ARTICLE

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Navigating Some Deep and Troubled Jurisprudential Waters: Lawyer–Expert Witnesses and the Twin Dangers of Disguised Testimony and Disguised Advocacy

Abstract. Expert testimony is indispensable to the uniquely American system of adversary justice. Without the assistance of expert witnesses with specialized knowledge, based on either science or experience and practice, jury verdicts would often be the result of pure whim and prejudice, or random and arbitrary decision-making. At the same time, the use of compensated, partisan expert witnesses poses significant dangers to the fair and just determination of disputes. This Article examines the enhanced dangers that can appear when the expert witness is a lawyer, chiefly the pervasive use of "disguised testimony" and "disguised advocacy." The Article concludes with some suggestions for reform to minimize or eliminate these problems.

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published in 1985.

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I. EXPERT TESTIMONY AND THE ADVERSARY SYSTEM

Sitting down to write about the now-common occurrence of lawyers serving as testifying expert witnesses (especially in legal malpractice cases[1]), I encountered three difficult choices: where to begin, where to

1. Attorney malpractice litigation effectively *requires* the use of expert testimony by lawyers in most cases. David S. Caudill, *The Roles of Attorneys as Courtroom Experts: Revisiting the Conventional Limitations and Their Exceptions*, 2 ST. MARY'S J. LEGAL MAL. & ETHICS 136, 158 (2012) (first citing Streber v. Hunter, 221 F.3d 701, 724 (5th Cir. 2000); then citing Geiserman v. MacDonald, 893 F.2d 787, 793 (5th Cir. 1990); and then citing Wilburn Brewer, Jr., *Expert Witness Testimony in Legal Malpractice Cases*, 45 S.C. L. REV. 727, 728 (1994)). The exceptions arise when the defendant's malpractice is so obvious that lay jurors would not need the assistance of an expert witness to appreciate it—the most common example being failing to file suit within the applicable statute of limitations. 4 RONALD E. MALLEN, LEGAL MALPRACTICE § 37:127, at 1786–1802 (2016 ed.). While there is "no bright-line test to determine when expert testimony is required" in legal malpractice cases, "[e]xpert testimony can be unnecessary when . . . . [T]he defendant–lawyer 'is so grossly ineffective that his lack of professionalism is plain to see.'" Caudill, *supra*, at 160 (first quoting Wilburn Brewer, Jr., *Expert Witness Testimony in Legal Malpractice Cases*, 45 S.C. L. REV. 727, 739 (1994); and then quoting Wagenmann v. Adams, 829 F.2d 196, 220 (1st Cir. 1987)). For example, "clearly defrauding a client[,] ignoring the client's requests and failing to do minimal discovery[,] failing to keep a client informed regarding the need for independent counsel in a conflict situation[,] and failing to provide a termite report in a residential real estate transaction" represent cases where the

end, and how much to cover in between. I concluded that to explain the fundamental jurisprudential difficulties inevitably implicated by the use of lawyer–experts, I had to start with expert testimony generally.

When used properly and according to the rules, expert witnesses streamline the litigation process and make accurate and just outcomes more likely. Each of the other key actors in the courtroom drama—advocates, judges, jurors, and lay witnesses—can better perform their assigned roles.

But if expert witnesses abuse the system by exceeding the boundaries of proper expert testimony,[2] the result is a jurisprudential mess. The line between sound opinion and speculation becomes blurred, assumptions and facts conflate,[3] and the distinction between observation and hearsay is lost.[4] Too often, moreover, these excesses are encouraged by the lawyers presenting the testimony of the experts,[5] thus calling into question, in yet another setting, the limits of adversary zeal.

All of these problems spill over into cases in which the expert witness is a lawyer but in more troubling variations that play havoc with baseline principles of the adversary system. In particular, there is the further danger that lawyer–experts will obscure the jurisprudentially critical line between law and fact by not only interfering with the fact-finding function of the jury but also trenching upon the court's prerogative to say what law

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defendant–lawyer's negligence was obvious, thereby negating the need for special learning to evaluate the defendant's conduct. *Id.* (footnotes omitted). There are few situations, other than opinion testimony on a "pure" question of law, in which expert testimony is prohibited altogether, but exactly what the lawyer–expert will be permitted to say on the witness stand and how are frequently contested issues that form much of the subject matter of this Article.

2. *See* David S. Caudill, *Controversial Defenses to Legal Malpractice Claims: Are Attorney–Experts Being Asked to Be Advocates?*, 5 ST. MARY'S J. LEGAL MAL. & ETHICS 312, 316 n.9 (2015) (acknowledging the possibility that experts in any field can encroach upon the judge's province by testifying as to the relevant law or upon the jury's role in finding the facts of the case).

3. *See* Clark v. Takata Corp., 192 F.3d 750, 757 (7th Cir. 1999) (refusing to admit expert testimony when the expert assumed a fact necessary to his opinion because there was no independent evidence of that fact).

4. *Compare* FED. R. EVID. 802 ("Hearsay is not admissible unless . . . other rules prescribed by the Supreme Court [provide otherwise]."), *with id.* R. 703 ("An expert may base an opinion on facts or data in the case that the expert has been made aware of or personally observed. If experts in the particular field would reasonably rely on [the same] kinds of facts or data in forming an opinion on the subject, they need not be admissible for the opinion to be admitted."). As explained in Part I.D. of this Article, however, Rule 703 does not presage the wholesale abandonment of the hearsay rule merely because an expert witness has taken the stand.

5. Charles W. Ehrhardt, *The Conflict Concerning Expert Witnesses and Legal Conclusions*, 92 W. VA. L. REV. 645, 645 (1990) (recognizing the attempt by trial lawyers to broaden the traditional limits "placed on the scope of opinion testimony").

will govern resolution of the dispute.[6]

A. *Relevance and Reliability*

The critical threshold question is why experts in *any* field are permitted to testify in *any* case. They typically have zero first-hand contemporaneous knowledge about the facts.[7] Then, what is the point of squandering precious court time on their testimony? How can expert testimony even be relevant?

The standard answer, given by Federal Rule of Evidence (FRE) 702[8] and its state counterparts in the thirty-five or so jurisdictions that follow the federal practice,[9] is that experts, such as physicians,[10] architects,[11] engineers,[12] accountants,[13] lab technicians,[14] and rodeo cowboys,[15] may state their *opinions* about the significance of facts—usually developed by

6. *See* Caudill, *supra* note 1, at 152 (contending legal expert opinions create a danger that the jury may look to the expert for an explanation of the legal principles governing the case rather than the trial judge's instructions).

7. *See* United States v. Smith, 519 F.2d 516, 521 (9th Cir. 1975) (endorsing expert witnesses' reliance on facts of which they have no personal knowledge).

8. FED. R. EVID. R. 702.

9. *See Uniform Rules of Evidence*, CORNELL U. L. SCH., https://www.law.cornell.edu/uniform/evidence (last visited May 5, 2016) (identifying thirty-eight states that have adopted the Uniform Rules of Evidence, which are very similar to the Federal Rules of Evidence).

10. *See* Cornejo v. Hilgers, 446 S.W. 3d 113, 122–23 (Tex. App.—Houston [1st Dist.] 2014, pet. denied) (holding an obstetrician had the requisite education, experience, and familiarity with the subject matter to testify on the probable causes of "hypoxic-ischemic injuries in babies").

11. *See* Bourgeois v. Arrow Fence Co., 592 So. 2d 445, 449 (La. Ct. App. 1991) (permitting a licensed architect and licensed builder who had extensive construction experience to testify as an expert in a design defect case involving the construction of a patio).

12. *See* Gholar v. A O Safety, 39 F. Supp. 3d 856, 860 (S.D. Miss. 2014) (refusing to allow the expert testimony of an engineer with a bachelor's degree in mechanical engineering and experience in safety engineering but no experience in the field of safety goggles manufacturing or design because his testimony would not assist the jury in a products liability claim against a safety goggles manufacturer).

13. *See* Wechsler v. Hunt Health Sys., Ltd., 381 F. Supp. 2d 135, 143 (S.D.N.Y. 2003) (admitting an accountant as qualified to testify based on his "[seventeen] years of experience reviewing financial documents").

14. *See* State *ex rel.* Dep't of Health & Human Res. v. Rice, 482 So. 2d 873, 875–76 (La. Ct. App. 1986) (allowing a witness to testify as an expert in paternity testing when he held a masters' degree in microbiology, had on-the-job training at a crime lab, and attended classes related to paternity testing).

15. *See* Pena v. Partridge, No. 13-95-119-CV, 1997 WL 33760708, at *4 (Tex. App.—Corpus Christi, Feb. 20, 1997, no pet.) (not designated for publication) ("Appellant's expert witness, Warren Evans, based his opinions on his general experience at numerous rodeos throughout the state, as well as his observations of the Sheriff's Posse arena, and depositions of the parties."). The case involved an amateur rodeo rider who was injured when her horse collided with another rider's horse as she exited the arena at speed into an adjacent alleyway. *Id.* at *1.

others[16]—but *only* if the expert's "specialized knowledge" will "help" the jury[17] "to understand the evidence or to determine a fact in issue."[18] Far from being irrelevant or of dubious value, expert testimony—properly cabined—is actually *essential* to the fair and just operation of the American dispute resolution system in both civil and criminal matters.

The American system, unlike any other in the world, routinely assigns to lay jurors the task of deciding contested questions of fact that they cannot comprehend, let alone decide intelligibly.[19] If that is not enough, the same laymen must then meld the facts they have found into a verdict consistent with a complex web of legal principles given to them in instructions from the trial judge,[20] the nuances of which they can barely appreciate.

On the one hand, without the help of experts who have been down these roads before and have gained specialized knowledge, either as a matter of scientific inquiry or through personal knowledge, skill, experience, training, or education, jurors would have no way of coming to sound decisions about the facts or the follow-on legal conclusions. They could only fall back on guesswork, whim, arbitrariness, sympathy, and ultimately prejudice. On the other hand, ensuring expert witnesses, and the lawyers presenting their testimony, do not provide *illegitimate* help to jurors—such as by cowing awestruck jurors into giving expert opinions more weight than they deserve—is also an indispensable feature of the American adversary system and of adversary ethics.

Both the permissive and the limiting aspects of the rule allowing expert opinion testimony have been fleshed out in a large body of subsidiary rules, practices, and procedures; all of which are connected, at least in part, to the seminal *Daubert v. Merrell Dow Pharmaceuticals, Inc.*[21] and its abundant progeny. *Daubert* confirmed that the touchstone of admissibility is

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16. *See* FED. R. EVID. 703 advisory committee's note (1972 proposed rules) (contemplating expert opinions may be based on facts and data presented outside of the courtroom and other than by personal perception and observation).

17. The rule speaks of "the trier of fact" rather than "the jury" to govern expert testimony in bench trials as well. *Id.* R. 702(a). However, the problems attending expert testimony by lawyers or non-lawyers during bench trials are comparatively benign and can be safely ignored for purposes of this Article.

18. *Id.*

19. *See id.* advisory committee's note (1972 proposed rules) ("An intelligent evaluation of facts is often difficult or impossible without the application of some scientific, technical, or other specialized knowledge.").

20. Ehrhardt, *supra* note 5, at 673 ("It is the judge's function to determine the applicable law and instruct the jury upon it; it is the jury's function to consider the evidence, to find the facts and to apply the law as received from the trial judge.").

21. Daubert v. Merrell Dow Pharms., Inc., 509 U.S. 579 (1993).

whether proffered expert testimony would indeed help the jury go about its work and established a largely hospitable atmosphere by taking a generous view of what is "helpful."[22] But the Court also constituted trial court judges as "gatekeepers" who must exclude expert testimony that would not be helpful or would actually make it more difficult for jurors to understand the issues and decide them on a permissible, non-arbitrary basis.[23]

Under *Daubert* and the most important follow-on case, *Kumho Tire Co. v. Carmichael*,[24] helpfulness (and thus admissibility) is determined chiefly by whether the proffered opinions are *relevant* to the specific factual dispute involved[25] and *reliable* in that they are grounded in sufficient facts or data and are based on sound scientific methodology or other expert analysis that is something more than speculation and diktat.[26]

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22. *See id.* at 591–92 (defining helpful testimony as testimony providing the trier of fact with knowledge that will assist in evaluating relevant facts of the case). Oddly, in some jurisdictions, opposition to the *Daubert* standard comes chiefly from plaintiffs' lawyers, who assert that it makes expert testimony—especially scientific expert testimony—*less* welcome in the courts and *harder* to introduce into evidence. This is odd because in *Daubert*, the testimony that was allowed would have been *excluded* by *Frye v. United States*, which *Daubert* replaced. *See id.* at 589, 593 (replacing *Frye*'s general-acceptance test for admitting expert scientific testimony with a non-exhaustive list of observations for admitting expert scientific testimony).

23. *See id.* at 593–95 (providing a non-exhaustive list of "observations" appropriate for determining whether the reasoning or methodology that underlies the expert testimony is scientifically valid and relevant to the facts of the case).

24. Kumho Tire Co. v. Carmichael, 526 U.S. 137 (1999). The main contribution of *Kumho Tire* was to clarify that the helpful-to-the-jury, specialized knowledge contemplated by FRE 702 was not limited to the hard sciences but included expertise gained from personal knowledge, practice, or experience (that would not be familiar to the typical juror). *Id.* at 147. Such expert testimony would continue to be admissible—for whatever weight the jury chose to give it—so long as the proffered opinions were solidly grounded and helpful in resolving the disputed factual issues in the case at hand. *See id.* at 152 (reiterating the importance of *Daubert*'s gatekeeping requirement as a means of ensuring the proffered expert testimony is reliable and relevant). Some lawyers did not immediately appreciate *Daubert*'s focus on the reliability of the "principles and methods" employed by the expert who had no particular applicability to testimony not derived from scientific inquiry. As a former law professor specializing in legal ethics, the author was once asked at a deposition what "methods" he had followed in reaching his opinions in a complex case involving conflicts of interest and breach of fiduciary duty. The author's bemused response: "I read a lot, I talk to people, and then I think about it a lot."

25. The *Daubert* Court stated expert opinions not relating to an issue in the case could not be helpful to the jury and, thus, were, by definition, not relevant. *Daubert*, 509 U.S. at 591. In addition, proffered opinions must fit the specific to be truly helpful and, thus, relevant. *Id.* As an example, the Court stated that an expert who studied the phases of the moon might have opinions that fit a case in which the issue was whether a certain night was dark but would have nothing helpful to contribute if the issue was whether a certain person acted irrationally because the moon was full on that night. *Id.*

26. *See Kumho Tire*, 526 U.S. at 152 (reiterating the importance of the gatekeeping role of judges described in *Daubers* to ensure the proffered expert testimony is reliable and relevant). A witness can

Significantly, this does *not* mean the trial court will hold a preliminary hearing and admit only the expert opinions that are more nearly *correct*. Judges themselves typically do not have the expertise to make such a call, and in any event, it is ultimately up to the jury to determine which of several competing relevant, reliable (and therefore admissible) expert opinions are most credible and, thus, most helpful.[27]

B. *Expert Testimony About an "Ultimate Issue"*

The broad scope of permissible expert testimony is further demonstrated by FRE 704(a), which states: "An opinion is not objectionable *just because* it embraces an ultimate issue."[28] In other words, although an expert need not proffer an opinion that includes the expert's own view about how an ultimate issue ought to be decided (by the jury), such testimony is not automatically barred and will often be admissible.

But there are limits to the ultimate issue rule as well; Rule 704 does not trump the other rules of evidence and permit unsupported and conclusory opinion testimony. The vice of such testimony is *not*, as is sometimes said, that it would inevitably "usurp[] the province of the jury"[29] because a

be a thoroughgoing "expert" in a field but still not have anything "reliable" to contribute to a particular case. In *Rosen v. Ciba-Geigy Corp.*, for example, the issue was whether the use for a few days and immediate discontinuation of a stop-smoking nicotine patch had "caused" a patient's heart attack. Rosen v. Ciba-Geigy Corp., 78 F.3d 316, 317–18 (7th Cir. 1996). One of the plaintiff's expert witnesses was a renowned cardiologist, but his testimony was excluded because he had no particular knowledge about the effects of nicotine patches on the progress of heart disease, let alone short-term use. *Id.* at 319–20. Affirming the exclusion, Judge Posner tartly noted, "[A] district judge asked to admit scientific evidence must determine whether the evidence is genuinely scientific, as distinct from being unscientific speculation offered by a genuine scientist." *Id.* at 318. Subsequently, the same court noted in another case that even "[a] supremely qualified expert cannot waltz into the courtroom and render opinions unless those opinions are based upon some recognized scientific method." Clark v. Takata Corp., 192 F.3d 750, 759 n.5 (7th Cir. 1999). After *Kumho Tire*, of course, an expert opinion need not be based on strictly "scientific" methods. *See id.* at 759 n.4 (referencing a non-scientific method relied on by defendants' expert). However, it is still the case that an expert cannot "waltz" into court and espouse unsupported opinions and conclusions.

27. In *Smith v. Ford Motor Co.* the court noted,

> The question of whether the expert is credible or whether his of her theories are correct given the circumstances of a particular case is a factual one that is left for the jury to determine after opposing counsel has been provided the opportunity to cross-examine the expert regarding his conclusions and the facts on which they are based.

Smith v. Ford Motor Co., 215 F.3d 713, 719 (7th Cir. 2000) (citing Walker v. Soo Line R.R., 208 F.3d 581, 589–90 (7th Cir. 2000)); *see id.* ("It is not the trial court's role to decide whether an expert's opinion is correct. The trial court is limited to determining whether expert testimony is pertinent to an issue in the case and whether the methodology underlying that testimony is sound.").

28. FED. R. EVID. 704(a) (emphasis added).

29. *Id.* R. 704 advisory committee's note (1972 proposed rules).

properly instructed and conscientious jury will perform its function the same way, whether or not the expert is providing opinions on ultimate issues. The jury's function could only be "usurped" if the jurors agree to cede their decision-making authority to the expert and slavishly follow whatever the expert says (perhaps because the expert is impressive or imposing or has good communication skills). But that would be an unacceptable systemic breakdown no matter the kind of opinions the expert witness gives.

The chief reason unsupported and unexplained expert testimony about an ultimate issue is inadmissible is that it has no *legitimate* capacity to "help the trier of fact";[30] thus, it is inadmissible under Rule 702.[31] Indeed, this kind of testimony will either further confuse the jury or cause it to shirk its independent duty to weigh *all* of the evidence, as described immediately above.

But even recognizing the continuing force of the limitations on expert testimony mandated by FRE 702 as glossed by the *Daubert* line of cases, the permission granted by FRE 704(a) to admit ultimate issue opinions is significant. For example, an expert witness may opine that the driver in an automobile crash case was intoxicated at the time of the accident,[32] that the car driven by the defendant was travelling in excess of the speed limit at the time of the accident,[33] that the value of property lost by an insured

30. *Id.* R. 702(a).

31. In *Kumho Tire*, the Supreme Court said:

> The objective of [the gatekeeping] requirement is to ensure the reliability and relevancy of expert testimony. It is to make certain that an expert, whether basing testimony upon professional studies or personal experience, employs in the courtroom *the same level of intellectual rigor that characterizes the practice of an expert in the relevant field.*

Kumho Tire, 526 U.S. at 152 (emphasis added). Similarly, in *Mid-State Fertilizer Co. v. Exchange National Bank of Chicago*, a case that preceded *Daubert* and *Kumho Tire* but is consistent with both, the court evaluated the testimony of an academic expert by the same standard:

> [A]n expert who supplies nothing but a bottom line supplies nothing of value to the judicial process. . . . [The expert] would not accept from his students or those who submit papers to his journal an essay containing neither facts nor reasons; why should a court rely on the sort of exposition the scholar would not tolerate in his professional life?

Mid-State Fertilizer Co. v. Exch. Nat'l Bank of Chi., 877 F.2d 1333, 1339 (7th Cir. 1989).

32. *See generally* Northside Equities, Inc. v. Hulsey, 567 S.E.2d 4 (Ga. 2002) (acknowledging, in a Dram Shop Act case, that expert testimony regarding the manifestations of intoxication in a person with the driver's blood alcohol level was sufficient to preclude summary judgment in favor of the tavern, despite eye witness testimony that the driver was not noticeably intoxicated when she left the premises).

33. *See generally* Burtner v. Lafayette Par. Consol. Gov't, 2014-1180 (La. App. 3 Cir. 4/15/15); 176 So. 3d 1056 (noting an accident reconstruction expert's testimony, that a police officer returning

in a fire exceeded a certain amount,[34] and that it was *not* necessary to perform an abortion to save the life of the mother.[35] Indeed, a properly qualified expert should be permitted to testify as to his opinion that the driver negligently caused the accident[36]—or, looking ahead to legal malpractice cases where the expert is a lawyer that testifies "in providing legal services to the client, the defendant[–]lawyer fell below the standard of care."[37]

In each case, however, the opinion will be inadmissible unless it is supported by more than mere fiat or self-validating appeals to the witness's scientific or other expertise. To satisfy the gatekeeping judge under *Daubert* and *Kumho Tire*, the expert must supply sufficient explanation and reasoning to make the testimony "reliable."[38]

In the above examples of permissible expert testimony, the crucial operative words are "opine" and "opinion"; without them, the nice jurisprudential balance established for expert testimony would be destroyed. The only reason the expert is *not* "usurping the province of the

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to the police station to use the restroom was traveling *at* least fifteen miles per hour above the speed limit at the time of the accident, required adjustment on appeal of comparative fault percentages). Accident reconstruction experts have testified that a criminal defendant charged with causing an accident by exceeding the speed limit in thousands of cases nationwide.

34. *See generally* McGuire v. State Farm Fire & Cas. Co., 175 So. 2d 838 (La. Ct. App. 1965) (asserting the value of a stamp collection lost in a fire could not be found to be greater than the cost of the individual stamps absent expert testimony).

35. In *People v. Wilson*, a physician was prosecuted for performing an abortion and a later physician who examined the patient was allowed to give his expert opinion and state he "found no evidence that a therapeutic abortion was necessary." People v. Wilson, 153 P.2d 720, 724 (1944). Obviously, this case long predated *Roe v. Wade*, 410 U.S. 113 (1973).

36. *See generally* Dakter v. Cavallino, 2014 WI App 112, 358 Wis. 2d 434, 856 N.W.2d 523 (permitting experts, including a retired instructor in a truck driver training program, to opine that the truck driver involved in an accident with an automobile turning in front of him was negligent, even though the driver was not exceeding the posted speed limit and had the right of way).

37. In Ronald E. Mallen, *Legal Malpractice*, the author cites hundreds of cases directly or inferentially supporting this proposition. 4 MALLEN, *supra* note 1, §§ 37:120–37:123, at 1762–78; *see also id.* § 37:120, at 1763 ("Expert testimony is used as the evidence to establish the standard of care or standard of conduct by which the defendant's conduct is to be judged. . . . [And] is necessary to show a breach of the appropriate standard."). As will be seen later in this Article, *infra* Parts II.A and II.B., the author has at least a semantical difference with Mallen about whether experts can and do help "establish" the standard of care with their testimony. Everyone agrees, however, that lawyer–experts routinely provide opinion testimony under oath about whether the standard has been *breached*.

38. FRE 705 states, in part, that "an expert may state an opinion—and give the reasons for it—without first testifying to the underlying facts or data" and further provides that the expert may be required to provide the missing detailed data on cross-examination. FED. R. EVID 705. This merely means that a scientific expert is not required (*on direct examination*) to provide specific testing data and that an expert with specialized knowledge or practical experience is not required to lay out in detail the facts assumed to be true. But, as noted in the text, the *reasoning* must still be given because otherwise the opinions would be of no (legitimate) help to the jury.

jury," is that he is *only* swearing under oath that he genuinely holds the opinions or conclusions in question. Furthermore, even that testimony is conditional: it holds *only if* all of the underlying facts "check out."[39] Most important, the expert will *not* be the one to "check out" the correctness of those facts—that function belongs to the jury alone. Once the jury has determined what the underlying facts actually are, the jury can then—and only then—move on to deciding whether the expert's opinions are sound and more worthy of belief than another expert's contrary conclusions.

C. *Expert Witnesses Assume Everything but "Know" Nothing*

The most confidently stated expert opinion, whether about the ultimate issue or any other, is only sound if the opinion fits or makes sense of the underlying facts. As intimated immediately above in Part I.B., a critical problem affecting almost all expert testimony is that expert witnesses, by definition, cannot testify about the existence or non-existence of those facts. Except for rare situations in which an expert witness was also a percipient witness to the events giving rise to the lawsuit, such as an emergency room physician who observed what his colleagues did or did not do, experts can only base their opinions on what they *assume* to be the facts. They actually know nothing at all about the underlying facts, except what others have told them or what others have said—in a deposition, for example, or a police or other investigative report.

Even when an expert is testifying about the results of scientific tests that he personally performed, such as DNA matching or earth core sampling to detect the presence of toxic chemicals, he has no independent knowledge about the origins of the material he tested. The sample was given to him for testing by someone who received it from someone else; the expert can only *assume* the sample came from where he was told. Even if the expert dug the core sample out of the ground for testing himself, someone else told him where to dig. And in either event, the expert has no independent knowledge about what happened before the blood was spilled or how it came to be spilled, or how the toxic chemicals got to the place they were discovered and who was responsible for getting them there.

To put it bluntly, expert witnesses must base all of their opinions and

39. When an expert testifies that the value of property lost in a fire exceeded a certain amount, as in one of the examples given above, the opinion must be understood to be qualified by a large number of assumptions about the underlying facts—facts that will be supplied by others and evaluated by the jury. A small sample would include (a) the property was in fact present at the time of the fire; (b) the property was real and not fake; and (c) the descriptions and bills of sale for the property were accurate and genuine.

testimony on facts they *assume* to be true and facts they must further assume the jury will later *find* to be true. Thus, all expert testimony has appended to it an unstated footnote: If you ladies and gentlemen of the jury find that the facts are otherwise, then my opinion would have to be modified.[40]

Unfortunately, expert witnesses today commonly obscure this point without directly denying it, often at the behest of the lawyers engaging them. By focusing almost all of their attention on their opinions and soft-pedaling the factual assumptions that necessarily underlie those opinions, experts give the impression that the assumptions and the facts are one and the same. But these are faux facts that, if repeated often enough, can become common currency for everyone in the courtroom, including the jury. If the jury willy-nilly accepts an expert's version of the facts without making its own independent determination, its function has de facto been usurped and one of the core features of the American adversary system has been undone.

This kind of "disguised testimony" about the facts provides an opportunity for the lawyer to use the expert's voice to project his side's closing argument to the jury mid-trial (and to do it more than once if more than one expert is presented). Although an expert—whether or not he is a lawyer—is not an advocate, he is hardly a disinterested witness; he is on the same team as the lawyer presenting his testimony.[41] By using the expert in this way, the lawyer who *is* an advocate gains an unfair advantage: jurors who are properly impressed by the witness's expert knowledge and professional manner may be unduly and improperly impressed by his seeming command of the facts as well but not sufficiently on guard against his built-in bias as a team player.

D. *Experts Are Permitted to Rely on Hearsay in Formulating Their Opinions, but May Not Serve as Mouthpieces, Spokesmen, or Parrots in Court*

Disguised testimony about the facts, as described in Part I.C., is often the most pernicious influence that experts bring into the courtroom, out-signifying so-called "junk science,"[42] which can be stopped at the

40. In the author's own practice as an expert witness, he inserts similar language into expert reports that he files under Federal Rule of Civil Procedure 26(a)(2)(B) or its state court counterparts: "Should the parties later agree that the facts are otherwise, a trier-of-fact find that they are otherwise, or should it otherwise appear that my assumptions about the facts were incorrect, some of my opinions might have to be revised, and I reserve the right to do so."

41. *See* discussion *infra* discussion Part I.E.

42. *See generally* PETER W. HUBER, GALILEO'S REVENGE: JUNK SCIENCE IN THE COURTROOM

courthouse gate by the *Daubert* gatekeeper or nullified by hard cross-examination. But FRE 703 appears, at first glance, to open the gate to much testimony that would otherwise be inadmissible (especially on hearsay grounds) as long as it forms the backdrop to expert testimony.

The rule provides that an expert witness "may base an opinion on facts or data . . . that the expert *has been made aware of* or personally observed,"[43] and if experts in the field "would reasonably rely on those kinds of facts or data in forming an opinion on the subject, *they need not be admissible for the opinion to be admitted*."[44]

Read literally, this suggests a physician could repeat for the jury a relative's statement that a patient had experienced stomach pain less than two hours after ingesting the defendant's product or an accountant could testify that he had based his opinion on the many conversations he had with a party's bookkeeper. Without more—and especially if the relative or the bookkeeper did not testify—these statements would be clear-cut violations of the hearsay rule because the jury would have no way of evaluating the underlying "facts" and the expert's testimony about the facts would no longer be "disguised"; it would be out in the open and unmistakable. At the same time, the expert's opinions would perforce become unreliable because they would be based on nothing of substance.

Some of this difficulty was alleviated when FRE 703 was amended in 2000, building on case law that had been developing. A sentence was added at the end of the rule that stated, in the case of otherwise inadmissible facts or data, as in the above examples, "the proponent of the opinion may disclose them to the jury *only* if their probative value in helping the jury evaluate the opinion substantially outweighs their prejudicial effect."[45] The cases and the notes of the Advisory Committee on Evidence Rules make clear that if inadmissible material is admitted by way of explanation of an expert's opinion under Rule 703, the court is at a minimum required to give a limiting instruction that directs the jury *not* to consider the evidence for any substantive purpose.[46]

198–213 (1991) (decrying the use of junk science and providing insights on how to combat it).

43. FED. R. EVID 703 (emphasis added).

44. *Id.* (emphasis added).

45. *Id.* (emphasis added). This balancing test is similar to the balance required under Rule 403, which states the probative value of concededly relevant evidence might be "substantially outweighed" by "unfair prejudice, confusing the issues, misleading the jury," or other concerns. *Id.* R. 403.

46. *See id.* R. 703 advisory committee's note (2000 amendments) ("If the otherwise inadmissible information is admitted under this balancing test [of amended Rule 703], the trial judge *must* give a limiting instruction, upon request, informing the jury that the underlying information *must not* be used for substantive purposes." (emphasis added)). The Advisory Committee's notes further state, "The

As developed in the case law, the refinement of FRE 703, as originally promulgated, has become a significant palliative to the worst forms of disguised testimony by experts. An expert may still formulate an opinion on the basis of hearsay or other inadmissible evidence, but he may be prevented from testifying about that aspect of his opinion *in court*. More important, if the underlying facts are not presented through the testimony of other witnesses, the expert may not be permitted to testify at all because his opinions may be found to have "rested on air"[47] and will, thus, lack the reliability required by FRE 702 and the *Daubert–Kumho Tire* line of cases.[48]

An excellent example was provided by *Loeffel Steel Products, Inc. v. Delta Brands, Inc.*[49] Loeffel alleged that Delta had sold it a defective line of industrial equipment, resulting in economic damage and lost profits.[50] The defendant proffered a financial expert who specialized in the appraisal of private businesses as a damages expert; for present purposes, his chief opinion was that Loeffel had suffered only small losses because by hiring a few more workers and adding a few more shifts, it could achieve roughly the same productivity it had before purchasing the Delta line of equipment.

When it became apparent the expert had "uncritically relied" on numbers provided by Delta's staff,[51] including estimates of how long it would take each new worker to perform the suddenly necessary additional tasks, his testimony was excluded.[52] The court said:

> [W]hile Rule 703 was intended to liberalize the rules relating to expert testimony, it was not intended to abolish the hearsay rule and to allow a witness, under the guise of giving expert testimony, to in effect become the

amendment provides a presumption against disclosure to the jury of information used as the basis of an expert's opinion and not admissible for any substantive purpose, when that information is offered by the proponent of the expert." *Id.*; *see also* TK-7 Corp. v. Estate of Barbouti, 993 F.2d 722, 734 n.9 (10th Cir. 1993) ("When an expert relies on hearsay information to form an opinion, '[t]he hearsay is admitted for the limited purpose of informing the jury of the basis of the expert's opinion and not for proving the truth of the matter asserted.'" (alteration in original) (quoting Wilson v. Merrell Dow Pharms., Inc., 893 F.2d 1149, 1153 (10th Cir. 1990))).

47. *See* Dura Auto. Sys. of Ind., Inc. v. CTS Corp., 285 F.3d 609, 615 (7th Cir. 2002) ("Without their testimony explaining and justifying the discretionary choices that they made, his testimony would have rested on air."). The *Dura Automotive* opinion was heavily relied upon by the court in *Loeffel Steel Prods., Inc. v. Delta Brands, Inc.*, which is discussed immediately below in the text.

48. *See* discussion *supra* Part I.A.

49. Loeffel Steel Prods., Inc. v. Delta Brands, Inc., 387 F. Supp. 2d 794 (N.D. Ill. 2005).

50. *Id.* at 798.

51. *Id.* at 807.

52. *Id.* at 808.

> mouthpiece of the witnesses on whose statements or opinions the expert purports to base his opinion.
>
> . . . .
>
> Rule 703 was never intended to allow oblique evasions of the hearsay rule.
>
> . . . .
>
> The problem [as in *Dura Automotive Systems of Indiana, Inc. v. CTS Corp.*[53]], then, is that the expert is vouching for the truth of what another expert told him—he is merely that expert's spokesman. But, "[a] scientist, however well credentialed he may be, is not permitted to be the mouthpiece of a scientist in a different specialty. That would not be responsible science."[54]

Loeffel Steel relied on *Dura Automotive* throughout. In *Dura Automotive*, an unquestioned expert in hydrogeology was engaged to give his opinion about whether toxic chemicals from the defendant–company's groundwater could have leached into the plaintiff–company's well field, which resulted in EPA fines against Dura Automotive. His opinion depended on whether CTS Corporation was in the same "well field capture zone" as Dura Automotive or had been in the last twenty or more years. To answer that preliminary question, he consulted computer mapping experts using software of their choosing.

CTS Corporation, perhaps thinking FRE 703 would authorize its hydrogeology expert to incorporate what he learned from the mapping experts into his own testimony, neglected to designate the latter as additional experts. Consequently—as intimated in the above quotation from the *Loeffel Steel*—the hydrogeology expert was not allowed to testify at all because he knew nothing about capture zones and nothing about which software could look backwards twenty years to determine the boundaries of a capture zone.

Affirming the trial court's exclusion order, the Seventh Circuit acknowledged, in many routine situations, one expert may rely on the say-so of another expert without more. But the situation is quite different, Judge Richard Posner continued for the court, when the *correctness* of the opinion of the expert who was relied on is at issue:

> The Committee Notes to the 1972 Proposed Rule 703 give the example of a

53. Dura Auto. Sys. of Ind., Inc. v. CTS Corp., 285 F.3d 609 (7th Cir. 2002).

54. *Loeffel Steel*, 387 F. Supp. 2d at 808 (alteration in original) (footnote added) (quoting *Dura Automotive*, 285 F.3d at 614).

> physician who, though not an expert in radiology, relies for a diagnosis on an x-ray. We too do not "believe that the leader of a clinical medical team must be qualified as an expert in every individual discipline encompassed by the team in order to testify as to the team's conclusions." But suppose the soundness of the *underlying* expert judgment is in issue. Suppose a thoracic surgeon gave expert evidence in a medical malpractice case that the plaintiff's decedent had died because the defendant, a radiologist, had negligently failed to diagnose the decedent's lung cancer until it was too advanced for surgery. The surgeon would be competent to testify that the cancer was too advanced for surgery, but in offering the *additional* and critical judgment that *the radiologist* should have discovered the cancer sooner *he would be, at best, just parroting the opinion of* [*another*] *expert in radiology* competent to testify that the defendant had x-rayed the decedent carelessly.[55]

Taken together, these and similar cases demonstrate what the author refers to throughout this Article as disguised testimony (about the underlying facts) continues to be frowned upon. Whether an expert is referred to as a "mouthpiece," a "spokesman," or a "parrot" of another expert or a lay witness, the point is the same: when the underlying facts are contested, the jury must be able to hear from those with real knowledge about those facts before it can turn to evaluating what the expert has to say about their significance.[56]

But this is another way of saying experts do not "know" much (about

55. *Dura Automotive*, 285 F.3d at 613 (emphasis added) (citations omitted). In a long and thoughtful dissent, Judge Diane Wood complained that the majority's view of "parroting" would result in an "infinite regression" of designated experts, because the second expert might well have relied on a third expert, and so on. *Id.* at 618 (Wood, J., dissenting) ("Expert [One] may have relied on something prepared using the expertise of Expert [Two], who in turn relied on the expertise of Expert [Three], and on out until we reach Expert N."). In her view, the majority was not being faithful to FRE 702 and the *Daubert* regime either, because all that was required of the computer modelers was that they advise the main expert that their *methodology* was sound—the software they were using was well-accepted and often used for exactly the kind of analysis they performed. *See id.* at 619 (stating "[n]othing in *Daubert*, any of the later Supreme Court decisions, or amended Rule 702 requires" what the majority posits). An important aspect of Judge Wood's dissent, however, was that the secondary experts should have been allowed to file late reports (and then presumably testify at trial). This narrows the dispute between Judges Posner and Wood on the Rule 703 portion of the case because, presumably, both would agree that *if* the computer modeling experts were permitted to testify at the trial, the jury would be able to separately evaluate the two issues, and the parroting problem would not arise.

56. If the evidence the expert is relying on might be admissible for some purpose other than explaining the expert's opinions, the parroting problem will disappear, *but only if the underlying evidence is actually presented.* If the evidence is admissible and is ultimately presented to the jury, it is not important whether the evidence has been put before the jury *at the time the expert testifies*. The proponent of the expert can assure the trial court that the underlying facts will be offered in admissible form, and the testimony "tied up." *Cf.* FED. R. EVID. 703 advisory committee's note (2000 amendments) (discussing the purposes and rationale behind the 2000 Amendments).

the facts); they can only assume what others will testify to in court *and what the jury will find to be true*.[57] Judge Posner argued against bootstrapping facts into an expert's opinion in another often-cited case, *In re James Wilson Associates*:[58]

> If, for example, the expert witness (call him A) bases his opinion in part on a fact (call it X) *that the party's lawyer told him*, the lawyer cannot, in closing argument, tell the jury, "See we proved X through our expert witness, A."[59]

This feature of expert testimony is more pronounced when the expert is a lawyer.[60] That does not mean lawyers should not be permitted to testify as experts, but only that special care should be taken to mitigate the "parroting" effect or bootstrapping from what the advocate tells the expert to assume into "proven" fact.

E. *Expert Witnesses Are Not Advocates; nor, However, Are They Unbiased or Disinterested*

Expert testimony is neither unbiased nor disinterested.[61] Experts will only agree to analyze a stranger's case, prepare a report, or testify under oath if they are paid for their time. Lawyers representing a client will only spend the client's money or advance their own to designate a particular expert if they are confident the expert's opinions will be helpful to the client's cause. That means, if initial discussions with Expert A are not promising, the lawyer will move on to Expert B or C.

Thus, although it is fashionable to refer to expert witnesses—especially

57. *See* discussion *supra* Part I.C.

58. *In re* James Wilson Assocs., 965 F.2d 160 (7th Cir. 1992).

59. *Id.* at 173 (emphasis added). The situation in *In re James Wilson Associates* was somewhat similar to the medical team example Judge Posner later used in the *Dura Automotive* case. In *In re James Wilson Associates*, an architect attempted to testify about the value of a building based upon a report provided to him by a consulting engineer, who had examined the building. *Id.* at 172. The court in *Dura Automotive* discussed how *In re James Wilson Associates* was factually similar:

> [T]he issue was the *state of repair of a building* and "the expert who had evaluated that state—the consulting engineer—was the one who should have testified. The architect [the expert who did testify] could use what the engineer told him to offer an opinion *within the architect's domain of expertise*, but he could not testify for the purpose of vouching for the truth of what the engineer had told him—of becoming in short the engineer's spokesman." It is the same here.

Dura Automotive, 285 F.3d at 613 (alteration in original) (emphasis added) (citation omitted) (quoting *In re James Wilson Assocs.*, 965 F.2d at 173).

60. *See* discussion *infra* Part II.

61. *See* David E. Bernstein, *The Misbegotten Judicial Resistance to the* Daubert *Revolution*, 89 NOTRE DAME L. REV. 27, 32–33 (2013) ("Expert testimony in the United States is therefore subject to massive adversarial bias—bias that arises because experts are hired to advance the cause of one party to an adversarial proceeding.").

scientists—as "objective" or "neutral" or "unbiased,"[62] that is empty sloganeering. The reason an advocate will prefer Expert B or C over Expert A is because the expert ultimately engaged will be biased *in favor* of the advocate's client.[63] And the only reason the lawyer will be confident in presenting either B or C as an expert is that he will have had time before depositions and trial to prepare the witness to clarify exactly what the witness will say.[64]

That is not to say all or most expert witnesses are lying about their true opinions; to the contrary, it is recognition that, if the issue at hand is at all nuanced and leaves room for disagreement and discretionary judgment, an expert who has been designated to testify on behalf of a particular client, will, *by definition*, exercise judgment in favor of that client.[65] *He would not have been engaged otherwise.*

To avoid slipups, moreover, the lawyer and the chosen expert will prepare for depositions and trial by thoroughly discussing and rehearsing

62. *See generally* David E. Bernstein, *Expert Witnesses, Adversarial Bias, and the (Partial) Failure of the* Daubert *Revolution*, 93 IOWA L. REV. 451, 455 (2008) (indicating jurors tend to assume that an expert witness, particularly a scientist, is likely to be unbiased).

63. *See* Bernstein, *supra* note 61, at 33 ("[I]n some cases attorneys . . . would simply select from the supply of available and honest experts those who had sincere views on the issue at hand that happened to coincide with what the attorney needed them to say to advance his client's case."). Assuming that the experts were indeed honest and their views indeed sincerely held, that is exactly as it should be.

64. *See* David S. Caudill, *Advocacy, Witnesses, and the Limits of Scientific Knowledge: Is There an Ethical Duty to Evaluate Your Expert's Testimony?*, 39 IDAHO L. REV. 341, 342 (2003) (noting the public's perception of expert witnesses is that "attorneys regularly *buy* expertise in a market where somebody will testify to just about anything"). Professor Caudill has no doubt correctly reported the public's perception, but in the author's view, that perception is badly skewed. Generally speaking, in a world with many potential expert witnesses available in most fields, lawyers should be able to find one who *genuinely holds* opinions favorable to the client without difficulty.

65. *See id.* at 343, 348, 354 (making several points that are germane to the arguments advanced in this Article). Before dealing with the ethics of advocacy, which typically permit lawyers to introduce almost any evidence that is not *known* (to the lawyer) to be false, Professor Caudill had to address how a lawyer would "know" when scientific evidence was "false." In doing so, Caudill criticized what he called an "idealized" or "oversimplified" view of science, in which scientific opinions readily fall into one of two categories—right or wrong, genuine or junk—with no room for discretionary judgment. *Id.* at 352 ("[The] tendency to see good versus junk science in law, rather than scientific *theories* in *conflict*, is indicative of a particular view of science as a field that is far removed and different from law."). This view of science, which the author of the instant Article refers to as "naïve" rather than "idealized," is not consistent with modern understandings of science and the scientific method. Instead, *just as with legal doctrine*, much of science is contested, contingent, and value-laden, depending on stated or unstated biases and personal agendas. Therefore, when scientists come into the courtroom as experts, they bring more than cartoonish, good-versus-bad opinions. Their opinions should neither be accepted nor rejected lightly, but they should be subjected to the same vetting process (by the jury) that is applied to all testimony, including the testimony of experts who are not scientists.

the details of the upcoming testimony, as noted above. This process (for expert and lay witnesses alike, including client–witnesses) is often referred to as "horseshedding,"[66] and its purpose is to make the testimony more effective without changing its basic thrust. Common advice is to avoid technical terms, speak slowly, use everyday examples, and above all, not volunteer information that is not asked for.[67] However, some authorities take a more jaundiced view and ban all but the most rudimentary witness preparation as unethical "coaching" or "scripting," sometimes even characterize it as suborning perjury.[68]

66. W. William Hodes, *The Professional Duty to Horseshed Witnesses—Zealously, Within the Bounds of the Law*, 30 TEX. TECH L. REV. 1343, 1349 (1999). In this Article, the author discussed at length the controversial "Preparing for Your Deposition" memo that was given to hundreds of individual plaintiffs in asbestos–mesothelioma cases handled by the Dallas law firm Baron & Budd. *See id.* at 1344–48 ("The Dallas law firm of Baron & Budd represented thousands of individual workers. . . . [A] paralegal worker for Baron & Budd developed a detailed set of instructions and worksheets . . . titled *Preparing for Your Deposition*."). The memo included color pictures of the labels on bags containing asbestos products that had been used in various workplaces as much as forty years earlier, tips on memorization techniques, and several reminders of the elements that would go into any damages calculation, such as fatigue and loss of sexual enjoyment. Memorandum from Baron & Budd to Clients 109–10, 128–30 (Aug. 1997) (on file with the *St. Mary's Law Journal*). The memo was subjected to almost universal criticism and attack in the press and within the legal profession; both criminal charges and attorney discipline grievances were filed but ultimately dismissed. Hodes, *supra*, at 1346. The witnesses being prepared were individual lay clients, but the asbestos cases provided lessons for expert testimony as well. *See* discussion *infra* Part II. After the law firm defending Baron & Budd and its clients learned (through a press interview) that the author was one of the few academics in the field of legal ethics who was willing, with some caveats, to defend the "Preparing for Your Deposition" memo, he was quickly engaged as an expert witness. And of course, he was horseshedded as well—starting in the car on the drive from the Corpus Christi airport to the courthouse.

67. The oath that all witnesses take "to tell the truth, the whole truth, and nothing but the truth" is universally ignored, and properly so. *See* STEVEN LUBET, NOTHING BUT THE TRUTH: WHY TRIAL LAWYERS DON'T, CAN'T, AND SHOULDN'T HAVE TO TELL THE WHOLE TRUTH 6 (2001) ("It is impossible [for lawyers] to tell the whole truth, since life and experience are boundless and therefore indescribable."). To tell the "whole truth" would be hopelessly time-consuming and counterproductive—a witness to a simple automobile accident would be required to list wholly irrelevant details, such as the names of every store on the block where the accident occurred, and every item of clothing the witness was wearing. More important, lawyers horseshedding witnesses instruct them *not* to tell the "whole truth" but only such parts of the truth that are helpful to the lawyers' clients. Conveniently, but perfectly ethically, the lawyer then asks on direct examination *only* questions that will generate helpful testimony. It is up to opposing counsel, on cross-examination and through other witnesses, to bring out the parts of the "whole" truth that the first lawyer deliberately left out. Under the American adversary system, if opposing counsel neglects to ask the right questions, that is the opposing lawyer's problem (and his client's). See LUBET, *supra*, at 7–9, for a fascinating account of how this feature of the adversary system works in practice, focusing on some famous real and fictional trials, which includes cases involving O.J. Simpson, John Brown, Wyatt Earp, Atticus Finch, and Sheila McGough.

68. The best defense for aggressive witness preparation was the typically iconoclastic chapter, entitled "Counseling the Client: Refreshing Recollection or Prompting Perjury?," found in MONROE

Ultimately, all of this means that, although expert witnesses do not have a *financial* interest in the outcome of cases in which they testify—expert witnesses may not be paid a contingent fee[69]—they are clearly aligned professionally with the party engaging them. Because an expert's testimony will be prepared and presented by a lawyer from that party's side and his expertise and credibility will be attacked by a lawyer from the other side, it is inevitable that professional pride and personal vindication, if nothing else, will dictate that an expert crave victory for his side.

But in the overall effort to win, an expert witness plays a distinct and *limited* role on the advocacy team subordinate to the leading role played by the lawyer representing the client in the case. An expert witness is permitted to give sworn testimony about one thing only: his own honestly held opinions and conclusions that are relevant to the case. He cannot testify about the underlying facts but must base his opinions on whatever facts he *assumes* will be determined by the jury to be true.[70] At the same time, an expert witness cannot make arguments about the law, even if he is a lawyer.[71] Indeed, an expert witness—even a lawyer—can only *assume*

H. FREEDMAN, LAWYERS' ETHICS IN AN ADVERSARY SYSTEM 59–77 (1975). The argument was reworked and refined in a chapter carrying the less provocative title "Counseling Clients and Preparing Witnesses," found in MONROE H. FREEDMAN & ABBE SMITH, UNDERSTANDING LAWYERS' ETHICS 187 (4th ed. 2010). Professor Freedman, long recognized as one of the country's stoutest defenders of uncompromising client-centered adversary ethics, did not shrink from acknowledging that an unscrupulous client who was told the details of what the law required to prevail might tailor or even fabricate his testimony accordingly. But Freedman balanced against this the reality that if some legally significant points were withheld from the client being horseshedded, an honest and conscientious client might not remember salient facts or might even suppress certain helpful facts in the mistaken belief that they were harmful. In the asbestos cases, for example, an elderly client would be unlikely to discuss his sex life with a young attorney or paralegal unless prompted to do so. Since it cannot be known in advance whether aggressive witness preparation will lead to dishonest testimony or to truthful but more effective testimony in any particular case, Monroe Freedman gave the client the benefit of the doubt. In the author's later article, *The Professional Duty to Horseshed Witnesses—Zealously, Within the Bounds of the Law* (hereafter *Horseshed Witnesses*), he relied heavily on Professor Freedman's work, but as the full title implies, only up to the point where the lawyer *knows* that the client is up to no good: a lawyer's obligation is to provide zealous representation *within* the bounds of law. Hodes, *supra* note 66, at 1355–56. In this context, "law" includes the Rules of Professional Conduct, where formally adopted, and Model Rule 3.3(a)(3), which prohibits a lawyer from "offer[ing] evidence that the lawyer knows to be false." MODEL RULES OF PROF'L CONDUCT r. 3.3(a)(3) (AM. BAR ASS'N 2013).

69. Model Rule 3.4(b) forbids a lawyer from, among other things, "offer[ing] an inducement to a witness that is prohibited by law." MODEL RULES r. 3.4(b). Statutory or common law in all or virtually all American jurisdictions prohibits the payment of fees to an expert witness that are contingent upon the efficacy of his later testimony.

70. *See* discussion *supra* Part I.C.

71. *See* discussion *infra* Part II. In *Horseshed Witnesses*, the author stated that his testimony (which was in the form of an affidavit) was "an *advocacy* document." Hodes, *supra* note 66, at 1351.

what law the court will deem to be applicable to the case, even where that is not greatly in doubt.[72]

In the end, the advocate on the team blends the expert's testimony into the overall effort; first, by making legal arguments *to the court* to establish the assumed legal universe; and second, by proving *to the jury's satisfaction*, the assumed facts that will make the expert's opinions are germane and helpful.

F. *Expert Witnesses and the Ethics of Advocacy*

To many laypersons, and even some lawyers and judges, the selection, preparation, and use of expert witnesses[73] is a scandal—one example among many of a justice system that has gone off the rails. It conjures up the image of hired-guns spouting junk science they do not genuinely believe in or experts as whores "assuming a certain position for money" as the saying goes. This is an unjustifiably cynical view, however, and is based on a near-complete misunderstanding of the adversary system and adversary ethics.

First, in all but the rarest case of an unforeseen third-party witness, who happened to be present at the time of the events giving rise to a lawsuit, *no* testimony is disinterested or unbiased. In a simple automobile collision case or a slip-and-fall, for example, both the plaintiff and the defendant will remember details differently and will emphasize different aspects of the underlying facts.

This does not mean that one or both of the parties are lying, although that is a possibility. Instead, each side's lawyer puts forward the most helpful facts and details, *omits* unhelpful testimony and evidence, and attempts to punch holes in the other side's "story." The jury, *taking into account the interests of most of the witnesses*, determines what weight to give to

This was technically accurate under the peculiar circumstances of the case described below, but it was a gaffe that has been thrown back in his face on a few occasions. What the author meant to say, or should have said, is the point made in the text as a general proposition: although an expert witness is *not* an advocate and can only testify under oath about the content of his genuinely held *opinions*, that testimony is an integral part *of the overall advocacy presentation* orchestrated by the lawyer. The author's statement was not wrong in the specific context of the proceeding in state court in Corpus Christi, however, because that proceeding was a hearing on a discovery motion, with no jury present, *and about a matter of law to boot* (whether the "Preparing for Your Deposition" memo was privileged or whether the privilege had been lost through application of the crime-fraud exception). Ironically, therefore, under the positions the author espouses in this Article, he should not have been allowed to testify at all.

72. *See* discussion *infra* Part II.

73. *See* discussion *supra* Part I.E.

each snippet of the testimony and exhibits and fuses it all into a single verdict. Expert testimony is treated exactly the same way, as it should be. The jury will know that each expert witness has been paid for his time and that each is serving the team of the party proffering his testimony.

Second, and more fundamentally, critics, queasy about the horseshedding of witnesses, are almost always caught up in a romantic and naïve view of the adversary system itself. They do not accept the sometimes unlovely fact that an American jury trial is *not* an all-out, let-the-chips-fall-where-they-may search for the truth but is instead an attempt by each side to *obscure* unhelpful parts of the truth *within limits established by law*,[74] including procedural law, evidence law, and the law of lawyering.[75]

The literature debating the limits of advocacy is vast, including not only academic and practice-based works but also thousands of judicial opinions and ethics rulings. For purposes of this Article, which is limited to presentation of expert testimony, it is sufficient to say the chief boundary line is that a lawyer may not knowingly "offer evidence that the lawyer knows to be false."[76] At the other end of the spectrum, a lawyer has discretion to withhold evidence (without fear of being charged with lack of diligence or, probably, legal malpractice) if "the lawyer *reasonably believes* [it]

74. *See e.g.*, ALAN M. DERSHOWITZ, REASONABLE DOUBTS: THE O.J. SIMPSON CASE AND THE CRIMINAL JUSTICE SYSTEM 166 (1996) ("[A] criminal trial is anything but a pure search for truth. When defense attorneys represent guilty clients—as most do, most of the time—their responsibility is to try, by all fair and ethical means, to *prevent* the truth about their client's guilt from emerging." (emphasis added)). The author collected considerable authority on that basic point, including the above quote from Professor Dershowitz and including the famous passage from Justice Byron White's dissent in *United States v. Wade*, which ended as follows:

> Undoubtedly there are some limits which defense counsel must observe, but more often than not, defense counsel will cross-examine a prosecution witness, and impeach him if he can, even if he thinks the witness is telling the truth, just as he will attempt to destroy a witness who he thinks is lying. In this respect, as part of our modified adversary system and as part of the duty imposed on the most honorable defense counsel, we countenance or require conduct which in many instances has little, if any, relation to the search for truth.

W. William Hodes, *Seeking the Truth Versus Telling the Truth at the Boundaries of the Law: Misdirection, Lying, and "Lying with an Explanation*", 44 S. TEX. L. REV. 53, 57 (2002) (footnote omitted) (quoting United States v. Wade, 388 U.S. 218, 258 (1967) (White, J., dissenting)).

75. The "law of lawyering" is understood to encompass what was in the past referred to as "legal ethics" or "professional ethics" plus other statutory and court-made rules and common law principles governing the conduct of lawyers. *See generally* GEOFFREY C. HAZARD, JR., W. WILLIAM HODES & PETER R. JARVIS, THE LAW OF LAWYERING (4th ed. Supp. 2015).

76. *See* MODEL RULES OF PROF'L CONDUCT r. 3.3(a) (AM. BAR ASS'N 2013) ("A lawyer shall not knowingly: . . . (3) offer evidence that the lawyer knows to be false. . . . A lawyer may refuse to offer evidence, other than the testimony of a defendant in a criminal matter, that the lawyer reasonably believes is false.").

is false."[77]

These baseline rules generate several secondary inquiries that are far beyond the scope of this Article. First, what is meant by "false" in this context? Must *the witness* know his own testimony is false, making the testimony perjurious? Or is it sufficient if *the presenting lawyer* knows the testimony is false, even if the witness believes that it is true?[78]

Second, what does it mean for a lawyer to "know" that certain evidence is false, and how can that knowledge be proven? The question, "What does a lawyer know?" is by itself a subject of major moral, ethical, and epistemological debate.[79] Rule 1.0(f) of the Model Rules of Professional Conduct defines knowledge as "actual knowledge of the fact in question"[80] and then goes on to say that "a person's knowledge may be inferred from circumstances."[81] One of the "circumstances," of course, is that lawyers are highly educated professionals, experienced in judging ambiguous situations. This means that at some point, giving a client the benefit of the doubt turns into willful blindness, moral irresponsibility, or "brute rationalization," as Monroe Freedman once wrote.[82] Similarly, Comment 8 to Model Rule 3.3, after noting the above definition from Rule 1.0(f), states that "although a lawyer should resolve doubts about the veracity of testimony or other evidence in favor of the client, the lawyer cannot ignore an obvious falsehood."[83]

And what of the duties of a lawyer who is an expert witness in a contested matter, rather than an advocate? He is not functioning *as a lawyer* in the matter, so the formal rules regarding the limits of advocacy (like Model Rule 3.3) do not apply. But even when a lawyer is "off-duty" in the sense that he is not counseling or representing a client, he is still a

77. *See id.* r. 3.3(a)(3) (emphasis added) (allowing counsel to withhold evidence that is reasonably believed to be false does not extend to the testimony of the defendant in a criminal case; otherwise, the discretion granted to the lawyer is broad).

78. *See* HAZARD, HODES & JARVIS, *supra* note 75, § 32.11 (taking the view that the broader interpretation should be adopted, because the point of Rule 3.3 is to prevent false information *that the lawyer can interdict* from sending the court or the jury off in a wrong direction).

79. Many of the arguments are summarized in HAZARD, HODES & JARVIS, *supra* note 75, §§ 1.23–1.24. With respect to expert testimony in particular, especially scientific expert testimony, see Caudill, *supra* note 64, at 352, who wrote, "Law is . . . unstable, adversarial, rhetorical, institutional, and value-laden, while science is characterized by universal standards, rigorous methodologies and testing, and consensus."

80. MODEL RULES r. 1.0(f).

81. *Id.*

82. *See* FREEDMAN, *supra* note 68, at 75 ("There does come a point, however, where nothing less than 'brute rationalization' can purport to justify a conclusion that the lawyer is seeking in good faith to elicit truth rather than actively participating in the creation of perjury.").

83. MODEL RULES r. 3.3 cmt. 8.

lawyer, and his conduct is governed by norms that go beyond those that apply to nonlawyer–experts.[84]

The balance of this Article attempts to answer the questions thus raised: How should on- and off-duty lawyers interact in the presentation of expert testimony? And, how will their interaction affect the quality of the justice system in which they are participating?

II. LAWYERS AS EXPERT WITNESSES—MORE OF THE SAME, BUT FUNDAMENTALLY DIFFERENT

When a lawyer takes the stand as an expert witness, the fine jurisprudential balance is in danger of becoming displaced and deranged, although the basic tweaks to the rules of evidence remain the same.[85] Helpful opinions, even respecting ultimate issues, are not only still welcome but also are still necessary to avoid pure (and unfair) guesswork by jurors who have no prior learning or experience in the area. At the other end of the spectrum, opinions that are mere speculation—not connected to the specific facts of the case or rest on the "air" of evidence never seen or heard by the jury[86]—will still be excluded, no matter how well qualified the expert.

But despite these basic similarities, lawyer–experts and other experts are fundamentally different. They differ as a matter of practice because lawyer–experts are trained in the arts of communication and persuasion and may make disguised testimony about the facts seem more like actual testimony about the facts;[87] more important, they differ jurisprudentially, because, *unlike* other experts, *lawyers are almost always called upon to give opinions that implicate the content of the law applicable to the case*.

Blend these two factors together and you have the "deep and troubled jurisprudential waters" of this Article's title. First, there is not only a danger that lawyer–experts will give disguised testimony about the *facts* (which they can only assume and not actually "know," at least in the sense of being able to testify about it under oath)[88] but there is the additional danger that they will use their lawyering skills to "advocate" in favor of the truth or correctness of those facts—*which even the lawyer presenting their*

84. *See id.* r. 8.4 (broadening the scope of professional responsibility of a lawyer to not "engage in conduct that is prejudicial to the administration of justice," without regard to whether the lawyer is acting as a representative or some other capacity); *see also* discussion *supra* Part II.

85. *See* discussion *supra* Part I.

86. *See* discussion *supra* note 54 and accompanying text.

87. *See* discussion *supra* Part I.C.

88. *See* discussion *supra* Part I.C.

testimony cannot ethically do.[89]

Second, and more important, lawyer–experts constantly flirt with, and often cross, the line between testimony—including disguised testimony—about *the facts* and testimony (disguised or implicit) about *the law*. But once a lawyer speaks in favor of one understanding of the law as opposed to some other understanding, he has ceased being a witness altogether and has become a full-throated advocate.[90] That further suggests supposed "testimony" given under oath is no longer testimony at all—it is legal argument.

The capstone is that a lawyer who switches roles from testifying witness to partisan lawyer also sheds one set of ethical obligation and dons another. A sworn witness is obligated to tell the truth, including the truth

89. *See* MODEL RULES r. 3.4(e) ("A lawyer shall not . . . assert personal knowledge of facts in issue except when testifying as a witness, or state a personal opinion as to the justness of a cause, the credibility of a witness, the culpability of a civil litigant or the guilt or innocence of an accused.").

90. In Caudill, *supra* note 2, the author argued throughout that, especially in legal malpractice cases, lawyer–expert witnesses risk invading the province of both the jury *and* the judge by becoming advocates, because it is almost impossible to separate supposed "factual" testimony from argumentation about "law." *Id.* at 315–16. The author was in attendance in San Antonio, Texas, where Professor Caudill delivered his talk at the 2015 *St. Mary's Law Journal on Legal Malpractice & Ethics* Symposium, and quickly agreed with the staff of the *Journal* to write this follow-on Article. For a discussion in more detail on the specific problems caused when the lines between law and fact; and advocacy and testimony are erased, see discussion *infra* Part II.A. In an earlier article, also published in this *Journal*, Professor Caudill again focused on the law–fact distinction, this time to suggest that the traditional hard and fast rule against testimony "about" the law might be relaxed in certain cases where the law was uncertain or complex, so that even after being properly instructed, jurors would have difficulty applying the concepts to the purely factual findings they had made. *See* Caudill, *supra* note 1, at 141 ("In reality, however, there are numerous exceptions to the ideal, which calls into question any clear distinction between law and fact."). In *The Roles of Attorneys as Courtroom Experts: Revisiting the Conventional Limitations and Their Exceptions* (hereafter *Roles of Attorneys*), Caudill considered the possibility that *mixed* questions of law and fact, such as whether the standard of care in a legal malpractice case had been breached, would be appropriate occasions to relax the general rule and openly allow testimony about matters that would otherwise be considered questions of law, and thus for the trial court alone to deal with in instructions. *Id.* at 147–49, 158–60, 164–65. Caudill noted the recognized exceptions to legal expert testimony but conceded that "while the judiciary is presumed to need no expert legal testimony and the jury is presumed to get all the law it needs from the judge's instructions, the inconsistent application of the prohibition demonstrates the genuine need . . . for expert legal testimony." *Id.* at 165 (footnotes omitted). The author takes a stricter view, using a series of "standard of care" examples to demonstrate that it is both possible and desirable to maintain a sharp distinction even in that context. *See* discussion *infra* Part II.B. That is *not* because the line between law and fact can be firmly drawn in the abstract—on that point, the author agrees with Professor Caudill—but because it is institutionally preferable for the trial court alone (with the help of the contending advocates) to deal with the "legal" side of mixed questions, leaving witnesses (including expert witnesses) to deal with the "factual" side. It is possible, however, that the author's view and Caudill's view in *Roles of Attorneys* are little more than two routes to the same result. As will be discussed *infra*, the author does agree that in the standard of care example, an expert witness will still be required to help the jury fit the facts to the law that they have been given and might involve some explanation of how that law actually plays out in the real world.

about his own beliefs and opinions. An advocate, on the other hand, is *not* required to believe in the soundness of the arguments he is making; his only obligation is to stay within the bounds of frivolousness.[91]

A. *Law Versus Fact and the "Specialized Knowledge" that Lawyer–Experts Do and Do Not Have*

Lawyers serving as expert witnesses are subject to the same requirements of relevance and reliability as all other expert witnesses.[92] In most jurisdictions, expert opinion testimony is "relevant" only if it "will help the trier of fact to understand the evidence or to determine a fact in issue."[93] In the large majority of jurisdictions that follow the *Daubert* approach,[94] expert testimony is "reliable" only if based on sound science or specialized knowledge grounded in experience or practice that jurors typically will not have.

But what is it, exactly, that lawyers bring to the stand as expert witnesses? What is their specialized knowledge?[95] Armed with years of post-graduate training and experience, plus subscriptions to Westlaw and LexisNexis, they concededly know more than jurors do about the content of applicable legal doctrines, as glossed by the most recent case law in the jurisdiction.

No one contends, however, that they should be allowed *to testify to a jury under oath* that such and such a court case has this meaning rather than that meaning, or that a particular statute or rule does or does not mean what it appears to say.[96] Such disagreements must be *argued to the court* by lawyer–

91. *Compare* MODEL RULES r. 3.1 ("A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law or fact for doing so that is not frivolous."), *and id.* r. 3.1 cmt. 2 (explaining frivolousness as the inability "to make a good faith argument on the merits of the action taken or to support the action taken by a good faith argument for an extension, modification or reversal of existing law"), *with id.* r. 3.3 (allowing a lawyer to offer evidence that he *reasonably believes* is false), *and id.* r. 3.3 cmts. 3, 7–9 (allowing a lawyer to offer false evidence if he *reasonably believes* the evidence is false, in effect mandating such conduct because otherwise the lawyer might be accused of providing ineffective assistance of council).

92. *See* discussion *supra* Part I.A.

93. FED. R. EVID. 702(a).

94. *See* discussion *supra* Part I.A.

95. Whatever specialized knowledge lawyer–experts have, it was not gained as a result of the kind of scientific inquiry considered in *Daubert*. Instead, lawyers bring their personal knowledge, skill, experience, training, and education, as permitted by *Kumho Tire*, the most important case after *Daubert*. *See* discussion *supra* Part I.A.

96. Professor David Caudill does not argue to the contrary in *Roles of Attorneys*. *See* discussion *supra* note 90 and accompanying text. His point in that article was that in some situations, roughly those usefully described as involving mixed questions of law and fact, it may be appropriate for a lawyer–expert to assist the jury in working through how to "apply" the law to the facts that it has

advocates, not under oath, rather than lawyer–witnesses.

Still, experts are usually needed to testify about how the law should be applied to the specific facts of the case—facts that have been found by the jury. That is nothing more (or less) than opinion testimony about an ultimate issue in the case, such as whether the defendant–lawyer breached the standard of care in a legal malpractice case or whether the defendant committed a breach of fiduciary duty. So long as *the court* retains full authority to define the standard of care or what the duties of a fiduciary are, it is perfectly acceptable for an expert witness to help the jury close the circle and reach a verdict about whether those legal standards have been breached or satisfied.[97]

B. *Breach of the Standard of Care in Legal Malpractice Cases: Defining the Legal Standard, Determining the Underlying Facts, and Reaching an Ultimate Conclusion*

A telling and often-debated example of the division of labor between the court, the jury, advocate–lawyers, and lawyer–expert witnesses is provided by the proper handling of the critical element of breach of the standard of care in legal malpractice cases.[98] According to the principles described immediately above,[99] it should follow that the trial court will first determine and then instruct the jury what the standard of care *is*, because that is a purely legal question. In making that legal determination, the court will be assisted by the advocates on both sides, and no expert witness—lawyer or lay person—will play any role.

But expert witnesses will have an essential role to play when the jury must determine *whether the court-defined standard has been met or breached*, because that is matter of fact, or at least application of law to facts, which

found. *See* Caudill, *supra* note 1, at 161 (explaining that an ordinary juror would be unable to determine the standard by which an attorney's behavior is determined or measure the attorney's conduct without the help from an expert such as another attorney). In doing so, a lawyer–expert may have to explain, under oath to boot, how certain legal principles "work" in practice, but that is a far cry from saying what the law "is."

97. *See* discussion *supra* Part I.B.

98. In most American jurisdictions, the tort of legal malpractice requires the plaintiff to plead and prove four elements: (1) that a lawyer–client relationship existed between the defendant and the plaintiff, thus creating a *duty*; (2) that the defendant *breached* the duties owed to the plaintiff, typically by failing to satisfy the applicable standard of care; (3) that breach *proximately caused* harm to the plaintiff; and (4) that the plaintiff was *damaged* thereby. Often, elements three and four are merged into a single element. Hedrick v. Tabbert, 722 N.E.2d 1269, 1272 (Ind. Ct. App. 2000). Interestingly, the *Tabbert* court relied on, without further comment, *Rice v. Strunk*, 670 N.E.2d 1280, 1283–84 (Ind. 1996), a case listing all four of the standard elements.

99. *See* discussion *supra* Part II.A.

is quintessentially a jury function. A lawyer–expert helps the jury come to its verdict by bringing experience about how the legal standard defined by the court "fits" the historical facts that the jury has found.

Consider the following thought experiment. Assume four mine-run legal malpractice cases, with identical facts, arise at the same time in four separate (hypothetical) jurisdictions in the United States. At the time these cases are filed, the law governing the standard of care in each state appears to be well-settled—keeping in mind that these are common law doctrines that are always subject to revision, modification, or abandonment.

Although the case law set out below establishing the four standards of care is perforce as hypothetical as the states in which the cases arise, at least the first three are based on language that has appeared in real court opinions in the United States.[100] With those caveats, the four standards are as follows:

STATE A

In a legal malpractice case decided in 1947, the Supreme Court of A said:

> It is more tiresome than difficult to state the elements of the tort of legal malpractice in this State. To prevail, the plaintiff must prove (a) the existence of a lawyer–client relationship with the defendant; (b) *that the defendant failed to exercise the care and skill that men of the legal profession commonly, or ordinarily, possess and exercise under the circumstances*; and (c) that the defendant's failure proximately caused the injury of which the plaintiff now complains.

This passage has been cited with approval in hundreds of State A appellate court opinions in the ensuing years; the only deviation being in 2012, when the Supreme Court of A announced that element (b) should, "in keeping with modern mores and with the realities of modern practice, be amended to refer to '*men and women of the legal profession*.'"

STATE B

In a legal malpractice case decided in 1994, the Supreme Court of B said:

> In our past jurisprudence, and in the jurisprudence of essentially all of our

100. The fourth approach to defining the standard of care has not been adopted by any court, but there has been considerable discussion of it within the legal profession. Some courts appear to be moving in that direction, and in the author's view, it is only a matter of time before it becomes "the law" somewhere in the United States.

sister states, the standard of care has been pegged at what a lawyer *commonly or ordinarily* would have done in like circumstances, or sometimes at what a lawyer *of average skill and learning* would have done, assuming that the lawyer also exercised *average care*.

This is problematic because of the notorious difficulty of proving or disproving to a jury what is "common" or "ordinary" or "average." But it is troubling for a more fundamental reason—hewing to those standards removes any incentive for the profession as a whole to improve or innovate, and ossifies past practice into perpetual practice.

Accordingly, we hold that a legal malpractice plaintiff must henceforth prove *that the defendant failed to exercise reasonable care and skill in carrying out the matters entrusted to him*. To be sure, proving or disproving *reasonableness* is not without its own difficulties, but it is a difficulty commonly encountered in the law. The main point, though, is that if lawyers in our state have commonly engaged in an *unreasonable* practice in the past, that practice should become less common after today's decision and should eventually cease.

STATE C

In a legal malpractice case decided in 1904, the Supreme Court of C said:

The English common law rule in these kinds of cases was that a lawyer would not be found to liable to his client in the absence of *gross negligence or gross incompetence*.

This rule has been criticized as insufficiently solicitous of the interests of clients, who typically do not meet their lawyers on an even plane when it comes to awareness of the hazards of legal matters. On the other, to hold lawyers to respond in damages for a mistaken judgment taken in good faith, or for the merely negligent conduct of their offices, is likely to breed timidity and stagnation in the legal profession. In the absence of a compelling reason to do so, we will not disturb the common law rule.

In a 2007 case, the same Court noted:

For something over one hundred years, our decision has been subjected to savage criticism in the legal journals, but without reference to any empirical evidence that citizens in our state have suffered from a glut of harmful lawyering. The compelling reason that we could not find in 1904 still eludes us, and we therefore continue to decline to abandon a rule that has served us well for a century, and our forefathers for several centuries before that. To prevail in a legal malpractice action in this state, a plaintiff must show *gross negligence or gross incompetence* on the part of the lawyer.

STATE D

In a legal malpractice case decided in 2013, the Supreme Court of D

said:

> Too much ink has been spilled and too many trees have been killed in endless debate (in both court opinions and academic writings) about the proper relationship between the standard of care in legal malpractice cases and the standard of conduct required by the rules of professional conduct.
>
> Almost every court that has faced the issue heretofore, including the courts of D, has held that while the rules of legal ethics may be "relevant to" establishing the standard of care or the breach of the standard of care in a legal malpractice case, they are not in and of themselves an independent font of tort liability.
>
> This is too formalistic, however. The *reason* that rules of professional conduct are routinely held to be at least "some evidence" of the standard of care for use in private party litigation is that both the rules and the common law principles at play in litigation are ultimately the responsibility of *this Court*, based on *this Court's* understanding of the public policy of D. Thus, the rationale for treating the two sets of norms as closely intertwined is obvious, but the rationale for stopping short at "relevant to" or "some evidence of" is not.
>
> Accordingly, we hold that a legal malpractice plaintiff may establish breach of the standard of care, in addition to the manner heretofore allowed, *by proving (by a preponderance of the evidence) a violation of one of the mandatory rules of the State D Rules of Professional Conduct.* This is not an abstract proposition; however, to satisfy the standing requirement, the plaintiff must also demonstrate that *violation of the specific rule in question is what proximately caused the plaintiff's injury*.

To sum up, in State A, the plaintiff must prove that the defendant exercised something less than *common or ordinary care and skill*, whereas as in State B, the plaintiff must prove that the defendant exercised something less than *reasonable* care or skill, *whether or not it was common or ordinary in the jurisdiction*. In State C, the plaintiff must prove *gross negligence* or *gross incompetence*, while in State D any violation of a mandatory rule of professional conduct affecting the plaintiff is sufficient.

It is perfectly evident that a lawyer representing the plaintiff or the defendant in one of these states will take discovery and plan trial strategy differently, depending upon *which* of the four states is the forum state. It should be just as obvious that the testimony of a lawyer–expert (presented by either side) will differ radically in the case pending in each jurisdiction. As an example, it would be useless for a plaintiff's expert in State C to offer the opinion that the defendant failed to act "with reasonable care"; indeed, such an opinion would be stricken as irrelevant and thus

inadmissible, because in State C only testimony going to *gross* negligence or incompetence is germane. Taking it a step further, the advocates in each jurisdiction will choose and prepare their lawyer–experts with the existing law in the jurisdiction firmly in view.[101]

Because the lawyer–expert's testimony must thus be tailored to the law in the jurisdiction, which is the mildest and least objectionable form of horseshedding,[102] it further follows that the expert must agree to *assume* the existence of that legal universe in formulating his opinions. Certainly the expert cannot "testify" (to a jury or to the court) about the content of the law.[103] Nor can the expert make arguments to the court about which standard should be adopted for purposes of the case at hand.[104]

In the standard of care thought experiment, the four hypothetical standards were stated to be "well-settled," but this only accentuates the fact that the expert is "stuck" with them and must base any testimony on the assumption that the jury will be instructed precisely that way about the law.[105]

Suppose, however, the law was in flux or a non-frivolous argument for modification was available? A lawyer–expert still has *no* authority to make those arguments—that is the role of the advocate planning to present his opinion testimony. At best, the expert is still stuck with, and must assume, the legal universe that the advocate agrees is the best approximation of the law as it stands as the case begins.[106] If the law changes during the case,

101. *See* Caudill, *supra* note 1, at 149 (stressing the importance of knowing the law of a jurisdiction and demonstrating how a plaintiff's expert may be excluded depending on the applicable law and how the expert testimony is formulated).

102. *See* discussion *supra* Part I.E.

103. *See* Caudill, *supra* note 2, at 315–16 (noting standard practice limits an attorney–expert to testimony about the facts, because testimony as an expert in law would invade the province of the court).

104. *See* Caudill, *supra* note 1, at 159 (noting "the general rule that expert witnesses are not to testify as to what the law is but only to assess the facts as to how the attorney acted in relation to the law").

105. William P. (Bill) Smith, Ethics Counsel to the Office of the General Counsel of the State Bar of Georgia and, for some thirty years, the General Counsel, responsible for the prosecution of lawyer discipline cases in the state, made a telling comment on this point at one of the innumerable CLE presentations he gave. Referring to the law that would be applicable in any particular case, regardless of the bar admission or office location of any of the participating lawyers, he invited the audience to imagine a trial judge announcing from the bench that just for one day the court was going to apply the law of Zimbabwe! No one would be any less qualified to participate in the case because they were not admitted to the Bar of Zimbabwe, yes, but all would have to tailor their presentations to the new legal baseline.

106. *But see* Caudill, *supra* note 1, at 155 (proposing recognition of an exception to the general rule against expert legal testimony where the law is unsettled or uncertain).

the expert will be obligated to adjust his testimony as well—the origin opinions will no longer even be germane.

The distinction made through use of the thought experiment—between defining or establishing the standard of care *as a matter of law* and proving whether it has been breached *as a matter fact*—can best be illustrated by a real-life, negative example. *Jing Hong Song v. Collins*[107] was a routine legal malpractice case in which the client (Jing) claimed she had executed a custody and visitation agreement with her former husband in their divorce action only because her former lawyer (Collins) had advised her that it was temporary and would be easy to modify.[108] That turned out not to be the case.

During the jury trial, both the plaintiff and the defendant presented expert testimony about whether the former lawyer had *breached* the standard of care for matrimonial lawyers who deal with custody and visitation issues, but neither party explicitly discussed what the standard actually *was*.[109] It would be fair to say, however, that both appeared to have *assumed* what it was, discussed it implicitly, and had no particular disagreements on the point.

But the jury was instructed to answer the following special interrogatory and answered it in the negative: "Did the plaintiff *prove*, by a fair preponderance of the evidence, *the standard of care* applicable to the defendant?"[110] As a result, the jury was required to return a verdict in favor of the defendant–lawyer.[111] That verdict was upheld by the trial court and on appeal.[112]

The Appellate Court of Connecticut stated that in Connecticut, a legal malpractice plaintiff "must present expert testimony to *establish* the standard of proper professional skill or care. . . . [Expert testimony will assist lay jurors] to *understand* the applicable standard of care *and to evaluate the defendant's actions in light of that standard*."[113]

The second of those propositions is universally accepted, as discussed throughout this Article: expert witnesses are needed to help the jury perform its fact-finding function, even if in the process the expert must state conclusions that implicate an ultimate issue (here, whether the lawyer

107. Jing Hong Song v. Collins, 97 A.3d 1024 (Conn. App. 2014).
108. *Id.* at 1025.
109. *Id.* at 1027.
110. *Id.* at 1025 (emphasis added).
111. *Id.*
112. *Id.*
113. *Id.* at 1026–27 (emphasis added).

breached the standard of care).[114]

But the statement that expert testimony is needed to *establish* the standard is distinctly odd and was made more so when the appellate court stated, *in the next paragraph on the same page*, exactly what the applicable standard was, cleanly and without equivocation: "The standard of care applicable to the defendant . . . in the present case was the 'degree of skill and learning commonly applied under all the circumstances in the community by the average prudent reputable member of the profession . . . .'"[115] The court cited one of its own decisions from 2006 as authority, and it is clear that of the four hypothetical standards given earlier, the real Connecticut standard most closely resembles that of State A.

It remains a mystery, however, why an expert witness should be allowed to testify about the standard itself, let alone why expert testimony is required, on pain of loss or dismissal of the plaintiff's suit. It is just as much a mystery what an expert witness would testify to under oath. It is hard to imagine that any court would countenance a lawyer–expert who testifies, "In my opinion, the standard of care is as stated in the 2006 appellate court decision, and I came to that conclusion because my research shows that the case has neither been overruled nor disapproved

114. *See* FED. R. EVID. 402 advisory committee's note (1972 proposed rules); *see also* discussion *supra* Part I.B.

115. *Jing Hong Song*, 97 A.3d at 1027. The same awkward approach can be seen in some Indiana cases, such as *Oxley v. Lenn*, where it was the defendant rather than the plaintiff who lost out—this time at the summary judgment stage than after a jury verdict. Oxley v. Lenn, 819 N.E.2d 851 (Ind. Ct. App. 2004).

In *Oxley*, the defendant–lawyer, Lenn, had neglected to tender a summons to accompany the complaint he had filed for his client. As a result, Oxley's suit was dismissed as untimely, which led to the malpractice suit. Lenn moved for summary judgment, arguing that when he filed the complaint, the Indiana authorities were in conflict about the requisite timing of the summons, so his inaction could not constitute malpractice as a matter of law. The trial court granted the motion, but the court of appeals reversed and remanded for trial, holding that even though the facts were undisputed, summary judgment was inappropriate because those facts did not lead inexorably to only one conclusion:

> We cannot agree with the trial court's conclusion that the existence of a conflict of law automatically renders an attorney's action or inaction as not negligent. Instead, it is for the jury to determine, given the then existing conflict of case law, *whether Lenn breached his duty by failing to exercise ordinary skill and knowledge* when he failed to tender the summons at the time he filed the complaint. *Furthermore, expert testimony is usually required* in a legal malpractice action *to establish the standard of care* by which the defendant attorney's conduct is measured.

Oxley, 819 N.E.2d at 857 (emphasis added). Once again, the second sentence simply does not match the first. The court of appeals correctly stated the governing Indiana standard of care without hesitation in the first sentence—"ordinary skill and knowledge"—and so expert testimony on the subject should be barred, not required. *Id.*

by the Connecticut Supreme Court."

Instead, with all of the pieces in place, it should be a simple matter for the trial court to instruct the jury that the standard is as quoted above and that the jury must decide based on the testimony, including expert testimony, whether the standard had been satisfied or breached. In such a regime, the plaintiff's expert would testify along the following lines: "I have assumed that the court will instruct the jury that the standard of care is as stated in the 2006 appellate court decision; it is then my opinion that the defendant breached that standard in several ways, based on my long experience handling matrimonial cases in Connecticut."[116]

The Connecticut approach is to let the jury decide whether *the plaintiff* has established the standard of care,[117] whereas the traditional approach the author advocates is to instruct the jury what *the courts* have "established" as the governing standard and let the jury decide whether that standard has been satisfied. A subtle distinction? Perhaps, but the distinction is as real and important as the Anglo-American jurisprudential sea is wide.

C. *Misuse of Lawyer–Experts in Proving or Disproving the Facts Regarding Breach of the Standard of Care or Breach of Fiduciary Duty*

If the division of function between the advocates, the witnesses, the court, and the jury is properly maintained,[118] there will be no disguised testimony or advocacy or argument by lawyer–experts *about the applicable legal standard*.[119] The task of "say[ing] what the law is"[120] will remain solely in the hands of judges, aided by the legal argument of lawyer–advocates, while neither lawyer–experts nor jurors will have any input.

But there is still an enhanced danger that lawyer–expert witnesses will improperly influence the jury through disguised testimony *about the facts*, and, to a lesser degree, through parroting the testimony of witnesses who

116. The jury verdict in the *Jing Hong Song* case might well come out the same way, but for the simple and jurisprudentially sound reason that the jury did not believe the testimony suggesting that Jing's lawyer did not perform as an "average prudent reputable member of the profession" would have. *Jing Hong Song*, 97 A.3d at 1027 (quoting Dixon v. Bromson & Reiner, 898 A.2d 193, 195 (Conn. App. 2006)).

117. *Id.* at 1026–27.

118. *See* discussion *supra* Part II.B.

119. *See* FED. R. EVID. 705 (declaring an expert witness may present an opinion without first testifying to the central facts).

120. One of the most notable quotations in all of American law comes from one of the most notable cases: "It is emphatically the province and duty of the judicial department to say what the law is." Marbury v. Madison, 5 U.S. 137, 177 (1803).

do not appear at the trial.[121]

Disguised testimony about the facts occurs when an expert witness confidently states an opinion that is of necessity based on certain facts of which the expert has no personal knowledge. Unless the jury is made aware that the opinion is actually conditional—upon those facts being found to be true *by the jury itself*—there is a danger the jury will instead take the expert's opinion to be evidence tending to prove those same facts. The following hypothetical, which is based on a real case that is still in litigation, demonstrates how badly disguised testimony can obscure what is truly in contest and thus distort the judicial process.

In the hypothetical version of the real case, suppose that a lawyer is representing the owner of a small business in commercial litigation against a supplier who reneged on several contracts and caused the plaintiff's business to fail. Discovery has been completed and the date for a jury trial has been set—and then continued twice due to illness and other scheduling difficulties. With the trial now only five weeks away, the lawyer schedules a mediation that his client only reluctantly agrees to attend—the plaintiff thinks it is a waste of time and would much prefer to have his day in court anyway.

The mediation quickly stalls, and everyone agrees by mid-afternoon there has been essentially no progress. At this point, the facts as told by the plaintiff and his lawyer diverge dramatically. According to the business owner, his lawyer—without any warning—presented him with a final proposal for settlement and threatened to withdraw from the case on the spot, unless the client immediately signed it. Unaware that a lawyer cannot withdraw in such circumstances without court approval, knowing that he could not possibly find a new lawyer and bring him up to speed in just five weeks, and shell-shocked by the suddenness of the betrayal by his own lawyer, the plaintiff signed the agreement, even though he furiously stated that the settlement amount was grossly inadequate.

The lawyer, on the other hand, defended the settlement as the best that could be obtained at the mediation and expressed great doubt that a better result could have been obtained if the case had proceeded to trial. More important, while agreeing that he had argued strenuously in favor of the settlement, the attorney denied coercing his client or making any threats to withdraw. The lawyer also agreed that the business owner had initially opposed the deal but stated that, in the end, the client agreed to accept it of his own free will, and did not express further disagreement.

121. *See* discussions *supra* Parts I.C.–D.

The client sues the lawyer for legal malpractice and breach of fiduciary duty, seeking as damages the difference between the "coerced" settlement and what he reasonably might have recovered from the supplier at trial—a classic "case-within-a-case" claim.[122] Both sides engage lawyers well-versed in commercial litigation as experts and, on cross-motions for summary judgment, both experts file affidavits stating the opinions they are prepared to present at trial.

The client's expert opines that *if the jury found the fact of coercion to be true*, then the lawyer's conduct was an outrageous breach of several duties that were owed to the client. The lawyer's expert, however, simply opines that in his experience, settlement always requires hard talk about compromise and the lawyer acted reasonably in his handling of the mediation.

The disconnect in the second expert's testimony is obvious: it is a textbook example of disguised testimony about the facts. No serious lawyer could actually believe in good faith that a lawyer who lied to his client, threatened him, and abandoned him on the eve of trial to coerce an inadequate settlement has acted loyally or in accord with the standard of care in any jurisdiction. Thus, the defendant's expert must be silently assuming that the client's version of the denouement of the mediation is false.

That might be so, of course, *but that is something that only the jury can determine*. Moreover, it is up to the advocates on both sides to present the core facts in such a way that their own client's version is more likely to be believed. But by leaving the proof of facts to factor out of the equation, the defendant's expert might be subtly pushing the jury in the direction of finding precisely those facts.[123] And that is the evil of disguised testimony in a nutshell—it is indistinguishable from advocacy.

The parroting of absent witnesses by experts (including lawyer–experts)[124] is a form of disguised testimony because it puts before the jury material that would not otherwise influence its fact-finding mission. It is a relatively rare problem in general, and in legal malpractice cases in particular, because the key witnesses—including the parties—almost

122. *See* Wilburn Brewer, Jr., *Expert Witness Testimony in Legal Malpractice Cases*, 45 S.C. L. REV. 727, 731 (1994) (categorizing the causal relationship between the breach of fiduciary duty and harm suffered by the clients as a "case-within-a-case" concept).

123. There is an easy cure for the kind of disguised testimony involved in this example. The expert witness for the defendant–lawyer should be asked on cross-examination to assume, one at a time, that every fact testified by the plaintiff is true and then asked whether his opinion would change. As a capstone, the expert should be required to confirm that he personally does not know which facts are true.

124. *See* discussion *supra* Part I.D.

always testify live before the jury and in detail.

But situations can arise in which a lawyer–expert will be exposed to hundreds of documents and dozens of depositions of relatively minor players as preparation for formulating opinions and conclusions. An expert may rely on such material at the preparation stage, but if the documents or minor witnesses are not actually presented at trial, the expert should not be allowed to rely on them during actual testimony.

The same is true with respect to material that the advocate presenting the expert discussed or described as part of preparation and horseshedding. There is nothing improper about setting out facts that the expert should assume and that the advocate intends to prove—indeed, that is the preferred way to proceed, at least at the outset. But if the expert provides opinions to the jury that are based on what the advocate intends to prove, *and the advocate is unable to or forgets to prove some of it*, the expert's testimony may and should be stricken and the client's case irretrievably harmed.

III. SOME SOLUTIONS TO THE PROBLEMS: THE ETHICS OF ADVOCACY AND THE ROLE OF PROFESSIONALISM

Near the end of his contribution to Volume 5 of the *St. Mary's Law Journal on Legal Malpractice & Ethics*,[125] Professor David Caudill sounded a pessimistic note about the possibility of removing too confident testimony by lawyer–experts that morphs into advocacy. He wrote:

> If there is a problem with the fact that attorney–experts confidently express contradictory conclusions in their courtroom testimony, that problem may not be solvable—not only are they trained as advocates to take the positions required by their client's situation, but the structure of their analysis when they are called as an expert in legal malpractice is the same structure as their analysis as an advocate.[126]

But Professor Caudill's final word was one of acquiescence. "Should we be shocked?" he asked.[127] "Or should we relax and be unsurprised that there is gambling in a casino?"[128] The real point of his Article, ultimately, was "to identify a false alarm and silence the critics who worry that something is wrong."[129]

125. Caudill, *supra* note 2, at 315.
126. *Id.* at 344.
127. *Id.* at 345.
128. *Id.*
129. *Id.*

The point of this Article is to insist that something *is* seriously wrong, but the problems the author identifies can be solved, or at least alleviated. The problem is *not* that advocates present only confident-sounding experts who support their client's position; that much is baked into the adversarial system. Indeed, this Article takes as given that expert witnesses are *not* unbiased or disinterested, and the author supports the meticulous horseshedding of witnesses, including experts.[130]

The problems arise when advocates and their expert witnesses cross the often blurry, but nonetheless, real lines separating ethical and professional conduct from the unacceptable. Zealousness in service to a client's cause is the classic mission of an advocate, but advocacy must be carried out within the bounds of law. Or, as Robert Kutak, chairman of the commission that proposed the first iteration of the Model Rules of Professional Conduct in 1983, once said, "[I]t may be a dog-eat-dog world, but one dog may eat another only according to the rules."[131]

The suggestions that follow are not radical, and generally require little more than all of the key actors—advocates, lawyer–experts, and judges—pay closer attention to professional propriety, even where the formal rules of professional responsibility are not implicated.

A. *Expert Testimony Should Never Be Permitted on Legal Motions Addressed to the Court*

Although most of this Article has discussed situations in which lawyer–experts will give testimony at jury trials, it is worth noting that expert testimony—usually by affidavit—is often tendered on motions addressed to the court. This practice is unobjectionable if the motion is for summary judgment, *and the expert's testimony is limited to a preview of what factual testimony would be given if the case proceeded to trial.* This is standard practice, helping to demonstrate the presence or absence of a genuine issue of material fact.

In most other situations, however, an expert's affidavit would be nothing more than pure advocacy about the law and should not be allowed. In these situations, advocates should not present expert affidavits, lawyer–experts should refuse to provide them, and judges should refuse to consider them.[132]

130. *See* discussion *supra* Part I.E.

131. HAZARD, HODES & JARVIS, *supra* note 75, § 29.03, at 29-8 (quoting Robert Kutak, *The Adversary System and the Practice of Law*, *in* THE GOOD LAWYER (David Luban ed. 1983)).

132. Early in his career, the author was asked to provide expert opinions (by affidavit) on a motion to disqualify counsel because he had previously represented the opposing party in "a substantially related matter." *See* MODEL RULES OF PROF'L CONDUCT r. 1.9(a) (AM. BAR ASS'N

B. *Disguised Testimony Should Be Replaced with Candor About the Limitations of Expert Testimony and Active Disclosure About Assumptions*

The most pervasive (and pernicious) problem in the use of lawyer–expert witnesses in jury trials is the easiest to cure. "Just Say No" to disguised testimony. This does not require advocates to temper their adversarial zeal or to short-change their clients; it simply requires them to play by the jurisprudential rules to maintain the integrity of the judicial system. Nor are expert witnesses, who are also lawyers, required to pull punches. They are still on the same "team" as the advocates who engaged them and should still strive to support the overall advocacy effort with honest testimony, but they can and should do so without obscuring the critical factual assumptions that must undergird their testimony.

The change in approach this Article advocates can be clearly seen in the earlier example of a malpractice suit against the lawyer who allegedly coerced his own client into a bad settlement at mediation.[133] In that case, the expert witness for the former client was prepared to testify that in his opinion, the former lawyer had misbehaved, *but only on the stated assumption that the client's account of the events was found by the jury to be true*.

By contrast, the defendant–lawyer's expert was prepared to give the defendant a clean bill of health without specifying what facts he was assuming. This could mislead the jury into believing that the historical facts were relatively unimportant, or even that the second expert was

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2013) (precluding a lawyer who "formerly represented a client in a matter" from representing another person "in the same or a substantially related matter" adverse to the initial client). Then-district court judge David Hamilton (now a judge on the U.S. Court of Appeals for the Seventh Circuit) ruled that the author's "opinions" about how the term "substantially related" should be interpreted were simply legal arguments on that issue. Accordingly, in an unpublished order, he struck the author's affidavit but *sua sponte* determined to consider it as a supplemental brief. This brilliant move allowed the court to consider the author's arguments on the merits but removed the fiction that he was anything other than a pure advocate and also removed the conceit that any lawyer can testify *under oath* about the content of the law. Several colleagues specializing in the law of lawyering have reported similar experiences.

With Judge Hamilton's example in mind, it should be clear in retrospect that the affidavit that the author prepared in the asbestosis case in Corpus Christi, which ultimately dealt with the applicability of the crime-fraud exception to the attorney–client privilege, should have been rejected as improper "testimony" about the law. The author was a pure advocate in that case and should have been required to file a brief if his views were to be heard. *See* discussion *supra* note 71 and accompanying text.

More recently, the affidavits of Professors Andrew Perlman and Steven Gillers, whose expertise could not possibly be questioned, were nonetheless stricken because their expert "testimony" was actually legal advocacy. United States *ex rel.* Fair Lab. Practices Assocs. v. Quest Diagnostics, Inc., No. 05 Civ. 5393(RPP), 2011 WL 1330542, at *6 (S.D.N.Y. Apr. 5, 2011).

133. *See supra* discussion Part I.C.

worthier of belief than the first, because only the first had qualified his opinions. Either way, the defendant would gain a tactical advantage to which he was not entitled.

To surrender such an unfair advantage, it would be necessary not only for the expert and the advocate presenting his testimony to acknowledge that he was assuming the client was over-dramatizing the events that transpired at the mediation *but also that it would be up to the jury to determine the true story*. With just that small adjustment, the task of *convincing* the jury would be returned to the advocates on both sides, and the task of *deciding*, without unfair influences, would be returned to the jury.

In the current climate, there may be some difficulty in putting this important change into universal or even common practice. Many advocates and lawyer–experts may fear being disadvantaged if they abandon disguised testimony and the other side does not. It is a justifiable fear, similar to that of being the first to engage in unilateral nuclear disarmament.

Trial judges can be of great assistance in this project. If trial judges are alert to the problem, they can caution counsel during final pretrial preparations and even admonish counsel during a recess or at a sidebar during trial. Judges can also welcome objections to the form of the question if it appears that disguised testimony is being "teed up." And a trial court alert to the problem can make a special effort to clarify for the jury in final instructions exactly how expert testimony should be treated.

C. *Bifurcated Trials Should Be Considered to Separate Historical Facts from Evaluative Facts*

The problem of disguised testimony could be eliminated completely if the jury was asked to find the historical facts *first* (such as through special interrogatories), *before* lawyer–experts were permitted to give their opinions about the significance of those facts. In such a regime, there would be no need for the experts to state their assumptions about the historical facts—the facts would already have been set in stone by the jury, and the experts would all be working from the same script thereafter.

The impact on a case, such as the alleged betrayal at mediation in the earlier hypothetical, would be decisive because there is almost no gray area between the two versions of the historical facts. If the jury heard all of the parties and any other witnesses who might have been present at the mediation, and determined that the betrayal was exactly as the former client claimed, it is impossible to believe that any plausible expert witness for the defendant would condone the behavior. By the same token, if the

jury found that the client's expert witness was mistaken in his initial factual assumptions—that there had been no threat and no coercion—then surely that expert would recant his original opinions as well, because the foundation for them would have been stripped away.

Bifurcating trials this way would be a radical departure from current practices *procedurally*, and it would be awkward or would not work at all if the historical facts themselves included elements that a jury would not be able to process without expert help. That aside, this innovation would not only be *jurisprudentially* sound but also would save the court and the jury a lot of time, because much of the supposed "battle of the experts" would evaporate in the face of a single set of facts.

IV. CONCLUSION

There is something radically wrong with the way in which lawyer–expert witnesses are—not always, but too often—used in litigation in the United States today. The problem is deep-seated because the relative jurisprudential functions of judge, jury, advocate and witness have been distorted.

When the expert witness is a lawyer, the lawyer responsible for presenting the case will too often push the witness into disguised testimony about the historical facts, thus usurping the jury's function, or disguised testimony about the law, thus unseating the judge. Too often, moreover, the lawyer–expert readily allows himself to be used in this improper fashion.

Because the problem is largely lawyer-made, it is not surprising that the cure must come from within the legal profession as well. The first principle of the ethics of advocacy is that clients are entitled to maximum zealous representation, but only *within* the bounds of law. Well-settled rules of the road about the litigation process, including the law–fact distinction, the allocation of decision-making authority between judge and jury, and the rules of evidence, must all be counted as "law" for this purpose.

Lawyers have an ethical duty to bring themselves back within proper boundaries and to police each other at the same time. Judges, moreover, have a professional duty to keep all actors in the judicial system coloring within the lines.

Regardless of the origins of the problems discussed in this Article—overzealousness in the adversarial culture is undoubtedly part of it—the continuing worsening of the problem may be attributable to habit, inertia, and lack of attention. Perhaps this Article can contribute to recognition of

the need for a change in the culture.