BY MARC FERNICH

Expert and Lay Opinion Under Federal Rules of Evidence

One of the most frequently litigated yet least understood aspects of criminal trial practice involves the interplay between expert and lay opinion testimony under the Federal Rules of Evidence. This article examines the parallels and distinctions between the two, offering basic tips for navigating what the U.S. Court of Appeals for the Second Circuit has called a "tangled" legal "thicket."[1]

The admissibility of lay and expert testimony is governed by Fed. R. Evid. 701-05. Under Rule 701, a lay witness—one lacking "scientific, technical or other specialized knowledge"—may give an opinion when two primary conditions are met. First, the opinion must be "helpful" to the jury's understanding a witness's testimony or material issue in the case. Second, the opinion must be based solely on the witness's own perception—shorthand for the familiar requirement of personal knowledge or observation.

Conversely, if a proffered opinion rests in any way on scientific, technical or other specialized knowledge, it must satisfy the strictures of *Daubert v. Merrell Dow Pharms., Inc.*,[2] as codified in the 2000 amendments to Fed. R. Evid. 702, namely, the twin criteria of reliability and relevance. Crucially, this sort of testimony also entitles the defense to expanded pretrial discovery under Fed. R. Crim. P. 16 and Fed. R. Evid. 705.

What, then, is the "fundamental"[3] difference between lay and expert testimony? Though the rules themselves draw no "definitive distinction,"[4] the former requires a foundation of firsthand knowledge—that which the witness perceives through his own senses and observations. In contrast, an expert may base his opinion on any information "reasonably relied upon by experts in the particular field,"[5] including, most vitally, otherwise inadmissible hearsay. Defense counsel should take care that the government respects this distinction, lest prosecutors dress their experts in "lay witness clothing"[6] to (a) skirt exacting reliability scrutiny under *Daubert* and Rule 702 and (b) evade broad notice and disclosure mandates.

Shared Improprieties

Despite their elusive discrepancies, and given their fluid contours, it is perhaps unsurprising that expert and lay opinion testimony also have much in common, particularly in terms of what exceeds permissible bounds. Thus, especially with regard to expert testimony, vigilant defense counsel should be aware of several recurring pitfalls:

• ***Legal Conclusions and Instructions Prohibited.*** As the Second Circuit has long recognized, government witnesses, lay and expert alike, may not express legal conclusions or presume to instruct the jury on the applicable law. Because it inappropriately invades the judge's domain, such testimony is unhelpful, inadmissible and should be excluded.

As a corollary, the Second Circuit has repeatedly warned against prosecution witnesses couching defendants' conduct in charging or statutory language indicating guilt. For example, the court vacated a stock fraud conviction where a government expert, an SEC investigator, tracked the statutes and regulations in issue by using defined terms like "manipulation" and "scheme to defraud."[7] In light of this precedent, trial counsel should be alert to government witnesses mimicking statutory and charging language to describe the criminal activity alleged, lodging appropriate objections and moving to strike any offending testimony.

• ***Ultimate Factual Conclusions Sometimes Proscribed.*** A related problem arises when a government witness seeks to opine on a factual question rather than a legal one. Though Rule 704(a) purports to allow such "ultimate issue" testimony, the situation becomes "troublesome,"[8] and defense counsel should be "wary,"[9] when the testimony's dominant purpose is to opine on the defendant's guilt or innocence, the central issue the jury is called on to determine. Such testimony merely tells the jury what result to reach, usurping their exclusive fact-finding function.

Thus, while a law enforcement agent may testify about the general structure and operations of mafia families and drug organizations,[10] the prosecutor may not suggest that the defendant must be guilty because his behavior matches the model the expert posits. This ploy, amounting to illicit and unfair bolstering, is both impermissible and intolerable.

'Cruz' and 'Castillo'

In *United States v. Cruz*, for example, the Second Circuit voided a narcotics conviction where the prosecutor argued in summation that a Drug Enforcement Agency agent's testimony about "how drug operations are run in this particular area ... is precisely what [government fact witness] LaBoy described to you as what [defendant] Bonafacio was doing...."[11] And in *United States v. Castillo*,[12] the court likewise reversed where the prosecutor elicited expert testimony about drug dealers' typical behavior —specifically, using guns and forcing customers to snort cocaine to weed out undercover officers—only to urge that the defendants were guilty because they did just that. In each case, the court cautioned the government against bolstering fact witness testimony by claiming that it fits or mirrors an "expert's description of [overall] patterns of criminal conduct."[13]

Finally, as established in *United States v. Scop*, a separate form of vouching—an expert's testifying that he believes a fact witness truthful—is equally inappropriate. In *Scop*, the government's expert based his stated conclusions not on personal knowledge, but on his impression of the testimony and credibility of other witnesses. Finding that this tack improperly trenched on the jury's sole province, the court upset the defendant's conviction, declaring:

> [T]estimony by one witness concerning the credibility of other testimony is objectionable in light of the presumption that the trier of fact is the best evaluator of credibility. Such testimony is thus not helpful to the trier of fact and is likely to be prejudicial.
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Continued on page 5

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1. *United States v. Dukagjini*, 326 F3d 45 (2d Cir. 2003). This article was written be the Second Circuit issued its recent decisio *United States v. Kaplan*, No. 05 5531 CR, __ __, 2007 WL 1087270 (2d Cir. April 11, 2007 instructive opinion on point to which the re s commended.
2. 509 US 579 (1993).
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4. Ibid. §701.03[4][b].
5. Fed. R. Evid. 703.
6. *Bank of China, New York Branch v. NBM* 359 F.3d 171, 181 (2d Cir. 2004) (citation an ternal quotes omitted).
7. *United States v. Scop*, 846 F.2d 135, 139 Cir.), modified on other grounds, 856 F.2d 5 Cir. 1988).
8. Weinstein §704.04[1].
9. *United States v. Garcia*, 413 F.3d 201, 210 Cir. 2005) (citation and internal quotes omit
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11. 981 F.2d 659, 663 (2d Cir. 1992).
12. 924 F.2d 1227 (2d Cir. 1991).
13. *Cruz*, 981 F.2d at 663-64.
14. 846 F.2d at 142-43 (citations omitted).
15. *Dukagjini*, 326 F.3d at 53.
16. Ibid. at 54, 59.
17. *United States v. Grinage*, 390 F.3d 746, 51 (2d Cir. 2004).
18. *Dukagjini*, 326 F.3d at 53.
19. *Garcia, 413 F.3d at 215.*
20. *Dukag*jini, 326 F.3d at 53-55.
21. *Grinage*, 390 F.3d at 749-50.
22. Ibid. at 750.
23. Ibid.
24. *Dukagjini*, 326 F.3d at 55-56.
25. Ibid. at 52.

CALENDAR

Continued from page 2

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'Grinage'

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BY MARC FERNICH[1]

Minding the Personal Knowledge Gap:
Expert and Lay Opinion Testimony under the Federal Rules of Evidence

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Essentials of Expert and Lay Opinion Testimony

The admissibility of lay and expert testimony is governed by Fed. R. Evid. 701-05. Under Rule 701, a lay witness – one lacking "scientific, technical or other specialized knowledge" – may give an opinion when two primary conditions are met. **First**, the opinion must be "helpful" to the jury's understanding a witness's testimony or material issue in the case. **Second**, the opinion must be based *solely* on the witness's own perception – shorthand for the familiar requirement of personal knowledge or observation.

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[1] **Marc Fernich** practices criminal and civil law in New York.

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[3] 509 U.S. 579 (1993).

[4] 4 Jack B. Weinstein & Margaret A. Berger, *Weinstein's Federal Evidence*, § 701.03[1] (Joseph M. McLaughlin, ed., Matthew Bender 2d ed. 2007) ("Weinstein").

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[11] *See, e.g., United States v. LoCascio*, 6 F.3d 924, 937 (2d Cir. 1993); *Garcia*, 413 F.3d at 216. To the extent the agent's knowledge comes from testimonial hearsay – *e.g.*, interviews with cooperating witnesses – counsel should object under the Sixth Amendment as recently re-envisioned in *Crawford v. Washington*, 541 U.S. 36 (2004). Neither the Supreme Court nor the Second Circuit has revisited the admissibility of this type of testimony since *Crawford* revolutionized Confrontation Clause analysis.

[12] 981 F.2d 659, 663 (2d Cir. 1992).

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In sum, as with opinion testimony conveying legal conclusions and instructions, practitioners should be sensitive to bolstering "factual" testimony that transcends designated limits, substituting the witness's judgment for the jury's and simply telling them how to decide the case. Counsel faced with such testimony should promptly object and make a thorough record.

The Dual Role Dilemma

A discrete and peculiarly vexing issue may ensue when a single witness – usually the case agent – endeavors to offer both expert *and* lay opinion testimony. Though not inherently wrong, this practice poses heightened risks of prejudice and jury confusion. For as the Second Circuit has noted, "[c]ase agent experts" may easily blur their "expert opinions and the facts of the case."[16] In such circumstances, jurors will find it difficult to discern whether the agent is properly basing his "expert conclusions" on "his general experience and reliable methodology," or relying improperly on his knowledge of the entire investigation.[17] And in turn, this conflation makes it hard to gauge the agent-witness's credibility – the jury's principal duty.

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15 846 F.2d at 142-43 (citations omitted).

16 *Dukagjini*, 326 F.3d at 53.

17 *Ibid.* at 54, 59.

In a spate of recent rulings, the Circuit has identified myriad "concerns"[18] surrounding such hybrid testimony. **First**, when a case agent functions as a government expert, the prosecutor cloaks him with an aura of special reliability and authority – one that unjustifiably enhances his credibility when "testifying [as to] factual matters from first-hand knowledge."[19] Concomitantly, this aura may create a perception that the agent has access to extra-record information, leading the jury to "improperly defer"[20] to his opinion.

Second, there is a palpable danger that testifying case agents will stray from the legitimate scope of their expertise – say, interpreting putative drug jargon on surveillance tapes – to express sweeping conclusions about the general meaning of conversations and the nature of the defendant's criminal activity. To that extent, the agent-expert essentially serves as a "summary witness," rehashing "an investigation by others that is not part of the record," covertly augmenting "the testimony of [] cooperating co-defendants" and illicitly infringing the jury's "exclusive function."[21]

'Grinage'

The Court of Appeals recently distilled these teachings in *United States v. Grinage*. In that case, the Circuit found *Dukagjini* error where a case agent went beyond interpreting code – a proper subject of expert testimony under Rule 702 – to summarize his own *beliefs* about the defendant's conduct, a matter not *solely* within his personal knowledge and therefore inadmissible as lay opinion under Rule 701.

In *Grinage*, DEA agent Scott Hacker was permitted to interpret three recorded calls for the jury, testifying – on the *totality* of his knowledge about the *entire* investigation – that he subjectively deemed them drug-related. Though never formally qualified as an expert, Hacker explained at length his background and training in narcotics investigations, detailing his experience in the field and his role as case agent.

Citing *Dukagjini*, the defendant asserted on appeal that Hacker's interpretation of the conversations constituted improper "expert testimony based on hearsay ... obtained in the course of the investigation."[22] The Second Circuit agreed and reversed. It found a clear "risk" that Hacker had testified "based upon information not before the jury" and outside the evidence at trial – or at least

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[18] *United States v. Grinage*, 390 F.3d 746, 750-51 (2d Cir. 2004).

[19] *Dukagjini*, 326 F.3d at 53.

[20] *Garcia*, 413 F.3d at 215.

[21] *Dukagjini*, 326 F.3d at 53-55.

[22] *Grinage*, 390 F.3d at 749-50.

that the jury could so infer. Significantly, this was true whether or not Hacker was actually labeled an expert.[23]

Thus, far from being "helpful," Hacker's testimony went beyond permissible lay opinion under Rule 701 by patently usurping the jury's function. Worse, his "aura of expertise and authority" made it more likely that the jury would simply bow to the agent's opinion "rather than rely on [their] own interpretation of the calls."[24] This was especially so because the calls' plain meaning – unambiguous and concededly uncoded – was admittedly within the jury's own common sense.

In short, conscientious counsel are advised to pay close attention to the evolving body of law on the dual role dichotomy, scanning Second Circuit advance sheets for emerging developments. More immediately, counsel should scrupulously ensure that case agents testifying as experts do not "elide"[25] the overriding distinctions among their twin capacities, lapsing into prejudicial bolstering.

Conclusion

The relationship between expert and lay opinion testimony is a famously "opaque"[26] subject – one that presents the practitioner with both challenges and opportunities. By absorbing the fundamentals and mastering them through regular courtroom use, counsel will find themselves richly rewarded.

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[23] *Ibid.* at 750.

[24] *Ibid.*

[25] *Dukagjini*, 326 F.3d at 55-56.

[26] *Ibid.* at 52.