EXPERTS IN CRIMINAL CASES

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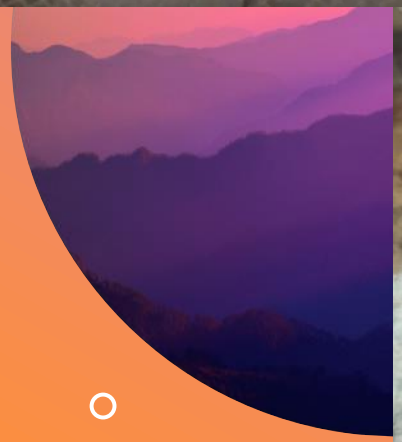
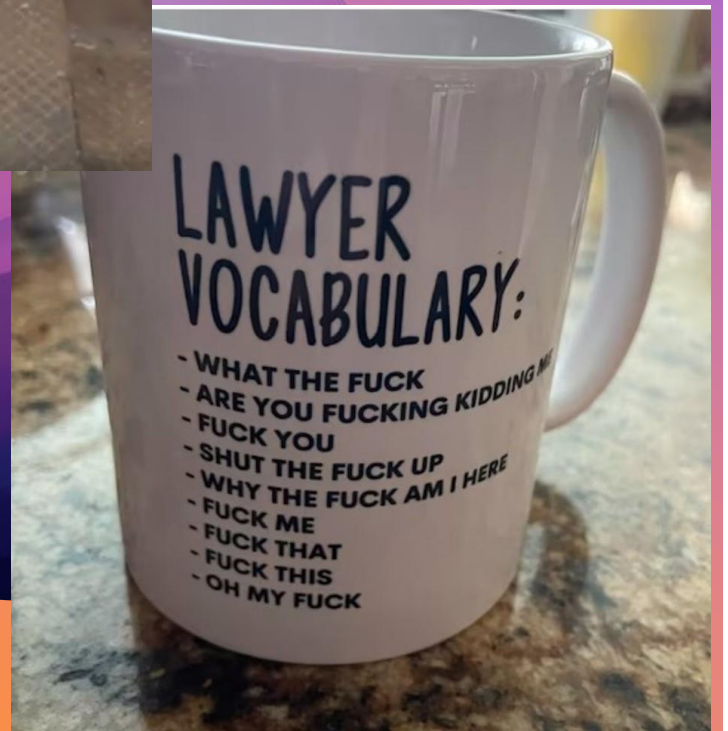
PSA




LAWYER VOCABULARY:
- WHAT THE FUCK
- ARE YOU FUCKING KIDDING ME
- FUCK YOU
- SHUT THE FUCK UP
- WHY THE FUCK AM I HERE
- FUCK ME
- FUCK THAT
- FUCK THIS
- OH MY FUCK

LET'S DO
CRIMES

Iowa

ARTICLE VII
OPINIONS AND EXPERT TESTIMONY

Rule 5.701	Opinion testimony by lay witnesses
Rule 5.702	Testimony by expert witnesses
Rule 5.703	Bases of an expert's opinion testimony
Rule 5.704	Opinion on an ultimate issue
Rule 5.705	Disclosing the facts or data underlying an expert's opinion
Rule 5.706	Court-appointed expert witnesses

What it isn't—lay witnesses

R. 5.602: need for personal knowledge

Rule 5.602 Need for personal knowledge. A witness may testify to a matter only if evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter. Evidence to prove personal knowledge may consist of the witness's own testimony. This rule does not apply to a witness's expert testimony under rule 5.703.
[Report 1983; November 9, 2001, effective February 15, 2002; September 28, 2016, effective January 1, 2017]

R. 5.701: scope of testimony for lay witnesses

Rule 5.701 Opinion testimony by lay witnesses. If a witness is not testifying as an expert, testimony in the form of an opinion is limited to one that is:

a. Rationally based on the witness's perception;
b. Helpful to clearly understanding the witness's testimony or to determining a fact in issue; and
c. Not based on scientific, technical, or other specialized knowledge within the scope of rule 5.702.

[Report 1983; November 9, 2001, effective February 15, 2002; September 28, 2016, effective January 1, 2017]

BACKGROUND STANDARDS

Here, for example, such evidence appears in reports, such as Defendant appeared suspicious, Defendant's behaviors were "peculiar," and other such commentary. As noted above, such constitutes improper 5.404(b) evidence; improper speculation, about which the witness lacks personal knowledge; and constitutes improper witness opinion testimony. Moreover, such testimony, as it relates to Defendant in particular, improperly invades Defendant's constitutional right not to testify to the extent it suggests Defendant's credibility despite his election not to testify and, should he testify, improperly invades the jury's role to determine credibility. As such, commentary in this form must be excluded.

Iowa

R. 5.702: scope of testimony for experts

Rule 5.702 Testimony by expert witnesses. A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue.

R. 5.703: basis of testimony for expert witnesses

Rule 5.703 Bases of an expert's opinion testimony. 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 those kinds of facts or data in forming an opinion on the subject, they need not be admissible for the opinion to be admitted. But if the facts or data would otherwise be inadmissible, 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.

R. 5.704: opinion on ultimate issue

Rule 5.704 Opinion on an ultimate issue. An opinion is not objectionable just because it embraces an ultimate issue.

**exception!

To the extent the State seeks to elicit such testimony, particularly if in the form of opinion concerning motive, intent, or desire, Defendant objects. *See, e.g.*, *State v. Tyler*, 867 N.W.2d 136, 153–54 (Iowa 2015) ("However, an expert may not opine as to whether a particular legal standard has been satisfied or to 'the defendant's guilt or innocence.'" (citation omitted)). Such testimony would invade the province of the fact finder and improperly constitute evidence concerning the ultimate question of guilt. *State v. Breitbach*, 488 N.W.2d 444, 447–48 (Iowa 1992) (citations omitted) (testimony is inadmissible if it invades the province of the jury, witnesses may not testify as to whether person meets a standard established by law, jury must draw its own conclusions, opinion testimony concerning defendant's intent is improper, and opinion evidence concerning guilt is improper); *accord State v. Nimmo*, 247 N.W.2d 228, 230 (Iowa 1976) (opinion testimony concerning defendant's intent to deliver controlled substances is improper); *State v. Myers*, 382 N.W.2d 91, 97–98 (Iowa 1986) (citation omitted) (witness is not permitted to express an opinion as to the ultimate fact of the accused's guilt or innocence).

BACKGROUND STANDARDS

Illinois

STANDARDS

Rule 702:

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise. Where an expert witness testifies to an opinion based on a new or novel scientific methodology or principle, the proponent of the opinion has the burden of showing the methodology or scientific principle on which the opinion is based is sufficiently established to have gained general acceptance in the particular field in which it belongs.

Frye—the "general acceptance" test

"Under the rule of *Frye*, scientific evidence is admissible at trial only "if the methodology or scientific principle upon which the opinion is based is 'sufficiently established to have gained general acceptance in the particular field in which it belongs.'" *In re Commitment of Simons*, 213 Ill. 2d 523, 529-30, 821 N.E.2d 1184, 290 Ill. Dec. 610 (2004), quoting *Frye*, 293 F. at 1014. Further, the *Frye* test is necessary only if the scientific principle, technique or test offered by the expert to support his or her conclusion is 'new' or 'novel.' See *People v. Basler*, 193 Ill. 2d 545, 550-51, 740 N.E.2d 1, 251 Ill. Dec. 171 (2000)."

People v. McKown, 236 Ill. 2d 278, 282-83, 338 Ill. Dec. 415, 418, 924 N.E.2d 941, 944 (2010)

"In this context, "general acceptance" does not mean universal acceptance, nor does it require that the methodology be accepted by unanimity, consensus, or even a majority of experts. *Donaldson v. Central Illinois Public Service Co.*, 199 Ill. 2d 63, 78, 767 N.E.2d 314, 262 Ill. Dec. 854 (2002), *abrogated on other grounds, In re Simons*, 213 Ill. 2d 523, 529-530 (2004). Instead, it is sufficient that the underlying method used to generate an expert's opinion is reasonably relied upon by experts in the relevant field. *Donaldson*, 199 Ill. 2d at 77; *Simons*, 213 Ill. 2d at 530."

Young v. Wilkinson, 2022 IL App (4th) 220302, ¶ 74, 464 Ill. Dec. 449, 465-66, 213 N.E.3d 486, 502-03

Federal

Rule 702. Testimony by Expert Witnesses

A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if the proponent demonstrates to the court that it is more likely than not that:

(a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;
(b) the testimony is based on sufficient facts or data;
(c) the testimony is the product of reliable principles and methods; and
(d) the expert's opinion reflects a reliable application of the principles and methods to the facts of the case.

Daubert—court as gatekeeper

"To be admissible, expert opinions must be based upon sufficient facts or data and must be the product of reliable principles and methods that have been reliably applied to the facts of the case. Fed. R. Evid. 702. Reliability can be established by showing that the expert's theory or technique can be (or has been) tested, that the theory or technique has been subject to peer review and publication, that there is a known or potential rate of error, and that the theory or technique is generally accepted in the scientific community. Id., quoting Daubert, 509 U.S. at 593-94."

Sprafka v. Med. Device Bus. Servs., Inc., 139 F.4th 656, 660 (8th Cir. 2025)

STANDARDS

"Under *Daubert*, district courts must make a "preliminary assessment of whether the reasoning or methodology underlying [an expert's] testimony is scientifically valid and of whether that reasoning or methodology properly can be applied to the facts in issue." *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579, 592-93, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993) (discussing Fed. R. Evid. 702). "Among the factors to consider is whether the 'expert testimony proffered in the case is sufficiently tied to the facts of the case that it will aid the jury in resolving a factual dispute.'" *Concord Boat Corp. v. Brunswick Corp.*, 207 F.3d 1039, 1055 (8th Cir. 2000) (quoting *Daubert*, 509 U.S. at 591). "[A]ny step that renders the analysis unreliable renders the expert's testimony inadmissible. This is true whether the step completely changes a reliable methodology or merely misapplies that methodology." *In re Wholesale Grocery Prods. Antitrust Litig.*, 946 F.3d 995, 1001 (8th Cir. 2019) (citations omitted)."

Lancaster v. BNSF Ry. Co., 75 F.4th 967, 969 (8th Cir. 2023)

FANDANGO
MOVIECLIPS

WORDS OF CAUTION: DUAL ROLE TESTIMONY

- LEO—investigator AND expert
- Problems!
  - (1) the witness's aura of credibility as an expert may inflate the credibility of her perception as a fact witness in the eyes of the jury;
  - (2) opposing counsel is limited in cross-examining the witness due to the risk that an unsuccessful attempt to impeach her expertise will collaterally bolster the credibility of her fact testimony;
  - (3) the witness may stray between roles, moving from the application of reliable methodologies into sweeping conclusions, thus violating the strictures of Daubert and Federal Rule of Evidence 702;
  - (4) jurors may find it difficult to segregate these roles when weighing testimony and assessing the witness's credibility; and
  - (5) because experts may rely on and disclose hearsay for the purpose of explaining the basis of an expert opinion, there is a risk the witness may relay hearsay when switching to fact testimony.

WORDS OF CAUTION: DUAL ROLE TESTIMONY

- Precautions
  - giving a cautionary instruction prior to testimony,
  - separation of time between fact witness testimony and opinion/expert witness testimony
  - allowing full and robust cross examination
  - clear delineation in questioning, including disallowing during portions of expert testimony fact questions and questions based upon knowledge of or resulting from the case investigation
  - refusing to refer to the officer as an "expert" in the jury's presence and disallowing the parties from doing so when referring to the officer, allowing instead only references to "opinion testimony,"
  - disallowing the government from laying foundation for expert or opinion testimony until after fact testimony is concluded
  - Cautionary jury instructions
    - "You should judge [their] testimony in the same way that you judge the testimony of any other witness. The fact that such a person has given an opinion does not mean you are required to accept it."

WHY MIGHT YOU WANT AN EXPERT IN CRIMINAL CASES?

1. Control your case
2. Friends
3. Known
4. Fighting
5. Fix it
6. Timing

EXAMPLES OF EXPERTS IN CRIMINAL CASES

Memory

EXAMPLES OF EXPERTS IN CRIMINAL CASES

- Drugs

REAL CASE ILLUSTRATIONS **GRAPHIC**

State v. Rupp: murder1; PCS2d; bitch

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REAL CASE ILLUSTRATIONS

State v. Rupp: murder1; PCS2d; bitch

Experts used:

1. Psychologists
2. Crime scene
3. DNA

REAL CASE ILLUSTRATIONS **GRAPHIC**

State v. Dodds: sex2dx3

Experts used:

1. Psychologist
2. Daycare provider

State v. Porter: sex2d

Experts used:

1. Psychologist
2. SANE

REAL CASE ILLUSTRATIONS **GRAPHIC**

State v. Demetrius Howard: murder

REAL CASE ILLUSTRATIONS **GRAPHIC**

State v. Demetrius Howard: murder

Experts used:

1. Psychologist—self-defense

REAL CASE ILLUSTRATIONS

USA v. Marshall: murder; drugs; firearms; carjacking with death

Experts used:

1. Mitigation—death penalty + sentencing

State v. Maddie Russo: theft1st

Experts used:

1. Psychologist—risk factor assessment and recidivism

REAL CASE ILLUSTRATIONS

Other examples—

Pathologists/doctors/nurses

Ballistics

Fingerprints

DNA

Forensic accountants

Stages of cases:

Investigation

Negotiations

Trial

Sentencing