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## Wyoming Rules of Evidence 701-706: Opinions and Expert Testimony

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## WYOMING RULES OF EVIDENCE 701-706: OPINIONS AND EXPERT TESTIMONY

In April 1977, the Wyoming Supreme Court adopted the Federal Rules of Evidence as the Wyoming Rules of Evidence, to become effective January 1, 1978. Article VII was adopted without any substantial changes<sup>1</sup> and the purpose of this Comment is to explore the six rules and their probable application in Wyoming courts.

### RULE 701: OPINION TESTIMONY BY LAY WITNESSES<sup>2</sup>

Rule 701 provides the standard for opinion testimony by a lay witness. To be admissible, the lay opinion must be "rationally based on the perception of the witness" and it must be "helpful to a clear understanding of his testimony or the determination of a fact in issue." The first requirement of Rule 701 restricts the witness's testimony to matters within his personal knowledge and observation, hence requiring that a competent foundation be laid for the testimony.<sup>3</sup> The second requirement guards against the admission of superfluous opinion testimony and is comparable to a relevancy requirement. The Rule imposes a requirement of "helpfulness" which is less demanding than a standard which admits opinion evidence only when it is strictly "necessary"<sup>4</sup> for determination of issues.

The standard applied in prior Wyoming case law was the orthodox rule that lay witnesses must testify to facts and may not give opinions.<sup>5</sup> This rule was based on the common law assumption that the testimony as to facts was more reliable than and readily distinguishable from the testimony as to

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1. According to a Wyoming Committee Note, Article VII of the Wyoming Rules of Evidence is identical to Article VII of the Federal Rules except that Wyoming Rule 706(b) omits a provision for payment from public funds in "proceedings involving just compensation under the fifth amendment." In Wyoming condemnation proceedings, the state is not always the plaintiff and Rule 71.1(1) Wyoming Rules of Civil Procedure provides for apportionment of costs.
2. "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."
3. FED. R. EVID. 701, Adv. Comm. Note; WEINSTEIN & BERGER, 3 WEINSTEIN'S EVIDENCE ¶ 701 [02], at 701-11 (1977) [hereinafter cited as WEINSTEIN].
4. "[N]ecessity as a standard for permitting opinions and conclusions has proved too elusive and too unadaptable to particular situations for purposes of satisfactory judicial administration." FED. R. EVID. 701, Adv. Comm. Note. See also MCCORMICK, EVIDENCE § 11 (2d ed. 1972) [hereinafter cited as MCCORMICK]; WEINSTEIN ¶ 701 [02], at 701-13. The necessity tests admits opinion testimony only if essential to the determination of fact.
5. Long v. Big Horn Constr. Co., 75 Wyo. 276, 295 P.2d 750 (1956); State v. Moore, 356 P.2d 141 (Wyo. 1960).

opinions.<sup>6</sup> However, the line of distinction is not nearly so clear since the witness, despite the words he uses, cannot recreate the actual event, and his statement is still to some degree the product of inference, memory and reflection.<sup>7</sup> As an eminent author noted, "the difference between the statement, 'He was driving on the left-hand side of the road' which would be classed as 'fact' under the rule, and 'He was driving carelessly' which would be called 'opinion' is merely a difference between a more concrete and specific form of descriptive statement and a less specific and concrete form."<sup>8</sup>

In addition to the nebulous boundary line between facts and opinions, the insistence upon solely factual testimony has often delayed or obstructed the trial process. Many witnesses use inferences and opinions intermixed with factual descriptions to clarify their narratives. Hence, when witnesses are constantly interrupted by objections, their testimony often becomes garbled, they are distracted, and the jury misses the point of their testimony.<sup>9</sup>

In recognition of the unclear distinction between facts and opinions and the necessity of admitting some opinions to expedite the trial process, prior Wyoming case law permitted lay opinion testimony to describe sound, size, weight, distance, speed and numerous other subjects that can only be related factually in language embodying inferences and opinions.<sup>10</sup>

Rule 701 goes further than allowing inferences and opinions to be expressed only when they are inextricably intertwined with the underlying observations.<sup>11</sup> The Rule is basically one of discretion which permits judges to admit adequately-founded, helpful opinion testimony when a statement of the underlying facts would be a waste of time.<sup>12</sup> The Rule then entrusts the jury to give proper weight to admissible opinion testimony in relation to strictly factual testimony on the issues in question.

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6. MCCORMICK § 11, at 23.

7. *Id.*

8. *Id.* at 23-24.

9. *Central R.R. Co. v. Monahan*, 11 F.2d 212, 214 (2d Cir. 1926); WEINSTEIN ¶ 701 [02], at 701-14.

10. *E.g.*, *Colwell v. Anderson*, 438 P.2d 448 (Wyo. 1968); *Cederburg v. Carter*, 448 P.2d 608 (Wyo. 1968).

11. WEINSTEIN ¶ 701 [02], at 701-13.

12. *Id.* at 701-13 to 14.

RULE 702: TESTIMONY BY EXPERTS<sup>13</sup>

Rule 702 allows factual or opinion testimony by a qualified expert if the expert's answer "will assist the trier of fact to understand the evidence or to determine a fact in issue." The requirement of helpfulness in assisting the trier of fact may be determined by a common-sense inquiry as to whether the untrained layman would be qualified to determine the issue to the best possible degree without enlightenment from those having a specialized understanding of the subject matter.<sup>14</sup>

There are some cases in which an understanding and determination of the issues necessarily depends upon expert testimony; so as a matter of substantive law, the plaintiff loses if he does not come forward with expert evidence.<sup>15</sup> The primary example of this type of case is the medical malpractice suit,<sup>16</sup> except where the doctrine of *res ipsa loquitur* is applicable and the medical negligence is sufficiently apparent and understandable to be within the realm of common knowledge.<sup>17</sup>

In other cases the admissibility of expert testimony is less clear-cut and will be determined with discretion according to the "helpfulness" standard. The application of this standard and the proper and improper use of expert testimony was demonstrated in a recent case.<sup>18</sup> There, a Federal Bureau of Investigation photographic expert gave an opinion on the similarity between photographs of the face of the accused and surveillance photographs taken during a bank robbery. He gave a second opinion on the similarity between clothing and a pistol shown in the surveillance photographs and photographs of clothing and a pistol seized from the accused's apartment. The testimony concerning the comparison of the two facial photographs was held to be improper because the

13. "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. 702, Adv. Comm. Note.

15. WEINSTEIN ¶ 702 [01], at 702-7.

16. See Comment, *Medical Malpractice—Expert Testimony*, 60 NW. L. REV. 834 (1966).

17. E.g., *Vonault v. O'Rourke*, 97 Mont. 92, 33 P.2d 535 (1934) (burn from hot water bottle); *Mitchell v. Saunders*, 219 N.C. 178, 13 S.E.2d 242 (1941) (sponge left inside patient). See Ladd, *Expert Testimony*, 5 VAND. L. REV. 414, 420 (1952).

18. *United States v. Brown*, 501 F.2d 146 (9th Cir. 1974).

jurors' common experience enabled them to make the comparison without the aid of an expert. However, the testimony concerning the comparisons of the photographs of the pistol and the clothing were held to be proper because the jurors could not adequately make the comparison without expert assistance.<sup>19</sup>

In another case,<sup>20</sup> an economist was permitted to testify, in a wrongful death action, on the value of a hypothetical housewife in the decedent's position had she lived. The receipt of the testimony was upheld since it was helpful to the jury and more reliable than the jury's musings on her worth.<sup>21</sup>

The helpfulness standard specified in the Rule is comparable to the standard applied in prior Wyoming case law that expert testimony was inadmissible where the normal experiences and qualifications of lay jurors enabled them to draw proper conclusions from the given facts. Expert testimony could be received only where special knowledge would aid the court or jurors on the subject matter.<sup>22</sup> As examples of the previous application of this standard, Wyoming courts have held that whether a particular teacher's certificate is of as high or higher rank than another certificate is not a matter of common knowledge and is a proper matter for expert testimony.<sup>23</sup> So also is the question of damages suffered by a tractor designed and equipped to haul and control a trailer carrying a heavy load.<sup>24</sup>

Rule 702 is broadly phrased to encompass scientific, technical and all other specialized knowledge. Similarly, the term "experts" is expansively defined to include those persons qualified by "knowledge, skill, experience, training, or education." Thus, in addition to physicians, scientists, and other experts who qualify by academic and professional credentials, the scope of the Rule encompasses a large group of "skilled" witnesses, such as bankers or landowners testifying as to land values.<sup>25</sup> In one case, a user and a seller of drugs were considered "experienced" and thus qualified to give expert opinions

19. *Id.* at 149-50.

20. *Har-Pen Truck Lines, Inc. v. Mills*, 378 F.2d 705 (5th Cir. 1967).

21. *Id.* at 711-12.

22. *Long v. Big Horn Constr. Co.*, *supra* note 5.

23. *State ex rel. Pape v. Hockett*, 61 Wyo. 145, 161-62, 156 P.2d 299, 304 (1945).

24. *Logan v. Pacific Intermountain Exp. Co.*, 400 P.2d 488, 493 (Wyo. 1965).

25. *FED. R. EVID. 702*, Adv. Comm. Note.

as to whether a certain substance was heroin.<sup>26</sup> In another case, an appellate court, while conceding the trial court had considerable discretion in deciding whether an expert was qualified, found it error to exclude the testimony of a pipefitter who had thirty-three years of experience on the ground that he was not a metallurgist. The appellate court held the pipefitter's extensive experience qualified him as an expert who could aid the jury.<sup>27</sup>

This aspect of the Rule is in accord with prior Wyoming case law which held that experts could qualify both by academic credentials or practical experience. As examples of the application of the "practical experience" formula, Wyoming courts have permitted a landowner to testify as to land values,<sup>28</sup> a dealer in secondhand oil-field equipment to testify as to the value of oil-field equipment,<sup>29</sup> and a truck driver and repairman to testify as to truck damage sustained in a collision.<sup>30</sup>

Under Rule 702, courts have permitted expert testimony even where the expert is not absolutely certain or lacks complete knowledge about the field in question, so long as his testimony is helpful to the jury.<sup>31</sup> In one case, for example, a handwriting expert was permitted to testify "although he could not be sure" the two writings in question were probably prepared by the same person.<sup>32</sup>

Under Rule 104(a),<sup>33</sup> also adopted in Wyoming, questions concerning the admissibility of evidence are to be decided by the court. The judge will make the initial determination under this Rule whether a case is a proper one for expert testimony and whether the proposed experts are properly qualified. Be-

26. *United States v. Atkins*, 473 F.2d 308, 313 (8th Cir. 1973).

27. *Cunningham v. Gans*, 507 F.2d 496, 500 (2d Cir. 1974). *See, e.g., Moran v. Ford Motor Co.*, 476 F.2d 289 (8th Cir. 1973) (reversible error to exclude testimony of automobile repairman with eighteen years experience); *Holmgren v. Massey-Ferguson, Inc.*, 516 F.2d 856 (8th Cir. 1975) (reversible error to exclude testimony of college professor-farmer who was familiar with farm machinery).

28. *Town of Douglas v. Nielsen*, 409 P.2d 240, 242 (Wyo. 1965).

29. *Chittim v. Armco Steel Corp.*, 407 P.2d 1015, 1018 (Wyo. 1965).

30. *Logan v. Pacific Intermountain Exp. Co.*, *supra* note 24, at 493.

31. WEINSTEIN ¶ 702 [02], at 702-13 to 14.

32. *United States v. Spencer*, 439 F.2d 1047, 1049 (2d Cir. 1971).

33. "Preliminary questions concerning the qualification of a person to be a witness, the existence of a privilege, or the admissibility of evidence shall be determined by the court, subject to the provisions of subdivision (b). In making its determination it is not bound by the rules of evidence except those with respect to privileges." *See LOUISELL & MUELLER, 1 FEDERAL EVIDENCE* §§ 27, 35 (1977); WEINSTEIN ¶ 702 [01], at 702-4 to 5.

cause there is no precise formula for determining which cases require expert testimony or for qualifying experts and because qualification must necessarily depend upon the particular expertise of each expert witness, the trial judge has considerable discretion under Rule 104(a) to determine appropriate cases for expert testimony and qualification of expert witnesses.<sup>34</sup> The appellate courts will sustain the admission or exclusion of expert evidence by the trial court unless such action is shown to be manifestly erroneous.<sup>35</sup> According to one author, doubts about whether an expert's testimony will be helpful in a case should generally be resolved in favor of admissibility unless there are strong factors favoring exclusion such as time or surprise.<sup>36</sup> Under prior Wyoming case law, determination of appropriate cases for expert testimony and qualification of expert witnesses also rested in the broad discretion of the trial court whose determination was not disturbed except in extreme cases.<sup>37</sup> Thus, this aspect of the Rule presents no significant changes from prior practice.

The concluding phrase of Rule 702 permits an expert to testify "in the form of an opinion or otherwise." The phrase is intended to recognize that an expert need not testify only in the form of opinions. Accordingly, the expert may give a dissertation or exposition of principles relevant to the case, leaving the trier of fact to apply the principles to the facts and draw the necessary conclusions.<sup>38</sup>

#### RULE 703: BASES OF OPINION TESTIMONY BY EXPERTS<sup>39</sup>

Rule 703 contains a striking change from the common law evidentiary rules. The first sentence of the Rule follows the common law fairly closely in allowing expert opinion based on facts or data which are perceived by the expert or made known to him at or before the hearing. This sentence

34. WEINSTEIN ¶ 702 [01], at 702-10.

35. *E.g.*, *Salem v. United States Lines*, 370 U.S. 31 (1962); *Fernandez v. Chios Shipping Co., Ltd.*, 542 F.2d 145 (2d Cir. 1976); *United States v. Green*, 548 F.2d 1261 (6th Cir. 1977).

36. WEINSTEIN ¶ 702 [01], at 702-9.

37. *E.g.*, *Taylor v. MacDonald*, 409 P.2d 762 (Wyo. 1966); *Colo. Serum Co. v. Arp*, 504 P.2d 801 (Wyo. 1972); *Elite Cleaners & Tailors, Inc. v. Gentry*, 510 P.2d 784 (Wyo. 1973); *Runnion v. Kitts*, 531 P.2d 1307 (Wyo. 1975).

38. FED. R. EVID. 702, Adv. Comm. Note.

39. "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."

authorizes the customary practice of permitting expert opinion testimony based on firsthand knowledge or evidence introduced at the trial phrased in terms of hypothetical questions.<sup>40</sup> Although the Advisory Committee criticized the hypothetical question as encouraging partisan bias, allowing mid-trial summations, and being time consuming,<sup>41</sup> the evidentiary tool is still available without any express limitation on its use.<sup>42</sup>

The second sentence of the Rule provides a radical departure from the common law by allowing expert opinion testimony based on inadmissible facts and data if they are of a type reasonably relied upon by experts in the particular field. According to the Advisory Committee, the Rule is designed to broaden the basis for expert opinions and to bring judicial practice into harmony with the practice of experts when not in court.<sup>43</sup> As an example, the Advisory Committee noted that physicians rely on information from relatives and hospital personnel in making diagnoses and "life-and-death" decisions and that such opinions, subject to cross-examination, should suffice for judicial purposes.<sup>44</sup>

Prior Wyoming case law followed the traditional approach by allowing expert witnesses to testify on the basis of firsthand knowledge and to answer hypothetical questions based on facts in evidence,<sup>45</sup> but expert opinion testimony based on inadmissible facts was not permitted.<sup>46</sup> Application of Rule 703 will streamline litigation in Wyoming by permitting expert opinion testimony without an expensive and time-consuming prior procession of witnesses to lay a foundation for the opinion.<sup>47</sup> Hence, expert opinion testimony based on information from third parties will require no greater foundation than expert opinion testimony based on personal observation or facts obtained at trial and will permit expert testimony based upon hearsay.<sup>48</sup>

40. FED. R. EVID. 703, Adv. Comm. Note.

41. FED. R. EVID. 702, Adv. Comm. Note; FED. R. EVID. 705, Adv. Comm. Note.

42. Gibbons, *Rules 701-706: Opinions and Expert Testimony*, TRIAL LAW GUIDE 500, 503 (1976).

43. FED. R. EVID. 703, Adv. Comm. Note.

44. *Id.*

45. *E.g.*, *Culver v. Sekulich*, 80 Wyo. 437, 344 P.2d 146 (1959); *Elite Cleaners & Tailors, Inc. v. Gentry*, 510 P.2d 784 (Wyo. 1973); *Ford Motor Co. v. Kuhbacher*, 518 P.2d 1255 (Wyo. 1974).

46. *E.g.*, *State v. Alexander*, 78 Wyo. 324, 324 P.2d 831 (1958); *Lujan v. State*, 423 P.2d 388 (Wyo. 1967).

47. FED. R. EVID. 703, Adv. Comm. Note.

48. FED. R. EVID. 703 does not authorize an expert witness to repeat the information received from those reliable sources and therefore is not a hearsay exception.



According to the Rule, the "facts or data" upon which an expert bases an opinion must be of a type reasonably relied upon by experts in the same field. Accordingly, admissibility turns upon a standard of reliability and does not require a showing of necessity.<sup>49</sup> It is not specifically stated in the language that reasonably reliable "facts or data" include opinions from third parties. Arguably, third party opinions should be encompassed within the phrase "facts or data" since such an interpretation would be in keeping with the liberality of Rule 703. The drafters thought the Rule covered third party opinions<sup>50</sup> and in practice, an expert would be unlikely to make a distinction between facts and opinions received from a reliable source.<sup>51</sup>

Also unclear from the Rule's language is whether the expert witness or the judge determines what is reasonably reliable in the field. A plain reading of the language suggests that the standards and practice in particular fields will be determinative. However, the Advisory Committee's Note hints that reasonableness may be determined by a judicial standard.<sup>52</sup> According to one author, the trial judge, in his discretion, will determine under Rule 104(a) whether the facts or data could be reasonably relied upon.<sup>53</sup> Where there is a serious issue, the judge will determine reliability by examining the expert outside the presence of the jury.<sup>54</sup> However, since the expert will know what is reasonably relied upon in his field, the judge will usually follow the expert's advice on the point.<sup>55</sup> The degree of confidence the court has in the professional calibre and ethics of the particular expert group will undoubtedly affect the amount of deference given to the expert's advice on reasonable reliability.<sup>56</sup>

Admissibility of expert evidence based upon hearsay will also be affected by the nature of the case. Where a matter is being tried before a judge, a more lenient standard may be applied for admitting expert opinion based upon hearsay

49. WEINSTEIN ¶ 703 [02], at 703-14.

50. FED. R. EVID. 703, Adv. Comm. Note.

51. McElhaney, *Expert Witnesses and the Federal Rules of Evidence*, 28 MERCER L. REV. 463, 483 (1977).

52. FED. R. EVID. 703, Adv. Comm. Note.

53. WEINSTEIN ¶ 703 [01], at 703-4.

54. *Id.* ¶ 703 [03], at 703-17.

55. *Id.* ¶ 703 [01], at 703-5.

56. *Id.* "Physicians are likely to be given more leeway than accidentologists."

than if a case is being tried before a jury.<sup>57</sup> As an example of this double standard, it was held in one case that reversal was not required in a non-jury case where a patrolman's testimony was based upon hearsay, although reversal would have been required had the testimony been admitted before a jury.<sup>58</sup> Also, there may be more stringent requirements for admitting expert opinions based on hearsay in criminal cases than in civil suits. In criminal cases, the constitutional right of confrontation may require in certain instances that the defendant be allowed to cross-examine the persons who prepared the data on which the expert relies.<sup>59</sup>

In the area of public opinion polls, a court's application of the Rule will determine the admissibility of survey evidence on a sound basis. Historically, public opinion poll evidence was sometimes excluded or given little weight because the testifying expert based his opinion on hearsay.<sup>60</sup> Under the Rule, however, admissibility turns upon the reliability and validity of the techniques employed rather than an inquiry whether hearsay is involved.<sup>61</sup> In utilizing this approach, once the validity of the survey is established and the requirements of Rules 401 and 403 are met,<sup>62</sup> the testimony is admitted and the trier of fact then determines the weight to be given to the survey evidence.<sup>63</sup>

#### RULE 704: OPINION ON ULTIMATE ISSUE<sup>64</sup>

Wyoming Rule of Evidence 704 abolishes the "ultimate facts" rule and allows both lay and expert witnesses to testify on the very questions at issue in the trial unless the testimony is inadmissible under some other evidentiary rule. For exam-

57. *Id.* ¶ 703 [03], at 703-18.

58. *Ward v. Brown*, 301 F.2d 445, 447 (10th Cir. 1962).

59. WEINSTEIN ¶ 703 [03], at 703-18. *See United States v. Williams*, 424 F.2d 344 (5th Cir. 1970), *petition for rehearing denied*, 431 F.2d 1168 (5th Cir. 1970), *aff'd en banc*, 447 F.2d 1285 (5th Cir. 1971), *cert. denied*, 405 U.S. 954, *rehearing denied*, 405 U.S. 1048 (1972).

60. *E.g.*, *Du Pont Cellophane Co. v. Waxed Prods. Co.*, 6 F.Supp. 859, 885 (E.D.N.Y. 1934), *modified*, 85 F.2d 75 (2d Cir. 1934), *cert. denied*, 299 U.S. 601 (1936); *Elgin Nat'l Watch Co. v. Elgin Clock Co.*, 26 F.2d 376 (D. Del. 1928). *See Judge Feinberg's analysis in Zippo Mfg. Co. v. Rogers Imports, Inc.*, 216 F. Supp. 670, 682 (S.D.N.Y. 1963).

61. FED. R. EVID. 703, Adv. Comm. Note.

62. WEINSTEIN ¶ 703 [03], at 703-20.

63. *E.g.*, *Holiday Inns, Inc. v. Holiday Out in America*, 481 F.2d 445, 447 (5th Cir. 1973); *Grottrian, Helfferich, Schulz, Th. Steinweg Nachf. v. Steinway & Sons*, 523 F.2d 1331, 1341 (2d Cir. 1975).

64. "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."

ple, under the old ultimate facts rule, a witness could give his opinion as to the value of property before an alteration and to its value afterward, but the witness would not be allowed to express an opinion as to the amount of damage done since the jury is to determine damages.<sup>65</sup> This traditional rule prohibits testimony on ultimate facts because the proper role of a witness is to supply facts to the jury, and it is the function of the jury to draw any inferences or conclusions necessary to decide the case.<sup>66</sup> Such a rationale has superficial appeal since it obviates the "danger that the jury might forego independent analysis of the facts and bow too readily to the opinion of an expert or otherwise influential witness."<sup>67</sup>

However, commentators have been uniformly outspoken in their criticism of the ultimate facts rule. Wigmore called it empty rhetoric and "one of those impracticable and misconceived utterances which lack any justification in principle".<sup>68</sup> McCormick said it was "unfairly obstructive" and illogical.<sup>69</sup> Weinstein called it "the cause of many foolish reversals and still more foolish appeals."<sup>70</sup> And Morgan termed it "sheer nonsense."<sup>71</sup> More specifically, the rationale for the rule was often questioned. As more than one commentator has pointed out, there can be no invasion of the province of the jury, for the jury has the power and the duty to judge the credibility of all witnesses, the weight to be given each opinion, and to reject outright any opinion which is inadequately supported.<sup>72</sup>

Not only is the rationale for such a rule unsound, but its development seems to have been a historical accident. As Dean Ladd points out:

[I]t is questionable whether the earlier declarations [against opinion evidence] meant more than that a witness must have personally perceived what he is to speak about. It is doubtful that the object of the rule was to attempt to control the language through which witnesses expressed facts.<sup>73</sup>

65. *Yost v. Conroy*, 92 Ind. 464, 47 Am. Rep. 156 (1883).

66. *Runnion v. Kitts*, 531 P.2d 1307 (Wyo. 1975).

67. MCCORMICK § 12, at 27.

68. 7 WIGMORE § 1921, at 19.

69. MCCORMICK § 12, at 28.

70. Morgan, *Basic Problems of State and Federal Evidence*, 195 (5th ed. WEINSTEIN 1976).

71. MORGAN, *BASIC PROBLEMS OF EVIDENCE* 218 (1962).

72. 7 WIGMORE § 1920, at 18.

73. Ladd, *Expert Testimony*, 5 VAND. L. REV. 414, 415 (1952).

The ultimate facts rule has also been criticized as unworkable. Witnesses have complained that first they are sworn to tell the truth and then the lawyers prevent them from doing so. Instead of allowing the witness to fulfill his function of aiding the jury, poorly phrased questions or unwary witness responses call forth a shower of objections that the question calls for a conclusion or the answer would invade the province of the jury. Learned Hand wrote:

No rule is subject to greater abuse; it is frequently an obstacle to any intelligible account of what happens. Most witnesses will tell their story in colloquial speech which skips the foundations and runs in terms of the 'ultimate facts.' Ordinarily, they tell it much more plainly in this way, and the warrant for what they say can be perfectly probed by cross-examination.<sup>74</sup>

In other respects this rule proved unworkable. The courts, from practical necessity, have long recognized exceptions in such matters as size, speed, distance and value<sup>75</sup> although opinions on these matters go to ultimate issues. In addition,

Efforts to meet the felt needs of particular situations led to odd verbal circumlocutions which were said not to violate the rule. Thus a witness could express his estimate of the criminal responsibility of an accused in terms of sanity or insanity, but not in terms of ability to tell right from wrong or other more modern standard. And in cases of medical causation, witnesses were sometimes required to couch their opinions in cautious phrases of "might or could," rather than "did," though the result was to deprive many opinions of the positiveness to which they were entitled, accompanied by the hazard of a ruling of insufficiency to support a verdict.<sup>76</sup>

Judicial efforts to resolve some of the confusion by distinguishing between testimony going to ultimate issues of fact (allowed in some jurisdictions)<sup>77</sup> and testimony on ultimate issues of law (prohibited) were unsuccessful as "this required separating matters of law from matters of fact, an often impossible task. . . ."<sup>78</sup>

74. *United States v. Cotter*, 60 F.2d 689, 693 (2d Cir. 1932).

75. See, e.g., *Colwell v. Anderson*, 438 P.2d 448 (Wyo. 1968); *Cederburg v. Carter*, 448 P.2d 608 (Wyo. 1968).

76. FED. R. EVID. 704, Adv. Comm. Note.

77. See MCCORMICK § 12.

78. WEINSTEIN ¶ 704 [01], at 5.

Generally, it can be said that the ultimate facts rule is a failure.<sup>79</sup> Faced with the choice of enforcing the rule and excluding useful information or changing the rule, more and more jurisdictions are either modifying the rule<sup>80</sup> or abolishing it completely.<sup>81</sup> Wyoming has followed the general trend. Originally, Wyoming followed the traditional rule,<sup>82</sup> but in recent years there were indications of change.<sup>83</sup> With the adoption of Federal Rule 704, Wyoming has embraced the better position and abolished the rule entirely. Weinstein points out the advantages of the Federal Rule 704 which is identical to Wyoming's:

The treatment of the ultimate rule problem in the federal rules has numerous advantages over previous practice. It eliminates quibbles over the meaning of ultimate fact, and the distinction between fact and law. Abolition of the rule ends the spectacle of courts endorsing a principle which they cite only as a precursor to applying an exception. It stops the resort to indirect means to bring the prohibited matter to the jury's attention, and most importantly, it allows the jury to receive the full benefit of a witness' judgment. Both lay and expert witnesses may testify in a more natural manner uninterrupted by technical objections which interfere with the flow of the trial but do not further the cause of truth.<sup>84</sup>

Rule 704 does not mean all opinions on ultimate facts will be admitted. As with all opinion testimony under the new Wyoming Rules, in order to be admissible the testimony must be helpful to the trier of fact.<sup>85</sup> Questions that are merely repetitious<sup>86</sup> or so qualified as to make their value negligible<sup>87</sup> may be disallowed as unhelpful. Weinstein notes

79. Judge Weinstein lists four reasons for the failure of the ultimate issue rule: 1) practical impossibility of distinguishing between ultimate and nonultimate fact, 2) difficulty of witness attempting to express self without reaching the ultimate issue, 3) doubtful rationale of the rule, and 4) futile judicial effort to distinguish between testimony on ultimate facts, which was allowed, and testimony on an issue of law, which was prohibited. WEINSTEIN ¶ 704 [01], at 4-5.

80. See Stoebe, *Opinions on Ultimate Facts: Status, Trends, and a Note of Caution*, 41 DEN. L.C.J. 226 (1964).

81. Arkansas, California, Florida, Kansas, Maine, Nebraska, Nevada, New Jersey, New Mexico, North Dakota, Wisconsin and Wyoming have either adopted the Federal Rule 704 or have a substantially similar rule.

82. *Macy v. Billings*, 74 Wyo. 404, 289 P.2d 422 (1955); *State ex rel. Kirk v. Gail*, 373 P.2d 955 (Wyo. 1962).

83. *Krahn v. Pierce*, 485 P.2d 1021 (Wyo. 1971); *In re Estate of Carey*, 504 P.2d 793 (Wyo. 1972).

84. WEINSTEIN ¶ 704 [01], at 10.

85. See WRE 701-702.

86. *United States v. Markham*, 537 F.2d 187 (5th Cir. 1976), cert. denied, 429 U.S. 1041 (1977).

87. *United States v. R. J. Reynolds Tobacco Co.*, 416 F. Supp. 316 (D.N.J. 1976).

that expert opinions which are expressed in terms of some legal standard (*i.e.*, whether plaintiff was disabled within the meaning of the Social Security Act) would also be inadmissible.<sup>88</sup> And, of course, if expert testimony is offered, the court must first be satisfied the subject of the proffered testimony is a suitable one for an expert.<sup>89</sup> Finally, judges have considerable discretion under the new rules. First, they can exclude testimony if its 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."<sup>90</sup> Second, under Rule 705, judges can insist that a witness disclose the basis for his testimony.<sup>91</sup>

The adoption of Rule 704 and concomitant abolition of the ultimate facts rule will go a long way toward eliminating the confusions and inequalities inherent in the traditional approach. The new Rule 704 places a premium on helpfulness rather than technical form and should allow necessary evidence to be given and received in a much more natural manner.

#### RULE 705: DISCLOSURE OF FACTS OR DATA UNDERLYING EXPERT OPINION<sup>92</sup>

Prior to Rule 705, an expert witness was required to state the factual basis for his testimony before actually giving his opinion. Expert opinions could be based on either information observed personally by the expert (for example, data collected by the physician-expert in the examination of a patient) or information inferred (for example, data a doctor obtains from reading medical records or listening to the testimony given at a trial). If an expert's opinion is not based on personal observation, the generally accepted method of eliciting the factual data underlying an expert's opinion is the hypothetical question. In the normal situation, a hypothetical question would recite all the relevant facts in evidence,

88. WEINSTEIN ¶ 704 [01], at 9.

89. *Tabatchnick v. G. D. Searle*, 67 F.R.D. 49 (D.N.J. 1975).

90. WRE 403.

91. WRE 705 discussed *infra*.

92. "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."

and then the witness would be asked whether he is able to form an opinion based on these assumed facts.<sup>93</sup> The rationale for such a procedure is to allow the jury to hear the basis of the expert's opinion and to prevent opinion based on irrelevant or untrue statements.

While full disclosure of the expert's factual foundation is praiseworthy, the use of hypothetical questions to elicit this information has been severely attacked. Critics have termed the use of such questions "a failure in practice and an obstruction to the administration of justice";<sup>94</sup> so "misused by the clumsy and abused by the clever, [that it] has in practice led to an intolerable obstruction of truth";<sup>95</sup> and "the most horrific and grotesque wen on the fair face of justice."<sup>96</sup>

The principal objections to use of hypothetical questions are that they allow an advocate to plead his case, tend to confuse and mislead the jury, and are often a waste of time.<sup>97</sup> Hypothetical questions allow a skillful advocate an excellent opportunity to plead his case under the guise of asking questions. The advocate can present a biased picture of the evidence by selecting some facts and omitting others, thereby presenting "an unfair and inadequate picture to the expert, and . . . the jury may give undue weight to the answer without considering its faulty basis."<sup>98</sup> The advocate can also use the hypothetical to make a "final argument" in the middle of the trial by including all the evidence favorable to his side.<sup>99</sup>

Hypothetical questions have also been criticized as tending to mislead and confuse both the witnesses and the jury.<sup>100</sup> The Wisconsin Supreme Court said:

[M]oreover, the members of this court, based upon their experience gleaned as practicing lawyers and trial judges, are satisfied that a mechanistic hypothetical question has the effect of boring and confusing the jury. Rather than inducing a clear expression of expert opinion and the basis for it, it inhibits the ex-

93. 2 JONES § 14:24.

94. MCCORMICK § 16, at 36.

95. 2 WIGMORE § 686, at 812.

96. Judge Learned Hand, New York Bar Association Lectures on Legal Topics, 1921-22 (New York, 1926), quoted in MCCORMICK § 16, at 37 n.9.

97. Ladd, *supra* note 73, at 426-27.

98. MCCORMICK § 14, at 33.

99. FED. R. EVID. 705, Adv. Comm. Note.

100. 2 WIGMORE § 686, at 812.

pert and forecloses him from explaining his reasoning in a manner that is intelligible to a jury.<sup>101</sup>

It has been held to be error to allow questions which were so long and complicated that they were likely to confuse witnesses or baffle their memory.<sup>102</sup>

Finally, the use of hypothetical questions has been severely condemned as wasteful of time and effort.<sup>103</sup> If the proponent does not include all of the facts material to the opinion he wishes to solicit, he may run the risk of both a battle in the courtroom over the adequacy of the question, and may nevertheless be reversed on appeal. Caution has often forced attorneys to set forth so many elements in their attempt to give a complete foundation, that the question becomes incomprehensible. In one extreme example, the hypothetical question covered eighty-three pages of transcript and was followed by a fourteen page objection.<sup>104</sup>

Rule 705 eliminates mandatory preliminary disclosure of the underlying facts and data, and therefore abolishes the *raison d'être* for hypothetical questions. The use of hypothetical questions is not prohibited by Rule 705—the trial court in its discretion can require preliminary disclosure of the factual basis for an expert's opinion and advocates can use hypothetical questions if they so desire—but the need for them will be reduced. And under Rule 403 confusing, repetitious or unnecessary questions can be excluded if the court finds their probative value is substantially outweighed by the dangers of prejudice, confusion or waste of time.<sup>105</sup>

Some attorneys fear expert testimony will be too brief. Under the new rules:

One bar association suggested that an expert might be called, qualified as an orthopedic surgeon, and then examined:

Q: Doctor, do you have an opinion based upon a reasonable degree of medical certainty as to the extent of permanent disability suffered by the plaintiff as a result of this auto accident?

101. Rabata v. Dohner, 45 Wis. 2d 111, 172 N.W.2d 409, 417 (1969).

102. Haish v. Payson, 107 Ill. 365; People v. Brown, 53 Mich. 531, 19 N.W. 172 (1884).

103. See MCCORMICK § 16, 2 WIGMORE § 686, at 812; FED. R. EVID. 705, Adv. Comm. Note.

104. Treadwell v. Nickel, 194 Cal. 243, 228 P. 25 (1924).

105. WRE 403.



A: Yes.

Q: What is your opinion?

A: She is totally and permanently disabled.

Q: Thank you doctor, that is all.<sup>106</sup>

Weinstein commented tersely, "Congress found no objection to such brevity. Many judges would welcome it."<sup>107</sup>

In practice this procedure would be rarely followed since the orderly presentation of evidence and the need to disclose some information in order to qualify the expert as a witness would necessitate some foundational questions.<sup>108</sup> The real advantage in proceeding under Rule 705 is that the witness would be allowed to testify in a much more natural and orderly fashion. Time would be saved and reliability can still be protected by full cross-examination.<sup>109</sup>

To the objection of those who believe it is unfair to make the cross-examiner bring out the underlying basis of his opponent's opinion, the Advisory Committee replies "the answer is that he [the cross-examiner] is under no compulsion to bring out any facts or data except those unfavorable to the opinion."<sup>110</sup> The note assumes fair and adequate discovery under Rule 26(b)(4) of the Rules of Civil Procedure.<sup>111</sup>

In spite of the reliance on discovery, several problems remain. First, discovery is much more limited in criminal cases and, therefore, does not afford an opposing counsel a fair opportunity to discover the probable basis for the expert's opinion before trial. Weinstein suggests that this problem can be overcome. In criminal cases "the trial judge should exercise his discretion more frequently to require a detailed preliminary disclosure of the premises on which the expert relied"<sup>112</sup> and he also suggests that counsel should exchange their experts' reports before trial to avoid surprise.<sup>113</sup>

106. *Hearings before the Special Subcomm. on Reform of Federal Criminal Laws of the House Comm. of the Judiciary*, 93d Cong., 1st Sess. 355-56 (Supp. 1973), quoted in WEINSTEIN ¶ 705 [01], at 2.

107. WEINSTEIN ¶ 705 [01], at 2.

108. *Id.* at 6-7.

109. *Twin City Plaza, Inc. v. Central Sur. & Ins. Corp.*, 409 F.2d 1195 (8th Cir. 1969).

110. FED. R. EVID. 705, Adv. Comm. Note.

111. FED. R. CIV. PRO. 26 (b)(4) gives opposing parties the right to discover the names of adverse experts, the subject matter and the probable content of the witness's testimony.

112. WEINSTEIN ¶ 705 [01], at 9.

113. *Id.*

Nevertheless, with the elimination of a requirement that the basis for an expert's opinion be offered before the opinion itself, the chance of the jury hearing opinion that later is found to be inadmissible is greatly increased. Of course, the opposing counsel may object if the opinion is wholly speculative and without any factual foundation and may move the court to strike the testimony under Rules 403 and 611. But as one author has pointed out, "telling a jury to disregard something they have just heard is about as effective as telling someone not to think of pink elephants."<sup>114</sup> Perhaps the only complete solutions to this problem are either to ask the judge to require preliminary disclosure of the basis for the witness's testimony or to get permission to voir dire the witness outside the hearing of the jury.<sup>115</sup>

In the ordinary case where full discovery is allowed, fears that opponents will be at a disadvantage will prove groundless. If the proponent were merely to qualify his expert and obtain a naked opinion on an ultimate issue, the opposing counsel could decline to cross-examine, leave the opinion as an unexplained conclusion, and then have his expert explain in great detail the research upon which his contrary opinion rests.<sup>116</sup>

Finally, it must be remembered that no opinion is conclusive, and as in the case of all other kinds of evidence, an opponent is free to refute the proffered opinion by any other admissible evidence. In any case, the jury is free to reject any evidence it finds unreasonable.

In spite of the problems, Rule 705 is clearly better than the traditional rule making preliminary disclosure in the form of hypothetical questions required. It should aid court witnesses and the jury by saving time, avoiding confusion and promoting fairness.

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114. McElhaney, *Expert Witnesses and the Federal Rules of Evidence*, 28 MERCER L. REV. 463, 489 n. 97 (1977).

115. Two states which have recently adopted the Federal Rules of Evidence added a subsection to Rule 705 specifically granting an opposing party the right to voir dire the expert in order to avoid prejudicing the jury. See FLA. STAT. ANN., Evidence Code § 90.705 (Supp. 1976); ME. REV. STAT. ANN. Maine Rules of Evidence, Rule 705 (Supp. 1977).

116. Gibbons, *Rules 701-706 Opinion and Expert Testimony*, 57 CHI. B. REC. 224, 229 (1976).

RULE 706: COURT APPOINTED EXPERTS<sup>117</sup>

Rule 706 expressly permits the appointment of expert witnesses by the court. Although there are no Wyoming cases in this area, the inherent power of a court to appoint an expert of its own choosing is virtually unquestioned.<sup>118</sup> In this respect Rule 706 merely affirms the common law and sets forth the necessary procedure.

Subdivision (a) of Rule 706 provides the basic procedure for appointing an expert. The proceeding can be initiated by either party or the court. The judge may request parties to submit nominations and may appoint an expert agreed upon by both parties, but he is not required to do so. After the expert has consented to serve, the judge must inform him of his duties either in writing or at a conference in which all parties may participate. The expert must communicate his findings to the parties, and any party may depose the expert. At trial any party, including the party calling the expert as a witness, has the right to cross examine.

Subsection (b) provides for reasonable compensation for court-appointed experts.<sup>119</sup> Subsection (c) gives the trial judge discretion to authorize disclosure of the expert's status as a court-appointed witness to the jury and Subsection (d) simply states that a party's right to call his own expert witnesses is in no way restricted by the appointment of a witness by the court.

117. "(a) *Appointment.* The court may on its own motion or on the motion of any party enter an order to show cause why expert witnesses should not be appointed, and may request the parties to submit nominations. The court may appoint any expert witnesses agreed upon by the parties, and may appoint expert witnesses of its own selection. An expert witness shall not be appointed by the court unless he consents to act. A witness so appointed shall be informed of his duties by the court in writing, a copy of which shall be filed with the clerk, or at a conference in which the parties shall have opportunity to participate. A witness so appointed shall advise the parties of his findings, if any; his deposition may be taken by any party; and he may be called to testify by the court or any party. He shall be subject to cross-examination by each party, including a party calling him as a witness.

(b) *Compensation.* Expert witnesses so appointed are entitled to reasonable compensation in whatever sum the court may allow. The compensation thus fixed is payable from funds which may be provided by law in criminal cases and civil actions. In civil actions and proceedings the compensation shall be paid by the parties in such proportion and at such time as the court directs, and thereafter charged in like manner as other costs.

(c) *Disclosure of appointment.* In the exercise of its discretion, the court may authorize disclosure to the jury of the fact that the court appointed the expert witness.

(d) *Parties' experts of own selection.* Nothing in this rule limits the parties in calling expert witnesses of their own selection.

118. *Scott v. Spanjer Bros., Inc.*, 298 F.2d 928 (2d Cir. 1962); Annot., 95 A.L.R.2d 390 (1964).

119. See note 1, *supra*.

While no one questions the need for expert testimony in litigation, commentators have been critical of the traditional adversarial method of selecting experts which places the responsibility for finding and the costs of employing experts on the parties to a lawsuit:

[The] biased nature of . . . permitting the parties to employ their own expert witnesses . . . invite[s] the suggestion of purchasing evidence and the suspicion that he wins who can best pay the fees to the experts.<sup>120</sup>

Morgan notes that sometimes experts "have given shocking exhibitions or partisanship in criminal cases, will contests and personal injury litigation."<sup>121</sup> In addition, juries can become confused when confronted by experts from each side, each expert swearing to a completely opposite conclusion. In such a "battle of the experts" the expert fails to fulfill his function to aid the trier of facts.<sup>122</sup>

To solve problems created by biased experts, many legal scholars have approved the concept of the impartial expert,<sup>123</sup> and a number of plans had been adopted prior to Federal Rule 706.<sup>124</sup>

Commentators have suggested that an impartial expert appointed by the court would benefit the parties by reducing the costs of litigation and would also benefit the state by reducing court congestion and trial costs.<sup>125</sup> In addition, use of impartial experts could reduce the "reluctance of many reputable experts to involve themselves in litigation."<sup>126</sup> Substantial justice would be served by reducing the tendency of parties to "expert" shop and would also encourage the pretrial disposition of cases. Indeed, the Advisory Committee Note to Federal Rule 706 points out the mere possibility of the use of impartial experts would have a salutary effect on both the expert witness and his employer.<sup>127</sup>

120. 2 JONES § 14:25.

121. MORGAN, STATE AND FEDERAL EVIDENCE, *supra* note 70, at 197.

122. MCCORMICK § 17.

123. See e.g., MCCORMICK § 17; 2 WIGMORE § 563; Sink, *The Unused Power of a Federal Judge to Call His Own Expert Witnesses*, 29 S. CAL. L. REV. 195 (1956).

124. UNIFORM RULES OF EVIDENCE 59-61 (1953); MODEL CODE OF EVIDENCE 403-10 (1942).

125. Report of the New Jersey Supreme Court Committee on Evidence 116 (1963) quoted in WEINSTEIN ¶ 706 [01], at 8.

126. FED. R. EVID. 706, Adv. Comm. Note.

127. FED. R. EVID. 706, Adv. Comm. Note.

In spite of its many advantages, the use of court-appointed experts has been attacked for several reasons. One critic has suggested the appointment of an expert by the court would violate the constitutionally protected right to trial by jury.<sup>128</sup> According to this argument, since the court-appointed expert is theoretically unbiased, his influence on the jury would be unduly persuasive: "For all practical purposes, trial by a single witness is substituted for trial by jury."<sup>129</sup> However, Rule 706 avoids the problem of undue influence by allowing the court discretion in revealing the impartial status of the expert. Use of the court's discretion in this matter should adequately safeguard the integrity and fairness of the trial.

Critics of the court-appointed expert concept also point out that experts may honestly and reasonably differ. For example, the propriety of using "open" versus "closed" reduction of a fracture in a specific situation is subject to medical debate. To appoint the holder of an opinion on one school of thought an "impartial expert" unnecessarily prejudices an expert for the opposing party. However, Rule 706 provides safeguards: "a court expert's lack of neutrality can be readily exposed because the parties must be furnished with his report and have an absolute right to call their own experts, thus enabling them to prepare for cross-examination."<sup>130</sup>

Finally, it should be noted that although Rule 706 codifies the trial court's common law power to call its own witnesses, there is little evidence to show that a trend is developing. Weinstein suggests that judges as a group "remain committed to adversarial responsibility for presenting evidence."<sup>131</sup>

### CONCLUSION

Under the new rules witnesses are allowed to testify in a more natural manner while reliability is safeguarded by requiring lay witnesses to testify from personal knowledge (Rule 701) and by requiring that experts be qualified by practical experience or academic credentials (Rule 702).

128. Levy, *Impartial Medical Testimony—Revisited*, 34 TEMP. L. Q. 416 (1961).

129. *Id.* at 124-25.

130. WEINSTEIN ¶ 706 [01], at 12.

131. *Id.*

Other changes will streamline litigation by allowing an expert to base his opinion on inadmissible evidence if it is of the type reasonably relied on by experts in his field (Rule 703), by allowing testimony on ultimate facts (Rule 704), and by allowing an expert to give his opinion without prior disclosure of the underlying facts (Rule 705). Finally, the new rules expressly provide for the appointment of expert witnesses by the court (Rule 706). The preceding rules show that the adoption of Article VII will promote fairness and judicial efficiency by making helpfulness to the trier of fact rather than technical form the standard under which opinion testimony is admitted.

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