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# ESSAY

## Inadmissible Evidence as a Basis for Expert Opinion Testimony: A Response to Professor Carlson

*Paul R. Rice\**

### I. INTRODUCTION

Rule 703 of the Federal Rules of Evidence permits expert witnesses to offer opinions based upon evidence that has not been offered in the proceedings.<sup>1</sup> The Rule also sanctions the expert's basing her opinion on inadmissible evidence if that evidence is "of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject."<sup>2</sup> In a recent Essay in this Review, Professor Carlson presents a helpful exposition of the confused evidentiary status of this otherwise inadmissible evidence.<sup>3</sup> He correctly notes that the majority of courts refuse to allow the inadmissible evidence upon which the expert bases her

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1. Rule 703 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 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.

FED. R. EVID. 703.

2. *Id.*

3. Carlson, *Policing the Bases of Modern Expert Testimony*, 39 VAND. L. REV. 577 (1986).

opinion to come in as excess baggage with the opinion itself.<sup>4</sup> The expert's reliance upon the inadmissible evidence does not change the evidentiary character of that evidence. For the limited purpose of explaining the expert's opinion, however, courts do permit the introduction of this otherwise inadmissible background information.<sup>5</sup>

Thus, on the one hand, the jury may consider the facts or data upon which the expert based her opinion to assess the weight to be given to that opinion. Yet, on the other hand, the jury, when deciding whether to arrive at the same conclusion, cannot accept what the expert relied upon as true. In reaching its own conclusion, the jury can rely only upon the product of that evidence—the expert's opinion.<sup>6</sup> If this practice sounds like judicial double talk, it is. Professor Carlson, however, supports this result on two grounds. First, he contends that the introduction of the underlying facts would violate the hearsay rule.<sup>7</sup> Second, Professor Carlson justifies exclusion because of sixth amendment confrontation problems in criminal cases.<sup>8</sup>

I disagree with Professor Carlson. With appropriate precautions, the introduction of the inadmissible facts or data upon which experts rely no more violates the hearsay rule's spirit than do the volumes of evidence that regularly are introduced through the numerous hearsay rule exceptions. And, although I am sympathetic to his confrontation concerns, recent developments suggest that no confrontation problem exists. More fundamentally, however, I oppose the view that Professor Carlson and the majority of courts support because that view is both illogical and unwise.

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4. *Id.* at n.25 and accompanying text. *Cf. Zenith Radio Corp. v. Matsushita Elec. Indus. Co.*, 505 F. Supp. 1125, 1145 (E.D. Pa. 1980) (finding that although public records that contained expert opinions and conclusions were admissible under the public records exception to the hearsay rule, Fed. R. Evid. 803(8)(c), the background information and data that accompanied the public records had to be independently admissible under another exception to the hearsay rule before being offered for its truth).

5. *See, e.g., Lewis v. Rego Co.*, 757 F.2d 66, 74 (3d Cir. 1985) (concluding that a conversation between the expert witness and another doctor was the kind of information on which experts in the field base their opinions and, therefore, the trial court should have allowed inquiry into the conversation).

6. *Cf. Fox v. Taylor Diving & Salvage Co.*, 694 F.2d 1349, 1356 (5th Cir. 1983), in which the court, although acknowledging that the expert is allowed to disclose hearsay only for the limited purpose of explaining his opinion's basis, allowed hearsay to be heard for its truth because the opponent of the evidence failed to make a timely hearsay objection.

7. *See Carlson, supra* note 3, at 584-86.

8. *Id.*

## II. THE ILLOGIC OF IT ALL

Admitting an expert's opinion, but not its basis, is illogical because one cannot accept an opinion as true without implicitly accepting the facts upon which the expert based that opinion. The value of any conclusion necessarily is tied to and dependent on its premise.<sup>9</sup> Consequently, if in forming an opinion someone assumes that certain facts are true, the acceptance of that opinion necessarily involves the acceptance of those assumed facts.<sup>10</sup> Compounding the absurdity of the approach supported by Professor Carlson is the court's allowing the expert to recite the underlying basis, and then instructing the jury not to accept the recited facts as true (even though the expert did), but to consider those facts only in assessing the value of the expert's opinion.<sup>11</sup> This instruction is pure fiction; it cannot be done. Even if the instruction's distinction logically were possible, jurors likely would not be capable of performing such mental gymnastics.

This practice is not a recent development. Courts have followed it for decades when physicians testify regarding statements made to them by their patients.<sup>12</sup> At one time, the hearsay exception for statements of present physical condition extended only to patients' statements about conditions experienced contemporaneously with the utterances. Thus, the physician could repeat in the courtroom, and the jury could accept as true, only what the patient said to the doctor about the condition then being experienced. The physician could not recount for truth the patient's statements about his medical history and the cause of his injuries. She could,

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9. Although a juror arbitrarily could attach value to an expert's opinion independent of its basis because of the perceived credibility of that expert, this juror's behavior, in effect, would be a relegation to the expert of the juror's factfinding role.

10. In the specific context of statements to a physician, which can be recited for the purpose of explaining a doctor's opinion but not for substantive evidence, Professor McElhaney agrees with this conclusion. McElhaney, *Expert Witnesses and the Federal Rules of Evidence*, 28 MERCER L. REV. 463, 467 (1977).

11. See, e.g., *United States v. Madrid*, 673 F.2d 1114, 1118 n.4 (10th Cir.) (instructing the jury that the testimony was being admitted to show the basis of the expert's opinion and not for the truth of the underlying source), *cert. denied*, 459 U.S. 843 (1982); *American Universal Ins. Co. v. Falzone*, 644 F.2d 65, 66 n.1 (1st Cir. 1981) (instructing the jury that the expert's testimony about his colleague's investigation was being admitted only to show basis of opinion, not for the truth of the investigation); *United States v. Sims*, 514 F.2d 147, 149-50 (9th Cir.) (recognizing the need for the court to instruct the jury that hearsay evidence is to be considered solely as a basis for the expert's opinion and not for its own truth), *cert. denied*, 423 U.S. 845 (1975).

12. See generally MCCORMICK ON EVIDENCE § 292, at 839-40 (K. Brown 3d ed. 1984) (discussing admissibility of a patient's statements to a doctor about a presently existing bodily condition).

however, recite the patient's statements about medical history and causation for the limited purpose of explaining her diagnosis and treatment, if those statements had been critical to the diagnosis and treatment.<sup>13</sup> This practice, however, has gained no logic with age. It was as schizophrenic and illogical when tied to the present physical condition exception as it is now under Rule 703.<sup>14</sup>

### III. AN OPEN-ENDED HEARSAY EXCEPTION—A WISER OPTION

Aside from the illogic of the practice, I believe that the exclusion of the underlying facts from the jury's consideration is unwise for two reasons. First, the exclusion formally changes the expert's role in litigation to that of a super-factfinder capable of producing admissible substantive evidence (an opinion) from inadmissible evidence.<sup>15</sup> This capability allows the expert witness to influence the outcome of a case based on evidence that the finder of fact may not hear and cannot consider. Second, the exclusion of the evidence ignores the objective assurance of reliability that the expert's examination, evaluation, and reliance can provide—an assurance that historically has justified exceptions to the hearsay rule.<sup>16</sup>

#### A. *The Historical Role of the Expert in Litigation*

Historically, the expert's role in litigation has been solely to assist the finder of fact.<sup>17</sup> The expert's judgment is not a substitute

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13. For example, the physician could testify that the patient said, "My stomach hurts," and the jury could accept as true that the patient had a stomach ache. Yet the court would refuse to admit the physician's testimony about the same patient's statements concerning the medical history ("Several years ago I was diagnosed as having colitis") and the cause of the condition for which treatment was sought ("I have been under a great deal of stress during the past few months," or "I have been eating a lot of hot, spicy food lately"). The court, however, could admit the testimony to explain the physician's opinion.

14. Perhaps the practice was worse under the present physical condition exception because the court would admit statements of history and cause only if they were *crucial* to diagnosis and treatment. Unless the jury relegates its factfinding role to the expert, the jury needs at least as much evidence as the doctor possessed to reach the same conclusion.

15. "Thus, when the expert witness has consulted numerous sources, and uses that information, together with his own professional knowledge and experience, to arrive at his opinion, that opinion is regarded as evidence in its own right and not as hearsay in disguise." *United States v. Williams*, 447 F.2d 1285, 1290 (5th Cir. 1971), *cert. denied*, 405 U.S. 954 (1972).

16. See generally 5 WIGMORE ON EVIDENCE § 1430 (Chadbourn rev. 1974) (providing the principle behind the exceptions to the hearsay rule).

17. For a general discussion of expert testimony, see Ladd, *Expert Testimony*, 5 VAND. L. REV. 414 (1952).

for that of the judge or jury.<sup>18</sup> For this reason, the common law limited the admissibility of expert opinion testimony to those instances when judges or jurors were unable to perform their fact-finding role properly without the assistance of someone with special expertise. This reason also explains the common-law approach of receiving expert testimony only after its factual basis had been revealed and independent evidence had been presented from which the finder of fact reasonably could infer those facts.<sup>19</sup> Without this independent basis, the expert's opinion was irrelevant.<sup>20</sup> If the finder of fact was a jury, the expert testimony had to assist the jury either in understanding the evidence it heard or in drawing rational conclusions from that evidence. The expert was not an independent source of substantive evidence unless she, like any other witness, had personal knowledge of facts related to the cause of action.<sup>21</sup>

Rule 703 of the Federal Rules of Evidence formally sanctions what the common law prohibited—reliance upon facts not of record. If no means is adopted for explicitly making those facts part of the record (because the expert relied upon them), this rule, with no apparent reason or justification, will have changed significantly the expert's role in litigation.

### B. *The Hearsay Issue*

To maintain the historical role of the expert under Rule 703, the underlying basis for the expert's opinion must qualify as an exception to the hearsay rule. Justification for this hearsay exception appears in the standard established in Rule 703 itself—reasonable reliance by experts in the particular field. This standard satisfies the traditional test for exceptions to the hearsay rule: that the circumstances of the out-of-court utterance adequately assure reliability in terms of both the accuracy of the declarant's perception and memory and the sincerity with which

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18. *See id.* at 428 (explaining purpose of expert testimony).

19. McCORMICK, *supra* note 12, §§ 14, 15.

20. *Id.* § 15, at 38. The opinion logically may have been relevant in the sense that the expert rationally based the opinion upon facts that were probative of the issues being litigated. The opinion nonetheless was irrelevant to the expert's functioning vis-a-vis the fact-finders, who had sole responsibility for resolving those issues based on evidence presented to them through witnesses with personal knowledge.

21. As explained by Professor McElhaney, an expert witness is permitted to offer opinions because he "is an explainer, whether he explains his own observations or someone else's." McElhaney, *supra* note 10, at 471.

the declarant recited what he perceived and remembered.<sup>22</sup>

The logic of sanctioning an expert's use of inadmissible evidence in forming opinions is that if the evidence is of the type experts reasonably rely upon in a particular field to form opinions, the expert will possess sufficient expertise in evaluating the evidence's reliability to justify its broader use in judicial proceedings. As one court has stated: "Years of experience teach the expert to separate the wheat from the chaff and to use only those sources and kinds of information which are of a type reasonably relied upon by similar experts in arriving at sound opinions on the subject."<sup>23</sup> If the witness possesses this ability (something that we apparently must presume under Rules 702 and 703 upon establishment of the witness' general expertise, along with the fact of regular reliance upon the facts or data in question) and, more important, uses her expertise to evaluate the underlying information, the standards of trustworthiness for the admission of hearsay will be met. The argument for admissibility is buttressed because the expert who initially assessed the offered information's reliability is presently available for cross-examination about that assessment. This availability will allow the finder of fact to evaluate the reliability of each piece of information and, in turn, the reliability of opinions based upon it.

Unlike other established hearsay exceptions codified in Rules 803 and 804(b), under which the judge assesses a statement's reliability based on the circumstances surrounding its utterance, the reliability justifying admission under the proposed Rule 703 exception would be based on a third party's out-of-court assessment. Because the expert's screening creates a presumption that a sufficient threshold of reliability exists, the direct assessment of those surrounding circumstances in the judicial proceeding would shift from the judge, as a question of admissibility, to the jury, as a question of the weight to be given to the information and, ultimately, to the opinion.

The critical premise underlying admission of the otherwise inadmissible evidence is the expert's evaluation of the information—not simply the expert's unquestioning reliance upon it for the purpose of rendering an opinion for the litigation. Combining her expertise with knowledge of the information or its source, the expert must have been convinced that the data was sufficiently

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22. See *supra* note 16.

23. *United States v. Sims*, 514 F.2d 147, 149 (9th Cir. 1975).

reliable to have formed the basis of an opinion in her daily professional practice. Accordingly, the "reasonable reliance" standard under Rule 703, which requires the information be "of the type" reasonably relied upon in the field, must be interpreted to require that the information not only be of the generic "kind" that is reasonably relied upon (for example, a doctor making diagnoses based upon statements from injured persons), but also be "acquired in a manner" that is consistent with the profession's standards (through the doctor's personal interviews of the injured persons, for example, rather than through a paralegal's interview subsequently provided to the doctor).<sup>24</sup>

This "kind" versus "manner of acquisition" distinction has been the underlying current of many decisions that have excluded expert opinions based upon otherwise inadmissible evidence. In *In re "Agent Orange" Product Liability Litigation*,<sup>25</sup> for example, Judge Weinstein found a hematologist's and a pathologist's expert opinions to be inadequate to overcome a motion for summary judgment because of the manner in which the experts acquired their data. After the action had been filed for the benefit of Vietnam veterans, plaintiffs' counsel asked those veterans to fill out a symptomology checklist and to indicate whether they had any of a number of physical, mental, or emotional symptoms, as well as to supply some general information about themselves and their children. The judge, in effect, excluded the opinions because even though this information is the "kind" that an examining physician would require in rendering an opinion about patients' illnesses (personal medical histories), that information normally would not be obtained in that manner. In addition, a physician normally would not rely upon this information without corroboration from medical records, physical examinations, and medical tests. This ruling reaffirmed the established Rule 703 principle that the "reasonably relied upon" standard is one of practice, not trial

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24. It goes without saying, of course, that the information upon which the expert relied must have been relevant to the controversy before the court and consistent (or at least not inconsistent) with the evidence upon which the finder of fact will be asked to render a decision. For example, an expert will not be allowed either to offer an opinion about the cause of a ship's sinking if that opinion is based upon factual assumptions that are flatly inconsistent with the undisputed facts in the case, *Cunningham v. Rendezvous, Inc.*, 699 F.2d 676 (4th Cir. 1983), or to speculate about the economic effect of certain conduct when evidence in the record contradicts the basis of the testimony, *Merit Motors, Inc. v. Chrysler Corp.*, 569 F.2d 666 (D.C. Cir. 1977).

25. 611 F. Supp. 1223 (E.D.N.Y. 1985).



preparation.<sup>26</sup>

Similarly, in *In re Swine Flu Immunization Products Liability Litigation*,<sup>27</sup> the court struck the testimony of a plaintiff's doctor because the doctor, in testifying to a causal link between a swine flu vaccination and Guillain-Barre Syndrome, relied upon data that the plaintiff's attorney collected from hospitals. The district court held that "[t]he technique employed in compiling the data is not of the caliber used in the field of epidemiology and medical statistics and therefore, cannot form the basis of [the doctor's] opinion testimony."<sup>28</sup>

If the judge properly screens expert opinions to ensure compliance with Rule 703's expanded basis requirements, no justification exists for precluding the finder of fact from hearing and using those facts supporting an opinion to the same extent as the expert. Indeed, the present physical condition hearsay exception under the Federal Rules of Evidence, from which the practice of differentiating between opinions and their bases appears to have been borrowed, precisely follows this suggested approach.<sup>29</sup> On the belief that doctors can detect if patients are fabricating their statements, Rule 803(4) now permits a doctor to repeat, for the truth of the matter asserted, what a patient said to him about medical history and cause, if those statements were "reasonably pertinent to diagnosis or treatment."<sup>30</sup>

26. See FED. R. EVID. 703 advisory committee's note, 56 F.R.D. 183, 283 (1973) (bringing Rule 703 practice into line with expert's own practice when not in court); see also *McLellan v. Morrison*, 434 A.2d 28, 30 (Me. 1981) (finding that a physician's conferring with another medical expert was common practice in forming opinions in that particular field).

27. 508 F. Supp. 897 (D. Colo. 1981).

28. *Id.* at 904.

29. Rule 803(4) states:

The following are not excluded by the hearsay rule, even though the declarant is available as a witness:

. . . .

(4) Statements made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pains, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment.

FED. R. EVID. 803(4).

30. See, e.g., *Shell Oil Co. v. Industrial Comm'n*, 2 Ill. 2d 590, 602-03, 119 N.E.2d 224, 231 (1954) (admitting injured person's statements to his treating physician about cause under a hearsay exception because of the presumed trustworthiness of a statement relayed in expectation of medical treatment). Further, what is significant about this expansion of the present physical condition exception is that the patient no longer needs to have consulted the physician solely for the purpose of treatment. Now the patient can consult solely for the purpose of developing a diagnosis for trial use. Despite this elimination of a major guarantee of trustworthiness—the patient's desire for accurate treatment—the Federal

Professor Carlson is concerned about the "wholesale introduction" of data through experts.<sup>31</sup> I share that concern to the extent that courts may permit experts to dump large quantities of unscreened evidence into the record. We should not resolve this concern, however, by arbitrarily excluding an entire body of evidence that the finder of fact should consider. If courts properly scrutinize expert testimony to ensure that each expert has used her special talents in screening the facts upon which she has relied, we avoid the problem. Until the Federal Rules of Evidence incorporate a new hearsay exception to accommodate specifically the new dimensions of the proposed practice under Rule 703, courts could admit this hearsay under the residual exceptions codified in Rules 803(24) and 804(b)(5).<sup>32</sup>

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Rules abandoned the common-law restriction because of the doctor's expertise in evaluating the reliability of hearsay evidence.

31. Carlson, *supra* note 3, at 592.

32. Rule 803(24) provides:

The following are not excluded by the hearsay rule, even though the declarant is available as a witness:

. . . .

(24) A statement not specifically covered by any of the foregoing exceptions but having equivalent circumstantial guarantees of trustworthiness, if the court determines that (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence. However, a statement may not be admitted under this exception unless the proponent of it makes known to the adverse party sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet it, his intention to offer the statement and the particulars of it, including the name and address of the declarant.

FED. R. EVID. 803(24).

Rule 804(b)(5) provides:

The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:

. . . .

(5) A statement not specifically covered by any of the foregoing exceptions but having equivalent circumstantial guarantees of trustworthiness, if the court determines that (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence. However, a statement may not be admitted under this exception unless the proponent of it makes known to the adverse party sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet it, his intention to offer the statement and the particulars of it, including the name and address of the declarant.

FED. R. EVID. 804(b)(5).

### C. A Potential Problem

If the basis of an expert's opinion is admissible to the same extent as the opinion that it supports, a party possibly could present his entire case through an expert's testimony.<sup>33</sup> This option would present the theoretical possibility of the finder of fact's resolving factual disputes based only on the testimony of biased experts who have pretried the case through their evaluation of the relevant facts. How realistic is this possibility? Although remote when adequate facts exist to support the expert's conclusions (because an advocate's case is always more convincing with the underlying evidence), the possibility is much greater in marginal cases when the party might attempt to mask the inadequacy or nonexistence of evidence through the use of biased testimony of his experts.<sup>34</sup> For practical purposes, however, the probability that a party would employ such a tactic is remote. In any event, depending on one's view of the purpose of Rule 703, the problem is either avoidable or, at least, manageable.

The most obvious solution to this potential problem is to limit the applicability of the proposed hearsay exception to those instances when the source of the expert's information is unavailable. This limitation could be accomplished simply by classifying the exception under Rule 804, which makes the declarant's unavailability material to his hearsay statement's admissibility. All exceptions under this rule require a demonstrated necessity for their use. Employing the residual exception presently recognized in Rule 804(b)(5) should achieve this result because subsection (B) of that rule requires that the hearsay evidence being offered be "more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts."<sup>35</sup>

If one views Rule 703's purpose as relieving parties of the

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33. Rule 704 increases this possibility by permitting experts to give opinions on ultimate issues in the case. It 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.  
FED. R. EVID. 704.

34. A necessary product of Rule 703, therefore, is the need for trial judges to screen the expert's testimony with care to ensure that a basis in fact exists and that the expert's biases do not render her testimony inadmissible under Rule 403. *See, e.g., Viterbo v. Dow Chem. Co.*, 646 F. Supp. 1420, 1425-26 (E.D. Tex. 1986) (concluding that the expert did not view the plaintiff's condition objectively because he sought employment from the plaintiff's attorney in the subject case).

35. *See supra* note 31.

cumbersome and time-consuming burden of establishing the basis of expert opinions (because the expert's professional assessment of that basis adequately assures its reliability), then the Rule 804 solution could be seen as inconsistent with that purpose. That is, a required demonstration of unavailability under Rule 804 usually would necessitate bringing forward the basis that Rule 703 no longer requires. Thus, under this view of Rule 703, the only way to avoid this extended use of experts is to require that a party establish a *prima facie* case independent of the expert's secondhand factual information. This approach would be untenable, however, because it would create an inferior class of substantive evidence given by experts. Such evidence would be admissible for its truth, but inherently insufficient to support a verdict. Likewise, such evidence would be sufficient to form the basis of opinions, but insufficient to support a verdict consistent with those opinions. In effect, this approach would perpetuate through the back door the same illogic that is addressed through the front door by the admission of the opinion's basis for its truth.

If we wish to give experts the right to rely on otherwise inadmissible evidence and do not wish to impose a demonstrated necessity requirement before they are permitted to offer that basis, the risk of adversarial manipulation may be unavoidable. Such a risk, however, is quite manageable for several reasons. First, as mentioned above, the probability of a party's employing such a tactic is remote. Second, if a party attempts to establish his factual case exclusively through an expert's testimony when independent evidence in fact is available, the judge or jurors naturally will become suspicious and, thus, view the expert's testimony with greater caution. Third, a party's failure to produce available evidence is the fair subject of comment by the opposition in its closing argument. Fourth, and most important, the expert's availability for cross-examination about her biases and the basis of her opinion should apprise the jury sufficiently of the unreliability of that basis.

The accommodation of this potential misuse of expert testimony is in substance similar to the situation in which a cause of action's single disputed element is proven through hearsay presented under an established exception. In the latter case the entire case's disposition turns on this hearsay evidence. The most significant difference in the hearsay establishing the basis of an expert's opinion is that its value can be more fully explored and, therefore, more realistically weighed by the jury, because the expert, who must have been in a position to evaluate its reliability, is

available for cross-examination.

#### IV. THE CONFRONTATION ISSUE

Professor Carlson confidently asserts throughout his Essay that if the court permits a government expert in a criminal prosecution to recite the inadmissible underlying facts upon which he relied (to prove their truth), a violation of the defendant's right of confrontation will occur. He claims that unless the government establishes a foundation, that is, qualifies the evidence under an exception to the hearsay rule, the facts are constitutionally inadmissible. I disagree.

In *Ohio v. Roberts*<sup>36</sup> the Supreme Court announced the requirements that the sixth amendment right of confrontation imposes on the government when it uses hearsay against a criminal defendant. In *Roberts* the defendant was convicted of a forgery and possession of a stolen credit card based on the prior recorded testimony that an unavailable witness had given at the defendant's preliminary hearing. In upholding the use of this hearsay, the Court provided a helpful explanation of the specific requirements that the government may have to satisfy if offering hearsay in a criminal prosecution, when the declarant is not available for cross-examination:

In sum, when a hearsay declarant is not present for cross-examination at trial, the Confrontation Clause normally requires a showing that he is unavailable. Even then, his statement is admissible only if it bears adequate "indicia of reliability." Reliability can be inferred without more in a case where the evidence falls within a firmly rooted hearsay exception. In other cases, the evidence must be excluded, at least absent a showing of particularized guarantees of trustworthiness.<sup>37</sup>

There are two important points to be made about *Roberts*. First, the permissible use of hearsay is not limited to statements that fall within an established exception to the hearsay rule. If the hearsay falls within such an exception, the requisite indicia of reliability will be presumed. If, however, the hearsay does not fall within an established hearsay exception, its use is still permissible if the government can demonstrate a sufficient level of trustworthiness. Second, the Court specifically noted that the rule of necessity (demonstrated unavailability) is inapplicable when the "utility of trial confrontation" is "remote."<sup>38</sup>

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36. 448 U.S. 56 (1980).

37. *Id.* at 66.

38. *Id.* at 65 n.7. In making this notation, the Court specifically referred to the type of

Contrary to Professor Carlson's suggestion, one cannot predict the constitutional invalidity of any particular hearsay evidence outside of the context in which that evidence is used. Even though the Constitution favors the accused's face-to-face confrontation of the witnesses offered against him, the use of hearsay does not ipso facto violate the confrontation clause. Therefore, introducing the otherwise inadmissible basis of expert opinions is not necessarily unconstitutional. A violation of the confrontation clause will occur only (1) when the court finds that a particular hearsay declarant should be brought forward if he is available, and the government fails to demonstrate that it has made a good faith, but unsuccessful, effort to do so; or (2) when despite an adequate demonstration of unavailability, the particular statement does not bear sufficient indicia of reliability.<sup>39</sup>

## V. CONCLUSION

As the role of experts in litigation expands, the question of the evidentiary status of an expert opinion's basis becomes increas-

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situation that had been before it in *Dutton v. Evans*, 400 U.S. 74 (1970). In *Dutton* the defendant was convicted of murder primarily on the basis of one of his co-conspirator's testimony. This testimony, however, was corroborated by a hearsay statement of another co-conspirator who, in response to the question "How did you make out in court?" (he had been arraigned on the murder charge) made the following statement to his cellmate: "If it hadn't been for the dirty son-of-a-bitch Alex Evans, we wouldn't be in this now." *Id.* at 77. The Court concluded that the use of this statement did not violate the defendant's confrontation rights because the utility of trial confrontation would have been remote. The Court based this conclusion on the following factors: (1) the hearsay statement was not an expression about a past fact; (2) the declarant was obviously in a position to have known whether Evans was involved in the murder; (3) little chance of faulty recollection existed; (4) the circumstances under which the statement was made indicated no reason for Evans' involvement in the crime to be misrepresented; (5) the primary evidence against Evans came from another co-conspirator's testimony; (6) that cross-examination of the declarant would have enlightened the jury about the statement's accuracy was highly unlikely; and (7) the witness who heard the statement uttered was fully cross-examined.

Subsequent to *Roberts*, the Court has held that the rule of necessity (and the required demonstration of unavailability) does not apply when the government offers a co-conspirator's statement against the accused. *United States v. Inadi*, 106 S. Ct. 1121 (1985). The Court thought that the truth-seeking process would gain very little from a face-to-face confrontation between the accused and the alleged co-conspirator. This was a poorly reasoned decision. See P. RICE, EVIDENCE: COMMON LAW AND FEDERAL RULES OF EVIDENCE § 5.01, at 331-37 (1986). One should be wary of its precedential value.

39. For an example of when the Court might find the indicia of reliability lacking, see *Lee v. Illinois*, 106 S. Ct. 2056 (1986). Even though a co-conspirator's confession that implicated Lee fell within the declarations against interest exception, the Court found that the confession possessed insufficient indicia of reliability because it was made while the co-conspirator was in custody and therefore had a motivation to fabricate in order to curry favor with the police. *Id.* at 2063-66.

ingly important. This status has given rise to litigation not only under Rule 703, but also under the public records exception to the hearsay rule, Rule 803(8)(C), when expert opinions are in the form of government agency investigative findings.<sup>40</sup> The charade that opinions and their bases are severable should end. Under the common law, such severance was simply an illogical practice that had no meaningful implications. With the formal recognition of the expert's right to rely on otherwise inadmissible evidence, however, the practice is altering the players' roles in litigation. If we are comfortable both with the expert's assumption of the role of super-factfinder and thirteenth juror and with the diminished role that necessarily follows for the judge or jury, we openly should acknowledge and embrace this expanded role. If we are not, we should give up the severability fiction as a remnant of the past and establish a hearsay exception for the introduction of the bases of experts' opinions that sets forth meaningful standards for ensuring reliability.

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40. See *Zenith Radio Corp. v. Matsushita Elec. Indus. Co.*, 505 F. Supp. 1125, 1143-50 (E.D. Pa. 1980) (stating that in examining a public report in the nature of an expert opinion, the court must determine the relevancy of the report by considering such factors as the agency's expertise, the factual basis of the report, and whether those facts are of a type reasonably relied upon by experts in the field).