In Defense of a Constitutional Theory of Experts

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IN DEFENSE OF A CONSTITUTIONAL THEORY OF EXPERTS

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Professor Ronald Allen honors the memory of John Henry Wigmore on virtually every occasion in which he targets an aspect of evidence law for scholarly study.1 As Wigmore Professor of Law, Allen has consistently afforded modern evidence specialists some of the best in provocative theory as grist for review and discussion. He now places experts in his sights, and the results are no less stimulating.

I. CORRECTLY IDENTIFYING THE POSITIONS

Professor Allen and Mr. Miller commence their review of the current writings on experts by dissecting several of my articles.2 Happily, the distillation of central points by Allen and Miller is clear and accurate. Because earlier commentators have confused my thesis, briefly restating the contentions seems advisable.

An expert forms conclusions based upon a variety of sources. In many cases an expert relies on a combination of factors consisting of the general theories, research, and studies in her field; hands-on experience with the person or process at issue in the litigation; and information drawn from out-of-court declarants who provide specific input regarding the expert's particular case. Frequently these declarants do not appear to testify. While the expert can state opinions based on nonrecord information if it is appropriately credited, the expert's detailed rendition of the case-specific hearsay drawn from out-of-court sources is barred.

I oppose attributing evidentiary status to such supporting data unless there is a sound and independent ground to admit the material.3

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1 My admiration of Wigmore is identified, among other places, in Ronald L. Carlson, Competency and Professionalism in Modern Litigation: The Role of the Law Schools, 23 GA. L. REV. 689, 713 n.88 (1989).


3 See Ronald L. Carlson, Experts as Hearsay Conduits: Confrontation Abuses in Opinion Testimony, 76 MINN. L. REV. 859, 870-71 (1992) ("The materials in the case-specific category may be used by the testifying physician to reach a conclusion, but are particularly subject to exclusion when admission is sought without foundation.").
Since 1984 I have opposed such classification without regard to whether the proponent offers the data as substantive evidence or as a simple explanation to the jury of the material relied upon by the expert.\(^4\)

In the face of this position, one article made an unexpected assertion:

Compounding the absurdity of the approach supported by Professor Carlson is the court's allowing the expert to recite the underlying basis, and then instructing the jury not to accept the recited facts as true (even though the expert did), but to consider those facts only in assessing the value of the expert’s opinion.\(^5\)

The article also pointed out that, for the limited purpose of explaining the expert's opinion, courts “permit the introduction of this otherwise inadmissible background information.”\(^6\) It then adds: “Professor Carlson, however, supports this result. . . .”\(^7\) This is not correct. I have consistently opposed the introduction of otherwise inadmissible background information whether offered directly or in the guise of justifying the expert’s opinion.\(^8\)

Allen and Miller get it right. They identify various positions currently used to govern experts, including this one: “The data [in the particular case upon which an expert bases an opinion] are not admissible and may only be referred to in a quite cursory fashion on direct examination, which is Carlson’s preference.”\(^9\)

Where this approach is rigorously applied—and I argue that it must be so applied to prosecution proof in criminal cases—precious little need arises for specially instructing juries. Juries need not be told to view voluminous supportive material as illustrative or explanatory evidence. The rule bars admission of such stuff, whatever the form of offer.

My adherence to this position has drawn criticism. Allen and Miller conclude that “Carlson ostensibly wants to bend the world of experts to fit the law rather than expand the law to accommodate the experts.”\(^10\) Not entirely. Sensible compromises can and have been made. In keeping with good expert witness practice, Federal Rule of Evidence 703 allows the expert to synthesize the primary source material—be it

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\(^6\) Id. at 584.

\(^7\) Id.


\(^9\) Allen & Miller, supra note 2, at 1134 (emphasis added) (footnote omitted).

\(^10\) Id.
hearsay or not—into properly admissible evidence in opinion form. The balance struck by the Rule, allowing opinion testimony by the expert but disallowing wholesale introduction of his underlying data, seems appropriate.

Another reasonable balance was reached in a Minnesota innovation. Concerned about the possibilities of abuse under Rule 703, Minnesota rule drafters created a new Rule 703(b):

(b) Underlying expert data must be independently admissible in order to be received upon direct examination; provided that when good cause is shown in civil cases and the underlying data is particularly trustworthy, the court may admit the data under this rule for the limited purpose of showing the basis for the expert's opinion. Nothing in this rule restricts admissibility of underlying expert data when inquired into on cross-examination.

II. THE CONSTITUTION IGNORED?

Why does the Minnesota provision except only civil cases from the doctrine of absolute exclusion of case-specific data? Criminal prosecutions are invariably subjected to the portion of the Minnesota Rule that bars an expert's underlying data. Unless independently authenticated, a prosecutor may not introduce the data on direct examination, not even to simply illustrate the expert's basis. The answer, of course, lies in the Confrontation Clause of the United States Constitution. A contrary practice would decimate the tenets of that valued provision of the Sixth Amendment. A contrary practice would authorize a local witness on the stand to read into the record or to give to the jury as an exhibit such evidence as a nontestifying expert's written report about the defendant's sanity or conclusions drawn from a DNA test performed by someone else at a distant lab. Proponents of wide-open admission of underlying data seem to say that such abuses are appropriate because the jury should know, in detail, the data that supports the courtroom expert's opinion. But they say little about the case law which condemns the patent unconstitutionality of the practice they endorse.

III. A RISING TIDE OF OPINION

Comprehensive writings on the misuse of case-specific reports prepared by hearsay declarants began in about 1984. Few litigated cases had isolated the issue at that time. With increased attention to the prob-

11 This formulation was adapted from language in United States v. Sims, 514 F.2d 147, 149 (9th Cir. 1975).
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lem, courts began to react, many in a commendable fashion, as illustrated by the decision in First Southwest Lloyds Insurance Co. v. MacDowell.\(^{15}\) The plaintiffs sued on a fire insurance policy and the insurance company refused to pay, alleging arson. A fire marshal testified to his opinions that the fire was set and that the plaintiffs had done it. The trial court excluded the fire marshal's testimony concerning a spectator's specific statements made to the marshal that served as a partial basis for the marshal's conclusions. While the trial court allowed the marshal to state that an account of the fire by the witness contributed to his conclusion that the cause of the fire was incendiary, it refused to allow him to state before the jury the specifics of what the witness had told him, "namely that [the witness] had seen the fire begin from a nightclub across the street from the beauty supply and that a white male ran from the front of the beauty supply and sped away in a vehicle."\(^{16}\)

The reviewing court approved exclusion of the hearsay report supplied by the out-of-court witness:

[While an expert in an arson case could properly state that he based his conclusion that a fire was incendiary upon many years of fire investigation training and experience, the physical findings at the fire scene, and reports made to him during the course of the investigation, he would not necessarily be entitled to express all the details of each of the bases of his opinion. If the expert were held to be entitled to detail every statement made to him that contributed to his conclusion, then the expert could be effectively used to present an infinite amount of evidentiary matters to the jury.\(^{17}\)]

The common law approach to this sort of problem required that

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\(^{15}\) 769 S.W.2d 954 (Tex. Ct. App. 1989).

\(^{16}\) Id. at 957.

\(^{17}\) Id. at 958. Texas courts have also addressed the issue of whether a party waives his objection to underlyng data when he does not object to the expert's statement of his opinion but rather objects for the first time when an underlying report is offered in evidence. Holding against waiver is Beavers v. Northrop Worldwide Aircraft Servs., Inc., 821 S.W.2d 669, 674 (Tex. Ct. App. 1991) ("The better judicial position is not to allow the affirmative admission of otherwise inadmissible matters merely because such matters happen to be underlying data upon which an expert relies."). Other authorities have appreciated the difference between an expert's opinion and inadmissible underlying data. See State v. Williams, 549 So. 2d 1071, 1072 (Fla. Dist. Ct. App. 1989) ("We reject the notion that the expert may be used as a conduit for the introduction of otherwise inadmissible evidence."); Federal Rules of Evidence: A Fresh Review and Evaluation, 120 F.R.D. 299 (1987); Peter J. Rescori, Comment, Fed. R. Evid. 703: A Back Door Entrance for Hearsay and Other Inadmissible Evidence: A Time for a Change?, 63 TEMP. L.Q. 543 (1990); see also David L. Faigman, Struggling to Stop the Flood of Unreliable Expert Testimony, 76 MINN. L. REV. 877, 889 (1992); Edward J. Imwinkelried, The "Bases" of Expert Testimony: The Syllogistic Structure of Scientific Testimony, 67 N.C. L. REV. 1 (1988). In applying the theory espoused in the writings of Carlson and Imwinkelried, courts may differentiate learned treatises and general points of scientific theory from case-specific information drawn from sources involved in the particular case at issue. It is material of the latter sort that courts need to be alert to, and to prohibit, unless independently authenticated.

This Essay seeks to make clear the fallacy of allowing an in-court expert to intensively refer to a variety of inadmissible data, and then instruct the jury to disregard its substantive effect and to consider it only for the purpose of crediting the expert's opinion. Professor Imwinkelried also identi-
bystanders or eyewitnesses appear before the court, give their testimony, and stand for cross-examination. Eliminating the last step by filtering a witness's testimony through an expert was prohibited. That ancient approach still makes good sense to me. Any rule that invites the abusive practice of insulating a key eyewitness from interrogation should be rejected.

IV. Conclusion

Allen and Miller cast the great experts controversy as one of education versus deference. Those favoring deference may remind opponents that deference only comes after the court educates itself on the reliability of the data underlying the expert's opinion, as well as the quality of the expert's credentials. Unaddressed by some proponents of education are constitutional restraints. The issue in the experts controversy is not unduly complex. A police detective is not allowed to repeat in court everything that informants and underworld sources may have told her, thus implicating a defendant. Neither is a prosecution expert entitled to relate what other out-of-court experts stated about scientific tests that suggest guilt, sanity, or other conclusions. Presumably, those espousing the wide-open view of admission of underlying data would permit this evidence. Given the penchant of rule drafters to adopt uniform evidence rules for both civil and criminal cases, proponents of the wide-open view can only have their approach taken seriously after they analyze how their view will impact the cases enforcing the Confrontation Clause.

The confrontation guarantee is, of course, directly applicable in criminal cases. Many of the thoughtful policies underlying that Clause also make good sense in the general run of civil cases, enforced by the hearsay rule. The Fifth Circuit said in an important decision that "it is time to take hold of expert testimony in federal trials." An excellent place to start is by avoiding a "let it all in" philosophy, which dictates virtually uncontrolled admission of background information disclosed to an expert through a variety of sources.

Appellate courts are just now addressing the problem. For that reasons the inability to cure this sort of problem with limiting instructions. Imwinkelreid, supra, at 12, 26.

18 I take this stand even while approving a modern approach to the separate question of the opinion itself, one which allows the expert to synthesize the primary source material into properly admissible evidence in opinion form.

19 Allen & Miller, supra note 2, at 1137.

20 See supra note 14 and accompanying text. The Supreme Court allows hearsay into evidence over a confrontation objection when the hearsay falls within an established and "firmly rooted" exception to the rule. Idaho v. Wright, 497 U.S. 805 (1990). It can hardly be argued that an expert's underlying basis falls within the definition of a longstanding and established hearsay exception. Such an exception is not even listed among those which are recognized in Rules 803 or 804 of the Federal Rules of Evidence.

21 In re Air Crash Disaster at New Orleans, 795 F.2d 1230, 1234 (5th Cir. 1986).
son, this issue and others raised by Allen and Miller are extremely timely. On the significant question of whether a courtroom expert’s reliance on reports of others magically makes those reports admissible, the response should be an emphatic no. Any other response violates the hearsay rule and, in criminal cases, the Confrontation Clause.