EXPERT AND OPINION EVIDENCE IN VERMONT: DEVELOPMENTS, PROFILES, AND EMERGING CONCERNS FOR RELIABILITY OF SCIENTIFIC EVIDENCE

Kenneth R. Kreiling*

INTRODUCTION

The Vermont Supreme Court adopted the Vermont Rules of Evidence based on the Federal Rules of Evidence in 1982.[1] Since that time, the court has decided several important cases involving opinion evidence. The supreme court has charted a mainstream course under the rules governing expert evidence, providing substantial guidance for Vermont practitioners. However, some federal developments over the past several years have been unsettling. The tenth anniversary of the Vermont Rules provides an appropriate occasion to review the law of opinion evidence in Vermont and to examine the emerging national concern about the reliability of expert evidence. That concern will undoubtedly be reflected in future challenges to expert evidence in Vermont as Vermont attorneys study the recent Vermont cases and the national developments.

The review of opinion evidence in Vermont in light of national developments is important to Vermont attorneys for several reasons. The use of expert evidence has increased dramatically during the years following the adoption of the federal rules,[2]

 Professor of Law, Vermont Law School; LL.M. 1976, Harvard University; M.A. 1967, J.D. 1966, University of Wisconsin; A.B. 1963, Marquette University. The author is a member of the Vermont Supreme Court Advisory Committee on the Rules of Evidence. The author is grateful to Vermont Supreme Court Justice John Dooley and especially to Karen McAndrew for their helpful comments on an earlier draft of this article, and to Adam Tschorn for comments and editorial assistance. Any errors in the final version are solely attributable to the author's failure to follow sound advice.

1. Order Promulgating the Vermont Rules of Evidence and Related Amendments to the Vermont Rules of Civil Procedure and Vermont Rules of Criminal Procedure, VT. R. EVID. (1983) (order contained in text preceding Rule 101).

2. FAUST F. ROSSI, EXPERT EVIDENCE 3-4 (1991). There is surprisingly little empirical evidence on the use of expert evidence, but the literature reflects a consensus that use of experts has increased dramatically. *See* MICHAEL J. SAKS & RICHARD VAN DUIZEND, THE USE OF SCIENTIFIC EVIDENCE IN LITIGATION (1983); Samuel R. Gross, *Expert Evidence*, 1991 WIS. L. REV. 1113 (providing two of the better treatments of incidence of problems associated with use of expert evidence).

which became effective in 1975.[3] Greater use of expert evidence is partly a function of the more liberal approach that is reflected by the modern rules. It is also a function of the increasingly complex nature of civil cases. For example, toxic tort, malpractice, and products liability cases typically require expert evidence to meet the required burdens of proof.[4] The use of scientific evidence is also commonplace in criminal cases due to decreased reliance on statements made by defendants, a result of the Warren court developments and the burgeoning of forensic science.[5]

The greater use of expert evidence requires attorneys to be well-versed in the issues framed by the rules governing expert evidence and related rules, such as the hearsay rule. Unfortunately, an examination of the Vermont cases indicates that many attorneys are not familiar with these issues. A substantial number of the cases involve the attorney's failure to make the appropriate, specific objection, or any objection, to the admission of expert evidence. Consequently, the appellant is faced with the almost insurmountable task of convincing the supreme court that the error, in a complex evidentiary milieu, is plain error.[6]

This article examines Article VII, the related Vermont rules, and recent national developments in a framework that allows integration of the recent Vermont case law. Part I places Article VII in perspective by comparing the Vermont Rules of Evidence with the Federal Rules of Evidence. Part II reviews the issues that must be considered under the basic Article VII opinion evidence rules and how the Vermont Supreme Court has analyzed these issues. Part III similarly addresses the other Article VII rules and related rules. Part IV focuses on the only well-developed body of Vermont case law involving opinion evidence, criminal cases in which the admissibility of evidence of general

---

3. ROSSI, *supra* note 2, at 4.

4. ROSSI, *supra* note 2, at 3.

5. RONALD CARLSON ET AL., EVIDENCE IN THE NINETIES 285 (3d ed. 1991).

6. "An objection on one ground to the trial court does not preserve a claim of error on appeal based on other grounds." . . . Accordingly, our review is limited to plain error. . . . "Plain error will be found 'only in a rare and extraordinary case where the error is an obvious one,' and only if the error affects substantial rights of the defendant."
State v. Sims, 2 Vt. L. Wk. 469, 471, 608 A.2d 1149, 1154 (1991) (citations omitted).

characteristics exhibited by the defendant or complainant is at issue. These cases illustrate the important interrelationship between the expert rules and the related rules of evidence. Finally, part V briefly considers the recent concern of several federal courts and the civil rules advisory committee about the reliability of expert evidence and discusses the possible restrictions on the use of expert evidence.

I. THE OPINION RULES IN CONTEXT

The Vermont Rules of Evidence were promulgated by the Vermont Supreme Court pursuant to chapter II, section 37 of the Vermont Constitution in December of 1982.[7] The reporter's notes to Rule 101 indicate that the rules are based upon the Federal Rules of Evidence except where Vermont conditions make departures therefrom desirable.[8] Departures from the federal model with respect to opinion evidence are rare and, unless otherwise noted in this article, the Vermont rules follow the federal model.[9] The reporter's notes refer the Vermont practitio-

---

7. VT. CONST. ch. II, § 37; Order Promulgating the Vermont Rules of Evidence and Related Amendments to the Vermont Rules of Civil Procedure and Vermont Rules of Criminal Procedure, VT. R. EVID. (1983) (order contained in text preceding Rule 101). The Vermont Supreme Court has the power to "prescribe and amend from time to time, general rules with respect to . . . evidence . . . for all actions and proceedings in all courts of this state." VT. STAT. ANN. tit. 12, § 1 (Supp. 1991); *see* John Dooley, *The Regulation of the Practice of Law, Practice and Procedure, and Court Administration in Vermont—Judicial or Legislative Power?*, 8 VT. L. REV. 211 (1983) (discussing the Vermont Supreme Court's rulemaking power and the tension between the court and the legislature with respect to rulemaking).

8. VT. R. EVID. 101 reporter's notes.

9. For example, Vermont Rule 704 reflects the original language of the federal rule which was subsequently amended by Congress to prohibit "opinion or inference as to whether the defendant did or did not have the mental state or condition constituting an element of the crime charged or of a defense thereto." FED. R. EVID. 704. Vermont Rule 706(b) varies slightly from the federal rule with respect to the compensation of court-appointed experts. *Compare* VT. R. EVID. 706(b) *with* FED. R. EVID. 706(b). "Expert witnesses so appointed are entitled to reasonable compensation in whatever sum the court may allow. In civil cases or 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." VT. R. EVID. 706(b).

> 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 and proceedings involving just compensation under the fifth amendment. In other 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

ner to the federal advisory committee notes and the legislative history as aids for interpreting the Vermont Rules.[10] The reporter's notes also refer to case law of the federal courts and states with identical rules as "an authoritative source for the interpretation of identical provisions of the Vermont Rules."[11] As will be seen in the last section of this article, the availability of the federal case law is a mixed blessing because of substantial disagreement with respect to recent developments limiting expert evidence. Nevertheless, the Vermont practitioner should be familiar with federal legislative history and explore case law from federal courts and states with rules modeled on the federal rules[12] to interpret the Vermont rules effectively.

Article VII is characterized by pithy draftsmanship, requiring the reader to be aware of the general goals of the article and to parse the rules' language carefully. The drafters attempted to continue a trend, already undertaken in Vermont prior to adoption of the rules,[13] to do away with formalistic rules governing opinion evidence in favor of a more expansive and functional approach to opinion evidence.[14] The drafters recognized the great variety of opinion evidence offered in modern litigation and the need for flexibility in admission of opinion evidence.[15] This approach has been frequently characterized as a shift to a relevancy model.[16] Thus, the key rules are characterized by broad language, such as "helpful to"[17] or "will assist the trier of fact"[18] and "reasonably relied upon by experts."[19]

---

charged in like manner as other costs.
FED. R. EVID. 706(b).

10. VT. R. EVID. 101 reporter's notes.

11. *Id.*

12. As of January, 1991, 34 states had adopted a version of the federal rules. RONALD CARLSON ET AL., *supra* note 5, at 26.

13. VT. R. EVID. 702-705 reporter's notes.

14. ROSSI, *supra* note 2, at 4-6, 9, 13-42.

15. FED. R. EVID. 702 advisory committee's note.

16. *See, e.g.*, Paul C. Gianelli, *The Admissibility of Novel Scientific Evidence:* Frye v. U.S., *a Half-Century Later*, 80 COLUM. L. REV. 1197, 1232-33 (1980).

17. VT. R. EVID. 701.

18. VT. R. EVID. 702.

19. VT. R. EVID. 703.

This general, functionally oriented draftsmanship has important implications. First, the practitioner must focus on very fact specific inquiries instead of drawing upon legalistic distinctions. The practitioner must carefully examine the relationship between the proposed evidence, the issues in the case, and the ability of the evidence to assist the trier in understanding and deciding the issues.[20] Second, the trial judge has enormous discretion in deciding whether to admit lay opinion and expert evidence. The trial judge will be reversed only for abuse of discretion.[21] Finally, the unprepared practitioner will be saved only infrequently by a plain error claim.[22] The practitioner must make a timely objection to opinion evidence and specify a correct basis for excluding the evidence.[23]

The key to successful litigation of opinion evidence issues is carefully anticipating and analyzing the relevancy of the evidence and Article VII issues. This in turn will depend on discovery of the qualifications of the witness to render the particular opinion, the basis for the opinion, and the opinion itself. In addition, the litigator must appreciate the possibility of shielding potential expert evidence by extending the attorney-client privilege to an expert consultant[24] and by invoking the work product doctrine.[25]

Each Article VII rule must be analyzed in conjunction with the other Article VII rules. For example, as the next section will demonstrate, the line between lay opinion and expert opinion is often a murky one. One cannot understand the limits on lay opinion under Rule 701 without considering Rule 702. Similarly, the procedural provisions of Rules 703 through 706 provide narrow limits upon opinion evidence allowed by Rule 702 and also provide a means to facilitate introduction of such evidence.[26]

---

20. *See* VT. R. EVID. 702.

21. *See infra* note 75 and accompanying text.

22. *See infra* notes 108-09 and accompanying text; VT. R. EVID. 103(a).

23. VT. R. EVID. 103(a).

24. *See* VT. R. EVID. 502(a)(3), (b) & reporter's notes; *see also* San Francisco v. Superior Court, 231 P.2d 26 (Cal. 1951).

25. *See* VT. R. CIV. P. 26(b)(4).

26. *See infra* part II.A, C, D.

In addition, Article VII rules must be analyzed in conjunction with the rules in other articles. Rule 403, which allows the judge to exclude certain otherwise relevant evidence, provides the most effective limit to the expansive reach of the Article VII rules.[27] Rule 703, governing the basis for an expert's opinion, and Rule 803(18), the learned treatise exception to the hearsay rule, both greatly reduce the traditional hearsay limitations on expert evidence.[28] Rules 611(a) and 614, which allow the court considerable latitude in governing the order and the mode of interrogation of witnesses, should be applied to Article VII issues.[29] Therefore, even though the focus of the next two sections is a rule-by-rule analysis under Article VII, the analysis of a particular issue must be undertaken in the context of the evidence rules generally and of the discovery rules.

II. THE BASIC OPINION RULES

The basic rules in Article VII, Rules 701 and 702, set forth the circumstances for use of expert or opinion evidence. The rules governing both lay[30] and expert opinion[31] rely heavily on a relevancy model[32] that requires the attorney to undertake a careful relevancy analysis in the opinion context. First, the attorney must identify the issue toward which the opinion/expert evidence will be directed. Second, whether the evidence relates to a disputed material issue must be considered. Finally, the rules ask whether the evidence will help, or, in the case of Rule 702, assist the trier to understand the testimony or to decide an issue in the case. Only after undertaking this examination of the

---

27. *See infra* notes 174-80 and accompanying text.

28. *See infra* text accompanying notes 81-89 and 130-41.

29. Vermont Rule 704 specifically allows the judge to require disclosure of underlying facts on direct examination. VT. R. EVID. 704. The Article VI rules provide general authority to control order, scope and mode of examination, and cross-examination. Some courts, for example, have utilized these rules to schedule competing expert witnesses back-to-back, out of the normal case order, to promote jury comprehension. *See generally* Kenneth R. Kreiling, *Scientific Evidence: Toward Providing the Lay Trier With the Comprehensible and Reliable Evidence Necessary to Meet the Goals of the Rules of Evidence*, 32 ARIZ. L. REV. 915, 956-59 (1990).

30. VT. R. EVID. 701.

31. VT. R. EVID. 702.

32. Both rules speak in terms of (a) helping or assisting the trier to understand the evidence, or (b) determining a fact in issue. The former is essentially a probative value requirement, the latter a materiality requirement.

relevance of an offer should the attorney consider the more technical requirements of the two rules.

The rules draw two basic distinctions that are not always easy to apply. The first is the distinction between lay persons and experts. Because both lay and expert witnesses can render opinions when helpful to the trier, the basis for the distinction resides in the expert's experience and training that make the expert uniquely qualified to give specialized background information and opinions on a particular issue.[33] The second distinction drawn by the rules is between opinion and non-opinion evidence. Lay witnesses are typically fact witnesses; expert witnesses are also frequently fact witnesses. Furthermore, expert witnesses are allowed by Rule 702 to relate technical background information that will assist the trier to understand other evidence in the case or to determine a fact in issue.[34] The opinion barrier is crossed and, in the case of experts, Rules 703 through 705 come into play only when the witness draws a sufficiently strong inference from the specific case facts or technical background information.

A. Rule 701—Lay Opinion

Until relatively recently, courts have exhibited a tendency to restrict lay opinion for fear of interfering with the trier of fact's role of drawing inferences from the evidence. Gradually, the courts realized the difficulty in breaking down certain observations into their constituent facts, but tended to restrict lay opinion to cases where facts were otherwise "incapable of being presented with their proper force."[35] As the reporter's notes to Vermont Rule 701 indicate, the relevancy based standard, "helpful to the understanding of his testimony or the determination of a fact in issue,"[36] significantly broadens the previous necessity based standard. In addition to the helpfulness requirement, the only

---

33. Rule 702 utilizes the following language: "scientific, technical, or other specialized knowledge." VT. R. EVID. 702.

34. Rule 702 provides, "a witness qualified as an expert . . . may testify . . . in the form of an opinion *or otherwise*." VT. R. EVID. 702 (emphasis added). The advisory committee note to Federal Rule 702 encourages the use of non-opinion expert testimony when counsel thinks the trier can draw the requisite inference, but notes that the rule does not abolish the use of opinions. FED. R. EVID. 702 advisory committee's note.

35. *See* VT. R. EVID. 701 reporter's notes.

36. VT. R. EVID. 701.

other requirement for lay opinion is that it be "rationally based on the perception of the witness."[37] This requirement is a specific application of the first-hand knowledge requirement of Rule 602.[38] Unlike the expert, the lay witness can only render an opinion rationally based upon the witness' own perceptions.[39]

Two Vermont cases involving intoxication illustrate the rational basis requirement. In *State v. Lettieri*, the court upheld the trial court's ruling that the defendant did not have to qualify as an expert to explain why his breath analysis indicated he had consumed more than the "double" he acknowledged drinking.[40] The court found that the answer could be based on the perception of the witness.[41] In *State v. Jewett*, the court held that a lay witness was competent to give an opinion about sobriety based on personal observations.[42]

In contrast, the court previously had held in *State v. Rifkin*, a pre-rules case citing Federal Rule 701, that a lay person could not render an opinion on whether a person was under the influence of marijuana.[43] The court stated that such an opinion was not rationally based upon the perception of the witness because of the confusing array of symptoms displayed by drugs other than alcohol.[44] Special training would be required before a witness could render an opinion connecting the confusing symptoms and their cause.[45] Similarly, expertise would be required before a party could testify as to the impact of tax law on the sale of property.[46] Another case that illustrates the limits of lay opinion is *Brown v. Whitcomb*.[47] A surveyor was tendered to

---

37. *Id.*

38. *See* VT. R. EVID. 602.

39. VT. R. EVID. 701 reporter's notes.

40. State v. Lettieri, 149 Vt. 340, 343, 543 A.2d 683, 685 (1988).

41. *Id.*

42. State v. Jewett, 148 Vt. 324, 332, 532 A.2d 958, 962 (1986).

43. State v. Rifkin, 140 Vt. 472, 476, 438 A.2d 1122, 1124 (1981).

44. *Id.*

45. *Id.* The court was concerned that a conviction requiring guilt beyond a reasonable doubt could be based on "mere speculation." *Id.*

46. Johnson v. Johnson, 3 Vt. L. Wk. 79, 80 (1992). However, "the court was correct to allow plaintiff to testify about the value of the partnerships." *Id.* (citing VT. STAT. ANN. tit. 12, § 1604 (1973)); Jackson v. Jackson, 139 Vt. 548, 550, 432 A.2d 1181, 1182 (1981).

47. Brown v. Whitcomb, 150 Vt. 106, 111, 550 A.2d 1, 4 (1988).

testify as to the length of time a fence wire had been embedded in a tree.[48] The supreme court held that the trial court could reasonably conclude that the opinion was not rationally based on the perception of the witness and that the witness had not been qualified as an expert.[49]

These cases illustrate the court's willingness to allow helpful lay opinion when the opinion involves matters of a familiar and non-technical nature, and the court's reluctance to allow the opinion when one would expect a lay person to have difficulty in accurately evaluating his perceptions and drawing the correct inference. The attorney must be aware of the possibility of qualifying the witness as a "skilled" witness in spite of a lack of formal training,[50] thereby allowing the witness to render an expert opinion.

B. Rule 702—Expert Testimony and Opinion

The decision to utilize expert testimony ordinarily rests with the attorney. However, this decision is severely constrained by two considerations. In situations such as malpractice and products liability cases, the substantive law may require that the plaintiff produce expert testimony.[51] Furthermore, the trier of fact may expect the attorney to produce expert evidence. This perceived expectation contributes to the greatly increased use of expert evidence in recent years.

Before reviewing the requirements for expert evidence, it is worthwhile to categorize the different ways in which an expert may testify. An expert may function, like a lay witness, as a fact witness. People who would qualify as an expert, in at least some respects, frequently testify about their perceptions. It is common for a treating physician, for example, to testify as to what the physician observed during the course of an examination. There is

48. *Id.*

49. *Id.*

50. *See infra* text accompanying notes 65-71.

51. *See, e.g.*, ROSSI, *supra* note 2, at 3.

no need for the witness to "qualify" as an expert to give this first kind of evidence.[52]

Rule 702 contemplates two other kinds of evidence for which the expert must be "qualified" as an expert,[53] although a formal finding by the court that the expert is "qualified" is not required.[54] The first type of evidence for which the expert must be qualified as an expert is an opinion based upon specialized knowledge.[55] The second type of evidence, reflected in the "or otherwise" language, is that which provides technical information to assist the jury, but is not in the form of an inference or an opinion.[56] For example, the physician may testify about the typical etiology of a particular disease to help the jury understand the causation issue in a case. Such testimony may be given with or without rendering an opinion about whether or not the defendant's action caused the symptoms. Because these two types of expert evidence are based on specialized knowledge, the expert must meet the requirements of Rule 702.

Expert opinion typically can be viewed as a syllogism with the opinion forming the conclusion.[57] The specialized knowledge underlying the opinion, which may be but is not necessarily the subject of testimony, is the major premise. The minor premise consists of the case specific facts that can be supplied by the expert or someone else and is governed by Rule 703.

The deceivingly simple and expansive language of Rule 702 imposes only two requirements for expert testimony. The first is that "specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue."[58] The

---

52. Rule 702 requires the witness to qualify as an expert only when relating "scientific, technical, or other specialized knowledge." VT. R. EVID. 702.

53. Rule 702 provides that an expert may testify "in the form of an opinion or otherwise." VT. R. EVID. 702.

54. VT. R. EVID. 702 reporter's notes. As long as the record discloses adequate training or experience, a formal finding by the court is not required. *Id.*

55. Rule 702 provides that an expert witness may testify if the expert's "specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue." VT. R. EVID. 702.

56. *See* FED. R. EVID. 702 advisory committee's note.

57. Edward J. Imwinkelried, *The "Bases" of Expert Testimony: The Syllogistic Structure of Scientific Testimony*, 67 N.C. L. REV. 1, 2 (1988).

58. VT. R. EVID. 702.

language recognizes the trier's need for background technical information as well as expert opinion. The language expands on the normal definition of relevance since expert evidence need not tend to prove a material issue; it need only assist the trier to understand other relevant evidence.[59] Although specialized knowledge will ordinarily provide a basis that the jury does not possess for evaluating other evidence in the case,[60] the modern standard of "will assist the trier of fact"[61] suggests that the specialized knowledge need not necessarily relate to an issue beyond juror comprehension.[62] The second requirement for expert testimony is that the witness be "qualified as an expert by knowledge, skill, experience, training, or education."[63] A number of difficult issues lie hidden in these seemingly simple requirements, issues that the Vermont court has begun to confront[64] and, undoubtedly, will have to consider in the near future.

The fact that no formal training is required to meet this expansive basis for expertise is reflected in a number of pre-rule and post-rule Vermont cases. The breadth of the basis for qualifying an expert is illustrated by *Cappiallo v. Northrup*.[65] Plaintiff brought an action alleging that hay sold by the defendant caused the death of three of his horses.[66] Plaintiff produced a veterinarian who had treated the horses, evaluated the autopsies of two of them, and testified that they died from ingesting bracken fern.[67] Defendant countered with a farmer who had twenty-five years of experience with bracken fern and had worked with horses for sixty-seven years.[68] The court held that the farmer's back-

---

59. Contrast the basic relevance definition in Rule 401: "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." VT. R. EVID. 401.

60. Presumably, counsel will not ordinarily go to the expense of calling experts when the jury can evaluate the evidence and draw the appropriate inferences. Counsel will utilize closing argument to draw upon common experience and suggest the appropriate inferences.

61. VT. R. EVID. 702.

62. *See, e.g.*, 3 JACK B. WEINSTEIN & MARGARET BERGER, WEINSTEIN'S EVIDENCE ¶ 702[02], at 702-9 to 702-18 (1992).

63. VT. R. EVID. 702.

64. *See infra* text accompanying notes 77-79 and 229-40.

65. Cappiallo v. Northrup, 150 Vt. 317, 552 A.2d 415 (1988).

66. *Id.* at 318, 552 A.2d at 416.

67. *Id.*

68. *Id.*

ground and experience met the requirements of Rule 702.[69] The court noted that the expert's limitations were clear, and there was no danger of the jury paying greater credence than his qualifications would allow.[70] The court was willing to uphold a finding by the trial court that a "skilled" witness was qualified as an expert, in an area in which one might expect that formal qualifications would be required, because the witness offered a limited opinion to match his limited qualifications.[71]

State v. Bubar involved testimony concerning rape trauma syndrome by a mental health counsellor who lacked relevant formal education, but had worked with four rape victims over four and one-half years, had attended training sessions concerning the problems of rape victims, and had read literature dealing with effects of rape on a victim.[72] In spite of a concern that the testimony could lend an "aura of special reliability and trustworthiness" to the complainant, the court sustained the trial court's decision to admit the testimony.[73] The court cited the reporter's notes: "The . . . rule is intended to embrace not only witnesses having technical expertise but so-called 'skilled witnesses' as well—those having any relevant special knowledge . . . ."[74]

The court emphasized in both of these cases that the "competency of an expert witness is a question to be determined by the trial court within its sound discretion."[75] "[I]t is for the jury to determine from the testimony whether such experts have sufficient skill to render their opinion of any importance."[76] Thus, the question of weight to be accorded the expert's testimony is normally for the jury.

There are limits, however, on the competence of a generally qualified expert to render opinions. The most thorough treatment

---

69. *Id.* at 318-19, 552 A.2d at 416. The farmer was also a "horse dentist," but it was his experience with bracken fern that supported the trial court's discretion to allow the opinion. *Id.*

70. *Id.* at 319, 552 A.2d at 417.

71. *Id.* at 318-20, 552 A.2d at 416-17.

72. State v. Bubar, 146 Vt. 398, 400-02, 505 A.2d 1197, 1199-1200 (1985).

73. *Id.* at 401, 505 A.2d at 1199.

74. *Id.* at 402, 505 A.2d at 1200 (quoting VT. R. EVID. 702 reporter's notes).

75. *Id.*; *see* Cappiallo v. Northrup, 150 Vt. 317, 552 A.2d 415 (1988).

76. State v. Perry, 151 Vt. 637, 643, 563 A.2d 1007, 1012 (1989).

in which the court has excluded evidence by a generally qualified expert is *State v. Gokey;* the court excluded evidence that a child was sexually abused because the reliability of the syndrome used as the scientific basis for the opinion did not extend to diagnosis of sexual abuse.[77] This important case indicates that the court will scrutinize the theory utilized in reaching an opinion, at least in criminal cases.[78] Similarly, the court has indicated a willingness to examine the factual data upon which the expert relies.[79]

The reported Vermont cases demonstrate that the trial courts have liberally qualified experts and that the Vermont Supreme Court has not yet found an abuse of discretion in finding a witness qualified. The cases do, however, suggest that the court will examine the reasoning process and the adequacy of the underlying major and minor premises of an expert opinion. Attorneys who offer experts or who oppose experts on qualification grounds must make their best case at the trial court and cannot count on relief from the supreme court.[80]

III. THE OTHER EXPERT RULES

Once a court has made the threshold determinations under Rule 702 that a particular witness qualifies as an expert and that his testimony will assist the jury, several other rules must be considered. These rules primarily concern the form the expert testimony will take, but two of the rules allow use of the expert as an implicit (Rule 703) or explicit (Rule 803(18)) vehicle for

---

77. State v. Gokey, 154 Vt. 129, 135, 574 A.2d 766, 769 (1990).

78. *See infra* text accompanying notes 229-48 (discussing social background evidence in detail).

79. *See infra* text accompanying notes 83-111.

80. *See* State v. Perry, 151 Vt. 637, 643, 563 A.2d 1007, 1011-12 (1989).

> Despite his lack of specific training concerning the relationship of a passenger's injuries to his position in the car immediately prior to the accident, Captain Fish had enough pertinent experience to qualify as an expert with regards to the defendant's position in the automobile at issue here. It was, therefore, not an abuse of discretion for the court to allow his testimony. "Though it is for the court to judge, in the first instance, whether witnesses introduced as experts possess sufficient skill to entitle them to give an opinion, it is for the jury to determine from the testimony whether such experts have sufficient skill to render their opinion of any importance."

Id. (citation omitted).

hearsay evidence.[81] In addition to the Article VII rules and the learned treatise exception, Rule 403 must be utilized in any expert evidence analysis because expert evidence may be confusing, misleading, or a waste of time.

A. Rule 703—Basis for the Expert's Testimony

Before examining the rule itself, it is important to examine the knowledge that underlies expert evidence. First, specialized knowledge is a prerequisite for qualifying as an expert.[82] Recall that an expert, under Rule 702, can relate the major premise type of evidence to the jury with or without rendering an opinion. It is best analytically to evaluate this specialized knowledge under Rule 702.

The second type of knowledge that underlies expert opinion is specific facts or data relating to a particular case, the minor premise type of evidence that is the concern of Rule 703. As Rule 703 indicates, "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."[83] Traditionally the basis for the opinion was limited to admissible evidence.[84] The expert could base an opinion on facts not personally known by him only if he listened to the admissible evidence at trial or if the facts in evidence were presented to him in the form of a hypothetical.[85] As expert evidence became more frequent, it became apparent that these limitations reduced the utility of expert testimony and did not reflect the way experts operated outside the courtroom.[86] Vermont and other jurisdictions began to allow expert testimony based, in part, on matters not in evidence.[87] Rule 703 accelerated the modern tendency: "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

---

81. *See* VT. R. EVID. 703, 803(18).

82. *See supra* text accompanying notes 55-60.

83. VT. R. EVID. 703.

84. FED. R. EVID. 703 advisory committee's note; 3 WEINSTEIN & BERGER, *supra* note 62, ¶ 703[01], at 703-06.

85. *See* VT. R. EVID. 703 reporter's notes.

86. FED. R. EVID. 703 advisory committee's note.

87. VT. R. EVID. 703 reporter's notes.

need not be admissible in evidence."[88] This rule's potential to create a vehicle to allow otherwise inadmissible hearsay evidence should be apparent, and explains why the supreme court has approached the rule warily.[89]

This rule poses two problems. The first involves determining whether the expert's reliance on otherwise inadmissible hearsay evidence is reasonable. The second is the extent to which the facts can be made known to and considered by the trier of fact. With respect to the first, the federal advisory committee's note reflects a desire to conform court practice to expert practice more generally and faith that at least practicing experts will carefully choose the base facts: "[h]is validation, expertly performed and subject to cross-examination, ought to suffice for judicial purposes."[90] On the other hand, Rule 104(a) gives the judge responsibility for determining most preliminary questions of fact underlying admissibility. The tendency of the federal cases is to accord substantial, but not absolute, deference to the testifying expert if the reasonableness is challenged.[91]

The Vermont Supreme Court has taken a cautious approach to the factual basis for expert opinion. The first indication of this approach came in two post-rules cases[92] that reiterated the pre-rules prohibition against opinion evidence based upon "speculation" about what the factual evidence might have been.[93] In the first case, *Jackson v. True Temper Corp.*, the court concluded that the testimony of two expert medical witnesses who had treated Jackson was "pure speculation" where the experts testified that

---

88. VT. R. EVID. 703. Interestingly, the example cited in the advisory committee's note is that of a diagnosing physician, not an expert hired for purposes of rendering an opinion. *See* FED. R. EVID. 703 advisory committee's note.

89. *See, e.g.*, State v. Percy, 149 Vt. 623, 641, 548 A.2d 408, 418-19 (1988) (the court admitted prior bad acts under Rule 703, but noted the need to balance the probative value of such evidence against the Rule 403 dangers).

90. FED. R. EVID. 703 advisory committee's note.

91. *See, e.g.*, ROSSI, *supra* note 2, at 55-63.

92. *See*, Turgeon v. Schneider, 150 Vt. 268, 275, 553 A.2d 548, 552 (1988); Jackson v. True Temper Corp., 151 Vt. 592, 595, 563 A.2d 621, 622-23 (1989).

93. Bliss v. Moore & Stoughton, 112 Vt. 185, 190, 22 A.2d 315, 317 (1941); *In re* New England Tel. & Tel. Co. 135 Vt. 527, 536, 382 A.2d 826, 833 (1977). The latter case is discussed in the Rule 703 reporter's notes in which the reporter suggested that the case was consistent with Rule 401, but did not address the question of whether the court's rationale was consistent with Rule 703. VT. R. EVID. 703 reporter's notes.

Jackson was depressed and had increased his alcohol usage.[94] The court justified its use of the pre-rules prohibition against opinion evidence based upon "speculation" by relying on the pre-rules requirement that "[o]pinions must be based upon the facts disclosed by the evidence in the case."[95] However, the *Jackson* court's analysis conflicted with Rule 703 which allows inferences from admissible evidence or reasonably relied upon facts.[96] Additionally, the court's use of the pre-rules prohibition was inconsistent with Rule 705 which allows the expert to render an opinion without first disclosing the underlying facts.[97]

The second case relying on the pre-rules "speculation" prohibition, *Turgeon v. Schneider*, acknowledged Rule 703 and relied on a relevancy rationale under Rules 401 and 402 rather than the outmoded "facts disclosed by the evidence" rationale.[98] In *Turgeon*, the trial court excluded a ruminant nutritionist expert's opinion about why silage in a silo had turned black because the expert had not actually seen the silage.[99] The Vermont Supreme Court, consistent with Rule 703, held that the trial court had

---

94. *Jackson*, 151 Vt. at 595, 563 A.2d at 622.

95. *Id.* (quoting *In re* New England Tel. & Tel. Co., 135 Vt. 527, 536, 382 A.2d 826, 833 (1977)).

96. VT. R. EVID. 703. The testifying experts were treating physicians. Under Rule 703, a treating physician can base his testimony on facts "perceived by or made known to him at or before the hearing." VT. R. EVID. 703. Rule 803(3) provides an exception to the hearsay rule for statements of the declarant's then existing "state of mind, emotion, sensation, or physical condition (such as . . . mental feeling, pain and bodily health)." VT. R. EVID. 803(3). Rule 803(4) provides an exception for "[s]tatements made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensations." VT. R. EVID. 803(4). Presumably, the treating physicians inquired into the matters covered by Rules 803(3) and 803(4) which are "admissible evidence" and relied upon their perceptions.

Rule 703 goes on to allow opinions based upon "facts or data" not admissible in evidence where the facts are "of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject." VT. R. EVID. 703. Even if the data obtained from the claimant Jackson were not admissible in evidence, the experts could presumptively rely on the data with regard to the claimant's condition.

97. Rule 705 provides that "[t]he 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." VT. R. EVID. 705.

98. Turgeon v. Schneider, 150 Vt. 268, 275, 553 A.2d 548, 552 (1978).

99. *Id.*

erred in excluding the opinion on the basis that the expert lacked personal knowledge.[100]

Rules 703 and 705 make it difficult for the supreme court to continue to rely on the "speculation" prohibition absent indicia in the record that the expert's reliance on the facts or data underlying the expert's opinion was unreasonable. Under Rules 703 and 705, the opponent must force disclosure of the factual deficiencies in an expert's testimony during cross-examination of the expert unless the trial court requires the expert to disclose the facts prior to giving an opinion. Absent disclosure of the factual deficiency and a motion to strike the expert's opinion, the record frequently will not permit the court to conclude that the opinion was "speculative." Attorneys concerned with the adequacy of the basis for expert testimony should seek permission to voir dire the expert prior to rendering an opinion or explore the underlying facts on cross-examination. The success of either course of action, especially the latter, will be highly related to thorough discovery of the basis for the expert's opinion.[101]

The second indication of a cautious approach to the factual basis came with adoption of an expansive judicial role in determining the reasonableness of the expert's reliance in a recent sexual abuse case, a case in which the court explicitly considered the implication of Rule 703.[102] Although the state introduced sexual abuse profile evidence for the limited purpose of explaining acts of the child that the defense contended were inconsistent with sexual abuse,[103] the trial court went further and allowed the state's expert to relate the child's graphic statements concerning her abuse by the defendant and to offer an opinion that the child was sexually abused.[104]

---

100. *Id.* The opinion does not discuss the expert's data or whether Rules 703 and 704 might have saved his opinion. The opinion is particularly confusing because the court relied on the failure to produce evidence of refilling the silo in 1985 when the tenants had vacated the premises in January, 1985, long before the 1985 growing season. *Id.*

101. *See infra* text accompanying notes 169-71 (discussing discovery of the basis for the expert's opinion).

102. State v. Gokey, 154 Vt. 129, 574 A.2d 766 (1990).

103. *Id.* at 137, 574 A.2d at 770.

104. *Id.*

The supreme court first held that the expert's conclusion that the child was sexually abused was inadmissible[105] and then went on to consider whether the expert could relate the child's statements concerning her abuse under Rule 703:

> First, without assuming the truth of what is sought to be proved, it is nonsensical to say that the psychologist legitimately relied on the child's statements that the defendant had abused her as a basis for her expert opinion that the child exhibited the symptoms common of sexually abused children. The child fit the profile, if at all, because her behavior matched the behavior of sexually abused children in general, not because she told the psychologist that she was a victim of abuse. The child's account of the incident is not a proper part of the basis of the psychologist's opinion that she fit the profile of an abused child any more than an automobile driver's statements to an accident reconstructionist that the other driver was at fault is a legitimate part of the basis of that expert's opinions on the mechanics of the accident. Second, there is absolutely no showing that "such statements are of a type reasonably relied on by experts." . . . The basis of an *inadmissible* opinion cannot be raised by its own bootstraps to the level of admissible evidence under Rule 703.[106]

In contrast, in *State v. Recor*, a case decided two years earlier than *Gokey*, the court cautioned about the hearsay dangers posed by Rule 703, but held that Rule 703 sustained admissibility of victim statements made to the expert when only a hearsay objection had been made.[107] As a result, Rule 703 controlled in *Recor*:

> Under Rule 703, if an expert relies on the out-of-court statements of another in forming his or her opinion *and* if such statements are of a type reasonably relied on by experts in the particular field, then the statements—even if not independently admissible for their substance—will be admissible for the limited purpose of demonstrating the basis for the expert's opinion. . . .

---

105. *Id.* at 138, 574 A.2d at 770-71.

106. *Id.* at 138-39, 574 A.2d at 771 (citation omitted).

107. State v. Recor, 150 Vt. 40, 48, 549 A.2d 1382, 1388 (1988).

> V.R.E. 703 is not to be treated as either an auxiliary hearsay exception, or as a backdoor to an expansive reading of existing hearsay exceptions. . . . [E]xpert use of otherwise inadmissible evidence as a basis for opinion does not make the evidence suddenly admissible for the inadmissible purpose . . . .
>
> In the instant case, the expert's recitation of statements made by the complaining witness was introduced over defendant's hearsay objections. However, as these statements were introduced as basis testimony, the trial judge properly overruled the hearsay objection.[108]

In a very recent syndrome evidence case, the court agreed that it was error to allow an expert to relate the victim's account of her alleged assault, but stated that it would not find plain error in the absence of an objection to the account.[109] In another recent case, the court again stressed the danger in allowing a sympathetic expert to relate the victim's account of the abuse.[110] Even though the "psychologist did not explicitly voice his opinion that the victim was truthful, his testimony, when viewed in context, gave the distinct impression that he believed her."[111] The court, thus, will carefully scrutinize the reasonableness of the expert's reliance on otherwise inadmissible hearsay evidence when the issue is properly raised, at least in criminal cases where the evidence may be highly prejudicial.

A second important limitation on the use of Rule 703 as a conduit for information obtained from others is reflected in three pre-rules cases, particularly *Cadel v. Sherburne Corp.*[112] In *Cadel,* the trial court allowed the expert "to testify that he knew of no one who was an expert in ski bindings and adjustment systems who did not share his opinion."[113] In response to defendant's contention that proposed Rule 703 allowed the expert

---

108. *Id.* at 48-49, 549 A.2d at 1388 (citations omitted).

109. State v. Noyes, 2 Vt. L. Wk. 289, 290, 596 A.2d 340, 341 (1991).

110. State v. Wetherbee, 2 Vt. L. Wk. 191, 594 A.2d 390 (1991).

111. *Id.* at 194, 594 A.2d at 393.

112. Cadel v. Sherburne Corp., 139 Vt. 134, 425 A.2d 546 (1980); *see also* Kinney v. Johnson, 142 Vt. 299, 454 A.2d 1238 (1982); State v. Towne, 142 Vt. 241, 453 A.2d 1133 (1982).

113. *Cadel,* 139 Vt. at 135, 425 A.2d at 547.

essentially to quote other expert opinion, the court acknowledged that an expert could rely on inadmissible evidence reasonably relied upon by experts in the field. The court, however, noted that "the question here is not what data an expert may rely upon, but what data he may put into evidence."[114] The court, citing an earlier Vermont case for the proposition that "corroboration of an expert witness, upon examination-in-chief, is not permissible" held that the admission of the opinion was error.[115]

The holding in *Cadel* is consistent with the syndrome cases[116] and is probably[117] correct to the extent that a testifying expert is prohibited from serving as a conduit for other non-testifying experts' case-specific opinions. It is not clear from *Cadel*, however, that the non-testifying experts' statements were case-specific; the testifying expert may have conveyed merely that the authorities agreed that leg injuries were inherent risks in the sport of skiing, in which case the information would not have been objectionable. An expert, under the "or otherwise" language of Rule 702, may relate technical information that is, in effect, hearsay.[118] This is significant because it enables the trier of fact, in evaluating an expert's technical information and opinion, to be aware of the extent to which the expert's statements represent mainstream specialized knowledge. The *Cadel* court failed to make the important distinction between general background technical information allowed by Rule 702 and case-specific data governed by Rule 703.

Two lessons are apparent from the cases explicitly discussing Rule 703 in this section. First, the attorney must be aware of the interrelationship between the hearsay rules and Rule 703. A specific objection must be made to inappropriate basis testimony;

---

114. *Id.* at 136, 425 A.2d at 547.

115. *Id.*

116. *See supra* notes 109-11 and accompanying text.

117. The word "probably" is used advisedly. There may be a situation where the testifying expert reasonably relies upon data in opinion form in forming his opinion. A physician, for example, may reasonably rely on another physician's diagnosis in forming his opinion. The court seems correct if it is unfair to allow the testifying expert to relate opinions that merely echo his opinion. These non-testifying experts are unavailable for cross-examination. Further, as noted in *Gokey*, the expert's opinion should be *his* opinion based on reliable data. *See supra* note 108 and accompanying text.

118. Rule 702 provides that an expert may testify "in the form of an opinion or otherwise." VT. R. EVID. 702.

a hearsay objection will not suffice. Second, much of what a victim, or other informant, relates to an expert may be appropriate as basis testimony because it does not infringe on the expert's role of evaluating the facts and drawing inferences. For example, as Justice Morse noted in *Gokey*, a victim's statement that she had headaches "may plausibly support a conclusion that the child fit the profile of a sexually abused child."[119] However, an expert may not become a conduit for otherwise inadmissible hearsay where it negates the expert's function of drawing informed inferences by telling the expert which inferences to draw. As already noted, the conduit concern must be limited to case-specific facts or opinion governed by Rule 703 and should not be confused with general background or specialized information not limited to the specific case. The latter is appropriately analyzed under the "will assist the trier of fact to understand the evidence or to determine a fact in issue" standard of Rule 702,[120] with possible resort to Rules 704 and 403.

The interplay of Rule 703, the hearsay rule, Rule 404(b), and Rule 403 is apparent in *State v. Percy* (*"Percy II"*).[121] In *Percy II*, defendant pleaded insanity. The trial court permitted the state's psychiatrist to relate defendant's statements regarding his prior rape conviction and other criminal acts to support the psychiatrist's opinion that defendant possessed an antisocial personality.[122] Although prior bad acts were inadmissible under Rule 404(b) to demonstrate defendant's bad character, the court allowed the testimony for the purpose of showing the basis for the expert's diagnosis.[123] Even though the defendant did not raise a Rule 403 objection, the supreme court recognized that the basis testimony's "limited probative value [could] be 'substantially outweighed by the danger of unfair prejudice.'"[124] Thus, the

---

119. State v. Gokey, 154 Vt. 129, 139 n.7, 574 A.2d 766, 771 n.7 (1990).

120. VT. R. EVID. 702.

121. State v. Percy, 149 Vt. 623, 548 A.2d 408 (1988).

122. *Id.* at 641-42, 548 A.2d at 418-19.

123. *Id.* at 641, 548 A.2d at 418. *But see* State v. Goodrich, 151 Vt. 367, 564 A.2d 1346 (1989) (finding use of prior convictions on cross-examination of defendant's expert were excluded under Rules 705 and 403 because they were, at best, minimally relevant and highly prejudicial).

124. *Percy*, 149 Vt. at 641, 548 A.2d at 419 (1988) (citation omitted); *see infra* text accompanying notes 176-84 (discussing *Goodrich* and *Percy* with respect to cross-examination as to the bases).

attorney who objects to basis testimony, which is otherwise inadmissible, should be prepared to argue that the probative value of basis testimony is substantially outweighed by the prejudice to the defendant.

The second major issue under Rule 703 is the question of how the basis testimony should be made available to the trier. Assuming there is reasonable reliance on facts that legitimately form the basis for the expert's opinion, under what circumstances may these facts be brought before the jury? Although a minority of jurisdictions allow the facts to be brought out only on cross-examination by the opponent,[125] Vermont follows the majority rule and allows the proponent to bring out the basis facts on direct examination.[126] Remember, however, that Rule 403 considerations may prohibit this approach. A sub-issue is how the jury may utilize the basis facts. *Recor* makes evident that the facts "will be admissible for the limited purpose of demonstrating the basis for the expert's opinion."[127] The court in *Recor* indicates, in dicta, that the opponent of the evidence is entitled to a "limiting instruction informing the jury of the narrow purpose for which the evidence has been received."[128] However, the instruction must be requested.[129]

In sum, the Vermont Supreme Court has been sensitive to both the need to allow basis evidence to make the expansive expert rules work efficiently, and the danger that Rule 703 may undermine other rules of evidence by providing an improper crutch for expert opinion. The court will examine basis evidence carefully, at least where the evidence is highly prejudicial, to ensure that it constitutes a legitimate basis for an admissible opinion. The court also will undertake a Rule 403 analysis to ensure that the probative value as basis is not substantially outweighed by the prejudicial impact.

---

125. ROSSI, *supra* note 2, at 82.

126. State v. Recor, 150 Vt. 40, 47-48, 549 A.2d 1382, 1388 (1988).

127. *Id.* at 48, 549 A.2d at 1388.

128. *Id.* at 49, 549 A.2d at 1388.

129. *Id.*, 549 A.2d at 1389.

B. Rule 803(18)—Reliable Technical Publications[130]

As suggested in the section analyzing Rule 702, experts are an implicit conduit for specialized hearsay.[131] When relating specialized knowledge to the trier, the expert is, in effect, often quoting other experts from whom the knowledge was learned. The rules governing expert evidence have recognized the necessity of relying on this type of "second-hand" knowledge.[132]

Traditionally, the courts have allowed reference to learned literature only when an expert is being cross-examined and acknowledges reliance on the literature, or its authoritativeness.[133] Rule 803(18) greatly expands the potential use of so-called "learned treatises."[134] The rule has been discussed by the court, but only in conjunction with two pre-rules cases that rejected attempts to rely on concurring out-of-court statements to bolster direct examination of experts.[135]

The rule is notable in three important respects. First, the rule allows use of "statements contained in published treatises, *periodicals, or pamphlets on a subject of history, medicine, or other science or art.*"[136] One can envision few technical publications not potentially covered by the rule. Second, the reach of the rule extends beyond cross-examination of the opponent's expert. The expert now may testify to materials "relied upon by him in direct examination."[137] Thus, an expert can specifically refer to and quote reliable authority to lend credibility to the testimony. The court's summary treatment of the rule in *Cadel* and the reporter's notes cited therein[138] (which indicate that the reference to

---

130. The author has not utilized the title "Learned Treatises" to Vermont Rule of Evidence 803(18). The above title was chosen to illustrate the breadth of the exception.

131. *See supra* note 81 and accompanying text.

132. *See supra* text accompanying notes 84-89 (discussing experts relating technical background information).

133. *See, e.g.*, ROSSI, *supra* note 2, at 135-37. The old Vermont rule is characterized as restrictive. *Id.*

134. VT. R. EVID. 803(18).

135. *See* Cadel v. Sherburne Corp., 139 Vt. 134, 425 A.2d 546 (1980); State v. Towne, 142 Vt. 241, 453 A.2d 1133 (1982); *see also supra* text accompanying notes 112-18 (discussing *Cadel*).

136. VT. R. EVID. 803(18) (emphasis added).

137. *Id.*

138. *Cadel*, 139 Vt. at 136, 425 A.2d at 547.

treatises is limited to cross-examination) do not reflect the language of the rule as adopted and therefore should not be relied upon. Third, the cross-examiner no longer may be thwarted by the wily expert who refuses to acknowledge that he relied upon the material in forming an opinion or that the material is authoritative. The cross-examiner often can establish that the material is "reliable authority"[139] through other experts or by judicial notice,[140] in effect impeaching the expert who unreasonably refused to acknowledge the reliability. If statements from learned treatises or other published materials are admitted, "the statements may be read into evidence but may not be received as exhibits."[141]

Although Rule 703 presents significant possibilities for expanding case-particular facts that can be brought before the jury, Rule 803(18) opens the door to explicit quotation of vast amounts of specialized literature that transcend the particular case. Material admitted pursuant to Rule 703 is admitted for a limited purpose, often accompanied by a limiting instruction, while the jury can consider the specialized literature admitted pursuant to Rule 803(18) for any purpose. Both types of hearsay information are admissible only through a qualified expert who can vouch for its reliability and explain any shortcomings on cross-examination or redirect examination.

C. Rule 704—Opinion on Ultimate Issue

Rule 704 represents an attempt to avoid unproductive controversies over what constitutes an "ultimate opinion" by an expert.[142] The rule provides that "[t]estimony in the form of an opinion or inference *otherwise* admissible is not objectionable

---

139. VT. R. EVID. 803(18).

140. *Id.* Statements may be called to the attention of the expert on cross-examination if "established as a reliable authority by the testimony or admission of the witness or by other expert testimony or by judicial notice." *Id.*

141. *Id.; cf.* VT. R. EVID. 803(5). The limitation in these two rules is intended to prevent greater use by the trier than that accorded to evidence from a testifying witness.

142. VT. R. EVID. 704 reporter's notes; *see also* FED. R. EVID. 704 advisory committee's report. The federal rule was amended to prohibit expert opinion with regard to the mental state of a criminal defendant. *See* FED. R. EVID. 704(b).

because it embraces an ultimate issue to be decided by the trier of fact."[143]

Examples of permissible opinions embracing an ultimate issue are evident in the intoxication and ski injury cases decided prior to formal adoption of the rule in Vermont.[144] In *State v. Norton*, the defendant objected to police officers' testimony that he was under the influence of alcohol.[145] The court upheld use of the opinion without specifically indicating whether the officers were experts, and relied initially on lay opinion cases that allowed testimony concerning intoxication.[146] The court noted that the tradition of allowing opinions with regard to intoxication was consistent with Federal Rule 704 and with the determination by the jury of credibility and weight of evidence.[147]

The court was confronted with expert testimony in *Cadel v. Sherburne Corp.*[148] Plaintiff contended that her ski injuries were attributable to binding release failure. Defendant contended that plaintiff's injuries resulted from her fall and were an inherent risk of skiing.[149] Plaintiff objected to defendant expert's testimony on whether the type of injury sustained by the plaintiff was an inherent risk of the sport of skiing.[150] The court, citing *Norton*, held that the question and the affirmative response were not objectionable as ultimate opinion.[151]

In *State v. Willis*, decided after adoption of the rules, the court also suggested, albeit in dicta, that it had adopted a liberal position with respect to admission of opinions that mirrored decisive issues in the case.[152] In rejecting a plain error claim, the court indicated that it was not "clear" that the state's psychi-

---

143. VT. R. EVID. 704 (emphasis added).

144. Vermont had adopted the federal rule position in its case law by the mid-1970s. *See* VT. R. EVID. 704 reporter's notes.

145. State v. Norton, 134 Vt. 100, 102, 353 A.2d 324, 325 (1976).

146. *Id.* at 102, 353 A.2d at 325.

147. *Id.* at 103-04, 353 A.2d at 326; *see also* State v. Zumbo, 2 Vt. L. Wk. 476, 601 A.2d 986 (1991).

148. *Cadel*, 139 Vt. at 135-37, 425 A.2d at 547-48.

149. *Id.* at 135, 425 A.2d at 546.

150. *Id.* at 136-37, 425 A.2d at 547-48.

151. *Id.* at 137, 425 A.2d at 547-48.

152. State v. Willis, 145 Vt. 459, 481, 494 A.2d 108, 120 (1985).

atrist's testimony, which mirrored elements of the insanity defense, was "improper."[153]

The court imposed limits, however, in *Riess v. A.O. Smith Corp.*,[154] its first thorough discussion of the difficulties posed by ultimate opinion. *Riess* involved a claim against two defendants, A.O. Smith and Pyrofax, for an explosion and a fire caused by a propane leak.[155] In examining A.O. Smith's expert, who was eager to place the blame on the other defendant, plaintiff's attorney was allowed to inquire about whether it was "negligence on Pyrofax's part in its installation and protection of the regulator" and whether the expert believed "that negligence was the proximate cause of this fire at the Riess's home."[156] The court cited *Norton* and *Cadel*, but indicated that the analysis could not end by reference to the earlier cases.[157] The court went on to construe the "otherwise admissible" language of the rule:[158]

> The Reporter's Notes to V.R.E. 704 suggest that "testimony that gratuitously tells the jury what conclusion to reach or that is expressed in misleading legal terminology" may be excluded. See also *Town of Brighton v. Griffin*, 148 Vt. 264, 271, 532 A.2d 1292, 1296 (1987) (a witness may not give an opinion on a question of law). The Vermont Reporter's Notes cite to the Federal Advisory Committee's Note to Fed. R. Evid. 704 (identical to V.R.E. 704), which states:
>
> > The abolition of the ultimate issue rule does not lower the bars so as to admit all opinions. Under Rules 701 and 702, opinions must be helpful to the trier of fact, and Rule 403 provides for exclusion of evidence which wastes time. These provisions afford ample assurances against the admission of opinions which would merely tell the jury what result to reach, somewhat in the manner of the oath-helpers of an earlier day. They also stand ready to exclude opinions phrased in terms of inadequately explored legal criteria . . . .[159]

The court held that, in spite of the extensive trial court discretion in determining whether an opinion should be allowed,

---

153. *Id.*

154. Riess v. A.O. Smith Corp., 150 Vt. 527, 556 A.2d 68 (1988).

155. *Id.* at 528, 556 A.2d at 69.

156. *Id.* at 528-29, 556 A.2d at 70.

157. *Id.* at 529-30, 556 A.2d at 70.

158. *Id.* at 529, 556 A.2d at 70.

159. Riess v. A.O. Smith Corp., 150 Vt. 527, 530, 556 A.2d 69, 70-71 (1988).

the opinions in this case went beyond the limits of admissibility.[160] The court distinguished between questions phrased in terms of legal conclusions and those involving an ultimate issue, but "not phrased in terminology carrying a precise legal definition that may be at variance with the common meaning of the terms . . . [that] the decisions allow."[161]

The holding elucidates what constitutes impermissible opinion, but also illustrates that the distinction is not an easy one to draw. As the court noted, "[t]he questions objected to in the case at bar asked for the ultimate conclusions at law—in effect asking, 'should Pyrofax lose?' They told the jury what 'conclusion to reach' and, at least as to proximate cause, were expressed 'in misleading legal terminology.'"[162] Under this analysis it appears that, to cross the impermissible line, the opinion must not only indicate how the jury should find on a crucial issue, but must do so in legal language that has a connotation at variance from the common lay understanding or is not adequately explained to the jury. For example, "proximate cause" is clearly a legal term of art, but "negligence" has both a legal and a common usage. The latter might be permissible if the two usages coincide or the attorney and the judge make certain that the jury understands the distinction between the usages. There may be cases in which some of the possible prejudice can be cured by instructions to the jury.[163]

As the next section will demonstrate, the court has been particularly concerned with expert opinion that comments on the credibility of the complainant or upon the guilt or innocence of the defendant. Nevertheless, the court has indicated that it will allow expert opinion in criminal cases that goes to critical elements of the crime.[164] In *State v. Richardson*, a homicide case, the defendant argued that it was plain error to allow a medical examiner to testify "that [the] victim died by homicide, not

160. *Id.* at 532-33, 556 A.2d at 72.

161. *Id.* at 532, 556 A.2d at 71.

162. *Id.*, 556 A.2d at 72.

163. *Id.*

164. State v. Willis, 145 Vt. 459, 494 A.2d 108 (1985); State v. Richardson, 3 Vt. L. Wk. 20 (1992).

suicide."[165] The court disagreed with the defendant's assertion that the opinion was more a legal than a medical conclusion; the opinion was not a comment on defendant's guilt or innocence and left for the jury the ultimate question of the defendant's involvement in the homicide.[166]

The court seems to allow opinion on an essential element in a criminal case when the expert is unable to convey the essence of the relevant testimony without drawing the inference. However, a statement that essentially tells the jury that the defendant is guilty or incredible is clearly impermissible because the essential information can be conveyed without an ultimate opinion.

In summary, the text of Vermont Rule 704 is misleading in light of the reporter's notes, the advisory committee report, and the case law. The sensible attorney will not tempt fate and rely on trial court discretion or the ability to avoid prejudice through jury instructions. The attorney should avoid questions that are phrased in terms of elements of the case unless, as in the situation with intoxication, mental illness, or whether the death was accidental or a homicide, the import of the testimony can only be conveyed through commonly understood terms that largely mirror legal usage. For example, in *Riess*, after inquiring about the customary practices and the practice followed in the particular case, defendant's expert could easily have been asked whether the practice followed by the defendant Pyrofax in installing the gas line followed customarily safe practices. Arguments to the jury with respect to technical legal elements of the case or credibility of the witness should be made in closing argument, not through questions addressed to an expert witness.

D. Rule 705—Disclosure of Underlying Facts and Data

Vermont Rule 705 was intended to liberalize the procedure for eliciting expert opinion, and to eliminate the requirement of the hypothetical question that had proven so problematic.[167] The

---

165. *Id.*

166. *Id.*

167. FED. R. EVID. 705 advisory committee's note. The rule is similar to a statute in effect in Vermont prior to the rules. *See* VT. STAT. ANN. tit. 12, § 1643 (1973).

rule is similar to a statute in effect in Vermont prior to the Vermont Rules.[168] The rule does not preclude use of the hypothetical and, if a hypothetical is used, the rule apparently would "eliminate any technical requirements that the question include all facts."[169] Theoretically, an attorney needs to ask only the necessary qualifying questions before soliciting an opinion. Practically, however, the attorney may address other matters to make the opinion more persuasive. The expert, in any event, may be required to disclose the underlying facts or data on direct examination, if required to do so by the court.[170]

When an expert is allowed to proceed directly to opinions after qualifying questions, the opponent may be disadvantaged in an attempt "to disclose the underlying facts or data on cross-examination."[171] Unless the opponent has undertaken extensive discovery of the expert, or had an opportunity to inquire in an in limine or voir dire hearing, the opponent will have little basis for cross-examination. However, "[i]f the cross-examination discloses that the facts or data are insufficient to support the opinion, the court may strike the testimony."[172] Although the terms "facts or data" theoretically could apply to either the underlying major premise relied upon by the expert or the case specific minor premise, the federal advisory committee's reference to eliminating the hypothetical seems to make it clear that the rule refers to the latter.[173]

Cases decided both before[174] and after[175] adoption of the Vermont Rules have stressed the breadth of permissible cross-examination of experts, but cross-examination is limited to

---

168. VT. R. EVID. 705 reporter's notes.

169. *Id.* Note that a misleading hypothetical could be subject to an objection under Rule 403.

170. VT. R. EVID. 705.

171. *Id.*

172. VT. R. EVID. 705 reporter's notes (citing O'Bryan Constr. Co. v. Boise Cascade Corp., 139 Vt. 81, 90-91, 424 A.2d 244, 249 (1980)).

173. FED. R. EVID. 705 advisory committee's note.

174. *See* State v. Smith, 140 Vt. 247, 256-60, 437 A.2d 1093, 1097-99 (1981); State v. Mercier, 138 Vt. 149, 154-56, 412 A.2d 291, 295 (1980); *see also* VT. R. EVID. 705 reporter's notes.

175. *See* Smith v. Gainer, 153 Vt. 442, 445-47, 571 A.2d 70, 71-72 (1990); Jackson v. True Temper Corp., 151 Vt. 592, 596, 563 A.2d 621, 623 (1989).

impeachment and facts underlying the opinion. The breadth of cross-examination is limited also by Rule 403. The only significant post-rules case to discuss both the breadth accorded the cross-examiner and its limitations is *State v. Goodrich*.[176] In *Goodrich*, the defense to a burglary prosecution was that the defendant was too intoxicated to form the requisite intent.[177] The state attempted to cross-examine the defense expert on the defendant's prior burglary convictions.[178] Although the convictions were inadmissible under Rule 609 as substantive evidence of the offense, the state argued that they could be used to disclose the basis for the expert's testimony under Rule 705 or to impeach the expert.[179] The court disagreed, stating that:

> Rule 705 may not be used to circumvent Rule 402. The evidence sought must either constitute facts underlying the expert's opinion, or tend to prove unreliability, prejudice or bias.
>
> In addition, the "wide latitude" of permissible cross-examination of expert witnesses is qualified by V.R.E. 403, under which evidence, even if relevant, may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice. While the balancing test of Rule 403 is a matter within the trial court's discretion, . . . here we find . . . that the court exercised its discretion "for reasons clearly untenable or to an extent clearly unreasonable."[180]

The expert in *Goodrich* was aware of the prior convictions and testified in limine that they did not influence his opinion.[181] The stale convictions were marginally relevant, if at all, to cast doubt on the conclusion that the defendant was unable to form the requisite intent on the evening in question. Undue prejudice was reflected by Rule 609 and the court's analysis in the *State v.*

176. State v. Goodrich, 151 Vt. 367, 564 A.2d 1346 (1989).
177. *Id.* at 369, 564 A.2d at 1347.
178. *Id.* at 370-78, 564 A.2d at 1348-52.
179. *Id.*
180. *Id.* at 376, 564 A.2d at 1351-52 (citations omitted).
181. *Goodrich*, 151 Vt. at 377, 564 A.2d at 1352.

Gardner[182] line of cases. The facts of *Goodrich* differ sharply from those in the *Percy II* case, where the state was allowed to elicit the defendant's prior convictions on direct examination of its expert.[183] In *Percy*, the state's theory, in response to defendant's insanity plea, was that the defendant was not insane, but suffered from an antisocial personality.[184] Unlike *Goodrich*, the prior convictions were highly relevant to expert testimony, serving as the basis for the opinion, in spite of their prejudicial effect.

E. Rule 706—Court Appointed Experts

Vermont has adopted the federal rule with minor variations in the section dealing with compensation of experts.[185] The court has not construed the rule, nor are there helpful pre-rules cases. Although judges have frequently criticized reliance on partisan experts and expressed approval, in theory, for the use of court-appointed experts,[186] the rule seldom is utilized for a number of practical reasons.[187] The reader should nevertheless keep the rule in mind, especially in cases where an opponent's expert will present evidence that lies beyond the bounds of reasonable expertise. Because of the formal requirements of the rule, request for a court-appointed expert should be made well in advance of trial.

IV. SOCIAL FRAMEWORK EVIDENCE AND THE RULES

In *State v. Bubar*,[188] a 1985 case, the court began a struggle with the category of evidence known as "social framework"[189]

---

182. State v. Gardner, 139 Vt. 456, 433 A.2d 249 (1981) (finding several factors that must be considered in balancing probative value of prior convictions against the prejudice that would result from their use).

183. State v. Percy, 149 Vt. 623, 641-42, 548 A.2d 408, 417-18 (1988); *see also supra* notes 121-23 and accompanying text.

184. *Id.* at 639-41, 548 A.2d at 417-18.

185. VT. R. EVID. 706 reporter's notes.

186. SAKS & VAN DUIZEND, *supra* note 2, at 66.

187. *Id.*; Kreiling, *supra* note 29, at 956-59.

188. State v. Bubar, 146 Vt. 398, 505 A.2d 1197 (1985).

189. Social framework evidence describes "the use of general conclusions from social science research in determining factual issues in a specific case." Laurens Walker & John Monahan, *Social Frameworks: New Use of Social Science in Law*, 73 VA. L. REV. 559, 570 (1987) (emphasis omitted) (citation omitted). The use of syndrome or profile evidence, the primary focus of the Vermont Supreme Court in the cases discussed in this part, is a

evidence. Social science, including applied social science such as clinical psychology and social work, can frequently provide information that will assist a trier of fact to understand and evaluate evidence better. For example, a victim of sexual abuse may delay reporting the offense, and the defendant will typically utilize the delay to impeach the victim's credibility.[190] Social science tells us that complainants frequently delay reporting an incident because of the trauma involved and the unpleasantness associated with pursuing a criminal complaint.[191] Without the evidence, a trier might place undue importance on the delay. Further, in some situations, clinicians developed a profile of symptoms that they have observed in trauma victims. These profiles are developed primarily to assist in evaluation and treatment of victims.[192] A particular patient may exhibit some, or even all, of the characteristics of the "profile" or "syndrome."[193] But not all of the potentially helpful social science evidence comes in the form of a profile or syndrome.[194]

Vermont Supreme Court cases suggest that prosecutors jumped on the syndrome bandwagon. Defense attorneys often failed to make appropriate objections below and then made

---

subset of social framework evidence. However, some Vermont cases have utilized social science evidence that does not fit within the profile-syndrome definition adopted by the court. *See infra* notes 197-213 and accompanying text (discussing State v. Percy [I] and State v. Valley).

190. *See, e.g.*, John E.B. Myers et al., *Expert Testimony in Child Abuse Litigation*, 68 NEB. L. REV. 1, 86-92 (1989) (cited by the Vermont Supreme Court in State v. Gokey, 154 Vt. 129, 134, 574 A.2d 766, 768 (1990)). *See generally* Robert P. Mosteller, *Legal Doctrines Governing the Admissibility of Expert Testimony Concerning Social Framework Evidence*, 52 LAW & CONTEMP. PROBS. 85 (1989) (regarding admission of social framework evidence in adult female rape cases); David McCord, *Syndromes, Profiles and Other Mental Exotica: A New Approach to the Admissibility of Nontraditional Psychological Evidence in Criminal Cases*, 66 OR. L. REV. 19 (1987) (concerning the major categories of non-traditional psychological evidence). The literature on specific syndromes is extensive.

191. Myers et al., *supra* note 190, at 86-87. Burgess and Holstrom, the initiators of the Rape Trauma Syndrome ("RTS"), identified certain symptoms in rape victims. The acute phase includes humiliation, embarassment, and self-blame. Roger S. Hanson, *James Alphonzo Frye Is Sixty-Five Years Old; Should He Retire?*, 16 WEST. ST. U.L. REV. 357, 424 (1989). Courts have allowed experts to testify that these symptoms frequently result in delay in reporting the assault. *See, e.g.*, Mosteller, *supra* note 190, at 127.

192. *See supra* note 190.

193. Hanson, *supra* note 191, at 422.

194. *See, e.g.*, State v. Valley, 153 Vt. 380, 384-89, 571 A.2d 579, 581-83 (1989); *see also infra* text accompanying notes 202-13.

unsuccessful plain error claims on appeal.[195] An analysis of this one heavily litigated area of expert evidence in Vermont illustrates application and interaction of the expert rules in a troublesome context. Further, a comprehensive understanding of the expert rules will help prevent misuse of this evidence in the future and will obviate appeals.

The court has not undertaken a detailed analysis of the first issue under Rule 702, qualifications of experts to offer social framework evidence, and appears to have followed its expansive reading of qualification in the *Bubar* case.[196] However, the court did express concern that "the counselor, by testifying as an expert on rape trauma syndrome, lent an improper 'aura of special reliability and trustworthiness' to the complainant's testimony about her subsequent mental state."[197]

The relevance/will-assist analysis began with the *Percy I* case in which the defendant asserted the insanity defense based on post-traumatic stress syndrome blackouts allegedly attributable to his Vietnam experiences.[198] At trial, the state in *Percy I* was allowed to elicit evidence, which was not profile evidence, from its psychiatric experts that rapists typically claim amnesia to support the inference that defendant should not be believed:[199]

> We fail to see how explanations or excuses offered by other rapists are relevant to what this particular defendant said in response to the offense charged. Many accused persons profess innocence. That does not mean that the prosecution can introduce evidence to suggest that the defendant's "story" is just like all others and therefore lacks credibility.
>
> Even if the testimony could be construed as being relevant, . . . its probative value was substantially outweighed by the danger of unfair prejudice and it should have been excluded.

---

195. *See supra* note 107.

196. *See supra* notes 73-75.

197. State v. Bubar, 146 Vt. 398, 401, 505 A.2d 1197, 1199 (1985) (quoting State v. Saldana, 324 N.W.2d 227, 230 (Minn. 1982)).

198. State v. Percy, 146 Vt. 475, 477, 507 A.2d 955, 956 (1985).

199. *Id.* at 483, 507 A.2d at 960.

> The testimony stereotyped the defendant as one whose explanations were not to be believed because they were explanations typically offered by psychiatric patients accused of rape. The resulting prejudice is obvious. The jury could well have concluded that this rapist was just like all other rapists and rejected the defendant's insanity defense not because of the evidence before it but because "he fit the mold."[200]

The court was concerned that the testimony of the expert might be given far more weight than appropriate, thereby prejudicing the defendant. The *Percy I* court reiterated the concern expressed in *Bubar* that expert social framework evidence might unduly affect credibility determinations.[201] The court's conclusion seems to undercut the use of any social framework evidence against a defendant.

The second non-profile case, *State v. Valley*, similarly involved an insanity defense, this time to a prosecution for manslaughter resulting from a particularly sordid case of child abuse.[202] A Social and Rehabilitative Services district director, who presumably qualified as an expert on child abuse, was allowed to testify "that the 'findings' in the literature on child abuse are that 'the incidence of mental illness is no greater among child abusers than it is in the general population.'"[203] The court sustained the trial court's admission of the director's testimony.[204] The court distinguished *Percy I* as "a direct attack on defendant's credibility intended to show the jury that defendant must be lying if he claimed amnesia."[205] The court later noted that "the evidence does not go directly to defendant's guilt, the characteristic we found objectionable in *Percy*."[206] The distinction between a direct and an indirect attack on the defendant's credibility is a difficult one to draw.

---

200. *Id.* at 484, 507 A.2d at 960-61 (citations omitted).
201. *See supra* note 198 and accompanying text.
202. State v. Valley, 153 Vt. 380, 382-83, 571 A.2d 579, 580 (1989).
203. *Id.* at 384-85, 571 A.2d at 581.
204. *Id.* at 385, 571 A.2d at 581.
205. *Id.*, 571 A.2d at 582.
206. *Id.* at 387, 571 A.2d at 583.

Nor could it be argued that the evidence was irrelevant. Citing *State v. Catsam*, the *Valley* court noted that it previously had rejected the possible reading of *Percy I* that "evidence that reflects research on the characteristics of persons in a certain position is irrelevant"[207] because Rule 401 adopts the expansive "having any tendency" standard.[208] In *Valley*:

> The State's theory of relevance is that the evidence dispels what could be a myth that someone who could abuse a child must not be sane. Thus, the argument that the testimony is relevant is similar to the argument that we adopted for profile evidence in *Catsam*—that it will help the jury understand the evidence.[209]

The Rule 702 requirement that evidence, offered as expert testimony, must "assist the trier" was satisfied in *Valley* because "the evidence here helped the jury understand the interrelationship of sanity and child abuse."[210] Presumably, cataloging the extensive harm suffered by the child at the hands of the defendant might have intuitively led to the conclusion that the perpetrator was insane. As the court noted:

> The more difficult question for us is whether the evidence fails the balancing test of V.R.E. 403 because its probative value is substantially outweighed by the danger of unfair prejudice. At the outset, we note that the trial judge has substantial discretion in ruling on V.R.E. 403 motions . . . . We think it [is] also important that the element that has been deemed the most critical in showing prejudice in cases like this—the direct bearing on victim or defendant credibility—is wholly absent in this case.[211]

The lack of even an "indirect" bearing on defendant's credibility and the fact that the evidence did not go "directly to the

---

207. *Valley*, 153 Vt. at 385-86, 571 A.2d at 582; *see also* State v. Catsam, 148 Vt. 366, 369-70, 534 A.2d 184, 187 (1987) ("Given the demonstrated usefulness that such evidence can have in assisting the jury to assess the credibility of the complaining child witness, we join the majority of courts that have concluded it was within the trial courts discretion to admit such evidence in appropriate circumstances.").

208. VT. R. EVID. 401.

209. State v. Valley, 153 Vt. 380, 386, 571 A.2d 579, 582 (1989).

210. *Id.* at 386, 571 A.2d at 582.

211. *Id.* at 387, 571 A.2d at 582.

defendant's guilt,"[212] the characteristic the court found objectionable in *Percy*, were crucial to the court's holding that the evidence was not unduly prejudicial.[213]

Catsam, interposed between *Percy I* and *Valley*, is the first in a line of child sexual abuse cases, and the first to deal explicitly with significant aspects of profile or syndrome evidence.[214] The state in *Catsam* introduced expert testimony relating to the emotional and physical symptoms of Post-Traumatic Stress Disorder and the expert's opinion that the complainant suffered from PTSD.[215] Neither the expert's testimony nor the expert's opinion were subject to objection.[216] Defense did object to the expert's opinion that sufferers of the disorder generally do not make up stories about sexual abuse.[217] The court noted only that the defendant used "fabrication of the charges as his primary theory of defense," not whether the defendant focused on delay or recantation by the complainant.[218] Referring to Rule 702, the court noted that this type of evidence generally is endorsed to assist the jury in understanding the effects on and behavior of victims of sexual abuse. It stated, "[g]iven the demonstrated usefulness that such evidence can have in assisting the jury to assess the credibility of the complaining child witness, we join the majority of courts that have concluded that it is within the trial court's discretion to admit such evidence in appropriate circumstances."[219]

Perhaps because the defendant had not objected to the admission of the profile evidence, the court did not analyze whether the evidence in this case actually met the Rule 403 balancing requirement. The opinion, unfortunately, seems to imply that

---

212. *Id.*, 571 A.2d at 583.

213. *Id.*

214. State v. Catsam, 148 Vt. 366, 534 A.2d 184 (1987).

215. PTSD is the acronym for Post-Traumatic Stress Disorder. Child sexual abuse syndrome, and rape trauma syndrome, frequently utilized by the prosecution, and the Vietnam syndrome used by the defendant in *Percy* are subsets of PTSD. The American Psychiatric Association has recognized the disorder. *See* DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS § 309.89 (3d rev. ed. 1987) [Hereinafter DSMIII].

216. *Catsam*, 148 Vt. at 367-70, 534 A.2d at 186-87.

217. *Id.* at 368-69, 534 A.2d 186-87.

218. *Id.* at 367, 534 A.2d at 186.

219. *Id.* at 369-70, 534 A.2d at 187.

such evidence is typically relevant to credibility. Yet, the court will struggle with the "appropriate circumstances"[220] issue in its future cases. The actual holding of the case, however, dealt with the expert's comments on the complainant's credibility. The court stated:

> The challenged expert testimony, however, went beyond the psychological and emotional profile of PTSD sufferers and an opinion as to whether the testifying complainant suffers from the disorder; the expert testified regarding the tendency of PTSD sufferers to tell the truth about incidents of sexual abuse .... When viewed as a whole, the testimony of Ms. Termini was tantamount to a *direct comment* that the complainant was telling the truth about the alleged sexual assault for which the defendant was charged. By testifying first that sufferers of PTSD generally do not fabricate claims of sexual abuse, and then that the complainant suffers from PTSD, her testimony left one clear and unmistakable inference to be drawn: the complainant would not fabricate this allegation.[221]

The profile cases decided over the next three years were typically concerned with application of the "direct comment"[222] prohibition and whether admission of expert opinion applying profile characteristics was plain error. Evidence that could be construed only as an indirect comment, such as evidence that victims commonly delay reporting incidents of abuse to counter cross-examination about the delay, or evidence about the unique effect of sexual assault on children, was held to be permissible. The court became much more critical of a variety of profile related evidence in a series of cases beginning with *State v. Gokey* in 1990.[223] The previous discussion of Rule 703 shows how the court has limited the ability of an expert to relate statements by the complainant as the "basis" for his opinion.[224] Statements to experts frequently do not fit within the Vermont hearsay excep-

---

220. *Id.*

221. *Catsam*, 148 Vt. at 370, 534 A.2d at 187-88 (emphasis added).

222. *Id.* at 370, 534 A.2d 187.

223. State v. Gokey, 154 Vt. 129, 131-41, 574 A.2d 766, 767-72 (1990).

224. *See supra* notes 102-06 and accompanying text.

tions for statements for medical diagnosis[225] or for child victim statements.[226] This undoubtedly influences both the Rule 703 analysis and the Rule 403 analysis of the prejudicial effect of such evidence.

Except for an explicit opinion that the child was telling the truth, *Gokey* involved the entire range of expert profile evidence: a description of the profile, the expert relating the child's report of defendant's abusive acts, and both the expert's opinion that the child fit the profile and that the child's symptoms could only be attributable to sexual abuse.[227] The *Gokey* court thoroughly analyzed the admissibility of each aspect of the expert's testimony.[228] The key to the court's analysis was a rigorous examination of the reliability of PTSD in the child abuse context and an application of the rules in light of such an analysis. As the court stated:

> Profile or syndrome evidence is evidence elicited from an expert that a person is a member of a class of persons who share a common physical, emotional, or mental condition. . . . The condition must be one that is generally recognized in the field . . . . Profile evidence is typically admitted in evidence to assist the jury in understanding "superficially bizarre behavior" of a putative victim, such as a child's ambivalence about pursuing a sexual abuse complaint . . . or a child's recantation of an earlier accusation . . . . In these situations, the expert's testimony may be useful to dispel misconceptions about the behavior of victims of certain crimes, and to show that the conduct of the complaining witness, however seemingly unusual, is consistent with the profile. . . . *The function of the testimony is thus primarily rehabilitative, where behavior such as delay in reporting, recantation, or a continued relationship*

---

225. Vermont's Rule 803(4) eliminated the last phrase of Federal Rule 803(4) which reads: "or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment." FED. R. EVID. 803(4). Hence the child's description of the sexual assault by the defendant to the expert does not fall within the hearsay exception for "statements made for purposes of medical diagnoses or treatment." VT. R. EVID. 803(4); *see* State v. Gokey, 154 Vt. 129, 141 n.8, 574 A.2d 766, 772 n.8 (1990).

226. Under Vermont Rule 804a(a)(2) child victim statements are inadmissible if taken in preparation for a legal proceeding or if made after the defendant's initial appearance. VT. R. EVID. 804a(a)(2).

227. State v. Gokey, 154 Vt. 129, 131-41, 574 A.2d 766, 767-72 (1990).

228. *Id.*

> *with the alleged abuser may be mistaken as impeaching the credibility of the child.*[229]

"Limited reference" to the syndrome evidence was relevant in the *Gokey* case because the defendant had impeached prosecution witnesses on the basis of the child's delay in reporting the abuse and the child's continued contact with the defendant after the incident.[230] The prosecution presented the expert as its last witness after the impeachment had taken place and the relevance/will-assist function of the evidence had become apparent.[231] The court admitted the evidence, stating, "[i]f use of the syndrome evidence is confined to these rehabilitative functions, the confusion clears, and the accommodation syndrome serves a useful forensic function."[232]

The point of the *Gokey* court's analysis is clear. Syndrome evidence should be admitted only after a defendant attacks the victim's testimony based on an aspect of the victim's behavior that might be misinterpreted by the jury and that can be clarified by the syndrome evidence. The evidence would not be relevant, for example, if the defense was mistaken identity. The expert testimony would not "assist the trier of fact to understand the evidence."[233]

The court drastically limited the use of syndrome evidence in the *Gokey* case to a general description of the syndrome and an opinion as to whether the child's behavior was consistent with the syndrome.[234] Based on the defendant's lack of objection to the expert's opinion, and the court's distaste for an expert vouching for the complainant in this and in subsequent cases,[235] the latter use is suspect in spite of the *Gokey* court's apparent approval. The court stated:

---

229. *Id.* at 133-34, 574 A.2d at 768 (emphasis added) (citations omitted).

230. *Id.* at 135-37, 574 A.2d at 769-70.

231. *Id.* at 136, 574 A.2d at 769.

232. *Id.* (quoting John Meyers et al., *Expert Testimony in Child Sexual Abuse Litigation*, 68 NEB. L. REV. 1, 68 (1989)).

233. VT. R. EVID. 702.

234. State v. Gokey, 154 Vt. 129, 137-38, 574 A.2d 766, 770 (1990).

235. *See supra* text accompanying note 110 (discussing *State v. Wetherbee*); *see infra* text accompanying notes 259-69 (discussing *State v. Sims*).

> The expert . . . may not, at least on this record, go so far as to conclude that the witness *is* a victim of sexual abuse. . . . At most, she ought to have been permitted to describe to the jury evidence on the tendency of sexually abused children to delay reporting incidents of abuse and to continue relationships with their abusers, to give her opinion whether the child's behavior was consistent with this evidence, and to explain the basis for that opinion. Her graphic retelling of the child's description of the events, her comments about the child's ability to distinguish truth from falsehood, and her conclusory remarks about "this victimization" were all beyond the pale—unduly prejudicial and unjustifiable under rules of evidence and our cases.[236]

The basis for this holding was an examination of the reliability of the general background information that the expert was allowed to relate to the jury.[237] Because a control group was not utilized to determine whether children not exposed to sexual abuse exhibited similar symptoms as those exposed to sexual abuse, there was "no scientific basis for determining that a causal relationship exists between sexual abuse and the 'clinical features of sexual abuse.'"[238] The court also noted the lack of a consensus among experts that application of the syndrome can detect child sexual abuse.[239] The syndrome is not probative of whether abuse took place because it is not a diagnostic device to detect sexual abuse. "Rather, it assumes the presence of abuse, and explains the child's reactions to it."[240]

The court's analysis in *Gokey* is also important in understanding the "otherwise admissible" language of Rule 704.[241] The court noted that:

> [The expert] was not qualified and was not possessed of "scientific, technical, or other specialized knowledge" pertaining to the credibility of this witness and the guilt or innocence of this defendant. These are matters, in our system of criminal

---

236. State v. Gokey, 154 Vt. 129, 134, 137-38, 574 A.2d 766, 768, 770 (1990).

237. *Id.* at 133-34, 574 A.2d at 768-69.

238. *Id.* at 134, 574 A.2d at 768 (citing State v. Black, 537 A.2d 1154, 1157 (Me. 1988)).

239. *Id.* at 135, 574 A.2d at 769.

240. *Id.*

241. *See supra* note 142 and accompanying text.

> law, that are reserved for the jury. . . . An expert was hardly required to "assist the trier of fact" in drawing inferences from the child's account of the abuse. Any lay person is adequate to the task. "Once the emotional antecedents underlying the victim's behavior are explained, 'the jury needs nothing further from the expert.'"[242]

The court's analysis suggested that, even if the expert possessed adequate specialized knowledge to support an opinion of abuse or truthfulness, such opinions should be excluded as unnecessary to assist the jury in fulfilling its function. The court did, however, leave open the possibility of allowing expert opinion on the question of abuse where justified "solely on the basis of observable symptoms apart from the child's story."[243] Although Rules 702 and 704 have greatly liberalized the ability of experts to render ultimate opinion, the court has been reluctant to allow opinions relating to credibility of the defendant or complainant, or to the guilt or innocence of the defendant.

The court in *Gokey*, however, allowed an opinion, where relevant, that "the child's behaviors were consistent with [sexual abuse]."[244] The court apparently admitted this form of opinion because it was endorsed by a leading article.[245] In *Gokey*, the court distinguished *Catsam* on the basis that the statement in *Catsam* that children suffering from PTSD "generally do not make up stories about sexual abuse"[246] was "tantamount to a direct comment that the complainant was telling the truth about the alleged sexual assault."[247] However, it is difficult to see how the expert's opinion, in *Gokey*, that the child's behavior was consistent with sexual abuse is less direct than the reference to complaints

---

242. *Gokey*, 154 Vt. at 140, 574 A.2d at 771.

243. *Id.* at 135 n.3, 574 A.2d at 769 n.3; *see supra* note 223 and accompanying text (discussing *Gokey*'s rejection of use of the statements made by the child relating to the sexual abuse as basis under Rule 703).

244. *Id.* at 140, 574 A.2d at 772.

245. *Id.* at 135, 574 A.2d at 768 (citing John Meyers et al., *Expert Testimony in Child Sexual Abuse Litigation*, 68 NEB. L. REV. 1, 85 (1989)) (dicta).

246. *Id.* at 137 n.4, 574 A.2d at 770 n.4.

247. *Gokey*, 154 Vt. at 137, 574 A.2d at 770.

generally in *Catsam*, although there was more explicit reference to credibility in *Catsam*.[248]

In *State v. Wetherbee*, the court adhered to the distinction, developed in *Gokey*, between prohibited opinions of complainant's credibility or sexual abuse and less direct comments.[249] In *Wetherbee*, the expert opined, apparently without objection, that the child had suffered from a traumatic experience.[250] The defenses were apparently that the child lied about the incident and misidentified her abuser.[251] The court quoted the *Gokey* language allowing the "opinion that the child's behaviors [were] consistent with that profile" and noted that credibility was the central issue at the Wetherbee trial.[252] The court went on to reiterate its concerns about the expert's limitations with respect to drawing inferences from the child's behavior and its "policy that experts not intrude 'on the core function of the jury, infringing upon defendant's constitutional right to a trial by jury.'"[253] The court did not discuss the predominant issue identified in *Gokey*: whether the profile evidence was helpful to understand an attack on the complainant's credibility.[254]

---

248. An attorney who is extremely well versed in the supreme court's expert opinion cases disagrees with my judgment that the court is making dubious distinctions when it characterizes a case as tantamount to direct comment on credibility or permissible comment about the complainant. To be fair to the court, a judgment that the opinion falls into the permissible or impermissible opinion category rests on a number of factors, such as the wording of the expert's opinion, the nature of the defense, other syndrome evidence in the case, and whether the evidence is general or particular to the case.

Gokey involved a situation where the defendant claimed that the child had been exposed to sexual material by her father and had sexual contact with her cousins. Hence, the opinion that the child's symptoms were consistent with sexual abuse did not impact as strongly on the complainant's credibility as it did in *Catsam*. Unfortunately, it is impossible to examine the facts of each of the cases in detail in this article. Furthermore, the court does not consistently examine these factors in its opinions.

Perhaps the important point is not whether a particular case categorization is a correct one in light of all the relevant factors, but whether the court's distinction is unworkable because reasonable people disagree about whether the facts of a particular case fall into one category or another. *See infra* text accompanying notes 269-72.

249. *See* State v. Wetherbee, 2 Vt. L. Wk. 191, 594 A.2d 390 (1991).

250. *Id.* at 192-93, 594 A.2d at 391-92.

251. *Id.*

252. *Id.* at 193, 594 A.2d at 392-93.

253. *Id.*, 594 A.2d at 393.

254. *See* State v. Gokey, 154 Vt. 129, 574 A.2d 766 (1990).

In analyzing the state's claim of harmless error in allowing the expert to relate the child's statements, the *Wetherbee* court used reasoning that seems to apply as much to "indirect" as direct opinions of credibility. The court noted:

> Although the psychologist did not explicitly voice his opinion that the victim was truthful, his testimony, when viewed in context, gave the distinct impression that he believed her. . . . He implicitly vouched for the believability of her story by his appearance as a witness for the prosecution. . . . It would be naive to believe that a juror would not naturally rely on an expert trained in the diagnosis of sexual abuse to resolve, at least in part, the issue of the victim's credibility, often the most crucial aspect of the prosecution's case. In cases like this one, the effect of that aura can be subtle to detect because it results, not only from the psychologist's expertise, but also from his special relationship with the victim. What the jury ends up seeing is not a 'hired gun.' . . . Rather, the jury sees a concerned therapist who has examined the child, believed her, and is probably currently engaged in her recovery process.[255]

An expert who opines that the child suffered from a traumatic experience, or who testifies that the child's behavior is consistent with the syndrome, also bases an opinion on the "special relationship with the victim"[256] and seemingly "vouche[s] for the believability of her story."[257] Given the concern with vouching for the credibility of the victim, it would appear more consistent to limit syndrome related evidence to a description of the syndrome when relevant to rebut a defendant's attack. In fact, it might be better if the expert were not the person who treated the victim. If the expert were the person who treated the complainant, the expert should not be allowed to refer to a personal relationship with the complainant unless brought out by the defendant on cross-examination.[258]

---

255. *Wetherbee*, 2 Vt. L. Wk. at 194, 594 A.2d at 393-95.

256. *Id.*, 594 A.2d at 394.

257. *Id.*, 594 A.2d at 393.

258. *See* State v. Lynds, 2 Vt. L. Wk. 433, 433-34, 605 A.2d 501, 502-04 (1991). In *Lynds*, the court reversed the trial court decision to allow a child sexual abuse expert's deposition because there was an inadequate showing of "unavailability" under the Confrontation Clause and Vermont Rule 804(a)(5). *Lynds* suggests what might be a better solution to the rehabilitation problem. Theoretically, it might be better to have the court

The court appeared to move in this direction in *State v. Sims*.[259] In this particularly sordid child sexual abuse case, the defendant raised a plain error claim where there was extensive expert evidence implicitly, if not explicitly, vouching for the credibility of the complainant.[260] Although there were three expert witnesses, one of whom testified that he told the defendant that he believed the victim rather than the defendant, the majority focused on the extensive testimony of an abuse counsellor.[261] A number of questions and answers were directed to explain why the victim had a difficult time relating the incidents, the extent of her ability to distinguish between a "good" and a sexual touch, and the reasons why she continued to visit her grandmother's house which the defendant frequented.[262] These questions were characterized by the court as assuming that the abuse had taken place in spite of the use of the phrase "alleged abuse" in some questions.[263] The court stated:

> The questions posed by the prosecutor in this case could not be answered without conveying the expert's belief that complainant was truthful and sexual abuse had occurred. . . . Preceding "abuse" with "alleged" does not save the question, because once the expert testifies as to the psychological effect that has been caused, the abuse has been removed from the realm of allegation to the realm of fact.
>
> This case demonstrates the dangers, pointed to in *Wetherbee*, of attempting to explain to the jury the emotional antecedents of child sexual abuse complainant's conduct through expert testimony concerning the particular complainant. . . . *The conduct of the child who has been sexually abused, and the emotional antecedents underlying this conduct, can be effectively explained to the jury through testimony relating to the class of victims in general.*[264]

---

give a brief instruction explaining the child sexual abuse syndrome and its limitations in appropriate cases to save time and avoid error-prone questions of the expert.

259. State v. Sims, 2 Vt. L. Wk. 469, 608 A.2d 1149 (1991).

260. *Id.* at 469-71, 608 A.2d at 1151-55.

261. *Id.* at 470, 608 A.2d at 1151.

262. *Id.* at 470-71, 608 A.2d at 1152.

263. *Id.*

264. *Sims*, 2 Vt. L. Wk. at 471, 608 A.2d at 1153-54 (emphasis added).

The *Sims* court relied on the cases prohibiting comment that was "tantamount to a direct comment."[265] However, the court also reiterated the "dangers . . . of attempting to explain to the jury the emotional antecedents of a child sexual abuse complainant's conduct through expert testimony concerning the particular complainant."[266] The court cited cases from other jurisdictions that limited evidence to, or expressed a strong preference for, generalized class testimony rather than testimony that referred to the particular case.[267] The court stopped short of adopting a rule limiting testimony to generalized evidence, but sounded a strong warning:

> While we have not, as yet, gone as far as these other jurisdictions in limiting particularized testimony, . . . we have repeatedly found use of particularized testimony to be error. Expert testimony concerning the particular complainant must be approached with caution, as it too often slips into impermissible comment on the complainant's credibility.[268]

In *Sims,* the court continued its tradition of rejecting plain error in profile cases, but for the first time there was more than one dissenter. The dissenters distinguished the earlier plain error precedent by focusing on the fact that the profile cases were now of sufficiently long standing to appraise the bench of the error and on the fact that the defendant was unrepresented by counsel.[269]

The court's sexual abuse profile cases contain sufficiently sound analysis to provide the basis for a coherent approach to such cases. However, the plain error context of many of the cases, and the court's attempt to ascertain whether evidence beyond relating relevant basic profile symptoms constitutes impermissible comment on credibility, have left the cases confusing. The latter problem contributes to the former, making appropriate objection difficult, because it is not clear what constitutes evidence "tantamount to a direct comment" on credibility and what constitutes implicit vouching for complainant's credibility.

---

265. *Id.* at 470, 608 A.2d at 1153.

266. *Id.* at 471, 608 A.2d at 1154.

267. *Id.*, 608 A.2d at 1153.

268. *Id.*, 608 A.2d at 1154.

269. *Sims*, 2 Vt. L. Wk. at 474-75, 608 A.2d at 1158-60.

The court should draw the line for expert testimony concerning profile evidence at general profile evidence because a case-by-case approach to determine whether expert application of the profile to the particular case constitutes impermissible comment has proven to be unworkable in light of the number of appeals.[270] The court's sound reasoning about the dangers of such evidence when tendered by a treating expert, and the role of the jury in credibility determinations support a rule limiting evidence to a general description of the profile when probative to meet a defense attack on the complainant. The court hinted that such an approach might be adopted.[271] Further, the court's allowance of particularized evidence in *Gokey*, *Wetherbee*, and *Sims* can be characterized as dicta because of the apparent lack of objection to the particularized evidence. Finally, the dicta in *Gokey* that appeared to allow such evidence is undermined by a footnote that states that, even though such comment may be arguably clinically reliable, it may be inadmissible under Rule 702.[272]

---

270. The court also could abandon its approach entirely and adopt a balancing approach to admissibility of RTS and child sexual abuse accommodation syndrome evidence. Such an approach would require that the trial court be given discretion to balance factors, such as necessity for the evidence, reliability of the evidence, ability to understand the evidence, and importance of the issue to the case. McCord, *supra* note 190, at 94-107. Robert Mosteller similarly identifies crucial issues for determining the admissibility of "framework evidence." Mosteller *supra* note 190 at 85. Adopting an explicit balancing approach would imply that the court review trial court determinations only for abuse of discretion. *Cf.* State v. Gardner, 139 Vt. 456, 433 A.2d 249 (1981); *see supra* note 258 (providing an efficient but admittedly iconoclastic possible approach).

271. *See supra* text accompanying note 268.

272. State v. Gokey, 154 Vt. 129, 135 n.3, 574 A.2d 766, 769 n.3 (1990). The court stated that opinions about sexually abused children, if based upon adequate data, may be reliable:

> But it does not follow that the opinion, though perhaps justified from a clinical standpoint, is admissible at trial. . . . As we have said, the jury does not generally need assistance in drawing conclusions from "the child's story" and the "idiosyncratic details of the abuse." Determining the truth of the child's report does not require "scientific, technical, or other specialized knowledge," the premise of Rule 702 testimony.

Id. The reasoning that the jury does not require the opinion to determine the truth of the child's report seems as applicable to opinions of "behavior consistent with sexual abuse" as the opinion of sexual abuse. The court, however, adopts too high a threshold requirement for expert evidence under Rule 702 when it states the jury "does not require" the evidence. Rule 702 demands only that expert knowledge "assist" the trier. *See supra* text accompanying note 58; *see also* VT. R. EVID. 704. Federal Rule 704 advisory committee's note and Vermont Rule 704 reporter's notes provide a more acceptable rationale for exclusion of evidence which infringes upon the function of the trier. The court apparently adopted this rationale in *Riess* which was decided prior to *Gokey*. *See supra* text accompanying notes 154-63.

However, the court has provided generally sound guidance to the bench and bar with an appropriate use of syndrome evidence. Sexual profile evidence is relevant or "will assist the trier of fact" when it is used to explain the complainant's conduct that might appear inconsistent with the claim of sexual abuse, after the conduct has been put in issue. The profile evidence must relate to the conduct under attack, such as delay in reporting, recantation, or a continued relationship with the abuser, which may be mistaken by the jury as impeaching the credibility of the complainant. The expert may not render an opinion that complainant is telling the truth or that the defendant is guilty. The *Gokey* court left open the possibility that an expert could render an opinion concerning whether a child was abused if based solely on the expert's observations. The court's vouching-for-credibility analysis, and its observation that the ability to render a valid clinical diagnosis does not imply admissibility, strongly suggest that such an opinion will not be permitted, at least absent a claim by the defendant that abuse did not take place.[273] The expert may not generally relate what a child told him about the incident as "basis" for his testimony. However, some statements made by a child to an expert may be admissible under Rules 803(4) and 804a(a), subject to the restrictions of those rules[274] and Rule 403.

The court has resolved most of the major problems with respect to the use of social framework evidence by paying careful attention in recent cases to the relevance/will-assist analysis and the dangers posed by an overly expansive reading of Rule 703. These developments will be important to the analysis in the next section of the reliability of expert evidence.

V. Reliability of Expert Evidence

The modern rules governing expert evidence represent a more expansive, relevance based approach to the topic.[275] The expansive rules and increased use of expert evidence have led to

273. *Gokey*, 154 Vt. 129, 139-41, 574 A.2d 766, 771-72 (1990).

274. *See supra* notes 225-26.

275. *See supra* text accompanying notes 9-14.

renewed criticism of partisan and unreliable experts.[276] The problem of unreliable expert testimony implicates important issues beyond just shopping for a favorable expert.

The first issue implicated by unreliable expert testimony is the inherent uncertainty of scientific knowledge. Scientific experts often have not accumulated sufficient research to be able to advance sound theories.[277] Scientists typically summarize what they know about a given area in terms of a probability statement which may not satisfy a legal standard of proof. Frequently there is an absence of consensus, even as to the validity of a "scientific" statement, and experts will disagree about the underlying theory, the relevant underlying data, and the conclusions to be drawn.[278] Even where there is consensus about the underlying theory and proper procedures, it may be difficult, for a variety of reasons, to secure an expert who is highly qualified in a particular case.

The second issue implicated by unreliable expert testimony is the limits of the legal system. We often forget that our trial system evolved from days when the trier could readily comprehend and evaluate evidence. Modern scientific evidence poses special problems not adequately addressed by the relevance model. Both the judge, in determining admissibility, and the jury, in evaluating the weight to be accorded competing expert claims, are severely handicapped by their lack of an appropriate scientific background and by the partisan use of experts. The battles over expert evidence consume time in an overburdened court system and increase the possibility of erroneous verdicts because the trier is unable to understand and evaluate the evidence. Finally,

---

276. The criticism is not new. *See, e.g.*, Learned Hand, *Historical and Practical Considerations Regarding Expert Testimony*, 15 HARV. L. REV. 40, 50-57 (1901). It has, however, become more frequent and vocal as the modern rules and increasingly complex litigation have led to much more frequent use of experts. *See* Gross, *supra* note 2 (perhaps the most thorough modern critique of partisan use of experts).

277. The scientific paradigm is based on formulation of a hypothesis and collection of data based upon a sound experimental design. The data frequently do not permit rejection of the null-hypothesis. *See* Kreiling, *supra* note 29, at 965-67.

278. Developments in the philosophy and history of science and the sociology of science, especially over the past thirty years, have emphasized the "consensual" nature of scientific knowledge. *See, e.g.*, Kreiling, *supra* note 29, at 965-66; SHEILA JASANOFF, THE FIFTH BRANCH 12-14 (1990). Where there is no consensus, the courts frequently become scientific battlegrounds.

especially in criminal cases, the significant costs required for experts exacerbate the disparity of resources between parties. This disparity may in turn result in uncritical acceptance of unreliable evidence that may lead to unfairness.

The relevancy model suggests that a court admit expert evidence by a qualified expert that is either probative of a material fact or assists the trier in understanding the evidence. The role of the judge in such a scenario is minimal; the judge would ensure that the evidence meets the few technical requirements unless the opponent can demonstrate that the probative value is substantially outweighed by the Rule 403 dangers. The jury would then determine the weight to be accorded the evidence. Critics of the model point to the problems previously set forth, and suggest that the rules be amended, or that the judge utilize the existing rules to ensure that the evidence is "reliable."[279] Adherents of the model point to the language and to the underlying philosophy of the rules, and to the fact that the judge is not scientifically trained to make the reliability evaluation.[280]

The case law under the federal rules reflects the controversy surrounding the reliability of expert testimony. Some courts have used Rules 702, 703, and 403 to adopt, in effect, a higher standard for evidence in toxic tort cases.[281] Some of the toxic tort cases also have used the burden of persuasion standard or the liberalized summary judgment standard to hold that plaintiffs' experts had not presented sufficient evidence from which a jury could find causation.[282] Further, some courts continue to utilize the *Frye* requirement that the expert theory must be generally accepted in the scientific community at least for "novel" scientific evidence.[283] Courts typically utilize this requirement in criminal

---

279. *See, e.g.*, Kreiling, *supra* note 29, at 939-53.

280. *See, e.g.*, Jack B. Weinstein, *Rule 702 of the Federal Rules of Evidence Is Sound; It Should Not Be Amended*, 138 F.R.D. 631, 631-32 (1992).

281. The phenomenon is often traced to Judge Weinstein's opinion in *In Re* "Agent Orange" Product Liability Litigation, 611 F.Supp. 1267 (E.D.N.Y. 1985), *aff'd*, 818 F.2d 187 (2d Cir. 1989); *see* Green, *infra* note 293 (discussing *Agent Orange* and subsequent cases).

282. *See, e.g.*, Brock v. Merrell Dow Pharm., Inc., 874 F.2d 307 (5th Cir. 1989), *cert. denied*, 494 U.S. 1046 (1990) (Benedictin litigation).

283. *See, e.g.*, United States v. Two Bulls, 918 F.2d 56, 61 (8th Cir. 1990) (enhanced reliability requirement for DNA identification evidence).

cases, but they occasionally use it in civil cases as well.[284] In contrast, other courts have maintained that the *Frye* requirement did not survive adoption of the Federal Rules and that an enhanced standard for scientific evidence should not be required.[285]

The Federal Advisory Committee on Civil Rules has recognized these problems and has proposed important changes in the rules governing expert evidence.[286] First, proposed Federal Rule of Evidence 702 provides that expert evidence "may be received if (1) it is *reasonably reliable* and will, if credited, *substantially* assist the trier of fact."[287] Second, proposed Federal Rule of Civil Procedure 26(a)(2)(A) requires that expert evidence that the party may introduce at trial should be comprehensively disclosed in writing.[288] The information obtained as a result of proposed Federal Rule of Civil Procedure 26 would assist the judge in making civil evidentiary determinations. However, the term "reliable" in the proposed rule of evidence is undefined by the rule itself. The case law lends no significant guidance because the term typically is used by the courts in conclusory language.

The advisory committee's note to the most recent draft of the evidence rules states that a flexible standard is necessary in light of the myriad situations in which expert evidence is offered. The "reasonably reliable" standard is seen as a special application of the concerns expressed in Rule 403 about confusing or misleading the jury. The committee lists a number of factors that might be

---

284. Christopherson v. Allied Signal Corp., 939 F.2d 1106, 1111 (5th Cir. 1991) (en banc) (per curiam) (toxic tort litigation).

285. United States v. Jakobetz, 955 F.2d 786, 796-97 (2d Cir. 1992) (DNA identification). The Supreme Court has recently granted certiorari in a case that raises the question of whether *Frye* survived the Federal Rules of Evidence and a number of other important questions about scientific evidence. Daubert v. Merrell Dow Pharm., Inc., 951 F.2d 1128 (9th Cir. 1992), *cert. granted*, 61 U.S.L.W. 3277 (Oct. 13, 1992).

286. Proposed FED. R. EVID. 702 advisory committee's note (May 1992) (unpublished proposal at 142-45). The original proposals were transmitted to the public by the Committee on the Rules of Practice and Procedure of the Judicial Conference of the United States on August 15, 1991. The Committee has considered a revised draft of the comprehensive proposals submitted in May, 1992 by the Advisory Committee on Civil Rules. The language in the text reflects the May, 1992 draft.

287. *Id.* at 142 (emphasis added).

288. Proposed FED. R. CIV. P. 26 (May, 1992) (unpublished proposal at 52).

scrutinized with respect to an offer of highly specialized expert testimony:

> [S]crutiny may be appropriate regarding the specialized education and training of the witness, and perhaps the recognition and standing of the witness among other epidemiologists; whether recognized standards, protocols, techniques, procedures, and methods were followed in conducting the experiments and drawing conclusions therefrom; whether the study was conducted solely for use in litigation; whether the experiments have been replicated, verified, or subjected to peer review; and the extent to which the opinions and experiments would be viewed as acceptable by other experts in the field.[289]

The advisory committee did not attempt to resolve all conflicts that have arisen as a result of the application of the *Frye* rule, but it intended that "the degree of acceptability within the field should ordinarily be considered, together with other appropriate factors such as those listed . . . in determining whether such evidence is sufficiently trustworthy."[290]

Similarly, the Committee listed factors to be considered in determining whether the proposed testimony, if credited, will be of "substantial assistance" to the fact-finder:

> The determination whether proposed opinion testimony, if credited, will be of substantial assistance to the fact-finder involves more than merely that the witness possesses greater knowledge about some subject than the ordinary juror. Among the factors that may affect this determination are the following: whether the proposed opinion relates to a matter that is in substantial dispute and of major consequence to the outcome of the case; whether other evidence in the case, including testimony from other experts, will provide an adequate basis for the jury to reach an informed decision regarding the matter; whether the opinion involves a highly technical subject or one with which most persons will have had some experience and knowledge; whether, if the opinion testimony is received, rebuttal testimony will be offered through other experts; and

---

289. Proposed FED. R. EVID. 702 advisory committee's note (unpublished proposal at 143).

290. *Id.* at 144.

> whether the person will be called as a witness only to present such opinion testimony, or will be testifying to personal observations regarding the facts of the case, with the opinions offered primarily to explain such testimony. The rule does not limit forensic experts to those whose testimony is essential, but does call for elimination of those whose testimony would be only marginally helpful at most.[291]

The "substantially assist" language of proposed federal rule 702, and these factors make it clear that expert evidence would have to meet more than the basic relevance standard.[292] The proposed rule envisions a much more active role for the judge in determining the admissibility of expert evidence. The proposal would go farther than the existing federal case law because not all circuits have adopted the higher *Frye* standard. Moreover, those that have adopted the *Frye* standard have essentially confined this standard to toxic tort cases and drug cases, both of which reflect enormous uncertainty with respect to causation.[293] The problems that proposed rule 702 and the advisory committee's note attempt to address, and those of the Vermont Supreme Court identified earlier, can perhaps best be explained by an analysis of the reliability problems associated with expert evidence.[294]

First, the difficulties with expert evidence typically relate to the lack of a sufficient nexus between material issues in the case and three basic aspects of expertise: the adequacy of the expert's qualifications to render the particular opinion, the adequacy of the underlying theory or major premise for the opinion, and the "basis" or particular case facts that provide the minor premise for

---

291. *Id.*

292. More importantly, perhaps, this language apparently overrides the presumption of admissibility reflected by Rules 402 and 403 and places the burden of demonstrating reliability on the plaintiff.

293. Michael D. Green, *Expert Witnesses and Sufficiency of Evidence in Toxic Substances Litigation: The Legacy of* Agent Orange *and Benedictin Litigation*, 86 NW. U. L. REV. 643, 699 (1992); ROSSI, *supra* note 2, at 77-79.

294. The foregoing discussion does not address a number of techniques that should be considered by the reader, such as expert reports, pretrial conferences, in limine motions, and court appointed experts. Such techniques would greatly assist the courts to facilitate admission of only reliable and comprehensible expertise. *See, e.g.*, Kreiling, *supra* note 29, at 956-59.

the opinion.[295] A fourth aspect of expertise, the faulty reasoning process, is particularly problematic unless the expert clearly departs from the underlying theory he purports to apply.

For example, even though a physician generally qualifies as an expert, the physician "expert" may have insufficient training or experience to testify about specialized issues, such as toxic tort cancer causation involving toxicology, epidemiology, and oncology. The physician may lack particularized training and experience in these areas and, even with some specialized training, may lack practical experience and sufficient familiarity with rapidly evolving specialized literature to render a truly helpful opinion. The latter problem is typified by the "expert" who acquires specialized expertise for purposes of the litigation.[296]

These problems require that a court carefully examine the nexus between the alleged specialized knowledge and training and the issue that the expert is addressing. Unfortunately, courts have tended to scrutinize the nexus insufficiently, and have allowed opinions where the expert's specialization is inadequate.[297] Rules 702 and 403, even without the proposed amendment, should demand a substantial nexus between the alleged specialized knowledge and the issue that the expert addresses because the expert will not assist the trier of fact if the expert engages in "speculation." The minimum probative value of the expert's testimony is often substantially outweighed by its tendency to mislead the jury because the expert is supposedly qualified, or by waste of time expended by direct examination, cross-examination, and necessary rebuttal of an underqualified expert. In egregious situations, the court might be able to conclude merely that the expert's testimony would not assist the jury because the expert is not qualified. Under the proposed rule, the "substantially assist" requirement would likely obviate the

---

295. This functional analysis of problems with expert evidence is suggested in an insightful consultant's report to the Carnegie Commission on Science, Technology and Government. *See* MARGARET BERGER, PROCEDURAL AND EVIDENTIAL MECHANISMS FOR DEALING WITH EXPERTS IN TOXIC TORT LITIGATION: A CRITIQUE AND PROPOSAL 15-31, 46-51 (1991).

296. *Id.* at 16-17.

297. *Id.* at 15-31, 46-47 (collecting cases regarding experts with inadequate expertise and discussing "the expert without expertise," respectively).

balancing analysis unless a fairly clear nexus exists between qualifications and testimony.

The second major problem concerning the reliability of expert testimony is the theory that an expert would relate to the jury or utilize as the premise underlying an opinion. As previously noted, the proposed rule requirements that the information be "reasonably reliable" and that the testimony "substantially assist" the trier provide impediments, beyond the relevance model, to expert evidence based upon inadequate theory. However, it appears that the Vermont Supreme Court already has adopted a reliability requirement under the traditional model, at least for profile evidence in criminal cases. For example, the court in *Percy I* observed that "[i]n order for this testimony to be admissible, the condition must be one that is generally recognized in the field."[298] This language was cited approvingly, again in the context of profile evidence, in *Gokey*.[299] Furthermore, the court in *Gokey* disallowed an opinion that the child had been abused, based upon the child's report, because the opinion was insufficiently reliable in light of the underlying scientific knowledge and the lack of consensus among the experts.[300] The extent to which the court would require scientific reliability or consensus of the relevant experts beyond profile cases, or even beyond criminal cases, is uncertain. In *Gokey*, the court was especially concerned about the impact of the treating expert's testimony on the trier when the testimony could appear to support victim credibility.[301] However, the basic reasoning that an expert could not offer an opinion, when the literature reflected an absence of consensus and of scientific evidence of reliability concerning such an opinion, appears to broadly apply. Even in the absence of a generalized reliability requirement, a court should apply the considerations relative to the qualifications set forth with respect to Rules 702 and 403.

A third problem concerning the reliability of expert testimony is when the expert attempts to base testimony on an insufficient factual basis. If the facts are otherwise inadmissible, Rule 703

---

298. State v. Percy, 146 Vt. 475, 483, 507 A.2d 955, 960 (1986).

299. State v. Gokey, 154 Vt. 129, 133, 574 A.2d 766, 768 (1990).

300. *Id.* at 134-35, 574 A.2d at 768-69.

301. *Id.* at 134-37, 574 A.2d at 768-70; *see supra* text accompanying notes 241-42.

requires that the expert reasonably rely on inadmissible facts before they can be utilized in forming an opinion.[302] The federal courts have relied often on this requirement to remove the linchpin from the expert's opinion in toxic tort cases.[303]

If the case particular facts have been admitted into evidence, a court must scrutinize the expert's reasoning process, as the court did with respect to use of victim statements in *Gokey*. Such an analysis presumably would be undertaken in light of the factors suggested by the underlying theory and would resort to Rules 702 and 403. Given the complexity of such an analysis, it seems unlikely that a court would be eager to second-guess a qualified expert who utilizes a reliable theory and who applies facts that pass muster under the rules of evidence. A court could, however, exclude the opinion when other experts appear to agree that the opinion or reasoning is unreliable, or does not represent a consensus of experts.

CONCLUSION

The reported Vermont cases do not reflect the alleged widespread abuse of expert testimony often described by the literature,[304] perhaps because the supreme court has been sensitive to potential abuse of an overly broad relevance model in its approach to Rules 702 through 705. The court, however, may be required to rethink its minimalist approach to expert qualifications and encourage the trial courts to scrutinize an expert's qualifications in light of the proposed testimony. If the Vermont Supreme Court is confronted with an increase in unreliable expert testimony, the court should consider adopting amendments similar to the proposed amendments to Federal Rule of Civil Procedure 26 and Federal Rule of Evidence 702.

As the discussion of the Vermont cases, many of which involved an attorney's failure to make a proper objection, and recent federal developments indicate, the analysis of expert issues is difficult. The attorney must carefully analyze all the issues

---

302. *See supra* notes 83-88 and accompanying text.

303. *See* ROSSI, *supra* note 2, at 53-76.

304. *See* BERGER, *supra* note 295, at 15-31 (noting Vermont cases have not involved experts with inadequate expertise); Gross, *supra* note 2.

raised by the several rules in light of the material issues in the case. The analysis will change as the courts grapple with a host of concerns implicated by expert evidence and if the proposed rules spawned by these concerns are adopted. In light of uncertainties and the considerable discretion accorded to the trial court concerning expert evidence, the attorney must be thoroughly conversant with the issues in advance of trial. The attorney must make appropriate objections and offers of proof to the trial judge, preferably in the context of in limine motions. To litigate successfully, the attorney must become a serious student of developments in expert evidence law.