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THE CONFLICT CONCERNING EXPERT WITNESSES AND LEGAL CONCLUSIONS

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I. INTRODUCTION

The increasing use of expert witnesses in almost every type of litigation has resulted in trial lawyers' attempting to expand the traditional limits that have been placed on the scope of opinion testimony. One of the issues currently causing conflict is whether an expert may express an opinion on a legal issue that the judge or jury will subsequently decide. Counsel may seek to elicit from an expert an opinion on whether a physician's medical treatment was negligent or whether the accused was involved in certain drug-related activity. Beyond the traditional type of expert opinion, a party may offer testimony of a lawyer to explain to the jury the applicable substantive law. The admissibility of this type of opinion involves

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the question of whether the witness is testifying in the form of a "legal conclusion," which traditionally has been condemned.[1]

Unfortunately, federal courts have not exhibited a clear understanding of when opinion testimony involves a legal conclusion and whether the prohibition against opinions in that form is still viable. The Federal Rules of Evidence do not provide unambiguous guidance because they do not directly address the admissibility of opinion testimony in the form of legal conclusions. The general approach of the Federal Rules is to admit opinion testimony when it will be an appreciable help to the jury.[2] Opinions are excluded when they do not meet the test of helpfulness or when they run afoul of Rule 403 criteria, such as unfair prejudice, confusion of the issues, waste of time, or misleading the jury.[3] Appellate courts have vested broad discretion in trial courts to determine whether expert testimony is admissible.[4]

Federal Rule 704(a) restates the view of the earlier evidence codifications that opinion testimony which is "otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact." Inclusion of the indefinite term "otherwise admissible" within Rule 704(a) suggests that the prohibition regarding legal conclusions, as well as other pre-Rules restrictions, may be included by implication.

This article addresses the admissibility under the Federal Rules of Evidence of three types of opinion testimony which may involve the admissibility of testimony in the form of a legal conclusion. The first involves testimony embracing an ultimate issue of fact. The paper concludes that these opinions should be routinely admitted, as jurors are able to determine whether the testimony should be

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1. *See, e.g.*, Kostelecky v. NL Acme Tool/NL Indus. Inc., 837 F.2d 828, 830 (8th Cir. 1988); Hogan v. American Tel. & Tel. Co., 812 F.2d 409, 411-12 (8th Cir. 1987); United States v. Milton, 555 F.2d 1198, 1203 (5th Cir. 1977). *See generally*, Note, *The Admissibility of Expert Testimony: Time to Take the Final Leap?*, 42 U. MIAMI L. REV. 831 (1988).

2. *See* FED. R. EVID. 702; Little Oil Co. v. Atl. Richfield Co., 852 F.2d 441, 446 (9th Cir. 1988); Specht v. Jensen, 853 F.2d 805 (10th Cir. 1988) (en banc), *cert. denied*, 109 S. Ct. 792 (1989); 3 J. WEINSTEIN & M. BERGER, WEINSTEIN'S EVIDENCE ¶ 702[01], at 702-07 (1987) [hereinafter WEINSTEIN]; J. WIGMORE, EVIDENCE § 1923, at 29-32 (3d ed. 1940) [hereinafter WIGMORE].

3. WEINSTEIN, *supra* note 2, ¶ 702[02], at 702-18-22.

4. *Id.* at 702-22-26.

accepted or rejected. Closely related to testimony embracing an ultimate fact is testimony in which the expert is asked to go a step further and apply a legal standard or definition to those facts. This paper will also examine the conflict in recent federal decisions involving the admissibility of this type of opinion testimony and examine the legislative history and underlying policy considerations. This section argues that because of the danger of misleading the jury, the federal courts should apply the intent of the Advisory Committee on the Federal Rules of Evidence and restrict the admissibility of opinion testimony when the witness testifies as to whether certain conduct conforms to a particular legal standard.

Disagreement concerning a third type of opinion testimony, which may involve a legal conclusion, has resulted from counsel's stretching traditional rules even further by asking experts to express their opinions on substantive law. An expert's description of the law may be broader or even different from those included in the trial judge's instructions to the jury. The policies supporting and opposing the admission of this testimony will be examined, and this article will conclude that expert testimony as to the law should continue to be prohibited. The primary reason for this exclusion is that testimony relating to the substantive law remains inconsistent with the role of the trial judge to determine the law and to instruct the jury upon it.

II. Ultimate Factual Issue

The admissibility of opinions which contain a legal conclusion is closely related to the issue of whether a witness may render an opinion on an "ultimate issue" to be determined by the jury.[5] These latter opinions have often been met with the objection that they "invade the province of the jury" or they "usurp the function of the jury." While in the past there was some acceptance of such a general limitation on opinion testimony,[6] such objections are what

5. *See* Note, *Expert Legal Testimony*, 97 Harv. L. Rev. 797 (1984).

6. *See* Healy v. Nordhous, 40 Ill. App. 2d 320, 324, 188 N.E.2d 227, 229 (1963); Van Voorhis, *Expert Opinion Evidence*, 13 N.Y.L.F. 651 (1967); Stoebuck, *Opinions on Ultimate Facts: Status, Trends, and a Note of Caution*, 41 Den. L. Cent. J. 226 (1964).

Wigmore called "empty rhetoric" since no one may force jurors to "accept the witness' opinion against their own."[7]

Prior to the adoption of the Federal Rules of Evidence, many jurisdictions rejected this restrictive view and did not limit the admissibility of opinion testimony which embraced an ultimate factual issue to be decided by the jury.[8] A helpful analysis of the issue is contained in *Grismore v. Consolidated Products Co.*,[9] where a farmer sued a feed company alleging that the defendant's feed had caused the death of his turkeys. The defendant argued that the admission of opinion testimony regarding whether the feed had caused the turkeys to lose weight and die was error. The *Grismore* court rejected the contention that the testimony invaded the province of the jury, stating that the argument stemmed from a "misconception of the necessity and purpose of opinion testimony."[10] The court reasoned that opinion testimony can never invade or usurp the province of the jury since admissible opinion testimony should be treated the same as fact testimony. Just as fact testimony is not excluded because it might be "decisive of an ultimate fact," the court reasoned that this opinion testimony should not be barred since the purpose of the opinion testimony is to aid the jury in ascertaining the truth. The jury has the ultimate responsibility of determining whether to accept or reject the opinion, just as it may accept or reject any other testimony.

Other reasons for the admission of opinion testimony have been suggested by Judge Weinstein, who focuses upon the practical difficulty in applying such a standard. Weinstein observed that distinguishing between an ultimate fact and a non-ultimate fact "proved impossible" in many instances. He also noted that it was sometimes impossible for a witness to testify to anything but an ultimate fact.[11]

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7. WIGMORE, *supra* note 2, § 1920, at 18-21.

8. *See, e.g.*, Morton's Adm'r v. Kentucky-Tennessee Light & Power Co., 282 Ky. 174, 138 S.W.2d 345 (1940); Carr v. Radkey, 393 S.W.2d 806, 812 (Tex. 1965).

9. 232 Iowa 328, 5 N.W.2d 646 (1942).

10. *Id.* at 344, 5 N.W.2d 655.

11. WEINSTEIN, *supra* note 2, ¶ 704[01], at 704-06.

Opinion testimony concerning an ultimate factual issue has rather routinely been admitted under Rule 704(a).[12] In cases where the opinion testimony has been admitted, the expert does not apply a legal standard or definition to the facts, rather, the expert couches the opinion in terms of the factual issues to be decided by the jury. For example, the admissibility of opinion testimony that an explosion was the factual cause of the plaintiff's injuries[13] and that the defendant was intoxicated[14] has recently been affirmed.

While the admission of expert testimony involving ultimate facts usually involves little difficulty, the recent trend of prosecutors' offering such testimony in criminal cases has caused concern. Typically, testimony of the prosecution's eye-witnesses shows that the defendant has engaged in certain actions. Then a law enforcement officer will be qualified as an expert, and the prosecution elicits the officer's opinion as to the type of conduct or modus operandi found in connection with a criminal activity.[15] The jury is able to infer that the defendant committed the crime charged because the defendant's actions conformed to those usually found in connection with the commission of that crime.

Frequently the prosecution is not content to permit the jury to draw the inference, but rather goes the next step and asks the expert to express an opinion on the fact to be inferred, that is, that the conduct of the defendant fits the pattern or modus operandi used

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12. *See* United States v. Lundy, 809 F.2d 392 (7th Cir. 1987) (in arson trial expert opinion that fire was purposefully set and was not accidental); Shad v. Dean Witter Reynolds, Inc., 799 F.2d 525 (9th Cir. 1986) (plaintiffs did not offer expert opinion that churning of a brokerage account occurred, but rather offered admissible opinion to the significance of various types of transactions and whether they were appropriate for the plaintiff's account); Long v. State, 284 Ark. 21, 680 S.W.2d 686 (1984) (officer's opinion that defendant was intoxicated).

13. *See* Ponder v. Warren Tool Corp., 834 F.2d 1553, 1557 (lOth Cir. 1987) (holding that the trial court abused its discretion by excluding expert testimony as to the cause of the explosion which damaged the plaintiff). Similarly in Hurst v. United States, 882 F.2d 306, 311 (8th Cir. 1989), there was no abuse of discretion in the trial judge's admission of expert testimony that certain "jetties" on a river did not cause the flooding on the plaintiff's property.

14. Long v. State, 284 Ark. 21, 680 S.W.2d 686 (1984).

15. *See* United States v. Tutino, 883 F.2d 1125, 1134 (2d Cir. 1989), *petition for cert. filed*, No. 89-5792 (U.S. Oct. 13, 1989) (WESTLAW 129717); United States v. Sanchez Solis, 882 F.2d 693, 696 (2d Cir. 1989).

in the crime charged.[16] For example, there has been no abuse of discretion in the admission of expert testimony that the defendant acted as a "steerer" in a drug transaction,[17] that a transaction on a street corner appeared to be a drug sale,[18] and that certain coded language related to narcotics and "specifically heroin."[19] At the same time appellate courts have upheld the admission of the foregoing opinions, they have voiced concerns that such opinions are "offensive"[20] or create "some degree of discomfiture"[21] and give the government an additional summation by having the expert interpret the evidence.[22] However, the admission of such opinions have rarely been found to be an abuse of the trial court's discretion.[23]

The most persuasive reason to exclude expert opinion testimony on ultimate facts is that it is the equivalent of the expert's rendering an opinion on the guilt or innocence of the defendant, which is impermissible.[24] On the other hand, with the sophistication of many criminal enterprises and the complexity of many prosecutions, this type of expert testimony is probably necessary to enable the jury to understand the significance of the defendant's actions.

III. Application of a Legal Standard or Definition

A. Pre-Federal Rules

Prior to the adoption of the Federal Rules of Evidence, jurisdictions that did not exclude expert opinions because they involved

16. In United States v. DeSoto, 885 F.2d 354, 360-61 (7th Cir. 1989) an expert testified regarding "counter-surveillance" techniques used by drug dealers to avoid detection and that the defendant's actions "definitely constituted countersurveillance." *See* United States v. Mang Sun Wong, 884 F.2d 1537, 1543 (2d Cir. 1989), *petition for cert. filed*, No. 89-5949 (U.S. Nov. 3, 1989) (WESTLAW 137209) (suggesting that defense counsel's cross-examination opened-the-door to the testimony).

17. United States v. Brown, 776 F.2d 397 (2d Cir. 1985), *cert. denied*, 475 U.S. 1141 (1986).

18. United States v. Carson, 702 F.2d 351 (2d Cir. 1983), *cert. denied*, 462 U.S. 1108 (1983). *See DeSoto*, 885 F.2d at 361-62 (7th Cir. 1989) (opinion notes that there appears to be authority that officer could testify that defendants were conducting "dope-deals").

19. United States v. Nersesian, 824 F.2d 1294, 1308 (2d Cir. 1987), *cert. denied*, 108 S. Ct. 357 (1987), *cert. denied sub nom.*, Annabi v. United States, 108 S. Ct. 1018 (1988).

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

21. *Nersesian*, 824 F.2d at 1308, *cert. denied*, 108 S. Ct. 357 (1987), *cert. denied sub nom.*, Annabi v. United States, 108 S. Ct. 1018 (1988).

22. *Nersesian*, 824 F.2d at 1308.

23. *See* United States v. Diaz, 878 F.2d 608, 616-18 (2d Cir. 1989), *cert. denied*, 110 S. Ct. 543 (1989).

24. *See infra* note 70 and accompanying text. United States v. Espinosa, 827 F.2d 604, 612 (9th Cir. 1987), *cert. denied*, 108 S. Ct. 1243 (1988) distinguishes expert testimony regarding the usual criminal modus operandi from a direct opinion upon the defendant's guilt.

an ultimate issue of fact generally continued to recognize other restrictions upon such testimony.[25] For example, the *Grismore* court cautioned that if the opinion did not concern a factual issue, but rather concerned "mixed questions of law and fact," an expert should not be permitted to testify thereto.[26] An opinion involves a mixed question of law and fact when a standard or measure has been fixed by law and the question is whether the person or conduct measures up to that standard. According to *Grismore*, the trial judge must instruct the jury as to the applicable legal standard and the jury must then conclude from the facts whether that standard was met. Thus, a witness would not be permitted to testify to the guilt of the defendant, to the presence or absence of negligence, or to the capacity to execute a legal document.[27]

Dean Mason Ladd further refined this analysis when he suggested that in a will contest involving mental capacity, if a witness were asked "if he believed the testator had the mental capacity to make a will,"[28] the witness could have in mind a much higher or a much lower standard of competency than the law requires. Therefore, Dean Ladd suggested that counsel should ask whether the "testator had the mental capacity to appreciate the nature and extent of his holdings and the natural objects of his bounty."[29]

The early evidence codifications, the *Model Code of Evidence*, and the original *Uniform Rules of Evidence* contained provisions to the effect that opinion testimony was not inadmissible because it embraced an ultimate issue to be decided by the trier of fact.[30] Al-

25. *See* Skelton v. Sinclair Refining Co., 375 P.2d 948 (Okla. 1962); Morton's Adm'r v. Kentucky-Tennessee Light & Power Co., 282 Ky. 174, 138 S.W.2d 345 (1940); Duncan v. Atchinson T. & S.F. Ry., 86 Kan. 112, 119 P. 356 (1911).

26. 232 Iowa at 361, 5 N.W.2d at 663.

27. *Id.*

28. Ladd, *Expert Testimony*, 5 VAND. L. REV. 414, 424 (1952). Dean Ladd served on the Evidence Editorial group which drafted the Model Code for consideration by the American Law Institute, *see* AMERICAN LAW INSTITUTE, MODEL CODE OF EVIDENCE xi-xii (1942), was a member of the Special Committee on the Uniform Rules of Evidence, *see* NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS, HANDBOOK OF THE NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS, 21 (1952), and was a member of the Standing Committee on Rules of Practice and Procedure at the time the Federal Rules of Evidence were drafted, *see* 46 F.R.D. 161, 162 (1969).

29. Ladd, *Expert Testimony*, 5 VAND. L. REV. 414, 424 (1952).

30. Rule 401 of the *Model Code of Evidence* provides: "In testifying to what he has perceived a witness, whether or not an expert, may give his testimony in terms which include inferences and

though there are no official comments discussing the issue, apparently the codifications were not intended to eliminate the restriction on opinions relating to a mixed question of law and fact.[31]

B. Federal Rules

Although Federal Rule 704(a) recognizes that an opinion relating to an ultimate issue is not objectionable if the opinion is "otherwise admissible," the Advisory Committee to the Federal Rules apparently intended that the distinction between an ultimate factual issue and a mixed question of law and fact continue. In its Notes to Rule 704(a), the Committee cautions:

> The abolition of the ultimate issue rule does not lower the bars so as to admit all opinions. Under Rules 701 and 702, opinions must be helpful to the trier of fact, and Rule 403 provides for exclusion of evidence which wastes time. These provisions afford ample assurances against the admission of opinions which would merely tell the jury what result to reach, somewhat in the manner of the oath-helpers of an earlier day. They also stand ready to exclude opinions phrased in terms of inadequately explored legal criteria. 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.[32]

The Advisory Committee's use of the same example used by Dean Ladd years earlier was probably more than coincidence since at the time the Notes were drafted he was a member of the Standing Committee on Rules of Practice and Procedure of the Judicial Conference.[33]

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may state all relevant inferences, *whether or not embracing ultimate issues to be decided by the trier of fact*, ..." (emphasis added).

Uniform Rule of Evidence 56(4) provides: "Testimony in the form of opinions or inferences otherwise admissible under these rules is not objectionable because it embraces the ultimate issue or issues to be decided by the trier of the fact." Federal Rule of Evidence 704(a) is nearly identical. UNIF. R. EVID. 56(4) (1953).

31. In Ladd, *Expert and Other Opinion Testimony*, 40 MINN. L. REV. 437, 445 (1956), Dean Ladd commented that "the *Grismore* case . . . is in direct accord with Uniform Rule 56(4)."

32. 56 F.R.D. 183, 285 (1973).

33. Ehrhardt, *In Memoriam Mason Ladd*, 8 FLA. ST. U.L. REV. 161 (1980). The Court recently reaffirmed the significance of Dean Ladd's writings on the construction of the Federal Rules of Evidence. *See* Green v. Bock Laundry Mach. Co., 109 S. Ct. 1981, 1986 n.11 (1989).

Federal appellate decisions interpreting Rule 704 sometimes ignore the above limitation. The problem is illustrated by two recent Eleventh Circuit decisions. In *Haney v. Mizell Memorial Hosp.*,[34] a medical malpractice case, the court upheld the trial judge's exclusion of expert testimony that the defendant-doctor was "negligent." Subsequently, a seemingly conflicting result was reached in *Parker v. Williams*,[35] a case involving a section 1983 civil rights claim against a sheriff for employing a jailer who allegedly had raped and kidnapped the plaintiff. The Eleventh Circuit found no reversible error in the trial judge's admission of the opinion of an expert in correctional facilities that the sheriff was "grossly negligent" in employing the jailer.[36] Among the reasons stated by the Eleventh Circuit for upholding the admission of this expert testimony was the fact that the trial court instructed the jury on the legal meaning of gross negligence.[37] Because of this instruction, the court reasoned that the jury would not be mislead by the expert's opinion.[38] Within three years, the Eleventh Circuit upheld both the *exclusion*[39] of expert opinion testimony on a defendant's "negligence" and the *admission* of expert opinion testimony on a defendant's "gross negligence."[40]

Inconsistent results have been demonstrated by a variety of other decisions. For example, the exclusion of expert opinion has been determined to be within the discretion of the trial court in a negligence action when it pertained to whether the defendant's conduct

34. 744 F.2d 1467 (11th Cir. 1984). *See also* McGowan v. Cooper Indus., Inc., 863 F.2d 1266, 1272-73 (6th Cir. 1988) (no error in excluding opinion testimony that action of factory representative was negligent).

35. 855 F.2d 763 (11th Cir. 1988), *vacated on other grounds*, 862 F.2d 1471 (1989). *See also Shad*, 799 F.2d at 530 (reversible error to exclude evidence that the defendant's actions evidenced a "reckless disregard" for plaintiff's interests); Wilson v. State, 669 P.2d 1292 (Alaska 1983) (no error in admitting opinion regarding defendant's negligence).

36. *Parker*, 855 F.2d at 777.

37. *Id.* at 777-78. The opinion also relied upon the wide discretion afforded the trial court in admitting expert testimony, a jury instruction regarding the proper weight to be given expert testimony and the conclusion that if the ruling was erroneous, it was not reversible error. *Id.*

38. *Id.*

39. *See McGowan*, 863 F.2d at 1272-73. *Compare* Andrews v. Metro N. Commuter R.R. Co., 882 F.2d 705 (2d Cir. 1989) (reversible error to admit opinion of "forensic engineer" that railroad was negligent when it struck plaintiff).

40. *See Shad*, 799 F.2d at 530; Wilson v. State, 669 P.2d 1292 (Alaska 1983) (no error in admitting opinion regarding defendant's negligence).

was the legal[41] or proximate[42] cause of the accident, whether various product warnings were so inadequate as to make the products unreasonably dangerous in a product liability action,[43] and whether the defendant had the necessary intent in a prosecution for misapplication of bank funds.[44] The denial of an accused's right to a fair trial was found in large part from the admission in a murder prosecution of expert testimony that there was no evidence of the involvement of any suspect other than the defendant.[45] According to the Sixth Circuit, the admission of opinion testimony that "went directly to the heart of the issue concerning guilt or innocence" impinged upon fundamental fairness.[46]

At the same time, appellate courts have found no abuse of discretion in the trial court's admission of expert opinion that a product was "unreasonably dangerous beyond the expectation of the average user" and that the defendant acted "recklessly" in producing and distributing it,[47] that certain expenses are deductible under the federal tax laws in a federal income tax prosecution,[48] that the defen-

41. *Kostelecky*, 837 F.2d at 830; Owen v. Kerr-McGee Corp., 698 F.2d 236, 240 (5th Cir. 1983). In Smogor v. Enke, 874 F.2d 295, 296-97 (5th Cir. 1989), there was no abuse of the trial court's discretion in refusing to admit expert testimony concerning whether the defendant's actions were negligent and the proximate cause of the plaintiff's injuries when the expert's answer was preceded by counsel's making a "precise statement of the law."

42. Matthews v. Ashland Chem., Inc., 770 F.2d 1303, 1311 (5th Cir. 1985). *See generally*, Steinbock, Richman & Ray, *Expert Testimony on Proximate Cause*, 41 VAND. L. REV. 261 (1988).

43. Strong v. E.I. Du Pont de Nemours Co., 667 F.2d 682 (8th Cir. 1981). *See also* Harris v. Pacific Floor Mach. Mfg. Co., 856 F.2d 64 (8th Cir. 1988).

44. United States v. Ness, 665 F.2d 248, 250 (8th Cir. 1981). The court expressed concern with witness who was unfamiliar with standards established by the criminal law being permitted to express an opinion and concluded that the jury could easily accord it too much weight. *Id.* The court concluded that this testimony was not "otherwise admissible" under FED. R. EVID. Rule 704. *Id. See also* Matter of Cheryl H., 153 Cal. App. 3d 1098, 1121, 200 Cal. Rptr. 789, 803 (1984) (expert testimony "about who caused Cheryl's sexual injuries" is not admissible); Downer v. Bramet, 152 Cal. App. 3d 837, 841-42, 199 Cal. Rptr. 830, 832-33 (1984) (no abuse of discretion in excluding expert testimony that the transfer of property was a gift).

45. Cooper v. Sowders, 837 F.2d 284, 287 (6th Cir. 1988).

46. *Id.*

47. Karns v. Emerson Elec. Co., 817 F.2d 1452 (10th Cir. 1987). *Compare* Harris v. Pacific Floor Mach. Mfg. Co., 856 F.2d 64 (8th Cir. 1988) (no abuse of discretion in refusing to permit expert witness to give opinion on adequacy of warnings in a product liability action but rather to limit testimony to the criteria by which he should form such an opinion).

48. United States v. Fogg, 652 F.2d 551, 556-57 (5th Cir. 1981), *cert. denied*, 456 U.S. 905 (1982). *See also* United States v. Clardy, 612 F.2d 1139, 1153 (9th Cir. 1980) (internal revenue agent was permitted to testify as an expert witness as to the deductibility of an interest deduction taken by taxpayer on his return).

dant willfully and intentionally increased his income knowing he had not reported the taxes on the increase,[49] that the defendant was involved in the distribution of cocaine,[50] that the method of shipping materials which caused the plaintiff personal injuries was a "booby trap,"[51] and that the device manufactured and possessed by the defendant would "have to be registered with the Department of Treasury" in a prosecution for the manufacture and possession of an unregistered firearm.[52]

The silence of the Federal Rules on the admissibility of these opinions could lead counsel and the court to believe that the restrictions on mixed question's of law and fact are no longer effective. Without the benefit of the traditional analysis, it could be concluded that allowing an expert to apply a legal standard to ultimate factual conclusions would possess, at least, a modicum of helpfulness and therefore meet the standard of Rule 702.

At least two other reasons may explain the admissibility of these opinions. First, the Federal Rules relaxed many other common law restrictions on expert testimony.[53] The tendency may be to interpret opinions applying legal standards in the same relaxed manner, particularly in light of the difficulty in distinguishing between opinions of ultimate facts and opinions involving mixed questions of law and

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49. United States v. Dotson, 817 F.2d 1127, 1132 (5th Cir. 1987), *modified*, 821 F.2d 1034 (5th Cir. 1987) (expert's opinion did not violate Rule 704(b)).

50. United States v. Kinsey, 843 F.2d 383, 387-89 (9th Cir. 1988), *cert. denied*, 108 S. Ct. 2882, *cert. denied*, 109 S. Ct. 99 (1988). *See* United States v. Battle, 859 F.2d 56 (8th Cir. 1988) (scales seized were common in drug or heroin operations); United States v. Anderson, 817 F.2d 384 (D.C. Cir. 1988), *cert. denied*, 109 S. Ct. 801 (1989) (in prosecution for interstate transportation of minor for prostitution, not reversible error in the admission of sociologist's testimony concerning the modus operandi of pimps and the pimp-prostitute relationship).

51. Coleman v. Parkline Corp., 844 F.2d 863, 866 (D.C. Cir. 1988).

52. United States v. Buchanan, 787 F.2d 477, 483-84 (10th Cir. 1986). The decision distinguished between "unadorned legal conclusions" which are impermissible and "the expression of expert opinions on ultimate issues of fact" which courts allow. *Id.* at 484. *See also* State v. Saunders, 317 N.C. 308, 314, 345 S.E.2d 212, 216 (1986) (When defendant asserted self-defense to a murder charge, no error was found in admitting expert testimony that victim's wound "was not a self-defense type of wound."); Miller v. Food Fair Stores, Inc., 63 A.D.2d 766, 404 N.Y.S.2d 740 (App. Div. 1978) (no error in admitting expert testimony that floor was unsafe).

53. For example, Rule 705 no longer requires the presentation of a hypothetical question and Rule 704 no longer requires an expert to rely on evidence admitted at trial. *See also* Beech Aircraft Corp. v. Rainey, 109 S. Ct. 439, 450 (1988).

fact.[54] The other reason is the great discretion afforded trial judges by the appellate courts in determining whether opinion testimony is admissible. This deferential philosophy resulted in appellate opinions which affirmed the trial court's admission of such opinion testimony, on the basis that there was no clear abuse of the trial court's discretion,[55] and then simply paraphrased the applicable Federal Rule of Evidence.[56]

Recently, at least one circuit has expressed concern with respect to the latter approach to a number of issues dealing with expert testimony. The Fifth Circuit stated:

> [W]e recognize the temptation [of the trial judge] to answer objections to receipt of expert testimony with the shorthand remark that the jury will give it "the weight it deserves." This nigh reflexive explanation may be sound in some case [sic], but in others it can mask a failure by the trial judge to come to grips with an important trial decision.[57]

The court noted that frequently expert witnesses were used simply to become advocates for one party or the other.[58] The Fifth Circuit rejected the use of experts for this purpose stating that "the trial judge ought to insist that a proffered expert bring to the jury more than the lawyers can offer in argument."[59] The court suggested that if an expert simply served this purpose, it was neither assisting the trier of fact to understand the evidence nor helping to determine the fact in issue.[60]

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54. *See* Town of Palm Beach v. Palm Beach County, 460 So.2d 879, 882 (Fla. 1984) ("While this is to some degree a matter of semantics, we find the distinction necessary.").

55. *See In re* Air Crash Disaster at New Orleans, La., 795 F.2d 1230, 1233 (5th Cir. 1986).

56. For example, even though the Second Circuit found it "rather offensive" to permit an expert to testify that a certain pattern of conduct is often found in narcotics cases and that defendant's conduct fit that pattern, the court found no abuse of discretion in admitting the testimony. *Brown*, 776 F.2d at 401, *cert. denied*, 475 U.S. 1141 (1986) (court noted that the 403 balancing test would not result in exclusion of evidence).

57. *In re Air Crash Disaster*, 795 F.2d at 1233. *See generally* Fanning, *Experts up to Here*, FORBES, July 13, 1987, at 378.

58. *In re Air Crash Disaster*, 795 F.2d at 1233.

59. *Id.*

60. The Fifth Circuit also voiced concern about the competency of experts and the opinions which they expressed. The court noted two signals trial judges might consider in determining whether to admit proffered expert testimony:

> First, many experts are members of the academic community who supplement their teaching salaries with consulting work. We know from our judicial experience that many such able

The ultimate test for expert testimony under the Federal Rules, including opinions applying legal standards, is whether the jury will receive "appreciable help" from the opinion.[61] If the jury is aware of the expert's opinion regarding the underlying facts, asking him or her to apply a legal definition may not meet this standard.[62] The answer to the final question applying the legal standard adds little to the prior testimony of the expert. In addition, there is concern that allowing an expert to express an opinion as to whether a legal standard has been violated will invade the province of the trial judge to determine the applicable law and instruct the jury based on it.[63]

The strongest argument in favor of the exclusion of these opinions was made by the Sixth Circuit in *Torres v. County of Oakland*,[64] where a county employee filed an employment discrimination action based on national origin. The trial court's decision to permit a witness to testify whether she believed the plaintiff had been "discriminated against because of her national origin" was found to be error because the question called for an improper legal conclusion.[65] The

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> persons present studies and express opinions that they might not be willing to express in an article submitted to a refereed journal of their discipline in other contexts subject to peer review. We think that is one important signal, along with many others, that ought to be considered in deciding whether to accept expert testimony. Second, the professional expert is now commonplace. That a person spends substantially all of his time consulting with attorneys and testifying is not a disqualification. But experts whose opinions are available to the highest bidder have no place testifying in a court of law, before a jury, and with the imprimatur of the trial judge's decision that he is an "expert."

Id. at 1234.

As a result, the Fifth Circuit clearly indicated that it would review the admission of expert testimony:

> with a sharp eye, particularly in those instances, hopefully few, where the record makes it evident that the decision to receive expert testimony was simply tossed off to the jury under a 'let it all in' philosophy. Our message to our able trial colleagues: it is time to take hold of expert testimony in federal trials.

Id.

61. Little Oil Co. v. Atlantic Richfield Co., 852 F.2d 441, 446 (9th Cir. 1988).

62. *See Id.* (No abuse of discretion in excluding opinion regarding ultimate issue in light of extensive testimony of over four hundred pages by expert. "The ultimate facts in question do not meet the 'appreciable help' test of FED. R. EVID. 702. Taylor had already given the jury the facts it needed to draw its own conclusions regarding ARCO's marketing practices."); *Kostelecky*, 837 F.2d at 830. *But see* Wilson v. State, 669 P.2d 1292 (Alaska 1983) (opinion regarding defendant's negligence was proper when counsel's question defined the standard).

63. Torres v. County of Oakland, 758 F.2d 147 (6th Cir. 1985).

64. *Id.*

65. *Id.* at 151.

Torres court reasoned that since the term "discriminate," as used by the witness, had a "separate, distinct and specialized meaning in the law different from that present in the vernacular," exclusion of this testimony was appropriate.[66] Because there was no assurance that the definition of the word "discriminate" used by the witness would be the same as the definition supplied by the law, the opinion did not meet the test of helpfulness.[67] Therefore, the jury could be mislead and confused by the testimony.[68]

The *Torres* court noted, however, that if counsel had framed a more careful question, much of the same information could have been elicited without the testimony having involved a legal conclusion.[69] For example, if the witness had been asked whether she believed the plaintiff's national origin "motivated" the hiring decision, the question would have been appropriate since the significance of the testimony would have been clear to the jury, and they could have clearly understood the issue upon which the witness was testifying.[70]

A short time thereafter the Sixth Circuit decided *Mitroff v. Xomox Corp.*,[71] an age discrimination suit in which the trial judge

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66. *Id.* Although the testimony in Torres was offered as lay opinion, the Sixth Circuit found it to be inadmissible under Rule 704. The analysis would be the same if the testimony was offered under Rule 701 or 702. *Id.* at 150. *See also* United States v. Lueben, 812 F.2d 179, 184 (5th Cir. 1987), *modified*, 816 F.2d 1032 (5th Cir. 1987), *aff'd*, 838 F.2d 751 (5th Cir. 1988) (expert opinion as to "whether the false statements . . . would have 'the capacity to influence' a loan officer" was appropriate while opinion that the statements were material was not admissible).

67. *Torres*, 758 F.2d at 151.

68. Occasionally the suggestion has been made that if the opinion applying a legal standard is admitted, and the court subsequently instructs the jury as to the legal definition of the terms used by the witness, the jury will not be mislead since it is aware of the necessary criteria. *See* Parker v. Williams, 855 F.2d 763, 777 (11th Cir. 1988), *vacated on other grounds*, 862 F.2d 1471 (11th Cir. 1989). However, this analysis overlooks the danger that the witness will not employ the same definition as does the law reflected in the instructions, and therefore the jury will be mislead.

69. 758 F.2d at 151.

70. The *Torres* opinion commented that an earlier Sixth Circuit opinion, Davis v. Combustion Engineering, Inc., 742 F.2d 916 (6th Cir. 1984), in which the trial court's decision permitting a business school professor to testify as to whether or not discrimination had occurred comported "with our analysis of this case." 758 F.2d at 151. While the *Davis* opinion is unclear, it appears that the testimony of the business school professor may have been admissible because he was an expert who would be familiar with the legal definition of age discrimination and therefore the court could be assured that his definition of age discrimination would be the same as that provided by the law. *Davis*, 742 F.2d at 916. Therefore, the professor's opinion concerning age discrimination would not mislead the jury.

71. 797 F.2d 271, 275 (6th Cir. 1986).

admitted the testimony of defendant's assistant personnel manager that "there was a pattern of age discrimination at Xomox." The Sixth Circuit found the proffered testimony inadmissible regardless of whether it was offered as lay or expert opinion.[72] No foundation had been laid to qualify the witness as an expert "to give a legal conclusion as to the existence of age discrimination."[73] More importantly, the *Mitroff* opinion noted that lay opinion generally is not admissible under Rule 704 because it usually would not "meet the test of being helpful to the trier of fact since the jury's opinion is as good as the witness' and the witness turns into little more than an 'oath helper.'"[74]

Although the court in *Mitroff* did not conduct a *Torres* analysis, it seems clear that had it done so, it would have reached the same result since there was no indication that the lay witness used any definition of discrimination other than his own. Had the witness in *Mitroff* been an expert, the likelihood of the witness using the accepted legal definition of terms like discrimination would have increased.

A similar rationale was recently applied in *United States v. Scop*[75] where the Second Circuit found that during a mail and securities fraud prosecution, the trial court committed reversible error by admitting expert opinion that "drew directly upon the language of the statute and accompanying regulations concerning 'manipulation' and 'fraud' . . . . [The terms] '[m]anipulation,' 'scheme to defraud,' and 'fraud' are not self-defining terms but rather have been the subject of diverse judicial interpretations."[76] The court distinguished prior decisions permitting the use of opinion testimony in narcotics cases on the basis that in those cases the experts were not asked to express their opinions using statutory terms or language.[77]

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72. *Id.*

73. *Id.* at 276.

74. *Id.* at 277.

75. 846 F.2d 135 (2d Cir. 1988).

76. *Id.* at 140. *See also* F.T.C. v. Amy Travel Serv., Inc., 875 F.2d 564, 573 (7th Cir. 1989), *cert. denied*, 110 S. Ct. 366 (1989).

77. *Id.* at 141-42. *See* Fuenning v. Superior Court, 139 Ariz. 590, 680 P.2d 121 (1983) (ordinarily, witness in DWI prosecution should not be permitted to testify that defendant was "drunk," "under the influence" or "intoxicated").

The *Scop* decision recognized a second significant reason to exclude this testimony: that the opinions could not have been helpful to the jury because their use would give the appearance that the trial judge was shifting to the expert witnesses the primary responsibility of deciding the case. The jury may simply defer to the opinion of the expert, rather than exercising its own independent judgment in determining whether the facts met a particular legal standard as a result of the "aura of special reliability and trustworthiness" which surrounds the expert's opinions.[78]

The *Torres* rationale is the same as that espoused by Dean Ladd many years ago. The most significant reason for exclusion of the opinion testimony is not due to the issue upon which the witness is testifying, but rather that there can be no assurance that the witness is using a term or legal expression in the same sense that the statutes and appellate decisions have defined the critical words of art.[79]

1. Federal Rule 704(b)

In 1984, Federal Rule of Evidence 704 was amended by Congress to eliminate the "confusing spectacle of competing expert witnesses testifying to directly contradictory conclusions as to the ultimate

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78. United States v. Fosher, 590 F.2d 381, 383 (1st Cir. 1979); *Fuenning*, 139 Ariz. at 600, 680 P.2d at 136 (1983). The stature of the expert may cause the jury to rely upon the expert's opinion rather than the jury's making its own judgment. Similarly, since the expert has already thought the problem through, the jury may defer to the expert.

79. Cleary argues that lawyers will "seldom" ask a witness about a term "except when the popular meaning is the same as the legal meaning." McCORMICK ON EVIDENCE § 12, at 32 (E. Cleary 3d ed. 1984) [hereinafter McCORMICK]. Neither the reported cases nor experience seem to support this observation. For example, in Andrews v. Metro North Commuter Railroad Co., 882 F.2d 705 (2d Cir. 1989), there was reversible error in the admission of expert testimony of a "forensic engineer" that the railroad was "negligent" when it struck the plaintiff. Among the reasons requiring reversible error was that instead of relying upon "well-settled rules of law, . . . [the expert] made up his own law" as to the standard of care. *Id.* at 710.

Note, *supra* note 1, at 895 suggests that the trial judge instruct the expert witnesses as to the applicable law so that they will apply the correct criteria in their testimony. On the other hand the Fifth Circuit has found no abuse of discretion in refusing to admit opinion testimony even where a "precise statement of the law" precedes the expert's testimony concerning negligence and proximate cause. Smoger v. Enke, 874 F.2d 295, 296-97 (5th Cir. 1989).

legal issue."[80] Rule 704(b) now prohibits expert opinion testimony concerning whether the defendant in a criminal case has the "mental state or condition" which constitutes an element of the crime or a defense to it. Under this amendment, experts may testify to their professional diagnoses and the characteristics of the defendant's mental condition, but may not testify to the ultimate legal conclusion, e.g., sanity or insanity. In effect, the amendment changes "the style of the question and answer" that can be used to establish the intent or lack thereof.[81] Thus, in a criminal action, there is a prohibition on expert opinion testimony which applies a legal standard to determine whether the defendant possessed the necessary state of mind.

There has been little, if any, analysis of the impact of Rule 704(b) upon the interpretation of Rule 704(a). In adopting the amendment, Congress may have changed or affected the interpretation of 704(a). One could apply the principle of statutory construction, that in construing legislation a court should not assume Congress intended to enact unnecessary statutes.[82] If this principle is applied, Rule 704(b) should be construed to restrict the admissibility of evidence, which would have been admissible before the amendment, under Rule 704(a). To construe Rule 704(b) otherwise would be to imply the enactment of Congress was meaningless. If Rule 704(a) prohibits the testimony, there was no reason for Congress to adopt 704(b). Under the foregoing analysis, expert testimony that is now prohibited by Rule 704(b), as to whether an accused possessed the necessary mental state to commit a crime, was admissible before the amendment. These questions involve the application of a legal standard or definition to a set of facts. Thus it can be argued that under Federal Rule 704(a) expert opinion applying a legal standard generally would be admissible.

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80. United States v. Cox, 826 F.2d 1518, 1524 (6th Cir. 1987), *cert. denied*, 484 U.S. 1028 (1988) (quoting S. REP. No. 225, 98th Cong., 2d Sess. 230, *reprinted in* 1984 U.S. CODE CONG. & ADMIN. NEWS 3182, 3412).

81. United States v. Mest, 789 F.2d 1069, 1071 (4th Cir.), *cert. denied*, 479 U.S. 846 (1986). *See also Cox*, 826 F.2d at 1524-25.

82. Jackson v. Kelly, 557 F.2d 735, 740 (10th Cir. 1977). *See also* Sutton v. United States, 819 F.2d 1289, 1295 (5th Cir. 1987); Consumers Union v. Sawhill, 512 F.2d 1112, 1118 (Temp. Emer. Ct. App. 1975).

There appear to be at least two reasons why this rule of statutory construction should not be adopted. First, there has been obvious confusion about the type of opinion testimony admissible under Rule 704(a). The amendment may have been adopted simply to eliminate that confusion with respect to one type of expert testimony in criminal cases. Second, the amendment was adopted not as a result of any recommendation by the Advisory Committee, but rather as a part of the Insanity Defense Reform Act of 1984,[83] which was enacted in reaction to John Hinkley's successful insanity defense in his trial for the attempted assassination of President Reagan. There is no indication that Congress gave any significant thought to whether the testimony prohibited in Rule 704(b) was or was not admissible under Rule 704(a).[84]

2. Non-Jury Trials

In *Hogan v. American Tel. & Tel. Co.*,[85] the Eighth Circuit suggested that the admissibility of opinions applying a legal standard will differ depending on whether the opinion is offered in a bench trial or before a jury. In *Hogan*, the admissibility of opinion testimony as to whether the defendant had practiced discrimination was upheld by the Eighth Circuit.[86] The court reasoned that the risks of misleading the trier-of-fact were not present since the judge, who served as the fact-finder in the Title VII claims, "was not likely to be misled by lay witness opinion using the term 'discriminate.'"[87] The court also observed that the trial judge permitted the witness to answer the question based on a definition supplied by the court.

However, relaxing the admissibility requirements for these opinions during bench trials overlooks at least two problems. First, under the Federal Rules of Evidence, similar evidentiary rules are

83. *Cox*, 826 F.2d at 1524 n.6. *See generally* Note, *Should Florida Follow the Federal Insanity Defense*, 15 FLA. ST. U.L. REV. 793, 794-95 (1987).

84. *See* Kiernan, *Hinckley Verdict Prompts Hill Attack on Insanity Defense*, Wash. Post, June 23, 1982, at 1, col. 1; *Widespread Public Outrage: Hinckley Verdict Prompts Bills to Overhaul Insanity Defense*, 40 CONG. Q. WEEKLY REP. 1505 (1982).

85. 812 F.2d 409 (8th Cir. 1987).

86. *Id.* at 412.

87. *Id. See also* Northern Heel Corp. v. Compo Ind., Inc., 851 F.2d 456 (1st Cir. 1987).

generally applied in both jury and non-jury trials; therefore, the exclusionary rules are the same in both types of trials.[88] The danger of the witness using a definition which differs from that supplied by the substantive law remains in bench trials.

Another practical reason not to differentiate between the two fact-finders is that appellate opinions do not always disclose whether a jury was involved, and confusion will result if different standards are applied. The parties in a jury trial could erroneously rely upon an appellate decision in which the expert's opinion was admitted in a bench trial but the decision failed to disclose the distinction, and vice versa.

Opinion testimony employing a legal standard will sometimes be offered to prove a fact which both the court and the jury must separately determine during the same trial. Some trials involve trying one cause of action before a jury and, at the same time, trying another cause of action to the judge. For example, a Title VII claim, which is tried before a judge, is frequently tried at the same time with an employment, racial, or age discrimination claim arising out of the same set of facts, which is tried to a jury. During these proceedings the jury may have to determine the existence of a fact, e.g., whether the defendant discriminated against the plaintiff, which the court must also determine as a matter of fact during the bench trial.[89] Thus, the confusing situation arises in which an expert's opinion applying a legal standard may be admissible in the non-jury action, with the jury instructed that it could not consider the evidence in determining its claim. Such a result is not desirable.[90]

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88. WIGMORE, *supra* note 2, § 1920: "[T]he improper evidence is equally inadmissible before a judge sitting without a jury. Whatever the organization of the tribunal, it is not to waste its time listening to superfluous and cumbersome testimony." *See also* Broadcast Music, Inc. v. Xanthas, Inc., 855 F.2d 233, 238 (5th Cir. 1988) ("neither this rule nor any other rule or statute creates an exception [to the Federal Rules of Evidence] for bench trials"); McClure v. Mexia Independent School Dist., 750 F.2d 396, 400 (5th Cir. 1985).

89. *See* McKee v. Bi-State Dev. Agency, 801 F.2d 1014 (8th Cir. 1986); *McClure*, 750 F.2d at 400; King v. Alco Controls Div., 746 F.2d 1331 (8th Cir. 1984).

90. *But see* WEINSTEIN, *supra* note 2, ¶ 704[02], at 704-16. Other types of trials also may involve the jury's making a determination as a factual matter in one cause of action, while the judge makes the same determination as a matter of law in a related cause of action. For example, if a defendant is charged with making false statements of material fact to a federally insured savings and loan

3. Other

The United States Supreme Court construed Federal Rule of Evidence 609(a) in *Green v. Bock Laundry Machine Co.*,[91] by applying the principle that "a party contending that legislative action changed settled law has the burden of showing the legislature intended such a change."[92] The weight of authority before Rule 704's adoption excluded expert testimony embracing a mixed question of law and fact.[93] The legislative history discloses that Congress did not intend to change the exclusion of this opinion testimony.[94] Thus, if the above principle is applied to Rule 704(a), testimony embracing a mixed question of law and fact will be excluded.

A witness who is applying a legal standard to the facts is doing no more than counsel does during the arguments to the jury at the conclusion of all the evidence. In effect, the witness becomes an advocate. Not only does this use of opinion testimony violate the spirit of the Federal Rules, since the witness is telling the jury what result to reach, it also changes the expert's function to one which argues a view of the facts and the law.

When a witness is asked to express a permissible opinion concerning the existence of ultimate facts, simply asking an additional question in which the witness applies a legal standard to the facts will seldom be reversible error.[95] The additional testimony will not sufficiently influence the outcome. Even though the error may be

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association, he will probably be charged with violating both 18 U.S.C. § 1001 and 18 U.S.C. § 1014. Some courts have assumed that whether the statements are material is a question of fact for the jury with respect to section 1014 and a question of law for the court with respect to section 1001. *See* United States v. Lueben, 812 F.2d 179 (1989), *modified*, 816 F.2d 1032, *aff'd*, 838 F.2d 751 (5th Cir. 1988) (materiality under section 1014 for court). In such a situation, if Rule 704(a) is interpreted as permitting the admission of opinions involving the application of a legal standard in the bench trial, though not admissible in the jury trial, there is a danger of confusing the jury by instructing it that the testimony could only be considered on the section 1014 claim. Even if the testimony would not be excluded by Rule 704(a), the application of a Rule 403 balancing usually should operate to exclude the opinion. *Leuben*, 812 F.2d at 184.

91. 109 S. Ct. 1981 (1989).

92. *Id.* at 1991.

93. *See* Skelton v. Sinclair Refining Co., 375 P.2d 948 (Okla. 1962); Morton's Adm'r v. Kentucky-Tennessee Light & Power Co., 282 Ky. 174, 138 S.W.2d 345 (1940); Duncan v. Atchinson T. & S.F. Ry., 86 Kan. 112, 119 P. 356 (1911).

94. WEINSTEIN, *supra* note 2, at 704-3.

95. Ladd, *Expert Testimony*, 5 VAND. L. REV. 414, 424 (1952).

harmless, the appellate courts should recognize the admission of the opinion as error in order to give as much guidance as possible to the participants in the trial process.

IV. SUBSTANTIVE LAW

Opinion testimony has traditionally been excluded when it states a matter of substantive law.[96] This type of testimony does not relate to the facts of the case but simply expresses an opinion concerning the applicable statutory and judicial authority which counsel believes is relevant to the litigation.

The rationale for excluding testimony on substantive law is different from that used to exclude testimony based on an ultimate issue or which involves a mixed question of law or fact; it is not that the testimony would not be helpful to the finder of fact, but rather that the testimony would not be helpful to the trial judge who can determine the matters of law without the testimony.[97] The trial judge's function is to rule on questions of law and instruct the jury thereon.[98] The judge is presumed to have special competence in this area.[99] Therefore, it is neither an interference with the jury's role nor the lack of helpfulness to the jury that excludes opinion testimony on legal matters, but rather it is the special legal knowledge and role of the judge.[100] Helpfulness would also be lacking if such opinion testimony was admitted and counsel then argued to the jury what the law was or should be.[101]

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96. *See, e.g.*, Spellman v. American Barge Line Co., 176 F.2d 716, 720 (3d Cir. 1949); Briney v. Tri-State Mut. Grain Dealers Fire Ins. Co., 254 Iowa 673, 687, 117 N.W.2d 889, 896-97 (1962); Mead v. Hellams, 200 Okla. 381, 385, 194 P.2d 603, 607 (1948).

97. WIGMORE, *supra* note 2, § 1952 at 103.

98. Adalman v. Baker, Watts & Co., 807 F.2d 359, 366 (4th Cir. 1986).

99. *See* United States v. Curtis, 782 F.2d 593, 599 (6th Cir. 1986); WIGMORE, *supra* note 2, § 1952 at 103.

100. *See* United States v. Brodie, 858 F.2d 492, 496-97 (9th Cir. 1988).

101. In Cooley v. United States, 501 F.2d 1249, 1253-54 (9th Cir. 1974), *cert. denied*, 419 U.S. 1123 (1975), there was error in the refusal of the trial judge to admit as evidence legal materials, which included several opinions of the United States Supreme Court, upon which defendants allegedly relied in deciding not to file tax returns. The court commented:

> In the orderly trial of a case, the law is given to the jury by the court and not introduced as evidence. It is the function of the jury to determine the facts from the evidence and apply the law as given by the court to the facts as found by them from the evidence. Obviously, it would be most confusing to a jury to have legal material introduced as evidence and then argued as to what the law is or ought to be.

Id. at 1253-54. *See* United States v. Gleason,726 F.2d 385, 388 (8th Cir. 1984).

The Federal Rules of Evidence do not speak to the admissibility of opinion testimony as to the law. Rule 704(a) provides that opinion testimony which is "otherwise admissible" shall not be excluded simply because it embraces an ultimate issue. Arguably, opinion testimony regarding the law is not "otherwise admissible," and therefore the adoption of Rule 704 does not change the general inadmissibility of the testimony.[102] On the other hand, Rule 702 provides that the opinion of an expert is admissible when it "assists the trier of fact to understand the evidence or to determine a fact in issue." Further, opinion testimony as to the relevant law may assist the jury in understanding the evidence since an expert may be better able than the court to explain to the jury the applicable law in an understandable manner. Although jury instructions are read to the jury and sometimes taken into the jury room, it appears that the jury often does not fully comprehend them.[103] Thus, permitting the expert to testify on the applicable law might permit a more thorough, and often more understandable, explanation of the legal principles. In addition, the opinion might meet the test of "helpfulness" because simply hearing the law explained a second time by a different person may aid the jury's comprehension.

A. Application

The inappropriateness of expert testimony concerning the law continues to be regularly reaffirmed by recent decisions.[104] For example, the Second Circuit interpreted the Federal Rules in *Marx & Co. v. Diners' Club, Inc.*,[105] and held that the trial court erred in permitting the plaintiffs in a securities action to offer the opinion

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102. *See Adalman*, 807 F.2d at 368.

103. *See* 1 E. DEVITT & C. BLACKMAR, FEDERAL JURY PRACTICE AND INSTRUCTIONS § 8.01 (3d ed. 1977). *See generally* Charrow & Charrow, *Making Legal Language Understandable: A Psycholinguistic Study of Jury Instructions*, 79 COLUM. L. REV. 1306 (1979); ELWORK, SALES AND ALFINI, MAKING JURY INSTRUCTIONS UNDERSTANDABLE (1982); Stille, *DeLorean Acquittal Fuels Furor*, NAT'L L. J., Jan. 12, 1987, at 3; Pacelle, *Contaminated Verdict*, AM. LAW., Dec., 1986, at 7.

104. *See* United States v. Zipkin, 729 F.2d 384 (6th Cir. 1984) (reversible error to permit bankruptcy judge to testify to his interpretation of the Bankruptcy Act and his own orders); Miller v. Bonar, 337 N.W.2d 523, 529 (Iowa 1983) (expert testimony concerning provisions of Iowa Code was generally inadmissible but it was admitted since counsel "opened the door to the subject of domestic laws").

105. 550 F.2d 505 (2d Cir.), *cert. denied*, 434 U.S. 861 (1977).

of a securities regulation expert. The expert testified as to the legal obligations which arose from a contract and said that, as a matter of law, the defenses asserted by the defendant were unacceptable.[106] The decision was premised on the interpretation that the Federal Rules did not change the inadmissibility of expert testimony as to the applicable law. The court held that "[i]t is not for witnesses to instruct the jury as to applicable principles of law, but for the judge."[107] The court adopted Wigmore's analysis that such testimony is "superfluous"; the expert opinion was not needed because the judge, or jury instructed by the judge, can determine the issue equally well.[108]

Similarly, in *Adalman v. Baker, Watts & Co.*,[109] the Fourth Circuit upheld the trial court's refusal to permit a lawyer to testify as to the meaning and applicability of the securities law as it related to the facts before the jury, because the opinion "usurped" or interfered with the province of the trial judge to determine and instruct the jury on the law.[110]

On the other hand, other appellate decisions have upheld the admission of expert legal testimony without any analysis of the issue by simply stating that the Federal Rules do not prohibit expert testimony which goes to an ultimate issue. For example, in *Case & Co. v. Board of Trade*,[111] the Seventh Circuit held that the Act Administrator could express his opinion as to the meaning of the Commodity Exchange Act and the rules promulgated thereunder, as well as whether the plaintiff complied with the Act and the rule.[112]

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106. *Id.* at 508.

107. *Marx*, 550 F.2d at 509-10. *See also* F.H. Krear & Co. v. Nineteen Named Trustees, 810 F.2d 1250 (2d Cir. 1987) (quoting *Marx* with approval).

108. *Id. See* WIGMORE, *supra* note 2, § 1952, at 103.

109. 807 F.2d. 359 (4th Cir. 1986).

110. The court was also concerned with the jury's looking to the witness, rather than to the judge, for the applicable law. *Id.* at 366.

111. 523 F.2d 355 (7th Cir. 1975).

112. *Id.* at 361. *See also* International Indem. Co. v. Coachman, 181 Ga. App. 82, 85, 351 S.E.2d 224, 228 (1986) (lawyer's testimony that "the Supreme Court of the United States lacked the requisite jurisdiction to review the decision" of the Georgia Supreme Court); *In re* Estate of Lenahan, 511 So. 2d 365, 371 (Fla. Dist. Ct. App. 1987) (expert testimony admissible which deals with "complex and obscure legal questions" which concern "probate law, federal and state estate taxation and will construction").

The decision reasoned that the expert opinion was admissible since the ultimate issue rule "is abolished by Rule 704 . . . ."[113]

Some appellate courts take another approach. They restate the general rule of exclusion but then conclude that opinion testimony, which appears to violate the rule, does not.[114] For example, in *United States v. Unruh*,[115] a prosecution for a bank-fraud scheme, the government offered expert testimony of the FDIC bank examiner concerning the meaning of Regulation 0, which prohibits certain bank loans to insiders. The Ninth Circuit first noted, "[w]e have condemned the practice of attempting to introduce law as evidence . . . . The problems of using experts to displace the role of the trial judge are exacerbated here because the case is complex and an expert may receive undue attention from the jury."[116] However, the court went on to hold that the admission of the testimony was justified without discussing how it differed from the usual situation. According to *Unruh*, the expert's testimony

> correctly explains Regulation 0. The trial judge's decision to let the testimony in, rather than explaining Regulation 0 in his instructions to the jury, is justified by the aid that it gave the jury in understanding other evidence presented as part of the prosecution's case. Any error on this point was not prejudicial.[117]

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113. 523 F.2d 361. Only opinion testimony which would be admissible at trial may be considered in ruling on a motion for summary judgment. *Id.*

114. *See, e.g.*, United States v. Hawley, 768 F.2d 249 (8th Cir. 1985). The government called an expert who testified that because of the defendant's income and marital status he was required to file an income tax return during certain years. *See id.* at 251. The Eighth Circuit affirmed the trial court's prohibition of the defendant's cross-examination of the expert concerning the reasonableness of the defendant's beliefs as to whether the return was required and commented:

> The government simply had asked the witness what Section 612 said and whether, given the facts presented at trial, the defendant was required to comply with that section. Thus, while the government's expert witness did testify as to an ultimate issue in the trial, as is permitted by FED R. EVID. 704, the witness did not interpret the law, as the defendant insists. It is clear that the law is to be given to the jury by the trial judge, and not introduced as evidence . . . . This is true whether the evidence is introduced as an exhibit, . . . or in the form of opinion testimony.

Id. at 251-52. The expert's testimony during direct examination as to the meaning of the Internal Revenue Code appears to violate the spirit of the Eighth Circuit's rationale. *See id.*

115. 855 F.2d 1363 (9th Cir. 1987), *cert. denied*, 109 S. Ct. 513 (1988).

116. *Id.* at 1376.

117. *Id. But cf.* Northern Heel Corp. v. Compo Indus., Inc., 851 F.2d 456, 468 (1st Cir. 1988) (the trial court did not abuse its discretion by rejecting expert opinion testimony as to the "interpretation of specific OSHA regulations"). After noting that the evidence was being proffered in a bench trial where the trial court's discretion was at "maximum girth," apparently because of the judge's expertise in the law the First Circuit suggested that the opinion evidence would not have assisted the judge sitting as the trier of fact.

The Tenth Circuit adopted a unique rule in *Specht v. Jensen*,[118] where it considered the admission of extensive expert testimony concerning the law of search and seizure in a civil rights action. The en banc decision first observed that an expert may not discourse "broadly over the entire range of the applicable law" and may not attempt to "define the legal parameters within which the jury must exercise its fact-finding function."[119] The court determined that since the expert "painstakingly" developed his conclusions over "an entire day" of testimony which touched on every element of the plaintiff's burden of proof, the testimony was more like a definition of the legal parameters of the case than an opinion which helped the jury understand the facts introduced in evidence.

The Tenth Circuit seems to condone the admission of a brief statement of the expert's opinion regarding the relevant law followed by the witness's application of the law to the facts. However, the Tenth Circuit condemns admission of any broader legal testimony. Apparently the amount of testimony concerning the law is being disapproved. In the last sentence of its majority opinion, the *Specht* court approved the testimony of a "legal expert who explains a discrete point of law which is helpful to the jury's understanding of the facts."[120]

The rationale for a distinction between the admissibility of an expert opinion as to a "discrete point of law" and broader legal testimony is unclear. The extent of the legal opinion seems not to be a basis to distinguish admissibility, but rather a basis of determining whether an error in admitting the opinion testimony was reversible.

Occasionally, a substantive legal principle will require or permit proof of the law. In these cases, proving the state of the law is a material element to a claim or defense. The admission of expert

118. 853 F.2d 805 (10th Cir. 1988) (en banc), *cert. denied*, 109 S. Ct. 792 (1989).

119. *Id.* at 809-10. The court was careful, however, to point out that the effect of the opinion was not to exclude "all testimony regarding legal issues," stating that a witness may properly refer to the law in expressing an opinion and an expert may couch his testimony in legal terms if he is aiding the jury. *Id.*

120. *Id.* at 810.

legal opinion in these cases is obviously necessary. However, it is a unique situation and is not authority for the general admissibility of the testimony. For example, when a party relies on foreign law, most jurisdictions authorize, or require, the admission of an expert's opinion to prove that foreign law.[121] This testimony is generally only given before the court, out of the jury's presence.[122] When a party's state of mind is a factual issue, the substantive law may be probative of that issue. For example, there is some authority for the admission of expert testimony concerning the unsettled state of federal income tax law to prove the taxpayer's lack of willfulness in violating the tax law.[123] This testimony has typically been offered in income tax cases where the taxpayer has proffered evidence that a particular area of tax law is unsettled and complex, with the taxpayer claiming that he could not have acted willfully in light of the unsettled state of the law. It is important to note that in these situations the expert testimony is not being offered to instruct and inform the trier of fact as to the applicable law.

B. Policy Considerations

In determining the proper construction of the Federal Rules with respect to opinion testimony on the law, it is helpful to consider underlying policy considerations. The most persuasive reason to admit opinions on the law is that it may be desirable for the jury to understand the governing legal principles before the trial judge in-

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121. *See* Islamic Republic of Iran Broadcasting v. Sotheby Parke Bernet, Inc., 839 F.2d 780, 782 (D.C. Cir.), *cert. denied*, 109 S. Ct. 82 (1988).

122. *See, e.g.*, *Adalman*, 807 F.2d at 366; WIGMORE, *supra* note 2, § 1952; MCCORMICK, *supra* note 79, § 12.

123. *See, e.g.*, United States v. Garber, 607 F.2d 92, 100 (5th Cir. 1979) (finding expert testimony that the tax treatment of certain proceeds was "novel and unsettled" admissible on the issue of the taxpayer's willfulness, even though there was no evidence that the defendant actually knew of the conflict in the law). *Cf.* United States v. Burton, 737 F.2d 439, 444 (5th Cir. 1984) (possibly limiting *Garber* to its "unique, indeed near bizarre, facts"); United States v. Howard, 855 F.2d 832, 837 (11th Cir. 1988) (discussing *Garber* and *Burton*). *But see* United States v. Curtis, 782 F.2d 593, 599 (6th Cir. 1986) (specifically rejecting *Garber*); United States v. Mallas, 762 F.2d 361 (4th Cir. 1985); United States v. Gleason, 726 F.2d 385 (8th Cir. 1984).

See also United States v. Komisaruk, 885 F.2d 490 (9th Cir. 1989) (refusing to permit the defendant to prove international law which she claimed was the basis of her lack of intent to commit the crime of willfully damaging government property).

structs the jury on the law after the presentation of all the evidence. Otherwise, it may not be possible for jurors to recognize the relevance or importance of a fact witness' testimony.

While the trial court may have the discretion to give a preliminary charge on the pertinent law to the jury before any evidence is introduced,[124] such instructions are seldom given. Permitting an expert to make a short statement concerning the relevant law during his testimony may enable the jury to better understand the significance of the facts or of the expert's interpretation of them. If the jurors do not have an understanding of the law at the time they hear the testimony, the significance of the testimony may be lost, particularly in a long or complicated trial. Thus, it could be argued that opinion testimony on the law meets the test of helpfulness in that it aids the jury in understanding the evidence.

Another reason supporting the admission of expert legal opinions is that the expert may be more effective than the court in explaining the applicable law to the jury. There is significant evidence that jurors frequently do not fully comprehend jury instructions, which are usually only read to them by the court.[125] If the jury's understanding of a point of law is of particular importance to a party, that party may desire to offer an expert's explanation to the jury.

Counsel may try to offer this opinion testimony to educate the judge on a matter of law or to give support to an interpretation of an unsettled legal principle in the light most favorable to their clients. It can be argued that if a lawyer testifies as an expert on the state of the law, rather than appearing as an advocate and arguing to the court, the obligation of the oath may cause the lawyer to give a more objective interpretation of the law.

The *Model Code of Professional Responsibility* permits a lawyer as an advocate to argue "any permissible construction of the law favorable to his client, without regard to his professional opinion

124. *See* 1 E. DEVITT & C. BLACKMAR, FEDERAL JURY PRACTICE AND INSTRUCTIONS § 5.03 (3d ed. 1977).

125. *See supra* note 103 and accompanying text.

as to the likelihood that the construction will ultimately prevail."[126] Similarly, the newer *ABA Model Rules of Professional Conduct* recognize that "a lawyer is not required to make a disinterested exposition of the law."[127] A lawyer under oath would be held to a higher standard.

In addition, if an expert testifies before the court, cross-examination is available. Thus, the bases of the expert's conclusions can be tested. However, if the court simply reads law review articles or books written by that same expert, cross-examination is not available and it is more difficult to attack the reliability of the opinions expressed. While this argument has considerable appeal if the court is determining the applicable law outside the presence of the jury,[128] it fails to address the admissibility of such testimony before the jury.

The strongest arguments supporting the admission of expert legal testimony essentially are premised on making the advocate's case more persuasive for the trier of fact. However, if one expert is permitted to testify regarding the applicable law, other parties will be able to call their own experts. It is unlikely that two experts, even those called by parties with similar interests, would agree on an identical statement of a substantive legal principle. These differing explanations would confuse and mislead the jury.[129] If the parties call experts who testify before the jury as to conflicting versions of the law, such testimony would not meet the "helpfulness" test.

Although the trial court's instructions to the jury on the applicable law at the close of the case may eliminate the confusion caused by the expert testimony, still another explanation of the law might further exacerbate the confusion. In this situation, the jury might

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126. MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 7-4 (1981); MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 7-3 (1981) (requiring a lawyer to "resolve in favor of his client doubts as to the bounds of the law"); MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 7-23 (recognizing that "[t]he adversary system contemplates that each lawyer will present and argue the existing law in the light most favorable to his client").

127. MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.3 comment (1981). Note, however, the advocate "must recognize the existence of pertinent legal authorities."

128. *See* Note, *supra* note 5, at 803-04 (arguing that expert legal testimony should be admissible before the "determiner of law").

129. *See Curtis*, 782 F.2d at 599.

be required to assume part of the judge's responsibility to rule on questions of law in determining which expert's opinion is accurate.[130]

The most significant reason for excluding expert opinion on the law remains that permitting such opinion is inherently inconsistent with our judicial system. It is the judge's function to determine the applicable law and instruct the jury upon it; it is the jury's function to consider the evidence, to find the facts and to apply the law as received from the trial judge.[131] Permitting experts to offer their opinions as to the law shifts to the advocates and their experts the power to inform the jury as to the applicable law.[132] There is a real danger that the jury would look to the expert, rather than the court, for their instructions on the law.[133] Permitting a lawyer to testify to legal principles, rather than arguing them as counsel, also deprives the judge of the give and take with counsel that has been helpful in judges' arriving at correct determinations. If an erroneous legal principle is applied by the trial judge, the aggrieved party has relief on appeal. If the jury decides on a point of law which is erroneous, the aggrieved party has no recourse.

If counsel needs to educate the jury as to the applicable law so that it understands the significance of certain testimony, he can do so during the voir dire examination of the jury as well as during his opening statement and final argument to the jury. If it is desirable for the jury to be made aware of the applicable law prior to the completion of all of the testimony, trial judges should be willing to give a short set of instructions at the beginning of, or during, the trial.

Finally, many feel that our jury process has already been overrun with experts and that they have taken over the courtroom. This has resulted, at least partially, from the "let-it-all-in" philosophy which some judges have apparently adopted with respect to expert testi-

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130. *See id.* at 599-600.

131. In fact, the jury is usually so informed in the jury instructions. *See* 1 E. DEVITT & C. BLACKMAR, FEDERAL JURY PRACTICE AND INSTRUCTIONS § 10.01, pp. 258-59 (3d ed. 1977).

132. *See Curtis*, 782 F.2d at 600; MCCORMICK, *supra* note 79 § 12.

133. *See, e.g.*, Specht v. Jensen, 853 F.2d 805 (10th Cir. 1988) (en banc), *cert. denied*, 109 S. Ct. 792 (1989); *Curtis*, 782 F.2d at 593; Adalman v. Baker, Watts & Co., 807 F.2d 359 (4th Cir. 1986); WEINSTEIN, *supra* note 2, ¶ 704[02], at 704-15.

mony. Permitting expert testimony concerning the law would be the final step in turning the courtroom over to experts. Not only would the experts be telling the jury what the ultimate facts were, they would be instructing them on the applicable law. While it would be a boon for law professors and some lawyers, the admission of expert testimony as to the law is both logically and intuitively undesirable. There is no indication that the drafters of the Federal Rules of Evidence intended that their actions would result in an expert's being permitted to assume the role of an advocate and to testify to the applicable law. Neither the language of the Rules nor the underlying policy support the admission of these opinions.

V. Conclusion

Much of the difficulty in determining the admissibility of opinion testimony involving legal conclusions flows from the appellate courts' use of a very broad abuse of discretion standard to review trial court rulings.[134] Some conflicting decisions by trial and appellate courts are reconciled and explained on the basis that neither the admission nor the exclusion of particular opinion testimony would be an abuse of discretion.[135]

This broad abuse of discretion standard may be appropriate, but it leads to undesirable results since these appellate decisions provide little guidance for trial lawyers as to the standards that should be applied regarding the admissibility of opinion testimony on the law. The legal system is not well served if the admissibility of this type of opinion and the outcome of the trial can vary from trial judge to trial judge. The use of this standard has resulted in appellate decisions that often fail to recognize the difference between an erroneous evidentiary ruling and an erroneous ruling which is reversible error.

In criminal cases, confusion may also result from result-driven decisions upholding the admission of various types of expert tes-

134. *See* Parker v. Williams, 855 F.2d 763, 776-78 (11th Cir. 1988), *vacated on other grounds*, 862 F.2d 1471 (11th Cir. 1989).

135. *See, e.g.*, *Smogor*, 874 F.2d at 296-97; *Specht*, 853 F.2d at 810, (en banc) (Stevens, J., dissenting), *cert. denied*, 109 S. Ct. 792 (1989); Harris v. Pacific Floor Machine Mfg. Co., 856 F.2d 64, 68 (8th Cir. 1988) (Lay, J., concurring).

timony offered by the prosecution. It is difficult not to admit similar types of opinion testimony using the same rationale when it is offered in other types of cases. Some of the inconsistency may be caused by the reasoning process employed by the court. The decisions which find no abuse of discretion in the admission of testimony concerning a mixed question of law and fact usually do not discuss the Advisory Committee Notes.[136] Instead they reason from the express language of the Rule. On the other hand, decisions upholding the exclusion of opinions regarding a mixed question of law and fact often rely heavily upon the Advisory Committee's intent as found in its Notes.[137]

The United States Supreme Court recently indicated the proper method of construing a Federal Rule of Evidence in *Beech Aircraft Corp. v. Rainey*,[138] where it resolved a conflict among the circuits concerning the proper interpretation of Federal Rule 803(8)(C), which deals with the admissibility of evaluative reports by governmental agencies. In determining whether a "narrow" or "broader" interpretation of the Rule was appropriate, the Court first determined that since the Federal Rules of Evidence were a legislative enactment, the principles of statutory construction should be applied. First, the Court consulted the Rule's language.[139] After determining that the language of Rule 803(8)(C) does not clearly indicate the proper interpretation, the Court turned to the Rule's legislative history which provided "no definitive guide to the [C]ongressional understanding."[140]

Because Congress did not amend the Advisory Committee's draft of Rule 803(8)(C), the Court found that "the Committee's commentary is particularly relevant in determining the meaning of the

136. *See, e.g.*, United States v. Battle, 859 F.2d 56 (8th Cir. 1988); United States v. Kinsey, 843 F.2d 383, 387-89 (9th Cir.), *cert. denied*, 108 S. Ct. 2882, *cert. denied*, 109 S. Ct. 99 (1988); *Dotson*, 817 F.2d at 1131-32, *modified on other grounds*, 821 F.2d 1034 (5th Cir. 1987).

137. *See, e.g.*, *Specht*, 853 F.2d at 807-08; *McGowan*, 863 F.2d at 1272-73.

138. 109 S. Ct. 439 (1988).

139. *Id.* at 445-46. *See also Bock Laundry Machine*, 109 S. Ct. at 1984 (using this same method of analysis to construe Federal Rule 609; however, after determining that the "plain language" of the Rule commands one interpretation, the Court determined, for various reasons, that it could not accept that interpretation and adopted the legislative intent).

140. *Beech Aircraft*, 109 S. Ct. at 448.

document Congress enacted.[141] The Court then examined the Committee Notes and determined that the Advisory Committee intended a particular construction of Rule 803(8)(C) and adopted that interpretation to resolve the conflict among the circuits.[142]

If the method of analysis used in *Beech Aircraft* is employed to determine the admissibility of opinions which both embrace a mixed question of law and fact and state substantive legal principles, the Federal Rules of Evidence generally will be interpreted to continue to exclude such opinion testimony. Looking first at the plain language of the Federal Rules, the proper interpretation is unclear. Neither Rule 704 nor any other rule speaks directly to the admissibility of these opinions. Moreover, there is no legislative history of 704(a) to consult since Congress adopted the Rule as proposed by the Advisory Committee without amendment or apparent discussion. In this situation the Court has indicated that the Advisory Committee's commentary should be "particularly relevant" in determining the proper interpretation of Rule 704(a).

As previously discussed, the Advisory Committee's comments clearly demonstrate that it did not intend for Rule 704(a) to permit the admissibility of opinion testimony on a mixed question of law and fact.[143] While the Advisory Committee Notes do not speak directly to the admissibility of expert opinion as to substantive law, it seems extremely doubtful that the Committee would have intended to allow testimony as to the law since it did not intend to admit opinions as to mixed questions of law and fact.

The Supreme Court has not been hesitant in recent years to accept and decide evidentiary issues arising under the Federal Rules of Evidence which involve matters of less widespread application and importance than do the issues discussed in this article.[144] It would

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141. *Id.* at 448, n.9.

142. *See id.* at 448-50.

143. *See* Note, *supra* note 1, at 897-98 (arguing for admissibility of most expert testimony embracing a mixed question of law and fact). Apparently, the author believes that the present Advisory Committee Note is not controlling. However, language is suggested to be included in a "redrafted" Advisory Committee Note which would reflect the author's approach. *See id.*

144. *See, e.g., Bock Laundry*, 109 S. Ct. at 1981 (whether felony convictions offered to impeach in civil case are admissible without the trial court applying a balancing test); *Beech Aircraft*, 109 S.

be desirable for the Court to resolve the uncertainty and confusion with respect to the admissibility of opinion testimony regarding legal conclusions, both those embracing a mixed question of law and fact as well as those expressing substantive legal principles. Clearer guidelines are needed for determining when, if ever, opinions involving legal conclusions are admissible. If the analysis suggested in this Article is ultimately adopted, it will necessitate drawing a sometimes thin line. Thus far, the Court has not shied from that task.[145]

Ct. at 439 (whether evaluative opinions are admissible in civil cases under Rule 803(8)(C)); Huddleston v. United States, 485 U.S. 681 (1988) (standard for admission of extrinsic fact evidence pursuant to Rule 404(b)); Bourjaily v. United States, 483 U.S. 171 (1987) (whether co-conspirator statement may be considered in determining whether foundation has been laid for the admission of co-conspirator statement); Dowling v. United States, 110 S. Ct. 668 (1990) (whether extrinsic fact evidence is admissible under Rule 404(b) when defendant has been acquitted of committing the extrinsic act).

145. *See, e.g.*, Perry v. Leeke, 109 S. Ct. 594, 600 (1989); *Kostelecky*, 837 F.2d at 830.