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Lead Story: Steps For Avoiding Potential Prejudice, Confusion And Other Problems In Using Law Enforcement Dual Fact and Expert Witnesses

A witness can provide both lay and expert testimony. Special concerns may arise when a law enforcement witness testifies as both a fact and expert witness. At least seven concerns may apply to this dual testimony, including (a) the lay testimony of the law enforcement witness may be afforded “unmerited credibility” based on the expert testimony; (b) there are heightened risks of prejudice; (c) the potential for jury confusion may be elevated; (d) the witness may stray from the scope of expertise; (e) the witness may rely on inadmissible hearsay and raise a potential Confrontation Clause issue; (f) the dual role may inhibit cross-examination; and (g) the testimony may usurp the role of the jury. This Lead Story reviews these challenges to dual fact and expert testimony by law enforcement witnesses and identifies specific steps to mitigate these potential problems.



help the jury or the court to understand the facts about which the witness is testifying and not to provide specialized explanations or interpretations that an untrained layman could not make if perceiving the same acts or events.”; “What is essentially expert testimony ... may not be admitted under the guise of lay opinions.”).

In illustrating this point, the Advisory Committee noted the case of *State v.*

Brown, in which the court recognized that a lay witness may testify that a substance seemed to be blood, but could not testify, unless previously qualified as an expert, that bruises around the eyes of a victim appeared to be the result of trauma. 836 S.W. 2d 530, 549 (Tenn. 1992) (cited in FRE 701 ACN (2000 Amendment)).

Special and unique concerns arise when a law enforcement official testifies as both a fact witness regarding the investigation and an expert witness, providing an opinion on the meaning or understanding of certain facts in the case. An agent may be involved in a long-term investigation. At trial, the agent may be called to testify about the facts in the investigation and also as an expert to assist the jury in an area involving specialized knowledge. Under direct and cross-examination, the witness may blend expert opinion with facts of the case. It may become difficult for the jury to separate or follow which portion of the testimony is lay and expert opinion. The witness may also rely on inadmissible hearsay or exceed the scope of the expert testimony.

The potential problems created by this dual testimony do not surface when there are no cross-over issues and the witness exclusively provides either fact or expert testimony. See, e.g., *United States v. Abboud*, 438 F.3d 554, 589 (6th Cir. 2006) (rejecting challenge to testimony as dual fact and expert witness where the witness was an expert witness and not a fact witness; “he was not the investigating agent and he had no role in gathering evidence”); *United States v. Solis*, 923 F.3d 548, 551 (7th Cir. 1991) (rejecting challenge where witness testified as an expert and not as a fact witness).

I. Overview

As a general matter, the same witness can give both lay and expert testimony. The Federal Rules of Evidence permit this dual testimony. See, e.g., FRE 701 ACN (2000 Amendment) (noting “it is possible for the same witness to provide both lay and expert testimony in a single case”). In fact, admissibility is not determined by the status of a witness as an expert or lay witness but by the testimony. See, e.g., FRE 701 ACN (2000 Amendment) (after 2000 Amendment, FRE 701 “does not distinguish between expert and lay witnesses, but rather between expert and lay testimony”) (citing *United States v. Figueroa-Lopez*, 125 F.3d 1241, 1246 (9th Cir. 1997) (law enforcement agents could testify that the defendant was acting suspiciously, without being qualified as experts; however, the rules on experts were applicable where the agents testified on the basis of extensive experience that the defendant was using code words to refer to drug quantities and prices)); see also *United States v. Peoples*, 250 F.3d 630, 639 (8th Cir. 2001) (“Lay opinion testimony is admissible only to



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