# IOWA RULE OF EVIDENCE 703: ITS USES AND LIMITS AS AN EXCEPTION TO THE HEARSAY RULE

## INTRODUCTION

### A. *Iowa Rule of Evidence 703*

In 1983, Iowa adopted Evidence Rule 703 that in part defines the permissible basis of opinion testimony by expert witnesses.[1] Iowa Rule 703 is identical to the Federal Rule 703, and states:

> The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to him at or before the trial or 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.[2]

The Committee Comment to Iowa Rule 703 indicates that the rule departs from the common law in that "[t]he underlying factual basis for the [expert] opinion need not be . . . admissible independently of the opinion, if it is of such a nature and type reasonably relied upon by experts in the particular field."[3] The adoption of Rule 703 requires the Iowa courts to confront the same gamut of issues that have been raised in the federal and state courts that have adopted the same rule.

Some of the issues raised by Rule 703 and addressed by this Note are: (1) In what respects does Rule 703 represent a departure from the common law governing the basis of expert opinion? (2) Is Rule 703 a new hearsay exception? (3) To what extent and by what means can Rule 703 be used to introduce otherwise impermissible hearsay? (4) What problems are presented by the use of Rule 703 as a hearsay exception? (5) What are the limits on Rule 703's use in introducing hearsay evidence? and (6) What limits should be placed on Rule 703?

### B. *Federal Case Law, Based on Federal Rule 703, As a Guide to the Future Course of Iowa Rule 703*

Case law based on Iowa Rule 703 is still in its infancy. At the writing of this Note, *State v. Henze*[4] represents the lone and very brief confrontation

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1. IOWA R. EVID. 703.
2. *Id.*
3. IOWA R. EVID. advisory committee note.
4. 356 N.W.2d 538 (Iowa 1984).

with the rule since its adoption in 1983.[5] By contrast, Federal Rule 703, adopted in 1975, has an abundance of judicial progeny. It appears that this vast body of federal case law on Rule 703 offers the most reliable guide to the Iowa practitioner in attempting to perceive the uses and parameters of Iowa Rule 703 for several reasons. First, the committee comment preceding the new Iowa Rules of Evidence, based on the Federal Rules, states that the committee avoided even minor wording changes in the Federal Rules "in order to accomplish uniformity and maximize the use in Iowa courts of the body of federal and state case law that has developed since the Federal Rules of Evidence were adopted in 1975."[6] Second, the Iowa Supreme Court has held that "federal case law interpreting similar federal statutes constitutes persuasive authority."[7] Third, Iowa Rule 703 is identical to Federal Rule 703.[8] Fourth, the federal cases addressing Rule 703 are, on the whole, reasonably consistent.[9] Fifth, the young evolution of Iowa case law has followed a similar path as that taken by the federal courts.[10]

## II. The Common Law Rules Governing the Basis of Expert Opinion Testimony

### A. *The Common Law*

Prior to the adoption of Rule 703, an expert opinion was inadmissible if it was based upon out of court information obtained from third persons.[11] The common law restricted the bases for expert testimony to the existence of facts the expert had personal knowledge of,[12] responses to hypothetical questions that assumed facts reasonably supported by the evidence,[13] and testimony previously elicited at trial.[14] Iowa followed the common law rule

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5. *Id.*

6. Iowa R. Evid. Committee Comment (1983). The comment also notes that "[a]doption of the rules of evidence will provide ready access to applicable principles of substantive evidence law and will also effect uniformity in trial practice and procedure between the Federal courts and the Iowa state court system." *Id.*

7. Mount Pleasant Community School Dist. v. Public Employment Relations Bd., 343 N.W.2d 472, 480 (Iowa 1984).

8. *Compare* Iowa R. Evid. 703 *with* Fed. R. Evid. 703.

9. *Accord Emerging Problems Under the Federal Rules of Evidence*, 1983 A.B.A. Sec. Litig. 208.

10. *See infra* notes 23-43 and accompanying text.

11. United States v. Sims, 514 F.2d 147, 149 (9th Cir.), *cert. denied*, 423 U.S. 845 (1975); C. McCormick, McCormick on Evidence, § 15 at 38 (3d ed. 1984). [hereinafter McCormick].

12. Zenith Radio Corp. v. Matsushita Elec. Indus. Co., 505 F. Supp. 1313, 1322 (E.D. Pa. 1981); Fed. R. Evid. 703 advisory committee note; Blakey, *An Introduction to the Oklahoma Evidence Code: The Thirty-Fourth Hearsay Exception*, 16 Tulsa L.J. 1, 5 (1980) [hereinafter Blakey].

13. Zenith Radio Corp. v. Matsushita Elec. Indus. Co., 505 F. Supp. at 1322.

14. *Id.*

that expert testimony based on hearsay should be excluded.[15]

The reason behind the common law rule was to prevent the jury from receiving hearsay evidence in the guise of expert opinion.[16] The common law assumed that the problems of unreliability associated with hearsay evidence could not be cured by filtering the evidence through an expert.[17]

### B. *The Erosion of the Common Law*

Even under the common law, prior to the enactment of Federal Rule 703, an exception emerged that allowed medical doctors to rely on various reports and third person observations, including those of the patient, in formulating their opinions.[18] This exception recognized that doctors must rely on lab reports prepared by others, charts prepared by other members of the hospital staff and the observations of colleagues to diagnose and treat a patient.[19]

Iowa's common law rule went through a similar phase of erosion prior to the adoption of Iowa Rule 703. In the rape trial of Gary Lee Davis, the Iowa Supreme Court held that a doctor's testimony, based in part on lab tests not conducted by him, was permissible.[20] The court in *Davis* justified this admission of expert testimony, based in part on hearsay evidence, by quoting from a Federal District Court case, *Birdsell v. United States*,[21] wherein it was said that "the physician making a diagnosis must necessarily rely on many observations and tests performed by others and recorded by them; records sufficient for diagnosis in the hospital ought [to] be enough for opinion testimony in the courtroom."[22]

## III. Rule 703, An Exception to the Hearsay Rule

### A. *The Federal Model*

Hearsay is not admissible into evidence in federal court unless an exception is provided for in the Rules of Evidence or by other rules promulgated by the Supreme Court or Congress.[23] Most of the exceptions to the

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15. In *State v. Beckwith*, the Iowa Supreme Court stated that "the general rule [would be] that the opinion of a medical expert based upon information obtained from third persons out of court is inadmissible." State v. Beckwith, 243 Iowa 841, 848, 53 N.W.2d 867, 871 (1952).

16. McElhaney, *Expert Witnesses and the Federal Rules of Evidence*, 28 Mercer L. Rev. 463, 481 (1977). [hereinafter McElhaney].

17. *Id.*

18. J. Weinstein & M. Berger, Weinstein's Evidence ¶ 703[2], at 703-10 (1985). [hereinafter Weinstein & Berger].

19. *Id.* at 703-11.

20. State v. Davis, 269 N.W.2d 434, 441 (Iowa 1978).

21. 346 F.2d 775, 779-80 (5th Cir.), *cert. denied*, 382 U.S. 963 (1965).

22. State v. Davis, 269 N.W.2d at 440.

23. "Hearsay is not admissible except as provided by these rules or by other rules prescribed by the Supreme Court pursuant to statutory authority or by Act of Congress." Fed. R.

hearsay rule are justified as containing such "circumstantial guarantees of trustworthiness" as to warrant nonproduction of the declarant for cross examination.[24] Most of the specific hearsay exceptions are set out in Rules 803 and 804 of the Federal Rules of Evidence,[25] but the Advisory Committee's note to Rule 802 lists several additional exceptions to the rule by operation of certain Federal Rules of Civil Procedure.[26]

Under Rule 703, "[t]he facts or data in a particular case upon which an expert bases an opinion or inference . . . need not be admissible in evidence" if of a type reasonably relied on by experts in the field.[27] Since the facts or data relied on by an expert need not be admissible in evidence, the question is whether Rule 703 operates as a backdoor hearsay exception by allowing an expert to recite the statements of an out-of-court declarant as a source upon which the expert has based his opinion.

A vast majority of the federal courts follow the rule stated in *United States v. McCollum*[28] that "an expert witness may be permitted to state an opinion based on otherwise inadmissible hearsay when the source of the information is 'of a type reasonably relied upon by similar experts.' "[29] For example, in *McCollum* the defendant's expert, a forensic hypnotist, was allowed to recite statements made by the defendant to him even though the defendant himself did not testify.[30] *McCollum* demonstrates a clear example of how Rule 703 operates to introduce otherwise inadmissible hearsay through an expert witness. Commentators are in general agreement that the effect of Rule 703 is to create a major hearsay exception.[31]

Simple acceptance of Rule 703 as a blanket exception to the hearsay rule is muddied by a qualification used by most courts that hearsay admitted pursuant to Rule 703 is allowed for the limited purpose of explaining the basis of the expert's opinion and not to prove the truth of the underlying matter.[32] The rationale for admitting hearsay solely to illustrate and explain

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EVID. 802.

24. FED. R. EVID. 803 advisory committee note.

25. FED. R. EVID. 803, 804.

26. FED. R. EVID. 802 advisory committee note.

27. FED. R. EVID. 703.

28. 732 F.2d 1419 (9th Cir.), *cert. denied*, 469 U.S. 920 (1984).

29. *Id.* at 1422 (quoting *United States v. Sims*, 514 F.2d 147, 149 (9th Cir.), *cert. denied*, 423 U.S. 845 (1975). *See, e.g.* Soden v. Freightliner Corp., 714 F.2d 498, 502 (5th Cir. 1983) ("Under Rule 703 an expert can discuss as the basis for an opinion facts or data which are otherwise inadmissible hearsay"); Baumholser v. Amax Coal Co., 630 F.2d 550, 553 (7th Cir. 1980).

30. United States v. McCollum, 732 F.2d at 1423.

31. McElhaney, *supra* note 16, at 481; MCCORMICK, *supra* note 11, § 324.2 at 910; Blakey, *supra* note 12, at 4.

32. Paddack v. Dave Christensen Inc., 745 F.2d 1254, 1262 (9th Cir. 1984); United States v. McCollum, 732 F.2d at 1422; United States v. Ramos, 725 F.2d 1322, 1324 (11th Cir. 1984); Fox v. Taylor Diving & Salvage Co., 694 F.2d 1349, 1356 (5th Cir. 1983); United States v. Sims, 514 F.2d at 149-50.

the expert's opinion, and not to prove the truth of the matter asserted, is paradoxical, as hearsay is defined as "a statement . . . offered in evidence to prove the truth of the matter asserted."[33] If an out of court declaration is offered for some other purpose than to prove the truth of the matter asserted, the declaration is not hearsay by definition and is admitted into evidence without the need of a special exception.[34]

Many commentators disagree with these courts, and argue that otherwise inadmissible facts, upon which an expert's opinion is based, should be admitted as substantive evidence.[35] The first reason advanced for admitting out of court declarations, relied on by experts, as substantive evidence is that experts are assumed to have the skill necessary to evaluate and sift through the hearsay with discriminatory rigor, which therefore gives the hearsay they rely upon the circumstantial guarantees of truthworthiness required of hearsay exceptions.[36] Experts are further limited to basing their opinions only on the type of otherwise inadmissible data that is "reasonably relied upon by experts in the particular field."[37]

Professor Walker Blakey advances two additional reasons to admit hearsay relied on by experts as substantive evidence.[38] He first notes that the rules, as a general policy, reject limited use hearsay objections.[39] He goes on to observe that the evidence should be treated as substantive because "the purpose for which it is admitted is clearly substantive."[40]

Finally, as previously noted, it is self-contradictory to admit hearsay evidence that is by definition "offered to prove the truth of the matter asserted"[41] for the "limited purpose of explaining the expert's opinion and not as truth of the underlying matter."[42] As a practical matter, since the courts agree that under Rule 703 an expert is allowed to disclose what is admittedly hearsay evidence to the jury for whatever purpose, it can only be concluded that Rule 703 indeed acts as an exception to the hearsay rule.[43]

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33. " 'Hearsay' is a statement, other than one made by the declarant while testifying at the trial or hearing, offered to prove the truth of the matter asserted." FED. R. EVID. 801(c).

34. MCCORMICK, *supra* note 11, § 249 at 732; WEINSTEIN & BERGER, *supra* note 18, ¶ 801(c)[01] at 801-67.

35. Blakey, *supra* note 12, at 35; MCCORMICK, *supra* note 11, § 324.2 at 911.

36. *In re* Agent Orange Product Liability Litigation, 611 F. Supp. 1223, 1245 (E.D.N.Y.), *petition for mandamus denied sub nom. In re* Diamond Shamrock Chemicals Co., 725 F.2d 858 (2d Cir.), *cert. denied*, 465 U.S. 1067 (1985); MCCORMICK, *supra* note 11, § 324.2 at 911.

37. FED. R. EVID. 703.

38. Blakey, *supra* note 12, at 35-37.

39. *Id.* at 35.

40. *Id.* at 37.

41. FED. R. EVID. 801(c).

42. Fox v. Taylor Diving & Salvage, 694 F.2d at 1356.

43. *See supra* notes 28-31 and accompanying text.

### B. *Iowa's Use of Rule 703*

The Iowa Supreme Court in *State v. Henze*,[44] took a significant first step in following the lead of the federal courts in using Rule 703 to carve out a hearsay exception.[45] In *Henze* the defendant was arrested for driving while intoxicated.[46] Dr. Michael Berstler, the defendant's expert, attempted to testify that Henze's behavior could be explained by his "history of anxiety neurosis, depression and valium use."[47] The doctor's opinion was based on Henze's past medical records, which were not in evidence.[48] The trial court ruled that the records were hearsay and that Dr. Berstler could not express an opinion on facts that were not allowed into evidence.[49] The Iowa Supreme Court disagreed, and stated, "[w]e believe that Rule 703 would allow an expert's opinion to be based on hearsay if the provisions of the rule are satisfied."[50] The Iowa Supreme Court did not fall into the trap of trying to limit the hearsay introduced to the single function of explaining the expert's opinion and not as substantive evidence. In a special concurring opinion prior to the adoption of Iowa Rule 703, Chief Justice Reynoldson argued in *State v. Galloway*[51] that the hearsay itself should not be admissible for other than explanatory reasons and further noted that the court was creating a new hearsay exception by allowing a psychologist to recite an experiment performed by another colleague.[52]

## IV. The Broadening Scope of Rule 703's Use as a Hearsay Exception

### A. *Expanded Types of Hearsay Admissible Under Rule 703*

Even at common law, the courts generally allowed testifying physicians to rely on statements from patients, laboratory tests and medical treatises if the data relied on was inherently trustworthy and necessary in forming the doctor's opinion.[53] In this respect, Rule 703 codifies an already existing practice.[54] The expanded use of Rule 703 as a hearsay exception can be illustrated from a selection of cases demonstrating just how far the rule goes in the types of hearsay that have been admitted and the methods used to admit them.

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44. 356 N.W.2d 538 (Iowa 1984).
45. *Id.*
46. *Id.* at 539.
47. *Id.*
48. *Id.*
49. *Id.*
50. *Id.*
51. 275 N.W.2d 736 (Iowa 1979).
52. *Id.* at 740.
53. Note, *Hearsay Bases of Psychiatric Opinion Testimony: A Critique of Federal Rule of Evidence 703*, 51 S. Cal. L. Rev. 129, 139-40 (1977) [hereinafter *Hearsay Bases*]; State v. Davis, 269 N.W.2d at 441.
54. *Hearsay Bases*, *supra* note 53, at 140.

The Advisory Committee's note to Rule 703 points out that the rule offers a "basis for ruling upon the admissibility of public opinion poll evidence."[55] In *Baumholser v. Amax Coal Co.*,[56] the plaintiffs, William and Eileen Baumholser, brought an action against the defendants, Amax Coal Company for damage to the plaintiffs' home that they alleged was caused by blasting at the defendant's mine.[57] The plaintiffs' expert, a geologist, conducted a survey of 169 residents within a six mile radius of the Baumholser home.[58] The survey was accomplished by questionnaires completed by student interviewers.[59] Amax complained on appeal that the survey was hearsay and should not have been admitted into evidence.[60] The Seventh Circuit Court of Appeals held that the survey was hearsay; however, an expert was "entitled to rely on hearsay evidence to support his opinion so long as the evidence was of a type reasonably relied upon by other experts in the field."[61] Allowance of this type of double hearsay represents a radical departure from the conservative allowances made under common law.[62]

In *Baumholser*, the court allowed a study to be admitted into evidence that consisted of statements from 169 residents to students from which the expert composed a damage report plotted on a local map.[63] It is hard to conceive of a way to get more hearsay admitted into a trial or hearing than to have an expert admit an opinion poll or survey as the basis for his opinion.

### B. *Expanded Definition of Experts Allowed to Rely on Hearsay Under Rule 703*

The introduction of hearsay evidence under Rule 703 is complicated by Rule 702, which broadens the definition of who is an expert.[64] The advisory committee's note to Rule 702 indicates how expansive the term "expert" is under the federal rules. "Thus within the scope of the rule are not only experts in the strictest sense of the word, e.g., physicians, physicists, and architects, but also the large group sometimes called 'skilled' witnesses, such as bankers or landowners testifying to land values."[65] Therefore, under Rule 702, almost anyone with a "skill" can qualify as an expert and a potential

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55. FED. R. EVID. 703 advisory committee note.
56. 630 F.2d 550 (7th Cir. 1980).
57. *Id.* at 551.
58. *Id.* at 552.
59. *Id.*
60. *Id.*
61. *Id.* at 553.
62. *See supra* text accompanying note 18.
63. Baumholser v. Amax Coal Co., 630 F.2d at 552.
64. Rule 702 states in part: "[A] witness qualified as an expert by knowledge, skill, experience, training or education, may testify thereto in the form of an opinion or otherwise." FED. R. EVID. 702.
65. FED. R. EVID. 702 advisory committee note.

viaduct for introducing hearsay into evidence.[66]

*United States v. Ramos*[67] illustrates the potential reach and problems presented by the skilled-witness-expert. In almost any criminal trial, the law enforcement officials involved will qualify as skilled-witness-experts. In *Ramos*, the defendant was convicted of making false statements with intent to secure a passport.[68] The Miami Fraud Examiner's opinion regarding the fraudulent nature of the defendant's birth certificate was based on hearsay information received from the New York Bureau of Vital Statistics and the New York Bureau of Health.[69] The Eleventh Circuit held that the hearsay information was properly admissible to show the basis of the Fraud Examiner's opinion as an expert witness under Rule 703.[70]

The questions not answered by *Ramos* are: (1) the extent of law enforcement personnel expertise; and (2) the kind of hearsay reasonably relied on by law enforcement agents as experts. An argument can be made that a law enforcement officer, in his capacity as such, relies on practically every comment made by anyone that relates to a particular investigation in formulating his expert opinion. There is no indication that the courts are willing to go so far as to allow a law enforcement officer to testify as to every out of court statement that may be relevant to an issue in controversy. In addition, it is reasonable to assume that the courts will not go that far for constitutional reasons.[71] The sixth amendment right to confrontation of witnesses[72] will slow any movement toward reckless wholesale admissions of hearsay through a law enforcement official, but it is still not clear where the line will be drawn as to how much and what type of hearsay may gain admission by the operation of Rule 703 via law enforcement officials.[73]

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66. *Id.*

67. 725 F.2d 1322 (11th Cir. 1984).

68. *Id.* at 1323.

69. *Id.* at 1324.

70. *Id.*

71. *See infra* notes 137-41 and accompanying text.

72. The sixth amendment states in part that: "In all criminal prosecutions, the accused shall enjoy the right to . . . be confronted with the witness against him . . . . " U.S. CONST. amend. VI.

73. Federal Rule 803(8) provides a hearsay exception for public records and reports, but specifically excludes admission of law enforcement reports in criminal cases, except as used against the government. FED. R. EVID. 803(8). The Rule states that:

> Records, reports, statements, or data compilations, in any form, of public offices or agencies, setting forth (A) the activities of the office or agency, or (B) matters observed pursuant to duty imposed by law as to which matters there was a duty to report, excluding, however, in criminal cases matters observed by police officers and other law enforcement personnel, or (C) in civil actions and proceedings and against the Government in criminal cases, factual findings resulting from an investigation made pursuant to authority granted by law, unless the sources of information or other circumstances indicate lack of truthworthiness.

*Id.*

The Advisory Committee observes that such records are not admissible in criminal cases, ex-

Some courts have rejected the use of Rule 703 as a vehicle to introduce hearsay through law enforcement personnel. In a civil case, *Dallas & Mavis Forwarding Co. v. Stegall*,[74] the driver-owner of a large truck attempted to pass a slower moving car, traveling in the same direction, by moving into the left lane.[75] The truck driver alleged that the car edged from the right lane into the left, causing a collision that wrecked the truck.[76] The truck driver brought an action against the car owner-defendant for damages.[77] The Sixth Circuit held that the opinion of a state trooper about the exact location of the accident, which was based on interviews with the parties and witnesses, was inadmissible.[78] The court further held that Rule 703 was not meant to admit the hearsay testimony of a biased witness through a law enforcement official, which would have the effect of giving the hearsay unwarranted credibility.[79]

The advisory committee's comment to Rule 703 seems to imply that there are also limits under the rule that prevent the introduction of any and all hearsay through the opinions of some types of experts. The comment states that the rule "would not warrant admitting into evidence the opinion of an 'accidentologist' as to the point of impact in an automobile collision based on statements of bystanders . . . ."[80]

The *Stegall* court reasoned that an available eyewitness should be required to testify directly and not be shielded from cross-examination by allowing the witness' statements to come in through a law enforcement official under Rule 703.[81] Allowing an accidentologist to use the same hearsay statements of a non-testifying eyewitness that cannot be used by a state trooper

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cept as against the government, because "of the almost certain collision with confrontation rights which would result from their use against the accused in a criminal case." FED. R. EVID. 803(8) advisory committee note. The Senate Committee report, however, states that the reason for the exclusion of law enforcement reports from the Rule 803(8) exception is "[t]hat observations by police officers at the scene of the crime or the apprehension of the defendant are not as reliable as observations by public officials in other cases because of the adversarial nature of the confrontation between the police and the defendant in criminal cases." SENATE COMM. ON JUDICIARY, FED. R. EVID., S. REP. NO. 1277, 93d Cong., 2d Sess. 17, *reprinted in* 1974 U.S. CODE CONG. & ADMIN. NEWS 7051, 7064.

*Ramos* would seem to indicate that in some situations, law enforcement reports in criminal cases based on hearsay that would not be admissible under the Rule 803(8) exception, may be admissible as the basis for expert testimony under Rule 703. United States v. Ramos, 725 F.2d 1322 (11th Cir. 1984).

74. 659 F.2d 721 (6th Cir. 1981).

75. *Id.* at 721.

76. *Id.*

77. *Id.*

78. *Id.* at 722.

79. *Id.* It should be noted that under the Rule 803(8) hearsay exception for public records and reports, the law enforcement officer's written report would be admissible. *See supra* note 73.

80. FED. R. EVID. 703 advisory committee note.

81. Dallas & Mavis Forwarding Co. v. Stegall, 659 F.2d at 722.

in explaining his opinion would circumvent the policy attempted to be implemented by *Stegall* and Rule 703.

The defendant in a North Dakota case, *Staiger v. Gaarder*,[82] successfully introduced into evidence the double hearsay of an accident investigation expert based in part on the statements of the investigating officer.[83] In *Gaarder*, counsel for the defendant asked an accident investigation expert to relate statements made to him by an investigating patrolman.[84] The court admitted the statements by the patrolman under Rule 703 of the North Dakota Rules of Evidence, which it noted was identical to Federal Rule 703.[85] The holding in *Gaarder* circumvents the limitations on the introduction of hearsay through accidentologists and law enforcement officials that are required by *Stegall* and the advisory committee's comments to Rule 703. If the hearsay rule is to have any meaning, some limitations must be placed on the types of experts and the kind of hearsay relied on by experts, otherwise Rule 703 becomes merely a shorthand cancellation of Rule 802.[86]

### C. *Expanded Methods of Introducing Hearsay Under Rule 703*

The methods of introducing hearsay through an expert have not been limited to having the expert recite hearsay on direct examination as the basis for the expert's opinion.[87] In *McCloskey v. State*,[88] the Delaware Supreme Court upheld a decision by a trial court that permitted the State to introduce hearsay to test the basis of the opinions offered by the defendant's experts.[89]

In *McCloskey*, the defendant intended to call two psychiatrists to testify that he lacked criminal intent when he killed an employee of a club during a burglary.[90] The psychiatrists based their opinions, in part, on statements by the defendant that he had not committed any serious crimes before the incident at issue.[91] The State indicated that if the psychiatrists

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82. 258 N.W.2d 641 (N.D. 1977).

83. *Id.* at 648.

84. *Id.*

85. *Id.* The court in *Gaarder* further observed that after the trial court had overruled the hearsay objection the expert testified that he relied not on the patrolman's statements, but on his own investigation in forming his expert opinion. *Id.* The Supreme Court of North Dakota held that at this point it was too late for the trial court to change its ruling and objecting counsel had made no motion to strike. *Id.* at 648-49.

86. *Cf.* Zenith Radio Corp. v. Matsushita Elec. Indus. Co., 505 F. Supp. at 1323 ("given the potential for open-ended receipt into evidence of testimony based upon information of questionable reliability, it is plain that some limitation on the types of information upon which an expert may rely is essential.").

87. *See infra* notes 88-97 and accompanying text.

88. 457 A.2d 332 (Del. 1983).

89. *Id.* at 336-37.

90. *Id.* at 334.

91. *Id.*

testified on the intent issue, the State would introduce statements by the defendant to the police that he had committed three previous burglaries.[92] The Delaware Supreme Court held that "[u]nder D.R.E. 703 even inadmissible facts or data may be introduced to test the basis of an expert's opinion . . . ."[93] The court further held that this type of hearsay could be used to impeach the expert's opinion on cross-examination.[94]

Following *McCloskey*, hearsay that has not previously been considered by an expert can be introduced into evidence for the first time at trial by opposing counsel for the purpose of impeaching the expert.[95] In this situation, the hearsay does not even come from the expert himself, but from opposing counsel for the purpose of testing the expert's opinion.[96]

Another unique approach to admitting hearsay under Rule 703 was demonstrated in *New York State Association for Retarded Children, Inc. v. Carey*.[97] In *Carey*, the Second Circuit went so far as to approve a district court order allowing government experts to go to a state hospital for the purpose of gathering statements from employees so as to enable them to express an opinion on the conditions at the hospital.[98] The plaintiff was permitted to send out an expedition of experts during the trial for the purpose of gathering enough hearsay from the nontestifying hospital staff to enable the experts to formulate an opinion on an issue in controversy.[99] *Carey* provides a doctrinally complicated case in that the plaintiff's right to discover must be separated from the right of the plaintiff's expert to testify based on that discovery.[100] Under Federal Rule of Civil Procedure 26(a), either party may obtain discovery by an on-premises inspection of the opposing party's land or property.[101] The real question that this Note is concerned with is the extent and propriety of sending out field expeditions of experts to gather hearsay data, in the form of interviews that can later be admitted into evidence under Rule 703, as a basis upon which the experts base their opinions. The court in *Carey* tried to minimize the impact of such a concept by noting that the eyewitness observations of the experts, in addition to other direct evidence, such as photographs of the hospital obtained by the experts,

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92. *Id.* (In a hearing to determine the permissible scope of cross-examination by the State, the psychiatrists stated that their opinions regarding the defendant's intent would be affected by information to the effect that the defendant had committed previous crimes).

93. *Id.* at 336. Delaware's Rule 703 is identical to Federal Rule 703. *Compare*, FED. R. EVID. 703 *with* DEL. UNIF. R. EVID. 703.

94. McCloskey v. State, 457 A.2d at 337.

95. *Id.*

96. *Id.* at 336. The Delaware Supreme Court does limit the hearsay to the "type reasonably relied on by experts in the particular field . . . ." *Id.*

97. 706 F.2d 956 (2d Cir.), *cert. denied*, 464 U.S. 915 (1983).

98. *Id.* at 960-61.

99. *Id.*

100. *Id.* at 961.

101. FED. R. CIV. P. 26(a).

formed an ample basis for the court to reach a decision apart from the hearsay.[102] Nevertheless, the court in *Carey* admitted that "[a]lmost all of the out-of-court statements by unnamed Willowbrook employees provisionally admitted were received for the purpose of enabling plaintiffs' experts to express an opinion as permitted by F.R.E. 703."[103] This type of court-ordered marshaling of hearsay evidence for introduction into evidence through an expert should be strictly limited. The type of hearsay gathered by the experts in *Carey* consisted of statements from employees of the hospital as to conditions at the hospital; it was straightforward and uncomplicated.[104] Such unsophisticated testimony does not require an expert to help the "trier of fact to understand the evidence to determine a fact in issue."[105] A better approach in *Carey* would have been to bring in the employees to testify as to conditions at the hospital. Such testimony could be exposed to cross-examination by the opposing party.[106] Also, the court's affirmative role in providing hearsay fodder for one party's expert seems at best an undesirable and lopsided interference by the court.

### D. *Psychiatric and Psychological Experts*

The biggest concern with the use of Rule 703 as a hearsay conduit centers around psychiatric or psychological testimony. It has been noted that the sources and methodology relied upon by the psychiatrist or psychologist do not always meet the test of trustworthiness or reliability that justify introducing expert testimony based on out-of-court statements and hearsay.[107] Many prominent authorities vigorously contend that psychiatry and psychology are purely subjective disciplines that lack the predictability and diagnostic accuracy expected of a true science.[108] The problem is obvious: If psychology is no more accurate or scientific than guessing, then the expert psychologist is not able through his judgment to filter unreliable from reliable hearsay in forming an expert opinion, therefore, the hearsay that is relied upon by the psychologist lacks the circumstantial guarantees of trustworthiness that are customarily demanded of a hearsay exception.[109]

Another major concern with the psychological expert is the type and

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102. New York State Ass'n for Retarded Children, Inc. v. Carey, 706 F.2d at 961.

103. *Id.*

104. *See infra* notes 154-57 and accompanying text.

105. *See infra* notes 137-44 and accompanying text.

106. *See generally Hearsay Bases*, *supra* note 53.

107. *Id.* at 130, 132-33.

108. *See generally* NAGEL, *Methodological Issues in Psychoanalytic Theory*, in PSYCHOANALYSIS, SCIENTIFIC METHOD AND PHILOSOPHY 38-55 (S. Hook ed. 1959); SCRIVEN, *The Experimental Investigation of Psychoanalysis*, in PSYCHOANALYSIS, SCIENTIFIC METHOD AND PHILOSOPHY 226-50 (S. Hook ed. 1959); L. COLEMAN, THE REIGN OF ERROR 2-5 (1984).

109. *Hearsay Bases*, *supra* note 53, at 132-38. The author of that Note cites two reasons that psychiatry lacks reliability: (1) unscientific methodology and (2) observer bias. *Id.*

quantity of hearsay admitted through the expert's opinion.[110] Psychiatrists and psychologists base their opinions to a large extent on information derived from interviews or reports that would legally be classified as hearsay.[111] The more obvious and traditionally more acceptable sources of diagnostic information received by the psychological expert include the reports of hospital staff, nurses and colleagues.[112]

The case of *United States v. Lawson*[113] illustrates the principle that, with psychiatrists and psychologists, practically any comment about or by a person is fair game as a basis for determining that person's psychological state.[114] In *Lawson*, the defendant pleaded insanity to charges of extortion and assault.[115] The government's expert psychiatrist examined Lawson and determined he was sane.[116] The psychiatrist admitted that he had little contact with the defendant and based his opinion on the reports of staff physicians and other staff members at the hospital where Lawson was examined.[117] In addition to the staff reports, the psychiatrist also stated that he relied on certain FBI reports, information from the United States Attorney's Office and information from the United States Marine Corps, from when Lawson was a marine.[118] Here the obviously biased opinions of the prosecuting attorneys and investigating officers found access to the jury via the opinion of the government's own expert witness.

The single limiting function on admissible hearsay contained in Rule 703 is that the hearsay must be "of a type reasonably relied upon by experts in the particular field in forming their opinions."[119] The limit of reasonable reliance by experts in the field loses meaning in a field like psychology, where the experts reasonably rely on any type of hearsay about or by the subject under study.[120] Under various court decisions, psychological experts

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110. *See infra* notes 111-26 and accompanying text.

111. *See infra* notes 112-26 and accompanying text.

112. In *United States v. Phillips*, the defendant was accused of shooting a United States Marshall. 515 F. Supp. 758, 759 (E.D. Ky. 1981). The defendant claimed that her husband had hypnotized her into committing the crime. *Id.* at 760. The court allowed the State's expert witness, a psychiatrist, to describe the contents of certain nursing notes and the report of a consulting psychiatrist. *Id.* at 762. The State's expert was also allowed to testify about "a report rendered by a team of 40 persons of . . . [varying] professional disciplines," which served as a basis for the expert's opinion. *Id.*

113. 653 F.2d 299 (7th Cir. 1981), *cert. denied*, 454 U.S. 1150 (1982).

114. *Id.* at 301-03.

115. *Id.* at 301.

116. *Id.*

117. *Id.*

118. *Id.* at 301. In *United States v. Sims*, the Ninth Circuit held that the testimony of the Government's expert psychiatrist was admissible. 514 F.2d 147, 150 (9th Cir.), *cert. denied*, 423 U.S. 845 (1975). The psychiatrist's opinion that the defendant could appreciate the wrongfulness of his acts was based in part on conversations held between the psychiatrist, government attorneys and IRS agents. *Id.* at 148.

119. FED. R. EVID. 703.

120. *See supra* notes 111-18 and accompanying text.

have been allowed to base their opinions about a subject on previous employment records,[121] the subject's military records,[122] statements by investigating law enforcement agents,[123] statements by the prosecuting attorneys,[124] the subject's prior psychological treatment record[125] and statements made by a nontestifying defendant.[126]

Finally, the types of hearsay introduced through the psychological expert pursuant to Rule 703 raise a number of constitutional questions dealt with in the next section. In sum, the problem of the psychological expert is a situation where experts in the least reliable science act as conduits for the least reliable forms of hearsay.

## V. Constitutional Problems

### A. *Fifth Amendment Right Against Self-Incrimination*

In a criminal case where a defense of insanity or diminished capacity is raised, the state can apply for and obtain a court order for the examination of the defendant by a state-appointed expert.[127] A problem arises when the defendant exercises his fifth amendment right and chooses not to testify, and nevertheless, the state uses Rule 703 to introduce into evidence statements made by the defendant to the state's expert witness during the court-ordered examination. In other words, if the defendant refuses to talk to the state directly, by claiming fifth amendment protection, the state can force the defendant to talk to the state's psychiatric expert, and introduce the defendant's testimony as a basis for expert opinion under Rule 703.

In *United States v. Madrid*,[128] the defendant, who was charged with bank robbery, raised the defense of insanity.[129] The government, pursuant

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121. Lafler v. Burlington Northern, Inc., 724 F.2d 98, 99 (8th Cir. 1984) (psychologist referred to a report in plaintiff's personnel records that he had been caught sleeping on the job).

122. *Id.* at 99; United States v. Lawson, 653 F.2d at 302.

123. United States v. Lawson, 653 F.2d at 302; United States v. Sims, 514 F.2d at 148.

124. United States v. Lawson, 653 F.2d at 302; United States v. Sims, 514 F.2d at 148.

125. Lafler v. Burlington Northern, Inc., 724 F.2d at 99.

126. United States v. McCollum, 732 F.2d 1419, 1422 (9th Cir.), *cert. denied*, 469 U.S. 920 (1984); United States v. Madrid, 673 F.2d 1114, 1117 (10th Cir.), *cert. denied*, 459 U.S. 843 (1982).

127. The Federal Rule of Criminal Procedure granting psychiatric examination provides:

> In an appropriate case the court may, upon motion of the attorney for the government, order the defendant to submit to a psychiatric examination by a psychiatrist designated for this purpose in the order of the court. No statement made by the accused in the course of any examination provided for by this rule, whether the examination shall be with or without the consent of the accused, shall be admitted in evidence against the accused on the issue of guilt in any criminal proceeding.

Fed. R. Crim. P. 12.2(c).

128. 673 F.2d 1114 (10th Cir.), *cert. denied*, 459 U.S. 843 (1982).

129. *Id.* at 1117.

to Federal Rule of Criminal Procedure 12.2(c), obtained an order requiring the defendant to submit to an examination by a government psychiatrist.[130] At trial, the psychiatrist testified that, in forming his opinion that the defendant was sane, he relied on admissions by the defendant to him that the defendant had committed armed robberies prior to the current incident.[131] The defendant claimed that recitation of his admissions to the psychiatrist that he had committed prior armed robberies violated his fifth amendment privilege against self-incrimination.[132] The Tenth Circuit held that "the statements made by the defendant during the Rule 12.2(c) examination were admissible at trial as a basis for the expert's opinion on the issue of sanity."[133] The court further held that, in a situation such as *Madrid*, the court could order an examination by a psychiatrist who could then testify against the defendant without violating the fifth amendment.[134]

Judge Jack B. Weinstein, in his commentaries, advises that a doctor's testimony based on a pretrial psychiatric examination violates a defendant's fifth amendment privilege if the defendant was not advised of his right to remain silent.[135] Weinstein notes, however, that where the psychiatrist is strictly determining sanity it is up to the trial court to determine admissibility of the statements based on reliability.[136]

### B. *Sixth Amendment Right to Confrontation*

Weinstein claims that the constitutional right of confrontation of witnesses may require that a defendant be provided the opportunity to cross-examine the persons who provided or prepared the underlying data upon which an expert relies under Rule 703.[137] The American Bar Association suggests that hearsay introduced under Rule 703 may "run afoul" of the confrontation clause of the constitution.[138] The Association suggests that the problem may be cured by giving opposing counsel access to the underlying data relied on by the expert prior to the trial, or by giving limiting instructions to the jury that the underlying hearsay data is not to be regarded as evidence.[139]

The Seventh Circuit, in *Lawson*, held that a criminal defendant has a

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130. *Id.*
131. *Id.* at 1118.
132. *Id.* at 1121.
133. *Id.*
134. *Id.* The court noted that by consenting to the Rule 12.2(c) examination, the defendant waived any objection to admission of any statements made by him to the examining psychiatrist. *Id.*
135. WEINSTEIN & BERGER, *supra* note 18, ¶ 703[03] at 703-23.
136. *Id.*
137. *Id.* at 703-24.
138. *Emerging Problems Under the Federal Rules of Evidence*, 1983 A.B.A. SEC. LITIG. 211.
139. *Id.* at 212.

right to effective cross-examination and, therefore, has a right of access to the hearsay information relied on by an expert witness.[140] The court further held that even though an expert's testimony based entirely upon hearsay may satisfy the requirements of Rule 703, it would still violate the defendant's right to confrontation.[141]

Conversely, Rule 703 may be used to shield the defendant from cross-examination while allowing the defendant's own hearsay testimony to be presented to the jury through the opinion of the defendant's psychological expert.[142] For example, in *State v. Eaton*, the defendant, accused of burglarizing a liquor store, claimed that he was suffering from alcohol blackout at the time of the burglary and was therefore incapable of forming the specific intent necessary to commit the crime.[143] The trial court refused to allow the defendant's psychiatrist to repeat the defendant's account of his activities on the evening of the burglary unless the defendant himself testified.[144] The trial court indicated that allowing the psychiatrist to repeat the hearsay of a nontestifying defendant would in effect allow him to testify without being subject to cross-examination.[145]

The Washington Court of Appeals ruled that under Washington Rule of Evidence 703, identical to Federal Rule of Evidence 703, if the psychiatrist could reasonably rely on the defendant's hearsay statements in forming an opinion about the defendant's mental state during the crime, then the psychiatrist's opinion was admissible.[146] Since psychiatrists routinely rely on the statements of their patients in formulating opinions about those patients, those statements would, under the holding in *Eaton*, invariably be admissible.[147]

### C. *Privileges and Immunities*

Rule 703 is occasionally used in such a way as to introduce testimony that would otherwise be barred by the privileges and immunities doctrine. Psychiatrists routinely rely on the statements of a subject's family members in assessing that subject's mental state.[148] Where a psychiatrist is called as an expert witness to testify about a subject's mental state, a question arises

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140. United States v. Lawson, 653 F.2d at 302. *See supra* notes 113-18 and accompanying text.

141. United States v. Lawson, 653 F.2d at 302. McCormick indicates that "Rule 703 should probably be followed unless a government expert is in effect being used solely to bring before the jury otherwise inadmissible matter . . . . " McCormick, *supra* note 11, § 15 at 40-41.

142. State v. Eaton, 30 Wash. App. 288, 633 P.2d 921 (1981).

143. *Id.* at ____, 633 P.2d at 922.

144. *Id.* at ____, 633 P.2d at 923.

145. *Id.*

146. *Id.* at ____, 633 P.2d at 925.

147. *See supra* notes 111-18 and accompanying text.

148. *Hearsay Bases*, *supra* note 53, at 132.

about whether the psychiatrist can recite the statements of a spouse as a basis for the expert opinion over the objection of spousal immunity.

In the South Dakota case of *State v. Gallegos*,[149] the defendant pled not guilty by reason of insanity to a charge of aggravated assault.[150] The state's psychiatrist testified that Gallegos was sane at the time of the crime and described his interviews with Gallegos' wife as a partial basis for his expert opinion.[151] The defendant claimed that the state's psychiatrist should not be allowed to repeat his interviews with Mrs. Gallegos on the grounds of spousal immunity.[152] The South Dakota Supreme Court, in allowing the psychiatrist to repeat the contents of the interviews, held that without the described portion of the interviews, the jury could not assign a proper weight to the testimony of the psychiatrist.[153]

It appears that Rule 703 can act not only as a hearsay exception, but as a hearsay exception that overcomes other hurdles to admissibility. It is also apparent that psychiatric experts most frequently serve as sponsors for the most controversial forms of hearsay. The final issue to be resolved is what limits there are on the use of Rule 703 as a floodgate for hearsay.

## VI. The Limits of Rule 703

### A. *Rule 702 as a Limit on Rule 703*

Rule 702 states that expert opinion testimony must assist the "trier of fact to understand the evidence" to be admissible.[154] In *United States v. Swaim*,[155] the Fourth Circuit disallowed testimony given by a postal inspector based on hearsay and concluded that the critical parts of his testimony did not require expert knowledge to be comprehensible.[156] Since the court concluded that certain portions of the postal inspector's opinion could be understood by the jury without an expert sponsor, the court further concluded that the hearsay upon which the opinion was based was inadmissible and, therefore, the opinion itself was inadmissible.[157] In other words, if an expert is not required to reach the conclusions and opinions testified to by the expert, the opinion and, therefore, the hearsay underlying the opinion,

149. 316 N.W.2d 634 (S.D. 1982).
150. *Id.* at 636.
151. *Id.*
152. *Id.*
153. *Id.* at 637.
154. Rule 702 provides: "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 . . . may testify thereto in the form of an opinion or otherwise." Fed. R. Evid. 702.
155. 642 F.2d 726 (4th Cir. 1981).
156. *Id.* at 730 (The postal inspector's testimony consisted of his conversation with seven employees, wherein six of the employees denied that they had handled certain checks, so the inspector concluded that the seventh must have handled them).
157. *Id.*

are inadmissible.

### B. *Reasonable Reliance Test*

Rule 703 contains its own most important limitation as a hearsay exception. The Rule mandates that the otherwise inadmissible evidence, upon which the expert bases his opinion under Rule 703, must be "of the type reasonably relied upon by experts in the particular field . . . ."[158] A majority of the courts agree that the determination of whether the data relied on by the expert is of a type relied upon by other experts in the field is a question to be determined by the trial court.[159] Some courts observe that because of the expert's "background, knowledge and experience" the trial court should allow the expert to determine what data an expert in the field would rely upon.[160] That is not to say the courts invariably defer to the expert to determine the type of data that experts in the field are reasonably entitled to rely upon. The United States District Court for the Eastern District of New York excluded testimony by a medical doctor to the effect that a Vietnam war veteran's exposure to "Agent Orange" herbicide was a cause of the cancer that eventually killed the veteran.[161] The district court observed that the doctor had based his opinion largely upon anecdotal stories supplied by the plaintiffs and general literature on the subject.[162] The court went on to hold that "[i]f the underlying data [of the expert's opinion] are so lacking in probative force and reliability that no reasonable expert could base an opinion on them, an opinion that rests entirely upon them must be excluded."[163]

In *Zenith Radio Corp. v. Matsushita Electric Industrial Co.*,[164] the Federal District Court for the Eastern District of Pennsylvania indicated that the following factors should be used to determine the reasonableness of an expert's reliance on certain data under Rule 703:

> 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 untrustworthy materials;
> 3. The extent to which the expert's assumptions have been shown to be unsupported, speculative, or demonstrably incorrect;

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158. FED. R. EVID. 703.

159. *In re* Agent Orange Product Liability Litigation, 611 F. Supp. at 1245; American Bearing Co. v. Litton Indus., 540 F. Supp. 1163, 1169 (E.D. Pa. 1982), *cert. denied*, 469 U.S. 854 (1984); State v. Galloway, 275 N.W.2d at 739.

160. United States v. Sims, 514 F.2d at 149; State v. Eaton, 633 P.2d at 925 ("If the judge is satisfied with the expert's general qualifications to express an opinion he usually should defer to the expert's advice on that point.").

161. *In re* Agent Orange Product Liability Litigation, 611 F. Supp. at 1283.

162. *Id.* at 1243.

163. *Id.* at 1245.

164. 505 F. Supp. 1313 (E.D. Pa. 1980).

> 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 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.[165]

### C. *Other Limits on Rule 703*

Hearsay introduced under Rule 703 is subject to exclusion from evidence by Federal Rule of Evidence 403 if the hearsay is prejudicial, cumulative, confusing or a waste of time.[166] The determination of whether to exclude evidence under Rule 403 is within the trial court's discretion.[167] In the *Agent Orange* case, the court excluded a medical doctor's testimony linking a Vietnam veteran's cancer to exposure to "Agent Orange."[168] The court based its decision in part on Rule 403, reasoning that the doctor's testimony had a "probative value to a point approaching zero" because it was based on unfounded assumptions.[169] The court further reasoned that the doctor's testimony would "[e]mbroil the jury in a protracted and fruitless inquiry" that would waste the jury's time in a case that had already dragged on for many years.[170]

Finally, several courts have held that an expert witness cannot simply summarize hearsay from other sources.[171] The Sixth Circuit Court of Appeals in *Dallas & Mavis Forwarding Co. v. Stegall*,[172] disallowed the opinion of a state trooper that was based solely upon the statements of eyewitnesses to a collision.[173] Allowing an expert to selectively gather hearsay with possible, or even obvious bias, to formulate an expert opinion that would reflect the same bias contained in the hearsay is obviously undesirable. Allowance of such testimony would allow a party to bring in an expert for the single purpose of introducing slanted hearsay under the guise of professional and detached opinion. McCormick observes that where an expert testifies simply to introduce otherwise inadmissible hearsay, the testimony should be

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165. *Id.* at 1330.
166. Fed. R. Evid. 403; Blakey, *supra* note 12, at 25.
167. *In re* Agent Orange Product Liability Litigation, 611 F. Supp. at 1283.
168. *Id.*
169. *Id.*
170. *Id.*
171. United States v. Lawson, 653 F.2d at 302; *see also* Dallas & Mavis Forwarding Co. v. Stegall, 659 F.2d at 722.
172. 659 F.2d 721 (6th Cir. 1981).
173. *Id.* at 722.

excluded.[174]

## VII. Conclusion

As a practical matter, Iowa practitioners can look to the body of federal case law to determine the use and limits of Iowa Rule 703. Iowa case law on Rule 703 is lean but definitely has evolved along the same path as its more extensive federal counterpart.

The majority of authorities agree that Rule 703 has become a potent and major new exception to the hearsay rule.[175] While most court decisions would limit the introduction of hearsay into evidence to the limited purpose of explaining or illustrating the expert's opinion, the more logical position is to acknowledge that hearsay by definition is a statement offered to prove the truth of the matter asserted. In practice, where an expert is entitled to recite entire hearsay conversations to explain his opinion, the effect on the jury is the same whether or not they are instructed to regard the out-of-court declarations as explanatory or substantive evidence, because when the same information is before the jury its purpose for being there becomes academic.

Rule 703 coupled with Rule 702 expands both the type and quantity of hearsay allowed, in addition to expanding the concept of who may qualify as an expert. The most expansive and controversial use of hearsay comes through the testimony of the psychological experts who customarily rely on practically everything said by or about the subject under consideration. The law enforcement official presents problems similar to the psychological expert. It should also be noted that the more subjective the discipline, the more it tends to rely on hearsay and the less it relies on empirical data.

Because the important constitutional right against self-incrimination and the right of confrontation can be compromised by unlimited use of expert-sponsored hearsay, some limits need to be imposed. Iowa should adopt a policy whereby the trial court closely scrutinizes the reliability of hearsay introduced through experts associated with the more subjective disciplines, such as psychology and sociology, as these types of disciplines have presented the most expansive and troublesome uses of hearsay. Testimony by experts such as psychologists that rely extensively on conversations with non-testifying witnesses should not be allowed where such testimony would put an opposing party at an unfair disadvantage because of inability to effectively cross-examine the non-testifying witness. Such testimony from experts in the more subjective disciplines should be strictly limited in any sit-

174. McCormick, *supra* note 11, § 18 at 41.

175. *See supra* note 29 and accompanying text.

uation where the amount and type of hearsay being introduced creates a bias independent of the opinion itself.

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