showing Is Made

The third alternative allows the expert to refer during direct examination to the unadmitted facts or data upon which the expert reasonably relied, but does not allow the expert to go into any detail about the facts, unless the facts or data are trustworthy or satisfy some additional requirement. In contrast to the alternative just discussed, this method is not only concerned with the reasonableness of the expert's reliance on unadmitted facts or date, but also on the propriety of allowing disclosure of the material to the jury. This third approach conforms to the purpose behind rule 703 by permitting experts to rely on inadmissible evidence when forming their opinions and to the concerns about the jury by protecting them from being improperly influenced by unadmitted facts or data. One rationale for the rule excluding hearsay, of course, is that juries are not able to give hearsay evidence its appropriate weight. The primary basis for that concern is that the weaknesses of any hearsay statement are incapable of being effectively exposed on cross-examination. This approach diminishes these problems. The obvious drawback, however, is that it is difficult, if not impossible, for the jury to evaluate an opinion without knowing its basis.[324] Simply permitting an expert to say that he relied on x and y, without providing the details of x and y, is like going back to the old common law approach of not allowing the expert to rely on inadmissible facts or data. The jury has no idea how much weight to give to the testifying expert's opinion if it does not understand how he came to his conclusion.

States have used several different means to implement this limited disclosure approach. Alaska and Texas have dealt with this problem by amending rule 705 to strengthen the rule 403 balancing test that applies to the admission of otherwise inadmissible facts or data relied upon by experts. For example, rule 705(c) of the Alaska Rules of Evidence provides:

> When the underlying facts or data would be inadmissible in evidence for any purpose other than to explain or support the expert's opinion or inference, the court shall exclude the underlying facts or data if the danger that they will be

322. *Id.*

323. *See supra* text accompanying note 318.

324. *See supra* notes 290-91 and accompanying text.

> used for an improper purpose outweighs their value as support for the expert's opinion. If the facts or data are disclosed before the jury, a limiting instruction by the court shall be given upon request.[325]

This approach gives more teeth to the traditional rule 403 analysis and directs courts to engage in a careful balancing in every case.[326] The rule eliminates rule 403's requirement that the unfair prejudice "substantially outweigh" the probative value of the evidence, thus lightening the burden of the party opposing admission of the evidence. A similar, though not identical, approach is taken by rule 609 in dealing with prior conviction misconduct of an accused.[327] The advisory committee's note to rule 609 suggests that a rule 403 analysis requiring the probative value to be *substantially* outweighed by the danger of unfair prejudice is insufficient because of the danger that the prior conviction would be used by the jury as propensity evidence, despite its introduction solely for impeachment purposes.[328] The approach taken by Alaska (and Texas in criminal cases) would substantially reduce the unfair prejudice associated with admitting otherwise inadmissible facts or data as the basis of an expert's opinion and the associated risk that the jury will fail to limit its consideration of the evidence.

Some state courts have by judicial action restricted disclosure of the expert's bases. California courts, for example, have recognized a heightened role for the state's equivalent of rule 403[329] in this context. *People v. Coleman*,[330] in which the defendant was convicted for the murder of his wife, illustrates the point in an unusual context. The California Supreme Court was confronted with the trial court's admission of three "highly emotional and inflammatory" letters written by the victim, relating her "hopelessness and despair" because of her husband's prior threats and abuse.[331] The letters were admitted during the cross-examination of the defendant's experts because the letters had been reviewed by the experts and thus were part of their basis. In admitting the letters, the trial judge relied

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325. ALASKA R. EVID. 705(c); *see also* TEX. R. CR. EVID. 705(d) (imposing same heightened balancing test, but only in criminal cases).

326. *See, e.g.*, Colt Indus. Operating Corp. v. Frank W. Murphy Mfr., Inc., 822 P.2d 925, 933 (Alaska 1991) ("The reasonableness of [the expert's] reliance . . . is judged by reference to the six factors set forth in Zenith Radio Corp. v. Matsushita Elec. Indus. Co., 505 F. Supp. 1313, 1330 (E.D. Pa. 1980)."); Norris v. Gatts, 738 P.2d 344, 349-51 (Alaska 1987) (applying six factors from *Zenith Radio Corp. v. Matsushita Elec. Indus. Co.* for determination of reasonableness under rule 703).

327. FED. R. EVID. 609(a)(1) provides, in pertinent part: "[E]vidence that an accused has been convicted of such a crime shall be admitted if the court determines that the probative value of admitting this evidence outweighs its prejudicial effect to the accused."

328. FED. R. EVID. 609 advisory committee's note. The note identifies that when the evidence is not being used against the criminal defendant then rule 403's balancing of probative against prejudicial value is appropriate. Logically, rule 403's balancing is insufficient when the evidence is being presented against the criminal defendant.

329. CAL. EVID. CODE § 352 (West 1997).

330. 695 P.2d 189 (Cal. 1985).

331. *Id.* at 196 ("In the letters defendant's wife states that defendant had 'twice before' tried 'to hurt' her, that he had 'many times' threatened to kill the family . . . and that his wife feared that he would 'do this to us.'").

upon a limiting instruction as adequate assurance that the jury would not misuse the evidence.[332]

The California Supreme Court reversed based upon the trial court's duty to exercise its discretion under section 352, finding that the content of the three hearsay letters should not have been disclosed to the jury in light of the futility of the limiting instruction.[333] The highly probative allegations contained in the letters, made by the now-deceased victim about the past conduct of the defendant, posed too great a risk of jury misuse. In dicta the court in *Coleman*, contrary to the federal approach, adopted a general rule that inadmissible evidence which is reasonably relied upon by experts may not be fully disclosed to the jury, but only briefly described.[334]

Similarly, a Texas court of appeals concluded that under rule 703 "[t]he sounder rule is that an expert witness should not and must not be permitted to recount hearsay conversations and hearsay statements from a third person even if that conversation or statement formed some part of the basis of his opinion."[335] The Oregon Court of Appeals imposed a trustworthiness requirement as a condition on the disclosure of inadmissible facts underlying an expert opinion,[336] even though Oregon has adopted verbatim the federal version of rule 703.[337]

The most stringent state requirements, however, are nearly identical provisions contained in the rules of evidence of Maryland[338] and Kentucky.[339] Their rules exclude inadmissible facts or data reasonably relied upon by an expert unless the information is "determined to be trustworthy, necessary to illuminate testimony,

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332. *Id.* at 196, 200.

333. *Id.* at 199.

334. *Id.* at 203.

335. Minnesota Mining & Mfg. Co. v. Nishika Ltd., 885 S.W.2d 603, 632 (Tex. Ct. App. 1994) (referring to Birchfield v. Texarkana Mem'l Hosp., 747 S.W.2d 361 (Tex. 1987)); *see also* First Southwest Lloyds Ins. Co. v. MacDowell, 769 S.W.2d 954, 958 (Tex. Ct. App. 1989) ("While an expert may generally state the basis for his opinion on direct examination, he is not necessarily entitled to state in detail all information that contributed to the formation of his opinion."). Several federal appellate courts have approved of this approach to rule 703. In *Marsee v. United States Tobacco Co.*, 866 F.2d 319 (10th Cir. 1989), for example, the court refused to reverse the trial judge's ruling that prevented the witness from testifying in detail about conversations the doctor had with other doctors concerning the risk of oral cancer from snuff dipping. *See id.* at 322-23; Nachtsheim v. Beech Aircraft Corp., 847 F.2d 1261, 1270-71 (7th Cir. 1988) (noting that expert's reliance under rule 703 does not necessarily entitle the expert to disclose the underlying facts or data).

336. *See* Mission Ins. Co. v. Wallace Sec. Agency, Inc., 734 P.2d 405, 407 (Or. Ct. App. 1987).

> Plaintiff urges that federal case law interpreting the analogous federal rule shows that statements by eyewitnesses should be admissible. Plaintiff's authorities are not controlling here.... FRE 703 (and OEC 703)... [do] not give *carte blanche* to admitting otherwise inadmissible hearsay.... The eyewitness statements that plaintiff seeks to have admitted do not have such extraneous indicia of reliability.

Id. (emphasis in original).

337. FED. R. EVID. 703; OR. REV. STAT. § 40.415 (1995).

338. *See* MD. R. EVID. 5-703(b).

339. *See* KY. R. EVID. 703(b).

and unprivileged."[340] This language tracks a 1987 proposal of the Criminal Justice Section of the American Bar Association[341] and gives the judge the duty to make a determination that the expert's basis is not only trustworthy, but is also necessary.[342] The necessity requirement focuses the judge's attention on an important and often overlooked question: does the jury need the information to understand and evaluate the opinion? A finding of trustworthiness and necessity alleviates many, if not all, of the concerns that accompany the admission of hearsay through an expert.[343] Rule 703, of course, does not impose a necessity requirement because the drafters believed that the "reasonably relied upon" requirement was sufficient for judicial purposes.[344] By the same token, the Kentucky/Maryland formulation of the rule would result in the exclusion of some reliable facts and data relied on by experts. Yet, the rules would help bring an end to the abuse of rule 703 by limiting disclosure of the expert's basis to the information the jury needs in assessing expert opinions and the information that is trustworthy.

4. Exclude the Inadmissible Facts or Data

The most draconian solution to solving the problem posed by rule 703 would be to retreat to the common law approach and prohibit expert witnesses from relying on inadmissible facts at all. In such a scenario, the expert would be forced to rely upon facts personally observed, facts in the record, and perhaps facts which would be admissible if offered by the party. Although the simplicity of the approach is appealing and would certainly eliminate the hearsay concerns that afflict the other approaches, it ignores the reality of how experts form their opinions.[345] People in all walks of life rely on statements made by others every day, despite the fact that such statements would not be admissible in a court of law. The drafters of rule 703 believed that it made little sense to make experts conform to a more stringent standard inside a courtroom than they do outside the courtroom, because it might severely limit the admission of helpful opinions. Many would argue that such an approach is not only unrealistic but also fails to recognize the reliability of information used by experts in their line of work. Yet, this common law approach does protect the jury from the unreliable evidence on

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340. *Id.*; *see* MD. R. EVID. 5-703(b). The additional requirements imposed by the Kentucky and Maryland versions of rule 703 are contained in an additional subpart and provide in pertinent part as follows: "If determined to be trustworthy, necessary to illuminate testimony, and unprivileged, facts or data relied upon by an expert pursuant to section (a) may in the discretion of the court be disclosed to the jury even if those facts and data are not admissible in evidence." *Id.*

341. *See* American Bar Ass'n Criminal Justice Section, *Federal Rules of Evidence: A Fresh Review and Evaluation*, 120 F.R.D. 299, 369-70 (1987).

342. Maryland and Kentucky adopted their versions of rule 703 in 1994 and 1990, respectively. *See* KY. R. EVID. 703; 1 MD. CODE ANN., Rule § 5 commentary at 731 (1996).

343. *See* Sabatino v. Curtiss Nat'l Bank, 415 F.2d 632, 636 (5th Cir. 1969); *supra* text accompanying note 291.

344. *See* FED. R. EVID. 703 advisory committee's note; 3 WEINSTEIN & BERGER, *supra* note 5, ¶ 703[01], at 703-14 (explaining that rule 703 does not include a necessity requirement).

345. *See* FED. R. EVID. 703 advisory committee's note.

which experts sometimes rely, and it recognizes the inherent bias of most experts who testify in court. In light of the "liberal thrust" of the Federal Rules as reflected by the generous exceptions to the hearsay rule, contained in rules 803 and 804, which result in the admission of most hearsay anyway, it is reasonable to conclude that inadmissible hearsay is in all likelihood unreliable.[346]

Several states have retained such a restrictive standard, including Ohio,[347] Kansas,[348] Alabama,[349] and Massachusetts.[350] The Ohio approach, for example, simply deletes the last sentence of the federal version of rule 703. The Ohio rule 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."[351] In refusing to permit experts to rely on facts made known to them before the hearing, the staff notes to the Ohio rule reflect a concern that the federal approach expresses no limitations upon the methods of making the facts or data known to the jury.[352] The Massachusetts Supreme Court in *Department of Youth Services v. A Juvenile*[353] echoes this sentiment in refusing to follow the federal approach. The court was particularly concerned with the phenomenon of litigators digging for experts who will base their opinions on otherwise inadmissible evidence simply so that they can get prejudicial hearsay before the jury.[354] In rejecting rule 703, the court settled on permitting an expert to rely on facts or data outside the record if the facts would be otherwise admissible.[355] It gave the opposing party the option of requesting a voir dire to

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346. *See* Imwinkelried, *supra* note 206, at 31. Professor Imwinkelried points to three developments in the law of hearsay under the federal rules: (1) the foundational requirements for some traditional exceptions were relaxed, (2) new exceptions were recognized, and (3) "catch-all" exceptions were created. *See id.* "If hearsay information cannot pass muster under these new, relaxed standards, there is good reason to question its reliability." *Id.*

347. *See* OHIO R. EVID. 703.

348. *See* KAN. STAT. ANN. § 60-456(b) (1994). The Kansas equivalent to rule 703 provides:

> 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 (1) based on facts or data perceived by or personally known or made known to the witness at the hearing and (2) within the scope of the special knowledge, skill, experience or training possessed by the witness.

Id.

349. *See* ALA. R. EVID. 703 (having a rule identical to Ohio rule quoted *infra* text accompanying note 351).

350. *See* Department of Youth Servs. v. A Juvenile, 499 N.E.2d 812, 821 (Mass. 1986) (refusing to judicially adopt rule 703 and retaining common law rule); *infra* notes 353-56 and accompanying text.

351. OHIO R. EVID. 703.

352. OHIO R. EVID. 703 staff notes (West, WESTLAW through Feb. 2, 1997) ("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.").

353. 499 N.E.2d 812 (Mass. 1986).

354. *Id.* at 820.

355. *Id.* at 821. The court states:

> Because of the problems now arising under rule 703, we are not persuaded we should accept the principles of the proposed rule. We believe, however, that we should take a modest step by permitting an expert to base an opinion on facts or

determine whether the facts or data were indeed admissible.[356] *Department of Youth Services* takes a step in the right direction in recognizing the powerful effect of expert bias on the use of rule 703. Yet the experience in these states teaches that a strict exclusionary approach often leads to the creation of incremental exceptions to accommodate experts in particular kinds of cases, resulting in a rule that is just as haphazard and unpredictable as a more flexible approach.[357]

5. Subject Matter Approach: Adopt a Stricter Standard in Criminal Cases

The fifth alternative is to adopt different standards for expert witnesses in civil and criminal cases. Two major concerns motivate disparate treatment of an expert's bases in civil and criminal cases: (1) the criminal defendant's constitutional right to confront "witnesses against him"; and (2) differences in discovery between civil and criminal cases. Due to these concerns, Louisiana,[358] Texas,[359] Minnesota,[360] and Virginia[361] have adopted more restrictive standards for the disclosure of inadmissible facts and data relied on by experts in criminal cases than in civil cases.

The Virginia and Minnesota schemes are substantially similar in that they maintain the historical prohibitions on an expert's reliance on inadmissible evidence, but only in criminal cases.[362] In civil disputes, Minnesota allows reliance on inadmissible facts or data "when good cause is shown . . . and the underlying data is particularly trustworthy."[363] Virginia imposes a much less stringent requirement on civil litigants, mandating merely that the inadmissible "facts, circumstances, or data" relied upon by the expert be "of a type *normally* relied upon by others in the particular field of expertise."[364]

Texas adopted separate rules of evidence for civil and criminal cases and in its Rules of Criminal Evidence included rule 705(d), a provision requiring the court to exclude inadmissible facts or data "if the danger that they will be used for an improper purpose outweighs their value as explanation or support for the expert's

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> data not in evidence if the facts or data are independently admissible and are a permissible basis for an expert to consider in formulating an opinion.

Id.

356. *Id.*

357. *See* Charles J. Walsh & Beth S. Rose, *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*, 26 SETON HALL L. REV. 183, 243 (1995).

358. *See* LA. CODE EVID. ANN. art. 705 (West 1995).

359. *See* TEX. R. CR. EVID. 705; TEX. R. CIV. EVID. 705(d).

360. *See* MINN. R. EVID. 703(b).

361. *See* VA. CODE ANN. § 8.01-401.1 (Michie 1996).

362. *See* MINN. R. EVID. 703(b); VA. CODE ANN. § 8.01-401.1; *see also* Simpson v. Commonwealth, 318 S.E.2d 386, 391 (Va. 1984) (Section 8.01-401.1 of the Virginia Evidence Code is a "clear expression of legislative intent to retain the historic restrictions upon expert testimony in criminal cases in Virginia.").

363. MINN. R. EVID. 703(b).

364. *See* VA. CODE ANN. § 8.01-401.1 (emphasis added).

opinion."[365] This provision is nearly identical to Alaska Rule of Evidence 705(c), but applies only to criminal cases.[366] This approach shifts the balancing test of rule 403, requiring a "simple balance of prejudice against probative value."[367] Louisiana's rule 705 includes the federal version of the rule as subpart (a) but limits it to civil cases, and includes a new provision, subpart (b), which applies to criminal cases and requires experts to state the facts upon which their opinion is based, but precludes the disclosure to the jury during direct examination of the inadmissible facts the expert reasonably relied upon.[368]

This subject matter approach to evidence is not unprecedented in the hearsay rules.[369] The public records exception to the hearsay rule, rule 803(8) of the Federal Rules of Evidence, excludes in criminal cases certain types of public records because of the drafters' worries about the "almost certain" violation of the criminal defendant's confrontation rights if the evidence was admitted.[370] The Confrontation Clause violations under rule 703 and its state equivalents, however, are not so certain. Arguably, the Confrontation Clause is not implicated by the admission of the expert's basis through rule 703 because the expert is subject to cross-examination concerning the expert's opinions and basis.[371] Courts have recognized two important requirements imposed by the Confrontation Clause. First, the defendant must have access to the hearsay information relied on by the expert, and second, an expert's testimony must not be based entirely on hearsay reports.[372] The likelihood that the jury will consider the expert's inadmissible basis for its truth, whether it is supposed to or not, makes those requirements particularly unhelpful.[373] The prominence of experts

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365. *See* TEX. R. CR. EVID. 705(d). This provision is identical to Alaska Rule of Evidence 705(c), although the Alaska rule applies to civil and criminal cases. *See* ALASKA R. EVID. 705(c).

366. ALASKA R. EVID. 705(c); TEX. R. CR. EVID. 705(d).

367. HELEN D. WENDORF ET AL., TEXAS RULES OF EVIDENCE MANUAL art. VII, at 77 n.27 (4th ed. 1995). The analysis under rule 705(d) should proceed as follows: (1) Determine whether the facts or data are sufficient to support the expert's opinion, and, if not, exclude the basis and the opinion; (2) If the basis is adequate, determine whether the underlying facts are admissible; (3) If the facts are admissible, then the test under rule 705(d) does not apply and the facts may be disclosed at the proponent's discretion; (4) If the facts are not admissible, the judge must balance the probative value against the danger of unfair prejudice from the improper use of the basis. *See id.* at 77.

368. *See* LA. CODE EVID. ANN. art. 705(b) (West 1995).

369. For a detailed argument in support of a broad subject matter approach to hearsay, see Roger Park, *A Subject Matter Approach to Hearsay Reform*, 86 MICH. L. REV. 51 (1987).

370. FED. R. EVID. 803(8); *infra* note 389 (text of rule 803(8)).

371. *Cf.* United States v. Lawson, 653 F.2d 299, 302 (7th Cir. 1981) (stating that an expert's testimony that was based entirely on hearsay might satisfy rule 703, but would violate the Confrontation Clause).

372. *See* United States v. Rollins, 862 F.2d 1282, 1293 (7th Cir. 1988); United States v. Kail, 804 F.2d 441, 447 (8th Cir. 1986); *Lawson*, 653 F.2d 302. In *Lawson*, the Seventh Circuit observed that "[t]he [g]overnment could not . . . simply produce a witness who did nothing but summarize out-of-court statements made by others." *Id.* (footnote omitted). The court found that access to the hearsay information was necessary to make the opportunity to cross-examine meaningful. *See id.*

373. *See supra* notes 256-69 and accompanying text.

in criminal litigation, in light of the continued expansion of forensic science, and the potential for abuse created by rule 703's expansion of the permissible expert bases, provide substantial justification for a subject matter approach to rule 703.

The discovery limitations in criminal cases make the case for this approach all the more compelling. One of the major reasons for permitting an expert to testify without first disclosing the basis for his opinion is that the discovery devices available to the cross-examiner are pervasive enough to give him the advance knowledge necessary for an effective cross-examination.[374] Yet, the discovery devices available in civil cases to uncover the bases of expert testimony are typically much more pervasive than they are in the criminal context.[375] The Federal Rules of Civil Procedure, for example, require the expert to prepare a written report containing a complete statement of all opinions and the bases therefore and provide it to the other side.[376] Furthermore, parties are entitled to depose all testifying experts and may discover through interrogatories or depositions the facts known and opinions held by pertinent non-testifying expert witnesses.[377] On the other hand, the Federal Rules of Criminal Procedure simply permit the government or the defendant to request a written description of the expert witness's opinions, bases, and reasons.[378] This summary does not provide a detailed analysis of the expert's testimony, nor does it provide the opportunity for a detailed follow-up by opposing counsel.[379] Although these requirements are part of a recent amendment to the Rules and ensure the exchange of more information than may have occurred under the former Rules, they still fail to provide litigants the opportunity to probe or test an expert's underlying basis before trial. Criminal litigants, in all but the rarest of cases, are not able to depose opposing experts or to explore their opinions (and bases) in any way. Thus, rule 703's liberal approach and rule 705's dependence on cross-examination and discovery have substantially greater justification in civil cases than they do in criminal cases.

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374. *See* FED. R. EVID. 705 advisory committee's note. The note states that:

> The answer assumes that the cross-examiner has the advance knowledge which is essential for effective cross-examination. This advance knowledge has been afforded, though imperfectly, by the traditional foundation requirement. Rule 26(b)(4) of the Rules of Civil Procedure, as revised, provides for substantial discovery in this area, obviating in large measure the obstacles which have been raised in some instances to discovery of findings, underlying data, and even the identity of the experts.

Id.

375. FED. R. CIV. P. 26(a)(2) and FED. R. CRIM. P. 16(e) specifically deal with expert testimony.

376. FED. R. CIV. P. 26(a)(2)(B).

377. FED. R. CIV. P. 26(b)(4)(B).

378. FED. R. CRIM. P. 16(a)(1)(E) provides in pertinent part:

> At the defendant's request, the government shall disclose to the defendant a written summary of testimony the government intends to use under rules 702, 703, or 705 of the Federal Rules of Evidence during its case in chief at trial. This summary must describe the witness' opinions, the bases and the reasons therefor.

379. *See id.*

B. Alternatives to Federal Rule of Evidence 803(4)

Just as states have tightened the requirements under their versions of rule 703 to avoid expert abuses, so too have a number of states adopted alternatives to federal rnle 803(4) to preclude the admission of unreliable hearsay evidence. The state versions of rule 803(4) may be generally grouped into three alternative approaches: (1) Admit the hearsay statement if it is found to be independently trustworthy by the judge; (2) Admit the hearsay statement if it was made in contemplation of treatment; or (3) Adopt a version of rule 803(4) limited to child declarants.

1. Admit the Statement if Independently Determined to Be Trustworthy

One approach taken by a number of state legislatures is to generally follow the federal approach to rule 803(4), but to impose an additional requirement of trustworthiness. New Hampshire, New Jersey, and Mississippi take this approach, giving the trial court discretion to exclude statements otherwise admissible under rule 803(4) if the trial court finds them to be untrustworthy.[380] In the notes accompanying the New Hampshire rule, the committee found that the requirements of its rule—that the statement must be made for purposes of diagnosis or treatment and must be trustworthy—were sufficient to warrant an exception to the hearsay rule and prevent a party from seeking a physician solely to enable him to testify.[381] In *State v. Lowe*,[382] the Supreme Court of New Hampshire applied the statute's trustworthiness requirement. In that case, a four-year-old girl was taken to see a doctor by her grandparents because they noticed bruises covering her legs, arms, back, and spine. During the examination, the doctor inquired how she received the bruises, and the girl replied that her father hurt her. Even though the doctor testified that one of the purposes behind asking the girl the source of her injuries was because of statutory reporting laws, the

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380. N.H. R. EVID. 803(4). The rule provides as follows:

> Statements made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment, regardless of to whom the statements are made, or when the statements are made, if the court, in its discretion, affirmatively finds that the proffered statements were made under circumstances indicating their trustworthiness.

Id.

381. N.H. R. EVID. 803(4) notes:

> The overriding guarantee of trustworthiness in the rule is that the statements must have been made for purposes of medical diagnosis or treatment, as opposed to solely for the purpose of enabling a physician to testify. Although a statement may be made for both purposes, it is believed that the fact that it is made for purposes of treatment, plus the required finding by the court that the statement is trustworthy, are sufficient to justify such a statement's admissibility.

382. 665 A.2d 740 (N.H. 1995).

trial court still admitted her response under rule 803(4). The Supreme Court, in applying the trustworthiness component, examined the intent of the doctor in asking the question and concluded that the query was not sought solely in connection with the statutory reporting requirement, but also from a concern about the child's health.[383] The court also said that the child's presence in the doctor's office where she had previously received medical care supported the trial court's finding that the statements were trustworthy.[384]

Mississippi modifies this approach only slightly and permits admission of such statements within the trial court's discretion only if the circumstances surrounding the utterance *substantially* indicate the statement's trustworthiness.[385] Thus, the court has the flexibility of excluding nearly every hearsay statement of this type unless there are substantial guarantees of trustworthiness. New Jersey takes a less restrictive approach, which is closer to the federal rule in construction. Its rule simply requires that the statements by the patient to the physician be made in good faith.[386]

These approaches are a constructive modification to the federal approach to rule 803(4), at least in theory. The rules give the trial court broad authority to exclude statements made by a patient only to prepare the doctor to testify. The rules also help direct the trial judge to the necessary, but quite difficult and fact-sensitive, inquiry into the reliability of the hearsay statements. The federal approach does not provide courts any such direction. Unfortunately, however, the courts charged with applying these trustworthiness provisions have not interpreted them to change the federal rule much, if at all. In *Lowe*, discussed above, the court discussed the trustworthiness of the statement in a perfunctory fashion, failing to address the requirement in any substantial way.[387] Other courts in these states have ignored the requirement altogether.[388] Of course, even

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383. *Id.* at 743.

384. *Id.*

385. MISS. R. EVID. 803(4). The rule provides as follows:

> Statements made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment, regardless of to whom the statements are made, or when the statements are made, *if the court* in its discretion, *affirmatively finds* that the proffered statements were made under circumstances substantially indicating their trustworthiness.

Id. (emphasis added).

386. N.J. R. EVID. 803(4). The rule provides that:

> Statements made in good faith for purposes of medical diagnosis or treatment which describe medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof to the extent that the statements are reasonably pertinent to diagnosis or treatment.

Id.

387. *See Lowe*, 665 A.2d at 743 (finding trustworthiness because examination of child arose from grandparents' concern about bruises on child's body and child's presence at familiar place where she had received medical care before).

388. *See, e.g.*, Eakes v. State, 665 So. 2d 852, 866-67 (Miss. 1995); Doe v. Doe, 644 So. 2d 1199, 1205-06 (Miss. 1994) (stating two-part test under rule 803(4) as requiring reasonable reliance and a treatment motivation, but not an independent trustworthiness requirement).

without the explicit trustworthiness requirement the trial judge still has the discretion to exclude unreliable evidence under rule 403.

In practical terms, the Mississippi, New Hampshire, and New Jersey rules do not so much add a trustworthiness requirement to 803(4) as they whisper a gentle reminder in the judge's ear to be particularly mindful of trustworthiness in this context. That modest reform should be compared to the approach of the federal rules to two hearsay exceptions. Rules 803(6) and 803(8), records of regularly conducted activity, and public records and reports, respectively, explicitly require the court to exclude such records if the circumstances indicate a lack of trustworthiness.[389] Under rule 803(8), the advisory committee's note gives a four-factor test to be applied when determining the admissibility of a government report: (1) the timeliness of the investigation; (2) the special skill or experience of the official; (3) whether a hearing was held and the level at which conducted; and (4) possible motivation problems suggested by the Supreme Court in *Palmer v. Hoffman*.[390] Rule 803(6)'s trustworthiness provision is based on *Palmer* as well.[391] The Second Circuit in *Palmer* excluded the statement of a railroad engineer which was contained in a report prepared by the railroad as part of investigating the cause of the accident.[392] The court reasoned that the document was inadmissible because the engineer-declarant was also the engineer on the train that was involved in the accident, he was a potential party to litigation resulting from the accident, and thus, he had a powerful motive to fabricate the statement in the report.[393] Similarly, in *United States v. Casoni*,[394] the court ruled that a statement made by a co-conspirator to his attorney implicating his fellow

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389. FED. R. EVID. 803(6) provides:

> A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity and if it was the regular practice of that business activity to make the memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness, unless the source of information or the method or circumstances of preparation indicate a lack of trustworthiness. The term "business" as used in this paragraph includes business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit.

FED. R. EVID. 803(8) provides:

> Records, reports, statements, or data compilations, in any form, of public offices or agencies, setting forth (A) the activities of the office or agency, or (B) matters observed pursuant to duty imposed by law as to which matters there was a duty to report, excluding, however, in criminal cases matters observed by police officers and other law enforcement personnel, or (C) in civil actions and proceedings and against the Government in criminal cases, factual findings resulting from an investigation made pursuant to authority granted by law, unless the sources of information or other circumstances indicate lack of trustworthiness.

390. FED. R. EVID. 803(8) advisory committee's note; *see* Palmer v. Hoffman, 318 U.S. 109 (1943).

391. *See* FED. R. EVID. 803(6) advisory committee's note.

392. Hoffman v. Palmer, 129 F.2d 976, 991 (2d Cir. 1942), *aff'd*, 318 U.S. 109 (1943).

393. *Id.*

394. 950 F.2d 883, 910-12 (3d Cir. 1991).

co-conspirator and recorded in a memorandum for the government was not trustworthy enough to satisfy the requirements of rule 803(6).[395] The motivational problems identified by the court in *Palmer* are quite similar to those often presented by rule 803(4). A patient who makes statements to a doctor to enable the doctor to testify is motivated to fabricate, and the doctor is as well. If rules 803(6) and 803(8) warrant an explicit trustworthiness requirement as a condition of admission, then rule 803(4) may also warrant such a provision.

2. Admit Statements for Purposes of Diagnosis Only if Made in Contemplation of Treatment

A second alternative adopted by some states is to exclude all statements made by a sick or injured person solely for diagnosis or to enable a physician to testify on the person's behalf. For instance, Rhode Island, in addition to the requirements for rule 803(4) under the federal rule, specifically excludes statements made to physicians solely for the purpose of preparing the expert to testify at trial.[396] Other states, such as Michigan, Louisiana, Maryland, and Tennessee, simply require that the statements of the patient be made to a physician for the purpose of treatment or for diagnosis in contemplation of treatment.[397] Louisiana in its comments to this exception notes that statements made solely for diagnosis do not contain the same indicia of reliability as statements made in connection with treatment, and thus should not be admissible.[398]

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395. *Id.*

396. R.I. R. EVID. 803(4). The rule provides that:

> Statements made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment, but not including statements made to a physician consulted solely for the purposes of preparing for litigation or obtaining testimony for trial.

Id.

Of course, other states achieve the same result through judicial decisionmaking. *See, e.g.*, State v. Jones, 451 S.E.2d 826, 842 (N.C. 1994) (holding that defendant's statements were not made for purpose of medical diagnosis or treatment, but instead "were made for the purpose of preparing and presenting a defense for the crimes for which he stood accused").

397. *See, e.g.*, MICH. R. EVID. 803(4). The rule states that:

> Statements made for purposes of medical treatment or medical diagnosis *in connection with treatment* and describing medical history, or past or present symptoms, pain, or sensations or the inception or general character of the cause or external source thereof insofar as reasonably necessary to such diagnosis and treatment.

Id. (emphasis added).

398. LA. CODE EVID. ANN. art. 803(4) (West 1995) comments:

> This paragraph follows Federal Rule of Evidence 803(4) but is narrower than Federal Rule of Evidence 803(4). Unlike federal rule 803(4), this paragraph excludes from its coverage statements made solely for purposes of diagnosis. The reliability deemed generally to inhere in statements made for purposes of medical treatment does not extend to statements made solely for diagnosis.

Maryland has also maintained the "treatment motivation" requirement. The Maryland Court of Special Appeals, in *Cassidy v. State*,[399] confronted the admission of the statement of a child victim of sexual abuse. The defendant was charged with and convicted of child abuse of the two-year-old daughter of the defendant's live-in partner.[400] Three days after the alleged abuse the child was examined by a doctor, and, in response to her question, "Who did this?" the child identified the defendant.[401] The court of appeals held that the statement of identification was not admissible as a statement to a physician consulted for treatment. The court refused to extend the traditional common law exception to statements made merely for medical diagnosis[402] and refused to follow the large number of courts adopting the holding of *United States v. Renville*[403] and finding that statements of identity by child victims of abuse are admissible under rule 803(4) or its equivalent.[404]

The court identified three bedrock foundations for its holding:

(1) The hearsay exception "requires a certain level of conscious sophistication on the part of the declarant—a purposeful motivation to describe accurately arising out of concerned self-interest," which did not exist with the two-year-old child.[405]

(2) The child's statement of identity was not related to medical treatment, but instead was for the treatment of emotional trauma, and, more particularly, was for the child's social disposition, which significantly reduces "the imperative to speak truthfully."[406]

(3) *Renville* and its progeny were incorrectly decided because they fail to focus on the state of mind of the declarant as they should, but instead shift the focus to the doctor and his need for the information to treat the patient's emotional injuries and to comply with legal obligations.[407]

These approaches are less flexible than the approach of those states adopting a trustworthiness provision. By excluding all statements made solely for the purpose of obtaining a diagnosis, the court may, in fact, exclude reliable evidence. Even though the declarant may have a motivation to lie or exaggerate

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399. 536 A.2d 666 (Md. Ct. Spec. App. 1988).

400. *Id.* at 667-68.

401. *Id.* at 668.

402. *See id.* at 689-90 (citing Beahn v. Shortall, 368 A.2d 1005, 1009 (1977)).

403. *See supra* notes 194-205 and accompanying text (discussing United States v. Renville, 779 F.2d 430 (8th Cir. 1985)).

404. *See Cassidy*, 536 A.2d at 684-85. The court in *Cassidy* reserved its most vitriolic words for the results orientation it perceived in the *Renville* line of cases. The court stated: "[T]he opinions are, in our judgment, poorly reasoned. Because of the strong desire for getting a child's identification of its abuser into evidence, the opinions strain for their results. . . . [W]e reject, as an appellate modality, result-orientation and the bad law it frequently generates." *Id.* at 685.

405. *See id.* at 680.

406. *See id.* at 682-83 (noting that Dr. Pullman's strong social obligation to report child abuse does not "transmute the social concern into a medical one").

407. *See id.* at 684-88 (Under *Renville* there are two flaws: (1) "[F]or the first time in the history of hearsay law, the state of mind of the hearsay declarant is effectively ignored."; and (2) "*Renville* . . . forgot the fact that the exception is rooted in the practice of medicine.").

the symptoms that ail him, there is no certainty that he will do so. What the rule loses in flexibility however, it gains in celerity. In these states, the trial judge is not required to perform the time-consuming process of interviewing the testifying physician outside the presence of the trier of fact to determine whether the statements made by the declarant were reliable. More importantly, these states preserve the original basis for the exception—the self-serving motivation to be truthful of one seeking treatment. This approach precludes the use of rule 703's "reasonably relied upon" language as the standard for statements made for medical diagnosis, an approach taken by many federal courts.[408] In this way, it ensures that hearsay statements admitted under this exception have sufficient trustworthiness to be admitted around the hearsay rule. Limiting the exception's reach helps to preclude abuse of the exception and to ensure the exclusion of unreliable hearsay. This reform would bring rule 803(4) into line with rule 703, creating a coherent policy in the treatment of the rules.

3. Admit Statements by Child Victims Under a Tender Years Version of Rule 803(4)

A third alternative is to limit rule 803(4) to child declarants instead of trying to squeeze such statements into the federal version of the rule. Many of the concerns about the current use of rule 803(4) relate to the admission of statements of identity by child victims of abuse. California, which does not have an equivalent to rule 803(4) in its Evidence Code,[409] dealt with the increasing problem of child molestation and abuse by adopting in 1995 a version of rule 803(4) that only applies to children under the age of twelve.[410]

Section 1253 of the California Evidence Code[411] creates a hearsay exception for statements reasonably pertinent to medical diagnosis or treatment provided that: (1) the statement is made by a victim of child abuse or neglect, (2) who is under the age of twelve at the time of the statement,[412] and (3) the statement is

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408. *See, e.g.*, Gong v. Hirsch, 913 F.2d 1269, 1274 & n.4 (7th Cir. 1990); United States v. Madoch, 935 F. Supp. 965, 973 (N.D. Ill. 1996).

409. The closest provision in the California Evidence Code is section 1251, which excepts from the hearsay rule statements of past mental condition or states of mind when in issue. *See* CAL. EVID. CODE § 1251 (West 1995).

410. *See* CAL. EVID. CODE § 1253 (West 1995).

411. Section 1253 provides, in pertinent part:

> [E]vidence of a statement is not made inadmissible by the hearsay rule if the statement was made for purposes of medical diagnosis or treatment and describes medical history, or past or present symptoms, pains, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment. This section applies only to a statement made by a victim who is a minor at the time of the proceedings, provided the statement was made when the victim was under the age of 12 describing any act, or attempted act, of child abuse or neglect.

CAL. EVID. CODE § 1253 (West 1995).

412. In addition, at the time of the proceeding at which the hearsay statement is introduced the declarant must be a minor. *See* CAL. EVID. CODE § 1253.

sufficiently trustworthy.[413] In effect, this provision adopts the federal version of rule 803(4), limits it to child victims of abuse, and requires that the statement was not "made under circumstances such as to indicate its lack of trustworthiness."[414] Other states have adopted so-called "tender years" exceptions to the hearsay rule, which more generally except statements made by minor victims of abuse if they are sufficiently reliable.[415]

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413. *See* CAL. EVID. CODE § 1252. The hearsay exception created by section 1253 is subject to the trustworthiness requirement of the preceding section, which provides: "Evidence of a statement is inadmissible under this article if the statement was made under circumstances such as to indicate its lack of trustworthiness." *Id.*

414. California did not previously have a provision that was parallel to federal rule 803(4), although section 1251 of the California Evidence Code admits statements of a declarant's pre-existing mental or physical state if the declarant is unavailable, the statement is sufficiently trustworthy, and is offered to prove the person's condition, which is in issue in the action. *See* CAL. EVID. CODE § 1251.

415. *See, e.g.*, DEL. CODE ANN. tit. 11, § 3513 (1995); FLA. STAT. ANN. § 90.803(23) (West Supp. 1997); MISS. R. EVID. 803(25); N.J. R. EVID. 63(33); 42 PA. CONS. STAT. ANN. § 5985.1 (1996); S.D. CODIFIED LAWS ANN. § 19-16-38 (1995). By way of example, the Florida statute provides as follows:

> (a) Unless the source of information or the method or circumstances by which the statement is reported indicates a lack of trustworthiness, an out-of-court statement made by a child victim with a physical, mental, emotional, or developmental age of 11 or less describing any act of child abuse or neglect, any act of sexual abuse against a child, . . . or any other offense involving an unlawful sexual act, contact, intrusion, or penetration performed in the presence of, with, by, or on the declarant child, not otherwise admissible, is admissible in evidence in any civil or criminal proceeding if:
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> 1. The court finds in a hearing conducted outside the presence of the jury that the time, content, and circumstances of the statement provide sufficient safeguards of reliability. In making its determination, the court may consider the mental and physical age and maturity of the child, the nature and duration of the abuse or offense, the relationship of the child to the offender, the reliability of the assertion, the reliability of the child victim, and any other factor deemed appropriate; and
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> 2. The child either:
>
> a. Testifies; or
>
> b. Is unavailable as a witness, provided that there is other corroborative evidence of the abuse or offense. Unavailability shall include a finding by the court that the child's participation in the trial or proceeding would result in a substantial likelihood of severe emotional or mental harm, in addition to findings pursuant to § 90.804(1).
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> (b) In a criminal action, the defendant shall be notified no later than 10 days before trial that a statement which qualifies as a hearsay exception pursuant to this subsection will be offered as evidence at trial. The notice shall include a written statement of the content of the child's statement, the time at which the statement was made, the circumstances surrounding the statement which indicate its reliability, and such other particulars as necessary to provide full disclosure of the statement.
>
> (c) The court shall make specific findings of fact, on the record, as to the basis for its ruling under this subsection.

FLA. STAT. ANN. § 90.803(23).

One potential advantage of the California approach is that it is specifically enacted for minor declarants and can be narrowly tailored to provide adequate assurance of the trustworthiness of proffered hearsay statements. In particular, the trustworthiness requirement allows for an independent analysis of the statements by the judge before their admission.[416] That is an improvement over the federal approach. Yet, the California provision uses the federal rule's language, and thus comes with the interpretational baggage carried by the federal rule.[417] As the Maryland court pointed out in *Cassidy v. State*,[418] rule 803(4) is not well suited for application to statements of identity by minor victims of abuse because it "requires a certain level of conscious sophistication" on the child's part.[419] A thoughtfully drafted provision specifically with child victims in mind is one solution to the problem.

V. SOLUTIONS

All of these alternatives are directed at ensuring that only reliable evidence is admitted through rules 703 and 803(4) and precluding the abuse of the rules by lawyers and witnesses. The number and variety of the state alternatives speak volumes about the complexity of the problems presented by the rules. The premise of this Article is that revisions are necessary to further the rules' objectives and to bring coherence to the rules. Undoubtedly, however, some significant measure of improvement is possible by means of judicially reforming the way the rules are applied by courts. Below, both possibilities will be addressed: reform in the courts' interpretation and treatment of the current rules and revision of the rules by legislative amendments.

A. Legislative Reform

1. Eliminate "diagnosis" as an independent basis of admission: The first goal of reform should be to bring rule 803(4) into line with rule 703 by eliminating "statements made for purposes of medical diagnosis" as an independent basis of admission. Rule 803(4) should except from the hearsay rule only those statements made for purposes of medical treatment or in contemplation of treatment.[420] The revision makes good evidentiary policy for three reasons. First, it would bring consistency to the hearsay rules by limiting the exception to those statements that have substantially heightened degrees of trustworthiness. Statements made for purposes of diagnosis are not necessarily made by

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416. *See* CAL. EVID. CODE §§ 1252-1253.

417. *See supra* notes 168-205 and accompanying text (discussion of judicial interpretation of rule 803(4)).

418. 536 A.2d 666, 680 (Md. Ct. Spec. App. 1988).

419. *Id.* at 680.

420. *See supra* notes 396-408 and accompanying text (discussion of states imposing treatment motivation on all statements under rule 803(4)).

declarants who have a self-serving motivation to be accurate.[421] In fact, prior to the enactment of the Federal Rules, courts excluded statements made to doctors solely for diagnosis or to enable the doctor to testify for the very reason that such statements were not reliable.[422] The primary rationale for the exception—the validation of the statement by the expert—is similarly unconvincing. No hearsay exception is based upon the validation of the person to whom the statement is made,[423] and that principle is all the more compelling with experts because the effect of an expert's opinion in court "is usually measured in dollars rather than life or health."[424]

Second, the change would bring clarity to the hearsay rules. It would help to eliminate the confusion that has been the natural result of rule 803(4)'s expansion of the common law hearsay exception based on nothing more substantial than concern about the operation of rule 703.[425] It would also ease the burden on trial and appellate judges who have strained to apply the expanded rule. Federal courts frequently have disagreed over the requirements for admission under rule 803(4): does the declarant's state of mind matter or is the sole inquiry the reasonableness of the expert's reliance?[426] They have disagreed

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421. *See* 4 DAVID W. LOUISELL & CHRISTOPHER B. MUELLER, FEDERAL EVIDENCE § 44, at 594 (1980) ("The big difference between statements made for purposes of obtaining medical treatment and those made for purposes of diagnosis is that in the latter case there is no assurance of the candor of the declarant.").

422. *See, e.g.*, Padgett v. Southern Ry. Co., 396 F.2d 303, 308 (6th Cir. 1968) (The exclusion of statements made for diagnosis "is based on the familiar hearsay doctrine and is designed, in practicality, to exclude the introduction of self-serving declarations of the patient under the guise of expert testimony."); Aetna Life Ins. Co. v. Quinley, 87 F.2d 732 (8th Cir. 1937) (If statements were admitted for their truth, the patient could be examined by the doctor, relate the circumstances of the injury and then call the doctor to testify to the patient's statements:); Candella v. Subsequent Injury Fund, 353 A.2d 263, 265-66 (Md. App. 1976) (When "the patient's history [is] related to a nontreating physician, . . . the trustworthiness which characterizes the declaration is no longer assured, since the patient is aware that the statements are being received primarily to enable the physician to prepare testimony . . . rather than for purposes of diagnosis and treatment.").

> Should it appear that the declarations were made *post litem motem* to an attending physician or to a skilled medical observer for the purpose of enabling the latter to testify as a witness for the declarant, the inference of trustworthiness largely disappears or is even reversed, the declaration being rejected by careful administrators as unreliable.

4 CHARLES FREDERIC CHAMBERLAYNE, A TREATISE ON THE MODERN LAW OF EVIDENCE § 2635 (1911).

423. *See supra* note 297 and accompanying text (discussing the declarant's state of mind as the basis for hearsay exceptions under rule 803).

424. *See* Gross, *supra* note 211, at 1158 n.137. Professor Gross questions the logic of the argument that experts are competent to judge the reliability of statements made to them "since expert witnesses are permitted to make these judgments in proceedings in which their own credibility is at issue." *See id.* at 1157-58.

425. *See supra* notes 174-205 and accompanying text (discussing conflicts among federal courts attempting to construe rule 803(4)).

426. *Compare* United States v. Iron Shell, 633 F.2d 77, 84 (8th Cir. 1980) (adopting two part test under rule 803(4), focusing on the declarant's motivation and the doctor's reliance) *with* Gong v. Hirseb, 913 F.2d 1269, 1274 & n.4 (7th Cir. 1990) (holding that the proper test

over the importance of the context: does it matter that the expert obtained the information in preparation for the expert's testimony or is that simply a matter of weight?[427] Revision of rule 803(4) would restore the conventional practice and would provide trial judges with a clear test[428] that focuses first on the declarant and her objectives. Statements made for purposes other than treatment would not come within the hearsay exception, although they might be the proper basis of the expert's opinion if they satisfied rule 703.[429]

Third, the new rule 803(4) would bring coherence to the Rules of Evidence as a whole. It would remove the inexplicable disparity that now exists between the treatment of statements made under 803(4) and 703. All such statements would be admissible for the same purpose, as the basis of the testifying expert's opinion. The fact that the jury may not appropriately limit its consideration of the expert's basis does not mean that the expert's basis should be substantively admissible, as the drafters concluded.[430] The determination of the admissibility of hearsay should be based on the reliability of the evidence such that the "hearsay risks" are in some way reduced. The drafters' legitimate concerns about the jury's misuse of the evidence require that steps be taken to limit the prejudice caused by the misuse. Several proposals are set forth below. A paid expert's reliance on a particular fact or datum in forming an opinion is not a substitute for trustworthiness. More should and must be required.

2. Require trustworthiness as a condition of disclosure of the expert's basis: Rules 703 and 705 leave unanswered the question of when and to what extent inadmissible facts or data reasonably relied upon by an expert in forming an opinion may be disclosed to the jury. Thus, the second most important reform is to fill that gap by amending the Rules to require that the expert's inadmissible basis be found trustworthy before the basis is disclosed to the jury on direct examination. This amendment should be made to rule 705[431] because that rule

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under rule 803(4) is the same as rule 703: reasonable reliance by the expert).

427. *Compare* Morgan v. Foretich, 846 F.2d 941, 950 (4th Cir. 1988) (admitting statements to doctor to enable him to testify because rule 803(4) eliminates the distinction) *with* State v. Jones, 451 S.E.2d 826, 842 (N.C. 1994) (excluding statements to doctor under rule 803(4) because they "were made for the purpose of preparing and presenting a defense to the crimes for which he stood accused").

428. The rule should be revised by changing the first portion of the rule to read: "Statements made for purposes of medical treatment or diagnosis in connection with treatment . . . ." The revision would restore the declarant's motivation as a critical inquiry for every statement offered under the exception.

429. Disclosure of the statement under rule 703 should not be automatic, however. Rather, the court should examine the context in which the statements were made and decide whether the expert's reliance on them was reasonable and whether the statements are sufficiently trustworthy to be disclosed to the jury. *See infra* notes 431-72 (discussing reforms needed to rule 703).

430. *See* FED. R. EVID. 803(4) advisory committee's note.

431. A number of states which have tightened the requirements for admission of the expert's basis have revised rule 705. *See, e.g.*, ALASKA R. EVID. 705; LA. CODE EVID. ANN. art. § 705 (West 1995); TEX. R. CR. EVID. 705. A number of other states have effectuated the change by adding an additional subpart to rule 703. *See, e.g.*, KY. R. EVID. 703(b); MD. R. EVID. 5-703(b). The greatest appeal of revising rule 705 is that it helps separate the two issues of reliance and disclosure. By adding a trustworthiness requirement to rule 705, courts would first have to

specifically addresses the disclosure of the expert's basis. The revision could be accomplished by adding to rule 705 a statement that, as a general rule, experts may state their bases on direct examination, but that unadmitted facts or data reasonably relied upon by experts may be disclosed on direct only if trustworthy.[432]

This revision would require courts to engage in a three step analysis: the court would first have to determine whether the expert's basis included inadmissible or not yet admitted evidence;[433] next, the court would inquire whether the expert's reliance on those matters was reasonable;[434] and third, the court would determine whether the inadmissible facts or data were otherwise sufficiently trustworthy to disclose to the jury.

This revision would have a number of salutary effects. First of all, it would force trial judges to determine both reasonable reliance by the expert and the often glossed-over issue of disclosure to the jury.[435] Secondly, it would heighten the scrutiny of the inadmissible matters used by experts, thus discouraging abuse of the rule by partisan experts (and their lawyers) and preserving the integrity of the trial. Thirdly, it would implicitly recognize the reality that jurors do not limit their consideration of the expert's basis, but rather consider such matters for their full value. Fourthly, the proposed revision would require courts to address the trustworthiness of the expert's basis on the record, thus providing appellate courts with a clearer record for their review.

At the same time, however, the revision leaves in place the core value of rule 703, allowing experts to continue to rely on unadmitted evidence to the extent such reliance is reasonable. Moreover, the revision would advance the efficiency goal of rule 703, allowing disclosure of unauthenticated matters or other evidence that is reliable but simply lacks the appropriate foundation.

The proposed change attacks the problem of disclosure directly, as opposed to the approaches of several states that simply appended the trustworthiness

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apply rule 703 and determine the reasonableness of the expert's reliance, and then would have to apply rule 705 and determine the trustworthiness of the facts or data for purposes of disclosure.

432. Rule 705 could be revised as follows:

> An expert may testify in terms of an opinion or inference and give reasons therefore without first testifying to the underlying facts or data or may disclose the underlying facts or data on direct examination before or after testifying to an opinion or inference and giving supporting reasons, unless the court requires otherwise. The expert may not, however, disclose on direct examination underlying facts or data that are not admissible in evidence unless the court finds that the facts or data are particularly trustworthy. In any event, the expert may be required to disclose the underlying facts or data on cross-examination.

433. Rule 703 does not place any limits on an expert's reliance on admitted evidence or matters that are within the personal knowledge of the expert. Thus, those matters can be fully disclosed through the expert, subject to other exclusionary rules. *See* FED. R. EVID. 703.

434. *See infra* notes 443-55 and accompanying text (discussing proposed reform of "reasonable reliance requirement" under rule 703).

435. *See supra* notes 102-105 and accompanying text.

requirement to the end of rule 703.[436] The result of that approach is to impose an additional requirement on the expert's underlying basis, but to leave still unaddressed the disclosure of the expert's basis. Thus, it fails to account for the rule's desire to accommodate the reasonable practices of experts when not testifying and, at the same time, fails to provide any guidance about the standard for disclosure to the jury.[437]

Undoubtedly, the most substantial criticism of the trustworthiness approach is that it makes the expert a "super-factfinder" by withholding the expert's bases from the jury.[438] In reality, however, experts typically bring a tremendous amount of experience and information to their testimony, and the jury remains ignorant of most of it. Moreover, experts who are foreclosed from disclosing all of their underlying bases to the jury are disadvantaged, not advantaged. The expert without adequately supported opinions is less credible than an expert whose opinions have a strong factual basis. Furthermore, precluding disclosure of inadmissible facts through experts does not mean the jury will be forced to choose between expert opinions deprived of their factual underpinnings. In fact, the most likely response of litigants will be exactly the opposite. Parties will elicit the desired testimony from live witnesses and will introduce the necessary exhibits, all of which will be subject to conventional adversarial testing. Thus, the tightening of rule 705 creates a disincentive to use experts as a shortcut to proof of facts, and conversely, provides an incentive to present the parties' proof in the traditional way, through competent witnesses and exhibits. In this way, it may be less efficient and more costly in terms of time and expense but it will lead to fewer abuses and better factfinding, a worthwhile trade-off.

The exclusion of the untrustworthy material relied upon by experts represents an appropriate balancing of the pertinent interests. The trustworthiness provision discourages abuse of rule 703 by taking away the "reward," while it allows the admission of the opinion (subject to rule 702). In addition, the proposed revision recognizes the substantive value often attached to facts introduced through an expert and treats them consistently with that reality. The change continues the practice of experts relying on inadmissible evidence, while placing a modest check on the undeniable abuses that have accompanied the change.

The trustworthiness requirement will achieve its objectives, however, only if it is construed by courts to have real substance. It should not be interpreted as the codification of the "restrictive" or "quasi-restrictive" approaches. Instead, it should be interpreted as an additional hurdle to be cleared before disclosure to the jury, substantially strengthening the rule 403 balancing that is the only

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436. *See, e.g.*, HAW. R. EVID. 703; MINN. R. EVID. 703(b); MO. ANN. STAT. § 490.065(3) (West 1996); TENN. R. EVID. 703. The additional trustworthiness requirement has not changed in any noticeable way the analysis of courts in those states adopting them. *See, e.g.*, Wulfing v. Kansas City S. Indus., Inc., 842 S.W.2d 133, 151-52 (Mo. Ct. App. 1992) (adopting standard resembling *In re "Agent Orange" Product Liability Litigation*, 611 F. Supp. 1223 (E.D.N.Y. 1985), *aff'd*, 818 F.2d 187 (2d Cir. 1987) approach).

437. *See* FED. R. EVID. 703 advisory committee's note.

438. *See* Rice, *supra* note 248, at 586 (Exclusion of the underlying facts makes the expert a "super-factfinder capable of producing admissible substantive evidence (an opinion) from inadmissible evidence.").

current check on disclosure. The court should determine whether the expert's underlying data have sufficient circumstantial guarantees of trustworthiness to satisfy the trustworthiness requirement in the residual exceptions to the hearsay rule.[439] Such a showing would merit disclosure of the data on direct examination.

B. Judicial Reform

In addition to the two proposed legislative changes, rules 703 and 803(4) require changes in how they are interpreted and applied. There are four proposed judicial reforms, starting with a sore spot in rule 703, the meaning of the term "reasonably relied upon."

1. Interpret "reasonably relied upon" in rule 703 to mean "sound judgment": Much of the conflict among federal courts in their interpretation of rule 703 can be traced to the single phrase "reasonably relied upon."[440] What does the rule mean when it requires that unadmitted evidence be "reasonably relied upon"? Undoubtedly, it means more than simply the standard practice in a particular field. The reflexive or formulaic adherence to a pre-existing practice requires no "reasonableness." Rhode Island made certain that courts did not misunderstand this point by adding to its version of rule 703 that the expert's underlying basis must be "reasonably and customarily relied upon."[441] Rule 703's reasonableness requirement denotes more than mere custom.[442] It suggests the use of judgment by the expert; judgment that is sound, sensible, wise, and judicious.[443] Thus, even

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439. *See* FED. R. EVID. 803(24) & 804(b)(5). Both exceptions require that out-of-court statements have "equivalent circumstantial guarantees of trustworthiness." *Id.* Professor Imwinkelried has pointed out that the liberal hearsay exceptions under the federal rules and in particular, the broad residual exceptions give rise to the inference that statements falling outside of the hearsay exceptions are unreliable. *See* Imwinkelried, *supra* note 206, at 31. The use of the existing hearsay structure as a guide for applying rule 703's trustworthiness requirement also provides some certainty and predictability to the requirement.

440. *Compare In re* Paoli R.R. Yard PCB Litig., 35 F.3d 717, 748 (3d Cir. 1994) (construing reasonably relied upon to mean "good grounds") *with In re* Japanese Elec. Prod. Antitrust Litig., 723 F.2d 238, 280 (3d Cir. 1983) (determining that "reasonably relied upon" requires that the judge defer to the expert's evaluation of the underlying data), *rev'd on other grounds sub nom.* Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574 (1986) *and* Zenith Radio Corp. v. Matsushita Elec. Indus. Co., 505 F. Supp. 1313, 1326, 1330 (E.D. Pa. 1980) (determining that "[r]easonably relied upon" requires "independent analysis of the trustworthiness of the data underlying the expert opinions" and listing six factors to be taken into account in the court's analysis).

441. *See* R.I. R. EVID. 703.

442. *See* BLACK'S LAW DICTIONARY 1138 (6th ed. 1990) (defining "reasonable" as "[f]air, proper, just, moderate, suitable under the circumstances"). In this era of plain meaning jurisprudence by the United States Supreme Court, the dictionary is a particularly popular reference in construing the Rules of Evidence. *See, e.g.*, Daubert v. Merrell Dow Pharms., Inc., 509 U.S. 579, 590 (1993) (citing to *Webster's Third New International Dictionary* in defining the term "scientific knowledge"); Beech Aircraft Corp. v. Rainey, 488 U.S. 153, 164 (1988) (citing to *Black's Law Dictionary* for definition of "finding of fact").

443. *See* CHARLTON LAIRD, WEBSTER'S NEW WORLD THESAURUS 617 (1985) (listing synonyms for "reasonably," including sensibly, soundly, wisely, judiciously, intelligently, and soberly). Professor Rice has noted that "reasonably relied upon" imposes a requirement "that

without amending rule 703, courts could clarify (and improve) practice under it by adopting a standard that better articulates the reasonableness requirement. Perhaps the standard would be best described as the "sound judgment" standard. It would limit expert reliance on inadmissible facts or data to that which an expert, in the same field, exercising sound judgment, would rely upon.

Five questions should guide the inquiry into the soundness of the expert's reliance: (1) Is the information used by other experts in the field in forming opinions on the same or similar matters? (2) Is the information unsupported, speculative, or demonstrably false? (3) Is the iuformation the best information available to the expert? (4) Is the information trustworthy? and (5) Is the information suitable for use by the expert under the circumstances (for example, was it obtained in the litigation context?), and has the expert recognized any limitations or problems with the information?

In *Zenith Radio Corp. v. Matsushita Electric Industrial Co.*,[444] then United States District Judge Edward Becker held that under rule 703 it was the trial court's responsibility to "undertake an independent analysis of the trustworthiness of the data underlying the expert opinions."[445] In doing so, the court identified a number of critical factors, including the extent of the expert's reliance on untrustworthy or unsupported materials, the care taken by the expert in forming an opinion, and the effect of the "peculiar circumstances of the case."[446] Judge Becker's opinion represents a remarkably rare foray into the uncharted waters of the meaning of the "reasonably relied upon" requirement.

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the expert's reliance be demonstrated as grounded in reason—a reasoned assessment of the reliability of the specific facts or data." *See* Rice, *supra* note 55, at 504.

444. 505 F. Supp. 1313 (E.D. Pa. 1981).

445. *Id.* at 1326. The court characterized its independent responsibility as requiring a sifting of the relevant facts. *Id.* The court rejected the idea that it should defer to the expert's determination of reasonableness finding that the "Advisory Committee . . . plainly contemplated that the trial court, as part of its admissibility judgment, would inquire into an expert's reasonable relianee." *Id.* at 1325.

446. *Id.* at 1330. The eourt listed six factors as its "guide" in determining 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 trustworthiness;
> (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 sphcre 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.

The Third Circuit, however, promptly reversed Judge Becker's treatment of rule 703 on appeal, holding that he had overstepped his bounds.[447]

Yet, despite its apparent premature death, *Zenith Radio* remains one of the foremost examples of a court actively struggling to define the requirements of rule 703. The decision's restrictive approach has been vindicated, at least partially, by the Third Circuit's opinion in *In re Paoli Railroad Yard PCB Litigation*,[448] authored by none other than Judge Becker, who now sits on the Third Circuit. In the Third Circuit opinion, the court concluded that the standard under rule 703 is identical to rule 702—"there must be good grounds on which to find the data reliable."[449] The court did not specifically incorporate any part of the *Zenith Radio* analysis in its decision. The Third Circuit's test, unlike *Zenith Radio* and the proposed "sound judgment" test, focuses only on the reliability of the underlying data and only indirectly on the reasonableness of the expert's conduct. Rule 703's reasonable reliance requirement, on the other hand, is directed at the soundness of the expert's reliance, and thus, requires courts to examine the expert's conduct. Undoubtedly, having "good grounds" is an essential part of exercising sound judgment, but it is not the whole story.

The "good grounds" formulation was taken from the Supreme Court's opinion in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*,[450] wherein it was a part of the court's dictionary definition of the term "scientific knowledge" in rule 702.[451] Thus, the expression "good grounds" specifically relates to the nature of scientific inquiry, not the more general term "reasonably," and is part of the definition of an altogether different term.

Under the "sound judgment" test, courts should treat the reasonableness inquiry under rule 703 as a preliminary question of fact under rule 104(a).[452] In making its determination the court should consider the expert's own assessment of the reasonableness of her reliance, but should not defer to, or be bound by, the expert's characterization of that reliance. To the contrary, the court should consider evidence from other experts and the court's own prior experience with expert witnesses and their underlying bases. The court must examine the trustworthiness of the underlying facts or data, because experts who rely on unreliable, unsupported material do not show "sound judgment." This step does not involve determining whether the out-of-court statements constitute admissible hearsay. Rather, the court's inquiry is to ensure that the statement has some external indicia of reliability such that it is appropriately considered by the expert. Furthermore, it is not sufficient for the court to examine merely the type of data used by the expert. The soundness of the expert's judgment cannot be evaluated in a vacuum. Rather, the court should inquire whether the expert's

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447. *See In re* Japanese Elec. Prod. Antitrust Litig., 723 F.2d 238 (3d Cir. 1983), *rev'd on other grounds sub nom.* Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574 (1986).

448. 35 F.3d 717 (3d Cir. 1994).

449. *Id.* at 748.

450. 509 U.S. 579 (1993).

451. *Id.* at 590.

452. *See* Zenith Radio Corp. v. Matsushita Elec. Indus. Co., 505 F. Supp. 1313, 1325-26 (E.D. Pa. 1980).

reliance on the information under the particular circumstances of the case was suitable.

This contextual analysis of the expert's basis requires that two additional factors be considered. First, does the expert need the inadmissible facts to form or support the expert's opinion? And second, to what extent do the expert's factual underpinnings rest on information obtained after the onset of litigation and from individuals interested in the outcome? In *Korsak v. Atlas Hotels, Inc.*,[453] the California Court of Appeals recognized the importance of both necessity and reliability in evaluating the expert's underlying hearsay basis. The court quoted approvingly from the *California Evidence Benchbook*: "If there is no necessity for the use of hearsay and there is little indication of trustworthiness, a finding against reasonable reliance by an expert is justified."[454] Experts exercise sound judgment when they do not cavalierly present opinions based on flimsy foundations, but instead, use only that which is appropriate under the circumstances. In particular, experts should use the best information available, relying on less reliable evidence only when necessary and justified under the circumstances.

Korsak's second point is important as well. Courts must examine the expert's supporting material for "litigation bias." The motivation of both the declarant and the paid expert is critical in determining the reliability of the expert's basis and the soundness of the expert's judgment.[455] When the self-interest of the expert and those from whom the expert obtains information drains the expert's basis of any reliability, as is sometimes the case under rule 703, the court should preclude reliance by the expert unless the circumstances otherwise justify it.

2. Consider the risk of jury misuse of the expert's basis under rule 403: the enigmatic limiting instruction is a source of great frustration under rule 703. The current practice of judges to rely on the limiting instruction as a check against the potential prejudice of disclosing the expert's basis[456] ignores the reality that the instruction will likely fail.[457] Of course, the courts' underlying assumption that jurors will follow the instructions they are given is consistent with longstanding precedent.[458] Yet, the task assigned to jurors under rule 703 mystifies judge and scholar alike, a fact that should not be ignored by the court.

Rather, the likelihood of jury misuse of the expert's basis should be taken into account by judges in deciding whether to allow disclosure on direct examination. The risk of juror misuse creates a "danger of unfair prejudice" under rule 403, which may, in turn, require exclusion of the evidence when balanced against the

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453. 2 Cal. App. 4th 1516 (1992).

454. *Id.* at 1524 (quoting 2 JEFFERSON, CALIFORNIA EVIDENCE BENCHBOOK § 29.3, at 1001-02 (2d ed. 1982)).

455. *See supra* notes 228-32 and accompanying text (noting significance of motivation of expert in assessing reliability).

456. *See* Engebretsen v. Fairchild Aircraft Corp., 21 F.3d 721, 729 (6th Cir. 1994); United States v. Affleck, 776 F.2d 1451, 1458 (10th Cir. 1985).

457. *See supra* notes 256-69 and accompanying text.

458. *See* Richardson v. Marsh, 481 U.S. 200, 206 (1987) (noting the "almost invariable assumption" that the jury will follow the limiting instruction).

probative value of the evidence.[459] The question for the court is the potential impact of the evidence if it is taken as true by the jury. The greatest danger under rule 703 is posed by the disclosure of inadmissible hearsay evidence that goes to the disputed issues in the case. Unfortunately, disclosure through experts of such central facts recurs with disturbing frequency. In *In re Melton*,[460] for example, the government's psychiatrist disclosed to the jury that he based his opinion that Melton would be dangerous in the future partly on the statement of Melton's mother that her son had punched her in the face.[461]

In a context closely analogous to rule 703, the Second Circuit, in *United States v. Reyes*,[462] thoughtfully analyzed the effectiveness of a limiting instruction. In *Reyes*, a United States Customs Agent was allowed to testify to out-of-court statements by certain nonparty co-conspirators because it was nonhearsay "background information."[463] The statements implicated the defendant in the charged offense, although the jury was instructed to limit its consideration of the evidence to explaining the agent's state of mind.[464] The appellate court reversed the trial court because of two principles that apply with equal force to the expert's basis under rule 703. First, the court should treat evidence as hearsay "when the likelihood is sufficiently high that the jury will not follow the limiting instruction, but will treat the evidence as proof of the truth of the declaration . . . ."[465] Second, the court should heighten the scrutiny of its analysis under rule 403 when it finds that the first proposition is true.[466]

In the specific context of rule 703, courts should, in accordance with the guidance of *Reyes*, consider the following:

(1) How important is the expert's basis to the expert's opinion and to the jury's understanding of the issues?[467]

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459. *See* FED. R. EVID. 403.

460. 597 A.2d 892 (D.C. 1991).

461. *Id.* at 895, 900; *see supra* notes 272-79 and accompanying text (discussing *In re* Melton, 565 A.2d 635 (D.C. 1989)).

462. 18 F.3d 65 (2d Cir. 1994).

463. *Id.* at 67-69. In *Reyes*, defendant Jeffrey Stein was convicted for conspiring to import more than five kilograms of cocaine. *Id.* at 66. At trial, Customs Agent Maryann Caggiano testified to statements made by other nonparty co-conspirators to Caggiano which implicated the defendant, and to the contents of a matchbook cover that had Stein's address as well as beeper numbers for two people in Columbia. The matchbook was shown to the Agent by one of the nonparty co-conspirators after that person's arrest. *Id.* at 67-68. The trial court admitted the hearsay statements "not for their truth but only to explain Agent Caggiano's state of mind." *Id.* at 69.

464. *Id.* at 69 (explaining that "the jury was instructed not to consider the out-of-court declarations as proof of the truth of what was said").

465. *Id.* at 69. The California Supreme Court, in *People v. Coleman*, 695 P.2d 189 (Cal. 1985), recognized this concern under the California equivalent to rule 703 (CAL. EVID. CODE § 801(b) (West 1996)). *Id.* at 199. The court reversed the trial court's order allowing disclosure of letters reviewed by an expert witness because the jury would be unable to limit its consideration of the victim's statements which were in the letters. *Id.*

466. *See Reyes*, 18 F.3d at 69-71.

467. *See id.* at 70 (adopting the first two questions posed by *Reyes*). This factor relates to the probative value of the evidence. The facts that support an expert's opinion are always relevant because they assist the jury in assessing the value of the opinion itself. Yet, facts that only

(2) Can the facts or data be communicated to the jury by less prejudicial evidence?[468]

(3) Do the facts or data constitute proof of an important disputed issue in the trial?[469]

(4) Was the information provided by a knowledgeable declarant so that it is likely to be believed?[470]

(5) Will the declarant testify at trial and be available for cross-examination, and if not, will the opponent have the opportunity and means to attack the unadmitted facts or data?[471]

(6) Can a limiting instruction protect against misuse or prejudice?[472]

The first five factors focus the court's attention on the critical aspects of rule 403: the probative value of the evidence if used properly by the jury (number one), the need for the evidence (numbers two and five), and the likelihood and extent of unfair prejudice to the opponent of the evidence (numbers three and four). The last question addresses the ultimate issue, requiring a balancing of the consequence of the jury's misuse of the evidence, the ease or difficulty with which the danger of unfair prejudice might be avoided, and the relative value of the evidence to the jury. Focusing on these concerns would limit the Hobson's

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confirm an expert's pre-existing opinion or are collateral to it and facts that the jury does not need in its deliberations should be weighed by the judge against their unfair prejudice.

468. *See Reyes*, 18 F.3d at 70 (discussing third question). This question invokes the unfair prejudice prong of rule 403 in terms of the need for the proffered evidence. If other, less prejudicial, evidence is available, then the judge may be wise to require its use.

469. *Id.* at 70 (discussing fifth question). The potential prejudice of this evidenee is demonstrated by the expert's basis admitted in *In re Melton*, 597 A.2d 892, 895, 900 (D.C. 1991) (discussed *supra* at notes 272-79 and accompanying text), and *United States v. Madoch*, 935 F. Supp. 965, 973-74 (N.D. Ill. 1996) (admitting defendant's statements to psychiatrist regarding pattern of abuse by co-defendant husband under rules 703 and 803(4)). In both cases the admitted evidence went to the central contested issues without any opportunity for the opponents to cross-examine the declarants. *See Madoch*, 935 F. Supp at 972-74; *In re Melton*, 597 A.2d at 894, 900-01. If the same fact is established by other uncontestcd evidence the court should exercise its discretion under rules 403 and 611(a) of the Federal Rules of Evidence and prohibit disclosure of the prejudicial information. *See Reyes*, 18 F.3d at 70 (discussing second part of fifth question).

470. *See Reyes*, 18 F.3d at 70 (discussing sixth question). In *Reyes* the court noted that the statements made by the defendant's alleged co-conspirators sent "a powerful message that the defendant was guilty" and thus, unfairly prejudiced the defendant. *Id.* at 71. In a similar vein, the court in *People v. Coleman* precluded the disclosure of three hearsay letters containing the deceased victim's incriminatory statements about the defendant because of the powerful impact such "statements from the grave" are likely to have on the jury. *See Coleman*, 695 P.2d at 198-99.

471. *See Reyes*, 18 F.3d at 70 (diseussing seventh question). This is an important part of the "unfair prejudice" inquiry. If the opponent cannot attack the evidence, then the jury is more likely to over-value it in deliberation. *See id.* at 71. In *In re Melton*, 597 A.2d at 892, the court suggested that the trial court could have required the declarant to testify as opposed to allowing the expert to repent her statement. *See id.* at 907. The court should utilize its discretion under rules 403 and 611(a) when appropriate and require a party to present live testimony and not merely the expert.

472. *See Reyes*, 18 F.3d at 70 (discussing eighth question). This question is simply the culmination of the evaluation of the other inquiries.

choice faced by lawyers under current practice—whether to request a limiting instruction and risk emphasizing the damaging evidence, or to waive the instruction and allow the evidence in for its truth. Of course, the concerns are particularly pronounced in criminal cases when hearsay evidence is being offered against the defendant.

Perhaps some modest improvement in practice might be achieved by paying greater attention to the timing and content of limiting instructions under rule 703. The limiting instruction, if found to be appropriate under the circumstances, should be given to the jury at the time the expert's basis is disclosed and again at the end of the case. This helps (to the extent possible) to condition the jury to the limited use of the evidence. Unfortunately, however, it also reinforces to the jury the significance of the evidence and identifies for the jury the improper use of the evidence. Perhaps more important than timing is the language used in the instruction. The instruction should be given in plain English. It should clearly state: (1) the specific evidence that is subject to the instruction; (2) the proper use of the evidence; (3) the improper use of the evidence; (4) the reason behind the limitations placed on the evidence; and (5) an example illustrating the distinction between the proper and improper use of the evidence. Such an instruction would provide the jury with sufficient information to at least attempt to follow the instruction, contrary to the current practice. Yet, regardless of changes in the wording or timing of the instruction, the jury will be hard pressed in its deliberations to avoid the natural and instinctive use of the evidence and thus will likely consider the expert's underlying basis for its truth. Unfortunately, merely making this kind of procedural refinement does not address the real problem and courts should take more seriously the risk that jurors will be unable to follow the limiting instruction.

3. Require that the declarant have a "medical" motivation: Fundamental changes in the interpretation of rule 803(4) are needed as well. Rule 803(4) requires that statements be made for purposes of *medical* diagnosis or treatment.[473] Many courts, both state and federal, have included statements to psychologists[474] and even social workers[475] within the term "medical." This construction is contrary to the historical treatment of the exception[476] and,

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473. *See* FED. R. EVID. 803(4).

474. *See, e.g.*, United States v. Newman, 965 F.2d 206, 210 (7th Cir. 1992) ("The rationale [of rule 803(4)] applies as forcefully to a clinical psychologist as to a physician."); Morgan v. Foretich, 846 F.2d 941, 949 n.17 (4th Cir. 1988) (admitting statements to psychologist); United States v. DeNoyer, 811 F.2d 436, 438 (8th Cir. 1987) (admitting statements to psychologist); State v. Roberts, 622 A.2d 1225, 1232 (N.H. 1993) (concluding that it is "irrelevant" whether statements were made to a drug counselor, physician or psychologist); State v. Bullock, 360 S.E.2d 689, 690 (N.C. 1987) (admitting statements to psychologist); State v. Edward Charles L., 398 S.E.2d 123, 136 (W. Va. 1990); State v. Nelson, 406 N.W.2d 385, 390 (Wis. 1987) (admitting statements to psychologist).

475. *See, e.g.*, United States v. Balfany, 965 F.2d 575, 581 (8th Cir. 1992) (admitting statements made to social worker); United States v. Provost, 875 F.2d 172, 176-77 (8th Cir. 1989) (same); *DeNoyer*, 811 F.2d at 438 (same).

476. *See* Mosteller, *supra* note 15, at 262; *see also* UNIF. R. EVID. 63(12)(b). The Uniform Rules of Evidence required that the statement relate to "an issue of declarant's bodily condition." *Id.*

equally importantly, the plain meaning of "medical." In a multitude of other contexts, in both state and federal statutes, the term "medical" or "medicine" is used to describe the work of medical doctors, but not the practice of psychologists or social workers.[477] In fact, psychologists and the like are generally forbidden from practicing medicine at all. A typical state statute provides that psychologists must avoid "infringing upon the practice of medicine."[478]

The Supreme Court of Tennessee, in *State v. Barone*,[479] construed that state's statutory definition of psychologist to mean that the term "medical" in rule 803(4) encompasses only statements relating to "physical ailments, injuries and deformities," and to not encompass "statements made by a patient to a psychologist."[480] The court based its construction of the term on two conclusions: (1) false reports of physical maladies are more easily discovered than fabricated psychological problems;[481] and (2) patients in the psychological setting are not as likely as medical patients to be aware that the effectiveness of treatment will turn on the accuracy of the information provided.[482]

Federal courts should read the term "medical" in 803(4) in the same way. This construction is consistent with the Supreme Court's "plain meaning" approach to the Rules of Evidence.[483] One commentator has gone so far as to argue that the extension of rule 803(4) to apply to psychologists and social workers "flies in the face of the apparent meaning of the words of the exception itself."[484] Although

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477. *See* 42 U.S.C. § 300e-1(4)(A) (1994) (defining the term "medical group" as including "health professionals licensed to practice *medicine* or osteopathy and of such *other licensed health professionals (including . . . psychologists)*") (emphasis added); 10 U.S.C. § 1079(a)(13) (1994) (precluding the provision of services which are not "medically *or psychologically* necessary to . . . diagnose or treat a mental or physical illness") (emphasis added); ALA. CODE § 34-26-1(b) (1991) (Psychologists may not administer or prescribe drugs and must use "a psychologically oriented physician . . . to make provision for the diagnosis and treatment of medical problems by a physician."); IDAHO CODE § 54-2313 (1994) (Psychologist is not authorized to engage "in the practice of medicine" and "shall not diagnose . . . or treat a client with reference to a medical condition."); KAN. STAT. ANN. § 74-5344(g) (1992) (Psychologists are not permitted "to engage in the practice of medicine."); ME. REV. STAT. ANN. tit. 32 § 3811-3 (1988) (Psychologists are not permitted to engage in "the practice of medicine."); OK. STAT. tit. 63 § 1-707a(C) (1997) (Psychologists with staff privileges must identify "a psychiatrist, a medical doctor, or a doctor of osteopathy who shall be responsible for the medical evaluation and medical management of the patient."); R.I. GEN. LAWS § 5-44-23(d) (1995) (Psychologist is not permitted "to practice medicine.").

478. *See* TENN. CODE ANN. § 63-11-204(a) (1990 & Supp. 1996).

479. 852 S.W.2d 216 (Tenn. 1993).

480. *Id.* at 219.

481. *See id.* at 220 (citing People v. LaLone, 437 N.W.2d 611, 613 (Mich. 1989)); *see also* Mosteller, *supra* note 15, at 268 ("[T]here can be little argument that as a class psychological maladies are less subject to verification than physical maladies.").

482. *See Barone*, 852 S.W.2d at 220.

483. *See* Daubert v. Merrell Dow Pharms., Inc., 509 U.S. 579, 590 (1993) (adopting interpretation of rule 702 based on dictionary definitions of "scientific" and "knowledge"); Bourjaily v. United States, 483 U.S. 171 (1987) (interpreting rules 801(d)(2)(E) and 104(a) in accordance with their plain meaning).

484. *See* 4 LOUISELL & MUELLER, *supra* note 421, § 444, at 267 (Supp. 1993).

the advisory committee's note does not specifically address the issue, it is consistent with this interpretation as well. In recognizing that statements under the rule need not be made to a physician, the committee identified nurses, ambulance attendants, and family members as potential recipients of the hearsay statements. Nurses and ambulance attendants both serve physicians and work for hospitals, reinforcing the traditional use of the term "medical." In fact, it would be surprising if the drafters intended the rule to mean otherwise. Practice prior to the enactment of rule 803(4) did not encompass statements to nonphysicians within the hearsay exception[485] and the drafters' notes contain no reference to any intended expansion of the exception to include psychologists, social workers, or other similar occupations.[486]

In addition to the guidance provided by the plain meaning of "medical," the common law, the advisory committee's note, and the interpretation of the rules by other states, this interpretation preserves the integrity of the exception by limiting it to those statements that are most likely to be the result of a patient's self-serving motivation to be truthful.[487] The veracity of statements to psychologists and the like is not subject to verification by the psychologist in the same way as physical complaints.[488] Furthermore, the emotional or mental problems that cause one to seek treatment from a psychologist in the first place make the individual's statements more suspect than similar statements by one complaining of physical ailments because of the nature of the impairment.[489] Lastly, psychologists consider everything a client tells them to be reasonably pertinent to the person's treatment,[490] hence extending the exception to a broad array of statements not intended by the drafters and not appropriate under the exception.

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485. *See supra* note 476 and accompanying text.

486. *See* FED. R. EVID. 803(4) advisory committee's note; Tome v. United States, 115 S. Ct. 696 (1995) (The plurality of the Court points to the failure of the advisory committee's note to state any intent to modify the common law pre-motive requirement for prior consistent statements under rule 801(d)(1)(B) in support of the Court's holding that rule contains a pre-motive requirement.).

487. *See Barone*, 852 S.W.2d at 219; 4 LOUISELL & MUELLER, *supra* note 421, at 611 ("It is not clear that a patient seeking psychiatric treatment feels the same kind of pressure to be candid that is experienced by a person seeking treatment for a physical injury or ailment."). When the purpose of an examination is not the treatment of a physical ailment, the reason for the exeeption in the rule ceases to exist because the patient is no longer fearful that the doctor will do something harmful to the patient's body. *See* People v. Meeboer, 484 N.W.2d 621, 639 (Mich. 1992) (Brickly, J., dissenting).

488. *See* People v. LaLone, 437 N.W.2d 611, 613 (Mich. 1989); Mosteller, *supra* note 15, at 268 ("There can be little argument that as a class psychological maladies are less subject to verification than physical maladies.").

489. *See* 4 WEINSTEIN & BERGER, *supra* note 5, ¶ 803(4)[01] at 803-159 (A patient's condition may have impaired her "perception, memory, or veracity.").

490. *See id.* (Experts in psychology and psychiatry "view everything relevant to diagnosis or treatment" because "everything relating to the patient is relevant to the patient's personality."); LOUISELL & MUELLER, *supra* note 421, at 611 ("[G]iven the uncertainty and tentativeness of psychiatric diagnoses, it seems that virtually any statement by the patient about his experiences in life would be considered 'reasonably pertinent.'") and § 444, at 267 (Supp. 1993) ("[T]here is virtually no limit on what is relevant to psychological evaluation.").

These points raise two additional concerns: the first relates to the admission of statements made to psychiatrists under rule 803(4). Although psychiatrists clearly practice "medicine," special caution is warranted when confronted with statements made to them because of the concerns identified above. The statements should have a medical purpose to satisfy the rule and the psychiatrist should not be allowed to become a "surrogate witness" for a party (particularly the criminal defendant).[491] Second, the "reasonably pertinent" requirement of rule 803(4) must be used by courts as a means of filtering out statements and not simply as a redundant relevance requirement.

4. Enforce the terms of rule 803(4) in cases involving statements by child victims: No cases present a more difficult task of delicately balancing divergent interests than the task of making evidentiary decisions in child abuse cases.[492] Due to the significance of the child abuse problem in society and the practical problems of proof endemic to these cases,[493] courts have tended to interpret rule 803(4) broadly.[494] The result has been the admission of statements by extraordinarily young children[495] regarding the nature of the alleged abuse and the identity of the alleged abuser.[496] These expansions often ignore the fundamental rationale underlying rule 803(4) (the declarant's self-serving motivation to be truthful) and fail to appropriately apply the "reasonably pertinent" requirement of the rule. The "result-orientation" that has led to the

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491. *See* GLEN WEISSENBERGER, FEDERAL EVIDENCE § 803.21, at 464 (1995) (noting that "[d]ifficult problems may emerge where the out-of-court statement is made in order to obtain medical aid for a mental problem" because the declarant may be impaired by his mental condition and the psychiatrist may become a "surrogate witness" for a party). In *United States v. Madoch*, 935 F. Supp. 965 (N.D. Ill. 1996), and *United States v. Joe*, 8 F.3d 1488 (10th Cir. 1993), the defendants were permitted to use psychiatrists in this way, using rule 803(4) to admit critical statements made by the defendants.

492. *See* Morgan v. Foretich, 846 F.2d 941, 951 (4th Cir. 1988) (Powell, J., concurring in part and dissenting in part):

> Few cases are more difficult to try than one of child abuse where the child is very young and does not testify in court. . . . [R]ulings on admissibility of evidence on behalf of the child are particularly sensitive. . . . [T]he district court [also] has the responsibility of shielding defendants from the admission of unduly prejudicial evidence.

Id.

493. *See Morgan*, 846 F.2d at 943 (noting extent of problems).

494. *See* Cassidy v. State, 536 A.2d 666, 685 (Md. Ct. Spec. App. 1988) (Opinions admitting statements by child victims which identify their abusers under rule "strain for their results."); CHRISTOPHER B. MUELLER & LAIRD C. KIRKPATRICK, EVIDENCE § 8.41, at 953 ("The child abuse prosecutions have strained the exception severely.").

495. *See, e.g.*, White v. Illinois, 502 U.S. 346, 349 (1992) (Child victim was four years old at time she made statements which were admitted by trial court under rule 803(4).); *Morgan*, 846 F.2d at 951 (Powell, J., concurring in part and dissenting in part) (Child declarant was four years old at time she made statements.).

496. *See* United States v. Renville, 779 F.2d 430, 436 (8th Cir. 1985); *supra* notes 194-201 and accompanying text.

expansive treatment of rule 803(4) undermines the exception's foundation and results in poorly reasoned opinions.[497]

Two reforms are needed. First, admission of the child's statements should be required to satisfy the trustworthiness rationale of rule 803(4). The rule contemplates a basic level of cognitive capacity on the part of the declarant, sufficient to understand the need to be truthful to a physician and the potential consequences of not being truthful.[498] Since the seminal case of *United States v. Iron Shell*,[499] courts have placed undue emphasis upon the age of the declarant,[500] focusing upon the general trustworthiness of statements made by a child.[501] That analysis may be appropriate under a residual hearsay exception,[502] but rule 803(4) is reserved for statements with a certain kind of trustworthiness that arises from the declarant's motivation. "[C]hildren do not necessarily possess the required cognitive ability to make the connection between giving truthful information and receiving proper medical care."[503] In fact, children may view a doctor or nurse as someone who "inflicts pain rather than alleviates it."[504]

Accordingly, judges should first inquire into the *cognitive capacity* of the child to understand the need to be truthful. This requires analysis of the age of the child and the child's experiences. At the very least, the child should satisfy the minimum threshold of a competent witness before being found to have the

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497. *See Cassidy*, 536 A.2d at 684 (concluding that opinions are "poorly reasoned" as a result of "the strong desire for getting a child's identification of its abuser into evidence" and concluding: "we reject . . . result-orientation and the bad law it frequently generates").

498. *See id.* at 679-80 ("The subjective purpose of the declarant is vitally important"; the declarant must be "mature enough to appreciate the critical cause-and-effect connections between accurate information, correct medical diagnosis, and efficacious medical treatment"; the trustworthiness rationale of rule 803(4) "requires a certain level of conscious sophistication on the part of the declarant.").

499. 633 F.2d 77 (8th Cir. 1980).

500. *See supra* notes 168-76 and accompanying text.

501. Perhaps the best example of this approach is *People v. Meeboer*, 484 N.W.2d 621 (Mich. 1992) decided by the Michigan Supreme Court. In *Meeboer*, the court adopted a list of 10 factors to determine whether the trustworthiness guarantees surrounding the making of the child's statement satisfied rule 803(4). *Id.* at 627. Most of the factors, however, related to the general trustworthiness of the child's statements, as opposed to the child's motivation to be truthful to the doctor. The factors include the spontaneity of the statement, the terminology used by the child, the "timing of the examination," and so on. *Id.* Only factor number 10 specifically addresses the proper inquiry—"the existence of or lack of motive to fabricate." *Id.* In dissent, Justice Brickley stated that under the majority's approach: "[T]he analysis is actually transformed into an evaluation of the totality of the circumstances to evaluate the trustworthiness of the statements, rather than determining the existence of a self-interest motivation on the part of the child declarant." *Id.* at 636 (Brickley, J., dissenting). In *Cassidy v. State*, the Maryland Court of Special Appeals noted the huge distinction between the two rationales: "[A]n infantile naivete [rationale] actually contradicts the trustworthiness rationale on which the Treating Physician exception exclusively depends." *Cassidy*, 536 A.2d at 680.

502. *See, e.g.*, FED. R. EVID. 804(b)(5).

503. *Meeboer*, 484 N.W.2d at 636 n.5 (Brickley, J., dissenting).

504. *Id.* at 642.

requisite capacity under rule 803(4).[505] Next, the judge should examine the circumstances surrounding the child's statements to determine if on the specific occasion presented the child understood the need to be truthful and the consequences of not being truthful. This step requires analysis of what instructions the child was given, if any, to whom the statement was made, where the statement was made, and the context in which the statement was made. Only statements made by children who can and do have the requisite self-serving motivation should be admitted. Obviously, this shift in judicial treatment of the exception would best be accomplished by adopting the revision of rule 803(4) proposed above. However, even in the absence of such reform, courts should return to the self-serving motivation rationale that led to the creation of the exception.

The second reform needed in child abuse cases is careful application by judges of the "reasonably pertinent" requirement of rule 803(4). Courts have stretched the rule beyond recognition by their admission of identity statements by children and others.[506] Initially, of course, the rule was applied only to cases in which the declarant was a child and the identified abuser was a family member or a member of the same household.[507] The analysis employed by these courts rested for reliability on the reasonable reliance of the expert.[508] However, "[t]he reasonable necessity of the information does not insure that the information will be inherently reliable or trustworthy; the only assurance that the hearsay statements will be inherently reliable is the self-interest motivation of the declarant in receiving proper medical care."[509] The expert's reasonable reliance on the patient's statement has no greater magical power of transformation here than it does under rule 703. The requirement of reasonable reliance under rule 803(4) limits the type of evidence admitted under the section; it does not provide additional guarantees of trustworthiness.[510]

In addition to providing a weak theoretical basis for the admission of hearsay statements, the reasonable reliance rationale has a number of flaws in its application. First, it extends the doctor's medical responsibilities beyond the provision of conventional care to identifying and punishing abusers, preventing

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505. *See* FED. R. EVID. 601 (Witness must be competent to testify.); FED. R. EVID. 602 (Witness must have personal knowledge.); FED. R. EVID. 603 (Witness must take oath before giving testimony.). Remarkably, one federal court has held that child declarants need not be competent to testify before their out-of-court statements can be admitted under rule 803(4). *See* Morgan v. Foretich, 846 F.2d 941, 949 (4th Cir. 1988).

506. *See* 4 LOUISELL & MUELLER, *supra* note 421, § 444, at 267 (Supp. 1993).

507. *See* United States v. Renville, 779 F.2d 430, 435-36 (8th Cir. 1985); *supra* notes 194-205 and accompanying text.

508. *See, e.g.*, United States v. Joe, 8 F.3d 1488, 1494-95 (10th Cir. 1993) (holding that reasonable reliance is the test under rule 803(4)); Morgan v. Foretich, 845 F.2d 941, 949 (4th Cir. 1988) (admitting statement of identity by child declarant despite the child's incompetence as a witness, because the doctor reasonably relied upon the child).

509. People v. Meeboer, 484 N.W.2d 621, 634 n.3 (Mich. 1992) (Brickley, J., dissenting). The dissenting judge in *Meeboer* concluded that "there is one, and only one, supporting rationale for the application of [rule] 803(4)." *Id. See generally* Mosteller, *supra* note 15, at 265-67 (discussing the reasonable reliance and self-interest rationales to rule 803(4)).

510. *See Meeboer*, 484 N.W.2d at 634 n.3 (Brickley, J., dissenting).

further mistreatment, and treating the psychological trauma associated with the abuse.[511] Undoubtedly, all of these are essential and valuable services. Yet, as one treatise points out, they "involve skills and social intervention . . . beyond the expertise of doctors."[512] Moreover, the obligation of doctors to report circumstances in which they suspect abuse, which is imposed by state law, emphasizes the social disposition of the child, not the child's medical treatment or diagnosis.[513] The doctor, psychologist, or social worker who conducts the interview is often more like an agent of the police than a provider of medical treatment.[514] To the extent the doctor is acting more like an investigator than a doctor, the child's statements certainly fall outside the contours of rule 803(4).

The momentum created by the small step taken by the Eighth Circuit in *United States v. Renville*,[515] admitting the child victim's statement identifying a family member as the abuser,[516] has been unstoppable as other courts have steadily expanded the statements of identity that are "reasonably pertinent" under the rule.[517] The consequence is a rule largely without borders and an approach to legal analysis that reaches the desired result first and worries about the rationale later.[518] Courts should construe rule 803(4) consistent with its underlying rationale by requiring some self-interest motivation to get medical help (either in the form of a diagnosis or treatment) before admitting the statement.

VI. CONCLUSION

Under rules 703 and 803(4) trial judges have too often acted more like the friendly "door man" than the cautious "gatekeeper," deferentially opening wide the door for testimony from experts about their underlying bases. Courts have relied on the testifying experts and juries to separate the wheat from the chaff, while avoiding that responsibility themselves. In part, of course, courts have taken their lead from the Rules' sometimes radical departures from the common law. Yet, the explosion in the use of experts since the Rules were enacted and the

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511. *See* MUELLER & KIRKPATRICK, *supra* note 494, at 953.

512. *See id.*

513. *See* Cassidy v. State, 536 A.2d 666, 682 (Md. Ct. Spec. App. 1988).

514. *See* MUELLER & KIRKPATRICK, *supra* note 494, at 953 ("[D]octors and social workers . . . act almost as extensions of the offices of prosecutors and police, and in some urban hospitals special areas are set aside to collect statements by abuse victims.").

515. 779 F.2d 430 (8th Cir. 1985).

516. *See supra* notes 194-205 and accompanying text (discussing Renville).

517. *See* United States v. Joe, 8 F.3d 1488, 1494-95 (10th Cir. 1993) (admitting statements of adult victim of domestic abuse identifying husband as abuser); Eakes v. State, 665 So. 2d 852, 867 (Miss. 1995) (extending the logic of admitting statements by a child victim that identify a household member or someone with regular contact with the child, to include perpetrators who are family friends, or acquaintances, or even strangers).

518. The Wyoming Supreme Court, for example, made no excuses for expanding the rules to admit hearsay statements in child abuse cases, concluding that "the function of the court must be to pursue the transcendent goal of addressing the most pernicious social ailment which afflicts our society, family abuse, and more specifically, child abuse." *See* Goldade v. State, 674 P.2d 721, 725 (Wyo. 1983); *cf. Cassidy*, 536 A.2d at 685 (criticizing result-orientation of some courts).

pervasive partisanship of experts necessitates heightened scrutiny of expert testimony. In short, judges must take seriously their role as gatekeepers.

In addition to a change in attitude, judges (and lawyers) need evidentiary rules that are coherent and clear. Coherence requires that rule 803(4) be amended to require that all statements admitted under that exception have a treatment motivation. Clarity requires that the expert witness rules be amended to specifically address the disclosure of the expert's unadmitted basis on direct examination. These changes would improve judicial decisionmaking and jury factfinding by recognizing that judges share the task of separating the wheat from the chaff of expert testimony, and that their responsibility is nondelegable.