Rule of Evidence 703—Problem Child of Article VII

By Nathan A. Schachtman

The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If the facts or data are of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, they need not be admissible in evidence for the opinion or inference to be admitted. Facts or data that are otherwise inadmissible shall not be disclosed to the jury by the proponent of the opinion or inference unless the court determines that their probative value in assisting the jury to evaluate the expert's opinion substantially outweighs their prejudicial effect.

Reform of the Common Law

Rule 703 formally abandoned the common-law requirement that expert witnesses base their opinions upon evidence of record, either personal observations or facts admitted into evidence. The first sentence of Rule 703, which has remained unchanged since its original adoption, makes clear that an expert witness may rely upon facts or data that are never admitted into evidence. This sentence details three methods of putting "facts or data" before expert witnesses. First, expert witnesses may themselves be percipient witnesses to the facts or data upon which they rely. Second, expert witnesses may learn of facts or data at the trial by observing other witnesses testify or by being asked to assume facts or data for purposes of giving an opinion. Third, expert witnesses may come to learn of "facts or data" before the hearing. It is this third method that represents a departure from the common law, and which raises the issue whether the expert witness has relied upon facts or data, which are themselves inadmissible.

The rationale for Rule 703 was the recognition that much of the expert witness's understanding of an area of science, medicine, or technology was governed by training, prior experience, professional collaborations, and extensive reading, all of which represented the basis, often in large part, of the case-specific opinions that are then offered in the courtroom. These bases are mostly hearsay, and mostly inadmissible if expert witnesses were to try to articulate any particular aspect of their personal learning. The rationale for Rule 703, however, also included the economy and convenience of presenting expert testimony without the need of formal proof of predicate "facts or data," at least if those facts or data were of the type reasonably relied upon by experts in the relevant field. Not surprisingly, advocates responded by using Rule 703 to inject all manner of hearsay into their trials, including opinion testimony from witnesses that would never testify at trial. Courts and commentators responded with confusion over whether Rule 703 created a new exception to the rule against hearsay.

Conduit for Inadmissible Evidence

Much academic, judicial, and professional criticism of Rule 703, before its amendment in 2000, centered on the mischief created by expert witnesses' reliance upon inadmissible evidence and the disclosure of this information to the jury. To be sure, Federal Rule 705 made clear that the expert witness need not disclose any basis; the expert opinion could be elicited as a conclusory opinion, or the expert could disclose some but not all bases. Parties, however, were often intent to use Rule 703 to present, at least selectively, those relied-upon facts and data (and sometimes opinions) that would aid their case, regardless of the admissibility of the disclosed expert witness bases. If the other side was foolish enough to request a limiting instruction, the proponent would revel in the emphasis that the court gave to their inadmissible facts and data.[1]

Of course, the presentation of expert opinion without requiring disclosure of bases is hardly calculated to permit jurors or trial judges to assess the validity or correctness of the opinions that they must weigh at trial. Furthermore, Rule 703 shifted the burden to opposing counsel to elicit bases to show flaws or weaknesses in reasoning and inference. This cross-examination frequently could not take place without eliciting inadmissible evidence.

In 2000, Rule 703 was amended to include its third, last sentence, which creates a presumption against disclosure of inadmissible facts or data to the jury. The presumption against disclosure may be overcome by a judicial finding that the probative value in helping the jury evaluate the opinion is outweighed by the prejudice of injecting inadmissible evidence into the trial. Nothing in the revised rule makes the inadmissible "facts or data"

Nathan A. Schachtman

Nathan A. Schachtman is a partner in the New York, New York office of Phillips Lytle LLP, where he concentrates on health effects litigation. The views expressed here are his own, and not necessarily shared by his firm or clients.

admissible, although at one point, the Advisory Committee Note confuses admissibility and disclosure when it writes in terms of relied-upon information that is "admissible only for the purpose of assisting the jury in evaluating an expert's opinion." Such evidence is not admissible at all, which is exactly why the presumption is against disclosure and the alternative is disclosure, along with consideration of a limiting instruction.

The early enthusiasm for an expansive role for Rule 703 as a tool for broad gatekeeping was problematic from the beginning.

Expert Witness Opinions—Castles in the Air

Whether underlying facts are disclosed or not, Rule 703, as currently applied in federal courts, raises serious concerns about whether expert witness opinion testimony has a reliable foundation. The law in most states is that an expert witness's opinion can rise no higher than the facts upon which the opinion is based. If the jury does not hear the bases of the opinion, it cannot meaningfully evaluate the opinion. Furthermore, the jury cannot make sense of an expert witness's opinion when it is bound by a limiting instruction, which explains that it may consider the basis in evaluating the expert witness's opinion, but it may not consider the basis as evidence that has been established in the case. If this basis is not otherwise established in the case, then the jury would be compelled to reject the testimony as unsupported by facts or data in the case. If the jury must consider the opinion because the expert witness claims to have relied reasonably upon inadmissible "facts or data," then the expert witness has been given important fact-finding power in the case.

Perhaps Rule 702, with its imposition of gatekeeping responsibilities upon the trial court, is supposed to solve this problem. Many of the circuits appear to be moving toward a requirement of pretrial hearings for Rule 702 challenges, at least when requested, and sometimes even when not. In some instances, the lack of a proper factual predicate, or unreasonableness in reliance upon an inadmissible factual predicate, can be developed in a pretrial hearing that allows the parties to join issue over the reasonableness of reliance and proof of the predicate facts or data.

Who Decides Reasonable Reliance?

Some of the earlier case law suggested that the expert witness could validate his or her own reliance upon "facts or data" as "reasonable."[2] Judges, like most people, glibly assumed that what people normally or customarily do is reasonable. Extending this assumption to the law of expert witnesses, courts have equated the reasonable reliance of Rule 703 with what experts customarily do in their field.[3] Other courts appeared to go further, especially in the context of forensic expert witness opinion, to equate reasonable reliance with what experts do in their courtroom testimony.

The current view, influenced no doubt by the Supreme Court's holdings in *Daubert*, *Joiner*, and *Kumho Tire*, has settled on requiring the trial court to make an independent assessment, based upon a factual showing, that the "facts or data" in question may be reasonably relied upon by experts in the relevant field.[4] One of the important implications of this shift is that courts may now accept an expert witness's testimony about what he or she normally does, but if opposing counsel challenges the reasonableness of the practice with affidavits, testimony, learned treatises, and the like, then the court will be required to make a preliminary determination of the reasonableness of the expert's "normal practice." Given that litigation often involves unusual situations outside both the statistical and prescriptive "norms" of ordinary life, the abandonment of extreme deference to expert witnesses as the ultimate arbiters of reasonableness is a significant advance in the evolution of the Federal Rules of Evidence.

Reasonable Reliance and Reliability

Some of the early enthusiasm for Rule 703 as a speed bump for unreliable expert witness testimony came from the explicit use of the concept of "reasonable reliance" in the second sentence of the rule. The original Advisory Committee Note encouraged this view by giving an example, without much analysis, of an accident reconstruction expert whose testimony would not be reasonably based upon the statements of bystanders. Before the advent of *Daubert*, this example was a tease to lawyers who were looking for some way to limit the flood of unreliable expert witness opinion testimony. The Advisors, however, did not explain why such reliance would be unreasonable. We could certainly imagine situations in which bystanders' statements were essential to re-creating an accident. Furthermore, the statements of bystanders might be admissible under various exceptions to the rule against hearsay, and the note thus seems to contradict the actual language of the rule, which limits the reasonableness requirement to reliance upon inadmissible evidence. In any event, the Advisory Committee's example of an "accidentologist" seemed to imply a requirement of trustworthiness, which might apply to both admissible and inadmissible "facts or data."

Perhaps because of the original Advisory Committee Note, litigants, in challenging the reliability of expert witness opinion testimony, frequently invoked both Rules 702 and 703 in support of exclusion. Indeed, cases that focus on

only Rule 703 are relatively uncommon; most cases note that they are addressing motions to bar expert witnesses, made under both rules. After the Supreme Court's Quartet on Rule 702 (*Daubert*, *Joiner*, *Kumho*, and *Weisgram*), the need to frame an exclusionary motion on Rule 703 has been largely dispelled.

One case that gave rise to much of the enthusiasm for Rule 703 as a basis for expert witness preclusion was Judge Weinstein's decision in *In re Agent Orange*.[5] Some of the expert witnesses in the *Agent Orange* litigation relied upon checklists of symptoms prepared by the litigants. Invoking Rule 703 to support exclusion of the expert witnesses' opinions, the trial court observed that "no reputable physician relies on hearsay checklists by litigants to reach a conclusion with respect to the cause of their affliction."[6]

The lesson of *Agent Orange* was that Rule 703 could serve as a basis for excluding expert witness testimony. If the expert witness relied unreasonably upon "facts or data," then that expert witness's testimony was fatally flawed under the rules and had to be excluded. The court in *Agent Orange* avoided the obvious conclusion that an expert witness's opinion, which was not reasonably based upon "facts or data," could not be helpful to the trier of fact, and thus the opinion would necessarily offend Rule 702, as well.

Practitioners, faced with dubious expert witness opinion testimony after *Agent Orange*, increasingly relied upon Rule 703, along with Rules 702 and 403, in stating their challenges to proffered opinions. Many courts, in ruling upon these challenges, did not separate out their holdings or reasoning in applying Rules 702 and 703 to exclude opinions.[7] Some courts, especially before the Supreme Court's decision in *Daubert*, framed reliability challenges almost exclusively in terms of compliance with Rule 703.[8]

The early enthusiasm for an expansive role for Rule 703 as a tool for broad gatekeeping was problematic from the beginning. Rule 703 has always required "reasonableness" for an expert witness's reliance upon inadmissible "facts or data." The Rule is, and has always been, silent about reliance upon admissible "facts or data." As a result, Rule 703 could never have aspired to the principal role of limiting the flow of unreliable expert testimony.

The Rules of Evidence provide ample bases for expert witnesses to formulate unreliable opinions based solely, and unreasonably, upon *admissible* "facts or data," such as inadvertent and false party admissions, self-serving statements made to examining physicians, or vanity press publications elevated to "learned treatise" status. The resulting opinions have little or no epistemic warrant or claim to reliable methodology, but they may readily pass muster under Rule 703.

Furthermore, even if Rule 703 were applied to eliminate all unreasonable reliance upon "facts or data," the rule would not have guarded against unreliability that crept into the opinions as a result of invalid inferences or reasoning from "facts or data," which themselves were beyond reproach.

The Advisory Committee Note to Rule 702, from 2000, attempts to answer some of the questions about the proper scope of Rule 703:

> There has been some confusion over the relationship between Rules 702 and 703. The amendment makes clear that the sufficiency of the basis of an expert's testimony is to be decided under Rule 702. Rule 702 sets forth the overarching requirement of reliability, and an analysis of the sufficiency of the expert's basis cannot be divorced from the ultimate reliability of the expert's opinion. In contrast, the "reasonable reliance" requirement of Rule 703 is a relatively narrow inquiry. When an expert relies on inadmissible information, Rule 703 requires the trial court to determine whether that information is of a type reasonably relied on by other experts in the field. If so, the expert can rely on the information in reaching an opinion. However, the question whether the expert is relying on a sufficient basis of information—whether admissible information or not—is governed by the requirements of Rule 702.

This note leaves a large gap in the analysis of expert witness opinion evidence. The question of the sufficiency of an expert's bases is understandably different from whether the "facts or data" are themselves reasonably (and thus presumably also reliably) relied upon by experts in the field. Rule 702 provides guidance about the sufficiency of "facts or data," as well as the reliable application of reliable principles and methods to the facts of the case. Rule 702, however, is silent about the reliability of the starting point in the scientific or technical knowledge: the data. Perhaps the Advisory Committee meant to imply that reliable methodology requires obtaining "facts or data" in a reliable way, but it failed to address the issue in the recent amendments to Rule 702.

There is another problem that amended Rules 702 and 703, along with the Advisory Notes, fail to address. This problem further illustrates the gap in the coverage of the rules, and perhaps it explains why courts have strained at times to include Rule 703 as part of their analysis of the reliability of expert witness opinion testimony. Consider what happens when a proffered expert witness's opinion has already been held to satisfy the relevance and reliability requirements of Rule 702. The court has explicitly ruled that the expert's opinion has a sufficient factual basis, and that the expert has reached the opinion by reliably applying reliable

When courts impose time limits in trial of complex matters, the inequity created by the modern Rule 703 is compounded.

methods to the facts of a case. After the court's Rule 702 ruling, the expert witness amends his or her report to add reliance upon a new study. The study is unfinished and unpublished. The paper has yet to be peer-reviewed. Furthermore, the study is written in a foreign language, and the expert has relied upon a translation that appears to have errors, with analyses that are at least partially incoherent or incorrect. This new study no longer raises questions about sufficiency of data, and the expert's overall opinion, *ex hypothesi*, satisfies Rule 702. This new study appears to raise fresh questions under Rule 703, not provided for in the Advisory Committee's allocation of issues between Rules 702 and 703.[9]

"Facts or Data" Versus "Opinions"

Rule 703 describes the condition for permitting expert witnesses to rely upon inadmissible "facts or data." The rule is silent about reliance upon others' opinions. Of course, the distinction between facts (or data) and opinions may occasionally be difficult to discern, but the entirety of Article VII is predicated upon the existence of the distinction.[10] The conspicuous absence of "opinions" from the rule's conditional allowance of expert testimony based upon inadmissible "facts or data" would seem to mean that such reliance upon extra-record opinion was not authorized under Rule 703.[11] Other courts, especially the Third Circuit, have given their blessing to the wholesale backdoor introduction of opinions, and they have not distinguished facts or data from opinions, as the potentially reasonably relied-upon inadmissible evidence under Rule 703.[12]

The Advisory Committee Note to the 2000 amendment to Rule 702 purports to answer the question of the scope of "facts or data" under Rule 703: "The term 'data' is intended to encompass the reliable opinions of other experts."[13]

The original Advisory Committee Note to Rule 703, however, refers to opinions as within the scope of "facts or data" in just one single passage, and in a relatively narrow context:

> Thus a physician in his own practice bases his diagnosis on information from numerous sources and of considerable variety, including statements by patients and relatives, reports and *opinions* from nurses, technicians, and other doctors, hospital records, and X-rays. Most of them are admissible in evidence, but only with the expenditure of substantial time in producing and examining various authenticating witnesses. The physician makes life-and-death decisions in reliance upon them. His validation, expertly performed and subject to cross-examination, ought to suffice for judicial purposes.[14]

The original Note to Rule 703 is highly misleading because opinions that are recorded in medical records would be admissible in any event as business records. Furthermore, even if physicians must sometimes make life-or-death decisions on the basis of limited, incomplete, undocumented opinions offered by another medical care provider, that *in extremis* scenario is hardly a propitious basis for opinion testimony at a judicial hearing where the trier of fact is charged with making a deliberate evaluation of the evidence. Courts and juries are charged with trying to ascertain the truth, and they do not have a warrant to abridge the fact-finding process because a physician, or any other "expert," at time past was acting under exigent circumstances.

This more recent attempt to endorse Rule 703 as a conduit for other expert "opinions" should fail for several reasons. First, the entire Article VII concerns itself with opinions and opinion testimony. To suggest that Rule 703 used "facts or data" to include "opinions" ignores the context of Article VII and the limited exception that Rule 703 was making to common-law procedure. Second, the original Advisory Committee Note spoke only, in one sentence, to opinions of medical-care providers. These opinions would normally be recorded in the patient's medical charts and records, and they would be admissible in any event.[15] There is nothing in the notes to Rule 703 to support the wholesale inclusion of hearsay opinion testimony. Third, the expansion of Rule 703 to include opinions should not circumvent the reliability requirements of Rule 702. Fourth, the rationale of convenience used to support the expansion of the common law through Rule 703 is stood on its head by this expansion to include opinions. The rule puts a heavy burden to ferret out reliance upon opinions of other nontestifying experts and to take adequate discovery of those persons or organizations. This is a steep price to pay for the "convenience" of having an opinion introduced without the usual safeguards of critical examination of the qualifications of the expert, or the reliability of his or her opinion.

Until this extension of Rule 703 is checked, practitioners must inquire of their adversary's expert witnesses, either in interrogatories or in depositions, whether the witnesses have consulted with and relied upon the writings or oral discussions with any other person regarded by the testifying expert witness as an expert. If the testifying expert witness has relied upon these nontestifying expert's statements or opinions, opposing counsel may have to entertain the expensive, inconvenient resort to additional discovery of the out-of-court declarant.

The Relationship Between Rules 703 and 705

Rule 705 simply provides:

> The expert may testify in terms of opinion or inference and give reasons therefor without first testifying to the underlying facts or data, unless the court requires otherwise. The expert may in any event be required to disclose the underlying facts or data on cross-examination.

Rule 705, despite its brevity and apparent simplicity, encourages radical changes in the presentation of expert witness testimony in the courtroom. Rule 705 permits expert witnesses to give opinions in the most conclusory terms. Combined with Rule 703's removal of admissibility as a requirement for materials "reasonably relied upon" by the expert witness, Rule 705 achieves the collapsing of difficult, technical issues into sound bites for juries and judges who increasingly suffer from inability to give sustained attention to such matters. Under the banner of "convenience" and "economy," these rules operate to shift the burden to the cross-examiner to elicit the bases of an expert's opinion as well as to then engage the expert witness on the reasonableness of his or her reliance, methodology, and application of method to the facts of the case, admissible or not.

The upshot of these changes is that the direct examination of an expert witness can often be very short, and it can be filled up with details of the expert witness's qualifications and thinly veiled attempts to accredit the witness, even in advance of any attack on credibility. The expert can then state his or her opinion as a conclusion, without any of the "messy" research facts or data, or other details. The cross-examiner is left to dig through the bases, with judge and jury looking impatiently at the clock. This imbalance creates practical and equitable hardships in how the Federal Rules allocate responsibility for developing factual bases for expert witness opinion between presenting and opposing counsel. When courts impose time limits in trial of complex matters, the inequity created by the modern Rule 703 is compounded.[16] Rule 705 gives trial courts discretion to require disclosure of bases. In the proper case, counsel must be vigilant to motions to require this disclosure before the expert witness delivers his or her opinion.

Conclusion

Although Rule 703 successfully addresses some evidentiary problems in presenting expert witness opinion testimony, serious problems still remain. The rule continues to permit expert witnesses to serve as conduits for inadmissible evidence, including opinion evidence that may escape the gatekeeping of Rule 702. As legal scholars have pointed out, the rule raises basic issues of fundamental fairness and constitutionality in both civil and criminal proceedings.[17] It is time for the Advisory Committee to go beyond restyling the rule and to reconsider its substance.

Endnotes

1. Although elsewhere in the Federal Rules, the Advisory Committee disparaged limiting instructions, commentators and some courts engaged in the "judicial deception" of instructing the jury to accept the inadmissible basis as part of the explanation for the expert witness's opinion, but not to accept or consider the basis for its truth. *See* United States v. Grunewald, 233 F.2d 556, 574 (2d Cir. 1956) ("judicial deception") (Frank, J.); Nash v. United States, 54 F.2d 1006, 1007 (2d Cir. 1932) ("mental gymnastic") (Hand, J.). Not only would such limiting instructions aggravate the problem by giving emphasis to the inadmissible evidence, but the instructions surely would confuse most reasonable people who are trying to understand whether an expert witness has applied a reliable method to correctly ascertained "facts or data."

2. Peteet v. Dow Chemical Co., 868 F.2d 1428, 1432 (8th Cir. 1989) ("[T]he trial court should defer to the expert's opinion of what they find reasonably reliable."); United States v. Sims, 514 F.2d 147 (9th Cir. 1975) (Rule 703 enacted, but not yet in effect) (affirming trial court's allowing government's psychologist to rely upon I.R.S. agent's statement that defendant had previous "legal difficulties" to counter defendant's claim of recent insanity against tax enforcement).

3. International Adhesive Coating Co. v. Bolton Emerson International, Inc., 851 F.2d 540, 544–45 (1st Cir. 1988) (equating reasonableness with "normal practice").

4. United States v. Locascio, 6 F.3d 924, 938 (2d Cir. 1993). The Third Circuit, which had adopted an extremely laissez-faire approach to expert witness testimony, signaled its compliance with the Supreme Court's decision in Daubert, in *In re* Paoli Railroad Yard PCB Litigation:

> We now make clear that it is the judge who makes the determination of reasonable reliance, and that for the judge to make the factual determination under Rule 104(a) that an expert is basing his or her opinion on a type of data *reasonably* relied upon by experts, the judge must conduct an independent evaluation into reasonableness. The judge can of course take into account the particular expert's opinion that experts reasonably rely on that type of data, as well as the opinions of other experts as to its reliability, but the judge can also take into account other factors he or she deems relevant.

35 F.3d 717, 748 (3d Cir. 1994) (emphasis in original).

5. *In re* Agent Orange Product Liability Lit., 611 F. Supp. 1223 (E.D.N.Y. 1985), *aff'd on other grounds*, 818 F.2d 187 (2d Cir. 1987), *cert. denied*, 487 U.S. 1234 (1988).

6. 611 F. Supp. at 1246. *But see* Fed. R. Evid. 803(4).

7. *See, e.g.*, Soldo v. Sandoz Pharm. Corp., 244 F. Supp. 2d 434, 572 (W.D.Pa. 2003) (barring expert witness opinion testimony, under Rule 702 and 703).

8. *See, e.g.*, Ealy v. Richardson-Merrell, Inc., 897 F.2d 1159, 1161–62 (D.C. Cir. 1990) (affirming exclusion of an expert whose opinion lacked scientific foundation, and ignored extensive contrary, published data); Lima v. United States, 708 F.2d 502, 508 (10th Cir. 1983) (affirming exclusion of epidemiologist who relied upon data not reasonably relied upon by experts in the fields of epidemiology and neurology).

9. *See, e.g.*, Garcia v. Novartis Consumer Healthcare, Inc., Opinion, N.J. Super. Ct., Middlesex Cty., Docket L-5532-01-MT (denying motion to preclude expert witnesses from relying, in part, on unpublished study) (Garruto, J.).

Continued on page 16

gives you the ability to narrow the issues in preparation for trial and perhaps better position yourself for a more favorable settlement. If you decide to file your motion on the eve of trial, then be prepared for what you will do if the motion is denied.

How do you preserve the ruling? Your motion may not be sufficient, alone, to preserve the specific evidentiary issue on appeal. For example, if your motion is seeking to admit certain evidence, and it is denied, you should request that the court allow you to make a proffer on the record of what the evidence would have been. Similarly, if the opposing party moves in limine to exclude your evidence and the motion is granted, you should use a proffer to establish in the record what the evidence would have been. Finally, to preserve a pretrial motion in limine ruling, many jurisdictions require you to renew your objection during the trial. So, if you file a motion in limine to exclude your opposing party's evidence, and the motion is denied, you will need to renew your motion when your opposing party introduces that evidence during trial. Failure to do so could waive your right to raise the issue on appeal.

Conclusion

In short, handling the evidentiary issues in your case requires identifying them as soon as possible. Do this by researching the elements of your case and your opposing party's claims/defenses. Once you have identified possible evidentiary issues, consider using motions in limine to admit and exclude evidence. Taking these important steps will make your life much easier at trial.

Rule of Evidence 703

Continued from page 7

This issue was anticipated in one of the leading cases on expert witness opinion testimony. *In re Paoli*, 35 F.3d 717, 749 n. 19 (3d Cir. 1994) (pointing out that Rules 702 and 703 were not redundant, and that reliable opinions might be partially based upon unreliable data).

10. *See* Beech Aircraft v. Rainey, 488 U.S. 153, 168 (1988) ("The distinction between statements of facts and opinion is, at best, one of degree.")

11. American Key Corp. v. Cole Nat'l Corp., 762 F.2d 1569, 1580 (11th Cir. 1985) ("Expert opinions ordinarily cannot be based upon the opinions of others whether those opinions are in evidence or not."); *see also* TK-7 Corp. v. Estate of Barbouti, 993 F.2d 722, 732 (10th Cir. 1993) (affirming exclusion of expert testimony under Rule 703 "where the expert failed to demonstrate any basis for concluding that another individual's opinion on a subjective financial prediction was reliable, other than the fact that it was the opinion of someone he believed to be an expert who had a financial interest in making an accurate prediction").

12. *See, e.g.*, Lewis v. Rego Co.,757 F.2d 66, 73–74 (3d Cir. 1985) (holding that trial court had erred in excluding a testifying expert witness's recounting of, and reliance upon, an out-of-court conversation with a non-testifying expert). *See also* Barris v. Bob's Drag Chutes & Safety Equipment, 685 F. 94, 102 n.10 (3d Cir. 1982) ("Under Rule 703, an expert's testimony may be formulated by the use of the facts, data and conclusions of other experts."); Seese v. Volkswagenwerk A.G., 648 F.2d 833, 845 (affirming admissibility, under Rule 703, of accident-reconstruction expert, whose opinion was based upon facts, data, and conclusions of a physician).

13. *See* the original Advisory Committee Note to Rule 703. The language "facts or data" is broad enough to allow an expert to rely on hypothetical facts that are supported by the evidence. *Id.*

14. Rheingold, *supra*, at 531; McCormick § 15. A similar provision is California Evidence Code § 801(b).

15. Fed. R. Evid. 803(6).

16. Evidentiary rules in state courts, even those states that have adopted Rule 703, vary considerably in how disclosure is required or allowed. Pennsylvania, for instance, has adopted its Rule 703 verbatim from the Federal Rules, but it handles disclosure very differently under its version of Rule 705:

> The expert may testify in terms of opinion or inference and give reasons therefore; however the expert *must* testify as to the facts or data on which the opinion or inference is based.

Pa. R. Evid. 705 (emphasis added). *See, e.g.*, Hansen v. Wyeth, Inc., 72 Pa. D. & C. 4th 225, 2005 WL 1114512, at *13, *19 (Phila. Ct. Common Pleas 2005) (Bernstein, J.) (granting new trial to verdict loser as result of expert witness's failure or inability to provide all bases for his opinion).

17. *See, e.g.*, Seaman, *Triangulating Testimonial Hearsay: The Constitutional Boundaries of Expert Opinion Testimony*, 96 Georgetown L.J. 827 (2008).