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NOTES

A LIBERALIZATION OF THE USE OF EXPERT TESTIMONY IN ILLINOIS—WILSON v. CLARK

Historically, common law\(^1\) standards restricted the use and presentation of expert testimony in the courtroom\(^2\) by limiting the number of subjects about which the expert could testify.\(^3\) The expert was required to base his opinion only upon facts which were admitted or, at a minimum, admissible into evidence.\(^4\) The rationale underlying this requirement was that if the

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1. For the purposes of this Note, common law refers to the fundamental principles which once governed the use of expert testimony. For a complete discussion of the history of expert testimony and the development of the rules which governed it, see Hand, *Historical and Practical Considerations Regarding Expert Testimony*, 15 Harv. L. Rev. 40 (1901).

2. One commentator has noted that "[in respect to admissible expert opinion, a body of rules has grown up involving techniques and skills almost equaling in complexity the subject matter about which the expert testimony is given."
3. To warrant the use of expert testimony, the subject or inference had to "be so distinctively related to some science, profession, business, or occupation as to be beyond the ken of the average layman." C. McCormick, *Handbook on the Law of Evidence* § 13, at 29 (2d ed. 1972) [hereinafter cited as McCormick]. Illinois courts are not this restrictive, and expert testimony involving matters of common knowledge is allowed if such testimony will assist the jury in reaching an understanding of the subject matter. See Thompson v. Hughes, 286 Ill. 128, 121 N.E. 387 (1918) (test is whether special knowledge and experience aid jury); Jamison v. Lambke, 21 Ill. App. 3d 629, 316 N.E.2d 93 (1st Dist. 1974) (expert testimony is admissible if it would aid the trier of fact in their understanding of the issues even though they might have general knowledge of the subject matter); Carlson v. Hudson, 19 Ill. App. 3d 576, 312 N.E.2d 19 (3d Dist. 1974) (rule barring use of expert testimony as to matters of common knowledge is not inflexible, and the trend in situations where the matter is difficult to comprehend and explain is to permit expert testimony to be received at discretion of trial court if it assists the jury in coming to an understanding); Stanley v. Board of Educ., 9 Ill. App. 3d 963, 293 N.E.2d 417 (1st Dist. 1973) (the better rule would give a trial judge a wide area of discretion in permitting expert testimony which would aid the triers of fact in their understanding of the issues even though they might have general knowledge of the subject matter); Mack v. Davis, 76 Ill. App. 2d 88, 221 N.E.2d 121 (2d Dist. 1966) (the trend is to permit expert testimony even as to matters of common knowledge and understanding where difficult to explain or comprehend without the aid of an expert) (citing Miller v. Pillsbury Co., 33 Ill. 2d 514, 516-17, 211 N.E.2d 733, 734 (1965)). For a general statement of the test for admissibility of expert testimony, see Wigmore on Evidence § 1923 (3d ed. 1940) [hereinafter cited as Wigmore].

Rule 702 of the Federal Rules of Evidence rejects the common law limitation of subjects upon which an expert may give testimony and provides for the admission of expert testimony if it assists the trier of fact in understanding the evidence or determining the facts in issue. Fed. R. Evid. 702.

t o. the fact couple was unaware of the data upon which the expert's opinion was based, he could not evaluate the reliability of the expert's testimony. An expert's opinion based on matters not in evidence was considered inadmissible hear of the non-evidentiary data forming the basis of the opinion was not subject to the ordinary tests for ascertaining the truth. Consequently, substantial time and effort were wasted during trial in presenting various witnesses whose sole purpose was to place certain data into evidence in order to construct a sufficient foundation for the expert's opinion. Moreover, because the expert could not resolve disputed facts, expert opinions could only be elicited in response to a hypothetical question. Because


Similarly, courts have held that an expert's opinion must not be guess or conjecture. See, e.g., Marshall v. First Am. Nat'l Bank, 91 Ill. App. 2d 47, 53, 233 N.E.2d 430, 433 (5th Dist. 1968) (quoting Kanne v. Metropolitan Life Ins. Co., 310 Ill. App. 524, 530, 34 N.E.2d 732, 735 (1st Dist. 1941)). Other courts have held that an expert's opinion must not be based on the opinion of another expert. See, e.g., Stancill v. McKenzie Tank Lines, Inc., 497 F.2d 529, 536 (5th Cir. 1974); Harris v. Smith, 372 F.2d 806, 812 (8th Cir. 1967). But see, People v. Noble, 42 Ill. 2d 425, 436, 248 N.E.2d 96, 102 (1969) (psychiatrist may base opinion on tests administered by psychologist he hired).

Finally, the expert's opinion must not invade the province of the jury. See, e.g., Gillette v. Chicago, 396 Ill. 619, 626, 72 N.E.2d 326, 329 (1947); Armstrong Paint & Varnish Works v. Continental Can Co., 308 Ill. 242, 245, 139 N.E. 395, 396 (1923). While these cases prohibited an expert opinion on an ultimate issue, recent Illinois decisions clearly allow such testimony. See, e.g., Merchant Nat'l Bank v. Elgin, J. & E. R.R., 49 Ill. 2d 118, 122, 273 N.E.2d 809, 811 (1971) (because the trier of fact is not required to accept the expert's opinion, the opinion does not usurp the province of the jury). Accord Clifford-Jacobs Forging Co. v. Industrial Comm'n, 19 Ill. 2d 236, 243, 166 N.E.2d 582, 586 (1960).


6. See McCormick, supra note 3, § 15, at 34; J. Weinstein & M. Berger, Weinstein's Evidence ¶ 703[02], at 703-9 (1978) [hereinafter cited as Weinstein]. McCormick assails this reasoning because "almost all expert opinion embodies hearsay indirectly, a matter which the courts often recognize and accept." McCormick, supra note 3, § 15, at 36. See also Wigmore, supra note 3, § 665(b); Spector, supra note 5, at 285.

7. For example, the author of the material relied upon by the witness is not exposed to cross-examination. Additionally, the court and jury are not afforded an opportunity to observe the author's character and demeanor on the witness stand. 29 Am. Jur. 2d Evidence § 493, at 552 (1967).


9. The hypothetical question is used "to prevent experts from implicitly testifying to the truth of facts on which they have no firsthand information." McElhaney, Expert Witnesses and the Federal Rules of Evidence, 28 Mercer L. Rev. 463, 472 n.45 (1977) [hereinafter cited as McElhaney]. See Economy Light & Power Co. v. Sheridan, 200 Ill. 439, 441, 65 N.E. 1070,
this rule was based upon a concern with admissibility rather than with the discovery of truth, it often prevented disclosure of facts necessary to reach a just solution to the case.\textsuperscript{10}

Contemporary trials often present highly technical information to juries composed of lay people.\textsuperscript{11} Evaluation of this highly technical evidence forms an integral part of the basis of a jury's verdict. Expert testimony, therefore, has become increasingly necessary to aid the jury in drawing reasonable conclusions from technical information.\textsuperscript{12} The Illinois Supreme Court, in \textit{Wilson v. Clark},\textsuperscript{13} recently adopted two federal rules of evidence which liberalized the trial procedures controlling expert testimony. In \textit{Wilson}, the court explicitly adopted Federal Rule of Evidence 703,\textsuperscript{14} governing the permissible bases of an expert's opinion, and Rule 705,\textsuperscript{15} governing the disclosure of information underlying an expert's opinion. As a result of the \textit{Wilson} decision, Illinois now adheres to a more practical approach concerning the use of expert testimony.

In order to assess the probable effect of these newly adopted rules in Illinois, the mechanics of each rule are discussed. The two federal rules are then compared with the Illinois trial procedures that previously governed the permissible bases for expert opinions and the mode for introducing expert testimony. Additionally, problems raised by the adoption of these rules are discussed and solutions are suggested.

\textsuperscript{10} See Rheingold, \textit{The Basis of Medical Testimony}, 15 \textit{VAND. L. REV.} 473, 475 (1962) [hereinafter cited Rheingold]. The author states:

Rules of evidence, developed years ago and applicable supposedly to all witnesses absorbed with questions of admissibility and not with proof, persuasion and the discovery of truth are being imposed in many jurisdictions to prevent free and full use of basic facts necessary to reach a correct and just solution of a case involving a medical issue.

\textsuperscript{11} ILLINOIS INST. FOR CONTINUING LEGAL EDUCATION, ILL. CIVIL TRIAL EVIDENCE § 5.14 (1971).

\textsuperscript{12} \textit{Id.} § 5.15. Chief Justice Burger, when sitting on the Circuit Court of Appeals, cogently stated the reasons courts allow expert opinions into evidence:

Opinion testimony is one of those practical anomalies of the law of evidence devised to help a jury of laymen understand technical subjects on which they would be required to speculate or guess without some expert explanation. Expert opinion is used on the theory that the subject cannot be made clear to lay jurors in any other way. The opinion testimony so admitted presumably bears on the issue which the jury must decide, and hence, the opinion may well have substantial persuasive effect on the jury, provided they consider the expert trustworthy.

\textsuperscript{13} Blocker v. United States, 288 F.2d 853, 862 (D.C. Cir. 1961) (Burger, J., concurring).

\textsuperscript{14} FED. R. EVID. 703.

\textsuperscript{15} FED. R. EVID. 705.
Essentially, the basis of an expert's opinion is the underlying information he relies upon to reach a conclusion. Rule 703 provides:

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

Incorporated into this rule are three sources of information upon which the opinion of an expert may properly rest. The first source consists of facts or data perceived by the expert prior to trial. This source refers to the expert's personal observations, such as the objective findings of a treating physician.

The second source of expert opinions derives from information made known to the expert at trial. The hypothetical question is the primary technique used to inform the expert of relevant facts introduced at trial. This procedure requires the expert to base his opinion upon data supported

16. See S. SALTZBURG & K. REDDEN, FEDERAL RULES OF EVIDENCE MANUAL Rule 703, at 425-27 (2d ed. 1977); WEINSTEIN, supra note 6, ¶ 703[01], at 703-4.
17. FED. R. EVID. 703.
18. See FED. R. EVID. 703 advisory committee note.
19. See id. See also Gibbons, Rules 701-706: Opinions and Expert Testimony, 57 CHI. B. REC. 224, 225 (1976) [hereinafter cited as Gibbons].
20. See Rheingold, supra note 10, at 488-89. A distinction must be drawn between whether the patient's symptoms are subjective or objective. In general, subjective symptoms are those which must be related by the patient to the doctor, for they cannot be observed. Objective symptoms, on the other hand, are those detectable only within the independent knowledge of the doctor. Id. at 489 n. 97. In Illinois, a testifying physician can only testify to objective symptoms unless a hypothetical question is used. People v. Hester, 39 Ill. 2d 489, 510, 237 N.E.2d 466, 479 (1968). This distinction between objective and subjective symptoms has led to some irreconcilable cases. For example, although an inability to flex a finger muscle has been held to be a subjective symptom, Barnes v. Chicago City Ry., 147 Ill. App. 601, 603 (1st Dist. 1909), the flexing of the knees and feet has been held to be objective. Hirsch v. Chicago Consol. Traction Co., 146 Ill. App. 501, 505-06 (1st Dist. 1909).
21. FED. R. EVID. 703 advisory committee note.
22. Id. Prior to the Wilson decision, the hypothetical question was the required mode for eliciting an expert's opinion if the expert did not testify from personal knowledge. See, e.g., City of Decatur v. Fisher, 63 Ill. 241, 243 (1872) (where facts not personally known to expert are in conflict, required procedure is for expert to give opinion based on hypothetical question containing an assumed set of facts); Borowski v. Von Solbrig, 14 Ill. App. 3d 672, 686-87, 303 N.E.2d 146, 156-57 (1st Dist. 1974), aff'd, 60 Ill. 2d 418, 328 N.E.2d 301 (1975) (courts have universally required the use of a hypothetical question in order to allow an expert to express his opinion where the premise upon which he bases his opinion is not supplied by the witness himself from his own observation); Sherman v. City of Springfield, 77 Ill. App. 2d 195, 214, 222 N.E.2d 62, 72 (1966) (where personal observation is lacking, a hypothetical question must be used).
by the evidence adduced or upon the assumption that certain testimony elicited is true. Alternatively, the expert witness may attend the trial and base his opinion on testimony heard in court.

Finally, the rule permits the expert to rely on information made known to him outside the courtroom by means other than his own perceptions. This is perhaps the most far-reaching and controversial provision of the rule. Under this provision, extrajudicial information need not be technically admissible into evidence if it is of a type reasonably relied upon by experts in forming opinions regarding their particular fields of specialty. This expands the scope of the bases of expert opinions beyond the common law standard which permitted the expert to testify only after the proper foundation had been laid. Accordingly, judicial procedure is brought into line with the practice of experts outside the court.


24. Fed. R. Evid. 703 advisory committee note. An imperfection with the trial observation technique is the difficulty of determining which segments of the evidence constitute the bases for the expert’s opinion, especially in cases where the evidence is conflicting. The advisory committee note addresses this, stating “[p]roblems of determining what testimony the expert relied upon when . . . the testimony is in conflict may be resolved by resort to Rule 705.” Under Rule 705, the judge may require an expert to disclose the underlying bases of his opinion. This will probably not be necessary, however, because for reasons of persuasion and credibility the trial attorney initially elicits from the “trial observing” expert all the facts or data that the expert has obtained from the hearing, which, in turn, are used to form the expert’s opinion. J. CROTCHEt & A. ELKIND, FEDERAL COURTROOM EVIDENCE 114 (1976).

25. Fed. R. Evid. 703 advisory committee note.


27. Fed. R. Evid. 703.


29. Fed. R. Evid. 703 advisory committee note. Using the example of the physician, the advisory committee reasoned:

[A] physician in his own practice bases his diagnosis on information from numerous sources and of considerable variety, including statements by patients and relatives, reports and opinions from nurses, technicians and other doctors, hospital records and x-rays. Most of them are admissible in evidence, but only with the expenditure of substantial time in producing and examining various authenticating witnesses. The physician makes life and death decisions in reliance upon them. His valid-
Expert opinions based on evidence not admitted at trial were ordinarily considered inadmissible under Illinois law. The Illinois Supreme Court, however, reconsidered the scope of this limitation on expert testimony in People v. Ward. In Ward, the court allowed a psychiatrist’s opinion testimony concerning the defendant’s sanity to be based upon information not in evidence. Although the court discussed Rule 703 favorably, it did not specifically adopt the rule. Consequently, prior to Wilson, the scope of the supreme court’s holding was arguably limited to cases involving factual situations similar to those present in Ward.

Rule 705
Disclosure of Facts or Data Underlying Expert Opinion

Traditionally, Illinois law has prohibited an expert from testifying at trial without prior courtroom disclosure of the information underlying his opinion.
If the expert had personal knowledge of the subject matter about which he would testify, he would first testify to his observations and then proffer his opinion. If the expert's testimony merely involved interpreting data and drawing conclusions, the required mode for eliciting his opinion testimony was the hypothetical question.

Within a hypothetical question, all undisputed facts that are material to the expert's opinion must be recited. In addition, the witness must accept as true every fact which is hypothetically presented because the witness cannot determine the validity of controverted facts. Finally, each fact included within the hypothetical question must be derived from evidence already adduced at trial. The court has discretion to permit an expert witness to answer a hypothetical question based upon facts not yet admitted into set forth reasons for his conclusion). See generally 4 CALLAGHAN, supra note 4, § 7.71 (1964); CLEARY, supra note 4, § 11.9; GARD, supra note 4, Rules 220, 221, 223.

36. See City of Chicago v. Central Nat'l Bank, 5 Ill. 2d 164, 125 N.E.2d 94 (1955); In re Barrie's Will, 393 Ill. 111, 65 N.E.2d 433 (1946). See also GARD, supra note 4, § 7.11.

37. See, e.g., City of Decatur v. Fisher, 63 Ill. 241, 242-43 (1872) (where all or some of the facts not personally known to the expert are in conflict, the required procedure is to give an opinion to a hypothetical question containing an assumed statement of facts). Borowski v. Von Solbrig, 14 Ill. App. 3d 672, 686-87, 303 N.E.2d 146, 156-57 (1st Dist. 1974) (courts have universally required the use of a hypothetical question in order to allow an expert to express an opinion where the expert fails to base an opinion on his or her own observations), aff'd, 60 Ill. 2d 418, 328 N.E.2d 301 (1975); Sherman v. City of Springfield, 77 Ill. App. 2d 195, 214, 222 N.E.2d 62, 72 (4th Dist. 1966) (where personal observation is lacking, hypothetical question must be used); Spring Valley Coal Co. v. McCarthy, 136 Ill. App. 473, 477 (1907) (proper way to examine an expert who is not acquainted with the facts is to pose hypothetical question embodying the facts). For a discussion of the hypothetical question, see generally CLEARY, supra note 4, § 11.9; GARD, supra note 4, Rules 220, 221, 223.

38. See Sanitary Dist. of Chicago v. Industrial Comm'n, 343 Ill. 236, 243, 175 N.E. 372, 375 (1931) (question is to include all facts which evidence tends to prove and all facts which are not in dispute); Ryan v. Blakey, 71 Ill. App. 3d 339, 350, 389 N.E.2d 604, 612 (5th Dist. 1979) (hypothetical question should incorporate all undisputed facts in evidence which are relevant and material to the issue); Lange v. Coca-Cola Bottling Co. of Chicago, 105 Ill. App. 2d 99, 110, 245 N.E.2d 35, 40 (1st Dist.) (where the evidence is undisputed, the hypothetical question must contain all facts and must not ignore material facts which would affect the opinion of the expert witness), rev'd on other grounds, 44 Ill. 2d 73, 254 N.E.2d 467 (1969). This rule is derived from the fear that the jury will be misled by the expert's opinion if the hypothetical fails to contain all relevant, undisputed facts. See Christianson v. City of Chicago Heights, 103 Ill. App. 2d 315, 322, 243 N.E.2d 677, 688 (1st Dist. 1968).


Essentially, the purpose of the hypothetical question is to disclose to the jury all information upon which the expert will rely in forming his opinion. This method of questioning aids in preventing any misunderstanding by the jury. Notwithstanding this meritorious objective, the requirement does not always serve its purpose. The hypothetical question is often verbose, awkward, and complex. A major problem with the hypothetical question is the selection of preliminary data which the question must contain. On one hand, the question must provide the material facts relevant to the formation of a rational expert opinion. On the other hand, it cannot include facts which have not been admitted into evidence. Because of its problems and susceptibility to abuse by counsel, the hypothetical question has been the target of much criticism.

41. See Jamison v. Lambke, 21 Ill. App. 3d 629, 636, 316 N.E.2d 93, 98 (1st Dist. 1974) (permitting an expert witness to answer hypothetical question based upon facts which have not been previously adduced in evidence is not desirable and is strongly discouraged). Cf. Gibson v. Healy Bros. & Co., 109 Ill. App. 2d 342, 352, 248 N.E.2d 771, 776 (1st Dist. 1969) (expert allowed to give opinion based on facts not in evidence only upon representation that counsel could adduce the missing evidence from subsequent witnesses).

42. WINESTEIN, supra note 6, ¶ 705[01], at 705-5. See, e.g., Wolczek v. Public Serv. Co., 342 Ill. 482, 498, 174 N.E. 577, 584 (1930) (hypothetical question must contain all material facts, otherwise expert’s opinion is apt to be misleading); Hammond v. Bloomington Can Co., 190 Ill. App. 511, 513 (3d Dist. 1914) (hypothetical question should contain all facts on which the answer is based so that the jury may fully understand the bases for the expert’s opinion).

McCormick notes that the hypothetical question is a logical device for assisting the jury in applying the expert’s knowledge to the case. McCormick, supra note 3, §16, at 36.

43. WIGMORE, supra note 3, § 686, at 813.

44. See McElhaney, supra note 9, at 42; Ladd supra note 2, at 427.

45. See Ladd, supra note 2, at 426-27. Support for this statement can be seen in Borowski v. Von Solbrig, 14 Ill. App. 3d 672, 303 N.E.2d 146 (1st Dist. 1973), aff’d, 60 Ill. 2d 418, 328 N.E.2d 310 (1975), where the hypothetical question propounded to the plaintiff’s doctor was 76 pages in length. Objections and rulings were an additional 27 pages long. Id. at 687, 303 N.E.2d at 157.

46. 11 J. MOORE, MOORE’S FEDERAL PRACTICE § 705.10, at VII-72 (2d ed. 1976) [hereinafter cited as MOORE]. Moore notes that by dispensing with the requirement that an expert’s opinion testimony be preceded by a statement of facts which underlie it, Rule 705 should eliminate the troublesome aspect of the hypothetical question and open the way for expert testimony in a form which will better aid the trier of fact. Id.

47. See supra note 38. Although there is no requirement that all material facts in the case be included in the hypothetical, Wirth v. Industrial Comm’n, 57 Ill. 2d 475, 480, 312 N.E.2d 593, 595 (1974), the court possesses discretion to require that additional facts be added to the original question if it deems such facts essential to providing an adequate basis for a helpful answer. McCormick, supra note 3, §14, at 34.

48. See supra note 40. See also Note, The Expert Witness and the Hypothetical Question, 13 CASE W. RES. 755, 756-57 (1962) (hypothetical question must be based on facts assumed to be true, and those facts must be in record).

49. Judge Learned Hand described the hypothetical question as the “most horrific and grotesque wen on the fair face of justice.” McCormick, supra note 3, §15, at 37 n.15 (citing New York Bar Ass’n Lectures and Legal Topics (1921-22)). McCormick charges that the
In contrast, Rule 705 permits an expert witness to give an opinion without first disclosing the facts upon which his opinion is based. The rule provides that "[t]he expert may testify in terms of opinion or inference and give his reasons thereof without prior disclosure of the underlying facts or data unless the court requires otherwise. The expert may, in any event, be required to disclose the underlying facts or data on cross-examination." 50

By eliminating the mandatory preliminary disclosure of the underlying bases of an expert's opinion, 51 Rule 705 represents an approach which was first suggested by Wigmore 52 and subsequently incorporated in the Model Expert Testimony Act, 53 the Model Code of Evidence, 54 and the Uniform Rules of Evidence. 55 The federal rule relies upon effective cross-examination to reveal the factual basis of an expert's opinion. 56 This in turn permits the hypothetical question is a "failure in practice and an obstruction to the administration of justice." 57 Id. at 36. By permitting counsel to pick out those material facts he wants to include in the question, the courts permit a one-sided hypothesis. On the other hand, if counsel is required to include all relevant facts, then an "intolerably wordy" question results. Id. Wigmore noted:

Its abuses have become so obstructive and nauseous that no remedy short of extirpation will suffice. It is a logical necessity, but a practical incubus, and logic here must be sacrificed. . . . It is a strange irony that the hypothetical question, which is one of the truly scientific features of the rules of evidence, should have become that feature which does most to disgust men of science with the law of Evidence.

WIGMORE, supra note 3, § 686, at 812. See also Ladd, supra note 2, at 426-27 (hypothetical question encourages partisan bias, affords an opportunity for summing up in the middle of trial, and is complex and time consuming). In 1969, the Eighth Circuit praised the not yet enacted Federal Rule as being designed "to remove stereotyped, long, belabored and nonsensical hypothetical questions from the arena of the trial." Twin City Plaza, Inc. v. Central Sur. & Ins. Corp., 409 F.2d 1195, 1201 (8th Cir. 1969).

50. FED. R. EVID. 705.
51. FED. R. EVID. 705 advisory committee note.
52. WIGMORE, supra note 3, § 686.
53. MODEL EXPERT TESTIMONY ACT § 9 (1937). Section 9 provides:
(1) An expert witness may be asked to state his inferences, whether these inferences are based on the witness' personal observation, or on evidence introduced at the trial and seen or heard by the witness, or on his technical knowledge of the subject, without first specifying hypothetically in the question the data on which these inferences are based.
54. MODEL CODE OF EVIDENCE Rule 409 (1942). Rule 409 provides:
An expert witness may state his relevant inferences from matters perceived by him or from evidence introduced at the trial and seen or heard by him or from his special knowledge, skill, experience or training . . . and he may state his reasons for such inferences and need not, unless the judge so orders, first specify, as an hypothesis or otherwise, the data which he draws them . . . .
55. UNIF. R. EVID. 58 (1953). Rule 58 states that "[q]uestions calling for the opinion of an expert witness need not be hypothetical in form unless the judge in his discretion so requires, but the witness may state his opinion and reasons therefore without first specifying data on which it is based as a hypothesis or otherwise." Id.
56. See generally D. LOUISELL & C. MUELLER, FEDERAL EVIDENCE § 399, at 703 (1979) (the validity of this approach rests upon the notion that the price of requiring the foundation to be laid first is simply too high). [hereinafter cited as LOUISELL & MUELLER].
trier of fact to assess credibility and to determine how much weight to accord the expert's testimony.57 As the federal rules advisory committee noted, the rule is based upon the assumption that the cross-examining party has the advance knowledge necessary to elicit disclosure of the underlying factual bases on cross-examination.58

Thus, Rule 705 simplifies the mode for eliciting an expert's opinion by allowing the expert to state his opinion without first disclosing the bases underlying that opinion. This rule, when combined with Rule 703, makes the use of expert testimony more efficient. Through the adoption of Rules 703 and 705, the Illinois Supreme Court in Wilson v. Clark59 abandoned the common law limitations on expert testimony.

FACTS AND PROCEDURAL HISTORY

John Wilson brought an action against Dr. David Clark on the basis of alleged negligent medical treatment which resulted in the amputation of the lower portion of Wilson's right leg. At trial, over plaintiff's objection,60 the court permitted defense counsel to place into evidence hospital records pertaining to plaintiff's three hospital confinements.61 After submitting the hospital records into evidence, defense counsel was permitted to instruct defendant's expert witness to assume that the facts stated in the hospital records were true.62 The expert was asked to further assume additional facts regarding plaintiff's treatment.63 With this foundation, defense counsel was

57. See Twin City Plaza, Inc. v. Central Sur. & Ins. Corp., 409 F.2d 1195, 1200 (8th Cir. 1969) (facts which cast a doubt on the expert's conclusion are best brought out on cross-examination to test the witness' credibility).
58. Fed. R. Evid. 705 advisory committee note.
59. 84 Ill. 2d 186, 417 N.E.2d 1322 (1981).
60. Plaintiff argued that two procedural steps are necessary before hospital records are admissible into evidence. First, the custodian of the records must verify that the records were kept in the ordinary course of business and that they are in the same condition at trial as when the entries were originally made. Second, the records must be verified through testimony of the person who made the entries. While the plaintiff admittedly waived the first requirement, he did not waive the second. 84 Ill. 2d at 191-92, 417 N.E.2d at 1325-26. Thus, the records were admitted without the necessary foundation. Id.
61. Id. at 192, 417 N.E.2d at 1326. The hospital records contained 100 pages of technical medical entries, including history sheets, temperature charts, medication charts, laboratory reports, administration sheets, x-ray reports, progress reports, pathology reports, post-anesthesia reports, physician orders, and nurses' notes. Id.
62. The plaintiff objected to the hypothetical question based on the hospital records on two grounds:
   (1) the hospital records are inadmissible without a proper foundation, and
   (2) the plaintiff would have no idea upon which facts contained in the hospital record defendant's expert witness based his opinion. Since there had been no evidence of the contents of the hospital records, it would be impossible to cross-examine the expert upon which facts he relied.
Brief for Appellee at 96, Wilson v. Clark, 84 Ill. 2d 186, 417 N.E.2d 1322 (1981) [hereinafter cited as Brief for Appellee]:
63. Defendant's counsel presented these additional facts in the hypothetical question:
   I would ask you further assume three additional facts. That a surgical amputation
permitted to elicit testimony concerning whether Dr. Clark exercised the degree of knowledge and expertise expected of a certified orthopedic surgeon in the same locality. The jury returned a verdict for Dr. Clark and Wilson appealed.

The Appellate Court for the Second District considered three of the ten issues presented and reversed the trial court on the ground that the defense failed to establish the necessary foundation for the admission of the hospital records into evidence. In so doing, the appellate court held that the trial court should not have allowed the hypothetical question based upon facts contained in those records. In support of its decision, the appellate court reasoned that allowing a hypothetical question based upon the unspecified contents of Wilson's hospital records hampered his counsel's cross-examination of defendant's expert witness, and permitted purely

was done to the lower right extremity of the hypothetical patient and at that time marked arteriosclerosis was found at or about the amputation site, which is approximately three to four inches below the knee. Secondly, found at that time that this hypothetical patient presented himself in the first occasion to another hypothetical orthopedic surgeon by [the] name of Robbins in the year of 1974, the month of March, that an opening in the front of the right tibia was dry and void of discharge. Thirdly, I would ask that you assume that it was the opinion of the hypothetical orthopedic surgeon by the name of Robbins in October 1st of 1974, if he were permitted to freshen up the ends of the bone and place a small screw to hold the bone in apposition that the condition of ill being then and there present in John Wilson was going on to healing.

Brief for Appellee, supra note 62, at 97.

64. Brief for Appellee, supra note 62, at 97. The question posed by defense counsel was as follows:

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

Id.

65. Wilson v. Clark, 80 Ill. App. 3d 194, 196-99, 399 N.E.2d 651, 653-55 (2d Dist. 1980). The three issues considered were:

(1) Whether the trial court erred in allowing plaintiff's hospital records to be admitted into evidence without a proper foundation, and in permitting a hypothetical question based upon those records.
(2) Whether the trial court erred in permitting use of a medical textbook without first establishing its authoritativeness.
(3) Did the trial court erroneously permit admission of incompetent and prejudicial testimony on the issue or contributory negligence?

Id.

66. Id. at 197, 399 N.E.2d at 653.
67. Id.

68. Id. As a corollary, it has been written that one should never cross-examine unless he knows what the answer will be. See I. Goldstein, Trial Technique § 559 (1935). Also, cross-examining on alleged incompetent testimony can result in waiving the right to claim error on
argumentative material to be placed before the jury. 69

THE WILSON DECISION

After dispensing with a number of unrelated issues, 70 the Illinois Supreme Court addressed the critical questions of whether the trial court erred in admitting the plaintiff's hospital records into evidence and subsequently permitting the expert witness to express his opinion in response to a hypothetical question based on those records. 71 Initially, the court recognized that a proper foundation must be established before hospital records can be admitted into evidence. 72 In view of this foundation requirement, the court maintained that the plaintiff's records were admitted improperly. 73 The court, however, determined that even though hospital records require a sufficient foundation before being admitted into evidence, a medical expert may give an opinion based on hospital records not placed into evidence. 74

In support of this proposition, the court cited People v. Ward. 75 The Ward court held that it was permissible for an expert witness to use medical records in forming an opinion regarding an accused's sanity even though the records were not placed into evidence. 76 Dispensing with the argument that Ward was limited to "treating" physicians, and, thus, applicable only to "treating" experts, 77 the court noted that federal and state courts have
interpreted Federal Rule 703, upon which the Ward decision was based, to allow expert opinions based on facts not yet entered into evidence. Further, neither these courts nor the federal rules have distinguished between treating and non-treating experts. Rather, as the Wilson court explained, the key element in applying Federal Rule 703 is whether the information upon which the expert bases his opinion is of a type that is reliable.

In assessing reliability, the Wilson court focused on the policy considerations underlying Federal Rule 703 and stated that it would be extremely time consuming to establish the reliability of hospital records by calling into court every person who made an entry in the records. To support its position the court referred to the advisory committee’s note on Rule 703, which provides that allowing expert opinions based on facts not in evidence promotes judicial efficiency because counsel no longer has to produce and examine various authenticating witnesses. The court further reasoned that a physician’s validation of the hospital records, expertly performed and subject to cross-examination, was sufficiently reliable for judicial purposes. In adopting Rule 703, the Wilson court held that due to the high degree of reliability of hospital records, an expert may offer an opinion in response to a hypothetical question based on facts contained in those records, even if the hospital records themselves are not admitted into evidence.
Recognizing a modern trend that has liberalized certain trial procedures, the court also adopted Federal Rule of Evidence 705. Rule 705 allows an expert to give an opinion without disclosing the facts underlying that opinion. Although the court recognized that the burden is on the adverse party to elicit, during cross-examination, facts underlying the expert's opinion, it maintained that this burden is not onerous in light of Illinois' extensive pretrial discovery procedures.

The Wilson decision acknowledged the desirability of adopting Rules 703 and 705 to eliminate the time-consuming process of posing long hypothetical questions. Yet, the court determined that it would be unfair to apply these rules to the plaintiff in Wilson. The court reasoned that at the time of the trial the plaintiff had no notice that a nontreating expert's opinion in response to a hypothetical question could be based on records not in evidence. Stating that the plaintiff did not have to risk waiving his valid objection to those records for the purposes of appeal, the court held that the allowance of a hypothetical question based on hospital records improperly admitted into evidence in the instant case constituted reversible er-

86. The Wilson court stated that 18 states (Alaska, Arizona, Arkansas, Colorado, Delaware, Florida, Maine, Minnesota, Montana, Nebraska, Nevada, New Mexico, North Dakota, Oklahoma, South Dakota, Washington, Wisconsin, and Wyoming) have adopted Federal Rule 703 verbatim, or with minor changes. The court also noted that 17 states, (Alaska, Arizona, Arkansas, Colorado, Florida, Maine, Michigan, Minnesota, Montana, Nebraska, New Mexico, North Dakota, Oklahoma, Washington, Wisconsin, and Wyoming), have adopted Rule 705. The court further recognized that California, Kansas, and New Jersey have adopted similar provisions. Id. at 195, 417 N.E.2d at 1327.

It should be noted that Florida and Maine have made substantive changes in their adoption of Rule 705. Florida's rule provides:

Prior to the witness giving his opinion, a party against whom the opinion or inference is offered may conduct a voir dire examination of the witness directed to the underlying facts or data for his opinion. If the party establishes prima facie evidence that the expert does not have a sufficient basis for his opinion, the opinions and inferences of the expert are inadmissible unless the party offering the testimony first establishes the underlying facts or data.

FLA. STAT. ANN. § 90.705(2) (West 1978). Maine has adopted a similar provision. See ME. CT. R. EVID. 705.

87. FED. R. EVID. 705.

88. See Bryan v. John Bean Div. of FMC Corp., 566 F.2d 541, 545 (5th Cir. 1978) (Rule 705 eliminates the need for elaborate disclosures of the bases of expert opinion by placing the onus of eliciting the bases of the opinion on the cross-examiner).

89. 84 Ill. 2d at 194, 417 N.E.2d at 1327. The Illinois statute allowing discovery provides in pertinent part:

A party shall not be required to furnish the names and addresses of witnesses, except that upon motion of any party disclosure of the identity of expert witnesses shall be made to all parties and the court in sufficient time in advance of trial so as to insure a fair and equitable preparation of the case by all parties.


90. 84 Ill. 2d at 195, 417 N.E.2d at 1327.

91. Id.
The court concluded, however, that Federal Rules of Evidence 703 and 705 would apply to future cases.

**Analysis and Impact of Wilson**

Traditionally, Illinois has recognized firsthand observation, the hypothetical question, and trial observation as sources of information upon which an expert's opinion may legitimately rest. Thus, the Wilson court's acceptance of Rule 703 merely reflects the existing practice in Illinois with regard to these sources.

Until Wilson, however, Illinois law was unclear on whether experts from fields other than the medical profession could form their opinions by relying upon information made known to them outside of court and by means other than their own perception. The adoption of Rule 703 by the Wilson court eliminates any question concerning the applicability of the Ward decision to non-medical testimony. Under the new rules adopted in Wilson, the change in Illinois law applies only to cases in which the initial complaints are filed on or after the date of the opinion, or in which trial commenced on or after September 1, 1981.

See, e.g., Spence v. Commonwealth Edison Co., 34 Ill. App. 3d 1059, 1071, 340 N.E.2d 550, 559 (1st Dist. 1975) (where an expert witness has knowledge of the facts based on his personal observation, there is no need for a hypothetical question); Skalon v. Manning, Maxwell & Moore, Inc., 127 Ill. App. 2d 145, 161, 262 N.E.2d 146, 154 (1st Dist. 1970) (expert may base his opinion on firsthand observation of facts or data perceived by him before trial); Sherman v. City of Springfield, 77 Ill. App. 2d 195, 204, 222 N.E.2d 62, 67 (4th Dist. 1966) (a treating physician may render an opinion based upon medical examination conducted prior to trial); Krueger v. Friel, 330 Ill. App. 557, 568, 71 N.E.2d 815, 820 (1st Dist. 1947) (when opinion is based on personal observation, hypothetical question is not required).


See People v. Covey, 34 Ill. 2d 195, 198, 215 N.E.2d 220, 222 (1966) (expert may give opinion based upon evidence produced by other witness). Although Illinois allows an expert to use trial observation as a source of facts or data for his opinion, the use of this method is ordinarily confined to testimony that is undisputed. See Maton Bros. v. Central Ill. Pub. Serv. Co., 356 Ill. 584, 585, 191 N.E. 321, 326 (1934) (expert cannot invade province of jury by weighing evidence at trial and expressing an opinion on a contested issue); Graham v. St. Luke's Hosp., 46 Ill. App. 2d 147, 155, 196 N.E.2d 355, 359 (1st Dist. 1964) (witness cannot be asked for opinion based on conflicting evidence).

Although the Ward decision may be construed as being limited to expert medical testimony, the principles stated in Rule 703 are generally held applicable to any field of expertise. See, e.g., United States v. Hollman, 541 F.2d 196, 200-01 (8th Cir. 1976) (expert's opinion that substance was heroin, based on lab comparison with substance given to him as heroin, is admissible); United States v. Morrison, 531 F.2d 1089, 1094-95 (1st Cir.) (FBI gambling expert allowed to testify as to results of lab analysis of betting slips and records seized from gambling operation to determine the monetary extent of the operation even though he did not perform
both medical and non-medical expert witnesses may rely on non-evidentiary data in arriving at their opinions. This procedure will save time by eliminating the necessity of bringing forth witnesses whose sole function at trial is to construct a proper foundation for the expert's opinion. Moreover, the adoption of the rule will conform the judicial practice to the daily practice of experts outside the court room by allowing an expert to base his opinion on the same information on which he normally relies in his daily work. Consequently, the expert will deliver more complete and accurate testimony to the trier of fact because the bases upon which he may rely in forming an opinion are not limited by technical rules.

The Wilson court's adoption of Rule 703 expands the permissible bases upon which an expert may rely in formulating an opinion. This expansion is complimented by the court's additional adoption of Rule 705, which permits greater flexibility in the presentation of expert testimony. The adoption of Rule 705 represents a major revision in Illinois evidence law. Prior to the Wilson decision, if an expert did not testify from personal knowledge, a hypothetical question was required to elicit his opinion. The question was used to introduce the underlying facts relied upon by the expert before asking him to state his conclusions. Rule 705, however, eliminates mandatory preliminary disclosure of the underlying bases of expert testimony.

99. One commentator has questioned how the unique status of the medical expert justifies the granting of such a broad license to other types of experts. See Gibbons, supra note 19, at 226. Gibbons also questioned why a Supreme Court Advisory Committee would rely upon decisions and empirical data relating to medical experts to establish new rules of evidence at the very time that the stated goal of the Chief Justice was to exclude from the federal courts most of the litigation in which medical experts would testify. Id.

100. As one commentator noted: "The emphasis can be on choosing witnesses who are needed to explain things satisfactorily to the jury's understanding, rather than on parading witness after witness to lay a complex foundation for a simple opinion. . . . Thus, Rule 703 creates a revolution in the logistics of expert testimony." McElhaney, supra note 9, at 482.

101. The purpose in broadening the bases for an expert opinion was to bring the judicial practice into conformity with the practice of experts when not in court. Fed. R. Evid. 703 advisory committee note. The advisory committee used the example of a physician who makes life and death decisions based upon information including statements by patients, hospital records, etc. Id.

102. The adoption of the rule recognizes that "the opinion of an expert witness must invariably rest, at least in part, upon sources that can never be proven in court. An expert's opinion is derived not only from records and data, but from education and a lifetime of experience." United States v. Williams, 447 F.2d 1285, 1290 (5th Cir. 1971), cert. denied, 405 U.S. 954 (1972). A mere recounting of details will not always be sufficient to accurately convey the total impression received by the witness. The adoption of the rule will allow an expert to use factors in forming his opinion which will make that opinion more complete, because he will not be limited solely to facts that are admissible into evidence. This emphasis on furnishing the trier of fact with usable data will greatly enhance the fact finding process.

103. See supra notes 38-40.

104. See supra note 35.

105. See Fed. R. Evid. 705 advisory committee note. An expert is still required to state the reasons for his opinion, but a foundation of underlying data is unnecessary. Id.
and, thus, eradicates the required use of the hypothetical question. Because most litigators will not merely qualify an expert and obtain an opinion without disclosing at least some of the facts or data upon which the opinion is based, however, the real advantage of Rule 705 is that it permits the streamlining of hypothetical questions, which will allow the expert to reach the central part of his testimony quickly and directly. As long as the question is not misleading, an examiner can now be far more selective in determining the contents of hypothetical questions.

Although the adoption of Rule 705 does not abolish the use of the hypothetical question, it will clearly curtail its use. Nonetheless, a court may still, in its discretion, require the use of the hypothetical question to elicit the expert's opinion. Unless the court explicitly requires the use of the hypothetical question, however, its use will be optional for counsel.

106. Direct testimony in the form of a bare opinion, without disclosure of facts and data underlying that opinion, often appears shallow. P. Rothstein, Rules of Evidence for the United States Courts and Magistrates (2d ed. 1979) [hereinafter cited as Rothstein]. One commentator has noted that in a practical sense, a litigant's right to introduce an opinion into evidence without prior disclosure of the underlying data may not result in any significant change beyond doing away with disputes as to whether a sufficient foundation has been laid. Gibbons, supra note 19, at 229.

107. For example, in a suit for personal injuries arising out of an automobile accident, one may envision the interrogation of the physician, once he has been qualified as an expert, to proceed as follows:

Q. Dr. Willis—I take it you are a medical doctor, is that correct?
A. Yes I am. I specialize in the field of neurology, which is treatment of disorders of the brain and nervous system.

Q. Are you familiar with the medical condition of Mr. Jon Price?
A. Yes, I am.

Q. Would you tell us about it, please.
A. Certainly. Jon Price hit his head on the side post of an automobile in which he was riding on January 5, 1976. That blow to the head caused a tear in the tissue of his brain, which formed a small scar as it healed. Because of that scar on his brain, he has a form of epilepsy. At times which cannot be predicted, his left hand and arm twitch and jerk uncontrollably. Unfortunately, there is no way to operate on his injury, and in his case, medication has been ineffective.

Q. Can you tell us, Doctor, how long this condition will last?
A. I am afraid it will be with him the rest of his life.

Q. Thank you, Doctor, no further questions.

108. See Moore, supra note 46, § 705.10, at VII-71 to 73 (2d ed. 1976); Weinstein, supra note 6, ¶ 705[10], at 705-06. In some instances, the hypothetical question may prove useful. The New Jersey Committee on Evidence, which proposed a rule similar to Rule 705, wrote: [T]he hypothetical question still retains its usefulness in a case where, for example, the "super-expert" applies his specialized learning to testimony in a case where he had no personal contact whatever either with the persons or the matter involved in the litigation, or in a case where there is a dispute as to the basic facts and a question should be presented hypothetically as to an alternative set of facts.

Weinstein, supra note 6, at 705-11 (quoting New Jersey Supreme Court Committee on Evidence at 113 (1963)).

109. The advisory committee note provides for "the discretionary power of the judge to require preliminary disclosure in any event." Fed. R. Evid. 705 advisory committee note.

110. It has been argued that litigators who have learned to use hypothetical questions effec-
In addition to the diminishing effect Rule 705 will have on the use of hypothetical questions, its adoption is likely to have a significant impact on Illinois litigation in at least two other areas. First, with the elimination of the requirement of prior disclosure of facts or data underlying the expert’s opinion, a new emphasis will be placed on the function of cross-examination. The justification for allowing an expert to give an opinion without prior disclosure of the underlying bases is that cross-examination suffices as a means of exposing whatever weaknesses exist in the testimony of the expert. Illinois traditionally has permitted great latitude in the cross-examination of expert witnesses. This flexibility, coupled with the cross-examiner’s ability to elicit the unfavorable facts underlying the expert’s opinion, will allow the skillful cross-examiner to refute poorly founded testimony.

Because the effective cross-examination of an expert witness requires thorough preparation, pretrial discovery also will be affected by the Wilson decision. A lawyer, even with the help of experts, cannot realistically anticipate the facts or data upon which his opponent’s expert will rely in forming an opinion. By shifting the burden of revealing the facts underlying the expert’s opinion to the cross-examining party, Illinois’ adoption of Rule 705 is likely to result in more extensive pretrial discovery. Thus, the adoption of Rule 705 will require the trial counsel to obtain advance knowledge of any information necessary for the effective cross-examination of the opponent’s expert witness. As the Wilson court correctly noted, because Illinois’ extensive pretrial discovery procedures are liberal, the

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111. See generally LOUISELL & MUELLER, supra note 56, § 399, at 703; WEINSTEIN, supra note 6, ¶ 705[01], at 705-08. Thus, Rule 705 will have substantial impact on trial preparation, at least in the case of some lawyers who, in an effort to conserve resources, rely to a considerable extent on information they obtain from opposing experts on direct. Because Rule 705 allows the expert to state his opinion without disclosing the underlying facts or data, the cross-examiner who is not prepared may find himself in a dilemma after the direct exam. ROTHSTEIN, supra note 106, at 291.

112. See FED. R. EVID. 705 advisory committee note. In anticipation of criticism, the advisory committee stated that "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."Id.


114. See FED. R. EVID. 705 advisory committee note.

115. McElhaney notes that Rules 703 and 705 contemplate that trial lawyers will ascertain the bases for expert opinions prior to trial by using ordinary means of discovery. McElhaney, supra note 9, at 489. See also, ROTHSTEIN, supra note 106, at 293.

116. See FED. R. EVID. 705 advisory committee note.

117. See supra note 92. This provision brings the civil practice into line with the Supreme Court Rules regulating discovery in criminal cases. ILL. REV. STAT. ch. 110A § 412(a)(i), (iv) (1981). These sections provide for discovery of expert witnesses, their reports and tests, and the substance of their statements. Spector, supra note 5, at 304 n.76.
opposing party's burden of obtaining the facts underlying the expert's opinion will not be excessive.\footnote{118}

**PRACTICAL CONSIDERATIONS RESULTING FROM THE ADOPTION OF RULES 703 AND 705**

With the adoption of Federal Rules of Evidence 703 and 705, Illinois has relaxed its previous limitations on the use of expert testimony. Although the Wilson decision is likely to have a positive impact on expert testimony in Illinois, the adoption of Rules 703 and 705 may precipitate negative ramifications that will hinder effective operation of the rules.

Under Rule 703, an expert may rely on facts or data that are inadmissible at trial as the basis for his opinion.\footnote{119} The only limitation on this rule is that the information be "of a type reasonably relied upon by experts in the particular field in forming opinions or inferences."\footnote{120} Other jurisdictions interpreting this rule have had difficulty determining whether the expert's reliance on inadmissible information was "reasonable".\footnote{121} The question that must be resolved is whether the expert or the judge should decide what is reasonably reliable in the field.\footnote{122} Underlying Rule 703 is the idea that the expert, rather than the court, better understands the nature and quality of data essential to support an opinion in his or her own field.\footnote{123} Consequently, it has been suggested that considerable weight should be given to any assurance by the expert that the underlying data is reliable.\footnote{124}

\footnote{118. 84 Ill. 2d at 194, 417 N.E.2d at 1327. See Fed. R. Evid. 705, advisory committee note; Weinstein, supra note 6, § 705[01], at 705-9. Although complete discovery may be sufficient for obtaining advance knowledge of information necessary for effective cross-examination, the increased use of pretrial discovery may be disadvantageous because one undeniable fact of exhaustive discovery is that it creates considerable delay. See Ehrenbrand, Cutting Discovery Costs Through Interrogatories and Document Requests, 1 Litigation 17 (No. 2 1975).


120. Id.


122. See McElhaney, supra note 9, at 483-86. McElhaney notes that the standards of reliability in any particular field must take into account the special situation in which it arises. A doctor making an emergency diagnosis at the scene of an accident will not use the same standards of reliability as he would in the research lab. Trials are supposed to provide an opportunity for calm deliberation, appropriately taking longer to review events than the events themselves may have taken to transpire. Thus, a judge should look to the expert's field for guidance, but not for his ultimate decision. Id.


124. See United States v. Sims, 514 F.2d 147, 149 (9th Cir.), cert. denied, 423 U.S. 845 (1975). The Sims court noted that because of [the expert's] professional background, knowledge, and experience, we should, in circumstances such as these, leave to the expert the assessment of the reliability of the statements on which he bases his expert opinion. . . .
The rule does not, however, abdicate judicial responsibility to the expert. The trial court, in the exercise of its discretion, ultimately must determine whether the expert's sources of information are sufficiently reliable to warrant the admission of the expert's opinion. In determining whether the data underlying the expert's opinion is "of a type reasonably relied upon by experts in the field," the court should consider: (1) the importance of the issue; (2) the extent to which the opinion relies on material not offered in evidence; (3) the impression the opinion will have on the jury; and (4) the availability of the out-of-court material on which the expert relies in forming the opinion. Although the court should defer to the expert's field for guidance, the final decision as to admissibility lies with the court.

While Rule 703 defines the sources from which experts may derive facts and data that serve as the bases for their opinions, the Wilson court's adoption of Rule 705 permits an expert to give his opinion without disclosing these underlying bases. This practice has been criticized on the ground that the trier of fact is more likely to hear an opinion which is inadmissible because the inadequate underlying data will not be brought out until cross-examination. Even if the court instructs the jury to disregard the opinion, the jury is still prejudiced by having heard the damaging expert testimony.

experience teach the expert to separate the wheat from the chaff and to use only those sources and kinds of information which are a type reasonably relied upon by similar experts in arriving at sound opinions on the subject.

See also United States v. Williams, 447 F.2d 1285, 1290 (5th Cir. 1971) (expert is competent to judge the reliability of records and statements on which opinion is based because of professional knowledge and ability), cert. denied, 405 U.S. 954 (1972).

125. See, e.g., Standard Oil Co. of Cal. v. Moore, 251 F.2d 188 (9th Cir. 1957) (determination of reasonable reliance lies within domain of trial judge's authority), cert. denied, 356 U.S. 975 (1958). This follows from the trial court's power to determine the ultimate admissibility of evidence. Weinstein, supra note 6, ¶ 703[02], at 703-15. A part of this determination is concerned with whether the expert himself and others in the field would actually rely on such data "for purposes other than testifying in a lawsuit." Id.


127. Professor McElhaney gives this hypothetical example of an appropriate court ruling concerning whether the expert's sources are sufficiently reliable to render his opinion admissible:

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

McElhaney, supra note 9, at 486. See supra note 125.

128. FED. R. EVID. 705.

129. McElhaney, supra note 9, at 486.

130. McElhaney remarks that "[t]elling the jury to disregard something they have just heard is about as effective as telling someone not to think of pink elephants." McElhaney, supra note 9, at 487 n.97.
It is possible, however, to reduce the likelihood of exposing the trier of fact to an inadmissible opinion. If an opposing party believes that the witness lacks an adequate basis for his opinion, he may request the court to permit a voir dire examination of the expert outside the presence of the jury. Voir dire is a useful device because it is far more effective to refute the foundation of an expert witness, thus preventing the opinion from being heard by the jury, than to allow the jury to hear the testimony and attempt to undercut it during cross examination.

Although some states expressly authorize voir dire examinations, Illinois does not allow them as a matter of right. Rather, voir dire examination lies within the court’s discretion. The adoption by Illinois of an express provision permitting voir dire examinations of expert witnesses would ensure opposing counsel the opportunity to demonstrate to the court the inadmissibility of the expert’s opinion outside the presence of the jury.

In instances where pretrial discovery indicates that the witness does not have a sufficient basis for his opinion, a motion in limine may be utilized to keep an inadmissible opinion from the jury. Under this procedure, a ruling will be made on the admissibility of the opinion before it is introduced at trial. If the data upon which the expert relied in forming his opinion is not of a type reasonably relied upon by experts in the field, the court may limit or prohibit testimony on such matters. Motions in limine are likely to minimize juror prejudice because the jury will be precluded from hearing inadmissible expert opinions if the motion is granted.

An additional consideration raised by Rule 705 is whether inadmissible facts or data underlying an expert’s opinion become admissible upon disclosure of the expert’s opinion, or whether the rule, like Rule 703, affects only the admissibility of the opinion itself. This distinction is important in a situation where the basis of the expert’s opinion is primarily hear-

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131. See People v. Sawhill, 299 Ill. 393, 408-09, 132 N.E. 477, 483 (1921) (opposing counsel should be permitted to examine witness to determine whether witness is competent to testify); Geving v. Fitzpatrick, 56 Ill. App. 3d 206, 211, 371 N.E.2d 1228, 1233 (4th Dist. 1978) (establishing qualifications of witness as an expert, as well as preliminary cross-examination, should be allowed before expert gives opinion to jury).

132. McElhaney, supra note 9, at 476.

133. See supra note 86.

134. Payne v. Murphy Hardware Co., 62 Ill. App. 3d 803, 805, 379 N.E.2d 817, 819 (2d Dist. 1978) (although allowing preliminary cross-examination going to the qualifications of the expert witness will further objective of affording everyone a fair trial, it is not necessarily a right in all cases).

135. A motion in limine is a request for a ruling on the admissibility of certain evidence made at any time prior to the offer of that evidence at trial. See, e.g., Reidelberger v. Highland Body Shop, Inc., 83 Ill. 2d 545, 549, 416 N.E.2d 268, 271 (1981) (motion in limine will protect moving party from whatever prejudicial impact the mere asking of the questions and the making of objections will have on the jury); Department of Pub. Works & Bldg. v. Sun Oil Co., 66 Ill. App. 3d 64, 67, 383 N.E.2d 634, 636 (5th Dist. 1978) (use of such a motion enables a party to prevent opponent beforehand from attempting to prejudice the jury by offering evidence that the opponent knows should be excluded or stricken upon objection).

136. See ROTHSTEIN, supra note 106, at 277.
say and the judge, in his discretion, requires disclosure of the underlying facts or data. The question then becomes whether the bases of the opinion will be admitted into evidence.

Unfortunately, the advisory committee note does not suggest an answer. It can reasonably be argued, however, that although the trial judge operates within a wide range of discretion, he cannot require disclosure of evidence that is inadmissible in open court, even if it seems desirable to elicit the bases for the expert's opinion. Otherwise a skillful attorney would be able to use his expert to bring facts into evidence which normally would not be allowed in open court.

CONCLUSION

The Wilson court's adoption of Federal Rules of Evidence 703 and 705 provides a welcome change to the prior limitations imposed on the use of expert testimony in Illinois. With this expansion of the sources from which an expert may rely in drawing facts and data to form his opinion, the judicial practice is brought into conformity with the practice of the experts themselves. The desirability of this result stems from the fact that an expert's opinion is not only derived from records and data, but also from years of education and a lifetime of experiences.

Furthermore, broadening the permissible foundation for an expert opinion, when combined with the relaxed requirements for disclosure of facts underlying the expert's testimony, substantially reduces the need for the use of hypothetical questions. The hypothetical question has proven to be an awkward method of eliciting an expert's opinion, as well as a device subject to abuse. The trier of fact will benefit by being informed as to the expert's perception of the relevant facts rather than confining the bases of the expert's opinion to select assumptions proposed by the attorneys. This, in turn, should present a more accurate picture to the trier of fact. Moreover, the adoption of these rules will promote judicial efficiency by eliminating the need for a large number of witnesses who generally appear in court solely to present data to the trier of fact in preparation for the expert's opinion.

Although the requisites for submitting expert testimony into evidence have been relaxed, the burden on cross-examiners has been increased correspondingly. Additionally, a more extensive pre-trial discovery is now required if counsel is to assess the propriety of the opposition's expert testimony. Despite these new considerations, the Illinois Supreme Court's decision in Wilson v. Clark has embraced a more practical and efficient approach for the use of expert testimony.

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137. See supra note 106 and accompanying text.
138. See supra notes 43-49 and accompanying text.