

5-1-1988

# The Admissibility of Expert Witness Testimony: Time to Take the Final Leap?

Maury R. Olicker

Follow this and additional works at: <http://repository.law.miami.edu/umlr>



Part of the [Evidence Commons](#)

---

## Recommended Citation

Maury R. Olicker, *The Admissibility of Expert Witness Testimony: Time to Take the Final Leap?*, 42 U. Miami L. Rev. 831 (1988)  
Available at: <http://repository.law.miami.edu/umlr/vol42/iss4/3>

This Article is brought to you for free and open access by Institutional Repository. It has been accepted for inclusion in University of Miami Law Review by an authorized administrator of Institutional Repository. For more information, please contact [library@law.miami.edu](mailto:library@law.miami.edu).

# The Admissibility of Expert Witness Testimony: Time to Take the Final Leap?

I. INTRODUCTION .....	831
II. HISTORICAL PERSPECTIVE .....	834
III. ANALYSIS .....	839
A. <i>Exclusion Based on "Common Knowledge"</i> .....	839
B. <i>Exclusion Based on "Ultimate Issue of Fact" Testimony</i> .....	848
1. THEORY OF THE RULE AND OBJECTIONS TO IT .....	848
2. HISTORY OF THE RULE .....	850
3. FEDERAL CASES UNDER RULE 704 .....	855
C. <i>Exclusion Based on "Conclusion of Law" Testimony</i> .....	862
1. THEORY OF THE RULE .....	862
2. CASE ANALYSIS .....	864
a. Witness Tries to State the Law .....	865
b. Witness States a Factual Conclusion Using Legally Defined Words .....	871
c. Witness States a Conclusion Employing Legal Criteria .....	875
D. <i>Exclusion of Testimony Under Rule 704(b)</i> .....	882
IV. TOWARD A UNIFIED THEORY OF EXCLUSION .....	885
A. <i>Theory of the Final Leap</i> .....	885
B. <i>Source of the Legal Standard</i> .....	892
V. CONCLUSIONS AND RECOMMENDATIONS .....	893

## I. INTRODUCTION

"Objection! The witness is usurping the function of the jury."  
"The witness is encroaching on the role of the court." Attorneys have recited these familiar assertions for years as shorthand ways of calling for the exclusion of expert witness testimony. In more specific variations, litigators have tried to prevent expert witnesses from expressing opinions that jurors were capable of reaching on their own, from offering conclusions that addressed the ultimate issue of fact, from stating the law, or from applying legal standards to the evidence.

Although the viability of these objections in the federal courts was somewhat uncertain under common law, it is tempting to believe that the unresolved questions were settled by the Federal Rules of Evidence. The common notion is that Rules 702 and 704 block objections to expert opinions on issues of fact but that experts may not express opinions on issues of law. This formula approximates but greatly oversimplifies reality. Judges have struggled with the policy implications and limits of the expert witness rules. Old concerns that may not be consistent with the intentions embodied in the new rules have continued to exert noticeable influence. The courts have encountered particular difficulty trying to articulate admissibility

standards for expert opinions that combine elements of fact and law. In short, the truth is much more complex and subtle than the caricature, and it is worthy of investigation.

This Comment discusses the kinds of opinions that may be expressed by expert witnesses and admitted into evidence pursuant to the Federal Rules of Evidence. It attempts to determine: First, the specific principles that guide courts in their decisions to admit or exclude expert opinion at trial; second, whether these principles have been uniformly applied; and third, whether these principles should be modified. The inquiry is limited to situations in which a party argues that an expert's opinion should not be admitted into evidence because the expert would be overstepping his proper role as a witness and interfering with the functioning of the court in its role as the exclusive authority on the law or the jury in its role as the exclusive trier of fact.

Expert testimony and opinion evidence are inextricably linked and considered together in article VII of the Federal Rules of Evidence, but they are not the same thing. The more general of the two areas of discussion, known at common law as the "opinion rule," deals with statements by witnesses that are classified as "opinions" rather than as "facts."<sup>1</sup> Under the Federal Rules of Evidence, opinions may be stated either by lay persons<sup>2</sup> or by experts,<sup>3</sup> although different criteria for admissibility are applied to the two classes of witnesses.

An expert witness was defined at common law as a "man of sci-

---

1. The Federal Rules of Evidence provide that evidence is admitted for the purpose of proving facts:

"Relevant evidence" means 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.

FED. R. EVID. 401. "Evidence which is not relevant is not admissible." FED. R. EVID. 402.

Rules 701 to 705 provide specific conditions for the admission of testimony in the form of opinion. Thus, opinion is implicitly different from facts, and the structure of the Federal Rules of Evidence presumes that the purpose of opinion evidence is to assist the trier of fact in the determination of matters of fact. The premise that opinion testimony is admitted into evidence for the purpose of supporting the determination of facts is also explicitly stated in Rules 701 and 702.

2. FED. R. EVID. 701. Under Rule 701, any witness who "is not testifying as an expert" is a lay witness and may state opinions only if they are (a) "rationally based on the perception of the witness" and (b) helpful to understanding the witness' testimony or determining a fact at issue. *Id.*

3. FED. R. EVID. 702. Rule 702 states:

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.

*Id.*

ence; a person conversant with the subject-matter; a person of skill; a person possessed of science or skill respecting the subject-matter; one who has made the subject upon which he gives his opinion a matter of particular study, practice or observation."<sup>4</sup> The Federal Rules of Evidence define an expert witness as one "qualified . . . by knowledge, skill, experience, training, or education."<sup>5</sup> Experts may testify "in the form of an opinion or otherwise."<sup>6</sup> The advisory committee's note to Rule 702 makes it clear that expert testimony may be factual in nature.<sup>7</sup> In fact, the note encourages expert testimony in "nonopinion form."<sup>8</sup>

It is not clear whether article VII of the Federal Rules of Evidence was intended to break new ground. Judge Jack Weinstein,<sup>9</sup> a leading commentator on the Federal Rules of Evidence, has remarked:

Although Rule 702 is a codification of existing federal case law, it has been pushed to center stage by the innovations in the other rules dealing with expert testimony: Rule 703's expansion of the data on which the expert may rely, Rule 704's abolition of the ultimate issue rule, and Rule 705's loosening of foundational requirements.<sup>10</sup>

Judge George Pratt, Judge Weinstein's colleague on the bench of the United States District Court for the Eastern District of New York, sees article VII more as an effort to consolidate existing case law than to make a revolutionary change:

With little discussion, Congress adopted the opinions rules in nearly the same form as the advisory committee proposed. Such easy acceptance is perhaps understandable since the rules reflect an enlightened, academic view of opinion testimony that dates back

4. B. JONES, *THE LAW OF EVIDENCE IN CIVIL CASES* § 368, at 687 (4th ed. 1938) (quoting *Pridgen v. Gibson*, 194 N.C. 289, 292, 139 S.E. 443, 445 (1927)).

5. FED. R. EVID. 702.

6. *Id.*

7. FED. R. EVID. 702 advisory committee's note, 56 F.R.D. 183, 282 (1973).

8. The note says in part:

Most of the literature assumes that experts testify only in the form of opinions. The assumption is logically unfounded. The rule accordingly recognizes that an expert on the stand may give a dissertation or exposition of scientific or other principles relevant to the case, leaving the trier of fact to apply them to the facts. Since much of the criticism of expert testimony has centered upon the hypothetical question, it seems wise to recognize that opinions are not indispensable and to encourage the use of expert testimony in nonopinion form when counsel believes the trier can itself draw the requisite inference.

FED. R. EVID. 702 advisory committee's note, 56 F.R.D. 183, 282 (1973).

9. Chief Judge, United States District Court for the Eastern District of New York.

10. 3 J. WEINSTEIN & M. BERGER, *WEINSTEIN'S EVIDENCE* ¶ 702[01], at 702-6 (1987) (footnote omitted) [hereinafter J. WEINSTEIN].

some fifty years. The lack of discussion is somewhat surprising, however, when one considers the persistence, frequency, and success of attorneys' objections to opinion testimony since the adoption of the Rules, objections made on the very grounds that Article VII sought to undercut.<sup>11</sup>

The discussion that follows is limited to the subject matter and phrasing of expert witness opinion testimony. It does not deal with objections on grounds relating to the qualification of the witness,<sup>12</sup> the bases on which the expert may rely,<sup>13</sup> or the requirements for disclosure of facts or data underlying expert opinion.<sup>14</sup> It also does not consider objections to testimony regarding the credibility of other witnesses.<sup>15</sup>

Section II of this Comment examines briefly the historical background of opinion evidence and expert witness testimony. The discussion in Section III considers in detail objections to testimony based on the common law rules barring testimony that is within the common knowledge of ordinary persons, testimony that reaches the ultimate issue to be decided by the trier of fact, and testimony that states conclusions of law. It also considers objections based on the statutory rule barring expert witness testimony as to whether a criminal defendant had the mental state constituting an element of a crime or a defense.<sup>16</sup> In Section IV, this Comment proposes a unified theory to explain the underlying bases of judicial decisions that admit or exclude expert opinions. The concluding discussion in Section V supports Judge Pratt's observation that trial practice in this area has not changed to the extent intended by the drafters of the Federal Rules of Evidence,<sup>17</sup> and it suggests a new interpretation of Rule 704 that, if implemented, may result in trial practice that more truly reflects the perceived intention of the drafters.

## II. HISTORICAL PERSPECTIVE

The opinion rule apparently does not have a very long history. Professor John Wigmore observed that traditional English common

---

11. Pratt, *A Judicial Perspective on Opinion Evidence Under the Federal Rules*, 39 WASH. & LEE L. REV. 313, 314 (1982) (footnotes omitted).

12. FED. R. EVID. 702.

13. FED. R. EVID. 703.

14. FED. R. EVID. 705.

15. For a discussion of the admissibility of expert witness opinion testimony relating to the credibility of other witnesses in cases involving the sexual misuse of children, see Comment, *Admissibility of Expert Psychological Testimony in Cases Involving the Sexual Misuse of a Child*, 42 U. MIAMI L. REV. 1033 (1988).

16. FED. R. EVID. 704(b).

17. See *supra* note 11 and accompanying text.

law had no notion that opinion testimony was either proper or improper.<sup>18</sup> Among the well-known English commentators whose writings apparently had nothing to say about the rule were Chief Baron Gilbert<sup>19</sup> and Justice Buller.<sup>20</sup> The evidence treatise of Jeremy Bentham appears to have made no comment on the opinion rule and it mentions expert witnesses only in connection with the authentication of handwriting.<sup>21</sup>

In its original form, the opinion rule was an offshoot of the requirement that a witness base his testimony only on personal knowledge.<sup>22</sup> Modern commentators point to Lord Coke's declaration in 1622—that it “is not satisfactory for a witness to say that he thinks or persuadeth himself”—as an early statement of the personal knowledge rule, although the statement itself was later misinterpreted as indicating disapproval of opinion testimony.<sup>23</sup> Dean Mason Ladd has pointed out that the rule against hearsay arose also from the personal knowledge rule. Thus, the opinion rule and the hearsay rule are lineal cousins.<sup>24</sup>

The use of skilled witnesses, however, was an exception to the personal knowledge rule. Wigmore cites a case as early as 1353 in which surgeons who had not witnessed the incident causing an injury were called to testify whether the wound was caused by “mayhem.”<sup>25</sup> This was not considered a contradiction to the general personal knowledge rule because experts had the status of “helper to the

---

18. 7 J. WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 1917, at 1 (J. Chadbourn rev. 1978) [hereinafter J. WIGMORE 1978]. Throughout this Comment, Professor Wigmore's treatise is cited in a historical context, with reference to the views on opinion evidence that he expressed in the first edition of his work, published in 1904. 4 J. WIGMORE, A TREATISE ON THE ANGLO-AMERICAN SYSTEM OF EVIDENCE IN TRIALS AT COMMON LAW §§ 1917-1921 (1904) [hereinafter J. WIGMORE 1904]. For the convenience of the reader, citations to the Wigmore treatise refer to the Chadbourn revision, currently in print, wherever possible. In every instance, if the Chadbourn revision is cited, the first edition also supports the assertion for which the Chadbourn revision is cited as authority. The section numbers are identical in both editions for all citations. If differences between the two editions are material to an assertion in this Comment, the first edition is cited, with a notation describing the difference between the two editions and a citation to the Chadbourn revision.

19. J. WIGMORE 1978, *supra* note 18, § 1917, at 1.

20. *Id.*

21. 3 J. BENTHAM, RATIONALE OF JUDICIAL EVIDENCE 598-608 (1827 & photo. reprint 1978).

22. J. WIGMORE 1978, *supra* note 18, § 1917, at 1-2.

23. Ladd, *Expert Testimony*, 5 VAND. L. REV. 414, 415 (1952) (quoting *Adams v. Canon*, 1 Dyer 53b n.15, 73 Eng. Rep. 117 n.15 (K.B. 1622)). There are slight textual differences between the two sources.

24. *Id.* at 415.

25. J. WIGMORE 1978, *supra* note 18, § 1917, at 3 (citing J. THAYER, CASES ON EVIDENCE 673 (2d ed. 1900) (which cited 28 Liber Assisarum fo. 145a, pl. 5 (1353-1354))).

court.”<sup>26</sup> They testified directly to the judge, not to the jury. As procedures evolved, by the late 1700’s the expert witness became a “mere witness to the jury,” a development that presented the English courts with a doctrinal conflict: How could an expert state his opinion to the jury if he did not have personal knowledge of the facts of the case?<sup>27</sup>

Lord Mansfield solved this problem in a 1782 case, *Folkes v. Chadd*,<sup>28</sup> by equating the expert’s general knowledge in his field of expertise with personal knowledge of facts.<sup>29</sup> At issue was the testimony of an engineer as to why a harbor had filled up:

It is objected that Mr. Smeaton is going to speak, not as to facts, but as to opinion. That opinion, however, is deduced from facts which are not disputed—the situation of banks, the course of tides and of winds, and the shifting of sands. . . . I cannot believe that where the question is, whether a defect arises from a natural or an artificial cause, the opinions of men of science are not to be received. . . . The cause of the decay of the harbor is also a matter of science . . . . Of this, such men as Mr. Smeaton alone can judge. Therefore we are of opinion that his judgment, formed on facts, was very proper evidence.<sup>30</sup>

This decision apparently settled the matter of admission of expert testimony in cases in which the witness did not have personal knowledge of the facts of the case.<sup>31</sup>

Meanwhile, according to Wigmore, although English and American courts traditionally admitted the “opinions, conclusions, or inferences of the ordinary lay witness when he came properly equipped with a basis of ‘facts,’ of personal observation,”<sup>32</sup> a counter trend began in the early 1700’s to instruct the jury to disregard the opinions of lay and expert witnesses, even if based on personal knowledge, if the jurors were equally capable of reaching a conclusion for themselves, based on the evidence presented.<sup>33</sup> In the early 1800’s, as testimony of expert witnesses without personal knowledge of the case increasingly gained acceptance, judges began to bar lay witnesses from stating opinions that the court considered superfluous to the decision of the jury.<sup>34</sup>

---

26. *Id.*

27. *Id.* at 4.

28. 3 Dougl. 157, 49 Eng. Rep. 589 (K.B. 1782), quoted in J. WIGMORE 1978, *supra* note 18, § 1917, at 4. The quotation in J. WIGMORE 1978 has minor editing differences.

29. *Folkes*, 3 Dougl. at 159-60, 49 Eng. Rep. at 590.

30. *Id.*

31. J. WIGMORE 1978, *supra* note 18, § 1917 at 4-5.

32. *Id.* at 5.

33. *Id.* at 7.

34. *Id.* at 8.

In the United States in particular, courts began to exclude lay witness opinion testimony much more broadly during the nineteenth century. "Instead of following the English approach of prohibiting statements of belief not drawn from personal observation, the American courts attempted the impossible task of admitting 'facts' while prohibiting all 'inferences, conclusions or opinions' without regard to whether they were rooted in observation."<sup>35</sup>

Wigmore, writing in 1904, tried to reverse this trend. He summarized a new theory of the opinion rule, as he saw it:

[W]herever inferences and conclusions can be drawn by the jury as well as by the witness, the witness is superfluous, and thus an expert's opinion is received because and whenever his skill is greater than the jury's, while a lay opinion is received because and whenever his facts cannot be so told as to make the jury as able as he to draw the inference.<sup>36</sup>

Wigmore advocated a very simple and very flexible rule: Any evidence that provides the jury with useful information it could not otherwise obtain should be admitted, regardless of whether it is opinion, but any evidence the jury does not need should be excluded.<sup>37</sup> Thus, Wigmore apparently advocated excluding evidence that duplicated the "common knowledge" of the jury, but he decried as "erroneous theories" rules in common application at the time that excluded evidence because it was opinion as opposed to fact,<sup>38</sup> because it "usurp[ed] the function of the jury,"<sup>39</sup> or because it addressed the "very issue before the jury."<sup>40</sup>

Wigmore was both prescient and influential. Weinstein reports that by the 1940's, there was a trend in many jurisdictions toward disregarding the orthodox rule excluding lay opinion testimony.<sup>41</sup> In 1942, the American Law Institute promulgated the Model Code of Evidence, which provided that a witness may testify to what he has perceived in terms that include inferences unless he can communicate his perceptions equally well without inferences and the statement of inferences would tend to mislead the jury.<sup>42</sup>

---

35. J. WEINSTEIN, *supra* note 10, ¶ 701[01], at 701-4.

36. J. WIGMORE 1904, *supra* note 18, § 1917, at 2549. Nearly identical text appears in the Chadbourne revision. J. WIGMORE 1978, *supra* note 18, § 1917, at 10.

37. J. WIGMORE 1978, *supra* note 18, § 1918, at 11-12.

38. *Id.* § 1919, at 14-17.

39. *Id.* § 1920, at 18-21.

40. *Id.* § 1921, at 21-26.

41. J. WEINSTEIN, *supra* note 10, § 701[01], at 701-6 (citing MODEL CODE OF EVIDENCE introductory note to chapter V (1942)).

42. MODEL CODE OF EVIDENCE Rule 401 (1942). For a discussion of Rule 401, see J. WEINSTEIN, *supra* note 10, ¶ 701[01], at 701-7 & n.20.



In 1952, Dean Ladd's widely cited article on expert testimony reported that the use of expert testimony had greatly expanded, largely as a result of great advances in scientific knowledge and methods of scientific proof.<sup>43</sup> In addition to noting many specific areas of inquiry that had proven fruitful for the consideration of expert opinions,<sup>44</sup> Ladd pointed out that experts were still not likely to be heard by the jury if the subject of inquiry fell within the common knowledge of laymen.<sup>45</sup> He also observed that expert evidence that could be advanced with great scientific certainty would be highly respected by courts, in some cases meriting even a directed verdict based on the expert's opinion.<sup>46</sup> Expert testimony more speculative in nature, however, was less likely to be admitted.<sup>47</sup> Ladd noted as well that the doctrine requiring exclusion of opinions on the issue of ultimate fact for jury decision, although discredited by commentators, was still widely observed by the courts.<sup>48</sup>

Against this background, it is tempting to view article VII of the Federal Rules of Evidence as an attempt to make a clean sweep of the common law doctrines that had grown up around expert and opinion testimony and replace them with the single, simple standard advocated by Wigmore: Evidence will be admitted if and only if it assists the jury in reaching its determination of fact. As Judge Pratt points out, "Article VII . . . is concise; its opinion rules appear to be simple and direct."<sup>49</sup> The remainder of this Comment tests that proposition by identifying the objections to expert opinion testimony that were raised frequently at common law and determining how those objections have fared in courts applying the Federal Rules of Evidence.<sup>50</sup>

---

43. Ladd, *supra* note 23, at 417.

44. *Id.* at 417-18. Among the inquiries specified by Ladd were blood analysis to determine paternity or intoxication, comparative analysis of handwriting, fingerprints, and bullets, and expert opinions on such questions as whether a witness was a pathological liar, whether a trade practice was misleading to the public, whether a writing was literature and whether a painting was art. *Id.*

45. *Id.* at 419.

46. *Id.* at 420-21. Ladd stated that in a paternity action an expert opinion, based on a blood test, that a man is not the father of a child should merit a directed verdict despite all other evidence to the contrary. *Id.* at 421.

47. *Id.*

48. *Id.* at 424.

49. Pratt, *supra* note 11, at 313-14.

50. Among the most frequently heard objections are that the witness is "invading the province of the jury," or "usurping the function of the jury." These phrases imply that the witness is personally deciding the case, leaving no role for the jury. As many commentators observe, the argument is a logical absurdity because the jury is always free to ignore or weigh expert testimony as it sees fit. *See, e.g.,* J. WIGMORE 1978, *supra* note 18, § 1920, at 18-21. Because the two phrases have no uniformly applied meaning and always overlap with the

## III. ANALYSIS

## A. Exclusion Based on "Common Knowledge"

It stands to reason that if an expert is permitted to state his opinion to the jury because his scientific, technical, or other specialized knowledge will assist the jury, then, conversely, he should not state opinions on matters of which his knowledge is no greater than what might be expected of the average juror. This simple proposition constitutes the basis of the common law exclusion of expert testimony that is within the common knowledge of the lay person.

Chief Justice Shaw of Massachusetts pointed out that a witness who told the jury what it could figure out for itself was, in effect, usurping the role of the finder of fact, a concern that runs through all the cases considered in this Comment:

Now, when th[e] experience [of the expert witness] is of such a nature that it may be presumed to be within the common experience of all men of common education, moving in the ordinary walks of life, there is no room for the evidence of opinion; it is for the jury to draw the inference. It is not because a man has a reputation for superior sagacity and judgment and power of reasoning that his opinion is admissible. If so, such men might be called in all cases to advise the jury, and it would change the mode of trial.<sup>51</sup>

Wigmore posited that the opinion rule was based on "the exclusion of supererogatory evidence."<sup>52</sup> By excluding expert testimony, Wigmore said, the court was telling the witness, "The tribunal is on this subject in possession of the same materials of information as yourself; thus, as you can add nothing to our materials for judgment, your further testimony is unnecessary, and merely cumpers the proceedings."<sup>53</sup>

The Supreme Court of the United States issued a curious pair of decisions in 1877 and 1878, in which it first applied the common knowledge rule in a conventional manner and then appeared to apply it contrary to the conventional application. *Milwaukee & St. Paul*

---

meanings of other commonly used objections, they are not discussed here as such. Suffice it to say that one or the other of these objections arises in many of the cases cited in this Comment.

51. *New England Glass Co. v. Lovell*, 61 Mass. (7 Cush.) 319, 321 (1851), quoted in J. MCKELVEY, *HANDBOOK OF THE LAW OF EVIDENCE* § 134 n.17 (1907).

52. J. WIGMORE 1978, *supra* note 18, § 1918, at 11. The word "supererogatory" means, "observed or performed to an extent not enjoined or required," or "that can be dispensed with," "superfluous," "nonessential." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 2293 (1976)

53. J. WIGMORE 1904, *supra* note 18, § 1918 at 2550. Nearly identical text appears in the Chadbourn revision. J. WIGMORE 1978, *supra* note 18, § 1918, at 11.

*Railway v. Kellogg*<sup>54</sup> concerned a dispute over a fire that had started on a Mississippi River steamboat and had spread to a grain elevator and a nearby sawmill.<sup>55</sup> The owner of the sawmill claimed damages from the owner of the steamboat and elevator. The steamboat/elevator owner attempted to call a fire insurance expert as a witness to testify that the two buildings were located so far from each other that the elevator would not have been considered a risk to the sawmill for the purpose of setting fire insurance rates.<sup>56</sup> The trial court refused to admit the expert's testimony. The Supreme Court affirmed, holding: "The subject of the proposed inquiry was a matter of common observation, upon which the lay or uneducated mind is capable of forming a judgment. In regard to such matters, experts are not permitted to state their conclusions."<sup>57</sup>

In *Spring Co. v. Edgar*,<sup>58</sup> a woman sued to recover damages for injuries she had suffered when she was attacked by a wild buck in a privately owned park that was open to the public.<sup>59</sup> The case turned on whether the park's owner should have known that bucks are dangerous and therefore should have exercised greater care to prevent the attack.<sup>60</sup> The woman introduced as experts a dentist, who claimed to be familiar with deer through personal observation and hunting, and a taxidermist, who had studied natural history and had read the "standard authors" on deer.<sup>61</sup> The trial court overruled defense objections that the witnesses were not shown to be competent as experts.<sup>62</sup>

On appeal, the park owner argued that the testimony of the expert witnesses was inadmissible for the following reasons: First, an animal's character and disposition were facts to be ascertained through experience; second, expert opinions were admissible only on questions of science, skill, or trade; third, the books of natural history that one witness had read were not of themselves competent evidence; and fourth, the witness' statements based on books about living animals well known to many people amounted to hearsay.<sup>63</sup> The Court held that even if the witnesses were not qualified as experts, their testimony was admissible because it dealt with a matter of "common

---

54. 94 U.S. 469 (1877).

55. *Id.* at 470.

56. *Id.* at 472.

57. *Id.* at 472-73.

58. 99 U.S. 645 (1878).

59. *Id.* at 646.

60. *Id.* at 653-56.

61. *Id.* at 647-48.

62. *Id.* at 648.

63. *Id.* at 650.

knowledge.”<sup>64</sup> The jurors, who presumably knew something of the subject themselves, were instructed by the trial court that they were to determine the proper weight to give to the testimony. Thus, the Court held that it was not improper to allow an expert to testify as to information the jurors were presumed to know.

In 1891, the Court once again adopted the more orthodox view of “common knowledge.” In *Inland & Seaboard Coasting Co. v. Tolson*,<sup>65</sup> a wharf owner sued the operator of a steamboat to recover damages for the injury he suffered when the boat struck the wharf with great force, breaking several planks and crushing his foot.<sup>66</sup> The steamboat’s owner raised contributory negligence as a defense and produced an experienced riverboat captain to testify whether it was reasonably safe for a wharfinger<sup>67</sup> to stand two or three feet from the fender piles of a wharf constructed like the one in question while a boat was approaching.<sup>68</sup> The Court held that the issue was to be decided by the jury, “depending on common knowledge and observation, and requiring no special training or experience to decide, and upon which, therefore, no opinions of witnesses were admissible.”<sup>69</sup>

Today, the reasoning of all three of these decisions seems strangely antiquated. Most modern Americans would undoubtedly take it for granted that appropriate experts could provide a jury with very useful information, going well beyond common experience, on such matters as how close to each other a wooden sawmill and a wooden grain elevator may be constructed without foreseeable risk that a fire in one will spread to the other, whether bucks are likely to attack humans, and how close to the edge of a wharf one may safely stand while a boat is landing there.

This perception may simply reflect the fact that today’s city dweller is not as “close to nature” as the typical American of a century ago, but that is probably not the entire answer. The questions in all three cases involved somewhat esoteric circumstances falling outside the range of everyday experience. It seems extraordinary to suggest that a jury of lay persons could not have seen these matters more clearly with the assistance of persons who had studied them in

---

64. *Id.* at 658.

65. 139 U.S. 551 (1891).

66. *Id.* at 552.

67. A “wharfinger” is “the operator or manager of a commercial wharf” or “one in charge of the handling of freight at a wharf who assigns the workers and facilities needed for the loading and unloading, storage, or removal of goods.” WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY 2600 (1976).

68. 139 U.S. at 559. The witness had never seen the actual site of the accident, and gave his opinion based on his general expertise regarding wharves and safe landing procedures. *Id.*

69. *Id.* at 560.

greater detail. Rather, the Court seemed to be saying that even if an expert could assist jurors in their decision, these are matters that must be determined on the basis of ordinary experience and common sense alone, perhaps because of some nineteenth century instinct that these are the kinds of things that each individual should know and decide for himself.<sup>70</sup> The modern view is quite different. Today, human knowledge is vast and specialized. On any given factual matter, we simply assume that there will be someone who has studied the subject and can give a more informed opinion than the average lay person. Thus, regardless of what most people share as common knowledge, the truly commonplace—information that the average lay person can be expected to know beyond all possibility of assistance from an expert—probably has shrunken dramatically in the past century.

The Federal Rules of Evidence make no reference to a common knowledge standard. Rule 702 requires only that expert witness testimony be supported by “scientific, technical, or other specialized knowledge [that] will assist the trier of fact to understand the evidence or to determine a fact in issue.”<sup>71</sup> The advisory committee’s note defines this helpfulness standard as “the common sense inquiry whether the untrained layman would be qualified to determine intelligently and to the best possible degree the particular issue without enlightenment from those having specialized understanding of the subject involved in the dispute.”<sup>72</sup>

In *Zenith Radio Corp. v. Matsushita Electric Industrial Co.*,<sup>73</sup> the court, noting this language, stated that the rule “expands slightly the practice of most jurisdictions of permitting expert testimony only when the subject matter was otherwise beyond lay comprehension.”<sup>74</sup> After examining a series of cases dealing with the admissibility of various types of expert testimony, most not involving matters of common knowledge, the court concluded that “the expert must utilize specialized knowledge, not ordinarily possessed by the layman, to reach an

---

70. In this context, *Spring*, in which expert testimony was admitted, may be distinguished from *Milwaukee & St. P. Ry.* and *Inland and Seaboard Coasting*, in which expert testimony was excluded, only because the trial court in *Spring* instructed the jury that it was free to disregard the expert testimony. It should also be noted that in all three cases, the Court affirmed lower court rulings. See *infra* note 159 and the first paragraph of Section V.

71. FED. R. EVID. 702.

72. FED. R. EVID. 702 advisory committee’s note, 56 F.R.D. 183, 282 (1973) (quoting Ladd, *supra* note 23, at 418).

73. 505 F. Supp. 1313 (E.D. Pa. 1980), *incorporated by reference*, 513 F. Supp. 1100 (E.D. Pa. 1981), *rev’d in part sub nom. In re Japanese Elec. Prod. Antitrust Litig.*, 723 F.2d 238 (3d Cir. 1983), *rev’d in part on other grounds sub nom. Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986).

74. *Id.* at 1330.

opinion which truly aids the jury."<sup>75</sup>

*Zenith* was an antitrust action in which American manufacturers claimed that Japanese manufacturers had formed a cartel to control illegally the United States television receiver market and drive the American manufacturers out of the business.<sup>76</sup> The district court opinion, one of many in a long, complicated case, dealt with the admissibility of the testimony of several expert economists, introduced by the American manufacturers to prove their conspiracy theory.<sup>77</sup> The court excluded major parts of all the proffered testimony on two principal grounds. First, it ruled that the underlying facts and analytical techniques employed by the economists did not justify reasonable reliance by experts in the field.<sup>78</sup> Second, it ruled that the experts, in arriving at their conclusions, did not apply a level of economic expertise beyond the understanding that the jurors themselves might have applied in examining the same data.<sup>79</sup> In other words, although the underlying economic data might have been highly specialized and beyond the knowledge of ordinary laymen, the ability to analyze the facts and draw conclusions from them required only common knowledge or common reasoning ability. Therefore, expert testimony was not needed.

The United States Court of Appeals for the Third Circuit reversed,<sup>80</sup> rejecting both the district court's dictum as to the existence of a remaining common knowledge rule<sup>81</sup> and its application of the rule to the testimony at issue.<sup>82</sup> The Third Circuit pointed out that "the requirement . . . that expert testimony be 'beyond the jury's sphere of knowledge' adopts a formulation which was rejected by the drafters of Rule 702." The court added:

---

75. *Id.* at 1334.

76. *In re Japanese Elec. Prod. Antitrust Litig.*, 723 F.2d 238, 251 (3d Cir. 1983), *rev'g in part Zenith Radio Corp. v. Matsushita Elec. Indus. Co.*, 513 F. Supp. 1100 (E.D. Pa. 1981), *incorporat'g by reference* 505 F. Supp. 1313 (E.D. Pa. 1980), *rev'd in part on other grounds sub nom. Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986).

77. 505 F. Supp. at 1319-20. The opinion discussed in great detail the contents of lengthy reports that were prepared by the economists. The reports set forth the opinions to which the economists were prepared to testify at trial. *Id.* at 1319.

78. *Id.* at 1339-41 *passim*. Analysis of the reasonable reliance issue entails an interpretation of Rule 703 of the Federal Rules of Evidence and is outside the scope of this Comment.

79. *Id.* at 1342.

80. *In re Japanese Elec. Prod. Antitrust Litig.*, 723 F.2d 238 (3d Cir. 1983), *rev'g in part Zenith Radio Corp. v. Matsushita Elec. Indus. Co.*, 513 F. Supp. 1100 (E.D. Pa. 1981), *incorporat'g by reference* 505 F. Supp. 1313 (E.D. Pa. 1980), *rev'd in part on other grounds sub nom. Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986).

81. *Id.* at 279.

82. *Id.* at 280.

Such a test is incompatible with the standard of helpfulness expressed in Rule 702. First, it assumes wrongly that there is a bright line separating issues within the comprehension of jurors from those that are not. Secondly, even when jurors are well equipped to make judgments on the basis of their common knowledge and experience, experts may have specialized knowledge to bring to bear on the same issue which would be helpful.<sup>83</sup>

The Third Circuit also held that the lower court was clearly erroneous in finding that the conclusions to be expressed in the testimony would have been unhelpful to the jury in light of the "complexity of the economic issues involved."<sup>84</sup>

Although the trial and appellate courts used the language of the common law rule barring expert opinion testimony on matters of common knowledge, they addressed matters that cannot reasonably be considered within the common knowledge of the average lay person. The district court could hardly have believed that most jurors would be able to evaluate and draw conclusions from highly technical and sophisticated economic data with the proficiency of trained economists. Although the district court's discredited ruling may have been an attempt to exclude testimony on the ultimate issue, as suggested in both opinions,<sup>85</sup> it also might have indicated a different unarticulated concern: that there was no real truth to be derived from the presented facts. The district court apparently was saying that no conclusion regarding the existence of an illegal cartel could be derived with substantial certainty from the evidence available to the expert witnesses. Therefore, in the court's view, because the experts' claims of certainty were not reliable, the opinions of the experts were no better than those of the jurors.

Weinstein points out that "[t]he helpfulness test subsumes a relevancy analysis," which includes evaluation of the current state of knowledge on the subject of the proposed expert testimony as it relates to the court's view of the facts of the case.<sup>86</sup> In *Zenith*, as in the two cases next considered, the courts appear to have been concerned more with the limited state of available knowledge than with the witness telling jurors what they already should know. The discourse has shifted from expert testimony being inadmissible because the witness proposes to state a conclusion that anybody could reach,

---

83. *Id.* at 279 (quoting 3 J. WEINSTEIN & M. BERGER, WEINSTEIN'S EVIDENCE ¶ 702[02], at 702-10 (1982) (footnotes omitted)).

84. *Id.* at 280.

85. *Japanese Electronic Products*, 723 F.2d at 279; *Zenith*, 505 F. Supp. at 1333-34; see *infra* notes 160-64 and accompanying text.

86. J. WEINSTEIN, *supra* note 10, ¶ 702[02], at 702-11.

to expert testimony being inadmissible because the witness proposes to state a conclusion that even the witness cannot reach with any certainty. In the cases examined, however, the parties who raised this argument did not convince the court that the expert testimony was useless to the jury and should be excluded.

In *United States v. Cyphers*,<sup>87</sup> the defendants were on trial for bank robbery.<sup>88</sup> One of the evidentiary issues in the case involved the trial court's admission of expert testimony regarding the microscopic comparison of hair samples.<sup>89</sup> The defendants objected to expert testimony that hair found on objects used by the robbers were "microscopically like" their own hair.<sup>90</sup> The expert testified that it was possible but not certain that the hair he tested came from the defendants.<sup>91</sup> The defendants argued that the expert's conclusions were so speculative that they were irrelevant and prejudicial, and that they were not based on reasonable scientific certainty.<sup>92</sup> In affirming the trial court's admission of the testimony, the United States Court of Appeals for the Seventh Circuit pointed out that the subject matter of the testimony was "beyond the ken of the ordinary layman" and therefore proper under Rule 702.<sup>93</sup> Only after disposing of this implicit common knowledge issue did the court rule that the lack of absolute certainty in the witness' statement of his conclusion goes to the weight of his testimony but not its admissibility.<sup>94</sup>

The Supreme Court of the United States carried the logic of the *Cyphers* court one step further. In *Barefoot v. Estelle*,<sup>95</sup> the defendant had been convicted of capital murder in Texas.<sup>96</sup> The state's capital

---

87. 553 F.2d 1064 (7th Cir.), cert. denied, 434 U.S. 843 (1977).

88. *Id.* at 1066.

89. *Id.* at 1067.

90. *Id.* at 1071.

91. *Id.* at 1072.

92. *Id.* The defendants also argued that the government did not prove that the hairs in question had been located on the objects used by the robbers at the time the police discovered the objects. *Id.* at 1073. The court held that the possibility the hairs might have fallen onto the objects while they were in police custody went to the weight, not the admissibility, of the expert's testimony. *Id.*

93. *Id.* at 1072.

94. *Id.* at 1072-73. Note that the court's analysis in *Cyphers* dealt with the fact that the witness could not declare unequivocally that the hairs found at the scene of the crime came from the defendants. *Id.* at 1071-72. At issue was the degree of certainty with which the witness expressed his conclusion, not the scientific acceptance or validity of the technique the expert used to arrive at his conclusion. The *Cyphers* court pointed out that the propriety of the testing technique and the validity of the conclusions drawn by the expert are subject to cross-examination, but apparently the defendant did not raise on appeal any objection to the scientific validity of microscopic comparison of hair samples. *Id.* at 1072.

95. 463 U.S. 880 (1983).

96. *Id.* at 883.



punishment statute required the court to ask the jury in a separate sentencing hearing "whether there [was] a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society."<sup>97</sup> In the sentencing hearing, the state qualified two psychiatrists as expert witnesses, described the defendant's past conduct to them in the form of hypothetical questions, and asked them to predict whether the defendant would commit future acts of criminal violence.<sup>98</sup> The witnesses opined that such a probability existed, the jury answered the interrogatory in the affirmative, and the defendant received the death sentence.<sup>99</sup>

On appeal, the defendant objected that the use of psychiatrists as expert witnesses to predict future conduct was unconstitutional because such testimony was demonstrably unreliable, and in fact, psychiatrists could not predict "future dangerousness" with any reasonable degree of accuracy.<sup>100</sup> Writing for the Court, Justice White responded that such a conclusion would be contrary to previous cases.<sup>101</sup> The Court had already ruled that the likelihood that a particular defendant would commit further violent crimes is a constitu-

---

97. TEX. CODE CRIM. PROC. ANN. art. 37.071(b)(2) (Vernon 1981) (current version at TEX. CODE CRIM. PROC. ANN. art. 37.071(b)(2) (Vernon Supp. 1988)), quoted in *Barefoot*, 463 U.S. at 883-84.

98. *Barefoot*, 463 U.S. at 884, 918.

99. *Id.* at 884. After the defendant's conviction for capital murder, a separate sentencing hearing was conducted before the same jury to obtain the answers to two prescribed questions, as required by Texas law. *Id.* at 883 & n.1, 884 (quoting TEX. CODE CRIM. PROC. ANN. art. 37.071(b) (Vernon 1981) (current version at TEX. CODE CRIM. PROC. ANN. art. 37.071(b) (Vernon Supp. 1988))). The second of the two interrogatories is quoted above. The first was "whether the conduct causing the death was 'committed deliberately and with reasonable expectation that the death of the deceased or another would result.'" *Id.* at 883 n.1, 884 (quoting TEX. CODE CRIM. PROC. ANN. art. 37.071(b)(1) (Vernon 1981) (current version at TEX. CODE CRIM. PROC. ANN. art. 37.071(b)(1) (Vernon Supp. 1988))). A third interrogatory prescribed by the statute, if raised by the evidence, was not submitted to the jury in this case. *Id.* at 883 n.1 (quoting TEX. CODE CRIM. PROC. ANN. art. 37.071(b)(3) (Vernon 1981) (current version at TEX. CODE CRIM. PROC. ANN. art. 37.071(b)(3) (Vernon Supp. 1988))). An affirmative answer to all questions presented, as in this case, resulted in the mandatory imposition of the death penalty. *Id.* at 884; TEX. CODE CRIM. PROC. ANN. art. 37.071(e) (Vernon Supp. 1988).

100. *Barefoot*, 463 U.S. at 884-85. The constitutional argument was that unreliable predictions will lead to erroneous sentences, violating the eighth and fourteenth amendments. *Id.* The American Psychiatric Association filed an amicus curiae brief in which it, too, argued that psychiatric predictions of future behavior are too unreliable to be admitted in testimony for this purpose. *Id.* at 899, 920. In his dissent, Justice Blackmun stated that psychiatric predictions of future dangerousness are wrong in two cases out of three, an assertion that carries the ironic implication that Texas courts might produce a more just result if they imposed the death sentence only if psychiatric witnesses predicted that the defendant would not be dangerous in the future. *Id.* at 916 (Blackmun, J., dissenting).

101. *Id.* at 896-98 (citing *Estelle v. Smith*, 451 U.S. 454, 473 (1981); *Addington v. Texas*, 441 U.S. 418, 429 (1979); *Jurek v. Texas*, 428 U.S. 262, 274-76 (1976); *O'Connor v. Donaldson*, 422 U.S. 563, 576 (1975)).

tionally permissible criterion upon which to base a death sentence<sup>102</sup> and that it is not impossible to predict future dangerous behavior:<sup>103</sup>

[I]f it is not impossible for even a lay person sensibly to arrive at [the] conclusion [that the defendant poses a danger of committing future violent crimes], it makes little sense, if any, to submit that psychiatrists, out of the entire universe of persons who might have an opinion on the issue, would know so little about the subject that they should not be permitted to testify.<sup>104</sup>

Justice White's attempt to justify the admissibility of expert witness testimony by equating it with a determination by a jury of lay persons was much the same as comparing apples and oranges. Lay jurors necessarily must assess the defendant's future behavior. Although nobody claims that jurors are infallible predictors of the future, the Texas Legislature has given them the responsibility of deciding whether a convicted capital murderer poses a continuing threat to society.<sup>105</sup> On the other hand, witnesses, both lay and expert, have no such statutory mandate. They may present their opinions to the jury only if such testimony meets the requirements in that jurisdiction for admission into evidence. Justice White was writing about the requirements of the federal Constitution,<sup>106</sup> not the rules of evidence for Texas state courts.<sup>107</sup> His reasoning, however, answered a question that might have arisen in a court applying Rule 702 of the Federal Rules of Evidence: Whether psychiatric predictions of future behavior can assist a jury in assessing a convicted capital murderer's "future dangerousness." In this context, the essence of the Court's opinion was that this type of expert testimony should be permitted regardless of its uncertain accuracy. The Court hammered this point home by stating that, generally, unprivileged evidence should be admitted, its weight left to the finder of fact to determine, and the jury should also be able to consider the views of opposing psychiatrists.<sup>108</sup>

In his dissent, Justice Blackmun argued that, given the known

---

102. *Id.* at 896 (citing *Jurek*, 428 U.S. at 274-76).

103. *Id.* (citing *Jurek*, 428 U.S. at 274-76).

104. *Id.* at 896-97.

105. TEX. CODE CRIM. PROC. ANN. art. 37.071(b)(2) (Vernon Supp. 1988).

106. *Barefoot*, 463 U.S. at 896.

107. The case was tried in a Texas state court, so the Federal Rules of Evidence did not apply. At the time, Texas followed common law rules of evidence, except if preempted by specific statutory provision. TEX. CODE CRIM. PROC. ANN. art. 38.01 (Vernon 1979). There was neither a general statute governing the subject matter of expert witness testimony nor a specific statute relating to expert witness testimony in capital murder sentencing hearings. In 1985, Texas adopted new Rules of Criminal Evidence that contain a rule identical to Rule 702 of the Federal Rules of Evidence. TEX. R. CRIM. EVID. 702 (West 1987).

108. *Barefoot*, 463 U.S. at 898-99.

unreliability of psychiatric predictions,<sup>109</sup> the issue of defendant's future behavior in the context of a capital murder sentence hearing does not lend itself to "the traditional battle of experts."<sup>110</sup> Jurors, said Justice Blackmun, will now be called upon to determine the reliability of psychiatric predictions, not the future dangerousness of the individual defendant.<sup>111</sup> To prevent this unjust result, he argued, expert psychiatric testimony should be excluded.<sup>112</sup>

Thus the battle line has been drawn for possible debate in the area of common knowledge. At what point do we declare that we will not allow experts to testify because they too have only common knowledge, at least to the extent that they can arrive at scientifically defensible conclusions?

## B. *Exclusion Based on "Ultimate Issue of Fact" Testimony*

### 1. THEORY OF THE RULE AND OBJECTIONS TO IT

The former rule against admission of testimony that contained an opinion on an issue of ultimate fact was based on the notion that this testimony simply told the jury what decision to make on contested issues without giving jurors any meaningful assistance in deciding the issue for themselves. In effect, objectors claimed, the witness made the decision for the jury, or as is often stated, usurped the function of the jury. Although there is a core of intuitively sound principle in this rule, its application has been fraught with definitional and conceptual problems.<sup>113</sup>

To exclude ultimate issue testimony, the judge first had to determine that the proffered testimony was opinion, not fact.<sup>114</sup> Next, the judge had to decide that the opinion was on a matter of ultimate, rather than evidentiary, fact. Depending on the complexity of the case, the number of elements to be proved, and the number of factual questions that were contested, a case might have one or many ultimate facts. Moreover, a fact that was evidentiary in one case might be

---

109. *Id.* at 916-29.

110. *Id.* at 934-35.

111. *Id.* at 935.

112. *Id.* at 938.

113. This discussion of objections to the Rule borrows its structure from J. WEINSTEIN, *supra* note 10, ¶ 704[01], at 704-6 to -7.

114. This determination presents a knotty theoretical problem. Analytically, "fact" and "opinion" tend to be relative terms, and a statement that is a fact in one context may be an opinion in another. See J. WIGMORE 1978, *supra* note 18, § 1919, at 14-17; see also Note, *Opinion Testimony and Ultimate Issues: Incompatible?*, 51 KY. L.J. 540, 542-43 (1963). In practice, whether disputed testimony is fact or opinion is not the issue in ultimate issue cases. The parties start with the common premise that the contested testimony is opinion.

ultimate in another.<sup>115</sup>

Having crossed the definitional chasm, the judge might discover that there was no better way for the witness to give his testimony than by stating an opinion of ultimate fact:

If a witness in an automobile accident case said the car was speeding, objections could be raised both on the basis of the opinion rule and the ultimate fact rule. As in the case of the opinion rule, expediency led to exceptions. Courts often allowed the witness to express his opinion on issues like speed, value, or identity where the witness would not otherwise have been able to give any testimony of value to the jury.<sup>116</sup>

Finally, and at the heart of the matter, underlying the ultimate issue rule was an assumption that jurors would abdicate their fact-finding role to the witness. Judges apparently felt that if the subject matter was sufficiently "beyond the ken" of the average layman that expert testimony was needed to help jurors understand the facts, then jurors could easily be led to whatever ultimate conclusion was desired by the proponent of the expert testimony. But this assumption ignored two important mitigating factors: First, the balancing effect of the adversary system, which gave the opposing party the opportunity to cross-examine the expert and to introduce experts with oppos-

---

115. In a personal injury case resulting from an automobile accident, for example, an expert witness stating that a reasonably competent driver should have been able to stop his car within 200 feet after rounding a curve and seeing a pedestrian in the roadway might be stating an opinion on an ultimate fact if the only factual issue regarding negligence was whether the driver stopped within a reasonable time after making the turn. If, however, there were other issues—whether the pedestrian was hidden behind an obstruction until emerging suddenly into the road, whether the pedestrian was dressed in dark clothes on a dark night and impossible to see, or whether the car's brakes failed suddenly for reasons not the fault of the driver—the expert's opinion might be one of only evidentiary fact, because all of these factors would contribute to a determination of the driver's negligence.

Cases have defined ultimate facts very broadly and very narrowly. One definition is "facts essential to the right of action or matter of defense." BLACK'S LAW DICTIONARY 1365 (5th ed. 1979) (citing *Wichita Falls & Okla. Ry. v. Pepper*, 134 Tex. 360, 371, 135 S.W.2d 79, 84 (1940), *overruled on other grounds*, *Burk Royalty Co. v. Walls*, 616 S.W.2d 911 (Tex. Civ. App. 1981)). Under this broad definition, any fact necessary in the chain of proof, no matter how remote from the ultimate conclusion, would be an ultimate fact. Another definition is "[t]hose facts found in that vaguely defined field lying between evidential facts on the one side and the primary issue or conclusion of law on the other, being but the logical results of the proofs, or, in other words, mere conclusions of fact." *Id.* at 1365 (citing *Christmas v. Cowden*, 44 N.M. 517, 523, 105 P.2d 484, 487 (1940)). Although somewhat circular, this definition may express a more common understanding of what the ultimate issue rule is trying to address.

For further discussion of the difficulties in trying to define issues of ultimate fact, see Note, *supra* note 114, at 541-42.

116. J. WEINSTEIN, *supra* note 10, ¶ 704[01], at 704-6 (footnote omitted). Although Weinstein's example usually applies to a lay witness, an expert might experience the same problem. If a physician testifies as to the extent and permanency of an accident victim's injuries, he is probably stating an opinion on an ultimate fact going to the issue of damages.

ing opinions; and second, the traditional instruction to jurors informing them that they were free to give as little or as much weight to expert testimony as they chose and were obligated to evaluate all the evidence independently and reach their own conclusions.<sup>117</sup>

Administration of the rule became even more complicated when courts tried to separate pure issues of ultimate fact from issues involving legal terms of art or pure issues of law. To the extent that fact and law are separable, the following discussion focuses first on pure fact questions and then turns to questions of law.

## 2. HISTORY OF THE RULE

Prior to the adoption of the Federal Rules of Evidence in 1975, the ultimate issue rule was the subject of much writing, most of it urging abolishment; however, the rule never was adopted universally. Scholars have not determined authoritatively the origin of the rule, although it apparently is an American invention.<sup>118</sup> Wigmore thought that it probably arose from an 1821 English case in which a physician stated before a panel of judges, "My firm conviction is that it was an act of insanity."<sup>119</sup> After consulting on the case, "several of the judges doubted whether the witness could be asked his opinion on the very point which the jury were to decide."<sup>120</sup> Professor William Stoebuck researched early American cases applying the rule and found none that cited the English case.<sup>121</sup> He stated that the rule probably originated in an 1840 Vermont case, and subsequently was recognized by courts in Louisiana, New York, and Iowa, all of them citing no authority and "stat[ing] the rule casually in a matter-of-fact way, as though it were too settled to require demonstration."<sup>122</sup>

Professor Simon Greenleaf said in his 1842 treatise that "where

---

117. See J. WEINSTEIN, *supra* note 10, ¶ 704[01], at 704-6 to -7; Slough, *Testamentary Capacity: Evidentiary Aspects*, 36 TEX. L. REV. 1, 11-12 (1957); Note, *Expert Testimony as an "Invasion of the Province of the Jury,"* 26 IOWA L. REV. 819, 840 (1941) [hereinafter Note, *Expert Testimony*]; Note, *Opinion Testimony "Invading the Province of the Jury,"* 20 U. CIN. L. REV. 484, 488-89 (1951) [hereinafter Note, *Opinion Testimony*].

118. J. WEINSTEIN, *supra* note 10, ¶ 704[01], at 704-6.

119. J. WIGMORE 1978, *supra* note 18, § 1921, at 21 n.1 (quoting *Rex v. Wright*, Russ. & Ry. 456, 457-58, 168 Eng. Rep. 895, 896 (Cr. Cas. 1821)). Wigmore pointed out that interpreting this case in the context of ultimate fact was probably erroneous because the witness gave an opinion on a matter of law. *Id.*

120. *Id.* at 22 n.1.

121. Stoebuck, *Opinions on Ultimate Facts: Status, Trends, and a Note of Caution*, 41 DEN. L. CENT. J. 226, 227 (1964).

122. *Id.* at 226-27. Professor Stoebuck cited the following cases: *Muldowney v. Illinois Cent. R.*, 39 Iowa 615, 622 (1874); *Marcy v. Sun Mut. Ins. Co.*, 11 La. Ann. 748, 749 (1856); and *Persse & Brooks Paper Works v. Willett*, 24 N.Y. Super. Ct. 131, 154 (1863); *Davis v. Fuller*, 12 Vt. 178, 189 (1840).

scientific men are called as witnesses, they cannot give their opinions, as to the general merits of the cause, but only their opinions upon the facts proved."<sup>123</sup> In debunking the rule in his 1904 treatise, Wigmore called it "one of those impossible and misconceived utterances which lack any justification in principle."<sup>124</sup> He cited four cases, from three states, in which courts excluded ultimate issue testimony.<sup>125</sup> He also cited eight cases, from seven states, and three cases, from United States Circuit Courts of Appeal, in which courts declined to follow the rule.<sup>126</sup>

On the other hand, the 1938 edition of Professor Burr Jones' evidence treatise declared:

If a question is so framed as to call upon the expert to determine the side on which the evidence preponderates or to reconcile conflicting statements, he is in effect asked to decide the merits of the case, a function which is wholly beyond his province. . . . [He] must not usurp the province of the court and jury by drawing conclusions of law or fact upon which the decision of the case depends.<sup>127</sup>

A 1941 student note cited Jones for the proposition that the prohibition of ultimate issue testimony was well-settled law in a majority of jurisdictions.<sup>128</sup>

In 1935, the Supreme Court of the United States issued its opinion in *United States v. Spaulding*,<sup>129</sup> a case often cited as supporting

123. 1 S. GREENLEAF, A TREATISE ON THE LAW OF EVIDENCE § 440, at 489 (1842 & photo. reprint 1972). These words could be interpreted as a statement of the classic rule against ultimate issue testimony, or in the still accepted narrower construction that an expert witness should not be permitted to tell the jury what to decide.

124. J. WIGMORE 1978, *supra* note 18, § 1921, at 22.

125. J. WIGMORE 1904, *supra* note 18, § 1921, at 2556 & n.1. The three states were Alabama, Illinois, and Indiana. *Id.* The Chadbourn revision cites the same cases, but the footnote in that edition also includes numerous citations to more recent cases on point. J. WIGMORE 1978, *supra* note 18, § 1921, at 21 n.1, 22.

126. *Id.* at 2557 & n.2. The seven states were Georgia, Maine, Massachusetts, Minnesota, New Hampshire, New York, and Texas. *Id.* The Chadbourn revision cites the same cases, but the footnote in that edition also includes numerous citations to more recent cases on point. J. WIGMORE 1978, *supra* note 18, § 1921, at 22 n.2, 26.

127. 2 B. JONES, THE LAW OF EVIDENCE IN CIVIL CASES, § 372, at 698-99 (4th ed. 1938). This statement, like the Greenleaf statement, can be read broadly or narrowly. Taken at face value, Jones also may be saying only that the expert should not tell the jury how to vote.

128. Note, *Expert Testimony*, *supra* note 117, at 825 (citing 3 B. JONES, COMMENTARIES ON THE LAW OF EVIDENCE IN CIVIL CASES §§ 1313, 1321 (J. Henderson 2d ed. 1926)). The note urged total abolition of the ultimate issue rule in Iowa. A number of other commentators also advocated an end to the rule. See, e.g., Ladd, *supra* note 23, at 424-25; Note, *supra* note 114, at 548; Note, *Opinion Testimony*, *supra* note 117, at 493-94. But see Austin, *Some Rules Governing the Examination of Expert Witnesses in Illinois*, 19 ILL. L. REV. 57, 70 (1924).

129. 293 U.S. 498 (1935).

the ultimate issue rule.<sup>130</sup> Plaintiff Spaulding sued to collect disability benefits under a war-risk policy that had lapsed more than eight years earlier.<sup>131</sup> The government denied liability, asserting that Spaulding had not suffered "total permanent disability" while the policy was in force, as required by statute and the policy.<sup>132</sup> Three doctors called by the plaintiff as expert witnesses testified that Spaulding could not work without damaging his health and shortening his life.<sup>133</sup> One said that he was "totally and permanently disabled."<sup>134</sup> In an opinion written by Justice Butler, the Court found that the testimony was inadmissible because "[t]he experts ought not to have been asked or allowed to state their conclusions on the whole case."<sup>135</sup>

---

130. See, e.g., *Dean v. Flemming*, 180 F. Supp. 553, 556 (E.D. Ky. 1959); M. GRAHAM, HANDBOOK OF FEDERAL EVIDENCE § 704.1, at 639-40 & n.99 (1981); MCCORMICK ON EVIDENCE § 12, at 30 & n.3 (E. Cleary ed. 1984); J. WEINSTEIN, *supra* note 10, ¶ 704[01], at 704-9 & n.18; Slough, *supra* note 117, at 12 & n.47. But see Stoebeck, *supra* note 121, at 229 n.24. Most of the federal courts that have cited *Spaulding* have used it to support a more narrow holding than the ultimate issue rule. See, e.g., *Mutual Life Ins. Co. of New York v. Frost*, 164 F.2d 542, 548 (1st Cir. 1947) (Expert opinion is objectionable if it "entangles factual matters as to which an expert opinion is appropriate with questions of law."); *Tiller v. Celebrezze*, 211 F. Supp. 792, 795 (S.D. W. Va. 1962) ("A flat assertion by a doctor that the claimant was disabled or unable to perform any gainful activity is of little, if any, assistance in aiding the arbiter of the facts in arriving at his conclusion concerning the disability as contemplated by the Act.").

131. *Spaulding*, 293 U.S. at 499-500.

132. *Id.* at 500.

133. *Id.* at 503-04.

134. *Id.* at 504.

135. *Id.* at 506. Actually, Justice Butler's adoption of the ultimate issue rule was less than unequivocal. He wrote:

Clearly the experts failed to give proper weight to [Spaulding's] fitness for naval air service or to the work he performed, and misinterpreted "total permanent disability" as used in the policy and statute authorizing the insurance. Moreover, that question is not to be resolved by opinion evidence. It was the ultimate issue to be decided by the jury upon all the evidence in obedience to the judge's instructions as to the meaning of the crucial phrase and other questions of law.

*Id.*

Although he used the catchwords "ultimate issue," Justice Butler may have been more concerned with the doctors' apparent misuse of the statutory and contractual definition of "total permanent disability" than with their reaching a factual conclusion about Spaulding's inability to work. *Spaulding* may actually be an early contribution to the current search for a clear understanding of how far an expert may go in describing his factual conclusion in legal terms. See *infra* Section III(C). The Court's intention is also somewhat muddled by the fact that it disagreed with the factual conclusion reached by the doctors.

Another noteworthy aspect of *Spaulding* is the Court's use of authority in support of the ultimate issue rule. Neither of the two Supreme Court cases cited deals with ultimate issue testimony at all. *Schmieder v. Barney*, 113 U.S. 645, 648 (1884); *Milwaukee & St. P. Ry. v. Kellogg*, 94 U.S. 469, 472 (1877). *Kellogg*, however, does contain an elaborately documented exposition of the common knowledge rule. 94 U.S. at 472. The three court of appeals cases cited do state the rule against ultimate issue testimony. *Germantown Trust Co. v. Lederer*, 263 F. 672, 676 (3d Cir. 1920); *Mullins Lumber Co. v. Williamson & Brown Land & Lumber*

Just eight years after *Spaulding*, the Court rejected the logic of the ultimate issue rule but did not mention the words "ultimate issue," or cite to *Spaulding* or any other case.<sup>136</sup> The occasion was the Court's opinion in *United States v. Johnson*,<sup>137</sup> a case in which the defendants had been convicted of income tax evasion and related charges in connection with the operation of several illegal gambling parlors.<sup>138</sup> The district court admitted the testimony of an expert witness regarding defendant Johnson's income and expenditures, including "computations based on substantially the entire evidence in the record as to Johnson's income."<sup>139</sup> The United States Circuit Court of Appeals for the Seventh Circuit found the testimony improper because the witness was testifying on the "controverted issue" of the case.<sup>140</sup> The Supreme Court reversed, finding the testimony altogether proper.<sup>141</sup> Writing for the Court, Justice Frankfurter pointed out that the testimony did not remove or withdraw any issue from the jury or interfere with the jury's ability to examine the same evidence evaluated by the expert and draw its own conclusion independently.<sup>142</sup> In fact, Justice Frankfurter wrote, any suggestion that the jury could not properly fulfill its role as the ultimate arbiter of fact, "tacitly assum[ed] that juries are too stupid to see the drift of evidence."<sup>143</sup> Justice Frankfurter added:

The jury in this case could not possibly have been misled into the notion that they must accept the calculations of the government expert any more than that they were bound by the calculations made by the defense's expert based on the defendants' assumptions of the case.<sup>144</sup>

---

Co., 255 F. 645, 646 (4th Cir. 1918); *Fireman's Ins. Co. of Baltimore v. J. H. Mohlman Co.*, 91 F. 85, 88 (2d Cir. 1898).

136. *United States v. Johnson*, 319 U.S. 503, 519-20 (1943). *Spaulding* was reported as a unanimous decision. 293 U.S. at 507. Although only a short time elapsed between *Spaulding* and *Johnson*, the composition of the Court had changed dramatically by the time *Johnson* was decided. Only Justices Stone and Roberts were members of the Court during the consideration of both cases. In *Johnson*, Justice Roberts dissented as to the evidentiary ruling. 319 U.S. at 520. His one paragraph opinion stated that substantial trial errors in the admission of evidence had operated to the prejudice of the defendant. *Id.* Justices Murphy, Jackson, and Rutledge did not participate in the case. *Id.*

137. 319 U.S. 503 (1943).

138. *Id.* at 515-17.

139. *Id.* at 519.

140. *United States v. Johnson*, 123 F.2d 111, 128 (7th Cir. 1941), *rev'd*, 319 U.S. 503 (1943).

141. *Johnson*, 319 U.S. at 519.

142. *Id.*

143. *Id.*

144. *Id.* The Supreme Court had earlier declined to exclude testimony on ultimate fact questions in *Texas & Pacific Railway v. Watson*, 190 U.S. 287 (1903), and *Transportation Line v. Hope*, 95 U.S. 297 (1877).



Because *Johnson* did not explicitly overrule *Spaulding*, attorneys litigating in federal courts before the adoption of the Federal Rules of Evidence could find precedent both for and against the ultimate issue rule.<sup>145</sup>

Meanwhile, the rule was also losing ground in the state courts. According to Dean Ladd and Professor Stoebuck, a 1942 Iowa case, *Grismore v. Consolidated Products Co.*,<sup>146</sup> was the seminal case in

---

145. *Spaulding* and *Johnson* illustrate the flexibility of the "ultimate issue" concept if used as an argument to exclude expert testimony. In *Spaulding*, the jury was asked to decide whether Spaulding was entitled to receive payment for his insurance claim. 293 U.S. at 499-500. One essential element of that entitlement was the determination that Spaulding had been totally and permanently disabled while the policy was in force, a question for the jury to decide by matching the medical evidence presented against the legal criteria for total permanent disability. *Id.* at 506. The Supreme Court decision does not state explicitly whether there were other essential elements of the claim in issue at trial, but it implies that there were not. *Id.* The medical evidence at issue in the Supreme Court decision consisted of medical conclusions that Spaulding could not work without serious detriment to his health and that his condition would not improve. *Id.* at 503-04. These conclusions were based on more preliminary medical conclusions that Spaulding was suffering from kidney failure and related conditions, which were based, in turn, on the diagnostic tools used by physicians, e.g., medical history, patient's stated symptoms, direct observations, and test results. *Id.* at 502-04. The testimony that the Supreme Court declared improper was thus at the third level in a five-level hierarchy of proof, starting with Spaulding's symptoms and ending with the conclusion that he was entitled to payment. The important point, however, is that if no other elements of the claim were at issue in the trial, then as a practical matter, the physicians' testimony answered the question at the very heart of the issue the jury was to decide. If the opinions of the physicians were taken at face value, there were no other points of controversy along the path to the conclusion that Spaulding was entitled to payment. *Id.* at 506.

In *Johnson*, the ultimate jury question was whether Johnson and his codefendants had violated the statute that prohibited willful attempts to evade payment of income taxes. 319 U.S. at 505-06. One essential element of this determination was the conclusion that Johnson's correct tax liability was larger than the amount he claimed on his return, a question for the jury to answer by determining the amount of Johnson's income and his tax liability according to statutory criteria. *Id.* at 514-17. In this case, the government claimed and Johnson denied that Johnson was the owner of several gambling parlors and that income from these enterprises was attributable to Johnson. *Id.* at 516-17. There were no accurate business records to show the earnings of the gambling parlors, so the government attempted to estimate the amount by circumstantial evidence that showed that Johnson's personal expenses were much greater than his declared income. *Id.* at 516-18. The jury was asked to make a leap from circumstantial evidentiary facts to a factual conclusion regarding the nature and extent of Johnson's relationship with the gambling parlors. The expert testimony that Johnson sought to exclude was an attempt by the government to help the jury make this leap by showing how all the evidence of Johnson's income and expenses could be assembled and what computations could be made upon it to determine Johnson's taxable income. *Id.* at 519. Thus, the testimony challenged as being inadmissible because it was "on the 'controverted issue' in the case," *id.*, was actually bridging the gap between primary evidentiary facts and a factual conclusion that the jury had to reach before it could apply legal criteria to determine one element of its final determination. Again, this is a long way in the hierarchy of proof from the final jury issue of the case. The defense argument assumed that if this particular testimony were to be accepted by the jury, then Johnson would be found guilty because there was nothing seriously controverted farther up the chain of proof.

146. 232 Iowa 328, 5 N.W.2d 646 (1942).

reversing the common law trend.<sup>147</sup> In *Grismore*, a farmer sued a feed salesman for selling him a product that allegedly killed his turkeys.<sup>148</sup> An expert in turkey-raising was permitted to testify as to the cause of the death of the turkeys, the sole issue in the case.<sup>149</sup> The Supreme Court of Iowa affirmed the admission in a lengthy opinion that Dean Ladd described as "so ably written that it ought to have awakened other courts to the possibility of making a clean sweep on this disturbing problem."<sup>150</sup> Apparently, that is exactly what happened, although like most changes in the law it did not occur quickly or neatly. By 1964, Professor Stoebuck was able to report that since *Grismore*, thirty-four states, eight federal circuits, and the District of Columbia had joined Iowa in abandoning or relaxing the rule.<sup>151</sup>

Thus, the adoption of Rule 704 of the Federal Rules of Evidence, abolishing the ultimate issue rule, did little more than codify the then existing practice in federal and state courts.<sup>152</sup>

### 3. FEDERAL CASES UNDER RULE 704

Rule 704(a), which deals with opinion on ultimate issues, states in part: [T]estimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact."<sup>153</sup>

Although Rule 704(a) abolishes the common law ultimate issue rule for the federal courts, except for the narrow proscription contained in Rule 704(b),<sup>154</sup> it only ends the exclusion of testimony on the basis of an ultimate issue objection. It does not admit testimony simply because the testimony touches on an ultimate issue. The advisory committee's note to Rule 704 states:

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

---

147. Ladd, *supra* note 23, at 423-24; Stoebuck, *supra* note 121, at 228 n.18.

148. 232 Iowa at 330-31, 5 N.W.2d at 649.

149. 232 Iowa at 340-41, 5 N.W.2d at 653-54.

150. Ladd, *supra* note 23, at 424.

151. Stoebuck, *supra* note 121, at 228-36. Additionally, Stoebuck reported, New Hampshire appeared never to have adopted the rule at all. *Id.* at 228.

152. J. WEINSTEIN, *supra* note 10, ¶ 704[01], at 704-8 (citing PROJECT OF A COMMITTEE OF NEW YORK TRIAL LAWYERS, RECOMMENDATION AND STUDY RELATING TO THE ADVISORY COMMITTEE'S PRELIMINARY DRAFT OF THE PROPOSED FEDERAL RULES OF EVIDENCE 205, 206, 207 (June 1, 1970)).

153. FED. R. EVID. 704(a). Subdivision (b) excludes expert testimony as to whether or not a criminal defendant had the mental state or condition constituting an element of a crime or defense. FED. R. EVID. 704(b); see *infra* Section III(D).

154. See *supra* note 153.

reach, somewhat in the manner of the oath-helpers of an earlier day.<sup>155</sup>

Further, the rule refers only to "an ultimate issue to be decided by the trier of fact," not to an ultimate issue of fact.<sup>156</sup> Thus, by its text alone, the rule does not exclude expert opinions phrased in legal terminology. In a negligence case, for example, the jury might be asked to determine whether the defendant's conduct was negligent after the judge instructed the jury as to the legal meaning of the word "negligence" and the elements of which it is composed. Should an expert witness be permitted to testify in the same case that, in his opinion, the defendant was negligent? The extent to which an expert witness is permitted to express an opinion using the words of the law is a matter of considerable uncertainty.<sup>157</sup>

The immediate analysis, however, is concerned only with opinions of ultimate fact and attempts to determine whether the courts are excluding evidence on the basis of a perceived ultimate issue rule despite Rule 704, and whether the courts are evading the intention of Rule 704—excluding ultimate issue testimony by arbitrarily declaring that it does not assist the jury, under the Rule 702 standard.

As noted by Judge Weinstein, few cases are settled by reference to Rule 704.<sup>158</sup> Cases involving issues of ultimate fact alone, without reference to legal questions, are few indeed. Most instructive is a group of cases in which the trial courts excluded evidence on grounds sounding in the ultimate issue theory, only to be overturned on appeal.<sup>159</sup>

In *Zenith Radio Corp. v. Matsushita Electric Industrial Co.*,<sup>160</sup> the district court noted the plaintiffs' claim that the proffered expert witness testimony on the economics of the consumer electronics industry would provide "specialized knowledge [that would] indeed help the fact finder to interpret the evidence before it."<sup>161</sup> The defend-

---

155. FED. R. EVID. 704 advisory committee's note, 56 F.R.D. 183, 285 (1973).

156. Weinstein says that "the result is the same with or without these words." J. WEINSTEIN, *supra* note 10, ¶ 704[01], at 704-8 n.16.

157. See *infra* Section III(C).

158. J. WEINSTEIN, *supra* note 10, ¶ 704[02], at 704-13.

159. Reversals are much more revealing than affirmances in opinion testimony cases because appellate courts give trial judges wide-ranging discretion in this area, reversing only if they find clear abuse of that discretion. Thus, an affirmance usually stands only for the proposition that the trial judge acted within his discretion, not that the appellate court would have made the same ruling. Pratt, *supra* note 11, at 313, 327 & cases cited at 313 n.1.

160. 505 F. Supp. 1313 (E.D. Pa. 1980), *incorporated by reference*, 513 F. Supp. 1100 (E.D. Pa. 1981), *rev'd in part sub nom. In re Japanese Elec. Prod. Antitrust Litig.*, 723 F.2d 238 (3d Cir. 1983), *rev'd in part on other grounds sub nom. Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986); see *supra* notes 73-79 and accompanying text.

161. *Id.* at 1331.

ants countered that the experts' opinions "ha[d] gone beyond the types of testimony contemplated by [Rule 704] and ha[d] entered the province of 'oath-helping' by merely interpreting the evidence . . . , explaining, in effect, what result should be reached."<sup>162</sup> In response to these conflicting perspectives, the court fashioned its own theory of the ultimate issue rule:

If, as defendants contend, the expert opinions in this litigation stem merely from a rehash of the evidence already before the trier of fact, without adding a component of expertise, *i.e.*, without instructing the trier of fact "in the ways of his [the expert's] work," those portions will be found inadmissible because they are the unhelpful "oath-helping" of a "conspiracyologist." If, on the other hand, the experts' economic sophistication enables them to explain the evidence to the jury in a permissible manner otherwise beyond the jury's sphere of knowledge, the opinion would be admissible. We note that expert testimony may not be used merely to interpret a factually complex record. The test for admissibility of an expert's opinion turns not on complexity but on the subject matter of the opinion, *i.e.*, on whether the expert's specialized knowledge enhances the jury's understanding.<sup>163</sup>

The United States Court of Appeals for the Third Circuit dismissed the district court's exegesis with one terse comment: "[T]o the extent that the trial court's discussion suggests that expressions of opinion on the ultimate fact in issue somehow impermissibly invade the province of the jury, it is inconsistent with the clear mandate of Rule 704."<sup>164</sup>

In *Vucinich v. Paine, Webber, Jackson & Curtis, Inc.*,<sup>165</sup> the district court was reversed on its exclusion of three different items of expert testimony, one bearing on an ultimate issue of fact.<sup>166</sup> Vucinich, an individual of limited means and no sophistication regarding investments, sold \$40,000 worth of stock she had inherited and invested the proceeds by selling short, upon the advice of the

---

162. *Id.*

163. *Id.* at 1334. The trial court determined that large parts of the expert opinions in this case did not meet this articulation of the helpfulness standard and were merely conclusions drawn from proffered testimony. This holding was one basis for the court's exclusion of the expert witness testimony. *Id.* at 1342.

164. *In re Japanese Elec. Prod. Antitrust Litig.*, 723 F.2d 238, 279 (3d Cir. 1983), *rev'g in part* *Zenith Radio Corp. v. Matsushita Elec. Indus. Co.*, 513 F. Supp. 1100 (E.D. Pa. 1981), *incorporat'g by reference* 505 F. Supp. 1313 (E.D. Pa. 1980), *rev'd in part on other grounds sub nom. Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986). The Third Circuit ruled that the excluded testimony was admissible. *Id.* at 282; *see supra* notes 80-84 and accompanying text.

165. 803 F.2d 454 (9th Cir. 1986).

166. *Id.* at 461.

defendant, a broker.<sup>167</sup> Although Vucinich had told the broker that she was interested in capital gains but not in gambling or speculation, the broker did not warn her that selling short was an extremely speculative and high risk form of investment.<sup>168</sup> After following his advice through several transactions, Vucinich lost all but \$8,274 of her investment over a four-year period. She then filed suit, claiming violations of the Securities Exchange Act of 1934,<sup>169</sup> common law fraud, breach of fiduciary duty, and negligence.<sup>170</sup>

The trial court excluded testimony by the plaintiff's securities business expert on the suitability of the investments offered to Vucinich, the adequacy of the information given to her by the broker, and the degree of control the broker exercised over her account, according to industry standards.<sup>171</sup> The exclusion was reversed on appeal, the United States Court of Appeals for the Ninth Circuit finding that all of the testimony would have "assisted the trier of fact 'to understand the evidence.'"<sup>172</sup>

Expert testimony on financial matters was also the subject of reversal in *United States v. Lueben*.<sup>173</sup> Lueben, a packager of real estate investment deals, was accused of making materially false statements to a federally insured savings and loan association in order to secure a loan.<sup>174</sup> Lueben based his defense on the argument that the misstatements were not material, as required by the statutory definition of the offense.<sup>175</sup> He proffered as an expert a certified financial examiner, who was prevented from testifying that a savings and loan would look only to the value of the property in making a loan of the type in question and would disregard the items that were misstated on the application.<sup>176</sup>

In excluding the evidence, the trial court stated the remarkable conclusion that "under Federal Rule of Evidence 704, a party 'cannot offer an expert opinion on one of the ultimate issues of fact, one of the ultimate issues in the case,' " citing two recent Fifth Circuit cases for support.<sup>177</sup> The United States Court of Appeals for the Fifth Circuit responded that the trial court had misconstrued the meaning of the

---

167. *Id.* at 456-57.

168. *Id.* at 457.

169. 15 U.S.C. §§ 78j(b), 78t(a) (1982).

170. *Vucinich*, 803 F.2d at 456.

171. *Id.* at 461.

172. *Id.*

173. 812 F.2d 179, *vacated in part on other grounds*, 816 F.2d 1032 (5th Cir. 1987).

174. *Id.* at 181-82.

175. *Id.* at 183 & n.3.

176. *Id.* at 182-83.

177. *Id.* at 183. The cases cited were *Matthews v. Ashland Chemical, Inc.*, 770 F.2d 1303

cited cases, both of which dealt with testimony on disputed conclusions of law.<sup>178</sup> In this case, the witness was not testifying that Lueben's misstatements were immaterial, a legal conclusion, only that the savings and loan would have tended to disregard them, a factual conclusion.<sup>179</sup>

Taken together, *In re Japanese Electronic Products Antitrust Litigation*,<sup>180</sup> *Vucinich*,<sup>181</sup> and *Lueben*<sup>182</sup> suggest an answer to both the inquiries posed at the beginning of this subsection: If the court concludes that challenged testimony involves only an issue of fact, it is likely to admit the testimony into evidence regardless of whether the opinion stated addresses an ultimate issue, and it will tend to construe narrowly any other available ground for excluding ultimate issue testimony, such as the Rule 702 requirement that the opinion assist the trier of fact.<sup>183</sup>

---

(5th Cir. 1985), and *Owen v. Kerr-McGee Corp.*, 698 F.2d 236 (5th Cir. 1983); see *infra* notes 280-93 & 368-72 and accompanying text.

178. *Lueben*, 812 F.2d at 183-84.

179. *Id.* at 184. One is tempted to argue, of course, that the proffered testimony would have entirely disposed of the legal issue, materiality, as well, because the misstatements clearly would be immaterial if the savings and loan ignored them. The case illustrates the fine line courts draw in distinguishing between issues of fact and issues of law. It also demonstrates the court's inclination to find a ground to admit the testimony in a situation in which the court easily could have decided the other way.

180. 505 F. Supp. 1313 (E.D. Pa. 1980), *incorporated by reference*, 513 F. Supp. 1100 (E.D. Pa. 1981), *rev'd in part sub nom. In re Japanese Elec. Prod. Antitrust Litig.*, 723 F.2d 238 (3d Cir. 1983), *rev'd in part on other grounds sub nom. Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986); see *supra* notes 160-64 and accompanying text.

181. 803 F.2d 454 (9th Cir. 1986); see *supra* notes 165-72 and accompanying text.

182. 812 F.2d 179, *vacated in part on other grounds*, 816 F.2d 1032 (5th Cir. 1987); see *supra* notes 173-79 and accompanying text.

183. FED. R. EVID. 702. In other cases, courts of appeals have upheld district court rulings allowing expert testimony going to an ultimate issue of fact. For instance, the United States Court of Appeals for the Ninth Circuit upheld the trial court's admission of expert testimony that clothing seized from a defendant matched clothing worn by a robber in surveillance photographs. Identification of the robber was the ultimate issue in contention. *United States v. Barrett*, 703 F.2d 1076, 1084 n.14 (9th Cir. 1983). It was error to admit the expert's conclusion that the items of clothing matched, but only because the government had voluntarily agreed that the expert would not offer a conclusion. *Id.* Had there been no such agreement, the testimony would have been entirely proper. *Id.* The court found that the error was rendered harmless by a curative instruction to the jury. *Id.*

The Seventh Circuit upheld the admission of testimony that a particular feature of a boat trailer taillight would be obvious to any person knowledgeable in the field, in a case in which such obviousness made the feature ineligible for patent protection. *Moore v. Wesbar Corp.*, 701 F.2d 1247, 1252-53 (7th Cir. 1983).

And the Sixth Circuit upheld the admission of testimony that an employee was terminated from his job because of his age in an age discrimination suit. *Davis v. Combustion Eng'g, Inc.*, 742 F.2d 916, 919 (6th Cir. 1984). The court suggested, however, that the expert should not have been permitted to testify that the employee's termination was "unlawful age discrimination," because that was a conclusion of law, not fact. *Id.* at 919-20; see *infra* notes 294-300 and accompanying text.

Furthermore, expert testimony that reaches the ultimate issue of fact will not necessarily be excluded merely because it is cumulative in nature and serves principally to tie together a large volume of complex evidence. In *United States v. Schafer*,<sup>184</sup> the United States Court of Appeals for the Fifth Circuit held that the government may call an expert witness in a complex tax case "[i]n order to assist the jury in organizing and understanding the mass of testimony and documents before them . . . provided . . . that the expert testifies on the basis of facts in evidence."<sup>185</sup> One district court case demonstrates, however, that there may be limits to the admissibility of cumulative expert testimony on an ultimate issue. In *King v. Fox Grocery Co.*,<sup>186</sup> an employee discharged from his job filed suit alleging violation of the Labor-Management Relations Act.<sup>187</sup> He attempted to introduce an expert report on the employee's termination prepared by a labor lawyer.<sup>188</sup> After noting that Rule 704 abolishes objections to expert testimony on ultimate issues of fact, the trial court ruled that the report was not admissible.<sup>189</sup>

Review of the report shows that it does not simply embrace an ultimate issue; it consists almost entirely of the proposed expert's opinion on the ultimate issue. The report is a far cry from the typical form of expert's report which largely concerns itself with complex or disputed facts. The trier of fact does not need an expert to determine the facts of this labor case. All that need be done is to unravel the chronology of conduct among the parties during the period in question.<sup>190</sup>

It may be concluded from the foregoing discussion that the federal courts appear to be applying Rule 704(a) vigorously and liberally on cases involving expert testimony on issues of ultimate fact. An opinion of the United States Court of Appeals for the Second Circuit demonstrates, however, that in at least some cases, the courts may not be happy with the outcome of the rule. In *United States v. Brown*,<sup>191</sup>

---

184. 580 F.2d 774 (5th Cir.), *cert. denied*, 439 U.S. 970 (1978).

185. *Id.* at 778. The court cited *United States v. Johnson*, 319 U.S. 503 (1943), in support of this proposition and did not refer at all to the Federal Rules of Evidence. For a discussion of *Johnson*, see *supra* notes 136-45 and accompanying text. Nonetheless, the *Schafer* ruling clearly allows testimony that is solely an opinion on the ultimate issue of fact. "Indeed, without [the expert's] testimony, the jury might well have been hopelessly confused, for it would have been well-nigh impossible for them to determine whether Schafer in fact had substantially underpaid his taxes." *Schafer*, 580 F.2d at 778.

186. 642 F. Supp. 288 (W.D. Pa. 1986).

187. 29 U.S.C. § 185 (1982). *King*, 642 F. Supp. at 289.

188. *Id.* at 291.

189. *Id.*

190. *Id.*

191. 776 F.2d 397 (2d Cir. 1985), *cert. denied*, 475 U.S. 1141 (1986).

an undercover police officer was allowed to testify, on the basis of his personal knowledge of the alleged crime and his experience in investigating narcotics traffic, that the defendant had acted in a drug deal as a "steerer," a person who screens potential drug buyers on the street to determine whether they are drug users or police officers.<sup>192</sup> Upholding admission of this testimony under Rule 704(a), the Second Circuit commented:

[T]here is something rather offensive in allowing an investigating officer to testify not simply that a certain pattern of conduct is often found in narcotics cases, leaving it for the jury to determine whether the defendant's conduct fits the pattern, but also that such conduct fitted that pattern, at least when other inferences could have been drawn not unreasonably although perhaps not as reasonably as that to which the expert testified.<sup>193</sup>

The appellate court's objection boils down to a sense that the jury, despite the defendant's opportunity to cross-examine and present opposing expert theories and despite the charge of the judge, might have given undue weight to the testimony of the expert. The court, following the precedent of its earlier cases, chose not to declare the testimony prejudicial and exclude it under Rule 403.<sup>194</sup> Nonetheless, this ruling, like the ruling in *King*<sup>195</sup> and the district court rulings in *Zenith*,<sup>196</sup> *Vucinich*,<sup>197</sup> and *Lueben*,<sup>198</sup> demonstrates that the courts have not abandoned their concern that expert witnesses will usurp the role of the jury. Although the common law rule against ultimate issue

---

192. *Id.* at 400.

193. *Id.* at 401 (footnote omitted). The drug deal was part of a police operation. *Id.* at 399. An undercover police officer, who was later the expert witness at the trial, approached a drug seller on the street and asked to buy heroin. *Id.* After discussion with the defendant, the seller agreed to the deal, took money from the officer, went into a nearby hotel, and came back with the drugs. *Id.* In a footnote, the court listed four other plausible explanations for the defendant's conduct: (1) that the defendant was a friend but not a partner of the drug seller; (2) that the defendant wanted to buy drugs himself and was simply trying to get the customer/officer out of his way; (3) that the defendant wanted to get the drug transaction done with so that he and the seller could do something else; or (4) that the seller was acting in the dual role of procurer and steerer for another seller in the hotel and there was no need for the defendant to act as steerer. *Id.* at 401 n.5.

194. *Id.* at 401-02 (following *United States v. Young*, 745 F.2d 733, 744, 752-53, 760 (2d Cir. 1984), *cert. denied*, 470 U.S. 1084 (1985); *United States v. Carson*, 702 F.2d 351, 369 (2d Cir.), *cert. denied*, 462 U.S. 1108 (1983), and distinguishing *United States v. Sette*, 334 F.2d 267, 269 (2d Cir. 1964)).

195. 642 F. Supp. 288 (W.D. Pa. 1986); *see supra* notes 186-90 and accompanying text.

196. 505 F. Supp. 1313 (E.D. Pa. 1980), *incorporated by reference*, 513 F. Supp. 1100 (E.D. Pa. 1981), *rev'd in part sub nom. In re Japanese Elec. Prod. Antitrust Litig.*, 723 F.2d 238 (3d Cir. 1983), *rev'd in part on other grounds sub nom. Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986); *see supra* notes 160-64 and accompanying text.

197. *See Vucinich*, 803 F.2d at 461; *supra* notes 165-72 and accompanying text.

198. *See Lueben*, 812 F.2d at 183; *supra* notes 173-79 and accompanying text.



testimony is banished from the federal courts, the judicial concern that brought forth the now discredited rule lives on in the minds of some federal judges.

### C. Exclusion Based on "Conclusion of Law" Testimony

#### 1. THEORY OF THE RULE

In theory, the judge is the sole authority on the law and its interpretation. This simple proposition is so basic to the common law system that it scarcely needs repeating. The corollary of this truism is that an expert witness may not give an opinion to the court or the jury on an issue of law:<sup>199</sup>

In order to justify having courts resolve disputes between litigants, it must be posited as an a priori assumption that there is one, but only one, legal answer for every cognizable dispute. There being only one applicable legal rule for each dispute or issue, it requires only one spokesman of the law, who of course is the judge. . . . To allow anyone other than the judge to state the law would violate the basic concept. Reducing the proposition to a more practical level, it would be a waste of time if witnesses or counsel should duplicate the judge's statement of the law, and it would intolerably confound the jury to have it stated differently.<sup>200</sup>

Issues, however, do not come with labels that tell a judge whether they are issues of fact or issues of law, and the distinction is sometimes difficult to make.<sup>201</sup> Professor Stoebuck pointed out in 1964 that many courts had excluded testimony based on the common law ultimate fact rule when the testimony actually dealt with an issue of law or a mixed issue of fact and law.<sup>202</sup> Other courts, in their eagerness to discard the ultimate fact rule, had sanctioned opinions on the law, mistaking them for opinions of fact.<sup>203</sup>

The Federal Rules of Evidence deal indirectly with opinions on questions of law. Rule 704(a) allows for the admission of testimony that "embraces an ultimate issue to be decided by the trier of fact."<sup>204</sup> It does not specifically refer to an "issue of fact" or to an "issue of law." The advisory committee's note points out that Rules 701

---

199. The older evidence treatises appear to take this proposition for granted, not mentioning it at all or passing it off in a brief reference. Greenleaf, for example, simply said that "witnesses are not receivable to state their views on matters of legal or moral obligation." S. GREENLEAF, *supra* note 123, § 441, at 491.

200. Stoebuck, *supra* note 121, at 237.

201. See *supra* notes 135 & 173-79 and accompanying text.

202. Stoebuck, *supra* note 121, at 237 & n.78.

203. *Id.* at 237-38 & n.79.

204. FED. R. EVID. 704(a).

(Opinion Testimony by Lay Witnesses), 702 (Testimony by Experts), and 403 (Exclusion of Relevant Evidence on Grounds of Prejudice, Confusion, or Waste of Time), used in combination, limit the inclusive thrust of Rule 704:

[These Rules] . . . stand ready to exclude opinions phrased in terms of inadequately explored legal criteria. Thus the question, "Did T have capacity to make a will?" would be excluded, while the question, "Did T have sufficient mental capacity to know the nature and extent of his property and the natural objects of his bounty and to formulate a rational scheme of distribution?" would be allowed.<sup>205</sup>

This often cited formulation attempts to illustrate the conceptual difference between an admissible conclusion of fact and an inadmissible conclusion couched in legal terminology. Testamentary capacity, the "capacity to make a will," is defined by statute and case law.<sup>206</sup> If a jury is called upon to determine whether *T*, a testator, had the capacity to make a will, the judge will instruct it as to the legal standard against which it must evaluate the evidence. Typically, that formulation will approximate the one used in the advisory committee's example.<sup>207</sup> In a hypothetical jurisdiction defining testamentary capacity in the language of the example, the judge would tell the jury that it must determine, based on all the evidence presented, whether *T* had sufficient mental capacity to (1) know the nature and extent of his property; (2) know the natural objects of his bounty; and (3) formulate a rational scheme of distribution. The jury would be directed to find that *T* had the capacity to make a will if it determined that the answers to all three of the stated inquiries were affirmative, and that *T* did not have the capacity to make a will if it determined that the answer to any of the inquiries were negative.

If the expert witness is permitted to state his opinion on all the questions of fact that the jury will have to answer in order to arrive at its ultimate conclusion on testamentary capacity, why should the court not go the next step and allow the expert to state the legal conclusion that is impelled by his answers to the questions of fact? Or, to phrase the question in a more compelling form: If the expert's answers to factual questions, once applied to the correct legal standard, impel a certain conclusion, has the expert not, in effect, already

---

205. FED. R. EVID. 704 advisory committee's note, 56 F.R.D. 183, 285 (1973) (citing MCCORMICK ON EVIDENCE § 12 (E. Cleary ed. 1984)).

206. 1 W. BOVE & D. PARKER, PAGE ON THE LAW OF WILLS § 12.15, at 592-93 (1960).

207. *Id.* § 12.21, at 608-09; see, e.g., *In re Estate of Edwards*, 433 So. 2d 1349, 1350 (Fla. 5th DCA 1983).

stated a conclusion of law, even if he has not used legal nomenclature to phrase his answers?

The answer is that the witness is not qualified as an expert on the law.<sup>208</sup> The court cannot assume that he knows, fully understands, and applies the legal criteria for "capacity to make a will" exactly as the court will instruct the jury to do. This is what the advisory committee means by "inadequately explored legal criteria."<sup>209</sup> If the expert does not explain the underlying basis of his conclusion, the jury does not know exactly what he means, because his notion of "capacity to make a will" might be entirely different from what is required by the law. If, on the other hand, he does explain the basis of his conclusion and then he goes on to draw the conclusion, he also is stating his interpretation of the legal criteria, thereby encroaching on the authority of the judge.

## 2. CASE ANALYSIS

Although the advisory committee's example seems simple enough, the federal courts have reached inconsistent results in trying to separate permissible opinions of fact from impermissible opinions of law. The cases fall, though not neatly, into three general groups: First, the expert witness may try to state an opinion on the current status of the law on a particular subject. Such testimony is almost always excluded. Second, the expert witness may state an opinion that is essentially factual in nature but that incorporates words or phrases with specific legal definitions. Generally, this testimony will be admitted if the court believes that the legally defined word can be understood by the jury in a more familiar context that does not depend on the legal definition. Third, the expert may try to state, using legal criteria, a conclusion that is essentially the same as the legal conclusion the jury will be asked to reach. This situation is essentially the one contemplated in the advisory committee's example and it is in cases of this type that the courts have struggled.<sup>210</sup>

---

208. Indeed, because the judge alone has that role, the witness by definition cannot be qualified as an expert on the law.

209. See *supra* note 205 and accompanying text.

210. The second and third categories are distinguished essentially by the difference between an opinion of fact and an opinion of law. Because the line between these is not always easy to draw, see *supra* note 114, the two categories tend to overlap at the edges. Although there appear to be two distinctly different kinds of cases, some look as though they might fit into either group. In those cases, the reader may disagree with the author's attempt at classification.

a. Witness Tries to State the Law

In cases in which the law is unusually technical or complex, parties may attempt to convince the jury that a certain course of conduct was lawful or unlawful, based on an expert's statement of how the law applies in that particular context. Such testimony implies that the law of the case is in dispute and that the jury may decide the issue based on its interpretation of the law, as explained by the expert.

This situation arose in *Marx & Co. v. Diners' Club, Inc.*<sup>211</sup> In 1967, Diners' Club acquired a travel agency from Marx in return for unregistered stock of Diners' Club and other consideration.<sup>212</sup> The agreement between the parties provided in substance that on the request of Marx, Diners' Club would "promptly" file a registration statement for the stock and use its "best efforts" to cause the registration statement to become effective.<sup>213</sup> Marx requested registration in 1969.<sup>214</sup> In 1970, when it appeared that no registration would be effected, Marx sued, alleging breach of contract.<sup>215</sup>

One claim made by Marx was that Diners' Club had unduly delayed before finally filing a registration statement in August 1969.<sup>216</sup> Diners' defense was that it had filed within the time permitted under the contract.<sup>217</sup> As a rebuttal witness, Marx called a securities lawyer who testified that, pursuant to the contract, the statement should have been filed by June 20, 1969 and should have been effective by August 1969.<sup>218</sup> In justifying his conclusion, the securities expert said:

I construe "best efforts" in the context of a covenant to register shares as the assumption on the part of the person who gives the covenant *an absolute, unconditional responsibility*, to set to work promptly and diligently to do everything that would have to be done to make the registration statement effective.<sup>219</sup>

The United States Court of Appeals for the Second Circuit ruled

---

211. 400 F. Supp. 581 (S.D.N.Y. 1975), *rev'd in part*, 550 F.2d 505 (2d Cir.), *cert. denied*, 434 U.S. 861 (1977).

212. *Id.* at 583.

213. The contract included several conditions precedent and conditions subsequent, modifying the obligation of Diners' Club to register the stock. One condition precedent, a requirement that Marx pay one-half the cost of registration, was an issue in the case, but the disputed expert testimony was not related to that issue. *Id.* at 583 n.1, 585.

214. *Id.* at 583-84.

215. *Id.*

216. *Id.* at 584 n.2.

217. *Id.* at 586.

218. *Id.*

219. *Marx & Co. v. Diners' Club, Inc.*, 550 F.2d 505, 509 (2d Cir. 1977) (emphasis added by the court of appeals), *rev'g in part* 400 F. Supp. 581 (S.D.N.Y. 1975), *cert. denied*, 434 U.S. 861 (1977).

that the witness, as an expert on securities law, could have testified as to the ordinary practices and procedures used in preparing registration statements.<sup>220</sup> Such testimony would have assisted the jury in evaluating Diners' conduct against normal industry standards.<sup>221</sup> But, said the court, the expert's testimony was of an entirely different character:

[H]e gave his opinion as to the legal standards which he believed to be derived from the contract and which should have governed Diners' conduct. He testified not so much as to common practice as to what was necessary "to fulfill the covenant" [of the contract].

. . . .

. . . "The question of interpretation of the contract is for the jury and the question of legal effect is for the judge. In neither case do we permit expert testimony."<sup>222</sup>

---

220. *Id.* at 509.

221. *Id.* Note that this type of testimony parallels the testimony given by physicians in medical malpractice cases. Presumably, using the same analogy, the securities expert would have been within bounds if he had compared Diners' conduct with normal industry standards and had stated an opinion as to whether Diners' conduct conformed. The Second Circuit did not address this possibility. The weakness of the analogy is that physicians establish and regulate their own standards of practice to a much greater extent than does the securities industry. See *infra* Section IV(B).

222. *Id.* at 509-10 (quoting *Loeb v. Hammond*, 407 F.2d 779, 781 (7th Cir. 1969)). The distinction raised between the role of the jury and the role of the judge raises an interesting question: Was the securities expert's testimony interpretation, a matter for the jury, or construction, a matter for the court? The question at issue was the meaning of the term "best efforts." The Second Restatement of Contracts provides rules for determining the meaning of a written agreement:

(1) The interpretation of an integrated agreement is directed to the meaning of the terms of the writing . . . .

(2) A question of interpretation of an integrated agreement is to be determined by the trier of fact if it depends on the credibility of extrinsic evidence or on a choice among reasonable inferences to be drawn from extrinsic evidence. Otherwise a question of interpretation of an integrated agreement is to be determined as a question of law.

RESTATEMENT (SECOND) OF CONTRACTS § 212 (1979).

There is no indication in the case report that the written contract was not an integrated agreement, as defined in section 209 of the Second Restatement of Contracts. Given the usual formality of securities transactions, it is reasonable to assume that the writing was an integrated agreement.

The Restatement suggests that if there are two reasonable meanings that could be attached to the "best efforts" clause, then it would be appropriate to present extrinsic evidence to the jury and allow it to decide which meaning was intended by the parties:

Analytically, what meaning is attached to a word or other symbol by one or more people is a question of fact. But general usage as to the meaning of words in the English language is commonly a proper subject for judicial notice without the aid of evidence extrinsic to the writing. Historically, moreover, partly perhaps because of the fact that jurors were often illiterate, questions of interpretation of written documents have been treated as questions of law in the sense that they are decided by the trial judge rather than by the jury.

The logic is slightly muddled by the fact that the expert witness was expressing his opinion of a contract, rather than of statutory or case law. The court stated, however, that construction of a contract is the equivalent of interpretation of the law—a matter out of the hands of the jury and therefore off limits for witnesses.<sup>223</sup>

It is instructive to contrast *Marx* with *United States v. Jensen*<sup>224</sup> and *Vucinich v. Paine, Webber, Jackson & Curtis, Inc.*,<sup>225</sup> cases stating that the privately promulgated rules and regulations of the securities industry are not matters of law and may be interpreted by an expert witness.<sup>226</sup> The facts of the two cases are similar. The defendants were accused of fraud in the sale of securities.<sup>227</sup> At trial, the defend-

RESTATEMENT (SECOND) OF CONTRACTS § 212 comment d (1979).

If the court was asserting that "best efforts" had but one judicially cognizable meaning, then under the Restatement view, the matter ends there. If other views were possible, then one could make a good argument that the securities expert should have been allowed to testify as to what would be a reasonable interpretation of the phrase in the usual usage of securities agreements. Nevertheless, even in that case, the court could still find fault with his statement phrased as "I construe," amounting to a conclusion based on "inadequately explored legal criteria."

223. The Second Circuit also pointed out that if a witness is allowed to state an opinion on a matter of law, the usual checks and balances inherent in the adversary system break down. Cross-examination is an invitation to disaster because an obstinate expert would merely repeat his statements and reinforce the potentially incorrect impression made on the jury. Opposing experts would be equally inappropriate: "With the growth of intricate securities litigation over the past forty years, we must be especially careful not to allow trials before juries to become battles of paid advocates posing as experts on the respective sides concerning matters of domestic law." *Marx*, 550 F.2d at 511; *accord Adalman v. Baker, Watts & Co.*, 807 F.2d 359 (4th Cir. 1986). Buyers of limited partnership interests in an oil and gas drilling venture that went bad sued the investment banking firm that syndicated the partnership units. *Id.* at 361-62. Plaintiffs claimed that the syndicator had violated securities laws by failing to disclose material information at the time of the offering. *Id.* at 362. The syndicator was not permitted to introduce the testimony of an attorney to the effect that there was no legal requirement that the omitted information be disclosed. *Id.* at 365. The Fourth Circuit affirmed exclusion of the testimony, citing *Marx* as authority, and said:

While this case turns on the applicability and meaning of the securities laws, the issue . . . has a far broader reach . . . . If such experts are to testify to the meaning and applicability of securities laws, what line is to be drawn to exclude tort lawyers from offering their expert opinions to the jury as to the meaning and applicability of the laws governing tort litigation? Examples of this sort could be multiplied across the gamut of litigation.

*Id.* at 366.

224. 608 F.2d 1349 (10th Cir. 1979).

225. 803 F.2d 454 (9th Cir. 1986).

226. *Vucinich*, 803 F.2d at 461; *Jensen*, 608 F.2d at 1356. In *Vucinich*, the Ninth Circuit reversed the trial court's exclusion of the testimony. 803 F.2d at 462. In *Jensen*, the Tenth Circuit upheld the trial court's admission of the testimony. 608 F.2d at 1356. *Vucinich* was a civil case. 803 F.2d at 456. *Jensen* was a criminal case. 608 F.2d at 1352. These distinctions do not appear to make any difference for purpose of the present discussion. For a discussion of *Vucinich* regarding the ultimate issue of fact rule, see *supra* notes 165-72 and accompanying text.

227. *Vucinich*, 803 F.2d at 456-58; *Jensen*, 608 F.2d at 1352.

ants objected to expert witness testimony interpreting the rules of the National Association of Security Dealers and reaching conclusions as to how the defendants' conduct related to those rules.<sup>228</sup>

The *Vucinich* court commented that the rules were "highly relevant and far from prejudicial 'because the rules reflect the standard to which all brokers are held.' . . . Not being civil law, these rules were proper matters for expert testimony."<sup>229</sup> This statement presents a curious paradox. These cases concerning industry rules can be reconciled with the logic of *Marx* only because a contract is held to be the private law of the parties, and as such, enforceable by the courts. The rules of an industry association, however, are voluntary among its members, and not having any status as law, are enforced only by sanctions the association might choose to impose. But the courts view the industry rules as relevant because they reflect the standard to which all brokers are held. This implies that the jury might be called upon to give the rules the effect of law and sanction the defendant for his failure to adhere to them. On this level, the cases demonstrate how fine the line between fact and law becomes and how difficult it is for a court to draw that line in a way that stands up to comparative analysis.

An interesting line of cases presents one small exception to the absolute proscription of expert testimony on the law: Situations in which confusion about the law may have influenced a party's conduct. In *United States v. Garber*,<sup>230</sup> the defendant was prosecuted for income tax evasion because she failed to report large amounts of money she received for selling blood plasma.<sup>231</sup> The main issue in the case was whether the tax law considered the transactions to be taxable sales of a product or service, or nontaxable exchanges of property for other property of equivalent value.<sup>232</sup> Garber argued that the law was so unsettled on the point that she could not have acted willfully in failing to report as income the money she received.<sup>233</sup> Garber and the

---

228. *Vucinich*, 803 F.2d at 461; *Jensen*, 608 F.2d at 1356. In *Vucinich*, the expert witness also discussed the rules of the New York Stock Exchange. 803 F.2d at 461. Testimony regarding both sets of rules was included in the same objection by defendant and was considered as a unit by the court. *Id.*

229. *Vucinich*, 803 F.2d at 461 (quoting *Mihara v. Dean Witter & Co.*, 619 F.2d 814, 824 (9th Cir. 1980)).

230. 607 F.2d 92 (5th Cir. 1979).

231. *Id.* at 93-94. Garber was one of only two or three persons in the world known to have in her blood a particular antibody that was extremely useful to blood banks. Three different pharmaceutical companies competed with each other for the right to buy her blood plasma. As a result, she was paid \$80,200, \$71,400, and \$87,200 for the three years covered by the indictment. *Id.* at 94 & n.1.

232. *Id.* at 95.

233. *Id.* at 96.

government both proffered experts with opposing views of the law.<sup>234</sup> The trial judge excluded both and finally ruled as a matter of law that the sale of Garber's blood produced taxable income.<sup>235</sup>

The exclusions were reversed on appeal because the expert testimony was an essential element of Garber's challenge to the willfulness element of the alleged crime.<sup>236</sup> The United States Court of Appeals for the Fifth Circuit declared:

[T]he unresolved nature of the law is relevant to show that defendant may not have been aware of a tax liability or may have simply made an error in judgment. Furthermore, the relevance of a dispute in the law does not depend on whether the defendant actually knew of the conflict.<sup>237</sup>

The Ninth Circuit followed *Garber* in *United States v. Clardy*,<sup>238</sup> a tax fraud case. In *Clardy*, an Internal Revenue Service agent was permitted to testify that a particular type of interest payment was "not deductible."<sup>239</sup> The statement was relevant to rebut the defendant's argument that he could not have acted willfully because deductibility of the interest was a subject of legitimate dispute.<sup>240</sup>

In another tax case, *United States v. Ingredient Technology Corp.*,<sup>241</sup> the United States Court of Appeals for the Second Circuit both distinguished and rejected *Garber*.<sup>242</sup> The defendant was accused of illegally manipulating inventories shown on its books in order to evade taxation.<sup>243</sup> It tried to attack the "willfulness" element of the charge by introducing expert testimony that the law was uncertain in this area.<sup>244</sup> The court first found that, unlike *Garber*, the defendant in this case genuinely thought that what it was doing was unlawful; therefore, it could not claim to have not acted willfully.<sup>245</sup> Second, the court said that any actual controversy about the state of the law was not a proper basis for a determination of willfulness, and therefore, not a proper subject for expert testimony.<sup>246</sup> Only the subjective state of mind of the defendant determined the willfulness of its

---

234. *Id.* at 94-95.

235. *Id.* at 94-96.

236. *Id.* at 99.

237. *Id.* at 98.

238. 612 F.2d 1139, 1141 (9th Cir. 1980).

239. *Id.* at 1153.

240. *Id.* at 1152-53.

241. 698 F.2d 88 (2d Cir.), *cert. denied*, 462 U.S. 1131 (1983).

242. *Id.* at 97.

243. *Id.* at 89.

244. *Id.* at 96.

245. *Id.* at 97.

246. *Id.*



conduct.<sup>247</sup>

The correct position may lie somewhere between the extremes represented by *Garber* and *Ingredient Technology*. It is difficult to see why legal uncertainty is relevant to determine the defendant's willful intent if the defendant was unaware of the debate. But if the defendant could show that he knew the law was in dispute, then evidence presenting the conflicting points of view and explaining why the defendant adopted one view or another might be probative.

---

247. *Id.* The Second Circuit said:

We agree with the *Garber* dissent, 607 F.2d at 105, that it would be very confusing to a jury to have opposing opinions of law admitted into evidence as involving a factual question for them to decide. Indeed, as that dissent points out, the inevitable logic of the majority's decision in *Garber* is that if the tax law is uncertain, the indictment should be dismissed.

*Id.*

Judicial interpretation and criticism of *Garber* did not end with *Ingredient Technology*. The United States Court of Appeals for the Fifth Circuit found no error in the exclusion of a tax professor's testimony that a defendant's "theory and belief that wages are not taxable income was not implausible." *United States v. Burton*, 737 F.2d 439, 443 (5th Cir. 1984). Evidence that others shared the defendant's belief may be relevant to the credibility of the defendant's claim that he held the belief, the Fifth Circuit explained. *Id.* The proffered testimony was potentially prejudicial and confusing, however, and it was within the trial judge's discretion to exclude it under the balancing standard of Rule 403. *Id.* The court held that the defendant in *Burton*, unlike the defendant in *Garber*, must show that he actually believed or relied on another person's belief that the law was uncertain in order to use legal uncertainty as a defense. *Id.* at 444. *Garber* was different from *Burton*, the court said, because of *Garber's* "unique, indeed near bizarre" facts. *Id.* In *Garber*, the level of uncertainty in the law was so high and so widely recognized that the court was able virtually to presume that the defendant was aware of it without any evidentiary showing. *Id.* Absent a showing, as in *Garber*, that the law was so uncertain as to approach the level of vagueness, the court stated, it is only marginally relevant to show that there is an abstract question of legal uncertainty of which the defendant is unaware. Thus, the court said, *Garber* is to be read narrowly and limited to its facts. *Id.*

In other circuits, courts of appeals have rejected or declined to follow *Garber*, pointing out that it is the defendant's state of mind, not the confused state of the law, that is relevant to proving willfulness and that any statement of the law or confusion therein should be made by the court, not by witnesses. *United States v. Curtis*, 782 F.2d 593 (6th Cir. 1986); *United States v. Mallas*, 762 F.2d 361 (4th Cir. 1985).

Rule 704(b), adopted in 1984, might have some effect on future cases in which defendants confront charges that include an element of willfulness. Apparently, no expert witness could state the conclusion that, because the law on a particular issue was undecided, the defendant was unable to form willful intent. *See infra* Section III(D). In the cases cited, however, there was no attempt to go that far. The expert witnesses were proffered only to state interpretations of the law, leaving it to counsel to argue to the jury that lack of willful intent should be inferred. Furthermore, willful intent could also be an issue in a civil action, in which Rule 704(b) would not apply. It seems likely, therefore, that the use of expert testimony to establish the defendant's state of mind in light of uncertain legal interpretation will continue to come up as a possible exception to the rule against testimony on issues of law.

b. Witness States a Factual Conclusion Using Legally Defined Words

At the opposite extreme from cases in which the witness tries to state a rule of law are cases in which the witness tries to state an essentially factual opinion using words that have legal definitions. If the court concludes that the jury will understand the words in some context other than their legal usage, then generally it will permit the testimony.

This situation occurred in *Hogan v. American Telephone & Telegraph Co.*<sup>248</sup> The plaintiff, a black female accountant, filed suit alleging that she had been demoted by her employer because of her race and gender and that the employer had taken retaliatory action after she filed a complaint with the Equal Employment Opportunity Commission.<sup>249</sup> The employer claimed that she had been demoted because of inferior job performance.<sup>250</sup> At the trial, the employer asked several witnesses "whether they had observed any discriminatory acts by . . . supervisors" working for the employer, and it asked supervisors "whether they had intended to discriminate."<sup>251</sup> Although the employee objected that the questions called for "legal conclusions," the trial court allowed the testimony.<sup>252</sup> The United States Court of Appeals for the Eighth Circuit affirmed, but noted that it might have been error to admit the testimony:

Because the judge and not a witness is to instruct the factfinder on the applicable principles of law, exclusion of opinion testimony is appropriate if the terms used have a separate, distinct, and special legal meaning. This is true of the term "discriminate." The task of separating questions calling for permissible factual responses from those calling for impermissible legal conclusions is not easy.<sup>253</sup>

The court found that reversal was not necessary because the trial court had rendered harmless any error by instructing the witness to answer the questions concerning race discrimination "on the basis of the lay version of the term: that people are treated differently because of their race."<sup>254</sup> The employee accepted this definition for purposes of the witness' testimony.<sup>255</sup>

---

248. 812 F.2d 409 (8th Cir. 1987).

249. *Id.* at 410.

250. *Id.*

251. *Id.* at 411. In this case, the witnesses were lay persons, not experts, but the evidentiary ruling is consistent with similar cases involving expert witnesses.

252. *Id.*

253. *Id.* at 411-12 (citations omitted).

254. *Id.* at 412.

255. *Id.*

Courts also have overruled objections to testimony couched in legal terms by observing that a jury of lay persons would not be misled by the use of a legal term because its plain meaning in every day speech matches its legal meaning. Following this rationale, a police narcotics officer was permitted to testify in one case that the quantity of cocaine found on the defendant at the time of his arrest was "a quantity that would be possessed with intent to distribute."<sup>256</sup> In another case, a physician was permitted to testify that an assault victim had suffered "serious bodily injury."<sup>257</sup> And in yet another case, a psychologist and a psychiatrist were permitted to testify that the defendant, accused of bank robbery, had acted "voluntarily," not "in fear of her life," and "of her own free will."<sup>258</sup>

There is yet another group of cases in which the court found that, although the witness reached a conclusion using a term of law, his statement must properly be understood in another context, completely disregarding the legal meaning. This is not quite the same as saying that the jury will not be confused because it will automatically tend to attach the correct meaning to the term. Instead, the court is saying that because of the broader context of the witness' testimony, the jury will understand that he did not mean the word in a legal sense but in some other sense.

---

256. *United States v. Kelly*, 679 F.2d 135, 136 (8th Cir. 1982).

257. *United States v. Johnson*, 637 F.2d 1224, 1246-47 (9th Cir. 1980). The defendant was accused of violating the Major Crimes Act, 18 U.S.C. §§ 113(f), 1153 (1976) (current version at 18 U.S.C. §§ 113(f), 1153 (1982)), which provide for punishment of an Indian who commits "assault resulting in serious bodily injury" upon another Indian. *Johnson*, 637 F.2d at 1228 & nn. 1-2.

258. *United States v. Hearst*, 563 F.2d 1331, 1351 (9th Cir. 1977), *cert. denied*, 435 U.S. 1000 (1978). This was the celebrated case of kidnap victim Patricia Hearst, who participated with her captors in the commission of several crimes, including the bank robbery at issue. Hearst claimed that she had been forced into her role in the bank robbery, despite the fact that she carried a weapon into the bank and despite videotapes released by her kidnapers in which she claimed to have acted voluntarily. The Ninth Circuit affirmed the trial court's decision to admit expert testimony in opposition to Hearst's contention:

[Hearst] contends that the question, "Did [Hearst] voluntarily rob the bank?" is legally and conceptually identical to the question, "Did T have capacity to make a will?" [referring to the advisory committee's example of testimony that should be excluded because it is phrased in terms of inadequately explored legal criteria, *see supra* notes 204-08 and accompanying text] thus requiring exclusion of the question and the opinion it elicited.

We disagree. The Advisory Committee's phrase "inadequately explored legal criteria" refers to terminology, the meaning of which is not reasonably clear to laymen. . . . The terms "voluntarily rob a bank" or "act under fear of death or grave bodily harm" do not suffer from that same disability. The average layman would understand those terms and ascribe to them essentially the same meaning intended by the expert witness.

*Id.*

In *United States v. Milton*,<sup>259</sup> the defendants were accused of conducting an illegal bookmaking operation.<sup>260</sup> The government's expert witness gave his interpretations of recorded conversations to which the defendants were parties.<sup>261</sup> Quoting from a transcript, the witness testified that one defendant had said, "A friend of mine gave me Florida . . . I'll hold a couple of dollars on that myself."<sup>262</sup> The witness then concluded that these remarks indicated that the defendant was "a part of the gambling business."<sup>263</sup> The defendant objected that the statement was a legal conclusion.<sup>264</sup> Admitting that, taken out of context, the testimony seemed more like a legal than a factual conclusion, the United States Court of Appeals for the Fifth Circuit nevertheless upheld admission of the testimony:

[T]he statement is more amenable to interpretation as an empirical observation that a commissioned bookmaker is characteristically part of a central bookmaking operation. The statement was not likely taken as promoting a legal doctrine that for purposes of § 1955 one who passes on bets for profit necessarily conducts the central gambling business. Indeed, the witness mentioned neither § 1955 nor any of its operative terms.<sup>265</sup>

Similarly, in *United States v. Fogg*,<sup>266</sup> a tax evasion case, a Treasury agent testified, "Without any other evidence those monies . . . would be considered constructive dividend [sic] to the taxpayer."<sup>267</sup> Over the defendant's objection that this was a legal conclusion, the United States Court of Appeals for the Fifth Circuit found that the witness "merely stated his opinion as an accountant, and did not attempt to assume the role of the court."<sup>268</sup> Because the trial judge gave the jury the customary instruction that it was not to accord unusual deference to the testimony of expert witnesses and because the witness did not attempt to couch his statement in the form of judicial instructions to the jury, it was not likely that the jury would take it as anything more than an accountant's opinion.<sup>269</sup>

---

259. 555 F.2d 1198 (5th Cir. 1977).

260. *Id.* at 1199.

261. *Id.* at 1203.

262. *Id.* at 1204.

263. *Id.*

264. *Id.*

265. *Id.*

266. 652 F.2d 551 (5th Cir. Unit B 1981), *cert. denied*, 456 U.S. 905 (1982).

267. *Id.* at 556.

268. *Id.* at 556-57.

269. *Id.* at 557. To reinforce that holding, the Fifth Circuit also pointed out that any accountant today who could not give a competent opinion with reference to the tax laws would be seriously risking malpractice liability. *Id.* The court may have proved its argument too well. It was implying that accountants are professionally trained to give opinions on matters

Finally, *United States v. Miller*<sup>270</sup> is a somewhat mystifying opinion because it treats an issue of inadequately explored legal criteria as if it were simply a matter of factual opinion.<sup>271</sup> The defendant was accused of interstate transportation of securities, knowing that they had been taken by fraud.<sup>272</sup> The government's expert witness, an accountant, was asked to consider all of the testimony on the record and state an opinion as an accountant as to whether the bond money in question had been obtained by fraud.<sup>273</sup> The defendant objected that the question "usurp[ed] the province of the jury."<sup>274</sup> The trial judge overruled the objection, observing that the Federal Rules of Evidence permitted testimony on the ultimate question to be presented to the jury.<sup>275</sup> The United States Court of Appeals for the Fifth Circuit indicated its approval of this ruling, citing Rule 704.<sup>276</sup> Neither court mentioned that the witness was asked to frame his response in terms of the word "fraud."<sup>277</sup> The defense attorney and the trial and appellate judges did not even question whether the accountant knew the legal definition of "fraud" for purposes of the statute, or whether the jury would be led to believe that the accountant was using the word "fraud" in exactly the same sense as that in which the judge would instruct the jury to use it during deliberations.<sup>278</sup>

Taken as a group, all of the cases discussed in this subsection illustrate judicial recognition of the essentially inclusive bias of article VII of the Federal Rules of Evidence. Judges, faced with situations in which the common law rule might have called for exclusion, find rea-

---

of tax law. If so, even if the witness were speaking as an accountant, he gave an opinion on the law.

270. 600 F.2d 498 (5th Cir.), *cert. denied*, 444 U.S. 955 (1979).

271. *Id.* at 500. For a discussion of the concept of inadequately explored legal criteria, see *supra* notes 204-09 and accompanying text.

272. The government charged that the defendant had violated 18 U.S.C. §§ 2, 2314 (1976) (currently at 18 U.S.C. §§ 2, 2314 (1982) in same form). *Miller*, 600 F.2d at 499.

273. *Miller*, 600 F.2d at 500.

274. *Id.*

275. *Id.*

276. *Id.*

277. *Id.*

278. The defendant conceded on appeal that the question posed to the expert witness was not improper. *Id.* at 500. Therefore, the court's statement regarding the ultimate issue rule was dictum. The apparently casual analysis at the appellate level may have occurred because there was no need to rule formally on this precise question. The defendant asked the court to find instead that the testimony was inadmissible because the witness had based his opinion in part on charts that reflected assumptions that were not supported by the evidence. *Id.* This appeal failed because the defendant had not objected when the charts were introduced during the trial. *Id.*

sons that occasionally border on the creative to admit the disputed testimony.

c. Witness States a Conclusion Employing Legal Criteria

Cases in which a witness tries to state a conclusion employing legal criteria most closely fit the paradigm of the testamentary capacity example given in the advisory committee's note to Rule 704.<sup>279</sup> This is exactly the kind of case in which the advisory committee suggested excluding expert testimony. Predictably, the testimony often is excluded, but there are some surprising exceptions.

The leading case in support of the advisory committee's interpretation is *Owen v. Kerr-McGee Corp.*<sup>280</sup> The plaintiff was the owner/operator of a bulldozer who contracted to clear a tract of land of stumps, logs, and debris.<sup>281</sup> Before he began digging, the plaintiff made note of signs on both sides of the property warning that an underground gas pipeline traversed the land, but he assumed that the pipeline was buried in a straight line between the two signs, some distance from where he planned to work. In fact, the pipeline made a sharp curve under the property and actually crossed the area where the plaintiff was digging.<sup>282</sup> The blade of the bulldozer struck the pipeline, resulting in an explosion that severely injured the plaintiff.<sup>283</sup>

The plaintiff sued the pipeline company, claiming that the pipeline was not buried deep enough, that its location was not adequately marked, and that the company had been on notice that he was clearing the land, and therefore, was under an affirmative duty to warn him.<sup>284</sup> The company's primary defense was contributory negligence, based on a claim that the plaintiff was under a duty to investigate further to determine the location of the pipeline before digging.<sup>285</sup> At trial, the company qualified an expert in the installation and maintenance of gas gathering systems and asked him to state his opinion as to the cause of the accident, based on all of the evidence that had been presented.<sup>286</sup> The plaintiff objected, and the trial judge excluded the answer, commenting that there was a difference between "an ultimate

---

279. See *supra* notes 204-09 and accompanying text. Note that *United States v. Spaulding*, 293 U.S. 498 (1935), often cited as an example of the Supreme Court's adoption of the common law rule excluding expert testimony on an issue of ultimate fact, more properly fits into this group. See *supra* notes 129-35 & 145 and accompanying text.

280. 698 F.2d 236 (5th Cir. 1983).

281. *Id.* at 237.

282. *Id.* at 237-38.

283. *Id.* at 238.

284. *Id.*

285. *Id.*

286. *Id.* at 239.

issue" and "the ultimate issue."<sup>287</sup> The question of the cause of the accident went to "the ultimate issue" for jury determination, and therefore could not be addressed by a witness.<sup>288</sup>

The United States Court of Appeals for the Fifth Circuit affirmed the trial court's ruling, but on different grounds. The court pointed out that the trial court's "ultimate issue" logic contradicted Rule 704.<sup>289</sup> Instead, the appellate court said, the testimony should be excluded because it was more like the first, impermissible, question in the advisory committee's testamentary capacity example than like the second, permissible, question.<sup>290</sup>

The court was well justified in concluding that the attorney's question sought from the witness his opinion as to the *legal*, not a factual "cause of the accident." This is so because there was no dispute in the evidence as to the factual cause of the mishap: [The plaintiff] ran into the pipeline with his bulldozer. Thus, this makes it obvious that the attorney was asking the witness to opine that [the plaintiff] was contributorily negligent. Whether or not [the plaintiff's] acts were the "cause of the accident" is the issue the jury must resolve after appropriate legal instructions by the court.<sup>291</sup>

Further emphasizing the correlation between the case at hand and the advisory committee's example, the court stated with approval that the pipeline company had also asked the witness to comment on whether he considered the usual practices of land clearing contractors

---

287. *Id.*

288. *Id.*

289. *Id.* at 239-40.

290. *Id.* at 240; see *supra* notes 204-09 and accompanying text.

291. *Owen*, 698 F.2d at 240. The court's statement on causation is somewhat facile. Arguably, the accident would not have occurred had the pipeline company buried the pipeline deeper in the ground, marked its route more clearly, or warned the bulldozer operator when it learned that he was clearing the property, or if the bulldozer operator had inquired as to the exact location of the pipeline. The nonoccurrence of each of these events, therefore, may be considered a link in the chain of causation in fact. The court appears to be saying that the question addressed to the witness as to the cause of the accident was really a question about the existence of an operator's duty to inquire, an element of the tort of negligence that is different from the causation element. If the jury were to determine that there was such a duty, then it would be virtually the equivalent of determining that the operator was contributorily negligent, because there was no apparent issue as to the other elements of his contributory negligence: breach of the duty, causation, or damage. Applying this analysis, the witness was not asked to state an opinion using the word "cause" in its legally defined sense. Rather, he was asked to state an opinion that, if it were sufficiently influential, would determine the jury's decision on the issue of contributory negligence. In other words, the question asked of the expert witness calls for an opinion on an intermediate, but determinative issue of law: whether the plaintiff was under a duty to inquire. On this basis, the court reasonably might have found that the answer to the proposed question would have been based on inadequately explored legal criteria, and therefore, was excluded properly.

in locating buried pipelines to be safe.<sup>292</sup> This question, the Fifth Circuit said, called for a factual, not a legal conclusion and therefore the trial court was correct in overruling plaintiff's objection.<sup>293</sup>

Similarly, in *Davis v. Combustion Engineering, Inc.*,<sup>294</sup> a personnel expert testified that the defendant employer had discharged the plaintiff from employment because of his age and that the discharge constituted "unlawful" age discrimination.<sup>295</sup> On appeal, the United States Court of Appeals for the Sixth Circuit held that it was proper for the expert to state his opinion as to the cause of the discharge, but suggested in dicta that it was arguably improper for him to conclude that the discharge was unlawful.<sup>296</sup> Although the court made note of *Owen*, it seemed more concerned with the fact that the witness was shown to have no expertise in age discrimination or knowledge of the statute<sup>297</sup> under which the action was brought.<sup>298</sup> The court did not determine whether the testimony as to the unlawfulness of the discharge was an opinion based on unexplored legal criteria, and as such, inadmissible.<sup>299</sup> The decision left open two important questions: Would a witness shown to be an expert on the law of age discrimination in employment have been permitted to state his opinion on the lawfulness of the discharge? And if not, would in-court exploration of the legal criteria for unlawful age discrimination before presentation of the testimony have made such an opinion admissible? The Sixth Circuit's citation to *Owen* coupled with its reluctance to apply the *Owen* holding in this case suggests that the court may be willing to reject the prohibition of opinion testimony based on unexplored legal

---

292. *Owen*, 698 F.2d at 240.

293. *Id.* This question, like the excluded question as to the cause of the accident, appears to be asking whether bulldozer operators are under a duty to inquire further before clearing land marked by pipeline warning signs. See *supra* note 291. The permitted question is one step further removed from the conclusion than the excluded question in that it asks about operators generally, whereas the excluded question asked about the duty of the plaintiff when engaged in the conduct that led to the accident at issue. Because neither the permitted word "safe," nor the excluded word "cause," was used in a legally defined sense, and because each was serving as a proxy for the legally defined word "duty," it is questionable whether the court's distinction between the question admitted and the question excluded is meaningful.

294. 742 F.2d 916 (6th Cir. 1984).

295. *Id.* at 918 n.1, 919.

296. *Id.* at 919-20. The court held that even if the testimony that the discharge was unlawful was improperly admitted, the error was harmless because, first, the witness' credibility as an authority on the law of employment discrimination was effectively impeached in cross-examination, and second, the jury was instructed that it could "totally disregard" such opinion if it found the opinion unsound for any reason. *Id.* at 920.

297. Age Discrimination in Employment Act of 1967, 29 U.S.C. §§ 621-634 (1982).

298. *Davis*, 742 F.2d at 918-20.

299. *Id.* at 919-20.



criteria in a future case that presents the issue squarely.<sup>300</sup>

A recent opinion issued by a three judge panel of the United States Court of Appeals for the Tenth Circuit rejected the *Owen* and advisory committee position entirely, but the panel's holding on this issue was reversed by the full court, after rehearing the case en banc. In *Specht v. Jensen*,<sup>301</sup> Ken Jacobs, a private citizen, obtained a state court order of possession for a computer that had been repossessed by Timothy Specht, and a writ of assistance directing any sheriff to help him obtain the computer.<sup>302</sup> Jacobs enlisted the aid of several local police officers who went with him to the business office of Specht's father and the home of Specht's parents to try to locate the computer, despite the fact that they had no search warrant.<sup>303</sup> Jacobs and the officers entered the office at night, without knowledge or permission of Specht's father, and "looked around."<sup>304</sup> At the home, they told Specht's mother that she would be arrested and jailed if she did not cooperate, refused to allow her to call her lawyer, and "mill[ed] around the kitchen, and living and dining areas" without permission.<sup>305</sup> Specht's parents brought claims against the police officers under 42 U.S.C. § 1983 and Colorado law for conducting illegal

---

300. Cf. *Haney v. Mizell Memorial Hosp.*, 744 F.2d 1467, 1473-75 (11th Cir. 1984). In a medical malpractice action, the expert witness, a physician, was permitted to testify that the defendant's diagnosis and treatment fell below the applicable standard of care but his conclusion that the defendant was negligent was excluded. The Eleventh Circuit, unable to determine the exact reason for the trial judge's ruling, advanced two hypotheses: First, that the opinion as to negligence "would be only marginally helpful to the jury, if helpful at all, or simply cumulative"; and second, that the district court, not being provided with any foundation evidence to show that the witness was familiar with the applicable legal standards for negligence or malpractice, concluded that the witness was asked to testify on the basis of inadequately explored legal criteria. *Id.* at 1474. This language suggests that if it had been shown that the witness were familiar with the applicable legal standard, his testimony on the mixed issue of law and fact would not have been vulnerable to the objection that it was based on inadequately explored legal criteria. The court surveyed the conclusions in *Owen*, 698 F.2d at 236 (discussed *supra* notes 280-93 and accompanying text); *United States v. Fogg*, 652 F.2d 551 (5th Cir. Unit B 1981), *cert. denied*, 456 U.S. 905 (1982) (discussed *supra* notes 266-269 and accompanying text); *United States v. Milton*, 555 F.2d 1198 (5th Cir. 1977) (discussed *supra* notes 259-65 and accompanying text); and two cases predating the Federal Rules of Evidence, and concluded that "the law in this circuit pertaining to the admissibility of an expert's opinion couched in legal terms is not crystal clear." *Haney*, 744 F.2d at 1474 n.7. The court's solution was to sidestep the issue by declaring that the exclusion, whether error or not, was harmless because the testimony that was admitted was "more meaningful, and probably more damaging to the position of [the defendant] than the opinion [that the plaintiff] wanted the jury to hear." *Id.* at 1475.

301. 832 F.2d 1516 (1987), *rev'd in part*, 853 F.2d 805 (10th Cir. 1988) (en banc).

302. *Id.* at 1519.

303. *Id.* at 1519-20.

304. *Id.*

305. *Id.* at 1520.

searches of the office and home.<sup>306</sup> A jury found in favor of the Spechts, awarding compensatory and punitive damages.<sup>307</sup>

At trial, the Spechts introduced testimony by an expert on the constitutional law of search and seizure and on criminal procedure, as to whether the activities of the officers constituted searches, and if so, whether the searches were illegal.<sup>308</sup> The officers objected that this testimony was on an issue of law and that the witness would invade the province of the court. The court offered to instruct the jury on the legality of the searches as a matter of law, but the officers declined.<sup>309</sup> The court then ruled that "if the legality of the searches was a matter for the jury to decide, [the expert witness] could give his opinion on that issue within the perimeters of the court's instructions on the law."<sup>310</sup> The expert testified, in response to hypothetical questions, that the officers' actions were searches and were illegal.<sup>311</sup>

On appeal, the officers argued that the expert's testimony "usurped the province of both the district court and of the jury."<sup>312</sup> The Tenth Circuit panel found that, under Rules 702 and 704, there was no merit to the claim that the expert had improperly expressed an opinion as to the ultimate jury question.<sup>313</sup> Furthermore, the panel held, he did not improperly tell the jury what law to apply:

Defendants pointed out on cross-examination that [the expert's] opinions were based on his own view of the law, and that [he] did not know what the court's instructions on the law would be. Although [the expert] agreed that his view of the law in the area of search and seizure could very well differ from that of the trial judge, his definition of an illegal search was essentially the same as the one the judge gave to the jury. [The expert] further stated that the trial court's "understanding of the law is controlling in this case." In addition to instructing the jury that it must apply the law as stated in the court's instructions, the [trial] court also informed the jury that it could determine what weight, if any, should be given to the expert testimony.<sup>314</sup>

Although the panel declined to rule that the testimony improperly influenced the jury to apply an incorrect legal standard, it is not entirely clear whether the testimony was saved by the correlation

---

306. *Id.* at 1518.

307. *Id.*

308. *Id.* at 1526.

309. *Id.*

310. *Id.*

311. *Id.*

312. *Id.*

313. *Id.* at 1526-27.

314. *Id.* at 1527 (citations omitted).

between the standard used by the expert and that used by the court, or whether it was saved by the repeated instructions to the jury that the jury was to apply the court's standard. It is apparent, however, that the panel did not object to an expert witness stating to the jury an opinion based on his application of legal criteria without first establishing that his understanding of the legal criteria conformed to that of the court.

Upon rehearing en banc,<sup>315</sup> the Tenth Circuit reversed, finding that the expert's testimony was inadmissible because it supplanted the trial court's duty to set forth the law and the jury's ability to apply the law to the evidence.<sup>316</sup> Allowing an attorney, testifying as an expert witness, to state his opinion of the law would subvert the proper functioning of a jury trial, the court said, because the jury might tend to believe that the attorney-witness was more knowledgeable than the judge,<sup>317</sup> and because the jury might be confused by a "battle of the experts" on the legal principles applicable to the case.<sup>318</sup> The court pointed out, however, that its holding was limited to expert opinions on "ultimate issues of law,"<sup>319</sup> situations in which the witness attempts to tell the jury how to decide the case. Expert witnesses may assist the jury in understanding specific questions of fact, even if the testimony regarding those issues is couched in legal terms, the court stated.<sup>320</sup>

Given the concern about expert witnesses employing legal criteria in ways that may conflict with the trial court's statement of the applicable law, why is there ever a justification for allowing an expert witness to testify in terms of legal criteria? Does such testimony ever meet the Rule 702 requirement that it assist the trier of fact? It is submitted that there are many such cases. As a practical matter, judges are often faced with situations in which the law, even if fully explained, is difficult to apply to the presented fact pattern.

A case involving federal firearms violations illustrates the problem. In *United States v. Buchanan*,<sup>321</sup> the defendant was accused of

---

315. *Specht v. Jensen*, 853 F.2d 805 (1988) (en banc), *rev'g in part* 832 F.2d 1516 (10th Cir. 1987).

316. *Id.* at 808.

317. *Id.* at 809 (citing *Marx & Co. v. Diners' Club, Inc.*, 550 F.2d 505, 512 (2d Cir.), *cert. denied*, 434 U.S. 861 (1977); *see supra* notes 211-23 and accompanying text).

318. *Id.*

319. *Id.* at 809-10.

320. *Id.* at 809 (citing *United States v. Buchanan*, 787 F.2d 477, 483 (10th Cir. 1986) (Expert was permitted to testify that certain weapons fit the statutory description of weapons required to be registered with the Bureau of Alcohol, Tobacco, and Firearms.); *see infra* notes 321-27 and accompanying text).

321. 787 F.2d 477 (10th Cir. 1986).

manufacturing and possessing an unregistered firearm.<sup>322</sup> An expert witness, an agent of the Bureau of Alcohol, Tobacco and Firearms, was asked whether the device in question was of the type that was required to be registered with the Department of Treasury.<sup>323</sup> He answered, "Yes."<sup>324</sup> The defendant objected that the testimony was an improper legal conclusion.<sup>325</sup> The United States Court of Appeals for the Tenth Circuit affirmed admission of the testimony, pointing out that "[t]he question before the jury involved the consideration of a particular homemade device against an array of statutory definitions. Under such circumstances, the courts have admitted this sort of testimony."<sup>326</sup> The array of definitions to which the court referred included four interlocking subsections of statute in which a number of terms were defined by cross-references.<sup>327</sup>

One might imagine numerous situations in which the statutes are so complex that an expert witness could play a useful role in helping the jury apply them to the evidence. Two obvious areas are cases involving securities laws and cases involving the Internal Revenue Code. In *Marx & Co. v. Diners' Club, Inc.*,<sup>328</sup> for example, the expert witness was attempting not only to state opinions of law, but also to interpret the conduct and obligations of the parties in the context of a complex regulatory environment.<sup>329</sup> In *Adalman v. Baker, Watts & Co.*,<sup>330</sup> the expert witness was attempting to apply complex statutes to complex fact patterns.<sup>331</sup> The Siamese-twin stumbling blocks of "legal conclusion stated by a witness" and "conclusion based on inadequately explored legal criteria" prevent juries from receiving expert testimony that might provide great assistance in cases of this type.

In tax cases, expert witnesses are permitted to state their sum-

---

322. *Id.* at 479. The unregistered "firearm" was a plastic milk jug filled with gasoline and charcoal lighter fluid and sealed with a rag fuse. This firebomb was used to burn a house trailer. The government charged that manufacture and possession of the device violated the National Firearms Act, 26 U.S.C. § 5861(d), (f) (1982). *Buchanan*, 787 F.2d at 479.

323. *Buchanan*, 787 F.2d at 483.

324. *Id.*

325. *Id.*

326. *Id.* (footnotes omitted) (citing *United States v. McCauley*, 601 F.2d 336, 339 (8th Cir. 1979) (per curiam), and *Bryan v. United States*, 373 F.2d 403, 406-07 (5th Cir. 1967)). In a footnote, the court also cited seven cases in which expert witnesses had testified as to statutory classification of firearms, but in which the propriety of such testimony had not been addressed on appeal. *Id.* at 483 n.7.

327. *Id.* at 483 n.6.

328. 550 F.2d 505, 509 (2d Cir. 1977), *rev'g in part* 400 F. Supp. 581 (S.D.N.Y. 1975), *cert. denied*, 434 U.S. 861 (1977); *see supra* notes 211-23 and accompanying text.

329. *Marx*, 550 F.2d at 508-12.

330. 807 F.2d 359 (4th Cir. 1986); *see supra* note 223.

331. *Adalman*, 807 F.2d at 361-62, 365.

mary conclusions about the meaning of defendants' transactions.<sup>332</sup> The United States Court of Appeals for the Eleventh Circuit recently may have inched over the line between allowing expert witnesses to interpret facts and allowing expert witnesses to apply the tax laws to those factual interpretations. In *United States v. Barnette*,<sup>333</sup> an Internal Revenue Service agent gave his opinion of the "income tax implications" of evidence presented in the case against defendants accused of defrauding the government in connection with a government contract.<sup>334</sup> The court held that such expert testimony is "clearly permissible."<sup>335</sup>

#### D. *Exclusion of Testimony Under Rule 704(b)*

The Insanity Defense Reform Act of 1984<sup>336</sup> amended Rule 704.<sup>337</sup> The original text of the rule became subdivision (a) and a new subdivision (b) was added.<sup>338</sup>

No expert witness testifying with respect to the mental state or condition of a defendant in a criminal case may state an 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. Such ultimate issues are matters for the trier of fact alone.<sup>339</sup>

The legislative history makes it clear that Congress recognized the insanity defense as one particular area in which expert witnesses were routinely called upon by the courts to express opinions on ultimate issues in terms of legal criteria:

The purpose of this amendment is to eliminate the confusing

332. *E.g.*, *United States v. Johnson*, 319 U.S. 503 (1943); *United States v. Schafer*, 580 F.2d 774 (5th Cir.), *cert. denied*, 439 U.S. 970 (1978). For a discussion of *Johnson*, see *supra* notes 136-45 and accompanying text. For a discussion of *Schafer*, see *supra* notes 184-85 and accompanying text.

333. 800 F.2d 1558 (11th Cir. 1986), *cert. denied*, 107 S. Ct. 1578 (1987).

334. *Id.* at 1568.

335. *Id.* (citing *United States v. Schafer*, 580 F.2d at 744). For a discussion of *Schafer*, see *supra* notes 184-85 and accompanying text). Arguably, the expert witness in *Schafer* also gave a mixed opinion of fact and law, in that his summary of the evidence against defendant included a computation of defendant's taxes, employing the net worth approach. 580 F.2d at 778. The *Schafer* court focused more on the expert's role in compiling and organizing the factual evidence against the defendant, whereas in *Barnette*, the phrase "income tax implications" strongly suggests a conclusion based on application of the legal standards to the facts of the case.

336. Pub. L. No. 98-473, title II, §§ 401-406, 98 Stat. 2057 (1984).

337. *Id.* § 406, 98 Stat. at 2067-68.

338. M. GRAHAM, *supra* note 130, note on subsequent enactment of Rule 704(b), at 182 (Supp. 1985). The original text of Rule 704 also was slightly modified by adding the introductory limiting reference, "Except as provided in subdivision (b)." *Id.* at 181-82.

339. FED. R. EVID. 704(b).

spectacle of competing expert witnesses testifying to directly contradictory conclusions as to the ultimate legal issue to be found by the trier of fact. Under this proposal, expert psychiatric testimony would be limited to presenting and explaining their diagnoses, such as whether the defendant had a severe mental disease or defect and what the characteristics of such a disease or defect, if any, may have been.<sup>340</sup>

Other than cases that have unsuccessfully challenged the Rule's constitutionality,<sup>341</sup> cases citing to Rule 704(b) generally determine whether the proffered testimony reaches the ultimate legal conclusion as to the defendant's mental state. In *United States v. Edwards*,<sup>342</sup> for example, the defendant, Edwards, pleaded not guilty by reason of insanity to a charge of unarmed bank robbery.<sup>343</sup> A psychiatrist called by the defense testified that the defendant was "off the wall" and that the doctor had a "very, very strong suspicion" that the defendant had suffered from "manic-depressive" illness at the time of the robbery.<sup>344</sup> In rebuttal, the government's psychiatrist concluded that the defendant "was not in 'an active manic state' at the time of the robbery because Edwards' actions were reasonably well controlled and goal directed."<sup>345</sup> The government's psychiatrist further testified that the defendant would have been depressed and frustrated by ongoing financial problems and that under the circumstances, his "frantic" decision to rob a bank was "understandable."<sup>346</sup> The defendant objected that this testimony was improper under Rule 704(b) because it contained the psychiatrist's opinion concerning his legal sanity.<sup>347</sup>

The trial court admitted the testimony into evidence and the United States Court of Appeals for the Eleventh Circuit affirmed, holding that the rule was not aimed at statements of this type:

Congress did not enact Rule 704(b) so as to limit the flow of diagnostic and clinical information. Every actual fact concerning the defendant's mental condition is still as admissible after the enactment of Rule 704(b) as it was before. . . . The ultimate legal issue at Edwards' trial was whether Edwards "lack[ed] substantial capacity either to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of law." In fact, the chal-

---

340. S. REP. NO. 225, 98th Cong., 1st Sess. 230, reprinted in 1984 U.S. CODE CONG. & ADMIN. NEWS 3182, 3412 [hereinafter S. REP. NO. 225].

341. See, e.g., *United States v. Alexander*, 805 F.2d 1458, 1462-64 (11th Cir. 1986).

342. 819 F.2d 262 (11th Cir. 1987).

343. *Id.* at 263.

344. *Id.* at 264.

345. *Id.*

346. *Id.*

347. *Id.*

lenged statements offer no conclusions at all about Edwards. Doctor Jaslow [the government's witness] was simply observing that people who are not insane can nevertheless become frantic over a financial crisis. . . . Using a common sense generalization, Doctor Jaslow explained why the defendant's behavior . . . did not necessarily indicate an active manic state. We think that the doctor played exactly the kind of role which Congress contemplated for the expert witness . . . .<sup>348</sup>

*Edwards* suggests that the courts will continue to follow a long-standing practice of liberally admitting psychiatric testimony,<sup>349</sup> drawing a narrow line that excludes only testimony using the words of the applicable legal standard, but little else. This appears to be in keeping with legislative intent:

Psychiatrists, of course, must be permitted to testify fully about the defendant's diagnosis, mental state and motivation (in clinical and commonsense terms) at the time of the alleged act so as to permit the jury or judge to reach the ultimate conclusion about which they and only they are expert.<sup>350</sup>

As intended by Congress, Rule 704(b) does not apply only to expert testimony on the issue of insanity.<sup>351</sup> The general language of the Rule refers to any "mental state or condition constituting an element of the crime charged or a defense thereto."<sup>352</sup> Thus, in *United*

348. *Id.* at 265 (citations omitted) (quoting *Blake v. United States*, 407 F.2d 908, 916 (5th Cir. 1969) (en banc), *modified sub nom.* *United States v. Lyons*, 731 F.2d 243 (5th Cir.), *cert. denied*, 469 U.S. 930 (1984)). The common law standard for the insanity defense, quoted above, has been replaced by the statutory standard set forth in the Insanity Defense Reform Act of 1984, Pub. L. No. 98-473, title II, § 402(a), 98 Stat. 2057 (codified at 18 U.S.C. § 17 (Supp. IV 1986)). *Edwards*, 819 F.2d at 265 n.3. The Act provides that a defendant must prove he "was unable to appreciate the nature and quality or the wrongfulness of his acts" in order to assert the affirmative defense of insanity. 18 U.S.C. § 17(a)-(b). Although the statutory standard was in effect at the time of *Edwards*' trial, it was not applied in that case because the robbery occurred before the effective date of the Act. *Edwards*, 819 F.2d at 265 n.3. The Fifth Circuit's *Blake* formulation of the common law insanity defense standard, used in the *Edwards* trial, was also replaced by a new common law standard in 1984. In *United States v. Lyons*, 731 F.2d at 248, the Fifth Circuit held that "a person is not responsible for criminal conduct on the grounds of insanity only if at the time of that conduct, as a result of a mental disease or defect, he is unable to appreciate the wrongfulness of that conduct." *Id.* *Lyons* was decided on April 16, 1984. *Id.* at 243. The Insanity Defense Reform Act was enacted on October 12, 1984. 98 Stat. at 2057. The 1984 *Lyons* court did not refer to the Insanity Defense Reform Act, which had not yet been enacted at that time. The 1987 *Edwards* court did not mention the superseded *Lyons* modification of the *Blake* common law standard.

349. "All evidence relevant or pertinent to the issue of insanity should be admitted. This is in keeping with the philosophy of letting in all facts which might be helpful to the jury in making the final determination of the criminal responsibility of the accused." *United States v. Alexander*, 805 F.2d at 1464 (citation omitted).

350. S. REP. NO. 225, *supra* note 340, at 231.

351. *Id.*

352. FED. R. EVID. 704(b).

*States v. Dotson*,<sup>353</sup> the defendant argued on appeal that the trial court erred in allowing an internal revenue agent to specify items of the defendant's conduct that indicated an "intent willfully to evade income taxes."<sup>354</sup> Affirming, the United States Court of Appeals for the Fifth Circuit found that the testimony was very close to stating a forbidden conclusion that the defendant had "willfully and intentionally" evaded income taxes.<sup>355</sup> But, the court said, a more reasonable interpretation was that the witness had not stated a conclusion as to the defendant's state of mind but only that the facts indicated that such a conclusion could be drawn.<sup>356</sup> Similarly, in *United States v. Brown*,<sup>357</sup> the United States Court of Appeals for the Second Circuit was moved to comment that an expert's characterization of defendant as a "steerer" in a drug transaction came dangerously close to, without quite violating, the prohibition of Rule 704(b).<sup>358</sup>

Beyond the problems of defining the exact scope of the Rule, a process that the courts are just beginning to explore,<sup>359</sup> Rule 704(b) is interesting for what it implies about congressional interpretation of the ultimate issue rule. The doctrine of the negative pregnant holds that by asserting a negative, one may also imply an affirmative.<sup>360</sup> If it is necessary for Congress to legislate that expert witnesses may not testify to a mixed conclusion of law and fact in a narrowly defined area of inquiry, then may courts infer that it is not per se impermissible for experts to state such conclusions in other areas? Thus, Rule 704(b) may provide the grounds for a future ruling that the abolition of the ultimate issue rule under Rule 704(a) extends as well to opinions in which witnesses apply legal criteria to the facts of the case.<sup>361</sup>

#### IV. TOWARD A UNIFIED THEORY OF EXCLUSION

##### A. *Theory of the Final Leap*

It is difficult to arrive at a single theory to explain the admission or exclusion of expert testimony. The cases decided under the Federal Rules of Evidence regime do not fall into a clearly articulated and

---

353. 817 F.2d 1127, *modified on other grounds*, 821 F.2d 1034 (5th Cir. 1987).

354. *Id.* at 1131-32.

355. *Id.* at 1132.

356. *Id.*

357. 776 F.2d 397 (2d Cir. 1985), *cert. denied*, 475 U.S. 1141 (1986); *see supra* text accompanying notes 191-93.

358. *Brown*, 776 F.2d at 401.

359. As of August 25, 1988, only thirty-six reported federal cases had cited to Rule 704(b).

360. BLACK'S LAW DICTIONARY 930 (5th ed. 1979).

361. This argument stops short, however, of overcoming the objection to conclusions based on inadequately explored legal criteria. *See infra* Section V.



easily organized body of law. The courts have applied the rules in an uneven and often unpredictable manner. Compare, for example, the way that the courts of appeals in three different circuits have resolved the question: Was the defendant's product or procedure "unreasonably dangerous?"<sup>362</sup>

In *Karns v. Emerson Electric Co.*,<sup>363</sup> a portable weed trimming device with a circular saw blade attachment, which was being used to clear overgrown brush as the manufacturer intended, "kicked back" without warning and severed the plaintiff's right arm above the elbow.<sup>364</sup> At trial, the plaintiff's expert witness testified that the product was "unreasonably dangerous beyond the expectation of the average user" and that the manufacturer "acted recklessly" in producing and distributing it.<sup>365</sup> In overruling the manufacturer's objection, the United States Court of Appeals for the Tenth Circuit found:

[T]he facts were of a sufficiently technical nature that expert testimony could be expected to assist the jury in deciding the case. In both instances, [the expert] explained the bases for his opinions in sufficient detail to permit the jury to independently evaluate his conclusions. The legal terms used are not so complex or shaded with subtle meaning as to be beyond the understanding of the average person, and [the expert's] use of those terms did not conflict with the court's instructions.<sup>366</sup>

Thus, a witness was permitted to state an essentially commonsense conclusion based on inadequately explored legal criteria because the

362. The phrase "unreasonably dangerous" is often used in jurisdictions that have adopted the product liability standard of the Second Restatement of Torts: One who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm thereby caused to the ultimate user or consumer, or to his property . . . . RESTATEMENT (SECOND) OF TORTS § 402A (1965). The official comments attempt to flesh out the meaning of the term:

The article sold must be dangerous to an extent beyond that which would be contemplated by the ordinary consumer who purchases it, with the ordinary knowledge common to the community as to its characteristics. Good whiskey is not unreasonably dangerous merely because it will make some people drunk, and is especially dangerous to alcoholics; but bad whiskey, containing a dangerous amount of fusel oil, is unreasonably dangerous.

*Id.* comment i.

363. 817 F.2d 1452 (10th Cir. 1987).

364. *Id.* at 1454.

365. *Id.* at 1459. *Karns* was tried under Oklahoma's common law action for strict liability based on the Restatement standard. *Id.* at 1455.

366. *Id.* (citations omitted). The Tenth Circuit panel that decided *Specht v. Jensen* cited *Karns* to support its holding that the witness had not improperly instructed the jury on the applicable law. *Specht v. Jensen*, 832 F.2d 1516, 1527 (1987), *rev'd in part*, 853 F.2d 805 (10th Cir. 1988) (en banc); see *supra* notes 301-20 and accompanying text. The *Karns* holding was ignored, however, by the full court sitting en banc when it reversed the panel's decision. *Specht*, 853 F.2d at 808-10.

subject matter was technical and the legal terms, though not explained, were easily understood.

In contrast stands *Strong v. E.I. DuPont de Nemours Co.*,<sup>367</sup> a case in which a construction supervisor for a natural gas company was killed by a gas explosion that resulted when a plastic gas pipe separated from a connector.<sup>368</sup> The supervisor's widow sued the pipe manufacturer under theories of negligence, strict liability, and breach of warranty.<sup>369</sup> The trial court excluded expert testimony that would have concluded that the defendant had provided inadequate instructions and warnings regarding safe installation of the pipe, making the product "unreasonably dangerous."<sup>370</sup> The United States Court of Appeals for the Eighth Circuit affirmed the exclusion on two grounds: First, that the conclusion was based on inadequately explored legal criteria, and second, that the matter was "not the kind of issue on which expert assistance is essential for the trier of fact. The jury was capable of drawing its own inferences from the available evidence."<sup>371</sup>

The *Strong* court's reasoning was opposite to the reasoning used by the *Karns* court, and not surprisingly, it reached the opposite conclusion: Although the subject matter of the proffered testimony was technical in nature, the conclusion it contained was a matter of common sense; therefore, the witness could not state his opinion.<sup>372</sup> Furthermore, inadequately explored legal criteria that could be understood easily by the *Karns* jury formed the basis for exclusion in *Strong*.

Finally, consider *Matthews v. Ashland Chemical, Inc.*,<sup>373</sup> a case in which a propane gas deliveryman was burned in a flash fire on the defendant's premises.<sup>374</sup> The accident occurred when a spark from a

---

367. 667 F.2d 682 (8th Cir. 1981).

368. *Id.* at 683.

369. *Id.* The case report does not state the legal standard for strict liability in Nebraska. The Supreme Court of Nebraska adopted the strict liability cause of action for defective products that cause personal injury to persons in *Kohler v. Ford Motor Co.*, 187 Neb. 428, 436, 191 N.W.2d 601, 606 (1971). In that case, the court cited with approval section 402A of the Second Restatement of Torts. *Id.* at 435, 191 N.W. 2d at 606. The court adopted the Restatement's standard for strict liability more explicitly and first used the phrase "unreasonably dangerous" in *McDaniel v. McNeil Laboratories, Inc.*, 196 Neb. 190, 196-99, 241 N.W.2d 822, 826-27 (1976). The court provided a judicial definition of "unreasonably dangerous" in *Hancock v. Paccar, Inc.*, 204 Neb. 468, 483-84, 283 N.W.2d 25, 37 (1979). In view of these cases, it is almost certain that the *Strong* trial court applied the standard of section 402A of the Restatement as adopted by Nebraska.

370. *Strong*, 667 F.2d at 685.

371. *Id.* at 686.

372. *Id.*

373. 770 F.2d 1303 (5th Cir. 1985).

374. *Id.* at 1305.

water cooler ignited propane gas that had escaped from a hose that the plaintiff was using to fill the defendant's tank. The plaintiff argued on appeal that the trial court erred in not permitting his expert witness to express an opinion as to whether the defendant had created an environment that was "ultrahazardous" or "unreasonably dangerous" by storing the tanks to be refilled too close to an electrical device.<sup>375</sup> The United States Court of Appeals for the Fifth Circuit affirmed the district court, stating:

"Rule 704 . . . does not open the door to all opinions. The Advisory Committee notes make it clear that questions which would merely allow the witness to tell the jury what result to reach are not permitted. Nor is the rule intended to allow a witness to give legal conclusions." This is what [the witness] was attempting.<sup>376</sup>

The witness could not apply the "unreasonably dangerous" criterion, the appellate court found, because he would have been answering an all-inclusive question, spanning the entire range of testimony, to reach the ultimate jury question.<sup>377</sup>

The variable that may explain the apparent irreconcilability of *Karns* with *Strong* and *Matthews* is the judge's confidence in the jury, a factor that might be called the theory of the "final leap." In each case, the judge has implicitly expressed an opinion about the jury's ability to pick up the pieces of the evidence at whatever stage they are left by the expert witness and independently evaluate that evidence to arrive at an ultimate conclusion. There are risks on both sides of the decision. If the expert stops too far short of the ultimate conclusion, the jury may not have received enough assistance to make the final leap intelligently. If the expert goes too far, the jury may be tempted to invest too much of its decision in the credibility of the expert and

---

375. *Id.* at 1311. Note that the use of the term "unreasonably dangerous" in this case did not have precisely the same meaning as in the two previous examples because the action was not based on common law product liability under the approach of the Second Restatement of Torts but on statutory strict liability under the Louisiana Civil Code. *Id.* at 1306 (citing LA. CIV. CODE ANN. arts. 2317 & 2322 (West 1979)). In an earlier opinion in the same case, the United States Court of Appeals for the Fifth Circuit ruled that the statute requires a plaintiff to prove that "the harm he suffered resulted from an unreasonable risk created by the defendant's conduct or equipment." *Id.* (citing *Matthews v. Ashland Chem., Inc.*, 703 F.2d 921, 924 (5th Cir. 1983) (which quoted *Entrevia v. Hood*, 427 So. 2d 1146, 1149 (La. 1983))). The question of "unreasonable risk" can go to the jury only if the trial judge has first determined that "the risk and the gravity of the harm created are of such magnitude that they outweigh the social utility of the defendant's conduct." *Id.* Apparently, the trial court equated the use of the phrase "ultrahazardous or unreasonably dangerous" in the question asked by plaintiff's attorney with the phrase "unreasonable risk" used in the appellate court's earlier opinion.

376. *Id.* at 1311 (quoting *Owen v. Kerr-McGee Corp.*, 698 F.2d 236, 240 (5th Cir. 1983)). For a discussion of *Owen*, see *supra* notes 280-93.

377. *Matthews*, 770 F.2d at 1311; see *infra* note 378.

verdicts may reflect nothing more than the personal credibility of the experts produced by opposing parties.

Examined in this light, the three "unreasonably dangerous" cases appear to deal more with the second risk than the first.<sup>378</sup> The *Karns*

---

378. The inquiry as to whether a product is "in a defective condition [and] unreasonably dangerous," under the standard of section 402A of the Second Restatement of Torts, may take on varying degrees of complexity and require different levels of analysis in weighing the first risk, the risk of providing the jury with inadequate assistance. In *Karns*, the product injured the plaintiff when it behaved in an unexpected way during ordinary use. 817 F.2d at 1454. The jury was faced with a relatively simple standard: Whether, taking into account the product's characteristics and the instructions and warnings provided with the product, the product was dangerous beyond the expectation of the ordinary consumer. *Id.* at 1455. This does not appear to be the kind of question for which the jury would require expert assistance. Who would be better than the jury to gauge the expectations of the ordinary consumer? If ever there were a "common sense" legal standard, this is it. The court commented that "the most that can be said is that the testimony defendant challenges was not helpful to the jury in deciding the case, since the expert was, in effect, merely telling the jury what result to reach." *Id.* at 1459. But the court did not state that the witness' opinion was not helpful to the jury. In allowing the testimony as being within the trial court's discretion, the court implied that the testimony could have been helpful.

*Strong* involved a very similar situation. The plaintiff alleged that the plastic natural gas line became unreasonably dangerous when her husband used it improperly due to the manufacturer's failure to provide adequate instructions and warnings to ensure that it would be installed safely. *Strong*, 667 F.2d at 684. There was no issue as to the technical performance of the pipe or how it should have been installed. All parties apparently agreed that a different method should have been used to connect the pipe. *Id.* at 684-85. The jury was required only to determine whether the manufacturer's instructions and warnings were adequate. *Id.* at 684-85. In this case, the Eighth Circuit ruled explicitly that the first risk was not present—that the jury did not need the expert's assistance. *Id.* at 686.

In *Matthews*, however, the issue was somewhat more complex. Under the legal standard, the jury was required to weigh the risk of harm against the social utility of the defendant's procedure, the storage of empty propane gas tanks near a water cooler. *Matthews*, 770 F.2d at 1306. Several factors might come into play in determining social utility, and an expert's opinion is more likely to be useful in suggesting how the factors might be weighed and balanced against one another. Indeed, the *Matthews* court did not explicitly rule out such testimony. The holding dealt specifically with the breadth of the question asked of the witness: "[W]hat happened on May 16th, 1979, and what [were] the origin and the cause of the fire . . . ?" *Id.* at 1311. The ruling implicitly leaves open the possibility that the court would have permitted a more focused question that would have enabled the witness to express an opinion as to whether the procedure was unreasonably dangerous. *Id.* This appears to be a case in which the first risk could have been taken into account if the plaintiff's counsel had asked the appropriate question.

In some product liability cases, courts have required a risk-benefit analysis to determine whether a product is "dangerously defective." In *Barker v. Lull Engineering Co.*, 20 Cal. 3d 413, 143 Cal. Rptr. 225, 573 P.2d 443 (1978), the Supreme Court of California listed five factors commonly weighed by California juries in the determination: "[T]he gravity of the danger posed by the challenged design, the likelihood that such danger would occur, the mechanical feasibility of a safer alternative design, the financial cost of an improved design, and the adverse consequences to the product and to the consumer that would result from an alternative design." *Id.* at 431, 143 Cal. Rptr. at 237, 573 P.2d at 455. In such a case, there would be a much greater risk that the jury could not apply the legal standard correctly without expert assistance and much greater justification for allowing expert testimony incorporating the legal standard than in simpler cases like *Karns* and *Strong*.

court expressed confidence that even if the witness were telling the jury something it could figure out for itself, the jury would still make the determination independently. The *Strong* and *Matthews* courts, on the other hand, appear to have been more worried that the witness would dominate the jury's decision.<sup>379</sup> According to one commentator, the court's approach depends upon the judge's confidence in the jury's ability to weigh the testimony and use it appropriately:

The greater a judge's trust in juries, the more relaxed and more permissive will be her application of rules restricting admissibility of opinion testimony. Conversely, a judge who lacks confidence in a jury's ability to distinguish a weak or fallacious argument from a sound and persuasive one will tend to impose more stringent requirements on opinion testimony, will more severely restrict the witness' manner of testifying, and will more freely grant motions to strike, all in an effort to control the flow of information upon which the jury may rest its final determination.<sup>380</sup>

Conversely, there are cases in which the risk of inadequate assistance to the jury appears to dominate the court's thinking, cases in which the fact pattern or the legal criteria to be applied are so complex that the judge is not fully confident of the jury's ability to make the final leap without expert assistance. This category includes cases like *In re Japanese Electronic Products Antitrust Litigation*,<sup>381</sup> which dealt with sophisticated economic theory and antitrust law; *Vucinich v. Paine, Webber, Jackson & Curtis, Inc.*,<sup>382</sup> dealing with securities sales transactions; and *United States v. Lueben*,<sup>383</sup> a case that dealt with commercial real estate loan transactions. Also included in this category are *United States v. Schafer*<sup>384</sup> and *United States v. Fogg*,<sup>385</sup> cases dealing with federal income tax liability; and the panel decision in *Specht v. Jensen*,<sup>386</sup> which was concerned with subtle distinctions in

---

379. Note the contrast between *Karns*, in which the witness explained why he reached his conclusion, 817 F.2d at 1459, and *Matthews*, in which the witness was asked simply to state a conclusion based on all the facts in evidence, 770 F.2d at 1311.

380. Pratt, *supra* note 11, at 331.

381. 723 F.2d 238 (3d Cir. 1983), *rev'd in part* *Zenith Radio Corp. v. Matsushita Elec. Indus. Co.*, 513 F. Supp. 1100 (E.D. Pa. 1981), *incorporat'g by reference* 505 F. Supp. 1313 (E.D. Pa. 1980), *rev'd in part on other grounds sub nom. Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986); *see supra* notes 73-84 & 160-64 and accompanying text.

382. 803 F.2d 454 (9th Cir. 1986); *see supra* notes 165-72 & 225-29 and accompanying text.

383. 812 F.2d 179, *vacated in part on other grounds*, 816 F.2d 1032 (5th Cir. 1987); *see supra* notes 173-79 and accompanying text.

384. 580 F.2d 774 (5th Cir.), *cert. denied*, 439 U.S. 970 (1978); *see supra* notes 184-85 and accompanying text.

385. 652 F.2d 551 (5th Cir. Unit B 1981), *cert. denied*, 456 U.S. 905 (1982); *see supra* notes 266-69 and accompanying text.

386. 832 F.2d 1516 (1987), *rev'd in part*, 853 F.2d 805 (10th Cir. 1988) (en banc); *see supra* notes 301-20 and accompanying text.

search and seizure law.

In many other cases, the line is not so clearly drawn. The subject matter may be such that the jury is likely to know something about it and have a reasonable basis in personal experience to draw a conclusion, but the expert can provide useful insights beyond the ordinary. At other times, the expert's opinion may be useful but difficult to express in words other than the words of the legal standard. In such cases, the courts weigh the jury's ability to make the final leap against the perceived danger of overvaluing the expert's opinion. When there is no compelling argument to be made on either side, the testimony is almost always admitted.

This process of judicial weighing is strikingly similar to the analysis inherent in Rule 403.<sup>387</sup> If the theory of the final leap is used as the criterion for judging the probative value of the evidence, and if the danger of misleading the jury by virtue of overvaluation is seen as the primary risk, then it becomes apparent that the courts may be falling back on one of the most basic tests in the Federal Rules of Evidence to decide the difficult expert opinion cases. This should hardly come as a surprise. As mentioned previously, the advisory committee's note to Rule 704 refers to Rule 403 as one of the bases for limiting the otherwise sweeping scope of the Rule 704 abolition of the ultimate issue rule.<sup>388</sup>

It should be noted in closing that Rule 704(b) is a special case of the theory of the final leap. Congress has decided that the jury will decide on its own whether the criminal defendant's mental state, as described by expert witnesses, met the legally defined criteria. Expert witnesses may not express an opinion on this ultimate issue. Congress apparently believed that expert witnesses have no expertise that will enable them to make this final leap with greater than ordinary insight or understanding.<sup>389</sup> Because such testimony will not assist the jury,

---

387. Rule 403 provides: Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence. FED. R. EVID. 403.

388. See *supra* note 155 and accompanying text. The advisory committee's note to Rule 704 suggests that Rule 403 be used to exclude testimony that wastes time. FED. R. EVID. 704 advisory committee's note, 56 F.R.D. 183, 285 (1973). It does not explicitly deal with the overvaluation issue. Weinstein commented: "Rule 403 gives the trial judge discretion to exclude statements of opinion whose probative value is substantially outweighed by the risks of prejudice, confusion or waste of time. . . . Rarely, therefore, will any case be decided by reference to Rule 704." J. WEINSTEIN, *supra* note 10, § 704[02], at 704-12 to -13.

389. The Senate Report on the amendment of Rule 704 quotes with approval a statement by the American Psychiatric Association that implies that psychiatrists are no better qualified than lay jurors to reach the ultimate conclusion as to legal sanity:

it is not admissible.<sup>390</sup> In other words, Congress believed that juries are capable of making the final leap on their own without expert guidance. The legislative history of Rule 704(b) also suggests the concern that experts tend to overwhelm and confuse the jury when testifying on the issue of the defendant's mental state.<sup>391</sup>

### B. *Source of the Legal Standard*

Courts also seem to be asking who sets the standard to which an expert witness will testify. If the standard is provided by the law, rather than by a source outside of the legal rulemaking process, there appears to be a greater reluctance to let the witness make the final leap.

In medical malpractice cases, for example, a physician ordinarily cannot be found negligent unless an expert witness testifies that he has violated the standards of proper medical practice in his community.<sup>392</sup> The expert may not be permitted to tell the jury, using the words of the law, that the defendant physician was negligent, as in *Haney v. Mizell Memorial Hospital*,<sup>393</sup> but his testimony that the defendant breached the standards of the profession has virtually the same operative effect.

The cumulative effect of [the common law rules relating to medical malpractice] has meant that the standard of conduct becomes one of "good medical practice," which is to say, what is customary and usual in the profession.

It has been pointed out often enough that this gives the medical profession, and also the [other professions], the privilege, which

---

It is clear that psychiatrists are experts in medicine, not the law. As such, it is clear that the psychiatrist's first obligation and expertise in the courtroom is to "do psychiatry," i.e., to present medical information and opinion about the defendant's mental state and motivation and to explain in detail the reason for his medical-psychiatric conclusions. When, however, "ultimate issue" questions are formulated by the law and put to the expert witness who must then say "yea" or "nay," then the expert witness is required to make a leap in logic. He no longer addresses himself to medical concepts but instead must infer or intuit what is in fact unspeakable, namely, the probable relationship between medical concepts and legal or moral constructs such as free will.

S. REP. NO. 225, *supra* note 340, at 231.

390. FED. R. EVID. 702.

391. *See supra* note 340 and accompanying text.

392. W. KEETON, PROSSER AND KEETON ON THE LAW OF TORTS § 32, at 188 (5th ed. 1984). The one common exception to the rule requiring expert testimony as a condition precedent to finding medical malpractice is the case in which the wrongful nature of the conduct at issue is thought to be within the common knowledge of laymen, as when a surgeon amputates the wrong leg. In such cases, the jury is often permitted to infer negligence without the testimony of an expert. *Id.* at 189.

393. 744 F.2d 1467, 1473-75 (11th Cir. 1984); *see supra* note 300.

is usually emphatically denied to other groups, of setting their own legal standards of conduct, merely by adopting their own practices. It is sometimes said that this is because the physician has impliedly represented that he will follow customary methods, and so has undertaken to do so. Another explanation, perhaps more valid, is the healthy respect which the courts have had for the learning of a fellow profession, and their reluctance to overburden it with liability based on uneducated judgment.<sup>394</sup>

Thus, assuming that in a given case there is no dispute as to the facts but only as to whether the defendant physician's acknowledged conduct was negligent under the circumstances, if the plaintiff's experts testify that the defendant's actions violated the standards of the profession and if defendant's experts testify that they did not, then the opposing experts are actually debating what the jury should consider to be the appropriate standard. They are testifying, in effect, as to what should be the law of the case. The court will instruct the jury that it must decide whether the relevant standard was breached. How can the jury decide this question without concluding that one set of experts presented a more credible standard than the other set of experts?

Similarly, in *United States v. Jensen*<sup>395</sup> and *Vucinich v. Paine, Webber, Jackson & Curtis, Inc.*,<sup>396</sup> in which the issue was the application of standards set within an industry, the courts were willing to let the witnesses interpret those standards to the juries, despite the fact that the standards might ultimately rise to the level of legal enforcement.<sup>397</sup> On the other hand, *Marx & Co. v. Diners' Club, Inc.*<sup>398</sup> and *Adalman v. Baker, Watts & Co.*<sup>399</sup> represent the court's belief that if the standard is set by law, only the jury may make the final leap from factual determination to legal application.

## V. CONCLUSIONS AND RECOMMENDATIONS

The most consistently applied rule of expert testimony is the rule

---

394. W. KEETON, *supra* note 392, § 32, at 189 (footnotes omitted).

395. 608 F.2d 1349 (10th Cir. 1979); *see supra* notes 224-29 and accompanying text.

396. 803 F.2d 454 (9th Cir. 1986); *see supra* notes 165-72 & 225-29 and accompanying text.

397. *Accord* Phillips Oil Co. v. OKC Corp., 812 F.2d 265, 279 (5th Cir.), *cert. denied*, 108 S. Ct. 152 (1987) (Witnesses were permitted to testify to meanings of accounting terms used in contract between parties in light of specialized usage of the oil and gas industry.); *Fund of Funds, Ltd. v. Arthur Andersen & Co.*, 545 F. Supp. 1314, 1372 (S.D.N.Y. 1982) (A witness was permitted to testify to the propriety of defendant's actions pursuant to generally accepted auditing standards.).

398. 550 F.2d 505 (2d Cir. 1977), *rev'g in part* 400 F. Supp. 581 (S.D.N.Y. 1975), *cert. denied*, 434 U.S. 861 (1977); *see supra* notes 211-23 and accompanying text.

399. 807 F.2d 359 (4th Cir. 1986); *see supra* note 223.



of judicial discretion. As appellate courts uniformly observe, the trial judge is in the best position to determine whether an expert's opinion will assist the jury.<sup>400</sup> The judge's ruling will be reversed only for abuse of discretion, which is found to occur in relatively few cases.<sup>401</sup>

Furthermore, article VII of the Federal Rules of Evidence is essentially inclusive, not exclusive, in its intent.<sup>402</sup> Consequently, the most common pattern of federal court disposition in the kind of case at issue is the trial judge's decision to admit challenged expert opinions into evidence, followed by affirmance on appeal.

On the most explicit level, it is apparent that judges try to apply Rules 702 and 704, both in letter and in spirit. It is also apparent that the judges are motivated by the same concerns that found expression in the displaced common law rules. Judges still do not want witnesses to tell the jury what it already knows, to make statements that cannot be supported by the current state of scientific knowledge, to state broad conclusions without providing any supporting information to help the jury make up its own mind, or to state conclusions in terms of legal standards that may not be understood by the jury. All of these judicial concerns can be supported by reference to specific provisions of the Federal Rules of Evidence.

On a more intuitive level, judges appear to balance the perceived ability of the jury to reach an ultimate conclusion of fact or of mixed law and fact, the "final leap," against the risk that expert testimony going to the ultimate issue will be overvalued by the jury, and thus do more harm than good. Judges also appear to be more willing to allow the witness to make the final leap if the standards against which facts will be measured have been developed by authorities other than courts or legislatures.<sup>403</sup>

At present, there appear to be two principal sources of unpredictability in the decision whether to admit expert testimony. The narrower problem is the possible exclusion of expert testimony because it is phrased in terms of "inadequately explored legal criteria." One position, represented by *Owen v. Kerr-McGee Corp.*,<sup>404</sup> is that an expert witness should never state a conclusion based on his own appli-

---

400. *E.g.*, *Strong v. E.I. DuPont de Nemours Co.*, 667 F.2d 682, 685-86 (8th Cir. 1981).

401. *E.g.*, *id.* at 685.

402. *See* M. GRAHAM, *supra* note 130, § 701.0, at 604; J. WEINSTEIN, *supra* note 10, § 702[02], at 702-14 to -15; Pratt, *supra* note 11, at 316-17.

403. In other words, testimony in which the expert witness evaluates facts and opinions against industry or professional standards of conduct is more likely to be admitted into evidence than testimony in which the expert witness evaluates facts and opinions against legal standards of conduct.

404. 698 F.2d 236 (5th Cir. 1983); *see supra* notes 280-93 and accompanying text.

cation of legal criteria to a factual situation. The other position, represented by the panel decision in *Specht v. Jensen*<sup>405</sup> and the implied logic of *Davis v. Combustion Engineering, Inc.*,<sup>406</sup> is that a witness should be able to state mixed conclusions of fact and law if it is demonstrated that he is familiar with the applicable legal criteria.

It is submitted, however, that both positions are incorrect and miss the point of Rule 704. The mere fact that a witness is shown to be familiar with, or is considered an expert in, a given field of law is not a sufficient reason to permit him to state his interpretation of the appropriate legal criteria to apply to the given fact situation. Without dispute, stating the law to the jury is the function of the judge. But Rule 704 contemplates that an expert witness should be able to state an opinion on any relevant issue, including the very issue that the jury will be asked to decide, assuming that his opinion will assist the jury and need not be excluded for Rule 403 concerns.<sup>407</sup>

The dual goals of allowing the witness his full testimonial range and avoiding confusion in the statement of the law are not mutually exclusive. In fact, these two concerns are easily harmonized. The judge need only instruct the witness and the jury in the applicable law before the witness answers a question in which legal criteria are to be applied. This simple device will ensure that all participants—judge, jurors, witness and parties—have a common understanding of the principles of law that will govern both the opinion of the witness and the decision of the jury, and it will do no violence to the proper performance of any participant's role in the trial. In any jury trial, the judge instructs the jury on the legal criteria to be applied just before it begins its deliberations. There is no compelling reason why the judge should not also provide such a statement at an earlier appropriate time. It is conceded that the trial may be delayed while opposing counsel argue about what that legal standard should be, but this exercise will occur at some point in the proceedings regardless. No additional time will be consumed by conducting the debate earlier.

If the judge were to instruct expert witnesses on the applicable law, much as he later instructs the jury, there would be no basis for concern about inadequately explored legal criteria, the expert competing with the judge as the authority on the law, or the expert stating a conclusion based on an incorrect perception of applicable law. Further, the court would be relieved of drawing difficult distinctions

---

405. 832 F.2d 1516 (1987), *rev'd in part*, 853 F.2d 805 (10th Cir. 1988) (en banc); *see supra* notes 301-20 and accompanying text.

406. 742 F.2d 916 (6th Cir. 1984); *see supra* notes 294-300 and accompanying text.

407. *See supra* notes 153-55 and accompanying text.

between permissible conclusions of fact and impermissible conclusions of mixed fact and law. Finally, and perhaps most importantly, the purpose of Rule 704 would be better served because the jury would receive the full benefit of the expert's opinion on the question at issue.

The traditional counterargument to the above suggestion is that the jury does not need the expert's assistance in applying the facts to the law, particularly after the expert has already gone to the very threshold of the fact/law conclusion by stating his opinion on the issue of ultimate fact. At that point, the jury should be quite capable of taking the last step on its own.

But this assertion does not stand up either as a matter of policy or in practice. On the policy level, there is nothing in the Federal Rules of Evidence to suggest that the jury should be walked only to the front doorstep of a party's proposed conclusion but not escorted inside. Any concern that the witness will in some way usurp the province of the jury ignores the policy decision inherent in Rule 704 that the jury will function best if adversaries on all sides of the controversy are allowed to make a full presentation. The Rule relies on the ability of opposing parties to present experts with opposing views, and on cross-examination to challenge the conclusions offered by expert witnesses, to give the jury an opportunity to consider all possible conclusions. The judge routinely instructs the jury that it should give no special deference to the opinions of experts and that it is free to decide the issues as it sees fit.

On the practical level, the foregoing discussion has identified several categories of cases in which it might be very useful for the witness to state mixed conclusions of fact and law, particularly cases involving complex economic and financial concepts. Furthermore, there is no good reason to allow a witness to state a conclusion that applies facts to a privately developed standard, but to prohibit the witness from applying facts to a judicial or legislative standard. The securities expert who testifies that a limited partnership's offering prospectus violated Securities and Exchange Commission rules is no more forcing the jury's conclusion than the doctor who opines that another doctor violated the standards of medical practice in his community. Given the technical nature of the standards and the fine discriminations that must be made in both situations, the securities expert's testimony is as helpful to the jury as the doctor's testimony. The mere fact that one is applying public regulations and the other private regulations is of no significance if both standards will be given the force of law by the court.

The second source of unpredictability in rulings on challenges to admission of expert testimony is the tension inherent in the process of weighing the jury's need for assistance against the risk that the jury will overvalue the expert's opinion in making the final leap. To the extent that it is truly a factor in judicial decisionmaking, this element of uncertainty should be eliminated entirely. A decision to disallow testimony based on mistrust of the jury's ability to evaluate witnesses is a throwback to the discredited rule against "usurping the province of the jury," and it finds no support in the text or underlying policies of article VII.

Although countless commentators and judges have decried the tendency of trials to become "battles of the experts," leaving the jury with little more to do than decide which side's experts it prefers, a superior alternative has not yet evolved. Rule 704's abolition of the ultimate issue rule was predicated on the belief that juries have the ability to comprehend and evaluate the reasoning and conclusions presented to them by experts.

The adversary system should ensure that experts cannot get away with "merely tell[ing] the jury what result to reach, somewhat in the manner of the oath-helpers of an earlier day."<sup>408</sup> If the proponent of an expert's opinion is remiss in bringing out the bases of the stated conclusions, the opponent should be quick to explore weaknesses or gaps in the presentation on cross-examination.

Elimination of the overvaluation variable in the weighing process leaves only one question for the judge in most of the examined cases: Can the jury make the final leap from fact to opinion without the expert's opinion as well as it could with it? At its root, therefore, the theory of the final leap is nothing more than a restatement of the essence of Rule 702: Expert testimony should be admitted if it will assist the trier of fact. Applied properly, Rule 704(a) is simply a gloss on Rule 702.

Rule 704(b) demonstrates that there is at least one situation in which public policy dictates that the jury alone must make the final leap. Experience may reveal other such situations. If so, they, like the "mental state or condition" standard of Rule 704(b) should be codified as exceptions to the general rule of admissibility.

Adoption of these suggestions could be accomplished most simply by redrafting the fourth paragraph of the advisory committee's note to Rule 704. The current text of the paragraph states:

The abolition of the ultimate issue rule does not lower the bars

---

408. FED. R. EVID. 704 advisory committee's note, 56 F.R.D. 183, 285 (1973).

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. Thus the question, "Did T have capacity to make a will?" would be excluded, while the question, "Did T have sufficient mental capacity to know the nature and extent of his property and the natural objects of his bounty and to formulate a rational scheme of distribution?" would be allowed. McCormick § 12.<sup>409</sup>

In the suggested redraft, the following words would be deleted: "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, the words, "would be excluded" would be replaced by the words, "could be excluded within the range of discretion allowed to the court." Finally, the suggested redraft would include new text explaining the circumstances in which an expert witness should be permitted to state opinions employing legal criteria, and proposing a procedure to facilitate such testimony. After incorporation of these modifications, the fourth paragraph of the advisory committee's note to Rule 704 would read as follows:

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 also stand ready to exclude opinions phrased in terms of inadequately explored legal criteria. Thus the question, "Did T have capacity to make a will?" could be excluded within the range of discretion allowed to the court, while the question, "Did T have sufficient mental capacity to know the nature and extent of his property and the natural objects of his bounty and to formulate a rational scheme of distribution?" would be allowed. McCormick § 12. If, as in this example, the ultimate application of legal criteria to findings of fact requires only the examination of a list of factors to determine whether all are present, the opinion of an expert usually will not assist the trier of fact in making that final step. In other cases, however, the trier of fact will be required to weigh one or more factors against one or more opposing factors (e.g., in professional malpractice, products liability, and other negligence litigation), follow a chain of intermediate conclusions to an ultimate

---

409. *Id.* (citing, MCCORMICK ON EVIDENCE § 12 (E. Cleary ed. 1984)).

conclusion (e.g., in many federal income tax cases), or engage in other deliberative processes that may be unfamiliar to jurors. Because the purpose of the Rule is to enable the trier of fact to consider all information, opinions and conclusions that might assist it in its deliberations, expert witnesses should be permitted to express opinions in terms of legal criteria in cases in which the legal criteria employ concepts unfamiliar to most lay persons or require complex or abstract reasoning. As a predicate to such testimony, the court should instruct the expert witness and the trier of fact in the applicable law to ensure that the terms of law employed by expert witnesses are adequately defined and understood by all participants in the proceeding. In determining whether to admit testimony that addresses an ultimate issue, either of fact or of fact applied to legal criteria, the court should base its decision solely on whether the testimony will provide information that is useful to the trier of fact, without giving any weight to the concern that such testimony may be excessively influential in deciding the ultimate issue.

MAURY R. OLICKER