THE ADMISSIBILITY OF EXPERT TESTIMONY UNDER THE IOWA RULES OF EVIDENCE: PROFFERING AND RESISTING EXPERT OPINION

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I. INTRODUCTION

In 1983, Iowa adopted the Uniform Rules of Evidence in a substantially unaltered form.[1] This adoption has had a major impact upon the admissibility of expert witness testimony in Iowa. Some well-established rules concerning the use and admissibility of expert testimony have been altered with the adoption of the Iowa Rules of Evidence. New methods may now be used to proffer and oppose expert opinion. This article will examine the rules concerning admissibility of expert opinion evidence. Additionally, it will attempt to provide the trial practitioner with insight into some of the practical questions faced in proffering and opposing expert testimony.

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1. By order of the Iowa Supreme Court, the Iowa Rules of Evidence were adopted in accordance with IOWA CODE §§ 684.18(1) and 684.19 (1981).

II. Expert Testimony in Iowa

Under traditional Iowa common law, expert testimony was admissible if the trial court concluded that such testimony would aid the trier of fact in the proper determination of the question before them.[2] Iowa common law and Rule 702 of the Iowa Rules of Evidence provide that in order to establish the admissibility of expert opinion evidence, the court must determine that the witness is a qualified expert and that his or her testimony will prove helpful to the trier of fact.[3] Iowa case law dictates that an expert opinion be based upon a sufficient factual foundation and that the facts or data supporting that foundation appear in the record.[4] Rule 703 of the Iowa Rules of Evidence requires that an expert opinion be supported by facts reasonably relied upon, but unlike Iowa common law, these underlying facts or data needn't appear in the record per se.[5]

The Iowa Rules of Evidence became effective July 1, 1983. Though Iowa has adopted the Uniform Rules of Evidence which are tantamount to the Federal Rules of Evidence, an examination of Iowa common law with respect to the factual foundation requirement will be helpful. The adoption of the new rules has not abrogated Iowa common law but rather modified and incorporated it where it was not totally inconsistent. This was the case in the adoption of the Federal Rules of Evidence. In *Werner v. Upjohn Co.*,[6] the court stated:

> It is clear that in enacting the Federal Rules of Evidence Congress did not intend to wipe out the years of common law development in the field of evidence, indeed the contrary is true. The new rules contain many gaps and omissions and in order to answer these unresolved questions courts certainly should rely on common law precedent.[7]

Thus, although where there is direct conflict the Rules of Evidence will prevail, Iowa courts will look to Iowa common law where there is an ambiguity in the newly adopted rules.[8]

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2. *See* Grismore v. Consolidated Products Co., 232 Iowa 328, 333, 5 N.W.2d 646, 654 (1942). In *Grismore*, the Iowa Supreme Court upheld the admission of the expert testimony of a turkey farmer concerning the cause of the death of a number of turkeys. *Id.* The court stated: "One of the tests for the admission of an expert opinion is whether the subject matter is such, and the witness is so qualified as to aid the jury in the proper determination of a question before them." *Id.*

3. *See* M-Z Enter. v. Hawkeye-Security Ins. Co., 318 N.W.2d 408, 414 (Iowa 1982); *see also* Iowa R. Evid. 702 advisory committee's comment (Rule 702 is consistent with prevailing common law).

4. *See* Osborne v. Massey-Ferguson, Inc., 290 N.W.2d 893, 900 (Iowa 1980); Shinrone, Inc. v. Tasco, Inc., 283 N.W.2d 280, 288 (Iowa 1979). *See also* McCormick, *Opinion Evidence in Iowa*, 19 Drake L. Rev. 245, 256 (1970) [hereinafter McCormick].

5. Iowa R. Evid. 703, 705.

6. 628 F.2d 848 (4th Cir. 1980), *cert. denied*, 449 U.S. 1080 (1981).

7. *Id.* at 856.

8. *See, e.g.*, Bandstra v. International Harvester Co., 367 N.W.2d 282, 288 (Iowa App.

Under Iowa common law there were generally three requirements that had to be satisfied to establish the admissibility of expert opinion evidence: (1) the subject matter had to be a proper one for expert testimony; (2) the witness was required to be qualified; and (3) there had to be a sufficient foundation in the record to support the opinion.[9] The Iowa Rules of Evidence have similar requirements for the admissibility of expert opinion testimony: (1) the subject matter must be a proper one—that is, the opinion must assist the trier of fact (Rule 702); (2) the expert must be qualified (Rule 702); and (3) if the underpinnings of the expert testimony are "reasonably relied upon" they need not appear in the record (Rule 703), but the court may require it (Rule 705).

III. Qualification of an Expert

After a preliminary finding by a court that expert testimony may be introduced,[10] it must be determined whether the proffered witness qualifies as an expert. Rule 702 provides general guidelines for evaluating an expert's qualifications which are similar to Iowa common law. The rule reads: "If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise."[11]

Under Iowa common law, an expert was required to have "skill, knowledge, or experience" in his or her field of expertise.[12] It has been firmly established that expertise may spring from practical experience and training as well as education.[13] The Iowa courts expressly adhere to a "liberal policy" concerning the admissibility of expert testimony.[14] The rationale for this lib-

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1985); Kellar v. Peoples Natural Gas Co., 352 N.W.2d 688, 694 (Iowa App. 1984).

9. McCormick, *supra* note 4, at 256.

10. In most instances, it will be obvious that expert testimony is proper. Where there is doubt, the court may be asked to make a determination in the context of a motion in limine ruling or a ruling pursuant to Iowa Rule of Evidence 104.

11. Iowa R. Evid. 702.

12. *See* McCormick, *supra* note 4, at 263.

13. *Id.*; *see also* Ganrud v. Smith, 206 N.W.2d 311, 315 (Iowa 1973); Dougherty v. Boyken, 261 Iowa 602, 605, 155 N.W.2d 488, 490 (1968). Thus, the Iowa Supreme Court has permitted a non-veterinarian butcher to testify, based on his practical experience, that certain animal hides were burned by lightning. Lyons v. Farm P.M. Ins. Ass'n, 188 Iowa 506, 510, 176 N.W. 291, 293 (1920).

14. *See, e.g.*, Miller v. Bonar, 337 N.W.2d 523, 528 (Iowa 1983); State v. Dvorsky, 322 N.W.2d 62, 64 (Iowa 1982); Fischer, Inc. v. Standard Brands, Inc., 204 N.W.2d 579, 582 (Iowa 1973); Tiemeyer v. McIntosh, 176 N.W.2d 819, 824 (Iowa 1970); Bandstra v. International Harvester Co., 367 N.W.2d 282, 288 (Iowa App. 1985). The Iowa Supreme Court stated its reasoning for this liberal attitude in *Bengford v. Carlem Corp.*:

> The admission of opinion evidence rests largely in the sound discretion of the court and considerable leeway is allowed in this field of evidence for the reason that no matter how the opinion question is phrased or formulated, it remains an opinion

eral policy is based primarily upon the belief that the trier of fact is free to reject any proffered opinion.[15] Accompanying this express liberal policy is the implicit recognition by the courts that the requirements for qualification are not unduly stringent.[16]

An expert need not be entirely sure of an opinion; nor must he or she be the most eminent expert in a field.[17] Once an expert is determined to be qualified, his credentials will weigh on the value given his testimony by the trier of fact. If an expert is at least minimally qualified in his field, his testimony will be admitted and his qualifications will go to the weight of the opinion rather than its admissibility.[18] The liberal view of the Iowa courts is reflected in cases allowing expert testimony from chiropractors, peace officers, chicken farmers, veterinarians, doctors, "accidentologists", engineers, professors, psychologists, and others.[19] Although an expert is only required

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> which the trier of facts is at liberty to reject. Therefore only in clear cases of abuse would admission of such evidence be found prejudicial.

Bengford v. Carlem Corp., 156 N.W.2d 855, 865-66 (Iowa 1968).

15. *See* State v. Nunn, 356 N.W.2d 601, 604 (Iowa App. 1984) (jury is not required to accept expert opinion as conclusive). *See also* Bengford v. Carlem Corp., 156 N.W.2d 855, 865-66 (Iowa 1968).

16. The Iowa Rules of Evidence were drafted with the intent that the qualifications of a witness be thoroughly explored by court and counsel through the use of voir dire as provided for in IOWA RULE OF EVIDENCE 104(a). The aim is to preclude the testimony of those having "marginal credentials." *See* IOWA R. EVID. 702 committee comment.

17. The courts recognize that a witness needn't be licensed in a certain field in order to give an opinion concerning matters pertaining to that field. In *Ganrud v. Smith*, the Iowa Supreme Court affirmed the trial court's admission of expert testimony concerning the memory loss of a party in an auto accident. Ganrud v. Smith, 206 N.W.2d 311, 315-16 (Iowa 1973). The testimony was objected to on the basis that the witness was not a licensed practicing physician. *Id.* at 315. The witness held degrees in science, chemistry, and physiology and had done considerable research work concerning brain damage associated with traumatic accidents. *Id.* The supreme court stated:

> Like licensed experts in other fields the fact that a person is licensed to practice in a branch of the healing arts carries a presumption of qualification to testify as an expert at least in his given field. But licensing does not necessarily settle the matter conclusively, as the necessity of specialization may be shown where the matter in issue calls for it. Nor is the lack of license necessarily a bar to accepting the person as a witness, as learning and experience may provide the essential elements of qualification.

Ganrud v. Smith, 206 N.W.2d at 315 (quoting 2 JONES, B., JONES ON EVIDENCE, § 14:13 (S. Grand 6th ed. 1972). In holding that the opinion was properly admitted, the court noted that the jury was entitled to judge the credibility of the opinion. Ganrud v. Smith, 206 N.W.2d at 316.

18. Dougherty v. Boyken, 261 Iowa 602, 609, 155 N.W.2d 488, 492 (1968).

19. *See, e.g.*, Miller v. Bonar, 337 N.W.2d 523, 528 (Iowa 1983) (testimony of state trooper concerning cause of truck collision held admissible); State v. Taylor, 336 N.W.2d 721, 726 (Iowa 1983) (detective qualified to testify as to effect of narcotics on defendant's behavior); Schmitt v. Clayton Co., 284 N.W.2d 186, 188 (Iowa 1979); Dougherty v. Boyken, 155 N.W.2d 488, 493 (Iowa 1968); State *ex rel.* Schmidt v. Backus, 259 Iowa 1144, 1146, 147 N.W.2d 9, 10-11 (1966); Shover v. Iowa Lutheran Hosp., 252 Iowa 706, 713-14, 107 N.W.2d 85, 89 (1961); Lowman v.

to have minimal qualifications, he or she must possess the particular skills necessary to render an opinion on the specific fact in issue. While this appears to be a qualification issue, courts more often refer to it as a factual foundation infirmity.[20]

Rule 702 requires that a witness be "qualified as an expert by knowledge, skill, experience, training, or education" to testify as an expert. The advisory committee's note to Federal Rule 702 leaves no doubt that the standard of admissibility with regard to the qualification of an expert is a liberal one.[21] The note states:

> The rule is broadly phrased. The fields of knowledge which may be drawn upon are not limited merely to the "scientific" and "technical" but extend to all "specialized" knowledge. Similarly, the expert is viewed, not in a narrow sense, but as a person qualified by "knowledge, skill, experience, training or education."[22]

Similarly, the advisory committee's comments on Iowa Rule 702 indicate that Iowa will retain its liberal attitude concerning the admissibility of expert testimony.[23] The committee refers to and approves the threshold tests of admissibility set forth in *State v. Hall*.[24]

It should be noted that the qualifications of the witness will be determined initially by the trial court in the context of a ruling upon a motion in limine or pursuant to Rule 104(a).[25] Iowa Rule 104 establishes a procedure whereby preliminary matters concerning the admissibility of, among other things, an expert's opinion can be addressed by the court.[26] Generally, the

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Kuecker, 246 Iowa 1227, 1230, 71 N.W.2d 586, 588 (1955) (chiropractor competent to testify concerning medical questions related to the chiropractic field).

20. *See infra* notes 41-64 and accompanying text.
21. FED. R. EVID. 702 advisory committee's note.
22. *Id.*
23. *See* IOWA R. EVID. 702 advisory committee's comment.
24. 297 N.W.2d 80, 83-85 (Iowa 1980).
25. The rule provides:

> Questions of admissibility generally. Preliminary questions concerning the qualifications of a person to be a witness, the existence of a privilege, or the admissibility of evidence shall be determined by the court, subject to the provisions of subdivision (b). In making its determination it is not bound by the rules of evidence except those with respect to privileges.

IOWA R. EVID. 104(a).

26. *See* IOWA R. EVID. 104 advisory committee's comment. *See also* IOWA R. EVID. 702 advisory committee's comment. In its comment to Rule 702, the committee states that after determining that expert testimony will assist the jury, the court will consider the qualifications of the witness:

> Once again, it is anticipated that the threshold requirements regarding the qualifications of the specific witness will be tested pursuant to 104(a). If the Court is satisfied that the threshold requirements have been met, the witness should be allowed to testify. All further inquiry regarding the extent of his qualifications go to the weight that the fact finder can give such testimony under Rule 104(e).

IOWA R. EVID. 702 advisory committee's comment.

trial court must be satisfied that either through training or experience the witness has a sufficient command of the subject about which he will be questioned to ensure accurate and reliable testimony. It has been said that "[t]he test is whether the [expert witnesses'] education and experience demonstrate a knowledge of the subject matter."[27] Iowa Rule 702 provides that an expert's knowledge can be derived from "skill" as well as "experience"; thus the rule is consistent with Iowa common law.[28]

Federal decisions point out that the experts needn't be completely certain as to their opinion nor must they possess absolute knowledge in their field of expertise.[29] Likewise, the fact that an expert is biased will weigh toward the credibility rather than the admissibility of his or her testimony.[30]

IV. Proper Subject Matter for Expert Testimony

Under Iowa common law and Rule 702 as adopted by Iowa, a prerequisite to the admission of expert testimony is that the subject matter be a proper one for expert opinion.[31] Expert testimony is admissible if it will aid the trier of fact in understanding the evidence. A predominant concern is that the expert opinion testimony "aid the jury on some factual issue in the case."[32]

Some Iowa opinions recite the traditional requirement that the expert opinion must be rendered upon a matter which persons without such expertise cannot decide.[33] In *Hedges v. Conder*,[34] the Iowa Supreme Court promulgated a requirement for the use of expert opinion that "the subject of the inference be beyond the ken of the average layman. . . ."[35] Though necessity may have been a qualification to receive expert testimony at one time, it is clearly no longer so.[36] In *State v. Galloway*,[37] the court rejected the testimony of the defendant's expert who testified to the effect that a witness has diminished memory capacity with the passage of time.[38]

Chief Justice Reynoldson, in a special concurrence joined by six other justices, cited cases from other jurisdictions in support of rejecting testimony from a memory expert and stated "[t]he predominant rationale for excluding such testimony which emerges from these cases is that the subject matter of the opinion offered is not beyond the knowledge and experience of

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27. Hill v. Gonzalez, 454 F.2d 1201, 1203 (8th Cir. 1972).
28. *See supra* text accompanying notes 15-27.
29. *See* 3 J. Weinstein & M. Berger, Weinstein's Evidence 702-28 (1985).
30. *See id.*
31. *See* Iowa R. Evid. 702 advisory committee's comments.
32. *See* State v. Galloway, 275 N.W.2d 736, 741 (Iowa 1979).
33. *See* McCormick, *supra* note 4, at 257.
34. 166 N.W.2d 844 (Iowa 1969).
35. *Id.* at 857 (quoting McCormick on Evidence, § 13).
36. *See infra* text accompanying notes 37-40.
37. 275 N.W.2d 736 (Iowa 1979).
38. *Id.* at 739.

a juror."[39] A cursory reading of this opinion leaves the impression that Iowa still adheres to the older and more rigid view that expert testimony is excluded except when necessity demands otherwise. Upon a closer reading, however, it appears that the *Galloway* concurrence was based not on the fact that the subject matter was not beyond the understanding of the average juror, but rather on the fact that in that instance the expert testimony would be more prejudicial than probative.[40] Such a reading would be more consistent with the general rule under Rule 702.

Decisions indicate that even before adoption of the new rules of evidence, Iowa had adopted the sum and substance of Rule 702.[41] In *M-Z Enterprises v. Hawkeye-Security Insurance Co.*,[42] the Iowa Supreme Court adopted the test delineated in Rule 702.[43] The court in *M-Z Enterprises* quoted the advisory committee note to Federal Rule 702:

> Whether the situation is a proper one for the use of expert testimony is to be determined on the basis of assisting the trier. "There is no more certain test for determining when experts may be used than the common sense inquiry whether the untrained layman would be qualified to determine intelligently and to the best possible degree the particular issue without enlightenment from those having a specialized understanding of the subject involved in the dispute."[44]

Rule 702 abandons the requirement of necessity and places emphasis upon the value of expert opinion testimony in aiding the trier of fact. This approach widens the scope of expert testimony.

V. Factual Foundation

The hypothetical question was commonly used to elicit expert testimony prior to the adoption of the Iowa Rules of Evidence.[45] Under Iowa common law, the facts upon which the expert opinion was based were required to appear on the record so that the trier of fact could establish that the expert's opinion was based upon reliable data and not mere conjecture or speculation.[46] Although Iowa common law and Rule 703 are inconsistent in that the latter does not require the facts upon which the opinion is based to appear on the record, they are alike in that both require a minimum factual foundation upon which the expert opinion must be based. It is difficult

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39. *Id.* at 741 (Reynoldson, C.J., concurring).
40. *See id.* at 741-42 (Reynoldson, C.J., concurring).
41. *See infra* text accompanying notes 42-44.
42. 318 N.W.2d 408 (Iowa 1982).
43. *See id.* at 414.
44. *Id.*
45. *See, e.g.*, Karr v. Samuelson, 176 N.W.2d 204, 209-11 (Iowa 1974). *See also* Hegtvedt v. Prybil, 223 N.W.2d 186, 189 (Iowa 1974); Hedges v. Conder, 166 N.W.2d 844, 857 (Iowa 1969).
46. *See* Haumersen v. Ford Motor Co., 257 N.W.2d 7, 12 (Iowa 1977).

to quantify the Iowa common law requirement that an opinion have a "sufficient basis in fact." Iowa courts have repeatedly stated that they take a liberal attitude with respect to the admissibility of expert testimony.[47] The admissibility of expert testimony is largely a matter of the trial court's discretion.[48] The trial court's discretion is normally upheld "absent manifest abuse of that discretion to the prejudice of the complaining party."[49] The discretion exercised by the trial court must be a "legal one based on sound judicial reasons."[50] In *Ganrud v. Smith*,[51] the Iowa Supreme Court discussed the leeway granted the trial court concerning the admissibility of expert testimony:

> The receipt of opinion evidence, lay or expert, rests largely in the sound discretion of the trial courts and we will not reverse its ruling absent manifest abuse of that discretion to the prejudice of the complaining party . . . . Of course, the discretion exercised in admitting or excluding expert or opinion testimony is not unlimited, but must be a legal one based on sound judicial reason . . . . The discretion of the trial court ceases where the record shows as a matter of law the witness is not qualified or the facts upon which the opinion is based are not sufficiently stated by the witness.[52]

In the overwhelming majority of reported Iowa cases, the courts chose to admit rather than exclude expert testimony. This is due in part to the attitude the courts take toward expert opinions: that it is better to resolve any doubt in favor of admissibility because the jury is always free to accept or reject any expert opinion proffered. Regardless of how an expert opinion is phrased, in the end it is still just an opinion.[53]

Thus it appears that given a threshold of foundation in fact, the court will admit an expert opinion. The task lies in determining just where the threshold lies. Examination of the many Iowa cases treating this subject yields no clearcut test of admissibility. Some general guidelines can, however, be gleaned from a number of Iowa cases.[54]

The Iowa Supreme Court has indicated that the threshold of admissibility is that point at which the expert opinion is based on enough of a factual foundation so as to make it rational and more than mere conjecture.[55]

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47. *See* State v. Dvorsky, 322 N.W.2d 62, 64 (Iowa 1982); Haumersen v. Ford Motor Co., 257 N.W.2d 7, 11 (Iowa 1977); Bandstra v. International Harvester Co., 367 N.W.2d 282, 288 (Iowa App. 1985).

48. *See id.*

49. *See* Ganrud v. Smith, 206 N.W.2d at 314.

50. Osborne v. Massey-Ferguson, Inc., 290 N.W.2d at 901 (quoting Dougherty v. Boyken, 261 Iowa at 608, 155 N.W.2d at 491).

51. 206 N.W.2d 311 (Iowa 1973).

52. *Id.* at 314 (citations omitted).

53. *See* Brower v. Quick, 249 Iowa 569, 577, 88 N.W.2d 120, 125 (1958).

54. *See infra* text accompanying notes 56-89.

55. *See* Haumerson v. Ford Motor Co., 257 N.W.2d 7, 11 (Iowa 1977).

In *Haumersen v. Ford Motor Co.*,[56] the court was presented with plaintiff's proffered expert who would testify as to the cause of an auto accident.[57] The supreme court upheld the trial court's decision to admit the expert testimony as to the cause of the accident, but in doing so, the court stated that "admission of [the expert's] opinion went to the outer limits of the trial court's discretion."[58] The supreme court propounded a test by which to judge the minimum basis in fact required for the admissibility of expert opinion evidence: there must be a sufficient factual foundation to supply the expert "some basis for a rational belief" in his opinion, thus making it "more than mere conjecture."[59]

Haumersen involved a products liability action brought by the father of a seven year old boy who was killed when an auto manufactured by Ford went out of control and plowed through a Davenport school yard.[60] Plaintiff's expert examined the auto in question more than eighteen months and 12,000 miles after the accident and formed an opinion as to what caused the car to accelerate against the will of the driver.[61] The expert opined that the motor mounts broke causing the engine to shift forward two inches, and that thereafter when the driver accelerated, the engine rotated resulting in an impingement on the throttle mechanism which caused the throttle to remain open and brought about the accident.[62]

Defendant Ford maintained that there was no factual foundation established for the plaintiff's expert testimony but the trial court disagreed.[63] The supreme court agreed with the trial court and stated that:

> Although the lapse of time between the accident and the observations of [plaintiff's expert] reduced the weight of [his] opinion, and although admission of his opinion went to the outer limits of the trial court's discretion, we are unwilling to hold that the trial court abused its discretion. The evidence did provide some basis for a rational belief that the conditions [he] related were present at the time of the accident; thus the facts on which he based his opinion were sufficient to enable him to express an opinion which was more than mere conjecture.[64]

Though this would appear to open the floodgates to expert testimony based on nothing more than speculation, several aspects of the case indicate otherwise. The court did look to the record and found that the plaintiff's expert had testified as to marks where the fan struck the rear of the radia-

56. 257 N.W.2d 7 (Iowa 1977).
57. *Id.*
58. *Id.* at 12.
59. *Id.* at 11-12.
60. *Id.* at 10.
61. *Id.* at 11.
62. *Id.*
63. *Id.*
64. *Id.* at 12.

tor, and these marks were covered with road film indicating they were not recently created.[65] The court also found other concrete evidence in the form of testimony to support the opinion. That is, the driver testified to movement that would be consistent with the expert's theory.[66]

The *Haumersen* decision undoubtedly involved the very minimum threshold of requisite factual basis. With this minimum threshold in mind, it is necessary to look for factors that can be used to determine if an opinion meets the test. In the cases in which the trial court has excluded expert testimony, or the supreme court has found it to be an abuse of discretion not to do so, there are guidelines indicating when the court will hold that this minimum factual foundation does not exist. Briefly, factors that may, alone or in combination, render an expert opinion inadmissible, are: (1) an inadequate investigation or knowledge of the facts on the part of the expert;[67] (2) an opinion based upon a fallacious or totally unaccepted scientific process;[68] (3) an opinion based upon data that is unreliable,[69] inaccurate,[70] erroneous,[71] or, according to Iowa common law, entirely hearsay.[72]

A. *Inadequate Investigation or Knowledge of Facts*

An expert witness must not only meet the requirement that he be generally qualified in his field of expertise, he must also be qualified with respect to the specific question asked.[73] The Iowa Supreme Court has more than once quoted Wigmore: "The capacity [to testify as an expert] is in every case a relative one, i.e., relative to the topic about which the person is asked to make his statement."[74] Sufficient data must appear upon which an expert could make an opinion, or else the opinion is designated incompetent.[75]

In *Tiemeyer v. McIntosh*,[76] the Iowa Supreme Court held that the trial court was correct in excluding the testimony of an accidentologist in this personal injury case.[77] The expert in question was called to fix the speed of one of the autos immediately prior to the collision at issue.[78] The court lim-

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65. *Id.*
66. *Id.*
67. *See infra* text accompanying notes 73-90.
68. *See infra* text accompanying notes 107-114.
69. *See infra* text accompanying notes 110-118.
70. *See infra* text accompanying notes 99-106.
71. *See infra* text accompanying notes 91-98.
72. *See infra* text accompanying notes 131-132.
73. *See* Kart v. Samuelson, Inc., 176 N.W.2d 204, 210 (Iowa 1970).
74. II Wigmore on Evidence, § 555-62 (3d Ed.). *See also* Ruden v. Hansen, 206 N.W.2d 713, 717 (Iowa 1973).
75. *See* Lessenhop v. Norton, 261 Iowa 44, 55, 153 N.W.2d 107, 114 (Iowa 1967).
76. 176 N.W.2d 819 (Iowa 1970).
77. *Id.* at 826.
78. *Id.* at 824.

ited its discussion to the expert's qualifications to do so under the particular facts available to him.[79] The expert had not visited the accident scene, he did not examine either of the vehicles involved, nor did he hear the testimony of other witnesses.[80] He undertook to estimate the speed of the car entirely from pictures of the cars and accident scene taken immediately after the collision.[81] The court stated that it felt that the testimony would be no more than mere conjecture.[82] This represents the classic case of an expert's opinion being excluded because the expert, or perhaps counsel, failed to do his or her homework.

Bernal v. Bernhartd[83] involved an action by a pedestrian to recover for injuries sustained when he was struck by defendant's vehicle.[84] The Winnebago District Court Judge sustained plaintiff's motion for a new trial after realizing he had wrongly allowed testimony by defendant's expert as to vehicle speed.[85] The supreme court affirmed the district court's decision.[86] The supreme court noted that the expert rendered an opinion as to the speed of the vehicle without taking into account road conditions, pavement type, tire tread and other relevant factors.[87]

In *Hedges v. Conder*,[88] another automobile-pedestrian collision case, the supreme court held that the lower court had abused its discretion in allowing testimony from plaintiff's expert.[89] Here again the court noted that the expert, though qualified in his field, did not take into account vital elements used in figuring the speed of a vehicle in such instances.[90]

B. *Opinion Based Upon Untrue or Inaccurate Data*

An expert's opinion rendered on erroneous facts will do little to aid the jury. In *Albrecht v. Raush*,[91] the supreme court held that the trial court should have excluded the expert witness testimony proffered by the defendant.[92] This case involved a collision between a car and a semi, and the expert was called to testify as to how long it would have taken the truck to stop.[93] The expert was asked in a hypothetical form, his opinion on how long it

79. *Id.* at 825.
80. *Id.* at 824.
81. *Id.*
82. *Id.* at 825.
83. 180 N.W.2d 437 (Iowa 1970).
84. *Id.* at 438.
85. *Id.*
86. *Id.* at 442.
87. *Id.* at 441-42.
88. 166 N.W.2d 844 (Iowa 1970).
89. *Id.* at 858.
90. *Id.* at 857.
91. 193 N.W.2d 492 (Iowa 1972).
92. *Id.* at 495.
93. *Id.*

would take to stop a 5-axle, 27,000 pound truck traveling at about 50 m.p.h. on level paved highway.[94] This was the only foundation laid for the opinion.[95] Evidence at the trial indicated that the truck was a 5-axle, 49-foot semi, weighing about 60,000 pounds and traveling from 48 to 52 m.p.h.[96] In rendering the opinion, the expert did not take into account the type of tractor-trailer, the surface of the road, or the slope of the highway.[97] The supreme court held that the trial court erred in admitting opinion testimony based upon these erroneous underlying facts.[98]

In *Holmquist v. Volkswagen of America, Inc.*,[99] an action was brought against the manufacturer and dealer of an auto for injuries sustained in an accident allegedly caused by a defective steering mechanism.[100] The supreme court upheld the trial court's decision in favor of the plaintiff.[101] The defendants appealed the exclusion of the testimony of an expert specializing in human factor engineering.[102] The supreme court held that the expert's opinion was rightly excluded.[103] There was simply an insufficient factual foundation for his testimony.[104] The trial court had set out the rationale for excluding the opinion.[105] The court emphasized that most of the physical facts included in the hypothetical offered the expert were estimates arrived at years afterward by people who were at the scene but made no effort to take exact measurements.[106]

C. *Fallacious Analysis or Unreliable Underpinnings*

When a party attempts to offer expert opinion that is outside of the traditional areas of expert testimony, many federal courts will apply the "Frye" test which dictates that the opinion be admitted if it is rendered pursuant to a process which has attained "general acceptance" in a given field of expertise.[107] Though the "Frye" doctrine is often criticized as outmoded and obsolete in the face of Rule 702,[108] many federal courts still refuse

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94. *Id.*
95. *Id.*
96. *Id.*
97. *Id.*
98. *Id.*
99. 261 N.W.2d 516 (Iowa App. 1977).
100. *Id.* at 519.
101. *Id.* at 526.
102. *Id.* at 520.
103. *Id.* at 524.
104. *Id.*
105. *Id.*
106. *Id.*
107. Frye v. United States, 293 F. 1013 (D.C. Cir. 1923) (rejecting admissibility of evidence from precursor of polygraph).
108. *See* State v. Hall, 297 N.W.2d 80, 84 (Iowa 1980), *cert. denied*, 450 U.S. 927 (1981).

to objure use of the test.[109]

Iowa has rejected the "Frye" test, and in doing so has indicated an especially liberal attitude with respect to the receipt of expert opinion testimony.[110] In *State v. Hall*,[111] a knife murder case, the court admitted the opinion of a blood-splatter analyst over the vigorous objection of the defendant.[112] The expert had spent over two years studying the splatter patterns made by blood as it flew various distances and at different momentums and his testimony tended to show that the pattern on the defendant's clothing was not the type made by carrying an already dead victim, but rather the type made by blood as it flew out of the body during a stabbing.[113]

The Iowa Supreme Court noted that the "Frye" test was subject to criticism and indicated it would serve better not as a test of admissibility, but rather as a gauge of reliability.[114] In refusing to require "general scientific acceptance" as an element of admissibility, the court made several observations:

> (1) The rule imposes a standard for admissibility not required in other areas of expert testimony;
> (2) The rule is inconsistent with the modern concepts of evidence such as those indicated by the Federal Rules of Evidence and specifically Rule 702;
> (3) It is difficult to distinguish "scientific" evidence from other areas of expert testimony;
> (4) "Acceptance in the scientific community" is a nebulous concept subject to conflict.[115]

The *Hall* court noted that general acceptance is but one of many indicia of the reliability of expert testimony.[116] The court applied a test that stressed prejudice as well as reliability.[117]

Though in *Hall* the court dismissed the assertion that "general scientific acceptance" of a process was necessary for admission, the court clearly continues to require reliability.[118] A reading of *Hall* makes it clear that the court made an independent inquiry into the foundation of the expert's opinion.

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109. *See* United States v. Tranowski, 659 F.2d 750 (7th Cir. 1981); United States v. Hendershot, 614 F.2d 648 (9th Cir. 1980); United States v. Brady, 595 F.2d 539 (6th Cir. 1979).
110. *See* State v. Hall, 297 N.W.2d 80, 83 (Iowa 1980), *cert. denied*, 450 U.S. 927 (1981).
111. 297 N.W.2d 80 (Iowa 1980), *cert. denied*, 450 U.S. 927 (1981).
112. *Id.* at 83.
113. *Id.*
114. *Id.* at 85.
115. *Id.* at 84-85.
116. *Id.* at 85.
117. *Id.* at 86.
118. *Id.* at 85.

VI. Admissibility Under the Iowa Rules of Evidence

The Iowa Rules of Evidence, like Iowa common law, require that an expert's opinion have a factual basis.[119] Unlike common law, the rules do not require a preliminary disclosure of the factual basis.[120] It is clear, however, from the words of Iowa Rule 705 and the accompanying advisory committee's comments that although the requirement of a preliminary disclosure is eliminated, the rules assume that a factual basis for the testimony exists. Facially, it appears inconsistent for the rules to require a factual foundation without requiring a preliminary disclosure of that foundation. This may have the effect of letting the jury hear testimony that might have been excluded for lack of foundation had a voir dire been conducted. This problem is solved by the Rule 104(a) requirement that the trial court make an initial determination of admissibility.[121]

The Iowa Rules of Evidence are also more liberal than Iowa common law with respect to the admissibility of opinions predominantly based upon matters that could not be introduced into evidence. Iowa Rule 703 requires that in order to be based upon inadmissible evidence, an expert opinion must be based upon the type of evidence "reasonably relied upon by experts in the particular field." The advisory committee comment to Iowa Rule 703 states that the rule is consistent with the Iowa holdings.[122] The advisory committee's note to Federal Rule 703, the forerunner of the Iowa rule, suggests that this question of reasonableness is a judicial standard:

> If it be feared that enlargement of permissible data may tend to break down the rules of exclusion unduly, notice should be taken that the rule requires that the facts or data "be of a type reasonably relied upon by experts in the particular field." The language would not warrant admitting in evidence the opinion of an "accidentologist" as to the point of impact in an automobile collision based on statements of bystanders, since this requirement is not satisfied.[123]

It is not entirely clear whether the judge or the expert is to be the one to decide the "reasonableness" of reliance upon underlying facts. Whether the test is one for the judge or the expert will undoubtedly make a difference as to whether certain evidence is admissible and may determine whether a case gets to the jury. Basically, the federal courts take two diver-

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119. *See* Iowa R. Evid. 703 advisory committee's comments.

120. The committee comment to Iowa Rule 703 notes the departure from Iowa common law and the fact that the hypothetical is no longer necessary. *Id.*

121. The advisory committee comment to Rule 703 states: "It is anticipated that counsel will make liberal use of 104(a) in determining whether the underlying factual basis meets the requirement of the rule." *Id.*

122. Iowa R. Evid. 703 advisory committee's comment (citing State v. Davis, 269 N.W.2d 434 (Iowa 1978) and State v. Galloway, 275 N.W.2d 736 (Iowa 1979)).

123. Fed. R. Evid. 703 advisory committee's note (citing Comment, Cal. L. Rev. Comm'n, Recommendation Proposing an Evidence Code 148-150 (1965)).

gent approaches in deciding reasonableness. Regardless of the approach, it is uniformly held that it is the judge's duty to make initial decisions with respect to the admissibility of the evidence.[124] The "liberal" approach involves the judge making the realization that he or she must determine reasonableness, but then deferring to the profession's standards of reasonableness within gross extremes.[125] A more restrictive approach involves the judge realizing that he or she must determine reasonableness and then determining whether it is reasonable to rely upon the particular facts providing the basis for the expert opinion testimony.[126]

Some legal scholars criticize the latter approach as being too restrictive. They look at the analysis as being one couched in terms of hearsay and thus argue that this reading of the rule renders 703 redundant.[127] This criticism is fallacious to the extent that it overlooks the specific language of the rule and the advisory committee note. The argument also neglects to take into account the basic premise upon which rules of evidence are based—that there should be guidelines as to what fact-finders should consider in determining an issue. Rules of evidence are themselves norms of reliability and as such should cause scrutiny of what other fields regard as reliable.

It is difficult to determine which camp the Iowa courts would fall into when applying new Iowa Rules 702 through 705. The Iowa Supreme Court hasn't ruled upon this question. The question may rarely arise upon appeal for several reasons. Instances in which the judge finds that it is unreasonable to rely on certain facts or data despite what the experts in the field say are bound to be infrequent. Second, a court may easily convolute the issue by determining that the questionable data is not considered reliable in a given field of expertise. Third, even though preserved on appeal, it may be labeled harmless error.

It appears that the Iowa courts may adopt the approach that calls for a judicial inquiry into the reasonableness of the reliance by an expert upon a given set of facts. In *State v. Hall*,[128] the Iowa Supreme Court conducted an extensive investigation into the reliability of a scientific process.[129] From a practical standpoint, the Iowa courts have as recently as *Hubby v. State*[130] made determinations of reliability with regard to hearsay evidence and thus would seemingly feel comfortable making inquiry into the reasonableness of matters relied upon.[131] Additionally, there is other precedent for making such determinations in the practice of the court in determining whether an

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124. Rule 104(a) provides that the court decide initial questions of admissibility.
125. *See* United States v. Sims, 514 F.2d 147 (9th Cir.), *cert. denied*, 433 U.S. 845 (1975).
126. *See* Zenith Radio Corp. v. Matsushita Elec. Indus. Co., 505 F. Supp. 1313 (E.D. Pa. 1980).
127. *See* 3 WEINSTEIN'S EVIDENCE ¶ 703[3].
128. State v. Hall, 297 N.W.2d 80 (Iowa 1980), *cert. denied*, 450 U.S. 927 (1981).
129. *See id.*
130. 331 N.W.2d 690 (Iowa 1983).
131. *Id.* at 696-97.

expert has strayed from his or her field of expertise.[132]

There are several matters that might cause a court to exclude an expert's opinion after scrutinizing its basis via Rule 703: (1) an opinion may be excluded because it was based upon unreasonable assumptions; (2) an opinion reaching plainly unsound conclusions will be excluded; (3) an opinion based upon patently unreliable underpinnings will be excluded; and (4) a purely speculative opinion will probably be rejected.[133]

A. *Unreasonable Assumptions and Inadequate Evidence*

There is federal precedent dictating that an expert's opinion should be excluded if it is found to be based upon inadequate evidence and is therefore nothing more than mere speculation.[134] The issue in *Merit Motors, Inc. v. Chrysler Corp.*,[135] arose on defendants' motion for summary judgment. The defendants argued that the plaintiff's expert's theories in this antitrust action were not substantiated by evidence and were strictly conjecture.[136] In a well-reasoned opinion authored by J. Skelley Wright, the court rejected the plaintiff's assertion that the proffered expert testimony created an issue of fact and held that a summary judgment was proper.[137] The court stated that it "is obvious that [plaintiff's expert] makes unsupported assumptions about the elasticities of demand in various markets and that he virtually ignores the impact of the dominant forces in the automobile market . . . ."[138] The opinion made it clear that the court was going to require more than mere unfounded speculation.

In *Drayton v. Jiffy Chemical Corp.*,[139] the Sixth Circuit held that the damage verdict of a bench trial was excessive where based upon faulty expert witness conclusions.[140] The circuit court found that the plaintiff's expert had testified to wholly unreasonable projections of future loss of earnings by the plaintiff chemical burn victim.[141] Although the plaintiff was a seven year old black female, the expert projected loss on the basis of a twenty-five year old white male college graduate.[142] Here the court merely looked to the facts, the expert's assumptions, and the conclusions reached and found the conclusions to be unreasonable.

Similar to *Drayton* is the case of *Scheel v. Conboy*,[143] where the court

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132. *See* Zenith Radio Corp. v. Matsushita Elec. Indus. Co., 505 F. Supp. at 1325.
133. *See infra* text accompanying notes 134-145.
134. *See* Merit Motors, Inc. v. Chrysler Corp., 569 F.2d 666 (D.C. Cir. 1977).
135. *Id.*
136. *Id.* at 672.
137. *Id.* at 673.
138. *Id.*
139. 591 F.2d 352 (6th Cir. 1978).
140. *Id.* at 362-63.
141. *Id.* at 363.
142. *Id.*
143. 551 F.2d 41 (4th Cir. 1977).

rejected an economist's damage calculations because they were unreasonable and speculative in nature.[144] The circuit court remanded for damage calculations.[145] The court noted that the economist for plaintiffs had estimated future wage loss on using unfounded assumptions.

These cases indicate that an opinion based on unreasonable assumptions should be excluded. If, for example, a judge could be convinced that an assumption upon which an opponent's expert's testimony was based was false, then any opinion based upon this faulty assumption would be excluded. Similarly, in *Tabatchnick v. G. D. Searle & Co.*,[146] the court refused to admit expert testimony because it was merely speculative and was based in part upon "facts" disproved by the record.

B. *Untrustworthy Underpinnings*

Some federal courts will look to the underlying data used by an expert to form an opinion, and finding it to be unreliable, will exclude the opinion.[147] In *Zenith v. Matsushita Electric Industrial Co.*,[148] an antitrust case, the plaintiffs sought to have experts testify as to the effects of the defendant's activities on the market.[149] The Federal District Court for New Jersey held the opinions to be inadmissible because the experts had in effect created their own assumptions by relying upon reports previously excluded from evidence.[150] The court found the underlying data to be untrustworthy. In a well-reasoned opinion, the court discussed the history of the case law in the area and delineated the following test to be used with regard to the admissibility of expert opinions. The court limited the applicability of this test to those cases determining the reasonableness of the expert's reliance outside the mainstream of 703 cases. The following criteria were delineated:

> (1) The extent to which the opinion is pervaded or dominated by reliance on materials judicially determined to be inadmissible, on grounds of either relevance or trustworthiness;
> (2) The extent to which the opinion is dominated or pervaded by reliance upon other trustworthy materials;
> (3) The extent to which the expert's assumptions have been shown to be unsupported, speculative, or demonstrably incorrect;
> (4) The extent to which the materials on which the expert relied are within his immediate sphere of expertise, are of a kind customarily relied upon by experts in his field in forming opinions or inferences on that

144. *See id.* at 43-44.
145. *Id.* at 44.
146. 67 F.R.D. 49 (D.N.J. 1975).
147. *See* Zenith Radio Corp. v. Matsushita Elec. Indus. Co., 505 F. Supp. 1313 (E.D. Pa. 1981).
148. *Id.*
149. *Id.*
150. *Id.* at 1313.

subject, and are not used only for litigation purposes;
(5) The extent to which the expert acknowledges the questionable reliability of the underlying information, thus indicating that he has taken that factor into consideration in forming his opinion;
(6) The extent to which reliance on certain materials, even if otherwise reasonable, may be unreasonable in the peculiar circumstances of the case.[151]

C. *Conjecture*

There is authority to the effect that testimony that appears to be merely speculative should be excluded.[152] In *Lanza v. Porretti*,[153] an action arising from a fire, the court excluded an expert's opinion because it did not feel the expert would be of any aid to the jury.[154] The court seemed to be saying that the opinion testimony was excluded because the expert could not testify to a single cause of the fire with any certainty.[155] The expert could only narrow the cause of the fire down to either of two causes, and the court decided this was not certain enough.[156]

An expert should be counseled that an opinion should be couched in terms of "probability" rather than "possibility." An expert opinion stated in terms of "possibilities" may be struck for failing to provide relevant assistance to the jury. An enlightened court will, however, look beyond the semantics of the opinion and admit expert testimony supported by a rational basis in fact. As one court has stated: "[o]ur function is not to reject opinion evidence because nonlawyer witnesses fail to use the words preferred by lawyers and Judges but to determine whether the whole record exhibits . . . substantial evidence."[157]

VII. Expert Opinion on the Ultimate Issue

Most trial lawyers can recount more than one case in which the testimony of an opposing expert was especially damaging because the expert opinion upon an issue ran to the very heart of the case. An opposing expert's opinion speaking to the "ultimate issue" of the case is presumably more

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151. *Id.* at 1330.

152. *See* Atlantic Mutual Ins. Co. v. Lavino Shipping Co., 441 F.2d 473, 474-75 (3d Cir. 1971); Lanza v. Poretti, 537 F. Supp. 777, 785 (E.D. Pa. 1982). *See also* Ward v. Kovacs, 55 A.D.2d 391, 390 N.Y.S.2d 931 (1977).

153. 537 F. Supp. 777 (E.D. Pa. 1982).

154. *Id.* at 785.

155. *Id.*

156. *Id.*

157. In re Ernest v. Boggs Lake Estates, 12 N.Y.2d 414, 416, 240 N.Y.S.2d 153, 155, 190 N.E.2d 528, 529 (1963). *See also* Ward v. Kovacs, 55 A.D.2d 391, 390 N.Y.2d 931 (1977) (noting that medical opinions stated as "possible" or "probable" are sustained where supported by rational basis in fact).

harmful when the subject of the testimony is of a highly technical or scientific nature.[158] This is because a jury in such a case would probably defer to one with a substantial degree of knowledge concerning an arcane or complex subject. Regardless of the complexity of the issue, however, there is an ever-present danger that a jury will give too much weight to an expert's opinion on questions that the jury is supposed to decide.[159] It is for this reason that counsel will oppose opinions that "invade the province of the jury."[160]

As anyone familiar with the Iowa or Federal Rules of Evidence is aware, there is no rule against proffering expert testimony on an "ultimate issue."[161] Iowa Rule 704 provides: "Testimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact."

Authorities were uniform in their criticism of the traditional rule prohibiting expert testimony on an open issue.[162] Courts were equally harsh with the rule.[163] The Iowa Supreme Court stated in regard to the rule:

> Jurors and witnesses have separate and distinct functions. It is the duty

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158. *See, e.g.*, Garrett v. Desa Industries, 705 F.2d 721, 724 (4th Cir. 1983); Strong v. E.I. Dupont DeNemours Co., 667 F.2d 682 (8th Cir. 1981). *See also*, Friendship Heights Associates v. Koubek, A.I.A., 785 F.2d 1154 (4th Cir. 1986); Owen v. Kerr-McGee Corp., 698 F.2d 236, 240 (5th Cir. 1983).

159. Rule 704, however, was adopted in part because the ultimate opinion rule was based upon the faulty assumption that experts could invade the province of the jury. Most authorities, when discussing the rule, point out that it was based partially on the recognition that experts cannot invade the province of the jury because juries are free to form their own conclusions. *See* 3 J. WEINSTEIN & M. BERGER, WEINSTEIN'S EVIDENCE ¶ 704[01] (1982). One writer, in discussing the ultimate issue rule, stated:

> It is a curious turn of mind that impels a judge to mistrust the ability of the juror to assay the opinion of an expert and simultaneously gives that same juror undeserved credit with respect to comprehension of an abstract, complex instruction. The reason behind the rule assumes that the jury will accept all opinions uttered at face value, overlooking the fact that the jurors have free rein under most circumstances to discount testimony presented for their consumption. In addition, it appears to discount the value of cross-examination, implying that expert opinion is beyond the pale of contradiction.

Slough, *Testamentary Capacity: Evidentiary Aspects*, 36 TEX. L. REV. 1, 11-12 (1957).

160. Although Rule 704 recognizes that jurors are free to reject expert testimony, there remains the implicit understanding that expert testimony can be very damaging if not regulated to some extent. *See* Owen v. Kerr-McGee Corp., 698 F.2d 236, 240 (5th Cir. 1983). *See also generally*, Ladd, *Expert Testimony*, 5 VAND. L. REV. 414 (1952); Norvell, *Invasion of the Province of the Jury*, 31 TEX. L. REV. 731 (1953); Pratt, *A Judicial Perspective on Opinion Evidence Under the Federal Rules*, 29 WASH. & LEE L. REV. 313 (1982); Slough, *Testimentary Capacity: Evidentiary Aspects*, 36 TEX. L. REV. 1 (1957); Stoebuck, *Opinions on Ultimate Facts: Status, Trends, and a Note of Caution*, 41 DENVER L. C. J. 226 (1964).

161. *See* IOWA R. EVID. 704; FED. R. EVID. 704.

162. *See* 3 J. WEINSTEIN & M. BERGER, WEINSTEIN'S EVIDENCE ¶ 704 [01] (1982); 7 WIGMORE, EVIDENCE § 1920 (3d ed. 1940).

163. *See* Stoebuck, *Opinions on Ultimate Facts: Status, Trends, and a Note of Caution*, 41 DENVER L. C. J. 226, 236 (1964).

> of the jury to decide issues of fact. A witness could not usurp that function or invade the province of the jury, by his opinion, if he wished. It may accept it wholly, or in part, or reject it in toto. If the opinion meets with its approval it should accept it. The purpose of court trials is to ascertain the truth and rightness of the matters in issue, and the purpose of expert-opinion testimony is to instruct and aid the jury in ascertaining that truth, whether it be the ultimate fact or some minor evidential fact.[164]

In fact, even prior to the adoption of the modern rules of evidence, the ultimate issue rule was honored mostly in the exception.[165]

Rule 704 was adopted to dispel the confusion surrounding the "ultimate issue" rule and its numerous exceptions.[166] Although the adoption of the rule did much to simplify this area of the law, there are questions that remain.[167] One point of contention is the form that an opinion might take.[168] Additionally, courts are in disagreement as to the method by which an opinion that purportedly speaks to an ultimate issue should be evaluated.[169]

Although the adoption of Rule 704 abolished the ultimate issue rule, it did not open the floodgates to all expert opinions.[170] Thus, most courts will exclude testimony if an expert gives an opinion in the form of a legal conclusion or attempts to tell the jury how it should decide a case.[171]

Clearly, it is improper for an expert witness to state that a party was "negligent",[172] or that a product was "unreasonably dangerous."[173] These are

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164. Grismore v. Consolidated Products Co., 232 Iowa 328, 345, 5 N.W.2d 646, 656 (1942).

165. Harried v. United States, 389 F.2d 281, 285 n.3 (D.C. Cir. 1967).

166. *See* FED. R. EVID. 704 advisory committee's note.

167. *See* United States v. Bednar, 728 F.2d 1043, 1048 (8th Cir. 1984), *cert. denied*, 469 U.S. 827 (1984); Owen v. Kerr-McGee Corp., 698 F.2d 236 (5th Cir. 1983).

168. *See* Owen v. Kerr-McGee Corp., 698 F.2d at 236 (stating that "Rule 704 . . . does not open the door to all opinions. The Advisory Committee notes make it clear that questions which would merely allow the witness to tell the jury what result to reach are not permitted. Nor is the rule intended to allow a witness to give *legal* conclusions.").

169. *See* 3 J. WEINSTEIN & M. BERGER, WEINSTEIN'S EVIDENCE ¶ 704 [2] (1982).

170. *See* Zimmer v. Miller Trucking Co., 743 F.2d 601, 604 (8th Cir. 1984); Strong v. E.I. DuPont DeNemours Co., 667 F.2d 682, 687 (8th Cir. 1981). *See also* Owen v. Kerr-McGee Corp., 698 F.2d 236 (5th Cir. 1983).

171. *See* Mathews v. Ashland Chemical, Inc., 770 F.2d 1303, 1311 (5th Cir. 1985); Owen v. Kerr-McGee Corp., 698 F.2d 236, 240 (5th Cir. 1983); Wade v. Haynes, 663 F.2d 778, 784 (8th Cir. 1981), *aff'd*, 461 U.S. 30 (1983). *See also* Zimmer v. Miller Trucking Co., 743 F.2d 601 (8th Cir. 1984).

172. *See* Aller v. Rodgers Machinery Mfg. Co., 268 N.W.2d 830 (Iowa 1978).

173. *See* Strong v. E.I. DuPont DeNemours Co., 667 F.2d 682 (8th Cir. 1981). In *Strong*, the plaintiff, a widow, sued the defendant pipe manufacturer on the basis of negligence, strict liability, expressed warranty, and implied warranty in connection with a natural gas explosion that killed her husband. *Id.* at 683. The plaintiff's decedent, a construction supervisor for a natural gas company, was investigating a report of a gas odor when the explosion occurred. *Id.* at 683. The explosion was linked to shrinkage in plastic pipe manufactured by the defendant. *Id.* at 684. The plaintiff proffered testimony of an engineer experienced in fire investigation. *Id.* at 685. The defendant objected to a number of questions that the plaintiffs posed to the engi-

legal standards or terms of art that should be left for the jury to decide with the guidance of the court.[174] The difficulty arises in dealing with a situation in which the testimony does not involve pure legal conclusions, but rather, mixed questions of law and fact.[175] To better understand which questions and opinions are permissible, it is helpful to examine the rationale by which some opinions are excluded.[176]

Rule 704 provides that opinions that are "otherwise admissible" are not objectionable merely because they speak to the ultimate issue of a case.[177] The better-reasoned opinions recognize that Rule 704 should be read in light of all of Article VII of the rules.[178] Thus, an opinion couched in the terms of a legal conclusion is not inadmissible because of any prohibition contained in Rule 704, but rather because it is not "otherwise admissible" under Article VII.[179] Rule 702 provides that expert testimony is admissible if it will be helpful to the jury.[180] Thus, an opinion couched in the form of a legal conclusion is inadmissible because it will not be of any assistance to

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neer and the court sustained the objections. *Id.* In offers of proof, the plaintiff's expert testified that in his opinion various communications from the defendant to the power company-pipe owner did not provide adequate warnings and instructions concerning the plastic pipe. *Id.* In particular, the expert stated that the lack of adequate warnings and instructions constituted defects which made the products "unreasonably dangerous." *Id.*

The appellate court upheld the trial court's exclusion of the expert's testimony. *Id.* at 686. The trial court, in ruling upon the admissibility of the testimony, cited to Rule 704 and the advisory committee's notes to that rule. *Id.* The Eighth Circuit stated that testimony of the expert concerning the adequacy of warnings and whether they rendered products unreasonably dangerous is not the kind of issue upon which expert assistance is essential for the trier of fact. *See id.* at 686. It is clear that the question of negligence in the situation at hand, like the issue of unreasonable dangerousness in *Strong*, is a matter upon which the jury must render a decision with the assistance of the court. *Id.* at 688.

Similarly, in *Wade v. Haynes*, the Eighth Circuit reaffirmed the impropriety of expert testimony given in the form of pure legal conclusions. Wade v. Haynes, 663 F.2d 778, 784 (8th Cir. 1981), *aff'd*, 461 U.S. 30 (1983). *Wade* involved an action by a prisoner against correctional officers for having been placed in a cell where he was sexually assaulted. *Id.* at 780. Although the court of appeals, in viewing the testimony as a whole, held that the trial court had not abused its discretion in allowing the expert's opinion, it conceded that the issue was a close one and stated: "In the sense that the question attempted to have the witness testify that defendant's conduct violated a constitutional norm, the form of the question was improper in seeking a pure legal conclusion." *Id.* at 784.

174. *See* United States v. Zipkin, 729 F.2d 384, 386 (6th Cir. 1984). Courts will sometimes exclude testimony because they fear the jurors will look to the expert, rather than to the judge, for guidance on the applicable law. *Id.*

175. *See* Owen v. Kerr-McGee Corp., 698 F.2d 236 (5th Cir. 1983).

176. *See infra* text accompanying notes 177-183.

177. IOWA R. EVID. 704.

178. *See* United States v. Ness, 665 F.2d 248, 250 (8th Cir. 1981).

179. *See* Zimmer v. Miller Trucking Co., 743 F.2d at 604. *See also* Lang v. Texas & P. Ry., 624 F.2d 1275 (5th Cir. 1980); Bauman v. Centex Corp., 611 F.2d 1115 (5th Cir. 1980).

180. *See* United States v. Baskes, 649 F.2d 471, 479 (7th Cir. 1980), *cert. denied*, 450 U.S. 1000 (1981).

the jury.[181] A court should look to Rule 702 and Rule 403 when determining whether proper testimony is admissible. Rule 403 dictates that testimony should be excluded where its probative value is substantially outweighed by the risk of undue prejudice, confusion or waste of time.[182]

When seeking guidance concerning the admissibility of expert opinion, the lawyer should look first to the rule and committee comments. The advisory committee comment to Federal Rule 704 is also helpful.[183]

VIII. Proffering and Objecting to Expert Testimony

The Iowa Rules of Evidence place emphasis upon the use of Rule 104(a) to challenge the qualifications of an expert as well as the underpinnings and factual hypothesis of the testimony.[184] The importance of the proper use of Rule 104(a) is highlighted by the numerous decisions stating that most questions of admissibility must be made on an ad hoc basis by a trial court which is accorded broad discretion upon appeal.[185]

The procedure utilized under Rule 104(a) is akin to the motion in limine in that both are vehicles by which the admissibility of evidence may be ruled upon before or when evidence is proffered.[186] Rule 104(a) is broader than the motion in limine in that the former can be used to obtain an advance ruling on the admission as well as the exclusion of expert testimony.[187]

A large portion of modern litigation depends upon the use of expert testimony. Qualification of an expert should be only a minor concern when more pressing issues need to be addressed at trial. The development of a qualification outline or method will make the task much easier.

An expert should be qualified in a manner that enhances his or her credibility in the eyes of the jury. A boring and routine qualification will not help a cause with the jury whereas an effective qualification will help persuade the jury to accept an expert's opinion. An extremely effective technique involves climaxing the qualification by requesting that the judge declare the witness an expert. This will clothe the expert with the judge's authority in the eyes of the jury. An unexpected response to a request to

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181. *Id.*

182. *See* Zimmer v. Miller Trucking Co., 743 F.2d at 604.

183. *See also* Annotation, *Proper Form of Question to Witness or of Testimony of Witness, as Regards Mental Condition of Person Whose Capacity to Execute a Will is in Issue*, 155 A.L.R. 281 (1945); Annotation, *Right of Expert Witness to Testify as to 'Total Disability' or Other Physical Condition Contemplated by Specific Provision of Insurance Policy*, 111 A.L.R. 603 (1937); Annotation, *Testimony of Expert Witness as to Ultimate Fact*, 78 A.L.R. 755 (1932).

184. *See* Iowa R. Evid. 703 advisory committee's comment.

185. *See, e.g.*, State v. Taylor, 336 N.W.2d 721, 726 (Iowa 1983); State v. Hall, 297 N.W.2d at 85; Bandstra v. International Harvester Co., 367 N.W.2d 282, 288 (Iowa App. 1985) (quoting State *ex rel.* Leas in re O'Neal, 303 N.W.2d 414, 420 (Iowa 1981)).

186. *See* Iowa R. Evid. 104(a) advisory committee's comment.

187. *Id.*

declare a witness an expert can be avoided through the use of Rule 104(a).

On occasion, an opponent will offer to stipulate to the expertise of a witness. Although the judge may limit time for establishing a witness' credibility, the proponent of expert testimony has an absolute right to put the expert's credentials before the jury.[188]

The adoption of the Iowa Rules of Evidence has abrogated the traditional requirement that an expert's opinion be disclosed through the use of a hypothetical question.[189] Thus, it is now sufficient to qualify an expert and merely ask his or her opinion on a matter. Some lawyers will undoubtedly continue to use the hypothetical question because it is still permissible. Used by a skilled lawyer, the hypothetical question can operate in a manner similar to a final summation.

Objections to the admission of expert testimony should be as precise as is possible. An objection to an opinion as based upon "speculation, conjecture and misinformation" or as being "without a proper foundation" is clearly inadequate.[190] An objection must state the particular respects in which an opinion is lacking.[191] The best way to object to testimony would be to point to a specific flaw in the proffered expert evidence and support the objection with concrete evidence of the infirmity.

IX. Conclusion

The adoption of the new Iowa Rules of Evidence has worked substantial changes in the way expert testimony is offered and opposed in the state courts. With the increased use of expert testimony, a practicing trial lawyer would be remiss not to be intimately familiar with the workings of the rules concerned with the admission of expert opinion testimony. Hopefully, the foregoing discussion will aid the practitioner in proffering and opposing expert testimony under the new Iowa rules.

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188. *See* Murphy v. National R.R. Passenger Corp., 547 F.2d 816 (4th Cir. 1977).
189. *See* Iowa R. Evid. 705.
190. *See* Carter v. Wiese Corp., 360 N.W.2d 122, 132 (Iowa App. 1984).
191. *See* Iowa R. Evid. 103(a)(1).