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Federal Rule of Evidence 703: The Back Door and the Confrontation Clause, Ten Years Later

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FEDERAL RULE OF EVIDENCE 703: THE BACK DOOR AND THE CONFRONTATION CLAUSE, TEN YEARS LATER

*Ian Volek**

Federal Rule of Evidence 703 allows experts to form opinions using information that is not admitted at trial, and even on evidence that is inadmissible. In 2000, Rule 703 was amended to emphasize that it did not serve as an exception to the other rules of evidence. When experts rely on inadmissible evidence, the evidence can only be disclosed for the limited purpose of assisting the jury to evaluate the expert's opinion, and only if the probative value of the evidence substantially outweighs its prejudicial effect. This Note reviews the application of Rule 703 before and after the 2000 amendment. It finds that disclosure of inadmissible evidence should still be expected in a substantial number of cases, but nevertheless concludes that the compromise approach struck by amended Rule 703 is largely correct. Courts should, however, weigh the strong possibility that limiting instructions under Rule 703 will often be ineffective (and logically impossible), and reduce disclosure accordingly.

This Note also considers Rule 703's intersection with recent changes in the U.S. Supreme Court's Confrontation Clause jurisprudence. It argues that, although Rule 703 allows expert reliance on inadmissible evidence, the compromises struck by Rule 703 should not be allowed to mask Confrontation Clause violations. Expert disclosure of testimonial hearsay basis evidence should be understood as a Confrontation Clause violation. Evaluating the expert's testimony to see if it includes an independent opinion, as suggested in some recent opinions, does not solve the problem. An expert can both provide an independent opinion and convey testimonial hearsay in violation of the Confrontation Clause.

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INTRODUCTION

“Expert” testimony on a multitude of topics appears in modern civil and criminal trials.¹ An engineer might provide an opinion on the operation of equipment at a manufacturing plant.² A doctor might opine about a person’s physical and mental competence to enter into an agreement.³ In a lawsuit over insurance, an expert might testify that a house fire was deliberate, not accidental.⁴ Or, in a criminal prosecution, a police officer might testify as a “gang expert” to provide information about the background of a gang, or to translate gang code words for the jury.⁵

Experts can obtain the information that underlies their opinions from many sources. A doctor, for example, can develop specialized medical knowledge by learning from teachers and colleagues during and after medical school, by gaining practical experience treating patients, and by reading medical journals and treatises.⁶ The doctor can also rely on a variety of sources to obtain information about a specific patient. The doctor might obtain information from personal observation of the patient, from the patient’s own description of his condition, from the patient’s family, from other medical professionals, and from medical records.⁷ In the context of a lawsuit, the doctor might also obtain information from the patient’s lawyer, from legal documents, and by observing the trial itself.⁸

An expert in practice can thus rely on a variety of information. The rules of evidence, however, restrict the information that a jury is permitted to hear.⁹ If an expert provides an opinion at trial, should the expert be allowed to rely on all of the information that she would in practice, or should the expert be allowed to rely on only the information that the jury can hear? An expert’s background knowledge that forms the basis of her expertise may present an unavoidable problem. The expert is useful precisely because of

1. Concern over expert testimony is not a modern phenomenon, however. Learned Hand criticized expert testimony in a 1901 Harvard Law Review article. See generally Learned Hand, *Historical and Practical Considerations Regarding Expert Testimony*, 15 HARV. L. REV. 40 (1901).

2. *Arkwright Mut. Ins. Co. v. Gwinner Oil, Inc.*, 125 F.3d 1176, 1182–83 (8th Cir. 1997) (describing the testimony of a mechanical engineer called to offer an opinion on the operation of a tank in a manufacturing plant).

3. *United States v. Zandford*, 110 F.3d 62, No. 95-5816, 1997 WL 153822, at *3 (4th Cir. 1997) (unpublished table decision) (describing the expert testimony of a neurologist and general physician).

4. See *Westfield Ins. Co. v. Harris*, 134 F.3d 608, 611–13 (4th Cir. 1998) (describing the expert testimony of a fire marshal that a fire was set deliberately).

5. *United States v. Garcia*, 447 F.3d 1327, 1332–33 (11th Cir. 2006) (describing the qualifications and testimony of a federal agent called as an expert witness).

6. See Paul D. Rheingold, *The Basis of Medical Testimony*, 15 VAND. L. REV. 473, 478–88 (1962) (describing the sources of general knowledge underlying a medical expert’s opinion).

7. See *id.* at 488–514 (describing a medical expert’s possible firsthand and secondhand sources of particular knowledge about an individual before trial).

8. See *id.* at 514–26 (describing possible legal sources that could supply a medical expert with knowledge about a particular case).

9. FED. R. EVID. 402 advisory committee’s note (“Not all relevant evidence is admissible. The exclusion of relevant evidence occurs in a variety of situations . . .”).

her expertise, which may be impossible for the jury to acquire through education at trial,¹⁰ and which the expert acquired without the rules of evidence in mind.¹¹ To gain the benefit of expert testimony, the legal system must recognize that knowledge.¹²

The case-specific information that an expert might use, however, presents greater problems. If the rules of evidence or other considerations¹³ have kept that information from the jury, should an expert be allowed to rely on such information to form an opinion to be presented at trial? If the expert does rely on such evidence to form an opinion, should the expert be allowed to disclose this “inadmissible basis evidence” to the jury?

The common law restricted the structure of expert testimony and the sources of information upon which experts could rely.¹⁴ With limited exceptions, the common law required experts to base their opinions on information admissible at trial, which the experts could obtain at trial or from their own observations outside of court.¹⁵ The common law strictures ensured, in theory, that the jury knew the factual underpinnings of the expert’s opinion and could accept or reject the opinion accordingly: “[A] juror should be able to say, ‘My conclusion is in accord with the opinion of the expert, not because he has expressed the opinion, but because he made me understand the facts in such a way that my opinion is the same as his.’”¹⁶

The Federal Rules of Evidence loosened the common law restrictions on expert testimony so that the information experts relied on to provide opinions for trial could more closely correspond to the information they would have relied on in practice (outside of court).¹⁷ In particular, Federal Rule of Evidence 703 allowed experts to rely on information that would not be admissible at trial.¹⁸

Rule 703 left open the question of whether an expert could disclose inadmissible basis evidence to the jury. Commentators advocated a variety

10. See Ronald J. Allen & Joseph S. Miller, *The Common Law Theory of Experts: Deference or Education?*, 87 NW. U. L. REV. 1131, 1133 (1993) (“Experts are often expert because of years of specialized training, and thus there may be formidable barriers to educating the fact finder about the relevant issues at trial.”).

11. See Rheingold, *supra* note 6, at 478–88.

12. See DAVID H. KAYE ET AL., *THE NEW WIGMORE: EXPERT EVIDENCE* § 4.1 (2010) (explaining that we accept that an expert’s background knowledge is necessarily based on hearsay).

13. “The exclusion of relevant evidence . . . may be called for by [the Federal Rules of Evidence], by the Rules of Civil and Criminal Procedure, by Bankruptcy Rules, by Act of Congress, or by constitutional considerations.” FED. R. EVID. 402 advisory committee’s note.

14. See *infra* Part I.A.1.

15. See *infra* Part I.A.1.

16. Mason Ladd, *Expert Testimony*, 5 VAND. L. REV. 414, 428 (1952).

17. FED. R. EVID. 703 advisory committee’s note (“[T]he 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.”).

18. FED. R. EVID. 703 (“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.”).

of approaches.¹⁹ One approach feared the use of experts as “conduits” or a “back door” through which parties could put inadmissible evidence before the jury.²⁰ This approach would have prevented the expert from discussing the inadmissible basis evidence in any detail.²¹ An opposing approach argued that information relied on by experts should be disclosed to the jury for substantive consideration.²² A third approach, charting a middle course that tended to be followed by courts,²³ argued that inadmissible basis evidence should be disclosed to the jury for the limited purpose of explaining the expert’s opinion, subject to an evaluation of the probative value and prejudicial effect of the evidence under Rule 403.²⁴

In 2000, Rule 703 was amended to confirm that courts should take an approach along the lines of this middle course.²⁵ Amended Rule 703 clarified that Rule 703 did not function as an exception through which otherwise inadmissible evidence could be admitted.²⁶ It also created a presumption that the jury should not hear inadmissible basis evidence relied on by an expert.²⁷ Under amended Rule 703, inadmissible basis evidence that an expert has relied on can be disclosed to the jury for the limited purpose of assisting the jury’s evaluation of the expert’s opinion, but only if the probative value of the evidence “substantially outweighs” the prejudicial effect of disclosure to the jury.²⁸ Rule 703 thus reverses the default presumption of disclosure under Rule 403 to create a presumption against disclosure even for the limited purpose of explaining the expert’s opinion.²⁹

It has been more than ten years since the amendment of Rule 703.³⁰ This Note revisits the controversy leading to the amendment and examines the

19. See *infra* Part I.B.3.

20. Ronald L. Carlson, *Experts as Hearsay Conduits: Confrontation Abuses in Opinion Testimony*, 76 MINN. L. REV. 859, 859–66 (1992) (describing “the problem of backdoor hearsay through expert opinion”).

21. See *infra* Part I.B.3.a.

22. See *infra* Part I.B.3.b.

23. See Allen & Miller, *supra* note 10, at 1135 (describing “the current practice of the courts of admitting the underlying data for the purpose of appraising the opinion”).

24. See *infra* Part I.B.3.c. According to Rule 403, “Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.” FED. R. EVID. 403.

25. FED. R. EVID. 703 advisory committee’s note on 2000 amendment. This Note uses the text of the rules as currently in force at the time of publication. On December 1, 2011, barring congressional action to the contrary, restyled rules will go into effect. The restyling was designed to be non-substantive, and thus should not impact case law precedent or the analysis in this Note. See *Federal Rules of Evidence—2011 Pending Amendment to Restyle the Federal Rules of Evidence*, FED. EVIDENCE REVIEW, <http://federalevidence.com/node/1051> (last visited Oct. 20, 2011).

26. See *id.*

27. See FED. R. EVID. 703.

28. See *id.*

29. Compare *id.* (“Facts or data that are otherwise inadmissible shall not be disclosed . . . unless . . . their probative value . . . substantially outweighs their prejudicial effect.”), with FED. R. EVID. 403 (“[E]vidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice . . .”).

30. FED. R. EVID. 703 advisory committee’s note on 2000 amendment.

application of amended Rule 703. Part I of this Note discusses the evolution of the rules governing disclosure of inadmissible basis evidence, from the common law to amended Rule 703. Part II discusses the application of amended Rule 703 in the courts, including the effect of the amendment to Rule 703 in closing a back door to inadmissible evidence. As discussed in Part II, the amendment to the Rule may have curbed disclosure of inadmissible evidence to some degree, but disclosure can still be expected in a substantial number of cases. Part II also addresses the implications of recent changes in Confrontation Clause jurisprudence for the treatment of inadmissible basis evidence. Part III discusses Rule 703 in view of experience under the amended Rule, and concludes that Rule 703 struck an appropriate compromise, but that courts should place additional emphasis on the ineffectiveness of limiting instructions under the Rule. The approaches taken in Rule 703 should not, however, be allowed to obscure Confrontation Clause problems inherent in some expert testimony.

I. THE HISTORY AND EVOLUTION OF FEDERAL RULE OF EVIDENCE 703

This part discusses the background and evolution of Rule 703. Part I.A addresses the common law background of Rule 703 and Rule 703's broadening of the common law restrictions on the permissible bases of expert testimony. Part I.B discusses approaches for treating disclosure of inadmissible basis evidence under Rule 703. Part I.C addresses the 2000 amendment to Rule 703.

A. *The Permissible Bases and Form of Expert Testimony Under the Common Law and the Federal Rules of Evidence*

Expert testimony can be understood as having a syllogistic structure.³¹ An expert applies specialized knowledge (the major premise) to information specific to the case at hand (the minor premise) to reach a conclusion.³² For example, a physician might testify that the plaintiff in a personal injury action had a brain injury.³³ The physician's major premise could be that the presence of particular symptoms A, B, and C indicates brain injury D.³⁴ The plaintiff's actual symptoms would form the physician's minor premise.³⁵ For example, assume the plaintiff exhibited symptoms A, B, and C. By applying the major premise to the minor premise, the expert could conclude that the plaintiff suffered from brain injury D.³⁶ Both the major and minor premises implicate inadmissible basis evidence.³⁷ This Note

31. See Edward J. Imwinkelried, *The 'Bases' of Expert Testimony: The Syllogistic Structure of Scientific Testimony*, 67 N.C. L. REV. 1, 2–3 (1988); see also Julie A. Seaman, *Triangulating Testimonial Hearsay: The Constitutional Boundaries of Expert Opinion Testimony*, 96 GEO. L.J. 827, 837 n.38 (2008) (“Professor Imwinkelried’s syllogistic framework remains the most helpful way of thinking about this process.”).

32. See Imwinkelried, *supra* note 31, at 2–3.

33. *Id.* at 2.

34. *Id.*

35. *Id.* at 3.

36. *Id.*

37. See *infra* notes 39–58 and accompanying text.

focuses on the minor premise, the case-specific data that an expert has relied on in forming an opinion. Common law rules strictly regulated the case-specific evidence underlying expert opinions.³⁸ The Federal Rules of Evidence loosened these restrictions, as will be discussed in Part I.A.2.

1. Restrictions on the Bases and Form of Expert Testimony at Common Law

At common law, much of the information that an expert might rely on was inadmissible hearsay.³⁹ Expertise developed through firsthand practical experience presented little problem,⁴⁰ but the majority rule at the end of the nineteenth century held “that standard medical and scientific works are inadmissible in evidence as proof of the declarations or opinions which they contain.”⁴¹ Thus, to the extent that the expert learned from others or by reading, the expert had relied on hearsay.⁴² Nevertheless, the common law recognized that experts frequently acquired their knowledge from hearsay, and that “to reject a professional physician or mathematician because the fact or some facts to which he testifies are known to him only upon the authority of others would be to ignore the accepted methods of professional work and to insist on finical and impossible standards.”⁴³ Thus, the common law accepted that an expert’s general knowledge often came from inadmissible evidence.

The expert’s case-specific knowledge, however, presented a greater problem. The common law restricted both the sources of case-specific information on which an expert could permissibly rely and the form of the expert’s testimony at trial.⁴⁴ These rules sought to ensure that the expert relied only on admissible evidence and that the jury knew the basis of the

38. See *infra* notes 44–58 and accompanying text.

39. 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, 484, 488 (1997). As currently defined by the Federal Rules of Evidence, hearsay 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.” FED. R. EVID. 801(c). The definition of hearsay in the Federal Rules reflects the common law understanding of hearsay. See 3 JOHN HENRY WIGMORE, A TREATISE ON THE ANGLO-AMERICAN SYSTEM OF EVIDENCE IN TRIALS AT COMMON LAW § 1361 (2d ed. 1923).

40. Blinka, *supra* note 39, at 484.

41. HENRY WADE ROGERS, THE LAW OF EXPERT TESTIMONY § 166 (2d ed. 1891); see also FED. R. EVID. 803(18) advisory committee’s note (noting that “the great weight of authority has been that learned treatises are not admissible as substantive evidence though usable in the cross-examination of experts”); Blinka, *supra* note 39, at 485–87. An exception existed for “books that relate[d] to the exact sciences,” or that by longstanding use had become widely recognized as the type of authority that people relied on to govern their lives. ROGERS, *supra*, § 163. This exception permitted admission in evidence of “almanacs, astronomical calculations, tables of logarithms, mortuary tables for estimating the probable duration of life at a given age, tables of weights and measures, and of currency, chronological tables, interest tables, and annuity tables.” *Id.*; Blinka, *supra* note 39, at 485.

42. Blinka, *supra* note 39, at 484.

43. 1 WIGMORE, *supra* note 39, § 665; see also KAYE ET AL., *supra* note 12, § 4.5; ROGERS, *supra* note 41, §§ 19, 162; Blinka, *supra* note 39, at 485–87.

44. See Blinka, *supra* note 39, at 487–90.

expert's testimony.⁴⁵ As a result, the jury could (at least in theory) evaluate the basis of the expert's testimony and accept or reject the expert's opinion accordingly.⁴⁶

More specifically, the common law generally limited the permissible case-specific bases of expert testimony to two sources.⁴⁷ First, the expert could testify based on the expert's personal observations.⁴⁸ Second, the expert could testify based on information admitted at trial.⁴⁹ The expert could obtain this information by attending the trial and listening to the same information as the jury.⁵⁰ Alternatively, and more commonly, the expert could be presented with the information in a hypothetical question at trial.⁵¹ The expert was not limited to one source of information or the other: an expert who had knowledge obtained by personal observation could also learn additional facts at trial.⁵²

Limited exceptions allowed experts to rely on certain inadmissible case-specific information, and to disclose the information to the jury.⁵³ Experts on the valuation of property were permitted to rely on inadmissible hearsay such as evidence of price lists or comparable sales.⁵⁴ This exception allowed courts to use information that experts commonly relied on outside of court, without imposing unnecessary costs on the court and the parties. In addition, a treating physician was permitted to rely on his patient's description of his condition.⁵⁵ As Dean John Henry Wigmore pointed out,

45. *See id.*

46. *See* KAYE ET AL., *supra* note 12, § 4.4, at 151 (noting that the hypothetical question, which was required in certain circumstances at common law, in theory, "provided the jury with a clear exposition of the expert's basis, so that it could decide whether to believe the premises and whether the expert's conclusions properly followed from them"); Blinka, *supra* note 39, at 488 ("What good was the expert's opinion, then, unless both the expert and the jury concurred in what was said or done in this specific case?").

47. *See* FED. R. EVID. 703 advisory committee's note; STEPHEN A. SALTZBURG ET AL., FEDERAL RULES OF EVIDENCE MANUAL § 703.02[1] (9th ed. 2006).

48. *See* FED. R. EVID. 703 advisory committee's note; Blinka, *supra* note 39, at 489; JoAnne A. Epps, *Clarifying the Meaning of Federal Rule of Evidence 703*, 36 B.C. L. REV. 53, 56–57 (1994). For example, a doctor could present an opinion based on his firsthand examination of a patient. FED. R. EVID. 703 advisory committee's note (citing Rheingold, *supra* note 6, at 489).

49. *See* FED. R. EVID. 703 advisory committee's note; Blinka, *supra* note 39, at 489–90; Epps, *supra* note 48, at 56–57. For example, an expert providing an estimate of damages suffered by a plaintiff would rely on evidence admitted at trial, instead of personal observation. Epps, *supra* note 48, at 62.

50. FED. R. EVID. 703 advisory committee's note; SALTZBURG ET AL., *supra* note 47, § 703.02[1]; Blinka, *supra* note 39, at 489–90; Epps, *supra* note 48, at 56–57.

51. FED. R. EVID. 703 advisory committee's note; SALTZBURG ET AL., *supra* note 47, § 703.02[1]; Blinka, *supra* note 39, at 489–90; Epps, *supra* note 48, at 57 & n.20.

52. 1 WIGMORE, *supra* note 39, § 678.

53. KAYE ET AL., *supra* note 12, § 4.5.1.

54. *Id.*; Epps, *supra* note 48, at 56 & n.19.

55. ROGERS, *supra* note 41, § 47; 1 WIGMORE, *supra* note 39, § 688; Blinka, *supra* note 39, at 496–98; Epps, *supra* note 48, at 56 & n.18. The patient's statements about his present physical condition for the purpose of treatment were at the core of the exception. Statements by the patient to a non-treating physician and statements by the patient about his medical history or the cause of his condition were viewed less favorably. Blinka, *supra* note 39, at 497–98.

“[T]he law cannot afford to stultify itself by refusing to recognize, in testimonial rules, the safe and accepted practices of medical science.”⁵⁶ The doctor relied on the patient’s statements in medical practice. The law should not prevent the doctor from doing so at trial.⁵⁷ Courts justified these exceptions by pointing to expert reliance on the information outside of court, efficiency, and the expert’s own validation of the information.⁵⁸

The common law also limited the form of the expert’s testimony. When the expert relied on personal observations, the rule at the end of the nineteenth century required the expert to disclose the observations before providing his opinion.⁵⁹ In addition, when the expert relied solely or partly on disputed information admitted at trial, common law rules required that the expert testify by answering a hypothetical question (or questions).⁶⁰ The hypothetical question was required to identify the premises of the expert’s opinion, which ensured that the opinion was based on admissible evidence,⁶¹ and also allowed the jury to evaluate the bases of the expert’s opinion.⁶² Hypothetical questions thus served important theoretical purposes. In practice, however, they were “difficult for the attorneys to frame, for the court to rule on, and for the jury to understand.”⁶³ Hypothetical questions could be quite long and complex,⁶⁴ and subject to bias.⁶⁵

The Federal Rules of Evidence both broadened the permissible bases of expert testimony and loosened the common law strictures on the form of expert testimony, as discussed in the next section.

2. Broadening the Permitted Bases and Form of Expert Testimony by the Federal Rules of Evidence

Building on the exceptions provided at common law,⁶⁶ Federal Rule of Evidence 703 broadened the permissible bases of expert testimony.⁶⁷ In addition, Rule 705 loosened common law restrictions on the form of expert testimony.⁶⁸

56. 1 WIGMORE, *supra* note 39, § 688, at 1097; *see also* KAYE ET AL., *supra* note 12, § 4.5.1.

57. 1 WIGMORE, *supra* note 39, § 688, at 1097–98; *see also* KAYE ET AL., *supra* note 12, § 4.5.1.

58. *See* KAYE ET AL., *supra* note 12, § 4.5.1.

59. Blinka, *supra* note 39, at 489. This requirement was largely left to the trial judge’s discretion by the middle of the twentieth century. *Id.*

60. 1 WIGMORE, *supra* note 39, §§ 676–78; Blinka, *supra* note 39, at 489–90.

61. Blinka, *supra* note 39, at 490.

62. 1 WIGMORE, *supra* note 39, § 680.

63. Ladd, *supra* note 16, at 425.

64. *See, e.g.*, Barnes v. Marshall, 467 S.W.2d 70, 74 (Mo. 1971) (describing, in a case relating to a decedent’s testamentary capacity, a question that “hypothesized much of the evidence related by the other witnesses for plaintiff and utilize[d] ten pages of the transcript”). One reported hypothetical question “extended over 83 pages of the reporter’s transcript.” Ladd, *supra* note 16, at 427 (citing Treadwell v. Nickel, 228 P. 25 (Cal. 1924)).

65. Ladd, *supra* note 16, at 427; *see also* KAYE ET AL., *supra* note 12, § 4.4.

66. *See* KAYE ET AL., *supra* note 12, § 4.5.1; *supra* notes 53–58 and accompanying text.

67. *See* FED. R. EVID. 703 advisory committee’s note.

68. *See* FED. R. EVID. 705; FED. R. EVID. 703 advisory committee’s note.

Rule 703, which addresses “[t]he facts or data in the particular case upon which an expert bases an opinion or inference,”⁶⁹ makes three possible sources of information available to an expert.⁷⁰ The first two sources continue common law practices⁷¹: under Rule 703, an expert can still permissibly base an opinion on firsthand observation and on information admitted at the proceeding.⁷² In addition, Rule 703 built on and broadened the permitted common law bases by adding a third source of information, “facts or data . . . made known to the expert . . . before the hearing.”⁷³ Under Rule 703, therefore, an expert can rely on information made known to her outside of the hearing other than by her own perception.⁷⁴ In addition, Rule 703 provides that the evidence relied on by the expert need not be admissible if the evidence is of a type “reasonably relied upon by experts in the . . . field.”⁷⁵

The drafters justified these changes by pointing to rationales similar to those that justified the more limited common law exceptions: the expert’s practice outside of court, efficiency, and the expert’s own validation of the evidence.⁷⁶ A doctor in practice, for example, bases a diagnosis on information obtained from various sources.⁷⁷ According to the advisory committee, much of this information would be admissible at trial, but only at the expense of judicial resources.⁷⁸ Allowing a doctor serving as an expert to rely on such information—even if it is not admitted—“bring[s] the judicial practice into line with the practice of the experts themselves when not in court” and yields efficiency benefits.⁷⁹ Indeed, the doctor in practice makes life and death decisions based on the information upon which she chooses to rely. Therefore, an expert’s “validation, expertly performed and subject to cross-examination, ought to suffice for judicial purposes.”⁸⁰ Thus, with the adoption of Rule 703, an expert could rely on information that was not admitted at trial and even on information that was not admissible at trial.⁸¹

Rule 705, moreover, eliminated the requirement for the hypothetical question and freed the expert’s testimony from the common law rules

69. FED. R. EVID. 703.

70. *Id.* advisory committee’s note. Rule 703 provides, in relevant part, “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.” FED. R. EVID. 703.

71. FED. R. EVID. 703 advisory committee’s note; *see supra* notes 47–52 and accompanying text.

72. FED. R. EVID. 703.

73. *Id.*

74. *Id.* advisory committee’s note (“The third source contemplated by the rule consists of presentation of data to the expert outside of court and other than by his own perception.”).

75. FED. R. EVID. 703 (“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.”).

76. *See supra* notes 53–58 and accompanying text.

77. FED. R. EVID. 703 advisory committee’s note.

78. *Id.*

79. *Id.*

80. *Id.*

81. *See* FED. R. EVID. 703.

requiring that the jury be made aware of the expert's premises.⁸² Under Rule 705, a party may—but is not required to—disclose the information underlying the expert's opinion before providing the opinion.⁸³ The opposing party may, however, inquire into the basis of the expert's opinion on cross-examination, even if the basis is not disclosed by the proponent of the expert's testimony.⁸⁴

In combination, Rules 703 and 705 departed from the common law rules that generally sought to ensure that the expert relied only on admissible evidence and that the jury knew the basis of the expert's testimony.⁸⁵ Under Rules 703 and 705, the expert can rely on information inadmissible at trial, and the expert is not required to disclose the bases of his opinion to the jury.⁸⁶ Rules 703 and 705 as adopted, however, left open the important question of whether or not inadmissible basis evidence could be disclosed to the jury, and if so, for what purpose. This question is addressed in the next section.

B. Disclosure of Inadmissible Basis Evidence to the Jury Under Rule 703

Under Rule 703, “[i]f of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data [upon which the expert relies] need not be admissible in evidence in order for the opinion or inference to be admitted.”⁸⁷ Rule 703 as originally implemented did not, however, address whether experts could disclose the information that they had relied on to the jury if the information was not admissible.⁸⁸ This omission from the Rule gave rise to disagreement about the proper treatment of such evidence, and to concern that expert testimony could be used to improperly place inadmissible evidence before the jury.⁸⁹

Part I.B.1 discusses what kinds of inadmissible evidence might be disclosed under Rule 703. Part I.B.2 discusses options for addressing whether, and to what extent, inadmissible basis evidence may be disclosed to the jury. Part I.B.3 discusses conflicting approaches advocated by commentators in the years leading up to the amendment to the Rule in 2000. And Part I.B.4 identifies the approaches to disclosing inadmissible basis evidence taken by the courts.

82. FED. R. EVID. 705 (“The expert may testify in terms of opinion or inference and give reasons therefor without first testifying to the underlying facts or data, unless the court requires otherwise.”).

83. *Id.*

84. *Id.* (“The expert may in any event be required to disclose the underlying facts or data on cross-examination.”).

85. *See supra* notes 44–65 and accompanying text.

86. *See supra* notes 66–84 and accompanying text.

87. FED. R. EVID. 703.

88. *See id.* advisory committee’s note.

89. *See infra* Part I.B.3.

1. What Inadmissible Evidence Might Be Disclosed?

The debate surrounding consideration and disclosure of inadmissible evidence by experts has focused primarily on hearsay.⁹⁰ When an expert relies on a statement made by a person outside of the courtroom, the jury cannot fully evaluate the reliability of the statement.⁹¹ Instead, the jury must rely on the expert's evaluation.⁹² An out-of-court statement is not hearsay merely because it is repeated in court, however. Instead, as defined by Rule 801(c), "'Hearsay' 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.*"⁹³ Thus, if an expert in court repeats an out-of-court statement, but not for the purpose of proving the truth of the subject matter asserted in the statement, the statement is not hearsay.⁹⁴ This distinction, and whether it is tenable in this context, is discussed further in the following sections.

Nevertheless, Rule 703 does not limit inadmissible basis evidence to hearsay.⁹⁵ Experts may also rely on information rendered inadmissible for other reasons, including other rules of evidence and the Constitution.⁹⁶ Moreover, hearsay and the Constitution intersect in an important Confrontation Clause problem discussed in Part III.

In *United States v. W.R. Grace*,⁹⁷ for example, the Ninth Circuit held that the district court erred by precluding experts from relying on information that had been excluded under Rule 403, without considering whether experts could reasonably rely on the information under Rule 703.⁹⁸ Information that the district court had determined to be "unreliable, irrelevant, or unduly prejudicial" could nevertheless be relied on by an expert if the other requirements for expert testimony—including "reasonabl[e] reli[ance]" under Rule 703—were satisfied.⁹⁹

90. See FED. R. EVID. 703 advisory committee's note; *supra* notes 39–58.

91. The value of a witness's testimony depends on the quality of the witness's perception, memory, and narration of the subject matter of the testimony, as well as the witness's sincerity in testifying. See FED. R. EVID. art. VIII advisory committee's note. To test these factors, the witness should preferably testify under oath, before the factfinder, and subject to cross-examination. See *id.* (discussing hearsay). When an expert relays a statement by an out-of-court speaker, these conditions are not met and the jury cannot fully evaluate the speaker. *Cf. id.*

92. *Cf.* FED. R. EVID. 703 advisory committee's note (arguing, although not in the context of disclosure, that expert validation of basis evidence should allow the expert to rely on the evidence in forming an opinion).

93. FED. R. EVID. 801(c) (emphasis added). As used in the Rule, "statement" is broader than the lay concept of a statement. The concept of "statement" for hearsay purposes includes oral and written assertions, as well as nonverbal conduct that is intended as an assertion. See FED. R. EVID. 801(a).

94. See FED. R. EVID. 801(c).

95. See FED. R. EVID. 703; *id.* advisory committee's note; Blinka, *supra* note 39, at 535.

96. See FED. R. EVID. 402 advisory committee's note.

97. 504 F.3d 745 (9th Cir. 2007). For the text of Rule 403, see *supra* note 24.

98. *W.R. Grace*, 504 F.3d. at 758, 760–61, 763, 766.

99. *Id.*

*Nachtsheim v. Beech Aircraft Corp.*¹⁰⁰ addressed the admissibility evidence of “other accidents,” which is admissible under Rule 404(b) in product liability actions for certain purposes if the other accidents were sufficiently similar to the accident at issue.¹⁰¹ In *Nachtsheim*, the court affirmed a district court’s ruling that the “other accident” evidence was inadmissible.¹⁰² The plaintiffs also attempted to argue that the evidence that another accident had occurred should have been admissible under Rule 703 through their expert witness, but were unsuccessful.¹⁰³

In *Pineda v. Ford Motor Co.*,¹⁰⁴ the Third Circuit explained that “[t]he District Court and the parties [had] conflate[d] the separate issues of whether [a “Safety Recall Instruction” (SRI)] itself can be admitted into evidence and whether [the expert’s] opinion can be admitted if it is based on a consideration of the SRI.”¹⁰⁵ While the SRI might be inadmissible as a subsequent remedial measure under Rule 407, the expert could nevertheless rely on the SRI in forming his opinion.¹⁰⁶ The court left open the possibility that the expert could disclose his reliance on the SRI to the jury.¹⁰⁷

In *Anderson v. Terhune*,¹⁰⁸ a convicted prisoner seeking habeas relief unsuccessfully challenged his convictions on several grounds, including that a juror slept during his trial.¹⁰⁹ Juror testimony and affidavits concerning the sleeping juror were inadmissible under Rule 606(b).¹¹⁰ But

100. 847 F.2d 1261 (7th Cir. 1988).

101. *Id.* at 1268–70; Daniel D. Blinka, *Ethical Firewalls, Limited Admissibility, and Rule 703*, 76 FORDHAM L. REV. 1229, 1253 (2007) (describing *Nachtsheim* and characterizing “other accident” evidence as falling under Rule 404(b)). Rule 404(b) provides, “Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident . . .” FED. R. EVID. 404(b).

102. *Nachtsheim*, 847 F.2d at 1269–70.

103. *Id.* at 1270 n.11. For another example, see *Peters v. Nissan Forklift Corp.*, No. 06-2880, 2008 WL 2625522, at *2–3 (E.D. La. Feb. 1, 2008) (order granting defendant’s motion in limine), in which the court permitted the plaintiff’s expert to rely on inadmissible “other accident” evidence if the reasonable reliance requirement of Rule 703 was satisfied, but prevented disclosure of the evidence to the jury.

104. 520 F.3d 237 (3d Cir. 2008).

105. *Id.* at 246–47.

106. *Id.* at 242, 246–47. Rule 407 provides in part that “evidence of . . . subsequent [remedial] measures is not admissible to prove negligence, culpable conduct, a defect in a product, a defect in a product’s design, or a need for a warning or instruction.” FED. R. EVID. 407. *But see* *Robenhorst v. Dematic Corp.*, No. 05 C 3192, 2008 WL 1821519, at *7 (N.D. Ill. Apr. 22, 2008) (order granting in part and denying in part defendant’s motion in limine) (“Because Rule 407 prohibits the introduction of evidence of subsequent remedial measures to prove ‘a defect in a product’ or ‘a defect in a product’s design,’ plaintiff’s expert cannot rely on the post-accident modifications as a basis for his opinion.”). Although the court in *Robenhorst* barred expert reliance altogether, it quoted the final sentence of Rule 703 (which only addresses disclosure of otherwise inadmissible basis evidence to the jury) as support for its decision. *Id.*

107. *Pineda*, 520 F.3d at 247 n.14.

108. 409 F. App’x 175 (9th Cir. 2011).

109. *Id.* at 178–79.

110. *Id.*

the prisoner successfully introduced an expert report that relied on the inadmissible juror testimony, because the expert could permissibly rely on inadmissible evidence under Rule 703.¹¹¹

Thus, under Rule 703, an expert can rely on information that would be inadmissible under various other rules. Significantly, an expert might also rely on information that would violate provisions of the Constitution if introduced at trial. Expert reliance on hearsay that would violate the Confrontation Clause of the Sixth Amendment is discussed in Part III. Other possibilities include expert reliance on information obtained in violation of a defendant's Fourth or Fifth Amendment rights.¹¹²

Expert reliance on inadmissible information risks frustrating the policies behind the Rules of Evidence or violating the protections offered by the Constitution, particularly if the expert is allowed to disclose the inadmissible information to the jury.¹¹³ The next sections discuss ways of addressing the issue of disclosure.

2. Evaluative Use, Substantive Use, and Limiting Instructions

Inadmissible basis evidence could be handled in a variety of ways. The expert could be prohibited from referring to inadmissible basis evidence at all.¹¹⁴ Or, the expert could be permitted to refer to the inadmissible basis evidence only in general terms.¹¹⁵ Alternatively, the expert could be permitted to disclose the inadmissible evidence to the jury, but only for the limited purpose of evaluating the expert's testimony (evaluative use).¹¹⁶ Finally, the expert could be permitted to disclose the inadmissible evidence to the jury, and the jury could be permitted to use the basis evidence for substantive purposes (substantive use).¹¹⁷

Moreover, inadmissible basis evidence need not be always admissible or always inadmissible (whether substantively or for a more limited use) under Rule 703. The evidence could be admitted under some circumstances and excluded in others. For example, inadmissible basis evidence could be

111. *Id.* at 178–79, 179 n.4.

112. *See* KAYE ET AL., *supra* note 12, § 4.6, at 158 (discussing issues raised by expert reliance on information obtained in “violation of the Confrontation Clause or the privilege against self-incrimination, or as the product of an illegal search or seizure”).

113. *See* Brennan v. Reinhart Institutional Foods, No. CIV97-4014, 1998 WL 2017925, at *4 (D.S.D. Sept. 17, 1998) (order denying defendant's motion for new trial) (“Rule 703 ought not be used by a party to eviscerate the public policy purposes of Rules 407 (subsequent remedial measures), 408 (offers to compromise), 409 (payment of expenses), or 411 (liability insurance)”); KAYE ET AL., *supra* note 12, § 4.6, at 158 (arguing that even expert reliance on information that is inadmissible for constitutional reasons may pose problems); Blinka, *supra* note 101, at 1249–54 (describing lawyers' use or attempted use of Rule 703 to circumvent other rules of evidence, including the rule against hearsay).

114. *See* Blinka, *supra* note 39, at 553 (citing State v. Weber, 496 N.W.2d 762, 766 n.6 (Wis. Ct. App. 1993)).

115. *See infra* Part I.B.3.a.

116. *See infra* notes 122–23 and accompanying text.

117. *See infra* notes 119–21 and accompanying text; *see also infra* Part I.B.3.b.

admitted for an evaluative use or substantive use subject to some determination of reliability or balancing of value and harm by the court.¹¹⁸

The evaluative use of basis evidence can be difficult to distinguish from the substantive use. For example, in diagnosing a patient, a first doctor might rely on a statement from a second doctor that the patient showed symptom X. In testifying as an expert, the first doctor might tell the jury that she relied on the second doctor's statement. If the basis evidence (the second doctor's statement) is admitted for substantive purposes, then both the proponent of the expert and the jury are permitted to consider the second doctor's statement as evidence that the patient did, in fact, have symptom X. To alter an example given by Judge Richard Posner, "If for example the expert witness (call him A) bases his opinion in part on a fact (call it X) that the party's lawyer told him, the lawyer [would] in closing argument tell the jury, 'See, we proved X through our expert witness, A.'"¹¹⁹ This approach would render the basis evidence admissible despite the rest of the rules of evidence.¹²⁰ In this example, the basis evidence would be admissible despite the rule against hearsay, because the jury would be permitted to consider the out of court statement as proof of what the statement asserted (that the patient had symptom X).¹²¹

If, on the other hand, the basis evidence is admitted only for the limited purpose of evaluating the expert's testimony, the expert's proponent and the jury cannot use the basis evidence for its prohibited use (for the truth of the statement made by the hearsay declarant, in this case), but they can use the testimony for its permitted use (evaluating the expert's testimony). The proponent of the expert thus cannot argue that she has proved a fact by pointing to inadmissible evidence that the expert relied on in forming an opinion.¹²² The jury can, however, use the basis evidence in considering whether the expert is credible. To explain the prohibited and permitted uses of the evidence, a court might give the jury an instruction like the following one:

Ladies and Gentlemen of the jury. You have heard expert A testify that she relied on [describe statement] in arriving at her opinion. You may consider this statement only in assessing the credibility of A's opinion. You cannot use the statement as proof of [whatever is described in the statement] even though A herself used it for this purpose.¹²³

118. See *infra* Part I.B.3.c. Ultimately, Federal Rule of Evidence 703 was amended in 2000 to adopt an approach along these lines. See *infra* Part I.C.

119. *In re James Wilson Assocs.*, 965 F.2d 160, 173 (7th Cir. 1992). Actually, the Seventh Circuit in *James Wilson Associates* viewed the expert testimony as an attempt to circumvent the rule against hearsay. *Id.* at 172–73. Correctly quoted, the Seventh Circuit explained, "If for example the expert witness (call him A) bases his opinion in part on a fact (call it X) that the party's lawyer told him, the lawyer cannot in closing argument tell the jury, 'See, we proved X through our expert witness, A.'" *Id.* at 173.

120. See Epps, *supra* note 48, at 64.

121. See FED. R. EVID. 801(c).

122. Blinka, *supra* note 39, at 548 n.460; see *supra* note 119.

123. Blinka, *supra* note 39, at 547–48.

Limiting instructions like this one are used under the rules of evidence when evidence can be permissibly considered by the jury for one purpose but not for another.¹²⁴

Limiting instructions have been roundly criticized.¹²⁵ Judge Learned Hand called a limiting instruction “the recommendation to the jury of a mental gymnastic which is beyond, not only their powers, but anybody’s else.”¹²⁶ Research also suggests that juries have difficulty following instructions on the law that they must apply.¹²⁷

Limiting instructions might be easier or harder for a jury to follow in different circumstances.¹²⁸ One distinction that might be particularly hard to make is the one between using the case-specific hearsay information underlying an expert’s opinion for substantive purposes, and using it only to evaluate the expert’s opinion. In evaluating the expert’s opinion, “one cannot accept an opinion as true without implicitly accepting the facts upon which the expert based that opinion.”¹²⁹ The expert used the underlying evidence for its substance. When a jury accepts an expert’s opinion, it is inherently accepting as true the facts upon which the expert has relied.¹³⁰ The jury is thus inherently accepting the underlying hearsay evidence for its truth. However, a limiting instruction in this context tells the jury to use the hearsay evidence to evaluate the expert’s opinion but at the same time tells the jury not to consider the hearsay evidence for the truth of what the hearsay declarant asserted (even if the expert used the information that way).¹³¹ Such a distinction may be impossible.¹³²

124. See FED. R. EVID. 105 (“When evidence which is admissible as to one party or for one purpose but not admissible as to another party or for another purpose is admitted, the court, upon request, shall restrict the evidence to its proper scope and instruct the jury accordingly.”); Blinka, *supra* note 39, at 528–34 (describing “limited admissibility” under the Federal Rules of Evidence).

125. See Blinka, *supra* note 101, at 1235–36 (“Courts and commentators have had a veritable field day questioning, criticizing, and often condemning limiting instructions as applied in particular cases and in general.”)

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

127. Judith L. Ritter, *Your Lips Are Moving . . . but the Words Aren’t Clear: Dissecting the Presumption that Jurors Understand Instructions*, 69 MO. L. REV. 163, 197–201 (2004) (summarizing research indicating that jurors have significant difficulty understanding jury instructions).

128. See Blinka, *supra* note 101, at 1235–36; Blinka, *supra* note 39, at 532–33.

129. Paul R. Rice, *Inadmissible Evidence as a Basis for Expert Opinion Testimony: A Response to Professor Carlson*, 40 VAND. L. REV. 583, 585 (1987).

130. *Id.*; see also KAYE ET AL., *supra* note 12, § 4.7.2 (arguing that the underlying evidence is only relevant if it is true, even if the jury only uses the evidence to evaluate the expert’s opinion).

131. Blinka, *supra* note 39, at 547. According to Blinka, “Common sense alone exposes the absurdity of such instructions.” *Id.*

132. *Id.* (“What does it mean to tell the jury that the evidence is received solely as it bears on the weight to be given the expert’s opinion and then preclude them from using it in the same way that the expert did?”); see also KAYE ET AL., *supra* note 12, § 4.7.2 (arguing that the limiting instruction ignores the reality that evaluation of an expert’s opinion requires an evaluation of the truth of the underlying evidence).

Under Rule 105, moreover, a limiting instruction will be made upon request.¹³³ A party may fail to request one, because of a failure to recognize the inadmissible evidence or perhaps because of a tactical decision not to highlight the inadmissible evidence.¹³⁴ Rule 703 may thus provide a conduit to present otherwise inadmissible evidence unchallenged before the jury.¹³⁵ On the other hand, questions of litigation tactics posed by limiting instructions is not limited to Rule 703, but rather extends throughout the rules of evidence.¹³⁶

When requested, limiting instructions hopefully educate the jury and prompt it at least to try to use evidence only for its permitted purpose.¹³⁷ Limiting the permissible use of expert basis evidence should also constrain the way that the court and parties refer to the information.¹³⁸

If the jury cannot follow the limiting instruction, or if no limiting instruction is requested, however, then the evaluative use option disappears into substantive use.¹³⁹ That is, if the jury does not follow the limiting instruction, then the jury has used the basis evidence for its substance¹⁴⁰ (assuming that the jury uses the information at all). In addition, if no limiting instruction is requested, then the jury will not know that the evidence can only be used for certain purposes.¹⁴¹

After the implementation of Rule 703, commentators presented various arguments for handling disclosure of inadmissible basis evidence. These are addressed in the next section.

3. Advocacy for Conflicting Approaches for Treating Disclosure of Inadmissible Basis Evidence Under Rule 703

After the implementation of Rule 703, commentators argued for several possible approaches to treating inadmissible basis evidence. One possibility, discussed in Part I.B.3.a, would have limited experts to a general description of the sources of inadmissible information. Another

133. See FED. R. EVID. 105 (“When evidence which is admissible as to one party or for one purpose but not admissible as to another party or for another purpose is admitted, the court, upon request, shall restrict the evidence to its proper scope and instruct the jury accordingly.”).

134. See Daniel D. Blinka, *Ethics, Evidence, and the Modern Adversary Trial*, 19 GEO. J. LEGAL ETHICS 1, 19 (2006) (“[A]grieved parties frequently forego limiting instructions for fear that they will only emphasize the damaging inference.”); Blinka, *supra* note 39, at 546 (“[T]he *opponent* bears the burden of: (1) timely recognizing that the expert’s basis is inadmissible for any number of reasons and (2) requesting a limiting instruction.” (citing Epps, *supra* note 48, at 72–73)).

135. See Blinka, *supra* note 101, at 1249–54 (describing lawyers’ use or attempted use of Rule 703 to circumvent other rules of evidence, including the rule against hearsay).

136. See *id.* at 1229–46.

137. See Blinka, *supra* note 101, at 1236; Blinka, *supra* note 39, at 532.

138. See *supra* notes 119–22 and accompanying text.

139. Allen & Miller, *supra* note 10, at 1134; Blinka, *supra* note 134, at 54.

140. Blinka, *supra* note 134, at 54 (explaining that under amended Rule 703, which provides for a limiting instruction, “absent an objection, the evidence is admitted for any relevant purposes thanks to the working of the waiver rule”); Epps, *supra* note 48, at 72–73 (“The opponent . . . must shoulder the burden of asking for a limiting instruction.”).

141. See Blinka, *supra* note 134, at 54; Epps, *supra* note 48, at 72–73.

possibility, discussed in Part I.B.3.b, would have interpreted Rule 703 as making inadmissible hearsay admissible for substantive purposes. A third approach, discussed in Part I.B.3.c, would have allowed consideration of inadmissible basis evidence for the limited purpose of evaluating the expert's opinion, subject to the balancing test of Rule 403.

a. The Restrictive Approach

At one end of the range of alternatives, Professor Ronald L. Carlson advocated an approach that would permit an expert on direct examination to refer only to the sources of evidence that he relied on, if the evidence was not otherwise admissible.¹⁴² He argued that permitting an expert to quote otherwise inadmissible evidence in court would violate the rule against hearsay.¹⁴³ For example, if an expert relied on the opinions of three other experts and disclosed their opinions to the jury, the proponent of the testimony could effectively present the testimony of four experts to the jury, while having to produce (and subject to cross-examination) only one of them.¹⁴⁴ Professor Carlson also contended that permitting an expert to disclose otherwise inadmissible basis evidence would “significantly damage[]” a criminal defendant's Confrontation Clause rights.¹⁴⁵ In particular, he feared that an expert's testimony could be used as a back door or conduit through which the prosecution could introduce a statement without producing the speaker.¹⁴⁶

Carlson therefore encouraged courts to make the “fine but important distinction between allowing an extra-record report to form a basis for courtroom opinion and permitting the whole of the report to come into evidence.”¹⁴⁷ This approach would not bar an expert from mentioning otherwise inadmissible basis evidence altogether. Rather, Carlson would permit an expert to “identify and briefly describe” the evidence on direct

142. Ronald L. Carlson, *Policing the Bases of Modern Expert Testimony*, 39 VAND. L. REV. 577, 584–86 (1986) (“Once the expert identifies the sources for his conclusions during direct examination, the reference to outside material is complete.”); Carlson, *supra* note 20, at 869–71 (arguing that Rule 703 should be amended to limit the circumstances under which otherwise inadmissible basis evidence can be disclosed to the jury).

143. Carlson, *supra* note 142, at 584 (“To . . . allow the admission of an unauthenticated writing into evidence or to permit the testifying expert to quote extensively from that writing violates accepted hearsay norms.”).

144. Ronald L. Carlson, *Experts, Judges, and Commentators: The Underlying Debate About an Expert's Underlying Data*, 47 MERCER L. REV. 481, 482–83 (1996).

145. Ronald L. Carlson, *In Defense of a Constitutional Theory of Experts*, 87 NW. U. L. REV. 1182, 1184 (1993) (arguing that permitting the disclosure of inadmissible basis evidence “would decimate the tenets” of the Confrontation Clause); Carlson, *supra* note 142, at 585.

146. Carlson, *supra* note 20, at 859–64; Carlson, *supra* note 142, at 585 (“This back door introduction of the contents of a nontestifying expert's report, without producing the author of the material, impinges on the criminal defendant's sixth amendment rights.”).

147. Carlson, *supra* note 142, at 584; *see also* Carlson, *supra* note 20, at 866.

examination.¹⁴⁸ In limited circumstances within the discretion of the court, more information might be admissible.¹⁴⁹

According to Carlson, the details of otherwise inadmissible basis evidence should not be admitted even to help the jury evaluate the basis of the expert's opinion.¹⁵⁰ He saw too much danger for misuse.¹⁵¹ The jury would be unable to see the distinction between use of the evidence for its substance and use of the evidence to explain the expert's testimony: "[I]t would be mythical to expect the jury simply to consider its illustrative effect and disregard its substantive content."¹⁵² Carlson therefore characterized the attempt to admit otherwise inadmissible basis evidence for the purpose of explaining the expert's testimony as a "subterfuge" that should not be permitted to circumvent the rule against hearsay.¹⁵³

b. The Open Approach

At the other end of the range of alternatives, Professor Paul Rice responded to Professor Carlson by arguing that expert reliance should serve as a hearsay exception.¹⁵⁴ He based his argument on the futility of limiting instructions, on the proper historical role for the expert as an assistant to—not replacement for—the factfinder, and on the reliability of the evidence on which an expert relies.¹⁵⁵

Like Professor Carlson,¹⁵⁶ Professor Rice found the distinction between using basis evidence for its substance or only to evaluate the expert's opinion to be impossible.¹⁵⁷ Allowing the expert to tell the jury what inadmissible evidence he has relied on, and then telling the jury to use the information only in evaluating the expert's opinion—without accepting the evidence as true—requires "mental gymnastics" that jurors probably cannot perform.¹⁵⁸ It is "schizophrenic and illogical."¹⁵⁹

148. Carlson, *supra* note 142, at 584.

149. Carlson, *supra* note 144, at 486 & n.34.

150. Carlson, *supra* note 144, at 484 (arguing that inadmissible basis evidence should not be admissible for the purposes of evaluating expert testimony); Carlson, *supra* note 145, at 1183.

151. Carlson, *supra* note 144, at 484.

152. Ronald L. Carlson, *Collision Course in Expert Testimony: Limitations on Affirmative Introduction of Underlying Data*, 36 U. FLA. L. REV. 234, 245 n.44 (1984).

153. *Id.*

154. Rice, *supra* note 129, at 586.

155. *Id.* at 585–86.

156. *See supra* note 152 and accompanying text.

157. Rice, *supra* note 129, at 584. Rice interpreted Carlson's position as supporting the use of otherwise inadmissible basis evidence for the limited purpose of evaluating the expert's opinion. *Id.* ("If this practice sounds like judicial double talk, it is. Professor Carlson, however, supports this result . . ."). Carlson later rejected this characterization. Carlson, *supra* note 145, at 1183 ("This is not correct. I have consistently opposed the introduction of otherwise inadmissible background information whether offered directly or in the guise of justifying the expert's opinion.").

158. Rice, *supra* note 129, at 585; *see also supra* note 126 and accompanying text.

159. *Id.* at 586; *see also supra* notes 129–30 and accompanying text.

From this position, Professor Rice took the opposite approach from Professor Carlson. According to Rice, instead of hiding basis evidence from the jury unless it is independently admissible, the basis evidence should be disclosed to the jury in view of the proper role of the expert and the reliability of expert basis evidence.¹⁶⁰ Rice argued that the proper role of the expert is to assist the jury.¹⁶¹ He pointed to the common law practice of presenting all of the case-specific evidence underlying the expert's opinion to the jury, to allow the jury to accept or reject the opinion accordingly.¹⁶² According to Rice, preventing the jury from hearing and evaluating the facts underlying the expert's opinion transforms the expert from an assistant to the factfinder into a "super-factfinder capable of producing admissible substantive evidence (an opinion) from inadmissible evidence."¹⁶³

To allow the jury to consider otherwise inadmissible basis evidence for its substance, Rule 703 must function as an exception to other exclusionary rules. Professor Rice would have created a hearsay exception.¹⁶⁴ He suggested adding a new hearsay exception, Rule 803(5):

The following are not excluded by the hearsay rule, even though the declarant is available as a witness:

...

(5) Statement Employed in Expert Testimony. A statement employed by an expert in arriving at a conclusion offered by that expert at trial, to the extent that (a) the statement is of a type reasonably relied upon by experts in a particular field in forming opinions or inferences upon the subject, and (b) the expert has demonstrated to [the] presiding judge a basis for concluding that the statement possesses substantial guarantees of trustworthiness.¹⁶⁵

Rice also proposed amending Rule 703 to make compliance with his proposed hearsay exception a prerequisite for expert reliance on inadmissible information.¹⁶⁶ Rice would further have prohibited expert reliance on evidence that was inadmissible for reasons "other than reliability," if disclosure would frustrate the policies of the rule excluding the evidence.¹⁶⁷

Rice's disagreement with Carlson could be characterized as choosing a model that favors education of the jury over deference to an expert's

160. Rice, *supra* note 129, at 585–86.

161. *Id.* at 586–87.

162. *Id.* at 587; *see supra* notes 45–46, 59–62 and accompanying text.

163. Rice, *supra* note 129, at 586–87.

164. *Id.* at 587. Rice's argument focuses on hearsay, but inadmissible basis evidence under Rule 703 is not limited to hearsay. *See supra* Part I.B.1.

165. Paul R. Rice, *The Allure of the Illogic: A Coherent Solution for Rule 703 Requires More Than Redefining "Facts or Data,"* 47 MERCER L. REV. 495, 506 (1996) (emphasis omitted).

166. *Id.* at 505 (describing a proposed Rule 703 that would require compliance with his proposed Rule 803(5) for information for which admissible proof was unavailable).

167. *Id.*

determination.¹⁶⁸ If the expert does not at least disclose the important basis evidence underlying his opinion, the jury cannot “be[] informed and then convinced.”¹⁶⁹ Instead, the jury must defer to the expert.¹⁷⁰ On the other hand, if the court allows the expert to disclose both her specialized knowledge and the reasons for her opinion in the specific case, the jury can more fully consider the expert’s opinion and reasoning.¹⁷¹ However, allowing the expert to disclose inadmissible evidence to the jury may simply change where deference is required¹⁷²: instead of requiring the jury to defer to the expert’s opinion divorced from at least some of its basis, Rice’s position requires the jury to defer to the expert’s selection of the evidence and evaluation of its evidence.¹⁷³ In the context of hearsay, Rice’s position would substitute the expert for the jury in evaluating hearsay statements.¹⁷⁴

Rice saw little problem in allowing expert testimony to function as a hearsay exception. According to Rice, if an expert relies on information of a type that experts in the field typically rely on as required by Rule 703,¹⁷⁵ the expert has the expertise necessary to determine whether the evidence is reliable.¹⁷⁶ Hearsay reasonably relied on by an expert is thus sufficiently reliable to be considered by the jury,¹⁷⁷ which justified the hearsay exception.¹⁷⁸ Rice also rejected Carlson’s Confrontation Clause concerns.¹⁷⁹ Rice’s position, however, was based on earlier Supreme Court Confrontation Clause precedent, which focused on the reliability of the hearsay evidence in determining whether a confrontation was required.¹⁸⁰

c. The Middle Course

A compromise approach, put forward in an article by Professor JoAnne Epps, rejected both Professor Carlson’s restrictive approach and Professor Rice’s open approach.¹⁸¹ According to Professor Epps, if an expert reasonably relies on inadmissible facts or data in accordance with Rule 703,

168. Allen & Miller, *supra* note 10, at 1134–38.

169. *Id.* at 1136.

170. *Id.*

171. *Id.* at 1136–37.

172. See Seaman, *supra* note 31, at 860 (arguing that allowing the jury to rely on the expert’s evaluation of the basis evidence is no different from allowing the jury to rely on the expert’s opinion divorced from any support).

173. See *id.* at 859–60.

174. See *supra* notes 90–94 and accompanying text.

175. FED. R. EVID. 703.

176. Rice, *supra* note 129, at 588.

177. *Id.* Rice emphasized that the expert must reasonably rely on the information. Uncritical reliance would not suffice. *Id.* at 588–89.

178. *Id.* at 587–88 (arguing that the reasonable reliance standard of Rule 703 “satisfies the traditional test for exceptions to the hearsay rule: that the circumstances of the out-of-court utterance adequately assure reliability in terms of both the accuracy of the declarant’s perception and memory and the sincerity with which the declarant recited what he perceived and remembered”).

179. *Id.* at 595.

180. *Id.* at 594–95; see *infra* notes 286–96 and accompanying text.

181. See Epps, *supra* note 48, at 70–74.

that inadmissible information should be disclosed to the jury, but only for the purpose of explaining and supporting the expert's opinion.¹⁸² Professor Epps suggested two tiers of such information. In the upper tier, "[i]nformation essential to the opinion should be presented to the jury, subject to Rule 403."¹⁸³ In the lower tier, information that the expert used but did not "need" should be subjected to a balancing test in which "the importance of the evidence to the jury [is balanced] against the likelihood that the jury will be improperly influenced by the evidence."¹⁸⁴ In fact, the upper tier may just represent a specific application of the lower tier.¹⁸⁵ If the information is essential to the jury, it presumably passes Epps's balancing test for less valuable information.¹⁸⁶

Professor Epps reasoned that if an expert relies on a fact in forming an opinion, that fact ought to be disclosed to the jury, which is charged with evaluating the opinion.¹⁸⁷ The proponent of the expert should be able to paint a complete picture of the formation of the expert's opinion, including both the admissible and inadmissible information upon which the expert relied.¹⁸⁸ As long as the expert did in fact reasonably rely on the inadmissible information, a limiting instruction is given, and disclosure would not be too prejudicial, disclosure serves values of "truth-telling" and "fairness to the proponent."¹⁸⁹

Thus, like Professor Rice,¹⁹⁰ Professor Epps emphasized that the expert must have reasonably relied on the information to be disclosed to the jury.¹⁹¹ She advocated an active role for the trial judge in assessing the reasonableness of expert reliance on particular data.¹⁹² According to Epps, the assessment should go beyond assessing reliability or whether experts in the field regularly rely on a certain type of data, because regular practice in a field might be insufficiently rigorous, to assessing the reasonableness of reliance on information in the particular case.¹⁹³

182. *Id.* at 60. Unlike Professor Carlson, *see supra* notes 150–53 and accompanying text, and Professor Rice, *see supra* notes 129–30, 157–59 and accompanying text, Professor Epps did not express strong concerns about the use of limiting instructions, *see* Epps, *supra* note 48, at 72–73.

183. Epps, *supra* note 48, at 84; *see supra* note 24 (reproducing the text of Rule 403).

184. Epps, *supra* note 48, at 84. Epps suggested "unfair prejudice, confusion, and the inability to distinguish the limited value of the evidence" as examples of "improper[] influence[]." *Id.* at 84 & n.134.

185. *Cf. id.* at 84.

186. *Cf. id.*

187. *Id.* at 70–71, 84.

188. *Id.* at 71.

189. *Id.* Epps also argued that the language of Rule 705 "would have been nonsensical unless it contemplated the routine disclosure of otherwise inadmissible facts or data underlying the expert's opinion." *Id.* And she argued that that the broadening policy of Rule 703, *see supra* Part I.A.2, and the general policy favoring admissibility of evidence under the Federal Rules, supported disclosure, *see* Epps, *supra* note 48, at 71–72.

190. *See supra* notes 175–78 and accompanying text.

191. Epps, *supra* note 48, at 74–84.

192. *See id.*

193. *See id.*

4. The Application of Pre-amendment Rule 703 in the Courts

The application of Rule 703 in the courts varied, but across a narrower range than the varying approaches advocated by commentators. The restrictive approach advocated by Professor Carlson was not widely adopted.¹⁹⁴ In addition, no court is recognized as having held that Rule 703 created a hearsay exception (or an exception to the other rules of evidence).¹⁹⁵

Courts did, however, appear to disagree on the necessity of a limiting instruction.¹⁹⁶ According to the Ninth Circuit in *United States v. 0.59 Acres of Land*,¹⁹⁷ when an expert disclosed inadmissible basis evidence to the jury, the court was required to instruct the jury that the evidence could only be used to evaluate the expert's opinion, and not for the truth.¹⁹⁸ The district court had admitted an expert appraiser's report with several inadmissible attachments.¹⁹⁹ The Ninth Circuit held that the attachments would not have been admissible even with a limiting instruction, but explained that a limiting instruction is necessary "[w]hen inadmissible evidence . . . is admitted to illustrate and explain the expert's opinion."²⁰⁰ On the other hand, in *United States v. Rollins*,²⁰¹ the Seventh Circuit did not object to an expert's disclosure of hearsay to the jury.²⁰² In *Rollins*, an FBI agent testified as an expert to provide his opinion on the meaning of code words used in taped telephone conversations between one of the defendants and a government informant.²⁰³ The agent testified that the informant told him that the code word "t-shirts" referred to cocaine.²⁰⁴ The Seventh Circuit upheld the admission of the expert's testimony.²⁰⁵ The court did not address the issue of limiting instructions, and did not explicitly adopt Professor Rice's approach of using Rule 703 as a hearsay exception.²⁰⁶

194. *Id.* at 63–64.

195. AM. BAR ASS'N SECTION OF LITIG., EMERGING PROBLEMS UNDER THE FEDERAL RULES OF EVIDENCE 229 (3d ed. 1998) ("It does not appear that any reported case has expressly recognized Rule 703 as creating an exception to the hearsay rule . . ."); Epps, *supra* note 48, at 64 ("Not surprisingly, no located case makes this ruling explicitly."); Rice, *supra* note 165, at 500 ("Professor Imwinkelried, again quoting Professor Epps, noted that not a single case has adopted the Rice view. Sadly, I must acknowledge that this is true.")

196. FED. R. EVID. 703 advisory committee's note on 2000 amendment.

197. 109 F.3d 1493 (9th Cir. 1997).

198. *Id.* at 1496; *see* FED. R. EVID. 703 advisory committee's note on 2000 amendment (describing *0.59 Acres of Land* as holding that it was an "error to admit hearsay offered as the basis of an expert opinion, without a limiting instruction").

199. *0.59 Acres of Land*, 109 F.3d at 1495–96.

200. *Id.* at 1496; *see also* AM. BAR ASS'N SECTION OF LITIG., *supra* note 195, at 229 n.96 (describing *0.59 Acres of Land* as "holding [that] it was error to admit hearsay as the basis for an expert's opinion without a limiting instruction").

201. 862 F.2d 1282 (7th Cir. 1988).

202. *Id.* at 1292–93; *see also* FED. R. EVID. 703 advisory committee's note on 2000 amendment (describing *Rollins* as "admitting, as part of the basis of an FBI agent's expert opinion on the meaning of code language, the hearsay statements of an informant").

203. *Rollins*, 862 F.2d at 1285, 1291–93.

204. *Id.* at 1293.

205. *See id.*

206. *See id.*

Nevertheless, the court did seemingly admit the hearsay for substantive use by the jury.²⁰⁷

Thus, while no court held that Rule 703 created a hearsay exception (or an exception to the other rules of evidence), courts, at least on occasion, allowed experts to disclose otherwise inadmissible basis evidence without a limiting instruction.²⁰⁸ A court that did allow an expert to disclose inadmissible basis evidence without requiring a limiting instruction effectively admitted the evidence for its substance.²⁰⁹ In addition, even if courts did not treat Rule 703 as a hearsay exception, considerable debate surrounded the proper application of Rule 703 and the effectiveness of limiting instructions under the Rule.²¹⁰ In 2000, the Rule was amended to address these concerns.

C. *The 2000 Amendment to Rule 703*

In 2000, Rule 703 was amended to clarify that it did not function as a hearsay exception, and to create a presumption against disclosing inadmissible basis evidence. The amendment added a third sentence to the Rule, which now provides:

The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence 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.²¹¹

Taken as a whole, Rule 703 permits an expert to disclose inadmissible basis evidence to the jury if two requirements are satisfied. First, the expert must have permissibly relied on the inadmissible information. That is, the inadmissible information must be “of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject.”²¹² Second, the court must—if the opponent of the expert objects to the disclosure—determine that the probative value of the information in

207. See AM. BAR ASS'N SECTION OF LITIG., *supra* note 195, at 229 n.96 (describing *Rollins* as “admitting, apparently for substantive use, the statements of an informant as part of the basis for the expert opinion testimony of an F.B.I. agent on the meaning of code language”).

208. See Advisory Comm. on Evidence Rules, Minutes of the Meeting (Apr. 14–15, 1997), available at <http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Minutes/ev4-97.htm> (“[T]he Reporter was instructed . . . to report on whether [Rule 703] was being used as a ‘back-door’ hearsay exception. The Reporter’s responsive memorandum concluded that there were some cases in which hearsay had been offered as the basis of an expert’s opinion, but without a limiting instruction.”).

209. See *supra* notes 139–41 and accompanying text.

210. See *supra* Part I.B.3.

211. FED. R. EVID. 703.

212. *Id.*

assisting the jury to evaluate the expert's opinion substantially outweighs its prejudicial effect.²¹³

Courts take two approaches to the first requirement.²¹⁴ Under one approach, the trial judge undertakes an independent investigation to determine reasonable reliance as a preliminary matter under Rule 104(a).²¹⁵ Under the other approach, the trial judge pays more deference to the expert role, and merely confirms that the expert has relied on information upon which other experts in the field rely.²¹⁶ The requirement of reasonable reliance must be passed for the expert to rely on the inadmissible evidence at all, even if the expert does not disclose it. If the court determines that the expert has relied on information that a reasonable expert would not, the opinion may be excluded.²¹⁷

The second requirement, which reverses Rule 403's presumption of admissibility, creates a presumption against disclosing the information to the jury.²¹⁸ The prejudicial effect that the court must consider should include the likelihood that the jury will be able to follow a limiting instruction.²¹⁹

Notably, Rule 703 does not prevent the opponent of an expert from fully exploring the basis of the expert's testimony on cross-examination.²²⁰ Indeed, Rule 705 provides that "[t]he expert may . . . be required to disclose the underlying facts or data on cross-examination."²²¹ If the expert's basis evidence has flaws, it may be unfair to the proponent to prevent the expert from disclosing and explaining the basis evidence during the expert's direct testimony, leaving the opponent to catch the expert in a "gotcha" moment

213. FED. R. EVID. 703; *id.* advisory committee's note on 2000 amendment ("The information may be disclosed to the jury, upon objection, only 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.").

214. 1 PAUL G. GIANNELLI & EDWARD L. IMWINKELRIED, JR., SCIENTIFIC EVIDENCE § 5.05[c], at 312–13 (4th ed. 2007).

215. *In re Paoli R.R. Yard PCB Litig.*, 35 F.3d 717, 748 (3d Cir. 1994) ("We now make clear that it is the judge who makes the determination of reasonable reliance . . ."); *see also* KAYE ET AL., *supra* note 12, § 4.6.1.b ("The dominant view is that courts have an independent obligation to assess the reasonableness of an expert's reliance on a type of factual data."). Rule 104(a) provides that the court determines "[p]reliminary questions concerning . . . the admissibility of evidence." FED. R. EVID. 104(a).

216. *See* KAYE ET AL., *supra* note 12, § 4.6.1.b (describing a "minority view" in which courts only examine whether experts typically rely on similar information); Blinka, *supra* note 134, at 51–52 (arguing that courts are reluctant to "second-guess" experts on the issue of reasonable reliance); Epps, *supra* note 48, at 76 (describing a "liberal approach," according to which courts may not independently evaluate reasonable reliance).

217. *In re TMI Litig.*, 193 F.3d 613, 697 (3d Cir. 1999) ("If the data underlying the expert's opinion are so unreliable that no reasonable expert could base an opinion on them, the opinion resting on that data must be excluded." (citing *In re Paoli*, 35 F.3d at 748)).

218. Compare FED. R. EVID. 703 (permitting *disclosure* of information if the probative value in evaluating the expert's opinion "substantially outweighs" the information's prejudicial effect), with FED. R. EVID. 403 (permitting *exclusion* of information if the probative value "is substantially outweighed by" the prejudicial effect).

219. FED. R. EVID. 703 advisory committee's note on 2000 amendment.

220. *Id.*

221. FED. R. EVID. 705; *see* FED. R. EVID. 703 advisory committee's note on 2000 amendment.

during cross-examination.²²² Indeed, calling into question the bases of an expert's testimony can be an important way for an opponent to challenge the expert's opinion.²²³

If the opponent does challenge the expert's basis, the door may be open for the proponent to respond with basis evidence that could not have been disclosed earlier.²²⁴ In addition, the proponent might want to preemptively expose the flaws in the basis evidence to "'remove the sting' from the opponent's anticipated attack."²²⁵ The advisory committee's note therefore directs the trial court to consider the proponent's possible strategic considerations when conducting the required balancing under Rule 703.²²⁶ In view of this direction, a weakness in inadmissible basis evidence may actually counsel in favor of disclosure.²²⁷

The amendment to Rule 703 was intended "to emphasize 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."²²⁸ To do so, it created a presumption against disclosure that reversed the Rule 403 presumption of admissibility.²²⁹ The presumption against disclosure, together with the probability that limiting instructions could be impossible for a jury to follow, at least in the context of Rule 703,²³⁰ would suggest that disclosure should be rare. On the other hand, the need for the jury to hear the underlying evidence to understand the expert's opinion,²³¹ coupled with the likelihood that an opponent may explore the evidence anyway,²³² counsel admission. The next part of this Note examines the application of amended Rule 703 in the courts.

II. THE APPLICATION OF RULE 703 IN THE COURTS

The amendment to Rule 703 addressed the controversy around inadmissible basis evidence by clarifying that Rule 703 did not serve as a hearsay exception and by creating a new presumption against disclosure of

222. See *supra* notes 188–89 and accompanying text.

223. See John F. Stoviak & Christina D. Riggs, *Preparing for and Cross-Examining the Opposing Expert at Trial*, in LITIGATORS ON EXPERTS: STRATEGIES FOR MANAGING EXPERT WITNESSES FROM RETENTION THROUGH TRIAL 326, 332–33 (Wendy Gerwick Couture & Allyson W. Haynes eds., 2010) (describing attacking an expert's bases as inaccurate or unsupported, and attacking an expert's bases as incomplete as two of five suggested ways to undermine expert testimony).

224. FED. R. EVID. 703 advisory committee's note on 2000 amendment ("[A]n adversary's attack on an expert's basis will often open the door to a proponent's rebuttal with information that was reasonably relied upon by the expert, even if that information would not have been discloseable initially under the balancing test provided by this amendment.").

225. *Id.*

226. *Id.*

227. *Cf. id.*

228. *Id.*

229. See *supra* note 218 and accompanying text.

230. See *supra* notes 129–32 and accompanying text.

231. See *supra* notes 187–89 and accompanying text.

232. See *supra* notes 221–27 and accompanying text.

the inadmissible evidence.²³³ Nevertheless, as explained in Part II.A, to the extent that the problem of back door evidence stems from a party inducing an expert to rely on questionable evidence in the hopes of disclosing such evidence to the jury, an examination of reasonable reliance acts as a first barrier to disclosure.²³⁴ If the court determines that the expert has, in fact, reasonably relied on inadmissible basis evidence, then the balancing test in the added third sentence of Rule 703 acts as a second barrier to disclosure.²³⁵ Part II.B reviews federal court opinions considering disclosure of inadmissible basis evidence during two-year periods before and after the 2000 amendment. This review shows a tendency toward disclosure before the amendment, which was curbed by the amendment to Rule 703. Even after the amendment, however, disclosure still occurs in a substantial number of cases.

Accordingly, the effectiveness of a limiting instruction becomes important. If a limiting instruction is ineffective, then the evidence disclosed in these cases turns into substantive evidence.²³⁶ Part II.C considers a subset of inadmissible basis evidence—evidence that would violate a criminal defendant’s Confrontation Clause rights if used for substantive purposes—that demonstrates that in at least one instance, Rule 703’s approach of limited admissibility is not tenable.

A. Back Door Evidence and Reasonable Reliance

To the extent that the problem of back door evidence stems from a party inducing an expert to rely on questionable evidence in the hopes of disclosing such evidence to the jury,²³⁷ an examination of reasonable reliance acts as a first barrier to disclosure.²³⁸ Courts in this context appear particularly suspicious of experts who rely on data selected for them by the parties who hire them, instead of conducting some independent investigation.²³⁹

233. See *supra* Part I.C.

234. See *supra* notes 212–17 and accompanying text.

235. See *supra* notes 213, 218 and accompanying text.

236. See *supra* notes 139–41 and accompanying text.

237. *Therasense, Inc. v. Becton, Dickinson & Co.*, Nos. C 04-02123, C 04-03327, C 04-03732, C 05-03117, 2008 WL 2323856, at *1 (N.D. Cal. May 22, 2008) (second omnibus order) (condemning the “abuse[]” of “spoon-feeding . . . client-prepared and lawyer-orchestrated” information to experts in the hopes of putting such information before the jury); *Blinka*, *supra* note 101, at 1249–54 (describing the use of Rule 703 to circumvent other rules and place information before the jury).

238. See *supra* notes 212–17 and accompanying text.

239. See *Therasense*, 2008 WL 2323856, at *1; *Sinco, Inc. v. U.S. Chicory Inc.*, No. 8:03CV315, 2005 WL 2180094, at *2–3 (D. Neb. Aug. 10, 2005) (order on motion in limine) (suggesting that an expert’s testimony on some topics may be inadmissible under Rules 403 and 703 because the opinions were “based, in large part, on ‘biased information’ provided . . . by the owner of [the] Defendant [corporation]”); *Crowley v. Chait*, 322 F. Supp. 2d 530, 542–43 (D.N.J. 2004) (order on motions in limine) (barring an expert’s opinion to the extent that it was based on “preselected deposition testimony” rather than independent investigation).

In addition, Rule 703 does not allow experts to serve as conduits for information upon which they have not actually relied.²⁴⁰ For example, in *United States v. Mejia*,²⁴¹ the Second Circuit explained that a gang expert could rely on hearsay, but could not merely repeat it.²⁴² In *Mejia*, the expert's testimony contained both acceptable expert opinion obtained from a "synthesis of various source materials" and unacceptable testimony in which the expert did not analyze the source material, but "merely repeated their contents."²⁴³ As discussed in Part III.B, this distinction between analysis and repetition does not resolve whether an expert has improperly transmitted hearsay in violation of Rule 703: an expert can both analyze inadmissible evidence and repeat its contents to the jury.²⁴⁴ In *Loeffel Steel Products, Inc. v. Delta Brands, Inc.*,²⁴⁵ the court determined that the defendant's damages expert had impermissibly calculated the plaintiff's loss using information provided by the defendant that the expert was incapable of evaluating.²⁴⁶ Along similar lines, in *Sterling v. Provident Life & Accident Insurance Co.*,²⁴⁷ the plaintiff attempted to introduce hearsay through its expert, but the expert admitted that she had no expertise about the claims to which the hearsay related.²⁴⁸

Finally, if the court determines that the expert has, in fact, reasonably relied on inadmissible basis evidence, then the balancing test of Rule 703 acts as a second barrier to disclosure.²⁴⁹ This balancing test, added in 2000, creates a presumption against disclosure of inadmissible evidence even for evidence upon which an expert has reasonably relied.²⁵⁰ The test could serve as an important barrier against inadmissible evidence, but competing and substantial interests weigh on both sides of the balance.²⁵¹ The next section addresses the effect of this balancing in practice.

B. Pre- and Post-amendment Application of Rule 703

This section reviews the application of Rule 703 before and after the 2000 amendment to assess the balancing test added to Rule 703 in 2000. The review of the pre-amendment Rule examines the years 1997 and 1998 because any problem corrected by the amendment should have been apparent in these years. The review of amended Rule 703 examines the years 2007 and 2008 because by that time courts should have become

240. See 29 CHARLES ALAN WRIGHT ET AL, FEDERAL PRACTICE AND PROCEDURE § 6273 (1997 & Supp. 2011) (explaining that Rule 703 is "simply inapplicable" and does not permit disclosing inadmissible basis evidence "when . . . the expert adds nothing to the out-of-court statements other than transmitting them to the jury").

241. 545 F.3d 179 (2d Cir. 2008).

242. *Id.* at 197.

243. *Id.* at 197–98.

244. See *infra* Part III.B.

245. 387 F. Supp. 2d 794 (N.D. Ill. 2005) (order on motion in limine).

246. *Id.* at 807–10.

247. 619 F. Supp. 2d 1242 (M.D. Fla. 2009) (order granting partial summary judgment).

248. *Id.* at 1258–59.

249. See *supra* notes 213, 218 and accompanying text.

250. See *supra* note 213 and accompanying text.

251. See *supra* notes 220–32 and accompanying text.

familiar with the 2000 amendment. The review does not consider decisions that turned on the first threshold issue described above in Parts I.C and II.A (whether the expert reasonably relied on the inadmissible basis evidence).²⁵² Instead, the review focuses on the 2000 amendment to Rule 703 by considering decisions that address disclosure of the inadmissible basis evidence where reasonable reliance was established or not at issue. A measure of subjectivity was involved, of course, in classifying courts' reasoning, which was not necessarily explicit.

The review suggests that the presumption against disclosure added to Rule 703 had at least some effect. Before the amendment, a tendency toward disclosure is apparent, as discussed in Part II.B.1. After the amendment, the cases are more evenly divided, as discussed in Part II.B.2, but disclosure still occurs in a substantial number of cases.

1. Pre-amendment Application of Rule 703

In 1997 and 1998, nine surveyed federal court opinions considered disclosure of inadmissible expert basis evidence under Rule 703. Of these nine, six permitted disclosure,²⁵³ while three prohibited it.²⁵⁴ Although the issue was not heavily litigated, this two-to-one ratio suggests a tendency toward permitting disclosure of the underlying basis evidence.

No clear pattern emerges from the cases. Some allowed disclosure of seemingly minor evidence, but others permitted disclosure of apparently

252. See *supra* Part II.A; notes 212, 214–17 and accompanying text.

253. *Whitehead v. Food Max of Miss., Inc.*, 163 F.3d 265, 274–75 (5th Cir. 1998) (upholding disclosure that the opponent of the expert did not object to, on plain error review); *Garner ex rel. Walden v. Howe*, 105 F.3d 647, No. 95-2492, 1997 WL 9764, at *3–5 (4th Cir. Jan. 13 1997) (unpublished table decision) (upholding a trial court's decision to allow an expert to discuss an article upon which he had relied); *In re Indus. Silicon Antitrust Litig.*, Nos. 96-2338, 96-1131, 96-2003, 96-2111, 95-2104, 1998 WL 1031508, at *1 (W.D. Pa. Oct. 20, 1998) (memorandum explaining evidentiary ruling) (explaining that disclosure of fewer than ten objected-to documents that were not the focus of the expert's opinion did not present a problem under Rule 703); *Brennan v. Reinhart Institutional Foods*, No. CIV97-4014, 1998 WL 2017925, at *1, 3–4 (D.S.D. Sept. 17, 1998) (order denying defendant's motion for new trial) (approving the testimony of a "vocational rehabilitation specialist" who testified that records he reviewed indicated that the plaintiff had a "partial impairment of eleven percent"); *Kinser v. Gehl Co.*, No. Civ.A. 96-2361, 1998 WL 231065, at *4 (D. Kan. Apr. 21, 1998) (order denying defendant's motions for judgment as a matter of law or new trial) (permitting disclosure of the contents of documents relied on by experts); *United States v. Morris*, No. Crim. A. 94-00046-C, 1997 WL 17649, at *3 (W.D. Va. Jan. 13, 1997) (reasoning that Rule 703 permits experts to introduce inadmissible information, which in this case included hearsay statements by gang members).

254. *United States v. Quintanilla*, 165 F.3d 920, Nos. 97-10339, 97-10540, 98-10091, 1998 WL 895360, at *5–6 (9th Cir. 1998) (unpublished table decision) (finding no reversible error in a district court decision preventing defendant's expert on battered women's syndrome from discussing the bases of his opinion, because the jury could not have relied on the evidence for its substance to establish the events relied on in any event); *Arkwright Mut. Ins. Co. v. Gwinner Oil, Inc.*, 125 F.3d 1176, 1182 (8th Cir. 1997) (approving a district court's decision to admit an opinion that relied on another expert's report and to exclude the substance of the other expert's report); *United States v. 0.59 Acres of Land*, 109 F.3d 1493, 1496–97 (9th Cir. 1997) (holding that the challenged basis evidence was "not of the kind that might be admitted in connection with the expert's testimony, regardless of the presence of a limiting instruction").

significant evidence. A trial judge in one case explained that the disclosure of a small number of documents did not present a problem, when the documents did not play a central role in the expert's opinion and the court gave the jury a limiting instruction to explain that the documents could not be considered for the truth of what they contained.²⁵⁵

On the other hand, in *Brennan v. Reinhart Institutional Foods*, a "vocational rehabilitation specialist" testified for the plaintiff.²⁵⁶ Over the defendant's objection, the court allowed the specialist to testify that he had reviewed the plaintiff's medical history, and that two doctors had determined that the plaintiff suffered from "a permanent partial impairment of eleven percent of the whole body."²⁵⁷ The Eighth Circuit later upheld the trial court's approach.²⁵⁸ The court rejected the defendant's argument that the plaintiff had been improperly allowed to present the testimony of medical experts through the testimony of its vocational specialist.²⁵⁹ In *Brennan*, the plaintiff appears to have succeeded in a tactic that Professor Carlson warned against—presenting the testimony of an expert who discloses the opinions of multiple other experts, effectively presenting the testimony of several experts to the jury, while having to produce (and subject to cross-examination) only one of them.²⁶⁰

2. Application of Amended Rule 703

In 2007 and 2008, fourteen surveyed federal court opinions considered disclosure of inadmissible expert basis evidence under Rule 703. Of these fourteen, seven permitted disclosure,²⁶¹ while seven prohibited it.²⁶²

255. *In re Indus. Silicon Antitrust Litig.*, 1998 WL 1031508, at *1.

256. *Brennan*, 1998 WL 2017925, at *1.

257. *Id.* at *3 (quoting the testimony of the specialist).

258. *Brennan v. Reinhart Institutional Foods*, 211 F.3d 449, 452 (8th Cir. 2000).

259. *Id.* at 450, 452.

260. See *supra* note 144 and accompanying text. In contrast to *Brennan*, a different case in the surveyed period recognized the problem of allowing one expert to introduce another expert's opinion. *Arkwright Mut. Ins. Co. v. Gwinner Oil, Inc.*, 125 F.3d 1176, 1182 (8th Cir. 1997) (approving a district court's decision to admit an opinion that relied in part on another expert's report, and to exclude the substance of the other expert's report).

261. *United States v. Wolling*, 223 F. App'x 610, 612–13 (9th Cir. 2007) (upholding a district court's decision to permit defense experts to describe the contents of medical records that were excluded under Rule 403, and to refuse the jury's request to view the records themselves); *United Nat'l Ins. Co. v. Aon Ltd.*, Civ. No. 04-539, 2008 WL 3819865, at *14–15 (E.D. Pa. Aug. 8, 2008) (orders on motions in limine) (permitting an expert to disclose the contents of hearsay English court decisions, but "anticipat[ing]" that the jury would be prevented from receiving the decisions in the jury room); *Betts v. Gen. Motors Corp.*, No. 3:04cv169-M-A, 2008 WL 2789524, at *10 (N.D. Miss. July 16, 2008) (order on motions in limine and for summary judgment) (citing Rule 703 as permitting an expert to testify about documents not admissible in evidence); *Galloway v. Big G Express, Inc.*, No. 3:05-CV-545, 2008 WL 2704443, at *5 (E.D. Tenn. July 3, 2008) (order on motions in limine) (permitting an expert to discuss inadmissible basis evidence for limited purposes, and indicating that a limiting instruction would be issued); *In re Guidant Corp. Implantable Defibrillators Prods. Liab. Litig.*, MDL No. 05-1708, Civil Nos. 06-25, 05-2596, 2007 WL 1964337, at *3–4, 6 (D. Minn. June 29, 2007) (order on motions in limine) (permitting experts to testify based on certain underlying data, and raising the possibility of issuing a limiting instruction "to meet the Rule 703 balancing test"); *Inline Connection Corp. v. AOL Time Warner Inc.*, 470

Again, no clear pattern emerges from the cases.²⁶³ Given the fact-dependent nature of the balancing test under Rule 703²⁶⁴ and the varying facts of the cases, however, a clear pattern would be unexpected. Considering the cases from 2007 and 2008 in the aggregate, the breakdown of seven decisions permitting disclosure and seven prohibiting disclosure suggests that the amendment to Rule 703 at least reduced a tendency toward disclosure that existed before 2000.²⁶⁵ Still, while amended Rule 703 may have curbed a pre-2000 tendency toward disclosure, half of the reviewed decisions permitted disclosure of inadmissible basis evidence.²⁶⁶ As a result, the debate over the proper treatment of inadmissible basis evidence retains significance.²⁶⁷

One of the reviewed cases from 2007, *United States v. Wolling*,²⁶⁸ illustrates a jury confronting the proper way to evaluate basis evidence underlying expert opinion testimony. The defendant in *Wolling* presented the expert testimony of a doctor in support of his diminished capacity defense.²⁶⁹ The expert testified that he relied on medical records relating to a psychologist's prior evaluation of the defendant.²⁷⁰ The court excluded the medical records under Rule 403.²⁷¹ Nevertheless, the expert, apparently

F. Supp. 2d 435, 443 (D. Del. 2007) (order on motion in limine) (reasoning that the probative value of the expert basis evidence substantially outweighed the prejudicial effect under the balancing test of Rule 703); *In re Moyer*, 421 B.R. 587, 596–97 (Bankr. S.D. Ga. 2007) (finding an otherwise inadmissible report admissible to explain the expert's opinion, but not for substantive use).

262. *Wiles v. Dep't of Educ.*, Civ. Nos. 04-00442, 05-00247, 2008 WL 6808428, at *2 (D. Haw. Oct. 7, 2008) (order on motion in limine) (holding that for statements underlying an expert opinion to be admitted, the proponent would be required to demonstrate that the statements were not hearsay or fell under a hearsay exception); *Rideout v. Nguyen*, No. 4:05CV-00001, 2008 WL 3850390, at *2 (W.D. Ky. Aug. 15, 2008) (order on motions in limine) (permitting expert reliance on, but not disclosure of, apparently inadmissible evidence); *Peters v. Nissan Forklift Corp. N. Am.*, No. 06-2880, 2008 WL 2625522, at *2–3 (E.D. La. Feb. 1, 2008) (order on motion in limine) (prohibiting disclosure of inadmissible documents of similar accidents in a product liability action); *Hynix Semiconductor Inc. v. Rambus Inc.*, Nos. CV-00-20905, C-05-00334, C-06-00244, 2008 WL 282376, at *4 (N.D. Cal. Jan. 28, 2008) (order on motions in limine) (ruling that a prior Federal Circuit decision from a different litigation could not be disclosed under Rule 703); *McDevitt v. Guenther*, 522 F. Supp. 2d 1272, 1294 (D. Haw. 2007) (orders on motions for summary judgment and motion in limine) (prohibiting an expert from reciting otherwise inadmissible facts under Rule 703); *Weiss v. Allstate Ins. Co.*, 512 F. Supp. 2d 463, 477 (E.D. La. 2007) (order on objections to exhibits, motions in limine, and motions to quash) (permitting an expert to rely on an inadmissible report, and appearing to permit only general reference to the report itself); *Garcia v. Los Banos Unified Sch. Dist.*, No. 1:04-CV-6059, 2007 WL 715526, at *1–2 (E.D. Cal. Mar. 8, 2007) (order on motions in limine) (preventing disclosure of hearsay statements of the plaintiff from the plaintiff's expert's testimony, after weighing the probative value and prejudicial effect of disclosure).

263. *See supra* Part II.B.1.

264. *Cf.* FED. R. EVID. 703; *id.* advisory committee's note on 2000 amendment.

265. *See supra* Part II.B.1.

266. *See supra* notes 261–62.

267. *See supra* Part I.B.

268. 223 F. App'x 610 (9th Cir. 2007).

269. *Id.* at 612.

270. *Id.*

271. *Id.*

without objection from the prosecution, informed the jury of the medical diagnoses in the medical records.²⁷² During deliberations, the jury asked to review the medical records upon which the expert had relied.²⁷³ The judge refused, and explained that the expert had described the medical records only to support his opinions.²⁷⁴

The jury in *Wolling*, in evaluating the expert's opinion, sought to more closely evaluate the basis evidence underlying the opinion.²⁷⁵ Indeed, it may be impossible to accept or reject an expert's opinion without accepting or rejecting the underlying data.²⁷⁶ In *Wolling*, the judge's limiting instruction and refusal to provide the records to the jury counteracted the jury's desire to scrutinize information that the judge had already found to be substantially more prejudicial than probative.²⁷⁷

Even if the amendment to Rule 703 has reduced the frequency of disclosure of inadmissible basis evidence, disclosure continues to occur.²⁷⁸ Indeed, in some cases it may not be possible for the jury to meaningfully evaluate an expert's opinion without hearing the underlying evidence.²⁷⁹

The resulting disclosure, however necessary, can place prejudicial information before the jury. In *United States v. Leeson*,²⁸⁰ the defendant challenged the disclosure of basis evidence by a psychologist who testified as an expert for the government.²⁸¹ The district court allowed the psychologist to testify that he relied on statements from two of the defendant's fellow inmates, who had not spoken to the testifying expert, but rather to a different psychologist.²⁸² According to the testifying expert, the two inmates reported that the defendant had requested help in "looking crazy."²⁸³ The Fourth Circuit held that the district court had correctly allowed disclosure of the inmates' statements, in view of the high relevance of the statements for the purpose of evaluating the psychologist's opinion.²⁸⁴

Even after the amendment to Rule 703, then, disclosure of inadmissible basis evidence can be expected in a significant number of cases because of the jury's need to hear the evidence to evaluate the expert's opinion. If a limiting instruction is ineffective, then the evidence disclosed in these cases

272. *Id.*

273. *Id.* at 613.

274. *Id.*

275. *See supra* text accompanying notes 270–73.

276. *See supra* notes 128–32 and accompanying text.

277. *See supra* text accompanying note 274.

278. *See supra* Part II.B.2.

279. *See In re Terazosin Hydrochloride Antitrust Litig.*, No. 99-MDL-1317, 2005 WL 5955699, at *6 (S.D. Fla. Feb. 2, 2005) (order on motions in limine) (reasoning that the jury would be unable to evaluate expert opinions without disclosure of the basis evidence); *Hambrick v. Ken-Bar Mfg. Co.*, 422 F. Supp. 2d 627, 639 (W.D. Va. 2002) (order denying motion for summary judgment) (explaining that a "survey's probative value is essential for understanding and evaluating" the expert opinion).

280. 453 F.3d 631 (4th Cir. 2006).

281. *Id.* at 636–38.

282. *Id.* at 634–35.

283. *Id.*

284. *Id.* at 637–38.

turns into substantive evidence,²⁸⁵ despite Rule 703's intent that such evidence be used only for the limited purpose of evaluating the expert's testimony. The next section discusses the disclosure of inadmissible basis evidence that would violate the Confrontation Clause if used substantively. This subset of inadmissible basis evidence demonstrates that in at least one area, Rule 703's approach of limited admissibility is not tenable.

C. Expert Reliance on Testimonial Hearsay

The Confrontation Clause of the Sixth Amendment provides that “[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him.”²⁸⁶ In its 2004 decision in *Crawford v. Washington*,²⁸⁷ the Supreme Court altered its approach to hearsay under the Confrontation Clause. Under the Court's 1980 decision in *Ohio v. Roberts*,²⁸⁸ the Confrontation Clause permitted the prosecution to use an unavailable witness's statement against the defendant if the statement possessed sufficient “indicia of reliability.”²⁸⁹ The test was satisfied if the statement fell “within a firmly rooted hearsay exception” or when it possessed “particularized guarantees of trustworthiness.”²⁹⁰ In *Crawford*, the Court rejected this reliability-based approach.²⁹¹ In its place, the Court adopted a test focusing on whether the hearsay was “testimonial.”²⁹² If a statement is testimonial, the Confrontation Clause permits its introduction against the defendant only if the declarant is unavailable and the defendant has had a prior opportunity for cross-examination.²⁹³ According to the Court in *Crawford*, confrontation is the only constitutionally acceptable method of assuring the reliability of such statements.²⁹⁴

The Court did not provide detailed guidance to explain what hearsay can be considered testimonial.²⁹⁵ The Court's guidelines did indicate that testimonial generally includes statements that resemble testimony at trial, such as statements made before a grand jury, as well as statements made under circumstances that suggest they would be used in prosecution, such as statements made in a police interrogation.²⁹⁶

285. See *supra* notes 139–41 and accompanying text.

286. U.S. CONST. amend. VI.

287. 541 U.S. 36 (2004).

288. 448 U.S. 56 (1980).

289. *Id.* at 66; see *Crawford*, 541 U.S. at 40.

290. *Roberts*, 448 U.S. at 66; see *Crawford*, 541 U.S. at 40.

291. *Crawford*, 541 U.S. at 60–68.

292. *Id.*

293. *Id.* at 68.

294. *Id.* at 68–69 (“Where testimonial statements are at issue, the only indicium of reliability sufficient to satisfy constitutional demands is the one the Constitution actually prescribes: confrontation.”).

295. *Id.*

296. *Id.* at 51–52, 68; Jennifer L. Mnookin, *Expert Evidence and the Confrontation Clause After Crawford v. Washington*, 15 J.L. & POL'Y 791, 792 (2007). The Court later clarified that statements made to police for the “primary purpose” of resolving an ongoing emergency are not testimonial. *Davis v. Washington*, 547 U.S. 813, 822 (2006). On the other hand, statements made for the “primary purpose” of proving past events, rather than resolving an emergency, are testimonial. *Id.* As explained by the Court in *Michigan v.*

After *Crawford*, the Court held in *Melendez-Diaz v. Massachusetts*²⁹⁷ that “certificates of analysis,” which indicated that a forensic analysis showed a substance to be cocaine, were testimonial.²⁹⁸ And most recently, in *Bullcoming v. New Mexico*,²⁹⁹ the Court held that the defendant in a drunk-driving prosecution had a right to be confronted with the actual scientific analyst who tested the defendant’s blood to produce a blood alcohol report (which was testimonial evidence).³⁰⁰ A different analyst who “had neither participated in nor observed the test” could not constitutionally serve as a substitute.³⁰¹

1. The Intersection of *Crawford* and Disclosure of Basis Evidence

Much information that an expert might rely on is nontestimonial.³⁰² But experts can also rely on testimonial statements that would be hearsay if offered for their truth.³⁰³ For example, a gang expert might rely on information obtained from police interrogations performed while investigating the defendant, or a psychologist might interview the family of a defendant in preparing to oppose a defendant’s insanity defense.³⁰⁴ In addition, one forensic expert might offer an opinion based on a testimonial report prepared by a different expert.

Perhaps significantly, the Court in *Bullcoming* noted that the substitute analyst did not offer an “independent opinion” on the blood alcohol report.³⁰⁵ Justice Sotomayor, one of five votes for the holding, discussed this point somewhat further, in “emphasiz[ing] the limited reach” of the opinion.³⁰⁶ Justice Sotomayor pointed out that *Bullcoming* did *not* involve an expert witness “asked for his independent opinion about underlying testimonial reports that were not themselves admitted into evidence.”³⁰⁷ In

Bryant, 131 S. Ct. 1143, 1155, 1157 & n.9 (2011), a statement can be nontestimonial in the absence of an ongoing emergency. In making this point, the Court may have walked back from *Crawford* toward the reliability standard of *Roberts*. *Bryant*, 131 S. Ct. at 1155, 1157 & n.9 (“In making the primary purpose determination, standard rules of hearsay, designed to identify some statements as reliable, will be relevant.”); *see also* Colin Miller, *Michigan v. Bryant*, Part 6, EVIDENCEPROF BLOG (Mar. 3, 2011), <http://lawprofessors.typepad.com/evidenceprof/2011/03/yesterday-i-posted-an-entry-about-justice-scalia-accusing-the-majority-in-michigan-v-bryant-of-retreating-from-crawford-v-washi.html> (“Thus, it seems to me that the majority in *Michigan v. Bryant* is using the *Ohio v. Roberts* ‘adequate indicia or reliability’ test to determine whether statements are testimonial or nontestimonial.”).

297. 129 S. Ct. 2527 (2009).

298. *Id.* at 2530–32.

299. 131 S. Ct. 2705 (2011).

300. *Id.* at 2709–11, 2715–17.

301. *Id.* at 2709, 2715–16.

302. *See id.* at 2722 (Sotomayor, J., concurring in part) (describing statements made for medical treatment as nontestimonial); *Michigan v. Bryant*, 131 S. Ct. 1143, 1157 n.9 (2011); *Melendez-Diaz*, 129 S. Ct. at 2539–40 (“Business and public records are generally admissible absent confrontation . . . because . . . they are not testimonial.”).

303. *See* Mnookin, *supra* note 296, at 801–09.

304. *See id.* at 808; *see also* *United States v. Turner*, 591 F.3d 928, 934 (7th Cir. 2010) (“*Melendez-Diaz* did not do away with Federal Rule of Evidence 703.”).

305. *Bullcoming*, 131 S. Ct. at 2715–16 (majority opinion).

306. *Id.* at 2719, 2722 (Sotomayor, J., concurring in part).

307. *Id.* at 2722.

doing so, she pointed out that Rule 703 allows experts to base opinions on inadmissible evidence.³⁰⁸ According to Justice Sotomayor, the court “would face a different question if asked to determine the constitutionality of allowing an expert witness to discuss others’ testimonial statements if the testimonial statements were not themselves admitted as evidence.”³⁰⁹ This reasoning parallels that used by lower federal courts in considering expert witness testimony based on possibly testimonial statements, as discussed in Part II.C.2.

In a footnote in *Crawford*, the Court parenthetically remarked that the Confrontation Clause “does not bar the use of testimonial statements for purposes other than establishing the truth of the matter asserted.”³¹⁰ Taken at face value, this statement would permit an expert to rely on and disclose testimonial hearsay for the purpose of evaluating the expert’s opinion, because that purpose is “other than [for] establishing the truth of the matter asserted.”³¹¹ That is, if the expert discloses a testimonial statement only for the purpose of evaluating the expert’s opinion, then the statement has not been offered for the truth of the matter asserted. Therefore, the statement is not testimonial hearsay,³¹² and the Confrontation Clause does not apply.³¹³ This rationale is widespread in the courts.³¹⁴ The New York Court of Appeals, however, has rejected this reasoning, as explained in the next section.

2. *People v. Goldstein*

The New York Court of Appeals rejected the non-hearsay explanation for expert basis evidence in *People v. Goldstein*.³¹⁵ *Goldstein* reversed the conviction of a mentally ill man for killing a stranger by throwing her in front of a subway train.³¹⁶ Expert psychiatrists testified for the prosecution

308. *Id.*

309. *Id.*

310. *Crawford v. Washington*, 541 U.S. 36, 60 n.9 (2004) (citing *Tennessee v. Street*, 471 U.S. 409, 414 (1985)). *But see* James L. Kainen & Carrie A. Tendler, *The Case for a Constitutional Definition of Hearsay: Requiring Confrontation of Testimonial, Nonassertive Conduct and Statements Admitted to Explain an Unchallenged Investigation*, 93 MARQ. L. REV. 1415, 1449–72 (2010) (arguing that admitting a testimonial statement for the nominally not-for-the-truth purpose of explaining an investigator’s action, when the defendant has not challenged the action, should be understood as a Confrontation Clause violation); Stephen Aslett, Comment, *Crawford’s Curious Dictum: Why Testimonial “Nonhearsay” Implicates the Confrontation Clause*, 82 TUL. L. REV. 297, 338 (2007) (arguing that the statement in footnote nine of *Crawford* conflicts with the framers’ understanding of hearsay).

311. *Crawford*, 541 U.S. at 60 n.9 (citing *Street*, 471 U.S. at 414); *see supra* notes 90–94 and accompanying text.

312. To be hearsay, the statement must be offered “to prove the truth of the matter asserted.” FED. R. EVID. 801(c); *see supra* notes 90–94 and accompanying text.

313. *See* Mnookin, *supra* note 296, at 811–29 (explaining and criticizing this argument); *see also supra* note 310 and accompanying text.

314. *See* KAYE ET AL., *supra* note 12, § 4.10.1; Seaman, *supra* note 31, at 846 n.93 (collecting cases).

315. 843 N.E.2d 727, 732–34 (N.Y. 2005).

316. *Id.* at 728–29.

and defense.³¹⁷ The prosecution's expert argued that the defendant's illness was "relatively mild," and that he used his illness as an excuse for violent, predatory acts against women.³¹⁸ The trial court permitted the prosecution's expert to repeat what six people told her about the defendant.³¹⁹ The Court of Appeals, focusing on four of the six declarants, determined that their out of court statements were testimonial under *Crawford*.³²⁰ The prosecution made the argument described above, that the statements had only been offered to evaluate the expert's opinion, not for their truth.³²¹

The court rejected the argument, reasoning that the jury could not have used the statements to evaluate the expert's opinion without accepting the statements as true or false.³²² The prosecution, the court pointed out, wanted the jury to accept the statements as true and to accept the opinion based on them.³²³ The statements had been offered for their truth, and were therefore testimonial hearsay under *Crawford*.³²⁴

As Professor Jennifer Mnookin explains, the *Goldstein* court recognized that the purpose for which the prosecution offered the statements required the jury to assess the reliability of the speakers.³²⁵ The statements were actually offered for a hearsay purpose.³²⁶ Thus, while it might have been acceptable for the expert to refer to her sources in general terms, it violated the defendant's Confrontation Clause rights to allow the expert to repeat the hearsay statements of her sources.³²⁷

Even if only a general reference is allowed, however, expert reliance on testimonial hearsay raises an additional question: what if the defendant attacks the basis of the expert's opinion? Under the approach to Rules 703 and 705 suggested by the advisory committee's notes, if the opponent challenges the expert's basis, the door may be open for the proponent to respond with basis evidence that could not have been disclosed earlier.³²⁸

317. *Id.* at 729.

318. *Id.*

319. *Id.*

320. *Id.* at 733–34.

321. *Id.* at 732; *see supra* Part II.C.1.

322. *Goldstein*, 843 N.E.2d at 732.

323. *Id.*

324. *Id.* at 733; *see Mnookin, supra* note 296, at 824–26 (characterizing the *Goldstein* analysis as "spot on: courts should not be able to avoid analysis of the *Crawford* issues present when prosecution experts disclose the substance of their sources on direct examination, through the fictional claim that such statements are offered for a purpose other than their truth").

325. *See Mnookin, supra* note 296, at 826.

326. *Id.*; *cf. Kainen & Tendler, supra* note 310, at 1449–72 (explaining that when a court admits a testimonial statement to explain the action of an investigator even though the defendant has not challenged the action, the statement lacks any permissible nonhearsay use (such as rebutting a defendant's challenge to an investigator's action)).

327. *See Mnookin, supra* note 296, at 826–27 (suggesting that referring to the general nature of an expert's sources, instead of the detailed substance of the information they provided, is more supportable under *Crawford*).

328. *See supra* notes 224–27 and accompanying text.

Whether this approach should apply to testimonial hearsay remains unsettled.³²⁹

3. Testimonial Hearsay and Expert Testimony in Federal Courts

Federal courts have not yet adopted *Goldstein's* reasoning, though concern exists about transmitting testimonial hearsay through experts. Thus, for example, the Second Circuit reasoned in *United States v. Lombardozi*,³³⁰ that an expert could rely on testimonial statements, but could not communicate them or directly convey their substance to the jury.³³¹ In another Second Circuit case, *United States v. Mejia*,³³² the court held that the government's expert had reasonably relied on various hearsay statements, but warned against allowing the expert to transmit hearsay to the jury.³³³ In *Mejia*, the expert repeated information without analysis in a way that suggested to the court that he was summarizing the evidence, and not acting as an expert.³³⁴

As phrased by the Fourth Circuit in *United States v. Johnson*,³³⁵ expert reliance on testimonial hearsay is problematic "only" if the expert "is used as little more than a conduit or transmitter for testimonial hearsay, rather than as a true expert whose considered opinion sheds light on some specialized factual situation."³³⁶ The experts in *Johnson* did not refer to the contents of any testimonial statements, however, and the admission of their testimony was therefore upheld.³³⁷ The Fourth Circuit made similar arguments in upholding the admission of expert testimony in *United States v. Ayala*.³³⁸ Quoting *Johnson*, the *Ayala* court explained that "the question when applying *Crawford* to expert testimony is 'whether the expert is, in essence, giving an independent judgment or merely acting as a transmitter for testimonial hearsay.'"³³⁹

These cases recognize that the government violates the defendant's Confrontation Clause rights when it uses an expert as a conduit for testimonial hearsay. Unlike *Goldstein*,³⁴⁰ these cases do not relate to a situation in which the testimonial hearsay was communicated to the jury in addition to the expert's opinion. Instead, *Johnson* and *Ayala* in particular

329. See KAYE ET AL., *supra* note 12, § 4.10.4.

330. 491 F.3d 61 (2d Cir. 2007).

331. *Id.* at 72–73. In *Lombardozi*, the court suggested that a small portion of the expert's testimony might have been excludable on Confrontation Clause grounds because the only source for the expert's information was testimonial evidence, but the error did not require reversal. *Id.*

332. 545 F.3d 179 (2d Cir. 2008).

333. *Id.* at 197–98.

334. *Id.* at 197–99; see also *United States v. Rubi-Gonzalez*, 311 F. App'x 483, 487–88 (2d Cir. 2009) (excluding the testimony of the same expert who testified in *Mejia*, for essentially the same reasons).

335. 587 F.3d 625 (4th Cir. 2009).

336. *Id.* at 635.

337. *Id.* at 636.

338. 601 F.3d 256 (4th Cir. 2010).

339. *Id.* at 275 (quoting *Johnson*, 587 F.3d at 635).

340. See *supra* Part II.C.2.

suggest a dichotomy between transmitting hearsay and providing an expert opinion.³⁴¹ As discussed above, Justice Sotomayor's concurrence in *Bullcoming* also suggests that an "independent" expert opinion might avoid Confrontation Clause problems.³⁴²

However, the "independent opinion" distinction does not resolve the problem of expert reliance on testimonial hearsay. As *Goldstein* and Rule 703 demonstrate, an expert can both provide an opinion and transmit hearsay to the jury in support of the opinion.³⁴³ Part III.B returns to this point.

III. REVIEWING RULE 703 TEN YEARS LATER

The 2000 amendment to Rule 703 emphasized that Rule 703 does not serve as an exception to the other rules of evidence.³⁴⁴ Instead, if an expert relies on evidence that is not admissible, the evidence can be disclosed to the jury only if the probative value of the evidence in evaluating the expert's opinion substantially outweighs the prejudicial effect of disclosing the evidence.³⁴⁵

As discussed in Part II.B., a review of federal court opinions considering disclosure of inadmissible basis evidence during two-year periods before and after the 2000 amendment suggests that there was a tendency toward disclosure before the amendment, which was curbed somewhat by the amendment to Rule 703.³⁴⁶ Even after the amendment, however, disclosure can still be expected in a substantial number of cases.³⁴⁷ As a result, the debate over the proper treatment of inadmissible basis evidence and the debate over the effectiveness of limiting instructions in this context retain significance.

Despite longstanding criticism and doubtful efficacy,³⁴⁸ limiting instructions are used throughout the Rules of Evidence when the same evidence is admissible for one purpose and inadmissible for another.³⁴⁹ The limiting instruction contemplated by Rule 703 is problematic, however, particularly in the context of hearsay. When otherwise inadmissible basis evidence is disclosed under Rule 703, the evidence is admitted for the limited purpose of evaluating the expert's opinion.³⁵⁰ Thus, the jury must

341. See *supra* notes 335–39 and accompanying text; see also Ross Andrew Oliver, Note, *Testimonial Hearsay as the Basis for Expert Opinion: The Intersection of the Confrontation Clause and Federal Rule of Evidence 703 After Crawford v. Washington*, 55 HASTINGS L.J. 1539, 1560 (2004) (suggesting a "continuum" with an expert who merely transmits others' statements at one end, and an expert who provides a "truly original" opinion based on diverse sources at the other end).

342. See *supra* notes 306–09 and accompanying text.

343. See *supra* Parts II.A, II.B, II.C.2.

344. See *supra* Part I.C.

345. FED. R. EVID. 703; see *supra* Part I.C.

346. See *supra* Part II.B.

347. See *supra* Part II.A.2.

348. See *supra* notes 125–27 and accompanying text.

349. See *supra* note 124 and accompanying text; see also Mnookin, *supra* note 296, at 812 ("Rules of limited admissibility are commonplace in evidence law.")

350. See *supra* notes 128–30, 151–53, 157–59 and accompanying text.

somehow use the inadmissible basis evidence to evaluate the expert's opinion, without considering whether or not the inadmissible basis evidence is true.³⁵¹ Even outside the context of hearsay, allowing evidence that is inadmissible under other rules to be disclosed via Rule 703 risks frustrating the purpose of those rules.³⁵²

Expert reliance on testimonial hearsay is particularly troubling.³⁵³ Rule 703's approach, however, invites Confrontation Clause violations, by providing that an expert opinion can allow discussion of inadmissible evidence.

Part III.A revisits amended Rule 703 after ten years' experience, outside of the context of the Confrontation Clause. It ultimately advocates a modified version of the existing Rule's approach that emphasizes the unworkability of limiting instructions in the context of Rule 703. Part III.B addresses Rule 703 in the Confrontation Clause context.

A. *Acceptable Balancing*

The proper treatment of inadmissible basis evidence under Rule 703 cannot be resolved merely by recognizing that juries cannot logically distinguish between substantive use and evaluative use of inadmissible basis evidence under Rule 703. Indeed, Professors Rice and Carlson both agreed that limiting instructions are ineffective,³⁵⁴ and from there took opposite positions on the proper treatment of inadmissible basis evidence.³⁵⁵ Even if it is assumed that the distinction between substantive use and evaluative use of inadmissible basis evidence is impossible for the jury, at least three potential approaches remain, based on the three approaches discussed in Part I.B.3. Ultimately, the restrictive and open approaches are both unsatisfactory. The current balancing approach, however, can still be expected to allow a substantial amount of disclosure. It should be applied with an understanding that a limiting instruction likely will be ineffective.

1. The Restrictive Approach

The restrictive approach would allow an expert on direct examination to refer only to the sources of evidence upon which she relied, if the evidence was not otherwise admissible.³⁵⁶ This approach would solve the problem of unworkable limiting instructions. However, the review of decisions on disclosure in 2007 and 2008 demonstrates that inadmissible basis evidence is disclosed in a substantial number of cases even though Rule 703 provides a presumption against disclosure,³⁵⁷ which reflects a judicial determination

351. *See supra* notes 128–30, 151–53, 157–59 and accompanying text.

352. *See supra* Part II.B.1.

353. *See supra* Part II.C.

354. *See supra* notes 151–53, 157–59 and accompanying text.

355. *See supra* Part I.B.3.a–b.

356. *See supra* note 142 and accompanying text.

357. *See supra* Part II.B.2.

that in many cases disclosure is important for the jury to understand the expert opinion.³⁵⁸

Perhaps in a nod in this direction, even Professor Carlson's restrictive approach would still have permitted some general disclosure of the expert's bases.³⁵⁹ Without disclosure, the jury may be forced simply to choose an expert to defer to, with little basis for its decision.³⁶⁰ Consider a lawsuit in which each party hires an expert on a certain topic. Each expert has probably considered the same general types of information. As a result, if the experts can only disclose the general types of inadmissible information that they have relied on, then there may be no way for the jury to adequately distinguish between the experts' direct testimony. The plaintiff's expert may testify, "I consulted sources A, B, and C, and I conclude X." The defendant's expert may instead testify "I consulted sources A, B, and C, and I conclude Z." Based on the direct testimony of the experts the jury may simply be forced to choose an expert to defer to.

Moreover, even if disclosure were prohibited on direct examination, each party would still be entitled to fully explore the basis of the other's expert on cross-examination.³⁶¹ Without a full opportunity for cross-examination, a party could present an expert who relied on very weak information, and the opponent would be helpless to expose the flaws. Prohibiting disclosure of inadmissible basis evidence on direct testimony would thus prevent a party from laying out an expert's reasoning for the jury, while shifting the explanation of the basis of the testimony to cross-examination.³⁶²

2. The Open Approach

The open approach would treat expert testimony as an exception to the other rules of evidence (or at least as an exception to the rule against hearsay) for information that is reasonably relied on by an expert.³⁶³ This approach would also solve the problem of unworkable limiting instructions, because the evidence would be admitted for substantive use.

This approach, however, is also ultimately unacceptable, because it admits too much. Consider *Brennan*, discussed above in Part II.B.1. In that case, over the defendant's objection, the court allowed a rehabilitation specialist to testify that he had reviewed the plaintiff's medical history, and that two doctors had determined that the plaintiff suffered from "a permanent partial impairment of eleven percent of the whole body."³⁶⁴ The plaintiff thereby appears to have succeeded in presenting the testimony of an expert who has relied on and discloses the opinions of multiple other experts, effectively presenting the testimony of several experts to the jury,

358. See *supra* notes 279, 284 and accompanying text.

359. See *supra* note 142 and accompanying text; see also *supra* note 327.

360. See *supra* notes 168–71 and accompanying text.

361. See *supra* notes 221–27 and accompanying text.

362. See *supra* notes 187–89, 221–27 and accompanying text.

363. See *supra* Part I.B.3.b.

364. *Brennan v. Reinhart Institutional Foods*, No. CIV97-4014, 1998 WL 2017925, at *1, *3 (D.S.D. Sept. 17, 1998) (quoting the testimony of the specialist).

while having to produce (and subject to cross-examination) only one of them.³⁶⁵

If the open approach had been adopted, the medical reports relied on by the specialist would have been admitted (to the extent that the specialist had reasonably relied on them) for substantive use not only by the jury but also by the proponent of the expert.³⁶⁶ The open approach could thus allow experts to become gateways for large amounts of evidence, forcing the jury to defer to the expert's selection and evaluation of substantive evidence.³⁶⁷

3. A Modified Middle Way

This Note therefore advocates continuing along the compromise course,³⁶⁸ as modified in amended Rule 703. Ten years of experience with the Rule demonstrates, however, that disclosure can still be expected in a number of cases.³⁶⁹ Indeed, disclosure should be expected. In many cases, disclosure will be necessary to evaluate the expert.³⁷⁰

The approach taken by Rule 703 should be modified in its application, however, by a recognition of the probable ineffectiveness of limiting instructions for the jury, particularly when the jury cannot permissibly use the evidence in the same way that the expert did.³⁷¹ In addition, Rule 703 as it exists now permits expert reliance on and disclosure of evidence rendered inadmissible not just on hearsay grounds, but also for a variety of other reasons.³⁷² Expert reliance and validation may alleviate concerns that unreliable information may be disclosed to the jury through expert testimony.³⁷³ Expert reliance and validation do not, however, wash away potential prejudice from evidence that is inadmissible for other reasons.³⁷⁴ For example, an expert may be capable of ignoring the prejudicial effects of a subsequent remedial measure that is inadmissible under Rule 407.³⁷⁵ But if a court allows the expert to disclose such information to the jury, it potentially frustrates the policy goals of Rule 407. Accordingly, courts should take care to apply the presumption *against* disclosure in Rule 703, with particular care to note when a limiting instruction will not be effective.

The 2000 amendment to Rule 703 serves an additional function, even though disclosure can still occur (and even though juries may be incapable of following limiting instructions, at least in some circumstances). Rule 703 makes clear that the basis evidence can only be admitted, if at all, for the evaluative—not substantive—use. Even if a jury cannot make the distinction, the idea of limited admissibility, however, is not restricted to

365. See *supra* note 144 and accompanying text.

366. See *supra* note 119 and accompanying text.

367. See *supra* notes 172–74 and accompanying text.

368. See *supra* Part I.B.3.c.

369. See *supra* Part II.B.2.

370. See *supra* Part II.B.2.

371. See *supra* notes 128–41 and accompanying text.

372. See *supra* Part I.B.1.

373. See *supra* Part I.B.3.b.

374. See *supra* note 167 and accompanying text.

375. See *supra* notes 104–07 and accompanying text.

the jury. It also affects the actions of the parties and the court.³⁷⁶ The proponent of the expert cannot argue that she has proved a fact by pointing to inadmissible evidence that the expert relied on in forming an opinion.³⁷⁷ In addition, consider the example of *Wolling*, which is discussed in Part II.B.2. During deliberations, the jury in *Wolling* asked to review the medical records upon which the expert had relied.³⁷⁸ The judge refused the jury's request, and explained that the expert had only described the medical records to support his opinions.³⁷⁹ If the open approach had been adopted, the medical records would have been admitted into evidence for the substantive use that the jury requested. By applying the limited admissibility approach in *Wolling*, the district court permitted the proponent of the expert to be clear that the expert had some basis for his opinion, but the court also kept prejudicial records from the jury room.³⁸⁰

The balancing approach of Rule 703, however modified, will not solve the problem of expert reliance on testimonial hearsay, which is discussed in the next section.

B. Unacceptable Disclosure

Rule 703's current approach confuses the problem of expert reliance on testimonial statements, by suggesting that an expert can disclose the testimonial statements to the jury for a non-hearsay use. If both Rule 703 and the Supreme Court's dictum in *Crawford* are taken at face value, otherwise inadmissible statements are disclosed under Rule 703 only for non-hearsay purposes, meaning that the Confrontation Clause is not implicated.³⁸¹ As commentators on both sides of the disclosure debate³⁸² and the New York Court of Appeals³⁸³ have correctly recognized, however, if an expert relies upon an out of court statement for its truth, jurors cannot possibly use the statement to evaluate the expert's opinion unless they also use it for the truth.³⁸⁴ In addition, if they accept the expert's opinion, they implicitly accept the evidence used to reach it.³⁸⁵

Evaluating whether the expert has offered an independent opinion, which is suggested as a possible approach in Justice Sotomayor's *Bullcoming* concurrence and in several Circuit Courts of Appeals' decisions,³⁸⁶ partially sidesteps the problem of testimonial hearsay. Courts are right to be wary of experts who serve as mere transmitters of hearsay.³⁸⁷ In addition, if an

376. *See supra* notes 119–22 and accompanying text.

377. *See supra* notes 119–22 and accompanying text.

378. *United States v. Wolling*, 223 F. App'x 610, 613 (9th Cir. 2007).

379. *Id.*

380. *Id.*

381. *See supra* notes 310–14 and accompanying text.

382. *See supra* Part II.B.3.a–b.

383. *See supra* Part II.C.2. At least the jury accepts the basis evidence underlying the opinion in the aggregate; they need not endorse each individual item of evidence.

384. *See People v. Goldstein*, 843 N.E.2d 727, 732–34 (N.Y. 2005).

385. *See id.*

386. *See supra* Part II.C.1, II.C.3.

387. *See supra* Part II.C.3.

expert offers only an independent opinion *without* conveying the substance of any testimonial statement, there may be no Confrontation Clause concerns.³⁸⁸

But an expert can provide an independent opinion *and* convey otherwise inadmissible evidence to the jury. Indeed, that is the very situation that Rule 703 addresses, and it was the situation encountered in *Goldstein*³⁸⁹ and in *Leeson*.³⁹⁰ A psychiatrist, for example, can offer an opinion about a defendant's sanity, and convey hearsay to the jury in support of the opinion. The hypothetical proposed by Justice Sotomayor in *Bullcoming* appears to be another such situation.³⁹¹ If an expert provides his own opinion, and discusses another expert's testimonial report in support of his opinion,³⁹² the expert is both providing his independent opinion *and* conveying testimonial hearsay to the jury. In these circumstances, the disclosure of testimonial hearsay basis evidence should be recognized as a Confrontation Clause violation, even if the expert also provides an independent opinion.

Thus, although the Supreme Court's recent Confrontation Clause decisions did not "do away with Federal Rule of Evidence 703,"³⁹³ the compromises struck by Rule 703 should not be allowed to provide a route for testimonial hearsay to reach the jury.

CONCLUSION

Rule 703 was amended in 2000 after a long debate on the proper treatment of inadmissible evidence relied on by experts in forming their opinions. Ten years of experience with the amended Rule demonstrates that disclosure of otherwise inadmissible evidence can still be expected in a substantial number of cases. In most instances, Rule 703 should continue substantially as before, but with an additional judicial emphasis on the ineffectiveness of limiting instructions under the Rule. In addition, even if disclosure of otherwise inadmissible evidence occurs, the amendment to Rule 703 emphasizes to the court and the parties that the evidence should only be used to evaluate the expert's opinion. In cases involving expert reliance on testimonial statements, the compromises struck by Rule 703 should not be allowed to provide a route to the jury for testimonial hearsay.

388. *See supra* notes 330–31, 341 and accompanying text.

389. *See supra* Part II.C.2.

390. *See supra* notes 280–84 and accompanying text.

391. *Bullcoming v. New Mexico*, 131 S. Ct. 2705, 2722 (2011) (Sotomayor, J., concurring in part).

392. *Id.*

393. *United States v. Turner*, 591 F.3d 928, 934 (7th Cir. 2010).