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Irene M. Sheridan

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INTRODUCTION

Expert testimony\(^1\) has been an essential component of medical malpractice cases,\(^2\) and has long been recognized as an important factor in personal injury cases.\(^3\) The most common way to present such testimony has been to use the hypothetical question, which traditionally required a proper foundation.\(^4\) In cases calling for a medical expert, the facts necessary for the foundation were often contained in the medical records of the injured party. These records, however, were inadmissible hearsay evidence.\(^5\) Thus, laying the foundation often required that each nurse, technician and doctor who had made an entry in the records testify based on personal knowledge as to the contents of those entries.\(^6\) Such a process was long and tedious, and the subject of much criticism.\(^7\) The response to this criticism in the federal courts was to adopt Federal Rules of Evidence 703 and 705,\(^8\) which eliminated the need for the hypothetical question with regard to expert testimony.

In an effort to expedite laying the foundation for the hypothetical question, and to bring expert testimony in line with the more flexible approach of the federal courts, the Illinois Supreme Court

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1. This testimony is by one who has special scientific, technical, or other specialized knowledge. Its purpose is to give the trier of fact the necessary background to evaluate the facts in the case. See E. Cleary & M. Graham, Handbook of Illinois Evidence, § 702.1 (3d ed. 1979) [hereinafter cited as E. Cleary & M. Graham].


4. See infra notes 15-16 and accompanying text.

5. See infra note 64 and accompanying text.

6. See infra note 66 and accompanying text.

7. See infra note 67 and accompanying text.

8. Federal Rules of Evidence 703 and 705 are hereinafter referred to as rules 703 and 705. See infra notes 19 and 28 for the text of rules 703 and 705.
adopted rules 703 and 705 in Wilson v. Clark.* Although these rules eliminated the need for the hypothetical question with regard to expert testimony, they did not change the status of medical records as hearsay testimony. As a result, use of these records, beyond the role they played in the formulation of the expert's opinion, will still require a proper evidentiary foundation.\(^6\) Wilson v. Clark, therefore, may not have gone as far as necessary to ease the burdens of eliciting expert testimony.

This article will first examine the background of expert testimony. After discussing expert testimony and medical records in the federal system, the article will look at the operation of rules 703 and 705 in Illinois in light of the decision in Wilson. Finally, the article will consider the ramifications of adopting rules 703 and 705 without instituting a corresponding change in the treatment of medical records. This discussion will point out the need to make medical records admissible under the business records exception to the hearsay rule.

**BACKGROUND OF EXPERT TESTIMONY**

Traditionally, an expert could base an opinion on any one of the following sources: special scientific or technical knowledge, firsthand observations, or facts and data presented at trial.\(^7\) It was essential, however, that the facts forming the foundation of that opinion be admitted into evidence because the jury\(^8\) needed the means to properly evaluate that opinion.\(^9\) In effect, an expert could not base an opinion on inadmissible evidence or on facts not already in evidence.\(^10\)

This traditional rule presented a problem in getting these facts admitted into evidence. If the expert's opinion was based on personal knowledge and observation, the expert could testify to those

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10. See infra note 81 and accompanying text.
11. See E. Cleary & M. Graham, supra note 1, at § 703.1.
12. Jury, as hereinafter used, refers to the finder-of-fact.
13. See 2 J. Wigmore, Evidence, §§ 672, 676 (Chadbourn rev. ed. 1979) [hereinafter cited as 2 J. Wigmore]. Wigmore notes that in order for the jury to know whether to accept the expert's opinion, the foundation for that opinion must be brought out. If the expert cannot supply that foundation from his or her own observation, a hypothetical question is necessary.
facts on direct examination. If, however, the expert did not have personal knowledge of the subject, but instead had relied on other sources to formulate an opinion, the traditional hypothetical question was required. The hypothetical question asked the expert to assume various facts and then to state an opinion based on those facts. Before the hypothetical question could even be asked, however, each fact to be assumed had to be proved. Therefore, if an assumed fact was based on an out-of-court statement, each declarant often had to testify to avoid hearsay problems. In cases calling for medical expert testimony, this procedure became particularly burdensome. In an effort to alleviate this problem, the federal system adopted a number of rules which, when combined, facilitate the use of expert testimony.

Expert Testimony and Medical Records in the Federal System

Rules 703 and 705

Under rule 703, the three permissible sources for an expert's

15. See 2 Wigmore, supra note 13, at § 675. Wigmore comments that while some courts have required a hypothetical question, even when the foundation of the expert's opinion is personal observation, the hypothetical is not necessary in those circumstances. On direct and on cross-examination, every detail of the observation supporting such an opinion can be brought out. See also Skalon v. Manning, Maxwell & Moore, Inc., 127 Ill. App. 2d 145, 160, 262 N.E.2d 146, 154 (1970) (expert's opinion not couched in a hypothetical question was admissible based on his own personal knowledge and observations).

16. See Blacks Law Dictionary (5th ed. 1979). "Hypothetical Question: A combination of assumed or proved facts and circumstances, stated in such form as to constitute a coherent and specific situation or state of facts, upon which the opinion of an expert is asked." See also C. McCormick, Evidence § 14 (2d ed. 1972) [hereinafter cited as C. McCormick]. For an example of a hypothetical question, see infra note 77.

17. Hearsay is an out-of-court statement offered to show the truth of the matters asserted therein. C. McCormick, supra note 16, at § 246 and at §§ 14-15. For a more complete discussion of the requirement that each declarant testify, see infra notes 63-66 and accompanying text.

18. The Federal Rules of Evidence became effective January 2, 1975 after extensive studies by a Special Committee on Evidence and its recommendation that the rules were both advisable and feasible. Rules 703 and 705 deal with the permissible bases of the expert's opinion and the manner in which those bases are disclosed. They were adopted in an effort to bring expert testimony in court more into line with the daily practice of experts themselves and to help ease the burden of the traditional hypothetical. See generally Fed. R. Evid. 703 advisory committee note; Fed. R. Evid. 705 advisory committee note; S. Rep. No. 93-1277, 93rd Cong., 2d Sess. (1974).

19. Rule 703 provides:

The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to him at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions and inferences upon the subject, the facts or data need not be admissible in evidence.
opinion include: 1) personal observation, 2) the familiar hypothetical, and 3) data presented to the expert outside of court. The third source generally represented a departure from the traditional, common law bases of an expert's opinion. Critics have feared that permitting an expert to base an opinion on out-of-court data would open the door to unreliable testimony. In the area of medical expert testimony, however, the third source was not a radical departure from the common law. Prior to the enactment of the federal rules, physicians had been allowed to base opinions on certain data presented to them outside of court, such as patient statements and medical records. These sources were considered very reliable, and therefore received special recognition in the Advisory Committee’s Note on rule 703. Thus, under rule 703, when an expert wishes to base an opinion on out-of-court data, that data must meet a reasonably reliable standard; it must be of a type reasonably relied upon by other experts in the field. If this test is met, the testimony is admissible even if the source material is not. According to the Advisory Committee, a physician's reliance on these sources in making both routine and critical decisions, exemplifies a reasonably reliable source of opinion under rule 703. Further, in

FED. R. EVID. 703.
20. FED. R. EVID. 703 advisory committee note.
22. See, e.g., Birdsell v. United States, 346 F.2d 775, 779-80 (5th Cir.), cert. denied, 382 U.S. 963 (1965), reh'g denied, 383 U.S. 923 (1966) (even though hospital records at that time were not admissible under 28 U.S.C. § 1732, an expert could use them as the basis for an opinion); Stewart v. Baltimore & O.R. Co., 137 F.2d 527, 530 (2d Cir. 1943) (it was error to exclude the physician's testimony based in part on statements by the deceased).
23. See, e.g., Baumholser v. Amax Coal Co., 630 F.2d 550, 553 (7th Cir. 1980); Bauman v. Centax Corp., 611 F.2d 1115, 1120 (5th Cir. 1980); FED. R. EVID. 703 advisory committee note.
24. In his commentary on rule 703, Weinstein indicated that the kind of data an expert could use to meet the standard of reasonable reliability would depend on the data available in the particular field and on the amount of trustworthiness accorded the data in that field. It cannot be data that only the expert customarily uses; it must be data customarily used in that area of expertise. Further, he notes that the courts ultimately determine the reliability question and that this determination can be made before any testimony is given. 3 J. Weinstein, supra note 21, at ¶¶ 703(01)-703(03). See also Zenith v. Matsushito, 505 F. Supp. 1313, 1325 (E.D. Penn. 1980) (the courts routinely decide if the expert has reasonably relied on trustworthy information).
25. See, e.g., Baumholser v. Amax Coal Co., 630 F.2d 550, 553 (7th Cir. 1980); Bauman v. Centax Corp., 611 F.2d 1115, 1120 (5th Cir. 1980) (lack of independent grounds of admissibility for the data does not render the expert's testimony inadmissible).
26. The Advisory Committee notes that physicians rely on numerous sources including
cases decided since the adoption of the rule, these sources have continued to be recognized as reliable.\textsuperscript{27}

Rule 703 did not establish whether, in presenting expert testimony, a proper foundation would be necessary in order to disclose the facts relied upon, or whether the opinion could be given without such disclosure. Rule 705\textsuperscript{28} solved this question by allowing the expert to state an opinion without prior disclosure.\textsuperscript{29} If, however, the expert based an opinion on reasonably reliable out-of-court data, and if the expert stated the opinion without prior disclosure of this data, the jury would not have any foundation by which to judge the accuracy or credibility of the opinion.\textsuperscript{30} To remedy this problem, the drafters of rule 705 provided that the court could require disclosure of the out-of-court data on cross-examination.\textsuperscript{31} The cross-examiner would be permitted to question the basis of the expert’s opinion and to use that information to challenge the expert’s testimony.\textsuperscript{32} While there is no absolute requirement of such disclosure, cross-examination was considered an adequate safeguard to insure the availability of this information to the jury.\textsuperscript{33} The same rationale that allows the expert to base an opinion on out-of-court data permits the cross-examiner to draw out that information. Trustworthy data, reasonably relied upon by experts in the field, is a competent basis for an opinion whether dis-

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\textsuperscript{27} See, \textit{e.g.}, O’Gee v. Dobbs Houses, Inc., 570 F.2d 1084, 1089 (2d Cir. 1978) (physician’s testimony based in part on patient’s statement as well as hospital records was admissible).

\textsuperscript{28} Rule 705 provides:

The expert may testify in terms of opinion or inference and give his reasons therefor without prior disclosure of the underlying facts or data, unless the court requires otherwise. The expert may in any event be required to disclose the underlying facts or data on cross-examination.

\textsuperscript{29} Id.

\textsuperscript{30} \textit{See supra} notes 13-15 and accompanying text.

\textsuperscript{31} \textit{See supra} note 28 for the text of rule 705.

\textsuperscript{32} See, \textit{e.g.}, Smith v. Ford Motor Co., 626 F.2d 784, 793 (10th Cir. 1980) (cross-examination can be used to ferret out the underlying facts); Bryan v. John Bean Div. of FMC Corp., 566 F.2d 541, 545-46 (5th Cir. 1978) (the burden is on the cross-examiner to elicit the basis of the opinion and to use it to impeach the witness); Polk v. Ford Motor Co., 529 F.2d 259, 271 (8th Cir. 1976) (it was not error to allow the roof expert to give an opinion based on facts not in evidence because weaknesses in that opinion could be developed on cross-examination).

\textsuperscript{33} \textit{See 2 J. Wigmore, supra} note 13, at § 686 (cross-examination is a sufficient safeguard against the fact-finder misunderstanding the expert’s opinion).
closed on direct or cross-examination. The net effect, therefore, of rules 703 and 705 is to eliminate the need for the hypothetical question, and to shift to the cross-examiner the burden of bringing out the factual foundation of the expert’s opinion.

Rule 803(6): An Aid In The Operation Of Rules 703 and 705

The reliability of testimony under rules 703 and 705 in situations calling for medical experts is further supported by rule 803(6) which is the business records exception to the hearsay rule. The critics of rule 703 believed that allowing the expert to base an opinion on out-of-court data would permit the jury to hear testimony based on hearsay. Although the determination as to the reliability of the source material is made by the court, and may be made before the opinion or any underlying facts are disclosed, such a determination does not change the hearsay characteristic of the underlying facts. It merely acknowledges that the facts are reliable enough to be the basis of an opinion and that, therefore, the jury may hear them. Rule 803(6), however, does change the hearsay characteristic of medical records; it redefines medical records as an exception to the hearsay rule.

Prior to the adoption of rule 803(6), the admissibility of medical records under the former business record exception was uncertain. The basic assumption of the business records exception recognized that records kept in the regular course of a business were

34. See generally Fed. R. Evid. 703 and 705 advisory committee notes.
35. See Fed. R. Evid. 705 advisory committee note. It was noted that the use of the hypothetical question is no longer required.
36. Federal Rule of Evidence 803(6) provides:
   The following are not excluded by the hearsay rule, even though the declarant is available as a witness:
   Records of regularly conducted activity. A memorandum, report, record, or data compilation, in any form, of act, 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 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(6) [hereinafter cited as Rule 803(6)].
37. See supra note 21 and accompanying text.
38. See supra note 24. See also 3 J. Weinstein, supra note 21, at ¶ 703[02] and 703[03].
39. See 3 J. Weinstein, supra note 21, at ¶ 705[01].
trustworthy and accurate. Therefore, they could be admitted to show the truth of the matters recorded. Medical records were generally regarded as particularly trustworthy. There was some question, however, as to whether all entries to the medical records were made in the regular course of business. In addition, while business records were traditionally composed of factual items, medical records frequently contained opinion entries and entries recording the statements of the patient as noted by medical personnel. Consequently, some courts refused to admit medical records as business records.

Rule 803(6) establishes that because medical records are kept in the regular course of business, they are business records and are therefore admissible as an exception to the hearsay rule. To clarify the intent to include medical records in rule 803(6), the words "diagnoses" and "opinions" were specifically described as possible contents of rule 803(6) records. Further, rule 803(6) defines "business" to include not-for-profit organizations thereby dispelling any doubt that hospitals would not be covered under the rule. This special recognition of the trustworthiness of medical records is in keeping with the Advisory Committee's comment to rule 703 that medical records are a reliable source of expert opinion.

In sum, under the federal rules, medical records are unquestionably reliable when used as the basis of an expert's opinion. The burden of disclosing and challenging the basis rests on the cross-
examiner. As a result, pre-trial discovery plays a very important role when expert testimony is involved.

Discovery of Medical Experts

Federal Rule of Civil Procedure 26(b)(4) adequately provides for the discovery of experts. Under rule 26(b)(4), a party may discover the identity of those experts who will testify, the subject matter on which they will testify, and the substance of the facts and opinions to which they are expected to testify. The courts in interpreting rule 26(b)(4) have recognized the importance of discovering both the facts relied on by the expert and his or her opinions, particularly when the expert testimony is to be elicited through the use of rules 703 and 705. Only through early access

51. See supra notes 31-33 and accompanying text.
53. FED. R. EVID. 705 advisory committee note. For a discussion of the weaknesses of rule 26(b)(4), see Graham, supra note 52.
54. Rule 26(b)(4) provides:

Trial Preparation: Experts. Discovery of facts known and opinions held by experts, otherwise discoverable under the provisions of subdivision (b)(1) of this rule and acquired or developed in anticipation of litigation or for trial, may be obtained only as follows:

(A)(i) A party may through interrogatories require any other party to identify each person whom the other party expects to call as an expert witness at trial, to state the subject matter on which the expert is expected to testify, and to state the substance of the facts and opinions to which the expert is expected to testify and a summary of the grounds for each opinion. (ii) Upon motion, the court may order further discovery by other means, subject to such restrictions as to scope and such provisions, pursuant to subdivision (b)(4)(C) of this rule, concerning fees and expenses as the court may deem appropriate.

FED. R. CRV. P. 26(b)(4). See also Hoover v. United States Dept. of the Interior, 611 F.2d 1132, 1141-42 (5th Cir. 1980); Hockley v. Zent, Inc., 89 F.R.D. 26, 29 (M.D. Penn. 1980) (the court noted that the proper means of discovering the identity, the subject matter and the substance is through an interrogatory; further inquiry must be pursuant to a court order).
55. See, e.g., Smith v. Ford Motor Co., 626 F.2d 784, 791-94 (10th Cir. 1980). This was a personal injury suit involving medical expert testimony offered under rules 703 and 705. The court stated that discovery is important to insure effective cross-examination and rebuttal, the narrowing of issues and the elimination of surprise. The court also pointed out that discovery as to experts does not stop with rule 26(b)(4). Rather, discovery continues under rule 25(e), which requires supplemental responses to interrogatories regarding additional experts who will testify and the subject matter and substance of that testimony.

Rule 26(e) provides:

A party who has responded to a request for discovery with a response that was complete when made is under no duty to supplement his response to include information thereafter acquired, except as follows:—the identity of each person expected to be called as an expert witness at trial, the subject matter on which he is
to the identity of the expert and to the data that the expert will use in forming an opinion can the cross-examiner adequately prepare for trial. Thus, efficient use of rules 703 and 705 involves not only meeting the standard of reasonable reliability, which has been eased by rule 803(6), but also engaging in thorough discovery under rule 26(b)(4) in order to prepare an effective cross-examination.

The effect of the federal rules is to facilitate presentation of expert testimony, and at the same time to insure that the basic elements of fairness and accuracy are not discarded. Illinois has also attempted to facilitate the manner in which experts may testify. Certain key elements, however, which are present in the federal system, are lacking in Illinois.

**EXPERT TESTIMONY AND MEDICAL RECORDS IN ILLINOIS**

The long, tedious process involved in eliciting expert testimony has not gone unnoticed in Illinois. Two recent cases, People v. Ward and Wilson v. Clark, have had a major impact on the development of the hypothetical question in Illinois.

The Hypothetical Question Before People v. Ward

In medical malpractice and personal injury cases, both treating and non-treating physicians are frequently called as expert witnesses. It is common in the medical profession, when forming an opinion and making a diagnosis, to rely on statements made by the patient concerning his or her pain and symptoms. Illinois recognizes that such statements made to a treating physician are a reliable source of information because they are motivated by a desire for proper treatment. Patients' statements are, therefore, the subject of an exception to the hearsay rule, and thus, the treating physician may recount these statements in court on direct exami-

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56. 61 Ill. 2d 559, 338 N.E.2d 171 (1975).
57. 84 Ill. 2d 186, 417 N.E.2d 1322 (1981).
58. Treating physicians may be called because of their personal knowledge of the matter; non-treating physicians may be called because of their recognition as experts in the particular field.
59. See Fed. R. Evid. 703 advisory committee note.
nation. This exception, however, does not extend to such statements made to a non-treating physician who can only testify regarding observable, objective conditions.

Physicians, whether treating or non-treating, also rely on information contained in the patient's medical records. These records, however, have not been afforded the same recognition given to a patient's statements. Because medical records contain both factual data and opinion information in the form of diagnoses, their reliability has been suspect. Therefore, they have been considered inadmissible hearsay. Consequently, the physician could not recount the information found in those records on direct examination. Before the expert could state an opinion, the hypothetical question had to be used in order to present the jury with a factual foundation. Because the records themselves had no independent basis of admissibility, however, the examiner had to lay a proper foundation before the facts contained in the records could be presented in the hypothetical question. This meant that each person who had made an entry in the record had to testify as to his or her personal knowledge of that entry. The expert could not state an opinion

61. Hearsay is testimony based on out-of-court statements and is generally inadmissible unless it falls into one of the hearsay exceptions. People v. Carpenter, 28 Ill. 2d 116, 190 N.E.2d 738 (1963). See also E. Cleary & M. Graham, supra note 1, at § 803.8.
62. See E. Cleary & M. Graham, supra note 1, at § 803.8. See also infra note 138.
63. See Fed. R. Evid. 703 advisory committee note.
64. Illinois Supreme Court Rule 236 covers the admissibility of business records as an exception to the hearsay rule. The Committee Comments note that the practice of admitting certain business records was founded in the belief that they would accurately reflect the character of a business. Testimony by the records' custodian as to their authenticity would be sufficient to admit them into evidence. Hospital records, however, were excluded from this rule. See Ill. Rev. Stat. ch. 110A, ¶ 236(b)(1981). The Committee Comments shed little light on this exception except to indicate that medical records were excluded from coverage because federal cases were not in agreement on the admissibility of such records. Thus, it was wise to exclude them from coverage.
65. See supra note 16 and accompanying text.
until this lengthy foundation process had been completed.

Thus, with the exceptions of testimony based either on personal observation, or in the case of the treating physician, on the patient’s statements, expert medical testimony had to be elicited through a hypothetical question. This time consuming and confusing procedure has been the subject of much criticism and the need for improvement has not gone unnoticed in the Illinois courts.

People v. Ward and The Hypothetical Question

In Ward, the Illinois Supreme Court took the first step toward alleviating the long, tedious process required by the hypothetical question. The court held that it was not error to allow the State’s treating expert to state his opinion based in part on the defendant’s medical records even though a proper foundation had not been laid. In order to determine whether or not such records were a permissible basis for an expert’s opinion, the court accepted a test of reasonable reliability, holding that the records used by the expert must be of a type reasonably relied upon by other experts in the field. The court found that because medical records have a
high degree of reliability, the expert's opinion had a valid basis. Each entrant's testimony, which had previously been a necessary part of the foundation, was no longer required. Consequently, the Ward decision considerably reduced the time involved in eliciting expert testimony. The court, however, did not go so far as to give medical records an independent basis of admissibility. Nor did the court indicate that the new test could be applied to non-treating as well as treating physicians. Moreover, the court did not decide how the facts, which form the basis of the opinion, should be presented to the jury to allow it to effectively evaluate the expert's opinion. Wilson v. Clark attempted to answer these questions.

Wilson v. Clark

In Wilson the plaintiff brought suit for the alleged negligence of Dr. Clark, which had resulted in the amputation of the plaintiff's right leg below the knee. At trial, over the plaintiff's objection, the defendant placed the plaintiff's hospital records into evidence without laying the customary foundation. The defendant's expert, a non-treating physician, was then asked to assume that the facts in those records were true and to assume some additional facts. The examiner then posed the hypothetical question.

opinion, was admissible). But see Matter of Smilley, 54 Ill. App. 3d 31, 369 N.E.2d 315 (1977) (treating expert's testimony based in part on another doctor's opinion was inadmissible not because it was unreliable, but because the testifying doctor had no supervisory control over the other doctor). For comments on this same problem, see supra note 70.

73. There is no indication in Ward of any such intent. See also Casey v. Penn, 45 Ill. App. 3d 582, 360 N.E.2d 93, 100 (1977). This case, decided after Ward, required a proper foundation in order to admit medical records.
74. 61 Ill. 2d at 567-68, 338 N.E.2d at 176-77.
75. 84 Ill. 2d 186, 417 N.E.2d 1322 (1981).
76. Id.
77. Id. at 192, 417 N.E.2d at 1325. It should be noted that while the examiner used the following hypothetical question, it did not comply with the requirements of the traditional hypothetical because none of the facts assumed were properly before the jury. See supra notes 13-15, and accompanying text. The hypothetical question read as follows:

Q "All right. Doctor, I will ask you to assume that the facts as contained in plaintiff's Exhibit 4 and defendant's Exhibits 12, 13, and 14, are true with respect to the hypothetical patient as described therein by name, John Wilson. That they are true with respect to a hypothetical doctor who is described therein by name, David Clark."

"I would ask that you further assume three additional facts. That a surgical amputation was done to the right lower extremity of the hypothetical patient and at that time marked arteriosclerosis was found at or about the amputation site, which is approximately three to four inches below the knee."
On appeal from a verdict for the defendant, the court considered the plaintiff's objections to the admissibility of those records. The plaintiff objected that the defense counsel had not laid a proper foundation and that consequently, the plaintiff's counsel could not effectively cross-examine the witness. The appellate court reversed and remanded, holding that a proper foundation was required before the hospital records could be admitted and that the hypothetical question, therefore, should not have been permitted.

The Illinois Supreme Court affirmed in part, reversed in part, and remanded. It ruled that a proper foundation is necessary before hospital records can be introduced into evidence. It also held, however, that such a foundation is not necessary before an expert, whether a treating or non-treating physician, can give an opinion based on those records. In so doing, the court adopted Federal Rule of Evidence 703.

The case was remanded because the law at the time of the trial required a proper foundation and the plaintiff's attorney therefore had no notice that the defendant's non-treating expert could testify based on matters not in evidence. People v. Ward, 61 Ill. 2d 559, 338 N.E.2d 171, (1975), involved a treating doctor's opinion, as did subsequent cases. See supra notes 70-71 and accompanying text. Thus, the Ward opinion was not notice to the plaintiff as to the permissible type of testimony for non-treating doctors. See Wilson v. Clark, 84 Ill. 2d 186, 195, 417 N.E.2d 1322, 1327 (1981).

"Secondly, found at that time that this hypothetical patient presented himself in the first occasion to another hypothetical orthopedic surgeon by name of Robbins in the year 1974, the month March, that an opening in the front of the right tibia was dry and void of discharge."

"Thirdly, I would ask that you assume that it was the opinion of this hypothetical orthopedic surgeon by name of Robbins in October 1st of 1974, if he were permitted to freshen up the ends of the bone and place a small screw to hold the bone in apposition that the condition of ill being then and there present in John Wilson was going on to healing."

"And I will now ask you to assume all those facts to be true. Would you have an opinion based upon a reasonable degree of medical and surgical certainty as to whether or not the hypothetical orthopedic surgeon, David Clark, exercised that degree of skill, applied that degree of knowledge and expertise that a Board Certified orthopedic surgeon should have applied to a patient in the County of Kane and State of Illinois in the years 1972 and 1973? Do you have an opinion?"

A "I have."
Q "What is your opinion?"
A "I feel that he did."

Brief for Respondent at 97.

78. See Wilson v. Clark, 80 Ill. App. 3d 194, 197, 399 N.E.2d 651, 653 (1980). The plaintiff alleged that his cross-examination had been hampered since the contents of the records had not been made known and thus he would not know on what facts the expert had relied.

79. Id. at 197, 399 N.E.2d at 653.


81. Id. at 192, 417 N.E.2d at 1326. The case was remanded because the law at the time of the trial required a proper foundation and the plaintiff's attorney therefore had no notice that the defendant's non-treating expert could testify based on matters not in evidence. People v. Ward, 61 Ill. 2d 559, 338 N.E.2d 171, (1975), involved a treating doctor's opinion, as did subsequent cases. See supra notes 70-71 and accompanying text. Thus, the Ward opinion was not notice to the plaintiff as to the permissible type of testimony for non-treating doctors. See Wilson v. Clark, 84 Ill. 2d 186, 195, 417 N.E.2d 1322, 1327 (1981).

82. 84 Ill. 2d at 196, 417 N.E.2d at 1327.
tion upon which the expert bases his opinion is of a type that is reliable. The court then evaluated whether the hospital records met this test of reasonable reliability. In answer to that question, the court held that "in the future . . . due to the high degree of reliability of hospital records, an expert may give his response to a hypothetical question based on facts contained in those records, even if the hospital records themselves are not in evidence."

The Illinois Supreme Court also adopted Federal Rule of Evidence 705, which allows an expert to give an opinion without disclosing the facts underlying that opinion. Under that rule, these underlying facts can and should be disclosed on cross-examination to the extent that they aid the cross-examiner. The court considered whether this procedure would place an undue burden on the cross-examiner and held that, given the liberal discovery procedures in Illinois, it would not.

Wilson, therefore, tried to answer the question left open in the Ward opinion. The standard of reasonable reliability must be applied to the data underlying the opinions of non-treating as well as treating physicians. Further, this underlying data is only revealed on cross-examination if required by the court or necessary to the cross-examination. The decision thus reduced the time required to elicit expert testimony yet allowed for a means of providing the jury with some foundation to evaluate the testimony.

While the Wilson decision did expedite medical expert testimony, it did not, give medical records an independent basis of admissibility. Although the court recognized the high degree of reliability of these records, it held that a proper foundation would

83. Id. at 193, 417 N.E.2d at 1326.
84. Id. at 194, 417 N.E.2d at 1326 (emphasis added).
85. Id. at 196, 417 N.E.2d at 1327.
86. See text of rule 705, supra note 28. Also, as previously noted, the Ward court, see supra notes 68-73 and accompanying text, did not address the question of cross-examination of an expert, who had relied on data not admitted in forming an opinion. In Wilson v. Clark, by adopting rule 705, the court said that it will be permissible to bring out those facts, whether based on firsthand or secondhand information, on cross-examination. The burden now falls on the adverse party to bring it out. Further, the Advisory Committee Notes point out that the cross-examiner is under no compulsion to bring out any facts or data that may be favorable to the opinion. He may bring out, if he chooses, only those that are unfavorable. Fed. R. Evid. 705, advisory committee note.
87. Wilson v. Clark, 84 Ill. 2d 186, 195, 417 N.E.2d 1322 (1981). This holding is in keeping with the attitude adopted by the Advisory Committee that liberal discovery sufficiently balances any extra burden to the cross-examiner. Fed. R. Evid. 705 advisory committee note.
88. See supra note 84 and accompanying text.
still be required for their admission. Consequently, rules 703 and 705 will not operate as efficiently in Illinois as they do in the federal courts.

Rules 703 and 705 and Discovery in Illinois

The Illinois Supreme Court adopted rules 703 and 705 to accomplish the same purpose that the federal system did: to lessen the substantial time involved in obtaining expert testimony. The court also adopted a standard of reasonable reliability under rule 703 which is the same standard used in the federal system. In addition, by acknowledging that rule 705 shifts to the adverse party the burden of disclosing the basis of an expert's opinion during cross-examination, the court followed the federal system's approach to rule 705. Moreover, the court acknowledged that, as in the federal system, liberal pre-trial discovery procedures would offset any extra burden that the rule might place on the cross-examiner. It appears, therefore, that in Wilson v. Clark, the Illinois Supreme Court adopted the necessary elements to assure efficient operation of Rules 703 and 705.

In Illinois, however, medical records themselves are still inadmissible hearsay. While adequate discovery rules may help the parties prepare for expert testimony under the new rules, Illinois is still lacking the extra support which rule 803(6) provides in the federal system by classifying medical records as business records.

Under chapter 110, paragraph 58(3) of the Illinois Civil Practice Act and under Supreme Court Rules 201 and 214, information on which experts rely, such as medical records and the patients' statements, is discoverable. A party may also discover the identity of

89. See supra note 81 and accompanying text.
90. 84 Ill. 2d at 194, 417 N.E.2d at 1326.
91. See supra text accompanying notes 82-83.
92. See supra text accompanying note 86.
93. See supra text accompanying note 87.
94. See supra note 64 and accompanying text.
95. Paragraph 58(3) provides: "A party shall not be required to furnish the names or addresses of his witnesses except that upon motion of any party disclosure of the identity of expert witnesses shall be made to all parties and the court in sufficient time in advance of trial so as to insure a fair and equitable preparation of the case by all parties." ILL. REV. STAT. ch. 110, ¶ 58 (1981).
Rule 201(a) provides:

Discovery Methods. Information is obtainable as provided in these rules through any of the following discovery methods: depositions upon oral or written questions, written interrogatories to parties, discovery or inspection of documents or property, and physical and mental examination of persons. Duplication of dis-
the experts who will testify at trial and may then depose the experts. In addition, the medical records themselves are discoverable. Although patients’ statements and medical records are accessible through discovery, they remain hearsay. Even though the records and the statements are discoverable, they are not necessarily admissible. As adopted by Illinois and as used by the federal courts, rules 703 and 705 allow the expert testimony to be heard despite the hearsay issue. The rationale behind this allowance is that the sources relied upon have a peculiarly trustworthy nature. In the federal courts, the trustworthy nature of medical records is bolstered by rule 803(6). In Illinois, however, medical records are still inadmissible hearsay.

Medical Records as Business Records

Illinois recognizes that records kept in the ordinary course of

covety methods to obtain the same information should be avoided.

Rule 214 provides:

Any party by written request may direct any other party to produce for inspection, copying, reproduction, photographing, testing or sampling specified documents, objects, or tangible things or to permit access to real estate for the purpose of making surface or sub-surface inspections or surveys or photographs, or tests or taking samples, or to disclose information calculated to lead to the discovery of the whereabouts of any of these items, whenever the nature, contents, or condition of such documents, objects, tangible things, or real estate is relevant to the subject matter of the action. The request shall specify a reasonable time, which shall not be less than 28 days except by agreement or by order of court, and the place and manner of making the inspection and performing the related acts. One copy of the request shall be filed with the proof of service on all other parties entitled to notice. A party served with the written request shall (1) comply with the request within the time specified, or (2) serve upon the party so requesting written objections on the ground that the request is improper in whole or in part. If written objections to a part of the request are made, the remainder of the request shall be complied with. Any objection to the request or the refusal to respond shall be heard by the court upon prompt notice and motion of the party submitting the request. If the party claims that the item is not in his possession or control or that he does not have information calculated to lead to discovery of its whereabouts, he may be ordered to submit to examination in open court or by deposition regarding such claim. If requested, the party producing documents shall furnish an affidavit stating whether the production is complete in accordance with the request.

96. See, e.g., Schaeffer v. Sippel, 58 Ill. App. 3d 816, 374 N.E.2d 1092 (1978) (non-disclosure of the expert’s identity can lead to dismissal); Plost v. Louis A. Weiss Memorial Hosp., 62 Ill. App. 3d 248, 378 N.E.2d 1176 (1978) (even during trial, if the identity of the expert is only then uncovered, a deposition may still be taken); Fure v. Sherman Hosp., 64 Ill. App. 3d 259, 380 N.E.2d 1376 (1978) (hospital and medical records are clearly discoverable).

97. See supra notes 25 & 83 and accompanying text.

98. See supra notes 83-84 and accompanying text.
business are trustworthy and accurate. Therefore, as in the federal courts, business records are the subject of an exception to the hearsay rule.99 Medical records, although kept in the ordinary course of business as part of the regular hospital routine, are specifically excluded from this exception.100

The rationale for excluding medical records from the business record exception was based on the federal courts' previous disagreement over their treatment.101 Rule 803(6), however, settled that disagreement and specifically included medical records in the business records exception.102 The drafters of federal rule 803(6) recognized that medical records were particularly trustworthy, and included the words “diagnoses” and “opinions” within the rule to clarify the intent to include medical records.103 Because the federal rules are no longer unsettled, the original reason for excluding medical records from the Illinois business records exception to the hearsay rule is no longer valid.

In addition, the Illinois Supreme Court, in Ward and in Wilson, identified medical records as a particularly good example of what rule 703 means by a reasonably reliable source of an expert’s opinion.104 As such, the facts and opinions contained in the records are admissible for the limited purpose of establishing the factual foundation of the expert’s opinion so that the jury may evaluate it.105 This leads to the anomalous result that a source of information widely recognized as highly reliable is only indirectly allowed into the proceedings. Moreover, should the examiner want to introduce any of the facts and opinions contained in the records, it will be necessary for the entrants to testify.106 This requirement reintroduces the foundation process previously required with the hypothetical question, and thus defeats the federal rules’ aim of brevity. If, however, medical records were included in the Illinois business records exception, as they are in the federal rules, this problem would not arise.107

99. See supra note 64.
100. Id.
101. Id. See also supra notes 40-46 and accompanying text.
102. See supra note 47 and accompanying text.
103. See supra note 48 and accompanying text.
104. See supra notes 72 & 84 and accompanying text.
105. See supra notes 85-87 and accompanying text.
106. See supra notes 66 & 89 and accompanying text.
107. If the medical records were included in the business records exception, the only testimony necessary would be that of an authenticating witness. See also supra note 64.
In addition, classifying medical records as inadmissible hearsay may create problems for the cross-examiner. There has been some confusion in the federal courts regarding the scope of cross-examination when the data underlying the opinion is inadmissible hearsay. This confusion does not arise, however, if the underlying data is admissible hearsay.108

Possible Limits on Cross-Examination Under Rule 705

In Bryan v. John Bean Division of FMC Corp.109 the plaintiff, on cross-examination of the expert, made maximum use of two reports that the witness had used in reaching his opinion.110 Those reports contained certain data as well as opinions of two other experts. The Fifth Circuit held that it was permissible to bring out the statistical information on cross-examination because the witness had used those statistics in forming his own opinion.111 The witness, however, had not relied on the two experts’ opinions found in those reports. Therefore, the court held that even though those opinions differed from that of the witness, it was not permissible to bring them out on cross-examination even to impeach the witness.112

The court disallowed the use of the report to impeach the expert witness because the opinions were hearsay and thus were not sufficiently trustworthy to warrant disclosure.113 It must be remembered, however, that hearsay is an out-of-court statement offered for its truth.114 In this case, the opinions of the other experts were not offered for their truth but rather to disclose that the testifying expert had knowledge of contrary opinions contained within the very reports he had used to form his own opinion.115 Although the court acknowledged that hearsay evidence should be admissible to impeach if strictly limited to that purpose, and if accompanied by an appropriate limiting instruction,116 the court held that the other opinions within the reports were not indepen-

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108. See infra notes 109-31 and accompanying text.
109. 566 F.2d 541 (5th Cir. 1978).
110. Id. at 544.
111. Id. at 546.
112. Id. at 544-47.
113. Id. at 546. Because those reports were compiled out-of-court, their contents represent out-of-court statements and as such they were inadmissible hearsay.
116. Id. at 545. It should also be noted that a limiting instruction regarding the use of the evidence was given at trial. Id. at 547 n.6.
dently trustworthy. Therefore, those opinions were not subject to disclosure under rule 705 or for impeachment.\textsuperscript{117} Proper use of these opinions as impeachment evidence would require calling as witnesses the authors of those opinions.\textsuperscript{118} Thus, under the \textit{Bryan} interpretation, if other opinions or facts would tend to impeach the expert, but the expert had not relied on those opinions or facts, they could not be raised during cross-examination. This rule would apply even if the court recognized the report containing these facts and opinions as a reasonably reliable basis for the opinion.\textsuperscript{119}

Such a ruling contradicts the traditional view of impeachment. Impeachment involves discrediting the witness' credibility and not presenting substantive evidence.\textsuperscript{120} Thus, the traditional view held that hearsay evidence could be used during cross-examination to discredit the witness provided that it was limited to that purpose and that the jury was carefully instructed about that limit.\textsuperscript{121} The \textit{Bryan} court recognized the traditional view as still valid, but required that the impeaching evidence meet a test of trustworthiness before it could be used to impeach.\textsuperscript{122}

Actually, the additional requirement of trustworthiness should have been unnecessary. The reports containing the other opinions had already met the standard of reasonable reliability in order to be accepted as a valid basis for the expert's opinion.\textsuperscript{123} In addition, the \textit{Bryan} rule contravened the basic concepts of fairness by not allowing the cross-examiner to show that the reports on which the expert relied also contained other information, and that, therefore, the expert's reliance may have been selective.\textsuperscript{124} As noted above, the use of these facts and opinions by the cross-examiner would not be to show their truth, but rather to discredit the expert's credibility.

Regardless of \textit{Bryan}'s inconsistency, the Fifth Circuit has again followed that approach. In \textit{Bobb v. Modern Products, Inc.},\textsuperscript{125} the court held it improper for the cross-examiner to impeach the ex-

\begin{itemize}
\item \textsuperscript{117} \textit{Id.} at 547.
\item \textsuperscript{118} \textit{Id.}
\item \textsuperscript{119} Under rule 703, the expert's opinion must be based on reasonably reliable information. Here the statistical information within the reports was considered reliable.
\item \textsuperscript{120} C. McCormick, \textit{supra} note 16, at \S 33.
\item \textsuperscript{121} See, e.g., Baltimore & O.R. v. O'Neill, 211 F.2d 190 (6th Cir. 1954).
\item \textsuperscript{122} \textit{Bryan v. John Bean Div. of FMC Corp.}, 566 F.2d 541, 545 (5th Cir. 1978).
\item \textsuperscript{123} See \textit{supra} note 119.
\item \textsuperscript{124} See, e.g., Karl v. Employer's Ins. of Wausau, 78 Wis. 2d 284, 254 N.W.2d 255, 262 (1977); C. McCormick, \textit{supra} note 16, at \S 14.
\item \textsuperscript{125} 648 F.2d 1051 (5th Cir. 1981).
\end{itemize}
pert by using facts in a hearsay report. The witness had seen the deposition of another physician prior to trial. The testifying expert, however, did not indicate that he had relied on the report contained in the physician's deposition. While his lack of reliance would have been a proper reason to disallow the disclosure under rule 705, the court did not exclude the report because of the expert's lack of reliance but rather because of its hearsay nature. Bobb held that such hearsay reports were not admissible, even as impeachment evidence, unless the expert had based his opinion on the opinions within the reports, or had testified directly from the reports. Thus, if courts continue to follow the Bryan and Bobb reasoning, cross-examiners may not be able to impeach experts with additional facts and opinions found within the same hearsay reports relied on by the experts.

In contrast to the Illinois approach, the Bryan limitation, as applied to medical expert testimony based on medical records, is eliminated in the federal system by rule 803(6). By including medical records in the business records exception to the hearsay rule, the drafters recognized the trustworthiness of medical records. Therefore, if the expert had relied on only part of the record in reaching an opinion, there could be no objection on the grounds of unreliability to further use of the complete record to impeach. Moreover, because the records are admissible under rule 803(6), the cross-examiner may later establish the impeachment evidence without having to call every person who made entries to the record.

The Future of the Bryan Rule in Illinois

It is not yet clear whether the Illinois Supreme Court will follow Bryan. In the recent case of People v. Pitts, the Illinois appel-

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126. Id. at 1055.
127. Rule 705 allows disclosure of the reports relied on by the expert in formulating his opinion. If, as here, there was no reliance, disclosure could not be required on that basis. But see infra notes 132-37 and accompanying text regarding a ruling that allowed cross-examination using reports upon which the expert did not explicitly rely because they were of a type of report reasonably relied on.
128. 648 F.2d at 1055.
129. Id. at 1056.
130. See supra note 47 and accompanying text. In addition, even the Bryan court recognized that medical reports would probably not be subject to the Bryan limitation because of their established reliability.
131. See supra notes 16-17 and 47-48 and accompanying text.
late court allowed the cross-examiner to impeach the expert’s testimony by using reports of other doctors, upon which the testifying expert had not relied or even read. According to the court, the key element under rules 703 and 705 is whether the information is of a type considered reliable. Because the reports of the other doctors were considered reliable, the contents of those reports could be raised on cross-examination even if the testifying expert had neither depended on them nor read them. Under the Pitts interpretation, the exclusion of medical records from the business records exception would have no bearing on their use for impeachment because they are considered reliable. Nevertheless, further use of the records would still require the tedious process of calling each entrant to testify. Moreover, should the Illinois Supreme Court decide to follow the Bryan approach, the records could only be used to impeach the expert witness to the extent that he or she had actually relied upon them. Should Illinois, however, follow the federal system by including medical records within the business records exception to the hearsay rule, the Bryan limitation, as well as the time consuming process required to introduce the records into evidence, could be eliminated.

**CONCLUSION**

The steps taken by the supreme court in *Wilson v. Clark* brought Illinois into line with the modern approach to expert testimony. The Illinois business records exception to the hearsay rule, however, which does not apply to medical records, reduces the impact of that decision. Rules 703 and 705 are designed to achieve brevity in the presentation of expert testimony while maintaining fairness and accuracy. The rules focus on the requirement that the basis of the expert’s opinion meet a standard of reasonable reliability. Medical records meet this standard, and including them in the business records exception would strengthen their competency as a reliable basis for an opinion. In addition, if the records are not included in the exception, and if the examiner is required to engage in long, testimonial proof regarding the basis of an expert’s opinion, the overall time involved will not be substantially reduced.

133. *Id.* at 11-13.
134. *Id.* at 12.
135. Once the report meets the standard of reasonable reliability, it could be used as the basis of the opinion as well as for impeachment.
136. *See supra* note 66 and accompanying text.
137. *See supra* notes 113-19 and accompanying text.
Moreover, the possible limitations on cross-examination may apply due to the hearsay character of medical records. To alleviate these problems and further facilitate expert testimony in Illinois, medical records should be included in the business records exception to the hearsay rule.\footnote{The adoption of rules 703 and 705 poses some additional questions. As already noted, statements made by a patient to the treating physician are admissible as an exception to the Illinois hearsay rule. See supra note 60. Similar statements made to a non-treating physician, however, are not admissible. Under rule 703 an expert may base his opinion on reasonably reliable information. In the federal system, rule 803(4) acknowledges that whether such statements are made to a treating or non-treating physician they are admissible as an exception to the hearsay rule. Thus relying on them and disclosing them under rules 703 and 705 poses no problem in the federal system. For a full discussion of this question as it may apply in Illinois, see Theis, The Doctor as Witness: Statements for Purposes of Medical Diagnoses or Treatment, 10 Loy. U. Chi. L.J. 363 (1979). In addition, the admission of records under the business records exception required authentication by the record custodian. See supra note 64. In Wilson v. Clark, the parties stipulated to the authenticity of the records. Consequently, when the court reviewed the case they did not answer whether it would be necessary or not to authenticate the records in the future if only used as the foundation for the expert's opinion.}  

IRENE M. SHERIDAN