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AN OPINION: FEDERAL JUDGES MISCONSTRUE RULE
704. (OR IS THAT AN IMPERMISSIBLE "LEGAL"
CONCLUSION?)

KATHY JO COOK¹

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I. INTRODUCTION

The use of experts in trial practice is no longer the exception, but the norm.² The nation's largest referral service for experts, Technical Advisory Service for Attorneys, Inc., lists 22,500 experts who are willing to testify on some 5,500 subjects, including ear print identification, UFO's and wigs.³ Expert testimony is big business, and clearly the experts are here to stay.

But when and on what can an expert testify? The Federal Rules of Evidence, in attempting to resolve the confusion which existed at common law,⁴ set forth the following basic premise: an expert can testify whenever it is helpful to the trier of fact.⁵ The expert's testimony may be based upon his own perceptions, the testimony of others, or the observations of certain others upon whom experts usually rely,⁶ and where the expert renders an opinion, the testimony

²Charles Bruce Rosenberg, a litigation management consultant, notes that "[t]wenty-five years ago, it was the unusual nonproduct [liability] case that involved an expert. Now, it's par for the course." Don J. DeBenedictis, *Off-Target Opinions*, ABA JOURNAL, Nov., 1994, at 76.

³*Id.*

⁴*See* discussion *infra* part II.

⁵FED. R. EVID. 702:

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

The advisory committee has stated that "[t]he basic approach to opinions . . . is to admit them when helpful to the trier of fact." FED. R. EVID. 704 advisory committee's note.

⁶FED. R. EVID. 703:

The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. . . .

As the advisory committee explained:

Facts or data upon which expert opinions are based may, under the rule, be derived from three possible sources. The first is the first-hand observation of the witness, with opinions based thereon traditionally allowed. A treating physician affords an example. . . . The second source, presentation at the trial, also reflects existing practice. The technique may be the familiar hypothetical question or having the expert attend the trial and hear the testimony establishing the facts. . . . The third source contemplated by the rule consists of presentation of data to the expert outside of court and other than by his own perception. In this respect the rule is designed to broaden the basis for expert opinions beyond that current in many jurisdictions and to bring the judicial practice into line with the practice of the experts themselves when not in court. Thus a physician in his own practice bases his diagnosis on information from numerous sources and of considerable variety, including statements by patients and relatives, reports and opinions from nurses, technicians and other doctors, hospital records, and X rays. Most of them are admissible

is not objectionable simply because it goes to the ultimate issue that the parties seek to resolve.⁷

Although these rules sound simple, the appellate briefs continue to stack up, and courts throughout the country are drafting countless opinions on the admissibility of expert opinion testimony in cases where the expert relates legal principles to factual bases.⁸ The decisions, for the most part, have only one thing in common: they track the *language* of the Federal Rules. Substantively, however, the decisions are highly inconsistent.

This article addresses the need to formulate a uniform and predictable approach to the admissibility of expert opinion testimony which relates the law to the facts. First, it briefly discusses the history of expert opinion testimony. Second, it discusses, through a case analysis, the difficult, if not impossible task that courts have assumed in attempting to differentiate between two types of expert opinions: (1) those which are, by their nature, factual; and (2) those which require some level of legal analysis—directly relating the law to the facts of the case.⁹ Finally, this article suggests an alternative approach which is arguably more consistent with the goals of Article VII of the Federal Rules of Evidence.

in evidence, but only with the expenditure of substantial time in producing and examining various authenticating witnesses.

Id.

⁷FED. R. EVID. 704(a): "[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."

The advisory committee's note states, in part:

The basic approach to opinions, lay and expert, in these rules is to admit them when helpful to the trier of fact. In order to render this approach fully effective and to allay any doubt on the subject, the so-called "ultimate issue" rule is specifically abolished by the instant rule

The abolition of the ultimate issue rule does not lower the bars so as to admit all opinions. Under Rules 701 and 702, opinions must be helpful to the trier of fact, and Rule 403 provides for exclusion of evidence which wastes time. These provisions afford ample assurances against the admission of opinions which would merely tell the jury what result to reach, somewhat in the manner of the oath-helpers of an earlier day.

FED. R. EVID. 704 advisory committee's note.

⁸In the wake of *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 113 S. Ct. 2786 (1993), many recent cases concern the admissibility of expert opinions based on scientific theories that have not gained "general acceptance" in the scientific community. This article does not endeavor to discuss the *Daubert* issues, as those issues are unrelated to the focus of this discussion—the admissibility of the expert's "legal" conclusion.

⁹This article does not attempt to discuss expert opinions on purely legal issues. For an excellent discussion of such expert testimony, see Note, *Expert Testimony*, 97 HARV. L. REV. 797 (1984); see also *Marx & Co., Inc. v. Diners' Club, Inc.*, 550 F.2d 505, 509 (2d Cir.), cert. denied, 434 U.S. 861 (1977) (expert was not allowed to testify as to the legal meaning of "best efforts" in the context of securities law).

II. THE HISTORY OF EXPERT OPINION TESTIMONY

Before jury trials were fully developed, expert testimony was used to settle disputes in at least two circumstances. First, the court or the mayor, would call people whose experience was especially relevant to the facts of the specific case to serve as a "jury."¹⁰ Second, experts were often called before the court when the court was unable to decide a technical issue on its own.¹¹ For example, in 1352, in an appeal of mayhem, the court sought the advice of a group of London surgeons to tell the court whether or not a wound was fresh.¹² In the early stages of the development of the jury trial system, it is unclear how much weight the court actually gave to the conclusions of these pseudo-experts. By the fourteenth century, however, the practice of having "experts" decide factual issues was well established.¹³

Judge Learned Hand cites the 1620 case of *Alsop v. Bowtrell*¹⁴ as "the first case which I have found of real expert testimony."¹⁵ In *Alsop*, the conclusions of an expert were actually submitted to a true jury. The issue turned upon whether or not a child born to a woman forty weeks and nine days after her husband's death, could, in fact, belong to the deceased husband.¹⁶ The expert testified that

¹⁰Learned Hand, *Historical and Practical Considerations Regarding Expert Testimony*, 15 HARV. L. REV. 40, 40-41 (1901).

For examples where the mayor summoned the jury of experts: Fishing nets with meshes smaller than those required by the trade ordinance: Riley, pp. 107 (1313), 135 (1320), 214 (1343), 219 (1344), 220 (1344), 483 (1385), 486 (1386). Improper tanning of hides: Riley, pp. 135 (1320), 420 (1378). False tapestry: Riley, pp. 260 (1350), 375 (1374). Improper hats and caps: Riley, pp. 90 (1311), 529 (1391). False pewter vessels: Ripley, p. 259 (1350). False gloves: Riley, p. 249 (1350). False wine: Riley, p. 318 (1364).

Id. at 41 n.3.

Selling putrid victuals, the prosecution being apparently public, no complainant appearing in the case: Riley, pp. 328 (1365), 408 (1377), 448 (1381), 471 (1382), 516 (1390). Selling putrid victuals, private prosecution: Riley, pp. 226 (1351), 464 (1382). Malpractice by a surgeon, whether the prosecution was public or private does not appear: Riley, p. 273 (1354).

Id. at 42, n.1.

¹¹*Id.* at 42.

¹²*Id.* at 42-43 n.3.

¹³*Id.* at 42. The practice of having experts decide factual issues still exists today in certain contexts. Consider, for example, the use of tribunals to screen medical malpractice claims. See, e.g., Mass. Gen. L. ch. 231, § 60B (1975).

¹⁴CRO. JAC 541 (1620).

¹⁵Hand, *supra* note 10, at 45-46. Judge Hand noted the following: "[T]he witnesses are not stated to have been called on either side; and from the meager report we have, they seem to have satisfied the court in the first instance of the truth of their conclusion before the evidence went to the jury."

¹⁶*Id.* at 45.

the child could belong to the deceased husband, and his conclusion was presented to the jury.¹⁷

Professor Wigmore cites an early, somewhat troubling, circumstance where a "decipherer"¹⁸ gave an opinion in a criminal case¹⁹ without offering *any* grounds whatsoever for his opinion.²⁰ In that case, based solely and exclusively upon the decipherer's opinion, the defendant was hanged.²¹

Despite what appeared to be a growing trend toward the admission of expert testimony, the practice began to meet with resistance as early as the seventeenth century.²² In 1622, Lord Coke declared that "[i]t is no satisfaction for a witness to say that he 'thinketh' or 'persuadeth himself . . .'"²³

By the eighteenth and nineteenth centuries the so-called "opinion rule"²⁴ became the subject of increasing scrutiny.²⁵ Professor Wigmore suggests that this was caused, in part, by the promulgation of several "erroneous theories."²⁶ One of these theories, the theory on the "ultimate issue," rapidly gained support among courts and commentators and in fact remains unsettled today.²⁷ That theory set forth the notion that an expert could not offer testimony on the ultimate issue to be decided by the jury because to do so would "usurp the jury's function."²⁸

Others advanced even more stringent notions. One judge went so far as to say that "[o]pinions, belief, deductions from facts, and such like, are matters

¹⁷*Id.*

¹⁸John H. Wigmore, *Proof By Comparison of Handwriting*, 30 AM. L. REV. 481, 494 (1896).

¹⁹R. v. Cator, 4 Esp. 117 (1802).

²⁰Wigmore, *supra* note 18, at 494-95.

²¹*Id.*

²²Maury R. Olicker, *Special Topics In The Law Of Evidence: The Admissibility of Expert Witness Testimony: Time to Take the Final Leap?*, 42 U. MIAMI L. REV. 831, 836 (1988).

²³John H. Wigmore, EVIDENCE IN TRIALS AT COMMON LAW, § 1917, at 2 (J. Chadborn rev. 1978) (quoting *Adams v. Canon*, 1 Dyer 53b, 73 Eng. Rep. 117 n.15 (K.B. 1622) (Coke, J.)). Commentators seem to agree that Lord Coke was probably addressing the hearsay rule when he made this statement. Nevertheless, this statement and statements like it formed the basis of what was to be called the "opinion rule." *See id.* *See also* Mason Ladd, *Expert Testimony*, 5 VAND. L. REV. 414, 415 (1952).

²⁴Although the opinion rule may be variously described, generally courts and commentators argued that it was exclusively the jury's role to draw inferences from facts, and that it was improper for a witness to state an opinion including inferences or conclusions.

²⁵*See* Wigmore, *supra* note 23, §§ 1917-1923, at 6-29.

²⁶*Id.* §§ 1919-1923, at 14-29.

²⁷*See* discussion *infra* sections III.A.1, III.A.2.

²⁸Wigmore, *supra* note 23, § 1921, at 21-22.

which belong to the jury . . .,"²⁹ a rule which no doubt, if adopted, would have entirely eliminated the use of expert testimony (the rule would have essentially limited the expert to testifying as to his or her own observations, and thus, the expert would not have been allowed to offer anything more than would a lay witness).

At the opposite end of the spectrum, in the nineteenth century, commentators like Dean Mason Ladd strongly supported the use of expert testimony in certain circumstances.³⁰ Dean Ladd differentiated between expert testimony that was rooted in scientific analysis and that which was not.³¹ He even went so far as to state that the court should direct a verdict in a case where an expert testified that a man was not the father of a child based solely upon an expert's testimony concerning the reliability of a blood test.³²

In the midst of this web of common law confusion, Professor Wigmore advocated a simple, singular principal: does the proffered testimony help?³³ In addressing the use of expert testimony, he argued that the testimony should be admitted on a case-by-case basis by applying a simple three-part test:

[1] Is it a *topic* as to which the witness as such needs a special experience above the ordinary, and [2] if so, does he [the witness] have this? . . . [and 3] Does the jury *need any inference* from the witness, either because of his skill or because his observed data cannot be adequately reproduced by him?³⁴

It is worth noting that the advisory committee's note to Federal Rule 704 sets forth "helpfulness" as the basic premise in determining whether or not to admit both lay and expert testimony.³⁵ Thus, one might be tempted to believe that the drafters were heavily influenced by Professor Wigmore's position.³⁶ What is clear is that the drafters' ultimate goal was to structure a series of rules which would eliminate the potpourri that had grown up out of the common law and, in doing so, to provide a sound basis for judicial decisionmaking and to foster uniformity within the judicial system.³⁷ Rather than adopting Wigmore's three-part test for analyzing each case, however, the drafters promulgated a more general, seemingly straightforward approach in Rules 702-705.

²⁹*Id.* § 1920, at 18 (quoting *Lincoln v. Saratoga & Schenectady R.R.*, 23 Wend. 425, 432 (N.Y. 1840) (Nelson, C.J.)).

³⁰See Ladd, *supra* note 23, at 421.

³¹*Id.*

³²*Id.*

³³See Wigmore, *supra* note 23, § 1923, at 29.

³⁴*Id.* § 1925, at 35.

³⁵See Fed. R. 704, advisory committee's note, *supra* note 7.

³⁶See Olicker, *supra* note 22, at 838.

³⁷See generally, FED. R. EVID. 704, advisory committee's note, *supra* note 7.

Rules 702 and 704 do seem to recapitulate Wigmore's basic notion.³⁸ Judges have not been swayed, however, by the relatively simplistic tenor of the Rules; a brief review of the cases dispels any notion that the confusion which existed at common law has been resolved.³⁹ As was the case at common law, the courts are particularly troubled by opinion testimony. The common law theories that Professor Wigmore criticized⁴⁰ still live on, as courts struggle to differentiate between "facts," "opinions" and "legal conclusions." Despite the implementation of the Federal Rules of Evidence, with their liberalization and simplification of expert testimony law, courts continue to be troubled by the admission of expert opinion testimony and have taken upon themselves, with little guidance from the Rules, the arduous task of determining what opinions should be admissible and what opinions should not—a process not unlike that which existed at common law.⁴¹

III. THE PURPORTED STANDARD

A. *The Admissibility of Expert Opinion Testimony in Federal Courts*

1. Introduction

The threshold question in determining whether or not an expert's testimony is admissible under the Federal Rules of Evidence is *helpfulness*. The court must first be convinced that the testimony may help the jury to "understand the evidence or determine a fact in issue."⁴² Second, pursuant to the Federal Rules, the court must determine that the testimony will not waste the jury's time or simply tell the jury what result to reach.⁴³ Having passed these preliminary hurdles, however, does not ensure that the proffered testimony will be admissible. The advisory committee's note to Rule 704 states one additional criterion: "opinions phrased in terms of inadequately explored legal criteria" are inadmissible.⁴⁴

But what exactly is such an opinion? While the drafters of the Federal Rules failed to offer an explanation, they did provide the following example:

"Did T have the capacity to make a will?" would be excluded, while the question, "Did T have sufficient mental capacity to know the nature

³⁸ See generally, FED. R. EVID. 702-704.

³⁹ See discussion *infra* section III.A.2.

⁴⁰ See Wigmore, *supra* note 23, §§ 1919-1923, at 14-29.

⁴¹ See discussion *infra* section III.A.2.

⁴² See FED. R. EVID. 702, *supra* note 5.

⁴³ See FED. R. EVID. 704 advisory committee's note, *supra* note 7. See also FED. R. EVID. 403.

⁴⁴ *Id.*

and extent of his property and the natural objects of his bounty and to formulate a rational scheme of distribution?" would be allowed.⁴⁵

Generally speaking, courts have interpreted these comments to mean that an expert can render an opinion that is based on his analysis of the facts,⁴⁶ but that an expert cannot render an opinion that is based on his interpretation of the law.⁴⁷ The expert can even give an opinion on the ultimate issue,⁴⁸ so long as the opinion is based upon the expert's analysis of the facts and *not* based on

⁴⁵*Id.*

⁴⁶As a practical consideration, distinguishing between "fact" and "opinion" is an impossible task. Consider the following:

[N]o such distinction [between fact and opinion] is scientifically possible. We may in ordinary conversation roughly group distinct domains for "opinion" on the one hand and "fact" or "knowledge" on the other; but as soon as we come to analyze and define these terms for the purpose of that accuracy which is necessary in legal rulings, we find that the distinction vanishes, that a flux ensues, and that nearly everything which we choose to call "fact" either is or may be only "opinion" or inference.

... If then our notion of the supposed firm distinction between "opinion" and "fact" is that the one is certain and sure, the other not, surely a just view of their psychological relations serves to demonstrate that in strict truth nothing is certain. ... [I]f ... the test is whether "doubt can reasonably exist," then certainly it must be perceived that the multiple doubts which ought to exist would exclude vast masses of indubitably admissible testimony. ... [I]f ... "opinion" is inference and fact is "original perception," then it may be understood that no such distinction can scientifically be made, since the processes of knowledge and the sources of illusion are the same for both. It is impossible, then (supposing it were desirable), to confine witnesses to some fancied realm of "knowledge" or "fact" and to forbid them to enter the domain of "opinions" or inferences. There are no such contrasted groups of certain and uncertain testimony, and there never can be.

Wigmore, *supra* note 23, § 1919, at 14-16.

[F]ew persons ever think that what are rightly called facts are at the same time no more nor less than conclusions. Thus, impressions of cold or heat, light and darkness, size, shape, distance, speed, and many personal qualities, physical and mental, are constantly acted on as facts, although not uniformly judged by all observers, for the simple reason that the facts cannot be otherwise communicated.

Id. at 17 (quoting *Kelley v. Richardson*, 436, 37 N.W. 514, 516 (Mich. 1888) (Campbell, J.)).

All evidence is opinion merely, unless you choose to call it fact and knowledge, as discovered by and manifested to the observation of the witness.

Id. (quoting *Hardy v. Merrill*, 56 N.H. 227, 241 (1875) (Foster, C.J.)).

⁴⁷See *Olicker, supra* note 22, at 864.

⁴⁸FED. R. EVID. 704, *supra* note 7.

the expert's application of the law to the facts. In other words, an expert cannot render what has been called an impermissible legal conclusion.⁴⁹

Those who support the exclusion of these so-called impermissible legal conclusions do so generally on the basis of one of two grounds. First, some argue that such testimony "usurps the authority of the judge."⁵⁰ They argue that the court cannot assume that the expert's interpretation and application of the law will be the same as the judge's.⁵¹ The judge must be the sole authority on the law, and thus, testimony which addresses "the law" should be inadmissible.⁵² Second, others argue that such testimony "usurps the role of the jury."⁵³ They contend that because the jury is the trier of fact, and has the task of applying the law to the facts to reach a conclusion and a verdict, the expert should not be permitted to tell the jury what result it should reach.⁵⁴

As a practical consideration, however, issues do not come neatly labeled as permissible "factual conclusions" and impermissible "legal conclusions." Furthermore, the drafters of the Federal Rules of Evidence did not state that expert witnesses could not render a legal conclusion; rather, the drafters stated that the witness's opinion was not to be couched in terms of "*inadequately explored* legal criteria."⁵⁵ It is doubtful that the drafters intended to admit or exclude expert opinion testimony based on some artificial notion which improperly places the emphasis on form as opposed to substance⁵⁶ and, this unquestionably creates confusion in the courts.

⁴⁹ MCCORMICK ON EVIDENCE § 12, at 32 (3d ed. West 1984).

⁵⁰ See discussion *infra* section III.A.2.

⁵¹ *Id.*

⁵² But see generally, Note, *Expert Testimony*, *supra* note 9.

⁵³ See Wigmore, *supra* note 23, § 1921, at 21-22.

⁵⁴ But see Wigmore, *supra* note 18, § 1920, at 18-19:

This phrase is made to imply a moral impropriety or a tactical unfairness in the witness' expression of opinion. In this aspect the phrase is so misleading, as well as so unsound, that it should be entirely repudiated. It is a mere bit of empty rhetoric. There is no such reason for the rule, because the witness, in expressing his opinion, is not attempting to "usurp" the jury's function; nor could he if he desired. He is *not* attempting it, because his error (if it were one) consists merely in offering to the jury a piece of testimony which ought not to go there; and he *could not* usurp it if he would, because the jury may still reject his opinion and accept some other view, and no legal power, not even the judge's order, can compel them to accept the witness' opinion against their own.

⁵⁵ See FED. R. EVID. 704 advisory committee's note, *supra* note 7 (emphasis added).

⁵⁶ See Note, *Expert Testimony*, *supra* note 9, at 800. See also discussion *infra* section III.A.2.

2. Case Analysis

As is demonstrated by a review of the cases, courts have wrestled and continue to wrestle with the difference between what they have deemed to be permissible "factual conclusions" and impermissible "legal conclusions." As Justice Fay so aptly noted: "[m]ore recent decisions underscore the lamentable fact that the adoption of Rule 704 did not totally dispel the confusion over the admissibility of expert opinions arguably amounting to conclusions of law."⁵⁷

Consider, for example, the admissibility of expert opinion testimony on the issue of discrimination. In *Davis v. Combustion Eng'g., Inc.*,⁵⁸ an expert testified that the plaintiff-employee had been discriminated against on the basis of his age.⁵⁹ The trial court admitted the testimony, and the jury found the defendant-employer liable for a wilful violation of the Age Discrimination in Employment Act.⁶⁰ On appeal, the employer argued that the expert's testimony was based on an improper legal conclusion.⁶¹ The Sixth Circuit held, however, that the trial court did not abuse its discretion in admitting the challenged testimony, in which the expert stated that the plaintiff "appears to be [sic] discriminated against" and that the termination was "because of his age."⁶² The court reasoned that these "are simply opinions which embrace an ultimate fact."⁶³ With respect to the expert's testimony regarding unlawful age discrimination, however, the court opined that the testimony was impermissible, reasoning that such testimony was an "opinion phrased in terms of inadequately explored legal criteria," i.e. a legal conclusion.⁶⁴

A careful examination of the Sixth Circuit's analysis demonstrates its flawed reasoning. The process required to determine whether a person has been "discriminated against . . . because of his age" and the process required to determine whether or not those same acts constitute "unlawful age discrimination," are *exactly* the same. In both instances one must apply the legal standard of discrimination to the specific facts of the case, and in the end, one reaches a legal conclusion in either circumstance.⁶⁵

⁵⁷Haney v. Mizell Mem. Hosp., 744 F.2d 1467, 1474 n.7 (11th Cir. 1984) (the admissibility of expert testimony couched in legal terms is not clear).

⁵⁸742 F.2d 916 (6th Cir. 1984).

⁵⁹*Id.* at 919.

⁶⁰29 U.S.C. § 621 *et. seq.* (1967).

⁶¹*Davis*, 742 F.2d at 918.

⁶²*Id.* at 919-20.

⁶³*Id.* at 919.

⁶⁴*Id.* at 919-20. For a description of the allegedly improperly admitted testimony, *see id.* at 918 n.1.

⁶⁵For an example of similar reasoning, *see Denny v. Hutchinson Sales Corp.*, 649 F.2d 816, 820-21 (10th Cir. 1981)(expert testimony that there were only 42 chances out of a million that the composition of the neighborhood could have occurred without dis-

Perhaps recognizing its own inconsistencies, the next year, in *Torres v. County of Oakland*,⁶⁶ a case which addressed the issue of racial discrimination, the Sixth Circuit held that testimony which set forth the opinion that the plaintiff "had been discriminated against" could be excluded, and this time the Sixth Circuit reasoned that such testimony constituted a legal conclusion.⁶⁷ The Eighth Circuit followed⁶⁸ and, in citing *Torres*,⁶⁹ also excluded testimony on the issue of discrimination.⁷⁰ Using the Sixth Circuit's reasoning, that court noted that opinion testimony is inappropriate if it is couched in terminology which has a "separate, distinct, and special legal meaning."⁷¹ The Eighth Circuit apparently recognized the problems inherent in distinguishing between these so-called factual and legal conclusions, noting that the "task of separating questions calling for permissible factual responses from those calling for impermissible legal conclusions is not easy."⁷²

If expert testimony was truly admitted or excluded based upon whether the court believed that the proffered testimony constituted a factual conclusion as opposed to a legal conclusion, then testimony concerning the breach of a *legal standard* would clearly be inadmissible. Such testimony is plainly a legal conclusion under the analysis federal courts attempt to apply pursuant to Rule 704.⁷³ Courts, however, have failed to follow this simple, logical analysis.

In a suit for negligence, for example, one must prove the existence of a legal duty, that the legal standard has been breached, and that the breach caused an injury.⁷⁴ Consider, however, the disparity in the admission of expert testimony

crimination was allowed, but testimony on the ultimate issue of whether discrimination actually occurred was excluded).

⁶⁶758 F.2d 147 (6th Cir. 1985).

⁶⁷*Id.* at 151. The question asked of the witness was whether "Torres had been discriminated against because of her national origin." *Id.*

⁶⁸*See* *Hogan v. American Tel. & Tel. Co.*, 812 F.2d 409, 411-12 (8th Cir. 1987) (determination of whether or not acts were discriminatory requires an application of the law to the facts and is inadmissible because it is the judge's role to render instructions on the law).

It should be noted that in both *Torres* and in *Hogan* the excluded testimony was lay witness testimony as opposed to expert witness testimony. The court in each case, however, failed to distinguish the testimony on that ground.

⁶⁹758 F.2d at 147.

⁷⁰812 F.2d at 411.

⁷¹*Id.*

⁷²*Id.* at 412.

⁷³*See* discussion *supra* section III.A.1.

⁷⁴W. PACE KEETON, ET AL., *PROSSER AND KEETON ON THE LAW OF TORTS* (5th ed. 1984) § 30, at 164-65.

on the application of the legal standards of "breach of duty" and "causation" in the following cases. In *Neilson v. Armstrong Rubber Co.*,⁷⁵ the Eighth Circuit held that an expert's testimony that the defendant's improper manufacturing processes "caused" a tire to be defective was permissible, admitting what was clearly a legal conclusion, and the conclusion that the plaintiff would ask the jury to reach.⁷⁶ On the other hand, in *Owen v. Kerr-McGee Corp.*,⁷⁷ in attempting to determine whether or not the plaintiff's own negligence was a contributing factor in a personal injury suit, the expert witness was not allowed to testify that the plaintiff was "the cause of the accident."⁷⁸

In *Parker v. Williams*,⁷⁹ after having noted that an opinion which constitutes a legal conclusion was inadmissible, the Eleventh Circuit allowed the expert to testify that the defendant was "grossly negligent," unquestionably a legal standard.⁸⁰ But in *Berry v. City of Detroit*,⁸¹ the Sixth Circuit held that the trial court erred when it allowed an expert in police policies and practices to testify that the Detroit Police Department's "failure to direct and discipline and train their officers not to use improper deadly force constitute[d] a pattern of gross negligence," on the grounds that such testimony was a legal conclusion.⁸²

⁷⁵570 F.2d 272 (8th Cir. 1978).

⁷⁶*Id.* at 276.

⁷⁷698 F.2d 236 (5th Cir. 1983).

⁷⁸*Id.* at 240.

⁷⁹855 F.2d 763 (11th Cir. 1988).

⁸⁰*Id.* at 777. The question asked of the expert and his answer were as follows:

Question: Do you have an opinion about whether [Williams] being employed by the Macon County Jail as Chief Jailer is grossly negligent or not?

Dr. Beto answered: Consider it grossly negligent.

Note the jury instruction:

If you find from a preponderance of the evidence in the case that Plaintiff has proved her claim that Sheriff Lucius Amerson was grossly negligent in employing James Michael Williams as a jailer in Macon County jail, and that Sheriff Amerson's gross negligence was a proximate cause of the alleged deprivation of Plaintiff's constitutional rights by James Michael Williams, . . . your verdict must be for the Plaintiff against Defendant Macon County and Lucius Amerson.

Id.

⁸¹25 F.3d 1342 (6th Cir. 1994).

⁸²*Id.* at 1354. The exchange occurred as follows:

[Question:] With regard to the history of pattern and practices of the Detroit Police Department, do you believe the Detroit Police Department has had a past pattern and practice of condoning the use of improper deadly force?

[Answer:] It's my opinion that their failure to direct and discipline and train their officers not to use improper deadly force constitute [sic] a

In the criminal context, particularly in drug-related cases where the issue is whether the defendant possessed an illegal substance for "personal use" or with the "intent to distribute," courts consistently admit expert testimony to support the charge of "intent to distribute" despite the fact that such testimony clearly draws a legal conclusion on the *exact* issue on which the jury will be asked to render a verdict.⁸³ The reasoning in decisions on this issue is highly disparate.

For example, in *United States v. Ruggiero*,⁸⁴ the Second Circuit allowed an expert who had carried out and supervised narcotic investigations for sixteen years to testify that the defendant "possessed heroin with the intent to sell."⁸⁵ The court's reasoning was, at best, curious: it stated that the witness's testimony was not couched in terms of the applicable legal criteria.⁸⁶ The expert testified, however, that the defendant "possessed heroin with the intent to sell," and the defendant was convicted of "possession of heroin with intent to distribute."⁸⁷ Plainly, the witness's testimony was an *almost verbatim* recitation of the issue before the jury.

The Eighth Circuit admitted similar expert testimony in *United States v. Kelly*,⁸⁸ it did so, however, based on entirely different reasoning. The *Kelly* court attempted to distinguish between "permissible" and "impermissible" legal conclusions, reasoning that the words "'possess with intent to distribute,' are commonly used and their plain meaning matches their legal meaning."⁸⁹ Thus, such testimony does not invade the province of the jury, and so it constitutes a "permissible" legal conclusion.⁹⁰

In admitting the same sort of expert testimony, the Seventh Circuit, in *United States v. Lipscomb*,⁹¹ opted not to articulate its reasons for admitting testimony that clearly set forth a legal conclusion.⁹² And finally, the Sixth Circuit, in what

pattern of gross negligence in my opinion, yes.
Id. at 1353 n.12.

⁸³See *infra* text accompanying notes 84-94.

⁸⁴928 F.2d 1289 (2d Cir. 1991), *cert. denied sub nom.* Gotti v. United States, 112 S. Ct. 372 (1991).

⁸⁵*Id.* at 1305.

⁸⁶*Id.*

⁸⁷*Id.* at 1289.

⁸⁸679 F.2d 135 (8th Cir. 1982).

⁸⁹*Id.* at 136.

⁹⁰*Id.*

⁹¹14 F.3d 1236 (7th Cir. 1994).

⁹²*Id.* While the court mentioned Federal Rule of Evidence 704(a), its discussion was centered around the implications of Federal Rule of Evidence 704(b). It is interesting to note that the court reasoned, first of all, that the witness was not rendering an opinion on the defendant's "actual mental state" but instead was drawing an inference from the circumstances. Secondly, the court noted that Rule 704(b) does not apply to all witnesses. In citing the House Judiciary Committee, the court stated that the rule is limited to

might be the most curious decision of all, *United States v. Starnes*,⁹³ reasoned that expert testimony on the defendant's intent to distribute marijuana was a factual conclusion as opposed to a legal one.⁹⁴

In products liability cases, where the allegation is breach of warranty under the U.C.C.⁹⁵ or strict liability in tort under Restatement (Second) of Torts § 402(A),⁹⁶ a breach of the legal standard occurs when the product is deemed to be "unreasonably dangerous."⁹⁷ Consider expert testimony offered on this legal standard.

In *Strong v. E.I. DuPont de Nemours Co.*,⁹⁸ the Eighth Circuit held that the trial court properly excluded expert testimony on the issue of whether or not the product was "unreasonably dangerous,"⁹⁹ reasoning that the question was

witnesses whose opinions rely on medical analysis, i.e., psychiatrists and other mental health experts. *Id.* at 1239-43; see discussion *infra* section III.A.3.

⁹³No. 93-5931, 1994 U.S. App. LEXIS 12505 (6th Cir. May 26, 1994), *cert. denied*, 63 U.S.L.W. 3347 (Oct. 31, 1994).

⁹⁴*Id.* The exchange was as follows:

"Now, as somebody who has been in the marijuana business yourself, is [thirty-five to forty pounds of marijuana] a quantity you would associate with personal use or a quantity you would associate with distribution?"

"The defendant objected, arguing that the government be required to qualify the witness a little bit further."

In response, the government argued that Mr. Godair was testifying based on his extensive personal experience in the marijuana business. The court overruled the objection, and Mr. Godair stated that such an amount would normally be associated with distribution.

Mr. Godair was then asked this question: "Say you were going to buy some marijuana for your personal use, how much would you buy at one time?" . . . Godair testified that if he were buying marijuana for personal use, he would buy one-quarter of an ounce.

Id. at *5.

⁹⁵U.C.C. § 2-314 (1990).

⁹⁶RESTATEMENT (SECOND) OF TORTS § 402(A) (1965).

⁹⁷Section 402(A) provides in part: "(1) 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. . . ." *Id.*

In *Back v. Wickes Corp.*, 378 N.E.2d 964, 969 (1978), the Massachusetts Court held that warranty law as expressed in the Uniform Commercial Code, enacted as Mass. Gen. L. ch. 106, § 2-314, is entirely congruent with *Restatement (Second) of Torts* § 402(A).

⁹⁸667 F.2d 682 (8th Cir. 1981).

⁹⁹*Id.* at 686. Dr. Harrison had testified in offers of proof that the "communications from Dupont and Norton McMurray to NNG did not provide adequate warning and instructions" and stated as well that "the lack of adequate warnings and instructions constituted defects which made the products unreasonably dangerous." *Id.* at 685. When the plaintiff sought to elicit this testimony at trial, the defendants objected a number of times and the trial judge sustained their objections. *Id.*

phrased in terms of inadequately explored legal criteria and called for an answer which was an impermissible legal conclusion.¹⁰⁰ The Tenth Circuit, however, in *Karns v. Emerson Elec. Co.*,¹⁰¹ reasoned that the expert *could* testify that the product was "unreasonably dangerous beyond the expectation of the average user" because "[t]he legal terms used [were] not so complex or shaded with subtle meaning as to be beyond the understanding of the average person[.]"¹⁰² The court appeared to be attempting to distinguish between "permissible" and "impermissible" legal conclusions on the basis that expert testimony is acceptable if the jury can understand it.¹⁰³

The Second Circuit used a similar, but not identical, means to determine whether or not an expert's testimony was admissible in *In re Air Disaster at Lockerbie, Scotland, on December 21, 1988*,¹⁰⁴ a case including an allegation that the defendants were involved in "wilful misconduct." The court reasoned that the expert was properly allowed to testify that the defendants engaged in "fraud" and "deceit," because the legal terms were used in a non-legal sense,¹⁰⁵ an analysis similar to the Eighth Circuit's analysis in *United States v. Kelly*.¹⁰⁶

In *Fiataruolo v. United States*,¹⁰⁷ the issue was whether or not the two defendants had so much authority over a family-run construction contracting business that they should be held responsible for payment of federal withholding taxes.¹⁰⁸ The expert was allowed to testify that one of the two defendants was not the "responsible party."¹⁰⁹ The court noted that the testimony was acceptable because it was not merely "a simple statement on

¹⁰⁰*Id.*

¹⁰¹817 F.2d 1452 (10th Cir 1987).

¹⁰²*Id.* at 1459.

¹⁰³*See id.* (citing *United States v. Johnson*, 637 F.2d 1224, 1246-47 (9th Cir. 1980)).

¹⁰⁴37 F.3d 804 (2nd Cir. 1994).

¹⁰⁵*Id.* at 825-27.

¹⁰⁶679 F.2d 135 (8th Cir. 1982).

¹⁰⁷8 F.3d 930 (2d Cir. 1993).

¹⁰⁸*Id.* at 933.

¹⁰⁹*Id.* at 935. The question and answer were as follows:

[Question:] "Based on your review of the [Connecticut Bank & Trust Co.] account and your own experience with the Internal Revenue Service as a certified public accountant, have you come to an opinion as to whether Angelo Fiataruolo was a responsible person with respect to . . . withholding taxes due and payable?"

[Answer:] "Based on the evidence that I looked at and the work that I did, I did not believe that Mr. Fiataruolo was a responsible party in connection with this matter."

Id.

how [the jury's] verdict should read" and because it was not "a simple bald assertion of the law."¹¹⁰

Numerous other cases discuss these varying analyses as applied to countless other phrases, all with equally disparate results, in the same fashion as the cases described above.¹¹¹ These cases make it disconcertingly clear that the erroneous

¹¹⁰*Id.* at 942.

¹¹¹*See, e.g.*, the following cases where the proffered testimony was held to constitute an impermissible legal conclusion: *Estes v. Moore*, 993 F.2d 161, 163 (8th Cir. 1993) (expert testimony in a § 1983 suit on whether "probable cause" existed for an arrest); *Hygh v. Jacobs*, 961 F.2d 359, 363-64 (2d Cir. 1992) (expert testimony in a civil rights suit for "police misconduct" that the police officer's conduct was not "justified under the circumstances"); *Montgomery v. Aetna Cas. & Sur. Co.*, 898 F.2d 1537, 1541 (11th Cir. 1990) (expert testimony that insurer had a "duty" to hire tax counsel); *Shahid v. Detroit*, 889 F.2d 1543, 1547-48 (6th Cir. 1989) (expert testimony in a civil rights suit on whether correctional officers were "negligent"); *Northern Heel Corp. v. Compo Indus., Inc.*, 851 F.2d 456, 468 (1st Cir. 1988) (expert testimony in a breach of contract suit that safety hazards in plaintiff's factories violated OSHA regulations); *Kostelecky v. NL Acme Tool*, 837 F.2d 828, 830 (8th Cir. 1988) (expert testimony in a personal injury suit that the plaintiff's injuries were "caused" by his own conduct); *Smith v. Atlantic Richfield Co.*, 814 F.2d 1481, 1484-85 (10th Cir. 1987) (expert testimony in a suit by a coal miner against his employer's parent corporation that acts or omissions of a corporation were "prudent mine practices"); *United States v. Scop*, 846 F.2d 135, 142 (2d Cir. 1988) (expert testimony in a securities suit that the defendants were engaged in "manipulation" and a "scheme to defraud"); *Mitroff v. Xomox Corp.*, 797 F.2d 271, 274 (6th Cir. 1986) (expert testimony in an age discrimination suit that there was a "pattern of age discrimination"); *Matthews v. Ashland Chem., Inc.*, 770 F.2d 1303 (5th Cir. 1985) (expert testimony in a personal injury suit that the defendant's premises were "ultrahazardous" or "unreasonably dangerous"); *Federal Aviation Admin. v. Landy*, 705 F.2d 624, 632 (2d Cir.), *cert. denied*, 464 U.S. 895 (1983) (expert testimony in a suit for violations of "Federal Aviation Safety Act" on the "meaning" and "applicability" of the regulations); *Stoler v. Penn Cent. Transp. Co.*, 583 F.2d 896, 898-99 (6th Cir. 1978) (expert testimony in a suit that involved a collision between a train and an automobile that the railroad crossing was "extra hazardous"); *Nickola v. Peterson*, 580 F.2d 898, 911-13 (6th Cir. 1978), *cert. denied*, 440 U.S. 961 (1979) (expert testimony in a patent infringement action that it would have been obvious to mount a gas meter and power box and an electric meter on the same pedestal).

But see, e.g., the following cases where the proffered testimony was held to be admissible: *United States v. Van Dyke*, 14 F.3d 415, 422-23 (8th Cir. 1994) (expert testimony in a prosecution for bank fraud explaining "banking regulations"); *Autoskill, Inc. v. National Educ. Support Sys.*, 994 F.2d 1476, 1492-93 (10th Cir.), *cert. denied*, 114 S. Ct. 307 (1993) (expert testimony in a copyright action on what constituted protectable and unprotectable portions of a computer program); *Heflin v. Stewart County*, 958 F.2d 709, 715-16 (6th Cir.), *cert. denied*, 113 S. Ct. 598 (1992) (expert testimony in a § 1983 suit that sheriff's conduct in failing to cut down a detainee found hanging in his cell constituted "deliberate indifference"); *Samples v. Atlanta*, 916 F.2d 1548, 1551 (11th Cir. 1990) (expert testimony that a police officer acted "reasonably"); *Ponder v. Warren Tool Corp.*, 834 F.2d 1553, 1556-57 (10th Cir. 1987) (expert testimony in a personal injury suit that the defendant's tire "caused" the accident); *United States v. Brown*, 776 F.2d 397, 399 (2d Cir. 1985), *cert. denied*, 475 U.S. 1141 (1986) (expert testimony in a heroin prosecution that defendant was a "steerer"); *Simon v. St. Louis County*, 735 F.2d 1082, 1084 (8th Cir. 1984) (expert testimony in a reinstatement action against a police department on the "reasonableness" of police department requirements); *United States v. Kelly*, 679 F.2d 135, 135-36 (8th Cir. 1982) (expert testimony in a drug prosecution that the cocaine was possessed with the "intent to distribute"); *United States v. Dozier*, 672

theories which Professor Wigmore noted at common law are alive and well,¹¹² and that these theories are used to support a wide range of analyses, none of which promote the spirit of the Federal Rules with respect to expert opinion testimony.¹¹³

3. The Implications of Federal Rule 704(b)

The very existence of Rule 704(b) implies that federal courts have misinterpreted Rule 704(a), and, in doing so, improperly excluded so-called "impermissible legal conclusions."¹¹⁴ Rule 704(b) states:

F.2d 531, 542 (5th Cir.), *cert. denied*, 459 U.S. 943 (1982) (testimony in a RICO and Hobbs Act prosecution that witnesses made or refused to make payments because such payments were sought through "duress" and "bribery"); *Wade v. Haynes*, 663 F.2d 778, 783 (8th Cir. 1981), *aff'd on other grounds sub nom. Smith v. Wade*, 461 U.S. 30 (1983) (expert testimony in an inmate's civil rights action against prison officials alleging negligence that the placing of persons in cells without checking their backgrounds was an "egregious failure"); *United States v. Logan*, 641 F.2d 860, 863 (10th Cir. 1981) (expert testimony in a prosecution for embezzlement that "the funds were improperly taken"); *United States v. Oles*, 994 F.2d 1519, 1522-23 (10th Cir. 1993) (testimony in a prosecution for bank fraud that the defendants had engaged in check kiting in order to perpetrate a "fraud"); *United States v. Johnson*, 637 F.2d 1224, 1229-30 (9th Cir. 1980) (expert testimony in a prosecution for assault resulting in "serious bodily harm" that the victim had suffered "serious bodily injury"); *United States v. Miller*, 600 F.2d 498, 500 (5th Cir.), *cert. denied*, 444 U.S. 955 (1979) (expert testimony in a prosecution for interstate transportation of securities by fraud that funds were "misapplied"); *United States v. McCauley*, 601 F.2d 336, 339 (8th Cir. 1979) (expert testimony in a prosecution for possession of an unregistered machine gun that the gun was "required to be registered under the statute"); *United States v. Hearst*, 563 F.2d 1331, 1351-52 (9th Cir. 1977), *cert. denied*, 435 U.S. 1000 (1978) (expert testimony in a prosecution for bank robbery that the defendant did not "act under fear of death or grave bodily harm" but instead acted "voluntarily"); *United States v. Masson*, 582 F.2d 961, 964-65 (5th Cir. 1978) (expert testimony in a prosecution for illegal gambling that the defendant was a "sub-bookmaker"); *United States v. Milton*, 555 F.2d 1198, 1204 (5th Cir. 1977) (expert testimony in a suit for illegal gambling that the defendants' transactions were "part of the gambling business").

¹¹²See Wigmore, *supra* note 23, §§ 1919-1923, at 14-29.

¹¹³See FED. R. EVID. 703, *supra* note 6.

¹¹⁴Additional support for the federal courts' misinterpretations of Rule 704(a) is found in the Supreme Court's analysis of the "public records exception" to the hearsay rule. See FED. R. EVID. 803(8). In *Beech Aircraft Corp. v. Rainey*, 488 U.S. 153 (1988), the Court held that a written opinion which could be considered to be a legal conclusion was admissible. That case concerned a Navy airplane which crashed, resulting in the death of a flight instructor and her student. At trial, the court admitted an investigative report by the Judge Advocate General Corps which stated that pilot error was most likely the "cause" of the accident. A panel of the Eleventh Circuit reversed the trial court's decision and remanded for a new trial, holding that the "opinions" or "conclusions" contained in the report should have been excluded. On rehearing *en banc*, the Eleventh Circuit was evenly divided, and the Supreme Court granted certiorari to resolve the issue. *Id.* at 159-61.

The Supreme Court reversed the appellate court's decision, holding that "neither the language of the Rule nor the intent of its framers calls for a distinction between 'fact'

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.¹¹⁵

The Rule clearly identifies a very limited, specific circumstance in which expert testimony that constitutes a legal conclusion is inadmissible. The Rule only excludes testimony in criminal cases offered to show the defendant's state of mind as it directly relates to the claim or defense at issue; and by its nature, it only applies to medical experts, in particular, psychiatric experts.¹¹⁶

Congress intended that Rule 704(b) limit certain medical testimony only, and for a specific articulated reason.¹¹⁷ The Senate Judiciary Committee report noted that "under [proposed Rule 704(b)], expert psychiatric testimony would be limited to [psychiatrists] presenting and explaining their diagnoses."¹¹⁸ The Senate Judiciary Committee indicated that the reason for such limits on expert testimony was stated by the American Psychiatric Association as follows:¹¹⁹

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.¹²⁰

and 'opinion' [and such a conclusion] is strengthened by the analytical difficulty of drawing such a line." *Id.* at 168. The Court reasoned that a "broad approach to admissibility" with regard to Rule 803(8) is consistent with the Federal Rules of Evidence's relaxed approach to opinion testimony, citing Rules 702-705. *Id.* at 169. Additionally, the Court noted that "[a] common definition of 'finding of fact' is . . . '[a] conclusion by way of reasonable inference from the evidence.'" *Id.* at 164 (citation omitted).

¹¹⁵FED. R. EVID. 704(b).

¹¹⁶*Id.* See Lipscomb, 14 F.3d at 1239-43.

¹¹⁷S. Rep. No. 225, 98 Cong., 2d Sess. 230-31 (1984), reprinted in 1984 U.S.C.C.A.N. 3182, 3412-13.

¹¹⁸*Id.* at 3412.

¹¹⁹*Id.* at 3413.

¹²⁰*Id.*

When examined carefully, Rule 704(b) carves out a very narrow exception to the general rule—an exception for one specific type of legal conclusion, thus implying that *only one* exception exists.¹²¹ If all or some other legal conclusions were to be inadmissible pursuant to Rule 704(a), then Rule 704(b) would be unnecessary surplusage. Thus, it can be reasonably inferred that other types of expert opinion testimony and, in particular, opinions which constitute what the court has deemed to be "impermissible legal conclusions," are not barred by the Federal Rules.

B. The Admissibility of Expert Opinion Testimony in Massachusetts State Courts

1. Introduction

Although Massachusetts has not adopted the Federal Rules of Evidence, Massachusetts courts seem to have embraced the spirit of the Federal Rules with respect to expert opinion testimony which applies the law to the facts, without becoming entwined in the federal courts' vicious circle of varying analyses and disparate results.¹²² Massachusetts judges tend to admit expert testimony on the ultimate issue as set forth by the Federal Rules,¹²³ but unlike the federal court judges, Massachusetts judges do not attempt to differentiate artificially between permissible factual conclusions, sometimes permissible legal conclusions, and sometimes impermissible legal conclusions.¹²⁴

Instead, they seem to focus on two issues: (1) whether or not the expert is qualified to render an opinion on the subject at hand; and (2) whether or not the subject matter of the proffered testimony is such that the jury will need help in understanding it.¹²⁵

2. Case Analysis

As early as 1955 the Massachusetts Supreme Judicial Court considered the question of the admissibility of the so-called "legal conclusion" in *Commonwealth v. Chapin*.¹²⁶ In that case, the prosecutor sought to admit psychiatric testimony on the issue of the defendant's sanity.¹²⁷ Defense counsel

¹²¹See *id.*; *United States v. Didomenico*, 985 F.2d 1159, 1172-73 (2d Cir. 1993); *Lipscomb*, 14 F.3d at 1239-43; *Olicker*, *supra* note 22, at 885.

¹²²See discussion *supra* sections III.A.1, III.A.2.

¹²³See generally, FED. R. EVID. 704, advisory committee's note, parts of which are set forth in note 7 *supra*.

¹²⁴See discussion *supra* sections III.A.1, III.A.2.

¹²⁵See *Commonwealth v. Gardner*, 216 N.E.2d 558, 560-61 (Mass. 1966).

¹²⁶132 N.E.2d 404 (Mass. 1956), *cert. denied*, 352 U.S. 857 (1956).

¹²⁷It should be noted that in federal court this testimony might have properly been excluded pursuant to Rule 704(b). See FED. R. EVID. 704(b) *supra*, text accompanying note 115. See also *Lipscomb*, 14 F.3d at 1239-43.

objected that such testimony constituted a legal conclusion and, therefore, was inadmissible.¹²⁸ The court responded as follows:

If the real ground of this assignment is that the answer to the question is the precise point to be determined by the jury, this is not a valid objection where the judge could find that the witness was qualified to express an opinion in the domain of professional knowledge which would be of assistance to the jury.¹²⁹

In the cases that followed, the court reiterated such a standard, and expert opinion testimony on the ultimate issue has remained admissible in Massachusetts so long as the expert is *qualified* to render an opinion and such an opinion is *helpful* to the jury.¹³⁰

Consider first the issue of whether or not an expert is qualified to render an opinion.¹³¹ In *Commonwealth v. Gardner*,¹³² for example, the court held that the proffered testimony was rightfully excluded. The defendant was charged with rape, and the prosecutor asked a gynecologist whether or not "there had been a forcible entry."¹³³ In affirming the defendant's conviction, the court reasoned

¹²⁸Chapin, 132 N.E.2d at 413-14. The exchange was as follows:

[Question:] Now, what was your opinion, doctor, after a study as to whether or not he was sane or insane at the time he committed this crime?

[Answer:] I believe that he was sane at that time. [Defense counsel objected.] When asked to state the reason for his objection, the defendant's counsel replied: "I believe that this testimony is of a medical man and not a legal man, it is for the court and jury to decide the legal conclusion of sanity."

Id.

¹²⁹Chapin, 132 N.E.2d at 414.

¹³⁰Having searched Supreme Judicial Court cases from 1899 to the present, I encountered only two other instances where the Court discussed the admissibility of testimony that it characterized as a legal conclusion. In both instances the testimony was admitted. First, in *Van Dyke v. Bixby*, 448 N.E.2d 353, 356 (Mass. 1983), the issue was whether or not a partnership existed. The Court admitted testimony that the two defendants were "partners" to show their state of mind in attempting to enter the partnership, noting the actual existence of the partnership was a legal conclusion to be resolved by the jury. Then in *Precourt v. Frederick*, 481 N.E.2d 1144, 1149 (Mass. 1985), an expert testified that the defendant physician "should have" made a disclosure that he did not make to the patient. Once again, although the Court noted that the expert's testimony constituted a legal conclusion, it was nevertheless admissible.

¹³¹*Cf.* FED. R. EVID. 702, *supra* note 5.

¹³²216 N.E.2d 558 (Mass. 1966).

¹³³*Id.* at 559-60. The physician was asked:

"Doctor, based upon your medical training and based upon your observations of the person of this young lady and based upon . . . [her] emotional state . . . , did you on that evening form an opinion as to whether or not there had been a forcible entry?"

After stating that he had formed an opinion, the witness was permitted to state that he "thought that there was forcible entry."

Immediately thereafter, the judge asked the witness if he had been given "a history from the patient as to what happened," and the

that the testimony should have been excluded *not* because it usurped the role of the judge or jury by setting forth a legal conclusion on the ultimate issue of rape, but because the question required "the witness to base his opinion on factors outside the area of his professional competence," that is to say, the question required the witness to speculate.¹³⁴

In *LaClair v. Silberline Mfg. Co.*,¹³⁵ the plaintiff brought a negligence suit against an aluminum powder manufacturer alleging that its product was the proximate cause of an explosion which resulted in the death of her husband.¹³⁶ She sought to admit expert testimony showing that the explosion was "caused by the ignition of a cloud of aluminum powder."¹³⁷ The testimony was excluded, not because it constituted a legal conclusion, but because the expert did not have adequate grounds for his opinion, and the opinion was therefore speculative.¹³⁸

Testimony which the expert is qualified to give, on the other hand, is admissible, assuming that such testimony is helpful to the jury. In *Commonwealth v. Montmeny*,¹³⁹ the court held that the expert testimony of a physician who testified that a child had been "molested" was properly admitted because the expert's testimony was based upon his own physical findings as opposed to speculation.¹⁴⁰

witness stated that he had. The judge then asked him whether that statement by the victim had formed "any part or basis of . . . [his] opinion."

The witness answered, "Well, . . . I would say yes."

Id. at 560.

¹³⁴*Id.*

¹³⁵393 N.E.2d 867 (Mass. 1979).

¹³⁶*Id.*

¹³⁷*Id.* at 874.

¹³⁸*Id.* at 873-74. The Court stated that "[e]xpert opinion, particularly when addressed to a jury, must be based on either the expert's direct personal knowledge, on evidence already in the record or which the parties represent will be presented during the course of the trial, or on a combination of these sources." *Id.* (citing W.B. LEACH & P.J. LIACOS, MASSACHUSETTS EVIDENCE 100-01 (4th ed. 1967); I.G. MOTTLA, PROOF OF CASES IN MASSACHUSETTS § 348 (2d. ed. 1966)).

¹³⁹276 N.E.2d 688 (Mass. 1971).

¹⁴⁰*Id.* at 689-90. The physician performed a physical examination and in doing so noted "vaginal abrasions," "dirt on her legs and thighs," "sensitivity to touch," etc. *Id.* at 689.

The pertinent questions and answers were as follows:

[Question:] "And Doctor, at the conclusion of your examination, did you form an opinion based upon a reasonable degree of medical certainty as to whether what you had seen was consistent with the history that you obtained from this girl? . . . Do you have an opinion? All I'm asking you is if you have an opinion, yes or no?"

[Answer:] "Yes, I do."

On an appeal from a conviction of the murder and rape of a child in *Commonwealth v. Pikul*,¹⁴¹ the defendant argued that the testimony of three medical experts who stated that the defendant's daughter died of "asphyxia during forced oral sexual assault" was improper.¹⁴² The defendant argued, among other things, that the testimony was a direct opinion on the ultimate issue, and that the opinion was beyond the expertise of the experts.¹⁴³ The court held, however, that the opinion testimony was properly admitted, stating that "[t]he opinions of the experts were within the area of their expertise and not based on conjecture and surmise."¹⁴⁴

Finally, in *Sacco v. Roupenian*,¹⁴⁵ a medical malpractice action, the court again held that the proffered testimony should have been admitted.¹⁴⁶ The plaintiffs in *Sacco* alleged that the defendant physician was "negligent" in failing to diagnose the decedent's breast cancer.¹⁴⁷ The trial court refused to allow the plaintiff's expert to testify that the "average qualified surgeon" would have diagnosed the breast cancer at the time of the biopsy.¹⁴⁸ On appeal, however, the court held that the testimony should have been admitted on the grounds that such an opinion was within the purview of the expert.¹⁴⁹

[Question:] "What is your opinion, sir, within a reasonable degree of medical certainty?"

[Answer:] "It certainly appears as though the girl had been molested."

Id. at 689 n.1.

141511 N.E.2d 336, 338-39 (Mass. 1987).

¹⁴²*Id.* at 338.

¹⁴³*Id.* at 339.

¹⁴⁴*Id.* at 340.

¹⁴⁵564 N.E.2d 386 (Mass. 1990).

¹⁴⁶*Id.* at 388-89.

¹⁴⁷*Id.* at 387.

¹⁴⁸*Id.* at 388.

¹⁴⁹*Id.* at 390. In a medical malpractice action, the physician's legal duty is to treat the patient according to the standard of an average, qualified physician or specialist at the time and place of the incident. The testimony in this case, regarding that standard of care, was as follows:

"Do you have an opinion with a reasonable degree of medical certainty as to whether the cancer which you have defined was present in January, 1982, was likewise diagnosable?" Defense counsel objected that there was insufficient basis for the question, and that it was inappropriately phrased because "anything is possible." At a sidebar conference, the plaintiffs' counsel offered to rephrase the question to ask whether "the average qualified surgeon in 1982 would have diagnosed this." The judge responded that "[e]ven then, it's kind of far-fetched," and sustained the defendant's objection.

564 N.E.2d at 388.

If the court determines that the expert is qualified to testify, then the testimony must pass an additional test: the testimony must be helpful to the jury.¹⁵⁰ The court has said that "[w]here the jury are [sic] equally capable of drawing the conclusion sought from an expert witness, the expert's testimony is inadmissible."¹⁵¹

For example, in a claim by a tenant against her landlord for reckless infliction of emotional distress, in *Simon v. Solomon*,¹⁵² a psychiatrist was called to testify on the issue of "emotional distress."¹⁵³ The psychiatrist testified that the tenant "appeared sincere and honest."¹⁵⁴ In upholding the trial court's decision to admit the proffered testimony, the court reasoned that while an expert may not state his opinion on matters that the jury is "equally competent to assess, such as credibility of witnesses," in this case the opinion of the expert was helpful.¹⁵⁵ As part of his practice, the psychiatrist routinely assessed the truthfulness of his patients, and he had interviewed the tenant. Thus, the court concluded that his testimony was helpful to the jury in rendering its verdict.¹⁵⁶

In *Commonwealth v. Cruz*,¹⁵⁷ a case of first degree murder, the court held that an expert was properly allowed to testify to the effect that a blood-alcohol level of .19 percent might have had on the defendant's mental processes.¹⁵⁸ In *Cruz*, the court reasoned that apart from the proffered testimony, the jury might not understand the effect of the alcohol on the defendant's state of mind.¹⁵⁹

Despite the lack of written rules, Massachusetts courts seem to be cognizant of the fact that the role of an expert witness should be to help the jury. Massachusetts courts have moved beyond the cryptic and obscure notions set forth in the federal courts' opinions. In a strikingly clear and simple summary, the Supreme Judicial Court noted:

The role of an expert witness is to help the jury understand issues of fact beyond their common experience. Under modern standards, expert testimony on matters within the witness's field of expertise is admissible whenever it will aid the jury in reaching a decision, even if

¹⁵⁰216 N.E.2d at 560.

¹⁵¹*Id.* (citing *New England Glass Co. v. Lovell*, 7 Cush. 319 (1851); *Commonwealth v. Russ*, 122 N.E. 176 (1919); *Jackson v. Anthony*, 185 N.E. 389 (Mass. 1933)).

¹⁵²*Simon v. Solomon*, 431 N.E.2d 556 (Mass. 1982).

¹⁵³*Id.* at 566.

¹⁵⁴*Id.*

¹⁵⁵*Id.*

¹⁵⁶*Id.*

¹⁵⁷602 N.E.2d 1089 (Mass. 1992).

¹⁵⁸*Id.* at 1091.

¹⁵⁹*Id.* at 1092.

the expert's opinion touches on the ultimate issues that the jury must decide.¹⁶⁰

IV. THE PROPOSED SOLUTION

A. Introduction

One need look no further than Rule 102 of the Federal Rules of Evidence to see the reason for a unified set of rules governing the law of evidence: "[t]hese rules shall be construed to secure fairness in administration, elimination of unjustifiable expense and delay, and promotion of growth and development of the law of evidence to the end that the truth may be ascertained and proceedings justly determined."¹⁶¹ With respect to expert opinion testimony, however, the Federal Rules of Evidence as they have been interpreted by the federal courts have fallen drastically short of meeting this goal.¹⁶²

The federal courts' murky and elliptical approach used to determine whether or not expert opinion testimony regarding mixed law and fact questions should be admissible is hardly fair.¹⁶³ The courts' focus on words like "factual conclusion" and "legal conclusion" has resulted in poorly reasoned and inconsistent decisions which improperly emphasize the form of the testimony rather than its substance. These inconsistencies result in and almost invite appeals. The ensuing "unjustifiable expense and delay" of litigation that the Rules sought to eliminate grows.¹⁶⁴ It is time for the federal courts to reevaluate the purpose for which expert testimony is admitted and to eliminate decisions based on artificial labels. "Labeling testimony as a legal conclusion in and of itself provides no meaningful guidance on either its admissibility or any resulting prejudice."¹⁶⁵

B. Admissibility: Laying the Proper Foundation for Expert Opinion Testimony

It is highly unlikely that anyone would disagree with the advisory committee's note that testimony which is couched in "inadequately explored legal criteria"¹⁶⁶ should not be admitted, and the trial judge *should* ensure against the admission of testimony that is based upon unfamiliar or inapplic-

¹⁶⁰Simon, 431 N.E.2d at 566.

¹⁶¹FED. R. EVID. 102.

¹⁶²See discussion *supra* sections III.A.1, III.A.2.

¹⁶³See FED. R. EVID. 102.

¹⁶⁴*Id.*

¹⁶⁵*Specht v. Jensen*, 853 F.2d 805, 815 (10th Cir. 1988) (Seymour, J. dissenting) (arguing that the admissibility of expert opinion testimony should be based on whether or not the testimony created "actual prejudice").

¹⁶⁶See FED. R. EVID. 704, advisory committee's note. See also text accompanying notes 44-45.

able legal grounds.¹⁶⁷ Such testimony could only confuse the jury. A blanket prohibition on the admission of so-called "legal conclusions," however, is not the answer. A straightforward analysis to determine admissibility must be formulated.

The analysis used by Massachusetts state courts¹⁶⁸ serves as a good start for creating a simple and direct test for admissibility, a test which is strikingly similar to the one Professor Wigmore advocated: (1) the judge should determine whether or not the expert is qualified to render an opinion on the subject; (2) the judge should determine whether or not the expert's understanding and acceptance of the law which may affect his opinion comports with the law as the judge will instruct the jury; and, (3) the judge should determine whether or not the proffered testimony will help the jury in resolving the issue before it.¹⁶⁹

1. Is the Expert Qualified?

First, the judge must determine whether or not the expert is qualified to render an opinion on the subject matter which is before the court.¹⁷⁰ To make this determination the judge must examine the witness's qualifications in a very narrow context, making certain his qualifications give him the necessary means to testify on the *exact issue* before the court. For example, a gynecologist will probably not be able to give a satisfactory opinion on lung cancer. Likewise, not all psychiatrists may be able to discuss adequately the relatively narrow disorder called "battered women's syndrome." Thus, it is important that the trial judge first exercise the utmost care in examining expert qualifications.

2. Does the Expert Understand and Accept the Applicable Legal Standard?

The judge must determine that the expert understands and accepts the legal standard upon which the judge will instruct the jury.¹⁷¹ If the witness is to render an opinion on "reasonableness" or on "causation," for example, the witness must understand the implications of his statements so that he can properly explain his opinion to the jury.

This might be accomplished very simply by a voir dire out of the presence of the jury in which the judge or proffering counsel might ask the expert witness a series of questions to determine whether or not the witness's understanding

¹⁶⁷See discussion *infra* sections IV.B.1, IV.B.2.

¹⁶⁸See discussion *supra* sections III.B.1, III.B.2.

¹⁶⁹*Id.*; Wigmore, *supra* note 23, § 1925, at 35.

¹⁷⁰See FED. R. EVID. 702, *supra* note 5; *supra* text accompanying notes 141-49; *cf. supra* text accompanying notes 132-34.

¹⁷¹See, e.g., *United States v. Johnson*, 637 F.2d 1224, 1247 (9th Cir. 1980) (expert testimony was admissible where it was clear that the expert understood and applied the proper legal standard).

of the legal standard which may affect his opinion is entirely congruent with the law as the court will instruct the jury. If the judge is not satisfied that the expert understands the law or that the expert can properly apply the law to the facts in the case, then, plainly the expert should not be allowed to render an opinion. Conversely, if the expert exhibits a firm grasp of both the applicable law and the facts of the case, he should be allowed to testify.

3. Is the Proffered Testimony Helpful?

Most importantly, the judge must determine whether or not the expert opinion testimony may be helpful to the jury in resolving the issue before it.¹⁷² Although there really can be no specific test, there are several important considerations. First, the expert must have some sort of "knowledge, skill, experience, training, or education"¹⁷³ that is beyond the common experience of the jury:

The true test of the admissibility of such testimony is not whether the subject matter is common or uncommon, or whether many persons or few have some knowledge of the matter, but it is whether the witnesses offered as experts have any peculiar knowledge or experience, not common to the world, which renders their opinions founded on such knowledge or experience any aid to the Court or jury in determining the question at issue.¹⁷⁴

* * *

[The] experience [must not be] 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.¹⁷⁵

* * *

When the consequences of actions or of combinations of circumstances may only be known by those familiar with the subject, and cannot be understood by those not possessing skill or peculiar knowledge thereof, opinions of experts are competent evidence.¹⁷⁶

As described above, the expert must be able to contribute something extra, something more than the jury would otherwise have. If the witness's expertise

¹⁷²See FED. R. EVID. 702, *supra* note 5; *supra* text accompanying notes 150-59.

¹⁷³FED. R. EVID. 702, *supra* note 5.

¹⁷⁴Wigmore, *supra* note 23, § 1923, at 31-32 (quoting *Taylor v. Monroe*, 43 Conn. 36, 44 (1875) (Loomis, J.)).

¹⁷⁵*Id.* § 1924 at 32 (quoting *New England Glass Co. v. Lovell*, 7 Cush. 319, 321 (Mass. 1951)(Shaw, C.J.)).

¹⁷⁶*Id.* (quoting *Hamilton v. Des Moines Valley R. R.*, 36 Iowa 31, 37 (1872) (Beck, C.J.)).

offers nothing more "peculiar"¹⁷⁷ than that which may be admitted by lay witness testimony, the expert's testimony is unnecessary.

Second, the expert must do more than set forth the conclusions; the expert must *educate* the jury by explaining the basis for his opinion. If, for example, the expert only testifies that a party was "negligent" or "unreasonable," then the testimony does not help the jury. The expert must explain the facts and what those facts mean in light of the legal standard that the judge will ask the jury to apply. To do otherwise serves only to echo one party, as "the oath-helpers of an earlier day," and such testimony is a waste of time.¹⁷⁸

Expert testimony should be admissible after these foundational requirements have been met. It is simply not feasible to "usurp the authority of the judge" when the judge has determined that the expert is qualified, that the expert understands and accepts the legal standards, and that the testimony may be helpful to the jury.

C. Credibility: The Jury Instruction

Just as it is impossible to "usurp the authority of the judge" if the proper foundation is laid, it is equally impossible to "usurp the role of the jury" so long as the judge gives the proper jury instructions. In 1942, in *United States v. Johnson*,¹⁷⁹ the Supreme Court ruled on the admission of expert testimony that was argued to have "invade[d] the province of the jury."¹⁸⁰ With razor-sharp insight, the Court noted:

The worth of our jury system is constantly and properly extolled, but an argument such as that which we are rejecting tacitly assumes that juries are too stupid to see the drift of evidence. The jury in this case could not possibly have been misled. . . . So long as proper guidance by a trial court leaves the jury free to exercise its untrammelled judgment upon the worth and weight of testimony, and nothing is done to impair its freedom to bring its verdict and not someone else's we ought not be too finicky or fearful in allowing some discretion [in the admission of testimony] to trial judges. . . .¹⁸¹

¹⁷⁷*Id.*

¹⁷⁸Federal Rule of Evidence 705 allows an expert to state an opinion without providing the basis for his opinion. This article does not attempt to explore the problems inherent in such a rule. It is worthwhile, however, to note that rendering an opinion without its basis cannot possibly help the jury to exercise its own combined judgment in reaching a verdict. Not having been told the basis of the opinion, but being forced to decide if it is valid, the jury is required to speculate in an area beyond its competence either to accept the opinion or to disregard it. The expert, in effect, has "merely . . . [told] the jury what result to reach," and, as such, has attempted to usurp the role of the jury. See FED. R. EVID. 704, advisory committee's note, *supra* note 7.

¹⁷⁹319 U.S. 503 (1942).

¹⁸⁰*Id.* at 519.

¹⁸¹*Id.*

If the jury is presented with expert testimony from both sides, both sides have an equal opportunity for cross-examination, and if the judge plainly and clearly explains to the jury that it is free to attach the level of credibility that it sees fit to any and all witnesses, including the experts, then the jury can render a collective opinion based upon its determination of the evidence presented.

D. A Proposed Rule 704

Because of the somewhat obscure tenor of Rule 704,¹⁸² and because the federal courts have encountered difficulty in applying its spirit, a revised Rule 704 should be promulgated which more clearly defines the parameters of the admissibility of expert opinion testimony on mixed questions of law and fact. Such a rule would set forth a precise set of criteria, thereby ensuring increased predictability among courts. A revision would promote judicial economy, enabling litigants to operate with some degree of certainty. Such a rule might be:

Rule 704: Expert Opinions

Expert testimony in the form of an opinion or inference is not objectionable because it embraces an ultimate issue to be decided by the trier of fact, so long as:

- (a) such testimony may assist the trier of fact in understanding any fact in issue or the law as it applies to any fact in issue;
- (b) the expert has been properly qualified to render such an opinion on the subject which is before the court;
- (c) the expert's understanding and acceptance of the legal standards which may affect his opinion have been determined to be entirely congruent with that of the court; and
- (d) if there is a jury, it has been properly instructed that it may accept or disregard all or any portions of the expert's testimony.

V. CONCLUSION

The judicial system is drastically overburdened, and today there are countless delays in litigation at both the trial and appellate court levels. Courts must recognize this and move toward a goal which would give parties the opportunity to litigate their differences fully and fairly, encouraging just results, while at the same time discouraging unnecessary appeals.

Judges can and should move toward effectuating this goal in the context of expert opinion testimony by applying a straightforward, uniform analysis to determine whether or not the proffered testimony is admissible. The expert should then be allowed to state the substance of his opinion unimpaired by

¹⁸²See FED. R. EVID. 704(a), *supra* note 7; FED. R. EVID. 704(b), *supra* text accompanying note 115.

needless quibbling over its form. Specifically, to render expert opinion testimony admissible, the judge should: first establish that the expert is qualified to render an opinion; second, that the expert understands and accepts the law as the judge will apply it in the case; and third, and most importantly, that the testimony may be helpful to the jury. Once these foundational requirements have been met, such testimony cannot "usurp the role of the judge," and thus should not be inadmissible based on some artificial label, such as, "impermissible legal conclusion":

Labeling evidence as a legal conclusion and holding it excludable on that ground obscures the real reason for its inadmissibility—lack of helpfulness—and frustrates a proper inquiry into that issue. When an expert gives an opinion that applies the principles of his expertise to the facts in evidence, thereby testifying to his view of the ultimate issue, his opinion will often be in the form of a "legal conclusion," i.e., a conclusion as to the legal result in the case. When jurors understand the legal criteria upon which the opinion is founded, such a "legal conclusion" may nonetheless be helpful to them. Thus, a standard that focuses on a label rather than on the value of the evidence to the jury may well exclude helpful evidence that is properly admissible, a result contrary to Rules 702 and 704.¹⁸³

Allowing each party's expert to render an opinion which not only states the expert's conclusion but which educates the jury on the basis for the opinion, gives each party the opportunity to present fully the substance of its case without fear that meaningful evidence will be excluded because its form is deemed improper. This is the sort of testimony which truly aids the jury in rendering its verdict: testimony which brings together dry and obscure legal principles and technically foreign facts and fuses them into simple and solid opinions.

So long as each side is allowed to present the substance of its case, and so long as the jury is plainly instructed that it is the ultimate trier of fact and that it may decide what weight, if any, to place on *all* testimony, such testimony cannot harm either party, nor does it "usurp the role of the jury," but instead enhances it.

Factual disputes are complicated, and parties hire experts to help explain their theory to the jury. By the time litigants reach trial, they have each made a significant investment in their experts. It is time for courts to acknowledge that expert opinion testimony which applies the law to the facts is helpful to the jury if it is properly dealt with by the judge. It is time to let the experts testify.

¹⁸³Specht, 853 F.2d at 814 (arguing that expert opinion testimony which applies the law to the facts should not be per se inadmissible).

