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ARTICLES

The Impropriety of Expert Witness Testimony on the Law

Thomas E. Baker*

Many of my law professor colleagues are taking on a new role, that of expert witness on the law. Of course, any law professor worthy of the title ought to have something to profess, whether in the classroom, in law reviews, or in the courtroom, in either a pro bono publico capacity or for hire. These are the traditional testimonies of law professors. Some of my colleagues, however, are being called on to play another role. They are not serving of counsel or as consultants. Rather, they are testifying in open court on the law. They give opinions from the witness stand on the state of domestic law, including federal law; the law of the jurisdiction in which the court is sitting; and the relevant law of other states. This otiosity makes no sense to me.

It is difficult to know how often this is permitted or how widespread the practice is, but my anecdotal impression is that it is not infrequently allowed. I am concerned that, at least in some federal district courts, a trend may be developing toward admitting such testimony by professors and other lawyers. My argument, with apologies to my moonlighting colleagues, is that this practice cannot be squared with sound federal judicial procedure.1

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1. The distinction I am making should be made explicit at the outset:

The bench and bar ought to rely on the law professoriate for legal expertise.

Indeed, one good measure of published legal scholarship is its relevance. In
I. BACKGROUND

A. The Rules of Evidence on Opinion Testimony

The requirement that a witness testify only about personal or firsthand knowledge, not mere personal opinion, has its roots in medieval law. This requirement demands that witnesses testify only as to "what they [actually] see and hear." The rule regulates the proper basis for testimony. A venerable dictum from Coke is frequently cited in support of this proposition. In 1622, Coke explained, somewhat quaintly to the modern ear, that "[i]t is no satisfaction for a witness to say that he 'thinketh' or 'persuadeth himself.' " Another frequently repeated, almost hackneyed, quotation used to support the general rule invokes the Delphic authority of Mansfield, who said simply: "mere opinion . . . is not evidence." These ancient statements and their continued currency provide evidence of the long-standing, well-established refusal to admit testimony that is not based upon personal knowledge.

In addition to the personal knowledge requirement, the so-called opinion rule developed early-on in the common law and became firmly established by the eighteenth century. The opinion rule, echoing venerable concerns for limiting witnesses, provided that witnesses may not testify about their mere personal opinions. This rule thus regulates the form the testimony may take. Although witnesses are generally governed by the opinion rule, expert witnesses have never been subject to the rule. The opinion rule and the use of expert testimony developed to fill a need for information resulting from the transformation to the adversarial trial system.

person, a professor's learning may be a valuable tool during the preparation for litigation, when the professor serves of counsel, or when the professor appears as the actual advocate. When a professor appears as an expert witness on the law, however, the testimony can only serve to throw an academic monkey wrench into the trial works.


5. Id. at 7 (quoting Carter v. Boehm, 3 Burr. 1905, 1918 (1766)).
7. Wigmore, supra note 4, § 1917.
Prior to the establishment of the adversarial system, which required that jury members have no knowledge of the issues, trials consisted of inquisitorial hearings in which the participants were persons with specialized experience regarding the issues in the case at bar. The inquisitors decided the issues based on their own information, knowledge, and experience. Therefore, this "jury of experts" decided the dispute based on their own knowledge brought with them from outside of the courtroom. Their knowledge and familiarity with the subject of the dispute was the jurors' very qualification to decide the case.

As it developed over the centuries, the adversarial system differed greatly from the inquisitorial hearing process. The new common-law trial system utilized an independent jury. Any knowledge regarding the controversy resulted in disqualification of a prospective juror. The testimony of witnesses together with tangible evidence thus became the sole sources of factual data on which a verdict could be rendered. Therefore, it was incumbent upon the witnesses to testify from personal knowledge of the matters, because the jury no longer possessed any specialized knowledge.

The early promulgation of the opinion rule within the modern adversarial system was regarded as a requirement that the witness have personal knowledge in order to testify. For example, witnesses were "prohibited . . . from merely repeating the statements of others who had [themselves] perceived [the incident]." Generally, witnesses were also prohibited from expressing opinions based on conjecture of the mind rather than on personal observation. "Ordinarily, the law insists that witnesses testify in the language of perception. That is, they must [describe] only what they saw, heard, felt, touched, tasted or did."

9. Id. (quoting 9 HOLDSWORTH, supra note 2, at 211-14).
10. Id.
11. Id.
12. Id. at 415.
13. Id.
14. Id. The opinion rule may also be derived, in part, from the modern preference for the most reliable evidence, when an in-court witness, for example, quotes a document or recites observations of perceived facts and events. See RONALD L. CARLSON ET AL., MATERIALS FOR THE STUDY OF EVIDENCE 419 (2d ed. 1986).
15. Ladd, supra note 8, at 415. There are exceptions to this general rule, of course. See FED. R. EVID. 803, 804.
evolved, a different expression of the same idea became commonplace: Considered functionally, it is the province of the jury to exercise judgment, to form opinions, and to reach conclusions in determining its verdict; the limited role for the witness is to state facts.\textsuperscript{18}

As previously noted, the opinion rule does not apply to expert witnesses.\textsuperscript{19} Expert witnesses are deemed necessary to interpret and explain data or evidence which the jurors cannot readily understand due to their lack of specialized knowledge. The expert witness is aptly considered to serve as an explainer and a teacher. As an expert, the witness may explain both personal observations and the observations of others.\textsuperscript{20} At common law, "expert testimony could be introduced only if its subject matter was beyond common knowledge and experience" and, therefore, by definition beyond the trier of fact's capacity to understand.\textsuperscript{21} In other words, the subject matter of the expert testimony was required to be "beyond . . . lay comprehension" before an expert could testify.\textsuperscript{22} The expert brought to the trial the special skills, experience, or scientific knowledge necessary to understand the issues.\textsuperscript{23} Within the evolution of common law regarding expert opinions, a body of rules developed—involving techniques and skills necessary for the introduction of expert testimony—that almost equalled the complexity of the subject matter about which the expert testimony was given.\textsuperscript{24} At common law, the intricacy of the hearsay rules had nothing on the complicated rules for qualifying an expert witness and for eliciting the expert's testimony.

B. Federal Rule of Evidence 702

The promulgation of Federal Rule of Evidence 702 codified the then-existing federal case law to the effect that expert witness testimony was not needed unless the issue to which the testimony would be directed was "not within the common knowledge of the

\begin{enumerate}
\item\textsuperscript{18} Id.
\item\textsuperscript{19} Id. at 470-71.
\item\textsuperscript{20} Id. at 471.
\item\textsuperscript{22} \textsc{Stephen A. Saltzburg & Kenneth R. Redden}, \textsc{Federal Rules of Evidence Manual} 631 (4th ed. 1986).
\item\textsuperscript{23} Ladd, \textit{supra} note 8, at 417.
\item\textsuperscript{24} Id.
\end{enumerate}
average layman."25 Additionally, Rule 702 allows expert testimony if it will aid the trier of fact. Therefore, the Rule modifies the common law by specifically providing that an expert may be employed merely because his testimony could be helpful to the trier of fact in understanding evidence that is simply difficult but not necessarily beyond ordinary understanding.26 Thus, Rule 702 establishes a more lax standard and a lower foundational threshold than did the common law.

Overall, the Federal Rules of Evidence codified most of the common law exceptions to the opinion rule.27 The Federal Rules operate aggregately to allow the admission of a larger amount of opinion evidence than would have been admissible under common law; however, the federal provisions retain the traditional safeguards to prevent undue prejudice.28 The Rules provide a self-contained analytical approach to the determination of admissibility requiring that opinion evidence be received only from a witness who is knowledgeable, and that the evidence be of assistance to the trier of fact.29 Federal Rule of Evidence 702 provides: "If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise."30

Rule 702 allows a qualified expert to give both factual and opinion testimony only if the testimony will help the trier of fact understand the issues at bar.31 The Rule "provides a broadly stated standard for the use of expert testimony."32 In Salem v. United States Lines Corp., the Supreme Court noted that "the trial judge


27. Id. at 123.

28. Id. The court may always hold evidence inadmissible if its introduction would cause undue prejudice. See F ED. R. EVID. 403.


30. F ED. R. EVID. 702.


has broad discretion in the matter of the admission or exclusion of expert evidence, and his action is to be sustained unless manifestly erroneous.\(^{33}\) The broad standard established by Rule 702, together with a deferential standard of appellate review, guarantees the trial court a great amount of discretion in the use of expert testimony.\(^{34}\)

Rule 702 still approximates the common-law rule.\(^{35}\) The Rule 702 Advisory Committee's note states that "an intelligent evaluation of facts is often difficult or impossible without the application of some scientific, technical, or other specialized knowledge. The most common source of this knowledge is the testimony of an expert witness."\(^{36}\) Like the common law, Rule 702 views expert witnesses as professional explainers.\(^{37}\) In essence, an expert witness may be employed if the specialized knowledge of the witness can be expected to be helpful in deciding a case correctly.\(^{38}\) Rule 702 authorizes expert witness usage whenever the expert will assist the trier of fact to understand the evidence or to determine a fact in issue.\(^{39}\)

C. Expert Testimony in the Modern Adversarial System

Today, expert testimony is used to accomplish a variety of tasks.\(^{40}\) "It is used to demonstrate facts that could not be dem-
onstrated to a factfinder without some special skill or discipline.  
It is also used to prove facts that cannot be proven otherwise through lay testimony. Additionally, expert testimony is used to explain nuances and to draw conclusions and inferences from a given set of facts which, again, may only be accomplished through the application of some special knowledge or skill. For any use, the basic requirement is that the expert testimony be helpful to the factfinder. An additional restriction is that the expert must not usurp the role of the factfinder or the judge. A final principle underlying the role of expert testimony is the concept of reasonable reliance, that is, reliance on the expert for testimony must make good sense. The expert may not be used to admit testimony that would otherwise be inadmissible. The Federal Rules of Evidence regarding expert testimony incorporate these principles, which were well-established in the common law. "The test expressed in Rule

witnesses and the lawyers and courts who rely on "junk science"); USING EXPERTS IN CIVIL CASES (Melvin D. Kraft ed., 2d ed. 1982) (book has sections on different areas of conflict where experts are frequently and beneficially used, plus general observations on the use of experts). The Federal Judicial Center currently is conducting a full-scale study of the use of expert witnesses at civil trials. This effort promises to provide empirical data on the frequency and nature of expert testimony. Letter from William B. Eldridge, Director Research Division, Federal Judicial Center to Honorable Robert E. Keeton, Chair, Committee on Rules of Practice and Procedure of the Judicial Conference of the United States (July 11, 1991) (on file with the Kansas Law Review).

42. Id.
43. Id.
44. See id.
45. Id. at 32. Presumably, testimony that otherwise satisfies the applicable Federal Rules of Evidence, by definition, will not be deemed usurpatious and will be admitted. In this way, this is more of a conclusion than a factor in the analysis.
46. Id. "[T]he concept of reasonable reliance . . . takes into consideration two issues: (1) is the material relied upon by the expert the type of material that experts in his [or her] field normally rely upon in their work and (2) is the material trustworthy?" Id.
47. Id.
48. Id. In August 1991, the Committee on Rules of Practice and Procedure released proposed amendments to Rule 702 for public comment. The Committee notes to the proposed amendments reinforce the general thesis of this Article:

This revision is intended to limit the use, but increase the utility and reliability, of party-initiated opinion testimony bearing on scientific and technical issues.

The use of such testimony has greatly increased since enactment of the Federal Rules of Evidence. This result was intended by the drafters of the rule, who were responding to concerns that the restraints previously imposed on expert testimony were artificial and an impediment to the illumination of technical issues in dispute. See, e.g., McCormick on Evidence, § 203 (3d ed., 1984). While much expert testimony now presented is illuminating and useful, much is not. Virtually all is expensive, if not to the proponent then to adversaries. Particularly in civil litigation with high financial stakes, large expenditures for marginally useful
702—will the expert testimony ‘assist the trier of fact to understand the evidence or to determine a fact in issue’—emerges as the central concern* and the controlling question. 49

The raison d’être for expert testimony is that the expert must supply something that nonexperts cannot or are not qualified to provide. 50 Another important distinction between expert and non-expert witnesses is that the expert may respond to hypothetical questions while the nonexpert may not. 51 Therefore, an expert witness may testify not only from facts perceived personally by the expert outside of the trial, but also from facts made known to the expert at or before the trial. 52 Additionally, the expert may testify based on personal background knowledge unrelated to the events of the trial. 53

Two elements are required to warrant the use of expert testimony. 54 First, “the subject of inference must be so distinctively related to some science, profession, business or occupation as to

*expert testimony has become commonplace. Procurement of expert testimony is occasionally used as a trial technique to wear down adversaries. In short, while testimony from experts may be desirable if not crucial in many cases, excesses cannot be doubted and should be curtailed.

While concern for the quality and even integrity of hired testimony is not new, *Winans v. New York & Erie R.R., 62 U.S. 88, 101 (1858); Hand, *Historical and Practical Considerations Regarding Expert Testimony, 15 Harv. L. Rev. 40 (1901), the hazards to the judicial process have increased as more technical evidence is presented:

When the evidence relates to highly technical matters and each side has shopped for experts favorable to its position, it is naive to expect the jury to be capable of assessing the validity of dramatically opposed testimony. 3 J. WEINSTEIN & M. BERGER, WEINSTEIN’S EVIDENCE, § 706[01] at 706-07 (1985).


One aspect of this revision is to dispel any doubts that the court, acting under Rule 104(a), has the power and responsibility to decide whether and on what subjects expert testimony should be permitted in a case and whether the particular witness proffered as an expert has the necessary expertise to provide such testimony. See id. at 157.


50. Zoeller & Lynch, supra note 40, at 34.


52. Fed. R. Evid. 703 and advisory committee’s note; Teen-Ed, 620 F.2d at 404. The expert may therefore sit in the trial and testify upon the evidence presented. Courts can allow the expert to remain in the courtroom under an exception to the exclusion of witnesses rule. The expert is viewed, in effect, as a party who needs to be present to assist counsel at the trial. See Fed. R. Evid. 615(3).

53. SALTZBURG & REDDEN, supra note 22, at 631-32.

54. MCCORMICK ON EVIDENCE, supra note 3, § 13, at 33.
be beyond the ken of laymen."55 Furthermore, the admission of expert opinion must assist the trier of fact. The Rule permits the admissibility of expert opinions even when the matter is within the competence of jurors, if the specialized knowledge is helpful to the jurors in their determination of the issues.56 Therefore, the second requirement for the admission of expert testimony is that the expert witness "must have sufficient skill, knowledge, or experience in or related to the pertinent field or calling" that the expert's opinion or inference might be expected to aid the trier of fact.57 Basically, this means that the witness must be qualified. Once a witness is qualified as an expert, any alleged shortcomings in the person's qualifications are matters of weight and not credibility.

If these two requirements are satisfied, then the money a party pays to the witness is called a "fee" rather than a "bribe." These two requirements, helpfulness to the trier of fact and specialized knowledge, will be elaborated separately.

1. Assistance to the Trier of Fact

The general test for use in determining whether expert testimony is helpful to the trier of fact has been described as: "a 'common sense inquiry [as to] whether the untrained layman would be qualified to determine intelligently and to the best possible degree the particular issue without enlightenment from those having a specialized understanding of the subject involved in the dispute.' 58

Essentially, the helpfulness analysis is an ad hoc determination and "[w]hether, in any given case, the expert testimony is necessary to aid the jury in its search for the truth depends upon such a variety of factors readily apparent only to the trial judge that [an appellate court] must depend heavily upon his [or her] judgment."59 Factors the trial judge ought to consider in deciding whether the expert testimony is helpful to the jury include: 1) whether the opinion offered is the proper subject for expert testimony; 2)

55. Id.
56. Id.; see also 3 WEINSTEIN & BERGER, supra note 25, ¶ 702(02), at 702-15 to -16.
57. MCCORMICK ON EVIDENCE, supra note 3, § 13, at 33. In Paris Adult Theatre v. Slaton, 413 U.S. 49, 56 n.6 (1973), the Court stated that expert testimony is generally admitted to explain what the jurors would otherwise not understand. The requirements for the admission of expert testimony are that: 1) the testimony must assist the trier of fact to understand the evidence, and 2) the witness must be qualified as an expert. FED. R. EVID. 702; see also ROBERT E. KEETON, JUDGING 243-44 (1990) (describing methods available for a judge to determine if an expert witness is qualified to testify).
whether the testimony is likely to mislead or confuse the jury; 3) whether the testimony is mere conjecture; 4) whether the testimony involves matters within the scope of ordinary experience; and 5) whether the witness is acting as a summary witness as opposed to an expert witness.\footnote{Zoeller & Lynch, supra note 40, at 34. Case law has elaborated on the criteria to examine the admissibility of expert testimony: 1) whether the subject matter is one for which the expert testimony is appropriate; 2) whether the probative value of the evidence is greater than its prejudicial effects; and 3) whether the witness is qualified to testify on the subject matter. E.g., United States v. Green, 548 F.2d 1261, 1268 (6th Cir. 1977); United States v. Amaral, 488 F.2d 1148, 1152-53 (9th Cir. 1973).} In addition to these factors, and included implicitly, is that each aspect of an expert witness’s testimony must also meet the requirement of Federal Rule of Evidence 403. Rule 403 provides that evidence is inadmissible, despite its relevance, if it is prejudicial, confusing, misleading, or wastes time.\footnote{FED. R. EVID. 403.} A rule of thumb often used to determine whether expert testimony will assist the trier of fact is whether the untrained layman would be capable of determining the issue intelligently without expert testimony.\footnote{Landis, supra note 21, at 468; see Hamling v. United States, 418 U.S. 87, 104-05 (1974); In re Japanese Elec. Prods. Antitrust Litig., 723 F.2d 238, 278-79 (3d Cir. 1983); Amaral, 488 F.2d at 1152-53; Zenith Radio Corp. v. Matsushita Elec. Indus. Co., 505 F. Supp. 1313, 1334 (E.D. Pa. 1980); Gibbons, supra note 58, at 225; William B. Stoebuck, Opinions on Ultimate Facts: Status, Trends and a Note of Caution, 41 DENV. L. CENTER J. 226, 234 (1964); see also FED. R. EVID. 702 advisory committee’s note.} No more specific rule has been formulated; therefore, the analysis is based upon the particular circumstances of each case.\footnote{See Landis, supra note 21, at 468.} Thus, “in deciding whether expert opinion testimony will be helpful to the trier of fact, the trial judge must determine whether the issue in question is capable of adequate illumination by factual testimony.”\footnote{Garner, supra note 25, at 128. Logically, expert opinion testimony on an issue is not more assistance to the trier of fact than factual testimony on the issue. Id. at 128-29. Usually, the subjects which require expert aid in order to assist the trier of fact are those involving technical subjects for which some expertise is necessary to understand the evidence. See McCormick on Evidence, supra note 3, § 13, at 33.} 

2. Expert Qualification

An expert must be qualified in the subject area of the offered testimony. The fields of knowledge which may be drawn upon under Rule 702 are not limited to scientific and technical knowledge, but extend to all specialized knowledge.\footnote{FED. R. EVID. 702 advisory committee’s note; McCormick on Evidence, supra note 3, § 13, at 33-34; see LaCombe v. A-T-O, Inc., 679 F.2d 431, 434 (5th Cir. 1982).}
scope of the Rule are witnesses skilled by their experience, such as bankers and landowners. Rule 702 is thus broadly phrased to include any identifiable field of specialized knowledge that may be used to assist the trier of fact. The requisite knowledge may be from reading alone, practice alone, or a combination of both. As the Rule 702 Advisory Committee's note states, a broad standard for testing the qualifications of an expert is recognized under the Federal Rules. The Committee explicitly noted that an expert's knowledge may be gained by experience and training as well as by formal education.

II. THE INADMISSIBILITY OF EXPERT LEGAL TESTIMONY IN THEORY

A. Expert Legal Testimony Defined

We may borrow a definition from an enthusiast: “Expert testimony on the law consists of an opinion on the state of domestic law, which includes federal law, the law of the jurisdiction in which the court sits, and the law of sister jurisdictions.” Expert testimony on the law may concern “the relative certainty or uncertainty of the law, what the law is, what it means, or any combination of these.”

66. FED. R. EVID. 702 advisory committee's note; LaCombe, 679 F.2d at 434 (landowner automatically qualified to give testimony regarding opinion on value of property).
67. See MCCORMICK ON EVIDENCE, supra note 3, § 13, at 34 & n.10. “The rule is broadly phrased. The fields of knowledge which may be drawn upon are not limited merely to the ‘scientific’ and ‘technical’ but extend to all ‘specialized’ knowledge. Similarly, the expert is viewed . . . [as an expert even when] testifying to land values.” FED. R. EVID. 702 advisory committee's note.
68. MCCORMICK ON EVIDENCE, supra note 3, § 13, at 34.
69. FED. R. EVID. 702 advisory committee's note.
70. Id. See generally Garner, supra note 25, at 129. It has been noted that “anyone who has skill, experience or training may qualify as an expert witness.” Gibbons, supra note 58, at 224. For example, a user and seller of drugs was considered an "experienced" person in the sense of Rule 702 and was therefore qualified to give an expert opinion as to whether a certain substance was heroin. United States v. Atkins, 473 F.2d 308, 313-14 (8th Cir. 1973), cert. denied, 430 U.S. 984 (1977).
71. Steven I. Friedland, Expert Testimony on the Law: Excludable or Justifiable?, 37 U. MIAMI L. REV. 451, 453 (1983). The author recognizes that expert testimony is permissible regarding the law of foreign jurisdictions. Id. at 456-57. It is unclear if this is what he means in his definition which includes “the law of sister jurisdictions.” Id. at 453.
72. Id. However expert legal testimony is defined, even enthusiasts admit that federal courts generally hold that such testimony is inadmissible. See id. at 451-52.
B. The Context of Judge and Jury

As has been explained, Rule 702 provides a broad standard for the use of expert testimony. The essential criterion used to determine whether expert testimony is appropriate is whether the information "will assist the trier of fact to understand the evidence or to determine a fact in issue."73 This criterion necessarily gives the trial judge considerable discretion in regulating the use of experts as well as in limiting the subject matter of their testimony. However, expert testimony should not usurp the role of the judge or the jury. It has been said that "[in] any jury trial, the court answers questions of law and the jury answers questions of fact."74 "This simple statement summarizes one of the cornerstones of the American legal system."75 The simplicity of this statement tends to mask the complexity underlying the application of the subtle concept of separation of function.76

As explained by one commentator:

It is not the jury's function to determine the law; the jury thus has no need to hear conflicting testimony on the proper interpretation of the law. In fact, such conflicting legal testimony could be harmful . . . [c]onflicting expert legal testimony or any legal testimony [which is] not in conformity with the judge's formulation of the law fails to meet the helpfulness standard and should be excluded.77

Commentators have stated that the line distinguishing the proper from the improper use of expert testimony should be the same line as that separating questions properly decided by the jury from those properly decided by the court: "The court decides the underlying legal issue. It is then left to the jury to determine the factual question . . . ."78 Both judge and jury must be aware of this distinction if the system is to work as it is designed. Each must perform its assigned role throughout trial, not just at the formal jury charge.

73. FED. R. EVID. 702.
75. Schaefer, supra note 74, at 447.
76. Id. See generally Symposium, The Role of the Jury in Civil Dispute Resolution, 1990 Chi. Legal F. 1.
Therefore, the conclusion cannot be escaped that expert legal testimony on the law is inadmissible under both Federal Rules of Evidence 403 and 702. Rule 702 initially allows only expert testimony that is of assistance to the trier of fact. If the testimony by the expert is to instruct the jury on the proper legal issues, the testimony usurps the role of the judge. The judge is the proper party to provide instruction on the law to the jury; and because the jury is instructed to apply the law as set forth by the judge, the testimony by an expert upon the law by definition cannot be of any assistance to the jury. If the expert’s testimony conflicts with that of the judge, the testimony may actually make the jury’s determination more difficult. This effect would be diametrically opposed to the essential function of expert testimony as contemplated in Rule 702.

Federal Rule of Evidence 403 provides that relevant evidence is inadmissible if it confuses, misleads, or wastes the jury’s time. Clearly, expert legal testimony may result in all three problems. If the expert testifies on the law and the testimony is not consistent with the judge’s instructions, then the expert’s testimony acts simply to confuse and mislead the jury. Furthermore, because the job of instructing the jury on the law belongs to the judge, even expert legal testimony that coincides with the judge’s instruction serves merely to waste the time of the court and jury and, therefore, should be excluded. Furthermore, there are the additional background concerns that reliance on expert witnesses can exacerbate resource inequalities that might exist between parties or can result in a confusing “battle of experts” when the litigants are evenly matched financially.

An admitted difficulty in this analysis is distinguishing between questions of law and questions of fact. Over time, common-law jurisdictions have redrawn the fine lines separating legal questions from factual questions. This has had much to do with the historic conflict between judge and jury over trial power. The modern trend towards the expanded use of expert testimony brings this contest into the spotlight once again. The “increasing complexity

79. Schaefer, supra note 74, at 447. Furthermore, mixed questions of fact and law require even greater sophistication and discernment. The determination of what is a question of fact for the jury and what is a question of law for the judge, however, goes beyond the scope of this Article. See generally Morris S. Arnold, Law and Fact in the Medieval Jury Trial: Out of Sight, Out of Mind, 18 Am. J. Legal Hist. 267 (1974); Clarence Morris, Law and Fact, 55 Harv. L. Rev. 1303 (1942); see also Linda L. Addison, Rule 704 and the Law: Not a Matter of Opinion, 50 Tex. B.J. 383 (1987) (the approach taken is borrowed from reported decisions which, for the most part, take for granted that a particular issue is one of law and then apply the circuit precedent regarding expert legal testimony).
of the facts in modern cases and the advances in the sophistication of various disciplines place determinations of [many] factual questions beyond the common knowledge of the jury. However complex these questions and distinguishing factors have become, clearly the Federal Rules of Evidence only permit expert testimony on issues of fact and not on issues of law.

C. Rule 702 Does Not Permit Expert Testimony on the Law

While Federal Rule of Evidence 702 allows testimony by experts, it allows such testimony only "[i]f scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue." The explicit language of Rule 702 does not contemplate the admissibility of expert testimony for any purpose other than to aid in the understanding of evidence or to determine a fact in issue. Clearly, these specifically stated purposes are not broad enough to include expert assistance on legal questions. This should end the inquiry, under the plain-meaning standard of interpreting the Rule without regard to legislative history, policy, or practical considerations. These other considerations, nonetheless, substantiate the same conclusion.

The Advisory Committee's commentary to Rule 702 neither mentions nor provides for the use of expert testimony as assistance to the jury on questions of law. The commentary begins by stating that "[a]n intelligent evaluation of facts is often difficult . . . without specialized knowledge." The commentary repeats the familiar test that expert testimony must be likely to assist the trier of fact to be admissible. This test may be applied only if the expert testimony is being offered initially for a permissible purpose under the Rule. This broad test cannot allow a party to avoid the specific limitations placed upon expert testimony set out explicitly in the text of the Rule itself. Additionally, the commen-

80. Schaefer, supra note 74, at 447.
81. FED. R. EVID. 702 (emphasis added).
83. FED. R. EVID. 702 advisory committee's note.
84. Id. (emphasis added).
85. Id.
86. Id.
tary states that the Rule is broadly phrased. As addressed by the commentary, this breadth has nothing to do with the subject matter required for the expert testimony to be admissible, but rather involves the qualifications which are necessary for an expert in the subject matter of the testimony. Once a witness is qualified as an expert, any alleged shortcomings in the person's qualifications are matters of weight and not admissibility.

Furthermore, the general intent and scope of Rule 702 do not permit testimony by experts on the law. Rule 702 was a codification of existing common law. The Rule was intended to permit a relaxation of the admissibility of opinion evidence while maintaining the imposition of reasonable restrictions on the use of such opinion testimony. Testimony by an expert on issues of law is beyond the scope of the Rule. Even before the codification of these common-law rules into the Federal Rules of Evidence, scholars noted that witnesses should not be permitted to provide evidence regarding legal questions. One commentator noted:

A witness cannot be allowed to give an opinion on a question of law . . . . In order to justify having courts resolve disputes between litigants, it must be posited as an a priori assumption that there is one, but only one, legal answer . . . . There being only one applicable legal rule for each dispute or issue, it requires only one spokesman of the law, who . . . is the judge . . . .

In addition, the use of expert testimony to admit conclusions of law is disfavored as shown by the Rule 704 Advisory Committee's note. Rule 704 permits witnesses to give their opinions on ultimate issues of fact. The Committee stated, however, that the rules "stand ready to exclude opinions phrased in terms of inadequately explored legal criteria." This related commentary makes it clear that testimony on ultimate issues of law is not favored. The functional basis for this important distinction between allowing expert testimony on ultimate issues of fact but not allowing testimony on issues of law is that testimony on legal issues "circumvents the jury's decision-making function by telling it how to decide the case."

87. Id.
88. Id. The broadly phrased discussion addresses potential experts' fields and sources of knowledge.
89. Stoebuck, supra note 62, at 237.
90. FED. R. EVID. 704 advisory committee's note.
93. Id.; see also Addison, supra note 79, at 383.
D. The Federal Rules of Criminal and Civil Procedure

The Federal Rules of Criminal Procedure do not permit expert testimony regarding legal issues except under proscribed circumstances. When determining issues of foreign law, an expert witness properly may assist the judge in finding the law of another country. Various rules so provide, but the authorization of such testimony is explicitly limited. Federal Rule of Criminal Procedure 26.1 only provides that: “The court, in determining foreign law, may consider any relevant material or source, including testimony, whether or not submitted by a party or admissible under the Federal Rules of Evidence.”

The Advisory Committee’s note states that “the rule frees the court from the restraints of the ordinary rules of evidence.” The freedom which allows expert testimony regarding foreign law is “made necessary by the peculiar nature of the issue of foreign law.” Furthermore, the Rule sets up procedural requirements that provide for prior notification to opposing counsel and the court of the intent to rely upon evidence regarding issues of foreign law. Cases applying this Rule interpret foreign law to be the law of countries other than the United States. The stated purpose of Rule 26.1, which specifically addresses the admissibility of expert testimony on foreign legal issues, is to remove the restrictions on this type of evidence under the Federal Rules of Evidence. This further supports the conclusion that the Federal Rules of Evidence do not allow expert evidence on domestic legal issues.

The Federal Rules of Civil Procedure make the same distinction. Rule 44.1 addresses the admissibility of evidence to aid in the determination of foreign law in civil trials. It provides that in determining foreign law, a court may consider “any relevant material or source, including testimony, whether or not submitted

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96. Id. advisory committee’s note.
97. Id. At least in part, the functional rationale for this exception is that foreign legal materials are generally less available. By the logical default, courts would have to rely on expert legal testimony on issues of domestic law, if cases and statutes and secondary materials were not otherwise available to the court and the litigants. But, of course, they are in fact readily available to all concerned.
100. See Fed. R. Civ. P. 43 (Federal Rules of Evidence apply in federal civil proceedings).
by a party or admissible under the Federal Rules of Evidence.\textsuperscript{102} The Rules of Civil Procedure, like the Rules of Criminal Procedure, provide a procedural requirement of prior notification when one intends to present evidence on an issue concerning the law of a foreign country.\textsuperscript{103}

The Advisory Committee's note states that the purpose underlying Rule 44.1 is to avoid restrictions imposed by the Federal Rules of Evidence which otherwise would prevent examination of material that could aid in the determination of foreign law issues.\textsuperscript{104} The rationale underlying the Rule is that the court, not the jury, should determine issues of foreign law.\textsuperscript{105} The Rule thus allows the court access to any information relevant to its decision.\textsuperscript{106}

Finally, it is noteworthy that under both Federal Rule of Criminal Procedure 26.1 and Federal Rules of Civil Procedure 44.1, a decision on a foreign law issue is considered a determination of law, not a question of fact, and therefore is consistent with the general concept that the court determines issues of law and the jury determines issues of fact.\textsuperscript{107}

E. Legal Malpractice Actions

Testimony about law may represent evidence of a factual standard in one kind of case. For example, expert testimony by an attorney is properly admissible in lawsuits involving legal malpractice.\textsuperscript{108} "It is now generally accepted that expert testimony is

\textsuperscript{102} Id. Rule 44.1 thus is similar to Rule 26.1 of the Federal Rules of Criminal Procedure.

\textsuperscript{103} FED. R. CIV. P. 44.1.

\textsuperscript{104} Id. advisory committee's note.

\textsuperscript{105} See id.


\textsuperscript{108} There are four evidentiary problems inherent in legal malpractice cases which are recognized by commentators. These are:

1) which issues should the court decide and which issues should the jury decide?
2) which issues should be addressed by expert testimony and which should not?
3) how should jury instructions be framed to leave factual questions to the jury and legal questions to the court?
4) upon appeal, which issues should be reviewed as factual determinations and which as legal determinations?

Leibson, supra note 78, at 2.
admissible in actions against attorneys." Most courts hold that the plaintiff in such an action must present expert testimony in order to prove a prima facie case of legal malpractice. In some cases, however, the expert testimony is not permitted because the action of the defendant-attorney is within the layman's common experience. In legal malpractice actions, expert legal testimony is often necessary to establish the proper standard of care, a standard which is factual. Because attorneys are required to exercise the skill and knowledge ordinarily possessed by attorneys under similar circumstances, an attorney is generally the only witness who will be qualified as an expert to establish the requisite standard of care.

Although expert legal testimony is proper in this circumstance, commentators agree that the expert should not be able to usurp the judge's function of deciding issues of law which are "not the proper subject of expert testimony." The existence of a duty on the part of the defendant-attorney is a question of law for the court. "It is black letter law that expert testimony is not permissible on issues of law." The question whether there was a breach of

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111. There are five recognized exceptions to the requirement of expert evidence in a legal malpractice case. These are: 1) the action by the defendant-attorney is within common experience; 2) the action is based upon the legal theory of res ipsa loquitur; 3) the expert legal testimony is obtained from the testimony of the defendant-attorney; 4) under FED. R. EVID. 803(18), the expert evidence is obtained from entering a learned treatise into evidence; and 5) the trial is a bench trial. *Id.* at 121-23.

112. *See id.* at 120.

113. *Id.* In Deere & Co. v. Farmhand, Inc., 560 F. Supp. 85, 93 (S.D. Iowa 1982), aff'd, 721 F.2d 253 (8th Cir. 1983), an attorney, qualified as an expert in trademark and patent law, testified regarding the proper conduct of a reasonably prudent attorney practicing in the field of unfair competition.

In a legal malpractice case, it may be an issue whether a lawyer had a reasonable belief about the law. The lawyer's advice, for example, may have been based on a conclusion that a certain body of law was uncertain, and the issue is whether that conclusion and the advice based on it were competent. Expert testimony by a lawyer on this issue presumably would be admissible under Rule 702.

114. Breslin & McMonigle, *supra* note 109, at 123. In other words, the court decides the underlying legal issue of whether the attorney committed an error of law. *See* Leibson, *supra* note 78, at 19. It is left to the jury to determine the factual question of whether other attorneys similarly situated would have made the same legal error. *See id.; see also* Robert E. Keeton, *Legislative Facts and Similar Things: Deciding Disputed Premise Facts*, 73 MICH. L. REV. 1, 51-54, 67-69 (1988) ("Trial rules and practices should prohibit experts from giving legal opinions.").

115. *Note,* *supra* note 77, at 797.
that duty, however, is a mixed question of fact and law with responsibilities falling on both the court and the jury to determine the issue.

When the proffered opinion relates to a claimed departure from a standard of practice, the opinion testimony is often affected by the underlying view of the applicable law. In such cases, the prudent course may be to ask the expert witness, outside the presence of the jury, to state precisely for the court the legal rules that are the premise for the witness’s opinion. The judge can then determine whether the expert’s legal premises are wholly compatible with the instructions on the law that the judge intends to include in the charge to the jury. The judge should admit only that testimony that is in ultimate harmony with the judge’s own anticipated instruction. This is generally the wise procedural course in legal malpractice cases.

F. The Unhelpful Distinction Between Bench and Jury Trials

Some commentators have argued that although the fundamental criterion of the admissibility of expert testimony is helpfulness, expert legal testimony may aid both the court as well as the jury. The judge must determine the applicable law and its proper interpretation. The obvious argument against the admission of expert legal testimony—besides the twin concerns for confusion of the jury and usurpation of the judge’s function—is that the judge is assumed to be an expert in domestic law and, therefore, has no practical need for another expert’s assistance. Although this assumption may sometimes be true, many commentators suggest that this presupposition has become something of an exaggeration due to the increased complexity of cases. It is difficult for judges to keep abreast of

116. Id. at 804-05.
117. Id. The Advisory Committee’s note to Rule 201(a) endorsed this procedure:
   In determining the content or applicability of a rule of domestic law, the judge
   is unrestricted in his investigation and conclusion. He may reject the propositions
   of either party or of both parties. He may consult the sources of pertinent data
   to which they refer, or he may refuse to do so. He may make an independent
   search for persuasive data or rest content with what he has or what the parties
   present. . . . [T]he parties do no more than to assist; they control no part of the
   process.
FED. R. EVID. 201(a) advisory committee’s note (quoting Edmund M. Morgan, Judicial
Notice, 57 HARV. L. REV. 269, 270-71 (1944); see also FED. R. EVID. 611 (giving a judge
reasonable control over the mode and presentation of evidence).
118. Note, supra note 77, at 804. See 7 WIGMORE, supra note 4, § 1952.
119. Note, supra note 77, at 804 (citing Breslin & McMonigle, supra note 109, at 123).
complex areas of law, however, the judge has various opportunities to gain the necessary expertise without admitting expert legal testimony before the jury.\textsuperscript{120}

A judge needing an update regarding the domestic law applicable to a case has several methods by which to obtain the requisite legal knowledge. The judge has judicial clerks whose duties include legal research and analysis; additionally, the judge may request briefs from counsel regarding the applicable law.\textsuperscript{121}

Some commentators urge that in a bench trial, the judge should allow the parties to present conflicting expert legal testimony whenever the judge is persuaded that the testimony likely will be of assistance.\textsuperscript{122} By the same token, the judge also could allow such testimony even in a jury trial by the simple expedient of requiring the experts to testify outside of the jury's presence.\textsuperscript{123} Furthermore, under Federal Rule of Evidence 706, the judge is authorized to appoint court expert witnesses rather than allowing the parties to present their own hired experts.\textsuperscript{124} By hearing expert legal testimony outside the presence of the jury, the judge arguably avoids the problems regarding jury confusion and usurping the judge's role. The judge still makes the final decision regarding the applicable law.\textsuperscript{125} Or so the argument goes.

The most succinct, though perhaps not the most erudite, counterargument is to ask, "What is the point of this?" The advocates

\begin{itemize}
\item \textsuperscript{120} Id. at 804. Continuing education for judges today is something of a growth industry, with the Federal Judicial Center leading the way.
\item \textsuperscript{121} Edmund M. Morgan, Judicial Notice, 57 Harv. L. Rev. 269, 270-71 (1944).
\item \textsuperscript{122} Note, supra note 77, at 805.
\item \textsuperscript{123} Id. It should be noted that by allowing briefs by counsel and expert testimony on legal questions, the cost of obtaining knowledge on the law is shifted to the litigants.
\item \textsuperscript{124} Fed. R. Evid. 706. There are, of course, ethical restraints beyond the rules of evidence. For example, "ex parte communications, or . . . other communications made to the judge outside the presence of the parties concerning a pending or impending proceeding are prohibited." Model Code of Judicial Conduct, Canon 3B(7) (1990). The Model Code goes on to approve of the ethics of appointing an expert witness on the law: "[a] judge may obtain the advice of a disinterested expert on the law applicable to a proceeding before the judge if the judge gives notice to the parties of the person consulted and the substance of the advice, and affords the parties reasonable opportunity to respond." Id. Canon 3B(7)(b). The commentary makes clear that ethical restraints prohibit "communications from lawyers, law teachers, and other persons who are not participants in the proceeding, except to the limited extent permitted." Id. The commentary goes on to impliedly suggest, however, that expert legal testimony from the witness stand is not appropriate or desirable, even as an ethical matter. However, "[a]n appropriate and often desirable procedure for a court to obtain the advice of a disinterested expert on legal issues is to invite the expert to file a brief amicus curiae." Id. The argument in this Article is not that the challenged practice is somehow unethical, but that it is not appropriate as a matter of the law of evidence.
\item \textsuperscript{125} Note, supra note 77, at 810.
\end{itemize}
at trial have available to them all the traditional modes of presenting the law to the court—briefs, memoranda, and argument—apart from the potentially confusing, even redundant, mode of calling an expert witness on the law.

III. SOME CONFUSION IN THE CASE LAW

An analysis of the modern use of expert legal testimony would not be complete without an appraisal of the case law. Many decisions hold that expert testimony on the law is generally inadmissible. This line of cases will be summarized first. Next, decisions which have admitted expert legal testimony will be sampled and critiqued. An analysis of United States v. Garber—126—the leading decision to permit expert legal testimony—and the cases rejecting or limiting application of this precedent will follow. The weight of appellate precedent is against the use of expert legal testimony, although there are reported opinions that seem to approve of it. That these inconsistent holdings coexist in the reports may explain district court rulings—which are not wholly unprecedented but are certainly anomalous—admitting such testimony.

A. Decisions Not Allowing Expert Legal Testimony

What might be called the “majority rule” is that expert testimony on the law is not admissible in federal court. Several leading decisions illustrate this rule.

In 1987, the Second Circuit decided F.H. Krear & Co. v. Nineteen Named Trustees.127 Krear involved a conflict over the control of employee benefit plan funds.128 The plaintiff contracted with the trustees to provide administrative services for the fund and sued for payment under the contract.129 The trustees proffered a lawyer as a witness to testify that the contract between the parties was unenforceable because essential terms were missing from the document.130 The court of appeals upheld the district court’s exclusion of the proffered expert testimony, and concluded that “[i]t is not for witnesses to instruct the jury as to the applicable principles of law, but for the judge.”131

126. 607 F.2d 92 (5th Cir. 1979); see infra part III.C.
127. 810 F.2d 1250 (2d Cir. 1987).
128. Id. at 1255.
129. Id.
130. Id. at 1256.
131. Id. at 1258 (quoting Marx & Co. v. Diner’s Club, Inc., 550 F.2d 505, 509-10 (2d Cir.), cert. denied, 434 U.S. 861 (1977)).
In deciding *Krear*, the court of appeals invoked an earlier decision from the Second Circuit, *Marx & Co. v. Diners' Club, Inc.*,\(^{132}\) which held that the trial court had erred in permitting expert testimony regarding the parties' legal obligations. In *Marx*, the plaintiff claimed that the defendant fraudulently induced the sale of unregistered stock in the defendant corporation.\(^{133}\) The district court admitted the testimony of a lawyer qualified as an expert in securities law.\(^{134}\) The lawyer-witness construed the contract between the parties and also testified that the defenses urged were insufficient as a matter of law.\(^{135}\) The Second Circuit held that the expert witness was qualified to explain the practices ordinarily followed by lawyers and corporations in obtaining registration of stock if the evidence was relevant to the case; however, the testimony regarding legal standards derived from the contract was not admissible.\(^{136}\) The court of appeals added that the judge's special legal knowledge made the lawyer's expert testimony superfluous.\(^{137}\) The appellate court pointed out that the danger in allowing this testimony is that the jury may think that the expert knows more than the judge in a particular area of law, which is an "inadmissible inference in our system of law."\(^{138}\) This was so prejudicial as to be deemed reversible error.\(^{139}\)

In 1986, the Fourth Circuit addressed the admissibility of expert testimony on the law in *Adalman v. Baker, Watts & Co.*\(^{140}\) In *Adalman*, the controversy surrounded a tax-sheltered investment.\(^{141}\) The tax investment was organized as a partnership, and investors were solicited.\(^{142}\) Subsequently, the partnership went into receivership, and investors filed this suit alleging securities law viola-
The main issue of fact at trial involved the defendant's omission from the prospectus of certain negative information. The defendant proffered an expert witness to testify to his conclusion that the applicable securities law did not require the disclosure of the omitted material and the district court ruled the testimony inadmissible. The court of appeals stated the issue as "to what extent may the parties call expert witnesses . . . to testify to the jury as to what the applicable law may mean, and what the applicable law does or does not require?" The appellate court began its analysis by stating the general proposition that "under our system it is the responsibility—and the duty—of the court to state to the jury the meaning and applicability of the appropriate law, leaving to the jury the task of determining the facts." The court went on to state broadly that "[u]nder circumstances involving domestic law, this court can conceive of no circumstances which would shift this burden [of determining the applicable law] from the court to the jury." Paralleling further the Rules-based argument made previously in this Article, the court added that Federal Rule of Evidence 704(a) does not permit the expert witness to "usurp the province of the judge."

The Fifth Circuit has decided several cases regarding the admissibility of expert testimony on the applicable law. The leading decision from the Fifth Circuit is United States v. Garber. Because of the central importance of Garber and the treatment that it has received both in later Fifth Circuit decisions and in decisions from other circuits, it merits discussion in a separate section of this Article. Other decisions in the Fifth Circuit, however, have addressed the issue without addressing the Garber decision, and fit in this discussion of decisions that disapprove of expert legal opinion.

In 1983, the Fifth Circuit decided Owen v. Kerr-McGee Corp. In Owen, the plaintiff alleged that the defendant negligently installed and operated an underground gas pipeline. At trial, the

143. Id. at 362.
144. Id. at 365.
145. Id.
146. Id. at 366.
147. Id.
148. Id.
149. Id. at 368.
150. 607 F.2d 92 (5th Cir. 1979).
151. See infra part III.C.
152. 698 F.2d 236 (5th Cir. 1983).
153. Id. at 237.
defendant sought to introduce testimony by an expert who would have given his opinion on the legal conclusions to be drawn from the evidence. In affirming the trial court's refusal to admit the evidence, the Fifth Circuit panel stated that the Federal Rules of Evidence generally do not allow a witness to "give legal conclusions." The court reasoned that allowing the expert to give his opinion on the legal conclusions to be drawn from the evidence would both invade the trial court's province and be irrelevant.

In 1977, the Fifth Circuit addressed a case involving a bookmaking organization. The court stated in *United States v. Milton* that the judiciary must "remain vigilant against the admission of legal conclusions, and an expert witness may not substitute for the court in charging the jury regarding the applicable law." This same theme had been sounded in a still earlier Fifth Circuit decision, which noted the importance of protecting the role of the judge in instructing the jury on the applicable law. In *Huff v. United States*, the plaintiff had attempted to introduce expert testimony regarding the construction and interpretation of customs, laws, statutes, rules, and regulations. The court of appeals noted that the Government, as a party prosecutor, could not be permitted to substitute its witness for the trial court in charging the jury as to the applicable law in the case.

The Sixth Circuit addressed the issue of expert legal testimony in *United States v. Zipkin*, decided in 1984. In *Zipkin*, an appointed receiver of a bankrupt estate was charged with embezzlement. The district court permitted the plaintiff's expert witnesses to testify about bankruptcy law and the law's application in the case with regard to interim compensation for receivers. Additionally, the district court allowed the bankruptcy judge presiding over the estate's bankruptcy proceedings to testify regarding the proper interpretation of an order he had made concerning the payment of fees to the receiver. The Sixth Circuit held that this testimony was inadmissible and that the error in admitting it was reversible because only the judge can properly instruct the jury on

154. Id. at 239-40.
155. Id. at 240.
156. Id.
157. 555 F.2d 1198, 1203 (5th Cir. 1977).
158. 273 F.2d 56, 61 (5th Cir. 1959).
159. Id.
160. 729 F.2d 384 (6th Cir. 1984).
161. Id. at 386.
162. Id.
163. Id.
the applicable principles of law. The court of appeals further noted that expert testimony on the law is properly excluded because a trial judge does not need the assistance of witnesses to determine the applicable law.

In a recent Seventh Circuit case, *Harbor Insurance Co. v. Continental Bank Corp.*, the court stated that a lawyer could not testify as an expert on the meaning of "indemnity" in the defendant-bank's charter. Harbor Insurance Company was required, under their policy, to indemnify a director or officer of Continental Bank for wrongful acts committed by them, if under the Bank's charter the bank itself was required or permitted to indemnify the director or officer. Therefore, the insurer's liability was dependent upon the meaning of "indemnify" under the Bank's charter. The court stated that, because the language of the charter was ambiguous, either party could introduce evidence regarding the true meaning. Although the court acknowledged that a lawyer was a proper witness to provide an opinion regarding the meaning of the charter, the lawyer-witness in this case had gone further at trial and based his opinion on judicial opinions. By allowing the lawyer to testify on the conclusions of his legal research, the district judge improperly "allowed the jury to infer that it could look to that witness for legal guidance." In effect, this amounted to the judge vouching for one side's theory of the case. According to the appellate court, "by doing this the judge impermissibly tilted the balance of power between the parties." Thus, the court of appeals concluded that the district court was incorrect in allowing the lawyer to testify on the legal meaning of indemnification.

Earlier, the Seventh Circuit decided *United States v. Baskes.* In *Baskes*, the defendant was convicted of obstructing the assessment and collection of income and gift taxes by the Internal Revenue Service. The Seventh Circuit began its analysis with the major premise that the Federal Rules of Evidence do not allow

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164. *Id.* at 387.
165. *Id.*
166. *922 F.2d 357* (7th Cir. 1990).
167. *Id.* at 366.
168. *Id.* at 359.
169. *Id.* at 365.
170. *Id.* at 366.
171. *Id.*
172. *Id.*
173. *See id.*
175. *Id.* at 473.
experts to testify on the legal implications of conduct. The court of appeals explained that expert testimony must be helpful to a clear understanding of specific facts in issue. Because expert legal testimony on the legal implications of conduct could not possibly aid the jury in understanding facts in issue, the district court’s decision not to admit the testimony was affirmed.

In *Farmland Industries v. Frazier-Parrott Commodities*, the Eighth Circuit recently held that an expert witness cannot testify regarding the requirements of the law. In *Farmland*, the plaintiff claimed that the defendants conspired to defraud the plaintiff by trading in oil futures contracts without authorization. The district court refused to allow the plaintiff’s expert witness to testify regarding the federal agency’s rules pertaining to the defendant’s conduct. The court of appeals approved the trial court’s refusal and stated that the special legal knowledge of the judge rendered the witness’s testimony superfluous. The panel further explained that, “‘[t]he admission of such testimony would give the appearance that the court was shifting to witnesses the responsibility to decide the case.’”

In 1974, the Ninth Circuit decided *Cooley v. United States*. The defendant in *Cooley* was convicted for willfully and knowingly failing to file a tax return. In upholding the trial court’s ruling that copies of case decisions were inadmissible, the court of appeals pointedly noted that the law is given to the jury by the court and is not introduced into evidence. The court of appeals invoked a functional analysis: “It is the function of the jury to determine the facts from the evidence and apply the law as given by the court to the facts.”

176. *Id.* at 479.
177. *Id.* at 478.
178. *Id.* In a still earlier decision, the Seventh Circuit had stated that “‘[t]he question of interpretation of the contract is for the jury and the question of legal effect is for the judge. In neither case do we permit expert testimony.” *Loeb v. Hammond*, 407 F.2d 779, 781 (7th Cir. 1969); *see also* United States v. Windfelder, 790 F.2d 576, 580-82 (7th Cir. 1986) (testimony concerning criminal defendant’s mental state would be inappropriate).
180. *Id.* at 1250.
181. *Id.* at 1253.
The Tenth Circuit addressed the admissibility of expert legal testimony in *Specht v. Jensen*, decided in 1988. The court of appeals directly addressed the issue of whether Federal Rule of Evidence 702 permits an attorney who is called as an expert witness to state his views on the law that governs the verdict. The plaintiff wanted to introduce the testimony of an attorney who would testify regarding the reasonableness of a search. The attorney was allowed to testify as an expert witness that the search was conducted in an illegal manner. The Tenth Circuit considered whether "the expert encroached upon the trial court's [function and] authority to instruct the jury upon the applicable law." The court noted that "it is axiomatic that the judge is the sole arbiter of the law and its applicability." The court concluded that "it would be a waste of time if witnesses or counsel should duplicate the judge's statement of the law, and it would intolerably confound the jury to have it stated differently." The court also invoked the Advisory Committee's note to Rule 704 which "emphasize[d] that testimony on ultimate questions of law is not favored." The Tenth Circuit, making the analogy that testimony on the law amounts to directing a verdict rather than assisting the jury's understanding, held that the expert testimony was improperly admitted into evidence. The court concluded, in no uncertain terms, that "[i]n no instance can a witness be permitted to define the law of the case."

In another recent decision, the Eleventh Circuit held that an expert witness is not allowed to testify regarding the legal interpretation of a contract. In *Montgomery v. Aetna Casualty & Surety Co.*, the court of appeals addressed a case regarding an alleged breach of fiduciary duty in an insurance contract. The court also noted that there are at least two other problems inherent in the introduction of expert testimony upon legal issues. Id. at 809. The jury may believe that the expert knows more about the law than the judge and therefore ignore the judge's instructions. Id. (citing Marx & Co. v. Diner's Club, Inc., 550 F.2d 505 (2d Cir.), cert. denied, 434 U.S. 861 (1977)). Additionally, the expert may present legal testimony which differs from that of the judge and, therefore, confuses the jurors. Id.

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189. *Id.* at 806-07.
190. *Id.* at 806.
191. *Id.* at 806.
192. *Id.* at 807.
193. *Id.*
194. *Id.* (citing Stoebuck, *supra* note 62, at 237).
195. *Id.* at 808.
196. *Id.* The court also noted that there are at least two other problems inherent in the introduction of expert testimony upon legal issues. *Id.* at 809. The jury may believe that the expert knows more about the law than the judge and therefore ignore the judge's instructions. *Id.* (citing Marx & Co. v. Diner's Club, Inc., 550 F.2d 505 (2d Cir.), *cert. denied*, 434 U.S. 861 (1977)). Additionally, the expert may present legal testimony which differs from that of the judge and, therefore, confuses the jurors. *Id.*
197. *Id.* at 810.
198. 898 F.2d 1537, 1538 (11th Cir. 1990).
insurance policy provided that the insurer would be legally liable for all costs involved in defending suits against the insured. The insured alleged that the insurer breached the insurance contract by not providing a tax attorney in a suit contesting a tax-status determination by the Internal Revenue Service. The insured offered expert testimony regarding the legal duty of the insurer under the policy. The Eleventh Circuit reversed the trial court's decision to admit the testimony. The court squarely held that an expert "may not testify to the legal implications of conduct." The trial judge "must be the jury's only source of law.

Significantly, then, the majority rule is so well-established that it is often deemed a basic premise or assumption of evidence law—a kind of axiomatic principle. Precedent for the reasoning detailed in Part II of this Article generally holds sway in eight of the twelve regional courts of appeals. Some confusion of precedent exists, however, which is centered in the Fifth Circuit and is spilling over into other circuits. These ersatz precedents often have to do with

199. Id. at 1538-39.
200. Id. at 1539-40.
201. Id. at 1540.
202. Id. at 1541.
203. Id.
204. Id. at 1541.
205. In addition to the courts of appeals, several district courts likewise have deemed expert legal testimony to be inadmissible. In 1987, the Southern District of New York held that an affidavit of a lawyer who qualified as an expert in trademark law could not be introduced into evidence. Motown Productions v. Cacomm, Inc., 668 F. Supp. 285, 288 (S.D.N.Y. 1987), rev'd on other grounds, 849 F.2d 781 (2d Cir. 1988). The court ruled that the expert testimony of a lawyer as to the ultimate issue of domestic law or as to the legal significance of facts was plainly inadmissible. Id. In 1986, the Western District of Pennsylvania held that a report by a lawyer otherwise qualified as an expert was inadmissible because it did not aid in the jury's understanding of facts in the case. King v. Fox Grocery Co., 642 F. Supp. 288, 291 (W.D. Pa. 1986). The Southern District of Ohio has held that the Rules of Evidence did not permit expert testimony on the law. Payne v. A.O. Smith Corp., 627 F. Supp. 226, 228 (S.D. Ohio 1985). The court held that "the Court, not a witness, may instruct the jury as to the applicable law in this action." Id. Furthermore, the court noted that this was clearly the law in the Sixth Circuit. Id. (citing United States v. Zipkin, 729 F.2d 384, 387 (6th Cir. 1984); Stoler v. Penn Central Transp. Co., 583 F.2d 896, 899 (6th Cir. 1978)). In 1983, the Eastern District of New York held that an expert's testimony upon the applicable law was inadmissible in light of the significant policy against allowing trials before juries to become "battles of paid advocates posing as experts on the respective sides concerning matters of domestic law." DiBella v. County of Suffolk, 574 F. Supp. 151, 153 (E.D.N.Y. 1983) (citing Marx & Co. v. Diner's Club, Inc., 550 F.2d 505, 511 (2d Cir.), cert. denied, 434 U.S. 861 (1977)). In 1979, the Western District of Pennsylvania simply held that "[t]here is nothing in Rule 702 which would allow an expert to interpret a legal document and substitute his judgment for that of the court." Eastern Assoc. Coal Corp. v. Aetna Casualty & Sur. Co., 475 F. Supp. 586, 592 (W.D. Pa. 1979).
the mental state element in criminal cases or with similar issues.

B. Decisions Allowing Expert Legal Testimony

Existing alongside the numerous decisions that disapprove of expert legal testimony, are several decisions which have held expert legal testimony to be admissible—for one reason or another.

In 1981, the Fifth Circuit decided *United States v. Fogg.*

In *Fogg,* the defendant, an executive of a food store chain, was charged with receiving illegal kickbacks from an orange juice supplier. The defendant allegedly overpaid the supplier for the juice and the supplier refunded the excess to the defendant. In the income tax evasion prosecution, the Internal Revenue Service offered an expert witness to testify before the jury that the payments received by the defendant amounted to constructive dividends from the defendant's corporation to the defendant. The witness based his opinion on the Internal Revenue Code and his experience as an internal revenue agent. The court of appeals held that the admission of the expert's testimony was not reversible error because he had merely stated his opinion, and the presentation did not encroach on the role of the court.

In 1981, the Fifth Circuit issued a similar opinion in *Huddleston v. Herman & MacLean.* In *Huddleston,* the plaintiffs alleged that the defendant violated securities regulations in its public offering of securities. The plaintiffs offered an expert in the securities industry to testify concerning the interpretation given to the boilerplate language of the prospectus. The expert witness testified that the only relevant statement concerning the risk of the investment was in the form of a standard statement used in every prospectus. The Fifth Circuit held that the expert testimony on the interpretation of the prospectus was admissible because it was relevant to the scienter element.

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207. Id. at 553-54.
208. Id. at 554.
209. Id. at 555.
210. See id. at 555-56.
211. Id. at 556-57.
212. 640 F.2d 534 (5th Cir. 1981).
213. Id. at 539.
214. Id. at 552.
215. Id.
216. Id. See also *United States v. Bilzerian,* 926 F.2d 1285, 1294-95 (2d Cir. 1991) (finding no abuse of discretion in allowing law professor's testimony concerning the requirements of tax forms because the testimony was general background evidence and the trial judge gave limiting instruction). This is analogous to expert testimony in legal malpractice cases. See supra text accompanying notes 108-15.
The Eighth Circuit decided *United States v. Bednar* in 1984.\(^{217}\) In *Bednar*, the defendant was indicted for making false entries in his company’s computer records in violation of federal securities regulations.\(^{218}\) Over the objection of the defendant, the Government offered an expert witness to testify that the records involved in the case were required to be kept according to the securities rules and regulations.\(^{219}\) The court of appeals upheld the admission of the evidence and affirmed the conviction.\(^{220}\)

In *Shad v. Dean Witter Reynolds, Inc.*, the Ninth Circuit upheld the use of expert legal testimony.\(^{221}\) The plaintiff had sued the defendants alleging that the defendants churned their investment accounts resulting in high commissions for the defendant at the expense of the plaintiff.\(^{222}\) The plaintiff admitted that he agreed to the investment but alleged that the defendant represented it as a conservative investment.\(^{223}\) At trial, the plaintiff offered an expert to testify on the significance of the various transactions and whether the completion of those transactions evidenced reckless disregard of the plaintiff’s interest.\(^{224}\) The Ninth Circuit held that exclusion of the plaintiff’s expert witness testimony prevented the plaintiff from presenting his case to the jury and remanded for a new trial.\(^{225}\)

In 1986, the Tenth Circuit held that the Government’s expert legal testimony was properly admitted to explain the requirements of firearm registration statutes. In *United States v. Buchanan*,\(^{226}\) the defendant argued on appeal that the trial court erred in allowing the prosecution to present an expert witness to testify that the explosive device which exploded in the defendant’s home was a “firearm” requiring registration under the applicable statutes.\(^{227}\)

\(^{217}\) 728 F.2d 1043 (8th Cir.), cert. denied, 469 U.S. 827 (1984).

\(^{218}\) Id. at 1045-46.

\(^{219}\) Id. at 1048.

\(^{220}\) Id.; see also Hogan v. AT&T, 812 F.2d 409, 412 (8th Cir. 1987) (per curiam) (finding no abuse of discretion in allowing opinion testimony regarding the existence of discriminatory acts because the lay meaning of “to discriminate” is similar to the legal meaning).

\(^{221}\) 799 F.2d 525, 530 (9th Cir. 1986).

\(^{222}\) Id. at 526.

\(^{223}\) See id.

\(^{224}\) Id. at 527.

\(^{225}\) Id. at 530; see also United States v. Unruh, 855 F.2d 1363, 1376 (9th Cir. 1987) (finding no error in allowing expert testimony on a regulation when the regulation was explained correctly and the jury was aided in understanding the complex case), cert. denied sub nom. Forde v. United States, 488 U.S. 974 (1988).

\(^{226}\) 787 F.2d 477 (10th Cir. 1986).

\(^{227}\) See id. at 483.
The court of appeals noted that the issue "involved the consideration of a particular homemade device against an array of statutory definitions." The court upheld the conviction noting that "under such circumstances, the courts have admitted this sort of testimony."

In an earlier decision, the Tenth Circuit also allowed the testimony of an expert on the interpretation and application of the rules of the National Association of Security Dealers. In *United States v. Jensen*, the defendant was convicted of violating federal securities regulations by committing fraud in the solicitation and sale of certain securities. The court of appeals began its analysis by explaining that an "expert witness cannot state legal conclusions by applying law to the facts, passing upon weight or credibility of the evidence, or usurping the province of the jury by telling it what result should be reached." However, the Tenth Circuit panel upheld the conviction and the admission of the testimony because "with respect to a self-governing rule of a private association," the expert legal testimony was not a legal conclusion.

These decisions, quantitatively described as a "minority rule," may best be characterized qualitatively as mistakes of precedent. They might be explained away as the West Publishing Company key number system gone awry. There can be no denying that they exist. The only argument here is that they are properly considered somewhat as "sports" of evidence law in which a district court's error is compounded on appeal.

C. The Confusing Precedent of *United States v. Garber*

In the Fifth Circuit and in other courts of appeals, one rather curious decision seems to have had a life of its own as a precedent to allow expert testimony on the law. This confusion of precedent requires separate discussion here.

In 1979, the Fifth Circuit decided *United States v. Garber*, perhaps establishing the basis for a new cliche that odd facts and

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228. Id.
229. Id.; see also Smith v. Atlantic Richfield Co., 814 F.2d 1481, 1487 (10th Cir. 1987) (government agency's approval of safety measures is relevant, and the mode of introducing evidence of that approval does not affect relevance).
231. Id. at 1352.
232. Id. at 1356.
233. Id.
234. 607 F.2d 92 (5th Cir. 1979). See generally Garner, supra note 25; Schaefer, supra note 74.
en banc courts establish odd law.\textsuperscript{235} In \textit{Garber}, the defendant was indicted for willfully and knowingly attempting to evade income tax liability by filing a false and fraudulent income tax return.\textsuperscript{236} The defendant had a rare antibody in her blood plasma and sold it periodically for substantial sums of money.\textsuperscript{237} In addition to the funds she received from the sale of her plasma, the defendant also received a weekly salary.\textsuperscript{238} It was undisputed that the plaintiff only paid taxes on the money received as salary.\textsuperscript{239} In order to succeed in its prosecution, the Government had to show: (1) a tax deficiency; (2) an affirmative act constituting tax evasion or attempted evasion; and (3) willfulness.\textsuperscript{240} The Government attempted to introduce the testimony of a lawyer who was a qualified expert in tax law.\textsuperscript{241} The Government's expert witness was to testify that the income received by the plaintiff was gross income under the Internal Revenue Code.\textsuperscript{242} In rebuttal, the defendant offered the testimony of a certified public accountant who concluded the money received by the defendant was not taxable income according to the Internal Revenue Code.\textsuperscript{243} The district court listened to the

\textsuperscript{235} The decision was by the former Fifth Circuit en banc, and, therefore, created circuit precedent for the new Fifth Circuit and the Eleventh Circuit. \textit{See} Thomas E. Baker, \textit{A Primer on Precedent in the Eleventh Circuit}, 34 MERCER L. REV. 1175, 1185-88 (1983); Thomas E. Baker, \textit{A Postscript on Precedent in the Divided Fifth Circuit}, 36 SW. L.J. 725, 737 (1982).

The 1979 decision is significant, as well as unfortunate, because it was the first en banc decision on expert legal witnesses after the July 1, 1975 effective date of the Federal Rules of Evidence. Prior to the decision, there were some few and unclear precedents upholding the use of expert witnesses on the law in peculiar situations. \textit{See} Schaefer, \textit{supra} note 74, at 454. The en banc court made the mistake of perpetuating this uncertainty and missed the opportunity to purge these precedents. \textit{Id.} at 454-55. Inexplicably, the en banc majority opinion never mentions the then-new Rules of Evidence. \textit{Id.} at 458-59.

After this Article was written, but before it was published, the Fifth Circuit en banc reconsidered the general rules for the admissibility of expert witness testimony and seemed to encourage district judges to be more skeptical and less hospitable to proffers of expert scientific testimony. Curiously, the 1991 decision does not discuss \textit{Garber}. \textit{See} Christophersen v. Allied-Signal Corp., 939 F.2d 1106 (5th Cir. 1991) (en banc); \textit{see also} Gary Taylor, \textit{Expert Witness Opinion Eyed}, NAT’L L.J., Oct. 21, 1991, at 3 (suggesting the issue is ripe for Supreme Court review).

\textsuperscript{236} \textit{Id.} at 93-94. In 1970 alone, the plaintiff was paid $80,200 for her plasma. \textit{Id.} at 94 n.1.

\textsuperscript{237} \textit{Id.} at 94. The plaintiff received a weekly salary of $200. \textit{Id.}

\textsuperscript{238} \textit{Id.}


\textsuperscript{241} \textit{Id.} at 94.

\textsuperscript{242} \textit{Id.} The lawyer based his opinion upon I.R.C. § 61(a) (1954).

\textsuperscript{243} \textit{Id.} at 95.
proffers of testimony from both experts outside the presence of the jury, but refused to admit their opinions because the question of taxability was deemed to be a question for the court, not the jury, to decide.244 The district court then ruled, as a matter of law, that the income received by the defendant was taxable income.245

On appeal, the en banc majority of the Fifth Circuit emphasized that because the district court "reserved to itself the job of unriddling the tax law," it had completely obscured the most important theory of the defendant's defense.246 The majority reasoned that the defendant could not have willfully evaded the tax if a reasonable doubt existed in the law regarding the taxability of the income.247 The majority further stated that the result did not depend upon the defendant's knowledge of the confused state of the law, because even if the defendant had sought professional advice, no clear legal answer would have been forthcoming.248 One cannot read the majority opinion without detecting a sense of appellate suspicion of the Internal Revenue Service and a corresponding appellate sympathy for the taxpayer-defendant.249 Additionally, the majority stated that "[i]n a case such as this where the element of willfulness is critical to the defense, the defendant is entitled to wide latitude in the introduction of evidence tending to show lack of intent."250 Finally, the majority relied, incorrectly, on precedent that admits expert legal testimony on questions of foreign law.251 Two dissenting opinions, supported by four judges, took issue with the majority's evidentiary holding by writing cri-

244. Id. at 94-95.
245. Id. at 96.
246. Id. at 97.
247. Id. at 97-98. The majority noted that "when the taxability of unreported income is problematical as a matter of law, the unresolved nature of the law is relevant to show that [the] defendant may not have been aware of a tax liability or may have simply made an error in judgment." Id. at 98.

In a recent decision, the Supreme Court held that a good-faith misunderstanding of the law or a good-faith belief that one is not violating the law negates willfulness, whether or not the claimed belief or misunderstanding is objectively reasonable. Cheek v. United States, 111 S. Ct. 604, 609-12 (1991). The Supreme Court also held that the defendant's views about the validity of the tax laws are irrelevant to the issue of willfulness and should not be heard by the jury. Id. at 612. The majority based the holding on statutory grounds and did not reach the arguable constitutional issues involved. Id. at 613 n.11.
248. 607 F.2d at 98-99.
249. "A criminal proceeding pursuant to section 7201 is an inappropriate vehicle for pioneering interpretations of tax law." Id. at 100.
250. Id. at 99.
251. Id. at 100; see supra part II.D.
tiques that mirror the discussion and reach the same conclusion of inadmissability reached in Part II of this Article.\(^\text{252}\)

In the years since the *Garber* decision, the Fifth Circuit has decided several cases in which one would expect reliance on the *Garber* precedent. Instead, the Fifth Circuit more often than not, has distinguished these cases from *Garber*. Many commentators have been critical of *Garber* and have suggested that the precedent should be, if it has not already been, limited to its peculiar facts.\(^\text{253}\) There is good reason to believe that the Fifth Circuit itself has come to feel that way about the precedent.

In 1980, a Fifth Circuit panel decided *United States v. Herzog*.\(^\text{254}\) The defendant in *Herzog* was convicted of willfully supplying false and fraudulent information on an income tax withholding-exemption statement.\(^\text{255}\) The defendant testified that he completed an “extensive study of federal income tax law and constitutional law” after which he concluded that he could be legally taxed only upon making a profit.\(^\text{256}\) The defendant explained that he did not pay taxes on his wages because he had concluded that his wages were not profit.\(^\text{257}\) The controlling issue for the jury was whether the defendant filed the improper forms under an honest, although erroneous, belief that his wages were exempt.\(^\text{258}\)

The defendant proffered testimony by an expert in income tax law.\(^\text{259}\) The expert would have testified about the extreme complexity of the tax laws and the substantial amount of literature concerning the complexity of those laws.\(^\text{260}\) On appeal, the Fifth Circuit approved the district court’s exclusion of the expert’s

\(^{252}\) 607 F.2d at 101, 105-07, (Ainsworth, J., dissenting); *Id.* at 109, 112-16 (Tjoflat, J., dissenting). See generally Joshua Stein, Note, *Criminal Liability for Willful Evasion of an Uncertain Tax*, 81 COLUM. L. Rev. 1348 (1981). Nowhere did the majority explain how and why expert testimony by a lawyer would pass muster under Rule 702. The issue was whether a layperson honestly or even reasonably believed a certain proposition about the law. The defendant ought to be allowed to present the jury with the underlying information or knowledge the defendant had and then the lay jurors ought to be allowed to draw their own inferences about the honesty or reasonableness of the claimed belief. The lay jurors are, in fact, better situated to make that determination than a lawyer-expert witness.

\(^{253}\) See, e.g., *United States v. Ingredient Technology Corp.*, 698 F.2d 88, 96-98 (2d Cir.), cert. denied, 462 U.S. 1131 (1983); Leibson, *supra* note 78, at 22; Schaefer, *supra* note 74, at 447; Stein, *supra* note 252, at 1348-53; *Note*, *supra* note 77, at 801-03.

\(^{254}\) 632 F.2d 469 (5th Cir. 1980).

\(^{255}\) *Id.* at 470.

\(^{256}\) *Id.* at 471.

\(^{257}\) *Id.*

\(^{258}\) *Id.* at 473.

\(^{259}\) *Id.*

\(^{260}\) *Id.*
proffered testimony because the witness’s opinion regarding the complexity of the tax laws was irrelevant to the determination of the defendant’s individual confusion regarding the tax law.\textsuperscript{261} The court distinguished \textit{Garber}, stating that the defense in \textit{Garber} had argued that the testimony of the expert was “‘to show that doubt existed as to whether a tax was due because it was incapable of being computed, and to demonstrate the vagueness of the law, which would preclude a willful intent to violate it’.”\textsuperscript{262} The Fifth Circuit reasoned that because the defendant in \textit{Herzog} was charged with making a false report, “no amount of expert testimony could help him in this regard.”\textsuperscript{263}

In 1984, the Fifth Circuit’s decision in \textit{United States v. Burton} further narrowed the \textit{Garber} holding.\textsuperscript{264} In \textit{Burton}, the defendant was convicted of failing to file income tax returns.\textsuperscript{265} The defendant argued that the district court erred in excluding expert legal testimony concerning the legal uncertainty over whether wages are income under the Internal Revenue Code.\textsuperscript{266} The Fifth Circuit approved the district court’s exclusion of the testimony.\textsuperscript{267} The defendant testified that he had a good faith belief that the wages were not income and, therefore, lacked the requisite intent to violate the law.\textsuperscript{268} The court of appeals agreed that “a \textit{bona fide} misunderstanding of the tax laws can negate the essential element of willfulness,” but concluded that any erroneous legal views that the defendant might have held could be described by the trial judge in his instruction to the jury regarding good faith.\textsuperscript{269} The court explicitly distinguished \textit{Garber} by characterizing that decision as having been made “in response to a decision by the trial court that the prior uncertainty of the legal question was not relevant to the jury’s decision.”\textsuperscript{270} According to the \textit{Burton} panel, “[w]hile the legal decision of taxability was for the judge, the uncertainty and doubt which had previously existed were yet relevant to the defendant’s [Garber’s] state of mind.”\textsuperscript{271} The court continued:

We are persuaded that, apart from those few cases where the legal duty pointed to is so uncertain as to approach the level of vagueness,
the abstract question of legal uncertainty of which a defendant was unaware is of marginal relevance. In other cases the judge will ordinarily be the sole source of the law.\textsuperscript{272}

The Fifth Circuit narrowed \textit{Garber} even further, in \textit{United States v. Daly}.\textsuperscript{273} In \textit{Daly}, the defendant was a disbarred attorney and convicted tax evader who gained control of a church which had been granted a tax-exempt status.\textsuperscript{274} The defendant attempted to introduce expert testimony on the alleged confusion of the applicable tax law for the purpose of negating the element of willfulness.\textsuperscript{275} The district court excluded the evidence as irrelevant.\textsuperscript{276} The Fifth Circuit characterized the controlling precedents, stating that "[i]n \textit{United States v. Burton}, this court limited \textit{Garber} to its bizarre facts—where the level of uncertainty approached legal vagueness."\textsuperscript{277} In holding that the district court correctly excluded the expert testimony, the \textit{Daly} panel stated that "the relevance of the expert’s testimony on plausible readings of the Internal Revenue Code can be easily outweighed by considerations of potential prejudice and of confusing the jury, especially considering that the judge is the jury’s sole source of information regarding the law."\textsuperscript{278}

Thus, the \textit{Garber} holding may be characterized as something of a Fifth Circuit curiosity of precedent which was decided upon peculiar facts and which has been limited by the Fifth Circuit virtually—but not quite—to the point of being overruled.

Outside the Fifth Circuit, other circuits also have distinguished or limited the application of the \textit{Garber} decision. In \textit{United States v. Ingredient Technology Corp.}, the Second Circuit explicitly refused to follow \textit{Garber}.\textsuperscript{279} The Second Circuit first noted that in a tax fraud case, the element of willfulness requires factual evidence of the defendant’s state of mind.\textsuperscript{280} The court noted secondly that questions of law are for the court and that admission into evidence

\begin{itemize}
\item[272.] \textit{Id.}
\item[273.] 756 F.2d 1076 (5th Cir.), cert. denied, 474 U.S. 1022 (1985).
\item[274.] \textit{Id.} at 1078.
\item[275.] \textit{Id.} at 1083.
\item[276.] \textit{Id.}
\item[277.] \textit{Id.}; see Stein, \textit{supra} note 252, at 1359-64.
\item[278.] \textit{Daly}, 756 F.2d at 1083. The issue in \textit{Daly} was whether the lawyer-defendant honestly believed the law to be as he supposed, i.e., whether his innocent belief negated the mental element for the crime. Arguably, the expert legal testimony was circumstantially relevant; the more objectively uncertain the body of law, the easier it is to infer that the lawyer-defendant actually formed the belief he claimed. Thus, the evidence had an even stronger claim for admissibility than the evidence in \textit{Garber}, which involved a lay defendant.
\item[279.] 698 F.2d 88, 97 (2d Cir. 1983).
\item[280.] \textit{See id.}
\end{itemize}
of expert opinions on the law therefore would confuse the jury.\textsuperscript{[281]}

Likewise, in 1986, the Sixth Circuit expressly declined to follow Garber, in United States v. Curtis.\textsuperscript{[282]} In Curtis, the appellate court addressed the defendant's tax evasion conviction.\textsuperscript{[283]} The Government made a motion in limine to exclude a defense witness's expert testimony that the applicable tax law was complex and unsettled.\textsuperscript{[284]} The district court granted the motion and ruled that the defendant could present expert evidence only if the defendant could also establish that he had specifically relied upon the expert's advice.\textsuperscript{[285]} The defendant argued that this ruling violated his right to a fair trial and based his argument directly upon the Garber decision.\textsuperscript{[286]} The Sixth Circuit stated that "[a]fter carefully reviewing Garber . . . this court declines to follow and rejects Garber."\textsuperscript{[287]} The Sixth Circuit panel reasoned that Garber had the effect of distorting the role of expert witnesses and their purpose and function in the adversarial trial.\textsuperscript{[288]} The panel emphasized that experts function to interpret and to analyze factual evidence.\textsuperscript{[289]} Experts do not testify about the law because the judge's special legal knowledge is presumed to be sufficient; the judge's role and duty is to inform the jury about the applicable law.\textsuperscript{[290]} The Sixth Circuit concluded:

The jury is not composed of lawyers; the typical juror is untrained in legal affairs. To attempt to explain the myriad rules of judicial construction, the complexity of legal principles, or the function of precedent would hopelessly divert the jury from their preeminent duty of assessing appellant's guilt.\textsuperscript{[291]}

Thus, Garber may be characterized, finally, as something of an oddity in Fifth Circuit precedent which has not commended itself to the other appellate courts that have addressed the issue with due diligence and care.

\textsuperscript{281} Id.
\textsuperscript{282} 782 F.2d 593, 599 (6th Cir. 1986).
\textsuperscript{283} Id. at 593-94.
\textsuperscript{284} Id. at 598.
\textsuperscript{285} Id.; cf. 1 Model Penal Code § 2.04(3)(b)(1968) (reasonable reliance must be based on an official statement of law); Wayne R. LaFave & Austin W. Scott, Jr., Criminal Law § 5.1, at 418-20 (2d ed. 1986).
\textsuperscript{286} 782 F.2d at 598.
\textsuperscript{287} Id. at 599.
\textsuperscript{288} Id.
\textsuperscript{289} Id.
\textsuperscript{290} Id.
\textsuperscript{291} Id. at 600 (citing United States v. Garber, 607 F.2d 92, 105 (5th Cir. 1979) (Ainsworth, J., dissenting)).
IV. CONCLUSION

Expert legal testimony should not be admitted into evidence. Despite the liberalization of the Federal Rules of Evidence, "it remains black-letter law that expert legal testimony is not permissible."292 Expert legal testimony does not meet the requirement of Federal Rule of Evidence 702 because the evidence is not helpful in assisting the jury in the determination of issues of fact. The judge is the sole authority on the law and its interpretation.293 Even proponents of expert legal testimony must admit that "[t]his simple proposition is so basic . . . it scarcely needs repeating."294 The jury's function is to evaluate the facts in the light of the applicable law which, in turn, is determined by the judge.295 Historically, there always has been an assumption of judicial expertise, which amounts to a license for the judge to take a kind of judicial notice of domestic law, without formal pleading or proof, from whatever study sources the judge may choose to rely. Expert testimony does not assist the jury regarding the interpretation or application of the relevant law. This is particularly so if expert legal testimony from different witnesses is conflicting or if an expert's testimony does not comport with the judge's formulation of the law. Such evidence from dueling experts fails the helpfulness standard and should be excluded.296

Expert legal testimony should also be excluded under an analysis of Federal Rule of Evidence 403. When conflicting evidence of the applicable law is placed before the jury, the jury may become confused and may apply an incorrect standard.297 Additionally, this kind of testimony is superfluous in light of the judge's presumed special knowledge of the law.298 We go to a great deal of trouble to nominate and to confirm federal judges. Our legiti-

292. Note, supra note 77, at 797; see also 31A AM. JUR. 2D Expert and Opinion Evidence § 136, at 143 (1989); 32 C.J.S. Evidence § 453, at 94 (1964); MICHAEL H. GRAHAM, HANDBOOK OF FEDERAL EVIDENCE § 704.1, at 644 (1981); MCCORMICK ON EVIDENCE, supra note 3, at 31; 3 WEINSTEIN & BERGER, supra note 25, ¶ 702[02], at 702-33.
293. See Olicker, supra note 91, at 862.
294. Id.
295. See MCCORMICK ON EVIDENCE, supra note 3, § 12; Note, supra note 77, at 811-12.
297. Note, supra note 77, at 881.
mate expectation is that these men and women as a group represent the elite of the profession, in both learning and experience.

The remaining argument for the admission of expert legal testimony is that it may help the particular judge who may not be fully knowledgeable regarding the applicable law. Even those few federal judges who, according to snide commentators, now wear robes principally because they were college roommates of some Senator, have the best and the brightest of law clerks, whose employment justification is to perform legal research. Besides the elbow clerks in chambers, there are central staff attorneys on whom to rely. The judge simply has several more traditional options available to provide the requisite knowledge without admitting expert legal testimony in the presence of the jury.

Let us not forget the attorneys in the case. They have every professional motivation to research and present the law in their memoranda, briefs, and arguments in the most able, complete, and effective manner possible. Most practicing attorneys have heard some variation of that weekend-ruining phrase, delivered with judicial solemnity, "The court will take the matter under advisement, and counsel will submit memoranda on the issue by Monday."

If the jury is allowed to hear evidence regarding the applicable law and its interpretation, where will the proverbial line ultimately be drawn? When questions regarding the admissibility of evidence arise, should the litigants present expert legal testimony on the applicable law and permit the jury to make the evidentiary ruling? Should we allow the litigants to present all relevant evidence and permit the confused jurors to decide the outcome without any judicial guidance, relying as best they can on experts hired by both sides? Obviously, admitting expert legal testimony raises many other questions concerning the proper roles of the trial participants. The door cannot be opened without addressing all of these questions. It has long been the function of the judge to decide and instruct the jury on the applicable law. Until a persuasive argument is made that submission of expert legal testimony has a benefit that cannot be achieved by another alternative, courts should refuse to admit it before the jury. Many of the same arguments can be made for a like prohibition at bench trials.

299. An attorney called as an expert witness performs in an incongruous role. In another context, the Model Code of Professional Responsibility EC 5-9 (1977), describes the incongruity: "The roles of an advocate and of a witness are inconsistent; the function of an advocate is to advance or argue the cause of another, while that of a witness is to state facts objectively."
Expert testimony on domestic law is unnecessary. Conceptually, the trial judge is charged with the function and responsibility for knowing the law and for resolving questions of law. Practically and historically, if the judge does require assistance in determining the law, the traditional sources—research by the judge and the filing of supplemental memoranda by the advocates—have proved to be adequate, and are without doubt superior to expert testimony on the law, with its attendant complications and risks.