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## Ethical Firewalls, Limited Admissibility, and Rule 703

### Cover Page Footnote

Professor of Law, Marquette University Law School. I thank the Fordham Law Review and Professor Daniel Capra for the kind invitation to participate in this Symposium. A research grant by Marquette Law School, for which I thank Dean Joseph D. Kearney, greatly assisted this essay's preparation.

# ETHICAL FIREWALLS, LIMITED ADMISSIBILITY, AND RULE 703

*Daniel D. Blinka\**

## INTRODUCTION

At first look, it seems a straightforward proposition: lawyers should not introduce inadmissible evidence. Trial lawyers who do so are behaving unethically or unprofessionally in some sense. But in what sense? The term “unethical” is certainly problematic, but less appreciated are the perplexing issues involving “admissibility,” an ambiguity that begets ethical ambivalence in the modern adversary trial.<sup>1</sup>

Assume that our plaintiff’s case essentially turns on a single, brief hearsay statement.<sup>2</sup> We will argue for its admissibility under several hearsay exceptions, but each one is problematic. Nonetheless, if opposing counsel misses the hearsay objection (unlikely but not unimaginable), or if the judge accepts just one of the tenuous exceptions, the hearsay evidence is admitted. And what if the judge rules the hearsay inadmissible? Modern evidence rules, we know, permit experts to base opinion testimony even on inadmissible bases, provided they are of a type reasonably relied upon. Thus, our retained expert will testify on direct examination that the hearsay is the type of information upon which she usually relies in drawing professional opinions and inferences. We will ask the judge to allow our expert to discuss the “otherwise inadmissible” hearsay for the limited purpose of explaining her reasoning and opinion, not for its truth.

In sum, the ethical trial lawyer is provided two redoubts by evidence law. First, the fundamentals of trial procedure obligate the opponent to object in a timely and proper manner to the hearsay itself and to each proffered exception. Evidence is not inadmissible until the judge rules it so based

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1. See, e.g., Am. Coll. of Trial Lawyers, Code of Trial Conduct 18(g) (1994) (“A lawyer should not attempt to get before the jury evidence which is improper. In all cases in which a lawyer has any doubt about the propriety of any disclosures to the jury, a request should be made for leave to approach the bench and obtain a ruling out of the jury’s hearing, either by propounding the question and obtaining a ruling or by making an offer of proof.”). The standard’s use of the word “improper,” rather than “inadmissible,” highlights the conceptual and ethical ambiguity inherent in modern evidence law.

2. See *infra* text accompanying notes 125–51 (discussing examples drawn from case law).

(almost always) on an objection. Second, the doctrine of limited admissibility allows proponents to avoid exclusionary rules by offering the evidence for a permissible purpose, a procedure that can be readily abused, especially with expert (witness) assistance.

Distinguished commentators have lamented that modern trial practice, particularly the limited admissibility doctrine, risks turning evidence rules “into something resembling the Internal Revenue Code with fancy loopholes for a favored few.”<sup>3</sup> Nor is this hyperbole. The remark, rather, insightfully reflects that the adversary ethic governs not just the presentation of proof, but also how evidence rules are used at trial.

This essay’s first section provides an overview of multiple admissibility, which is the foundation of modern evidence law. Its corollary, limited admissibility, permits lawyers to offer evidence for one purpose even if the rules preclude its use for others. Trial procedures governing these doctrines contemplate an adversarial use of the rules themselves, inviting parties to evade or ignore exclusionary rules. In sum, doctrine, policy, and procedures combine to create ethical firewalls for lawyers introducing otherwise inadmissible evidence.

Limited admissibility is hardwired into modern evidence law. The second section of this essay offers a brief overview of how the doctrine permeates the Federal Rules of Evidence. Limited admissibility is integral to the very idea of relevant evidence, liberally used in a host of rules governing special aspects of relevancy, and so informs the definition of hearsay that it has assumed constitutional dimensions.

In the third and fourth sections we turn to Rule 703, an innovative rule that sought to modernize trial practice by permitting experts to base opinions on the same type of information upon which they rely in their practices, callings, and professions, regardless of whether such information is admissible at trial. Several cases vividly illustrate the doctrinal consternation that arises when experts rely on inadmissible evidence that the proponent wants placed before the jury to explain (ostensibly) the expert’s opinion and reasoning. These “emerging problems” triggered Rule 703’s amendment in 2000, a solution that explicitly embraced limited admissibility together with the often incoherent, ultimately inconsistent policies it serves. The fourth section discusses how amended Rule 703 provides an additional ethical firewall for counsel intent on exposing the jury to otherwise inadmissible evidence.

The conclusion argues that we must rethink how limited admissibility is used in the Federal Rules of Evidence and at trial. Distinctions painstakingly drawn in an evidence course are probably ill suited for trial. Moreover, we have need not only to recraft limiting instructions, but also to pay more attention to how lawyers may argue such evidence during their closing summations. Finally, the essay concludes with suggestions for

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3. 21A Charles Alan Wright & Kenneth W. Graham, Jr., *Federal Practice and Procedure* § 5062, at 246 (2d ed. 2005).

rethinking Rule 703 so that expert assistance is better reconciled with the often different imperatives governing the pursuit of truth in an adversary trial.

### I. LIMITED ADMISSIBILITY AND ETHICS

Limited admissibility is firmly ensconced in the modern law of evidence. Commentators have duly noted, however, its penchant for “mischief” in evading exclusionary rules of evidence.<sup>4</sup> The discussion below first places limited admissibility in the broader context of multiple admissibility and the fundamentals of trial procedure. The context is essential for understanding our second point: limited admissibility is a key feature in an adversary ethic that permits lawyers to use rules to their client’s best advantage.

#### A. *Multiple and Limited Admissibility: Policy and Procedure*

Most evidence may be used to prove multiple factual propositions.<sup>5</sup> For example, a witness is asked to testify that she received an e-mail stating that her company’s “chief financial officer (CFO) is manipulating financial statements in order to inflate the value of his stock options.” The e-mail may be used to prove multiple propositions, including (1) the effect it had on the reader (e.g., why the witness called government regulators), (2) the declarant’s (the e-mail writer’s) belief that the CFO was manipulating the financials, whether correct or incorrect, and (3) the “fact” that the CFO had manipulated the company’s books. Focusing just on hearsay, the e-mail’s admissibility turns on how it is used as evidence.<sup>6</sup> Moreover, an opponent’s failure to object or to limit the e-mail’s evidentiary use means that it may be used to prove any and all reasonable inferences.<sup>7</sup>

The principle of multiple admissibility forms the core of modern evidence law. Indeed the two are so inextricably interwoven that one distinguished commentator, Professor Kenneth Graham, Jr., quipped that the modern common law of evidence “spawned (or was spawned by)” multiple admissibility, an observation that also nicely captures their blurred origins in providing a rational (logical) foundation for proof at trial.<sup>8</sup> Multiple admissibility simply recognizes that “every piece of evidence supports numerous inferences.”<sup>9</sup> The very concept of “relevant evidence,”

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4. *Id.* § 5067, at 358; see *infra* text accompanying notes 49–60. For the contention that the adversary ethic pervades the rules of evidence generally and contemplates the adversarial use of the rules themselves, see Daniel D. Blinka, *Ethics, Evidence, and the Modern Adversary Trial*, 19 *Geo. J. Legal Ethics* 1 (2006).

5. See 21A Wright & Graham, *supra* note 3, § 5062, at 242 (noting that “every piece of evidence supports numerous inferences”).

6. The hearsay issues are only the most obvious. Documents also raise issues of authentication and the original writings rule.

7. See Paul C. Giannelli, *Understanding Evidence* § 6.02, at 68 (2d ed. 2006).

8. 21A Wright & Graham, *supra* note 3, § 5062, at 243. Professor Kenneth Graham credits John Henry Wigmore with the term “multiple admissibility.” *Id.*

9. *Id.* § 5062, at 242.

as we will see, is keyed to the principle of multiple admissibility.<sup>10</sup> Difficulties quickly surface, however, when some, or even just one, of these inferences are forbidden by an evidentiary rule.

Thus, it should come as little surprise that “[m]uch of the modern law of evidence doubtless emerged from efforts of judges and lawyers to cope with multiple inferences.”<sup>11</sup> And there are a variety of ways to cope with the problem. Suppose that testimony (e.g., our e-mail above) hosts inferences X, Y, and Z, yet only X is permitted by the rules. One solution is to admit the evidence for all reasonable inferences: the price we pay for inference X is the downside of inferences Y and Z.<sup>12</sup> A second solution skews the balance in the opposite direction: exclude the evidence completely, thereby eliminating the good (X) along with the bad (Y and Z). Limited admissibility illuminates a third way: admit the evidence for X but exclude its use for Y and Z, a seemingly reasonable, pragmatic, and enlightened solution that begets yet other problems.<sup>13</sup>

The policy underlying limited admissibility has long, deep roots in multiple admissibility, and it too is tightly interwoven into modern evidence law.<sup>14</sup> The U.S. Supreme Court has elevated the doctrine to axiomatic status:<sup>15</sup>

But there is no rule of evidence which provides that testimony is admissible for one purpose and inadmissible for another purpose is thereby rendered inadmissible; quite the contrary is the case. It would be a strange rule of law which held that relevant, competent evidence which tended to show [for example] bias on the part of a witness was nonetheless inadmissible because it also tended to show that the witness was a liar.<sup>16</sup>

Supporting limited admissibility is the policy of “admitting as much evidence as possible, despite the prejudice that may ensue to one of the parties from jury misuse of the evidence.”<sup>17</sup> Some commentators see the doctrine as a “binary choice” between denying the proponent of needed, helpful evidence and subjecting her opponent to its likely “misuse.”<sup>18</sup> Put differently, limited admissibility embodies a crude “cost-benefit formula”

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10. See *infra* text accompanying notes 63–75.

11. 21A Wright & Graham, *supra* note 3, § 5062, at 242 (citation omitted).

12. See *id.* § 5062, at 243 (discussing prior inconsistent statements).

13. Limited admissibility extends to parties as well as purposes. Thus, evidence may be admissible against party A but not party B in a civil or criminal case. For its typically thorough, insightful discussion, see 21A Wright & Graham, *supra* note 3, § 5064. While party-admissibility raises similar issues, our focus will be on evidence used for a limited purpose.

14. Giannelli, *supra* note 7, § 8.02, at 97 (“The concept of limited admissibility is ingrained in evidence law.”). The varying positions of evidence commentators are succinctly critiqued at 21A Wright & Graham, *supra* note 3, § 5062, at 250–51.

15. See 21A Wright & Graham, *supra* note 3, § 5063, at 254–55 (discussing Rule 105 in light of the common law and the principle of multiple admissibility).

16. *United States v. Abel*, 469 U.S. 45, 56 (1984).

17. 21A Wright & Graham, *supra* note 3, § 5062, at 253.

18. *Id.*

where the trial judge exercises discretion in weighing two quite imperfect alternatives.<sup>19</sup>

Although the policy strikes one as eminently reasonable on its face, the doctrine of limited admissibility is unsettled by its procedural features. First, there is the seemingly capricious way in which the doctrine is invoked. Second, the principal method of enforcing the limited use of evidence, namely, a terse, often cryptic jury instruction, has richly earned the hackles and brickbats of courts and commentators for decades.

First, limited admissibility is not self-executing under either Rule 105 or the common law; the burden usually falls on the opponent to raise the issue. The proponent, of course, may elect to raise the issue herself at trial or in a motion in limine, particularly where an objection is obvious or clearly anticipated.<sup>20</sup> Yet this is purely a matter of proponent's choice. A judge may also intervene sua sponte (without objection or motion by the parties), but most judges are loathe to do so except in extraordinary circumstances.<sup>21</sup> Absent action by the proponent or the judge, the opponent must move to restrict the evidence or face the procedural consequences of default.<sup>22</sup>

Motions to restrict evidence under Rule 105 are closely related, functionally and procedurally, to objections under Rule 103. Unless there is a timely and specific objection or request to limit the evidence by opposing counsel, "the trial judge commits no error by doing nothing."<sup>23</sup> In terms of timing, the request (or objection) normally should be made when the evidence is proffered regardless of whether the opponent is seeking to exclude it altogether,<sup>24</sup> requesting a limiting instruction, or moving that proponent's argument be restricted.<sup>25</sup> The request, like an objection, should be reasonably specific. Although opposing counsel need not have worked out the intricacies of a limiting instruction (assuming she wants one), the request should nonetheless notify the judge and proponent of the grounds upon which the evidence may be misused and its limited, permissible use.<sup>26</sup> Of course, opposing counsel may just elect to object to the evidence and

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19. The policy underlying Rule 105 and limited admissibility is discussed in *id.* § 5062, at 245, 253.

20. *Id.* § 5065, at 326.

21. See *id.* § 5066. Most trial judges are inclined to let the lawyers try their cases as they see fit. A judge will likely intervene only when there is substantial risk of plain error. *Id.* § 5066, at 341–44.

22. *Id.* § 5065, at 325–26; see also Giannelli, *supra* note 7, § 8.05[A], at 102.

23. 21A Wright & Graham, *supra* note 3, § 5065, at 327.

24. Here the "request" takes the form of an objection. The procedural minuet, as we shall see, often features the proponent then articulating a permissible purpose. See *infra* text accompanying notes 49–60.

25. See 21A Wright & Graham, *supra* note 3, § 5065, at 335–37 (discussing the complications of the timing requirement depending on whether the proponent's use was reasonably foreseeable and whether opposing counsel is seeking a limiting instruction or restrictions on counsel's ability to argue the evidence). Even if the opponent is undecided about when a limiting instruction should be read—then or at the close of the case—or undecided about even asking for one, the request for limitation should be made whenever the misuse of the evidence is reasonably foreseeable.

26. *Id.* § 5065, at 333.

thereby force the proponent to articulate the permissible ground in an offer of proof.<sup>27</sup> In sum, Rule 105 is not invoked unless requested by the parties. Absent action by the proponent, the onus falls on opposing counsel.

Doing nothing carries staggering procedural implications and imposes extraordinary costs on the opponent, whether the omission is deliberate (tactical) or inadvertent. First, any error is waived on appeal unless it falls within the nether regions of plain error. Second, and with grave implications for trial, the jury is free to use the evidence for any relevant purpose, which also means that the proponent may so argue in closing. To continue with our e-mail example, the jury may use the evidence to infer facts X, Y, and Z absent a limiting ruling. Third, and related, reviewing courts may rely on the evidence for any and all relevant inferences when assessing the sufficiency of the evidence.<sup>28</sup>

Costs aside, opposing counsel may rationally decide that often it is just not worth the effort. After all, the request (or objection) usually only serves to draw the jury's attention to harmful evidence while underscoring counsel's acknowledgment (the request) that the evidence hurts. And assuming the judge grants the request, limited admissibility is enforced through two often unsatisfactory procedures. First, the judge may give a limiting instruction. Second, the judge's ruling itself restricts how proponent may argue the evidence in closing summation. We will discuss each in turn.

The much maligned limiting instruction is often the prime remedy.<sup>29</sup> Perversely, it is the very ineffectiveness of the limiting instruction that may provide the opponent's strongest argument against the limited use of the evidence. If opposing counsel convinces the trial judge that the limiting instruction will not protect the affected party from unfair prejudice, the judge may exclude the evidence altogether under Rule 403.<sup>30</sup> Nonetheless, limiting instructions are a timeworn, well-established feature of modern trials, their efficacy notwithstanding. Their use is amply supported by the assumption (legal fiction?) that juries follow their instructions, an article of faith fiercely protected by a gag (Rule 606) that renders jurors incompetent to testify about their deliberations.<sup>31</sup>

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27. See *id.* § 5065, at 327–29 (discussing the interplay of Rules 103 and 105, particularly the use of objections to “smoke out the limited admissibility of the evidence”).

28. See Giannelli, *supra* note 7, § 6.02, at 68; *id.* § 8.05[C], at 102–03; see also 21A Wright & Graham, *supra* note 3, § 5065.

29. Although the limiting instruction and restricted argument by counsel are the prime procedural remedies, the judge may consider others, including excluding the evidence. 21A Wright & Graham, *supra* note 3, § 5062, at 246 (noting that “trial courts have an extensive arsenal against prejudice that goes beyond popgun limiting instructions”); see also *id.* § 5063.1, at 275–77 (listing other remedies).

30. See Giannelli, *supra* note 7, § 8.06, at 103.

31. Fed. R. Evid. 606(b); see Giannelli, *supra* note 7, § 18.08. To take an extreme example, even were all jurors to sign an affidavit to the effect that they collectively and deliberately ignored a limiting instruction and used the evidence for an improper purpose, Rule 606 would exclude the affidavit in favor of the fiction that the jury did indeed (if not in reality) follow the instruction.



Rule 105 explicitly endorses limiting instructions while providing scant guidance about how a judge should balance probative value against prejudicial effect.<sup>32</sup> The judge must give an instruction upon request, which must be timely (i.e., normally the request must coincide with the admission of the evidence itself unless its misuse was not reasonably foreseeable).<sup>33</sup> The judge in her discretion may give a limiting instruction *sua sponte*, but the better authority strongly suggests that she consult with counsel, who may forego the cure because it is sometimes worse than the disease, despite the risk that the omission may result in a waiver on appeal.<sup>34</sup> The timing of the instruction itself raises a further issue. Counsel may demand that the instruction be given when the evidence is admitted, which is perhaps the “best time.”<sup>35</sup> It may, however, be delayed (or repeated) during the closing charge to the jury.<sup>36</sup> Finally, the form and content of the instruction depends, of course, on the evidentiary issue itself. The most helpful instructions tell the jury both how it can and cannot use the evidence in question.<sup>37</sup>

Courts and commentators have had a veritable field day questioning, criticizing, and often condemning limiting instructions as applied in particular cases and in general. It may be that limiting instructions have inspired some of the most colorful commentary known to evidence law. One judge cracked that “if you throw a skunk into the jury box, you can’t instruct the jury not to smell it.”<sup>38</sup> Judge Learned Hand observed that a limiting instruction “is, the recommendation to the jury of a mental gymnastic which is beyond, not only their powers, but anybody’s else.”<sup>39</sup> And a final illustrative comment is from Justice Robert Jackson, who remarked upon “[t]he naive assumption that prejudicial effects can be overcome by instructions to the jury, all practicing lawyers know to be unmitigated fiction.”<sup>40</sup> Justice Jackson may have placed too much

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32. See 21A Wright & Graham, *supra* note 3, § 5063.1, at 271–75 (discussing the factors that the balancing approach weighs).

33. *Id.* § 5066, at 338–39; see also Giannelli, *supra* note 7, § 8.05[A], at 102.

34. 21A Wright & Graham, *supra* note 3, § 5066, at 343–44; see also *supra* text accompanying note 28.

35. 21A Wright & Graham, *supra* note 3, § 5066, at 345. The authority is also split over whether the instruction must precede the admission of the evidence or whether it may follow, and, if so, how near in time the instruction must be to the introduction of evidence. The wisest approach is to entrust these details to the judge’s discretion, requiring only that the instruction be “reasonably near” the evidence’s introduction. *Id.* § 5066, at 346–47; see also Giannelli, *supra* note 7, § 8.05[B], at 102.

36. 21A Wright & Graham, *supra* note 3, § 5066, at 348.

37. *Id.* § 5066, at 351.

38. *Id.* § 5066, at 353 (quoting *Dunn v. United States*, 307 F.2d 883, 885 (5th Cir. 1962)).

39. *Id.* (quoting *Nash v. United States*, 54 F.2d 1006, 1007 (2d Cir. 1932)).

40. *Id.* (quoting *Krulewitch v. United States*, 336 U.S. 440, 453 (1949) (Jackson, J., concurring)).

confidence in the trial bar's (apparent) judgment, yet, to date, empirical studies have failed to sway the issue one way or the other.<sup>41</sup>

So why then do lawyers request limiting instructions? First, despite the lack of empirical support, one hopes that jurors take the judge's cautionary words to heart and try their best to keep the evidence in harness. Sometimes, however, the distinction between the permissible and impermissible uses of evidence is strained to the point of credulity, so why would a lawyer request a limiting instruction under these circumstances? This points to a second, more compelling reason for making the request: a failure to request a limiting instruction may be treated as a waiver of the issue on appeal.<sup>42</sup> Yet, here too, we see the proverbial two-edged sword. Appellate courts often point to such instructions, and the "fiction" that the jury followed them, in finding that evidence was properly admitted for a limited purpose.

Regardless of limiting instructions, Rule 105 commands the trial judge to "restrict the evidence to its proper scope."<sup>43</sup> Less abstractly, Rule 105 limits how the lawyers, judge, and jury may use the evidence. The proponent is limited to whatever purpose (or against whichever party) the evidence is admitted because "she is the lawyer most tempted to abuse the doctrine."<sup>44</sup> Yet so also is the opposing party (who probably requested the limitation in the first instance). In terms of trial practice, the restriction limits how the parties' lawyers may argue the evidence during their closing summations.<sup>45</sup> Judges are similarly bound by their own rulings, whether serving as the trier of fact in a bench trial or assessing the sufficiency of evidence in motions after verdict.<sup>46</sup> Juries are also theoretically restricted in their use of the evidence, most often through the tool of limiting instructions but also through a judge's power to comment on the evidence, assuming the judge has such authority.<sup>47</sup>

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41. *Id.* § 5066, at 353–54 (discussing and criticizing the empirical studies of limiting instructions). See generally Todd E. Pettys, *The Emotional Juror*, 76 *Fordham L. Rev.* 1609 (2007); Regina A. Schuller, *Expert Evidence and Hearsay: The Influence of "Secondhand" Information on Jurors' Decisions*, 19 *Law & Hum. Behav.* 345 (1995).

42. See Giannelli, *supra* note 7, § 8.05[C], at 102–03; see also 21A Wright & Graham, *supra* note 3, § 5065, at 327–28 ("[I]f the trial court overrules the [opponent's] objection, the opponent cannot stand on the objection if the evidence is arguably admissible for a limited purpose; she must request a limiting instruction to force the limited purpose into the open." (citations omitted)).

43. Fed. R. Evid. 105.

44. 21A Wright & Graham, *supra* note 3, § 5067, at 355 ("The proponent who gets evidence in for a limited purpose is bound by the representation that admitted the evidence . . .").

45. See *id.* § 5067, at 355–58 (discussing the "mischief" that lawyers on all sides may generate in civil and criminal trials).

46. *Id.* § 5067, at 358–59.

47. *Id.* § 5067, at 359–60.

### B. Ethical Considerations

Murky legal doctrine, conflicted policies, and capricious procedures guarantee that ethical issues involving limited admissibility will be similarly contorted. In many ways, limited admissibility serves the ends of both those evading the smothering effect of exclusionary rules of evidence as well as those seeking to smother the other. The purpose of this section is to identify and track ethical implications that are present whenever limited admissibility is invoked, but also with an eye toward Rule 703, which we will discuss later in this essay.<sup>48</sup>

The doctrine's penchant for lawyerly "mischief" is clearly present.<sup>49</sup> Professor Graham observes that limited admissibility "means that if the proponent can find a single legitimate purpose, the evidence is admissible even though his opponent can find ten improper purposes for which the evidence might be used."<sup>50</sup> With some hyperbole, Graham continues,

In short, all that stands between a party and his opponent's high-priced (or unscrupulous) lawyer's imaginative evasion of the Evidence Rules is a limiting instruction. Indeed, if the judge is biased or stupid, the lawyer does not have to be particularly bright—so long as he represents someone the judge likes.<sup>51</sup>

Nor is the mischief confined to purpose limitations. For example, one "sneak[y] tactic" involves joining an uninsured party to an action, eliciting her damaging admission, and "then dismissing her from the action in hopes that the trial court will not grant a mistrial to avoid prejudice to the remaining deep pockets."<sup>52</sup>

Abuses—assuming that is the right word—are not, however, confined to the unscrupulous and the sneaky; rather, limited admissibility is an open invitation to evade or ignore exclusionary bars to evidence. Proponents are the usual suspects when naming likely offenders.<sup>53</sup> Yet opposing counsel is hardly a hapless victim; the doctrine permits the exclusion of evidence that might very well be admissible for several permissible uses. For instance, opposing counsel may object to evidence with the (silent) knowledge that there are several permissible, limited uses of the evidence of which the inexperienced or inept proponent is unaware. If the judge sustains the objection, neither opposing counsel nor the judge is under any obligation to educate the proponent about other theories of admissibility.<sup>54</sup> In sum, the

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48. See *infra* text accompanying notes 112–24.

49. 21A Wright & Graham, *supra* note 3, § 5067, at 358.

50. *Id.* § 5062, at 245.

51. *Id.* § 5062, at 245–46. My only quibble with Graham's characterization is that limited admissibility's mischief is open to all comers, not just the unscrupulous and the overpaid.

52. *Id.* § 5067, at 357–58.

53. *Id.* § 5067, at 355 (noting that the proponent "is the lawyer most tempted to abuse the doctrine").

54. Blinka, *supra* note 4, at 36–37.

byzantine procedural complexities of the doctrine invite aggressive use of evidence rules by both proponents and opponents.

Ethical questions most often surface, however, when the proponent seeks to sidestep exclusionary rules through purpose limitations, which immediately implicates proponent's motives. Consider a simple hearsay problem. Does proponent really want to introduce the e-mail about the CFO's speculations (our example above) to show why the e-mail reader went to government regulators (permissible), or does she secretly hope that the jury will use it as proof that "in fact" the CFO engaged in such misconduct (not permissible), regardless of the judge's instructions? The short answer is that admissibility does not turn on the lawyer's motives or unarticulated (at least on the record) tactical thinking.<sup>55</sup>

Although some lawyers undoubtedly abuse the doctrine, it is a doctrine that nonetheless invites abuse and sharp practice by harboring distinctions that are often questionable and sometime just plain meaningless. Moreover, its procedures are truly a "trap for the unwary," whether proponent or opponent.<sup>56</sup> The rules of professional responsibility largely default to the law of evidence regarding questions of admissibility.<sup>57</sup> Waiver rules, as we have seen, guarantee that an opponent's failure to object or to request a limiting instruction renders the evidence admissible for all relevant purposes.<sup>58</sup> More concretely, this places the onus on opposing counsel to anticipate potential misuses of evidence and to timely request a restriction on its use.<sup>59</sup> Meanwhile, the proponent is not under any duty to alert the court, much less opposing counsel, to potential pitfalls or to offer the evidence for a permissible purpose in the first instance. And when confronted by a timely objection, the proponent may resort to an ostensible permissible purpose even if she harbors the secret hope that the jury will nonetheless use it for an improper purpose, regardless of the judge's instructions. The evasion is most troubling, and perhaps the easiest to effect, when the distinctions between the permissible and impermissible purposes are vague, overlapping, or simply nonsensical.

In sum, the doctrine of limited admissibility enthusiastically embraces the adversary ethic by permitting trial lawyers to use evidence rules to their

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55. See J. Alexander Tanford, *The Trial Process: Law, Tactics and Ethics* 211 (3d ed. 2002) [hereinafter Tanford, *Trial Process*] (arguing that "[y]ou may not include in your direct examination evidence which is not admissible" and, even further against the grain, "you may not include evidence that you think is not admissible"); see also J. Alexander Tanford, *The Ethics of Evidence*, 25 *Am. J. Trial Advoc.* 487 (2002). My critique of Tanford's high-minded but ultimately unworkable "good faith" principle may be found at Blinka, *supra* note 4, at 39-42.

56. See 21A Wright & Graham, *supra* note 3, § 5062, at 254.

57. Blinka, *supra* note 4, at 7-11. See generally Fred C. Zacharias, *Are Evidence-Related Ethics Provisions "Law"?*, 76 *Fordham L. Rev.* 1315 (2007).

58. See *supra* text accompanying note 28.

59. Good trial lawyers understand that trials are not final examinations in evidence courses. Objections are usually kept to the minimum and reserved for particularly troubling evidence. In sum, the mind set is never to object reflexively and appear obstructionist. See, e.g., Tanford, *Trial Process*, *supra* note 55, at 184-87.

best advantage at trial.<sup>60</sup> As we will see in the next section, the doctrine permeates modern evidence law.

## II. LIMITED ADMISSIBILITY AND THE FEDERAL RULES OF EVIDENCE

The doctrines of multiple admissibility and limited admissibility are threaded throughout the Federal Rules of Evidence. In numerous instances a “rule excludes evidence only for one purpose while explicitly or implicitly permitting its use for other purposes.”<sup>61</sup> By no means is limited admissibility cabined in Rule 105; rather, the doctrine is structural, forming the core of modern evidence law. A brief survey underscores how pervasively these doctrines define and delimit nearly all key evidentiary rules.<sup>62</sup>

The relevancy rules and so-called quasi-privileges ensconced in article IV of the Federal Rules of Evidence provide many of the most dramatic examples and difficult problems. The concept of relevant evidence openly embraces the principle of multiple admissibility, and specialized relevancy rules are textbook illustrations of limited admissibility.

The concept of relevancy is “the threshold issue for *all* evidence.”<sup>63</sup> Evidence that is not relevant is excluded.<sup>64</sup> Relevant evidence is admissible unless otherwise excluded by the rules.<sup>65</sup> Under Rule 401 evidence is relevant if it has any tendency to make a consequential proposition more or less likely.<sup>66</sup> The definition has two elements. Consequential propositions are delimited by the substantive law and the pleadings; their range may be expanded or contracted depending on what claims, defenses, or criminal charges are filed.<sup>67</sup> The only limitations are counsel’s imagination (and learning) and the law governing frivolous claims and defenses.<sup>68</sup> Yet multiple admissibility is truly given effect through the “any tendency” element, which governs the relationship between the evidence and the factual proposition it is offered to prove. As long as the evidence has “any tendency” to make that proposition more or less likely, it is relevant. The tendency may be grounded in life experiences and common sense; it is not an arid exercise in logic nor is it confined to case law precedent. The factual proposition may be just a tenuous link in a circumstantial chain because, as the advisory committee put it, “[a] brick is not a wall.”<sup>69</sup> Rule

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60. 21A Wright & Graham, *supra* note 3, § 5062, at 254 (“Rule 105 genuflects toward traditional notions of party autonomy . . .”).

61. *Id.* § 5063, at 256.

62. This survey is eclectic, not exhaustive. For another survey that also makes the point that limited admissibility pervades the federal rules, see 21A Wright & Graham, *supra* note 3, § 5063.

63. Giannelli, *supra* note 7, § 9.01, at 107.

64. Fed. R. Evid. 402.

65. *Id.*

66. Fed. R. Evid. 401.

67. See Giannelli, *supra* note 7, § 9.02, at 108–10.

68. Fed. R. Civ. P. 11.

69. Fed. R. Evid. 401 advisory committee’s note (internal quotation marks omitted).

401, then, “sets the bar very low.”<sup>70</sup> It recognizes that “[t]he law furnishes no test of relevancy”<sup>71</sup> and for that very reason accords trial lawyers great leeway in deciding how to best prove their cases and vests trial judges with broad discretion in determining whether evidence has any probative value.<sup>72</sup>

The interrelationship of relevancy and limited admissibility is readily apparent. Evidence may be expressly barred for factual proposition Z, but as long as it has “any tendency” to make consequential proposition X more or less likely, it is relevant and hence admissible under Rule 402.

Limited admissibility, as we have seen, implicates Rule 403, which authorizes the judge to exclude relevant evidence where its probative value is substantially outweighed by unfair prejudice, confusion of the issues, or misleading the jury.<sup>73</sup> For present purposes it is enough to observe that Rule 403, like Rule 402, is strongly biased in favor of admissibility. The judge may exclude the evidence only if the “dangers” (e.g., unfair prejudice) substantially outweigh its probative value. A hesitant judge inclined to admit evidence for a limited purpose may draw comfort from the legion of case law holding that limiting instructions adequately safeguard the trial process.<sup>74</sup>

In sum, Rules 401 through 403 are the collective embodiment of “assumptive admissibility.”<sup>75</sup> Evidence that passes the exceedingly low threshold of relevancy should be weighed by the trier of fact. And the flaccid conceptualization of relevancy usually means that creative counsel can conjure some consequential proposition for which the evidence has “any” probative value.

Other specialized rules of relevancy explicitly embrace limited admissibility and carry with them a vast, often realized, potential for lawyerly “mischief.” Rule 404(a) broadly precludes use of a person’s character trait to show that he or she acted in conformity with that trait on a particular occasion, the so-called propensity inference. The rule effectively means that prosecutors cannot offer evidence of the defendant’s bad character in criminal cases, and in civil cases neither the plaintiff nor the defendant may draw upon the character-propensity inference.<sup>76</sup> Thus,

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70. *United States v. McVeigh*, 153 F.3d 1166, 1190 (10th Cir. 1998).

71. James Bradley Thayer, *A Preliminary Treatise on Evidence at the Common Law* 265 (Rothman Reprints 1969) (1898).

72. See Fed. R. Evid. 401 advisory committee’s note.

73. Fed. R. Evid. 403; see *supra* text accompanying notes 11–19; see also Giannelli, *supra* note 7, § 9.05[B][1], at 121 (“In addition to an appeal to emotion, unfair prejudice [under Rule 403] may involve the risk that a jury will use evidence improperly, despite a limiting instruction.”).

74. See *supra* text accompanying notes 29–31.

75. Graham C. Lilly, *An Introduction to the Law of Evidence* § 2.4, at 34 (3d ed. 1996).

76. In civil cases there are instances in which a person’s character is itself an element of the claim or defense. For example, in claims for negligent hiring, supervision, or entrustment, the plaintiff must establish that the employer knew or should have known that the employee in question was a bad driver. Rule 404(a) does not bar this use of evidence and also has three exceptions. Fed. R. Evid. 404(a). The first two apply in criminal cases

evidence that a person is “careless” or a “bad driver” cannot be used to prove his or her negligence in a car crash.

Yet Rule 404(b) expressly permits other act evidence to prove something other than character and conduct in conformity. Its dubious distinction as the “most litigated” evidence issue bespeaks the rule’s potential for mischief.<sup>77</sup> For the unmotivated trial lawyer, Rule 404(b) includes a long laundry list of permissible “other” purposes for which this explosive evidence may be used. In criminal cases, prosecutors frequently proffer (“sneak”?) evidence of the defendant’s prior bad acts and criminal conduct not to prove his bad character (and hence guilt), but ostensibly to prove other propositions, such as motive, opportunity, plan, intent, and the like.<sup>78</sup> Often the real difficulty is that the distinction between the permissible purpose and the forbidden character inference is strained or nonexistent. Prior crimes offered to show defendant’s identity or the requisite mental state (intent) may look and feel very much like forbidden character evidence.<sup>79</sup>

Civil litigation yields many similar examples of abuse and mischief. Assume the plaintiff claims that the tortfeasor was drunk and failed to yield right of way in an automobile collision. In a run-of-the-mill negligence action, the tortfeasor’s prior drunk driving conviction is inadmissible to show that she is a “drunk” driver. But by pleading punitive damages, the plaintiff may then argue that the prior drunk driving episode, in which the tortfeasor struck and killed a young child, is admissible to prove that she should have known about the dangers of drinking and driving on this occasion as well.<sup>80</sup> Instruct the jury as you will, it is likely that the jury may be tempted also to use the prior drunk driving as some proof that she was drunk and failed to yield right of way in the underlying negligence action.

Rule 404(b) is hardly an aberration. The quasi-privileges throughout article IV are modeled on a similar template: a broad rule of exclusion followed by exceptions for limited purposes. Rule 407 excludes evidence of subsequent remedial measures when used to prove negligence or culpable conduct.<sup>81</sup> Such evidence is, however, admissible to prove other factual propositions, such as ownership, control, and feasibility, as well as impeachment, when relevant. Rule 408 protects and promotes settlement talks by excluding evidence of compromises and offers to compromise

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and permit a criminal defendant to prove his, or the victim’s, character for propensity purposes. The third exception permits impeachment of a witness’s truthful character. *See* Fed. R. Evid. 608; Fed. R. Evid. 609.

77. *See* Giannelli, *supra* note 7, § 11.01, at 163.

78. *Id.* § 11.03, at 165 (noting that “this tactic is often a subterfuge for sneaking character evidence before the jury”). Professor Paul Giannelli strongly suggests that the list be deleted from Rule 404(b) because it has engendered “difficult[ies]” when prosecutors use it as a laundry list of reasons for evading the character evidence ban. *Id.*

79. *See* 22 Wright & Graham, *supra* note 3, § 5242, at 591.

80. *See* *Lievrouw v. Roth*, 459 N.W.2d 850, 855–56 (Wis. Ct. App. 1990).

81. Fed. R. Evid. 407.

when offered to prove the validity of a disputed claim or amount.<sup>82</sup> Yet evidence of compromise, for example, may be used to prove bias, to negate a contention of undue delay, to prove obstruction of justice, or for any other relevant purpose. Rule 409 protects “Good Samaritans” by excluding evidence that a party offered, promised, or actually paid medical and similar expenses to prove liability for the underlying injury.<sup>83</sup> Again, the same evidence may be used to prove some other relevant proposition. A final example suffices. Rule 411 forecloses the tenuous (yet relevant) inference that because one carried or failed to carry liability insurance, one is negligent or otherwise liable.<sup>84</sup> The fact of insurance may, however, be used to prove ownership, agency, or bias.

Special rules of limited admissibility are also present in article VI, which governs witnesses. Two rules from that article will be briefly discussed. Both rules concern impeachment of a witness’s character for truthfulness and fully embody the foibles of limited admissibility. Rule 608(b) provides that any witness, including a party, may be cross-examined about specific instances of untruthful conduct, such as false statements on college applications, puffery in resumes, and outright fraud.<sup>85</sup> In theory the evidence is narrowly confined to deficiencies in the witness’s truthful character from which the jury may infer that the witness is lying at trial. There is, of course, considerable chance that the witness’s prior frauds, deceit, and lies will be used to infer simply that the witness is also a “bad person,” or a “crook,” a particularly grave risk for parties. Yet the case law unerringly reposes discretion in trial judges to guard against unfair prejudice by limiting cross-examination where appropriate and by “giving limiting instructions.”<sup>86</sup> Rule 609 carries even greater potential for unfairness, as it permits impeachment of witnesses, including parties, with prior criminal convictions.<sup>87</sup> Federal courts typically allow evidence of “the particular felony charged, the date, and the disposition of a prior conviction for impeachment purposes.”<sup>88</sup> Less clear is “why information about the nature of a witness’s felony conviction is relevant” to credibility.<sup>89</sup> Some courts are forthright in their bewilderment over the rule:

The implicit assumption of Rule 609 is that prior felony convictions have probative value. Their probative value, however, necessarily varies

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82. Fed. R. Evid. 408. Another rule, Federal Rule of Evidence 410, promotes plea discussions in criminal cases.

83. Fed. R. Evid. 409.

84. Fed. R. Evid. 411.

85. See Giannelli, *supra* note 7, § 22.09, at 279–81. See generally Gerald L. Shargel, *Federal Evidence Rule 608(b): Gateway to the Minefield of Witness Preparation*, 76 *Fordham L. Rev.* 1263 (2007).

86. *E.g.*, *United States v. Whitmore*, 359 F.3d 609, 621 (D.C. Cir. 2004).

87. Fed. R. Evid. 609.

88. *United States v. Smith*, 454 F.3d 707, 716 (7th Cir. 2006) (citation omitted). The rule applies in civil as well as criminal cases. *Id.*

89. *United States v. Howell*, 285 F.3d 1263, 1268 (10th Cir. 2002).



with their nature and number. . . . We are not certain what evidence of two convictions for theft by taking, one conviction for armed robbery, and one conviction for aggravated assault says about [the witness's] credibility, but we are certain that the jury should have been given the opportunity to make that decision.<sup>90</sup>

While such candor is refreshing, it should give us pause about how seriously courts scrutinize limiting instructions.

Modern hearsay doctrine adheres to the same pattern. The starting point is the definition of hearsay itself. Most jurisdictions embrace some variant of Rule 801(c), which provides that “[h]earsay” is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.<sup>91</sup> Manifestly, there is nothing wrong with using hearsay evidence, which parties frequently do in all sorts of trials. Rule 802 excludes hearsay evidence unless it falls within any one of the more than three dozen exceptions to the rule.<sup>92</sup> And while the wide range of exceptions provides entry gates for a sweeping variety of hearsay, they are not boundless. For this reason, trial lawyers seeking to admit this evidence often turn to the seemingly straightforward definition of hearsay itself. The goal is simple: if I cannot find a workable exception, perhaps I can define my way out of hearsay in the first place.

Hearsay is conceptualized in terms of limited admissibility.<sup>93</sup> The term “statement” is defined as a verbal or nonverbal assertion of fact or opinion (other than one made while on the witness stand).<sup>94</sup> Whether a “statement” constitutes “hearsay” under Rule 801(c) depends, however, on what the proponent is using it to prove, thus, implicating limited admissibility. Only when the statement is offered “in evidence to prove the truth of the matter asserted” is it hearsay.<sup>95</sup> Conversely, if the proponent offers the statement for any *other* relevant purpose it is, by definition, not hearsay and, hence, admissible unless excluded by some other rule.

The case law has identified three principle nonhearsay purposes. First, statements that trigger legal rights or duties under substantive law are admissible for that reason alone under the verbal acts (or operative facts) doctrine, as, for instance, when used to show whether the conveyance of

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90. *United States v. Burston*, 159 F.3d 1328, 1335 (11th Cir. 1998) (citations omitted).

91. Fed. R. Evid. 801(c).

92. Fed. R. Evid. 802.

93. A “declarant” is defined as a “person.” Fed. R. Evid. 801(b). Although seemingly straightforward, “declarant” so defined eliminates from hearsay’s reach a wide range of communications, particularly those that are machine produced, such as the cash-register receipt generated by a store’s scanner.

94. Fed. R. Evid. 801(a). Critical, then, is whether the declarant intended to communicate (assert) a fact or opinion. Verbal utterances that are in the form of a question (“How are you today?”) or an imperative (“Stop!”) are not assertions, so long as they do not also contain an assertion of fact (“Stop, there’s a truck coming!”). Nonverbal conduct is not hearsay unless the declarant intended it as a communication, as when a victim literally points to a suspect in a lineup. To take another classic example, a person who opens an umbrella when the rain starts is trying to stay dry, not warning the world that it is raining outside.

95. Fed. R. Evid. 801(c).

property was a gift or bailment.<sup>96</sup> Second, the statement may be admissible for its effect on one who heard it (if oral) or read it (if written). This purpose, often called “effect on listener/reader,” usually comes into play to show that a person had knowledge or notice of something.<sup>97</sup> Third, a statement may be used for the nonhearsay purpose of proving the declarant’s thoughts or beliefs regarding the matter, irrespective of whether the facts are “true.”<sup>98</sup> In theory, none of these purposes depend for their relevancy on the statement’s truth.

Let us return to the earlier e-mail example, where the witness is asked to testify that she received an e-mail stating that her company’s CFO is manipulating financial statements in order to inflate the value of his stock options. In a defamation suit brought by the CFO, the e-mail’s words may be tortious wholly apart from their truth—the verbal acts doctrine. (Indeed the CFO will contend they are manifestly false.) If used to explain why the witness reported the allegations to federal regulators, the statement is being used for its effect on the reader. The statement may also be relevant to prove the declarant’s (the e-mail writer’s) knowledge or belief regarding the allegations, such as why he wrote an extortionate note to the CFO demanding payment in exchange for silence. (Here too the truth of the allegations is not involved.) Finally, the e-mail’s content may be used as evidence for the truth of the matter asserted, namely, the “fact” that the CFO manipulated the company’s books for personal gain.

This discussion prompts several difficult questions. First, how do we know which use the proponent is making of the statement? The short answer is that the *opponent* must object on hearsay grounds in order to ferret out the purpose. Absent a timely hearsay objection, the statement may be used for any relevant proposition, including its truth, regardless of whether a hearsay exception can be established.<sup>99</sup> The important point for present purposes is that a lawyer intent on spilling the e-mail’s content before the jury, but who lacks even a colorable hearsay exception, may sidestep the hearsay quagmire by offering the statement for any of the nonhearsay purposes described above. Of course relevancy may rear its head, but this is a separate objection that the opponent must timely make (or waive).

Second, how will the jury distinguish between the permissible nonhearsay purpose (e.g., effect on reader) and the ostensibly prohibited inference of the statement’s factual accuracy? The discerning reader knows the answer: a limiting instruction. We simply educate the jury about the distinctions between the truth of the matter asserted (red light) and the pertinent nonhearsay purpose (green light). This time-honored solution is, however, even more fantastical in this context than in many others. The

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96. Giannelli, *supra* note 7, § 31.06[B], at 426 (noting that “the uttering of certain words carries independent legal significance under the substantive law”).

97. *See id.* § 31.06[A], at 424.

98. *Id.* § 31.06[E], at 429.

99. 30B Michael H. Graham, Federal Practice and Procedure § 7009 (2006).

typical law school evidence course devotes significant instructional time and attention (e.g., class discussion, assigned reading) to these reified distinctions, yet at trial a three-sentence jury instruction often suffices.

Prior inconsistent statements provide a convenient, recurring example. Assume a witness testifies to events in a manner dramatically at odds with what he told investigators before trial in an unsworn statement. Under Rule 801(d)(1)(A), his prior out-of-court statements may not be used for their truth because they were not given “under oath subject to the penalty of perjury.”<sup>100</sup> Yet federal case law freely admits those very same statements for impeachment on the theory that they prove the witness once harbored different thoughts or beliefs about the subject matter, which in turn raises issues about the credibility of his testimony at trial.<sup>101</sup> (Is he lying? Is he mistaken?) The potential for abuse on direct as well as cross-examination has been duly noted.<sup>102</sup> Distinguishing between the statement’s use for impeachment purposes and its use to prove the truth of the matter asserted bedevils law students, lawyers, and judges. One suspects it is altogether lost on the jury.<sup>103</sup> The likely futility of a limiting instruction impelled many jurisdictions to erase the purported distinction, thereby permitting prior inconsistent statements for substantive use as well as for impeachment unqualified by the oath/perjury element.<sup>104</sup>

So ingrained is this practice of defining away the hearsay problem that it has been embraced as constitutional doctrine. The Sixth Amendment confrontation right restricts the government’s use of hearsay against a criminal defendant, although the doctrine is unsettled. From 1980 to 2004, the Supreme Court focused on reliability concerns in *Ohio v. Roberts*<sup>105</sup> and

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100. Fed. R. Evid. 801(d)(1)(A). On the difference between substantive and impeaching use of prior inconsistent statements, see Giannelli, *supra* note 7, § 31.06[D], at 428.

101. See Graham, *supra* note 99, § 7011, at 90.

102. See Stephen A. Saltzburg, Michael M. Martin & Daniel J. Capra, Federal Rules of Evidence Manual § 801.02[3][a] (9th ed. 2006) (“There is a legitimate concern that clever lawyers may attempt to call witnesses solely to ‘impeach’ them with inconsistent statements in the hope that the jury will consider the inconsistent statements as substantive evidence.”). As the preceding quotation illustrates, the problem is not confined to cross-examination. Elsewhere the authors observe that often the direct examiner may have to impeach her own witness with a prior inconsistent statement. See *id.* § 607.02[2]–[3].

103. *But see* United States v. Tafollo-Cardenas, 897 F.2d 976 (9th Cir. 1990) (finding reversible error where the trial judge failed to instruct the jury that the prior statements were admissible solely for impeachment purposes). This case also illustrates how ingrained is the reliance on limiting instructions. I am indebted for the citation to Saltzburg et al., *supra* note 102, § 801.02[3][a].

104. The original draft of the Federal Rules of Evidence took this approach, but the rule was amended by Congress to include the oath/perjury element for substantive use. Other jurisdictions permit both impeaching and substantive use of any prior inconsistent statement, provided the declarant testifies at the trial and is subject to cross-examination. See 21A Wright & Graham, *supra* note 3, at 243 (using this example to illustrate how “problems arise when both permissible and impermissible inferences can be drawn from the same piece of evidence”).

105. 448 U.S. 56 (1980).

its progeny.<sup>106</sup> The Court dramatically overhauled confrontation doctrine in *Crawford v. Washington*,<sup>107</sup> a 2004 case that rebuked the *Roberts* reliability approach in favor of one (allegedly) truer to the right's historic roots. The confrontation right, explained the Court, applies only to "testimonial" hearsay, which the government may introduce only if the declarant testifies, subject to cross-examination, or is shown to be unavailable and the defendant had a prior opportunity to cross-examine her.<sup>108</sup>

For present purposes, what is significant is that since 1980, whether construing the now (largely) discarded *Roberts* reliability approach or the *Crawford* "testimonial" approach, the Court has insisted that the confrontation right applies only when the prosecution offers an out-of-court statement for purposes of proving the truth of the matter asserted. In short, the definition of hearsay under evidence law triggers, or perhaps controls, the constitutional right of confrontation. And that definition, of course, is governed by the principles, policies, and practices of limited admissibility. The Court first explicitly adopted this position in *Tennessee v. Street*,<sup>109</sup> where it upheld the prosecution's use of an accomplice's confession in a lynching case even though the accomplice did not testify. The accomplice's confession was not offered to prove its truth, that is, as evidence of the lynching itself. Rather, the government offered it for purposes of showing discrepancies between the accomplice's version and the defendant's own confession, where defendant contended that police had falsely attributed the accomplice's statement to him as well.<sup>110</sup> Although *Street* was decided in the full flower of the *Roberts* reliability approach, the Court has expressly endorsed *Street* under its *Crawford* testimonial approach as well.<sup>111</sup> Thus, if the government offers a prior statement for a relevant nonhearsay purpose, it falls outside the protections accorded testimonial hearsay under the *Crawford* doctrine.

In this section we have seen that limited admissibility suffuses modern evidence law. It forms the very core of relevancy. It is relied upon to effectuate the public policy goals of the quasi-privileges. It permeates impeachment doctrine. And it has penetrated hearsay doctrine to the point that the Court has accorded constitutional status to limited admissibility under the confrontation right.

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106. *E.g.*, *White v. Illinois*, 502 U.S. 346 (1992) (limiting the prosecution's duty to produce the declarant to instances where the hearsay is made in the course of a prior judicial proceeding); *Idaho v. Wright*, 497 U.S. 805 (1990) (construing the reliability prong of the *Roberts* test).

107. 541 U.S. 36 (2004).

108. In *Davis v. Washington*, 126 S. Ct. 2266 (2006), the U.S. Supreme Court elaborated upon the meaning of testimonial hearsay in light of 911 emergency calls and routine police contact with crime victims.

109. 471 U.S. 409, 413 (1985) (noting that the confrontation right is not triggered unless the out-of-court statement is "hearsay under traditional rules of evidence").

110. *Id.* at 409 (noting in the case summary that the statement was used "not to prove what happened at the murder scene but to prove what happened when [defendant] confessed").

111. *Crawford*, 541 U.S. at 59 n.9.

### III. THE ALCHEMY OF RULE 703

Rule 703 may well represent the apogee of limited admissibility.<sup>112</sup> For much the same reason, it may also epitomize what Professor Graham has tabbed a “bogus” variety of multiple admissibility, where nonevidence is transformed into a species of ill-defined evidence.<sup>113</sup> An exhaustive survey of the cases and commentary construing Rule 703 is beyond our scope.<sup>114</sup> Rather, we will look to Rule 703 as perhaps the most spectacular example of limited admissibility’s flawed preoccupation with analytic precision and sophistic distinctions.

This section begins with a brief discussion of Rule 703’s innovative origins and discusses several cases that illustrate its function at trial. It then addresses the “emerging problems” that led to Rule 703’s amendment in 2000 and its explicit embrace of limited admissibility in a manner that is doctrinally incoherent because of the ultimately inconsistent policies it serves. In Part IV this essay discusses how amended Rule 703 provides an ethical firewall for counsel intent on exposing the jury to otherwise inadmissible evidence.

#### A. Rule 703: Origins and Problems

Rule 703 originated in a welcomed effort to smooth the common law’s rigid, formalistic approach to expert opinion testimony.<sup>115</sup> The common law relentlessly protected the autonomy of the trier of fact from expert witnesses, at least in theory. It did so first by permitting expert testimony only when it was necessary to assist the jury in its fact finding. Second, and more important for our purposes, it demanded that any expert opinion rest on admissible evidence.<sup>116</sup> Put differently, the expert’s opinion had to rest on the very same case-specific evidence that the jury itself would consider in deciding the facts. Experts with personal knowledge (e.g., a doctor who examined the patient) could describe the facts observed. Or an expert might sit through the trial listening to the same evidence as a jury. The hypothetical question, however, served as the principle mechanism for enforcing the common law rule. By tediously reciting each of the factual

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112. Fed. R. Evid. 703.

113. 21A Wright & Graham, *supra* note 3, § 5063, at 255.

114. See generally Ronald L. Carlson, *Experts, Judges, and Commentators: The Underlying Debate About an Expert’s Underlying Data*, 47 Mercer L. Rev. 481 (1996) [hereinafter Carlson, *Experts*]; Ronald L. Carlson, *Policing the Bases of Modern Expert Testimony*, 39 Vand. L. Rev. 577 (1986) [hereinafter Carlson, *Policing*]; Edward J. Imwinkelried, *The Meaning of “Facts or Data” in Federal Rule of Evidence 703: The Significance of the Supreme Court’s Decision to Rely on Federal Rule 702 in Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 54 Md. L. Rev. 352 (1995); Paul R. Rice, *Inadmissible Evidence as a Basis for Expert Opinion Testimony: A Response to Professor Carlson*, 40 Vand. L. Rev. 583 (1987).

115. See 1 McCormick on Evidence § 14, at 86–87 (Kenneth S. Broun ed., 6th ed. 2006) [hereinafter McCormick].

116. See Rice, *supra* note 114, at 586–87; see also McCormick, *supra* note 115, §§ 13–15.

predicates upon which the expert opinion rested, the proponent served notice that each of these facts either was or would be introduced into evidence. (The failure to do so opened the way for opposing counsel to have stricken the opinion testimony based on the hypothetical.) The judge also instructed the jury that it should discard any expert opinion based on material facts that the jury rejected.<sup>117</sup>

The increasing use of expert testimony strained the common law's rigid approach primarily because it was so out of tune with how such experts arrived at their opinions, whether in court or in their own practices. The reality was that experts relied upon all sorts of case-specific information irrespective of its admissibility in the courtroom.<sup>118</sup> Case law manifested the strains and attempted to accommodate the expert's professional practices with evidence doctrine.<sup>119</sup>

Encompassing a "broader modern view,"<sup>120</sup> Rule 703 permits expert opinion testimony predicated upon admissible or inadmissible evidence, provided it is of a type reasonably relied upon by experts in the field in forming opinions or inferences on such matters.<sup>121</sup> The rule sought to conform expert practice and trial practice.<sup>122</sup> The federal advisory

117. See Giannelli, *supra* note 7, § 25.03[A], at 353.

118. For my effort to explain the common law background of Rule 703, see Daniel D. Blinka, "Practical Inconvenience" or *Conceptual Confusion: The Common-Law Genesis of Federal Rule of Evidence 703*, 20 Am. J. Trial Advoc. 467 (1997).

119. As explained in McCormick,

[A]t common law an expert could base an opinion either on personally known facts or facts stated in an hypothesis. However, those two bases do not exhaust the possibilities. The expert could also attempt to rest an opinion on third party hearsay reports. There formerly was a majority view, however, that a question is improper if it calls for the witness's opinion on the basis of reports that are inadmissible in evidence under the hearsay rule. The rationale for this view was that as a matter of logic, the jury could not accept the opinion based on the facts if the only evidence of the facts is inadmissible. This view applied even when the witness was asked to give an opinion, not merely on the basis of reports of this kind, but on those matters supplemented by the witness's own observations. However, there has been a strong case law trend toward a contrary view.

McCormick, *supra* note 115, § 15, at 91 (citations omitted).

120. *Id.* § 15, at 92.

121. Fed. R. Evid. 703 states,

The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence in order for the opinion or inference to be admitted. Facts or data that are otherwise inadmissible shall not be disclosed to the jury by the proponent of the opinion or inference unless the court determines that their probative value in assisting the jury to evaluate the expert's opinion substantially outweighs their prejudicial effect.

The first two sentences comprised the original rule. The last sentence was added in 2000. See *infra* text accompanying notes 162-79.

122. A leading authority explains the policy as follows:

The rationale for this view is that an expert in a science is competent to judge the reliability of statements made to her by other investigators or technicians. She is just as competent to do this as a judge and jury are to pass upon the credibility of

committee explained that “the rule is designed to broaden the basis for expert opinions beyond that current in many jurisdictions and to bring the judicial practice into line with the practice of the experts themselves when not in court.”<sup>123</sup> Criticism that Rule 703 diluted, or perhaps eviscerated, exclusionary rules of evidence was misplaced, said the advisory committee in a single sentence that emoted Olympian detachment:

If it be feared that enlargement of permissible data may tend to break down the rules of exclusion unduly, notice should be taken that the rule requires that the facts or data “be of a type reasonably relied upon by experts in the particular field.”<sup>124</sup>

Precisely why or how the reasonable reliance element alone would thwart the “break down” of exclusionary rules was not explained. Case law soon revealed the fundamental incompatibility of Rule 703’s reasonable reliance standard and exclusionary rules of evidence. Several examples suffice.

Hearsay problems predominate. *Ricciardi v. Children’s Hospital Medical Center*<sup>125</sup> provides a textbook illustration of adversarial ingenuity in applying multiple admissibility and limited admissibility while mining Rule 703’s potential for end runs around exclusionary rules. After undergoing surgery to replace an aortic valve, Peter Ricciardi suffered neurological complications that he blamed on medical malpractice. His “only proof of negligence” was a note in his medical chart written by a neurology resident, Dr. Krishna Nirmel, several days after the surgery.<sup>126</sup> The note said, “during surg. episode of aortic cannula accidentally out x 40–60 secs.”<sup>127</sup> Nirmel, however, had no personal knowledge of this “episode” and claimed not to “know where he obtained the information he recorded in the note.”<sup>128</sup> Rather, Nirmel “assumed that he obtained the information from ‘professional people’” (nurses? staff?) involved in the surgery.<sup>129</sup> In sum, Ricciardi’s medical malpractice case rested entirely on

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an ordinary witness on the stand. If the expert vouches that statements are the type of data which she would ordinarily rely on in the practice of her profession, they should be a sufficient basis for her professional opinion on the stand. This argument has special force when the opinion is founded not only on reports but also in part on the expert’s firsthand observation. The data gained by observation puts the expert in an even better position to evaluate the reliability of the statement.

McCormick, *supra* note 115, at 92–93 (citations omitted).

123. Fed. R. Evid. 703 advisory committee’s note. The committee added an equally cryptic illustration: “The language would warrant admitting in evidence the opinion of an ‘accidentologist’ as to the point of impact in an automobile collision based on statements of bystanders since this requirement is not satisfied.” *Id.*

124. *Id.*

125. 811 F.2d 18 (1st Cir. 1987).

126. *Id.* at 20.

127. *Id.* The U.S. Court of Appeals for the First Circuit explained that “[a]n aortic cannula provides a means of circulating blood from the heart-lung machine back into the body when the heart is being bypassed for surgery.” *Id.*

128. *Id.*

129. *Id.*

his ability to prove the truth of the “episode” described in Nirmel’s terse note. In this he failed.

Ricciardi first applied the principle of multiple admissibility with a seeming vengeance, asserting that Nirmel’s note was admissible under no less than five different hearsay exceptions. The trial court rejected all five, however, and the U.S. Court of Appeals for the First Circuit affirmed. A brief summary is instructive. The note failed to qualify under a state hospital records exception or under Rule 803(6) as a record of a regularly conducted activity primarily because Nirmel could not recall who provided the underlying information; thus, Ricciardi could not establish that it came from a hospital employee “with an obligation to supply” accurate information.<sup>130</sup> Nor did the note qualify as a recorded recollection under Rule 803(5), which requires testimony by a witness who “once had knowledge.”<sup>131</sup> Nirmel lacked personal knowledge of the surgery; the person possessing such knowledge was unknown and hence could not testify.<sup>132</sup> Next, the First Circuit tersely rejected the note’s proffer under the residual exception to the hearsay rule because of obvious issues about “trustworthiness.”<sup>133</sup> And, finally, the record was insufficient to admit the note as an “adoptive admission” by the surgeon who allegedly read the note without objecting to its accuracy.<sup>134</sup>

Ricciardi then turned to Rule 703, seeking “to have an expert witness, Dr. [Harold] Kay, rely on the statement to form an opinion that [the cannula came out during surgery].”<sup>135</sup> More precisely,

Dr. Kay told the court that if he could rely on Dr. Nirmel’s note, it would be his opinion that the cause of the embolus was that the cannula came out. Otherwise, he would have to conclude, based on probabilities, that the cause was residual air being trapped.<sup>136</sup>

The trial judge ruled that Nirmel’s note was too unreliable to serve as a basis for Kay’s opinion. The First Circuit found no abuse of discretion, but plainly struggled to support the ruling. It conceded that “neurological consultation reports may well be the ‘type’ of records upon which an expert would reasonably rely,” yet emphasized that “there has been absolutely no showing here that unattributed material usually comprises a part of such consultative reports, or that experts in the field would rely on this kind of a statement.”<sup>137</sup> Kay himself admitted that he had never before “seen such a statement in a hospital chart” and described the note as “bizarre.”<sup>138</sup>

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130. *Id.* at 21–23.

131. Fed. R. Evid. 803(5).

132. *Ricciardi*, 811 F.2d at 23.

133. *Id.* at 23–24.

134. *Id.* at 24 (“[T]here is not a sufficient basis to conclude that Dr. Norwood read the note and under the circumstances would have objected to it if he did not think it were true.”).

135. *Id.*

136. *Id.*

137. *Id.* at 25.

138. *Id.*



Further complicating matters, another doctor, a pediatric neurologist, “said he did not have any doubt about what was written in the chart and that he accepted what Nirmel wrote ‘to be the truth as he has reported it to be.’”<sup>139</sup> Nonetheless, said the court, the record failed to “establish that experts reasonably would rely on the note about the cannula.”<sup>140</sup>

In sum, *Ricciardi* vividly illustrates how skilled trial lawyers use multiple avenues of admissibility to place critical evidence before the jury. When Ricciardi swung and missed on five different hearsay exceptions, he facetiously turned to Rule 703’s latitude in permitting experts to rely on inadmissible evidence (here, hearsay) in forming their opinion. Interestingly, the expert’s (Kay’s) opinion offered little more than a paraphrase of the inadmissible hearsay. In light of its holding, however, the First Circuit did not have to confront what Kay would have been permitted to tell the jury about the basis for his opinion had he reasonably relied on Nirmel’s note.

In *Sphere Drake Insurance v. Trisko*,<sup>141</sup> the U.S. Court of Appeals for the Eighth Circuit engaged the doctrinal messiness that occurs when the trial judge finds reasonable reliance under Rule 703. Robert Trisko, who designed and sold jewelry, displayed his wares at several shows in Florida. He claimed that he carefully placed his jewelry in several suitcases, which he then put in the trunk of his rented Buick. Although Trisko claimed that he and another employee maintained a vigilant watch on the car at all times, both suitcases (and the jewelry within) had vanished when they opened the trunk at the airport. Trisko carried “Jewelers Block” insurance, which covered loss and damages but not an “unexplained loss” or “mysterious disappearance.”<sup>142</sup> The insurer sought a declaratory judgment that Trisko’s loss was not covered.

To prove he was the victim of a covered theft, Trisko introduced at trial the deposition of George Crowley, a Miami police detective, whose testimony sounded like a Damon Runyon novel. Crowley educated the jury about property crime in the Miami area. He also testified that two informants, identified only as “Hernando and Freddy,” told Crowley that “two individuals had been paid \$20,000 each to steal Trisko’s jewelry.”<sup>143</sup> Based on Hernando and Freddy’s inside information, Crowley opined that “Trisko’s loss did not constitute a mysterious disappearance, but rather was likely a theft.”<sup>144</sup> A jury found in Trisko’s favor.

The Eighth Circuit affirmed, upholding the admissibility of Crowley’s opinion as well as his testimony about its basis. First, the court held that

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139. *Id.*

140. *Id.* (explaining further that the pediatric neurologist “was not asked, however, whether he accepted the note about the cannula in particular, or whether he would rely on this type of note in forming an expert opinion”).

141. 226 F.3d 951 (8th Cir. 2000).

142. *Id.* at 954. The policy also excluded losses that occurred while jewelry was in a vehicle, unless Robert Trisko or his employees watched the vehicle.

143. *Id.* At various points in the opinion the name is given as “Freddy” or “Freddie.”

144. *Id.*

Crowley was properly qualified to offer expert opinion testimony “on theft in the Miami area.”<sup>145</sup> His “specialized knowledge of jewel thieves and their methods of operation” together with his investigation of Trisko’s theft “afforded him distinct knowledge of this case outside of the jury’s common experience.”<sup>146</sup> Second, Crowley properly relied upon Freddy and Hernando, whose statements would have been inadmissible hearsay had they “been introduced for their truth.”<sup>147</sup> The court held that Rule 703 permitted experts, like Crowley, “to rely on otherwise inadmissible hearsay in forming the basis of his opinion, so long as the hearsay is of the type reasonably relied upon by experts in his field.”<sup>148</sup> Since the court had already found Crowley qualified as an expert theft investigator, it immediately followed that he reasonably relied upon statements by informants, such as Freddy and Hernando.<sup>149</sup>

Crowley thus both testified to his opinion that Trisko’s jewelry had been stolen and related the substance of Freddy and Hernando’s statements, namely, that several thieves had been paid handsomely to steal the jewelry. Significantly, the trial judge did not delete the references to the inadmissible hearsay or restrict Crowley to generic references that omitted the statements’ content. The Eighth Circuit also upheld this exercise of discretion for several reasons. First, experts “may ‘testify about facts and data outside of the record for the limited purpose of exposing the factual basis of the expert’s opinion.’”<sup>150</sup> Second, the trial judge had

specifically instructed the jury “to give no weight to the statements of Hernando or Freddie in the consideration of the issues in this case. You are to consider that testimony only in developing what Detective Crowley did in the course of his investigation.” Because the hearsay statements were not admitted for their truth, but rather only to inform the jury of the factual basis of Crowley’s expert opinion, they were properly admitted by the district court.<sup>151</sup>

*Trisko*, then, illustrates an almost glib use of limited admissibility in connection with Rule 703. Trisko’s lawyer placed the content of Freddy and Hernando’s statements before the jury with nary an argument that they fell within any hearsay exception (much less five as offered by the *Ricciardi* plaintiff). The limiting instruction directed the jury “to give no weight” to the informants’ statements, but rather to consider them only in relation to

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145. *Id.* at 955.

146. *Id.*

147. *Id.* In context it seems that Trisko’s counsel made no pretense that Freddy and Hernando’s statements fell under some hearsay exception and thus could be used for their truth.

148. *Id.*

149. *Id.* (“Crowley testified that he regularly relied on the statements of informants as an investigating officer. He likewise was permitted to do so in forming the basis of his expert opinion.”).

150. *Id.*

151. *Id.*

the bases for Crowley's opinion.<sup>152</sup> Yet Crowley himself had obviously believed that Freddy and Hernando were truthful and correct about the theft, as there was no other basis for Crowley's conclusion that a jewelry heist had occurred. How then was the jury to assess the basis for Crowley's opinion when it was specifically instructed that it could give no weight to the very informants' statements on which Crowley's conclusion depended? Indeed Crowley's opinion testimony is little more than his attestation that he believed Freddy and Hernando's hearsay account of how the theft occurred. Yet far from subverting the hearsay rule, Trisko's lawyer had skillfully employed the vagaries of Rule 703 and limited admissibility.

Champions of the hearsay rule may view Rule 703 as their arch nemesis, but it must be appreciated that Rule 703 encompasses any ground of inadmissibility, not just hearsay. *Nachtsheim v. Beech Aircraft*,<sup>153</sup> which concerns inadmissible "other accident" evidence under Rule 404(b), is instructive. Plaintiffs brought a products liability action against the manufacturer of a private jet airplane that had crashed and killed all aboard. They alleged that the plane's design "rendered it unsafe for flight in icing conditions."<sup>154</sup> To prove the unsafe design and causation, plaintiffs offered evidence that an identical plane had crashed in arguably similar flying conditions one year later in St. Anne, Illinois. The trial judge ruled, however, that the two crashes were not sufficiently similar to warrant admissibility as permissible "other act" evidence under Rule 404(b).<sup>155</sup>

Thwarted on this theory of admissibility, plaintiff turned to Rule 703 when he called an expert on aircraft design, Dr. Donald Kennedy, who opined that the aircraft was defectively designed. The U.S. Court of Appeals for the Seventh Circuit's discussion of the trial record reveals Rule 703's procedural awkwardness and policy shortcomings. On direct examination, plaintiff's counsel asked, "What, if anything, have you done, Dr. Kennedy, to strengthen the opinion that you hold and that you've expressed here today?"<sup>156</sup> On its face the question raised no substantive objection.<sup>157</sup> Yet Kennedy's response "that he had looked at other accidents involving the same or similar aircraft" obliquely spilled the inadmissible other accident evidence before the jury.<sup>158</sup> Defense counsel then objected, a lengthy discussion ensued "outside the presence of the

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152. *Id.*

153. 847 F.2d 1261 (7th Cir. 1988).

154. *Nachtsheim*, 847 F.2d at 1265.

155. *Id.* at 1269-70. The U.S. Court of Appeals for the Seventh Circuit affirmed this ruling and found no abuse of discretion. Although both crashes involved identical aircraft under icing conditions, the St. Anne's crash involved no evidence of elevator failure.

156. *Id.* at 1270 n.11.

157. Arguably, the question called for a narrative response (i.e., it invited Dr. Donald Kennedy to deliver a lecture).

158. *Nachtsheim*, 847 F.2d at 1270 n.11.

jury,” and the judge “sustained the defendant’s objection and disallowed the evidence.”<sup>159</sup>

*Nachtsheim*, then, illustrates that Rule 703 reaches all grounds of admissibility, including explosive character and other act evidence, not just hearsay. Procedurally, Rule 703 is not self-enforcing. Kennedy’s opinion testimony was admissible. Moreover, there was no dispute about whether he had reasonably relied upon the St. Anne’s crash in reaching his opinion. Thus, it was permissible for him to discuss the St. Anne’s crash until the opponent objected. And it was within the discretion of the trial judge to determine whether Kennedy could discuss the “inadmissible” St. Anne’s crash during his direct examination.<sup>160</sup>

The trilogy of *Ricciardi*, *Trisko*, and *Nachtsheim* illustrates Rule 703’s facility in permitting skilled lawyers to circumvent other exclusionary rules of evidence, whether hearsay or character/other act rules. In *Trisko*, the proponent pushed Rule 703 and limited admissibility to its furthest doctrinal boundaries with great success, yet *Ricciardi* and *Nachtsheim* show how hard opposing counsel and the court must work in wrestling with a rule that is procedurally awkward, predicated upon questionable policy, and which invites proponents to end-run exclusionary rules.

#### B. “Emerging Problems” and the 2000 Amendment to Rule 703

The difficulties posed by Rule 703 have not passed unnoticed. Commentators pointed to both theoretical and practical problems. In 2000, the Supreme Court amended Rule 703 in an attempt to address these difficulties. As amended, Rule 703 may well signal the high-water mark for limited admissibility as a bypass for exclusionary rules.

The American Bar Association’s Section of Litigation (ABA) has closely monitored the Federal Rules of Evidence since their inception.<sup>161</sup> In periodic studies bearing the title *Emerging Problems Under the Federal Rules of Evidence*, the ABA scrutinized each rule with an eye toward “unforeseen” problems and whether some were doing “more harm than good.”<sup>162</sup> Rule 703 received lengthy, trenchant, and insightful criticism in 1997. The ABA study observed that “notwithstanding” the federal advisory committee’s self-satisfied assurance (quoted above) that Rule 703 would not become a hearsay sinkhole,<sup>163</sup> “the courts have found that much

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159. *Id.* Since the jury found in favor of defendant Beech Aircraft, there was no occasion to consider whether it had been prejudiced by Kennedy’s response despite the judge’s formal exclusion of the testimony and, one assumes, instruction to disregard the reference.

160. *Id.* at 1270–71. The Seventh Circuit held that Rule 703 conveys a “flexible-liberal” discretionary authority in the trial judge to determine whether inadmissible bases should be “reveal[ed]” to the jury. *Id.* at 1271 (internal quotation marks omitted). The Seventh Circuit’s struggle with terminology—“reveals,” “admits,” “disclosure”—is discussed at *infra* note 198 and accompanying text.

161. ABA, *Emerging Problems Under the Federal Rules of Evidence*, at xiii (3d ed. 1998) [hereinafter *Emerging Problems*].

162. *Id.* at xiv.

163. See *supra* text accompanying notes 123–24.

hearsay, if reasonably relied upon by experts, may be used and disclosed as the basis for the expert's opinion."<sup>164</sup> Reviewing several illustrative cases, the ABA study distinguished "between an expert who merely recites hearsay for the benefit of the jury and the expert who actually bases his or her opinion upon hearsay reasonably relied upon in the expert's field."<sup>165</sup> "The former type of testimony," the ABA study reported, "is an impermissible abuse of Rule 703."<sup>166</sup> The study cautioned that Rule 703 did not create a hearsay exception, ominously noting that no federal case to date had so held, yet it struggled to articulate how such evidence may be properly used, as illustrated in the following sentence:

Even though an expert may rely on hearsay reasonably relied upon in the expert's field, and may disclose it to the trier of fact for use in evaluating the weight to be given to the expert's opinion, the hearsay is not generally considered to be admissible over objection as substantive evidence.<sup>167</sup>

The ABA study clearly labored to justify the distinction between uses. It underscored that Rule 105 grants opponents the right to an instruction "limiting any inadmissible hearsay relied upon by an expert to its use in evaluating the expert's opinion and prohibiting its use independently to prove the truth of any out-of-court assertions relied upon by the expert."<sup>168</sup> But the study immediately conceded that "[t]he efficacy of such instructions . . . may be questionable."<sup>169</sup>

The 1997 ABA study also noted the "sharp[] disagree[ment]" among scholarly commentators regarding Rule 703.<sup>170</sup> Professor Ronald Carlson, for example, has long criticized the practice of allowing experts to disclose their inadmissible bases on direct examination.<sup>171</sup> Such disclosures traduce exclusionary rules (hearsay especially). Rule 703 permits the expert to rely on the inadmissible information and perhaps to identify the "sources" of her opinions, but no further detail is permissible (except on cross-examination).<sup>172</sup> Limiting instructions, warns Carlson, will not "take care of the problem" and may even have the "opposite effect" of underscoring the hearsay.<sup>173</sup> In sum, "inadmissible" should mean just that. At the opposite pole, Professor Paul Rice has acknowledged the "charade" created by Rule 703 but strenuously argues that the expert's reasonable reliance

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164. Emerging Problems, *supra* note 161, at 228.

165. *Id.* at 229.

166. *Id.*

167. *Id.* Truly noteworthy is the committee's caveat about the need for a hearsay objection. As a matter of doctrine, Rule 703 did not create a hearsay exception, but commentators' frequent felt need to so proclaim underscores the risk that it often functions precisely in that fashion.

168. *Id.* at 230.

169. *Id.* at 231 (citation omitted).

170. *Id.* at 232 (citing and discussing the divergent views on Rule 703 by Professors Ronald Carlson and Paul Rice).

171. See Carlson, *Policing*, *supra* note 114, at 585.

172. *Id.* at 584-85.

173. See Carlson, *Experts*, *supra* note 114, at 485.

should be sufficient to permit substantive use of (otherwise inadmissible) hearsay.<sup>174</sup>

Returning to the 1997 ABA study, it closed by acknowledging the risk of abuse while conceding that the prevalence of misuse is undetermined.<sup>175</sup> The study did not explicitly endorse an amendment to Rule 703 as necessary or even desirable, but it acknowledged the seriousness of the problem and hoped that limiting instructions combined with Rule 403 would suffice.

Those calling for textual change eventually won out. In 2000, Rule 703 was amended by adding the following final sentence: "Facts or data that are otherwise inadmissible shall not be disclosed to the jury by the proponent of the opinion or inference unless the court determines that their probative value in assisting the jury to evaluate the expert's opinion substantially outweighs their prejudicial effect."<sup>176</sup> The added language, explained the advisory committee, "emphasize[s] that when an expert reasonably relies on inadmissible information to form an opinion or inference, the underlying information is not admissible simply because the opinion or inference is admitted."<sup>177</sup> Or is it?

Protestations to the contrary, amended Rule 703 performed like the legendary alchemist's stone, transforming inadmissible evidence into a species of admissible evidence. The transformation occurred first in the new text of Rule 703, which reframed the issue as the disclosure of "otherwise inadmissible" evidence.<sup>178</sup> Amended Rule 703 guarded against "potential misuse," concluded the advisory committee, by two means. First, the new rule only permits disclosure "if the trial court finds that the probative value of the information in assisting the jury to evaluate the expert's opinion substantially outweighs its prejudicial effect."<sup>179</sup> Bluntly stated, Rule 703 "provides a presumption against disclosure to the jury."<sup>180</sup> Second, should the trial judge permit disclosure, opposing counsel can claim the protections of Rule 105, which requires the trial judge to give a "limiting instruction upon request."<sup>181</sup> It was, however, left to the trial

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174. Rice, *supra* note 114, at 587 (hearsay exception), 596 ("charade").

175. Emerging Problems, *supra* note 161, at 232 (quoting a memorandum by Professor Daniel Capra, the reporter to the Advisory Committee on Evidence Rules).

176. Fed. R. Evid. 703.

177. Fed. R. Evid. 703 advisory committee's note (amended 2000).

178. Fed. R. Evid. 703 (emphasis added). The complete text of Federal Rule of Evidence 703 appears at *supra* note 121. The second sentence of current Rule 703 speaks of an expert's reliance on evidence that "need not be admissible," but the third sentence uses the telling phrase "otherwise inadmissible." The Advisory Committee's choice represents an apparent compromise between critics who argued against any disclosure on direct examination and those who advocated that an expert's reasonable reliance sufficed to admit the evidence, particularly over hearsay objections. See Emerging Problems, *supra* note 161, at 232-33 (discussing other proposals, including state revisions to Rule 703 that were more heavily weighted against disclosure).

179. Fed. R. Evid. 703 advisory committee's note (amended 2000).

180. *Id.*

181. *Id.*

court to consider “the probable effectiveness or lack of effectiveness” of such instructions under the “particular circumstances.”<sup>182</sup> As we have seen, the two safeguards are integrally related and the ruling ultimately driven, one suspects, by the judge’s assessment of a limiting instruction. A judge satisfied that the instruction is adequate will likely conclude that the presumption against disclosure has been overcome.

In sum, amended Rule 703 reconceptualizes the disclosure issue as a problem of limited admissibility. Prior to 2000, the dilemma had been what to do with the expert who reasonably relied on inadmissible evidence. After 2000, Rule 703 reformulated the problem as the expert’s reasonable reliance on “otherwise” inadmissible evidence. Proponents need no longer struggle to explain why they should be permitted to pour inadmissible evidence into the trial record; the expert’s reasonable reliance effectively means the evidence is now “otherwise admissible” to help the jury better understand the expert’s reasoning and conclusion.

### C. Postscript: Post-2000 Problems

It is beyond the scope of our purpose to consider the efficacy of amended Rule 703, but several points are in order. First, the new language seems overly preoccupied with hearsay issues. Rule 703 permits experts’ reliance on evidence that is “inadmissible” under any exclusionary rule; hearsay may be the most common affliction, but it is not the sole ground for exclusion.<sup>183</sup> Nor does inadmissible hearsay always pose the greatest risk of unfairness.<sup>184</sup> Second, and related, amended Rule 703 has formally embraced all the doctrinal shortcomings and baggage associated with limited admissibility, including the very real question of whether the purported distinctions between permissible and impermissible uses are meaningful in themselves and adequately expressed in a limiting instruction.

At this stage it is too early to tell whether amended Rule 703 has had any pronounced effect on trial practice. Has the asserted “presumption” against disclosure for limited purposes resulted in fewer rulings permitting disclosure for the limited purpose of better understanding the expert’s reasoning? It seems unlikely, for example, that *Sphere Drake Insurance v. Trisko* would have come out differently under the present rule.<sup>185</sup> The trial judge found that the jury needed to hear Hernando and Freddy’s statements to the detective. The limiting instruction told the jury to give the statements

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182. *Id.*

183. *Id.* The Advisory Committee repeatedly distinguishes between evidence that is not admissible for “substantive purposes” but which may be admissible to assist the jury in weighing the expert’s opinion. The distinction is apt in the hearsay context but lacks efficacy when considering evidence excluded under the other acts doctrine, for example.

184. For example, inadmissible character and propensity evidence may pose a far greater danger of misuse. See Christopher B. Mueller & Laird C. Kirkpatrick, *Evidence* § 4.11 (3d ed. 2003).

185. See *supra* text accompanying notes 141–51.

“no weight” except as it “inform[ed]” them of the factual basis for Detective Crowley’s expert opinion that the jewelry had been stolen (just as Hernando and Freddy said it had).<sup>186</sup> The jury’s need for the evidence would likely have “substantially outweigh[ed] the[] prejudicial effect”<sup>187</sup> of the hearsay in light of the courts’ faith in limiting instructions.

Proponents seeking disclosure of “otherwise inadmissible” evidence on direct examination seemed to have gained the most from amended Rule 703’s explicit embrace of limited admissibility, which makes such arguments much more straightforward than before 2000. Yet the new language may have the unintended effect of creating new avenues for excluding expert opinion testimony altogether. Where an expert’s opinion rests primarily on inadmissible evidence that does not warrant disclosure under amended Rule 703, some courts have precluded not just the proponent’s use of such evidence on direct examination but have also excluded the expert’s opinion itself, which would otherwise serve only as a hearsay conduit.<sup>188</sup>

#### IV. ETHICAL FIREWALLS AND RULE 703

Need trial lawyers apologize for using Rule 703 to disclose inadmissible evidence? More to the point, is this unethical or unprofessional conduct that opens the lawyer to sanctions or disciplinary rebuke? Pulling together the strands of ethics, evidence doctrine, and trial practice, this section focuses on how Rule 703 and limited admissibility provide at least two ethical firewalls that insulate against charges of impropriety. Both firewalls are made of the same stuff: the assumption that parties will use evidence rules in an adversarial manner to promote their clients’ best interest. In elaborating upon this point, we will draw upon the earlier examples in

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186. *Sphere Drake Ins. v. Trisko*, 226 F.3d 951, 955 (8th Cir. 2000).

187. Fed. R. Evid. 403.

188. See *Turner v. Burlington N. Santa Fe R.R. Co.*, 338 F.3d 1058, 1061–62 (9th Cir. 2003) (citing amended Rule 703, the trial court properly precluded an arson expert from testifying that the fire was intentionally set where the opinion rested almost exclusively on an inadmissible laboratory report which found that gasoline had been poured into the soil in question). In a sense, *Turner* conflicts with Rule 703, which explicitly permits an expert to base an opinion on inadmissible evidence that is of a type reasonably relied upon by such experts in the field. Thus, the judge could have permitted the opinion but not a full explanation of its bases. Obviously this result troubled the *Turner* court. While the proponent would have liked to disclose the content of the laboratory report (for whatever purpose), the opinion alone satisfied its prima facie burden. And opposing counsel would not dream of cross-examining the expert about his bases because this would open the door to the “otherwise inadmissible” laboratory report. Yet if the cross-examiner says nothing about the expert’s bases, during argument the proponent can rightfully refer to its expert’s “unchallenged findings” that the fire was caused by arson.

It is too early to tell, but *Turner* may embody a new line of cases which hold that the expert’s opinion must be predicated on facts and data that are sufficiently compelling to warrant disclosure under amended Rule 703, assuming they are not admissible in the first instance. Such a construction, however, seems in conflict with amended Rule 703 and a throwback to the common law stance that the expert’s bases must be admissible. See *supra* text accompanying notes 115–19.



*Ricciardi*, *Trisko*, and *Nachtsheim*. Our focus will be on the proponent of the evidence, as Rule 705 accords opposing counsel virtually free rein to cross-examine an expert about anything, admissible or inadmissible, upon which an opinion is based.<sup>189</sup>

The first firewall is the threshold issue of whether the underlying evidence is admissible or inadmissible. The law places the burden on the opponent to object in a timely and reasonably specific manner. Absent a proper objection, the opponent waives the error.<sup>190</sup> Thus, if opposing counsel in *Ricciardi* had failed to object properly to Nirmel's note on hearsay grounds, its contents would have been admissible as substantive evidence and the jury would have been instructed to give it whatever weight it deemed appropriate.<sup>191</sup> The proponent displayed imagination, creativity, and skill in arguing that Nirmel's note was admissible under any one of five different hearsay exceptions, which in turn provoked more objections by opposing counsel, who was equally skilled in the ways of hearsay. While the court rejected all five hearsay theories of admissibility, there was no intimation that proponent's contentions were frivolous. In cases like *Ricciardi*, the ground of exclusion is so obvious and the evidence so critical that only legal malpractice would likely account for a failure to raise the objection, but in other cases opposing counsel may forgo it for tactical reasons or because she simply missed it.<sup>192</sup> The point is simply that evidence only becomes "inadmissible" as a result of a timely objection and ruling by the court. From the proponent's perspective, there is no harm in trying.

Limited admissibility comprises the second ethical firewall. Saddled with rulings that their critical evidence was inadmissible, the proponents in *Ricciardi*, *Trisko*, and *Nachtsheim* all held a critical evidentiary card: each had experts who, they believed, would testify that the evidence was of a type reasonably relied upon by experts in the field.<sup>193</sup> In *Nachtsheim* an expert on aircraft design was deemed to have reasonably relied upon inadmissible evidence of another airplane crash.<sup>194</sup> *Trisko* nicely illustrates how easily the standard is met. The expert, Detective Crowley, "testified that he regularly relied on the statements of informants as an investigating

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189. See Fed. R. Evid. 705; see also Fed. R. Evid. 703 advisory committee's note (amended 2000) ("Nothing in this Rule restricts the presentation of underlying expert facts or data when offered by an adverse party.").

190. See 21 Wright & Graham, *supra* note 3, § 5037.

191. See *supra* text accompanying notes 125–34.

192. Blinka, *supra* note 4, at 32–33.

193. In *Ricciardi* the court held that reasonable reliance had not been established, although its analysis seems a bit strained. See 811 F.2d 18, 25 (1st Cir. 1987); see *supra* text accompanying notes 136–40.

194. See *Nachtsheim v. Beech Aircraft Corp.*, 847 F.2d 1261, 1270–71 (7th Cir. 1988). Reasonable reliance was apparently not disputed. Rather, the issue centered on whether the plaintiff's expert should have been permitted to discuss the inadmissible other accident evidence on direct examination.

officer.”<sup>195</sup> This simple foundation is all that Rule 703 demands. One suspects that parties hiring experts have few difficulties establishing that the expert “regularly” or “customarily” relies on the type of evidence in question, whether inadmissible hearsay or other act evidence.<sup>196</sup>

Once reasonable reliance is established, the proponents inevitably argue for disclosure of inadmissible evidence for the limited purpose of explaining or clarifying the expert’s opinion. Prior to 2000, courts struggled to conceptualize the status of inadmissible expert bases, ranging among words like “reveal,” “disclose,” and “admit.”<sup>197</sup> Amended Rule 703, as we have seen, drained the doctrinal quagmire by transforming the inadmissible bases into ones that are “otherwise inadmissible” and safeguarding against abuses by presumptively precluding disclosure by proponents. More to the point, proponents are no longer forced to argue awkwardly that their expert’s “inadmissible” bases should nonetheless be “disclosed” to the jury for some ill-defined other (often meaningless) purpose. Rather, those bases are now just “otherwise inadmissible” and proponents will argue that Rule 105 and a limiting instruction provide the time-honored remedies against potential unfairness. Limited admissibility, then, defuses the presumption against disclosure. The burden is effectively shifted to opposing counsel to explain why she is not adequately protected by a limiting instruction. Alternatively, opposing counsel may argue that the expert’s testimony should be confined to a generic or otherwise oblique reference to the offending evidence (not all the details), but this too may prove elusive.

Once again *Trisko* illustrates these points, underscoring that Trisko’s lawyer did not behave unethically or unprofessionally in any sense by spilling inadmissible hearsay before the jury. As argued above, there is no compelling reason to believe that *Trisko* comes out differently under amended Rule 703. A trial judge convinced that the jury should hear what informants Freddy and Hernando told the detective about the theft and that a limiting instruction is adequate, even if nonsensical, to protect against unfairness will likely rule the same way. In light of the trial court’s wide

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195. *Sphere Drake Ins. v. Trisko*, 226 F.3d 951, 955 (8th Cir. 2000). It is unclear whether Trisko formally retained Detective George Crowley for his testimony or whether the latter was deposited in his capacity as the investigating detective in the case, in which event Crowley’s assertions of reasonable reliance may have carried greater weight with the judge.

196. See Edward J. Imwinkelried, *Evidentiary Foundations* § 9.03[4][c] (6th ed. 2005). The reasonable reliance standard itself is subject to competing authority, with some cases evoking a liberal approach that largely defers to experts and others a more restrictive approach that permits the judge to override a compliant expert where reliability is an issue. See *Emerging Problems*, *supra* note 161, at 225–27.

197. For example, in *Nachtsheim* the Seventh Circuit lurches back and forth among different characterizations: (1) “whether the expert may reveal,” (2) whether “materials independently excluded” by another rule will be “admitted under Rule 703,” (3) the trial judge’s power “to permit an expert witness to testify about otherwise inadmissible facts,” and, again, (4) whether the judge, in her discretion may “allow the expert to reveal to the jury the information gained from the expert’s pretrial studies and investigations.” 847 F.2d at 1270–71 (internal quotation marks omitted).

discretion and Rule 703's open invitation to launder inadmissible evidence into a species of admissible evidence, why would a proponent forgo the opportunity? Here too the burden is on the opponent to object that she is not protected by a limiting instruction or that the inadmissible bases should be edited or redacted in some fashion to minimize the harm, but even this may be insufficient.<sup>198</sup>

In sum, Rule 703 fully embodies the adversary ethic. It provides two ethical and evidentiary firewalls for proponents seeking to expose the jury to problematic evidence. First, fundamental trial procedure places the burden on opposing counsel to properly object, absent which the problematic evidence is admissible. Second, Rule 703 transforms inadmissible evidence into "otherwise inadmissible" evidence provided the proponent's expert testifies that it is the "type" of information upon which she regularly, usually, or customarily relies in forming opinions—a low barrier indeed. This simple foundation opens the way to a request for complete disclosure of the problematic evidence subject to a limiting instruction that a jury may likely find so baffling that it will be ignored.

#### CONCLUSION

Ambiguity about the core concept of admissibility yields, unsurprisingly, ethical ambivalence by lawyers applying evidence rules in an adversary trial. The issue is not whether trial lawyers abuse the doctrine of limited admissibility. As we have seen, it is a doctrine that invites abuse through clever, overly refined, sometimes sophistic distinctions that are designed to elide exclusionary rules. The objective is to expose the jury to the evidence, trusting that twelve people with common sense will draw all reasonable inferences regardless of a limiting instruction, and especially when the limiting instruction is incomprehensible. So long as evidence law harbors, and indeed blesses, such evasions, why would skilled trial lawyers not use the doctrine to full advantage?

From this, several suggestions follow. First, there is a need to revisit many of the distinctions now recognized by evidence law. Does public policy justify them? Are the distinctions coherent and meaningful, or are they so diaphanous as to be meaningless and unintelligible, particularly when presented to laypeople? The goal is not to turn the clock back to rigid, paternalistic exclusionary rules, but to better appreciate that tortured distinctions that consume hours of class time in evidence courses are likely more problematic, and more damaging, in a trial.

Second, in rethinking applications of limited admissibility, we must look to the trial. Certainly limiting instructions need to be redrawn, but the

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198. For example, in *Trisko*, the judge may have ruled that Detective Crowley could only testify that his opinion was founded on "information he received from his informants, Freddy and Hernando." 226 F.3d at 951. One suspects that a jury would quickly fill in the blanks when Crowley testifies, "Based on my conversation with two reliable informants, Freddy and Hernando, I concluded that the jewelry had been stolen." *Id.*

suggestion here is more than a plea for “better” instructions. Rather, the distinctions harbored by the sundry rules must be meaningful, justified by public policy, and comprehensible to laypersons. In short, if we cannot intelligibly explain the concept to the average person, it may not be worth maintaining.

Finally, putting to one side the nettlesome issues about limiting instructions, we should pay more attention to arguments by counsel. The real impact of a ruling that limits the use of evidence may be its effect on closing arguments. Jurors are far less likely to embrace a prohibited purpose (though one may assume they will recognize it) if the parties’ lawyers are not, in effect, beseeching them to do so. Here, too, the key is a doctrine that embraces coherent, rational distinctions.

Our experience with Rule 703 embodies many of these lessons. Although improved by the 2000 amendment, the rule is still flaccid. The range of inadmissible evidence extends to all evidentiary pitfalls. Rule 703 should be rethought to consider whether, for example, inadmissible character and other act evidence pose far more significant risks of misuse than hearsay. In determining an expert’s reasonable reliance, the judge should play an active, autonomous, gate-keeping role that recognizes that her responsibilities at trial are as important a consideration as how the expert usually uses such inadmissible evidence in his own calling.<sup>199</sup> Disclosure on direct examination should be restricted to “otherwise inadmissible” hearsay evidence at most; it should not extend to inadmissible character evidence, for example. Generally, the proponent should not be permitted to disclose the inadmissible evidence in any detail, although a generic reference, “I reviewed affidavits,” may be appropriate. In those instances where the proponent convinces the trial judge that the need for, and reliability of, the information is so compelling as to overcome the presumption against any disclosure, Rule 703 may work in tandem with Rule 807 (the residual hearsay exception) to permit the jury to consider the evidence for the very same purpose as the expert did.<sup>200</sup> In short, where warranted, evidence doctrine should properly recognize the critical roles played by the *Hernandos* and *Freddys* of the world rather than contenting itself with a silly, pointless legal fiction that invites abuse of and, worse, disrespect for a trial system that strives very hard to get at the truth.

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199. Carlson, *Policing*, *supra* note 114, at 582–83.

200. *See* Rice, *supra* note 114, at 591.