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Expert Testimony on the Law: Excludable or Justifiable?

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I. INTRODUCTION

Expert testimony on domestic law¹ currently occupies an unenviable position in the federal² trial system. The Federal Rules of Evidence³ do not recognize it. The Federal Rules of Civil⁴ and Criminal⁵ Procedure do not specifically permit, much less encourage, its use. Neither the judiciary nor legal scholars have shown much interest in the subject.⁶ A party seldom offers expert legal testimony, and when he does, the judge often excludes it.⁷

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1. For purposes of this article, domestic law includes federal law and the laws of all the states.

2. This article examines the use of expert testimony on the law only in federal courts, but the principles discussed are equally applicable to state courts.

3. 28 U.S.C. app. § 2076 (1976 & Supp. V 1981). The Federal Rules of Evidence govern the admission of evidence at trial in federal courts.

4. *Id.* § 2072.

5. 18 *id.* app. § 3001.

6. Reported cases rarely mention testimony on the law or its application. *Sharp v. Coopers & Lybrand*, 457 F. Supp. 879 (E.D. Pa. 1978), discussing the testimony of Professor Bernard Wolfman, is an exception. Professor Wolfman, a tax specialist at Harvard Law School, has testified in more than six cases, but this is the only case that mentions his testimony. Courts have either considered the testimony on the law to be inconsequential or the opinions have not been published. See *Wallin v. Lanz*, No. 79-1627 (S.D. Fla. 1982).

Two law review casenotes and one law review comment have discussed expert testimony on the law. Comment, *Criminal Liability for Willful Evasion of an Uncertain Tax*, 81 COLUM. L. REV. 1348 (1981); Note, *United States v. Garber: The Propriety of Expert Legal Testimony*, 26 Sr. LOUIS U.L.J. 447 (1982); Case Note, *The State of the Law as Evidence for the Jury: United States v. Garber*, 46 Mo. L. REV. 255 (1981).

7. See, e.g., *Marx & Co. v. Diners' Club, Inc.*, 550 F.2d 505, 510 (2d Cir.), *cert. denied*, 434 U.S. 861 (1977) (reversible error to admit expert testimony on the legal significance of various facts addressed at trial); *Cooley v. United States*, 501 F.2d 1249, 1253 (9th Cir. 1974), *cert. denied*, 419 U.S. 1123 (1975) (proffered evidence consisting of written legal opinions properly excluded); *Richard T. Green Co. v. City of Chelsea*, 149 F.2d 927, 930 n.5 (1st Cir.), *cert. denied*, 326 U.S. 741 (1945) (district court properly excluded the testimony of the tax assessor on the question of whether property was real or personal); *Lisansky v. United States*, 31 F.2d 846, 851 (4th Cir. 1929) (proper to exclude expert opinions of accountants that profit did not have to be reported until received); *Allen v. Union R.R.*, 162 F. Supp. 635, 637 (W.D. Pa. 1958) (Interstate Commerce Commission inspector's interpretation of a safety regulation properly excluded).

Expert testimony on the law generally lacks recognition as a trial resource.⁸

Despite its disfavored status, expert legal testimony has occasionally been permitted at trial to assist the judge⁹ or the jury.¹⁰ This article explores the propriety of expert testimony on domestic law in both contexts—to assist the court in determining questions of law, and to aid the jury¹¹ in deciding matters of fact.¹²

This article concludes that the prevailing attitude against the use of all expert legal testimony is inappropriate. Instead, such testimony should be considered on a case-by-case basis. While valid historical reasons may once have existed for completely excluding expert legal testimony,¹³ the current predisposition against even limited usage disregards the utility of the testimony to judge and jury.¹⁴

The first part of this article defines expert legal testimony and explains why it has traditionally been excluded. The second part presents the argument for selective use of expert legal testimony. The next section describes the cases in which expert legal testimony has been permitted at trial. The final section provides a brief assessment of the merits of such legal testimony.

8. At one time, however, the English court system permitted testimony on the law; the testimony in medieval English trials consisted solely of legal conclusions. Farley, *Instructions to Juries—Their Role in the Judicial Process*, 42 YALE L.J. 194, 196 (1932).

9. See, e.g., *Ohio v. Collins (In re Madeline Marie Nursing Homes)*, 694 F.2d 433, 455 (6th Cir. 1982) (district court should have availed itself of expert testimony on Ohio Medicaid regulations).

10. See, e.g., *United States v. Garber*, 607 F.2d 92 (5th Cir. 1979); *Laverne v. Corning*, 376 F. Supp. 836 (S.D.N.Y. 1974). *Contra United States v. Herzog*, 632 F.2d 469 (5th Cir. 1980).

11. For purposes of this article, the fact finder will always be a jury. Many of the problems discussed here will not arise if the judge determines both law and fact. Adherence to the evidentiary rules is less strict in nonjury trials. C. McCORMICK, *HANDBOOK OF THE LAW OF EVIDENCE* § 60, at 137 (E. Cleary 2d ed. 1972); G. LILLY, *AN INTRODUCTION TO THE LAW OF EVIDENCE* § 3, at 3 n.4 (1978).

12. Expert testimony could also be used to assist the judge in clarifying the law for the jury. This article will not address that use.

13. There existed an historical presumption of judicial expertise, which permitted the judge to take judicial notice of domestic law. The judge often determines the applicable law without any requirement of formal pleading or proof and is free to choose the sources of information upon which he intends to rely. C. McCORMICK, *supra* note 11, § 335, at 776.

14. *Id.* Courts formerly refused to permit expert testimony on foreign law. Foreign law was a question of fact to be proved and pleaded to the jury until the enactment of Federal Rule of Civil Procedure 44.1 and Federal Rule of Criminal Procedure 26.1 in 1966. See generally Miller, *Federal Rule 44.1 and the "Fact" Approach to Determining Foreign Law: Death Knell for a Die-Hard Doctrine*, 65 MICH. L. REV. 613, 617 (1967).

II. DEFINING EXPERT LEGAL TESTIMONY

Expert testimony on the law consists of an opinion on the state of domestic law, which includes federal law, the law of the jurisdiction in which the court sits, and the law of sister jurisdictions. The testimony may bear on the relative certainty or uncertainty of the law, what the law is, what it means, or a combination of these.

Expert legal testimony is given by a witness in open court¹⁵ in much the same way as factual testimony. The expert is subject to cross-examination¹⁶ and to questions from the judge.¹⁷ When expert testimony on the law is used to assist the jury in determining a question of fact,¹⁸ the usual evidentiary requirements apply. The testimony must be relevant—tending to make a fact in issue more or less probable¹⁹—and may not be unfairly prejudicial, confusing, or the cause of undue delay.²⁰ Special evidentiary limitations on expert witnesses require that the expert be qualified and that his testimony assist the jury in determining a fact in issue or in understanding the evidence.²¹ In contrast, expert legal testimony offered to assist the judge is not considered evidence and is not subject to any guidelines except those imposed by the court.

III. THE TRADITIONAL RATIONALE FOR EXCLUDING EXPERT LEGAL TESTIMONY

The traditional rationale for excluding expert testimony on domestic law is that it is unnecessary, both practically and conceptually. As a conceptual matter, the judge is charged with full responsibility for knowing the domestic law and resolving any questions about it. On a practical level, if the judge requires assistance in determining the law, sources superior to legal testimony allegedly exist.

At trial, responsibilities are allocated between judge and jury²² so that issues of law are reserved for the court and questions of

15. FED. R. CIV. P. 43.

16. FED. R. EVID. 611.

17. *Id.* 614(b).

18. *See id.* 702.

19. *Id.* 402.

20. *Id.* 403.

21. *Id.* 702.

22. *See* 9 J. WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 2549, at 499-500 (3d ed. 1940).

fact for the jury.²³ Within the present trial system, it is almost axiomatic that the judge is the sole arbiter and dispenser of the law at trial.²⁴ The judge decides the content of the law²⁵ and instructs the members of the jury on the applicability of the law to the facts of the case.²⁶

The judge is responsible for deciding questions of law because of the presumed legal expertise he has achieved through training and experience.²⁷ This presumption of expertise is the primary reason that expert legal testimony has been deemed unnecessary. Professor Wigmore has written:

The general principle . . . is . . . that the tribunal does not need the witness' judgment and hence will insist on dispensing with it. But here it is not that the *jury* can of themselves determine equally well; it is that the *judge* (or the jury as instructed by the judge) can determine equally well. . . . It is not the common knowledge of the jury which renders the witness' opinion unnecessary, but the special legal knowledge of the judge.²⁸

If the judge lacks sufficient expertise in a particular area of the law, the system affords well-accepted means of assistance. The judge may undertake independent investigation on his own or may direct law clerks²⁹ to do the research. The judge may also request briefs from counsel or hear oral argument.³⁰ Given the presumed

23. Even the great English jurist, Lord Coke, adopted this definition of the roles of judge and jury at trial. See *Dowman's Case*, 77 Eng. Rep. 743 (K.B. 1585).

[T]his they may do by the common law, which has ordained, that matters in fact shall be tried by jurors, and matters in law by the Judges: . . . the saying of the law, and the wisdom of the law was to refer things to persons in which they had knowledge, and were expert, according to the ancient rule . . . ; and therefore the law will not compel . . . the jurors, who have not knowledge in the law, to take upon them the knowledge of points in law . . . , but leave them to the consideration of the Judges.

Id. at 750.

24. J. WIGMORE, *supra* note 22.

25. C. McCORMICK, *supra* note 11, § 335, at 776.

26. The judge informs the jury through sets of instructions at the close of each case and may request that counsel propose instructions to be given to the jury. *Id.* § 345, at 824. The judge also determines the admissibility of evidence, FED. R. EVID. 104, and matters of procedure such as the correctness of service of process and jurisdiction.

27. 7 J. WIGMORE, *supra* note 22, § 1952, at 103. Permitting only the judge to rule on questions of law enhances "precision in the statement of the rule." See 1 W. HOLDSWORTH, *A HISTORY OF ENGLISH LAW* 168 (1956).

28. 7 J. WIGMORE, *supra* note 22, § 1952, at 103 (footnote omitted).

29. Each federal district court judge employs two full-time law clerks. The judge may apply for a third clerk to deal with a large case or other pressing matter.

30. In determining the content or applicability of a rule of domestic law, the judge is unrestricted in his investigation and conclusion. He may reject the pro-

expertise of the judge and the sources at his disposal, expert legal testimony to the court appears to invade the province of the judge and either to convey information that the court already possesses or to convey data that the court could easily obtain.

Expert legal testimony to the jury appears to have similar deficiencies. If the testimony were presented to the jury, it would arguably usurp the judge's role as sole dispenser of the law, impugning judicial integrity in the process. Moreover, the substance of the testimony may simply repeat what the judge already has stated or may otherwise confuse the jury with inconsistencies.³¹

IV. THE JUSTIFICATION FOR ALLOWING EXPERT LEGAL TESTIMONY

The traditional rationale, described above, for excluding expert testimony on domestic law is not entirely persuasive today. Specific situations exist where the benefits of expert legal testimony outweigh its costs. In these situations, both the underlying objectives of the trial system and the procedural rules that shape the system support the utilization of the testimony.³²

A. *The Usefulness of Expert Legal Testimony and the Objectives of the Trial System*

The objectives of the trial system, as reflected in its rules of procedure and evidence, provide the criteria for the admission of evidence at trial and are, *a fortiori*, the standard by which expert legal testimony should be measured. Two central objectives of the trial system are fairness and efficiency. Each plays a special role. Fairness promotes public confidence in the system. It encompasses notions of uniformity, regularity, predictability, and the opportunity to be heard. Efficiency, on the other hand, focuses on the operability of the system. Procedural rules, which ensure that the system is administrable as well as fair, increase the efficiency of the system.

positions of either party or of both parties. He may consult the sources of pertinent data to which they refer, or he may refuse to do so. He may make an independent search for persuasive data or rest content with what he has or what the parties present. . . . [T]he parties do no more than to assist; they control no part of the process.

FED. R. EVID. 201 advisory committee note (quoting Morgan, *Judicial Notice*, 57 HARV. L. REV. 269, 270-71 (1944)).

31. Under the Federal Rules of Evidence, testimony that is confusing should be excluded. FED. R. EVID. 403.

32. See *infra* text accompanying notes 66-69.

Efficiency dictates that the evidence admitted at trial for the jury's consideration must be both useful and cost effective. Fairness demands that the evidence not be fairly prejudicial. The Federal Rules of Evidence expressly reflect these tenets.³³ Notions of efficiency and fairness also suggest that the judge, in determining the applicable law, should consult only those sources that would assist him and that have some indicia of reliability, such as recognized authorities. If expert testimony on the law to judge or jury can be justified on grounds of efficiency and fairness, the testimony is appropriate.

B. *Usefulness to the Judge*

In cases involving obscure issues of domestic law,³⁴ the judge may lack the resources required to make an informed determination of those issues. For example, applicable precedent or other written authorities may not be readily accessible in published form. In these situations, the court must resort to alternative sources to determine the law. One very useful source may be expert legal testimony.

An instructive parallel is the treatment of foreign law questions at trial. Historically, the inaccessibility of reliable sources led to the use of expert legal testimony in determining questions of foreign law.³⁵ Foreign law questions, often not capable of ready and accurate determination by the court,³⁶ were generally treated as questions of fact, subject to formal pleading and proof.³⁷ Expert

33. FED. R. EVID. 402, 403.

34. See *Ohio v. Collins* (*In re Madeline Marie Nursing Homes*), 694 F.2d 433, 445 (6th Cir. 1982) (involving Ohio Medicaid regulations).

35. See *Miller*, *supra* note 14, at 617; see also *Black Diamond S.S. Corp. v. Robert Stewart & Sons*, 336 U.S. 386, 397 (1949); *Philp v. Macri*, 261 F.2d 945 (9th Cir. 1958); *Dulles v. Katamoto*, 256 F.2d 545 (9th Cir. 1958); *United States ex rel. Zdunic v. Uhl*, 137 F.2d 858, 861 (2d Cir. 1943); *Tsangaraskis v. Panama S.S. Co.*, 197 F. Supp. 704 (E.D. Pa. 1961); J. BEALE, A TREATISE ON THE CONFLICT OF LAWS § 621.2 (1935).

American courts for many years treated the law of sister states as foreign law to be pleaded and proved. Note, *Judicial Notice of Foreign Law*, 18 VAND. L. REV. 1962, 1974 (1965).

36. See *Miller*, *supra* note 14, at 619. The judge was not presumed to know the law outside of his own jurisdiction. Note, *supra* note 35, at 1974.

37. The treatment of a foreign law question depended upon whether the law was written or unwritten. Note, *supra* note 35, at 1974.

Foreign law questions received disparate treatment. For example, while it was accepted in English courts that foreign law would not be treated the same as English law, it was unclear exactly what proof was required, how such proof should be offered, and who should decide the issue. *Id.* at 1973. American courts also permitted various forms of proof. See *Miller*, *supra* note 14, at 620-24; see also *Siegelman v. Cunard White Star Ltd.*, 221 F.2d 189

testimony became the widely accepted means for proving issues of foreign law.³⁸

In 1966, with the adoption of Rule 44.1 of the Federal Rules of Civil Procedure and Rule 26.1 of the Federal Rules of Criminal Procedure, foreign law issues finally received uniform treatment as questions of law for the court rather than as questions of fact.³⁹ The new rules alleviated the difficulties that had existed in proving foreign law. These rules, which are essentially identical, expressly reaffirmed the court's freedom to consider multiple sources, including expert testimony, in determining foreign law questions: "The court, in determining foreign law, may consider any relevant material or source, *including testimony*, whether or not submitted by a party or admissible under the Federal Rules of Evidence."⁴⁰

Obscure questions of domestic law are analagous to questions of foreign law in that both may present problems of unreliable and inaccessible source material. When clear interpretation of the law is not available, both fairness and efficiency dictate that the most reliable source of information should be considered. In matters of obscure domestic law, as in matters of foreign law, expert legal testimony will often be the most reliable source of information available to the court.

A legal expert may also assist the court in cases involving complex questions of law by enhancing the judge's understanding of the meaning of a particular law. This may occur, for example, in a complicated business or antitrust matter brought before a judge who seldom hears these types of cases.

The complexity and obscurity of legal questions has increased dramatically in recent years, further justifying the use of expert legal testimony. Prior to the modern technological revolution, it was easier for judges to be "experts" on the law. Laws were not as numerous⁴¹ and were often less complex. Judicial calendars were

(2d Cir. 1955); FED. R. CIV. P. 44.1 advisory committee note.

38. Note, *supra* note 35, at 1977; Miller, *supra* note 14, at 622.

39. "Rule 44.1 is added by amendment to furnish Federal Courts with a uniform and effective procedure for raising and determining an issue concerning the law of a foreign country." FED. R. CIV. P. 44.1 advisory committee note. "Rule 26.1 is substantially the same as Civil Rule 44.1." FED. R. CRIM. P. 26.1 advisory committee note.

One commentator has noted: "One of the objectives of Rule 44.1 is to abandon the fact characterization of foreign law and to make the process of determining alien law identic with the method of ascertaining domestic law to the extent that it is possible." Miller, *supra* note 14, at 657.

40. FED. R. CRIM. P. 26.1 (emphasis added). The Federal Rule of Civil Procedure is identical, except that it reads "admissible under Rule 43." FED. R. CIV. P. 44.1.

41. The second session of the 97th Congress passed more than 400 amendments to ex-

not as severely backlogged.⁴² There were not as many multi-party, multi-district, or multi-month trials. In the past few decades, technological advances have had a significant effect on the law. Break-throughs such as those that occurred in the computer industry have stimulated entirely new areas of scientific proof.⁴³ The proliferation of big business has led to exceedingly complex takeover fights and mammoth corporate mergers.⁴⁴ The tax laws have undergone such exponential growth that interpretation of the Internal Revenue Code is now beyond the comprehension of all but tax specialists.⁴⁵ Precedent, in the form of published legal opinions, has proliferated.⁴⁶ The law now includes areas of such depth and difficulty that specialization is almost a necessity to comprehend a single field of law. For these reasons, a judge may need and benefit from the assistance of legal experts.⁴⁷

Yet, if expert testimony is to be truly efficient, it must be superior, at least in some respects, to other forms of assistance such as independent research or memoranda of law.⁴⁸ Expert testimony

isting laws and enacted more than 40 new federal statutes. 1982 U.S. CODE CONG. & ADM. NEWS Table 10, 161-70.

42. Some cases have taken as long as ten years to resolve. See, e.g., *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886 (1982) (The complaint was filed in a Mississippi state court on October 31, 1969. The United States Supreme Court decided the case on July 2, 1982.).

43. Ladd, *Expert Testimony*, 5 VAND. L. REV. 414, 417 (1952).

44. See generally *Panter v. Marshall Field & Co.*, 646 F.2d 271 (7th Cir.), cert. denied, 454 U.S. 1092 (1981); *Marshall Field & Co. v. Icahn*, 537 F. Supp. 413 (S.D.N.Y. 1982).

45. In response to taxpayers' questions, the Internal Revenue Service issued more than 50,000 letter rulings in 1982. Private Letter Rulings 8201001-8252166, I.R.S. LETTER RUL. REP. (CCH) (Jan. 1982-Jan. 1983).

46. Between 1920 and 1980 the Federal Reporter published 191 volumes; 143 of those volumes contain cases decided between 1960 and 1970.

47. The practice of courts in fifteenth and sixteenth century England may provide an instructive parallel. There, while testimony by witnesses was largely disfavored due to a fear of perjury, Rosenthal, *The Development of the Use of Expert Testimony*, 2 LAW & CONTEMP. PROBS. 403 (1935), witnesses were still summoned on occasion as "expert assistants to the court," 9 W. HOLDSWORTH, *supra* note 27, at 212, to aid the judge on various subjects requiring special knowledge. See, for example, *Buckley v. Thomas*, 75 Eng. Rep. 192 (C.P. 1554) (Saunders, J.):

[I]n 7 H. 6. [about 1429] in a case that came before the Judges, which was determinable in our law, and also touched upon the civil law, they were well content to hear Huls, who was a batchelor of both laws, argue and discourse upon logic, and upon the difference between *compulsione praecisa et causativa*, as men that were not above being instructed and made wiser by him.

Id.

48. Regarding the pecuniary cost of an expert witness on the law, the expert witness fee would probably be no greater than the fees of other experts. The cost may even be less than that for preparing briefs or oral arguments.

It would be inefficient for a judge to permit expert testimony on the law when he is

does have several advantages. A significant advantage is that the legal testimony is offered in the same manner as factual testimony. The judge may ask questions and assess the witness's demeanor, and the parties may cross-examine the witness. Legal testimony may thus prove to be more accurate and responsive than other sources such as arguments of counsel or submitted memoranda.⁴⁹ In addition, other sources may not match the expertise of a witness.

C. *Usefulness to the Jury*

When the state of the law is pertinent to deciding a fact in issue, expert legal testimony may assist jurors in determining that fact. For example, a jury charged with deciding whether a person intentionally violated a tax law may find the law—and what constitutes a reasonable, good faith interpretation of the law—beyond the realm of common understanding. While it remains the proper function of the judge to instruct the jury on the law, expert testimony on the reasonableness of the defendant's interpretation of the law can help the jury to assess the merits of a good faith defense and can provide a frame of reference for the jury's decision.⁵⁰ Testimony on the relative uncertainty of a law may also be useful to a jury. Where the willfulness of a party's conduct is at issue, and the party allegedly relied on the law, logic suggests that the more uncertain the law, the more likely it will be that the party acted in good faith. A witness, however, may not merely assert that the law is so vague that an individual could not have the requisite intent to violate it. If that were the case, the law would be constitutionally void for vagueness. Instead, the testimony should focus on whether the law, though satisfying a challenge on void-for-vagueness grounds, contains ambiguities or uncertainties that would support the defendant's position.⁵¹ The testimony would therefore bear on the credibility of the defense presented and would be relevant to the factual issue of intent.

certain of the law. Allowing the testimony in such a case would simply be a waste of time. Similarly, the introduction of unlimited conflicting opinions will be inefficient.

49. It is reasonable to believe that someone who has written a treatise in the field or has taught the subject for many years is better able to effectively convey the subtleties of the law than are the most competent practicing attorneys.

50. See *United States v. Garber*, 607 F.2d 92, 99 (5th Cir. 1979). *Contra Comment, Criminal Liability for Willful Evasion of an Uncertain Tax*, 81 COLUM. L. REV. 1348, 1355 n.52 (1981).

51. See, e.g., *United States v. Garber*, 607 F.2d 92, 99 (5th Cir. 1979).

The value of testimony to the jury concerning a law's uncertainty or the reasonableness of different interpretations of the law depends on several factors. One factor is whether the defendant relied on the law.⁵² If the defendant did not rely on the law, testimony on reasonable interpretations of the law would probably be irrelevant. Another factor is the type of case in which the testimony is offered. The testimony's value may be enhanced, for example, if it is offered by the defense in a criminal matter. In this situation the defendant has much at stake, and the testimony may be important to the defendant's theory of the case.

Regardless of its relevance, expert legal testimony to the jury may be prejudicial and subject to exclusion. For example, if a preeminent legal expert testifies, the aura of expertise may be difficult to overcome.⁵³ Experts with impressive credentials from all walks of life, however, are routinely permitted to testify before juries, and there appears to be no evidence that legal experts would influence juries any more than experts in other fields do. The potential for prejudice resulting from expert testimony, moreover, is minimized by the availability of cross-examination and jury instructions when appropriate.⁵⁴

Additionally, it may be claimed that an expert's testimony on the uncertainty or vagueness of a law—presented to show that the defendant cannot be guilty of a willful violation—may confuse the jurors, who will later be instructed on the law by the court.⁵⁵ Although the danger of a jury misinterpreting the role of such testimony is real, it can be lessened considerably through careful explanation and instruction from the bench.

D. *The Effect of Expert Legal Testimony on the Trial System*

Expert legal testimony appears to be fair and efficient in terms of its assistance to the judge and jury. It remains inappropriate,

52. See, e.g., *United States v. Clardy*, 612 F.2d 1139, 1153 (9th Cir. 1980).

53. See *United States v. Collins*, 395 F. Supp. 629 (M.D. Pa. 1975), *aff'd*, 523 F.2d 1051 (3d Cir. 1975). "[T]here was a substantial risk that the credentials and persuasive powers of the expert would have had a greater influence on the jury than the evidence presented at trial, thereby interfering with the jury's special role as fact finder." 395 F. Supp. at 637.

54. See Case Note, *The State of the Law as Evidence for the Jury: United States v. Garber*, 46 Mo. L. Rev. 255, 264 (1981).

55. Cf. *Cooley v. United States*, 501 F.2d 1249, 1253-54 (9th Cir. 1974):

It is the function of the jury to determine the facts from the evidence and apply the law as given by the court to the facts as found by them from the evidence. Obviously, it would be most confusing to a jury to have legal material introduced as evidence and then argued as to what the law is or ought to be.

however, if it excessively disrupts the orderly functioning of the judicial system. That functioning relies on the predictable and well established allocation of responsibilities between judge and jury.⁵⁶ Hence, if expert legal testimony interferes with this allocation, it would not be warranted.

The central problem posed by expert legal testimony on the systemic level arises from the "law" label affixed to the testimony.⁵⁷ Under the present trial structure, this label almost automatically signifies that the subject matter is within the domain of the judge and is not properly offered as testimony or as evidence, both of which are traditionally reserved for "factual matters." It would be erroneous, however, to permit the law label to fully determine the treatment of an issue at trial.⁵⁸ An improper label can

56. The separate functions of judge and jury gained acceptance as early as the sixteenth century. For example, in *Townsend's case*, 75 Eng. Rep. 173, 178-79 (K.B. 1554), the court stated: "For the office of 12 men is no other than to enquire of matters of fact, and not to adjudge what the law is, for that is the office of the Court, and not of the jury"

There was, however, some dissension concerning this principle among English jurists. See *Bushel's Case*, 84 Eng. Rep. 1123, 1124-25 (C.P. 1670). See generally 1 *HOLDSWORTH*, *supra* note 27, at 317-19 (7th ed. 1956) (jury's role in determining the law was evident as early as the fourteenth century); THAYER, *A PRELIMINARY TREATISE ON EVIDENCE AT THE COMMON LAW* 185 (1898) (court always had a role in deciding questions of fact); Scott, *Trial by Jury and the Reform of Civil Procedure*, 31 *HARV. L. REV.* 669, 675-83 (1918) (discussing the history of the jury's province).

The rule underwent a similar struggle to establish its preeminence in colonial America, where lawyers occasionally were permitted to argue the law to the jury. Farley, *Instructions to Juries—Their Role in the Judicial Process*, 42 *YALE L.J.* 194, 201 (1932). By the time of the American Revolution, however, the modern division of responsibilities at trial regarding matters of law and fact was firmly established in criminal cases, and was generally followed in civil cases as well. Not all judges agreed. In 1794 Chief Justice Jay wrote:

[It is] the good old rule, that on questions of fact, it is the province of the jury, on questions of law, it is the province of the court, to decide. But it must be observed, that by the same law, which recognizes this reasonable distribution of jurisdiction, you have, nevertheless, a right to take upon yourselves to judge of both, and to determine the law as well as the fact in controversy. On this, and on every other occasion, however, we have no doubt, you will pay that respect which is due to the opinion of the court: for as, on the one hand, it is presumed, that juries are the best judges of facts; it is, on the other hand, presumable, that the court are the best judges of law. But still, both objects are lawfully, within your power of decision.

Georgia v. Brailsford, 3 U.S. (3 Dall.) 1, 4 (1794) (footnotes omitted). That the jury only decides questions of fact is well established. See *United States v. Del Toro*, 426 F.2d 181, 184 (5th Cir.), *cert. denied*, 400 U.S. 829 (1970); *Cameron v. Hauck*, 383 F.2d 966, 973 (5th Cir. 1967), *cert. denied*, 389 U.S. 1039 (1968).

For reasons why the jury should generally decide questions of fact, see Broeder, *The Functions of the Jury—Facts or Fictions?*, 21 *U. CHI. L. REV.* 386, 417-19 (1954).

57. For analogous concerns about the label of "law" or "fact" in a similar context, see Miller, *supra* note 14.

58. Law has been defined as a "phras[e] which shall set off in one class the generality

have serious consequences, as illustrated by the historical treatment of foreign law issues at trial.⁵⁹ The treatment of foreign law questions also demonstrates that labels of law or fact can change. The similarities between some law and fact issues, moreover, do not support the radically different consequences that flow from labeling an issue as either law or fact. Just as the differences between fact and opinion are matters of degree and not of kind, the boundary between law and fact is similarly blurred.⁶⁰ One commentator has asserted that only lawyers view questions of law and questions of fact as falling into separate categories.⁶¹ The close relationship between the two is evidenced by the existence of issues containing both law and fact, called "mixed questions of law and fact."⁶² For these reasons, strict adherence to treating questions labeled as law different from those labeled as fact misinterprets the significance of the law-fact distinction. It is not the label affixed to the testimony that is important, but whether a deviation in use interferes with the performance of responsibilities by judge or jury. Significantly, expert legal testimony does not upset the existing system. When such testimony is offered to the jury, the judge still decides whether the testimony meets the requirements of admissibility.⁶³ And under the Federal Rules of Evidence, the judge has

that the State sanctions and will habitually enforce a relation of a specific content." 1 J. WIGMORE, *supra* note 22. Fact, on the other hand, has been defined as the occurrence of any concrete phenomenon or event. *Id.*; see also Bohlen, *Mixed Questions of Law and Fact*, 72 U. PA. L. REV. 111, 112 (1924).

While the definitions appear distinct, the dividing line escapes obvious demarcation. The term "fact" encompasses all matters "in the sense that everything in the Cosmos is a fact or phenomenon." J. WIGMORE, *supra* note 22, § 1.

Even without such an expansive definition of fact, it is often difficult in practice to distinguish between issues of law and issues of fact. As one commentator has noted: "Matters of law grow downward into roots of fact and matters of fact reach upward into matters of law." J. DICKINSON, *ADMINISTRATIVE JUSTICE AND THE SUPREMACY OF LAW IN THE UNITED STATES* 55 (1927). Cf. Morris, *Law and Fact*, 55 HARV. L. REV. 1303 (1942) ("'Questions of fact' and 'questions of law' are distinct categories, involving real differences for the lawyer and the judge. And the difference is one of kind, and not merely one of degree." *Id.* at 1306.).

59. See *supra* text accompanying notes 35-40.

60. See McCormick, *Some Observations upon the Opinion Rule and Expert Testimony*, 23 TEX. L. REV. 109, 111 (1945).

61. J. BEALE, *supra* note 35, at 118 (1916).

62. Mixed questions, such as whether a person acted reasonably or negligently, require a determination of whether certain conduct falls within a particular legal category. For a discussion of the characterization of issues as mixed questions of law and fact, see O.W. HOLMES, JR., *THE COMMON LAW* 122 (1881). Mixed questions, which in effect call for determinations of the boundaries of the law, most often are placed before the fact finder for resolution.

63. The judge determines admissibility pursuant to Federal Rule of Evidence 104.

full authority over the use, scope and form of the testimony presented.⁶⁴ By providing jury instructions to shape the effect of the testimony, the judge retains further control. Thus, the use of expert legal testimony does not sacrifice the judge's status as sole arbiter of the law, or impugn the integrity and authority of the judicial office.

Furthermore, and perhaps most significantly, the actual impact of the testimony should be minimal because of its limited occurrence. In most cases there will be no cause to permit it,⁶⁵ nor is it even likely to be offered. Cost considerations and judicial reluctance to ignore the "law" label affixed to the testimony will undoubtedly act as a natural cap on its use. In addition, judges will want to avoid the appearance of depending on experts to inform them about the law. If necessary, rules limiting the use of such testimony could be promulgated. Accordingly, expert legal testimony should have a minimal impact on the system.

E. *Support in the Federal Rules*

The purpose and spirit of the Federal Rules of Evidence, which govern the admissibility of evidence at trial, support the limited use of testimony on the law. The stated purpose of the Federal Rules of Evidence is "to secure fairness in administration, elimination of unjustifiable expense and delay, and promotion of growth and development of the law of evidence to the end that the truth may be ascertained and proceedings justly determined."⁶⁶ This broad purpose encompasses several precepts of the trial process—including fairness and efficiency—and may reasonably be viewed as embracing testimony that furthers these goals.

The specific rule covering expert testimony supports the use of expert testimony on the law to the jury. Rule 702 states, in pertinent part, that a witness may testify as an expert "[i]f scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue"⁶⁷ This provision does not set boundaries on the content of the testimony. Instead, it focuses on the utility of the testimony. As stated in the Advisory Committee Notes: "Whether the situation is a proper one for the use of expert testimony is to be determined on

64. The judge is responsible for the mode and order of presentation of evidence at trial. FED. R. EVID. 611.

65. See cases cited *supra* note 7.

66. FED. R. EVID. 102.

67. *Id.* 702.

the basis of assisting the trier. . . . When opinions are excluded it is because they are unhelpful and therefore superfluous and a waste of time."⁶⁸ This approach, geared almost exclusively toward the usefulness of the testimony, may reasonably be seen as providing for selective expert testimony on the law.

Regarding testimony to the court, the Rules do not place an express limitation on the judge. The judge has broad discretion in determining the methodology to be used to ascertain the applicable domestic law. The Advisory Committee Notes, however, imply that the data consulted must be "pertinent."⁶⁹

V. SPECIFIC USES OF EXPERT TESTIMONY ON THE LAW

A. *For the Benefit of the Judge*

In the context of aiding the judge, courts have permitted expert testimony on the law in several recent cases. These cases have presented complex or obscure questions of law.

In one recent case, *Ohio v. Collins*,⁷⁰ a federal bankruptcy court judge in Ohio rejected expert testimony on the state's Medicaid law despite the court's inability to find a written statement concerning the Ohio system for determining Medicaid reimbursement rates. The judge, in refusing to allow the witness to testify, noted that the testimony would have involved only matters of state law, which the judge is presumed to know. On appeal, the Sixth Circuit Court of Appeals stated that the judge's ruling ordinarily would have been proper, but that this case presented questions of law to which answers were not readily available.

The court of appeals was unable to decide the case without a precise statement of the Ohio regulatory scheme. Ohio had not published administrative regulations for the period in question. The case was remanded to permit the expert to fulfill "the overriding need of the court to ascertain the proper status of Ohio law."⁷¹ The circuit court stated:

We believe that when the legal inquiry extends to a complex scheme such as Medicaid, and when the state regulations are not readily available in published form, a court should not hesitate

68. *Id.* advisory committee note.

69. *Id.* 201 advisory committee note, quoted *supra* note 30.

70. *Ohio v. Collins* (*In re Madeline Marie Nursing Homes*), 694 F.2d 433, 445 (6th Cir. 1982).

71. *Id.* at 446.

to seek out all of the practical assistance it can obtain in its function as ultimate determiner of the law. . . .

. . . We believe that it was appropriate for the state to have offered expert testimony and documentary proof as to matters of Ohio's regulatory scheme which ordinary diligence would not unearth. It is beneficial for the trier of fact to take the initiative to uncover and familiarize itself with the appropriate legislative and historical facts needed for decision. We remand for that purpose.⁷²

A federal district court in Florida permitted a legal expert to testify in the case of *Louis v. Nelson*.⁷³ The case involved a challenge by Haitian immigrants to the policies and procedures of the United States Immigration and Naturalization Service (INS). The Haitians alleged that the United States government had formulated a detention policy that did not meet the Administrative Procedure Act requirements and had applied that facially neutral policy in a discriminatory manner against only Haitians.⁷⁴ At trial, the plaintiffs offered the testimony of Professor Charles Gordon,⁷⁵ a noted authority on immigration law.⁷⁶ Professor Gordon testified on the substance and effects of the immigration laws, particularly on the INS policy toward Haitians.⁷⁷ The trial court admitted Professor Gordon's testimony over the defendant's objection. The policy of detaining only Haitians was unwritten, and although many employees of INS testified about implementation of the policy, the trial judge admitted the testimony of the immigration law expert.

An expert on the law of unfair competition testified in *Deere & Co. v. Farmhand, Inc.*⁷⁸ In *Deere*, the plaintiff alleged violations of its trademark and of the common law of unfair competition. Farmhand counterclaimed that Deere had brought a baseless action in an attempt to monopolize the market for farm equipment. In support of this contention, Farmhand offered the testimony of a

72. *Id.* at 445-46 (footnotes omitted).

73. 544 F. Supp. 973 (S.D. Fla. 1982), *aff'd in part, rev'd in part, sub nom. Jean v. Nelson*, 711 F.2d 1455 (11th Cir.) (opinion withdrawn), *reh'g en banc granted*, 714 F.2d 96 (1983), *rev'd*, No. 82-5772 (Feb. 27, 1984).

74. 544 F. Supp. at 984.

75. Professor Gordon was formerly General Counsel of the Immigration and Naturalization Service of the United States. At the time of the testimony, he was a professor at the Georgetown University Law Center.

76. Professor Gordon is the co-author of C. GORDON & H. ROSENFELD, *IMMIGRATION LAW AND PROCEDURE* (rev. ed. 1983).

77. Appellees/Cross-Appellants Brief at 13, *Jean v. Nelson*, No. 82-5772 (11th Cir. Apr. 12, 1983).

78. 560 F. Supp. 85 (S.D. Iowa 1982), *aff'd*, 721 F.2d 253 (8th Cir. 1983).

professor of trademark and patent law, who "testified as an expert in the field of unfair competition law."⁷⁹ The court determined that the expert's testimony was relevant, and it overruled the plaintiff's objections.⁸⁰

The *Deere* trial judge noted "that throughout the entire trial of this action, the parties have disagreed as to the nature of the alleged wrong. Although both parties agree that this is an action for unfair competition, they disagree as to the applicability of trademark law."⁸¹ The legal expert testified on the plaintiff's burden of proof under the trademark law and on whether a prudent attorney practicing in this area of the law would have brought an action against Farmhand for the violations alleged.⁸² The judge considered the expert testimony in determining that the plaintiff should not prevail on either the trademark infringement or the unfair competition claims.⁸³ The trial judge expressly stated that he allowed the expert testimony because of his own ability to properly weigh testimony.⁸⁴

B. *For the Benefit of the Jury*

Where legal testimony has been presented to a jury, it has generally consisted of an opinion on the uncertainty of the law at the time of the alleged violation,⁸⁵ or of an opinion on the reasonableness of the party's interpretation of the law.⁸⁶

In *United States v. Garber*⁸⁷ a woman who received over two hundred thousand dollars in payments for her rare blood plasma was convicted of willfully attempting to evade federal income tax laws.⁸⁸ An integral part of her defense was that she believed she

79. 560 F. Supp. at 93. The expert was Michael Voorhees, a practicing attorney and a professor of trademark and patent law. *Id.*

80. *Id.*

81. *Id.* at 94.

82. *Id.* at 91 n.10; *id.* at 92 n.12.

83. *Id.* at 88.

84. *Id.* at 91 n.10.

85. See *United States v. Carter*, 607 F.2d 92 (5th Cir. 1979).

86. See *United States v. Herzog*, 632 F.2d 469 (5th Cir. 1980). Expert testimony on the law was not allowed in this case because it would not shed any light on why the defendant had filed false tax returns.

87. 607 F.2d 92 (5th Cir. 1979).

88. Garber's blood plasma contained a very rare antibody that was used in the production of a blood-typing serum. Garber donated her antibodies as many as six times per month in a painful procedure. Garber reported a weekly salary received as part of her donative activities, but she did not report the payments for the antibody donations. She was indicted for failing to report the receipts for the antibody donations in the years 1970, 1971 and 1972.

was not obligated to pay tax on the receipts.⁸⁹ At the trial, both the defendant and the prosecution proffered expert testimony concerning the taxability of the defendant's income. The prosecution offered an expert's opinion that defendant's earnings from the sale of plasma constituted taxable income. The defendant offered an expert's opinion that the earnings did not fall within the legal definition of income under section 61(a) of the Internal Revenue Code, and therefore were not taxable.⁹⁰ The trial judge heard the testimony of the two experts, but refused to admit the testimony of either witness into evidence for the jury's consideration, reasoning that the question of taxability was an issue of law for the court and not for the jury to decide. The judge did, however, allow the prosecution to introduce into evidence the expert testimony of an Internal Revenue agent that additional taxable income was due but not reported for the years in question. The defendant objected to the introduction of this testimony, arguing that the witness based his testimony on the conclusion that the compensation received was indeed taxable.⁹¹

The court rejected the defendant's argument that the testimony of its expert should be permitted before the jury to show that doubt existed as to whether a tax was due and to demonstrate the vagueness of the law. The defendant alleged that this testimony was crucial to her case, since admission of the testimony would have precluded the finding of the requisite intent to violate the law. The court, while recognizing that the defense expert's theory may have been relevant to the issue of taxability, ruled that, since the expert had never discussed his opinion of the law with the defendant, the opinion was not relevant to the factual issue of the defendant's intent.⁹²

After hearing all the evidence, the trial court held as a matter of law that the money received by the defendant during the three years in question was income that was subject to taxation. The jury found the defendant innocent of the charges for the first two years, but found her guilty of knowingly misstating her income on her tax return for the third year.⁹³

89. 607 F.2d at 99.

90. The defense offered a former revenue agent and certified public accountant who would have testified that in his opinion the taxability of the payments was novel and uncertain.

91. 607 F.2d at 95.

92. *Id.*

93. She was sentenced to eighteen months in prison, all but 60 days of which were suspended by the court, given a \$5,000 fine, and placed on probation for twenty-one months.

Without resolving the issues of whether the defendant's earnings were taxable, or whether this was purely a question of law for the court's resolution, the Fifth Circuit Court of Appeals in an en banc decision reversed the trial court and remanded the case. The court stated:

We hold that the combined effect of the trial court's evidentiary rulings excluding defendant's proffered expert testimony and its requested jury charge [that a misunderstanding as to defendant's liability for the tax is a valid defense to the charge of income tax evasion] prejudicially deprived the defendant of a valid theory of her defense. . . .

. . . .
. . . [B]ecause the district court refused to permit . . . the expert for the government, and . . . the expert for the defense, to testify and because it reserved to itself the job of unriddling the tax law, thus completely obscuring from the jury the most important theory of Garber's defense—that she could not have willfully evaded a tax if there existed a reasonable doubt in the law that a tax was due—her trial was rendered fundamentally unfair.⁹⁴

The court stressed that "[i]n a case such as this where the element of willfulness is critical to the defense, the defendant is entitled to wide latitude in the introduction of evidence tending to show lack of intent."⁹⁵ The court applied a balancing test in deciding whether to hold that the expert testimony should have been admitted, weighing the general impropriety of testimony on the law against the importance of assuring that the defendant has a full and fair opportunity to defend against the charges.

Judges Ainsworth and Tjoflat both filed dissenting opinions in *Garber*, raising what are perhaps the two most pressing objections to the use of expert testimony on the state of the law—that it invades the province of the judge and that it fails to meet the admissibility requirements of the Federal Rules of Evidence.

It is the trial judge who must make rulings on the law involved in the case, and boilerplate jury instructions have since time immemorial stated that the jury takes the law only from the court. Now a new rule is attempted by the majority which in effect states that the jury must take its instructions on the law from

Id.

94. *Id.* at 97.

95. *Id.* at 99.

expert witnesses as well as the trial judge.⁹⁶

Judge Ainsworth further stated that, since “[t]he purpose of expert testimony is to ‘assist the trier of fact to understand the evidence or to determine a fact in issue,’ ”⁹⁷ and “since there was no showing that [the defendant] had consulted the expert or relied on his view, or views of any other accountant or lawyer, the testimony was unrelated to a determination of defendant’s intent or willfulness,”⁹⁸ and was properly excluded from the jury.

Judge Tjoflat, in his dissent, argued that the expert testimony was not relevant to the defendant’s intent, and thus failed to meet the admissibility requirements of Federal Rule of Evidence 402. Furthermore, he believed that the probative value of the testimony failed to outweigh the dangers of unfair prejudice, confusion of the issues and the possibility of misleading the jury, so that the testimony was also inadmissible under Federal Rule of Evidence 403.

Judge Tjoflat asserted that the defendant’s argument that the law was so uncertain that she could not be guilty of willful evasion was in effect a vagueness challenge against the statute, and consequently was an issue of law for the court. The vagueness challenge is premised on the proposition that “when the law is vague or highly debatable, a defendant—actually or imputedly—lacks the requisite intent to violate it.”⁹⁹ “Due process requires that the language of a criminal statute convey ‘sufficiently definite warning as to the proscribed conduct when measured by common understanding and practices.’ ”¹⁰⁰ Judge Tjoflat concluded that the law was indeed vague in its proscription of defendant’s activities. Since the impact of the vagueness of the law on the defendant’s intent is an issue of law for the court’s determination, Judge Tjoflat believed that the appellate court should have dismissed the charges instead of remanding for a new trial.

The Ninth Circuit Court of Appeals recognized the appropriateness of expert legal testimony in *United States v. Clardy*.¹⁰¹ The defendant had been convicted of assisting taxpayers in the preparation of fraudulent tax returns. The court of appeals held that the trial court properly admitted into evidence the expert tes-

96. *Id.* at 105 (Ainsworth, J., dissenting).

97. *Id.* at 106 (quoting in part FED. R. EVID. 702).

98. *Id.*

99. *Id.* at 111 (quoting *United States v. Critzer*, 498 F.2d 1160, 1162 (4th Cir. 1974) (Tjoflat, J., dissenting)).

100. *Id.* at 110 (quoting *Jordan v. DeGeorge*, 341 U.S. 223, 231-32 (1951)).

101. 612 F.2d 1139 (9th Cir. 1980).

timony of an Internal Revenue Service agent that the defendant's interest expenses were not legally deductible. Citing *Garber*, the court stated that "this type of testimony is relevant to the issue of willfulness where the theory of the defense is that there is a good faith dispute as to the interpretation of the tax laws."¹⁰²

In contrast to the above cases allowing expert testimony on the uncertainty of a law, there are instances in which a party may seek to introduce testimony on the certainty of a law. Such testimony was allowed in *Laverne v. Corning*.¹⁰³ In *Laverne*, property owners brought a civil rights action against various officials of the Village of Laurel Hollow for alleged unlawful inspections of plaintiffs' property. The inspections had been made under the authority of a village ordinance that subsequently was declared unconstitutional. The defendants claimed that they inspected the property in good faith pursuant to the ordinance. If true, this good faith would be a complete defense to the civil rights action. At the trial, the defendants were permitted to call an expert who testified that at the time of the inspection "only a clairvoyant could have realized that the defendants' inspections would some day be declared" unconstitutional.¹⁰⁴ Based upon the jury's finding of good faith, the court dismissed the plaintiffs' complaint.

VI. BRIEF ANALYSIS

The opinions that have been discussed appropriately reflect less concern for legal testimony to a judge than to a jury. This disparity is probably attributable to confidence in the judge's ability to assess the testimony on its merits and not to be unduly swayed by an individual's expertise. The willingness of courts to permit expert testimony for the benefit of the judge may also indicate a recognition that the presumption of judicial expertise in all areas of the law is not always realistic. Whether the purpose of the testimony is fairness to the parties,¹⁰⁵ or to add to the judge's knowledge,¹⁰⁶ expert testimony on the law has received some support.

Deere is an excellent example of the appropriate use of expert legal testimony. The issue, whether the defendant had infringed

102. *Id.* at 1153.

103. 376 F. Supp. 836 (S.D.N.Y. 1974).

104. *Id.* at 838.

105. *E.g.*, *Deere & Co. v. Farmhand, Inc.*, 560 F. Supp. 85 (S.D. Iowa 1982), *aff'd*, 721 F.2d 253 (8th Cir. 1983); *see supra* text accompanying notes 78-84.

106. *E.g.*, *Ohio v. Collins (In re Madeline Marie Nursing Homes)*, 694 F.2d 433 (6th Cir. 1982); *see supra* text accompanying notes 70-72.

the plaintiff's functional trademark, was complex. The parties' failure to agree on the proper cause of action for remedying the alleged wrong rendered the briefs, memoranda of law and the oral arguments of little help to the court. The expert legal testimony in *Deere* met the criteria of efficiency and fairness.

Expert testimony to a jury presents additional problems, which are both systemic and evidentiary. The testimony may encroach on the province of the judge and may be irrelevant or prejudicial. The *Garber* case illustrates these problems. Except for the fact that it was a criminal prosecution, *Garber* was a weak case for expert legal testimony.¹⁰⁷ There was no evidence that the defendant had relied on or consulted the applicable law prior to violating it. Although the defense theory may have been potentially valid, the evidence did not present a factual basis for the proffered testimony. Therefore, the lack of relevance of the testimony and the likelihood of undue prejudice should probably have dictated exclusion of the evidence. In other circumstances, however, such as in *Laverne v. Corning*,¹⁰⁸ or where reliance on the law is shown, a reasonable argument can be made for the propriety of the testimony.

VII. CONCLUSION

Although it is infrequently employed at trial and generally held in disfavor, expert testimony on domestic law is appropriately offered in limited situations to either a judge or a jury. It may assist the judge in determining obscure or complex questions of law. It may assist the jury in determining whether an individual intended to violate a law or whether he did so in good faith. In these situations, the systemic and evidentiary objections to allowing the testimony are outweighed by considerations of fairness and efficiency. In the final analysis, the decision to use such testimony remains firmly in the hands of the judiciary. Until or unless rules concerning legal testimony are formulated, courts should focus on the usefulness of the testimony in deciding whether to permit legal experts to testify.

107. 607 F.2d 92, 105 (5th Cir. 1979) (dissenting opinions).

108. 376 F. Supp. 836 (S.D.N.Y. 1974); see *supra* text accompanying notes 103-04.