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How to Use and Not Lose Experts in Criminal Cases

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Rare is the white-collar case today where an expert witness does not play a powerful role. But the vagueness in expert disclosure rules in criminal cases can lead unwary defense counsel to forfeit an expert entirely.

Experts are powerful because, unlike fact witnesses, they can tell the jury not just what the evidence is, but what it means. Rule 704 of the Federal Rules of Evidence permits experts to address dispositive or "ultimate" issues, like whether alleged errors in a financial statement were false or material.

Embracing Ultimate Issues

The government often exploits this latitude by having case agents testify that a defendant's conduct is consistent with a criminal scheme. Government experts cannot opine that a defendant committed a crime, but if they do not parrot the language of the relevant statute, courts let them interpret evidence in a way that compels that conclusion.

For example, while an expert in a market manipulation case cannot opine that defendants' trading constituted fraud, an expert may testify that investors were "misled" by defendants' "prearranged trades," which "artificially increased" the price of the relevant stock. The former opinion relies on legal terms, but the latter is merely an "ultimate factual conclusion." *U.S. v. Scop*, 846 F.2d 135, 142 (2d Cir. 1988). *See also SEC v. U.S. Environmental, Inc.*, 2002 WL 31323832 (S.D.N.Y. Oct. 16, 2002).

Defendants, too, may offer expert testimony about an ultimate factual conclusion. Indeed, preventing a defendant's expert from presenting an exculpatory interpretation of the evidence can be reversible error, as in the recent prosecution of David Safavian, former chief of staff of the General Services Administration (GSA). While at GSA, Safavian was invited by the infamous lobbyist Jack Abramoff to a golf outing in Scotland, essentially at Abramoff's expense. Abramoff was seeking information from Safavian about potential business with GSA — in particular, a property that GSA wanted to redevelop — but he never obtained a GSA contract. Safavian asked a GSA ethics officer for an opinion permitting him to take the trip. In that request, and during later investigations concerning the trip, Safavian denied that Abramoff was "doing business" with GSA. The government charged that those denials were false, and he was convicted of making false statements to government agents and obstructing justice. *See U.S. v. Safavian*, 528 F.3d 957 (D.C. Cir. 2008).

Safavian argued that his statements were true because he meant that Abramoff lacked a GSA contract, not that Abramoff had no dealings with GSA. He tried to support this defense with an expert who would have explained that, in government contracting, "doing business" describes someone who has a contract. But the district court decided that the jury should rely on its own understanding of "doing business" and excluded the testimony.

The D.C. Circuit vacated Safavian's conviction and remanded for a new trial. The court held that common words can have technical meanings, and a defendant is entitled to present those meanings through an expert. Although Safavian explained the technical definition in his own testimony, the court recognized that without expert corroboration, the jury was not as likely to believe him.

Similarly, former Bristol-Myers Squibb (BMS) CFO Frederick Schiff will be allowed to rebut securities fraud charges, if his case goes to trial, by using experts to explain business practices that the government claims constitute "earnings management." *U.S. v. Schiff*, 538 F. Supp. 2d 818 (D.N.J. 2008). The government alleges that BMS met earnings targets by giving wholesalers incentives to buy more goods than they needed, and that Schiff misled investors by not disclosing this "channel stuffing." The district court ruled that Schiff may challenge this theory with testimony from a "distribution-channel strategy" consultant that BMS's sales incentives complied with common practice in the pharmaceutical industry.

Rule 16 and *Daubert*

To preserve the opportunity to use experts, counsel must mind the rules re-

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garding experts in criminal cases, which are not as clear as the civil rules. In civil cases, parties generally must disclose, at least 90 days before trial, any expert witness they "may" use, and must produce a written report containing a "complete statement of all opinions" the expert will give, all data considered to form those opinions, and any exhibits that will support or summarize the opinions. Fed. R. Civ. P. 26(a)(2).

In criminal cases, however, pretrial expert disclosure is triggered only if the defendant requests it from the government. If that happens, the government must produce a "written summary" of expert testimony the government "intends" to use in its case-in-chief. Fed. R. Cr. P. 16(a)(1)(G). The summary must "describe" the witness's opinions, the bases and reasons for those opinions, and the witness's qualifications. If the government complies and requests reciprocal disclosure, the defendant must provide a summary of any expert evidence he intends to use at trial. Rule 16 does not specify when expert summaries must be disclosed.

In addition, any party proposing an expert must establish that: 1) the expert's testimony is based upon sufficient facts or data; 2) the testimony is the product of reliable principles and methods; and 3) the witness has applied the principles and methods reliably to the facts of the case. Fed. R. E. 702; *see Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993). *Daubert* and its progeny require trial courts to exclude unreliable expert testimony. *Kumho Tire Co. v. Carmichael*, 526 U.S. 137 (1999).

Trial courts can assess reliability from written reports, at *Daubert* hearings, or at trial. That discretion, combined with Rule 16's vagueness, creates uncertainty regarding when and how to establish reliability in a criminal case. Should a defendant not make pretrial expert disclosure and wait to qualify an expert at trial, risking the court's displeasure at having to interrupt trial for a *Daubert* hearing? Or should the defendant not only provide Rule 16 disclosure, but file a pretrial motion arguing the expert's reliability? Courts have given little guidance on these questions.

The Cost of Uncertainty

Lack of guidance may have hurt former Qwest CEO Joseph Nacchio, whose attempt to present expert testimony to defend against insider trading charges was thwarted because the district court ruled that his Rule 16 disclosures did not establish that his expert's opinion was reliable or relevant. *U.S. v. Nacchio*, 519 F.3d 1140 (10th Cir. 2008), *vacated in part en banc*, 555 F.3d 1234 (2009). Before trial, Nacchio disclosed that he intended to call Professor Daniel Fischel to explain that his stock sales seemed more like an attempt to achieve economic diversification than an attempt to profit from inside information. The government claimed that Nacchio's disclosure violated Rule 16 because it did not explain the reasons for Fischel's opinion. Nacchio filed a revised disclosure outlining those reasons, describing the documents and data Fischel reviewed, and stating that, to reach his opinion, Fischel studied Nacchio's sales "in relation to various benchmarks and other relevant criteria." The government argued that Nacchio still had not satisfied Rule 16, and that, even if he had, he had not established Fischel's reliability.

Seemingly conflating Rule 16 and *Daubert* requirements, the trial court excluded Fischel's testimony because Nacchio's Rule 16 disclosures did not demonstrate that Fischel was reliable. Nacchio was convicted of roughly half of the insider trading charges and acquitted of the rest.

Recognizing both the importance of Fischel's testimony to Nacchio's defense and the uncertainty in expert procedures in criminal cases, a split Tenth Circuit panel held it was reversible error to evaluate Fischel's reliability based on Rule 16 disclosures alone. The panel suggested that the district court had mistakenly applied civil rules to a Rule 16 summary, which need not provide a "full explanation" of an expert's method, much less establish reliability.

After rehearing *en banc*, a majority of the Tenth Circuit affirmed Nacchio's conviction, holding that the district court's decision wasn't about compliance with Rule 16, it was about *Daubert*, and, as even the dissent agreed, Nacchio had failed to prove Fischel's reliability. According to the majority, Nacchio knew or should have known that Fischel's reliability was at issue, and if he wasn't sure how the court planned to assess reliability, he should have asked; courts aren't required to engage in "handholding." 555 F.3d at 1246 n.10.

Whatever the outcome in Nacchio (he has filed a petition for a writ of *certiorari*), the case reminds counsel to heed their disclosure and *Daubert* obligations. Counsel should learn well before trial how a judge determines reliability. They should consider flushing out government objections (or judicial reservations) concerning an expert's analysis — especially if the analysis is novel or complex — by moving in limine for a ruling before trial that the expert's testimony will be admitted, or adding enough detail to their Rule 16 summaries to elicit a pretrial motion by the government to exclude the expert on *Daubert* grounds.

Taking steps to ensure admission could mean giving up a key defense advantage: going second. As the Nacchio dissent recognized, a criminal defendant "may not be required to disclose his evidence or trial strategy" until after the government rests. But it may be worth giving up surprise to ensure the jury will hear an expert explain, in appropriate "factual" language, that your client is innocent.