Expert Qualifications: Traps for the Unwary

Paul C. Giannelli
FORENSIC SCIENCE
EXPERT QUALIFICATIONS: TRAPS FOR THE UNWARY

Paul C. Giannelli*

Introduction

The importance of expert testimony in criminal practice cannot be overstated. One study reported: "About one quarter of the citizens who had served on juries which were presented with scientific evidence believed that had such evidence been absent, they would have changed their verdicts—from guilty to not guilty." Of course, the quality of the expert testimony received at trial depends almost entirely on the quality of the witnesses who testify as experts. This article examines some of the pitfalls associated with the qualifications of expert witnesses.

Federal Rule 702

Federal Evidence Rule 702 provides that a witness may qualify as an expert by reason of "knowledge, skill, experience, training, or education." Rule 104(a) entrusts the trial judge with determining the qualifications of experts and that decision is reviewable only for an abuse of discretion. Dean Wigmore wrote that the witness's expertise "may have been attained, so far as legal rules go, in any way whatever; all the law requires is that it

---

* Albert J. Weatherhead III & Richard W. Weatherhead Professor of Law, Case Western Reserve University. This article is based in part on P. Giannelli & E. Imwinkelried, Scientific Evidence (3d ed. 1999). Reprinted with permission.


2 Fed. R. Evid. 702: "If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise."

3 Fed. R. Evid. 104(a): "Preliminary questions concerning the qualification of a person to be a witness . . . shall be determined by the court . . . ."

4 See Hamling v. United States, 418 U.S. 87, 108 (1974) ("[T]he District Court has wide discretion in its determination to admit and exclude evidence, and this is particularly true in the case of expert testimony."); Salem v. United States Lines Co., 370 U.S. 31, 35 (1962) ("The trial judge has broad discretion in the matter of the admission or exclusion of expert evidence, and his action is to be sustained unless manifestly erroneous.").

249
should have been attained.'

The federal drafters expressed it this way: "'[T]he expert is viewed, not in a narrow sense, but as a person qualified by 'knowledge, skill, experience, training or education.' Thus within the scope of the rule are not only experts in the strictest sense of the word, e.g. physicians, physicists, and architects, but also the large group sometimes called 'skilled' witnesses, such as bankers or landowners testifying to land values.'"

**Rules of Thumb**

A number of basic points are not in dispute. First, because "the rule uses the disjunctive, a person may qualify to render expert testimony in any one of the five ways listed: knowledge, skill, experience, training, or education." In other words, the "[q]ualifications which may satisfy the requirements of Evid. R. 702 are multitudinous. . . . [T]here is no 'degree' requirement, per se. Professional experience and training in a particular field may be sufficient to qualify one as an expert."

Second, an expert need not be an "outstanding practitioner in the field in which he professes expertise." Indeed, an "expert need not have certificates of training, nor memberships in professional organizations . . . ."

Third, comparable qualifications between experts testifying on the same issue are not required: "[O]ne expert need not hold the exact same set of qualifications to rebut another expert’s testimony. . . . This Court need not analyze, as Defendant contends it should, whether a psychologist or psychiatrist is more qualified to testify as to the psychological condition of a patient at the time of the offense." If a battle of the experts develops, "[c]omparisons between [an expert’s] professional stature and the stature of witnesses for an opposing party may be made by the jury . . . . But the only question for the trial judge who must decide whether or not to allow the jury to consider a proffered expert’s opinions is, ‘whether his knowledge of the subject matter is such that his opinion will most likely assist the trier of fact in arriving at the truth.’"

Fourth, an expert’s qualifications should be based on the nature and extent of the witness’s knowledge and not on the witness’s "title." In *Jenkins v. United States* the D.C. Circuit reversed a trial court’s ruling that psychologists were not qualified to testify on the issue of insanity because they lacked medical training. "[W]e must examine the reality behind the

---

8 2 J. Wigmore, Evidence § 556, at 751 (Chadbourn rev. 1979).
9 Fed. R. Evid. 702 advisory committee’s note.
7 Kopf v. Skynr. 993 F.2d 374, 377 (4th Cir. 1993).
10 Id.
title 'psychologist.' On one hand, many psychologists would not be qualified to express an opinion on insanity because their "training and experience may not provide an adequate basis for their testimony." On the other hand, other psychologists, because of their training and experience in the diagnosis and treatment of mental disorders, may be qualified.

**Criminals as Experts**

An interesting example of experience as a qualification for expert testimony involves the use of criminals. For example, in *United States v. Johnson* an experienced marijuana smoker was permitted to testify that certain marijuana came from Colombia; the witness "had smoked marijuana over a thousand times . . . . He based his identification upon the plant's appearance, its leaf, buds, stems, and other physical characteristics, as well as upon the smell and the effect of smoking it." In *United States v. Williams* the witness testified about a street gang's drug code. The court wrote: "There was no pretense that he was impartial, or a member of a learned profession. Neither condition is required to qualify a person as an expert witness under the current rules of evidence . . . . There is not even a paradox in the suggestion that the biggest experts on crime are, often, criminals."

**Declaring a Witness an Expert**

In contrast to existing practice, the Kentucky Supreme Court has taken the position that the trial judge should not declare the witness an expert in the presence of the jury. In *Luttrell v. Commonwealth* the court stated: "Great care should be exercised by a trial judge when the determination has been made that the witness is an expert. If the jury is so informed such a conclusion obviously enhances the credibility of that witness in the eyes of the jury. All such rulings should be made outside the hearing of the jury and there should be no declaration that the witness is an expert."

**Stipulations**

Frequently, opposing counsel offers to stipulate to the qualifications of

---

14 Id.
15 Id.
16 575 F.2d 1347 (5th Cir. 1978), cert. denied, 440 U.S. 907 (1979).
17 Id. at 1360.
18 81 F.3d 1434 (7th Cir. 1996), cert. denied, 522 U.S. 1062 (1998).
19 Id. at 1442 ("You don't have to be a scientist or use the methodology of science, or even be an honest, decent, law-abiding citizen, in order to possess specialized knowledge about a criminal activity.").
20 Id. at 1441.
21 952 S.W.2d 216 (Ky. 1997).
22 Id. at 218.

251
an expert. These offers are often rejected because the stipulation deprives the jury of information that makes the expert’s opinion more persuasive. In *State v. Colwell*\(^2\) the trial court required the defense counsel to accept the prosecution’s offer to stipulate to the qualifications of the defense pathologist. Consequently, the jury was deprived of learning the credentials of the expert, who had a “national reputation” in the field of forensic pathology. In contrast, eleven pages of the transcript were needed to record the qualifications of the prosecution’s expert. The Kansas Supreme Court reversed: “We conclude that an offer by the State to stipulate to the qualifications of an expert witness called by the defendant is merely an offer unless accepted by the defendant. Absent such acceptance, the defendant has the right to present the witness’ qualifications to the jury.”\(^2\)

**Licensure**

Although some professions require licensing by the state, licensing in a field is usually not determinative in qualifying a witness as an expert—but this may be changing. In *People v. West*\(^2\) an Illinois appellate court held that a witness not licensed to investigate fires under a state statute was not qualified to testify about the cause of a fire in an arson prosecution. Similarly, in *Soliz v. State*\(^2\) a Texas appellate court ruled a police officer unqualified as an hypnotist under a statute that prohibited hypnotic interviews by the police unless the officer had completed a training course approved by a state commission and passed an examination designed to test the officer’s knowledge of investigative hypnosis.

**Certification**

Certification by a professional peer group may also be a trend in the future.\(^2\) There are a number of forensic science organizations that certify its members, and this is an important development. It is not, however, without problems. One of the factors cited by the United States Supreme Court in its “junk science” case, *Daubert v. Merrell Dow Pharmaceuticals, Inc.*\(^2\) was the “existence and maintenance of standards” in a field. The *Daubert* Court cited *United States v. Williams*,\(^2\) a voiceprint case, on this point. In *Williams* the Second Circuit cited the certification procedures of the International As-

---

\(^2\) 790 P.2d 430 (Kan. 1990).

\(^2\) Id. at 434.

\(^2\) 636 N.E.2d 1239, 1245 (Ill. App 1994).

\(^2\) 961 S.W.2d 545, 549 (Tex. App. 1997) (citing Tex. Gov’t Code Ann. § 415.036(a) (Vernon 1990)).

\(^2\) See questioned documents cases at notes 52–54 and accompanying texts.


\(^2\) 583 F.2d 1194, 1198 (2d Cir. 1978), cert. denied, 439 U.S. 1117 (1979).
sociation of Voice Identification. The problem with the Supreme Court’s citation of Williams is that a National Academy of Sciences report on voiceprints concluded that this was not a scientific group; this Association “as presently constituted does not possess the broad base of representation usually considered appropriate and perhaps essential for a national certifying board.”

This group was composed of law enforcement officers who were trained to do voice identifications. Only one person in the group, Dr. Tosi, who conducted the initial voiceprint experiments at Michigan State University, was a scientist.

Moreover, the certification procedures should be scrutinized. For example, an article in The Wall Street Journal, entitled “The Making of an Expert Witness: It’s in the Credentials,” discusses the American College of Forensic Examiners (ACFE), which makes $2.2 million a year certifying experts. The roots of this organization, according to its founder, can be traced to the Daubert decision, which (paradoxically) was intended to tighten the standards for expert testimony. This organization appears to be a “certification” mill. It cost $350 to get certified—just dial 1-800-4A-Expert. Professor Carol Henderson applied the term “checkbook credentials” to this type of certification procedure. Nevertheless, the “ACFE is the biggest credentialing body in forensic science and the only one that credentials experts in many specialties. It has 13,000 members and nearly 17,000 board-certified diplomates.”

Brewer v. State, a bite-mark case, raised a different issue. In that case, the defense challenged the qualifications of Dr. Michael West because he had been suspended by the American Board of Forensic Odontology and had resigned from the International Association of Identification and the American Academy of Forensic Sciences while under investigation. The court rejected the challenge, pointing out that West’s “fiasco” in a prior case involved his “blue light” technique, through which he claimed to be able to perfectly match a bruise on an accused’s palm with the murder weapon. Moreover, West had testified in seven cases after his suspension, and the defense expert conceded that West was qualified and that his direct comparison technique was an acceptable method.

---

33 Hansen, “Expertise to Go,” 86 ABA J. 44, 45 (Feb. 2000).
34 Id. at 46.
37 725 So. 2d at 125–26.
In a surprising number of cases experts have lied about their credentials.\textsuperscript{38} For example, in one case a serologist testified that he had a master's degree in science, "whereas in fact he never attained a graduate degree."\textsuperscript{39} In another case the death penalty was vacated when it was discovered that a prosecution expert, who "had testified in many cases," had lied about her professional qualifications: "she had never fulfilled the educational requirements for a laboratory technician."\textsuperscript{40} Moreover, a psychologist was convicted of perjury for claiming he had a doctorate during the Ted Bundy trial.\textsuperscript{41} Other cases are listed in the margin.\textsuperscript{42}

Professor Starrs has written comprehensively on this topic, noting that one firearms expert took some credit for "the development of penicillin, the 'Pap' smear, and to top it all off, the atomic bomb."\textsuperscript{43} Professor Saks insightfully asks: "But if people are willing to lie about something [credentials] on which it is so easy to be caught, how common and how damaging to the fact-finding process are misrepresentations about the substance of forensic science: fabrication of findings, exaggeration of findings, withholding of exculpatory findings, and other knowing attempts to create in the fact finder an impression that is not supported by the scientific evidence?"\textsuperscript{44}

In a recent case in Cleveland, a thief and forger testified as a questioned documents examiner. When his background was revealed by a newspaper reporter, he was charged and convicted of perjury because he had lied about his credentials. When the lawyer who called this witness was questioned by the press, he reportedly stated: "It's not my job to check out people's credentials."\textsuperscript{45} But if it is not the attorney's responsibility, whose is it?

\textsuperscript{38} See generally American Academy of Forensic Sciences, By Laws, art. II (code of ethics and conduct) ("Every member of the AAFS shall refrain from providing any material misrepresentation of education, training, experience or area of expertise.").


\textsuperscript{40} Commonwealth v. Mount, 257 A.2d 578, 579 (Pa. 1969).

\textsuperscript{41} Kline v. State, 444 So.2d 1102 (Fla. Ct. App. 1984).

\textsuperscript{42} E.g., Maddox v. Lord, 818 F.2d 1058, 1062 (2d Cir. 1987) (serologist testified falsely about his academic credentials); People v. Alfano, 420 N.E.2d 1114, 1116 (Ill. App. 1983) (arson expert testified falsely about his academic credentials); State v. Elder, 433 P.2d 462 (Kan. 1967) (lab technician convicted of perjury for misrepresenting his educational background); State v. DeFronzo, 394 N.E.2d 1027, 1030 (Ohio C.P. 1978) (lab analyst pleaded guilty to 8 counts of falsification for misstating his academic credentials).


\textsuperscript{45} Ewinger, "Thief, forger key witness for ex-boss of CMHA," Cleveland Plain Dealer, Sept. 25, 1999.
Lack of Valid Experience

It was once shocking, but now commonplace, to find experts who are totally unqualified to testify. Some courts seem to follow the old trial lawyer's adage: "If the witness comes from out-of-town and carries an attaché case, the witness is an expert." For instance, a study of drug testing laboratories in the 1970s discovered the following drug "expert," who had 43 years of experience and more than 2500 court appearances: "[The expert] admitted that not only did he not have a college degree, but that he had never even finished high school. He claimed that heroin was an alkaloid, which it is, but did not remember what an alkaloid was. He could not draw the structure of heroin or benzene, one of the commonest and simplest organic molecules. . . . In addition, he could not explain any single chemical reaction about which he had testified."\(^\text{46}\)

Another example involved neutron activation analysis (NAA). In *Ward v. State*\(^\text{47}\) the prosecution expert was employed by a city crime laboratory. An important article on NAA questioned whether this person would have the proper qualifications in nuclear physics and analytical chemistry necessary to conduct this type of analysis.\(^\text{48}\) Also, the qualifications necessary to conduct NAA differ from the qualifications needed to interpret the results; the "qualifications of the expert as an analytical chemist do not necessarily establish his competence to interpret the legal relevance of his measurements."\(^\text{49}\)

In *State v. Barnes*\(^\text{50}\) the testimony of a defense expert concerning a pellet dispersion pattern test was excluded because the expert was not qualified. He "became a gunsmith after completing a correspondence course. He had never received training in forensic science, firearms identification or ballistics. He had never testified as an expert in any area. He worked as a sales clerk at a hardware store and in his own gun repair business."\(^\text{51}\)

Cases involving questioned documents examiners also illustrate this point. In *United States v. Bourgeois*,\(^\text{52}\) the Fifth Circuit Court of Appeals upheld a trial court's exclusion of the testimony of an "expert" who was not a member of the American Board of Forensic Document Examiners, who practiced graphotherapy in addition to handwriting comparison, and who acquired a masters degree in graphoanalysis and a Ph.D. in metaphysics and

\(^{46}\) Stein, Laessig & Indriksons, "'An Evaluation of Drug Testing Procedures Used by Forensic Laboratories and the Qualifications of Their Analysts'" 1973 Wis. L. Rev. 727, 728.
\(^{49}\) Id. at 1031.
\(^{50}\) 597 So. 2d 1109 (La. App. 1992).
\(^{51}\) Id. at 1112.
\(^{52}\) 950 F.2d 980, 986 (5th Cir. 1992).
religion by *correspondence*. Although other cases are in accord,⁵³ there are some noteworthy exceptions. Indeed, one dissenting judge stated in exasperation: "If this witness has indeed testified over 300 times as an expert on discovering spurious handwriting as she claimed, it is an astonishing indictment on the gullibility of lawyers and judges."⁵⁴

Perhaps the best (worst?) examples involve hypnosis "experts." In one Wyoming case,⁵⁵ even the prosecutor had difficulty stating his expert's qualifications. The majority held that the hypnotist did not need any qualifications. The dissent replied:

> It follows, therefore, that a hobo passing through town or a derelict in the county jail could hypnotize a potential witness, and the witness' testimony would be admissible at trial . . . . There is a man in Oakland, California, who is the dean and lone "professor" at "Croaker College." For the sum of $150 each, this man trains frogs to jump . . . . As part of his rigid training curriculum, the "professor" claims that he hypnotizes the frog; while they are in their hypnotic trance, he plays an attitude-improvement tape to them. Under our present standards the dean of "Croaker College" would be over-qualified as a hypnotist.⁵⁶

In a subsequent case, the majority described a hypnotist as a "non-professional with meager training in hypnotic techniques."⁵⁷ From the dissent we learn that the "meager training" was a 32-hour course; the hypnotist was also a janitor at Pacific Power and Light Company.⁵⁸

---

⁵³ E.g., State v. Livanos, 725 P.2d 505, 507 (Ariz. App. 1986) (The record revealed that "he had never testified in a superior court in Arizona, that the last time he had testified in a superior court was in Indiana in 1969, that he belonged to an organization called World Association of Document Examiners, . . . whose admissions procedures were very informal, but that he was not certified by the American Board of Forensic Document Examiners."); Carroll v. State, 634 S.W.2d 99, 102 (Ark. 1982) ("He had taken a correspondence course from the International Graphoanalysis Society of Chicago, which had certified him. . . . In his twelve years of alleged experience 'in questioned document work' he had testified as an expert only once, in Clinton, Iowa, and had 'worked with' law enforcement officers in two Arkansas counties, but the cases did not come to trial. . . . He was not a member of the Academy of Forensic Sciences."); People v. Tidwell, 706 P.2d 438, 439 (Colo. App. 1985) (excluding testimony of a graphoanalyst because not certified by American Board of Document Examiners); Gaves v. State, 547 N.E.2d 881, 882 (Ind. App. 1989) ("The witness testified she was a graphoanalyst, a graduate of the International Graphoanalysis School in Chicago, a member of the International Graphoanalysis Society and the World Association of Document Examiners, and had previously testified as an expert on four occasions.").

⁵⁴ Hooten v. State, 492 So. 2d 948, 958 (Miss. 1986) (dissenting opinion).


⁵⁶ Id. at 105–06, 106 n. 3.


⁵⁸ Id. at 289 n. 1.
Testifying Beyond Expertise

One of the most common problems concerns experts who testify beyond their expertise. As Professor Maguire noted a half century ago, "It goes without saying that an expert qualified to testify upon one topic may be completely unqualified to testify about another as to which he lacks special knowledge, skill, experience, or training, but some applications of this principle take the unwary by surprise." There is no shortage of examples.

A series of bite-mark cases illustrate this point. In State v. Garrison the expert was permitted to state his conclusion in terms of probability theory, testifying that "there is an eight in one million probability that the teeth marks found on the deceased's breast were not made by appellant." Such a statement appears to be without scientific foundation. The expert did not perform any of his own mathematical calculations, was unaware of the formula used to arrive at that figure other than that it was "computerized," and was ignorant of the statistical weight assigned to each variable used in the equation. The dissent commented: "While Dr. Campbell may have a great deal of expertise in the actual comparison techniques of bite-mark identification, he is totally out of his field when the discussion turns to probability theory."

In Commonwealth v. Henry the expert went beyond a comparison and characterized a bite mark as "sadistic" rather than a "sexual" or "fighting" mark. In his view, the "essence of the distinction is that fighting bite marks are less well defined because they are done carelessly and quickly, whereas attacking and sadistic bite marks are made slowly and produce a clearer pattern." According to the expert, "the sadistic bite mark is one of the most well defined. Sexual bite marks are also well defined, but usually have

---

62 Id. at 566.
63 "As indicated in the majority opinion, Dr. Campbell was unsure as to precisely where he obtained the figure 'eight in one million.' My independent research reveals that of the two treatises which he could name as containing statistical information, only one lists any figures on the uniqueness of a bite-mark. Rather than the eight in one million figure vouched for by Dr. Campbell, though, that treatise contains the figure eight in one hundred thousand." Id. at 568–69. "Moreover, the applicability of even an eight in one hundred thousand figure to the defendant is dubious." Id. at 569 n.1.
64 Id. at 568. See also McCord, "A Primer For the Nonmathematically Inclined on Mathematical Evidence in Criminal Cases: People v. Collins and Beyond," 47 Wash. & Lee L. Rev. 741, 801 (1990) ("A blistering and convincing dissent [in Garrison] showed the probability to be without foundation and thus unfairly prejudicial.").
66 Id. at 934.
a red center, produced by sucking tissue into the mouth.'\textsuperscript{66} The testimony characterizing the mark as a "sadistic" mark was relevant on the issue of whether the homicide was committed by means of torture. It seems doubtful that a bite mark can be characterized as "sexual" or "fighting" by an examination of the mark alone. Surrounding circumstances, including an autopsy, may permit such a characterization.

### Technicians

One illustration of an expert testifying beyond his expertise arises with technicians. Courts must "differentiate between ability to operate an instrument or perform a test and the ability to make an interpretation drawn from use of the instrument."\textsuperscript{67} For example, "an officer may administer a breath test even though he is not otherwise qualified to interpret the results."\textsuperscript{68}

Similarly, in a case involving the horizontal gaze nystagmus test for intoxication, one court remarked: "[The officer's] opinion that appellant was under the influence of alcohol, to the extent it was based on the nystagmus test, rests on scientific premises well beyond his knowledge, training, or education. Without some understanding of the processes by which alcohol ingestion produces nystagmus, how strong the correlation is, how other possible causes might be masked, what margin of error has been shown in statistical surveys, and a host of other relevant factors, [the officer's] opinion on causation, notwithstanding his ability to recognize the symptom, was unfounded."\textsuperscript{69}

### The Supervising Expert

A different issue arises when the testifying expert is qualified (perhaps eminently so) but the witness did not conduct the actual examination. In short, the wrong expert is on the witness stand. For instance, in \textit{Reardon v. Manson}\textsuperscript{70} a toxicologist testified about the identity of a seized substance (marijuana) based on tests performed by chemists working under his supervision. The Second Circuit upheld the practice: "Expert reliance upon the output of others does not necessarily violate the confrontation clause where the expert is available for questioning concerning the nature and reasonable-

\textsuperscript{66} Id.


\textsuperscript{70} 806 F.2d 39 (2d Cir. 1986), cert. denied, 481 U.S. 1020 (1987).
ness of his reliance. . . . This is particularly true where the defendants have access to the same sources of information through subpoena or otherwise."

The court, however, passed over a significant problem. In 1983 Saks and Duizend published a study on the use of scientific evidence. Part of their investigation involved case studies of different forensic techniques. The drug case in their study is the Reardon prosecution. They commented: "In this case, the laboratory in question had three doctorate-level toxicologists and twenty-two or twenty-four less-credentialed chemists. The volume of tests performed (about 20,000 annually) left the toxicologist an average of only a few minutes per day to attend to any given test. Is this adequate involvement to justify testifying to the findings?" In other words, the toxicologist was "supervising" fifty cases a day. As the district judge had discerned: "[I]t strains credulity to assert that Dr. Reading could personally 'supervise' some fifty of these tests daily."

**Lay Testimony Distinguished**

There is sometimes an overlap between lay and expert testimony. Both lay and expert witnesses, for example, are permitted to state opinions concerning handwriting and sanity. One court even permitted lay witnesses to respond to hypothetical questions. There is, however, an important difference between these two types of opinions: "[T]he lay witness is using his opinion as a composite expression of his observations otherwise difficult to state, whereas the expert is expressing his scientific knowledge through his opinions." The Fifth Circuit put it this way:

Unlike expert opinion, where the opinion is the product of applying special skill in some art, trade, or profession acquired apart from the case, lay opinion expresses a conclusion drawn from observations in circumstances where it is impractical, if possible at all, to recount the observed "factual" components of the opinion. The common illustrations are an expression of opinion by a lay observer of a car's speed or a person's expression or emotional state (he was furious). Because these opinions draw upon the facts in the case itself, they are more easily confronted

---

71 Id. at 42.
74 Fed. R. Evid. 701: "If the witness is not testifying as an expert, the witness' testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness and (b) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue."
75 The better terminology is lay and expert "testimony" rather than "witnesses" because one witness may be both a "fact" witness and an expert witness.
76 See United States v. Ranney, 719 F.2d 1183, 1188–89 (1st Cir. 1983) (investors permitted to answer a number of hypothetical questions to establish that they would not have invested but for the representations made; not being asked as experts).
than are expert opinion, whose source is often extraneous to the case at trial. As such, receipt of lay opinion is much less likely to be prejudicial, especially where its role is cumulative and is not essential to the sufficiency of the evidence, as here.\textsuperscript{78}

In some cases lay witnesses cross the line and testify about matters that require expertise.\textsuperscript{79} In other cases, the line between lay and expert testimony becomes blurred. Indeed, the First Circuit has commented: "No longer is lay opinion testimony limited to areas within the common knowledge of ordinary persons. Rather, the individual experience and knowledge of a lay witness may establish his or her competence, without qualification as an expert, to express an opinion on a particular subject outside the realm of common knowledge."\textsuperscript{80} In contrast, other courts lament this development: "[W]ith each new trial day the government pushed to squeeze as much as possible from this 'lay witness.' The result is clear, certainly now, that during [the witness's] two-and-half days on the stand, he wielded his expertise as a bank examiner in a way that is incompatible with a lay witness."\textsuperscript{81}

The distinction between lay and expert testimony should be maintained. As the Supreme Court noted in \textit{Kumho Tires Co. v. Carmichael},\textsuperscript{82} the evidentiary rationale underlying Rule 702 is that the Federal Rules grant experts special latitude unavailable to other witnesses on the assumption that expert testimony has a reliable basis. A proposed amendment to Federal Rule 701, which governs lay opinion testimony, would add language to clarify this distinction.\textsuperscript{83}

Moreover, the distinction between lay and expert testimony is critical in applying other rules. For instance, Federal Rule of Criminal Procedure 16(a)(1)(E) requires pretrial disclosure of a summary of an expert's testimony. Classification of the evidence as lay opinion denies the adverse party the benefit of this rule. As one court has remarked, the prosecution should not "subvert" the expert discovery rule by offering expert opinion on

\textsuperscript{78} United States v. Carlock, 806 F.2d 535, 552 (5th Cir. 1986), cert. denied, 480 U.S. 949 (1987).
\textsuperscript{79} E.g., State v. Flaherty, 605 N.E.2d 1295, 1300 (Ohio App.) ("The average police officer is not sufficiently versed in psychology to render an opinion that a given individual's reaction to stress is normal or abnormal, especially a person as emotionally complex as appellant appears to be"); testifying on whether defendant cried the morning of the murder), app. dismissed, 596 N.E.2d 469 (Ohio 1992).
\textsuperscript{80} United States v. Paiva, 892 F.2d 148, 157 (1st Cir. 1989).
\textsuperscript{81} United States v. Riddle, 103 F.3d 423, 428 (5th Cir. 1997).
\textsuperscript{82} 526 U.S. 137 (1999) ("Rules 702 and 703 grant expert witnesses testimonial latitude unavailable to other witnesses on the 'assumption that the expert's opinion will have a reliable basis .... '").
\textsuperscript{83} Fed. R. Evid. 701 (1998 proposed amendment adding a third requirement—"(c) not based on scientific, technical or other specialized knowledge."). The current rule can be found in note 74 supra.
drug trafficking as lay opinion testimony. In addition, Federal Rule 704(b) prohibits testimony on ultimate issues concerning an accused’s mental condition in criminal cases; this provision does not apply to lay witnesses.

Conclusion

The issues examined in this article are not new. Over a century ago, the Minnesota Supreme Court observed that “[t]here is hardly anything, not palpably absurd on its face, that cannot now be proved by some so-called ‘experts.’” More recently, a federal judge stated that “experts whose opinions are available to the highest bidder have no place testifying in a court of law” and it “is time to take hold of expert testimony in federal trials.”

85 Keegan v. Minneapolis & St. Louis R.R. Co., 78 N.W. 965, 966 (Minn. 1899).
86 In re Air Crash Disaster at New Orleans, 795 F.2d 1230, 1234 (5th Cir. 1986).