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Expert Testimony in Criminal Cases

White-collar cases frequently involve highly sophisticated financial transactions, voluminous documents, and the potential for significant sentences should the defendant be convicted. In order to assist the jury in wading through this information, both the defense and the government may seek the admission of expert testimony to assist the trier of fact to understand the evidence. Expert testimony can have a significant impact on the outcome of a criminal case.

Recent cases raise two separate issues with respect to expert testimony in criminal cases:

- First, the federal courts of appeals have recognized a defendant's right to present expert testimony in order to explain the defense to the jury.
- Second, two U.S. Court of Appeals for the Second Circuit cases have examined the government's sometimes questionable use of law enforcement officials as expert witnesses.

These cases demonstrate that the manner in which these expert witnesses testify and the substance of their testimony can seriously prejudice a defendant.

A Defendant's Right

The defendant's right to present expert testimony was addressed by the Tenth Circuit in *United States v. Nacchio*.[1] Joseph Nacchio, former chief executive of Qwest Communications, was convicted in the U.S. District Court for the District of Colorado of 19 counts of insider trading and sentenced to six years in prison, fines totaling $19 million, and ordered to forfeit over $52 million. In March 2008, a panel of the Tenth Circuit voted 2-1 to reverse the conviction, finding that the district court judge improperly excluded the testimony of Mr. Nacchio's expert witness.

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The government alleged that Mr. Nacchio engaged in insider trading by selling Qwest stock while in possession of material nonpublic information. Specifically, the government asserted that Mr. Nacchio knew that Qwest was relying heavily on nonrecurring sources of revenue to meet its first- and second-quarter numbers and that the company had not shifted to recurring revenue streams as required to meet its year-end numbers. In defense, Mr. Nacchio disclosed his intention to call an expert who would analyze Mr. Nacchio's trading patterns and testify that his sales were not consistent with insider trading and that Qwest's stock price was not significantly affected when the allegedly material information was released.

The government objected to the admission of the expert evidence, arguing that the defense had failed to comply with the notice requirements of Federal Rule of Criminal Procedure 16, which governs disclosure obligations of both the government and defense. With respect to expert witnesses, the rule requires the defendant, "at the government's request, [to] give to the government a written summary of any testimony that the defendant intends to use [] as evidence at trial."[2] A defendant is only required to provide this information if the defendant had requested the same of the government and the government complied.

The district court concurred with the government that the defendant had failed to satisfy the requirements of Rule 16, finding that Mr. Nacchio had "offer[ed] no bases or reasons whatsoever for [the expert's] opinions contained in the summary" disclosure. Mr. Nacchio was instructed to file a revised disclosure, which he did. The subsequent disclosure included a "Summary of Opinions and Bases for Opinions" explaining the expert's intended testimony. Once again, the government objected, filing motion papers arguing that the Rule 16 disclosure was still inadequate. The government further reasoned that even if Mr. Nacchio had complied with Rule 16, the court should find that the defense had not established the admissibility of the evidence under *Daubert v. Merrell Dow Pharmaceuticals*, the Supreme Court decision relating to the admissibility of expert testimony.[3]

When Mr. Nacchio's defense team called their expert to the stand the following day, the court dismissed the jury and, without hearing argument from either party, ruled that the expert's testimony was inadmissible. Explaining his rationale, the district judge found the defendant's Rule 16 submission to contain significant deficiencies under *Daubert* and *Kumho Tire*. In addition, the court found that the expert disclosure failed to set forth any methodology. Finally, the court concluded that the testimony would not be helpful to the jury, as required under Federal Rule of Evidence 403 or 702, "because expert economic analysis would 'invit[e] the jurors to abandon their own common sense and common experience and succumb to this expert's credentials.'"[4]

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Tenth Circuit's Holding

The Tenth Circuit panel disagreed. First, the Court of Appeals examined the disclosure requirements of Rule 16, finding that it did not include an extensive discussion of the expert's methodology. Rather, the court noted that the purpose of the rule was to give opposing counsel notice, allowing them "more complete pretrial preparation." The court strongly stated that the rule was not designed, however, to allow a district court to move immediately to a *Daubert* determination without briefs, a hearing, or other appropriate means of testing the proposed expert's methodology.

Observing that Mr. Nacchio's Rule 16 disclosure contained his expert's opinions, the bases of and reasons for those opinions, and a recitation of the witness' qualifications, the court found that the defense had adequately met its disclosure requirements under the rules. Speculating on the basis for the district court's ruling, the court noted that the district court judge may have confused the more stringent expert witness disclosure requirements under the Civil Rules of Procedure[5] with those required under Criminal Rule of Procedure 16.

The Court of Appeals then turned to the government's argument that even if the defendant had complied with Rule 16, the district court properly excluded the testimony under *Daubert* and F.R.E. 702. As an initial matter, the court found that the district court failed to make any genuine determination under *Daubert*, ruling instead on the Rule 16 disclosures. Further, the court found that such a ruling would have been an abuse of discretion, as the record was "devoid of any factual basis on which a *Daubert* ruling could be made." "The district court could not make an informed *Daubert* determination without hearing [] testimony or receiving submissions on the issue."[6]

Finally, the Court of Appeals concluded that the district court was erroneous in finding that the expert testimony would not have been helpful to the jury or was more prejudicial than probative. "This misunderstands the nature of economic expertise. An economic expert is permitted not only to tell the jury that an economic concept 'is an issue' but to analyze the concept and offer informed opinions. In other words, expert testimony may 'assist the trier of fact to understand the facts already in the record, even if all it does is put those facts in context.'"[7]

In reversing Mr. Nacchio's conviction, the Court of Appeals noted that the right of a defendant to call witnesses was a fundamental element of due process and crucial for defending the charges against him. In this case, the court found that the exclusion of Mr. Nacchio's expert's testimony was prejudicial and may have changed the jury's mind. Because the record did not otherwise contain "overwhelming evidence of guilt," the exclusion was not harmless and the conviction was reversed.

There is a post-script to the Tenth Circuit's decision, however. On July 30, 2008, the Tenth Circuit granted the government's petition for a rehearing en banc.

Although the admission of expert testimony in support of a defense theory is invaluable to white-collar defendants, the improper use of expert testimony by the government can be devastating, possibly amounting to a constitutional violation.

Key Questions

As framed by the court, the questions to be addressed are: (1) whether the defendant was "sufficiently on notice that he was required either to present evidence in support of the expert's methodology or request an evidentiary hearing in advance of presenting the expert's testimony"; (2) whether the defendant had "an adequate opportunity to present such evidence or request an evidentiary hearing in advance of presenting the expert's testimony"; (3) whether the defendant had the burden of requesting such a hearing; and (4) whether the district court abused its discretion in disallowing the evidence and, if so, whether the appropriate remedy is a new trial or remand for an evidentiary hearing.[8] The case was argued on Sept. 25, and is awaiting decision.

The Second Circuit also has addressed the importance and admissibility of expert testimony on a criminal defendant's behalf. Most recently, in *United States v. Joseph*,[9] the court reviewed a district court's decision excluding expert testimony. The defendant was convicted in the Southern District of New York for traveling in interstate commerce for purpose of engaging in illicit sexual conduct with a minor. At trial, the defendant sought to call an expert to testify about the culture of role-playing in the context of sexually explicit conversations on the Internet. The district court rejected the admissibility of this testimony.

Although the Court of Appeals vacated the defendant's conviction and remanded specifically because of the trial court's erroneous jury instructions, the court noted that the issue of the admissibility of the expert testimony was likely to recur at retrial and "urge[d] the District Court to give a more thorough consideration to the defendant's claim to present [the expert's] testimony."

First, the court said that the social science expert's opinions were likely to help the jury understand the evidence. "Although some jurors may have familiarity with Internet messaging, it is unlikely that the average juror is familiar with the role-playing activity that Dr. Herriot was prepared to explain in the specific context of sexually oriented conversation in cyberspace."[10]

In addition, the court stated that the expert's testimony would be relevant, dismissing the dissent's argument that the defendant's testimony adequately addressed the role-playing explanation for the defendant's conduct. "[W]hen the Government implores a jury to find the defendant and his explanation not credible, we think the presentation of that explanation from a qualified expert would be significant, especially where the explanation is not one with which jurors are likely to have familiarity."[11]

Government's Experts

Although the admission of expert testimony in support of a defense theory is invaluable to white-collar defendants, the improper use of expert testimony by the government can be devastating, possibly amounting to a constitutional violation. Last month, the Second Circuit vacated the convictions of two gang members after finding that the admission of testimony from the government's law enforcement expert witness violated the Federal Rules of Evidence and the Sixth Amendment Confrontation Clause.

In *United States v. Mejia*,[12] the government indicted a group of gang members, charging them with various racketeering activity for activities associated with two drive-by shootings. At trial, the government called Hector Alicea, an officer with the New York Sate police to serve as an expert witness on the gang's "structure and the

derivation, background and migration of the [] organization, its history and conflicts, as well as its hierarchy, cliques, methods and activities, modes of communication and slang."

During voir dire examination and cross-examination, defense counsel elicited testimony from Mr. Alicea that revealed that a significant portion of his testimony and knowledge was based on information learned during custodial interrogations with various gang members. Defense counsel objected to the admission of Mr. Alicea's testimony, arguing that it was "impermissible hearsay." The trial court disagreed, allowing Mr. Alicea to testify. The defendants appealed.

Before reaching the substance of the defendants' arguments, the Court of Appeals chronicled the emergence of the law enforcement officer expert as a "skilled witness" in the 1980s, noting that it frequently had upheld the admission of that type of expert testimony because it aided the jury in its understanding of the evidence, such as the nature and structure of organized crime organizations. Law enforcement officers in these cases were able to testify about "much that was outside the expectable realm of knowledge of the average juror," such as the "operation, symbols, jargon, and internal structure of criminal organizations."[13]

The court noted, however, that the use of this type of expertise should be limited, stating that "[a]n increasingly thinning line separates the legitimate use of an officer expert to translate esoteric terminology or explicate an organization's hierarchical structure from the illegitimate and impermissible substitution of expert opinion for factual evidence." The court observed that the improper use of expert testimony in this way replaced a jury's factfinding function.[14]

The court concluded that this line had been crossed with respect to Mr. Alicea's testimony. First, the court found that much of Mr. Alicea's testimony concerned matters outside the scope of his expertise in violation of Federal Rule of Evidence 702. Specifically, the court said that the witness' testimony about the number of firearms seized from the gang, how many gang members had been arrested for dealing narcotics, and the number of murders committed by gang members during a given period of time was material "well within the grasp of the average juror" through the admission of separate fact evidence by the government. The court noted that the government could not use expert testimony as a substitute for factual evidence in the first instance, using as an example proof of a pattern of racketeering activity involving murder. "[T]hat an individual was murdered remains a *fact* that must be proven by competent *evidence*."

The court further concluded that Mr. Alicea's testimony was inadmissible hearsay, admitted in violation of Federal Rule of Evidence 703 and the Confrontation Clause of the Sixth Amendment. Although experts are permitted to rely on hearsay to form their opinion, they can not relay that hearsay directly to the jury, allowing the government to circumvent the hearsay rules. Because the hearsay statements relied upon by Mr. Alicea were made in the course of custodial interrogations of other gang members, they are deemed testimonial under *Crawford v. Washington*.

When faced with the intersection of the *Crawford* rule [prohibiting the introduction of out-of-court testimonial statements made by an absent witness unless that witness is unavailable and the defendant had a prior opportunity for cross-examination,] and officer experts, we have determined that an officer expert's testimony violates *Crawford* "if [the expert] communicated out-of-court testimonial statements of cooperating witnesses and confidential informants directly to the jury in the guise of an expert opinion."[15]

With respect to Mr. Alicea's testimony, the court concluded that he was simply summarizing the investigation that was not otherwise a part of the record and presenting it to the jury as an expert opinion. Furthermore, because of the officer's status as an expert, his factual testimony was likely to have "unmerited credibility" before the jury. Because these errors were not harmless, the court vacated the convictions and remanded the case.

The government's use of law enforcement expert witnesses to present summary factual information to the jury is not the only way in which expert testimony can be improperly presented. In *United States v. Scop*, the Second Circuit examined whether the testimony of the government's expert witness improperly included legal conclusions.[16] The defendants were convicted in the Southern District of New York of perjury, mail fraud, securities fraud, and conspiracy. At trial, an SEC investigator testified as an expert witness in the securities trading practices. Over defense objections, the witness was allowed to testify as to his opinion of whether the defendants had engaged in a scheme to defraud investors. On appeal, the defendants argued that the opinion testimony improperly embodied legal conclusions and was improperly allowed.

The Court of Appeals agreed, finding that the witness' repeated statements embodying legal conclusions exceeded the permissible scope of opinion testimony under the Federal Rules of Evidence. "Had [the witness] merely testified that controlled buying and selling of the kind alleged here can create artificial price levels to lure outside investors, no sustainable objection could have been made. Instead, however, [the witness] made no attempt to couch the opinion testimony at issue in even conclusory factual statements but drew directly upon the language of the statute and accompanying regulations concerning 'manipulation' and 'fraud.'" Finding that the opinions were highly prejudicial and invaded the court's province in instructing the jury as to the applicable law, the court concluded they could not have been helpful to the jury in carrying out its legitimate function. Accordingly, the convictions related to this testimony were reversed.[17]

Conclusion

White-collar defendants can benefit greatly from the use of expert witnesses to explain the evidence and their theory of the case. Counsel should advocate for the presentation of this evidence as integral to a defendant's right to present a defense. In addition, defense counsel should carefully monitor the government's use of expert testimony to ensure that neither summary factual information nor legal conclusions are improperly offered to the jury.

1. 519 F.3d 1140 (10th Cir. 2008).
2. Fed. R. Crim. P. 16(b)(1)(C).
3. 509 U.S. 579 (1993).
4. 519 F.3d at 1150.
5. Fed. R. Civ. P. 26(a)(2)(B)(i).
6. 519 F.3d at 1153.
7. Id. at 1155 (citing 4 Jack B. Weinstein & Margaret A. Berger, Weinstein's Federal Evidence §702.03[1] (2d ed.2006)).
8. 535 F.3d 1165 (10th Cir. 2008).
9. 542 F.3d 13 (2d Cir. 2008).
10. Id. at 22.
11. Id. at 22, fn. 10.
12. __F.3d__, 2008 WL 4459289 (2d Cir. Oct. 6, 2008).
13. Id. at *7.
14. Id. at *8.
15. Id. at *16 (citing *United States v. Lombardozzi*, 491 F.3d 61, 72 (2d Cir. 2007)).
16. 846 F.2d 135 (2d Cir. 1988). One of the authors and other members of the firm represented one of the defendants in this appeal before the Second Circuit.
17. Id. at 140.