USING NONSCIENTIFIC EXPERT TESTIMONY: A PLAY-BY-PLAY TOOLKIT

ABSTRACT

Effective use of expert testimony is essential in today’s courtroom. Without expert testimony, our adversarial system would be limited to the understanding of the fact finder with little guidance and explanation of important details in each case. Although use of scientific expert testimony has been historically permitted, it was not until recently that the U.S. Supreme Court provided clear guidelines for the admissibility of expert testimony offered for nonscientific purposes. As expert testimony continues to evolve in scope and application, its core purpose remains clear: It offers guidance and explanation, provides helpful analysis for otherwise complex areas of knowledge, and it assists the fact finder in decision making. For practitioners new to the art of expert testimony, this Note is designed as a toolkit, offering a detailed historical analysis of the evolution of expert testimony, as well as suggestions for effective implementation of such testimony in the courtroom.

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“No one will deny that the law should in some way effectively use expert knowledge wherever it will aid in settling disputes. The only question is as to how it can do so best.”

I. INTRODUCTION

Evolving over the past three decades in its scope and application, expert testimony remains a key component of our adversarial trial court system. Its purpose is clear: provide necessary and helpful information to the fact finder. Without such testimony, an “intelligent evaluation of facts” is nearly impossible. Common sense directs our court system to the sensible solution—use experts as resources for uncommon knowledge. More specifically, while use of expert testimony has been historically permitted, it was not until recently that the U.S. Supreme Court provided clear guidelines for the admissibility of expert testimony offered for nonscientific areas of expertise.

This Note seeks to address the obstacles and issues arising when using expert testimony, and, more specifically, nonscientific expert testimony. Historically, use of science-based testimony has been the base of expert testimony because it may be applied with ease to the Federal Rules of Evidence. However, confusion and contest seems to ensue over the use of nonscientific expert testimony. Although the focus of this Note will be on the use of nonscientific expert testimony, the applicability of this Note is

2. See FED. R. EVID. 702.
4. See FED. R. EVID. 702.
5. See Frye v. United States, 293 F. 1013, 1014 (D.C. Cir. 1923) (establishing the test for district court judges to use when determining whether to admit scientific expert testimony).
far-reaching. Today, scientific and nonscientific experts are treated in a similar manner when it comes to their selection, preparation, and execution. Therefore, practitioners may apply this play-by-play toolkit to the different forms of expert testimony—scientific or nonscientific.

This Note is written in the form of a toolkit for ease in applying it to everyday expert testimony encounters. It is a simple play-by-play (or step-by-step) analysis designed to walk a practitioner through, and offer due consideration to, key concepts in the vast realm of expert testimony.

In sports settings, teams reflect on past games, noting how far they have come and highlighting improvements that still need to be made. Part II of the Note reminds practitioners how critical it is to know the history of expert testimony. The process for selecting and properly using expert testimony has evolved considerably since the formation of the Federal Rules of Evidence, and it continues to be pushed to new limits with time.

Likewise, before a game, teams must determine the key players, acknowledge their respective strengths and weaknesses, and strategically plan how to use each player to create an advantage. In Part III, this Note comments on the roles of each key player in an expert testimony scenario—the attorney, the judge, and the expert. For each “player,” this Note details the responsibilities and challenges they face and provides insight on how best to conquer those barriers. More specifically, for attorneys, this Part highlights some strategic techniques for effective use of expert testimony, including selection of experts, and preparation and execution of their testimony. For judges, this Part features the Daubert factors considered by courts when determining the admissibility of expert testimony. And, for the expert role, this Part discusses how the Daubert factors implicate the selection of experts and the execution of their testimony.

Ethical standards have become commonplace in many areas of American society—including sports. Just as athletes are held to a certain code of conduct, so too are attorneys, judges, and experts. Part IV discusses the ethical and professional responsibilities surrounding the use of expert testimony, including the legal profession’s system of ethical and

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7. See Kumho, 526 U.S. at 148 (noting that Daubert’s rationale was not limited to scientific expert testimony).
8. See discussion infra Part II.
9. Infra Part III.
10. See Daubert, 509 U.S. at 589–95.
11. Id.
professional responsibilities. Part IV also includes commentary on an interesting survey conducted by the Federal Judicial Center, in which judges weighed in on the risks of using expert testimony.12

Lastly, Part V provides guidance for execution of expert testimony. In many sport settings, individuals spend much of their time preparing for the day it all gets put to use, hoping that practice makes perfect. The court system is no different; practice and preparation are not foreign concepts to our adversarial system. Part V focuses on providing examples and discussing effective executions of non-scientific expert testimony under the federal rules. The examples and subsequent discussions are designed to broaden the use of expert testimony, while keeping in mind the possible benefits and obstacles.

II. REVIEW YOUR PLAYBOOK: KNOW WHERE YOU CAME FROM

A. The Early Days of Frye and the General Acceptance Standard

The Advisory Committee’s note to Federal Rule of Evidence 702 recognizes that not all trial court participants are all-knowing advocates.13 Rather, the participants thrive and depend on the “application of some scientific, technical, or other specialized knowledge” of an expert.14 However, nearly fifty years before the enactment of the Federal Rules of Evidence and the Advisory Committee wrote its note, the Court of Appeals for the District of Columbia declared expert testimony admissible only when the issue involves a topic outside the scope of “common experience or common knowledge [and] requires special experience or special knowledge.”15 In Frye v. United States, the court also noted that so long as the expert testimony contains a scientific principle generally accepted in the field to which it belongs, the expert testimony is admissible.16 In Frye, since the pioneer blood pressure deception test (later known as the polygraph test) had not been recognized among physiological and psychological authorities, the court ruled such evidence inadmissible.17 Likewise, under the Frye standard, expert testimony veering “significantly

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14. Id.
16. Id.
17. Id.
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from the procedures accepted by recognized authorities in the field.... cannot be shown to be generally accepted as a reliable technique.”


The Frye methodology has been widely criticized by scholars and courts alike. And, in Daubert v. Merrell Dow Pharmaceuticals, the Court held that the Federal Rules of Evidence effectively superseded the Frye test of general acceptance. In contrast with Frye, the Daubert Court found no “clear indication that Rule 702 or the [r]ules as a whole were intended to incorporate a ‘general acceptance’ standard.” Instead, the Daubert Court read the general acceptance test to be “at odds” with the Federal Rules of Evidence and “their general approach of relaxing the traditional barriers to ‘opinion’ testimony.” The Federal Rule of Evidence 702 states:

A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if:

(a) the expert’s scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;

(b) the testimony is based on sufficient facts or data;

(c) the testimony is the product of reliable principles and methods; and

(d) the expert has reliably applied the principles and methods to the facts of the case.

As noted in Daubert, nowhere in the rule is Frye’s “general acceptance” language. In order to reconcile the direction of the Frye test and Rule 702, the Daubert Court dissected the language of Rule 702. In Daubert, the Court interpreted “knowledge” within Rule 702 to “connote[...]

20. See id. at 587.
21. See id. at 588.
24. See Daubert, 509 U.S. at 588.
25. See id. at 589–92.
more than subjective belief or unsupported speculation” and “scientific knowledge” as requiring “an inference or assertion . . . derived by the scientific method” established by the Federal Rules of Evidence reliability standard.26 Additionally, Daubert interprets Rule 702’s “help the trier of fact to understand the evidence or to determine a fact in issue”27 language to be determined by Federal Rules of Evidence reliability measures.28 Daubert also considers the scientific reliability of the principles and methods employed by the expert.29 “Scientific methodology today is based on generating hypotheses and testing them to see if they can be falsified . . . this methodology is what distinguishes science from other fields of human inquiry.”30

C. Kumho’s Response to Daubert: Applying the Federal Rules of Evidence to Scientific and Nonscientific Expert Testimony

The Advisory Committee’s note on Rule 702 details that both traditional scientific and nonscientific experts are permitted.31 The key inquiry is: “whether the untrained layman would be qualified to determine intelligently and to the best possible degree the particular issue without enlightenment.”32

After Daubert, there was uncertainty among the lower federal courts as to “whether, or how” the Daubert standard applied to nonscientific knowledge.33 The Court answered that question in Kumho Tire Co. v. Carmichael, and held that trial court judges have the ultimate gatekeeping function—to “assess reliability and helpfulness of proffered expert testimony”34 for both scientific and nonscientific experts.35 Not only do the

26. Id. at 590 (internal quotation marks omitted).
27. FED. R. EVID. 702.
29. See id. at 592–93.
31. See FED. R. EVID. 702 advisory committee’s note (2000) (noting that the Rule’s scope also encompasses “skilled witnesses, such as bankers or landowners testifying to land values” (internal quotation marks omitted)).
32. Id. (quoting Mason Ladd, Expert Testimony, 5 VAND. L. REV. 414, 418 (1952)).
34. FED. R. EVID. 702 advisory committee’s note (2000) (noting that Rule 702 has been amended for consistency with both Daubert and Kumho).
35. Kumho, 526 U.S. at 141.
Federal Rules of Evidence permit admittance of scientific and nonscientific evidence, but the *Kumho* Court also noted that requiring trial judges to decipher the scientific from the nonscientific would prove nearly impossible, time consuming, and unnecessary.36

In *Kumho*, the Court was charged with deciding how to apply *Daubert* when dealing with nonscientific expert engineers.37 In *Daubert* and in *Kumho*, the Court granted district courts great flexibility in determining how to assess reliability.38 When applying the gatekeeping function as established in *Daubert*, the Court held that a trial court is permitted to consider any or all of the *Daubert* factors when assessing reliability of expert testimony.39 To back up the Court's argument in favor of applying *Daubert*'s evidentiary standard to all forms of expert testimony, the Court looked directly to the language of Rule 702.40 Noting that the “language makes no relevant distinction between ‘scientific’ knowledge and ‘technical’ or ‘other specialized’ knowledge,” the Court found that “any such knowledge might become the subject of expert testimony.”41 While some have criticized the *Kumho* decision for its lack of a clearly defined rule for admitting expert testimony,42 the *Kumho* Court purposefully left broad discretion to trial courts, noting that *Daubert* provided a “list of factors [that] was meant to be helpful, not definitive.”43 To clarify why *Daubert* only referred to “scientific” testimony, the *Kumho* Court noted the expert testimony at issue in the *Daubert* decision involved a hard science matter.44

As our world evolves and new fields of study emerge, drawing a distinction between “scientific” and “technical” or “other specialized”
knowledge will prove difficult. According to Kumho, “[t]here is no clear line that divides the one from the others. . . . Neither is there a convincing need to make such distinctions.” And, because experts vary on a spectrum of expertise, Kumho’s expansion of Daubert gives the trial court “considerable leeway” for assessing the reliability of all expert testimony. The Kumho decision did not reject Daubert; rather, it highlighted the importance of reliability and relevancy when confronted with all forms of expert testimony.

III. SELECTING YOUR PLAYERS: KNOW THE ROLE OF EACH PLAYER

Although historically courts seemed to prefer traditional, scientific bases for expert testimony, it is clear that between Rule 702 and the decision in Kumho, courts are willing to accept expert testimony from both scientific and nonscientific experts so long as the testimony is deemed reliable. In fact, the use of social scientists as a tool in composing expert testimony is often relevant and “an integral part of many cases.” But knowing how to effectively use each player—the attorney, the judge, and the expert—to their fullest potential is essential.

A. The Attorney

Challenging the credibility of an expert should be approached with caution. The Second Circuit in United States v. Dukagjini noted that experts typically tout impressive credentials and offer opinions “that, unlike a factual matter, [are] not easily contradicted.” Additionally, as a litigator, seeking to disprove an expert’s posed theory or rationale can backfire. For example, if a strategy to contradict an expert flops and that same expert serves as a fact witness later in trial, the expert’s credibility may actually be bolstered inadvertently by the attorney’s mishap.

45. See id. at 148.
46. Id.
47. Id. at 152.
48. See id.
49. See discussion supra Parts II.A–B.
50. See FED. R. EVID. 702; Kumho, 526 U.S. at 141.
51. United States v. Mamah, 332 F.3d 475, 477 (7th Cir. 2003) (quoting United States v. Hall, 93 F.3d 1337, 1342 (7th Cir. 1996)) (internal quotation marks omitted).
53. See id.
54. See id. at 54.
Posing hypothetical questions to experts may be an effective technique in the adversarial process of a trial. Likewise, answering hypothetical questions based on facts already presented in the case is permissible for an expert witness. Although *Ingram v. McCuiston* pre-dates *Daubert* and is rooted in scientific principles, the North Carolina Supreme Court’s holding is still relevant for this Note. In *Ingram*, the attorney hypothetically questioned the expert witness and improperly slanted the facts of the case to favor his client. The lengthy hypothetical situation positioned the plaintiff as a physically, emotionally, and psychologically healthy person, when the real facts actually detailed an “extremely apprehensive” plaintiff. Additionally, in *Ingram*, the attorney’s questions relied on opinions of other experts, referring to the diagnosis of Ingram’s psychiatrist, for example. While hypothetical questions may be a good tool for helping the jury relate an expert witness’s opinions and expertise to the facts of a particular case, the tactic is not without controversy. Although an expert may not initially be pressured to reveal his sources when answering a hypothetical question, such experts may nevertheless be required to expose the underlying facts or data used to form the expert opinion.

B. The Judge

As the Federal Rules of Evidence replaced the *Frye* standard for expert witness testimony, the role of judges expanded significantly.
Today, just as in the Frye-era, trial judges “must ensure that any and all scientific testimony or evidence admitted is not only relevant, but reliable.”64 However, before any such testimony is produced, the trial judge must first determine whether the proposed “scientific knowledge . . . will assist the trier of fact to understand or determine a fact in issue.”65 Under the Federal Rules of Evidence, a “preliminary assessment” is required to determine whether the testimony is “scientifically valid” and whether the “reasoning or methodology . . . can be applied to the facts in issue.”66 Although the Daubert Court was unwilling to prescribe a checklist for judges to evaluate expert testimony, the Court did provide a collection of factors for courts to apply in any given case.67

The whole purpose of expert testimony is to assist the trier of fact in understanding the evidence.68 To assist the trier of fact, the evidence proffered by the expert’s testimony must relate to an issue in the present matter.69 In Daubert, the Court found the terms “scientific testimony” to imply certain grounds for validation—“a standard of evidentiary reliability.”70 These first two factors function as a “preliminary assessment” of the admissibility of expert testimony.71 Additional factors under the rule require that the “testimony is based on sufficient facts or data; . . . is the product of reliable principles and methods; and . . . has reliably applied the principles and methods to the facts of the case.”72 One significant method of determining whether an expert’s testimony will aid the trier of fact is to examine its hypotheses and field testing.73

Another avenue for the courts to take in determining the helpfulness and reliability of expert testimony is to examine the expert’s publications and peer reviews on the subject matter in question.74 However, these

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64. Daubert, 509 U.S. at 589; see also Kumho Tire Co. v. Carmichael, 526 U.S. 137, 148 (1999).
65. Daubert, 509 U.S. at 592; see also FED. R. EVID. 104(a).
67. See id. at 593–95.
68. FED. R. EVID. 702.
69. Daubert, 509 U.S. at 591.
70. Id. at 590.
71. Id. at 592–93.
72. FED. R. EVID. 702.
73. Daubert, 509 U.S. at 593.
74. Id.
methods do not always apply with ease to all forms of expert testimony. It is quite easy to imagine cutting-edge expertise that is reliable, yet too recent or too limited to be published and reviewed by peers. However, the court cannot underestimate the value of scrutiny within the respective expert's field. Additionally, courts may look for a “known or potential rate of error” within the expert’s basis of testimony. While Daubert provided these useful factors to aid courts in determining helpfulness and reliability, the drafters of the Federal Rules of Evidence envisioned a flexible rule on expert testimony, in which the “overarching subject is . . . validity,” including the evidentiary principles of relevance and reliability.

The Frye-era is, however, not extinct. The “general acceptance” test deduced from Frye can influence a court's assessment of reliability and relevancy of scientific or specialized knowledge. In Daubert, the Court noted “[w]idespread acceptance can be an important factor in ruling particular evidence admissible . . . [when] a known technique . . . has been able to attract only minimal support within the community,” a court may properly view the scientific or specialized knowledge with skepticism.

Undoubtedly, some expert opinions will be highly complex for both the trial judge and the prospective jurors. To alleviate some confusion, the Federal Rules of Evidence have built in a mechanism for courts to seek assistance in deciphering an expert’s expertise. Under Rule 706, a court is permitted to—either on its own or on a party’s motion—“order the parties to show cause why expert witnesses should not be appointed” when such assistance is needed. Following this procedure, the court may then appoint any agreed-upon expert “and any of its own choosing” to help inform the trier of fact. This court-appointment process, however, in no

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76. Daubert, 509 U.S. at 593.
77. See id. (noting that scrutiny “increases the likelihood that substantive flaws in methodology will be detected”).
78. Id. at 594.
79. Id. at 594–95.
80. See id. at 594.
81. Id. (quoting United States v. Downing, 753 F.2d 1224, 1238 (3d Cir. 1985)) (internal quotation marks omitted).
82. See FED. R. EVID. 706.
83. Id. R. 706(a).
84. Id. The court-appointed expert must also advise parties of findings made, be available for deposition by any party, and at trial be available to be called upon to testify and cross-examined by any party. Id. R. 706(b).
way inhibits parties from producing their own expert witnesses.85

Beyond the rules directly dealing with expert witnesses and their testimony, the court is also bound by the rules regarding relevancy.86 Along with a court’s great power of discretion within the expert witness rules, the court has the power to exclude relevant evidence over concerns of undue prejudice, confusion, or waste of time.87 The threshold for the court is whether the evidence’s “probative value is substantially outweighed by a danger of . . . unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence.”88 When considering this power of exclusion, the court must take into account the effectiveness of a limiting instruction under Rule 105.89

C. Expert Witness

The Federal Rules of Evidence do not permit unfettered acceptance of expert testimony; rather, the rules dictate standards and expectations for admittance.90 Rule 702 clearly states which subjects and theories may be presented as expert testimony.91 The rule covers “scientific, technical, or other specialized knowledge,”92 which “implies a grounding in the methods and procedures of science.”93

Under Rule 702, it is crucial that the expert’s testimony be reflective of the work conducted by the expert.94 In Tuli v. Brigham & Women’s Hospital, the federal district court noted the importance of a direct connection between an expert’s topical expertise and the expert’s proffered testimony.95 In Tuli, the defendants sought to exclude testimony of a professor of psychology who specialized in the science of sex stereotyping and discrimination, in addition to the testimony of two physicians who

85. Id. R. 706(e).
86. See Id. R. 403.
87. FED. R. EVID. 403 advisory committee’s note (2000).
88. FED. R. EVID. 403.
89. See Id. R. 105 (permitting the restriction of evidence to its “proper scope”).
90. See Id. R. 702.
91. See id.
92. Id.
94. See id. at 589.
planned to rebut the claim of discrimination.\textsuperscript{96} The \textit{Tuli} court found the professor’s testimony admissible as it simply guided the jurors and told them what to consider when faced with an issue regarding topics of his expertise—sex stereotypes and discrimination.\textsuperscript{97} However, the court found the testimony of both physicians to be unrelated to their education and expertise, noting the testimony “amounts to nothing more than well-credentialed physicians saying: Take my word for it;... this is not discrimination, ... this is a sham peer review.”\textsuperscript{98} For example, one of the physicians in question was a board-certified surgeon who “has never testified on what conduct comprises illegal sex discrimination,” and according to the court, held expertise in surgery, not sex discrimination.\textsuperscript{99} The other physician involved in the \textit{Tuli} case claimed expertise in “sham peer review.”\textsuperscript{100} The fact that this kind of testimony was nonscientific did not deter the court from admitting it; rather, finding the testimony conclusory and not helpful to the jury prohibited its admittance.\textsuperscript{101} Regardless of the topic of the testimony, “it should be evaluated by reference to the ‘knowledge and experience’ of that particular field.”\textsuperscript{102}

The expert’s testimony must also be helpful to the trier of fact.\textsuperscript{103} According to Rule 702, the testimony must “help the trier of fact to understand the evidence or to determine a fact in issue.”\textsuperscript{104} In the \textit{Tuli} case, the physician’s testimony about the potential for a “sham peer review” proved inapplicable to the gender discrimination claim.\textsuperscript{105} Unlike the inapplicable testimony from the physicians, the professor’s testimony in \textit{Tuli} was helpful in explaining a complicated issue to the fact finder.\textsuperscript{106} Likewise, the testimony given must be “sufficiently tied to the facts of the case that it will aid the [fact finder] in resolving a factual dispute.”\textsuperscript{107} The professor’s testimony was not only applicable to the particular facts of the

\textsuperscript{96.} Id. at 210–11.
\textsuperscript{97.} Id. at 211.
\textsuperscript{98.} Id.
\textsuperscript{99.} Id. at 212.
\textsuperscript{100.} Id. at 213 (internal quotation marks omitted).
\textsuperscript{101.} Id.
\textsuperscript{104.} \textit{Fed. R. Evid.} 702.
\textsuperscript{105.} \textit{Tuli}, 592 F. Supp. 2d at 213.
\textsuperscript{106.} Id. at 215.
Tuli case, but also offered insight on a topic unfamiliar to the jury. 108 In addition to providing helpful expert testimony, the professor conducted his testimony in a way that “allow[ed] the jury to make the final decision.” 109

The basis of an expert’s testimony must be rooted in “opinion on facts or data in the case that the expert has been made aware of or personally observed.” 110 Similarly, facts or data backing the opinion of an expert witness do not need to be admissible for the opinion to be admitted. 111 However, if the “facts or data would be otherwise be inadmissible,” they may be disclosed to the jury so long as their probative value substantially outweighs the prejudice inflicted. 112

In 2000, the Federal Rules of Evidence were amended to highlight that just because an expert’s opinion is admitted into evidence does not mean that such expert may automatically use inadmissible hearsay. 113 Instead, a court must determine whether the inadmissible hearsay is information reasonably relied upon by experts of the particular field. 114 Likewise, unless ordered by a court, an expert is permitted to give an opinion and its rationale without disclosing the underlying facts or data backing up the opinion. 115 However, upon cross-examination, an expert must be prepared to disclose the basis of the expert opinion. 116

A clear illustration of this dilemma can be found in United States v. Steed, in which the court found an officer’s reliance on conversations with other law enforcement officials over the course of a career was permitted under Rule 703. 117 In Steed, the court held that even assuming the police officer’s testimony regarding prior conversations with other law enforcement officers was inadmissible hearsay, the sources relied upon were sources reasonably relied upon by experts in the field of law enforcement. 118

In Dukagjini, a federal court dealt with the admissibility of using an

109. Id. at 216.
110. FED. R. EVID. 703.
111. Id.
112. Id.
113. FED. R. EVID. 703 advisory committee’s note (2000).
114. FED. R. EVID. 703.
115. Id. R. 705.
116. Id.
117. United States v. Steed, 548 F.3d 961, 975 (11th Cir. 2008).
118. Id.
expert witness to decode a drug deal conversation. The objections in *Dukagjini* arose over an interpretation of an intercepted phone conversation regarding the sale of narcotics that was disguised as a conversation about asbestos removal job opportunities. The party objecting claimed that the phone conversation was perfectly intelligible and, therefore, interpretation by an expert was neither helpful nor necessary for the jury. Additionally, objections claimed that even if the deciphering was necessary, it should not have been permitted under Rule 704 since it stated conclusions about the narcotics referred to in the undercover conversation. However, the court noted that the Federal Rules of Evidence grant trial courts broad discretion regarding the admissibility of expert testimony.

Rule 704 dictates that just because an ultimate issue is raised in the expert opinion, it is not automatically objectionable. However, the exception to the rule states that in criminal cases, expert witnesses are not permitted to opine regarding the “mental state or condition that constitutes an element of the crime charged or of a defense.” When testifying about ultimate issues, expert witnesses walk a fine line; they must remember to leave the ultimate determination to the jury—the tier of fact. In *Dukagjini*, the appellate court ultimately concluded that the trial court did not err in permitting the testimony explaining the code language because the jury was still left with the duty to determine whether the undercover conversation fulfilled the requisite intent for the crime charged.

Dueling testimony is another problematic area when dealing with expert opinions. Although courts are cognizant of the dangers surrounding dual expert testimony, courts are nevertheless willing to allow such testimony. In *Dukagjini*, the federal court dealt with a witness who testified as both a case agent and as an expert witness. The court recognized and understood the problem—the potential to go beyond

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119. United States v. Dukagjini, 326 F.3d 45, 52 (2d Cir. 2003).
120. *Id.* at 50–51.
121. *Id.* at 52.
122. *Id.*
123. *Id.*
124. FED. R. EVID. 704(a).
125. *Id.* R. 704(b).
126. *See id.; Dukagjini*, 326 F.3d at 53.
127. *Dukagjini*, 326 F.3d at 53.
128. *See id.* at 56.
129. *Id.* at 53.
specialized opinion into knowledge of the specific case. Although it took note of the dangers surrounding dual roles of the witness, the Dukagjini court was unwilling to take the next step of declaring the testimony impermissible. Instead, the court determined that it was up to the trial court, as part of its gatekeeping function, to make determinations of reliability.

IV. PLAYING FAIR: ETHICAL CONSIDERATIONS WHEN EMPLOYING EXPERTS

The Federal Rules of Evidence suggest that the purpose of the rules is to “administer every proceeding fairly, eliminate unjustifiable expense and delay,” and to find the truth. If that is the goal of the rules, how can expert testimony be used so that this primary purpose is maintained?

A. Battle of the Experts

As the Daubert factors imply, “knowledge” for purposes of expert testimony is filtered through an investigative analysis to determine reliability, and ultimately, admissibility. In order to claim the specialized knowledge demanded by Rules 702 and 703, such knowledge must be justified. To hold oneself out as knowing something that is unsubstantiated is irresponsible; however, the real ethical problem is posed when the unsubstantiated knowledge is presented to others who rely on the expert for guidance.

Although expert witnesses often serve as insightful tools for the fact finder, a battle of the experts may be inevitable because “[a]n expert can be found to testify to the truth of almost any factual theory, no matter how frivolous.” This so-called “battle” can turn into a real problem when experts are “selected by, affiliated with, compensated by, and apparently biased toward a particular party.”

130. Id. at 53, 55.
131. Id. at 56.
132. Id.
133. FED. R. EVID. 102.
134. See supra text accompanying notes 64–79.
136. Sanders, supra note 135, at 1542.
138. Christopher Tarver Robertson, Blind Expertise, 85 N.Y.U. L. REV. 174,
The affiliation bias that can result from pre-litigation interaction with experts is difficult to avoid. This problem—a “truth-deficit”—fails to provide fact finders with helpful signs of truth and can, in turn, hinder the fact finder’s reliance on the expert witness. “Given their freedom to cherry pick from a continuum of choices within a broad gray line, it is easy for experts to proffer partisan testimony without being dishonest.” Although “expert shopping” allows litigants to accurately reflect their position on an issue, the popular tactic has a hitch—it “tends to screen out mainstream testimony in favor of [testimony] that zealously represent[s] extreme views.”

In addition to expert witness impartiality problems, a Federal Judicial Center survey conducted in 1998, just five years after Daubert, revealed other problems. According to the survey of judges and attorneys, significant problems were identified as including: expense and reliability of expert witnesses, conflict among experts hired, and incompetence of experts.

These problems can multiply when the fact finder is unable to notice the bias in action. Likewise, expert witness shopping can prove dangerous when experts “hide behind an inscrutable veil of esoteric knowledge that renders cross-examination difficult.” In fact, it may be more beneficial for a litigant to select expert witnesses for their “courtroom persuasiveness” instead of their “special expertise” in a particular field.

B. Solutions to Unsportsmanlike Conduct

There are limited incentives for attorneys to filter through experts in order to find an expert who will accurately and ethically reflect the expertise necessary to prove the case. Attorneys are charged with the

177 (2010).
139.  Id. at 181.
140.  See id. at 184–88.
142.  Id. at 253.
143.  See JOHNSON ET AL., supra note 12, at 5–6.
144.  Id. at 6.
145.  See Yee, supra note 141, at 253.
146.  Id.
147.  Id.
148.  Sanders, supra note 135, at 1562.
task of zealously advocating on behalf of the client, but this advocacy requirement for attorneys inherently fosters partisan representation.

Although it is not the attorney's job to dissect the expert's expertise, in order to meet the minimal professional standards of conduct, an attorney should “exercise professional discretion in determining the means by which a matter should be pursued.” Likewise, attorneys “shall not knowingly . . . make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact.” While not all assertions made by an expert witness are directly that of an attorney, Rule 3.1 of the Model Rules of Professional Conduct calls for attorneys to not abuse legal procedure by avoiding frivolous claims by clients. Similarly, an attorney is barred from knowingly presenting false information. This duty is rooted in an attorney's “obligation as an officer of the court to prevent the trier of fact from being misled by false evidence.”

For attorneys, the possibility of being reported for professional misconduct may prevent violations of the Model Rules of Professional Conduct in the realm of aiding untruthfulness within expert testimony. However, with witness immunity for unethical expert witnesses, the options for sanctioning unethical experts are limited. But similar to an attorney's ethical binds by the Model Rules of Professional Conduct, sanctions for unethical conduct by experts may be controlled via professional codes.

150. See Sanders, supra note 135, at 1562–63.
151. MODEL RULES OF PROF’L CONDUCT R. 1.3 cmt. 1; see also id. R. 1.2 cmt. 2 (“Clients normally defer to the special knowledge and skill of their lawyer with respect to the means to be used to accomplish their objectives, particularly with respect to technical, legal and tactical matters.”).
152. Id. R. 3.3(a)(1).
153. Id. R. 3.1 & cmt. 1.
154. See id. R. 3.3(a)(3) (“If a lawyer, the lawyer's client, or a witness is called by the lawyer, has offered material evidence and the lawyer comes to know of its falsity, the lawyer shall take reasonable remedial measures . . . .”).
155. Id. R. 3.3 cmt. 5.
156. See id. R. 3.3 cmt. 6.
157. See id. R. 8.4 cmt. 1 (“Lawyers are subject to discipline when they violate or attempt to violate the Rules of Professional Conduct . . . .”).
158. See Briscoe v. LaHue, 460 U.S. 325, 345–46 (1983) (finding that the indispensable role of witnesses in bringing litigation to a conclusion warrants absolute immunity).
159. See Sanders, supra note 135, at 1566 (noting that professional sanctions,
For example, in *Deatherage v. Examining Board of Psychology*, the Washington Supreme Court found that absolute witness immunity did not extend to misconduct proceedings conducted by the entity governing the expert's profession.160

While many professions have professional codes of conduct, some countries employ *courtroom* codes of conduct.161 For example, in New South Wales, Australia, the rules of civil procedure encompass a code of conduct for expert witnesses.162 Among some of its provisions, expert witnesses have an overriding duty of impartiality and an obligation to not advocate for one party over another.163 The purpose of such a code is simple: to reinforce the expert’s role as an *educator*, not an *adversary*.164

Another possible solution to the broad side of these problems may be found in court appointments of expert witnesses. While this option does not eliminate individual parties from employing their own expert witnesses, it does provide the fact finder with a seemingly neutral expert.165 Under the Federal Rules of Evidence, by its own prerogative, “the court may appoint any expert that the parties agree on and any of its own choosing.”166 In this quasi-neutral role, the expert must present findings to both parties and, at the request of either party, be available for deposition, in-court testimony, and cross-examination.167

V. PRACTICE MAKES PERFECT: PREPARING AND EXECUTING EXPERT TESTIMONY IN THE SOCIAL SCIENCE ARENA

A. Do Not Let Your Expert Stray into Sweeping Conclusions

In reaction to the 2000 amendment of Rule 702, the advisory committee noted that, although expert testimony must be rooted in

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162. *See* Uniform Civil Procedure Rules 2005 (NSW) 31.23(1), sch 7 (Austl.);
    Sanders, *supra* note 135, at 1567.
163. Uniform Civil Procedure Rules 2005 (NSW) sch 7 para 2; *see also*
    Sanders, *supra* note 135, at 1567.
164. *See* Uniform Civil Procedure Rules 2005 (NSW) sch 7 para 2; Sanders,
    *supra* note 135, at 1567.
165. *See* FED. R. EVID. 706.
166. *Id.* R. 706(a).
167. *Id.* R. 706(b).
“reliable principles and methods that are reliably applied to the facts of the case[,] . . . the terms ‘principles’ and ‘methods’ may convey” different meanings when applied to nonscientific expertise.\textsuperscript{168} Similarly, an expert’s “experience alone—or experience in conjunction with other knowledge, skill, training, or education”—is likely enough to be considered reliable by the courts.\textsuperscript{169}

However, experts may find themselves walking a fine line between offering general expertise and providing sweeping conclusions.\textsuperscript{170} Rule 704 also provides guidance in this area, noting that in criminal cases, experts “must not state an opinion about whether the defendant did or did not have a mental state or condition that constitutes an element of the crime charged or of a defense. Those matters are for the trier of fact alone.”\textsuperscript{171} However, “[a]n opinion is not objectionable just because it embraces an ultimate issue.”\textsuperscript{172} In \textit{Dukagjini}, the court noted that many components of the expert’s testimony appeared based in his “familiarity with the specifics of the case, rather than his general expertise in the drug trade.”\textsuperscript{173} While the court recognized that conclusions on facts are permissible, the court held that taking the next step—applying criminal intent—was impermissible.\textsuperscript{174}

The \textit{Dukagjini} case is an example of the unique problem posed by allowing a witness to serve as both an expert and fact witness, which potentially creates a risk of prejudice.\textsuperscript{175} Expert testimony by Briggs, the case agent and expert witness for the government, poses two examples of how an expert “can stray from the scope of his expertise.”\textsuperscript{176} As an expert in decoding drug trade conversations, Briggs was hired by the government to testify about the meaning of specific words within certain conversations.\textsuperscript{177} However, Briggs impermissibly strayed from his expertise in drug-dealing decoding by testifying about the “meaning of conversations

\begin{itemize}
\item \textsuperscript{168} Id. R. 702 advisory committee’s note (2000).
\item \textsuperscript{169} Id.
\item \textsuperscript{170} See United States v. Dukagjini, 326 F.3d 45, 52–53 (2d Cir. 2003).
\item \textsuperscript{171} FED. R. EVID. 704(b).
\item \textsuperscript{172} Id. R. 704(a).
\item \textsuperscript{173} \textit{Dukagjini}, 326 F.3d at 50. The expert in this case was serving as both a case agent and as an expert witness for the government. \textit{Id.} He was primarily hired, however, for his expertise in decoding conversations about drug transactions. \textit{Id}.
\item \textsuperscript{174} \textit{Id.} at 53.
\item \textsuperscript{175} \textit{Id}.
\item \textsuperscript{176} \textit{Id.} at 55.
\item \textsuperscript{177} See \textit{id.} at 55.
\end{itemize}
in general” and not merely about “the interpretation of code words.”

Similarly, Briggs’s statements in his capacity as an expert witness were “partially the product of his out-of-court interviews with co-conspirators,” and not “within the permissible bounds of expertise . . . nor within recognized exceptions to the hearsay rule.”

In this matter, the jury may question whether the expert testimony is derived from experience in dealing with drug transactions or whether it is rooted in underlying knowledge learned from the case agent role.

“Straying from the scope of expertise may also implicate another concern under Rule 403, juror confusion,” creating difficulty in discerning “general experience and reliable methodology” from reliance on knowledge learned from working on the case.

Similarly, in Berry v. City of Detroit, the Sixth Circuit Court of Appeals commented on the differences between scientific and nonscientific expert witnesses. To illustrate this distinction, the court explained how different expert witnesses could offer different expert opinions on the same issue. “By way of illustration, if one wanted to explain to a jury how a bumblebee is able to fly, an aeronautical engineer” could apply universal flight principles—“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.” Likewise, “a beekeeper with no scientific training at all would be an acceptable expert witness,” and the testimony “would not relate to his formal training, but to his firsthand observations” regarding beekeeping.

B. Walking the Fine Line Between Expert and Lay Witness Testimony

As far back as Frye, our adversarial system has experienced difficulty in pinpointing the exact moment when expertise leaves the lay witness realm and crosses over into the expert witness realm. Similarly, post-Daubert, courts experienced tremendous difficulty distinguishing between

178. Id.
179. Id. at 59.
180. Id. at 54.
181. Id.
183. Id.
184. Id.
185. Id. at 1350.
186. See Frye v. United States, 293 F. 1013, 1014 (D.C. Cir. 1923) ("Somewhere in this twilight zone the evidential force of the principle must be recognized . . . .").
scientific and other specialized or technical knowledge. In permitting nonscientific, but specialized knowledge, the *Kumho* Court ruled that because “there is no clear line that divides” scientific from nonscientific, Daubert principles apply to both types of testimony. Whether “expert testimony focuses upon specialized observations,” or whether it zeros in on specialized theory derived from research or experience, the expert testimony will be rooted in some concept foreign to the jury. Because the trial judge is to determine the reliability of an expert’s testimony, the judge must apply the Daubert standards to ensure the testimony will not wrongfully mislead the jury. Therefore, the judges, in their gatekeeper function, heavily guide the fine line between lay witness testimony and expert witness testimony.

This duty—determining whether testimony is expert or lay—is guided by Rule 701. In the 2000 Amendments to Rule 701, Congress incorporated an ending clause to clarify the difference between expert testimony and lay testimony. In *United States v. Garcia*, the court differed from *Dukagjini* even though in both cases experts discussed and decoded a drug-related conversation. Unlike in *Dukagjini*, in which the court permitted testimony by expert Briggs regarding his interpretation of specific words in a drug transaction conversation based on his experience in law enforcement, the court in *Garcia* found similar descriptions of drug-related conversations to be lay testimony. In *Garcia*, the lay witness, Toro Balcarcel, was an active participant in the drug transaction conversation. Working with detectives, Balcarcel gave his interpretation of the conversation, maintaining it was about a drug deal, while the

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188. Id.
189. Id. at 148–49.
190. Id. at 149 (citing Hand, *supra* note 1, at 54).
191. See id.
192. See id. at 148–49. In *Kumho*, there is no definitive checklist for admissibility of non-traditional scientific expert testimony. Rather, the Court recognized that expertise is derived from a wide range of sources including personal knowledge, education, training, etc. Id. at 150.
194. *Fed. R. Evid.* 701 advisory committee’s note (2000). This amendment sought to prevent disguising expert witnesses as lay witnesses. Id.
197. *Garcia*, 291 F.3d at 141.
198. Id. at 134.
defendant, Garcia, insisted the conversation was about the actual words spoken—an asbestos removal operation. 199

In this case, the government offered Balcarcel as a lay witness, not as an expert witness. 200 However, to an extent, the method of questioning employed by the government seemed to suggest Balcarcel’s testimony was offered as an expert opinion. 201 This case serves as a prime example of walking the fine line between an expert and lay witness. 202 For example, if Balcarcel attributed his opinion to his prior experience in drug dealing, his opinion would no longer function as lay testimony. 203 Instead, Balcarcel would morph into an expert’s role because his opinion would be based on experience in a specialized field, rather than based in his own perception as a participant. 204 Likewise, “[b]ecause the government did not qualify Toro Balcarcel as an expert, any opinion testimony based on his expertise and knowledge as a drug dealer was improper.” 205

C. Education

Just because an expert offers testimony, the court is not obliged to admit it. 206 While an expert’s education, or lack thereof, is not determinative, it is crucial that a link exist between the facts and data the expert employs and the expert’s testimonial conclusions. 207 In United States v. Mamah, the experts, Dr. Pellow and Dr. Ofshe were both highly educated in their respective fields—Ghanaian culture and the false confession phenomenon, respectively. 208 However, the court in Mamah found that Dr. Pellow and Dr. Ofshe lacked the connection between facts

199. Id.
200. Id. at 139.
201. Id. at 139 n.9 (“For example, the government asked Toro Balcarcel, In your past experience in drug dealing had you even used codes before?” (internal quotation marks omitted)).
202. See id. at 139–40.
203. See id. at 139 n.9.
204. See id.
205. Id. at 140 n.9.
206. United States v. Mamah, 332 F.3d 475, 478 (7th Cir. 2003).
207. Id.; see also Gen. Elec. Co. v. Joiner, 522 U.S. 136, 146 (1997) (“Trained experts commonly extrapolate from existing data. But nothing in either Daubert or the Federal Rules of Evidence requires a district court to admit opinion evidence that is connected to existing data . . . . A court may conclude that there is simply too great an analytical gap between the data and the opinion proffered.”).
208. Mamah, 332 F.3d at 476.
and data and their respective opinions. Dr. Pellow, an experienced researcher in Ghanaian culture, may have been helpful to the jury to answer questions regarding “how a repressive military regime shapes Ghanaian behavioral patterns,” but these kinds of questions were not relevant in the case. Dr. Pellow’s expert testimony lacked “facts and data to support the proposition that Mamah’s cultural background might have induced him to give a false confession.” Likewise, although Dr. Ofshe had experience in the theory behind false confessions, there was no connection between his sociological research and the specific facts and data of the case, causing the court to render his testimony unnecessary and unhelpful.

D. Social Science Evidence

Social science research sometimes expands on common knowledge that jurors may already possess. However, “even if the inferences may be drawn by the lay juror, expert testimony may be admissible as an aid.” For example, battered woman syndrome—a syndrome describing a domestic violence victim’s counter-intuitive behavior—often requires extra explanation since the psychological and behavioral characteristics of victims are typically outside the scope of the average juror, even though the concept of being abused may be within a juror’s common knowledge.

An expert witness’s testimony may also offer additional factors or independent analysis of events.

Expert psychological evidence can only be admissible in a [prosecution for child abuse] if it is at least partly based on factors in addition to and independent of the victim’s accounts. Otherwise, the expert’s conclusions are of no value to the jury because they present no new evidence and are merely vouching for the credibility of the child victim

209. Id. at 478.
210. Id.
211. Id.
212. Id.
213. See United States v. Hall, 93 F.3d 1337, 1345 (7th Cir. 1996).
215. See, e.g., State v. Grecinger, 569 N.W.2d 189, 195 (Minn. 1997) (describing the phenomenon of battered woman syndrome, including why victims stay with batterers, recant abuse, tell inconsistent stories, and delay prosecution).
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When an expert is permitted to opine, the expert must not simply discuss the credibility of a victim or witness. In *Hoult v. Hoult*, the expert, Dr. Brant, crossed this line by giving an opinion about the plaintiff’s credibility, rather than limiting her opinion to “psychological literature or experience or to a discussion of a class of victims generally,” the expert “came perilously close to testifying that this particular victim/witness could be believed.”

VI. COOL DOWN: THE CONCLUSION

Expert testimony has evolved and expanded in the last thirty years, but its core purpose has remained constant—to help inform the fact finder. Without expert testimony, our adversarial system would be limited to the understanding of the fact finder with little guidance and explanation of important details in each case. Although this toolkit is easily applied to both hard, scientific and nonscientific expert testimony and to nonscientific expert testimony, the most important aspect of this Note comes from its suggestions regarding implementation. Like athletic teamwork, successful use of expert testimony is only effective when all parts work together and when all people know their respective roles.

*Susan C. Scieszinski*

217. *Id.*
218. *See* *Hoult v. Hoult*, 57 F.3d 1, 7 (1st Cir. 1995).
219. *Id.* (quoting United States v. Rosales, 19 F.3d 763, 765 (1st Cir. 1994) (internal quotation marks omitted)).

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