Tulsa Law Review

Volume 16 | Number 1

Fall 1980

An Introduction to the Oklahoma Evidence Code: The Thirty-Fourth Hearsay Exception

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AN INTRODUCTION TO THE OKLAHOMA EVIDENCE CODE: THE THIRTY-FOURTH HEARSAY EXCEPTION

INFORMATION RELIED UPON AS A BASIS FOR ADMISSIBLE EXPERT OPINION†

Walker J. Blakey*

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† This article is the third in a series to be published in the TULSA LAW JOURNAL which will comprehensively examine the Oklahoma Evidence Code in its entirety. This article draws upon the author's work on a proposal for rules of evidence for North Carolina which was supported by the North Carolina Law Center, and upon work on a book tentatively titled AN INTRODUCTION TO THE FEDERAL RULES OF EVIDENCE. I must thank Dean Frank T. Read and Professor Ralph C. Thomas for their assistance in dealing with Oklahoma law and my colleagues Henry Brandis, Jr., and Kenneth S. Broun for their critiques of this article. I received assistance on work which is incorporated into this article from Marilyn O. Adamson, now a member of the Oklahoma Bar, Mary E. Lee, now a member of the North Carolina Bar, and Gary Hampton and James R. Wear, third year law students at the University of North Carolina.

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I. INTRODUCTION—HEARSAY AND EXPERT WITNESS TESTIMONY

A. The Thirty-Fourth Hearsay Exception

The Oklahoma Evidence Code[1] creates thirty-four exceptions to the rule against hearsay. Twenty-nine are express hearsay exceptions which are set out in sections 2803 and 2804.[2] Four are "exceptions by

1. Oklahoma Evidence Code, ch. 285, 1978 Okla. Sess. Laws 801 (codified as OKLA. STAT. tit. 12, §§ 2101 to 2107, 2201 to 2203, 2301 to 2305, 2401 to 2411, 2501 to 2513, 2601 to 2615, 2701 to 2705, 2801 to 2806, 2901 to 2903, 3001 to 3008, and 3101 to 3103). In this article all citations as well as textual references to the Oklahoma Evidence Code will be designated by the codified section numbers.

2. The next article in this series will discuss the express hearsay exceptions in §§ 2803 and 2804.

definition" created by provisions in section 2801. Section 2801 purports merely to define "hearsay," but follows Federal Evidence Rule 801 and adopts such an elaborate definition of "hearsay" that several categories of statements which would otherwise be considered hearsay, are declared not to be hearsay.[3] There are arguments which can be made to justify special treatment of each of these categories of statements, and the draftsmen of both section 2801[4] and Federal Evidence Rule 801[5] found those arguments persuasive. Many lawyers, however, are likely to find it confusing and unsatisfactory to describe these categories of statements as nonhearsay because the statements included in each category are to be admitted into evidence for the purpose of proving the truth of what they either state or imply. It may be more helpful to recognize that these categories of statements are hearsay under pre-Code standards, and that the purpose of the provisions of section 2801 is to create hearsay "exceptions by definition" by which statements in these categories are admitted for the purpose of proving the truth of either what they state or imply.

Three "exceptions by definition" appear in section 2801(4). These are, (1) an exception for sworn prior inconsistent statements by a witness,[6] (2) an exception for prior consistent statements by a witness,[7] and (3) an exception for admissions by a party-opponent.[8] Section 2801(1) creates a fourth "exception by definition" for non-assertive conduct[9] offered as circumstantial evidence of the actor's beliefs.[10]

Many of these first thirty-three hearsay exceptions might be used

3. *See* Blakey, *An Introduction to the Oklahoma Evidence Code: Hearsay*, 14 TULSA L. J. 635, 638-42 (1979) [hereinafter cited as *Introduction II*].

4. *See* the arguments made by the Subcommittee on Evidence of the Code Procedure—Civil Committee of the Oklahoma Bar Association in their note to their proposed Rule 801 in *Proposed Oklahoma Code of Evidence*, 47 OKLA. B. J. 2605, 2644-45 (1976) [hereinafter cited as *Proposed Code*]. The notes prepared by the Oklahoma Evidence Subcommittee were revised after the adoption of the Oklahoma Evidence Code by the legislature and these revised notes appear throughout OKLA. STAT. ANN. tit. 12, §§ 2101-3103 (West Supp. 1980) in the form of comments upon the enacted sections.

5. The arguments by the Federal Advisory Committee which drafted the first versions of Federal Evidence Rule 801 appear in Proposed Rules of Evidence for United States Courts and Magistrates, 56 F.R.D. 183, 293-97 (1972) [hereinafter cited as Proposed Federal Rules].

6. See *Introduction II*, *supra* note 3, at 655-77.

7. *See id.* at 677-80.

8. *See id.* at 644-54.

9. *See id.* at 681-94.

10. The Oklahoma Evidence Code did not adopt one "exception by definition" that appears in Federal Evidence Rule 801(d)(1)(C). That provision creates a hearsay exception for prior statements by a witness if they are statements "of identification of a person made after perceiving him." *See Introduction II*, *supra* note 3, at 680-81; Note, *Admissibility of Extrajudicial Indentifications*, 32 OKLA. L. REV. 462 (1979).

to admit evidence necessary to introduce or support expert opinion testimony. These include hearsay exceptions created by the Code for statements of sensation or physical condition,[11] statements made for purposes of medical diagnosis or treatment,[12] medical records,[13] and learned treatises.[14] The Code also creates a special thirty-fourth hearsay exception which applies only to the testimony of expert witnesses. This new hearsay exception in section 2703 is a part of a new set of theories about testimony by expert witnesses.

B. Testimony by Expert Witnesses Under the Oklahoma Evidence Code

Sections 2701 through 2705 of the Oklahoma Evidence Code are virtually identical to Federal Rules of Evidence 701 through 705.[15] These sections adopt the philosophy of those Federal Rules that opinion and expert witness testimony ought to be admissible whenever they would be helpful to the trier of fact.[16] In order to achieve that goal, these sections restate the requirements for the admission of opinion and expert witness testimony in ways intended to assure that helpful opinion and expert witness testimony is not excluded. Most of the changes in past law adopted by these sections merely eliminate prior barriers to opinion and expert witness testimony that might be termed "artificial". Thus, section 2702 provides that expert opinion testimony is admissible whenever such testimony will assist the trier of fact. This section rejects the argument that an idea must be beyond the comprehension of a lay factfinder before expert testimony may be used.[17] Section 2702 also states clearly that some quite ordinary person may be an expert witness if his experience gives him the requisite knowledge concerning a point

11. OKLA. STAT. tit. 12, § 2803(3).
12. *Id.* § 2803(4).
13. *Id.* § 2803(6).
14. *Id.* § 2803(18).
15. There is one insignificant change in the language of § 2705.
16. "The basic approach to opinions, lay and expert, in these rules is to admit them when helpful to the trier of fact." Proposed Federal Rules, *supra* note 5, at 284 (quoted in *Proposed Code*, *supra* note 4, at 2642).
17. *See* C. MCCORMICK'S HANDBOOK OF THE LAW OF EVIDENCE § 13 (2d ed. E. Cleary 1972) [hereinafter cited as MCCORMICK]; 3 D. LOUISELL & C. MUELLER, FEDERAL EVIDENCE § 382 (1979) [hereinafter cited as LOUISELL & MUELLER].
Judge Weinstein and Professor Berger appear to read into the "helpfulness test" the old standard that the subject of expert testimony must lie "beyond common knowledge," 3 J. WEINSTEIN & M. BERGER, WEINSTEIN'S EVIDENCE ¶ 702 [01] at 702-6 (1978 & Supp. 1979) [hereinafter cited as WEINSTEIN & BERGER] but go on to advocate the admission of helpful expert testimony even if it does not meet a "beyond common knowledge" test. *Id.* at 702-8 & 702-10.

in a trial.[18] Section 2704 rejects the idea that an enlightening opinion should be excluded because the issue with which it deals is "an ultimate issue to be decided by the trier of facts."[19] Two sections of the Code, however, contain far more drastic alterations of prior law. Sections 2703 and 2705 completely change the theory of expert witness testimony.[20]

Prior to the adoption of the Code an expert witness was usually held to be different from any other witness in only one respect: he was qualified to form and express an opinion which a lay witness would not be permitted to express. In all other respects he was considered to be an ordinary witness. He could testify to the existence of facts only if he had the same sort of personal knowledge of those facts that was required of a lay witness. If he lacked the requisite personal knowledge of all the facts necessary to form an opinion, he would be forced to give an answer to a hypothetical question which assumed the existence of the necessary facts.[21] He would not be permitted to answer such a hypothetical question unless the record contained evidence which would support a finding by the trier of fact that each hypothetical fact actually existed.[22]

Sections 2703 and 2705 largely overturn all of these requirements. Section 2705 gives the trial judge discretion to permit an expert witness to state an opinion without the use of a hypothetical question, even though the expert witness lacks personal knowledge of the facts upon which that opinion is based. Under section 2703 an expert witness may, if certain requirements are met, render an opinion based upon facts that are not in evidence and which may not even be admissible.

One purpose of these changes is to allow expert witnesses to reach their opinions and to explain those opinions in almost the same manner that they would in their offices and laboratories. The Oklahoma Evidence Subcommittee stated, quoting the Federal Advisory Committee: "In this respect the rule is designed to broaden the basis for expert opinions beyond that currently recognized in many jurisdictions and to bring the judicial practice into line with the practice of the experts

18. *See* Proposed Federal Rules, *supra* note 5, at 282.

19. *See* 7 J. WIGMORE, EVIDENCE § 1920 (J. Chadbourn ed. 1978).

20. *See generally*, Blakey, *An Introduction to the Oklahoma Evidence Code: Relevancy, Competency, Privileges, Witnesses, Opinion, and Expert Witnesses*, 14 TULSA L.J. 227, 315-20 (1978) [hereinafter cited as *Introduction I*] and McElhaney, *Expert Witnesses and the Federal Rules of Evidence*, 28 MERCER L. REV. 463 (1977) [hereinafter cited as McElhaney].

21. *Proposed Code*, *supra* note 4, at 2643; MCCORMICK *supra* note 17, §§ 14 & 15.

22. MCCORMICK, *supra* note 17, § 14 at 33.

themselves when not in court."[23]

The new rules adopted by sections 2703 and 2705 make a drastic change in the theory of expert testimony but they do not make nearly as drastic a change in actual courtroom practice. The frequent conflicts between the ways in which expert witnesses actually reached their opinions and the ways in which pre-Code law attempted to control expert testimony were often resolved by compromises violating formal legal rules.[24] Undoubtedly, in pre-Code Oklahoma as elsewhere, expert witnesses were permitted to assume the existence of facts known to them through sources that were not properly introduced into evidence, although in such cases the parties risked the sort of reversal found in *Fuller v. Lemmons*.[25] Furthermore, expert witnesses in many cases ignored what the lawyers and judges told them about legal rules and hypothetical questions and they gave their actual opinions based upon whatever they believed the facts to be. Sections 2703 and 2705 do not go so far as to authorize any form of testimony that an expert witness might choose to give, but they do eliminate (or give the trial judge the discretion to eliminate) almost all restrictions to which an expert witness might reasonably object.

C. *Oklahoma Evidence Code Section 2705 Gives the Trial Judge Discretion to Permit an Expert Witness to State an Opinion Without Disclosure of the Facts upon Which His Opinion Is Based*

Under pre-Code law, if an expert witness lacked personal knowledge of the essential facts necessary to form an opinion, he had to be asked a hypothetical question[26] which assumed the necessary facts to support his opinion.[27] The hypothetical question was necessary be-

23. *Proposed Code*, *supra* note 4, at 2642 (quoting Proposed Federal Rules, *supra* note 5, at 283.)

24. *See* WEINSTEIN & BERGER, *supra* notes 17, ¶ 703 [01] at 703-8 through 703-15. *See also* Maguire & Hahesy, *Requisite Proof of Basis for Expert Opinion*, 5 VAND. L. REV. 432 (1952) and Rheingold, *The Basis of Medical Testimony*, 15 VAND. L. REV. 473 (1962).

25. 434 P.2d 145 (Okla. 1967). This decision is discussed in the text accompanying notes 81-89 *infra*.

26. *Proposed Code*, *supra* note 4, at 2643. In some cases it was possible to avoid the worst features of the full hypothetical question by inviting the expert witness to listen to the introduction of the evidence which was offered to prove the facts upon which his opinion was to be based, and then by instructing him to assume the truth of the testimony he had heard. That was only another form of hypothetical question. Colley v. Sapp, 44 Okla. 16, 142 P. 989 (1914); 2 J. WIGMORE, EVIDENCE § 681 (3d ed. 1940).

27. MCCORMICK, *supra* note 17, § 14 at 33.

cause a statement by the expert which stated or assumed the truth of any facts outside his personal knowledge would be hearsay.

The draftsmen of section 2705 and Federal Evidence Rule 705 decided to reduce the number of situations requiring the use of hypothetical questions.[28] They did so by adopting a change in existing law which was far more radical than the creation of a new hearsay exception, although it incidentally creates a minor hearsay exception not included in the thirty-four previously mentioned. Section 2705 provides that "the expert may testify in terms of opinion or inference and give his reasons therefore without prior disclosure of the underlying facts or data, unless the court requires otherwise. The expert may be required to disclose the underlying facts or data on cross-examination."

This is a radical change from pre-Code law, under which the basis of an expert opinion was considered an essential foundation necessary to prove the correctness of that opinion.[29] Under section 2705, unless the court requires that the basis be shown, an expert opinion can stand on its own, without any apparent basis.[30] There must still be a basis in fact, but that basis may not appear in the evidence introduced into the record. The Subcommittee on Proposed Rules of Evidence of the Colorado Bar Association objected to this change during the congressional debates on the adoption of the Federal Rules of Evidence and offered the following illustration:

> The proposed rules require no foundation to be admitted on which the expert based his opinion. Your committee feels that it is absolutely essential that a foundation be required before an expert opinion be admitted. Otherwise, once any expert has been qualified as such he could offer his opinion on any matter with no reasons to support that opinion. For example, one can envision the following dialogue immediately after the expert had been qualified as an orthopedic surgeon:
>
> Q. *Doctor, do you have an opinion based upon a reasonable degree of medical certainty as to the extent of permanent disability suffered by the plaintiff as a result [of] this automobile accident?*
>
> A. Yes.
>
> Q. *What is your opinion?*
>
> A. She is totally and permanently disabled.

28. *Proposed Code*, *supra* note 4, at 2643; Proposed Federal Rules, *supra* note 5, at 285.
29. J. WIGMORE, EVIDENCE § 672 (3d ed. 1940).
30. *See* note 33 *infra*.

Q. *Thank you, doctor, that is all.*[31]

In fact, it is unlikely that very many plaintiffs' attorneys would be willing to stop at that point. Weinstein and Berger, however, quote the statement by the Colorado subcommittee[32] and then comment, "Congress found no objection to such brevity. Many judges would welcome it."[33]

Section 2705 speaks only of permitting a party not to make a "prior disclosure" of the basis of an expert opinion, but it clearly means that a party may be permitted to introduce opinion testimony the basis for which has not been disclosed and may never be disclosed. The opposing party may always bring out, on cross-examination, any portion of the basis that it finds profitable to disclose. It is possible, in this situation, that the facts brought out on cross-examination by the opposing party may reveal that there is no adequate basis for the opinion. If that should happen, the opposing party should move to strike the expert's opinion.

At common law, the opposing party would also have had a right to have the expert's opinion stricken if the facts brought out on cross-examination revealed that the expert did not have personal knowledge of the facts upon which his opinion was based, even if there was evidence in the record to support a finding that those facts did exist. Under the Code, that is no longer true. Section 2705 serves as a minor hearsay exception in cases in which the expert's opinion is based upon facts that have been introduced into evidence, but which are not within his personal knowledge. Under pre-Code law, the use of a hypothetical question was required in such a situation to avoid a hearsay objection that the facts were not within the expert's personal knowledge. By permitting an expert witness to give an opinion in such a situation without the use of a hypothetical question section 2705 creates a minor hearsay exception to solve that problem. This exception also permits the expert

31. *Hearings on Proposed Rules of Evidence Before the Subcomm. on Criminal Justice (formerly designated as Special Subcomm. on Reform of Federal Criminal Laws) [sic] the House Comm. on the Judiciary*, 93rd Cong., 1st Sess., Ser. 2, Supp. at 353, 355-56 (1973).

32. WEINSTEIN & BERGER, *supra* note 17, ¶ 705[01] at 705-1 & 705-2.

33. *Id.* ¶ 705[01] at 705-2. Louisell and Mueller comment on this same illustration: "It is precisely this kind of testimony which Rule 705 envisions and modern decisions recognize as such." LOUISELL & MUELLER, *supra* note 17 § 400, at 707 (footnote omitted). McElhaney suggests that the illustrated testimony may be longer than the Federal Rules of Evidence require and offers a shorter version:

Q. Doctor, would you tell us about the plaintiff's condition, please?
A. Yes. She is totally permanently disabled.
Q. Thank you, doctor, that is all.

McElhaney, *supra* note 20, at 480.

to refer to facts that are in evidence but not within his personal knowledge in order to explain his opinion.

The section 2705 exception only applies to facts which are already in evidence and which, therefore, could have been included in a hypothetical question if one had been used. The expert may base his opinion upon facts that are not in evidence only if those facts satisfy the requirements of the second sentence of section 2703.

How does an expert learn what particular facts are in evidence and which, therefore, may be used as a basis for his opinion? The Code does not deal with this question and it appears that no particular method is required. The expert can clearly base his opinion upon other testimony which he has actually heard, but it would also appear proper for him to rely upon a transcript which he read, or even an oral summary of other testimony.

Section 2705 does not abolish the hypothetical question.[34] Parties may use hypothetical questions or other traditional methods of explaining or supporting expert testimony whenever the need arises, in order to make expert testimony both understandable and persuasive.[35]

Nevertheless, there will be cases in which a party will decide to offer at least some expert opinion testimony without disclosing the basis for it. Whenever this happens, both the trial judge and the opposing party will be confronted with a series of potentially difficult decisions. It is always within the power of the trial judge to require disclosure of the basis of an expert opinion prior to that opinion's admission, but it is

34. "[T]he federal draftsmen have made it clear that the use of the hypothetical question usually is optional." G. LILLY, AN INTRODUCTION TO THE LAW OF EVIDENCE 397-98 (1978) [hereinafter cited as LILLY]. Dean Read agrees: "[H]ypothetical questions can still be used at the option of the questioner." F. READ, OKLAHOMA EVIDENCE HANDBOOK § 2705, at 192 (1979) [hereinafter cited as OKLAHOMA EVIDENCE HANDBOOK].

The new rules do raise new problems with respect to the use of hypothetical questions. "Questions arise as to what standards hypothetical questions must now meet. May a party who did not need to use a hypothetical question at all use an incomplete one? It would appear that the trial judge still has power to exclude questions that are unfair and misleading." BLAKELY, *Opinion and Expert Testimony* in THE OKLAHOMA EVIDENCE CODE 121 (OBA/CLE Institute, July 7, 1978). Professor McElhaney suggests that parties may now ask better, more flexible hypotheticals. "The real advantage of Rule 705 is that it permits a streamlining of hypothetical questions. They no longer need to be stiff and stylized. As long as they are not misleading, there is no reason why an examiner cannot be far more selective than before in choosing the contents of hypothetical questions." McElhaney, *supra* note 20, at 488 (quoted in MCCORMICK, *supra* note 17, § 16 (Supp. 1978)).

35. P. ROTHSTEIN, RULES OF EVIDENCE FOR THE UNITED STATES COURTS AND MAGISTRATES 291 (2d ed. 1978) [hereinafter cited as ROTHSTEIN, FEDERAL RULES]; WEINSTEIN & BERGER, *supra* note 17, ¶ 705 [01] at 705-6 & 705-7; Ladd, *Expert Testimony*, 5 VAND. L. REV. 414, 428 (1952) [hereinafter cited as Ladd]. *See also* LOUISELL & MUELLER, *supra* note 17, § 400 (Supp. 1980).

clear that the draftsmen of section 2705 did not intend for the trial judge to impose such a requirement in all cases,[36] or even in those cases in which the opposing party objects to the introduction of an unexplained expert opinion.[37] It is likely, therefore, that the *opposing* party will now find it necessary to persuade the trial judge that prior disclosure of the basis of this particular opinion should be required. I stated in an earlier article in this series:

> It seems clear that the burden of persuading the court that there is an adequate basis for an expert opinion remains with the party who offers the opinion as evidence. The burden of raising a bona fide question about the adequacy of that basis, however, has apparently been shifted to the party seeking to oppose the introduction of that opinion. However, this might be more accurately described as a "burden of discovery" than as a burden of coming forward. In a case in which the opposing party can justify its failure to conduct adequate discovery, the trial court probably should exercise its discretion to require that the basis for an expert opinion be shown by the party offering the opinion.[38]

The opposing party will be confronted by a similar problem if expert opinions are admitted without prior disclosure of their bases. The opposing party has a right to expose the weaknesses of such opinions through cross-examination, but it will probably be impossible to conduct that cross-examination effectively,[39] without full discovery of the

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36. McElhaney argues:

> The other way to deal with the problem is to ask the trial court to require hypothetical questions, retreating from the advances of the Federal Rules. This backward step is not likely to be attractive to federal district judges, whose crowded dockets can be eased by the timesaving aspects of Article 7. Since both the voir dire examination and the hypothetical question are now discretionary with the trial court, it seems probable that they will only be imposed by the court when the opposing counsel asserts on the good-faith basis of full discovery that the opinion about to be offered will ultimately be inadmissible.

McElhaney, *supra* note 20, at 489. Louisell and Mueller agree:

> The phrasing of the Rule suggests that this kind of to-the-point presentation should be routinely allowed. To be sure, the Rule allows the trial judge to "require otherwise"; however, the sense of the provision is that he should not so require as a practice, but should do so only where he finds particular facts, peculiarly important in the individual case, which indicate a special need to develop the foundation first.

LOUISELL & MUELLER, *supra* note 17 § 400, at 707.

37. "Section [2705] gives the trial court, not the opposing party, the discretion to require that the basis be shown." *Introduction I*, *supra* note 20, at 317.

38. *Id.* at 318.

39. The Federal Advisory Committee stated in defense of Federal Evidence Rule 703:

> If the objection is made that leaving it to the cross-examiner to bring out the supporting data is essentially unfair, the answer is that he is under no compulsion to bring out any facts or data except those unfavorable to the opinion. The answer assumes that

basis of the expert's opinion.[40]

D. Oklahoma Evidence Code Section 2703 Creates an Exception to the Hearsay Rule

Section 2703 permits an expert witness to give his actual opinion in many cases in which his opinion is based upon facts beyond his personal knowledge. The language of section 2703, which is identical to Federal Evidence Rule 703, does not say this directly, but it does clearly lead to this conclusion. Section 2703 provides:

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

The effect of this language is to permit an expert to base his opinion upon a fact in any of three situations: (1) those situations in which he has personal knowledge of the fact; (2) those situations in which the fact is "of a type reasonably relied upon by experts in the particular field," and the fact has been "made known" to him; or, (3) those situations in which the fact was "made known" to him and also introduced into evidence at the trial or hearing. The language of the Oklahoma Evidence Subcommittee[41] and the Federal Advisory Committee[42]

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

Proposed Federal Rules, *supra* note 5, at 286.

40. *See* the text accompanying notes 106-125 *infra* for a discussion the discovery problems related to § 2705.

41. The Oklahoma Evidence Subcommittee's note to its rule which became § 2703 stated:

> Facts or data upon which the expert opinions are based may, under the rule be derived from three possible sources. First, data may be derived from the firsthand observations of the witness, with his opinions based on those observations being traditionally allowed by the courts. The observations of a treating physician affords an example of this type of data. Whether the expert would first have to relate his observations is treated in Rule 705. Second, the facts or data may be derived from evidence presented at trial. The technique may be the familiar hypothetical question or having the expert attend the trial and hear the testimony establishing the facts. Problems of determining what testimony the expert relied upon, when the latter technique is employed and the testimony is conflict, may be resolved by resort to Rule 705. 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. In this respect the rule is designed to broaden the basis for expert opinions beyond that current in many jurisdictions and to bring the judicial practice into line with the practice of the experts themselves when not in court. Thus a physician in his

states somewhat more clearly than section 2703 does, that facts which do not qualify under the second sentence of section 2703 must be introduced into evidence, but some such restriction can be logically inferred from the existence of the second sentence.[43]

The language of the first sentence of section 2703 also appears broad enough to abolish the requirement that a hypothetical question must be used whenever an expert witness is testifying to an opinion that is based upon facts outside his personal knowledge. Again, the language of the notes suggests that a less radical change was intended. Both the notes to section 2705[44] and Federal Rule of Evidence 705[45] suggest that it was necessary for those rules to abolish the requirement of prior disclosure of the foundation of an expert opinion in order to abolish the requirement of a hypothetical question. Furthermore, under section 2705 the trial judge has discretion to require "prior disclosure of the underlying facts or data," and this apparently means that the judge has discretion to require the use of a hypothetical question. The argument could be made that neither rule or note actually states that the trial judge may require the use of a hypothetical question as the means by which "prior disclosure of the underlying facts or data" is

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

Proposed Code, *supra* note 4, at 2642 (paraphrasing the explanation of Federal Rule 703 by the Federal Advisory Committee).

42. Proposed Federal Rules, *supra* note 5, at 283.

43. The commentators generally appear to read Federal Evidence Rule 703 as requiring that facts not within an expert witness' personal knowledge be "made known" to him through conventional methods unless those facts qualify under the second sentence of the rule. Thus, McElhaney describes the first sentence of the rule as making "no giant leaps." McElhaney, *supra* note 20, at 481. Weinstein and Berger state, "[s]ince the first sentence of Rule 703 is a restatement of previous law, the courts will continue as before to permit experts to testify from personal experience or from facts obtained at trial." WEINSTEIN & BERGER, *supra* note 17, ¶ 703 [03]. *See also* LOUISELL & MUELLER, *supra* note 17 § 388, at 654, and S. SALTZBURG & K. REDDEN, FEDERAL RULES OF EVIDENCE MANUAL 425 (2d ed. 1977) [hereinafter cited as SALTZBURG & REDDEN]. However, Professor Rothstein argues that Rule 703 changes prior law to authorize an expert witness to base his testimony upon a "beforehand briefing" which it appears that Professor Rothstein believes may not be subject to the reasonably relied upon test of the second sentence of Rule 703. ROTHSTEIN, FEDERAL RULES, *supra* note 35, at 275-76. *But see id.* at 293; P. ROTHSTEIN, UNDERSTANDING THE NEW FEDERAL RULES OF EVIDENCE 81 (1973 & Supps. 1974, 1975) [hereinafter cited as ROTHSTEIN, UNDERSTANDING]. The first sentence of the rule, if taken by itself, would support such an interpretation, but the second sentence and the Advisory Committee comments would appear to exclude it.

44. *Proposed Code*, *supra* note 4, at 2643.

45. Proposed Federal Rules, *supra* note 5, at 283.

to be made. A fair reading of the notes would indicate that the draftsmen of section 2705 and Federal Evidence Rule 705 expected that prior law, requiring the use of hypothetical questions to lay the foundation for opinion testimony by expert witnesses lacking personal knowledge of necessary facts, would continue except insofar as it was modified by section 2705 and Federal Rule 705. Certainly, two of the draftsmen of those rules assumed, in their writings, that the trial judge has the discretion to require the use of hypothetical questions. Judge Weinstein served on the Federal Advisory Committee. Weinstein and Berger note that "[t]he requirement of the hypothetical question is abolished, and use of this technique is made optional, subject to the discretion of the court."[46] Similarly, Dean Read, who served as Chairman of the "S.C.R. 69 Committee" which reviewed the draft of the Oklahoma Evidence Code prepared by the Oklahoma Evidence Subcommittee and recommended its adoption, wrote: "Note that the elimination of the hypothetical question is not absolute. The use of an opinion, without disclosure of underlying facts, is subject to the qualifying words 'unless the court requires otherwise.' "[47]

Nevertheless, it might be inappropriate to require the use of a hypothetical question when an expert witness is basing his opinion upon facts which are not within his personal knowledge, but which qualify under the second sentence of section 2703 as facts or data "of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject." In that situation, section 2703 permits the expert witness to serve as the means by which information about these facts may be introduced into evidence. The next section of this article will examine the question whether the expert witness should be permitted to testify about facts not within his personal knowledge. In any event, section 2703 serves as a hearsay exception for those facts by permitting the expert's opinion to be based upon them.[48]

46. WEINSTEIN & BERGER, *supra* note 17, ¶ 705 [01] at 705-6.
47. OKLAHOMA EVIDENCE HANDBOOK, *supra* note 34 § 2705, at 192.
48. *See* Frazier v. Continental Oil Co., 568 F.2d 378 (5th Cir. 1978).

II. MAY AN EXPERT WITNESS TESTIFY TO OTHERWISE INADMISSIBLE HEARSAY UPON WHICH HIS OPINION IS BASED?

A. Oklahoma Evidence Code Section 2703 Creates a Hearsay Exception for Facts upon Which an Expert Witness Has Based an Admissible Opinion

To what extent does reliance by an expert witness on facts not in evidence to form the basis of his opinion permit that information to be introduced into evidence through his testimony? Section 2703 states only that the expert's opinion may be based upon such facts. The Code does not explain how such an opinion is to be introduced, or cross-examined. It seems clear, however, that an expert witness must be permitted to explain the basis of his opinion whenever that opinion is admissible. No other result would be logical. A reasonable examination of an expert witness whose opinion is based on information which is not in evidence would be impossible without disclosing and examining that out of court information. Consider the problem of cross-examination by the opposing party. How can the opposing party persuade the jury not to accept an opinion, if the rules of evidence require the expert witness to say, "I have an adequate reason for my opinion, but I am not permitted to state it in court."

The party conducting the direct examination of such an expert witness has the same problem. How can this party persuade the jury to believe that an expert's opinion is correct, if the expert is not permitted to explain the basis forming the opinion?[49] Under section 2705, the party offering the expert's opinion testimony may be required to lay a foundation before the opinion may be offered as evidence.[50] If that party is required to lay a foundation for the opinion, the particular out of court information upon which the expert is relying comprises part of the foundation that must be shown. Conversely, if no foundation is required and the party merely introduces evidence to increase the expert's credibility, the expert continues to have the right to base his opinion on the out of court information, and the party should continue to have the right to explain that out of court information.

If we accept, as a fact, that section 2703 means what it says, that expert witnesses may base their opinions on certain kinds of information that are not in evidence, we must deal with this information just as

49. *See* Ladd, *supra* note 35, at 428.
50. See discussion in text accompanying notes 26-33 *supra*.

we deal with any other information upon which experts base their opinions. Subject to certain limits, a party examining an expert witness whose opinion is based upon information which is not in evidence, but which is "of a type reasonably relied upon by experts in the particular field" may bring out the information which is not in evidence either on direct examination or on cross-examination of the expert witness.[51] It would appear proper to include the information in hypothetical questions addressed to the expert witness himself. After the expert witness has testified that he is relying upon this information, the information may be used in hypothetical questions addressed to other expert witnesses.

For purposes of this analysis it does not matter whether the facts not in evidence upon which the expert has based his opinion would be admissible if offered as evidence or if they are inadmissible, except under section 2703. The most important practical result of section 2703 is that it frees the parties from the burden of proving those facts reasonably relied upon by experts which could be admitted in evidence "but only with the expenditure of substantial time in producing and examining various authenticating witnesses."[52] The most exciting aspect of this analysis, however, is the prospect that otherwise totally inadmissible evidence may be admissible under section 2703 and Federal Evidence Rule 703. Therefore, many of the discussions of section 2703 and Rule 703 refer to the hearsay exception created by those rules as a hearsay exception for otherwise *inadmissible* hearsay.[53] None of these discussions appear to contend that the exception is, in fact, limited to otherwise inadmissible evidence; they are simply focusing on the most interesting possible use of the exception. A more descriptive title would be either bland or awkward. The discussions are essentially consistent with the broader ideas in this article.[54]

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51. These limits are discussed in part IV of this article.

52. *Proposed Code*, *supra* note 4, at 2642 (quoting from Proposed Federal Rules, *supra* note 5, at 283).

53. SALTZBURG & REDDEN, *supra* note 43, at 426-27; ROTHSTEIN, UNDERSTANDING, *supra* note 43, at 82-83. *But see* ROTHSTEIN, FEDERAL RULES *supra* note 35, at 277; Note, *Admissibility of an Expert Opinion Based on Inadmissible Hearsay*, 32 OKLA. L. REV. 444, 451 (1979).

54. A student note in the Oklahoma Law Review recognizes the need to admit otherwise inadmissible hearsay whenever expert witnesses are permitted to base their opinions upon such evidence. The note asks: "[w]hat, then, is the evidentiary status of inadmissible data which the expert has reasonably relied upon, and which the jury will hear when the court requires disclosure of those facts or when they are brought out on cross-examination?" The note falls into error, however, because it attempts to avoid the logic of that very question with an argument that the inadmissible data admitted in this situation are not hearsay. They are hearsay, they are being admitted for a hearsay purpose, and § 2703 serves as an exception to the rule against hearsay

The changes adopted by section 2703 will appear far less alarming if the changes are recognized as a new hearsay exception which is based upon a substantial guarantee of trustworthiness. The fact that experts reasonably rely upon out of court information which qualifies for use under section 2703 provides a circumstantial guarantee of trustworthiness that compares favorably with the guarantees underlying such established hearsay exceptions as business records[55] and declarations against self interest.[56] None of these circumstances provides an absolute guarantee that an out of court statement is accurate, but they each provide a strong enough indication that a statement is accurate to justify an exception to the hearsay rule.

B. Interpretations of Federal Evidence Rule 703 Largely Find That the Rule Creates a Hearsay Exception for Facts upon Which an Expert Witness Has Based an Admissible Opinion

Federal Evidence Rule 703 is identical to Oklahoma Evidence Code section 2703, and the same problem will arise under it whenever an expert witness is permitted to state an opinion based upon information which is not in evidence. Only a few courts and a few writers have to date undertaken to discuss how that question should be decided under Rule 703. The conclusions of those who have done so largely support the position that, whenever an expert opinion which is based upon facts that are not in evidence is properly admissible under Rule 703, then those facts should also be admissible either on direct examination or cross-examination of the expert. Professors Saltzburg and Redden have articulated the strongest statement of this position:

> Rule 703 plainly provides for reliance by experts on facts or data that are not admissible in evidence to arrive at an opinion or inference. But the Rule does not indicate whether the expert can state for the jury the factual basis of an opinion if the facts are of a type generally excluded from evidence. Rule 705 is not helpful on this point either. The best reading of Rule 703 in our view is to read the word "otherwise" into the last sentence of the Rule before the word "admissible." The result of this reading is that the expert can not only rely

when they are admitted. Note, *Admissibility of an Expert Opinion Based on Inadmissible Hearsay*, 32 OKLA. L. REV. 444, 451 (1979).

55. § 2803(6).

56. § 2804(B)(3).

> on facts reasonably relied upon by experts in his field, but also can give a full account to the jury, which is necessary to insure that the jury has a basis for properly assessing the testimony.[57]

Professor Rothstein suggests that the last sentence of Federal Evidence Rule 705 does give the cross-examiner the right to bring out facts not in evidence upon which the expert has based his opinion, but he is more cautious about the rights of the direct examiner.

> The question whether underlying materials and information (books, lectures, medical reports, patient statements, consultations, polls, etc.) can *themselves* be brought out on direct examination when they are otherwise of an inadmissible variety, is left somewhat in limbo, because Rule 703 speaks only to the admissibility of the *opinion* based thereon. Rule 705 (disclosure of facts or data underlying expert opinions) is similarly inconclusive on this question:
>
> Rule 705 abrogates any *requirement* that underlying facts and data must be brought out on direct examination (unless the judge requires); but says nothing about whether the direct examiner can do so if he wishes to voluntarily where the facts and data would themselves be inadmissible. Rule 705 and the comments to 705, to 803(4) (final paragraph), and to 1002 (penultimate paragraph) seem to imply that he can.[58]

The strongest judicial statement on the disclosure of facts not in evidence if used as the basis of an expert opinion appears in a decision in which the United States Court of Appeals for the Fifth Circuit ultimately held that the statements in issue should *not* have been admitted because they were not trustworthy and were not relied upon by the expert. In *Bryan v. John Bean Division*[59] the Fifth Circuit stated:

> The modern view in evidence law recognizes that experts often rely on facts and data supplied by third parties. *See* Fed. R. Evid. 703. Rules 703 and 705 codify the approach of this and other circuits that permits the disclosure of otherwise hearsay evidence for the purpose of illustrating the basis of the expert witness' opinion . . . . Since rule 705 shifts to the crossexaminer the burden of eliciting the bases of an expert witness' opinion, otherwise hearsay evidence that reveals the underlying sources of the expert's opinion should be as permissible on cross-examination as on direct. Moreover, other-

57. SALTZBURG & REDDEN, *supra* note 43, at 426-27.

58. ROTHSTEIN, UNDERSTANDING, *supra* note 43, at 82-83. *But see* ROTHSTEIN, FEDERAL RULES, *supra* note 35, at 277.

59. 566 F.2d 541 (5th Cir. 1978).

> wise hearsay evidence disclosing the basis of an expert witness' opinion should be admissible to impeach if strictly limited to that purpose by instructions and if, in the discretion of the judge, the impeaching evidence has sufficient guarantee of reliability that the prophylactic effect of the hearsay rule is not necessary to ensure trustworthiness.[60]

It would, therefore, appear that Professor McElhaney is correct when he describes Federal Evidence Rule 703 as "virtually a major new exception to the hearsay rule."[61] Apparently, the only authority flatly denying the admissibility of hearsay statements relied upon by an expert witness as a basis for an admissible opinion is a statement by Professor Kimball in his Programmed Materials on Problems in Evidence in which Professor Kimball asserts:

> FRE 703 justifies the expert's forming his opinion on the basis of hearsay, if experts in his field customarily rely on that sort of information, but this does not justify his retailing that information to the jury for the jury's evaluation. It is to be his opinion that the jury receives not the opinions or observations of others which the witness merely relays to the jury as a composite judgment.[62]

The position of Professors Louisell and Mueller is unclear. They write that Rule 703 "was not designed to enable a witness to summarize and reiterate all manner of inadmissible evidence."[63] They also state that "[w]hile an expert may, pursuant to Rule 703, testify on a basis of facts or data which are themselves inadmissible in evidence, his standing as an expert does not open the door for testimony which simply recites such facts or data if they are indeed inadmissible."[64] It is not clear, however, whether Louisell and Mueller's statements are meant to advocate a reading of Rule 703 under which an expert's opinion could be based upon facts which could not be discussed in evaluating his opinion. Louisell and Mueller certainly do not suggest how such a system would work.[65] Their statements may merely be meant to point out that Rule 703 does not authorize the admission of inadmissible infor-

60. *Id.* at 545.

61. McElhaney, *supra* note 20, at 481.

62. E. KIMBALL, PROGRAMMED MATERIALS ON PROBLEMS IN EVIDENCE 268 (1978).

63. LOUISELL & MUELLER, *supra* note 17 § 389, at 663.

64. *Id.* at 647.

65. Louisell and Mueller do point out, however, that the whole idea of expert testimony based upon facts not in evidence may be subject to attack in criminal cases on confrontation grounds. *Id.* at 663-65. They also suggest that it is likely to be a problem if the expert witness is viewed as a "summary witness" who merely reports out of court hearsay. *Id.* at 665 & n.80. Their analysis does not consider, however, the argument that hearsay admitted under the second sen-

mation known to the expert, if that information does not form the basis of a properly admissible opinion. In *United States v. Brown*,[66] the principal case Louisell and Mueller rely on, the majority rejected[67] an argument by the dissent[68] that Federal Rule 703 was one way to justify the admission of testimony by an Internal Revenue Agent that ninety to ninety-five percent of a sample of income tax returns prepared by the defendant contained overstated deductions.[69] The majority did not, however, draw any distinction between an admissible expert opinion and an inadmissible basis. They rejected the agent's entire testimony as "hearsay of the rankest kind,"[70] and held that admission of it was "plain error" justifying reversal even though no objection to it had been made at trial.[71]

The conflict between the majority and the dissent in *Brown* illustrates a problem that will arise if the hearsay exception created by section 2703 and Rule 703 is held to apply only to expert opinions and not to the facts upon which those opinions are based. Frequently, difficulty arises in characterizing a particular statement by an expert as either an opinion, or a fact upon which his opinion is based. In *Brown*, despite long and thoughtful opinions by both the majority and the dissent, the two arguments concerning the applicability of Rule 703 never met because each used an entirely different characterization of the witness' testimony. The dissent discussed the application of Rule 703 to an accountant's expert opinion based on documents and hearsay.[72] The majority considered the same testimony merely the repetition by the accountant of out of court accusations made by the defendant's former clients.[73]

III. THE BEST EVIDENCE RULE DOES NOT BAR TESTIMONY BY AN EXPERT WITNESS CONCERNING THE CONTENTS OF WRITINGS, RECORDINGS, AND PHOTOGRAPHS UPON WHICH HIS OPINION IS BASED

Under pre-Code law, testimony by an expert witness as to either

tence of Rule 703 (or § 2703) would be trustworthy enough to satisfy the demands of the confrontation clause.

66. 548 F.2d 1194 (5th Cir. 1977).
67. *Id.* at 1206 n.22.
68. *Id.* at 1212-13 (Gee, J., dissenting).
69. *Id.* at 1198. *But see id.* 1210-11 (Gee, J., dissenting).
70. *Id.* at 1208.
71. *Id.* at 1207-08.
72. *Id.* at 1212 (Gee, J., dissenting).
73. *Id.* at 1206 n.22.

his opinion based upon documents not in evidence, or his opinion as to the contents of those documents, would not only have been a violation of the rule requiring personal knowledge and the rule against hearsay but it would also have violated the best evidence rule. The best evidence rule is based upon the theory that a writing, recording, or photograph is the "best evidence" of its own contents. The rule prohibits the use of substitutes, such as mere testimony, to describe the contents of a writing, recording, or photograph unless the original is shown to be unavailable.[74] The Code adopts a best evidence rule in section 3002, which provides that "[t]o prove the content of a writing, recording or photograph, the original writing, recording or photograph is required except as otherwise provided in this Code or by other statutes." Section 2703 is, however, one of the "as otherwise provided in this Code" exceptions to the best evidence rule. The Federal Advisory Committee's Note to the corresponding Federal Rule of Evidence, Rule 1002, points this out. "It should be noted, however, that [the Federal Rule of Evidence corresponding to section 2703] allows an expert to give an opinion based on matters not in evidence, and the present rule must be read as being limited accordingly in its application."[75] The Committee went on to apply the same exception to experts who were not even witnesses. "Hospital records which may be admitted as business records under Rule 803(6) commonly contain reports interpreting X-rays by the staff radiologist, who qualifies as an expert, and these reports need not be excluded from the records by the instant rule."[76]

It is clear both from these comments by the Federal Advisory Committee and from the language of section 2703 itself that section 2703 is an exception to the best evidence rule. The only possible question is whether that exception applies to both the experts' opinions and the written, photographed, and recorded facts upon which those opinions are based, or only to the opinions themselves. This question presents the same issues as the question of whether the hearsay exception created by section 2703 applies to both opinions and the facts upon which they are based, or only to the opinions themselves. The answer to both questions must be the same, and in both situations it is unrea-

74. 4 J. WIGMORE, EVIDENCE, §§ 1177, 1178 & 1183 (J. Chadbourn ed. 1972); MCCORMICK, *supra* note 17, § 230, 231; Proposed Federal Rules *supra* note 5, at 342; *Proposed Code, supra* note 4, at 2658.

75. Proposed Federal Rules, *supra* note 5, at 343.

76. *Id.*

sonable to read section 2703 to authorize only the introduction of the opinions themselves.

It is only because the Code changes pre-existing law that it is even possible to speak of admitting an expert's opinion into evidence without the facts upon which it is based. Under pre-Code law, an expert's opinion which did not appear to be based either upon personal knowledge, or evidence introduced into the record was insufficient to uphold a finding by the trir of fact.[77] The Oklahoma Evidence Code has changed this. Under section 2705, the expert witness need not state the basis of his opinion unless one of the parties chooses to bring out that basis or the judge chooses to require that it be brought out.[78] Since section 2703 authorizes expert witness testimony based upon facts that need not be in evidence, it is possible under the Code to introduce proper expert testimony that is not supported by any evidence whatsoever in the record. These sections compel a reversal of the pre-Code rule on the sufficiency of unsupported expert opinion. Such an opinion, *if it is admitted*, must be considered sufficient to support a finding by the trier of fact. Any other result would make meaningless the changes of law adopted in sections 2703 and 2705 and turn those sections into traps for parties who relied upon those changes.

This does not mean, however, that under the Code, testimony by expert witnesses ought to consist of unsupported and unexplained statements of opinion made by those experts. An unsupported and unexplained expert opinion is not very persuasive.[79] It would take an unusual combination of decisions, by the parties and the trial court, to produce a trial in which such unsupported statements of expert opinion would form an important part of the evidence. In most cases in which the trial judge exercises his discretion under section 2705 and permits the use of expert opinion without prior disclosure of the foundation for that opinion, the parties will introduce those portions of the foundation they think will be persuasive to the trier of fact. The purpose of the provisions in section 2705 which would permit the use of unsupported statements of expert opinion is not to exclude evidence of the foundation, but to free the parties to use only those portions of the foundation which will be persuasive.

It is barely possible under the Code, therefore, to argue for an interpretation of section 2703 under which expert opinions based upon

77. *See* 2 J. WIGMORE, EVIDENCE § 676 (3d ed. 1940).
78. See discussion in text accompanying notes 26-33 *supra*.
79. See authorities cited in note 35 *supra*.

facts not in evidence would be admissible, but the facts upon which they were based would not be admissible. Such an interpretation would make no practical sense. The opinion evidence would not be persuasive, and parties would use such a device only as a last resort. Section 2703 must be read, therefore, as creating both a hearsay exception, and an exception to the best evidence rule for any facts not in evidence which form the basis of an expert opinion and which satisfy the requirement of section 2703 that they be "of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject."

The creation of such an exception to the best evidence rule is particularly appropriate with respect to the scientific and medical information dealt with by the second sentence of section 2703. The theory of the best evidence rule is that a writing, recording, or photograph is the "best evidence" of its own contents,[80] but frequently that is not true with respect to scientific and medical records. They typically require interpretation by expert witnesses.

A case decided by the Supreme Court of Oklahoma in 1967, *Fuller v. Lemmons*,[81] illustrates this problem. In that case, the plaintiff claimed that she had suffered personal injuries in an automobile accident and recovered a judgment at trial.[82] The Supreme Court ordered a new trial on the sole issue of damages because plaintiff's medical witness had based his opinion upon X-rays which had not been admitted in evidence.[83] The Supreme Court held that the admission of the doctor's testimony, without the X-rays, violated a rule which combined the best evidence rule and the pre-Code requirement that an expert's opinion be based on facts in evidence, or within the expert's personal knowledge. The majority stated:

> A medical expert must always predicate his opinions on certain premises of fact. It is apparent that the medical expert based his opinion of the condition of the injured vertebrae on the x-ray, which is the best evidence of what it shows. Therefore, the opinion, based on an x-ray not in evidence, has no foundation upon which it may be predicated. The general rule, well established, that the opinion of an expert must be based on evidence, which rule permits the jury to consider the expert opinion in relation to the facts upon which it is based,

80. MCCORMICK, *supra* note 17, § 231.
81. 434 P.2d 145 (Okla. 1967).
82. *Id.* at 145.
83. *Id.* at 146-47.

> applies to a medical expert testifying in regard to his opinion based on an x-ray. The opinion of the medical expert, based on an x-ray, is not admissible until the x-ray has been admitted into evidence.[84]

The medical expert had testified on direct as to the extent of the plaintiff's injuries without making any reference to X-rays. Defense counsel brought up the question of X-rays during the direct examination both by an objection to testimony by the expert without the introduction of X-rays and a request for leave to ask a "preliminary question" as to whether the doctor took X-rays.[85] On cross-examination defense counsel brought out that X-rays had been taken and that the medical expert had used them in reaching his conclusions and then moved to strike the testimony of the expert witness. At about this point plaintiff's counsel began to "offer" the X-rays, which were present in the courtroom, to defense counsel rather than offering them in evidence.[86]

Justices Hodges and Williams dissented from the decision. One of the arguments which Justice Williams made in his dissent was that the offer of the X-rays to defense counsel should be enough to satisfy past Oklahoma case law. Justice Williams pointed out that defense counsel had not questioned either the authenticity or the interpretation of the X-rays.[87] With respect to the fact that the X-rays were not introduced in evidence he went on to say:

> From the facts and circumstances present in the instant case, it is my view that a reversal of the verdict below on the sole ground that the X-rays used by plaintiff's medical witness to formulate his opinion of the extent of her injuries were not formally introduced in evidence, is not warranted. X-ray medical photographs are capable of being interpreted, except in the rarest of cases, only by a trained physician or technician, and by themselves, such X-rays are of no aid to a jury, a trial judge, or to an appellate court in their determination of whether a party is suffering from an alleged injury.[88]

I suggest that Justice Williams correctly identified the important considerations in cases such as *Fuller*. It makes no sense to require that meaningless evidence, such as X-rays, be introduced into evidence.

84. *Id.* at 147.
85. *Id.* at 146.
86. *Id.*
87. *Id.* at 149 (Williams, J., dissenting).
88. *Id.*

There is a real need to ensure that the opposing party has an adequate opportunity to investigate both the authenticity and the interpretation of such evidence.[89]

The best way to provide opportunities for such investigation is to permit full discovery prior to trial. Two years after *Fuller* was decided, however, the Oklahoma Supreme Court held that then existing Oklahoma law did not give the opposing party in a personal injury suit the right to discover information possessed by a plaintiff's doctor. Under *Avery v. Nelson*,[90] a personal injury plaintiff could claim the patient-physician privilege up until the moment he took the stand at the trial itself. A later section of this article discusses how the Code has solved that problem.[91]

Requirements that a party produce all the evidence at trial are not, however, a very good substitute for full discovery. One of the defense counsel in *Fuller* illustrated this point. When both plaintiff's counsel and the trial judge began to offer him an opportunity to examine the X-rays he responded, "I can't examine x-rays. I don't know anything about them."[92]

IV. LIMITATIONS ON THE USE OF SECTION 2703 AS A HEARSAY EXCEPTION

Two Oklahoma Evidence Code sections limit the introduction of hearsay information through an expert witness. These are section 2703 itself and section 2403.

A. Section 2403 Limits the Use of Section 2703 as a Hearsay Exception

Section 2403 limits the use of all kinds of evidence. That section provides that relevant evidence "may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, misleading the jury, undue delay, needless presentation of cumulative evidence, or unfair and harmful surprise."[93]

89. Although Justice Hodges was willing to join the majority in requiring that X-rays be offered in evidence when medical testimony was based upon them in future cases, he dissented in *Fuller v. Lemmons* because in his opinion prior case law required no more than that such X-rays be produced for inspection. *Id.* at 149.

90. 455 P.2d 75 (Okla. 1969).

91. See text accompanying notes 113 through 126 *infra*.

92. 434 P.2d 145, 146 (Okla. 1967).

93. *See Introduction I*, *supra* note 20, at 243-47; OKLAHOMA EVIDENCE HANDBOOK, *supra* note 34 § 2403, at 67-69.

Out of court information, which satisfies the requirements of section 2703, might be excluded under section 2403 as cumulative or unfairly prejudicial just as any other evidence offered to support an expert opinion might be excluded under section 2403 for those same reasons. It is extremely unlikely, however, that a court would rule that the probative value of out of court information was substantially outweighed by any prejudicial effect if the information were essential to provide a basis for expert opinion. When there is other evidence to form a basis for expert opinion, it will be easier for a court to exclude a particular piece of information as unfairly prejudicial, confusing, or needlessly cumulative. In a case in which there was abundant evidence introduced to support an opinion, all testimony concerning facts not in evidence might well be unnecessarily cumulative evidence.

B. Limitations Created by Section 2703 Itself

1. The Hearsay Exception Created by Section 2703 Is Not Limited to Otherwise Inadmissible Evidence

The most important use of the hearsay exception created by section 2703 will be to admit otherwise inadmissible evidence, but the exception also covers other facts not in evidence upon which an expert witness relies, if those facts satisfy the requirements of the second sentence of section 2703, even though they would be admissible in evidence. Indeed, facts already in evidence would qualify if they satisfy the requirements of that second sentence.

The restrictions on cumulative evidence set forth in section 2403 would apply if a party tried to use section 2703 to repetitiously prove the same facts. But section 2703 can be used to permit an expert to include facts that have already been introduced in evidence in an explanation of his opinion, and the section can also be used to introduce hearsay which might have been introduced in some other way.

2. Section 2703 Requires Both Reliance by Experts in the Particular Field and That the Reliance Be Reasonable

Professor Rothstein raises the question whether experts in a particular field must "customarily"[94] rely upon a type of fact in order for that type to qualify. Federal Rule 703 and section 2703 stop just short

94. ROTHSTEIN, UNDERSTANDING, *supra* note 43, at 84; ROTHSTEIN, FEDERAL RULES, *supra* note 35, at 290.

of requiring customary use. Federal Rule 703 was amended between the 1969 draft[95] and the 1971 draft[96] to add the restriction "in the particular field." The obvious purpose of the change was to focus attention on the question whether other experts would use facts or data in the way in which the expert, who is now a witness, is seeking to use them. The change means that it is not enough that the trial judge be convinced that this particular expert witness is being reasonable in basing his opinion on certain facts; other persons in the same field must also rely on the same type of facts in forming similar opinions. One might wonder, in the abstract, whether this is a desirable restriction, but it will not turn out to be a very serious restriction because it does *not* require that the use of a certain type of facts be customary. The only experts who cannot satisfy this requirement will be those who want to use methods that practically no one else in their fields would use.

The major requirement in the second sentence of section 2703 and Federal Rule 703 is that reliance by the expert upon his facts be reasonable. Reasonableness is ultimately a decision that the trial judge must make. Neither legal rules nor the comments of the draftsmen will be of much assistance to the trial judge in making this decision. The Federal Advisory Committee's one example of how Rule 703 would be applied was a statement that "the opinion of an 'accidentologist' as to the point of impact in an automobile collision based on statements of bystanders,"[97] would not satisfy the requirements of the rule. This has been disputed by several commentators.[98]

Weinstein and Berger go even further than the Advisory Committee's comment on accidentologists when they suggest that an expert opinion should not be accepted as "reasonable" if it is used only in preparing for litigation.[99] While preparation for litigation would be a factor the trial judge should consider, Weinstein and Berger go much

95. Committee on Rules of Practice and Procedure of the Judicial Conference of the United States, Preliminary Draft of Proposed Rules of Evidence for the United States District Courts and Magistrates, 46 F.R.D. 161, 315 (1969).

96. Committee on Rules of Practice and Procedure of the Judicial Conference of the United States, Revised Draft of Proposed Rules of Evidence for the United States Courts and Magistrates, 51 F.R.D. 315, 404 (1971).

97. Proposed Federal Rules, *supra* note 5, at 284.

98. 11 J. MOORE & H. BENDIX, MOORE'S FEDERAL PRACTICE ¶ 703.10[3] (1976); ROTHSTEIN, UNDERSTANDING, *supra* note 43, at 82; and Note, *Admissibility of an Expert Opinion Based on Inadmissible Hearsay*, 32 OKLA. L. REV. 444, 450, 452 (1979). *See also* McElhaney, *supra* note 20, at 484-86, and WEINSTEIN & BERGER *supra* note 17, ¶ 703[02] n.7.

99. WEINSTEIN & BERGER, *supra* note 17, ¶ 703[03] at 703-17.

too far in suggesting that none of the procedures developed for litigation involving experts can ever satisfy the requirements of Rule 703 and section 2703. Professor McElhaney makes the opposite point. Many of the procedures which are reasonable under the circumstances in which they are used may not be reliable enough to admit into the courtroom. He points out that "[a] medical doctor making an emergency diagnosis at the scene of an accident will not use the same standards of reliability as he did in the research laboratory he left just before starting home."[100]

The commentators agree[101] with Professor McElhaney that ultimately, "[t]he standard of reasonableness that the judge should apply is the judicial one, looking at the expert's field for guidance but not for ultimate decision."[102] The commentators do suggest that the judge can learn a great deal about the reasonableness and trustworthiness of the expert's procedures from the experts.[103] Indeed, some of them suggest something close to deference to the expert's opinion of his own procedures.[104] For example, Louisell and Mueller suggest:

> Frequently, however, determining the reasonableness of reliance upon underlying data is itself a task requiring knowledge of the sort judges do not commonly have. Particularly when the expert is a highly educated and sophisticated analyst in a technical field, the trial judge should limit his role: He should make certain that the expert is in fact adequately qualified, but should accord considerable weight to any assurance by him that the underlying data are indeed adequate, in terms of both quality and quantity.[105]

Judges and trial lawyers will recognize this situation. It is the same situation that already exists with respect to the questions of whether a particular person is an expert witness and whether he has an expert opinion that is likely to be helpful to the trier of fact. In each situation the trial court judge has power to decide the questions of fact, but he may not have a mastery of the facts themselves. In theory, all of these questions of fact concerning expert witnesses are resolved after the parties present the facts to the judge. The parties, however, fre-

100. McElhaney, *supra* note 20, at 486.

101. WEINSTEIN & BERGER, *supra* note 17, ¶ 703[01] at 702-6; SALTZBURG & REDDEN, *supra* note 43, at 426; LOUISELL & MUELLER, *supra* note 17 § 389, at 663.

102. McElhaney, *supra* note 20, at 486.

103. LOUISELL & MUELLER, *supra* note 17 § 389, at 662; SALTZBURG & REDDEN, *supra* note 43, at 426; WEINSTEIN & BERGER, *supra* note 17, ¶ 703[03], at 703-17.

104. LOUISELL & MUELLER, *supra* note 17 § 389, at 662.

105. *Id.*

quently fail to present the facts clearly to the judge, thereby forcing him to decide on the basis of personal presumptions. Thus, witnesses he would expect to be qualified, such as medical doctors, are treated as qualified unless the opposing party can show reasons why they should not be so treated.

The Evidence Code does not attempt to change that situation. Instead it enables parties to forego formal factual proof which is not expected to be persuasive. While the trial judge will have the power to decide whether an expert witness' decision to base his opinion on a fact not yet in evidence is reasonable, he may not have the information to make that decision. Under the forms of proof which the judge may permit under sections 2703 and 2705, he may not even know that the expert is basing his opinion upon a fact that is not in evidence.

The key to the whole system is that the parties are given a much wider choice as to whether to offer evidence or whether to oppose it. In order to make use of that choice, the parties need to come to court knowing which questions concerning expert witness testimony are worth raising.

3. The Need for Full Discovery and the Special Problem of the Patient-Physician Privilege Under the 1980 Amendment to Oklahoma Evidence Code Section 2503

The flexibility which sections 2703 and 2705 offer will work best in cases in which the parties have been able to conduct full discovery prior to trial. Discovery does not have to be conducted using the most expensive procedures. Weinstein and Berger point out that adequate disclosure of experts' opinions can often be achieved by an exchange of experts' reports and summaries of their testimony.[106] Judge Weinstein and Professor Berger state that "[t]his practice should be standard at any pretrial conference."[107] Nevertheless, there will be many cases in which one, or both parties, will not have conducted adequate discovery with respect to potential expert testimony. The trial judge can protect such parties from the dangers to which their lack of discovery exposes them, and he should do so if their failure can be excused because discovery was impossible[108] or too expensive[109] considering the circum-

106. WEINSTEIN & BERGER, *supra* note 17, ¶ 705[01].

107. *Id.*

108. ROTHSTEIN, FEDERAL RULES, *supra* note 35, at 293. Weinstein and Berger point out that because of the much narrower scope of discovery in criminal cases "an attorney will be less likely

stances of the case.

Under section 2705 the trial judge has complete discretion to require that a foundation be laid before an expert opinion is admitted. Normally, the trial judge should not impose such a requirement unless the opposing party can suggest a good reason to do so.[110] An excusable failure to conduct discovery can be such a reason.

It will be more difficult to protect a party who has not conducted discovery against the effects of section 2703. There are two things, however, which the trial judge can do. First, he can rigorously require proof that the expert's reliance is reasonable. That requirement is likely to be overlooked[111] unless the opposing party raises particular questions about the expert's testimony, and a party who has not conducted discovery is unlikely to be able to do so. Secondly, the judge can require that the question of the reasonableness of the expert's reliance on facts not in evidence be considered[112] in a voir dire hearing outside the presence of the jury. Voir dire hearings slow down a trial, but may well be appropriate whenever a question arises about the reasonableness of an expert's use of facts not in evidence. If the opinion, and those facts upon which it is based, are ultimately admitted, the jury will have to decide the similar question of whether the expert's methods

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to have sufficient advance knowledge for effective cross-examination." WEINSTEIN & BERGER, *supra* note 17, ¶ 705[01] at 705-9.

109. Rules 703 and 705 contemplate that trial lawyers will know the bases for expert opinions in advance of trial by having used ordinary means of discovery. This is a position which reflects current academic thought; complete discovery is felt to be good, just as forum-shopping is thought to be bad. At the same time, there is a growing concern among thoughtful practitioners that exhaustive discovery may do more harm than good; one of its undeniable effects is to cause considerable delay.

McElhaney, *supra* note 20, at 489.

110. See text accompanying notes 36-38 *supra*.

111. See the discussion in the text following note 105 *supra* of the fact that many factual issues concerning expert testimony are not pressed to a point at which the trial court judge can make a factually based decision.

112. Saltzburg and Redden point out the variety of proof that can be considered on this question.

> Just as a witness may himself establish personal knowledge about an event that is the subject of his testimony, it appears that an expert witness should be able to lay a foundation that establishes the reasonableness of the basis of his opinion. In other words, if a psychiatrist is called to testify as to the sanity of a criminal defendant, and if the psychiatrist indicates that his opinion is based in part on reports by school officials, the psychiatrist should be able also to testify that such reports are ordinarily used and relied upon by other psychiatrists in making psychiatric diagnoses. Of course, it should be permissible for opposing counsel to introduce evidence to the contrary. The trial judge will ultimately have to decide whether the basis of the opinion is of a type reasonably relied upon by experts on the basis of what he learns from the experts produced by the parties, from the written material which the experts authenticate under Rule 803(18), or by taking judicial notice.

SALTZBURG & REDDEN, *supra* note 43, at 426.

are persuasive. The jury, however, does not have the same freedom to consider inadmissible evidence that the judge does under both section 2103(B)(1) and section 2703. A voir dire hearing will give the party opposing the introduction of the expert's evidence an opportunity to conduct some belated discovery, without exposing the jury to informatin that is not even admissible under section 2703. It seems clear, however, that when a party opposes the introduction of evidence under section 2703 there is no adequate substitute for full prior discovery of the relevant facts.

It was, therefore, extremely important that section 2503 of the Oklahoma Evidence Code eliminated a barrier to the discovery of information concerning plaintiffs' medical treatment in personal injury actions. The Supreme Court of Oklahoma had held in *Avery v. Nelson*[113] that the physician-patient privilege created by the then existing Oklahoma statute[114] was not waived until a plaintiff patient took the stand as a witness at the trial.[115]

Under section 2503(D)(3) of the Oklahoma Evidence Code, as adopted in 1978,[116] a patient who brought a personal injury action would waive the physician-patient privilege with respect to any physical, mental, or emotional condition constituting an element of his claim.[117] Former section 2503(D)(3) of the 1978 Code provided:

> There is no privilege under this Code as to a communication relevant to the physical, mental or emotional condition of the patient in any proceeding in which the patient relies upon that condition as an element of his claim or defense or, after the patient's death, in any proceeding in which any party relies upon the condition as an element of his claim of defense.[118]

This language does not use the word "waiver," but its effect is to compel a party bringing a lawsuit in which a medical condition is an element of his claim to lose the physician-patient privilege with respect to

113. 455 P.2d 75 (Okla. 1969).

114. Former OKLA. STAT. tit. 12 § 385(6); Act of March 12, 1953, ch. 9, § 1, 1953 Okla. Sess. Laws (repealed 1977). From October 1, 1977 to October 1, 1978, former OKLA. STAT. tit. 12 § 418, Act of June 21, 1977, ch. 265, 1977 Okla. Sess. Laws (repealed 1978) was in effect. It contained all of former OKLA. STAT. tit. 12 § 2503, Act of May 10, 1978, ch. 285 § 503, 1978 Sess. Laws (amended 1980) except for the waiver provision for a condition which is an element of a claim or defense in the proceeding.

115. Avery v. Nelson, 455 P.2d 75, 77-79 (Okla. 1969).

116. Act of May 10, 1978, ch. 285, § 503, 1978 Okla. Sess. Laws (amended 1980).

117. *See Introduction I, supra* note 20, at 290-91.

118. Act of May 10, 1978, ch. 285, § 503, 1978 Okla. Sess. Laws (amended 1980).

that condition in that proceeding. The bringing of the lawsuit would be an "automatic" waiver of the privilege.[119] This provision, therefore, made possible pretrial discovery with respect to the physicians who had treated the plaintiff in a personal injury case. Furthermore, the fact that such discovery would be available would give plaintiffs increased incentive to agree to informal exchanges of information that would be less costly than formal discovery.

In 1980, section 2503(D)(3) was amended[120] to provide an express authorization for "statutory discovery." Section 2503(D)(3) now provides:

> The privilege under this Code as to a communication relevant to the physical, mental or emotional condition of the patient in any proceeding in which the patient relies upon that condition as an element of his claim or defense or, after the patient's death, in any proceeding in which any party relies upon the condition as an element of his claim or defense, is qualified to the extent that an adverse party in said proceeding may obtain relevant information regarding said condition by statutory discovery.[121]

The purpose of this amendment is not apparent. The draftsmen of this amendment may have thought that the original version of section 2503(D)(3) was not sufficiently clear in authorizing pretrial discovery. Both versions of the section authorize the use of discovery in the same circumstances. The "restriction" of discovery to "statutory discovery" under the amended section does not appear to be significant. Under both the original and amended versions of section 2503(D)(3), a patient wishing to use a medical condition as an element of a claim or a defense in a legal proceeding is compelled to waive his privilege against pretrial discovery with respect to the physicians who treated that condition. Under both versions, the privilege would apparently end with respect to discovery at the moment a personal injury plaintiff begins his lawsuit.

The fact that amended section 2305(D)(3) provides that the privilege is only "qualified to the extent that an adverse party . . . may obtain relevant evidence . . . by statutory discovery" may create a series of new problems. The amended section does not say whether a waiver of the privilege would occur if the patient himself gives volun-

119. *See Introduction I, supra* note 20, at 291.
120. Act of April 10, 1980, ch. 113, § 1, 1980 Okla. Sess. Laws.
121. *Id.*

tary testimony at the trial concerning the condition, or calls other physicians to testify concerning that condition. Under former section 385(6),[122] the privilege was waived if the patient offered himself, or another physician, as a witness. Under the original section 2503(D)(3), the question of waiver at trial did not arise because the entire privilege ended, for purposes of the lawsuit, as soon as the lawsuit was filed.

It clearly would make sense to hold that testimony by the patient, or by any other witness called by the patient at trial concerning the condition, waives the privilege with respect to all other communications by the patient concerning the condition. The Code would appear to leave the Oklahoma courts free to adopt this position either as a matter of interpretation, or as a common law rule,[123] and they should do so.[124]

If neither the Oklahoma courts, nor the legislature, adopt a rule providing for waiver of the privilege by the patient's testimony or that of his witnesses concerning the condition at trial, amended section 2503(D)(3) appears to provide that the privilege would continue except to the extent that the adverse party has conducted pretrial discovery. Under this interpretation, if one of the plaintiff's physicians had been deposed, that physician could be called to the stand and questioned about privileged communications with the plaintiff,[125] but another of the plaintiff's physicians, who had not been subjected to any discovery, could not be called at all. In a complicated case, there might be arguments that only some of the privileged communications with a particular physician had been brought out by discovery, and that the other communications with that physician remained privileged.

If this interpretation of section 2503(D)(3) is adopted, it would create great pressure upon adverse parties to conduct all possible discovery with respect to privileged medical treatment. Furthermore, the "statutory discovery" necessary to satisfy section 2503(D)(3) would be

122. Act of March 12, 1953, ch. 9, § 1, 1953 Okla. Sess. Laws (repealed 1977).

123. *See* MCCORMICK, *supra* note 17, § 103; 8 J. WIGMORE, EVIDENCE § 2389(2) (McNaughton rev. 1961). Wigmore states:

> Certainly it is a spectacle fit to increase the layman's traditional contempt for the chicanery of the law when a plaintiff describes at length to the jury and a crowded courtroom the details of his supposed ailment and then is permitted to suppress the available proof of his falsities by asserting that he wishes to keep the matter confidential.

Id.

124. In any event, statements by the patient disclosing any significant part of his communications to a physician will waive the privilege with respect to that physician under § 2511 of the Oklahoma Evidence Code.

125. The section does appear to permit normal, live witness testimony about the matters which have been covered by statutory discovery.

an expensive form of discovery. Defendants might feel compelled to take depositions of physicians, rather than exchange reports. There is, however, a possible solution to this problem. The patient himself always retains a right to waive the privilege,[126] and he may well choose to do so rather than go through the expense of discovery. Indeed, a decision by the patient to turn over his medical reports may be all the waiver that is necessary. Defense counsel will generally prefer express agreements waiving all physician-patient privileges.

If a plaintiff in a personal injury case refuses to waive the physician-patient privilege with respect to his condition, then the defendant will be compelled to use "statutory discovery," and this will be expensive. The only form of discovery provided by Oklahoma statutes, which can be used to obtain information from persons who are not parties, is the oral deposition.[127] Written interrogatories,[128] and motions to produce can[129] be directed only to parties.

In many cases, the adverse party would want to depose the plaintiff's physicians in any event and the requirements of amended section 2503(D)(3) will not lead to any difficulties in those cases. In other cases, the adverse party will take the depositions of physicians who would not have been deposed, except for the provisions of amended section 2503(D)(3). Some of those depositions will probably be very short and formal. There may be cases, however, in which an adverse party realizes during the course of trial that calling one of the plaintiff's physicians whom he did not depose would be desirable or necessary. Even in that situation the possibility of meeting the formal requirement of "statutory discovery" exists, especially if the trial judge can be persuaded that the failure to depose a particular physician was reasonable under the circumstances, and that a continuance should be granted.[130] Therefore, there will only be a few cases in which the amended section 2503(D)(3) will deprive a party of evidence that should have been available, and a somewhat larger group of cases in which the section will force the parties to bear the expense of taking depositions which

126. OKLA. STAT. tit. 12, § 2511 (Supp. 1979) provides that, "a person upon whom this Code confers a privilege against disclosure waives the privilege if he or his predecessor voluntarily discloses or consents to disclosure of any significant part of the privileged matter. This section does not apply if the disclosure itself is privileged."

127. OKLA. STAT. tit. 12, §§ 423, 435, 436 (1971) and §§ 433, 441 (Supp. 1979).

128. *Id.* § 549 (Supp. 1979).

129. *Id.* § 548.

130. *See* Herbert v. Chicago, R.I. & Pac. R.R., 544 P.2d 898 (Okla. 1969). However, in that case the defendant had no right to take the deposition of the absent doctor until the plaintiff took the stand at the trial.

were not felt necessary. Nevertheless, there is no justification for the restriction which that section seems to impose and a broader waiver rule should be adopted.

V. WHAT IS THE PROBATIVE VALUE OF OTHERWISE INADMISSIBLE HEARSAY ADMITTED UNDER SECTION 2703?

The suggestion has been made that the introduction of otherwise inadmissible facts upon which an expert's opinion is based should be permitted only for the limited purpose of explaining the expert's opinion, and that such facts should not be considered to be substantive evidence. Saltzburg and Redden argue that "[e]vidence not otherwise admissible is not admitted under this Rule for its truth; it is admitted to explain the bases of the expert opinion. A limiting instruction often should be required to explain this to the jury."[131] McElhaney also states that the cross-examiner should be entitled to such a limiting instruction, but he suggests that, in all but the most unusual situations, "a request for such an instruction would be a mistake."[132] Alaska Rule of Evidence 705(c) provides that, when facts or data are disclosed before the jury which "would be inadmissible in evidence for any purpose other than to explain or support the expert's opinion or inference," the court, upon request, is to give a limiting instruction.[133]

The Alaskan rule and other discussions of this problem describe the evidence admitted, under a rule such as section 2703, as "otherwise inadmissible" evidence. This is accurate only in the sense that the evidence can be admitted under such a rule which has not been shown to be otherwise admissible. Much of this evidence could have been admitted in other ways but, "only with the expenditure of substantial time in producing and examining various authenticating witnesses."[134] Other items of evidence might not be admissible in the absence of a rule such as section 2703. It is impossible, however, for a court to draw an effective distinction between evidence admitted under this rule, but which could have been admitted in some other way if the party offering it had called additional witnesses and offered additional foundation, and the truly "otherwise inadmissible" evidence which could only be admitted under this rule. The only distinction that a court can draw is

131. SALTZBURG & REDDEN, *supra* note 43, at 427.
132. McElhaney, *supra* note 20, at 482 n.83.
133. ALASKA RULE OF EVIDENCE 705(c) (quoted in LOUISELL & MUELLER, *supra* note 17, § 399 (Supp. 1980)).
134. Proposed Federal Rules, *supra* note 5, at 283.

one based on the record before it. This distinction will be between evidence for which the record shows an alternate basis for admission and evidence for which the record does *not* show any basis for admission.[135]

One commentator[136] argues that otherwise inadmissible statements introduced as the basis of an expert witness' opinion under sections 2703 and 2705 are not substantive evidence.

> While an expert may be required to state the basis for his opinion, 12 Okla. Stat. § 2705 (Supp. 1978), where an expert has based his opinion on the out-of-court statements of others and he discloses these statements at trial, the statements are not actually hearsay because they are not being offered to prove the truth of the matter asserted. They are being offered as the basis of the expert's testimony. Courts often overlook this distinction. The difficulty is that jurors may be unable to distinguish the limited grounds for admitting the evidence and may mistakenly consider the evidence substantively.[137]

There are two reasons why otherwise inadmissible evidence admitted under a rule such as section 2703 should be considered substantive evidence. The first is merely persuasive; the second is conclusive.

First, the creation of a new limited use device for the admission of hearsay is inconsistent with the overall approach of the Oklahoma Evidence Code and the Federal Rules of Evidence to such devices. Since the Code and the Rules do not state that they are creating a hearsay exception for otherwise inadmissible facts reasonably relied upon by experts, they do not reveal whether that exception should be a limited use exception. The Code and the Rules, however, generally reject the idea of limited use hearsay exceptions. Insofar as the draftsmen could, they turned the common law limited use hearsay exceptions into complete hearsay exceptions. Thus, the common law rule permitting the introduction of learned treatises solely for purposes of impeachment was expanded into a full substantive exception.[138] Similarly, limited use exceptions for some prior consistent statements[139] and statements to

135. See text accompanying notes 52 & 53 *supra*.

136. Note, *Admissibility of an Expert Opinion Based on Inadmissible Hearsay*, 32 OKLA. L. REV. 444 (1979).

137. *Id.* at 445 n.6.

138. OKLA. STAT. tit. 12, § 2803(18) (1980). *See* OKLAHOMA EVIDENCE HANDBOOK, *supra* note 34 § 2803(18), at 232; Proposed Federal Rules, *supra* note 5, at 316-17; and *Proposed Code*, *supra* note 4, at 2650.

139. OKLA. STAT. tit. 12, § 2801(4)(a)(2) (1980). *See Introduction II*, *supra* note 3, at 677-80.

nontreating physicians[140] became full substantive exceptions. The Code did not abolish limited admissibility. Section 2106 expressly recognizes that evidence may be admissible for one purpose but not for another, and it provides for appropriate limiting instructions to the jury. Prior inconsistent statements by a witness that do not satisfy the requirements of section 2801(4)(a)(1) remain admissible for the limited purpose of impeachment,[141] but this reflects a congressional defeat[142] suffered by the draftsmen of the Proposed Federal Rules of Evidence. Prior inconsistent statements by a witness that do satisfy the requirements of section 801(4)(a)(1) are admissible for full substantive use.[143]

Moreover, the comments by the Federal Advisory Committee which drafted the Proposed Federal Rules of Evidence demonstrate a conviction on the part of the draftsmen that limited use hearsay exceptions would not work. In commenting on Proposed Federal Evidence Rule 803(18) the Advisory Committee stated: "Moreover, the rule avoids the unreality of admitting evidence for the purpose of impeachment only, with an instruction to the jury not to consider it otherwise. The parallel to the treatment of prior inconsistent statements will be apparent."[144] Similarly, the Advisory Committee commented with respect to the problem of statements to nontreating physicians who were to testify as expert witnesses:

> Conventional doctrine has excluded from the hearsay exception, as not within its guarantee of truthfulness, statements to a physician, consulted only for the purpose of enabling him to testify. While these statements were not admissible as substantive evidence, the expert was allowed to state the basis of his opinion, including statements of this kind. The distinction thus called for was one most unlikely to be made by juries. The rule accordingly rejects the limitation. This position is consistent with the provision of Rule 703 that the facts on which expert testimony is based need not be admissible in evidence if of a kind ordinarily relied upon by experts in the field.[145]

Therefore, a decision that otherwise inadmissible evidence admitted under section 2703 was not substantive would be inconsistent with

140. *Id.* § 2803(4) (1980). See comment by Federal Advisory Committee, Proposed Federal Rules, *supra* note 5, at 306, quoted in text at note 145 *infra*.

141. *Introduction II*, *supra* note 3, at 661.

142. 11 J. MOORE & H. BENDIX, MOORE'S FEDERAL PRACTICE ¶ 801.01[4] (1976).

143. *Introduction II*, *supra* note 3, at 659-61.

144. Proposed Federal Rules, *supra* note 5, at 317.

145. *Id.* at 306.

the general rejection of limited use exceptions to the hearsay rule by both the Code and the Federal Rules of Evidence.[146] This should be a persuasive argument, if it were possible to make a choice as to whether such evidence should be considered substantive. There is, however, no choice to be made. The second reason why such evidence should be considered to be substantive is that the purpose for which it is admitted is clearly substantive.

Limited use exceptions to the rule against hearsay are only possible in those situations where there is a limited nonhearsay nonsubstantive purpose for which a particular out-of-court statement can be used. At common law, a prior statement by a witness might be admissible for the limited nonhearsay and nonsubstantive purpose of showing that the witness had been either consistent[147] or inconsistent.[148] Similarly, at both common law[149] and under the Code,[150] in a case containing an issue whether notice of a fact was given, an out of court statement inadmissible under the rule against hearsay might be admissible for the limited nonhearsay purpose of showing that notice was given.

There is no nonhearsay and nonsubstantive purpose for which we can use otherwise inadmissible evidence which is admitted under section 2703. Furthermore, the purpose for which such evidence *must* be used is a substantive hearsay use. Consider the following hypothetical: An expert witness having no personal knowledge of the facts of a case is called to the witness stand. He has read a report of a medical examination which is not in evidence and which states that a particular fact is true. No evidence has been introduced at the trial to show that the particular fact is true. The trial judge finds that it is both reasonable and customary in this expert's field to rely upon that medical examination report as establishing that fact. The expert testifies, "I have reached a certain conclusion. My conclusion is based upon the particular fact that I read in the medical examination report that is not in evidence." It should be clear that the trier of fact can adopt the expert's conclusion only if it can accept, as true, the particular fact upon which the conclusion is based. This means that the medical examination report concerning the particular fact is being used for a hearsay purpose, and as substantive evidence.

146. *See* McElhaney, *supra* note 20, at 482 n.83.
147. 4 J. WIGMORE, EVIDENCE §§ 1128, 1129, 1132 (J. Chadbourn ed. 1972).
148. 3A J. WIGMORE, EVIDENCE § 1018 (J. Chadbourn ed. 1970); MCCORMICK, *supra* note 17, § 34.
149. LILLY, *supra* note 34, at 164-66.
150. *Introduction II*, *supra* note 3, at 643.

The argument to the contrary is based upon the assumption that there exists some alternative way of using such evidence which is variously described as using the evidence "to explain the bases of the expert opinion,"[151] "to explain or support the expert's opinion or inference,"[152] "as the basis of the expert's opinion,"[153] or as evidence that "comes in only as the basis of the opinion, to help evaluate the opinion."[154] Theoretically, it would be possible to admit a statement for the limited purpose of explaining facts already in evidence;[155] but, in the cases with which we are dealing, there is nothing in evidence to be explained. The evidence with which we are dealing is necessary to assert the existence of the facts which it will explain.

Under pre-Code law, a few courts did use an "explanation" theory to permit the introduction of hearsay statements upon which a physician had based his opinion where such statements were not admissible under the prevailing hearsay rules of those jurisdictions.[156] That theory was a "legal fiction," and what those courts were actually adopting was a hearsay exception similar to section 2803(4) or even section 2703.[157] It would be ironic if that "legal fiction" were now used to restrict the working of section 2703. Instead, it seems appropriate to proceed, as Professor Callahan suggested in another context, to "consign to the ash can, which is clearly the proper depository, a few adjectives and a couple hundred years of legal funny-business."[158]

In most situations, it will not matter whether otherwise inadmissible facts upon which an expert's opinion is based are called substantive evidence. The distinction between substantive and non-substantive evidence is important only in situations where there is an essential point

151. SALTZBURG & REDDEN, *supra* note 43, at 427.

152. (c) *Balancing test: limiting instructions.* When the underlying facts or data would be inadmissible in evidence for any purpose other than to explain or support the expert's opinion or inference, the court shall exclude the underlying facts or data if the danger that they will be used for an improper purpose outweighs their value as support for the expert's opinion. If the facts or data are disclosed before the jury, a limiting instruction by the court shall be given upon request.

ALASKA RULE OF EVIDENCE 705(c) quoted in LOUISELL & MUELLER, *supra* note 17, § 399 (Supp. 1980).

153. Note, *Admissibility of an Expert Opinion Based on Inadmissible Hearsay*, 32 OKLA. L. REV. 444, 445 n.6 (1979).

154. ROTHSTEIN, FEDERAL RULES, *supra* note 35, at 279. *See also* McElhaney, *supra* note 20, at 482 & n.83.

155. 6 J. WIGMORE, EVIDENCE §§ 1720(1) & 1720(3) (J. Chadbourn ed. 1976).

156. *Id.*; MCCORMICK, *supra* note 17, § 293.

157. *See* cases summarized in 6 J. WIGMORE, EVIDENCE § 1720(1) n.1 (J. Chadbourn ed. 1976).

158. C. CALLAHAN, ADVERSE POSSESSION 72 (1961).

in a party's case which is not supported by any other substantive evidence. Since a properly admitted expert opinion would, itself, be substantive evidence, it would not matter for purposes of motions for directed verdict or summary judgment whether the supporting facts were considered substantive evidence.

There is a possibility, however, that misanalysis of the facts upon which an expert's opinion is based as nonsubstantive might confuse jury deliberations. This can be illustrated by the argument by one commentator that otherwise inadmissible statements admitted under section 2703 "are not actually hearsay because they are not being offered to prove the truth of the matter asserted."[159] The commentator proceeds from that premise to suggest that the jury should be given an instruction which is erroneous. "For example, the judge might instruct the jury, you are not to decide whether Bystander's statements are true, but whether Expert's opinion, based upon Bystander's statements, is correct."[160] The "correctness" of Expert's opinion depends, however, upon the truth of at least some of the facts upon which it is based.

Of course, under section 2705, the party who called Expert as a witness might have been permitted to introduce Expert's opinion without any reference to the facts upon which it is based, and the jury would be permitted to accept that opinion.[161] But an unexplained and unsupported statement of opinion is not persuasive.[162] The party who called Expert was, therefore, permitted to introduce evidence to show the basis of Expert's opinion. It would appear that, in the situation assumed by the above example,[163] Expert based his opinion upon statements made by Bystander that were not introduced into evidence except through Expert's testimony that he relied upon the Bystander's statements. This sounds unreasonable but one must assume the existence of facts that show that Expert is reasonably using procedures relied upon by similar experts in the field, for we are told, in effect, that the court has permitted Expert to justify his opinion by repeating Bystander's statements.

In such a situation, the jury must be permitted to decide whether they believe that Bystander's statements are true. If they are forbidden

159. Note, *Admissibility of an Expert Opinion Based on Inadmissible Hearsay*, 32 OKLA. L. REV. 444, 445 n.6 (1979).

160. *Id.* at 451 n.50.

161. See text following note 78 *supra*.

162. See authorities cited in note 35 *supra*.

163. Note, *Admissibility of an Expert Opinion Based on Inadmissible Hearsay*, 32 OKLA. L. REV. 444, 451 n.50 (1979).

to do so, Expert has not really been permitted to base his opinion on Bystander's statements.

There is one other way in which a question can arise regarding whether otherwise inadmissible evidence admitted under section 2703 can be used as substantive evidence. It is possible to read Alaska Rule of Evidence 705(c) as requiring a limiting instruction only when this situation arises,[164] but it is not likely to arise very often. A party may want to use otherwise inadmissible evidence, which was admitted under section 2703, to explain an expert opinion based upon it to prove something in addition to the correctness of an expert's opinion. Rothstein gives as an example[165] a hearsay statement about the speed of an automobile involved in an accident which might be used to prove some totally different point in a case. In this situation, it is finally possible to draw a distinction between the purpose for which the evidence *must* be used, and another purpose for which it *might* be used.

I suggest that this additional substantive use is proper under section 2703. There are two reasons why this substantive use should be permitted. First, a contrary rule would require a jury instruction that this information was adequate to prove a fact in one part of a case, but not to prove the same fact in another part of the case. Second, the exact opposite is true. If a statement satisfies the reasonably relied upon test of section 2703, it ought to be trustworthy enough to be weighed as evidence of whatever it tends to prove. Of course, a standard as general as section 2703 is in danger of abuse, but any abuses should be resisted directly by the use of both sections 2703 and 2403. Statements that satisfy the requirements of both of those sections should be admitted for all purposes.

164. *See* note 152 *supra* for text of ALASKA R. EVID. 705(c).
165. ROTHSTEIN, FEDERAL RULES, *supra* note 35, at 279-80.