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A JUDICIAL PERSPECTIVE ON OPINION EVIDENCE UNDER THE FEDERAL RULES

GEORGE C. PRATT*

I. Introduction

The purpose of this article is to focus upon some practical aspects of opinion evidence under the Federal Rules of Evidence. The issues, suggestions, and problems posed are largely intuitive, and are derived primarily from trial experience. Implicit in the discussion are one major premise and two minor premises. The major premise is that Article VII of the Federal Rules of Evidence represents a realistic, practical, and desirable approach to the problems associated with opinion testimony.

The two minor premises arise from application of Article VII in practice and relate to the role of attorneys and trial judges in achieving the maximum benefits from Article VII. First, because Article VII's approach to opinion testimony relies heavily on the adversary system, special burdens are placed on the advocates. Thus, attorneys have fruitful opportunities available to them in presenting opinion testimony, and attorneys seeking to counter such testimony must in pretrial proceedings carefully discover the expert's opinion and its underlying basis in order to undercut that evidence at trial. Second, appellate courts almost universally regard a trial court's rulings in admitting or excluding opinion testimony as discretionary and seldom reverse those rulings.¹ Therefore, the trial judge, to achieve a just result, should make every effort to insure that counsel fairly present opinion testimony and the jury carefully evaluates it.²

Article VII of the Federal Rules of Evidence is concise;³ its opinion

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¹ *E.g.*, *Randolph v. Collectramatic, Inc.*, 590 F.2d 844, 847 (10th Cir. 1979); *United States v. Williams*, 583 F.2d 1194, 1197-98 (2d Cir.), *cert. denied*, 439 U.S. 1117 (1979); *United States v. Johnson*, 575 F.2d 1347, 1360 (5th Cir.), *cert. denied*, 440 U.S. 907 (1979); *United States v. Cyphers*, 553 F.2d 1064, 1072 (6th Cir.), *cert. denied*, 434 U.S. 843 (1977); *United States v. Brown*, 540 F.2d 1048, 1053 (10th Cir. 1976), *cert. denied*, 429 U.S. 1100 (1977). *Cf.* *Knight v. Otis Elevator Co.*, 596 F.2d 84, 86-87 (3d Cir. 1979); *United States v. Garvin*, 565 F.2d 519, 522 (8th Cir. 1977). *Knight* and *Garvin* cite the general rule, but find abuses of the trial courts' discretion under the circumstances of the cases.

² Of course, in a non-jury case, the court must carefully make its own evaluation.

³ See notes 6, 13, 14, 25 & 30 *infra*. Rule 706, relating to court-appointed experts, is outside the scope of this article and is not discussed.

rules appear to be simple and direct. With little discussion, Congress adopted the opinion rules in nearly the same form as the advisory committee proposed.⁴ Such easy acceptance is perhaps understandable since the rules reflect an enlightened, academic view of opinion testimony that dates back some fifty years.⁵ The lack of discussion is somewhat surprising, however, when one considers the persistence, frequency, and success of attorneys' objections to opinion testimony since the adoption of the Rules, objections made on the very grounds that Article VII sought to undercut.

II. The Opinion Rules

A. Rule 701

Rule 701 permits a lay witness to testify to an opinion or inference that is rationally based on his perception and helpful either to a clear understanding of his testimony or to the determination of a fact in issue.⁶ As Dean Wigmore pointed out, the rule prohibiting lay witnesses from giving opinions is a phenomenon peculiar to American jurisprudence.⁷ While English courts condemned testimony consisting of "opinion," they used the term to refer only to a statement not made on the basis of the witness' personal knowledge.⁸ American courts, however, expanded the English courts' concept of opinion testimony and sought to limit a lay witness' testimony to "facts," while excluding his "opinions," "conclusions," and "inferences."⁹ This stricter American approach to lay opinions has proven to be logically unsound and impossible to apply in practice.¹⁰

Under Rule 701, witnesses may testify in terms used in everyday speech. Witnesses who testify in the courtroom, unless carefully coached in advance, frequently try to express themselves using the phrases "I

⁴ See Notes of Advisory Committee on Proposed Rules, *reprinted in* FED. R. EVID., Rules 701-706, 28 U.S.C. Appendix 570-73 (1976).

⁵ See generally 7 J. WIGMORE, EVIDENCE, § 1917 (3d Ed. 1940) [hereinafter cited as WIGMORE]; C. MCCORMICK, EVIDENCE, § 11 (1954) [hereinafter cited as MCCORMICK]; 3 J. WEINSTEIN & M. BERGER, WEINSTEIN'S EVIDENCE ¶ 701[01] (1981) [hereinafter cited as WEINSTEIN & BERGER].

⁶ FED. R. EVID 701, Opinion Testimony by Lay Witness, provides:

If the witness is not testifying as an expert, his testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness and (b) helpful to a clear understanding of his testimony or the determination of a fact in issue.

⁷ 7 WIGMORE, *supra* note 5, § 1917.

⁸ See *id.* §§ 1917-29; Hand, *Historical and Practical Considerations Regarding Expert Testimony*, 15 HARV. L. REV. 40, 44-45 (1901).

⁹ *Hardy v. Merrill*, 56 N.H. 227, 241 (1875); *Sydleman v. Beckwith*, 43 Conn. 9, 12 (1875); *Cooper v. State*, 23 Tex. 331, 337-39 (1859); *Evans v. People*, 12 Mich. 27, 35 (1863); see 7 WIGMORE, *supra* note 5, § 1918.

¹⁰ See, e.g., MCCORMICK, *supra* note 5, § 12.

think," "I believe," "my impression was," or "in my opinion." In New York, where state courts tenaciously adhere to the old "opinion rule,"¹¹ a witness' answer prefaced by any of the foregoing almost automatically provokes a "knee-jerk" objection on the ground that "it calls for the operation of the witness' mind." Too often the objection is sustained. A carefully prepared witness, of course, would express the same thought in the permissible form: "to the best of my recollection." By permitting testimony "in the form of" opinions or inferences, Rule 701 recognizes that much of the courtroom conflict over a lay witness' opinion testimony is merely argument over form.

There are two prerequisites to the admissibility of a lay opinion. The first requires that the lay witness' testimony be "rationally based on the perception of the witness." Unlike an expert witness, who may assume facts to be true, the opinions or inferences of a lay witness must arise from her own perception. The second prerequisite requires the witness' opinion to be helpful either to a clear understanding of the witness' testimony or to the determination of a fact in issue. This limitation of Rule 701 is nothing more than a special adaptation of Rule 403, which permits exclusion of relevant evidence on grounds of prejudice, confusion, or waste of time.¹² Thus, if a witness' opinion, even when based on her perception, does no more than draw an inference from facts readily expressed from the witness stand, it is not truly "helpful" and, therefore, may be excluded as a "waste of time." In practice, however, a lay witness' own opinion or evaluation of the facts to which she testifies is usually apparent from her testimony. It is frequently quicker and less confusing to permit the witness to express such an opinion than to hear argument upon an objection, a process that always engenders confusion in the minds of the jury. Thus, permitting such an opinion is usually not only harmless but also a timesaver.

There is a further advantage to relatively free admission of lay opinions. Unlike many experts, lay witnesses frequently lack experience in testifying. They tend to become flustered when their usual manner of expression proves unacceptable to the presiding judge. Testifying is difficult enough without needless, artificial barriers. A witness who is upset because she is made self-conscious about her speech patterns will often prove to be less persuasive. By eliminating the artificial rule that prevented lay witnesses from expressing themselves in opinion form, Rule 701 has made it easier for them to express themselves and to com-

¹¹ See generally Fisch, *Lay Opinions in New York*, 37 CORNELL L. REV. 32 (1951).

¹² FED. R. EVID. 403 provides:

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

See generally Dolan, *Rule 403: The Prejudice Rule in Evidence*, 49 S. CAL. L. REV. 220 (1976).

municate effectively with counsel. In so doing, Rule 701 has advanced the truth-finding function of trials.

B. Rules 702 and 703

Rules 702 and 703 set forth prerequisites for admitting expert opinions. Under Rule 702, a person who is "qualified as an expert" may give opinion testimony.¹³ Her qualifications must come from "knowledge, skill, experience, training or education," and she is permitted to testify to scientific, technical, or other specialized knowledge that will assist the trier of fact to understand the evidence or to determine a fact in issue. Under Rule 703, an expert may base her opinion upon facts or data perceived by or made known to her either at or before the hearing.¹⁴ Those facts or data need not be admissible in evidence provided that they are of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject.

A comparison of the requirements for lay opinions with those for expert opinions is revealing. While Rule 701 limits a lay witness' opinion testimony to opinions rationally based on the witness' perception, Rule 703 permits an expert to base her opinions upon "facts or data" perceived by her, or made known to her either at or before her testimony. This broad language encompasses everything that the expert may know, not only in general, but about the particular case. Most significantly, the expert may rely on facts or data which are inadmissible evidence, provided that they are of a type reasonably relied upon by experts in the field.

Both lay and expert witnesses may testify to an opinion that will aid in "determination of a fact in issue." An alternative condition permits an opinion from a lay witness when it is helpful to a clear understanding of "his testimony," and from an expert when it will assist the trier of fact to understand "the evidence," which includes not only the expert's testimony, but any other evidence that may be presented.

Thus, Rules 702 and 703 permit a wide range of expert testimony. While prior case law frequently limited expert testimony to subject areas in which the witness was engaged as a profession, trade, or calling,¹⁵ the Federal Rules now permit such testimony wherever special-

¹³ FED. R. EVID. 702, Testimony by Experts, 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 by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

¹⁴ FED. R. EVID. 703, Bases of Opinion Testimony by Experts, provides:

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

¹⁵ 7 WIGMORE, *supra* note 5, § 1923.

ized knowledge will assist the trier of fact. To qualify as an expert, the witness need not be a certified academic, but is required merely to have knowledge, skill, experience, training, *or* education.

Some judges have been heard informally to express the test for expertise in terms of whether the witness knows more about the subject than the court or jury. Since Rule 702 permits expert testimony if the witness possesses specialized knowledge that will assist the trier of fact, the rules potentially make virtually every person an expert in some field. Nearly every activity in which people engage involves specialized knowledge of one degree or another. For example, cleaning a house, cooking, running a Little League team, operating an office, processing a check through a bank, operating an automobile or an airplane, skiing, and caring for a horse all require expertise. Someone who engages in any of these activities may have specialized knowledge that, under proper circumstances, could assist the trier of fact in determining a fact in issue.

What consequences flow from these considerations? In the first place, no bright line now separates a lay witness from an expert on the basis of academic degrees, scholarship, or professional status. The scope of expert testimony has been so expanded that many people, formerly thought of as lay witnesses, now can be qualified as experts and can express an opinion even though it is not based on matters directly perceived. Indeed, even the opinion of a lay witness need not be based upon the particular events at issue, but only upon matters perceived by the witness. Thus, an experienced lay witness can testify, for example, to his opinion as to the likelihood of harm for using a particular procedure with which he was personally familiar.¹⁶ A trial lawyer should not overlook these expanded potentials for opinion testimony.

Rule 702 offers an additional opportunity for expert testimony by permitting the expert witness to testify in the form of an opinion "or otherwise." As the advisory committee noted, the assumption that experts testify only in the form of opinions is logically unfounded.¹⁷ The advisory committee phrased Rule 702 to permit the expert to "give a dissertation or exposition of scientific or other principles relevant to the case, leaving the trier of fact to apply them to the facts."¹⁸ Here again, the advocate has an opportunity to shape the jury's thinking about the problems of the case. Frequently, a solution follows more from asking the right question rather than from finding the correct answer, and us-

¹⁶ *E.g.*, *Farner v. Paccar, Inc.*, 562 F.2d 518, 529 (8th Cir. 1977) (lay witness in trucking business for 30 years permitted to give opinion on proper design of suspension system for trucks under either Rule 701 or 702). *But see* *Randolph v. Collectramatic, Inc.*, 590 F.2d 844, 848 (10th Cir. 1979) (restaurant owner not permitted to give opinion on safety of pressure cooker).

¹⁷ Notes of Advisory Committee on Proposed Rules, *reprinted in* FED. R. EVID., Rule 702, 28 U.S.C. Appendix 570 (1976).

¹⁸ *Id.*

ing an expert to present the principle or theory underlying the key issue in the case can be a most effective means of persuasion. Education of the trier of fact by an expert may prove invaluable, whether or not the expert takes the further step of suggesting to the jury the critical inference, opinion, or conclusion.

Another consequence arises out of the second sentence of Rule 703, which permits an expert to base an opinion upon facts or data that are not admissible in evidence, provided that 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." The full impact of this broadening of the permissible bases for expert opinions has yet to be felt. The rule, of course, permits an expert to rely upon the literature, studies, tests, experiments, and other hearsay matters that form the basis for nearly every recognized area of expertise. It goes further, however, in permitting, for example, a physician to give a diagnosis or prognosis based on a variety of sources, including statements by patients and relatives; reports and opinions from nurses, technicians, and other doctors; hospital records; and x-rays. Such information is generally reliable; indeed, physicians routinely rely upon that information in making decisions. While most of the underlying material would in any event be admissible in evidence, the rule obviates the need for calling many witnesses and authenticating the documents. Pretrial discovery and preparation can reveal any deficiencies in the underlying data, and cross-examination can expose the weaknesses in the physician's analysis.

A more difficult problem is presented when the trial court makes an initial determination that the underlying basis for the proposed expert's opinion is inadmissible. Such a situation was faced by the court in *Zenith Radio Corp. v. Matsushita Electric Industrial Co.*,¹⁹ a multi-district antitrust case of mammoth proportions.²⁰ There, the court ruled that inadmissible hearsay and other unreliable evidence so permeated the materials relied upon by plaintiffs' experts in formulating their opinions that the opinions themselves were inadmissible. Discussing one expert's opinion, the court noted: "What [the expert] has in essence done is to examine the myriad documents supplied to him by plaintiffs' counsel, to quote liberally from those documents, and to conclude, 'Aha! Cartel! Conspiracy! Illegal concerted action!'"²¹

Chief Judge Weinstein disagrees with what he terms the restrictive

¹⁹ 505 F. Supp. 1313 (E.D. Pa. 1981).

²⁰ The series of orders entered by the *Zenith* court following a lengthy pretrial evidentiary hearing consumes nearly 300 pages in the Federal Supplement. *Id.*; 505 F. Supp. 1190 (E.D. Pa. 1980); 505 F. Supp. 1125 (E.D. Pa. 1980). The court noted that plaintiff's pretrial statement totaled 17,000 pages and that over 250,000 documents had been produced. 505 F. Supp. at 1137 & n.4.

²¹ 505 F. Supp. at 1349.

approach taken in *Zenith* and similar cases²² because it tends to undermine the second sentence of Rule 703, which conditions admissibility upon the reasonableness of the materials relied upon by the expert, not upon the admissibility of underlying data itself.²³ Rule 703 implicitly incorporates a hearsay exception permitting the expert to base an opinion on inadmissible hearsay, provided that the hearsay is reasonably relied upon by experts in the field. What the court determined to decide in *Zenith* was whether the particular antitrust area lent itself to expert reliance on hearsay. Alternative grounds for reaching the same result in *Zenith* are provided by Rule 403, which permits exclusion of testimony in the interests of efficiency, a fact recognized by both Chief Judge Weinstein and the trial judge in *Zenith*.²⁴ The use of Rule 403 does not restrict Rule 703's liberal approach, but the *Zenith* approach adds an unnecessary and undesirable requirement to Rule 703.

C. Rule 704

Rule 704 provides that an opinion that is otherwise admissible is not objectionable simply because it embraces an ultimate issue to be decided by the trier of fact.²⁵ Many courts previously excluded testimony which related to "an ultimate issue" or "usurped the function of the jury."²⁶ The philosophy of the Federal Rules is to permit the witness to give such testimony and to leave it to the jury to evaluate the opinion in the light of cross-examination and the other evidence. Frequently, the difference is merely one of form, because it is often impossible to determine what is "an ultimate fact." The rules go beyond the purely formal distinction, however, and permit opinion testimony on any issue of fact.

For example, counsel may now even prove the character of a defendant or of any witness by opinion as well as by reputation evidence.²⁷ Opinion testimony is more natural and generally more believable than the stilted form of "reputation in the community," particularly when the witness is given an opportunity to explain the basis for her opinion. However, in my experience, few attorneys take advantage of this added opportunity for persuasion.

Opinion testimony that involves mixed questions of fact and law

²² *E.g.*, *Berguido v. Eastern Airlines, Inc.*, 317 F.2d 628, 631-32 (3d Cir.), *cert. denied*, 375 U.S. 895 (1963).

²³ 3 WEINSTEIN & BERGER, *supra* note 5, ¶ 703[03].

²⁴ *See id.* ¶ 703[03], at 703-21; 505 F. Supp. at 1326 n.12.

²⁵ FED. R. EVID. 704, Opinion on Ultimate Issue, 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.

²⁶ *See* 7 WIGMORE, *supra* note 5, § 1920; 3 WEINSTEIN & BERGER, *supra* note 5, ¶ 704[01]; MCCORMICK, *supra* note 5, § 12.

²⁷ FED. R. EVID. 405; *see* FED. R. EVID. 608 (placing limitations on FED. R. EVID. 405).

presents additional problems. Generally, an opinion by a witness about the law is excluded because it is superfluous, in light of the judge's presumed special knowledge of the law.²⁸ In other circumstances, however, where facts must be applied in the light of a fairly well established legal standard, the witness has been permitted to give her opinion.²⁹

D. Rule 705

Rule 705 is directed at the form of an expert's testimony.³⁰ Before the Federal Rules, most courts required experts to respond to a hypothetical question, an artificial device that caused confusion, delay, and frustration.³¹ Under Rule 705, the hypothetical question may be avoided; all that is required is that the expert first be qualified and then state her opinion. Nothing even requires her to give on direct examination the reasons for her opinion, let alone the underlying facts or data.³² Of course, a jury may not give much credence to an unsupported opinion, so if the proponent of the testimony fails to have the expert give her reasons for the opinion or its underlying facts, counsel on cross-examination may for tactical reasons choose to ask no questions at all or she may choose to develop only those facts and ideas that run counter to the opinion.

This marked change in the form of expert testimony is a welcome development in trial practice, but it places additional burdens on adversary counsel. In order to determine how to attack an expert's opinion, and whether to explore the reasoning behind it or the facts underlying the opinion, the opposing attorney in a civil case must learn all of that information in advance. For Rule 705 to operate fairly, therefore, extensive pretrial discovery of experts is essential.³³

²⁸ See *Marx & Co., Inc. v. Diners' Club, Inc.*, 550 F.2d 505, 508-10 (2d Cir.), *cert. denied*, 434 U.S. 861 (1977).

²⁹ See 3 WEINSTEIN & BERGER, *supra* note 5, ¶ 704[02].

³⁰ FED. R. EVID. 705, Disclosure of Facts or Data Underlying Expert Opinion, provides: The expert may testify in terms of opinion or inference and give his reasons therefor without prior disclosure of the underlying facts or data, unless the court requires otherwise. The expert may in any event be required to disclose the underlying facts or data on cross-examination.

³¹ See Notes of Advisory Committee on Proposed Rules, *reprinted in* FED. R. EVID. Rule 705, 28 U.S.C. Appendix 571-72 (1976); Ladd, *Expert Testimony*, 5 VAND. L. REV. 414, 427 (1952). See also 3 WEINSTEIN & BERGER, *supra* note 5, ¶ 705[01].

³² The court may, however, require prior disclosure of the underlying facts or data.

³³ FED. R. CIV. P. 26(b)(4) contemplates extensive pretrial discovery of experts. FED. R. CIV. P. 26(b)(4) authorizes interrogatories which require an adversary to identify experts, state the subject matter on which each is expected to testify, and state the substance of the facts and opinions to which the expert is expected to testify along with a summary of the grounds for each opinion. See note 42 *infra*. Given the ingenuity of attorneys who strive to draft answers that reveal as little information as possible, interrogatories in practice fall far short of providing adequate discovery of experts. The rule goes further, however, and, on motion, the court may order further discovery by other means subject to restrictions and possible payment of expert fees. *Id.*

E. "Learned Treatises"

Although not part of Article VII, Rule 803(18) relating to "learned treatises" not only opens the door to an additional form of opinion evidence, but also is closely related to the use of expert opinion.³⁴ In a "learned treatise" an attorney frequently finds an inexpensive source of opinion evidence which proves helpful to the jury or effectively rebuts or corroborates a testifying expert. While the title of subdivision 18 of Rule 803 is "Learned Treatises," the material which may be read to the jury under the rule is described in the text of the rule in much broader language. It includes "statements contained in published treatises, periodicals or pamphlets on a subject of history, medicine or other science or art." In appropriate cases, counsel may effectively and persuasively use learned treatises.

There are two preconditions to use of a statement from a learned treatise. First, the treatise must be established as a reliable authority. It may be qualified "by the testimony or admission of the witness or by other expert testimony or by judicial notice." Presumably, counsel also may establish the reliability of a statement in a treatise before trial by serving her adversary with a notice to admit.³⁵ If the attorney denies the truth of the matters sought to be admitted, the denial may be a basis for recovering the costs of calling an expert solely to establish the statement as a reliable authority.³⁶ As the second precondition to use of a "learned treatise," counsel must call the statement to the attention of an expert witness upon cross-examination, or the witness must rely on it in direct examination. As a practical matter, if a friendly expert uses the statement, she will testify about it in her direct examination. If it is to be used in connection with an unfriendly expert, counsel will probably have to establish the statement's reliability independently.³⁷ Once reliability is established, the cross-examiner need only call the statement to the expert's attention and then read the favorable statement to the jury.³⁸ By

³⁴ FED. R. EVID. 803 exempts certain items from exclusion by the hearsay rule. Subdivision (18) provides:

Learned Treatises. To the extent called to the attention of an expert witness upon cross-examination or relied upon by him in direct examination, statements contained in published treatises, periodicals, or pamphlets on a subject of history, medicine, or other science or art, established as a reliable authority by the testimony or admission of the witness or by other expert testimony or by judicial notice [are not excluded by the hearsay rule]. If admitted, the statements may be read into evidence but may not be received as exhibits.

See generally Note, *Learned Treatises and Rule 803(b)(18) of the Proposed Federal Rules of Evidence*, 5 VAL. U.L. REV. 126 (1970).

³⁵ FED. R. CIV. P. 36.

³⁶ FED. R. CIV. P. 37(c).

³⁷ Every well-coached expert tends to deny the reliability of authorities suggested by the cross-examiner.

³⁸ The attorney may also ask whether the expert agrees with the statement, or whether she considered it in formulating her opinion, or whether it affects her opinion in any way.

this means, counsel may bring considerable hearsay evidence to the jury's attention, without cross-examination.

Under the rule, a "learned treatise" may be read to the jury but may not be received in evidence. It is helpful, however, for counsel to mark for identification any learned treatises to which she refers. I require that counsel provide an extra copy of the statement to me so I can mark whatever parts are actually read to the jury. Not only does a written copy in the hands of the expert facilitate cross-examination, but written identification of those portions that have been read to the jury eliminates any awkward dispute during summation over whether the particular material has been read during the testimony.

III. Requiring Written Direct Testimony

As noted under Rule 705 above, advance knowledge of opposing experts' opinions is essential under the Federal Rules' approach. I believe advance knowledge is so important that in civil cases I require an expert's direct testimony to be written out, in full, and provided to the other side well in advance of trial. Whether the testimony is presented in narrative or in question and answer form is optional with the attorney. In the courtroom, when the expert appears, I read or summarize her qualifications to the jury,³⁹ clarify how an expert's testimony differs from that of an ordinary witness, and explain why her testimony will be different in form. I further caution the jury not to draw an inference from the fact that the expert will read the testimony. After the expert reads her direct testimony to the jury, the opposing attorney cross-examines her, and any loose ends are then picked up on redirect examination.

This technique of requiring the expert to write out and then read her direct testimony, while not unique in the federal courts, is concededly somewhat unusual. In practice, it has proved to have several advantages. First, it requires both the expert and the attorney to prepare well in advance of trial. Obviously, by providing complete disclosure of the testimony, it eliminates surprise. Written direct testimony also reduces and focuses the need for discovery. As a practical matter, if counsel defer depositions of the expert until after the expert prepares the testimony, both experts and attorneys save considerable time and

³⁹ The attorney may also have the expert's written qualifications admitted into evidence so that the jury has access to them during their deliberations. This is a sound tactical move even when the court reads the expert's qualifications, since the trial judge and the jury often become restless when counsel explores the expert's qualifications at length on the witness stand. The written resume admitted into evidence thus saves time in the courtroom since it highlights the expert's qualifications and at the same time gives the jury an opportunity to explore the qualifications at greater length.

effort.⁴⁰ As a desirable by-product, the technique discourages development of last minute theories for the expert to expound upon.

Secondly, at trial this technique underscores for the jury that an expert's testimony differs essentially from that of ordinary witnesses. Furthermore, the technique saves considerable time at trial in presenting the direct testimony, because the expert simply reads her prepared testimony to the jury after an appropriate explanation from the court regarding why the expert uses this unusual mode of testimony. Moreover, since opposing counsel knows the exact substance of the testimony, she generally prepares her cross-examination well and focuses precisely on the expert's weak points. Indeed, many times there is no cross-examination at all.⁴¹

Admittedly, there are a few disadvantages to this method of handling experts' testimony. Inevitably the opposing experts seek to adjust their opinions to match or meet points raised by the other side in their proposed testimonies. The court can minimize this difficulty, however, by permitting liberal amendment of the written testimonies after they are exchanged, provided the amendments are made sufficiently in advance of trial to avoid surprise. The threat of cross-examination concerning the changes is a substantial deterrent to abuse of the amendment privilege. Some people fear that after the expert reveals her opinions, these opinions may persuade or inspire fact witnesses to change their testimony so as to avoid or undercut certain conclusions of the opposing expert. The court can easily circumvent this problem by deferring exchange of the expert's testimony until after counsel have had the opportunity to question the fact witnesses through depositions and interrogatories in order to pin down their versions of the events.

Some attorneys fail to perceive in advance how the dynamics of this method of presenting expert testimony works in the courtroom. An expert may read her testimony poorly, either stumbling over words, using a monotonous tone, or she may generally fail to be convincing. These problems are not inherent in the technique, however, and most expert witnesses can readily overcome them with a brief rehearsal.

Another question has been raised as to whether requiring full disclosure of an expert's opinion conflicts with Federal Rule of Civil Procedure 26(b)(4),⁴² which contemplates limited discovery of experts. In my

⁴⁰ Most attorneys do not resist depositions of their experts or disclosure of the experts' reports. See Graham, *Discovery of Experts Under Rule 26(b)(4) of the Federal Rules of Civil Procedure: Part Two, An Empirical Study And A Proposal*, 1977 U. ILL. L.F. 169, 177.

⁴¹ In the heat of a trial, one of the most difficult statements for counsel to make is "No cross-examination." But when counsel has the opportunity to review with her own expert the opposing expert's direct testimony and to carefully analyze its significance in the relative calm of the office, a decision to forego cross-examination seems to come more easily.

⁴² FED R. CIV. P. 26(b)(4) provides:

Trial Preparation: Experts. Discovery of facts known and opinions held by ex-

opinion, no real conflict exists. In the first place, Congress enacted Civil Procedure Rule 26(b)(4) before the Federal Rules of Evidence greatly changed the form of opinion testimony,⁴³ and the liberalized form now allowed virtually demands more intensive pretrial discovery. Second, Rule 26(b)(4) itself contemplates "further discovery" if sought by motion; the rule's goal is not altered simply because the court, on its own motion, orders disclosure.⁴⁴ Third, the extra burden placed on the expert by preparing written direct testimony is not so great as to require the extra compensation that might be appropriate if counsel subjected her to a deposition.⁴⁵ Finally, Rule 26(b)(4), as well as all other rules, seeks to obtain a "just, speedy and inexpensive determination,"⁴⁶ a standard that can be satisfied at trial under the Federal Rules of Evidence only by thorough and complete pretrial disclosure of experts' opinions.

Requiring written direct testimony of experts raises still another question. Some have questioned whether written direct testimony is inadmissible hearsay because it constitutes reading at trial an out-of-court statement offered for its truth.⁴⁷ The answer is that while the definition of hearsay may fit such testimony in form, the policies against use of

perts, otherwise discoverable under the provisions of subdivision (b)(1) of this rule and acquired or developed in anticipation of litigation or for trial, may be obtained only as follows:

(A)(i) A party may through interrogatories require any other party to identify each person whom the other party expects to call as an expert witness at trial, to state the subject matter on which the expert is expected to testify, and to state the substance of the facts and opinions to which the expert is expected to testify and a summary of the grounds for each opinion. (ii) Upon motion, the court may order further discovery by other means, subject to such restrictions as to scope and such provisions, pursuant to subdivision (b)(4)(C) of this rule, concerning fees and expenses as the court may deem appropriate.

(B) A party may discover facts known or opinions held by an expert who has been retained or specially employed by another party in anticipation of litigation or preparation for trial and who is not expected to be called as a witness at trial, only as provided in Rule 35(b) or upon a showing of exceptional circumstances under which it is impracticable for the party seeking discovery to obtain facts or opinions on the same subject by other means.

(C) Unless manifest injustice would result, (i) the court shall require that the party seeking discovery pay the expert a reasonable fee for time spent in responding to discovery under subdivisions (b)(4)(A)(ii) and (b)(4)(B) of this rule; and (ii) with respect to discovery obtained under subdivision (b)(4)(A)(ii) of this rule the court may require, and with respect to discovery obtained under subdivision (b)(4)(B) of this rule the court shall require, the party seeking discovery to pay the other party a fair portion of the fees and expenses reasonably incurred by the latter party in obtaining facts and opinions from the expert.

⁴³ FED. R. CIV. P. 26 was last amended on March 30, 1970. 28 U.S.C. Appendix 438 (1976). Congress enacted the Federal Rules of Evidence on January 2, 1975. Pub. L. No. 93-595, § 1, 88 Stat. 1926 (1975).

⁴⁴ FED. R. CIV. P. 26(b)(4)(A)(ii); *see note 42 supra*.

⁴⁵ FED. R. CIV. P. 26(b)(4)(C); *see note 42 supra*.

⁴⁶ FED. R. CIV. P. 1.

⁴⁷ FED. R. EVID. 801(c).

hearsay are not intended to prevent the "freezing" of an expert's testimony in advance of trial. Several rationales could circumvent the hearsay objection. The court may classify the testimony not as a statement made out of court, but merely as one prepared out of court for presentation in court. Alternatively, the court could view the prepared direct testimony as part of a deposition whose cross-examination was reserved for trial and whose use at trial was warranted as a "special circumstance" because the witness is an expert. Finally, on a more technical level, the court could admit the prepared testimony under Rule 803(24), the catch-all exception to the hearsay rule.⁴⁸

For nearly five years I have required this technique for presenting experts' testimony. Before they actually use the technique, attorneys generally exhibit negative reactions. After trial, however, many have enthusiastically praised the method, because it forced their expert to prepare early, and because it also prodded the attorney to a better, more intensive analysis of the problems of her case. Finally, the time saved in developing the expert's testimony at trial, while of little significance to the attorney, is of great concern to the court and the general administration of justice.

IV. Attorney's Perspective

An attorney practicing under Article VII of the Federal Rules must weigh many questions in dealing with opinion testimony. Of the many possible experts available, which ones should I use? Should I get an academic type who is strong on theory and book learning, or should I use a practical expert who has extensive experience with the process or device at issue? Should I use an expert at all, or should I use opinions of lay witnesses who have perceived either the events in issue or circumstances identical to those in issue? How should I frame questions to help the jury better understand the case? If the opposing expert fails to explain her opinion, do I ask her to explain her reasoning or to describe the factors, facts, or data upon which she relies? If on direct examination the expert explained her opinion in part, do I ask her on cross-examination about other facts or factors and how she would evaluate them? What exhibits should I use to illustrate the expert's testimony? How do I handle the conflicting experts' views in summation?

Attorneys must resolve all of these practical questions with two objectives in mind: admissibility and persuasion. In presenting her own expert, the attorney must, of course, be sure that the testimony is legally admissible. The attorney must present the necessary foundation of qualifications and must ensure that the expert's opinions are relevant and relate to questions of fact rather than law. Remember that admissi-

⁴⁸ FED. R. EVID. 803(24).

bility is determined by the trial court, whose discretion is rarely overruled.⁴⁹ Since expert testimony may require difficult judgments, a pretrial conference provides an ideal time to explore the trial judge's views about the experts and the admissibility of their testimony. A formal motion *in limine* may determine in advance of trial the admissibility of a doubtful opinion. In general, however, given the significantly relaxed standards established by Article VII, legal admissibility of opinion testimony is a hurdle relatively easily cleared.

Different types of cases present different opportunities for use of expert opinion testimony to persuade the fact-finder. For example, in *United States v. Johnson*,⁵⁰ the government sought to establish that certain marijuana had been grown in Columbia. Authorities never seized the marijuana, but the government witness had examined the marijuana at issue and offered his opinion that it was Columbian-grown.⁵¹ Out of the jury's presence, the prosecutor established that the witness had smoked marijuana more than a thousand times, "dealt" in marijuana twenty times, and had identified types of marijuana over one hundred times.⁵² The witness explained that he based his identification of marijuana on its appearance, smell, taste, and effect.⁵³ Satisfied, the trial court found the witness to be qualified as an expert based on his "experience of being around a great deal and smoking" marijuana.⁵⁴ Defendant attempted to rebut the testimony by offering an academic expert who testified to the lack of scientific proof that Columbian marijuana differed from marijuana grown in the United States.⁵⁵ The jury, however, rejected the professor's "proof" and apparently believed the pot-smoker's "expert" testimony that the marijuana was not grown in the United States. The resulting conviction was ultimately upheld on appeal.⁵⁶

This simple illustration suggests that the advocate must assess carefully the likely impact of different types of expert testimony on the jury. By far the most important consideration in preparing and presenting opinion testimony is its persuasiveness. The attorney must always seek the most effective means of getting the point across to the jury. Well prepared and presented expert testimony provides an invaluable aid to this end.

⁴⁹ See text accompanying note 1 *supra*.

⁵⁰ 575 F.2d 1347 (5th Cir. 1978), *cert. denied*, 440 U.S. 907 (1979).

⁵¹ 575 F.2d at 1360.

⁵² *Id.*

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ *Id.* at 1361.

⁵⁶ The Fifth Circuit Court of Appeals actually affirmed in part, reversed and remanded in part, and vacated in part the decision of the trial judge. See *id.* at 1367. The Fifth Circuit found that the trial court acted within its discretion in allowing the pot-smoker to testify that the marijuana was grown in Columbia. *Id.* at 1360-62. None of the grounds for reversal is relevant to the points discussed in this article.

Many of the problems discussed above disappear when considered in light of the need for persuasion in an adversary trial system. For example, no advocate would present an expert, qualify her, ask for her opinion, and then sit down without asking her to explain either her reasoning or the facts which support it. To any thinking mind, an opinion is only as good as the reasoning and premises behind it. No attorney should present unsupported, and therefore unpersuasive, opinion evidence at trial.

Despite the welcome demise of the unbending requirement for the hypothetical question,⁵⁷ the device should not be totally ignored. In some cases, the hypothetical question affords an opportunity for a mid-trial "summation." The attorney can summarize all of the evidence necessary for the fact-finder to reach the desired verdict and then ask the expert to state her opinion based on that evidence. The hypothetical question serves, therefore, as a road map or diagram of the case to remind the jury of the case's essential fact elements.

To be persuasive, an advocate must know her ultimate objective. This requires careful preparation of an attorney's own expert, and also requires careful consideration and rebuttal of the opposing expert's views. Effective cross-examination demands advance knowledge of the expert's testimony. An attorney should employ all possible discovery techniques to ascertain not only the opinion but also its foundations. With that information, the attorney can construct a factual foundation to undercut the opinion and also carefully prepare questions that highlight any weaknesses in the expert's presentation.

Even with lay opinions, counsel can expose weaknesses on cross-examination by directing attention to conflicting facts or illogical inferences. Given the philosophy of the Federal Rules to present as much relevant evidence as is consistent with a fair and economical trial, the advocate should focus her attention on those matters designed to persuade the trier of fact on the merits. Formal, technical objections to an expert's testimony tend to reduce the objecting side's credibility if the trier is a jury. Therefore, counsel should either ignore technical objections or raise them in advance out of the jury's presence.

V. Judge's Perspective

Article VII's liberal approach to opinion testimony implicitly imposes duties on the trial judge. The Federal Rules provide that courts should admit relevant opinion evidence but that the counter-considerations of Rule 403 must be carefully weighed. In this area, a special burden rests on a trial judge because her determinations are rarely upset on appeal.⁵⁸ If a fair trial is to be achieved through, or

⁵⁷ See text accompanying notes 30-33 *supra*.

⁵⁸ See text accompanying note 1 *supra*.

perhaps despite, opinion evidence, it will be done only through the judgment and assistance of the trial court.

Courts have expressed different views of the means through which the goal of a fair trial ought to be accomplished. Many evidentiary rulings reflect a court's underlying attitude toward juries. For example, the judge who is confident of the jury's ability to sift through and evaluate opinion evidence is more apt to admit opinion testimony based on what some might view as a questionable technique. The judge who is less convinced of the jury's critical abilities may impose a higher threshold of reliability before admitting an expert opinion in a novel area.

In *United States v. Williams*,⁵⁹ the Second Circuit upheld the admissibility of spectographic voice identification evidence, finding that the technique was "not so inherently unreliable or misleading as to require its exclusion from the jury's consideration."⁶⁰ In *United States v. Brown*,⁶¹ however, the Sixth Circuit found reversible error in the admission of hair-matching evidence through a process known as ion micro-probe analysis. While the cases may be distinguishable on their facts, implicit in each court's analysis is its view of the jury's proper role. The court in *Brown* feared that evidence of a novel technique "may tend to confuse or mislead the trier of fact and thus defeat a defendant's right to a fair trial:"⁶²

A courtroom is not a research laboratory. The fate of a defendant in a criminal prosecution should not hang on his ability to successfully rebut scientific evidence which bears an "aura of special reliability and trustworthiness," although, in reality the witness is testifying on the basis of an unproved hypothesis in an isolated experiment which has yet to gain general acceptance in its field.⁶³

This "general acceptance in the field" criterion stems from *Frye v. United States*⁶⁴ and has been the subject of criticism both before and after adoption of the Federal Rules.⁶⁵ Although courts apparently abandoned this requirement in favor of Rule 702's "assist the trier of fact" standard (limited only by Rule 403), and despite commentators' general disapproval of the *Frye* test, *Brown* illustrates the tenacity of the "general acceptance in the field" standard.

⁵⁹ 583 F.2d 1194 (2d Cir. 1978), *cert. denied*, 439 U.S. 1117 (1979).

⁶⁰ 583 F.2d at 1200.

⁶¹ 557 F.2d 541 (6th Cir. 1977).

⁶² 557 F.2d at 556 (citations omitted).

⁶³ *Id.*

⁶⁴ 293 F. 1013 (D.C. Cir. 1923).

⁶⁵ See, e.g., MCCORMICK, *supra* note 5, § 170; 3 WEINSTEIN & BERGER, *supra* note 5, ¶ 702[03]. See generally Note, *Expert Testimony Based on Novel Scientific Techniques: Admissibility Under the Federal Rules of Evidence*, 48 GEO. WASH. L. REV. 774 (1980).

In contrast to the Sixth Circuit's decision in *Brown*, the Second Circuit opinion in *Williams* displays a greater confidence in juries:

It bears reiteration that admissibility alone is under consideration. The jury remains at liberty to reject voice analysis evidence for any of a number of reasons, including a view that the spectrographic voice analysis technique itself is either unreliable or misleading.⁶⁶

This more liberal approach toward admissibility of novel scientific evidence is consistent with Article VII generally.

While the trial judge's own view of a jury's ability inevitably influences her determination of whether a novel technique passes the threshold of reliability, the court's role in ensuring that expert testimony is fairly presented extends even further. Because so much of the attorney's approach to opinion testimony depends upon pretrial discovery, the trial judge should liberally grant motions under Federal Rule of Civil Procedure 26(b)(4) for discovery by means other than interrogatories.⁶⁷ Pretrial discussion of the opinions with counsel may help them to focus their experts' testimony and perhaps eliminate aspects which provide little help in deciding the case. When dealing with lay opinions at trial, the trial judge can helpfully remind the jury of the difference between facts actually observed and opinions based on facts assumed to be true. The trial judge may further caution the jury to weigh the witness' opinion in the light of the witness' own testimony and the testimony of the other witnesses. Similar cautions at the time the court receives expert opinion can help juries deal with the complex subjects addressed by experts. Since cross-examination is very valuable in testing the soundness of an expert's opinion, and since an attorney is unlikely to lead an expert witness astray, the court should permit the attorney to employ a relatively free-wheeling examination that forces the expert to defend her opinion.

Special problems with expert testimony arise in criminal cases. Congress designed Rule 705 to eliminate or at least reduce the need for hypothetical questions. In civil cases, where discovery is extensive, the risk of unfairness that could arise out of an expert's abbreviated testimony is minimized. In a criminal case, however, discovery is greatly restricted. Federal Rule of Criminal Procedure 16 entitles a defendant to discover her own statements, certain documents and tangible objects in the government's possession, and any reports of examinations and tests in the government's possession or control.⁶⁸ A defendant must turn over the results of any independent examination or test report only if the

⁶⁶ 583 F.2d at 1200.

⁶⁷ See note 42 *supra*.

⁶⁸ FED. R. CRIM. P. 16(a)(1)(A),(C),(D).

government previously turned over reports to the defendant and the defendant intends to offer either the reports or the witness who prepared the reports at trial.⁶⁹

Since only the reports of experts need be disclosed in a criminal case, many attorneys try to protect their experts from pretrial discovery by discouraging them from preparing a "report." In practical effect, many criminal cases operate not far from the "trial by ambush" pattern familiar in civil cases years ago. It is not surprising, therefore, that criminal trials require a more antiquated form of handling expert witnesses. To effectively cross-examine a surprise expert witness in a criminal case, the attorney needs to know in advance not only the opinion, but also its logic and factual foundations. To provide that knowledge, the trial court should consider exercising the discretion granted under Rule 705 and requiring the expert on direct to disclose the facts or data that underlie her opinion.⁷⁰ The court should then require the expert to give the reasons for her opinion. Opposing counsel can then better assess whether and how to cross-examine.

Potential problems also arise in criminal cases under Rule 703, which permits experts to base their opinions on facts or data that are not admissible in evidence.⁷¹ For example, when the government presents an opinion based on hearsay statements, constitutional problems may arise under the confrontation clause.⁷² In addition, a defendant may present an expert who, after being qualified, gives an opinion favoring defendant on one of the essential elements of the crime, without explaining her reasons. On cross-examination, it turns out that the opinion rests in part on communications that are privileged, either under the attorney-client privilege or the fifth amendment. Unless the court finds a waiver of the privilege, the government's only remedy is a motion to strike,⁷³ which at best has doubtful efficacy. Fairness to the government, therefore, requires that counsel carefully explore the issue before the witness expresses her opinion to the jury.

Indigent criminal defendants present special problems. If the government intends to offer scientific evidence, the indigent defendant probably lacks the resources needed to understand or even to discover the basis for the opinion in order to prepare a challenge to the government's expert. Rule 706, which permits the court to appoint a neutral expert on its own motion, can alleviate the problem in some instances. Additionally, the Criminal Justice Act provides for payment of "other services necessary for an adequate defense."⁷⁴ The court should construe

⁶⁹ FED. R. CRIM. P. 16(b)(1)(B).

⁷⁰ See note 30 *supra*.

⁷¹ See text accompanying notes 14 and 19-24 *supra*.

⁷² See U.S. CONST. amend. VI.

⁷³ At this point it remains unclear whether an opinion would necessarily be inadmissible even though based on facts whose very existence, let alone their truth, cannot be explored on cross-examination.

these provisions liberally, to guarantee the indigent defendant a fair and impartial trial and a meaningful opportunity to confront the government's expert witnesses.

VI. Conclusion

Article VII of the Federal Rules of Evidence, which is a practical, realistic, and sensible approach to handling opinion evidence in the courtroom, grants wide discretion to the trial judge. How she exercises that discretion will reflect her general attitude toward juries and their ability to deal with issues presented generally, and with opinion evidence particularly. The greater a judge's trust in juries, the more relaxed and more permissive will be her application of rules restricting admissibility of opinion testimony. Conversely, a judge who lacks confidence in a jury's ability to distinguish a weak or fallacious argument from a sound and persuasive one will tend to impose more stringent requirements on opinion testimony, will more severely restrict the witness' manner of testifying, and will more freely grant motions to strike, all in an effort to control the flow of information upon which the jury may rest its final determination.

Article VII reflects the general philosophy of the Federal Rules, which favor admissibility of relevant evidence and leave attorneys to test the weight and persuasiveness of the evidence by free-wheeling cross-examination and effective summation. The opinion rules place much reliance, then, on the attorney and her abilities as an advocate. In the vast majority of cases, the natural dynamics of the adversary system operate effectively to determine truth and to produce fair, just, and sensible decisions.

¹⁴ 18 U.S.C. § 3006A(e)(1). See also 3 WEINSTEIN & BERGER, *supra* note 5, ¶ 706[01].

