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Expert Testimony in Illinois

INTRODUCTION

Traditional common law rules1 created a complex set of constraints that restricted the use of expert testimony.2 The class of subjects sufficiently formidable to the average layman to require an expert's opinion was strictly construed.3 When an expert was qualified to render an opinion, the law dictated resources that the expert could rely upon to produce admissible evidence.4 This limitation, in turn, necessitated the appearance of numerous witnesses to lay the appropriate foundation so that such resources could be admitted into evidence. Finally, since the expert could not resolve any controverted facts in dispute, he was required to state his opinion in the hypothetical.5

These common law restrictions rest upon the premise that the trier of fact may be overly influenced or mislead by an expert's opinion on a matter.6 However, even accepting this premise, the operation of the above rules creates unnecessary confusion in the

1. The distinction between traditional or historical common law and present Illinois common law is used throughout this article. For purposes of this discussion, traditional common law is a concept which represents fundamental principles which once governed the use of expert testimony, while the term present Illinois common law is meant to reflect more recent case developments. For a complete discussion of the history of expert testimony and the development of the rules which govern the subject, see Hand, Historical and Practical Considerations Regarding Expert Testimony, 15 HARV. L. REV. 48 (1901).

2. As one commentator has noted, "in respect to admissible expert opinion, a body of rules has grown up involving techniques and skills almost equalling in complexity the subject matter about which the expert testimony is given." Ladd, Expert Testimony, 5 VAND. L. REV. 414, 417 (1952).

3. Hence, expert testimony was limited to matters "beyond the ken of the average jurors," and therefore necessary to their understanding of the disputed facts before them. See text accompanying notes 12-13, infra.

4. If experts reasonably relied on matter which was inadmissible, such information could not be disclosed to the trier of fact. See text accompanying notes 51-53, infra.

5. See discussion accompanying notes 96-99, infra.

6. Although the limitation on the basis of an expert's opinion is primarily derived from evidentiary principles, see text accompanying notes 51-53 infra, the restrictions prohibiting an expert from testifying on matters within the common knowledge of the jury, or upon the ultimate issue, and the requirement of the use of hypothetical questions reflect such a concern. Thus, expert testimony on the ultimate issue is deemed to usurp the function of the jury. See, e.g., Hughes v. Wabash Ry. Co., 342 Ill. App. 159, 173, 95 N.E.2d 735, 742 (1950). Expert testimony on matters of common knowledge is thought to invade the province of the trier of fact. See, e.g., E. CLEARY et al., MCCORMICK'S HANDBOOK OF THE LAW OF EVIDENCE § 13, at 29 (2d ed. 1972) [hereinafter cited as MCCORMICK (2d ed.).] The hypothetical format assures that the expert does not appear to believe the facts on which his opinion is based. See McElhaney, Expert Witnesses and the Federal Rules of Evidence, 28 MERCER L. REV. 463, 472 fn.44 (1977) [hereinafter cited as McElhaney].
introduction of expert testimony. The potential problem of undue persuasion could be resolved without hindering the effective presentation of expert testimony to the trier of fact. In recognition of this fact, Illinois has abandoned many of the common law limitations and has gradually adopted a more sensible approach to the use of expert testimony. The most recent reform, which broadened the permissible matter underlying an expert’s opinion, is indicative of this trend. The only major surviving common law restriction is the mandatory use of the hypothetical question.

This article will discuss present Illinois common law vis a vis the proposed Illinois Rules of Evidence governing expert testimony. Since the Proposed Rules basically codify the existing law concerning experts in Illinois, the article will focus on relatively recent changes made in the Illinois common law and the inconsistencies created by these reforms.

**Admissibility of Expert Testimony**

Under present Illinois common law, expert testimony is admissible if a court concludes that such testimony will assist the trier of fact in understanding the evidence. Both Illinois law and Rule 702 reject the traditional restriction of expert testimony to matters “beyond the ken of the average juror.” The test is not whether the expert’s explanation is necessary to the fact finders understanding

7. See text accompanying notes 56-62, infra.
8. See text accompanying notes 96-99, infra.
9. The Proposed Rules of Evidence presently remain before the Illinois Supreme Court in a no action status. For purposes of this article the Proposed Rules which are discussed will be cited as Rule XXX. The Federal Rules of Evidence which govern expert testimony are identical to the Proposed Rules except in the instance of Rule 705. See note 113, infra. Of course, since the two versions are the same there is no need to discuss them separately.
11. Rule 702 reads as follows:
   If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.
13. The “necessity” requirement limitation was finally abandoned in Miller v. Pillsbury Co., 33 Ill. 2d 514, 211 N.E.2d 733 (1965). Rejecting the notion that permitting expert testimony on matters of common knowledge would invade the province of the jury, the court reasoned that “[t]he jury still may accept or reject such testimony.” Id. at 516, 211 N.E.2d at 734.

The “necessity” requirement may be warranted in some contexts. For example, courts are generally reluctant to admit the testimony of an accident reconstructionist which merely supplements or contradicts eyewitness testimony, unless there is a compelling need to apply
of the evidence, but whether the expert can assist the trier of fact. This approach widens the scope of expert testimony.¹⁴

Under the assistance criterion, an expert may be permitted to testify as to matters within the common knowledge of the jury.¹⁵ For example, in Stanley v. Board of Education,¹⁶ plaintiff claimed damages from an injury sustained while participating in a recreational activity supervised by the defendant. The trial court allowed an expert on recreational activities to testify as to what constituted safe distances between groups of children at play. On appeal, the defendants argued that the court erred in admitting expert testimony on a subject that was within the trier of fact's common understanding.¹⁷ The court rejected this contention and concluded, "[w]e think, . . . the better rule would give a trial judge a wide area of discretion in permitting expert testimony which would aid the triers of fact in their understanding of the issues even though they might have a general knowledge of the subject matter."¹¹⁸


¹⁵ Yet under Federal Rule 702, the federal courts have demonstrated a more restrictive approach to the admissibility of expert testimony in two areas: criminal trials and emerging sciences and technology. Illinois courts, in applying the common law version of Federal Rule 702, should do the same.

The prejudicial impact of expert testimony is deemed greater in criminal than in civil trials. "[W]ithin the context of a criminal trial, "scientific or expert testimony particularly courts the second danger [of undue prejudice or of confusing the issues or misleading the jury] because of its aura of special reliability and trustworthiness." United States v. Green, 548 F.2d 1261, 1268 (6th Cir. 1977).

In the context of emerging sciences and technology courts are reluctant to permit a verdict to rest primarily on evidence which has not yet "crossed the line between the experimental and demonstrable stages." United States v. Brown, 557 F.2d 541, 557 (6th Cir. 1977) (evidence of ion microphotography inadmissible due to inability to duplicate tests, inadequate size of hair sample, and lack of promulgated standards for use of the technique). But cf. United States v. Baller, 519 F.2d 463 (4th Cir. 1975) ("voice-printing" evidence admissible due to sufficient indicia of reliability). See also Latin, Remote Sensing Evidence and Environmental Law, 64 Cal. L. Rev. 1300 (1976).

When courts are confronted with expert testimony concerning an "emerging science", they have employed the "Frye" test in order to determine its admissibility. The "Frye" test requires that the new scientific principles "must be sufficiently established to have gained general acceptance in the particular field in which [they belong]." Frye v. United States, 293 F. 1013, 1014 (D.C. Cir. 1923). A test substantially similar to the "Frye" test was applied in People v. Jennings, 252 Ill. 534, 96 N.E. 1077 (1911), where the court became the first in the United States to admit expert testimony regarding the technique of fingerprinting.


¹⁷ Id. at 974, 293 N.E.2d at 425. In support of its decision the court cited Federal Rule 702 with approval.
Qualification of an Expert

After a preliminary finding by a court that expert testimony may be introduced, the question then becomes whether the proffered witness qualifies as an expert. Federal Rule 702 provides general guidelines for evaluating an expert's qualifications which are consistent with Illinois common law. In Illinois, "[e]xpert evidence is not confined to classed and specialized professions, but is applicable wherever peculiar skill and judgment . . . are required to explain results or to trace them to their causes." Similarly, Rule 702 states that an expert may be qualified to testify by reason of his "knowledge, skill, experience, training or education." Both standards clearly permit an expert to acquire his expertise from practical experience.

Under this approach courts have qualified a variety of "experts" in recognition of their peculiar skills and judgment. Illinois common law recognizes expert testimony to include a farmer's knowledge about the effects of hail on corn, an automobile mechanic's experience with brake systems, a medical assistant's observations concerning the nature of a wound, and a police officer's testimony on the operation of Bolito, a Puerto Rican lottery.

Moreover, the standard used to determine whether a witness qualifies as an expert implicitly recognizes that the requirements for qualification are not unduly stringent. An expert witness need not be the foremost expert in his field or a specialist in a particular field. For example, a doctor of internal medicine was qualified to testify about neurological ear, nose, and throat problems although he was not a specialist in these areas. While an expert need only possess "minimum" qualifications, courts nonetheless require that the expert's particular skills and expertise be related to the specific facts

21. These standards reject earlier, traditional restrictions on just who could testify as an expert because, "[i]n the beginning experts were 'men of science' who gave opinions as to nautical matters, handwriting or medical science." W. KING & D. FILLINGER, A STUDY OF THE LAW OF OPINION EVIDENCE IN ILLINOIS 255 (1942).
in issue. Under this additional criteria, an expert witness is more likely to be allowed to testify where there is a similarity between his knowledge and experience and the subject matter in dispute.27 For example, in *Murphy v. Hook,*28 an engineering physicist was proffered as an expert on accident reconstructions. The court concluded that the witness, though a fully qualified engineering physicist, could not testify as an expert on accident reconstruction because of his inexperience with respect to automobile collisions.29

The difficulty with the attempt to measure a nexus between the expert's specific experience and the facts in issue is that too rigid an application of this requirement might disqualify many experts. This would circumvent the liberal Illinois approach to qualifying experts, and the admission of expert testimony itself. Clearly, unless there are obvious and extreme disparities between the expert's experience and the facts of the case the witness should be qualified by the court. Of course, once the court has determined that a witness qualifies as an expert, opposing counsel is still free to point out discrepancies between the expert's experience and the facts at hand. Cross-examination on this point could damage the expert's credibility and in turn influence the weight given his testimony by the trier of fact.30

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27. 11 MOORE'S FEDERAL PRACTICE § 702.10 at VII-29 (2d ed. 1976) [hereinafter cited as MOORE'S (2d ed.)].

In this respect a major issue confronting Illinois courts is determining whether a psychologist may testify, as an expert, regarding a defendant's sanity, i.e., his mental condition and its causal relationship to the crime. An Illinois court has permitted a psychologist to testify as to whether the defendant was suffering from a mental defect at the time of the crime. People v. Felton, 26 Ill. App. 3d 395, 325 N.E.2d 400 (1975). The court, however, refused to allow the psychologist to opine whether, in view of the mental defect, the defendant was legally insane at the time of the crime. *Id.* at 400, 325 N.E.2d at 403. Another Illinois case, in dicta, implied that the scope of a psychologist's testimony could be extended to include the sanity issue. People v. Noble, 42 Ill. 2d 425, 248 N.E.2d 96 (1969).

The issue of sanity is usually considered to be a medical diagnosis and is thus regarded as within the province of the psychiatrist. People v. Skeoch, 408 Ill. 276, 96 N.E.2d 473 (1951); People v. Gilliam, 16 Ill. App. 3d 659, 306 N.E.2d 352 (1974). The federal courts, however, have permitted properly qualified psychologists to give an opinion on what is essentially the ultimate issue of sanity. United States v. Brawner, 471 F.2d 969 (D.C. Cir. 1972); Jenkins v. United States, 307 F.2d 637 (D.C. Cir. 1962). A liberal reading of Rule 702, with its special emphasis on assistance and practical experience of the expert, should result in permitting qualified psychologists to testify on the issue of sanity.


29. *Id.* at 1011, 316 N.E.2d at 151.

Form of Expert Testimony

Under Illinois common law, an expert is not required to testify solely in opinion form. He may merely disclose certain basic principles, leaving the trier of fact to draw the requisite inferences. Rule 702 tracks the common law by allowing the expert to testify “in the form of an opinion or otherwise.”

When the expert witness testifies in the form of an opinion, Illinois common law permits him to offer his opinion on matters involving the ultimate issue of a case. Thus, Illinois common law is in accord with Rule 704. Traditionally experts were not allowed to render opinions on ultimate issues in order to prevent them from “usurping the function of the jury.” Wigmore accurately labeled this rationale “a mere bit of empty rhetoric.” The function of the expert witness is to draw those inferences which the jury is unable to reach on its own; of necessity, these inferences must often embrace the ultimate issue. To restrict expert testimony to matters other than the ultimate issue might leave the jury uninformed about the crucial aspects of the case. The Illinois common law has recognized that the exclusion of ultimate issue testimony is undesirable and illogical. Moreover, Illinois courts have held that opinions on

31. “[N]othing in the nature of things precludes the expert from merely giving an exposition upon the subject at hand, without expressing an opinion.” E. Cleary, HANDBOOK OF ILLINOIS EVIDENCE § 11.4, at 186 (2d ed. 1963). See Shorb v. Webber, 188 Ill. 126, 58 N.E. 949 (1900) (physician allowed to relate theories concerning intoxication and the effect of alcohol on the bloodstream).


33. Rule 704 provides that: “Testimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact.” This rule is also applicable to lay witnesses. Salteburg & Redden, supra note 30, Rule 704, at 436.


35. 7 J. Wigmore, A TREATISE ON THE ANGLO-AMERICAN SYSTEM OF EVIDENCE IN TRIALS AT COMMON LAW § 1920, at 17 (3d ed. 1940 Supp. 1977) [hereinafter cited Wigmore (3d ed.)]. The traditional rule has been described as “unduly restrictive, pregnant with close questions of application and the possibility of misapplication, and often unfairly obstructive to the presentation of a party’s case...” McCormick (2d ed.), supra note 6, § 12, at 27-28.

36. “If he is truly an expert and is needed because the area of testimony is outside the knowledge of the average juror, then he must of necessity tread in the area of the ultimate questions.” Brinton, The Proposed Federal Rules of Evidence: Pointing the Way to Needed Changes in Illinois, 5 J. Marshall Prac. & Proc. 242, 249 (1972).

37. “It is rewarding to see that the drafters [of the Federal Rules of Evidence] have put
ultimate issues do not "invade the province of the jury" since the jury is free to accept or reject the expert’s testimony.\textsuperscript{38}

There are, however, two interrelated qualifications on the reception of ultimate issue testimony stemming from the general proposition that all opinions must be helpful to the trier of fact. First, the opinion must not be phrased in terms of "inadequately explored legal criteria."\textsuperscript{39} Secondly, the opinion must not merely tell the jury how to decide.\textsuperscript{40} Generally, this latter issue is raised when the expert has not presented sufficient facts or reasons to support his opinion to the jury.\textsuperscript{41} Failure to satisfy these criteria may mean exclusion of the expert's testimony.\textsuperscript{42}

**Bases of Opinion Testimony by Experts**

Essentially, the basis of an expert's opinion consists of the under-
lying facts or data used by the expert to arrive at his conclusions. An expert may obtain this underlying material from personal observations before or during trial, and from facts or data reasonably relied upon by experts in a particular field in forming opinions upon a subject. Illinois common law and Rule 703 both permit an expert to utilize these sources in formulating his opinion.

Illinois courts have always allowed experts to testify on the basis of information gathered from personal observation or examination. In this respect, the expert witness is no different than any other witness, and is competent to testify as to matters within his personal knowledge. For example, a treating physician may render an opinion based upon a medical examination conducted prior to trial. Similarly, Illinois courts have permitted experts to develop their opinions from facts revealed to them during trial. An expert present throughout the trial may formulate an opinion on the basis of the testimony and evidence introduced. The expert may also render an opinion based upon facts revealed to him in a hypothetical question. Under either of these alternatives, the expert assumes that the facts upon which he relies are true. Further, the expert's testimony is itself confined to facts offered into evidence.

The foregoing are the traditional techniques used for offering expert testimony. Historically, common law standards required the expert to base his opinion only upon facts admitted into evidence.

43. See text accompanying notes 56-63 infra.
44. Federal Rule 703 provides that:
   The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to him at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence.
47. See People v. Covey, 34 Ill. 2d 195, 215 N.E.2d 220 (1966). Use of this method is ordinarily confined to testimony that is undisputed. See Graham v. St. Luke's Hospital, 46 Ill. App. 2d 147, 196 N.E.2d 355 (1964); Henry v. Hall, 13 Ill. App. 343 (1883). If the rule were otherwise, the expert would be permitted, in effect, to evaluate the testimony of other witnesses, a function which is within the sole province of the jury. Id.
50. See text accompanying notes 51-53, infra.
51. E. Cleary, Handbook of Illinois Evidence § 11.9 at 189 (2d ed. 1963). In Kanne v. Metropolitan Life Ins. Co., 310 Ill. App. 524, 530, 34 N.E. 2d 732, 734-35 (1941), the court held that the opinion of an expert is to be allowed only if it is based on and supported by facts in evidence. Accord, Theesfeld v. Eiles, 122 Ill. App. 2d 97, 258 N.E.2d 39 (1970);
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Thus, an expert’s testimony could be stricken if unsupported by the evidence. The rationale for this restriction was that an opinion based upon facts not in evidence was worthless, because the trier of fact lacked the data with which to evaluate the reliability of the expert’s conclusion. Accordingly, Illinois courts consistently labeled such opinions “speculation, guesswork, and conjecture.” Moreover, such testimony was considered flagrant hearsay, since the facts testified to were not subject to the procedural safeguards of the judicial truth seeking process.

Illinois courts have repudiated this traditional limitation on the bases of expert testimony by accepting expert opinions derived in part from materials not in evidence. In People v. Ward, the Illinois Supreme Court quoted Federal Rule 703 with approval. The court recognized the modern trend away from the common law's restriction of an expert’s testimony to facts in evidence, and concluded the better view is that experts may use data reasonably relied upon by others in a particular field to reach an opinion upon a subject. In Ward the trial court admitted a psychiatrist’s opinion on the defendant’s sanity, despite the fact that it was based upon information not in evidence. The psychiatrist, a state witness, had gathered this information from hospital records, psychological tests conducted by a psychologist, and a psychiatric examination performed by another psychiatrist. Although the data used by the testifying psychiatrist would not normally have been admissible, the court held that the expert’s opinion could be based upon such materials since psychiatrists normally rely upon them when forming an opinion on the sanity of a patient.

Under present Illinois common law, therefore, an expert is permitted to fashion his opinion upon facts reasonably relied upon by others in his field. This rule represents an important expansion of the traditional bases for expert testimony, since such facts need not

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54. Spector, supra note 52, at 285.
55. Id. at 285. McCormick has commented that this reasoning is unsound because “almost all expert opinion embodies hearsay indirectly, a matter which the courts often recognize and accept.” McCormick (2d ed.), supra note 6, § 15, at 36.
56. 61 Ill. 2d 559, 338 N.E.2d 171 (1975).
57. Id. at 567, 338 N.E.2d at 176.
58. Id.
59. The data was inadmissible because it was compiled by others who did not testify. Id.
60. Id. at 568, 338 N.E.2d at 177.
be admissible substantively. It aligns the judicial procedure which governs expert testimony with the actual practice of the experts themselves. Experts normally rely upon certain resources which are not admissible under the rules of evidence, and this approach relaxes the constraints which control expert testimony. The application of Ward saves judicial time by removing the necessity of parading witnesses in order to lay a complex foundation for an expert opinion. Moreover, it allows experts to deliver more complete and accurate testimony to the trier of fact.

**Ward Applied**

Rule 703 represents the most radical departure from traditional common law within Article VII of the Federal Rules of Evidence.

61. This rationale is illuminated as follows:

[A] physician in his own practice bases his diagnosis on information from numerous sources and of considerable variety, including statements by patients and relatives, reports and opinions from nurses, technicians and other doctors, hospital records, and X-rays. Most of them are admissible in evidence, but only with the expenditure of substantial time in producing and examining various authenticating witnesses. The physician makes life-and-death decisions in reliance upon them. His validation, expertly performed and subject to cross-examination, ought to suffice for judicial purposes.


62. Id.

63. “The emphasis can be on choosing witnesses who are needed to explain things satisfactorily to the jury’s understanding, rather than on parading witness after witness to lay a complex foundation for a simple opinion.” McElhaney, supra note 6, at 482.

Under the Ward holding, material constituting the basis of an expert’s opinion may be synthesized and revealed by a single expert witness without having to be independently introduced into evidence. This, as McElhaney notes, “creates a revolution in the logistics of expert testimony.” Id.

This “revolution”, though beneficial, does raise a constitutional question arising from sixth amendment concerns. Where an expert renders an opinion based upon facts or data obtained from persons not present at trial, is the defendant’s constitutional right to confront his accusers abridged? This question has been answered in the negative for three reasons. First, the introduction of expert testimony in criminal trials is subject to more stringent review. United States v. Green, 548 F.2d 1261 (6th Cir. 1977). Secondly, the evidence is solely the expert’s opinion and not the factual basis of his opinion. See United States v. Burrell, 505 F.2d 904 (5th Cir. 1974); United States v. Williams, 447 F.2d 1285 (5th Cir. 1971). See also Moore’s (2d ed.), supra note 27, § 703.50, at VII-55 to 57. Finally, the right to cross-examine the expert so as to explore and discount the basis of his opinion sufficiently safeguards the defendant’s sixth amendment rights. Id.

64. Hopefully this more complete and “realistic” approach to expert opinion formulation will diminish the somewhat antagonistic relationship between the scientific community and the judicial process, an antagonism stemming from the dissonance between “the scientific method, in which objectivity is emphasized . . . [and] the adversary method, where truth is established by deciding between the opposing contentions of interested parties.” Note, The Doctor in Court: Impartial Medical Testimony, 40 S. CAL. L. REV. 728, 728 (1967).

65. McElhaney, supra note 6, at 480.
Its recognition in Illinois constitutes a major revision of the common law, and its significance should not be obscured by an over-technical construction of the Ward holding.

The Illinois Supreme Court has recently reaffirmed the Ward holding. In Lawson v. G.D. Searle & Co., the court relied on Ward and allowed an expert to render an opinion supported by scientific data from clinical studies not admitted into evidence. At trial, the expert testified that the decedent's disease was not causally related to the use of an oral contraceptive. The court held that the information in the published studies were of the type reasonably relied upon by medical experts in forming such opinions. Moreover, the court concluded that the expert could relate the out-of-court statements for the purpose of explaining how he reached his conclusion.

Rule 703 itself is unclear on whether the expert may state the underlying factual basis of his opinion for the trier of fact. Certainly the rule allows an expert's opinion to rest upon certain types of data not admissible in evidence, and in this respect defeats a motion to strike the opinion on those grounds. Logically, the rationale of Rule 703 should support the disclosure of such otherwise inadmissible information to the trier of fact. Searle supports the conclusion implied by Rule 703 that an expert may give a full account of the methodology and resources used in reaching inferences or conclusions.

Although both Ward and Searle dealt with expert opinions in the medical field, the reasonable reliance test embodied in Rule 703 should extend to any field of expertise. After a court resolves pre-
liminary questions of law, the trier of fact determines the weight given to the expert’s testimony. The introduction of the foundation of the expert’s opinion enables the trier of fact to make a more informed evaluation of the expert’s conclusions. Accordingly, there is no justification for restricting the disclosure of an expert’s methodology or resources to the medical field. Such a narrow interpretation of Ward ignores the reasoning behind the decision.

Furthermore, it is critical to distinguish the use of underlying data or facts under Rule 703 from the question of substantive admissibility. Several cases have interpreted Ward as establishing a new hearsay exception. This interpretation is very misleading. First, the underlying basis of the expert’s opinion is offered for limited purposes. The question is not whether the underlying basis is offered for the truth of the matter asserted. It is simply whether the material satisfies Rule 703. When evidence not otherwise admissible is offered pursuant to Rule 703, the trier of fact may use the data only for the purpose of determining whether the basis of the expert’s opinion is sound. At an appropriate time the trial court should entertain a motion for a limiting instruction to the jury concerning the use of such materials. A party is certainly entitled to such an instruction when the inadmissible data tends to prove another disputed fact. Second, even if Rule 703 operates to except matter from the hearsay doctrine, matters that are sufficiently trustworthy to be

v. Sims, 514 F.2d 147 (9th Cir. 1975) (psychiatrist’s testimony regarding defendant’s sanity could be based upon information obtained from government attorneys and IRS agents); Elgi Holding, Inc. v. Insurance Co. of N. Am., 511 F.2d 957 (2d Cir. 1975) (opinion that arson had occurred could be based on un unintroduced laboratory report); Nanda v. Ford Motor Co., 509 F.2d 213 (7th Cir. 1974) (opinion that firewall around an automobile gas tank was needed could be based upon a report of the National Advisory Committee for Aeronautics entitled: “Appraisal of the Hazard to Human Survival in Airplane Crash Fires.”).

75. In In re Smilley, 54 Ill. App. 3d 31, 35, 369 N.E.2d 315, 318 (1977), the court asserted: “Necessarily, we agree with respondent that the standards for admissibility of the ‘hearsay’ testimony set forth in Ward were not met in this case.” (emphasis added) Accord, Clemons v. Alton & S. R.R. Co., 56 Ill. App. 3d 328, 370 N.E.2d 679 (1977) (court referred to the “hearsay” rule in Ward and held that the offered testimony fell within that rule).

76. “Evidence not otherwise admissible is not admitted under this Rule [703] for its truth; it is admitted to explain the bases of the expert opinion.” SALTZBERG & REDDEN, supra note 30, at 427.

77. Because data is not offered for its own validity does not mean it is not being used to show or explain the truth of the matter asserted by the expert’s opinion. Hence the use of hearsay standards to determine the admissibility of the underlying data itself is both inaccurate and confusing.

78. SALTZBERG & REDDEN, supra note 30, at 427.

79. Id.

80. McElhaney, supra note 6, at 482 n. 83. In general, a request for such an instruction would be a mistake, for in most instances it would only serve to underscore the unwanted testimony. Id.
offered substantively under hearsay exceptions are distinguishable from material which is inadmissible except as the basis of the expert’s opinion. The former category is scrutinized under traditional trustworthiness standards within the hearsay rule, while the latter is primarily governed by the reliance test embodied in Ward and Rule 703.

The Reasonable Reliance Standard

Rule 703 indicates that an expert may base his opinion on data reasonably relied upon by experts in a particular field. The underlying matter, if reasonably relied upon, need not be otherwise admissible into evidence. Whether a particular matter falls within this category is a question left to the trial court’s discretion. Rule 703 directs a court to determine “reasonable reliance” on the basis of prevalent practice in the field of expertise at issue. Nevertheless, courts sometimes determine the question of reasonable reliance with reference to evidentiary concepts of reliability. The fact that the underlying matter in question usually passes muster under both standards of reliability is immaterial. An essential purpose of Rule 703 is to align judicial practice with the out-of-court practice of the experts themselves. Therefore, courts should define “reasonable reliance” in the context of standards employed by experts in a particular field. The court’s initial conclusion that an expert is qualified to testify should mean that the expert’s underlying data is also acceptable for Rule 703 purposes. When a court refuses to defer to

81. Spector, supra note 52, at 290.
82. "Rule 703 recognizes that there may be data which has not yet reached the degree of trustworthiness required by the hearsay rule entitling it to consideration by the jury which nevertheless is a sufficiently reliable for an expert to assess." 3 J. WEINSTEIN & M. BERGER, WEINSTEIN'S EVIDENCE § 703 (01), at 703-04 (1976) [hereinafter cited as WEINSTEIN].
83. Fed. R. Evid. 703.
84. Id.
85. This follows from the trial court’s inherent power to determine the ultimate admissibility of evidence.
86. See cases at note 75, supra.
88. Under this approach a court may reason as follows:

Certainly, I must decide the foundational question under Rule 104(a). What I am to decide is not whether I think it is reasonable to rely on such information, but whether I find the profession in question thinks it reasonable to do so. While I personally would not rely on this information, the Federal Rules defer to the standards of the profession of the expert witness, outside of gross extremes, which are not presented here. Any objection to the basis for this expert opinion may be shown on cross-examination, and goes to the weight the jury should give the opinion, but does not affect its admissibility. The evidence is admitted.

McEhlaney, supra note 6, at 486.
the standards of the experts, the purpose of Rule 703 is frustrated.
It does not follow from the foregoing that the application of Rule 703 permits experts to dictate standards of evidentiary proof. A review of the matters within the sound discretion of the court indicates that the spectre of the expert usurping the judicial role is unfounded. First, it is the court who determines whether the expert’s testimony will assist the trier of fact. Second, assuming a matter is reasonably relied upon by experts in a field, the court has the power to limit or deny proof on any matter on the basis of exclusionary rules. This does not mean that the court reconsiders the question of reasonable reliability. Under such circumstances, the issue is not one of reliability, but one of exclusionary policies which often involve constitutional considerations. A court may conclude that the policy at stake is not sufficiently vindicated by a limiting instruction as to the basis of the expert’s opinion. Finally, the court may restrict proof on a matter when its probative value is clearly outweighed by other countervailing factors. Thus, if the dangers of prejudice, unfair surprise or the potential of ineffective cross-examination exist due to the expert’s reliance on out-of-court materials, the court may exclude the expert’s opinion. Admittedly, the underlying materials may be considered untrustworthy under evidentiary principles. However, the determinative factor is the prejudice to the opposing party, and it is that countervailing consideration which supports a court’s ruling to exclude the facts or data.

Presentation of Expert Testimony

Discussion of the presentation of expert testimony must be qualified in two respects. First, the trial court has considerable discretionary control over such matters. In effect, the court retains a de facto veto over the mode of presentation. Thus, examining counsel may elect alternative formats unless the court requires otherwise. Second, examination of the possible formats for introducing expert

89. Id.
90. For example, best evidence and relevancy rules may delimit the scope of an expert’s reasonable reliance. For a discussion of these issues see Spector, supra note 52, at 299-300.
91. Id. For example, an expert could base his opinion on illegally obtained evidence. Though an expert may reasonably rely on such material in his own practice, fourth amendment considerations may compel the exclusion of the opinion. Obviously, this is a matter for the trial judge. Id.
92. Id.
93. Id. Although no constitutional defect has been found in relation to the lack of effective cross-examination of the inadmissible bases of an expert’s opinion, see note 63, supra, a judge presumably retains the power to exclude an opinion on these grounds in the interest of fairness. See also text accompanying notes 118-20, infra. E.g., Sherman v. City of Springfield, 77 Ill. App. 2d 195, 222 N.E.2d 62 (1967).
testimony that are supported by Illinois common law is essentially an abstract inquiry devoid of the tactical considerations present in a courtroom situation. Accordingly, the circumstances at trial may dictate the most advantageous format for presenting such testimony. This discussion simply explores the feasible alternatives a litigator may choose from in eliciting expert testimony.

**Illinois Common Law**

Traditionally, when an expert witness renders his opinion the mode of introducing his testimony is restricted. Certainly an expert with first-hand observations, such as the treating physician, is permitted to testify concerning matters within his personal knowledge. However, if the expert testimony only entails a series of conclusions developed primarily from a field of expertise, the mode of introducing such testimony changes. In such situations, the conventional hypothetical question is used to elicit the expert's opinion.

The hypothetical question is the traditional common law method for the presentation of expert testimony. When examining counsel uses this format the expert's conclusion follows a question carefully developed to include the underlying bases of the expert's opinion. Several common law rules define the permissible scope of the hypothetical. First, the expert may not decide any controverted facts contained in the hypothetical. He may only assume that the facts are true solely for the purpose of forming an opinion. Second, the question must include all undisputed facts which are relevant and material to the opinion, since their omission is misleading to the trier of fact. Finally, there must be evidence which tends to prove the assumed facts in the hypothetical. However, there are two

94. McCormick refers to this type of witness as a "non-fact" expert. McCormick (2d ed.), supra note 6, § 14, at 31.


exceptions to this last principle. When examining counsel guarantees that evidence will be introduced, a fact not presently in evidence may be included in the question. Furthermore, Ward establishes that an expert may reasonably rely on material which is otherwise not admissible. It follows that such underlying facts or data can be included within the hypothetical.

The general rules defining the contours of the hypothetical question prove difficult to apply in practice. Moreover, while the essential purpose of the hypothetical is the disclosure of the underlying bases of the expert's opinion to the trier of fact, that purpose is far too easily muddled by the clumsy practitioner, and all too often subordinated by the skillful litigator. The hypothetical format encourages overly long, confusing questions and affords examining counsel an opportunity to sum up his case in the middle of trial. Notwithstanding these difficulties, and despite repeated criticism, Illinois common law apparently continues to mandate the use of the hypothetical question.

The hypothetical is the logical counterpart of the common law limitation which restricted the basis of an expert's opinion to facts or data admitted into evidence. In theory, the hypothetical method prevents the expert's testimony from misleading the trier of fact. Counsel elicits the expert's opinion in a hypothetical form so that the expert will not appear to be testifying as to the truth of facts for which he had no first-hand information. The Ward decision's
recognition of Federal Rule 703 may present a challenge to some of these assumptions underlying the hypothetical in Illinois. Ward indicates that the underlying basis of expert opinion may include facts or data not in evidence, but reasonably relied upon by experts. When the underlying basis of an expert opinion includes facts not in evidence, the question arises as to how such material should be disclosed to the trier of fact.

Under a strict hypothetical format, examining counsel will disclose the data, and the expert is then required to assume the truth of the inadmissible facts as he hears them reuttered in a hypothetical question. In such circumstances, this hypothetical mode of presentation constitutes an unnecessary charade that promotes confusion. With respect to underlying data not in evidence, it is the expert who has the relative first-hand information, and he is usually in the best position to offer an explanation of such facts. The purpose of disclosure to the trier of fact is best served through a straightforward explanation by the expert. Moreover, if there is a concern about misleading the trier of fact as to the truth of such facts, a limiting instruction would be just as useful as an attempt to frame the matters in a hypothetical. The expansion of underlying bases for expert opinions recognizes a modern trend to align judicial procedures with those of the experts. Subsequent to Ward, the expert should be allowed greater flexibility in the format of his testimony so that he may disclose the foundation of his opinion himself.

**PROPOSED RULE 705**

Greater flexibility in the presentation of expert testimony should follow an expansion of the permissible matter upon which an expert may rely in developing his conclusions. The enactment of some version of Rule 705 would assure this result. Rule 705 obviates the

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109. McElhaney points out the absurdity of this situation: "It would hardly make sense to provide that [the bases for an opinion need not be admissible in evidence] and then require that the expert assume the truth of those inadmissible facts as he listens to them recited in a hypothetical question." *Id. at 487.*

110. In this respect, Spector notes that:

> With the adoption of Rule 703, there is no longer a need for the hypothetical question. The original purpose of the question was to elicit the basis of the expert's opinion in a non-objectionable manner. Now the expert's opinion no longer must be based solely on admissible evidence. Thus, there is no reason to retain this confusing and often abused practice.

Spector, *supra* note 52, at 304-05.


112. *See discussion accompanying notes 108-10 supra.*

113. The text of the Federal version of Rule 705 is """"The expert may testify in terms of
requirement of preliminary disclosure of the underlying basis of an expert's opinion, and thus eliminates the mandatory use of the hypothetical question. Rule 705 also allows examining counsel to use alternative formats in presenting expert testimony unless the court requires otherwise. Moreover, enactment of Rule 705 would compliment the adoption of Rule 703 in People v. Ward, and give the field needed consistency. Illinois courts have so far failed to adopt a rule similar to 705. The remainder of this article will briefly analyze the potential impact of abandoning the mandatory hypothetical format. It is submitted that the difficulties associated with such reform would be insubstantial.

The primary argument against the adoption of Rule 705 is that in effect, it places the burden of disclosing the foundation of an expert's opinion upon opposing counsel. Since Rule 705 allows an expert to state his opinion without prior disclosure of the underlying matters relied upon, opposing counsel may not learn the foundation of the expert's opinion on direct examination. Consequently, the advantages which accrue to examining counsel on direct examination are said to create substantial disadvantages for opposing counsel on cross-examination. Admittedly, this claim has merit when opposing counsel is not sufficiently appraised of the bases of an expert's opinion prior to trial. However, assuming adequate discovery, the enactment of Rule 705 itself does not work to any party's advantage per se. If examining counsel foregoes his opportunity to present the underlying foundation of the expert's opinion,

opinion or inference and give his reasons therefore 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. The proposed Illinois version is the same except it provides, "Any party may require the expert to disclose the underlying facts or data on cross-examination." The Illinois version thus emphasizes the right of the opposing party to have such matters disclosed. For purposes of discussion, Rule 705 will be used to refer to both provisions herein.

114. Note that Rule 705 still requires the expert to state his "reasons", see note 113, supra, but the provision clearly states that a foundation of underlying data is not required. While all of this is subject to the court's discretion, Rule 705 recognizes that experts may testify in a more flexible fashion than lay witnesses when rendering an opinion.

115. See Fed. R. Evid. 705, Advisory Comm. Notes. Although Rule 705 eliminates the mandatory use of the hypothetical, the option is still available to examining counsel. The enactment of some version of Rule 705 may actually go unnoticed by many litigators, since they will continue to elect the hypothetical format for strategic reasons. It has been argued that Rule 705 deserves more careful attention. See McElhaney, supra note 6, at 488.

116. See text accompanying notes 56-61 supra.

117. Traditionally the foundation of the expert's opinion was disclosed to the cross-examiner via the hypothetical question.

118. This criticism was anticipated in the advisory committee notes to Fed. R. Evid. 705.
opposing counsel stands prepared to delve into those matters relied upon which discredit the expert's testimony.

Several safeguards under Illinois law remove the possibility of such unfairness in the event Rule 705 is adopted. First, Illinois statutes provide for extensive discovery of expert witnesses. Under these provisions parties are entitled to the reports, tests, and statements the expert relies upon.\(^{119}\) Moreover, any deficiencies in the discovery process can be rectified prior to trial,\(^{120}\) and therefore the opportunity to test the foundation of the expert's conclusion is preserved. Second, Illinois traditionally permits great latitude in the cross-examination of expert witnesses.\(^{121}\) This latitude is complemented by the right of any party to require disclosure of the bases on cross-examination.\(^{122}\) Finally, the cross-examiner is not compelled to elicit facts other than those which are unfavorable to the expert's opinion.\(^{123}\) Accordingly, cross-examining counsel may probe into such underlying facts or data in a selective fashion.

Another difficulty which some predict will follow adoption of Rule 705 is that the trier of fact is more likely to hear opinions which are ultimately inadmissible.\(^{124}\) This might occur after an expert relates his opinion on direct examination without first disclosing its underlying bases and such matters are later disclosed on cross-examination. If the court finds the underlying matter either inadmissible or of a type not "reasonably relied" upon, the opinion must be excluded. Unfortunately, the jury has already heard the opinion.\(^{125}\) While the

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119. ILL. REV. STAT. ch. 110, § 58(3) (1977) provides for discovery in civil cases as follows:
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.

Extensive discovery of expert witnesses is available in criminal cases pursuant to ILL. REV. STAT. ch. 110A § 412(a)(i) (1977).

120. "This practice should be standard at any pre-trial conference." WEINSTEIN, supra note 82, § 705(01), at 705-9.

121. The rule, is of course, a familiar one that cross-examination of a witness should be confined to matters brought out upon the direct examination. But in determining the scope of the "matter" testified to on direct examination the rule is not to be given a narrow or technical application. This is especially true with respect to expert testimony. . . . Great latitude is accordingly allowed in the cross-examination of an expert.


122. FED. R. EVID. 705.


124. McElhaney, supra note 6, at 488.

125. The problem that then confronts both the court and counsel in this situation is commonly referred to as attempting to "unring the bell." Id., at 489 n. 97.
court may direct the jury to disregard the expert’s opinion, the instruction’s efficacy is questionable.\textsuperscript{126}

This situation can be avoided by various trial techniques. As a practical matter, cross-examination revealing the faulty basis of the expert’s opinion may totally discredit his testimony. When opposing counsel wishes to prevent the expert opinion from reaching the jury, a motion \textit{in limine} may be necessary.\textsuperscript{127} Thus, when pre-trial discovery indicates that the basis of the expert’s opinion is inadmissible and not of a type reasonably relied upon by experts in the field, the court may limit or prohibit proof on such matters. In addition, counsel can request a \textit{voire dire} examination of the prospective witness at trial prior to the admission of the expert’s opinion. This could demonstrate to the judge the inadmissibility of the expert’s opinion.\textsuperscript{128}

Many of the potential difficulties involved in the enactment of Rule 705 can most easily be avoided if courts and counsel do not read Rule 705 too literally. The rule should not be construed so as to totally eliminate the use of foundation testimony where necessary.\textsuperscript{129} Rule 705 provides flexible guidelines which govern the presentation of such testimony. Examining counsel should recognize that the presentation of the expert’s opinion in an understandable, persuasive, and meaningful manner to the trier of fact will certainly necessitate at least minimal foundation testimony in most cases.\textsuperscript{130}

More importantly, counsel may receive some enlightenment from the court concerning such matters, since ultimately the court has

\begin{itemize}
\item \textsuperscript{126} “Telling a jury to disregard something they have just heard is about as effective as telling someone not to think of pink elephants.” \textit{Id.}
\item \textsuperscript{127} Motion in limine is a procedure through which counsel can obtain a ruling on the admissibility of evidence before such evidence is introduced. In criminal trials, this technique is often called a motion to suppress.
\item \textsuperscript{128} The \textit{voire dire} examination can be quite an effective trial technique. It is far more effective to destroy the foundation of an expert’s opinion before it goes to the jury, rather than attempting to undercut it on cross-examination. McElhaney, \textit{supra} note 6, at 476.
\item \textsuperscript{129} This is generally how the federal courts have interpreted Rule 705. For example, in Polk v. Ford Motor Co., 529 F.2d 258, 271 (8th Cir.), \textit{cert. denied}, 426 U.S. 907 (1976), the court asserted that even under Rule 705, “There must, of course, be sufficient facts already in evidence or disclosed by the witness as a result of his investigation to take such testimony out of the realm of guesswork and speculation.” \textit{Accord}, Daniels v. Matthews, 567 F.2d 845 (8th Cir. 1977). See Logsdon v. Baker, 17 F.2d 174 (D.C. Cir. 1975); United States v. R.J. Reynolds Tobacco Co., 416 F. Supp. 316 (D.N.J. 1976).
\item \textsuperscript{130} \textit{Weinstein}, \textit{supra} note 82, § 750(01), at 705-7.
\end{itemize}

Weinstein offers two additional reasons why disclosure might be necessary. First, a witness’ familiarity with specific data may have to be demonstrated in order to qualify him as an expert. Secondly, an expert witness with first hand knowledge may be required to recite the facts underlying his opinion, because the facts themselves must be disclosed in order to satisfy the burden of proof. \textit{Id.}
the power to require foundation. The court may determine that the cross-examiner would be unfairly burdened without preliminary disclosure on direct,\textsuperscript{131} or conclude that the opinion is on such a critical matter in the case that an unsupported opinion is inadmissible.\textsuperscript{132} Further, Rule 705 must be viewed in context with other evidentiary principles. Thus, if the disclosure of basis is insufficient, the judge may exclude the opinion for lack of probative value on the ground that it fails to assist the trier of fact.

As outlined above, the problems commonly associated with abandoning the mandatory requirement of the hypothetical question, and preliminary disclosure in general, are somewhat illusory. The benefits offered by no longer requiring total disclosure on direct are substantial. First, by no longer mandating the use of the hypothetical question the court will no longer encourage a confusing and exploitative trial technique.\textsuperscript{133} Second, adopting Rule 705 will eliminate any remaining inconsistency between the Ward holding and the use of the hypothetical question.\textsuperscript{134} Lastly, since preliminary disclosure will no longer be required on direct examination, and the cross-examiner may inquire selectively into those underlying facts,\textsuperscript{135} much confusion and trial time can be saved.

\textbf{Conclusion}

In most respects, the law governing the use of expert testimony in Illinois reflects a modern approach to the subject. Ward’s expansion of the permissible bases of an expert’s opinion, the reception of expert testimony on ultimate issues, and the liberal standards relating to the introduction of expert testimony are the main components. Elimination of the mandatory use of the hypothetical question will complete the modernization process and bring internal consistency to the Illinois law of expert testimony.

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\textsuperscript{131} Although this problem can usually be avoided, see discussion accompanying notes 118-123, supra, certain situations may arise, perhaps involving “unfair surprise”, which could compel a trial judge to require preliminary disclosure of the bases of an expert’s opinion.

\textsuperscript{132} McCormick (2d ed.), supra note 6, § 12 at 26.

\textsuperscript{133} See discussion accompanying notes 103-106, supra.

\textsuperscript{134} See discussion accompanying notes 108-111, supra.

\textsuperscript{135} See discussion accompanying notes 122-124, supra.