

# NAVIGATING THE NUANCES OF MODERN EXPERT WITNESS LAW: HOW TO TEACH ABOUT EXPERTS

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## I. INTRODUCTION

Most law students arrive at the door of their first Evidence class with personal experience involving only one kind of real world, practicing expert: their medical doctor. There will be the occasional individual whose background is more interesting and it brought him or her into contact with a psychologist or psychiatrist. And perhaps the cases encountered during a summer law firm clerkship exposed the person to one or two other types of experts. The point is that the student's contact with the person and topic of experts is narrow and limited. The evidence class is the place to expand the horizons.

Why is this important? Quite simply because, in the United States, trial by jury has become trial by expert.<sup>1</sup> Experts testify in over 85% of civil jury trials.<sup>2</sup> In criminal cases, it is often the DNA expert who provides the dramatic proof that turns the direction of the trial.<sup>3</sup>

In short, in the world of modern trials, experts are the coin of the realm. Lawyers know that most of the time, experts are case-breakers. Their demeanor, knowledge, and presentation ability are key qualities. Accordingly,

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1. Edward J. Imwinkelried, *A Minimalist Approach to the Presentation of Expert Testimony*, 31 STETSON L. REV. 105, 105 (2001).

2. *Id.* (citing a study in the early 1990s of 529 civil cases in the California Superior Court where researchers found that 86% used expert testimony).

3. Calling experts fulfills juror expectations. One author refers to the "CSI effect." Mark Hansen, *The Uncertain Science of Evidence*, 91 A.B.A. J. 48, 52 (July 2005). The phrase is explained: "The term refers to the impact popular television shows are having on the public's expectations of what forensic science can and cannot do." *Id.* Jurors are disappointed and will vote against a party if the technologies they see on TV are not used in court. *Id.* at 53. A prosecutor remarked that "[w]e've had numerous cases where jurors have told us they acquitted even though they thought the defendant was guilty because there was no scientific evidence to back us up." *Id.*

their persuasive effect on modern lay jurors makes it incumbent upon students to fully grasp the outlines and details of expert witness law. This is so much the case that many evidence instructors consider experts the most significant topic in the course.

The subject has profound significance for judges as well. It is the function of today's trial judge to ensure that the expert's opinions are appropriately grounded and directed. That means not allowing a social worker to testify about the medical dynamics of bone disease, for example.<sup>4</sup> This point brings our attention to the law and tactics of laying a foundation for expert proof, a step that begins with the expert qualification process.

## II. TEACHING ABOUT QUALIFICATIONS

Today's post-*Daubert* world places enhanced emphasis upon the credentials and backgrounds of prospective witnesses. If a witness proposes to testify that a doctor committed malpractice, the judicial system needs to ensure that the speaker has medical training and experience. A big part of a judge's gatekeeping responsibility is to check an expert's credentials. And even if qualified, the trial court must exercise care to see that the expert testifies within the parameters of her specialty.

### A. *Starting at the Start*

The course of study on experts usually begins with the witness qualification process. Most text presentations, as well as in-class instruction, commence with this step. In this respect, classroom treatment tracks courtroom practice. As all lawyers know, an expert at trial must initially be shown to be especially skilled in some relevant scientific, professional, or other technical process.<sup>5</sup>

The emphasis on expert credentials brings home to students that we do not lightly dispense with the rule against opinions. Lay witnesses testify to facts, with a few exceptions. The only witnesses allowed to freely employ the most

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4. See, e.g., *Gilbert v. DaimlerChrysler*, 685 N.W.2d 391, 410 (Mich. 2004).

5. The duty of the court to check expert qualifications was stated in *Smith v. Ford Motor Co.*: "In analyzing the reliability of proposed expert testimony, the role of the court is to determine whether the expert is qualified in the relevant field and to examine the methodology the expert has used in reaching his conclusions." 215 F.3d 713, 718 (7th Cir. 2000). Cases in which experts were deemed to be qualified include *United States v. McPhilomy*, 270 F.3d 1302, 1312-13 (10th Cir. 2001) (finding a geologist qualified by education and experience to testify as expert on the value of stone) and *Groobert v. President and Directors of Georgetown College*, 219 F. Supp. 2d 1, 7-11 (D.D.C. 2002) (determining personal experience was a proper method for assessing reliability of expert testimony regarding future earnings of deceased stock photographer in absence of reports or studies on income of stock photographers, and concluding that testimony of photographic production company owner with twelve years exclusive work in stock photography was reliable and admissible).

powerful form of testimony, opinion evidence, are experts. It is fundamental that permission to use this mode of communication comes only after a threshold showing of past accomplishments.

### B. *Emphasizing the Point*

The care that a lawyer must use in accrediting her witnesses is not readily visible to students from perusing appellate cases alone. Accordingly, it is essential that role-playing be utilized to make dramatic the qualifying process. With students playing the parts, the class will be able to appreciate the need for a lawyer to walk the witness through the witness's education, publications, work experience, and professional associations. Sources are available to illustrate the needed steps. For example, *A Student's Guide to Elements of Proof*<sup>6</sup> contains an extensive qualification of an automobile design engineer in a products liability case. In the illustrative case, a claim is made that the gasoline tank was improperly located unduly close to the rear bumper when the car was manufactured. This caused the tank to explode in a collision. The text takes the student through the Q. & A. of qualifying the engineer. After the demonstration, the instructor will perhaps highlight how the sponsoring lawyer led the witness through his engineering education, work experience focusing upon automobile fuel system design, prior courtroom experience,<sup>7</sup> professional associations and organizations, and publications.

### C. *Nuances*

Courts seem more inclined than in the past to police the parameters of expert testimony. Key contemporary issues facing the trial bench include whether the witness, although an expert, is talking within an area of his or her expertise.

Recent Michigan experience illustrates. An expert qualified in subject A cannot turn around and testify about subject B. The Michigan Supreme Court said exactly that in *Gilbert v. DaimlerChrysler*.<sup>8</sup> The plaintiff recovered a \$21 million verdict in her sexual harassment suit.<sup>9</sup> This was the largest recorded compensatory award for a single-plaintiff sexual harassment suit in America. "[Plaintiff] contended during her trial that defendant's failure to deal adequately with sexual harassment in her plant led to a permanent change in her 'brain chemistry' and a relapse into substance abuse and depression, and

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6. RONALD L. CARLSON, *A STUDENT'S GUIDE TO ELEMENTS OF PROOF* 165 (2005).

7. See Irving Prager and Kevin S. Marshall, *Examination of Prior Expert Qualification and/or Disqualification—(Questionable Questions Under the Rules of Evidence)*, 24 REV. LITIG. 559, 562–65 (2005).

8. 685 N.W.2d at 394.

9. *Id.*

that these conditions will soon lead to her untimely and excruciating death.”<sup>10</sup> The foundation for this theory of recovery was laid by a social worker called to the stand by the plaintiff.

The social worker had apparently studied the plaintiff’s hospital records, and was asked several questions on direct examination including:

Q. Will [plaintiff] be able to work in light of what you know about her condition as recently as yesterday? Will she continue to be physically able to work?

A. No. *Her medical complications at this point have progressed to the point where she is going to be physically unable to work fairly soon.*

Q. Do you have any idea what was the cause of her problems as they exist in this lady as late as yesterday?

A. Alcoholism, major depression precipitated by work stresses, and sexual harassment. That is the bottom line.<sup>11</sup>

The use of a social worker to provide what the court saw as medical conclusions was deemed to be error. “The medical ‘prognosis’ of a social worker who has no training in medicine and lacks any demonstrated ability to interpret medical records meaningfully is of little assistance to the trier of fact.”<sup>12</sup>

The gatekeeping responsibility imposed on judges by cases like *Gilbert* has been robustly interpreted by the appellate courts. In 2005, the Michigan Court of Appeals found the trial court failed to properly exercise its function as the gatekeeper of expert opinion testimony. The trial court erred when it ruled on the admissibility of evidence “without either conducting a more searching inquiry under its obligation to preclude speculative and unreliable evidence,” or holding a hearing regarding the acceptance of an expert’s theories.<sup>13</sup> *Gilbert* was cited as requiring trial courts to ensure that any expert testimony admitted at trial is reliable. The court of appeals, quoting *Gilbert*, added: “Careful vetting of all aspects of expert testimony is especially important when an expert provides testimony about causation.”<sup>14</sup>

*Gilbert* is also having an impact in other jurisdictions. The Tennessee Court of Appeals cited it for the proposition that when an “expert relies on unreliable foundational data, any opinion drawn from that data is likewise

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10. *Id.*

11. *Id.* at 411.

12. *Id.* at 413.

13. *Clerc v. Chippewa County War Mem’l Hosp.*, 705 N.W.2d 703, 707 (Mich. Ct. App. 2005); see Brian Benner & Ronald Carlson, *Gatekeeping After Gilbert: How Lawyers Should Address the Court’s New Emphasis*, MICH. BUS. L.J. (forthcoming 2006).

14. *Clerc*, 705 N.W.2d at 706.

unreliable.”<sup>15</sup> The court added: “By the same token, an expert’s testimony is unreliable, even when the underlying data is sound, if the expert employed flawed methodology or applied sound methodology in a flawed way.”<sup>16</sup>

The *Gilbert* decision illustrates a modern trend. Gatekeeping is on the ascendancy. In an earlier era, an expert who was generally qualified in an area of practice could testify to opinions regarding virtually any aspect of the calling. Today, some particularized degree of skill or experience in specialty areas is routinely required.<sup>17</sup> *Daubert* has had an impact on the process. So have recent legislative enactments.

#### D. Legislation

Part of the refining process is attributable to legislative action. In an era of tort reform, legislatures have stepped into the witness qualification process. A 2005 Georgia enactment illustrates. Experts frequently testify against architects, accountants, pharmacists, and engineers, among others. When the witness testifies against a doctor in a medical malpractice action in Georgia, the witness must demonstrate “professional knowledge and experience” in the specialty about which the opinion is given.<sup>18</sup> This requirement is satisfied

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15. *Waggoner Motors, Inc. v. Waverly Church of Christ*, 159 S.W.3d 42, 61 (Tenn. Ct. App. 2004). On the need for reliable underlying data, see *Montgomery County v. Microvote Corp.*, 320 F.3d 440, 448–49 (3d Cir. 2003), where expert testimony is inadmissible when based upon questionable data and when expert did not know the source of the documents on which he relied.

16. *Waggoner Motors*, 159 S.W.3d at 61.

17. Experts were rejected for want of qualifications in *Ralston v. Smith & Nephew Richards, Inc.*, 275 F.3d 965, 969 (10th Cir. 2001) (noting that the medical witness had never performed research in the litigated area of specialty nor had she published anything on the subject). See also *Jinro Am. Inc. v. Secure Invs., Inc.*, 266 F.3d 993, 1005 (9th Cir. 2001), *opinion amended by* 272 F.3d 1289 (9th Cir. 2001) (witness did not meet qualifications of an expert regarding Korean business practices).

Of course, expert testimony is sometimes rejected because the topic upon which the expert is offered is not one requiring expert guidance. *Stromback v. New Line Cinema*, 384 F.3d 283, 295 (6th Cir. 2004) (holding that expert testimony was unnecessary to determine similarity between plaintiff’s poem and defendant’s movie in copyright infringement case); *Eannott v. Carriage Inn of Steubenville*, 799 N.E.2d 189, 192 (Ohio Ct. App. 2003) (rejecting expert testimony offered on a question that is within the jury’s range of knowledge); *Williams v. Carr*, 565 S.W.2d 400, 404 (Ark. 1978) (stating that “the action of the trial court in qualifying a mortician as an expert on the issue of mental anguish and grief is rather shocking . . . to this Court,” where a funeral director and embalmer’s attendance at an institute of mortuary science and participation in approximately 200 funerals did not render him an expert on the topic of “extraordinary grief”); cf. *Vogler v. Blackmore*, 352 F.3d 150, 155–56 (5th Cir. 2003) (holding that admission of expert testimony about grief is in the discretion of trial court). Three of the foregoing cases find expert testimony to be improper in the context of issues to be decided by the jury. On the other hand, the language of drug dealers and their modus operandi are not topics with which most jurors are familiar, and law enforcement officers may be allowed to testify on these subjects. *United States v. Solorio-Tafolla*, 324 F.3d 964, 966 (8th Cir. 2003).

18. GA. CODE ANN. § 24-9-67.1(c)(2) (2005).

when the proponent of the witness shows that the expert has been actively engaged in the practice of the involved medical specialty “for at least three of the last five years.”<sup>19</sup> Another way for an expert to satisfy the practice limitation is to be a teacher of the subject for the described three-year period.<sup>20</sup> Alerting evidence students to the potential for legislatures prescribing a code of qualifications would seem to be worthwhile.

### III. DAUBERT AND FRYE

Interest within the academy in scientific evidence is high. The outpouring of literature about *Daubert v. Merrell Dow Pharmaceuticals, Inc.*<sup>21</sup> has been colossal. Rare is the aspiring evidence professor, one who is seeking tenure, who does not consider writing an article upon some aspect of *Daubert*. It is the topic *du jour* for law reviews and bar journals alike.

A 2005 survey of articles recently published on the law of evidence concluded that expert testimony comprised the greatest segment of compositions written on evidentiary topics.<sup>22</sup> “By far the largest number of articles by subject matter (74, or about one-third) was devoted to various aspects of expert evidence.”<sup>23</sup>

Accordingly, few instructors need much coaxing when it comes to incorporating current Supreme Court jurisprudence on scientific evidence into the evidence course curriculum. What may be less widespread is ensuring that future lawyers are aware of the test for scientific evidence in the law school’s local jurisdiction. While this message may not be a priority in schools without a substantial in-state enrollment base, it is an important component where a law school places the bulk of its graduates in one or two local jurisdictions.<sup>24</sup>

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19. *Id.* § 24-9-67.1(c)(2)(A).

20. *Id.* § 24-9-67.1(c)(2)(B). On the subject of legislatively imposed standards for qualifying an expert witness, see Tate *ex rel.* Estate of Hall v. Detroit Receiving Hospital, 642 N.W.2d 346 (Mich. Ct. App. 2002).

21. 509 U.S. 579 (1993). Around the time of *Daubert*, an energetic debate occurred regarding whether courts had been overwhelmed by “junk science.” Compare PETER W. HUBER, GALILEO’S REVENGE: JUNK SCIENCE IN THE COURTROOM (1991), with Kenneth J. Chesebro, *Galileo’s Retort: Peter Huber’s Junk Scholarship*, 42 AM. U.L. REV. 1637 (1993).

22. D. Michael Risinger, *Around the Law Reviews*, Evidence Section News 5 (Spring/Summer 2005).

23. *Id.*

24. The above comment presupposes that the scientific evidence test in the jurisdiction is clearly established. Usually that will be the case, but not always. See, e.g., John M. Conley & Scott W. Gaylord, *We Are Not a Daubert State—But What Are We? Scientific Evidence in North Carolina After Howerton*, 6 N.C.J. L. & TECH. 289 (2005); Elizabeth K. Strickland, *Making Waves in a Sea of Uncertainty: Howerton Muddies the Waters of Expert Testimony Admissibility Standards in North Carolina*, 83 N.C. L. REV. 1613 (2005). The case which is the object of these writings is *Howerton v. Arai Helmet, Ltd.*, 597 S.E.2d 674 (N.C. 2004). While federal courts and several states are controlled by *Daubert*, a few jurisdictions follow standards different from both

The professor who boasts that no local law is taught in his or her class does all a disservice.

When the instructor completes the basics of *Daubert*<sup>25</sup> and *Frye*,<sup>26</sup> she

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*Daubert* or *Frye*. See *Williams v. State*, 312 S.E.2d 40, 48 (Ga. 1983) (holding that, to be admissible, process analyzing fibers must have reached a scientific state of verifiable certainty). Illinois and Missouri are usually listed as *Frye* jurisdictions. See *People v. Wheeler*, 777 N.E.2d 961, 967 (Ill. App. Ct. 2002) (“Illinois courts follow the test set forth in *Frye* . . .”); *State v. Kinder*, 942 S.W.2d 313, 327 (Mo. 1996) (en banc) (referring to the evidentiary hearing as the “*Frye* hearing”).

25. The evolution from *Frye* to *Daubert* is traced in Edward J. Imwinkelried & William A. Tobin, *Comparative Bullet Lead Analysis (CBLA) Evidence: Valid Inference or Ipse Dixit?*, 28 OKLA. CITY. U. L. REV. 43, 45 (2003). Authors Imwinkelried and Tobin confirmed the presence that the “general acceptance” *Frye* test has in many state trials today:

In 1923, the Court of Appeals for the District of Columbia handed down its decision in *Frye v. United States*. In *Frye*, the court pronounced that before an expert may base courtroom testimony on a scientific theory, the expert’s proponent must lay a foundation establishing that the theory is generally accepted within the relevant scientific circles. At one time, *Frye* was the controlling test in federal court and forty-five of the states. . . . [T]he Supreme Court in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, ruled that *Frye* is no longer good [federal] law. However, the *Daubert* decision was based on statutory construction rather than constitutional analysis. Hence, even in the states with evidence codes patterned after the Federal Rules, the state courts remain free to interpret their statutes differently and to continue to adhere to *Frye*. [As of 2004,] [e]ighteen states [had] opted to continue to adhere to *Frye*. Significantly, that number [included] jurisdictions such as California, Florida, Illinois, New York, Pennsylvania, and Washington. Since these jurisdictions are among the most populous and litigious states, even today *Frye* is the governing law at most state trials.

*Id.* at 54–55.

For cases interpreting and applying *Daubert*, see *Craftsmen Limousine, Inc. v. Ford Motor Co.*, 363 F.3d 761, 777 (8th Cir. 2004) (ruling that the expert opinion should not have been admitted because it failed to “incorporate all aspects of the economic reality”) (quoting *Concord Boat Corp. v. Brunswick Corp.*, 207 F.3d 1039, 1057 (8th Cir. 2000)); *Hynes v. Energy West, Inc.*, 211 F.3d 1193, 1205 (10th Cir. 2000) (finding expert testimony regarding oxidation of gas admissible under *Daubert* principles); *United States v. Ewell*, 252 F. Supp. 2d 104, 111–15 (D.N.J. 2003) (denying defendant’s motion to suppress government’s evidence from DNA testing process, where process was capable of verification, subject to peer review and generally accepted, error rate was not significant, and laboratory maintained high standards); *Christian v. Gray*, 65 P.3d 591, 609–12 (Okla. 2003) (holding that the trial court abused its discretion in denying testimony from the plaintiff’s medical expert in a case alleging injury from airborne chemicals inhaled while attending a circus because it failed to determine that the expert’s methods were insufficient pursuant to one of the particular *Daubert* factors or some other factor consistent with the principles of *Daubert*).

26. *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923). *Frye* imposes a substantial impediment to free introduction of novel scientific applications. In *State v. Sipin*, 106 P.3d 277 (Wash. Ct. App. 2005), computer-generated accident reconstruction evidence was inadmissible under *Frye*.

While many state jurisdictions follow the general scientific acceptance standard of *Frye*, its strictures led some courts to a more liberal rule even before *Daubert*. See *United States v. Downing*, 753 F.2d 1224 (3d Cir. 1985). In 1993 in *Daubert v. Merrell Dow Pharmaceuticals*,

often turns to some of the more enriching advanced issues that mark the field of scientific evidence. The abundant literature which is available supplies an avenue to most of these, ranging from the application of *Daubert* in criminal cases<sup>27</sup> to a debate over what the Supreme Court meant when it said there must be “appropriate validation” of expert testimony in order to make it admissible.<sup>28</sup>

Other issues involve the extension of *Daubert* to “soft” science, as opposed to instrumental processes. This is where the proliferating commentary on *Daubert* has dual value. The exploration of sophisticated issues by commentators makes them explicit for instructors in the field. Further, scientific evidence decisions from the courts need to be dissected and analyzed. This is the only way a comprehensive *Daubert* code can be hammered out, for the guidance of the judiciary and the bar. Commentators do both the law of evidence and the world at large a favor when they dedicate their efforts to solving *Daubert*’s mysteries.

#### IV. RULE 703

Of all the rules contained in Article VII of the Federal Rules of Evidence, the most difficult for law students to grasp is Rule 703. This is understandable. At first blush, the provisions seem counter-intuitive. How can an expert rely on inadmissible evidence, like hearsay, and still be able to give her opinion? Isn’t the opinion flawed by predicating it upon inadmissible data? Further, once the expert states her conclusions, why is she barred from reciting in detail the facts she relied upon?

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*Inc.*, 509 U.S. 579 (1993), the Court rejected *Frye* for federal courts in favor of a liberalized standard. After *Daubert*, the Third Circuit identified eight non-exclusive factors to consider in determining whether a particular scientific method is reliable:

- (1) whether a method consists of a testable hypothesis;
- (2) whether the method has been subject to peer review;
- (3) the known or potential rate of error;
- (4) the existence and maintenance of standards controlling the technique’s operation;
- (5) whether the method is generally accepted;
- (6) the relationship of the technique to methods which have been established to be reliable;
- (7) the qualifications of the expert witness testifying based on the methodology; and
- (8) the non-judicial uses to which the method has been put.

Paoli R.R. Yard PCB Litig. v. Se. Penn. Trans. Auth., 35 F.3d 717, 742 n.8 (3d Cir. 1994).

27. Paul Giannelli, *The Supreme Court’s “Criminal” Daubert Cases*, 33 SETON HALL L. REV. 1071 (2003).

28. Edward J. Imwinkelried, *The Meaning of “Appropriate Validation” in Daubert v. Merrell Dow Pharmaceuticals, Inc., Interpreted in Light of the Broader Rationalist Tradition, Not the Narrow Scientific Tradition*, 30 FLA. ST. U. L. REV. 735 (2003).

Other issues involve the extension of *Daubert* to “soft” science, as opposed to instrumental processes. See Alexander Scherr, *Daubert & Danger: The “Fit” of Expert Predictions in Civil Commitments*, 55 HASTINGS L.J. 1, 88 (2003) (stating that mental health predictions are subject to, and admissible, under *Daubert*).

In 2000, Professor Daniel Capra and the Federal Evidence Advisory Committee effected one of the best clarifications yet engrafted on the rules. The 2000 amendment provides a presumption against wholesale disclosure of an expert's underlying data, at least on direct examination. Clarified by the measure are the limits of Rule 703. An expert can freely rely upon customarily-used hearsay or other inadmissible evidence to help her propound those conclusions in the courtroom. What the expert cannot do is use this rule to run impermissible data and documents into the record.<sup>29</sup> The 2000 amendment proscribes such bootstrapping. A major abuse was stanching by the enactment.

After the December 1, 2000 amendment to Rule 703, a number of courts have denied admission to an expert's underlying data. *Turner v. Burlington N. Santa Fe R.R. Co.*<sup>30</sup> is a good example. The *Turner* court applied the presumption against disclosure when the information is offered by the proponent of the expert, and thus rejected a lab report.<sup>31</sup> At issue was the cause of a fire. The railroad denied that the fire was caused by its negligence and sought to prove that the fire was the result of arson. Samples of debris piles from the railroad's property were sent to Armstrong Forensic Laboratory in Arlington, Texas, for analysis.<sup>32</sup> The lab detected gasoline.<sup>33</sup> The lab's report was going to be used by a fire investigator to conclude that an arsonist started the fire, but the court rejected the testimony, stating:

The lab report was otherwise inadmissible hearsay evidence in the absence of foundation testimony by the laboratory that conducted the testing. The prejudice that would result from admission of this evidence was substantial, whereas its probative value was minimal. Because the probative value of this otherwise inadmissible evidence does not outweigh its prejudicial effect, our inquiry is ended under [Rule] 703.<sup>34</sup>

The movement to exclude such hearsay will doubtless be accelerated by the 2004 decision of the United States Supreme Court in *Crawford v. Washington*.<sup>35</sup> *Crawford* requires the cross-examination of the authors of many of the documents sought to be used by prosecutors against accused

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29. Ronald L. Carlson, *Is Revised Expert Witness Rule 703 a Critical Modernization for the New Century?*, 52 FLA. L. REV. 715, 716 (2000).

30. 338 F.3d 1058 (9th Cir. 2003).

31. *Id.* at 1062.

32. *Id.* at 1060.

33. *Id.*

34. *Id.* at 1062. See *Black v. M. & W. Gear Co.*, 269 F.3d 1220, 1229 (10th Cir. 2001) (holding that plaintiff was entitled to rely on an inadmissible article in forming his opinion about whether defendants' mower was defective and unreasonably dangerous; however, plaintiff was not entitled to testify concerning the contents of the article, as this evidence was otherwise inadmissible).

35. 541 U.S. 36 (2004).

persons. However, often documents relied upon by experts are prepared by persons other than the expert who is on the stand. Dumping such documents on the jury in order to simply illustrate the basis for the expert's opinion would seem particularly inappropriate after *Crawford*.

Some experts go further and even forecast findings of unconstitutionality from an expert merely *basing* opinions upon hearsay, in certain instances. One such view argues:

[T]here is a continuum of situations in the analysis of whether an expert opinion based on testimonial hearsay violates the Confrontation Clause. On one end of the spectrum are experts who base their opinions almost solely on testimonial hearsay and merely recount to the jury what others have said. This type of expert opinion is almost surely a violation of the Confrontation Clause if the defendant cannot test the reliability of the expert's testimony by cross-examining the declarants of the underlying statements. On the other end of the spectrum exist cases where an expert has relied on a number of sources and types of data and has added significant expertise to interpret and analyze them. In these circumstances, a confrontation violation likely will not exist because the expert's opinion is truly original and a product of his special knowledge or experience, and the defendant can test its reliability by cross-examination of the expert.<sup>36</sup>

Another commentator has warned about the dangers of an expert witness serving as a "conduit" for placing hearsay before the jury.<sup>37</sup> Unless the expert develops some independent findings of her own, the author warns that the expert witness can inappropriately become a "subterfuge" for admitting testimonial hearsay.<sup>38</sup>

At the very least, there is good reason for counsel to object when an expert called by the other side tries to achieve wholesale introduction of the expert's underlying hearsay. Excellent advice for counsel in this regard is contained in Jeffrey Cole's article, *Hearsay, Juries, White Elephants and Hippopotamuses*.<sup>39</sup> Cole advises attorneys to carefully assess whether the expert testimony is in reality being used as a vehicle to evade the hearsay rule—either intentionally or inadvertently.<sup>40</sup> If so, that is objectionable. Cole cites a wealth of caselaw which communicates the message that "otherwise inadmissible evidence relied upon by an expert 'is not somehow

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36. Ross Andrew Oliver, *Testimonial Hearsay as the Basis for Expert Opinion: The Intersection of the Confrontation Clause and Federal Rule of Evidence 703 After Crawford v. Washington*, 55 HASTINGS L.J. 1539, 1560 (2004).

37. Bradley Morin, *Science, Crawford, and Testimonial Hearsay: Applying the Confrontation Clause to Laboratory Reports*, 85 B.U. L. REV. 1243, 1271 (2005).

38. *Id.* at 1272.

39. 30 LITIG. 49 (Winter 2004).

40. *Id.* at 55.

transmogrified into admissible evidence simply because the expert relies on it.”<sup>41</sup>

Federal Evidence Rule 703 does a good job of prohibiting improvident disclosure of an expert’s inadmissible background data. As the authorities we have just reviewed indicate, courts have demonstrated a willingness to robustly enforce the prohibition. The continuing need to do so is underlined by the experience in courts without this sort of rule. For example, Iowa Evidence Rule 703 did not contain the extra language of the federal rule. This sort of situation invites abuse at the trial level, and appellate supervision is often required. The problem was illuminated when the Iowa Supreme Court decided *Gacke v. Pork Xtra, L.L.C.*<sup>42</sup> Hearsay declarants affirmed in writing an odor

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41. *Id.* at 56 (quoting *In re Lake States Commodities, Inc.*, 271 B.R. 575, 585 (Bankr. N.D. Ill. 2002)). Cole invites the reader to consider the following authorities:

*Hutchinson v. Groskin*, 927 F.2d 722 (2d Cir. 1991) (expert referred to letters from three experts and said they were “consistent” with his opinion. The court of appeals reversed, condemning this “tactic” to evade the hearsay rule); *State v. Vandeweaeghe*, 799 A.2d 1, 9 (N.J. Super. 2002) (“Simply put, [e]xpert testimony is not a vehicle for the wholesale introduction of otherwise inadmissible evidence.”); *United States v. Dukagjini*, 326 F.3d 45, 57–59 (2d Cir. 2003) (“[I]n this case the expert was repeating hearsay evidence without applying any expertise whatsoever, thereby enabling the government to circumvent the rules prohibiting hearsay.”); *Option Resource Group v. Chambers Development Co., Inc.*, 967 F. Supp. 846, 850 (W.D. Pa. 1996) (“Rule 703 cannot be used as a backdoor to get the evidence before the jury.”); *Plourde v Gladstone*, 190 F. Supp. 2d at 719–21 (If the doctors and veterinarians are not available at trial, then the toxicologist’s opinion “really amounts to nothing more than inadmissible ‘hearsay in disguise’ under Rule 703.”); *Law v. National Collegiate Athletic Association*, 185 F.R.D. 324, 341 (D. Kan. 1999) (“The NCAA basically presented [the expert] as a channeler, seeking to present non-expert, otherwise inadmissible hearsay through the mouth of an economist.”); *In re Lake States Commodities, Inc.*, 271 B.R. 575, 585 (Bankr. N.D. Ill. 2002) (otherwise inadmissible evidence relied upon by an expert “is not somehow transmogrified into admissible evidence simply because the expert relies on it.”); *ID Security Systems Canada*, 249 F. Supp. 2d at 622; *Watanabe Realty Corp. v. City of New York*, 2004 WL 188088 (S.D.N.Y. Feb. 2, 2004) (expert relied on estimate from a builder of replacement cost in forming option. “But an expert may not act as a ‘mere conduit’ for the hearsay of another.”); 29 Charles Alan Wright & Victor James Gold, *Federal Practice and Procedure: Evidence* § 6273 (1997) (“Rule 703 does not authorize admitting hearsay on the pretense that it is the basis for expert opinion when, in fact, the expert adds nothing to the out-of-court statements other than transmitting them to the jury. In such a case, Rule 703 is simply inapplicable and the usual rules regulating the admissibility of evidence control.”).

*Id.* at 55–56. Cole’s advice, which urges attorneys to object when one’s opponent endeavors to use an expert as a hearsay conduit, would seem to be well taken in Missouri. In *Davolt v. Highland*, 119 S.W.3d 118, 133 (Mo. Ct. App. 2003), the court observed that Missouri law does not prohibit an expert from relying upon hearsay, as long as the hearsay “sources serve only as a background for [the expert’s] opinion and are not offered as independent substantive evidence.”

42. 684 N.W.2d 168 (Iowa 2004).

problem emanating from nearby hog confinement facilities.<sup>43</sup> The plaintiff collected these responses, and medical experts testified to medical and breathing problems based upon them.<sup>44</sup> The trial court allowed both the testimony as well as the written hearsay into evidence.<sup>45</sup> This created a problem. Although the Iowa rule generally allowed such information to be received in evidence to show the basis for an expert's opinion,<sup>46</sup> the wholesale entry into the record of so much raw hearsay was too much even for the Iowa court, which reversed the judgment for the plaintiffs.

As noted, the revised federal rule contains commendable limitations which prevent this kind of problem. Courts following the revised rule have vigorously policed unwarranted efforts to bootstrap inadmissible evidence into the record. Less amplified has been court treatment of the Rule 703 escape clause, the narrow license provided to allow admission of some underlying data in exceptional cases.<sup>47</sup> Rule 703 permits disclosure of an expert's underlying information in rare cases when the trial judge determines the probative value of the inadmissible data substantially outweighs its prejudicial effect. Hopefully, future adjudications under this clause will afford admission of data only in very limited circumstances. If expansive admissibility under this clause is practiced by the courts, the exception will swallow the rule. The intent of the December 2000 revision must be kept in mind, which is to supply a presumption against underlying data admissibility.<sup>48</sup>

## V. INVADING THE PROVINCE OF THE JURY

Federal Evidence Rule 704 raises some exciting issues. An expert has wide latitude to state her opinions broadly, circumscribed by only a few important limitations. An expert on mental states of accused persons cannot categorically announce that the defendant had the *mens rea* to commit a specific crime.<sup>49</sup> Nor may an expert invade the province of the jury in a civil

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43. *Id.* at 181.

44. *Id.*

45. *Id.*

46. There are at least three major approaches to this issue. First, a minority of jurisdictions, like Iowa, allow an expert to rely on inadmissible data and also permit disclosure of the data to the jury. A middle position is followed in state and federal courts following Federal Rule 703. This allows an expert to rely on hearsay (or other inadmissible evidence) but bars full disclosure and rendition of the data to the jury. Finally, another minority of courts, like those in Michigan, disallow expert reliance on hearsay unless the hearsay or other data is admitted at trial. *See Badiie v. Brighton Area Sch.*, 695 N.W.2d 521, 540–41 (Mich. Ct. App. 2005).

47. Few cases have been decided. Minnesota has a similar escape clause in Minnesota Rule of Evidence 703. The provision was applied in *Sherman v. Marden*, 525 N.W.2d 550, 552 (Minn. Ct. App. 1994).

48. *See generally* Carlson, *supra* note 29.

49. *United States v. Finley*, 301 F.3d 1000, 1014–15 (9th Cir. 2002).

or criminal case. She does so, among other ways, by attempting to testify that a testator lacked mental capacity to sign a will, in a will contest case.

#### A. *Legal Opinions and the Ban on Credibility Experts*

Legal opinions, those embracing mixed questions of law and fact, are barred. The license supplied an expert in Rule 704 to propound conclusions on ultimate issues is a limited one. A distinction must be made between opinions as to factual matters versus opinions involving a legal analysis.<sup>50</sup> For an expert to conclude that an architect's conduct amounted to culpable design negligence violates the rules, for example.

One commentator pleads for more wide-open expert testimony and freedom from the "centuries-old doctrine that forbids any witness from 'invading the province of the jury.'"<sup>51</sup> Of course, he recognizes there are appropriate limits. The author points out that the Federal Evidence Rules Advisory Committee "did not mean to allow expert witnesses to offer definitions of legal terms or draw legal conclusions."<sup>52</sup> However, he argues that allowing experts to opine on the credibility of witnesses violates none of these principles. "[I]f we can determine that there are experts that can provide reliable and useful information about credibility (and the evidence suggests that we are at or very near that point), why would we want a lay jury to make these most critical decisions without any guidance?"<sup>53</sup>

Removing the restrictions on expert testimony about witness credibility would loosen court restrictions on eyewitness-reliability experts in criminal

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50. MINN. R. EVID 704 comm. cmt. (1977); see *Good Shepherd Manor Found., Inc. v. City of Momence*, 323 F.3d 557, 564 (7th Cir. 2003) (rejecting expert testimony by law professor that defendant's conduct violated federal law); see also *Terrell v. Reinecker*, 482 N.W.2d 428, 430 (Iowa 1992).

51. Ric Simmons, *Conquering the Province of the Jury: Expert Testimony and the Professionalization of Fact-Finding*, 74 U. CIN. L. REV. 1013, 1015 (2006).

52. *Id.* at 1025.

53. *Id.* at 1066. A main target of Professor Simmons is the rule applied in many courts which bars eyewitness testimony experts in criminal cases. Even if that prohibition is eventually eroded and eyewitness experts became commonplace, it is doubtful that many courts would weaken the related (but not identical) rule, which prohibits any witness, lay or expert, from testifying that another witness in the trial lied from the witness stand. No witness is allowed to state directly that another witness who testified earlier in the case lied when the earlier witness gave his testimony. This prohibition has the support of the courts and most commentators. And just as a witness cannot tell the trial jury that a witness who previously testified was lying, affirmations that another witness gave honest testimony are similarly barred. See *United States v. Perez-Ruiz*, 353 F.3d 1, 12-13 (1st Cir. 2003) (holding that it was wrong for a DEA agent to offer his opinion that another government witness told the truth about the accused; also, the witness should not have testified that "several other witnesses, several other cooperating sources" had confirmed the informant's testimony). "[T]he prosecution cannot prop up a dubious witness by having a government agent place the stature of his office behind the witness," especially when apparently drawing from "evidence" not before the jury. *Id.* at 13.

cases.<sup>54</sup> It would have the same effect upon the admissibility of polygraph evidence. Currently, many federal circuits and most states maintain a virtual ban on admissibility.<sup>55</sup>

Contrary to this approach, it is urged that since polygraph tests are so widely used in the world outside the courtroom, the forensic ban should be reconsidered in light of *Daubert*.<sup>56</sup> “[I]n the case of polygraphs, growing evidence indicates that the proffered expert testimony is reliable, and *Daubert* has given courts the opportunity—if not the duty—to re-evaluate existing presumptions about [the ban on] expert admissibility.”<sup>57</sup>

Whether one concurs or disagrees with these observations, this kind of reexamination of traditional doctrine is to be applauded. *Daubert* asks courts and scholars to review formerly rejected technical processes to determine if their rejection is based upon unreliability of the process, or if it simply results from the inherent conservatism of the law. Professor Ric Simmons concludes that it is the latter consideration which is responsible for the widespread hostility to experts on witness credibility.

### B. *Experts on Mental State*

In-class coverage of Rule 704(b) needs to introduce crucial elements of history. The students need to know who John Hinckley is and that he was acquitted by reason of insanity in his attempt to assassinate President Reagan. Political pressures resulted in the creation of a new provision banning expert testimony when that expert overtly tells the trier of fact that the accused “did not have the mental state or condition constituting an element of the crime charged.”<sup>58</sup>

Rule 704(b) is not without its nuances. *United States v. Finley*<sup>59</sup> dramatically illustrates the fine line which is drawn between prohibited mental state testimony and allowable psychological proof. The court explained:

Finley owned a law bookstore and ran a bar review course for students of non-accredited law schools. . . . Finley began looking for investors to assist him in opening a chain of approximately twenty bookstores across the United States.

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54. For the traditional approach rejecting eyewitness experts, see *United States v. Smith*, 122 F.3d 1355 (11th Cir. 1997); *Johnson v. State*, 511 S.E.2d 603 (Ga. Ct. App. 1999). Compare *People v. Smith*, 743 N.Y.S.2d 246 (N.Y. Sup. Ct., 2002), with *State v. Chapple*, 660 P.2d 1208 (Ariz. 1983). For an overview of the law in different jurisdictions, see John P. Rutledge, *They All Look Alike: The Inaccuracy of Cross-Racial Identifications*, 28 AM. J. CRIM. L. 207, 218–20 (2001).

55. Simmons, *supra* note 51, at 1042–43; see *United States v. Scheffer*, 523 U.S. 303 (1998); *United States v. Campos*, 217 F.3d 707 (9th Cir. 2000).

56. Simmons, *supra* note 51, at 1043–44.

57. *Id.* at 1046.

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

59. 301 F.3d 1000 (9th Cir. 2002).

Finley could not obtain traditional bank financing because of a dispute he had with the IRS over a large tax claim.<sup>60</sup>

Finley's efforts to get financing resulted in three counts of bank fraud, and he was convicted on two of them. His conviction was reversed when the Court of Appeals determined that the trial court erred in striking the testimony of Finley's psychological expert, Dr. Wicks.<sup>61</sup> Dr. Wicks suggested that the defendant's rigid belief system distorted reality.<sup>62</sup> The defendant could not realistically assess the fraudulent nature of monetary instruments he attempted to cash, it was claimed. This delusional disorder makes it difficult for an individual to entertain the intent to commit fraud, the key element of the charged offense.<sup>63</sup>

Writing the opinion for the court, Judge Myron Bright deemed it essential in *Finley* to distinguish between prohibited expert opinions that "necessarily compel" a conclusion about the defendant's *mens rea* and those which do not.<sup>64</sup> The latter are permissible. He observed that the testimony of Dr. Wicks did not compel the conclusion that Finley was incapable of knowingly defrauding the banks.<sup>65</sup> However, the jury could infer that conclusion from the testimony. Finley claimed he was innocent of any knowing intent to defraud.<sup>66</sup> Judge Bright ruled that the defense was entitled to present evidence to support that assertion.<sup>67</sup> This included expert opinions from which the jury could draw the inference that the defendant lacked the necessary intent to defraud.<sup>68</sup> But such an inference did not compel a diagnosis of no criminal *mens rea*.<sup>69</sup> "A psychological diagnosis, unlike a lie detector test, does not automatically entail an opinion on the truth of a patient's statements. Furthermore, the psychological diagnosis can be limited such that it in no way touches upon the specific issues of fact to be resolved by the jury."<sup>70</sup>

Whether one agrees or disagrees with whether Judge Bright correctly gauged the compulsion inherent in the expert's testimony, all can concur on one point. That relates to the creativity of courts. Judges can be very inventive in getting around the prohibition against testimony on the defendant's ultimate mental state. Innovation by judges in avoiding the impact of Rule 704(b) is

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60. *Id.* at 1002.

61. *Id.* at 1019.

62. *Id.* at 1005–06.

63. *Id.* at 1005.

64. *Finley*, 301 F.3d. at 1015.

65. *Id.*

66. *Id.* at 1016

67. *Id.*

68. *Id.*

69. *Finley*, 301 F.3d. at 1016.

70. *Id.*

one hallmark of judicial opinions in this field.<sup>71</sup> *Finley* amply illustrates the point.

## VI. ADVOCATES AND INSTRUCTORS

The life of the law revolves around trials. Law school coursebooks—no matter whether the text is one in contracts, antitrust, criminal law, or corporations—are filled with appellate cases which began as trials. Notwithstanding some commendable emphasis in recent years on alternate modes of processing disputes, the trial remains the gold standard for the resolution of society's conflicts.

The role of the lawyer in the process is not an ambiguous one. A perceptive commentator observed: "The adversarial component of the litigation process is the cornerstone of the American justice system. Ideally, if two equally matched attorneys zealously and competently represent their clients within the bounds of the ethical rules and the law, the correct result will ultimately be reached."<sup>72</sup>

The advocate, in turn, relies most heavily in discharging his or her weighty responsibility upon knowledge of the law of evidence. Going to court without a thorough command of the rules is like a carpenter going to a construction job without his hammer, a welder without his torch, or a police officer without her baton. Competency in the topic begins with the law school course in Evidence. Accordingly, the instructor in this field performs one of the most crucial functions needed to sustain an adversary system of justice. She educates society's advocates in their most vital body of knowledge.

Outstanding advocates are critically needed in all of the various areas of litigation, including contract cases, product liability disputes, tort claims, or real estate controversies. But there is a special need for accomplished attorneys in the field of criminal law. Commentators have urged that of all the rights that an accused person has, the right to representation by a trained lawyer is the most important. One, in particular, writes:

Only the adversarial system can effectuate the search for the truth. The alternative is a nonadversarial society whereby one being accused is the equivalent of one being convicted. If criminal defense lawyers do not "put the government to its proof whenever necessary or whenever the client requires it, then we are close to those totalitarian states where accusation equals guilt [and] the criminal defense lawyers are but an adjunct prosecutor expected to make the client confess and aid in his or her rehabilitation." Hence, if criminal

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71. Simmons, *supra* note 51, at 1026 (citing *United States v. Lipscomb*, 14 F.3d 1236, 1240–43 (7th Cir. 1994)); *see, e.g.*, *United States v. Combs*, 369 F.3d 925 (6th Cir. 2004).

72. Lonnie T. Brown, Jr., *Ending Illegitimate Advocacy: Reinvigorating Rule 11 Through Enhancement of the Ethical Duty to Report*, 62 OHIO ST. L.J. 1555, 1616 (2001).

defendants are not represented, the foundation of the judicial system is eroded . . . .<sup>73</sup>

## VII. ETHICS

Some instructors will wish to incorporate treatment of ethics issues which are particular to the topic of experts. A number of problems are worthy of potential consideration. When qualifying a medical doctor, should the sponsoring lawyer leave out an aspect of a physician's background? If the point of history is unhelpful to the calling lawyer, is it legitimate to omit it? Suppose a testifying doctor in a medical malpractice case sat for part of the certification examination of the American Board of Surgery, but failed the examination. Does this information need to be volunteered? What if the sponsoring lawyer is virtually certain that the opposing attorney will not discover nor ask about the point?

Cross-examination of experts also poses ethical dilemmas. If the cross-examiner is convinced that an opposing expert is incompetent and lying, is it appropriate to ask about a medical treatise which is non-existent? If the overblown expert answers, "Yes, I know that book," can the cross-examiner expose the fraud?<sup>74</sup>

While the course in Professional Responsibility will take primary responsibility for a student's formal ethics instruction, touching upon selected ethics issues in the Evidence class can be helpful.

## VIII. CONCLUSION

The role of the Evidence instructor is a vital one in sustaining the adversary system of justice. Nowhere in the Evidence course is skill in instruction more challenged than when presenting the topic of experts. The sophistications and nuances embedded in the cascade of cases authored by courts pose a withering challenge for the Evidence teacher. Exactly what subtopics will be selected for coverage?

This Essay has posited a rough diagram of topics for Evidence professors. How experts are qualified, dissatisfaction with *Frye*, the rise of junk science, controlling wide-open admission of an expert's underlying data, the ban on legal opinions, the role of the advocate, and the ethics of experts are all worthy subjects. They are topics which I cover in my course.

After forty years of teaching the law of evidence, it has been an enriching trail. Dean Mason Ladd at Iowa began the trip for me when he asked me to

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73. Stephen Jones, *A Lawyer's Ethical Duty to Represent the Unpopular Client*, 1 CHAP. L. REV. 105, 107 (1998) (quoting JOHN WESELY HALL, JR., PROFESSIONAL RESPONSIBILITY OF THE CRIMINAL LAWYER § 9:12, at 297-98 (2d ed. 1996)).

74. This issue is discussed in RONALD L. CARLSON & EDWARD J. IMWINKELRIED, DYNAMICS OF TRIAL PRACTICE: PROBLEMS AND MATERIALS, 318-19 (3d ed. 2002).

teach his Evidence class. He was about to start a new law school at Florida State, he explained, and needed me to take over from time to time when he was absent from Iowa City. Since that time I have taught the course on forty-four occasions at six different law schools. I will be forever grateful for Dean Ladd's original request.