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# Experience-Based Opinion Testimony: Strengthening the Lay Opinion Rule

Anne Bowen Poulin\*

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## I. INTRODUCTION

Consider the familiar expert witness scene from the movie *My Cousin Vinny*. Vinny, played by Joe Pesci, calls as a witness Mona Lisa Vito, played by Marisa Tomei. Her experience as an auto mechanic is held to qualify her as an expert in general automotive knowledge. The court allows her to testify that the set of tire tracks made by the fleeing felons' car could not have been made by the defendant's car because only a car with positraction could have left those tracks. Her testimony leads to the dismissal of all charges. But is she an expert? Should she be given the latitude accorded an expert to base her testimony on information not personally known to her and to express an opinion without clarifying its basis for the jury? Or is she a lay witness with an unusual experience base and therefore limited to conclusions rationally derived from her base of knowledge?

Take an example of typical testimony offered as expert opinion in a prosecution for a narcotics violation. The defendant is charged with illegal distribution of cocaine, but claims he is not a drug dealer. At trial, the prosecution calls a law enforcement agent to testify that certain aspects of the defendant's conduct were consistent with the behavior of an experienced drug dealer. Specifically, the agent opines that when the defendant circled the parking lot before meeting with the undercover agents, he was engaging in counter-surveillance, that the defendant's use of a rental car is the mark of an experienced drug dealer, and that, when the defendant spoke with the informant to set up the sale, he used the coded language of a drug dealer. The law enforcement witness bases these opinions on experience

investigating drug cases. Is the opinion testimony admissible? Should the court evaluate the evidence as expert or as lay opinion?<sup>1</sup>

Consider experience-based testimony offered on the question of design defect. The plaintiff lost his leg when he was hit by a car while riding a motorcycle. He claims that the motorcycle was defectively designed because it did not have crash bars. Experts dispute the efficacy of the crash bars used on police motorcycles. To support his claim, the plaintiff calls a former police chief who has served on motorcycle patrol and has investigated motorcycle accidents. The witness's opinion is that police motorcycle crash bars are effective. The witness has no scientific or engineering expertise in motorcycle design and limited experience with the type of motorcycle the plaintiff was riding at the time of the accident. Should the court evaluate the offered testimony as expert opinion or as lay opinion? Is it admissible?<sup>2</sup>

Finding the line between expert and lay opinion testimony is not always easy.<sup>3</sup> Determining where experience-based opinion falls on this spectrum has proven particularly challenging to the courts. Opinion based on the witness's unusual experience base does not always fit neatly into either category. In some cases, the court undervalues relevant experience as a basis for opinion, either lay or expert. In others, the court defers too readily to the claim that a witness's experience qualifies the witness to provide an opinion, often treating experience as sufficient to establish expertise.

1. This hypothetical is based on *United States v. Figueroa-Lopez*, 125 F.3d 1241 (9th Cir. 1997) (discussed *infra* note 179 and accompanying text). In *Figueroa-Lopez*, the Ninth Circuit concluded that the testimony should have been evaluated as expert opinion and excluded because the prosecution did not provide the required pretrial notice. *Id.* at 1246.

2. This hypothetical is based on *Satcher v. Honda Motor Co.*, 52 F.3d 1311, 1316–18 (5th Cir. 1995) (discussed *infra* at notes 183–190 and accompanying text). The facts of that case are detailed in the district court opinion, *Satcher v. Honda Motor Co.*, 758 F. Supp. 393 (S.D. Miss. 1991), *rev'd*, 984 F.2d 135 (5th Cir. 1993). In *Satcher*, the Fifth Circuit held that the testimony was admissible expert opinion. *Satcher*, 52 F.3d at 1317–18.

3. See *United States v. Colón Osorio*, 360 F.3d 48, 52–53 (1st Cir. 2004); *Downeast Ventures, Ltd. v. Wash. Cnty.*, 450 F. Supp. 2d 106, 110–11 (D. Me. 2006); *Falconer v. Penn Mar., Inc.*, 421 F. Supp. 2d 190, 208 (D. Me. 2006) (noting that the line between lay and expert testimony is not always easy to draw); *State v. Ellis*, 547 S.E.2d 490, 493 (S.C. 2001) (dissent disagreeing with majority conclusion that officer's testimony went beyond his expertise and arguing it was permissible lay opinion); 1 KENNETH S. BROUN ET AL., MCCORMICK ON EVIDENCE § 11, at 59 (6th ed. 2006) (recognizing difficulty); Brandon L. Bigelow, *Summary and Expert Witnesses: A Distinction with a Difference*, 9 SUFFOLK J. TRIAL & APP. ADVOC. 1, 1 (2004) (discussing confusion that can arise at trial); Daniel J. Capra, *Distinguishing Between Lay Witnesses and Experts*, N.Y. L.J., Mar. 13, 1998, at 3 [hereinafter Capra, *Distinguishing Between Lay Witnesses*] (discussing difficulty of delineating the line under pre-amendment rules); David Martinez & Bree Arlyn-Pessin, *Undesignated Hitters*, L.A. LAW., Feb. 26, 2004, at 28 (referring to the “often blurry distinction”).

The Federal Rules of Evidence (the Rules) were amended in 2000, adopting specific, more stringent requirements for expert testimony and hardening the line between lay and expert opinion. Expert opinion testimony is now admissible only if based on reliable methodology, whereas lay opinion must merely be rationally derived using everyday reasoning.<sup>4</sup> The decisions applying these rules do not strike the right balance with regard to experience-based opinion. Too often, courts allow opinion testimony simply because the witness has an unusual base of experience, either accepting a claim of experience-based expertise at face value or admitting experience-based opinion as lay opinion without rigorously applying the governing rule. As a result, the courts admit unreliable and unwarranted opinion testimony and grant unqualified witnesses latitude in presenting opinion accorded only to experts. This Article explains why more experience-based opinion should be evaluated as lay opinion, and also argues for increased scrutiny of such lay opinion.

The improper admission of experience-based opinion is particularly problematic in criminal cases. Law enforcement officers are routinely permitted to testify as experts based on their law enforcement experience.<sup>5</sup>

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4. FED. R. EVID. 701–02.

5. See *Miller v. California*, 413 U.S. 15 (1973) (permitting law enforcement officer with specialization in obscenity cases to provide expert testimony regarding the state’s community standards and whether defendant was in violation of them); *United States v. Vann*, 336 F. App’x 944 (11th Cir. 2009) (permitting police detective to testify as expert witness regarding drug use and practice); *United States v. Paiva*, 892 F.2d 148 (1st Cir. 1989) (using a police officer to provide expert testimony as to whether substance in question was cocaine); *United States v. Brown*, 872 F.2d 385, 392 (11th Cir. 1989) (allowing FBI special agent to provide expert testimony regarding “drug code” interpretation and jargon); *Williams v. Evans*, No. CV F 08-01586 LJO BAK HC, 2009 WL 1460832, at \*31–32 (E.D. Cal. May 26, 2009) (referencing long history of allowing law enforcement officers to testify as experts on gangs and gang activity); 1 BROUN ET AL., *supra* note 3, § 13, at 70 n.16 (stating that expert witness knowledge may be derived from experience, and listing law enforcement testimony regarding the modus operandi for various crimes as exemplary of such experience-based knowledge); 3 MICHAEL H. GRAHAM, HANDBOOK OF FEDERAL EVIDENCE § 702:2, at 74 n.4 (6th ed. 2006) (stating that courts commonly recognize expert testimony of law enforcement officers). A number of commentators have criticized the use of law enforcement officers as prosecution experts in criminal cases. See, e.g., Phylis Skloot Bamberger, *The Dangerous Expert Witness*, 52 BROOK. L. REV. 855 (1986); Joelle Anne Moreno, *What Happens When Dirty Harry Becomes an (Expert) Witness for the Prosecution?*, 79 TUL. L. REV. 1 (2004) (criticizing courts for allowing prosecution experts to testify without scrutinizing their basis); D. Michael Risinger, *Navigating Expert Reliability: Are Criminal Standards of Certainty Being Left on the Dock?*, 64 ALB. L. REV. 99 (2000) (discussing disparity between standards applied to prosecution experts and those applied to defense experts). The courts’ ready acceptance of questionable law enforcement expert testimony may be precipitated in part by the courts’ frequent exposure to law enforcement testimony in hearings on defense motions to suppress evidence on Fourth Amendment grounds. In such a hearing, evidence is relevant that should not ordinarily be admitted at trial. For example, evidence concerning the law enforcement officer’s state of mind and understanding based on prior cases, as well as the defendant’s reputation for drug trafficking can be introduced to support the prosecution’s claim that the officer had probable cause or reasonable suspicion. Similarly, an officer can rely on information obtained from other officers when determining whether there is probable cause. See *United States v. Garcia*, 413 F.3d 201, 213 (2d Cir. 2005) (discussing the

The prosecution employs these opinion witnesses to ascribe criminal significance to otherwise innocent conduct. The prosecution also uses them to advance and endorse inferences supporting guilt that the prosecution will argue to the jury at the end of the trial. Most of this law enforcement testimony should not be admitted as either expert or lay opinion. The courts should curtail this practice by enforcing the rules governing opinion testimony, with less deference given to the prosecution's claims.<sup>6</sup>

Courts should assess all experience-based opinion with greater care. When a party offers as an expert a witness who has an unusual experience base, the court should scrutinize the way in which the expert arrived at the offered inferences. If a witness has a broad base of relevant experience, but brings no methodology to bear in drawing inferences, the witness's opinion should be treated as lay opinion. A witness who is merely applying everyday reasoning to draw inferences from the combination of the witness's experience and the relevant observed facts should not be granted the latitude accorded an expert. Taking this approach, courts would not allow a witness to give expert opinion based solely on experience without determining that the witness had a reliable and specialized mode of analysis, and had applied it to a reliable basis. Most experience-based opinion would be evaluated as lay opinion and restricted accordingly.

In addition, the rule governing lay opinion, Rule 701, should be given more bite. The courts should scrutinize lay opinion to make sure that the witness's knowledge supports the inferences reflected in the opinion. Lay opinion must be rationally related to the witness's perception. Under the

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difference between information pertinent for probable cause and foundation necessary for admissible lay opinion). Such testimony may also be admissible to explain the reasonableness of an officer's actions in civil cases where a law enforcement officer is sued for damages by someone who was the object of police action. *See, e.g.,* Lawson v. Trowbridge, 153 F.3d 368 (7th Cir. 1998) (action under 42 U.S.C. § 1983 where key question was whether officer had probable cause). None of these avenues should be open to the prosecution at trial. While strongly probative on Fourth Amendment questions, the evidence is both irrelevant and unfairly prejudicial at trial.

6. The problem with the prosecution's use of experts relates closely to the flaws in the forensic sciences discussed in the National Academy of Sciences Report. NAT'L RESEARCH COUNCIL OF THE NAT'L ACADS., STRENGTHENING FORENSIC SCIENCE IN THE UNITED STATES: A PATH FORWARD (2009) [hereinafter STRENGTHENING FORENSIC SCIENCE]. Law enforcement experts claim experience and pooled information from within the law enforcement community as a basis for expertise. But the prosecution does not demonstrate the reliability of the expert opinion for the particular case and the particular questions addressed by the claimed expert. *See also* Paul C. Giannelli, *The Admissibility of Laboratory Reports in Criminal Trials: The Reliability of Scientific Proof*, 49 OHIO ST. L.J. 671 (1988) (discussing unreliability and role of subjective judgment in forensic analysis); Moreno, *supra* note 5, at 34–35 (discussing law enforcement testimony regarding drug jargon interpretation and noting that "there has [never] been a real effort to study or test the reliability of any drug jargon definitions").

rule, the trial court should demand that the opinion reflect inferences that can fairly be drawn from the facts observed by the witness using everyday reasoning. Currently, courts permit witnesses to express opinions simply because they possess unusual experience, without any assurance that their opinions satisfy these requirements. As a result, they allow the jury to hear unreliable opinion testimony.

This Article explains why more of the testimony given by experienced witnesses who inhabit the border between lay and expert status should be evaluated under the rules governing lay opinion and suggests specific guidelines for scrutinizing opinion testimony. Section II outlines the law governing lay and expert opinion and the differentiation between the two types of opinion. Section III explains why it makes a difference whether an opinion is evaluated as lay rather than expert. Section IV examines the relationship between experience and opinion testimony, looking at the ways in which the witness's experience may inform the opinion. Section V highlights the risks entailed in admitting opinion testimony based solely on experience. Finally, Section VI suggests five guidelines for a court determining the admissibility of experience-based opinion: (1) the court should generally determine the admissibility of the opinion under the rules governing lay opinion; (2) the court should be skeptical of claims that the witness possesses expertise based on experience and "training," understanding that the combination of experience and training does not necessarily signal that the witness brings reliable methodology to bear on the facts; (3) the court should scrutinize the fit between the witness's experience and the proffered opinion; (4) the court should strictly limit opinion testimony that draws inferences based on third party conduct; and (5) the court should preclude witnesses from over-generalizing based on their experience.

## II. OPINION TESTIMONY UNDER THE RULES OF EVIDENCE

The Federal Rules of Evidence devote an entire article to opinion testimony. For purposes of this discussion, two rules are critical. Rule 701 defines the requirements for lay opinion testimony.<sup>7</sup> Rule 702 sets the parameters for admitting expert testimony.<sup>8</sup> Both rules were amended in 2000 to demark the line between them more clearly and to assure the reliability of opinion evidence.<sup>9</sup>

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7. See *infra* Section II.A.

8. See *infra* Section II.B.

9. See generally STRENGTHENING FORENSIC SCIENCE, *supra* note 6, at 92–95 (discussing 2000 amendment).

The common law rules that predated the Federal Rules of Evidence restricted the use of both lay and expert opinion.<sup>10</sup> When the Federal Rules of Evidence were enacted in 1975, they relaxed the restrictions on opinion testimony.<sup>11</sup> For example, whereas the common law typically restricted the use of opinion testimony to instances in which the jury could not otherwise understand the evidence, the Federal Rules of Evidence adopted a lower threshold for admitting opinion.<sup>12</sup> Under the rules, opinion evidence can be

10. See 1 EDWARD J. IMWINKELRIED ET AL., *COURTROOM CRIMINAL EVIDENCE* § 1401, at 591–605 (4th ed. 2005) (stating the common law opinion rule and discussing its criticisms); 7 JOHN HENRY WIGMORE, *EVIDENCE IN TRIALS AT COMMON LAW* §§ 1919–22, at 14–29 (1978) (criticizing the opinion rule and advocating for its abandonment).

11. See FED. R. EVID. 701 advisory committee's note (commenting that lay opinion should not be subjected to the requirement that it be necessary and that "the practical impossibility of determining by rule what is a 'fact'" has created problems in the law of evidence); FED. R. EVID. 702 advisory committee's note (noting that the key to admissibility is simply whether the testimony will assist the trier of fact); see also Bamberger, *supra* note 5 (discussing liberalization of rules governing expert testimony). Wigmore criticized the common law rules limiting the admissibility of opinion evidence and argued that opinion should be admitted more readily. 7 WIGMORE, *supra* note 10, §§ 1919–22, at 14–29; see also *Asplundh Mfg. Div. v. Benton Harbor Eng'g*, 57 F.3d 1190, 1195 (3d Cir. 1995) (discussing Wigmore and other critics); 1 BROUN ET AL., *supra* note 3, § 11, at 55 (discussing Wigmore's position and suggesting that a number of judges already take the Wigmore approach). In 1901, Learned Hand explained the rationale for and development of the rules limiting opinion evidence:

The rule that a witness shall not testify to mere opinion or conclusion is such a rule, and its origin no doubt was, if we could trace it, due to a gradual recognition by successive judges of the advantage of curtailing the trial and simplifying the issue by leaving out redundant matter. I call this redundant because in fact the opinion of the witness upon the issue can have no useful bearing on the case, and trenches on the jury's function. It is the jury that should form the opinion, make the conclusion and say truly—*vere dicere*—the fact, not the witness; he merely says what he knows. Therefore this rule of evidence—if in view of this it may be properly called such—is somewhat different from those which shut off certain facts actually probative of the issue. Moreover, it was recognized comparatively early in the history of rules of evidence. For we find Vaughan, C.J., that great defender of the right of juries to go "on their own knowledge," well saying in Bushell's case in 1671: "The Verdict of a Jury and Evidence of a Witness are very different things, in the truth and falsehood of them; a Witness swears but to what he hath heard or seen, generally or more largely, to what hath fallen under his senses. But a Juryman swears to what he can infer and conclude from the Testimony of such Witnesses by the act and force of the Understanding, to be the Fact inquired after, which differs nothing in the Reason, though much in the punishment, from what a Judge, out of various Cases consider'd by him, infers to be the Law in the Question before him." The distinction cannot be put more plainly.

Learned Hand, *Historical and Practical Considerations Regarding Expert Testimony*, 15 HARV. L. REV. 40, 44–45 (1901) (footnote omitted); see also Edward J. Imwinkelried, *The Next Step After Daubert: Developing a Similarly Epistemological Approach to Ensuring the Reliability of Nonscientific Expert Testimony*, 15 CARDOZO L. REV. 2271, 2274–76 (1994) [hereinafter Imwinkelried, *The Next Step*] (discussing common law limitations on opinion testimony).

12. The Advisory Committee Notes to Rule 701 comment that "necessity as a standard for permitting opinions and conclusions has proved too elusive and too unadaptable to particular



admitted even when the jury could resolve the issues without the assistance of opinion.<sup>13</sup>

The common law also imposed additional restrictions if expert testimony represented new technology or science.<sup>14</sup> Key Supreme Court decisions in the 1990s changed that approach to expert testimony, requiring the trial court to assess the reliability of the expert's approach before admitting expert testimony.<sup>15</sup> In *Daubert v. Merrell Dow Pharmaceuticals, Inc.*<sup>16</sup> and *Kumho Tire Co. v. Carmichael*,<sup>17</sup> the Court reformulated the test

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situations for purposes of satisfactory judicial administration.” 1 BROUN ET AL., *supra* note 3, § 11, at 53–54 (discussing evolution away from necessity requirement); 1 IMWINKELRIED ET AL., *supra* note 10, § 1401, at 591–94 (discussing evolution of the law); *see also Asplundh*, 57 F.3d at 1195–98 (discussing move from common law to rules); David L. Faigman et al., *Check Your Crystal Ball at the Courthouse Door, Please: Exploring the Past, Understanding the Present, and Worrying About the Future of Scientific Evidence*, 15 CARDOZO L. REV. 1799 (1994) (discussing evolution of rules from common law to *Daubert*); D. Garrison Hill, *Lay Witness Opinions*, S.C. LAW., Sept. 2007, at 36 (discussing South Carolina pre-rule law, which permitted opinion only if it was the sole way the facts could be proven). *But see* Imwinkelried, *The Next Step*, *supra* note 11, at 2271 (suggesting that lay opinion is admissible only if the witness cannot otherwise convey the information).

13. Rule 701 allows lay opinion if it will help the jury, and Rule 702 allows expert opinion if it will assist the jury. *See* 1 BROUN ET AL., *supra* note 3, § 11, at 55 (stating that Rule 701 “codifies ‘convenience’ as the standard” for lay opinion, rather than requiring strict necessity); 1 IMWINKELRIED ET AL., *supra* note 10, § 1401, at 595–96 (noting that, in adopting the “helpfulness” standard for lay opinion testimony, the federal drafters “explicitly rejected ‘necessity’ as the standard”); Matthew J. Rita, *Rule 701: Admissibility of Opinion Testimony by Lay Witnesses*, 26 COLO. LAW., Mar. 1997, at 63 (suggesting that lay opinion is admissible even if the jury could resolve the case without it).

14. Novel scientific evidence was subjected to the general acceptance test, established in *Frye v. United States*, 293 F. 1013, 1014 (D.C. Cir. 1923):

Just when a scientific principle or discovery crosses the line between the experimental and demonstrable stages is difficult to define. Somewhere in this twilight zone the evidential force of the principle must be recognized, and while the courts will go a long way in admitting expert testimony deduced from a well-recognized scientific principle or discovery, the thing from which the deduction is made must be sufficiently established to have gained general acceptance in the particular field in which it belongs.

*Id.*; *see also* 1 IMWINKELRIED ET AL., *supra* note 10, § 606, at 200. Under the general acceptance test, the trial court did not have to assess the expert's approach for reliability, but instead turned to the relevant discipline to determine the acceptance of the methodology.

15. *See generally* Edward J. Imwinkelried, *Evaluating the Reliability of Nonscientific Expert Testimony: A Partial Answer to the Questions Left Unresolved by Kumho Tire Co. v. Carmichael*, 52 ME. L. REV. 19, 20–23 (2000) [hereinafter Imwinkelried, *Evaluating the Reliability*] (discussing evolution of the law).

16. 509 U.S. 579 (1993). *See generally* 1 IMWINKELRIED ET AL., *supra* note 10, §§ 613–16, at 219–34 (discussing the relevance and application of *Daubert*); THOMAS A. MAUET & WARREN D. WOLFSON, TRIAL EVIDENCE § 2.3, at 16–17 (4th ed. 2009) (discussing the new emphasis given the “gatekeeper” function of federal judges following *Daubert*); David E. Bernstein, *Expert Witnesses, Adversarial Bias, and the (Partial) Failure of the Daubert Revolution*, 93 IOWA L. REV. 451, 467–72 (2008) [hereinafter Bernstein, *Expert Witnesses*] (describing the development of courts' gatekeeping role); Daniel J. Capra, *The Daubert Puzzle*, 32 GA. L. REV. 699, 720–23 (1998) (discussing gatekeeping role established by *Daubert*); Faigman et al., *supra* note 12, at 1811–22 (discussing *Daubert*).

17. 526 U.S. 137 (1999). *See* Michael H. Graham, *The Expert Witness Predicament: Determining “Reliable” Under the Gatekeeping Test of Daubert, Kumho, and Proposed Amended*

for admitting expert testimony. It concluded that the Federal Rules did not codify the general acceptance test.<sup>18</sup> Instead, the Court read Rule 702 as requiring that expert testimony be reliable and imposing the role of gatekeeper on the courts.<sup>19</sup> In the wake of these decisions, there were heated debates about how the courts should assess reliability and what types of evidence were subject to the reliability assessment.<sup>20</sup>

The amendments to the rules on lay and expert opinion in 2000 responded to these decisions and the ensuing debate. The amendments codified the reliability assessment for expert testimony, mandated that *all* expert testimony be subjected to reliability assessment, and also established a clearer line between expert and lay opinion testimony. The rules protect against unreliable opinion testimony, whether lay or expert, and give the court a significant role in assuring the quality of the evidence admitted in each of the categories.<sup>21</sup> The court should check the reliability of the way in which the witness derived the opinion,<sup>22</sup> and should also make sure that the

*Rule 702 of the Federal Rules of Evidence*, 54 U. MIAMI L. REV. 317, 332–36 (2000) (discussing *Kumho*); Imwinkelried, *Evaluating the Reliability*, *supra* note 15, at 24–30 (discussing *Kumho*).

18. *Daubert*, 509 U.S. at 587; *see* Graham, *supra* note 17, at 318–19 (discussing *Daubert*).

19. *See* United States v. Hermanek, 289 F.3d 1076, 1094 (9th Cir. 2002) (describing the court's gatekeeping function); *see also* STRENGTHENING FORENSIC SCIENCE, *supra* note 6, at 90–92 (discussing *Daubert* and *Kumho*); Bernstein, *Expert Witnesses*, *supra* note 16, at 467–72 (describing development of courts' gatekeeping role); Capra, *The Daubert Puzzle*, *supra* note 16, at 720–23 (discussing gatekeeping role established by *Daubert*); Jennifer Laser, Comment, *Inconsistent Gatekeeping in Federal Courts: Application of Daubert v. Merrell Dow Pharmaceuticals, Inc. to Nonscientific Expert Testimony*, 30 LOY. L.A. L. REV. 1379 (1997) (discussing *Daubert* before *Kumho* was decided). The rule is arguably applied differently in criminal cases. Moreno, *supra* note 5, at 14–18 (suggesting that *Daubert* has had far less impact in criminal cases).

20. *See* Tassin v. Sears, Roebuck & Co., 946 F. Supp. 1241, 1246–48 (M.D. La. 1996) (discussing debate and citing cases); *see also* Walter G. Amstutz & Bobby Marzine Harges, *Evolution of Controversy: The Daubert Dilemma: The Application of Daubert v. Merrell Dow Pharmaceuticals Inc. to Expert Testimony of Law Enforcement Officers in Narcotics-Related Cases*, 23 U. HAW. L. REV. 67, 78–84 (2000) (discussing debate); Erica Beecher-Monas, *Blinded by Science: How Judges Avoid the Science in Scientific Evidence*, 71 TEMP. L. REV. 55, 80 (1998) (discussing disagreement concerning which types of evidence are subject to *Daubert* analysis); Capra, *The Daubert Puzzle*, *supra* note 16, at 738–51 (discussing applicability of *Daubert* to non-scientific expert opinion); K. Issac deVyver, Comment, *Opening the Door but Keeping the Lights Off: Kumho Tire Co. v. Carmichael and the Applicability of the Daubert Test to Nonscientific Evidence*, 50 CASE W. RES. L. REV. 177, 183–85 (1999) (explaining the strong disagreement among circuits, judges, and legal commentators about the scope of *Daubert* and its applicability to nonscientific evidence); Laser, *supra* note 19, at 1389 (discussing debate).

21. *See* FED. R. EVID. 702 advisory committee's note (recognizing courts' gatekeeper role); *see also* Capra, *Distinguishing Between Lay Witnesses*, *supra* note 3, at 34 (discussing courts' gatekeeping role for expert and lay opinion prior to amendment of rules).

22. *See* FED. R. EVID. 702 advisory committee's note (recognizing the importance of assurance of reliability).

opinion is presented in a manner that permits the jurors to fairly evaluate it.<sup>23</sup> In the subsections that follow, this Article outlines the rules governing lay and expert opinion and defines the line between the two types of opinion.

A. *Lay Opinion—Rule 701*

Rule 701 governs lay opinion. The rule provides:

If the witness is not testifying as an expert, the witness'[s] testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness, and (b) helpful to a clear understanding of the witness'[s] testimony or the determination of a fact in issue, and (c) not based on scientific, technical, or other specialized knowledge within the scope of Rule 702.<sup>24</sup>

The rule defines four hurdles that lay opinion must clear to gain admission: (1) the witness must speak from personal knowledge; (2) the inferences reflected in the opinion must be rationally based on that knowledge; (3) the opinion must be helpful to the jury; and (4) the opinion cannot be based on scientific, technical, or other specialized knowledge.<sup>25</sup> Thus, every lay opinion rests on a combination of the witness's experience base, information known to the witness, and a process of rational reasoning. The assurance of reliability lies in these first three requirements. The fourth requirement was added to the rule in 2000 in an effort to better demarcate the line between expert and lay testimony.<sup>26</sup> The court's job when ruling on the admissibility of lay opinion is to ensure that the opinion rests on a base of personal knowledge and experience and is fairly derived from that base with everyday reasoning.

Much of the routinely admissible lay testimony combines opinion and non-opinion testimony, and in many instances, that distinction is inconsequential.<sup>27</sup> For example, lay testimony as to someone's age, size, or behavior involves both factual observation and opinion, but the court need not decide which aspects of the testimony are fact and which are opinion. Such routine lay opinion easily clears the hurdles established by the rule,

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23. See FED. R. EVID. 701 advisory committee's note (stressing that jurors should get sufficient information to evaluate opinion); see also Capra, *The Daubert Puzzle*, *supra* note 16, at 705 (noting the importance of providing opinion in a form that the trier of fact can evaluate).

24. FED. R. EVID. 701.

25. *Id.*

26. See FED. R. EVID. 701 advisory committee's note.

27. See generally *Asplundh Mfg. Div. v. Benton Harbor Eng'g*, 57 F.3d 1190, 1195–96 (3d Cir. 1995) (discussing the common law rule and criticism and development of federal rule); 1 BROUN ET AL., *supra* note 3, § 11, at 53 (discussing Wigmore).

provided the witness speaks with personal knowledge or does not draw a patently unwarranted inference.<sup>28</sup>

However, lay opinion is not always so routine. A witness with unusual experience may be permitted to testify to a lay opinion based on that experience.<sup>29</sup> The concern with admitting lay opinion increases when the opinion goes beyond routine information and expresses a more sophisticated judgment pertinent to the case. If the court does not assure that the lay opinion satisfies the requirements of the rule—that the witness has an adequate basis in personal knowledge and is within the bounds of rational inference—lay opinion may become a vehicle by which inadmissible evidence is veiled and then presented to the jury.<sup>30</sup> Lay opinion that does not satisfy the rule’s requirements may inject unreliable inferences, inadmissible hearsay or character evidence, or evidence that would normally be excluded under Rule 403 as unfairly prejudicial into the testimony. Careful enforcement of the rule’s requirements should avoid this hazard.

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28. *United States v. Yazzie*, 976 F.2d 1252 (9th Cir. 1992) (discussing admissibility of lay opinion on question of apparent age). In the Advisory Committee Note to the 2000 amendment of Rule 701, the committee stated:

The amendment is not intended to affect the “prototypical example[s] of the type of evidence contemplated by the adoption of Rule 701 relat[ing] to the appearance of persons or things, identity, the manner of conduct, competency of a person, degrees of light or darkness, sound, size, weight, distance, and an endless number of items that cannot be described factually in words apart from inferences.”

FED. R. EVID. 701 advisory committee’s note (quoting *Asplundh*, 57 F.3d at 1196).

29. *See United States v. Williams*, 81 F.3d 1434 (7th Cir. 1996) (allowing former gang member to decode conversations for the jury); *Asplundh*, 57 F.3d at 1198–201 (discussing examples); *United States v. Paiva*, 892 F.2d 148, 156–57 (1st Cir. 1989) (permitting a drug user to testify as a lay witness that white powder “looked and tasted” like cocaine, and noting that lay witnesses may testify to subjects outside “the realm of common knowledge” based on the witness’s individual experience); *see also* 1 *IMWINKELRIED ET AL.*, *supra* note 10, § 1401, at 604 (suggesting that witnesses with experience beyond common knowledge may be permitted to testify as lay witnesses rather than expert witnesses); JACK B. WEINSTEIN & MARGARET A. BERGER, *WEINSTEIN’S EVIDENCE MANUAL* § 10.02[2][c], at 10-14 (Joseph M. McLaughlin ed., 2011) (noting that, even after the 2000 amendment to Rule 701, a witness who uses the processes of ordinary persons to form opinions based on particularized experience and knowledge may testify as a lay witness). *But see* G. Michael Fenner, *The Daubert Handbook: The Case, Its Essential Dilemma, and Its Progeny*, 29 *CREIGHTON L. REV.* 939, 975–77 (1996) (discussing *Asplundh*); Graham, *supra* note 17, at 326 n.30 (2000) (discussing *Asplundh* and arguing that the experienced witness should be treated as an expert).

30. *See, e.g., United States v. Garcia*, 413 F.3d 201, 212–13 (2d Cir. 2005) (describing witness’s reliance on information gathered by other law enforcement agents).

## 1. Based on the Perception of the Witness

The lay opinion rule requires that a lay opinion be based “on *the perception of the witness*.”<sup>31</sup> This reflects a particular emphasis on the personal knowledge requirement that is implicit throughout the Rules of Evidence.<sup>32</sup> A witness who rests her opinion on information from others in addition to her own observations does not comport with the requirements for lay opinion.<sup>33</sup> Whereas an expert can rely on vicarious experience and relayed information, a witness providing lay opinion can call only on personal experience and personally observed facts.<sup>34</sup>

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31. *Id.* at 211 (emphasis added) (discussing the personal perception requirement). The Second Circuit emphasized that “lay opinion [is] an acceptable ‘shorthand’ for the ‘rendition of facts that the witness personally perceived.’” *Id.* (quoting 4 JACK B. WEINSTEIN & MARGARET A. BERGER, WEINSTEIN’S FEDERAL EVIDENCE § 701.03[1] (Joseph M. McLaughlin ed., 2d ed. 2004)). In *Garcia*, the court used the following example of acceptable shorthand:

To illustrate: when an undercover agent participates in a hand-to-hand drug exchange with a number of persons, the agent may well testify that, in his opinion, a particular participant, “X,” was the person directing the transaction. Such an opinion is based on his personal perception of such subjective factors as the respect various participants showed “X,” their deference to “X” when he spoke, and their consummation of the deal only upon a subtly signaled approval by “X.” By allowing the agent to state his opinion as to a person’s role in such circumstances, Rule 701 affords the jury an insight into an event that was uniquely available to an eyewitness. In this respect, the rule recognizes the common sense behind the saying that, sometimes, “you had to be there.”

*Id.* at 211–12; *see also* *Osborn v. State*, 92 S.W.3d 531, 535 (Tex. Crim. App. 2002) (stating that “perceptions” include the witness’s interpretation of personal sensory experience); 1 BROWN ET AL., *supra* note 3, § 11, at 57 n.30 (stating that the perception requirement “mandates that the opinion be one which a lay person could normally form from observed facts”); 1 IMWINKELRIED ET AL., *supra* note 10, § 1401, at 595 (discussing the perception condition and noting that it refers to the firsthand knowledge requirement that is codified in Federal Rule of Evidence 602).

32. *See Hirst v. Inverness Hotel Corp.*, 544 F.3d 221, 225–26 (3d Cir. 2008) (discussing and implementing personal knowledge requirement of Rule 701); *United States v. Glenn*, 312 F.3d 58, 67 (2d Cir. 2002) (holding that witness lacked basis in personal knowledge to give opinion that bulge in defendant’s pants, observed from some distance, was caused by a gun); *Gorby v. Schneider Tank Lines, Inc.*, 741 F.2d 1015 (7th Cir. 1984) (holding that lay opinion was properly excluded because witness lacked sufficient firsthand knowledge). McCormick emphasizes that the original common law restriction on lay opinion was based in a concern that the witness not speak without personal knowledge. 1 BROWN ET AL., *supra* note 3, § 11, at 51–52. Federal Rule of Evidence 602 imposes a personal knowledge requirement on all witnesses except those who testify as experts. FED. R. EVID. 602.

33. *See Garcia*, 413 F.3d at 211 (holding lay testimony based on information and opinion gathered by numerous officers in the course of an investigation to be inadmissible under Rule 701’s perception requirement); *TLT-Babcock, Inc. v. Emerson Elec. Co.*, 33 F.3d 397, 400 (4th Cir. 1994) (rejecting lay opinion testimony by a project manager based on reports from his staff); 1 BROWN ET AL., *supra* note 3, § 10, at 48 (noting that testimony which rests on statements of others lacks the requisite firsthand knowledge requirement); 3 GRAHAM, *supra* note 5, § 701:1, at 11 n.2 (noting that a lay witness offering an opinion must base that opinion on the witness’s “own personal knowledge”).

34. *See Garcia*, 413 F.3d at 211; *Bank of China v. NBM LLC*, 359 F.3d 171, 181 (2d Cir. 2004) (noting that testimony not based on the witness’s perception should not have been admitted as lay testimony); Edward J. Imwinkelried, *The Taxonomy of Testimony Post-Kumho: Refocusing on the Bottomlines of Reliability and Necessity*, 30 CUMB. L. REV. 185, 203 (2000) [hereinafter

## 2. Rationally Based on the Witness's Perception

The rule further requires that lay opinion be “*rationally based*” on the witness's perception.<sup>35</sup> The court's job when applying this requirement of the rule is to ensure that the opinion expressed by the witness is one that can be drawn from the witness's knowledge base using ordinary reasoning.<sup>36</sup> If the witness's opinion represents too great a leap from the witness's knowledge base, the court should exclude it as not rationally based.<sup>37</sup>

## 3. Helpful

The rule also requires that a lay opinion be “helpful to a clear understanding of the witness'[s] testimony or the determination of a fact in

Imwinkelried, *Taxonomy of Testimony*]. Professor Imwinkelried points out that a key distinction between expert and lay opinion lies in the permissible basis for the opinion. *See generally infra* Section III (discussing significance of difference between lay and expert opinion).

35. FED. R. EVID. 701 (emphasis added). In *United States v. Figueroa-Lopez*, 125 F.3d 1241, 1246 (9th Cir. 1997), the Ninth Circuit assumed that scrutiny under the lay opinion rule was limited to an assurance that the witness had observed the facts—“mere percipience”—and overlooked the requirement that the opinion be rationally based on the witness's perception.

36. The Advisory Committee Note to the 2000 amendment states:

The amendment incorporates the distinctions set forth in *State v. Brown*, 836 S.W.2d 530, 549 (1992), a case involving former Tennessee Rule of Evidence 701, a rule that precluded lay witness testimony based on “special knowledge.” In *Brown*, the court declared that the distinction between lay and expert witness testimony is that lay testimony “results from a process of reasoning familiar in everyday life,” while expert testimony “results from a process of reasoning which can be mastered only by specialists in the field.”

FED. R. EVID. 701 advisory committee's note; *see also* *United States v. Kaplan*, 490 F.3d 110, 119 (2d Cir. 2007) (noting that courts should ensure that opinion is rationally derived from witness's observation); *Asplundh Mfg. Div. v. Benton Harbor Eng'g*, 57 F.3d 1190, 1201 (3d Cir. 1995) (emphasizing role of requirement that lay opinion be rationally based on witness's perception). Some commentators ascribe no independent significance to the rational relation requirement, but simply treat it as part of the personal knowledge requirement. *See* 1 IMWINKELRIED ET AL., *supra* note 10, § 1401, at 595 (discussing requirements for admissibility of lay opinion); *see also* Bigelow, *supra* note 3, at 4–5 (discussing *Asplundh*); Capra, *Distinguishing Between Lay Witnesses*, *supra* note 3, at 34 (discussing *Asplundh* and characterizing this approach as injecting the *Daubert* gatekeeping function into Rule 701).

37. Professor Imwinkelried captured this notion in his discussion of how a court should approach the testimony of a witness who offers an opinion regarding habit. Imwinkelried, *The Next Step*, *supra* note 11, at 2293–94. Professor Imwinkelried suggested that the trial judge can assess the similarity of the observed behavior that provides the basis for the witness's opinion on habit. *Id.* at 2294 (“If the judge's common sense and intuition tell her that the experiences are not at all parallel, the inference is acceptable neither as a matter of law nor as a matter of epistemology.”). Thus, he called for the judge's assessment that the opinion can be rationally derived from the witness's experience/personal knowledge base. *Id.*

issue.”<sup>38</sup> In some cases, the witness uses lay opinion to express information that cannot be conveyed through a bare factual account.<sup>39</sup> Even when the witness can convey the facts without providing opinion testimony, lay opinion may enrich understanding by adding depth and clarity to the witness’s account.<sup>40</sup>

Nevertheless, an opinion is not helpful if it simply tells the jury what inferences to draw<sup>41</sup> or summarizes the party’s case.<sup>42</sup> The concern that the witness threatens the province of the fact finder may likewise lead to the conclusion that the opinion is not helpful.<sup>43</sup> For example, a witness who opines that the defendant was a partner in a drug distribution, based on the witness’s conclusions from recorded phone calls and other information gathered in a criminal investigation, supplants the jury’s function of determining the defendant’s culpability.<sup>44</sup>

Similarly, if the witness’s opinion merely applies everyday reasoning to evidence equally available to the jury, the court may deem the opinion unhelpful. For example, if the witness simply compares the defendant’s appearance with a surveillance photo and opines that the defendant is the person in the photograph, the court may reject the testimony as unhelpful because the witness is no better equipped than the jury to draw that conclusion.<sup>45</sup>

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38. FED. R. EVID. 701(b); *see also* 1 BROUN ET AL., *supra* note 3, § 11, at 55 (suggesting that “value to the jury” is the “principal test” under the Rules); 1 IMWINKELRIED ET AL., *supra* note 10, § 1401, at 595–96 (discussing helpfulness assessment).

39. *Virgin Islands v. Knight*, 989 F.2d 619, 629–30 (3d Cir. 1993) (concluding that the trial court should not have excluded eyewitness testimony that a gun was fired accidentally, even though it was “difficult . . . to articulate all of the factors that lead one to conclude a person did not intend to fire a gun,” because the eyewitness testimony would have been helpful to the jury).

40. *Id.* at 630.

41. *United States v. Grinage*, 390 F.3d 746, 749–51 (2d Cir. 2004) (holding that lay opinion testimony admitted at trial was improper because it merely told the jury what result to reach); *see also* 1 BROUN ET AL., *supra* note 3, § 12, at 61 n.12 (citing cases rejecting lay opinion on ultimate issue as unhelpful).

42. *United States v. Garcia*, 413 F.3d 201, 213–14 (2d Cir. 2005) (holding case agent’s summary of the evidence in the case is not an admissible, helpful lay opinion). The *Garcia* court noted that the agent’s summary replicated the role of the prosecution’s opening statement. *Id.* *But see* Bigelow, *supra* note 3, at 5–8 (discussing use of summary witnesses).

43. *See, e.g., United States v. Meises*, 645 F.3d 5, 18 (1st Cir. 2011) (concluding agent’s testimony was not helpful because it usurped the role of the jury); *Garcia*, 413 F.3d at 210–11 (emphasizing the need to protect the province of the jury, and the role of Rule 701’s foundation requirements in protecting that province); *Grinage*, 390 F.3d at 750 (noting that agent’s testimony concerning phone calls usurped the jury’s function); *United States v. LaPierre*, 998 F.2d 1460, 1465 (9th Cir. 1993) (expressing concern that testimony may have invaded province of jury); Hand, *supra* note 11, at 52.

44. *See Garcia*, 413 F.3d at 210–11.

45. *See* discussion *infra* Section III. For example, an expert can express an opinion that a non-expert would not be permitted to draw. The expert can base that opinion on information that has not been admitted, and is even inadmissible. *See LaPierre*, 998 F.2d at 1465 (holding that police officer should not have been permitted to give lay opinion that defendant was same person as person in

#### 4. Not Based on Scientific, Technical, or Other Specialized Knowledge

In 2000, Rule 701 was amended to stipulate that lay opinion must not be based on scientific, technical or other specialized knowledge. The amendment was intended to harden the division between lay opinion and expert opinion, and to ensure that all opinion based on scientific, technical or other specialized knowledge would be subject to the reliability requirements of Rule 702.<sup>46</sup> This aspect of the Rules is discussed further in the sections that follow.

#### B. Expert Testimony—Rule 702

The Federal Rules of Evidence permit expert witnesses to testify in ways that non-expert witnesses cannot.<sup>47</sup> Before the court accords a witness that latitude, it must ensure that the witness satisfies the requirements of Rule 702.

Rule 702 provides:

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, if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles

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photograph). *But see* United States v. Martin, 262 F. App'x 392 (3d Cir. 2008) (allowing similar lay opinion testimony); Rita, *supra* note 13, at 64 (concluding that lay witness can sometimes testify concerning identity of person in photo).

46. The Advisory Committee Notes to the 2000 amendment comment that “Rule 701 has been amended to eliminate the risk that the reliability requirements set forth in Rule 702 will be evaded through the simple expedient of proffering an expert in lay witness clothing.” FED. R. EVID. 701 advisory committee’s note; *see also* Hirst v. Inverness Hotel Corp., 544 F.3d 221, 227–28 (3d Cir. 2008) (discussing purpose of amendment); Tampa Bay Shipbuilding & Repair Co. v. Cedar Shipping Co., 320 F.3d 1213, 1222 (11th Cir. 2003) (commenting that the amendment to Rule 701 was intended to eliminate uses of Rule 701 to avoid reliability requirements of Rule 702); *see also* Capra, *Distinguishing Between Lay Witnesses*, *supra* note 3, at 34 (discussing reasons for amendment of Rule 701).

47. *See* FED. R. EVID. 702–03. As the comment to the Rules reflects, expert witnesses can also provide helpful non-opinion testimony. FED. R. EVID. 702 advisory committee’s note (noting additional role of expert beyond mere opinion testimony); *see also* John William Strong, *Language and Logic in Expert Testimony: Limiting Expert Testimony by Restrictions of Function, Reliability, and Form*, 71 OR. L. REV. 349, 360 (1992) (describing possible roles expert may play).



and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.<sup>48</sup>

The rule as originally drafted demanded only that the expert's testimony "assist" the trier of fact.<sup>49</sup> While the expert's testimony still need not be necessary to the resolution of the case in order to be admissible,<sup>50</sup> the rule now also requires assurance that the testimony is reliable. The 2000 amendment to Rule 702 incorporated the three specific requirements intended to assure the reliability of expert testimony—the requirements of sufficient facts or data; reliable principles and methods; and reliable application.<sup>51</sup>

The amendment contemplates that the expert has employed reliable methodology—something beyond everyday reasoning—to draw inferences from the information base.<sup>52</sup> A number of pre-amendment decisions clarify the requirements for expert testimony. Both *Daubert* and *Kumho Tire* addressed the question of what qualifies as knowledge and stressed the role of methodology.<sup>53</sup> In *Daubert*, the Court asked what qualified as "scientific knowledge" admissible as expert testimony under the pre-amendment rules.<sup>54</sup> The Court concluded that the way in which "knowledge" was derived was critical to whether it qualified as "scientific knowledge."<sup>55</sup> In

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48. FED. R. EVID. 702.

49. FED. R. EVID. 702 advisory committee's note.

50. 1 IMWINKELRIED ET AL., *supra* note 10, § 1404, at 612–13 (discussing Rule 702's requirement that expert testimony "assist the trier of fact," and noting that the standard is more liberal than the common law, which often required that the subject of expert testimony be "beyond the comprehension of a layman"); Strong, *supra* note 47, at 354, 356 (discussing requirements).

51. FED. R. EVID. 702.

52. See *LifeWise Master Funding v. Telebank*, 374 F.3d 917, 928–29 (10th Cir. 2004) (applying criteria and concluding that witness did not satisfy requirements of rule); see also Brian Leiter, *The Epistemology of Admissibility: Why Even Good Philosophy of Science Would Not Make for Good Philosophy of Evidence*, 1997 BYU L. REV. 803, 815–17 (discussing limitations of judges as arbiters of scientific reliability); Strong, *supra* note 47, at 354–56 (emphasizing role of expert in providing reliable information both as a "check on jury notice of unreliable propositions" and as a source of "evaluational or computational accuracy" beyond the jury's capability).

53. Neither *Daubert* nor *Kumho* involved arguable lay opinion; both decisions addressed only the reliability requirements for expert testimony. See *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 153 (1999); *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 589, 597 (1993).

54. *Daubert*, 509 U.S. at 584–85.

55. *Id.* at 590. The Court explained:

The adjective "scientific" implies a grounding in the methods and procedures of science. Similarly, the word "knowledge" connotes more than subjective belief or unsupported speculation. The term "applies to any body of known facts or to any body of ideas inferred from such facts or accepted as truths on good grounds." Of course, it would be unreasonable to conclude that the subject of scientific testimony must be "known" to a certainty; arguably, there are no certainties in science. But, in order to qualify as "scientific knowledge," an inference or assertion must be derived by the scientific method. Proposed testimony must be supported by appropriate validation—i.e., "good grounds," based on what is known. In short, the requirement that an expert's testimony pertain to "scientific knowledge" establishes a standard of evidentiary reliability.

*Kumho Tire*, the Court recognized that an expert's experience can play a role in the testimony.<sup>56</sup> The Court further emphasized that the experience of the *discipline* may play a role in establishing the reliability of expert testimony.<sup>57</sup>

In addition, of course, the witness must qualify as an expert. To do so, the witness must possess scientific, technical or other specialized knowledge. The threshold for expertise was traditionally low.<sup>58</sup> The addition of the three reliability factors may have also increased the requirements to qualify as an expert.<sup>59</sup> Under the amended rule, the expert witness must now be competent to apply reliable principles and methods and to do so reliably.<sup>60</sup> It will not be enough for the witness merely to have some knowledge beyond that of the average juror.

*Id.* (citations omitted).

56. *Kumho Tire*, 526 U.S. at 148–49. The Court explained:

[W]hether the specific expert testimony focuses upon specialized observations, the specialized translation of those observations into theory, a specialized theory itself, or the application of such a theory in a particular case, the expert's testimony often will rest "upon an experience confessedly foreign in kind to [the jury's] own." The trial judge's effort to assure that the specialized testimony is reliable and relevant can help the jury evaluate that foreign experience, whether the testimony reflects scientific, technical, or other specialized knowledge.

*Id.* at 149 (quoting Hand, *supra* note 11, at 54).

57. The Court stated: "And where such testimony's factual basis, data, principles, methods, or their application are called sufficiently into question, the trial judge must determine whether the testimony has 'a reliable basis in the knowledge and experience of [the relevant] discipline.'" *Id.* (quoting *Daubert*, 509 U.S. at 592).

58. The Advisory Committee's Note to Rule 702 states:

The rule is broadly phrased. The fields of knowledge which may be drawn upon are not limited merely to the "scientific" and "technical" but extend to all "specialized" knowledge. Similarly, the expert is viewed, not in a narrow sense, but as a person qualified by "knowledge, skill, experience, training or education." Thus within the scope of the rule are not only experts in the strictest sense of the word, e.g. physicians, physicists, and architects, but also the large group sometimes called "skilled" witnesses, such as bankers or landowners testifying to land values.

FED. R. EVID. 702 advisory committee's note; *see also* *United States v. Velasquez*, 64 F.3d 844, 849 (3d Cir. 1995) (applying traditional low standard); *Miller v. Brass Rail Tavern, Inc.*, 664 A.2d 525, 528 (Pa. 1995) (stating that the standard for qualification of expert witness is liberal, and stating that the test is whether the witness has "any reasonable pretension to specialized knowledge on the subject"); 1 BROWN ET AL., *supra* note 3, § 13, at 86; 2 WIGMORE, *supra* note 10, § 556, at 751.

59. McCormick cites "an incipient trend to toughen standards" in jurisdictions that have adopted *Daubert*. 1 BROWN ET AL., *supra* note 3, § 13, at 71; *see also* *LifeWise Master Funding v. Telebank*, 374 F.3d 917, 928–29 (10th Cir. 2004) (requiring qualifications that equip witness to satisfy reliability requirements); Moreno, *supra* note 5, at 12–14 (discussing amendment).

60. *See* FED. R. EVID. 702.

### C. *Delineating the Difference*

The comments to the Rules acknowledge that a witness with a deep experience base may provide a lay opinion,<sup>61</sup> and also that a witness may qualify to give expert opinion solely through experience.<sup>62</sup> Thus, experience-based opinion may fall under either Rule 701 or Rule 702. When a party seeks to elicit opinion testimony based on experience, the court must determine which rule applies.

The line between lay and expert opinion has never been clearly drawn.<sup>63</sup> Traditionally, there has always been an area of overlap between the two.<sup>64</sup>

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61. The Advisory Committee Note to the 2000 amendment of Rule 701 remarks: [M]ost courts have permitted the owner or officer of a business to testify to the value or projected profits of the business[,] without the necessity of qualifying the witness as an accountant, appraiser, or similar expert. Such opinion testimony is admitted not because of experience, training or specialized knowledge within the realm of an expert, but because of the particularized knowledge that the witness has by virtue of his or her position in the business. The amendment does not purport to change this analysis. Similarly, courts have permitted lay witnesses to testify that a substance appeared to be a narcotic, so long as a foundation of familiarity with the substance is established. Such testimony is not based on specialized knowledge within the scope of Rule 702, but rather is based upon a layperson's personal knowledge.

FED. R. EVID. 701 advisory committee's note (citations omitted).

62. See FED. R. EVID. 702 advisory committee's note. The Advisory Committee Note to the 2000 amendment of Rule 702 states:

Nothing in this amendment is intended to suggest that experience alone—or experience in conjunction with other knowledge, skill, training or education—may not provide a sufficient foundation for expert testimony. To the contrary, the text of Rule 702 expressly contemplates that an expert may be qualified on the basis of experience. In certain fields, experience is the predominant, if not sole, basis for a great deal of reliable expert testimony.

*Id.* See, e.g., *United States v. Jones*, 107 F.3d 1147 (6th Cir. 1997) (no abuse of discretion in admitting the testimony of a handwriting examiner who had years of practical experience and extensive training, and who explained his methodology in detail); *Tassin v. Sears, Roebuck & Co.*, 946 F. Supp. 1241, 1248 (M.D. La. 1996) (design engineer's testimony can be admissible when the expert's opinions "are based on facts, a reasonable investigation, and traditional technical/mechanical expertise, and he provides a reasonable link between the information and procedures he uses and the conclusions he reaches"); see also *Kumho Tire*, 526 U.S. at 156 (stating that "no one denies that an expert might draw a conclusion from a set of observations based on extensive and specialized experience").

63. See, e.g., *United States v. Paiva*, 892 F.2d 148, 159 (1st Cir. 1989) (noting that the Federal Rules blurred distinctions between lay and expert opinion); *Farner v. Paccar, Inc.*, 562 F.2d 518, 528–29 (8th Cir. 1977) (concluding that witness with extensive experience could provide either lay or expert opinion); see also *United States v. Horn*, 185 F. Supp. 2d 530 (D. Md. 2002) (discussing line between lay and expert opinion in relation to horizontal gaze nystagmus test); *State v. Blackwell*, 971 A.2d 296, 303–05 (Md. 2009) (discussing same).

It is worth noting that the line does not depend on categorization of the witness. The same witness may provide some testimony as an expert and other testimony as a lay witness. See *United States v. White*, 492 F.3d 380, 403 (6th Cir. 2007) (commenting that the Rules "distinguish between lay and expert testimony, not witnesses"); *United States v. Ayala-Pizarro*, 407 F.3d 25, 28 (1st Cir. 2005); *Downeast Ventures, Ltd. v. Wash. Cnty.*, 450 F. Supp. 2d 106, 110–11 (D. Me. 2006); *Falconer v. Penn Mar., Inc.*, 421 F. Supp. 2d 190, 208 (D. Me. 2006). Moreover, the fact that the witness *could* qualify as an expert does not foreclose the witness from giving lay opinion testimony.

However, when the Federal Rules were amended to define the lay-expert line more clearly and to subject expert opinion to reliability testing, delineating the difference between the two categories of opinion became critical. The amendments raised the bar for expert testimony, while also seeking to eliminate the risk that expert opinion would fly under that reliability radar and be admitted as lay opinion.<sup>65</sup> The Rules define the key question as whether the opinion rests on scientific, technical, or other specialized knowledge.<sup>66</sup>

Evaluating opinion testimony based on experience raises particular questions: What constitutes the “specialized knowledge” that requires an opinion to be handled as expert testimony under Rule 702 and what level of special background or experience base is consistent with providing lay opinion under Rule 701? Does the knowledge derived from an especially rich experience base constitute “specialized knowledge” that forces the court to evaluate the evidence under the reliability requirements of Rule 702? The courts must differentiate between a lay opinion that rests on an unusually rich experience base and an expert opinion based on experience. The courts should not categorize an opinion as expert merely because the witness

*See* Teen-Ed, Inc. v. Kimball Int'l, Inc., 620 F.2d 399, 403 (3d Cir. 1980) (fact that accountant-witness might have qualified as expert did not prevent witness from giving lay opinion concerning lost profits). Thus, whether a given opinion is lay or expert depends on the basis and development of the particular opinion.

64. 1 IMWINKELRIED ET AL., *supra* note 10, § 1401, at 603–04 (discussing overlap); Capra, *The Daubert Puzzle*, *supra* note 16, at 768 (summarizing courts' approach to overlap).

65. FED. R. EVID. 702 advisory committee's note; *see also* United States v. Garcia, 413 F.3d 201, 215 (2d Cir. 2005) (“The purpose of this final foundation requirement is to prevent a party from conflating expert and lay opinion testimony thereby conferring an aura of expertise on a witness without satisfying the reliability standard for expert testimony . . . .”); Bank of China v. NBM LLC, 359 F.3d 171, 181 (2d Cir. 2004) (quoting Advisory Committee Note that amendment of Rule 701 is intended “to eliminate the risk that the reliability requirements set forth in Rule 702 will be evaded through the simple expedient of proffering an expert in lay witness clothing” and concluding that the trial court had improperly allowed that to happen); *Falconer*, 421 F. Supp. 2d at 208 (“The amendments to Rule 701 were designed to prevent ‘proffering an expert in lay witness clothing.’”); 4 WEINSTEIN & BERGER, *supra* note 31, § 701.03[4][b], at 701-30 (explaining that “[t]he purposes of the amendment are twofold. First, it ensures that evidence qualifying as expert testimony under Rule 702 will not evade the reliability scrutiny mandated by the Supreme Court’s *Daubert* decision and the 2000 amendment to Rule 702 . . . . Second, it also provides assurance that parties will not use Rule 701 to evade the expert witness pretrial disclosure requirements of Federal Rule of Civil Procedure 26 and Federal Rule of Criminal Procedure 16.” (footnotes omitted)); Martinez & Arlyn-Pessin, *supra* note 3, at 30 (discussing purpose of amendment). Before the Rules were amended to incorporate the reliability requirements, a debate raged concerning the application of the requirement to nonscientific evidence. *See, e.g.*, 1 IMWINKELRIED ET AL., *supra* note 10, § 1401, at 604–05 (discussing amendment); Imwinkelried, *The Next Step*, *supra* note 11, at 2283–90 (discussing application of *Daubert* factors to nonscientific expert testimony).

66. *See* FED. R. EVID. 702.

possesses an unusual level of experience. Only the application of a reliable methodology—a proven analytical approach beyond mere everyday reasoning—should qualify an opinion as expert rather than lay.<sup>67</sup>

### III. THE LINE BETWEEN LAY AND EXPERT OPINION: WHY DOES IT MATTER?

Each type of opinion offers advantages and disadvantages to the proponent.<sup>68</sup> The key differences are explored below. Section A examines the way in which courts should approach opinion testimony depending on whether it is lay or expert. Section B considers the difference in the factual basis required for each type of opinion. Section C discusses the information required to be disclosed to the court and the jury. Section D focuses on the form of the opinion testimony. Section E describes the pretrial discovery obligation that attaches to expert opinion and not to lay opinion. Finally, Section F notes the deference accorded expert opinion.

#### A. *Evaluation of the Opinion*

The two types of opinion require quite different judicial scrutiny. The court's competence to scrutinize lay opinion is greater because it rests on ordinary reasoning and not on the application of a specialized methodology. For lay opinion, the trial court must ensure that the opinion is helpful to the jury and reflects reasonable inferences. To do so, the court must determine whether the witness could fairly draw the inferences by applying everyday reasoning to the facts the witness knows in the case and the witness's experience base.

In contrast, if the witness offers expert opinion, the court must scrutinize the witness's claim to reliability by evaluating the methodology, the sufficiency of the basis, and the application of the methodology. The court must also determine whether the expert opinion will assist the jury. Thus, while the court does not need to rise to the level of the expert and is not invited to assess the reasonableness of the specific inferences, it must check that the parameters assuring reliability are met.<sup>69</sup>

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67. See Samuel R. Gross & Jennifer L. Mnookin, *Expert Information and Expert Evidence: A Preliminary Taxonomy*, 34 SETON HALL L. REV. 141, 146–47 (2003) (discussing the requirement of validity and suggesting that the question is whether those in the field of expertise have the tools to produce valid answers).

68. See 1 IMWINKELRIED ET AL., *supra* note 10, § 1401, at 604 (noting the consequences of classification of opinion).

69. See Amstutz & Harges, *supra* note 20, at 80 (“The ‘gatekeeper’ function finds description in *Daubert*, but it finds its source in Rule 702. Rule 702 makes the trial judge no less the gatekeeper when counsel characterizes proffered expert testimony as ‘technical’ or ‘specialized,’ rather than ‘scientific.’” (quoting *United States v. Webb*, 115 F.3d 711, 717 (9th Cir. 1997) (Jenkins, J., concurring))); Beecher-Monas, *supra* note 20, at 65 (“The most important mandate of *Daubert* is

### B. Basis of the Opinion

The requisite basis for the opinion also depends on how the opinion is classified. Lay opinion must rest on facts observed by the witness. As a result, the witness testifying to lay opinion cannot consider any information outside her realm of personal knowledge.<sup>70</sup>

In contrast, an expert witness can base an opinion on information that is not within her personal knowledge and is not presented in court.<sup>71</sup> The expert can base her testimony on data that is conveyed to her rather than observed by her, if the information is of the type relied upon by experts in the particular field.<sup>72</sup> Further, the information need not be admitted and may form the basis of the opinion even if it is not admissible.<sup>73</sup> For example, a physician testifying about the permanence of the plaintiff's injury may rely on the results of tests that are not admitted in evidence.<sup>74</sup> Thus, an expert

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that judges must actively evaluate proposed expert testimony.”); Capra, *The Daubert Puzzle*, *supra* note 16, at 735–38 (noting that the judge need not become a super-expert); Jeffrey M. Schumm, *Precious Little Guidance to the “Gatekeepers” Regarding Admissibility of Nonscientific Evidence: An Analysis of Kumho Tire Co. v. Carmichael*, 27 FLA. ST. U. L. REV. 865, 865–66 (2000) (arguing that as gatekeepers, federal judges may assess reliability as they see fit); Laser, *supra* note 19, at 1411 (noting the benefits of the court's gatekeeping role, particularly the relief it offers the jury from “weighing the credibility of highly specialized expert evidence,” and opining that because judges must examine a witness's methodology, expert witnesses will not be able to testify based only on their credentials); Note, *Reliable Evaluation of Expert Testimony*, 116 HARV. L. REV. 2142, 2146 (2003) (explaining how the gatekeeping role of the courts has grown between *Daubert* and *Kumho*). The Supreme Court emphasized that, as gatekeepers, judges must examine “the particular circumstances of each case to determine whether the factors are reasonable measures of reliability.” Schumm, *supra*, at 873 (citing *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579 (1993)). The gatekeeping role of the judge, if “overly restrictive,” may negatively affect the role of the jury, especially when the expert testimony is nonscientific. *Id.* at 890–91 (noting that, because the reliability of nonscientific expert testimony is not externally tested, the jury is “just as qualified” as the judge to evaluate, and warning that a rigorous application of the gatekeeping function by the judge may lead to the judge taking on the role of the jury). The gatekeeping function “should not expand the trial judge's role, but rather assist the jury in fulfilling its responsibility.” *Id.* at 891.

70. See *United States v. Freeman*, 498 F.3d 893, 905 (9th Cir. 2007) (pointing out that lay opinion could not rest on facts not known to the witness and that lay opinion witness could not testify to hearsay statements that provided basis for opinion).

71. See FED. R. EVID. 703, 705; see also *United States v. Mejia*, 545 F.3d 179, 197–99 (2d Cir. 2008) (discussing line between permissible and impermissible basis for expert opinion); Fenner, *supra* note 29, at 978 (noting that experts can base their opinions on inadmissible evidence whereas lay witnesses cannot); Gross & Mnookin, *supra* note 67, at 145–46 (discussing difference in basis).

72. See Fenner, *supra* note 29, at 978.

73. *Id.*

74. See 1 BROUN ET AL., *supra* note 3, § 15, at 92 (stating that “an expert may give an opinion based on facts and data” that are not admissible in evidence if “of a type reasonably relied upon by experts in the particular field” (quoting FED. R. EVID. 703)). The Advisory Committee Note accompanying Rule 703 comments:

can draw on a wider range of information than a lay witness in the process of forming an opinion.

### C. *Disclosure of the Basis to the Court and Jury*

The party presenting expert or lay opinion has two disclosure obligations. First, the party must provide enough information to the court to persuade it that the opinion is admissible.<sup>75</sup> Second, the party must present enough information to the jurors to enable them to understand and evaluate the opinion. The jury does not necessarily hear all the information provided to the judge to inform the evidentiary ruling. The extent of the disclosure obligations to both judge and jury depends on how the opinion is classified.

#### 1. Disclosure to the Court

The proponent of expert testimony must provide extensive information to the court. When a witness testifies as an expert under Rule 702, the court has a substantial gatekeeper role.<sup>76</sup> Before the jury is allowed to hear the expert testimony, the court must determine that the expert has proper qualifications, is using a reliable methodology appropriately, and is applying it to an adequate basis.<sup>77</sup> This assessment requires the proponent to inform the court in some detail of the basis of the opinion and the process by which it was reached.<sup>78</sup> Without that detailed information, the court cannot determine whether the expert witness has employed reliable methodology and applied it reliably to a sufficient basis.<sup>79</sup>

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The third source [of facts or data upon which expert opinions are based] 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. . . . His validation, expertly performed and subject to cross-examination, ought to suffice for judicial purposes.

FED. R. EVID. 703 advisory committee's note.

75. See FED. R. EVID. 104; Imwinkelried, *Evaluating the Reliability*, *supra* note 15, at 30–32 (discussing Rule 104).

76. See FED. R. EVID. 702 advisory committee's note.

77. See FED. R. EVID. 702.

78. See FED. R. EVID. 705 advisory committee's note.

79. The Advisory Committee Note accompanying Rule 705 comments:

If a serious question is raised under Rule 702 or 703 as to the admissibility of expert testimony, disclosure of the underlying facts or data on which opinions are based may, of course, be needed by the court before deciding whether, and to what extent, the person should be allowed to testify.

*Id.*

In contrast, the proponent of a lay opinion must provide the court with sufficient information to determine not only that the witness has personal knowledge of the facts that form the basis for the opinion, but also that the opinion is rationally related to those facts and that it is helpful to the jury. Rule 701 directs the judge to assure herself that the witness's inferences are reasonably derived from the witness's personal knowledge using only ordinary reasoning processes.<sup>80</sup> The judge cannot make that assessment without knowing the witness's knowledge and experience base.

## 2. Disclosure to the Jury

The jurors do not determine admissibility of evidence. Instead, they assess its weight, ultimately deciding whether they are persuaded by all the evidence introduced at trial to find in favor of the party with the burden of persuasion. As a result, the party offering evidence does not normally disclose to the jury all the information necessary for the judge to rule on admissibility. Indeed, some of that information may be inadmissible.<sup>81</sup>

Although the party presenting an expert opinion must provide the court with extensive information, the party does not ordinarily reveal the basis of the opinion to the jury. The Rules both exempt and circumscribe the expert from disclosing the basis of her opinion to the jury. The expert need not tell the fact finder about the basis for an opinion as a prerequisite to expressing that opinion.<sup>82</sup> The proponent may elect to have the witness explain the basis of the opinion to some degree. However, the Rules limit the extent to which the expert can relay information on which the opinion is based, but that has not been admitted, to the jury.<sup>83</sup> Thus, the jury will often be in the dark as to aspects of the basis for the expert opinion.

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80. *United States v. Garcia*, 413 F.3d 201, 215 (2d Cir. 2005).

81. FED. R. EVID. 104(a) provides: "Preliminary questions concerning the qualification of a person to be a witness, the existence of a privilege, or the admissibility of evidence shall be determined by the court . . . . In making its determination it is not bound by the rules of evidence except those with respect to privileges." The rule allows the court to consider information that is neither admitted nor admissible, and therefore is not disclosed to the jury.

82. FED. R. EVID. 705 provides: "The expert may testify in terms of opinion or inference and give reasons therefor without first testifying to the underlying facts or data, unless the court requires otherwise. The expert may in any event be required to disclose the underlying facts or data on cross-examination."

83. Rule 703 was amended in 2000 to provide that "[f]acts or data that are otherwise inadmissible shall not be disclosed to the jury by the proponent of the opinion or inference unless the court determines that their probative value in assisting the jury to evaluate the expert's opinion substantially outweighs their prejudicial effect." FED. R. EVID. 703; *see also* Capra, *The Daubert Puzzle*, *supra* note 16, at 774–80 (discussing reasons for limiting disclosure of expert's basis to jury).



Rule 701 does not specify whether the basis for a lay opinion must be disclosed to the jury. However, logic dictates that the proponent must provide the jury with enough information to allow the jurors to evaluate the opinion and determine whether everyday reasoning supports the inferences drawn from the facts observed by the witness. If the jury is not given sufficient information about the basis for the opinion, the opinion will not be helpful, since the jury's only choice will be to take it or leave it. Thus, the witness should present to the jury the information provided to the court in support of admitting the lay opinion. The witness can give the jury an overview of her basis for the opinion or can cite specific facts that support the opinion.<sup>84</sup> Correspondingly, if the witness relies on experience, she can explain that experience to the jury.

#### *D. Form of Testimony: The Hypothetical Question*

There may also be differences in the way in which expert and lay opinion are presented at trial. Traditionally, expert witnesses often gave their opinion in response to hypothetical questions, a practice that is permitted under the Rules.<sup>85</sup> The hypothetical question posits the key facts of the case to the witness as a hypothetical case and asks the witness to express an opinion based on those hypothetical facts.<sup>86</sup> An attorney questioning a lay witness has less latitude to use a hypothetical.

Some courts have asserted that only expert witnesses are permitted to answer hypothetical questions.<sup>87</sup> In some cases, the personal knowledge requirement for lay opinion forecloses the use of hypothetical questions. For example, in *Certain Underwriters at Lloyd's, London v. Sinkovich*, the plaintiff sued under an insurance policy covering his boat.<sup>88</sup> At trial, the insurance company's investigator was precluded from testifying as an expert due to the lack of pretrial notice.<sup>89</sup> Nevertheless, the trial court permitted the

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84. See 1 BROUN ET AL., *supra* note 3, § 11, at 56 (suggesting that witness should provide as much concrete information as possible).

85. See *id.* § 14, at 86–91 (discussing hypothetical questions as a vehicle for presenting expert opinion).

86. See *id.* § 14, at 86–87; 31 AM. JUR. 2D *Expert and Opinion Evidence* § 77, at 101–02 (2002).

87. See *United States v. Henderson*, 409 F.3d 1293, 1300 (11th Cir. 2005) (concluding that witness who was not testifying as an expert should not have been permitted to answer hypothetical question and emphasizing that the distinction between lay and expert witnesses lies in the ability to answer hypothetical questions); *Teen-Ed, Inc. v. Kimball Int'l, Inc.*, 620 F.2d 399, 404 (3d Cir. 1980) (stating “[t]he essential difference, however, is that a qualified expert may answer hypothetical questions” (citing the Advisory Committee Notes accompanying Rule 703)); see also 2 WIGMORE, *supra* note 10, § 679, at 940 (stating that only skilled witnesses may respond to hypothetical questions); *Fenner*, *supra* note 29, at 977 (stating that lay witnesses are generally not allowed to respond to hypothetical questions).

88. *Certain Underwriters at Lloyd's, London v. Sinkovich*, 232 F.3d 200, 201 (4th Cir. 2000).

89. *Id.* at 203.

investigator to respond to hypothetical questions concerning steps the plaintiff could have taken to mitigate the damage to the insured boat.<sup>90</sup> The Fourth Circuit held that the testimony was improper coming from a lay witness.<sup>91</sup> There were two problems: first, in answering the question the witness offered an opinion without personally observing the necessary facts, and, second, the questioning led the witness into areas where he would have needed expertise.<sup>92</sup> The witness had not seen the accident and was not familiar with the area in which it occurred.<sup>93</sup> As a result, the testimony went beyond that permitted under Rule 701.<sup>94</sup>

However, a blanket assertion that lay witnesses cannot answer hypothetical questions is too sweeping to be accurate. There are instances in which a hypothetical question can fairly be posed to a lay witness. Suppose, for example, a witness testifies to the opinion that the deceased had the habit of stopping at a particular restaurant for breakfast on the way to work every weekday morning.<sup>95</sup> The witness could then be asked, “If the deceased left for work at the usual time on August 2, 2009, what time would the deceased have arrived at the restaurant?” The question is posed as a hypothetical, but calls for a conclusion within the witness’s competence and requires no expertise.

90. *Id.*

91. *Id.* at 205–06.

92. *Id.* at 204.

93. *Id.*

94. *Cf.* United States v. Wiseman, 339 F. App’x 196 (3d Cir. 2009). In *Wiseman*, the trial court permitted an underwriting manager to respond to a series of hypothetical questions even though she had not been identified as an expert. *Id.* at 198. The court described the questioning as follows:

The Government solicited Beck’s opinion concerning what she would have done if she had been presented with a loan application with similar representations of sale price and present value. The Government asked: “Now, if you had all this information as indicated in this chart, that you had done if you were associated with both of these loans and had this information, what would you do with that loan?” The Government later continued: “Now, let’s assume that as an underwriter or bank employee you have this information in front of you. What, if anything, do you [do] with that loan file . . . ?” And concerning the other property, the Government asked, “Now, I’ll ask you to assume for a moment that [the property] is in one of the most distressed areas . . . . With that assumption in mind, what do you do with the . . . loan file?”

*Id.* The Third Circuit declined to address the propriety of the testimony and held that, if error, it was harmless. *Id.* at 199.

95. Federal Rule of Evidence 406 permits a witness to testify concerning habit. *See* Imwinkelried, *The Next Step*, *supra* note 11, at 2293–94 (noting that before admitting evidence under Rule 406, the judge must assess whether the witness has observed enough instances of conduct to reach an opinion as to habit).

### E. Pretrial Disclosure Requirements

The rules of procedure in both civil and criminal cases mandate more extensive pretrial disclosure for expert witnesses than for other witnesses. The Rules require each party to designate its expert witnesses and provide pretrial reports describing their testimony.<sup>96</sup> In contrast, lay opinion may be introduced with no advance notice. An undesignated witness may therefore be limited to lay testimony.<sup>97</sup>

The disclosure obligation has frequently been the focal point of disputes about the scope of the lay opinion rule. Thus, a party that did not provide information about an opinion witness to the adverse party before trial may try to avoid exclusion of the evidence by arguing that the witness is a lay witness testifying to lay opinion. Conversely, the opposing party will argue that the opinion is expert opinion and should therefore be excluded to sanction the failure to comply with the discovery rules.<sup>98</sup>

The advance disclosure concerning expert witnesses protects the opposing party.<sup>99</sup> Having received pretrial notice, the opposing party can prepare to respond to the expert testimony. As a result, courts may be reluctant to treat opinion from an experienced witness as lay opinion because it allows the party to circumvent the pretrial disclosure requirement. However, the application of the rule of evidence should not be driven by procedural considerations.

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96. See FED. R. CRIM. P. 16(a)(1)(G); FED. R. CIV. P. 26(a)(2); *Downeast Ventures, Ltd. v. Wash. Cnty.*, 450 F. Supp. 2d 106, 111 (D. Me. 2006) (explaining the rationale for the disclosure requirement: “The Rule and the Scheduling Order are designed to place the opposing party on fair notice: once the expert’s qualifications and the bases for his opinion are disclosed, the opposing party possesses the necessary knowledge to consider the potential impact and to decide how to respond—to evaluate whether to engage in further discovery, such as a deposition, to investigate whether the technical and scientific basis for the proposed testimony is sound, and to determine whether to obtain a countervailing expert.”); see also Bigelow, *supra* note 3, at 8–10 (discussing the disclosure requirement); Gregory P. Joseph, *Emerging Expert Issues Under the 1993 Disclosure Amendments to the Federal Rules of Civil Procedure*, 164 F.R.D. 97 (1996) (discussing issues raised by disclosure requirements).

97. *Downeast Ventures*, 450 F. Supp. 2d at 110–11. Professor Capra makes the point that “[t]he difference . . . boils down to disclosure obligations.” Capra, *Distinguishing Between Lay Witnesses*, *supra* note 3, at 34.

98. See, e.g., *United States v. Hamaker*, 455 F.3d 1316, 1330–31 (11th Cir. 2006) (addressing defendant’s complaint that prosecution witness gave expert testimony without compliance with disclosure rule); *United States v. Ayala-Pizarro*, 407 F.3d 25, 27 (1st Cir. 2005); *Sinkovich*, 232 F.3d at 203–04 (witness restricted to lay testimony due to lack of pretrial notice); *Downeast Ventures*, 450 F. Supp. 2d at 110–11 (noting that “prudent counsel will designate such a witness as an expert to avoid the accusation that he has proffered ‘an expert in lay witness clothing’”); see also Martinez & Arlyn-Pessin, *supra* note 3, at 28–29 (discussing the disclosure requirement).

99. See *United States v. Maher*, 454 F.3d 13, 24 (1st Cir. 2006); *United States v. Figueroa-Lopez*, 125 F.3d 1241 (9th Cir. 1997) (prosecution’s use of lay witness rules “subverts the requirements” of the pretrial discovery rule); Bamberger, *supra* note 5, at 871–77 (discussing importance of pretrial disclosure).

F. *Deference Accorded Expert Opinion*

A party may obtain the advantage of deference by designating a witness as an expert and presenting opinion as expert rather than lay opinion. First, the judge may not subject the witness's reasoning process to close consideration.<sup>100</sup> Second, the witness's opinion may gain enhanced credibility, giving the opinion testimony more weight in the jurors' minds.<sup>101</sup> Finally, the party relying on the opinion may invoke the witness's expert status in argument, inviting the jury to ascribe greater weight to the testimony because the witness is an expert.<sup>102</sup>

IV. THE ROLE OF EXPERIENCE IN ESTABLISHING  
THE BASIS FOR OPINION TESTIMONY

The determination of whether an experience-based opinion is lay or expert has significant consequences, yet categorizing such opinions poses a particular challenge. Before the 2000 amendments, the line between lay and expert opinion was less stark. Once a court concluded that a witness, like Mona Lisa Vito of *My Cousin Vinny*, had unusual experience, the court could allow the witness to express an expert opinion drawing on that experience base without regard to whether the witness possessed a reliable methodology or applied anything other than ordinary reasoning skills to the

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100. See Moreno, *supra* note 5, at 5–7 (discussing inappropriate use of prosecution experts); Neil Vidmar & Shari Seidman Diamond, *Juries and Expert Evidence*, 66 BROOK. L. REV. 1121, 1177 (2001) (summarizing studies and concluding that judges are not adept at evaluating expert testimony).

101. See *United States v. Webber*, 259 F. App'x 796, 802 (6th Cir. 2008) (noting that the trial court instructed the jury that an agent had testified as an expert); *United States v. Freeman*, 498 F.3d 893, 903 (9th Cir. 2007) (noting weight accorded expert testimony); *United States v. Downing*, 753 F.2d 1224, 1239 (3d Cir. 1985) (noting that some expert testimony has an "aura of infallibility"); *State v. Blackwell*, 971 A.2d 296, 308 (Md. 2009) (noting "aura of certainty" that attached to officer's testimony concerning horizontal gaze nystagmus test); Beecher-Monas, *supra* note 20, at 81 (discussing weight accorded to expert testimony); Moreno, *supra* note 5, at 8. If the court does not use the term "expert" to label the witness, the enhancement effect is likely to be contained. See FED. R. EVID. 702 advisory committee's note (cautioning against instructing the jury that the witness is an "expert"); Charles Richey, *Proposals to Eliminate the Prejudicial Effect of the Use of the Word "Expert" Under the Federal Rules of Evidence in Criminal and Civil Jury Trials*, 154 F.R.D. 537, 559 (1994). But see Vidmar & Diamond, *supra* note 100, at 1177 (summarizing studies of juror comprehension and evaluation of expert testimony and concluding that jurors competently assess expert testimony).

102. See, e.g., *United States v. Grinage*, 390 F.3d 746, 750 (2d Cir. 2004). In *Grinage*, the court noted: "[T]he Government in its rebuttal summation told the jury that 'the agent has the background to make interpretations,' suggesting either expertise, for which he had not been qualified, or investigative information not before the jury." *Id.*

knowledge base.<sup>103</sup> The amendments hardened the line between the two types of opinion testimony, raising the question of when experience alone leads to the type of specialized knowledge that qualifies a witness as an expert and requiring a different approach to experience-based opinion testimony.

The amendments to the Rules direct courts' attention to the reasoning process employed by a witness in reaching an opinion.<sup>104</sup> The Advisory Committee's notes on Federal Rule of Evidence 701 state that "the distinction between lay and expert witness testimony is that lay testimony 'results from a process of reasoning familiar in everyday life,' while expert testimony 'results from a process of reasoning which can be mastered only by specialists in the field.'"<sup>105</sup> Thus, the distinction lies in whether the witness's reasoning process entails a reliable methodology beyond everyday reasoning.<sup>106</sup> A lay witness, however experienced, offers no methodology beyond ordinary reasoning. An expert is equipped to draw more sophisticated, yet still reliable, inferences.<sup>107</sup> The crux of expert testimony is that it presents inferences that are supported through the application of a reliable methodology.<sup>108</sup> Thus, the witness who relies on experience to support an expert opinion cannot simply claim insights arrived at by applying everyday reasoning to that experience base, but must explain the methodology employed to reach that opinion.<sup>109</sup> An experienced witness

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103. See, e.g., *United States v. Williams*, 81 F.3d 1434 (7th Cir. 1996) (allowing former gang member to decode conversations for the jury); *United States v. Johnson*, 28 F.3d 1487, 1496 (8th Cir. 1994) (allowing former gang members to testify about the business of drug trafficking). After *Daubert* was decided, but before Rule 702 was amended to require a demonstration of reliability for any expert testimony, courts debated whether experience-based expert testimony was subject to *Daubert* analysis at all. See generally *Tassin v. Sears, Roebuck & Co.*, 946 F. Supp. 1241, 1246–48 (M.D. La. 1996) (discussing debate and citing cases).

104. *United States v. Garcia*, 413 F.3d 201, 215 (2d Cir. 2005). In *Garcia*, the court noted: In this case, the government made no attempt to demonstrate that Klemick's challenged opinion was informed by reasoning processes familiar to the average person in everyday life rather than by scientific, technical, or other specialized knowledge. . . . We hold that the foundation requirements of Rule 701 do not permit a law enforcement agent to testify to an opinion so based and formed if the agent's reasoning process depended, in whole or in part, on his specialized training and experience.

*Id.* at 216.

105. FED. R. EVID. 701 advisory committee's note (quoting *State v. Brown*, 836 S.W.2d 530, 549 (Tenn. 1992)).

106. See *United States v. White*, 492 F.3d 380, 404 (6th Cir. 2007) (emphasizing that witnesses' opinions were expert opinion because they rested on specialized reasoning process and not on everyday reasoning).

107. McCormick explains: "The expert has something different to contribute. This is the power—the knowledge or skill—to draw inferences from the facts which a jury could not draw at all or as reliably." 1 BROWN ET AL., *supra* note 3, § 13, at 67.

108. See generally STRENGTHENING FORENSIC SCIENCE, *supra* note 6, at 113–22 (discussing the development and validation of new methodology); *Laser*, *supra* note 19, at 1418 (discussing meaning of methodology).

109. The Advisory Committee commented:

who does not bring such methodology to bear should be subject to the restrictions of the lay opinion rule.

The question for a court faced with an experience-based opinion is how the experience informs that opinion. In considering that question and the implications for admitting experience-based opinion, a court should be guided by the rules governing the admissibility of similar evidence of experience.

A. *How Experience Informs Lay Opinion: Similar Happenings and Other Act Evidence*

All lay opinion testimony is based on experience. The lay opinion witness brings life experience to bear on the observed facts and forms an opinion rationally based on those facts.<sup>110</sup> The witness draws conclusions based on a background of experiencing similar happenings or events and

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If the witness is relying solely or primarily on experience, then the witness must explain how that experience leads to the conclusion reached, why that experience is a sufficient basis for the opinion, and how that experience is reliably applied to the facts. The trial court's gatekeeping function requires more than simply "taking the expert's word for it."

FED. R. EVID. 702 advisory committee's note; *see* *Daubert v. Merrell Dow Pharm., Inc.*, 43 F.3d 1311, 1319 (9th Cir. 1995) ("We've been presented with only the experts' qualifications, their conclusions and their assurances of reliability. Under *Daubert*, that's not enough."). The Advisory Committee also noted: "The more subjective and controversial the expert's inquiry, the more likely the testimony should be excluded as unreliable." FED. R. EVID. 702 advisory committee's note; *see* *O'Conner v. Commonwealth Edison Co.*, 13 F.3d 1090 (7th Cir. 1994) (expert testimony based on a completely subjective methodology held properly excluded); *see also* *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 151 (1999) ("[I]t will at times be useful to ask even of a witness whose expertise is based purely on experience, say, a perfume tester able to distinguish among 140 odors at a sniff, whether his preparation is of a kind that others in the field would recognize as acceptable."). The Advisory Committee cited lower court decisions to support the assertion that experience alone may be sufficient to qualify a witness as an expert. However, those decisions suggest that expert testimony must be based on something more than simply experience. For example, in *United States v. Jones*, 107 F.3d 1147, 1159–61 (6th Cir. 1997), discussing the admissibility of handwriting analysis, the court noted that the witness's expertise was a product of knowledge, skill, education, and training, as well as experience, and commented further that the witness explained his procedure to the jury. Similarly, in *Tassin v. Sears, Roebuck & Co.*, 946 F. Supp. 1241, 1248 (M.D. La. 1996), the expert witness brought far more than experience to his testimony: he had both undergraduate and master's degrees in mechanical engineering; he had been employed for nine years by the Louisiana Productivity Center, working in areas that included product development, quality control, and manufacturing; he had an additional thirteen years of experience working at various companies in design engineering; he had served as a consultant in the design of various machines and structures. His proffered testimony concerning alternative designs was excluded because he had not applied his methodology to a reliable base of information. *Id.* at 1250–52.

110. Professor Imwinkelried asserts that "one of the most fundamental tests of the reliability of nonscientific opinion is whether it has any supporting experience, either personal or vicarious." Imwinkelried, *The Next Step*, *supra* note 11, at 2291. He goes on to cite Hume's assertion that "the trustworthiness of an inference depends upon 'a repetition of similar' experiences." *Id.*

applies everyday reasoning informed by that experience to form the opinion.<sup>111</sup> In order to determine that the opinion is rationally related to the witness's knowledge, the court must make sure that the witness has the experience base, as well as the observed facts, to rationally derive the opinion.<sup>112</sup>

The court should demand that the witness's experience base include a sufficient sample of similar events, and that those past events support the witness's inferences. Applying these criteria, courts have admitted the opinions of unusually experienced lay witnesses, as well as the opinions of witnesses with a more ordinary experience base.<sup>113</sup> But the test is always the

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111. See, e.g., *Bank of China v. NBM LLC*, 359 F.3d 171, 180–81 (2d Cir. 2004) (holding that the witness who had acquired special knowledge when he conducted an investigation of the bank's dealings with the defendant could give lay opinion based on that knowledge, and allowing the witness to testify concerning business community's understanding, certain business concepts, and what constituted fraud in the transactions with which the witness was familiar); *United States v. Jones*, 24 F.3d 1177, 1179–80 (9th Cir. 1994) (concluding that the defendant's voice identification witness was not an expert because he could point to no reliable methodology supporting his testimony, but permitting him to testify to his lay opinion based on his aural comparison of the defendant's voice with that on recordings introduced by the prosecution). Jurors also bring experience to bear on the case. See *Taylor v. Sisto*, 606 F.3d 622 (9th Cir. 2010) (discussing the role of experience in jurors' assessments and holding that trial court committed error by instructing prospective jurors that they would have to set aside all their experiences to serve on the jury); *Strong*, *supra* note 47, at 353.

112. See, e.g., *Bank of China*, 359 F.3d at 180–81 (holding that the trial court had improperly permitted the lay witness to testify to some opinions not clearly based on the witness's perceptions); *O'Conner*, 13 F.3d at 1106–07 (holding that the testimony of a physician claiming that he could recognize radiation-induced cataracts was properly excluded where the expert did not ground his opinion in the scientific literature and had only observed five cases of radiation induced cataracts).

113. Courts have traditionally permitted property owners or those intimately involved with a business to provide lay opinion concerning the value of the property or workings of the business. FED. R. EVID. 701 advisory committee's note; see, e.g., *United States v. Wiseman*, 339 F. App'x 196 (3d Cir. 2009) (holding that witnesses experienced in real estate were properly permitted to testify as lay witnesses concerning loan process); *LifeWise Master Funding v. Telebank*, 374 F.3d 917, 928–30 (10th Cir. 2004) (summarizing precedent and holding that company president could have testified to lost profits using ordinary techniques based on the company's history, but could not testify to a model concerning moving averages, compounded growth rates, and S-curves, or other technical, specialized subjects in which he was not versed); *Tampa Bay Shipbuilding & Repair Co. v. Cedar Shipping Co.*, 320 F.3d 1213, 1217–18 (11th Cir. 2003) (concluding that company's employees could properly testify as lay witnesses that company's charges were reasonable); *Asplundh Mfg. Div. v. Benton Harbor Eng'g*, 57 F.3d 1190, 1198–99 (3d Cir. 1995) (collecting examples); *MCI Telecomms. Corp. v. Wanzer*, 897 F.2d 703, 706 (4th Cir. 1990) (concluding that bookkeeper should have been permitted to testify to lay opinion on the question of the profits from leases since she personally kept the relevant records); *Teen-Ed, Inc. v. Kimball Int'l, Inc.*, 620 F.2d 399 (3d Cir. 1980) (holding that party's accountant should have been permitted to provide lay opinion concerning party's lost profits); *Falconer v. Penn Mar., Inc.*, 421 F. Supp. 2d 190, 208 (D. Me. 2006) (concluding that witness's experience in engineering business qualified him to testify as a lay witness concerning engineering responsibilities); see also *1 BROUN ET AL.*, *supra* note 3, § 10, at 51 (noting that a lay witness who was familiar with a business's operation may be permitted to testify concerning the business's profits). But see *Donlin v. Philips Lighting N. Am. Corp.*, 564 F.3d 207, 215 (3d Cir. 2009) (concluding that lay witness lacked basis to express opinion concerning estimated lost earnings and pension benefits); *JGR, Inc. v. Thomasville Furniture Indus., Inc.*, 370 F.3d 519,

same: whether the witness has enough personal information drawn from experience and observation to reach the offered conclusion using everyday reasoning.

Look for a moment at an example of routine lay opinion. Testimony concerning the speed of a car is often cited as an example of unremarkable admissible lay opinion.<sup>114</sup> Most adult lay witnesses have a sufficient experience base driving, riding in, and observing moving vehicles to be able to draw a rational inference concerning speed. But consider a witness who has lived her entire life in central Manhattan, does not drive, and has never seen highway traffic. As an adult, she ventures for the first time into the countryside and happens to witness a high-speed traffic accident. Should she be permitted to testify that, in her opinion, the defendant's car was moving sixty-five miles per hour? She has no experience base that would assure the accuracy of her opinion. While possessed of the necessary personal knowledge of the traffic accident, she does not have the accumulation of observed similar events necessary to legitimize her opinion by assuring that it is rationally based on her knowledge. Her opinion should be excluded.<sup>115</sup> Lay opinion should not be admitted without the assurance that the witness has the requisite experience of observing sufficient similar events to draw accurate inferences.

In some cases, the courts simply fail to apply Rule 701 with care. For example, in *United States v. Simas*,<sup>116</sup> the court held that agents had properly

525–26 (6th Cir. 2004) (holding that accountant-witness could not provide lay opinion on lost profits because he did not have personal knowledge of the plaintiff's books).

114. See *Bandera v. City of Quincy*, 344 F.3d 47, 54 (1st Cir. 2003) (listing speed of a vehicle as an example of the "limited" testimony permitted by Rule 701); *Asplundh*, 57 F.3d at 1197 (citing speed of vehicle as quintessential lay opinion testimony); *Clifford v. Commonwealth*, 7 S.W.3d 371, 374 (Ky. 1999) (describing testimony about the speed of a moving vehicle as common lay opinion testimony); 3 GRAHAM, *supra* note 5, § 701:1, at 26 (including the speed of a vehicle in list of common topics about which lay witnesses may testify); Imwinkelried, *Taxonomy of Testimony*, *supra* note 34, at 194 (listing the speed of a car as an example of admissible lay opinion testimony).

115. See also 3 GRAHAM, *supra* note 5, § 701:1, at 13 n.3 (discussing recluse who has no experience driving or riding in a car and concluding recluse would not be able to testify as to the observed speed of a car).

116. 937 F.2d 459, 464–65 (9th Cir. 1991); see also *United States v. Colón Osorio*, 360 F.3d 48, 52–53 (1st Cir. 2004) (permitting officer to give lay opinion that gun possessed by defendant was manufactured outside Puerto Rico and therefore had traveled in interstate commerce). In *Colón*, the witness's lay opinion masked underlying evidence questions. The court allowed the opinion because the officer had visited the factory in Massachusetts where the gun was manufactured. *Colón*, 360 F.3d at 53. The information was "based on information gleaned from [the officer's] personal experience . . . and was arrived at 'from a process of reasoning familiar in everyday life.'" *Id.* The officer did not see the gun manufactured, so he was necessarily relying on hearsay rather than his own knowledge. It seems unlikely that a court would have permitted a non-law enforcement witness to testify that a particular item was manufactured in a particular location simply on the basis of



testified as lay witnesses concerning their understanding of certain ambiguous statements made by the defendant. The court first noted that the agents had heard the actual statements, and concluded that the personal knowledge requirement of Rule 701 was therefore satisfied.<sup>117</sup> The court further concluded that the helpfulness requirement was satisfied simply because the opinions would help the jury to make sense of the sometimes incomprehensible statements of the defendant.<sup>118</sup> However, the court failed to implement the requirement that the opinion be rationally related to the facts observed by the witness.<sup>119</sup> The court should have required the prosecution to demonstrate that, in addition to hearing the statements, the agents had a background that allowed them to interpret those statements, based on prior similar instances. If that background was lacking, the opinions were not rationally derived and threatened to mislead the jury. The court may have assumed that the agents based their interpretation on prior similar conversations with the defendant, but by failing to articulate that basis and the need for a rational connection between the opinion and the observed facts, the court stripped Rule 701 of its intended role.<sup>120</sup>

The way in which experience informs lay opinion can be better understood by looking at other evidence that samples experience as a way of advancing fact-finding. To understand how courts should approach experience-based testimony, one should consider how courts approach evidence of similar happenings and other acts. These types of evidence require special scrutiny as a prerequisite to admissibility. The same scrutiny should be applied to lay opinion, which purports to draw inferences from similar happenings or other acts.

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having visited the factory. Courts have also allowed such testimony as expert testimony under Rule 702, although it is not clear how the testimony satisfies the reliability requirements. *See* United States v. Cormier, 468 F.3d 63, 72–73 (1st Cir. 2006) (allowing agent to testify as expert regarding origin of weapon); United States v. Singletary, 268 F.3d 196, 197–98 (3d Cir. 2001) (ATF agent’s expert testimony regarding origin of weapon sufficient to establish interstate commerce element of 18 U.S.C. § 922(g)). By treating the testimony as expert testimony, the courts allow the prosecution to employ a witness with no special methodology to rely on records and conversations to state an opinion, relieving the government of the obligation to obtain primary admissible evidence concerning a gun’s origin.

117. *Simas*, 937 F.2d at 464.

118. *Id.* at 465.

119. *Id.*

120. *See also* United States v. Freeman, 498 F.3d 893, 903–05 (9th Cir. 2007) (holding agent’s testimony interpreting conversations largely admissible as lay opinion); United States v. De Peri, 778 F.2d 963, 977–78 (3d Cir. 1985) (allowing witness to interpret conversations without considering basis for opinion). In some cases, courts allow this testimony as expert testimony. Instead, it should be evaluated as lay testimony.

### 1. Similar Happenings and Lay Opinion

Events that are not part of the matter on which a trial focuses are not generally admissible.<sup>121</sup> However, in some instances, such an event has particular probative value and is admitted as a similar happening. The analysis of similar happenings evidence provides a model for evaluating lay opinion.

Admissibility of similar happenings and other events is governed by Rules 402 and 403.<sup>122</sup> Rule 402 provides that if evidence has probative value, it is admissible unless otherwise excluded.<sup>123</sup> The probative value of other events generally turns on questions of similarity.<sup>124</sup> Rule 403 permits the court to exclude evidence on grounds such as the risk of unfair prejudice, jury confusion, and waste of time.<sup>125</sup> Similar happenings evidence often generates one or more of these problems and may be excluded as a result.

While not generally admissible, similar happenings evidence may be admitted to establish the existence of a defect or dangerous condition or to prove notice of such a problem.<sup>126</sup> For example, evidence of other auto accidents at a specific point on a highway may act as evidence that the stretch of road was defectively designed or constructed. But the other accidents support that inference only if they happened under substantially similar conditions. If the case on trial involves a fair weather accident and the other accidents occurred during inclement weather, then the other happenings have little probative value in the case on trial. If the court admits evidence of the other accidents, the jury will apply everyday reasoning to determine the probative value, but may be confused or unfairly prejudiced because the other accidents are superficially similar, yet dissimilar in key respects.<sup>127</sup> Thus, to determine the admissibility of the similar accidents, the trial court should scrutinize the offered evidence to determine whether the similarities permit the jury to draw the desired

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121. 22 CHARLES ALAN WRIGHT & KENNETH W. GRAHAM, JR., FEDERAL PRACTICE AND PROCEDURE § 5170, at 111–12 (1978).

122. *Id.* § 5170, at 116–18; *see also* Simon v. Town of Kennebunkport, 417 A.2d 982 (Me. 1980) (discussing use of other accidents to prove defect in sidewalk and applying Rule 402 and 403 to assess admissibility).

123. FED. R. EVID. 402.

124. *See* 1 BROUN ET AL., *supra* note 3, §§ 196–200, at 788–808 (discussing criteria for admitting similar happenings and transactions).

125. FED. R. EVID. 403.

126. *See* 1 BROUN ET AL., *supra* note 3, § 200, at 802–04.

127. 22 WRIGHT & GRAHAM, *supra* note 121, § 5170, at 114–16.

inference and whether the evidence will generate too great a risk of unfair prejudice or confusion.<sup>128</sup>

The process of evaluating lay opinion should follow a parallel path. The court should determine the basis for the opinion—both the perceived facts relevant to the case and the experience base of similar happenings that the witness can bring to bear on the issue. The court should then ask whether everyday reasoning could support drawing the proffered opinion from that base of knowledge. One possible basis for rejecting the opinion is a deficiency in the witness's experience base. If the witness has not observed enough similar happenings, the witness lacks the basis in personal experience to draw the opinion.

Consider an example. Suppose the defendant attempts to elicit the lay opinion that the plaintiff lost control of her car because it was snowing and she was driving too fast for the conditions. If the witness had only observed driving in snowy conditions on two prior occasions, the witness would not have experienced enough similar situations to draw the desired conclusion about the plaintiff's driving. Like a jury confronted with improper similar happenings evidence, the witness may be led to the opinion by superficial similarity, confusion, or improper reasoning. Even if the witness observed the entire accident, the witness should not be allowed to express that opinion.

The lay testimony allowed in *Soden v. Freightliner Corp.*<sup>129</sup> exemplifies lay testimony that has a proper experience base. It illustrates the proper relationship between similar happenings evidence and lay opinion. The plaintiffs in *Soden*, Soden's widow and children, alleged that a design flaw in step brackets on the defendant's truck had resulted in the death of Soden in a fire that erupted after the truck he was driving rolled over.<sup>130</sup> The trial court permitted a witness with extensive experience servicing trucks to testify concerning the damage to the fuel tanks he observed on that particular truck involved in the accident, and also on two or three other trucks manufactured by the defendant that he had seen following other accidents.<sup>131</sup> The other accidents included one rollover and one or two jackknives, and none involved a fire.<sup>132</sup> However, in each of the accidents, the witness had observed puncture marks in the fuel tank near the location of the step

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128. *Id.* §§ 5213–14, at 258–73.

129. 714 F.2d 498 (5th Cir. 1983).

130. *Id.* at 500.

131. *Id.* at 510–11.

132. *Id.* The witness testified that on the other occasions, he had “seen puncture holes in the fuel tanks at the location of the step brackets” that were allegedly defective; that he had seen similar holes in the fuel tanks of the plaintiff's truck; that the brackets caused the fire and that their design was dangerous; and that the plaintiff's accident prompted him to modify the brackets by removing the pointed ends. *Id.* On appeal, the defendant challenged only the witness's opinion testimony on cause and dangerousness. *Id.*

brackets.<sup>133</sup> The accidents were thus sufficiently similar on the issue of the brackets' design and the punctures they caused in the accident.<sup>134</sup> The differences in the way the accidents happened and the absence of fire did not affect the witness's ability to infer that the brackets tended to puncture the fuel tank and were therefore dangerously designed.<sup>135</sup> The evidence of the similar events could have been admitted, and the lay opinion based on those events was properly allowed.<sup>136</sup>

When a party offers lay opinion, the court should ask whether the other events on which the witness bases her reasoning satisfy the criteria applied to similar happenings. The trial court should assess the points of similarity and difference to determine whether the events in the witness's prior experience have sufficient probative value, and determine whether the differences undermine the probative value or inject confusion. When the witness's experience includes enough similar instances to support the offered opinion, the witness should describe to the jury, at least in summary, the similar happenings that form the experience base so the jury can then determine the appropriate weight to accord the opinion. Unfortunately, courts do not always include this step in their evaluation of lay opinion.<sup>137</sup>

## 2. Other Act Evidence and Lay Opinion

Lay opinion sometimes purports to draw conclusions about an actor's behavior based on that actor's prior conduct. The witness takes what she knows about the actor and uses that as a basis for interpreting the actor's behavior in the context of the case on trial. The courts should approach such lay opinion cautiously. The law carefully circumscribes the use of character and other act evidence.<sup>138</sup> Lay opinion based on such evidence should be subject to the same limitations.

The Federal Rules of Evidence strictly limit the use of a person's character or acts at other times as a basis for inferring action at the time in question.<sup>139</sup> The law generally prohibits proof of character—the type of person someone is—as a basis for concluding how the person acted at the

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133. *Id.* at 510.

134. *Id.* at 511–12.

135. *Id.*

136. *Id.* at 512.

137. *See infra* Section VI.C.

138. *See* FED. R. EVID. 404.

139. *See id.*

time in question.<sup>140</sup> Other act evidence<sup>141</sup> is restricted because of the risk that the jury will use this evidence to draw inferences about the character or conduct of the actor. The chain of inference, either from character to action in conformity or from other acts to character to action in conformity, is specifically prohibited by the Federal Rules of Evidence in most instances.<sup>142</sup> Lay opinion regarding an actor based on the actor's past conduct should be held to corresponding limitations.

There are two ways an actor's prior conduct may become admissible at trial as evidence of the actor's behavior—as evidence of habit or as the basis for judging an actor's character in the limited circumstances in which character evidence is admissible.<sup>143</sup> The rules governing habit evidence

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140. *See id.*

141. Other act evidence refers to proof of the person's conduct at some time other than events that are the subject of the trial.

142. FED. R. EVID. 404(b). *But see* FED. R. EVID. 404(a)(1)–(3), 413–15.

143. Federal Rule of Evidence 404(a) provides that evidence of a person's character or a trait of character is admissible for the purpose of proving action in conformity therewith on a particular occasion in the following limited situations:

(1) Character of Accused. In a criminal case, evidence of a pertinent trait of character offered by an accused, or by the prosecution to rebut the same, or if evidence of a trait of character of the alleged victim of the crime is offered by an accused and admitted under Rule 404(a)(2), evidence of the same trait of character of the accused offered by the prosecution; (2) Character of Alleged Victim. In a criminal case, and subject to the limitations imposed by Rule 412, evidence of a pertinent trait of character of the alleged victim of the crime offered by an accused, or by the prosecution to rebut the same, or evidence of a character trait of peacefulness of the alleged victim offered by the prosecution in a homicide case to rebut evidence that the alleged victim was the first aggressor; (3) Character of Witness. Evidence of the character of a witness, as provided in Rules 607, 608, and 609.

FED. R. EVID. 404(a)(1)–(3). In those instances, the party may establish character by calling an opinion witness. *See* 1 IMWINKELRIED ET AL., *supra* note 10, § 804, at 341–51 (describing use of opinion evidence to establish a defendant's character). The party may also prove character with evidence of reputation. FED. R. EVID. 405. *See* 1 IMWINKELRIED ET AL., *supra* note 10, § 804, at 342–45 (listing and describing the use of reputation evidence in establishing character of defendant). Reputation represents a more filtered assessment of conduct over time. *See* 1 BROUN ET AL., *supra* note 3, § 187, at 746 (describing reputation evidence as the “preferred mode of proof of character”); 1 IMWINKELRIED ET AL., *supra* note 10, § 804, at 344 (noting that all courts permit the use of reputation testimony, and describing such testimony as “likely to be fairly trustworthy”). Also, if character is an element of a claim or defense, the party can introduce specific instances of conduct to allow the jury to infer character from past conduct. *See* 1 BROUN ET AL., *supra* note 3, § 187, at 744–47 (noting that, when character is a material fact in a case, courts typically permit evidence of specific acts); 1 GRAHAM, *supra* note 5, § 405:2, at 919–20 (noting that specific instances of conduct may be introduced into evidence whenever character is an essential element of a charge, claim, or defense); 1 IMWINKELRIED ET AL., *supra* note 10, § 804, at 344 (stating that evidence of specific acts are permissible when a defendant's character is “an ultimate, material fact in the case”). The opinion regarding the person's character is based on the witness's assessment of the person's past behavior in light of the witness's experience of people in general. The character witness must have both a sufficient sampling of the person's conduct and sufficient relevant life experience to rationally support the opinion. *See* 1 BROUN ET AL., *supra* note 3, § 11, at 57 n.30 (stating that “a foundation must be laid as to the witness's personal knowledge of facts to which the observed facts are being

relate closely to lay opinion. Proof of habit may be admitted to prove behavior consistent with the actor's habitual behavior only if evidence of the actor's past conduct establishes a pattern so regular and consistent that it supports an inference about the actor's behavior at the time in question.<sup>144</sup> Habit may be established one of two ways. The party may prove enough specific instances of conduct that the jury can fairly infer the behavior was habitual. Alternatively, the party may present a witness who can testify to the habit.<sup>145</sup> The witness's testimony takes the form of lay opinion and should be assessed accordingly.<sup>146</sup> To arrive at the opinion, the witness applies ordinary reasoning and knowledge gleaned from experience with other people to the witness's observation of the actor. The witness must have a large enough sampling of the behavior in question to rationally conclude it is habitual.<sup>147</sup> Thus, when determining whether habit evidence is admissible, the court must ensure that the instances of similar behavior presented to the jury or known to the opinion witness support the conclusion about habit as an indicator of likely conduct at the time in question.

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compared"); *see also* United States v. Williams, 212 F.3d 1305, 1309–10 (D.C. Cir. 2000). In *Williams*, the D.C. Circuit noted:

The Office of Legal Education of the Executive Office for United States Attorneys provides guidelines to establish a proper foundation for the opinion testimony of a skilled lay observer: 1. That the witness has, on prior occasions sufficient in number to support a reasonable inference of knowledge of or familiarity with a subject, observed particular events, conditions, or other matters.

*Williams*, 212 F.3d at 1309–10 n.6.

144. FED. R. EVID. 406 provides:

Evidence of the habit of a person or of the routine practice of an organization, whether corroborated or not and regardless of the presence of eyewitnesses, is relevant to prove that the conduct of the person or organization on a particular occasion was in conformity with the habit or routine practice.

145. *See* 1 BROUN ET AL., *supra* note 3, § 195, at 786 (listing witness testimony and specific instances as methods of proving habit, and noting that witness testimony is the most common method of proof); 1 GRAHAM, *supra* note 5, § 406:4, at 949 (noting that, while Rule 406 is silent on the method of proof, the Advisory Committee's Note to Proposed Rule 406(b) listed opinion testimony and proof of "specific instances [of conduct] sufficient in number to warrant a finding [of] habit" as methods of proof); 1 IMWINKELRIED ET AL., *supra* note 10, § 809, at 363 (listing specific instances and opinion evidence as "recognized methods" of proving existence of habit).

146. *See* 1 GRAHAM, *supra* note 5, § 406:4, at 951 (noting that a lay witness may provide testimony regarding habit, and that such testimony must comply with the provisions of Rule 701); 1 IMWINKELRIED ET AL., *supra* note 10, § 809, at 364 (stating that judges should determine the admissibility of lay opinion using Rule 701 criteria).

147. *See* 1 BROUN ET AL., *supra* note 3, § 195, at 786 (noting that there must be enough instances to establish habit); 1 GRAHAM, *supra* note 5, § 406:2, at 940 (stating that habit testimony is admissible "only if a sufficient pattern of repeated responses is established").

Other act evidence may also be admitted if it is relevant for a non-character, non-conduct purpose.<sup>148</sup> To admit other act evidence on this basis, the trial court must determine that the evidence plays a non-character role and will not simply be used as character evidence. Thus, the court has to assess the connection between the other act evidence and the permissible inference for which it is offered. Moreover, even if the evidence has probative value for a non-character purpose, the court has discretion to exclude the evidence if it is substantially more likely that the jury would use it as evidence of character and action in conformity than for the permitted purpose.<sup>149</sup>

Thus, other act evidence is subject to strict rules. In the situations in which such evidence is admissible, the trial court is required to carefully assess the basis for offering the evidence and its probative value for the permitted purpose. Opinion testimony based on observation of past conduct should be similarly scrutinized and restricted.<sup>150</sup>

### 3. Evidence of Third Party Conduct and Lay Opinion

Lay opinion is sometimes derived from assessments based on third party conduct. The witness takes what she knows about the behavior of others and uses that as a basis for interpreting or predicting the behavior of the actor in question. The courts should approach lay opinion that rests on third party conduct with particular caution. Evidence of third party conduct is rarely admissible, and lay opinion based on such evidence should likewise be restricted.

Evidence of a third party's conduct provides little probative insight into how someone else acted. Such use of third party conduct raises the concerns underlying both evidence of similar happenings and evidence of the prior conduct of the actor. Superficial similarity may draw the witness and the jury to unfounded inferences. A witness using third party behavior to form an opinion may over-generalize, reaching unsupported conclusions.

Take a simple example. Suppose the defendant crashes her car into a tree, injuring a passenger in the car. Suppose also that two other drivers in the previous six months crashed into the same tree and were shown to have been negligent. Can the passenger-plaintiff introduce evidence of those

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148. Other act evidence may also be admissible when it proves something other than character and conduct in conformity, such as identity, motive, or knowledge. FED. R. EVID. 404(b).

149. FED. R. EVID. 403 provides: "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." See also 1 GRAHAM, *supra* note 5, § 404:5, at 607 (discussing Rule 403).

150. Cf. Moreno, *supra* note 5, at 43–44 (suggesting that drug jargon testimony acts impermissibly as evidence of bad character by suggesting to the jury that the defendant learned the jargon while engaged in prior drug dealing).

crashes and ask the jury to infer that, because those two drivers were negligent, the defendant was also negligent? The answer is clearly no. If all three drivers were driving rental cars, could the plaintiff introduce that evidence and ask the jury to conclude that the plaintiff, having the use of the rental car in common with the third parties, was therefore negligent? Again, the answer is a clear no. While evidence of similar accidents may be used to establish a static condition, such as defect in the design or maintenance of the road,<sup>151</sup> it cannot be used to prove the behavior of the plaintiff. Correspondingly, a witness should not be allowed to base a lay opinion that the defendant was negligent on the conduct or characteristics of the other two drivers.

That is not to say that third party conduct is never relevant or that a lay opinion based on third party conduct is never admissible.<sup>152</sup> In some situations, experience with the behavior of others can appropriately inform a witness's lay assessment. For example, the lay opinion that a person acted intoxicated may be based entirely on the comparison of the person's conduct with that of intoxicated third parties observed by the witness at other times.<sup>153</sup> If the person in question exhibits similar behavior, the witness can fairly opine that the person was intoxicated.<sup>154</sup>

When lay opinion rests in part on third party conduct, the court should challenge and scrutinize the underlying chain of inferences. The court should demand a very high level of similarity between the third party conduct and that of the person in question. The court should also make sure

151. See 1 BROUN ET AL., *supra* note 3, § 324.3, at 418 (discussing the admissibility of evidence of similar accidents and injuries and the role the evidence may play).

152. In some cases, courts exclude testimony based on a third party that is relevant and would be helpful to the jury. In *Trevino v. City of Rock Island Police Department*, 91 F. Supp. 2d 1204, 1206–08 (C.D. Ill. 2000), the court rejected the testimony of a monocular police officer on a range of issues relating to whether a monocular officer could appropriately perform the job of a police officer. The court held that the witness did not qualify as an expert. *Id.* at 1208. Instead, the court should have recognized the witness as an experienced lay witness and permitted him to testify concerning his ability to execute specific tasks. The witness's conduct could help the jury understand the extent to which monocularism does or does not impede the ability to function as an officer.

153. See, e.g., *United States v. Denny*, 48 F. App'x 732, 737–38 (10th Cir. 2002) (upholding the admissibility of a witness's statement that defendant was "extremely intoxicated" as appropriate lay witness testimony); *Asplundh Mfg. Div. v. Benton Harbor Eng'g*, 57 F.3d 1190, 1196 (3d Cir. 1995) (listing lay witness opinion that an individual appeared drunk as exemplary of Rule 701 testimony); *State v. Hall*, 353 N.W.2d 37, 43 (S.D. 1984) (upholding lay testimony of police officers that defendant was intoxicated based on the officers' previous interactions with intoxicated individuals).

154. Of course, even in these situations, an opinion based solely on comparison with third parties who exhibited similar behavior by definition does not take into account the personal situation of the actor and will be wrong if the symptoms are caused by insulin imbalance or some other condition that manifests itself in similar symptoms. The use of reliable methodology, such as a blood test or a breathalyzer test, will avoid this problem.



that the inferences drawn from the third party conduct are fair in the context of the particular case. In addition, the court should guard against the possibility that the opinion invites the jury to view the person in question as sharing character traits with the third parties and acting in conformity with that character.

Unfortunately, courts sometimes admit opinion based on third party conduct without adequate scrutiny.<sup>155</sup> For example, courts routinely admit law enforcement testimony concerning drug jargon, opining that the defendant's words were actually code or jargon for drug-related terms. The opinion concerning the meaning of terms is based on having heard third parties use them in a context that revealed their meaning to the witness, and inferring therefore that the defendant is using the terms in the same way.<sup>156</sup> This jargon testimony is merely lay opinion based on the conduct of third parties. While the testimony may sometimes be admissible, the court should ensure that the opinion witness has heard the exact jargon used in sufficiently similar circumstances an adequate number of times to reasonably infer that the defendant's meaning is the same as that of the third parties' meaning.

#### B. *How Experience Informs Expert Opinion*

Most expert opinion also rests to some degree on the experience of the witness.<sup>157</sup> However, regardless of the extent to which an expert relies on experience, the expert must demonstrate a reliable methodology.<sup>158</sup>

If the witness offers expert opinion, employing a specialized methodology to develop inferences based in part on a rich experience base, the court must inform itself about the methodology, assuring itself that the methodology is reliable and was reliably applied to an adequate basis of

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155. See *infra* Section VI.D.

156. United States v. Diaz, No. CR 05-00167 WHA, 2006 WL 2699042, at \*2 (N.D. Cal. Sept. 19, 2006) (describing manner in which law enforcement officer arrived at understanding of jargon). In *Diaz*, although it treated the witness as an expert, the court recognized that jargon testimony rests on "repetition and context" and properly held that the officer should not have been permitted to testify to the meaning of a phrase he had never heard used before. *Id.* at \*3-4.

157. See David L. Faigman, *Expert Evidence in Flatland: The Geometry of a World Without Scientific Culture*, 34 SETON HALL L. REV. 255, 259-60 (2003) (discussing basis for expert testimony and noting that the "essence of the expert's testimony is that this case is like other similarly situated cases in the world"); Imwinkelried, *Taxonomy of Testimony*, *supra* note 34, at 204 (arguing that experts necessarily rely on "accumulated, vicarious experience" and not solely on personal experience). But see David Crump, *The Trouble with Daubert-Kumho: Reconsidering the Supreme Court's Philosophy of Science*, 68 MO. L. REV. 1, 15-16 (2003) (complaining that expertise based on experience does not fit into the analytical framework of *Daubert* or amended Rule 702).

158. See FED. R. EVID. 702 advisory committee's note (emphasizing reliability requirement).

information relevant to the case.<sup>159</sup> The court should ask what the witness has done with the experience.

The line dividing expert opinion and lay opinion from a witness with unusual experience is sometimes very fine.<sup>160</sup> In *United States v. Kayne*, for example, the jury needed help determining the value of the rare coins the defendants had allegedly sold for inflated prices.<sup>161</sup> The prosecution called eight coin dealers to testify concerning the value of the coins, and the First Circuit saw no error, noting that “[o]pinions of value are a traditional subject of expert testimony.”<sup>162</sup> The witnesses were experienced and explained their methods of assessing value.<sup>163</sup> The court did not elaborate on the witnesses’ methodology, but consider the possibilities: If a coin dealer merely assessed value based on personal experience buying and selling similar coins, the witness’s opinion should be treated as lay opinion. If the witness’s opinion reflected the use of more far-reaching research and application of method,<sup>164</sup> the witness should be evaluated as an expert.

#### V. THE RISK OF ADMITTING OPINION BASED ON EXPERIENCE ALONE

Whether or not a witness is an expert, a party may seek to gain an advantage by pushing the limits of permitted opinion testimony. The risk with all experience-based opinion is that the jury will defer to the witness’s

159. If the expert cannot demonstrate a reliable connection between the facts and the opinion, the opinion should be excluded. See *Moore v. Ashland Chem. Inc.*, 151 F.3d 269, 277–79 (5th Cir. 1998) (concluding that trial court properly excluded aspects of opinion that were not shown to be reliably grounded in science); Mark P. Denbeaux & D. Michael Risinger, *Kumho Tire and Expert Reliability: How the Question You Ask Gives the Answer You Get*, 34 SETON HALL L. REV. 15, 48–60 (2003) (discussing evaluation of witness whose expertise is based in part on experience).

160. See, e.g., *Walker v. Soo Line R.R. Co.*, 208 F.3d 581, 591 (7th Cir. 2000) (concluding that witness whose professional experience included responsibility for safety of power facilities from lightning was qualified to give expert testimony concerning the safety of the tower in which plaintiff claimed to have been struck by lightning). The court did not elaborate on the witness’s experience. Whether he was fairly treated as an expert would depend on whether he analyzed the tower’s safety with the help of some reliable methodology acquired through his experience or whether he simply used everyday reasoning and analogized from events in his experience.

161. *United States v. Kayne*, 90 F.3d 7, 11 (1st Cir. 1996).

162. *Id.* at 11–12.

163. *Id.* at 12.

164. The witness could research the provenance of the coins and the price the coins would bring in different geographic markets and at different times. See *United States v. Numisgroup Int’l Corp.*, 170 F. Supp. 2d 340, 346–47 (E.D.N.Y. 2001) (discussing the use of an expert witness with a history of leadership and success in the numismatic community to testify as to the grade and appraisal value of fraudulent coins); see also 95 AM. JUR. 3D *Proof of Facts* §§ 38–41, 44–57, at 271–80, 285–337 (2009) (providing history of coin appraisal and grading, including how a witness may be considered an expert in the field, and the role of opinion testimony as to coin value).

inferential process simply because the witness has superior information.<sup>165</sup> A witness with a long history of observing a particular type of behavior may draw conclusions based on those observations. However, experience alone does not assure reliability.<sup>166</sup> A rich experience base does not necessarily sharpen the witness's reasoning process, and may deepen the witness's bias.<sup>167</sup>

In addition, the admission of experience-based opinion creates the opportunity for overreaching when courts fail to subject the opinion to appropriate scrutiny. If the court fails to determine that the witness's experience base fits the issue and that the witness's reasoning from experience is reliable, a party may exploit the opportunity, pushing beyond the fair use of the opinion witness. The party may use the opinion witness to vouch for inferences only loosely supported by the evidence or add the expert's imprimatur to inferences more properly left for counsel's argument.<sup>168</sup> The party may elicit testimony that goes beyond what can be rationally inferred from the witness's particular combination of experience

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165. While recognizing that expert opinion may be based on experience alone, the Advisory Committee cautions courts to approach such testimony with care. See FED. R. EVID. 702 advisory committee's note; see also Bernstein, *Expert Witnesses*, *supra* note 16, at 482–83 (discussing experience-based expertise under Rule 702).

166. See Bernstein, *Expert Witnesses*, *supra* note 16, at 486 (recognizing that “connoisseur” testimony may not be admissible under Rule 702 because its reliability cannot be shown); D. Michael Risinger et al., *The Daubert/Kumho Implications of Observer Effects in Forensic Science: Hidden Problems of Expectation and Suggestion*, 90 CALIF. L. REV. 1 (2002) (considering ways in which inaccuracy affects forensic sciences).

167. See *Donlin v. Philips Lighting N. Am. Corp.*, 564 F.3d 207, 215 (3d Cir. 2009); *United States v. Paiva*, 892 F.2d 148, 157 (1st Cir. 1989). In *Donlin*, the Third Circuit stated: “When a lay witness has particularized knowledge by virtue of her experience, she may testify—even if the subject matter is specialized or technical—because the testimony is based upon the layperson’s personal knowledge rather than on specialized knowledge within the scope of Rule 702.” *Donlin*, 564 F.3d at 215. In *Paiva*, the First Circuit held that a drug user who had tasted and observed the appearance of the questioned substance could properly testify to a lay opinion that it was cocaine. *Paiva*, 892 F.2d at 157. The court stated:

Although a drug user may not qualify as an expert, he or she may still be competent, based on past experience and personal knowledge and observation, to express an opinion as a lay witness that a particular substance perceived was cocaine or some other drug.

... The liberalization of Rule 701 has blurred any rigid distinctions that may have existed between lay witnesses and expert witnesses. . . . No longer is lay opinion testimony limited to areas within the common knowledge of ordinary persons. Rather, the individual experience and knowledge of a lay witness may establish his or her competence, without qualification as an expert, to express an opinion on a particular subject outside the realm of common knowledge.

*Id.* (citations omitted); see also Gross & Mnookin, *supra* note 67, at 156–58 (discussing the risk of bias in law enforcement testimony based on experience); Moreno, *supra* note 5, at 30 (discussing the hazards of reasoning from experience, which include the risk that the witness will rely on intuition or will reach conclusions that are “personal, idiosyncratic, and subjective”).

168. See *United States v. Garcia*, 413 F.3d 201, 214 (2d Cir. 2005) (condemning the use of introductory overview by opinion witness and remarking that “[t]he law already provides an adequate vehicle for the government to ‘help’ the jury gain an overview of anticipated evidence as well as a preview of its theory of each defendant’s culpability: the opening statement”).

and observation, introducing opinion testimony that should not properly be admitted.<sup>169</sup>

Courts should distinguish between applying ordinary reasoning to a broad experience base and applying some reliable methodology informed by a broad experience base.<sup>170</sup> If the witness brings no reliable methodology beyond everyday reasoning from observed similar situations to the proffered opinion, the witness should be evaluated as a lay witness, subject to the corresponding limitations. The court should question whether the opinion is rationally based on the witness's perception—whether it rests on inferences fairly drawn from the witness's experience—and the jury should be invited to scrutinize the opinion in the same way.

In some cases, courts defer too readily to claims that a witness can draw certain inferences based on experience. The courts should recognize that mere experience, uninformed by methodological analysis, can lead to false inferences.<sup>171</sup> The very experience base that qualifies the witness may bias the witness to view new situations through a distorted lens—swayed by an anecdotal sense of what inferences can be drawn, but not by any reliable method of approach.<sup>172</sup>

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169. See, e.g., *United States v. Mejia*, 545 F.3d 179, 188–91 (2d Cir. 2008) (correcting trial court's erroneous admission of "expert" testimony that drew together hearsay from unspecified sources to summarize the activity of the gang whose members were on trial, and noting "it is a little too convenient that the Government has found an individual who is expert on precisely those facts that the Government must prove to secure a guilty verdict—even more so when that expert happens to be one of the Government's own investigators"); *United States v. Lopez-Medina*, 461 F.3d 724, 744–45 (6th Cir. 2006) (noting that the prosecution's expert witness's testimony "essentially amounted to an expert opinion that the items he himself had found in [the defendant's] home demonstrated a conspiracy to distribute cocaine"); see also *United States v. Frazier*, 387 F.3d 1244, 1264–65 (11th Cir. 2004) (holding that trial court properly excluded witness's testimony concerning physical evidence that would be "expected" in case of rape).

170. Courts have recognized, for example, that witnesses with medical training and expertise should not be permitted to present an opinion based on their anecdotal observations in their medical practice. See David E. Bernstein, *The Admissibility of Scientific Evidence After Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 15 CARDOZO L. REV. 2139, 2147–60 (1994) [hereinafter Bernstein, *Admissibility of Scientific Evidence*] (discussing cases); see also Bernstein, *Expert Witnesses*, *supra* note 16, at 476–77 (giving examples of scientific opinions based on "educated guesses" rather than reliable methodology and proven to be wrong).

171. See Capra, *The Daubert Puzzle*, *supra* note 16, at 720–23 (discussing the problems of anecdotal information as a basis for reliable opinion). Professor Capra points out two problems with anecdotal information: it may be too limited a sample to support the conclusion and it may be too dissimilar to support the conclusion. *But see* Crump, *supra* note 157, at 26 (assuming that Freud's dream theories should be admissible and referring to the exclusion of fingerprint ID as "nonsensical"). Professor Crump seems reluctant to entertain challenges to accepted "science" even though it is not shown to rest on reliable foundation.

172. See *United States v. Hermanek*, 289 F.3d 1076, 1096 (9th Cir. 2002) (noting that government expert on drug jargon "appears at times to have interpreted cryptic language as referring

Experience-based opinion may be skewed by perception bias—the tendency to ascribe greater significance to observed facts than is warranted.<sup>173</sup> A witness who identifies with a particular point of view will view the data through that prism, skewing the inferences drawn.<sup>174</sup> As a result, an untrained witness who has observed certain patterns may overgeneralize, drawing bad conclusions. The witness may leap to unwarranted inferences, ascribing more significance to the knowledge base than it supports.<sup>175</sup> Reasoning solely from experience, the witness may be prone to biased conclusions. One role of reliable methodology is to minimize the impact of bias.<sup>176</sup>

Another source of unreliability when a witness reasons from experience to opinion without the benefit of reliable methodology has been referred to as “*post hoc* reasoning.”<sup>177</sup> *Post hoc* reasoning imputes significance to

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to cocaine simply because he believed appellants to be cocaine traffickers” and condemning “[s]uch circular, subjective reasoning”); see also Bernstein, *Expert Witnesses*, *supra* note 16, at 453–55 (arguing that modern rules for expert testimony are necessary due to adversarial bias on the part of expert witnesses); Risinger et al., *supra* note 166, at 19–26 (discussing how bias impacts observation and conclusions).

173. See KEITH A. FINDLEY, *CONVICTION OF THE INNOCENT: LESSONS FROM PSYCHOLOGICAL RESEARCH* (B. Cutler ed., 2010) (discussing the problem of “tunnel-vision,” which leads law enforcement officers and prosecutors to focus on information that supports their conclusion of a defendant’s guilt while ignoring information that goes against the established conclusion); STRENGTHENING FORENSIC SCIENCE, *supra* note 6, at 122 (discussing the “willingness to ignore base rate information in assessing the probative value of information” and noting, for example, that the significance of finding carpet fibers that match those in the suspect’s home depends on the base rate—the rate at which those fibers are found in other homes); Moreno, *supra* note 5, at 39 (addressing the threat of prejudice posed by a law enforcement officer who offers expert testimony based solely on subjective on-the-job experiences); see also *United States v. Murphy*, 457 F. Supp. 2d 1228, 1231 (D. Kan. 2006) (acknowledging that a witness’s bias may cause the court to enforce requirements for expert testimony more strictly).

174. The committee that undertook a study of forensic sciences for the Academies of Science saw bias as a sufficiently large problem and they recommended research on “human observer bias and sources of human error in forensic examinations.” STRENGTHENING FORENSIC SCIENCE, *supra* note 6, at 24, 122–24 (discussing the role of bias and recommending a study of the issue and steps to reduce the impact of bias); see also Angela Fagerlin et al., *Reducing the Influence of Anecdotal Reasoning on People’s Health Care Decisions: Is a Picture Worth a Thousand Statistics?*, 25 *MED. DECISION MAKING* 398, 398–99 (2005) (explaining the tendency of anecdotal information to influence medical decisions); Emily L.B. Lykins et al., *Beliefs About Cancer Causation and Prevention as a Function of Personal and Family History of Cancer: A National, Population-Based Study*, 17 *PSYCHO-ONCOLOGY* 967, 972 (2008) (explaining how beliefs concerning cancer are influenced by personal and family history of cancer). One may also hypothesize that experts will intentionally manipulate the evidence if courts do not adequately check for reliability. See Laser, *supra* note 19, at 1409.

175. Bias may lead one to become anchored to an early conclusion or to “see patterns that do not actually exist.” STRENGTHENING FORENSIC SCIENCE, *supra* note 6, at 123–24.

176. *Id.* at 122 (discussing bias).

177. See Bernstein, *Admissibility of Scientific Evidence*, *supra* note 170, at 2147–49 (discussing *post hoc* reasoning).

observed events that is not statistically warranted.<sup>178</sup> Only the application of reliable assessment can assure the court that the opinion witness is not engaging in such faulty reasoning. Consider again the example of a law enforcement witness who testifies that the defendant's use of a rental car indicates that defendant is an experienced narcotics trafficker.<sup>179</sup> The agent's opinion ascribes criminal significance to facially neutral conduct. The agent did not bring any special methodology to the opinion interpreting the defendant's conduct; the agent brings only experience—repeated observations of similar conduct—and pooled information gathered from other law enforcement agents. Both the agent and the sources of the pooled information are biased sources. The result may be a biased and unwarranted opinion. Before allowing the opinion, the court should analyze it closely.

The testimony of this law enforcement witness should not be viewed as expert opinion.<sup>180</sup> No methodology plays a role in arriving at the conclusion that use of a rental car suggests an experienced drug dealer. In addition to the witness's own observations of this and of prior drug transactions, the witness may have obtained information from other agents either anecdotally or through some sort of training classes. In effect, these amount to a single argument: that the witness is an expert by virtue of access to the law enforcement community's pooled information. But the collective information is derived from pooling experience-based knowledge and beliefs, without subjecting the information and conclusions to testing under the lens of some reliable methodology. The reasoning underlying the expert opinion, while collective, is familiar lay reasoning applied by a group that is biased by its focus on investigation of narcotics trafficking: "We have seen this happen often enough that we think it is significant in this particular way." The court should not allow that conclusion to be presented to the jury without scrutinizing its foundation and justification. Before allowing this as

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178. See *id.* (discussing illustration of a physician who observes a small sample of children who develop a brain tumor after receiving measles vaccine and infers a causal relationship). Professor Bernstein criticizes the courts for accepting such reasoning too readily, noting that family physicians often gave such testimony. *Id.* at 2145.

179. *United States v. Figueroa-Lopez*, 125 F.3d 1241, 1243 (9th Cir. 1997); see also Capra, *Distinguishing Between Lay Witnesses*, *supra* note 3, at 3, 34 (discussing *Figueroa-Lopez*). In *Figueroa-Lopez*, the Ninth Circuit rejected the prosecution's argument that the opinion was admissible as lay opinion, but held that the opinion would be admissible only if the witness was qualified as an expert. *Figueroa-Lopez*, 125 F.3d at 1247.

180. See *United States v. Moore*, 521 F.3d 681 (7th Cir. 2008) (noting that to arrive at the conclusion that only guilty people are present at a drug deal, the law enforcement expert "assumes that everyone present is culpable and uses that assumption as the 'proof' of culpability," and condemning the reasoning as unreliable).

expert opinion, the court must demand that some reliable methodology be employed to counteract the effect of inferences drawn by biased observers.

The agent's opinion should be evaluated as lay opinion. The court should gather enough information about the agent's experience base to assess the relationship between the information known to the agent and the proffered opinion, asking if the agent's conclusion is rationally related to the facts perceived. The court cannot properly evaluate the opinion without information about the frequency of drug deals not involving rented cars, the frequency and characteristics of drug deals involving rental cars, and the frequency of use of rental cars for other purposes in the relevant community. The court can assure that the witness's opinion is fairly grounded in observed facts and not skewed by the witness's bias only if it is fully informed on the underlying basis.

#### VI. SCRUTINIZING EXPERIENCE-BASED OPINION: APPLYING RULE 701 WITH BITE

Courts often fail to subject experience-based opinion to proper scrutiny under either the standards for lay opinion or those for expert opinion. At times, courts accept too readily claims that a witness's unspecified experience base supports the inferences expressed in a lay opinion. At other times, courts inappropriately accept claims that a witness has developed relevant expertise from experience alone. In both situations, juries are permitted to hear unsupported opinion testimony that should be deemed inadmissible.

The following subsections detail five steps the courts should take to control the use of experience-based opinion testimony. These steps should be added to the comments to Rule 701 to provide stronger protection from unfounded and unreliable opinion testimony. First, instead of treating witnesses as experts by virtue of their experience and training, the court should evaluate them as experienced lay witnesses. Second, the court should not take at face value claims of expertise based on training or shared experience; such claims may reflect nothing more than a set of unreliable beliefs shared by a particular group. Third, the court should scrutinize opinions informed by the witness's experience, asking if the witness's experience base includes enough similar observations to support the witness's opinion. Fourth, the court should limit the extent to which a witness can base an opinion on the conduct of unrelated third parties. Finally, the court should check the inferences drawn from experience and prohibit over-claiming, preventing the witness from drawing broad, inadequately supported opinions.

## A. Evaluate Experience-Based Opinion as Lay Opinion

The lay opinion rule provides the preferred framework for analyzing experience-based opinion because every lay opinion represents the application of ordinary reasoning to the witness's cumulated experience to inform personal observation.<sup>181</sup> Accordingly, the courts should scrutinize these opinions to ensure that they are rationally derived from the witness's experience base using everyday reasoning. Thus, the opinions of the witnesses described in the hypothetical cases at the beginning of this Article—Mona Lisa Vito, the law enforcement witness with experience in drug cases, and the witness whose opinion rests on experience with motorcycles—should be evaluated as lay opinion. Only when the witness brings a reliable methodology to bear on the experience should the witness's testimony be evaluated under the rules governing expert testimony. Specifically, the rules governing lay opinion should constrain opinion testimony from witnesses who base their opinions on a deep experience base, but no reliable methodology, by ensuring that the opinion is rationally related to the witness's knowledge and experience.

In some cases, courts erroneously admit opinion evidence that should be excluded because it fails to satisfy the requirements for either lay or expert opinion.<sup>182</sup> In *Satcher v. Honda Motor Co.*,<sup>183</sup> for example, the plaintiff

181. This will allow the proponent to present the opinion testimony without complying with the pretrial disclosure rules applicable to expert testimony. See discussion of pretrial disclosure rules *supra* Section III.C.2. The opposing party's protection will lie in the trial court's careful assessment of the opinions offered and the court's discretion to permit the opposing party additional time to prepare cross-examination or obtain a responsive witness.

182. See, e.g., *Betterbox Commc'ns Ltd. v. BB Techs., Inc.*, 300 F.3d 325 (3d Cir. 2002). In *Betterbox*, a trademark infringement case tried before the amendments to Rule 702 went into effect, the Third Circuit affirmed the admission of expert testimony based on experience, but acknowledged that there was no showing of reliable methodology. *Id.* at 328–29. While an expert could apply reliable methodology to determine the likelihood of confusion, these experts did not, so their testimony should not have been admitted as expert testimony. *Id.* at 329–30. Nor was it clear that their testimony satisfied the requirements for lay opinion. *Id.*

The testimony of forensic experts also poses problems that should be addressed by more exacting application of the rules governing lay and expert opinion. See STRENGTHENING FORENSIC SCIENCE, *supra* note 6, at 127–82 (challenging the reliability of a number of forensic sciences); Beecher-Monas, *supra* note 20, at 74 n.126 (demonstrating the lack of reliability of bite-mark evidence that is routinely admitted); Bernstein, *Expert Witnesses*, *supra* note 16, at 459–61 (forensic testimony); Simon A. Cole, *Where the Rubber Meets the Road: Thinking About Expert Evidence as Expert Testimony*, 52 VILL. L. REV. 803, 819–22 (2007).

Arson testimony illustrates the way in which courts have accepted claims of experience-based expertise and admitted unfounded expert opinion where evaluation of the experience as a basis for lay opinion should have prompted the courts to exclude the evidence. See STRENGTHENING FORENSIC SCIENCE, *supra* note 6, at 173 (discussing the unreliability of arson expertise); David



claimed that the motorcycle he had been riding at the time of his injury was not crashworthy, alleging that it should have had crash bars. At trial, the efficacy of using crash bars was disputed.<sup>184</sup> To support his claim, the plaintiff called a former police officer as an expert to give his opinion that the crash bars used on police motorcycles were “effective in reducing injuries.”<sup>185</sup> The witness had no formal training that would give him expertise in motorcycle design.<sup>186</sup> His claim to expertise lay in his nine-year service on the police motor squad and his investigation of hundreds of motorcycle accidents.<sup>187</sup> The witness brought no methodology to bear on his assessment, but merely drew inferences based on his experience.<sup>188</sup> Thus, his opinion was based on his application of everyday reasoning to draw inferences from the many similar happenings he had observed. The trial court allowed this witness to testify as an expert that, based on his observations, he had the impression that crash bars provided effective protection of the rider’s leg.<sup>189</sup> The court should have instead scrutinized and excluded the testimony as lay opinion.<sup>190</sup>

Low-level experience-based experts, such as law enforcement officers with some experience in drug enforcement, who have been treated as experts in the past, are unlikely to satisfy the reliability requirement now imposed on expert testimony.<sup>191</sup> While they possess an unusual knowledge base as a result of their experience, they apply no methodology beyond everyday reasoning to draw inferences from their experience, and their opinions

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Grann, *Trial By Fire: Did Texas Execute an Innocent Man?*, NEW YORKER, Sept. 7, 2009, at 42 (discussing the unreliability of arson evidence).

183. 52 F.3d 1311, 1313 (5th Cir. 1995).

184. *Id.* at 1316. One manufacturer, Harley-Davidson, recommended against the use of crash bars on police motorcycles. *Id.* at 1316–17. Engineering experts had conducted tests to determine whether crash bars increased safety, with mixed results. *Id.* Some engineering tests suggested that the utility of the crash bars depended on the precise nature of the motorcycle accident. *Id.*

185. *Id.* at 1316. The court held that permitting the witness to testify as an expert was not error. *Id.* at 1317–18. The court provided the following account of his testimony:

Kenneth Harms, a former Miami police chief with experience on the motorcycle patrol and in investigating motorcycles accidents, believes that police crash guards, particularly those used on Harley-Davidson motorcycles, are effective in reducing injuries. Harms conceded that he had no scientific or engineering expertise in motorcycle design. Harley-Davidson has expressly recommended against the use of crash bars on its police motorcycles.

*Id.* at 1316.

186. *Id.*

187. *Id.* at 1317–18. It was not clear that he had any experience with Honda motorcycles. *See id.*

188. *Id.*

189. *Id.*

190. The experts who testified disagreed about the use of crash bars and testified that the utility of crash bars depended on the precise type of motorcycle crash. *Id.* at 1317. As a result, it seems unlikely that the court would have permitted a lay witness, however experienced, to offer an opinion on the safety of the motorcycle design. *See id.*

191. *See* FED. R. EVID. 702.

should therefore be evaluated as lay opinion. This approach will preclude reliance on information that has not been admitted in formulating their opinions; to the extent the witness has relied on information that has not been admitted, the witness must satisfy the reliability requirements applied to expert opinion.<sup>192</sup> Their depth of experience may qualify such witnesses to help educate the jury, but their lack of methodology should foreclose them from expressing expert opinions.

Courts have often allowed law enforcement witnesses to testify as experts, expressing their opinions concerning the significance of the defendant's conduct or use of language.<sup>193</sup> These witnesses rely on their

192. See *United States v. Garcia*, 413 F.3d 201, 216 (2d Cir. 2005) (noting that the agent-witness's testimony "depended, in whole or in part, on his specialized training and experience" and therefore must be evaluated as expert testimony); *Martinez & Arlyn-Pessin*, *supra* note 3, at 28 (suggesting that the amendment to Rule 701 will modify the practice of allowing a lay witness to call on special knowledge in forming opinions). This Article addresses only the issues that arise when the witness is asked to give an opinion. If the witness simply shares her experience or specialized knowledge with the jury, the problem may not arise. For example, in *United States v. Caballero*, the defendants argued that certain prosecution witnesses should have been treated as experts even though they had not expressed opinions. *United States v. Caballero*, 277 F.3d 1235, 1246 (10th Cir. 2002). The defendants suggested that the witnesses were experts merely because they "presented specialized knowledge, and because their testimony was based on their perceptions, education, training and experience." *Id.* The witnesses testified concerning INS procedures and also summarized the defendants' bank accounts and files. *Id.* The court distinguished between opinion and other testimony and rejected the defendants' argument, because the witnesses "expressed neither a lay nor an expert opinion, as distinguished from a statement of fact as to what they had witnessed during their respective careers." *Id.* at 1247; see also *United States v. Hamaker*, 455 F.3d 1316 (11th Cir. 2006) (allowing FBI financial analyst to testify as a lay witness to review and summarize voluminous records from the defendant's company). In *Hamaker*, the Eleventh Circuit did not view the witness's testimony as calling on any expertise. The court stated:

To prepare for his testimony, Odom simply added and subtracted numbers from a long catalogue of MCC records, and then compared those numbers in a straightforward fashion. As Odom himself explained at trial, while his expertise and the use of computer software may have made him more efficient at reviewing MCC's records, his review itself was within the capacity of any reasonable lay person.

*Hamaker*, 455 F.3d at 1331–32. The mere fact that the witness summarized records did not convert him into an expert. *Id.*

193. See *United States v. Decoud*, 456 F.3d 996, 1012–13 (9th Cir. 2006) (holding that agent was properly allowed to testify to drug jargon); *United States v. Dukagjini*, 326 F.3d 45, 52 (2d Cir. 2003) (discussing admissibility of expert testimony on drug operations and drug jargon); *United States v. Watson*, 260 F.3d 301, 307 (3d Cir. 2001) (summarizing the range of subjects on which prosecution experts have been permitted to testify in narcotics cases); *People v. Barnes*, 19 Cal. Rptr. 3d 229, 237–40 (Ct. App. 2004) (discussing admissibility of drug profile evidence). In *Watson*, the Third Circuit stated:

The courts that have considered this issue have recognized the operations of narcotics dealers as a proper field of expertise. It is well-established that government agents may testify to the meaning of coded drug language under Fed. R. Evid. 702. *United States v. Gibbs*, 190 F.3d 188 (3d Cir. 1999); see also *United States v. Theodoropoulos*, 866 F.2d 587, 590–91 (3d Cir. 1989), *overruled on other grounds*, *United States v. Price*, 76 F.3d

experience and training to support their opinion testimony.<sup>194</sup> They do not employ any reliable methodology.<sup>195</sup> Instead, law enforcement witnesses

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526 (3d Cir. 1996); *United States v. Plunk*, 153 F.3d 1011, 1017 (9th Cir. 1998) (noting that the jargon of the narcotics trade and drug dealers' code language are proper subjects of expert opinion), *cert. denied*, 526 U.S. 1060, 119 S. Ct. 1376, 143 L. Ed. 2d 535 (1999); *United States v. Delpit*, 94 F.3d 1134, 1145 (8th Cir. 1996) (same); *United States v. Boissoneault*, 926 F.2d 230, 232 (2d Cir. 1991) (same). In addition, "experienced narcotics agent[s] may testify about the significance of certain conduct or methods of operation to the drug distribution business, as such testimony is often helpful in assisting the trier of fact understand the evidence." *United States v. Griffith*, 118 F.3d 318, 321 (5th Cir. 1997) (quoting *United States v. Washington*, 44 F.3d 1271, 1283 (5th Cir. 1995), *cert. denied*, 514 U.S. 1132, 115 S. Ct. 2011, 131 L. Ed. 2d 1010 (1995)). Thus, the operations of narcotics dealers have repeatedly been found to be a suitable topic for expert testimony because they are not within the common knowledge of the average juror. *Theodoropoulos*, 866 F.2d at 590–92. Therefore, we reject Watson's argument; knowledge of the operations of narcotics dealers is a proper field of expertise.

*Watson*, 260 F.3d at 307.

194. See, e.g., *United States v. Lopez*, 547 F.3d 364, 373 (2d Cir. 2008) (law enforcement witness permitted to testify as expert because of his lengthy experience); *United States v. Throckmorton*, 269 F. App'x 233, 236 (3d Cir. 2008) (concluding that officer testified as an expert because he "brought the wealth of his experience as a narcotics officer to bear" and holding that agent's opinion should not have been admitted in the absence of proper pretrial notice).

195. See Amstutz & Harges, *supra* note 20, at 74–75 (discussing credentials of law enforcement experts); Moreno, *supra* note 5, at 21–22, 33–35 (discussing lack of reliable methodology underlying drug jargon expert testimony). Amstutz and Harges suggest the following questions as the gauge of reliable law enforcement methodology:

- To your knowledge does your department or agency subscribe to what the education in the field of narcotics in law enforcement suggests?
- Does your agency often conduct investigations with other local, state or federal agencies?
- Does your agency and/or the officers involved exchange current information regarding narcotics-related information?
- As a result does your department or agency keep current with changes in the field regarding narcotics-related information?
- Does your department use the suggestions and/or information from other agencies to update its own practices in narcotics-related matters?
- Would that information entail changes in the law?
- Would that information entail changes in the way you conduct investigations?
- As a result of the changes in procedures and/or tactics of narcotics traffickers does your department also change in response to current narcotics activities?
- Does your department and/or agency engage in activities and or investigations from which to derive input or criticism for future operations?
- Is there a school or academic facility that teaches such tactics or changes in tactics?
- What agencies are identified as the leaders in teaching narcotics-related tactics and techniques?
- Have you or your department received specialized training by those agencies?
- Do you often exchange information with the staff or agents of those agencies either in a classroom setting or field setting?
- Is that in an effort to develop a peer review of the practices currently in place?
- Has your methodology been subjected to peer review?
- Are the practices you use currently used by other experts in the area?
- Has your technique or methodology been generally accepted in the relevant community?

apply familiar reasoning to their experience base, and any expression of opinion should be scrutinized under Rule 701 as lay opinion.<sup>196</sup>

For example, in *United States v. Garcia*,<sup>197</sup> the Second Circuit concluded that the witness called on “specialized knowledge” when he testified to his opinion that the defendant was a partner in a drug transaction.<sup>198</sup> The court supported its conclusion by stating that the

[ ] Has your technique or methodology been derived naturally and directly out of research you conducted independent of this litigation, or have you developed your opinions expressly for purposes of testifying?

[ ] Have you adequately accounted for obvious alternative explanations than yours?

[ ] Is your field of expertise known to reach reliable results for the type of opinion given?

Amstutz & Harges, *supra* note 20, at 96–97. The suggested questions test the witness’s experience and access to pooled information, but do not target any reliable methodology.

196. See *United States v. Glenn*, 312 F.3d 58, 67 (2d Cir. 2002). In *Glenn*, the trial court allowed a prosecution witness who had observed the defendant from some distance to testify that the bulge in defendant’s pants shortly before the defendant allegedly shot the victim was a gun. *Id.* at 66. The Second Circuit held that the testimony was not proper. *Id.* The witness lacked the personal observation required for lay opinion, but was also not qualified to provide expert opinion. *Id.* at 67. The court noted that the witness “did not arrive at his conclusions through reliable principles or methods but through casual, sporadic observations of drug dealers over some unspecified time period.” *Id.* Drug identification testimony also poses a particular problem. In some cases, lay witnesses have been permitted to draw on their experience with drugs to identify a questioned substance. See, e.g., *United States v. Durham*, 464 F.3d 976, 982–83 (9th Cir. 2006) (holding that lay witness was properly allowed to give opinion that substance was marijuana given her experience with marijuana and her multi-sensory opportunity to observe the questioned substance); *United States v. Paiva*, 892 F.2d 148, 157 (1st Cir. 1989) (permitting lay witness to express opinion that substance was cocaine based on her personal experience with drugs). Courts should proceed cautiously in this area. In the absence of chemical analysis, no witness should be permitted to testify to a substance’s identification; instead, a witness should be restricted to the opinion that a substance “appeared to be” a particular substance. An experienced lay witness cannot rationally arrive at a more definite opinion using everyday reasoning due to the fact that other substances may mimic illegal drugs. Furthermore, training in drug related law enforcement does not qualify a law enforcement officer as an expert in drug identification. Only scientific methodology can reliably and definitely identify a questioned substance as a particular drug.

197. 413 F.3d 201.

198. *Id.* at 216–17. In *Garcia*, the court summarized the basis of the witness’s testimony and concluded he had testified as an expert:

Klemick testified that his opinion as to the various conspirators’ roles was based on “intercepted phone conversations and research of law enforcement databases and surveillance.” Focusing simply on the wire intercepts, we observe that Klemick’s review of these conversations was hardly that of an average person. To highlight this very fact for the jury, the government specifically elicited that Klemick had reviewed thousands of intercepted conversations in the course of various narcotics investigations, and that he had had the benefit of cooperating witnesses’ insights on some of these occasions. Based on this experience, certainly outside the ken of the average person, Klemick informed the jury that he did not expect to overhear explicit references to drugs on the intercepted tapes; his experience taught him that drug dealers generally used code words when referring to their illicit transactions. . . . Further, based on his “training and experience,” Klemick knew that when targets discussed kilogram quantities of drugs, that meant they

witness's reasoning process was that of a narcotics officer, not an average person.<sup>199</sup> To the contrary, while the witness had a broader experiential background than most lay people, he employed the basic analytical approach of making inferences from that experience base and the observed facts.<sup>200</sup> Such testimony should be evaluated as lay opinion.

In some instances, assessing the testimony as lay rather than expert opinion would lead to its admissibility.<sup>201</sup> For example, in *United States v.*

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were likely acquiring drugs for distribution rather than personal use. When he overheard references to dollar amounts, he could assess their significance in light of his specialized knowledge that the price for a kilogram of cocaine in the New York market at the relevant time was \$20,000 to \$30,000. . . . Training and experience had further taught him that quality could affect where within this range cocaine was priced, as could the number of middlemen in the distribution chain between the foreign supplier and the New York purchaser.

In sum, when Klemick concluded from wiretaps, database information, and surveillance observations, that Garcia was a "partner" with Valentin in receiving cocaine from DeArmas, and that his responsibilities included testing the quality of the cocaine, his reasoning process was not that of an average person in everyday life; rather, it was that of a law enforcement officer with considerable specialized training and experience in narcotics trafficking.

*Id.* (citations and footnotes omitted); *see also Watson*, 260 F.3d at 307–08 (permitting three agents to testify as experts on the basis of their experience).

199. *Garcia*, 413 F.3d at 217.

200. *Id.*

201. *See, e.g., United States v. Spotted Elk*, 548 F.3d 641, 662–63 (8th Cir. 2008) (experienced drug enforcement agent testified that cash was wrapped in Saran wrap to mask the odor to prevent detection by police dogs, that packages of cocaine were coated in grease to mask the smell, and that pieces of tinfoil had been used to smoke cocaine); *United States v. Vesey*, 338 F.3d 913, 916–18 (8th Cir. 2003) (discussing admissibility of testimony from defense witness who was an experienced drug dealer and confidential informant). In *Spotted Elk* and *Vesey*, the witness's experience would have provided the basis for lay opinion, and his testimony should not have been assessed as expert testimony. *See Spotted Elk*, 548 F.3d 641; *Vesey*, 338 F.3d 913; *see also United States v. Lee*, 339 F. App'x 153 (3d Cir. 2009). In *Lee*, a government agent was permitted to testify as an expert on the basis of "specialized knowledge of drug distribution networks and narcotics trafficking." *Lee*, 339 F. App'x at 158. The court summarized the witness's testimony as follows:

Agent Parks testified on aspects of drug trafficking in the Philadelphia area, none of which are common knowledge among lay persons serving as jurors. Among other points, Agent Parks testified regarding the manner in which heroin is typically packaged, bundled, stamped and sealed in the Philadelphia area, how many individual packets are in a bundle, and how those packets and bundles of packets are usually priced. Specifically, Agent Parks testified that heroin typically costs between \$70 and \$90 dollars per gram, and that, based on his conversations with the DEA lab, the amount of heroin in a bag generally varies from .03–.05 grams, resulting in an average of .04 grams. Agent Parks further testified that resellers typically purchased heroin in bundled format, as opposed to individual packets. In addition, Agent Parks testified to some of the common names for heroin in the Philadelphia area, including "dope" and "H." Agent Parks also testified concerning the relationship between resellers and suppliers, explaining that money may be paid to the supplier up-front, at first, but that the reseller may be "fronted" the heroin once trust is established between the two.

*Id.* at 159. The defendant complained that the witness's "expertise was merely to repeat information that unidentified others communicated to him." *Id.* at 158. The defendant further pointed out that the witness had no methodology or claim to expertise based on personal extensive experience. *Id.*

*Oriedo*,<sup>202</sup> the trial court allowed the agent to testify based on his own observations that cocaine is packaged by cutting the end off a baggie and then twisting or tying the drug into the removed corner of the bag.<sup>203</sup> On appeal, the Seventh Circuit held that the testimony should have been evaluated as expert opinion and should have been excluded because the prosecution had failed to disclose it before trial.<sup>204</sup> Instead, the court of appeals should have affirmed the admission of the evidence as permissible lay opinion. The agent based his testimony on his personal observations and experience, invoked no special methodology, and testified to an opinion that was fairly derived using everyday reasoning.<sup>205</sup>

Even the scholarly discussion does not get this issue right. Academics, as well as courts, cite the three examples discussed below—the perfume smeller, the beekeeper, and the farmer—as examples of experience-based expert opinion. Categorizing these witnesses as experts ascribes too much value to the witnesses’ experience and illustrates inappropriate deference to claims based on experience in the absence of methodology. In most instances, these witnesses provide opinion derived through everyday reasoning by bringing their experience base to bear on observed facts.<sup>206</sup>

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The court held that the witness was properly qualified by specialized experience. *Id.* at 159. The court described the witness’s training and experience as follows:

Parks, an FBI agent for over eleven years, testified that he received training in narcotics and drug distribution organizations, participated in over 100 narcotics investigations, over 100 related searches, and wiretaps covering thousands of conversations concerning drug activity, and that he debriefed numerous drug dealers and individuals involved with drug distribution. In addition, Agent Parks testified that he consulted manuals and guidelines issued by the Drug Enforcement Administration (“DEA”) and the FBI to stay current. The District Court did not abuse its discretion in ruling that through such practical experience and training, Agent Parks gained specialized knowledge in the field of drug distribution networks and narcotics trafficking. That this was Agent Parks’s first time testifying as an expert does not undermine those qualifications.

*Id.* The court did not address the reliability requirement of Rule 702 and did not explain how the witness satisfied that requirement. A better approach would have been to assess the opinion under Rule 701. The witness’s testimony could be admitted as lay opinion given the witness’s experience.

202. 498 F.3d 593 (7th Cir. 2007).

203. *Id.* at 602–03.

204. *Id.* at 604.

205. See also *United States v. Lopez*, 547 F.3d 364, 373 (2d Cir. 2008) (discussing a law enforcement witness whose opinions were based on what he had seen and not what he had been told). In *Lopez*, the court should have concluded that the investigator’s opinion was admissible lay opinion, provided he could cite sufficient instances in which he observed similar paraphernalia being used in drug distribution.

206. See also Dale A. Nance, *Reliability and the Admissibility of Experts*, 34 SETON HALL L. REV. 191, 233–36 (2003) (discussing example of “gestalt expert” who testifies to the value of property based only on a combination of experience and a visit to the property). Like the other examples, this gestalt expert is better viewed as an experienced lay witness who assesses value based

Their testimony should be evaluated as lay opinion, scrutinized accordingly, and excluded unless the court determines that the witness's experience supports the opinion through the application of everyday reasoning.

**The perfume smeller:** Some have suggested that a witness who has deep experience as a perfume smeller should be permitted to provide an expert opinion.<sup>207</sup> Instead, the witness is an example of a lay witness with unusual experience. The witness does not draw on any broad field of research, collective knowledge, or specialized method of analysis. To the contrary, the claimed basis for the ability to form an opinion is the witness's personal experience of olfactory observation, a store of similar happenings. The court should decide whether the witness's particular experience base and the witness's sniffing of the scent in question permits the witness to form a rationally based opinion as to the identity of the questioned scent.<sup>208</sup>

**The beekeeper:** The beekeeper has also been cited as a witness whose experience would support the expert opinion that bees always take off into the wind.<sup>209</sup> The beekeeper's claim to expertise is based on his extensive

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on similar and dissimilar properties. The witness should be able to explain the points of similarity and difference to demonstrate how the other properties' prices lead to the opinion concerning the value of the property in question.

207. See *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 151 (1999) (referring to the perfume sniffer expert); Bernstein, *Expert Witnesses*, *supra* note 16, at 484–85 (discussing perfume sniffer example); Crump, *supra* note 157, at 15. Crump also cites a garage mechanic's testimony concerning the price of repairs. Crump, *supra* note 157, at 15.

208. Interestingly, there is reliable methodology that could substitute for the sniffer's experience-based identification of the smell. See Raffi Khatchadourian, *Annals of Science: The Taste Makers*, *NEW YORKER*, Nov. 23, 2009, at 85 (discussing experienced tasters and smellers and a scientific means of assessing smells through the use of a Virtual Aroma Synthesizer, which chemically analyzes scents). Another example of the use of smell to form an opinion can be found in cases in which police officers testify that they recognized the scent of burning marijuana. To establish the foundation for that opinion, the officer, sometimes visibly uncomfortable, must establish familiarity with the scent. The officer may testify, for example, that the police periodically burn seized marijuana so they will recognize the scent. This testimony establishes that the officer has a sufficient experience base to express a lay opinion on the question, but does not demonstrate expertise.

209. For example, in *Berry v. City of Detroit*, 25 F.3d 1342, 1349–50 (6th Cir. 1994), the Sixth Circuit explained:

The distinction between scientific and non-scientific expert testimony is a critical one. By way of illustration, if one wanted to explain to a jury how a bumblebee is able to fly, an aeronautical engineer might be a helpful witness. Since flight principles have some universality, the expert could apply general principles to the case of the bumblebee. Conceivably, even if he had never seen a bumblebee, he still would be qualified to testify, as long as he was familiar with its component parts.

On the other hand, if one wanted to prove that bumblebees always take off into the wind, a beekeeper with no scientific training at all would be an acceptable expert witness if a proper foundation were laid for his conclusions. The foundation would not relate to his formal training, but to his firsthand observations. In other words, the beekeeper does

experience observing bees. Unless the beekeeper brings reliable methodology to bear on the question of whether bees always take off into the wind, the beekeeper's opinion should be governed by the lay opinion rule. The court should determine whether the beekeeper's experience includes enough observations of bees taking off in varying conditions to reasonably draw the conclusion. The court should scrutinize the opinion, recognizing that the testimony is based on anecdotal, impressionistic observation and may also be influenced by beekeeper lore—the possibly inaccurate shared belief that bees always take off into the wind.

An expert opinion concerning these flight patterns must be derived through reliable methodology. To bring such methodology to bear on bee behavior to determine whether bees always take off into the wind, researchers could subject bees to systematic observation.<sup>210</sup> Bee takeoffs into the wind and not into the wind could be counted and analyzed. If only into-the-wind takeoffs were observed, statistical analysis could assess the likelihood that the observations were the result of chance.<sup>211</sup> The resulting data would support an expert opinion.

**The farmer:** The farmer who offers an opinion concerning the most effective methods of shoring an irrigation ditch or the effectiveness of specific fertilizers has also been advanced as an example of an experience-based expert.<sup>212</sup> Like those discussed above, this witness should be treated as a lay witness testifying based on unusual personal experience.

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not know any more about flight principles than the jurors, but he has seen a lot more bumblebees than they have.

*See also* United States v. Jones, 107 F.3d 1147, 1158 (6th Cir. 1997) (citing beekeeper example and quoting *Berry* to explain why handwriting witness should be permitted to give expert opinion); Bernstein, *Expert Witnesses*, *supra* note 16, at 480 (discussing beekeeper as example of “connoisseur testimony”).

210. Hives and bees in locations away from the hive could be filmed over a period of time and in a variety of conditions.

211. *See* Moreno, *supra* note 5, at 33–35 (suggesting how methodology could be applied to drug jargon testimony).

212. Professor Imwinkelried, asking whether a witness should be permitted to testify to an opinion based on “a ‘few’ instances of supporting experience,” turns to the example of a farmer offering testimony concerning fertilizer. Imwinkelried, *The Next Step*, *supra* note 11, at 2290–91. He concludes that a farmer, offering the expert opinion “that a particular chemical compound is one of the effective fertilizers for a particular crop” in the county, should be permitted to testify even if he has only a few confirming experiences. *Id.* at 2291. Imwinkelried bases his conclusion in part on the limited nature of the opinion, noting that the witness “is not claiming that the fertilizer in question is the only effective one or the one universally used.” *Id.*; *see also* Fed. Crop Ins. Corp. v. Hester, 765 F.2d 723, 728 (8th Cir. 1985) (admitting testimony of neighboring farmers who had experience growing corn on land similar to the defendant’s as expert testimony on the question of



The farmer uses everyday reasoning and does not bring any reliable methodology to bear. The farmer merely applies ordinary reasoning to draw inferences from her experience base. As a lay witness, the farmer should not be permitted to express the opinion unless her experience base—the number of similar and dissimilar events the farmer has observed—is sufficient to give rational support to the opinion. The court should assure itself that the combination of observed facts and experience permits the witness to draw the opinion using everyday reasoning. If the witness’s experience is too limited, either because the farmer has observed too few relevant events or because the farmer’s experience base is too skewed to similar or dissimilar events, the court should exclude the opinion testimony.

*B. Be Skeptical of Claimed Expertise Based on Shared Experience*

Another risk when a witness offers experience-based opinion is that the witness will draw on information pooled by those with related experience, but not subjected to reliability testing. When a witness in a field without methodology claims expertise based in part on “training,” the training may consist merely of a formal process for sharing experiences and the inferences drawn from those experiences.<sup>213</sup> This pooled information, not tested for reliability, is inadmissible hearsay and could not be presented to the jury. The court should not permit the pooled information to be admitted through opinion testimony, either explicitly as the stated basis for the opinion or implicitly by presenting the opinion without elucidating the basis.

The extrapolation of inferences by applying ordinary reasoning to anecdotal information is not generally permitted.<sup>214</sup> Lay opinion must be based on the witness’s own experience and knowledge, not on information relayed from others. Furthermore, the mere sharing of information does not transform the witness’s opinion from a lay opinion into an expert opinion. For example, suppose a witness owns and drives a particular make and

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yield). The testimony would better be analyzed as lay opinion, permitting the witnesses to testify on the yield from defendant’s land if they had sufficient similar observations to support the opinion.

213. See *United States v. Lee*, 339 F. App’x 153, 158–60 (3d Cir. 2009) (upholding expert testimony by a law enforcement agent, based largely on his access to pooled information and general experience in the police force, and stating that in the absence of methodology, reliability focuses mainly on personal knowledge or experience); *United States v. Lopez*, 547 F.3d 364, 373 (2d Cir. 2008) (upholding the expert testimony of a law enforcement officer without reliable methodology, based on experience and information gained during his time as a detective investigating drug crimes, including information learned from other agents, as well as his own personal experience); *United States v. Watson*, 260 F.3d 301, 307 (3d Cir. 2001) (stating that Rule 702 qualifications have been interpreted liberally, often allowing expert testimony by law enforcement officers based on training and experience, rather than methodology); *United States v. Poulsen*, 543 F. Supp. 2d 809, 810–11 (S.D. Ohio 2008) (stating that experience-based expert testimony may satisfy the *Daubert* reliability requirement, and upholding the testimony of an FBI agent based solely on his training and experience, and not scientific methodology).

214. See discussion of similar happenings *supra* Section IV.A.1.

model car and has felt the car pull to the left when she applies the brakes—her personal experience base. Suppose that she has also spoken to others with the same car and they have reported the same effect, and, further, that she has looked at online sources that report this effect. That added information does not qualify her to give an expert opinion on the braking action.<sup>215</sup> Moreover, the additional information is inadmissible hearsay and cannot inform the witness’s lay opinion. To admit a lay opinion based on such pooled information would inject a possible source of unreliability that neither the court nor the jury could adequately assess.

Allowing an experience-based witness who possesses no reliable methodology to testify as an expert and rely on pooled information generates an even greater risk of unreliability. In *United States v. Lee*,<sup>216</sup> the court rejected the defendant’s argument that the agent should not have been permitted to testify as an expert because he was simply relying on what other agents had told him. The court concluded that the agent could rely on this pooled information if it was the type of information reasonably relied upon by experts in the field.<sup>217</sup> The problem is that any group with a shared experience base will vouch for the practice of relying on pooled information—the lore of the group.<sup>218</sup> When the court treats a witness as an expert because the witness has access to this pooled information, the court allows the witness to present the views of the group in the guise of expert opinion. In this way, the witness transmits to the jury the beliefs of a group of self-proclaimed and possibly biased experts who employ no reliable method to draw inferences from their pooled information. Not only does

215. See *United States v. Murphy*, 457 F. Supp. 2d 1228, 1233 (D. Kan. 2006) (rejecting the argument that defense witness’s conversations with many marijuana growers established expertise). By contrast, shared information can play a key role in determining whether a law enforcement officer had probable cause. See *United States v. Garcia*, 413 F.3d 201, 213 (2d Cir. 2005) (stating that, while pooled information is permissible testimony in probable cause challenges, it is not admissible at trial under Rule 701); see also *Thacker v. City of Columbus*, 328 F.3d 244, 256 (6th Cir. 2003) (finding probable cause based on the information “gathered collectively” and shared by the police officers at the scene); *Dubner v. City of S.F.*, 266 F.3d 959, 966 (9th Cir. 2001) (noting that probable cause may be established “through the collective knowledge of the officers at the scene”); *United States v. Cruz*, 834 F.2d 47, 51 (2d Cir. 1987) (stating that “[t]he determination of whether probable cause . . . exists can be based on the collective knowledge of all of the officers involved . . .”).

216. 339 F. App’x 153.

217. *Id.* at 157.

218. For example, it is quite likely that the beekeeper or the farmer, discussed *supra* Section VI.A, has discussed the problem at hand (bees’ takeoffs or fertilizer) with other beekeepers or farmers. A body of untested, but trusted, lore may have developed from this pooled information. See *Denbeaux & Risinger, supra* note 159, at 15, 60 (discussing the problem of a “guild-like group . . . who share the same beliefs and general methods”).

such an approach fail to ensure reliability, it actually heightens the threat of unreliability while clothing the witness in the mantle of specialized knowledge and expertise.

This problem exists in some areas of forensic science. A forensic witness's expertise may rest on having been apprenticed by a more experienced expert, neither of them having grounding in a methodological approach.<sup>219</sup> Arson investigators, for example, have often been permitted to testify as experts, even though their assessments rest on experience and shared "wisdom" rather than developed and reliable methodology.<sup>220</sup> Based

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219. STRENGTHENING FORENSIC SCIENCE, *supra* note 6, at 15 (discussing problems of professional culture in the forensic sciences); *see also* Beecher-Monas, *supra* note 20, at 88–91 (demonstrating that even claims of methodology do not assure reliability and should be scrutinized); Bernstein, *Expert Witnesses*, *supra* note 16, at 481 (discussing some forensic expert testimony as examples of "connoisseur testimony"); Risinger et al., *supra* note 166, at 27–42 (discussing ways in which results of forensic analysis are skewed by observer effects). Courts continue to accept claims of expertise based primarily on experience and rely on the acceptance of an opinion by similarly qualified experts to assure reliability. *See, e.g.*, United States v. Santiago, 202 F. App'x 399, 401 (11th Cir. 2006) (holding testimony of arson expert qualified through experience was properly admitted, noting in part that his "findings were subject to review by his co-workers and supervisors").

Handwriting analysis is also a field where analysis presented as expert analysis is not supported by reliable methodology, but often seems to be the result of lore transmitted from one "expert" to another. *See* United States v. Jones, 107 F.3d 1147, 1157 (6th Cir. 1997) (pre-*Kumho* decision acknowledging that expert handwriting analysis is not supported by empirical evidence, but nevertheless concluding it is admissible); D. Michael Risinger et al., *Exorcism of Ignorance as a Proxy For Rational Knowledge: The Lessons of Handwriting Identification "Expertise,"* 137 U. PA. L. REV. 731 (1989); *see also* United States v. Velasquez, 64 F.3d 844 (3d Cir. 1995) (discussing handwriting expertise in case where expert summarized her analytical approach, but did not establish its reliability; concluding that trial court should have admitted testimony of critic of handwriting expertise). The National Research Council of the National Academies summarized its findings on handwriting analysis as follows:

The scientific basis for handwriting comparisons needs to be strengthened. Recent studies have increased our understanding of the individuality and consistency of handwriting and computer studies and suggest that there may be a scientific basis for handwriting comparison, at least in the absence of intentional obfuscation or forgery. Although there has been only limited research to quantify the reliability and replicability of the practices used by trained document examiners, the committee agrees that there may be some value in handwriting analysis.

STRENGTHENING FORENSIC SCIENCE, *supra* note 6, at 166–67 (footnotes omitted). Some handwriting witnesses also testify as experienced lay witnesses and are therefore subject to the limitations of the lay opinion rule. *See* 1 BROUN ET AL., *supra* note 3, § 11, at 54 (cites recognition of skilled lay observer on handwriting recognition).

220. DAVID L. FAIGMAN ET AL., SCIENCE IN THE LAW: FORENSIC SCIENCE ISSUES § 7-1.1, at 339 (2002) (describing the process of using accepted tools and clues to determine the cause of a fire: "Some of these clues are derived from sound science. Others are nothing more than a set of more or less shared beliefs that may or may not be true. An opinion is then reached by these clues being processed through each investigator's personal experience, beliefs and assumptions—in addition to or instead of any well tested model for analyzing fire evidence." (footnotes omitted)). The experience would include the observation of similar patterns at fires that the witness believed resulted from arson and dissimilar patterns at fires that the witness did not believe resulted from arson. Explorations of whether arson expertise rests on reliable methodology have now revealed the speculative and unreliable nature of much expert testimony. *See id.* § 7-1.2, at 343 (reporting that

on experience and pooled information, the witness would testify that certain physical evidence (burn patterns or reactions of window glass) were signs of arson, indicating that the fire was set and signaling where it originated.<sup>221</sup> The problems associated with pooled information infect arson testimony: An arson “expert” would erroneously conclude that a fire resulted from arson when it had not, and would then share the observations from the fire scene with other arson investigators to support the belief that certain patterns indicated arson—beliefs later shown to be wrong.<sup>222</sup> The courts that allowed these arson investigators to testify as experts should have rejected claims of expertise based on shared information, and instead evaluated and excluded the offered testimony as lay opinion.<sup>223</sup>

The use of pooled information that has not been tested by reliable methodology is likely to compound the effect of inaccurate inferential reasoning. When experience-based opinions and beliefs do not pass through the crucible of a methodology that checks for accuracy and reliability, the effect of perception bias or other distorting reasoning is reinforced. The

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before *Kumho* was decided, “some insurance company attorneys began counseling fire investigators to identify themselves as ‘experience-based’ experts, in an effort to avoid scrutiny under *Daubert*”; STRENGTHENING FORENSIC SCIENCE, *supra* note 6, at 173 (discussing unreliability of arson expertise); Grann, *supra* note 182, at 42 (discussing unreliability of arson evidence).

221. FAIGMAN ET AL., *supra* note 220, § 7-1.1, at 341 (citing concrete spalling, crazed glass, and burn pattern testimony as having been common and having been unsupported by empirical research). Courts continue to accept claims of arson expertise based primarily on experience. *See, e.g., Santiago*, 202 F. App’x 399. In *Santiago*, the Eleventh Circuit concluded that an expert’s testimony that the fire resulted from arson was properly admitted even though the witness was not a certified arson investigator given his experience in the field. *Id.* at 401.

222. The National Academy of Sciences Report states:

Despite the paucity of research, some arson investigators continue to make determinations about whether or not a particular fire was set. However, according to testimony presented to the committee, many of the rules of thumb that are typically assumed to indicate that an accelerant was used (e.g., “alligatoring” of wood, specific char patterns) have been shown not to be true.

STRENGTHENING FORENSIC SCIENCE, *supra* note 6, at 173.

223. Had the courts evaluated the opinion as lay opinion, the courts should have excluded the evidence, determining that the witness could not reach the offered opinions by applying lay reasoning to the witness’s experience base. The witness could not know with certainty which of the earlier observed fire sites resulted from arson and which did not. That missing knowledge injects a risk that the witness would engage in questionable reasoning and arrive at unfounded conclusions. A witness reasoning from experience uninformed by reliable methodology might conclude that, because a particular fire pattern is present at the site of the questioned fire and was also present at the site of an earlier fire, which the witness believed resulted from arson, the questioned fire must also have resulted from arson. If the presence of the pattern also influenced the witness to conclude that the first fire resulted from arson, the reasoning is circular and the basis for concluding the first fire was arson is flawed. However, even if the witness knew with certainty that the earlier fire or fires resulted from arson, lay reasoning does not support the conclusion that a particular burn pattern at the earlier site suggests arson.

entire lore may be skewed by faulty reasoning and by the resulting expectations of those making the observations.<sup>224</sup> As a result, those relying on the pooled information will become biased observers.<sup>225</sup> The courts should recognize that a witness does not become an expert through the transfer of unconfirmed lore and may be more likely than a witness without that preconditioning to jump to unfounded conclusions.

*C. Evaluate the Fit Between the Witness's Experience and the Opinion*

Once expertise is established, an expert witness is allowed to call on undisclosed pools of information gleaned from others in the field, as well as the expert's own personal observations.<sup>226</sup> The expert is not required to provide all the background information. A lay witness should not be accorded similar latitude. Instead, the court must consider whether the combination of the witness's experience and observation of relevant facts in the case allows the witness to derive the proffered opinion through the application of everyday reasoning.<sup>227</sup> In some cases, the witness's experience base supports the lay opinion.<sup>228</sup> In others, however, the opinion

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224. For example, a novice beekeeper will be told that bees take off only into the wind. That will encourage the beekeeper to look for that phenomenon and discount anything the beekeeper observes to the contrary.

225. In *United States v. Abel*, 469 U.S. 45 (1984), the Supreme Court explained bias as follows: Bias is a term used in the "common law of evidence" to describe the relationship between a party and a witness which might lead the witness to slant, unconsciously or otherwise, his testimony in favor of or against a party. Bias may be induced by a witness's like, dislike, or fear of a party, or by the witness's self-interest. Proof of bias is almost always relevant because the jury, as finder of fact and weigher of credibility, has historically been entitled to assess all evidence which might bear on the accuracy and truth of a witness's testimony.

*Id.* at 52.

226. See FED. R. EVID. 703.

227. See, e.g., *United States v. Ayala-Pizarro*, 407 F.3d 25, 28 (1st Cir. 2005) (holding that officer's testimony concerning certain aspects of narcotics trafficking was admissible lay opinion where the officer laid out his experience in some detail; the testimony stayed within the realm of inferences rationally based on the officer's knowledge); *United States v. Myers*, 972 F.2d 1566, 1577 (11th Cir. 1992) (holding that officer was allowed to express lay opinion that burn marks on victim's back "were consistent with marks that would be left by a stun gun," an opinion rationally derived from his prior observations); see also FAIGMAN ET AL., *supra* note 220, § 7-1.3.3, at 348 (suggesting that "[c]ourts would be well advised to unpack the claimed 'experience' in order to discover what was learned from it and whether that something supports a valid and reliable expert opinion").

228. See, e.g., *United States v. Oriedo*, 498 F.3d 593, 602-04 (7th Cir. 2007) (witness provided opinion based on his own observations that cocaine is packaged by cutting the end off a baggie and then twisting or tying the drug into the removed corner of the bag; the opinion should have been allowed as admissible lay opinion).

cannot be rationally derived by bringing the witness's experience to bear on the observed facts.<sup>229</sup>

In *Satcher v. Honda Motor Co.*,<sup>230</sup> discussed above, the court allowed a former police officer to testify to an expert opinion concerning the efficacy of crash bars on police motorcycles.<sup>231</sup> The witness drew on his experience serving on the police motor squad and his investigation of hundreds of motorcycle accidents.<sup>232</sup> His opinion was based on his application of everyday reasoning to draw inferences from the other motorcycle accidents—other happenings—he had observed. The court should have evaluated his testimony as lay opinion and should also have determined the similarity or dissimilarity of the circumstances in those other accidents. Without that inquiry, the court had no assurance that the opinion was rationally based on the witness's experience and the observed facts.

In *United States v. Maher*,<sup>233</sup> the court allowed the prosecution to present lay opinion from a law enforcement officer that, based on his training and experience, the Post-It note found in the defendant's van was a "drug note[.]" or a "[d]rug distributor's way of being organized."<sup>234</sup> The court should have been more exacting. First, the opinion was not supported by any demonstration that the officer had sufficient experience with similar uses of Post-It notes to support his opinion.<sup>235</sup> Without that information, the

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229. See, e.g., *id.* In *Oriedo*, the Seventh Circuit approved the trial court's decision to admit as lay opinion the testimony of an agent who testified that he was "personally concerned about there being two vehicles" because "more than one vehicle . . . raises concerns about" counter-surveillance. *Id.* at 602. The Seventh Circuit concluded that the witness's testimony involved only lay opinion because the agent did not testify about counter-surveillance practices in the drug trade or characterize what he saw as counter-surveillance. *Id.* In *Oriedo*, the opinion should not have been admitted without a demonstration that the agent had an adequate basis in personal observation to support the opinion. The court noted that the agent only testified to "his own state of mind while observing this particular drug deal." *Id.* Of course, the greatest problem with this testimony is that the agent's state of mind was entirely irrelevant in the jury trial, but the court did not address that concern. This may represent an example of a court not differentiating between evidence relevant to a Fourth Amendment question, but not relevant to the question of guilt or innocence. The agent's state of mind could contribute to probable cause, but was not relevant at the defendant's trial.

230. 52 F.3d 1311 (5th Cir. 1995).

231. *Id.* at 1316–18.

232. *Id.* at 1317–18.

233. 454 F.3d 13 (1st Cir. 2006).

234. *Id.* at 24.

235. To be admitted as lay opinion, the officer's opinion must be extrapolated from similar events in his experience base, but the prosecution did not elicit testimony establishing that similar events existed. The opinion testimony constituted a shortcut for evidence of similar events—instances in which such notes had been found and had been shown to be drug records—and the connection of those events to the defendant's case through the officer's opinion. If this aspect of the prosecution's case were unpacked, the trial court would have to go through a much more careful analysis. First,

court could not ensure compliance with the requirement that the opinion be rationally based on the witness's perception.<sup>236</sup> Furthermore, the manner in which it was presented gave the jurors no basis for independent assessment and invited them merely to defer to the superior knowledge of the officer.

#### *D. Limit Opinion Based on Third Party Conduct*

The use of third party conduct to form the opinion that a defendant acted in a way that was typical of particular criminal activity is a recurrent problem in the testimony of law enforcement witnesses.<sup>237</sup> Experience-based law enforcement opinion witnesses often testify to inferences based on third party conduct. The prosecution uses these opinion witnesses to paint the defendant with the criminality of others they have investigated. The witness accomplishes this goal either by testifying that the defendant's apparently innocent conduct is actually criminal behavior because the witness has seen other criminals behave in the same way or that the defendant's criminal behavior has particular significance not otherwise apparent to the jury. In this manner, law enforcement witnesses have labeled using Post-It notes,<sup>238</sup> riding a bicycle around the neighborhood,<sup>239</sup> and driving a rental car as conduct that signals involvement in drug

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the prosecution would present evidence of the similar events—instances observed by this particular officer (not recounted to him by others) and sufficiently similar to be probative; the court would have to determine that these other instances cleared the hurdle of basic relevance under Rule 402 and also had sufficient probative value to avoid exclusion under Rule 403 as being unfairly prejudicial. Second, the court would have to determine that the officer's opinion reflected a rational inference from this pool of data and was helpful to the jury, even though the jury was now armed with as much information as the officer. The claim that the officer participated in numerous drug cases should not be allowed to substitute for more specific information about the officer's particular basis of knowledge concerning the use of drug notes.

236. See also *United States v. Williams*, 212 F.3d 1305 (D.C. Cir. 2000). In *Williams*, without examining the basis for the officer's opinion, the trial court permitted a patrol officer to testify as an expert that drug users commonly carry guns for protection. *Id.* at 1306. When the court of appeals examined the basis for the opinion, the court concluded that the witness had been involved in fewer than twelve arrests involving firearm possession, not enough to support his opinion testimony. *Id.* at 1309. The court also concluded that the foundation was insufficient to support a lay opinion on the issue. *Id.* at 1309–10. But see *United States v. Gill*, 513 F.3d 836, 847 (8th Cir. 2008) (dismissing defendant's argument that agent should not be permitted to testify about the connection between firearms and drug trafficking because he had no experience with drugs and licensed firearms).

237. See generally Peter Schofield, Comment, *Criteria for Admissibility of Expert Opinion Testimony on Criminal Modus Operandi*, 1978 UTAH L. REV. 547 (discussing the use of testimony concerning typical modus operandi to convince the jury that defendant's conduct was criminal).

238. See, e.g., *United States v. Maher*, 454 F.3d 13, 17 (1st Cir. 2006); see also *United States v. Throckmorton*, 269 F. App'x 233 (3d Cir. 2008) (discussing admissibility of officer's testimony about narcotics "owe-sheets").

239. See *United States v. Lopez-Medina*, 461 F.3d 724, 744–45 (6th Cir. 2006) (allowing prosecution's fact witnesses to testify as expert witnesses and opine that the defendant was conducting counter-surveillance when he left home on his bicycle, and that scraps of paper contained notes related to drug transactions).

dealing.<sup>240</sup> To invite the jury to connect weapon possession with drug-dealing, officers have testified that drug dealers commonly carry guns for protection.<sup>241</sup> The courts must ensure that these opinions do not reflect unwarranted inferences of criminality drawn by biased witnesses.

The courts should also guard against the prejudicial impact of having a witness attach criminal significance to the defendant's otherwise innocent conduct by characterizing it as a *modus operandi* typical of a particular type of crime. Consider, for instance, the law enforcement expert's testimony that a defendant's use of a rental car signaled that defendant was an experienced narcotics trafficker.<sup>242</sup> The opinion rests on the inference that, because some other drug traffickers act this way, the defendant's action marks him as a drug trafficker as well. The court should not give this evidence a role in the defendant's case. Generally, it is not permissible to invite the jury to draw an inference about this defendant based on the conduct of an unrelated third party. If the prosecution simply offered evidence that a different defendant in a different case used a rented car, it would be inadmissible because it lacks probative value and injects too much risk of unfair prejudice.<sup>243</sup> If the court admits this lay opinion, the court accepts the agent-witness's conclusion that it has happened often enough to be a drug trafficking practice. But neither the court nor the agent is in a position to draw that inference. The agent's opinion is suspect because the agent's sample of observation is skewed to include a disproportionate number of drug transactions, leaving the agent unable to assess the use of

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240. *United States v. Figueroa-Lopez*, 125 F.3d 1241, 1243–44 (9th Cir. 1997); *see also* *United States v. Millbrook*, 553 F.3d 1057, 1064–65 (7th Cir. 2009) (allowing agent to testify as an expert that drug users pay in small bills, in order to explain defendant's possession of \$1000 in cash and refute his claim that he was going to use it to pay an \$800 utility bill), *overruled on other grounds by* *United States v. Corner*, 598 F.3d 411 (7th Cir. 2010); *United States v. Jeanetta*, 533 F.3d 651 (8th Cir. 2008) (allowing expert law enforcement witness to testify that Ziploc bags, radios, scanners, cameras, monitors, night vision goggles and large quantities of cash were all associated with drug dealing); *United States v. Martinez-Avina*, 234 F. App'x 688, 690 (9th Cir. 2007) (agent testified that having air freshener and only one or two keys in a vehicle signaled that it was transporting drugs).

241. *See* *United States v. Farrish*, 297 F. App'x 162, 165 (3d Cir. 2008) (listing the government's evidence that drug dealers commonly carry guns as support for defendant's conviction); *United States v. Branch*, 537 F.3d 582, 589 (6th Cir. 2008) (noting that "drug dealers frequently carry weapons"); *see also* *Williams*, 212 F.3d at 1309–10 (holding patrol officer did not have enough experience to testify to the opinion that drug users commonly carry guns for protection).

242. *Figueroa-Lopez*, 125 F.3d at 1243–44; *see also* Capra, *Distinguishing Between Lay Witnesses*, *supra* note 3, at 3, 34 (discussing *Figueroa-Lopez*).

243. *See supra* Section IV.A.3.



rental cars in the general population. Moreover, the agent is a biased observer, watching for signs of narcotics trafficking.<sup>244</sup>

The government's use of the drug courier profile also illustrates the risk of such testimony. When admitted as proof of guilt, the witness testifying to the drug courier profile is allowed to list the aspects of the defendant's behavior that typify drug courier behavior.<sup>245</sup> The witness is permitted to opine, and the jury is invited to infer, that the defendant is guilty because the defendant shares these behaviors with others who have committed drug offenses.<sup>246</sup> Courts have recognized that such testimony injects a substantial risk of unfair prejudice and is generally improper.<sup>247</sup> The courts should extend that cautious approach to other similar uses of third party conduct.

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244. The opinion should also be excluded as expert opinion. Nothing assures the reliability of the conclusion. The agent does not employ a reliable methodology to ensure that she does not ascribe unwarranted significance to innocent behavior and act as a biased witness who may not reliably decide the fair probative value of the instances of similar conduct in other criminal transactions. Although the Advisory Committee acknowledged these types of law enforcement experts when Rule 702 was amended to reflect *Daubert's* emphasis on reliability, the Committee did not explain how the process employed by the agent differs from lay reasoning applied to a deep experience base and satisfies the requirement of reliable methodology:

For example, when a law enforcement agent testifies regarding the use of code words in a drug transaction, the principle used by the agent is that participants in such transactions regularly use code words to conceal the nature of their activities. The method used by the agent is the application of extensive experience to analyze the meaning of the conversations. So long as the principles and methods are reliable and applied reliably to the facts of the case, this type of testimony should be admitted.

FED. R. EVID. 702 advisory committee's note.

245. See, e.g., *United States v. Lui*, 941 F.2d 844 (9th Cir. 1991). In *Lui*, the trial court permitted an agent to testify that the defendant showed five characteristics of a drug courier:

(1) [A]lthough "heroin couriers have a hundred ways to smuggle heroin," typically they wrap it around their bodies or place it in false bottoms and tops of suitcases; (2) in approximately 80 percent of smuggling cases, couriers use hard-sided suitcases; (3) couriers often use the excuse of conducting business or visiting a relative in the United States; (4) couriers create itineraries with multiple stops for short periods of time so as to enter the United States from a "non-source" country to avoid detection; and (5) couriers often use paging devices.

*Id.* at 846.

246. It has been noted that the profile can be adapted to fit almost any traveler. See, e.g., *United States v. Webb*, 115 F.3d 711, 719 (9th Cir. 1997) (noting that the court has long been critical of drug courier profiles); *United States v. White*, 890 F.2d 1012, 1014 (8th Cir. 1989); *United States v. Hernandez-Cuertas*, 717 F.2d 552, 555 (11th Cir. 1983) (noting that "[d]rug courier profiles are inherently prejudicial because of the potential they have for including innocent citizens as profiled drug couriers"). The profile is more appropriately used as a test for reasonable suspicion to justify a search or seizure than as an indicator of guilt at trial. See *Ornelas v. United States*, 517 U.S. 690 (1996) (drug courier profile information went towards forming reasonable suspicion); *United States v. Sokolow*, 490 U.S. 1 (1989) (allowing drug courier information to form reasonable suspicion for investigative stop); *United States v. Lewis*, 556 F.2d 385 (6th Cir. 1977). But see *United States v. Urrieta*, 520 F.3d 569, 576 (6th Cir. 2008) (cautioning against using profile generalizations to establish reasonable suspicion).

247. See *United States v. Gutierrez-Farias*, 294 F.3d 657, 662-63 (5th Cir. 2002) (holding that admission of agent's testimony concerning modus operandi of drug dealers was error); *United States v. Jones*, 913 F.2d 174, 176-77 (4th Cir. 1990) (holding it was error to permit an agent to testify

The courts should not defer to government claims that a witness, whether expert or lay, is drawing fair inferences from the conduct of others. Instead, the court should scrutinize the opinion. The court should not permit the inference unless the party offering the opinion provides information concerning base rates—how frequently or infrequently the same conduct occurs in innocent contexts.<sup>248</sup> For example, the fact that packages of drugs are frequently wrapped in duct tape may be helpful when trying to determine the contents of a package wrapped in duct tape, but it does not support the inference that possession of duct tape signals drug dealing. The base rate undermines the inference: many who do not distribute drugs possess duct tape. Without base rate information, the court should recognize the risk that the opinion witness is presenting an unfounded inference, skewed by the observer’s bias, and only rarely admit opinion testimony based on third party conduct.

#### E. Prohibit Over-Claiming

The courts should prohibit experience-based witnesses from drawing broad conclusions from the observed facts.<sup>249</sup> The cases illustrate efforts to push opinion testimony past any reasonable limit.<sup>250</sup>

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“that crack dealers often sell crack in small quantities and keep the proceeds from the sales nearby rather than in a bank” and “that crack dealers normally possess firearms and that crack users can be distinguished from dealers by the amount of the drug that each keeps on hand”); *United States v. Quigley*, 890 F.2d 1019, 1022 (8th Cir. 1989) (concluding profile evidence should not have been admitted). The courts permit the use of drug courier profile testimony at trial to provide background explaining why the defendant was stopped or arrested or to rebut certain defense claims. *See United States v. Sanchez-Hernandez*, 507 F.3d 826 (5th Cir. 2007) (allowing agent’s testimony because it was not precisely profile testimony and it served to rebut defendant’s claims of innocence); *United States v. Urbina*, 431 F.3d 305, 311–12 (8th Cir. 2005) (allowing profile evidence to rebut defendant’s claim that he was unaware of drugs in gas tank); *United States v. Beltran-Rios*, 878 F.2d 1208, 1212–13 (9th Cir. 1989) (allowing profile evidence to rebut defendant’s claim he was too poor to be a courier).

248. STRENGTHENING FORENSIC SCIENCE, *supra* note 6, at 112.

249. *See, e.g.*, *United States v. Oriedo*, 498 F.3d 593, 602 (7th Cir. 2007) (approving admission of agent’s testimony that he was “personally concerned about there being two vehicles” because “more than one vehicle . . . raises concerns about . . . countersurveillance”); *United States v. Grinage*, 390 F.3d 746, 747–50 (2d Cir. 2004) (holding that trial court improperly permitted agent to provide opinions based on his investigation and the content of 2000 recorded phone conversations describing the criminal organization and the roles of various participants).

250. *See, e.g.*, *United States v. Meises*, 645 F.3d 5 (1st Cir. 2011) (condemning use of an agent to give broad overview of criminal case); *Jinro Am. Inc. v. Secure Invs., Inc.*, 266 F.3d 993, 1001–06 (9th Cir. 2001) (holding that trial court properly excluded testimony about the tendency of Korean businessmen to circumvent currency regulations and the ways in which they did so); *Trevino v. Rock Island Police Dept.*, 91 F. Supp. 2d 1204, 1206–08 (C.D. Ill. 2000) (reporting that plaintiff

When agents are accepted as experts, they are sometimes permitted to state quite broad opinions concerning the criminal character of a defendant's conduct.<sup>251</sup> In *United States v. Brown*,<sup>252</sup> for example, the courts allowed law enforcement experts to opine that a particular apartment was used for storing drugs, that the defendant's stop at the house was "consistent with . . . a drug delivery," that the defendant had control over the apartment, and that the defendant's actions "were consistent with that of someone engaging in counter-surveillance activities and attempting to destroy evidence."<sup>253</sup> In this way, the prosecution used its expert witnesses to endorse the inferences the prosecution hoped to persuade the jury to draw.<sup>254</sup> These inferences should be the subject of argument rather than testimony.<sup>255</sup>

Even when a witness testifies to lay opinion, the party offering the testimony may push the witness to over-claim. In *United States v. Garcia*, for example, the prosecution presented the case agent at trial as a lay witness to introduce the case by describing the roles played in the drug conspiracy by the various defendants, and the trial court allowed the testimony.<sup>256</sup> This

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wanted to use monocular police officer to testify to broad assertions about the performance of monocular officers based only on his own experience).

251. See, e.g., *United States v. Cruz*, 363 F.3d 187, 197 (2d Cir. 2004) (concluding that prosecution expert strayed from his expertise when he stated opinion concerning what defendant meant by particular statement); *United States v. Dukagjini*, 326 F.3d 45, 59 (2d Cir. 2003) (concluding that trial court had improperly permitted expert to provide opinion testimony outside the scope of his expertise).

252. 110 F.3d 605 (8th Cir. 1997).

253. *Id.* at 610.

254. See also *United States v. Lopez-Medina*, 461 F.3d 724, 744–45 (6th Cir. 2006). In *Lopez-Medina*, the prosecution's fact witnesses also served as expert witnesses and stated opinions concerning the criminal character of defendant's conduct. *Id.* at 743. The Sixth Circuit concluded that the trial court did not sufficiently inform the jury on the demarcation between the expert opinion and the fact testimony, but did not condemn the opinion testimony. *Id.* at 745. The prosecution sees such value in this testimony that it sometimes offers expert testimony on criminal behavior when it is not relevant to the particular case. See, e.g., *United States v. Vallejo*, 237 F.3d 1008, 1015–16 (9th Cir. 2001) (concluding that agent's testimony on drug trafficking was not relevant to the case against the defendant and noting that the government reported that it routinely introduces such testimony in all drug cases).

255. See *United States v. Moore*, 521 F.3d 681, 683 (7th Cir. 2008) (prosecution expert testified that no one who was not involved with the drug deal would be present at the deal); *United States v. Parra*, 402 F.3d 752, 758–60 (7th Cir. 2005) (holding that agent properly testified to expert opinion that defendant's otherwise innocent behavior looking up and down the street constituted counter-surveillance).

256. 413 F.3d 201, 208–09 (2d Cir. 2005) (recounting agent's testimony). On appeal, the government argued unsuccessfully that "a case agent may offer, at the beginning of a trial, a lay opinion providing a summary overview of anticipated evidence." *Id.* at 211. The Second Circuit condemned this practice, but concluded it was harmless error and upheld the conviction. The court stated: "Klemick's opinion did more than provide a 'summary' of Garcia's words and actions—by whomever they were observed. It told the jury that Klemick, an experienced DEA agent, had determined, based on the total investigation of the charged crimes, that Garcia was a culpable member of the conspiracy." *Id.* at 213. The court further noted:

testimony should have been disallowed; the agent's biased conclusions about the defendants' criminality went beyond helpful lay opinion and injected substantial prejudice into the case.

When a witness states an experience-based opinion, even if the court admits it as lay opinion, the proponent may present the witness and the opinion in a way that suggests expertise. For example, when a law enforcement witness provides a lay opinion, the prosecution may emphasize that the opinion is based on experience and training, as well as participation in other narcotics cases, thus clothing the opinion in the appearance of expertise.<sup>257</sup> The trial court should prohibit such bolstering while the witness is testifying, as well as during closing argument.

## VII. CONCLUSION

The classification of experience-based testimony as either lay or expert is critical to its admissibility. However, the line demarking the categories is difficult to determine, and courts do not always strike the proper balance. Too often, witnesses with unusual or rich experience bases are permitted to testify as experts despite employing no reliable methodology or analysis. Absent such methodology, witnesses offering experience-based testimony merely apply ordinary lay reasoning to their experience base. Such everyday reasoning does not meet the reliability standard required of expert testimony. Experience alone often fails to sharpen a witness's reasoning process and may sometimes deepen the witness's bias. Thus, only witnesses

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[T]his practice is particularly problematic in criminal cases because it allows "the government to paint a picture of guilt before the [supporting] evidence has been introduced." We . . . condemn the practice of having a case agent offer a summary opinion as to culpability before any evidence to support such a conclusion has been presented for jury review.

*Id.* at 214; see Bigelow, *supra* note 3, at 5–8 (discussing prosecution use of summary witnesses).

257. See, e.g., *United States v. Oriedo*, 498 F.3d 593, 602 (7th Cir. 2007) (allowing as lay opinion agent's testimony, conveying a veiled claim of expertise, that based on his experience and training, he could tell when there was counter-surveillance and that he observed counter-surveillance in the defendant's case); *United States v. Maher*, 454 F.3d 13, 24 (1st Cir. 2006) (opinion witness provided no specific basis in past experience for reaching conclusion that Post-It notes were a "[d]rug distributors' way of being organized," but alluded to his experience and training, thus suggesting that the opinion rested on expert knowledge). In *Maher*, the agents' search had yielded a large roll of currency and approximately half a gram of heroin in the defendant's pocket, and, in the van, a bag which contained three sandwich bags of cocaine, a scale, and a Post-It note listing several names, each with a number to the right. *Maher*, 454 F.3d at 17. Given this evidence, it is hard to understand why the prosecution felt the need to elicit the officer's opinion concerning the nature of the Post-it note.

who use reliable methodology to form their opinions should be permitted to testify as experts.

Witnesses who derive their opinions by applying everyday reasoning to their personal experiences should be treated as lay witnesses. Rule 701 provides the appropriate framework for scrutinizing experience-based opinion testimony. The rule directs the court to ensure that the opinion is rationally derived from facts perceived by the witness. The court should assess the reasonableness of the witness's inferences given the witness's experience and the facts known to the witness. Thus, the classification of experience-based testimony as lay testimony will keep courts from attributing inappropriate value and deference to such testimony.

Further, courts should apply Rule 701 with bite. Rather than accepting at face value a witness's claims based on training or shared experiences, courts should recognize that groups sometimes subscribe to a set of shared, but nonetheless unreliable, beliefs. Courts should also scrutinize whether the witness's experience base is sufficiently extensive to support the opinion, limit the extent to which opinion testimony may be based on the conduct of unrelated third parties, and insist that the witness refrain from over-claiming by suggesting that a lay opinion rests on expertise or by drawing over-broad inferences from the witness's experience. By giving teeth to the lay opinion rule, courts can avoid admitting opinion testimony that lacks a sufficient basis and ensure that only reliable inferences fairly drawn from experience are presented to the jury.