Using the Double-Edged Sword of Expert Testimony to Defense Advantage

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In the previous issue of Forum,[1] we addressed the Ninth Circuit's reinterpretation of Rule 704(b)'s proscription on expert testimony on mens rea in the Morales case [2] and the basic rules governing the admissibility of expert testimony at trial. We now focus on the practical uses to which expert testimony can be put in white collar cases.

In the past few decades Congress has gone to considerable lengths to extend the reach of the criminal law to ordinary business practices involving technical violations of regulatory schemes. That trend is especially apparent in the area of health care fraud, where prosecutions for often merely negligent instances of overbilling have virtually metastasized in recent years. Scholarly criticism bemoans this intrusion of the criminal law into areas traditionally addressed by civil enforcement and suggests that such prosecutions damage the efficiency of the market and blur the focus of effective law enforcement. Sanford H. Kadish, Some Observations on the Use of Criminal Sanctions in Enforcing Economic Regulations, 30 *U.Chi. L. Rev*. 423, 449 (1963) Unpopular as the expansion of white collar prosecutions may be among scholars and practitioners, however, indictments aimed at business people, doctors and other professionals appear destined to remain a significant component of most federal case loads. Given this reality, we propose that the defense bar respond by using experts more creatively and aggressively at trial to explain often arcane industry practice, clarify complex statutory schemes, achieve admission of otherwise inadmissible hearsay and, in some instances, even provide a substitute for testimony by the defendant.

Customary Practice

As discussed in the previous article, the government routinely uses customary practice evidence under the moniker of "modus operandi" evidence. The range of uses approved by the courts for modus operandi evidence also describes the permissible range for customary practice evidence. That range is broad.

In United States v. Johnson, 735 F.2d 1200, 1202 (9th Cir. 1984), for example, the Ninth Circuit held that "government agents or similar persons may testify as to the general practices of criminals to establish the defendants' modus operandi." The Court explained that such testimony "helps the jury to understand complex criminal activities, and alerts it to the possibility that combinations of seemingly innocuous events may indicate criminal behavior." Id. Of course, the Ninth Circuit long has endorsed modus operandi testimony even in cases which are not complex. Agent testimony explaining drug dealer use of particular jargon, or of accoutrements such as pagers, for instance, is a commonplace in the non-complex world of most drug prosecutions. See, e.g.United States v. Bailey, 607 F.2d 237, 240 (9th Cir. 1979) *cert. denied, sub nom.* Whitney v. United States, 445 U.S. 934 (1980) (trial judge had discretion to

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[1] Mary McNamara and Edward W. Swanson, Recent Rulings on Expert Testimony About Defendants' Mens rea: A Double-Edged Sword, Volume 26, number 2, page 69.

[2] United States v. Morales, 108 F.3d 1031 (9th Cir. 1997).

admit as expert testimony DEA agent's interpretation of commonly used drug jargon); United States v. Gil, 58 F.3d 1414, 1422 (9th Cir.), *cert. denied*, 516 U.S. 969 (1995) (rejecting argument against agent testimony of drug dealer's use of pagers, public telephones, delivery of drugs in public places and the like that "modus operandi testimony was more prejudicial than probative because activities described were not complex ones requiring expert explanation.") [3]

Expert testimony of modus operandi has been approved to establish motive, or to refute claimed lack of knowledge. On both of these grounds, the Court in United States v. Webb, 115 F.3d 711 (9th Cir. 1997) approved expert testimony on the reasons that people conceal weapons in the engine compartments of cars in a case where a defendant was charged with being felon in possession of a gun which was found concealed in the engine compartment of a car.

Expert testimony of modus operandi also has been approved to prove up Rule 404(b) evidence. In United States v. Gomez Osorio, 957 F.2d 636 (9th Cir. 1992) the Court found no abuse of discretion in admitting expert testimony of an agent to prove up "other act" evidence that defendant was engaged in money laundering. The defendant faced charges of failure to report mailing of currency outside the U.S. and structuring of illegal monetary transactions. A government agent testified that the defendant was involved in money laundering because 1) ledger sheets reflected large quantities of currency exchanged for monetary instruments; 2) runners were used to obtain these instruments and 3) pagers were used. Id. at 641-42. The Court approved this use of expert testimony. However, the Court held that it was error (although not such as to warrant a new trial in light of the weight of the other evidence) for the trial court to have admitted the agent' s statement that the defendant structured the transactions to avoid the reporting requirements of federal forms -- i.e., that the defendant possessed the mens rea for the charged offenses. Id. at 642.

In the white collar arena, modus operandi evidence has been admitted on such sweeping topics as the "typical structure of mail fraud schemes" (United States v. McCollum, 802 F.2d 344, 346 (9th Cir. 1988) and the nature of fraudulent securities schemes (United States v. Johnson, 735 F.2d 1200, 1202 (9th Cir. 1984)). In Shad v. Dean Witter Reynolds, Inc., 799 F.2d 525, 530 (9th Cir. 1986), an action for churning of brokerage accounts, the Ninth Circuit held that expert testimony on churning should have been admitted at trial because the testimony would have assisted the jury in the complex analysis of the history of the broker's management of the accounts.

Given the broad range of permissible uses of modus operandi testimony, defense lawyers should be more creative in using customary practice evidence. The reasons for doing so in white collar cases are particularly compelling. Often the aura of infallibility attends government presentations of, say, a defendant's seemingly suspicious conduct in a complex financial fraud

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[3] See also, United States v. Espinosa, 827 F.2d 604, 611-12 (9th Cir. 1987) (allowing expert testimony regarding the use of apartments as "stash pads" for drugs and money); United States v. Patterson, 819 F.2d 1495,1507 (9th Cir. 1987) (allowing expert testimony and how criminal narcotics conspiracies operate); United States v. Maher, 645 F.2d 780,783 (9th Cir. 1981) (per curiam) (permitting expert testimony that defendant's actions were consistent with the modus operandi of persons transporting drugs and engaging in counter-surveillance).

case. In many instances, however, what appears suspicious to the layperson can be entirely appropriate under industry custom. In such cases, only a well credentialed expert can take the sting out of government characterizations of defendants' behavior as secretive or deceitful. As one commentator has noted:

> A jury which believes it cannot understand is likely to surrender [their common sense and experience] and be driven by the charges themselves. . . . ¶ In explaining customs and practice, experts can also dispel prosecutorial suggestions of criminality. For example, it is common practice in the securities business for a potential seller of securities to go through a broker instead of dealing directly with the buying broker. A suggestion of clandestine conduct to conceal fraud can be dispelled by testimony that such conduct is routinely followed to enable a seller to get the best price for his securities. Absent such evidence, juries are likely to accept a suggestion that secretiveness is tantamount to deceit.

Peter R. Grand, Using Expert Testimony to Enhance a White Collar Criminal Defense, 473 *P.L.I./Lit* 131 (August 24, 1993) at 145-46.

For example, in a health care fraud prosecution premised on provision of unnecessary services, expert testimony explaining that accused doctors would not benefit financially from the practice if they were part of a capitation system of reimbursement rather than a "fee for service system" could provide evidence of innocence. See Pamela H. Bucy, The Poor Fit of Traditional Evidentiary Doctrine and Sophisticated Crime: An Empiral Analysis of Health Care Fraud Prosecutions, 63 *Fordham L. Rev*. 383 (1994) at 412-13.

Similarly, in pension fraud cases, evidence that it is customary practice for businesses to provide little information to plan participants about the investment choices of an ERISA plan outside of provision of the annual Form 5500 report to the Department of Labor can dispel the suggestion that the defendant failed to provide information in order to conceal a fraud.

In the area of public corruption, testimony by lawmaker witnesses as to the custom and practice of other lawmakers vis-a-vis accepting bona fide contributions likewise can be of enormous importance. See generally, Edward J. Imwinkelreid & Ephraim Margolin, The Case for the Admissibility of Defense Testimony about Customary Political Practices in Official Corruption Prosecutions, 29 Am. Crim. L. Rev. 1 (1991). See also, United States v. Lankford, 955 F.2d 1545 (11th Cir.1992) where the Eleventh Circuit held that the trial court erred in totally excluding expert testimony relevant to the defendant's intent to commit tax fraud. 955 F.2d at 1551 & n. 14 (the expert testimony concerned the question whether a campaign contribution should be classified as a gift or as income, an issue about which most jurors "simply lack the specialized knowledge, background, and experience needed to assess the reasonableness of the" defendant's gift/income characterization).

The range of possible uses of customary practice evidence is virtually limitless. For instance, experts can explain the workings of business and industry, on such topics as the operation of the securities market, the workings of commodities trading pit, the way a security specialist operates to maintain a stable market, or the typical procedures involved in bank loan approval processes. Grand, *supra*, at 146. Or, the testimony can be as exotic as demonstrating the feasibility and profitability of smuggling diamonds in the alimentary canal. In United States v. Onumonu, 967 F.2d 782 (2nd Cir. 192), the defendant, an alimentary-canal drug smuggler on trial for importing heroin, testified that he thought he was smuggling diamonds, not heroin. The

trial court excluded expert testimony offered by the defendant regarding the business to be had in smuggling diamonds in the alimentary canal. The Second Circuit held that the trial court erred in excluding such testimony because it was relevant to the defendant's intent and the average juror knows very little "about the feasibility of internally smuggling diamonds by swallowing [diamond-filled] condoms." 967 F.2d at 788.

Confusion as to the Law

Few white collar cases present simple issues of fact unclouded by questions of law. This is particularly true in cases involving the securities fraud, ERISA fraud and health care fraud where a complex series of regulations overarches equally complex statutory schemes. In the case of health care fraud in particular, where billing regulations are often confusing, "[t]here is room for legitimate difference in opinion as to how these laws and regulations should be or have been interpreted. Testimony by and examination of expert witnesses may be the only viable way to flesh out these disagreements." Bucy, *supra*, at 405.

One of the leading cases approving admission of expert testimony to show confusion in the law as an explanation for defendant's actions is United States v. Garber, 607 F.2d 92 (5th Cir.1979) (en banc). Dorothy Garber was one of only a handful of individuals in the world whose blood was known to contain a particular kind of valuable antibody and she generated substantial income by selling her blood plasma. Because Garber failed to report this income, the government prosecuted her for the willful evasion of income taxes. At trial, the government conceded that the taxability of income generated by selling blood plasma was an issue of first impression. Garber sought to introduce the testimony of a certified public accountant that a recognized theory of tax law supported Garber's belief that such income was not taxable. The trial court refused to allow the proffered testimony on the ground that the question of taxability was an issue of law; it instructed the jury that the income Garber received from the sale of her blood was taxable. Garber, 607 F.2d at 94-96. The Fifth Circuit, sitting en banc, reversed Garber's conviction, holding that the expert's testimony was relevant to the issue of intent, even where the defendant, like Garber, was unaware of the legal confusion:

> The tax treatment of earnings from the sale of blood plasma or other parts of the human body is an unchartered area in tax law. The parties in this case presented divergent opinions as to the ultimate taxability by analogy to two legitimate theories in tax law. The trial court should not have withheld this fact, and its powerful impact on the issue of Garber's willfulness, from the jury.

Id. at 99. The Court held that "[b]y disallowing [the expert's testimony] that a recognized theory of tax law supports Garber's feelings, the court deprived the defendant of evidence showing her state of mind to be reasonable." Id. [4]

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[4] The Fifth Circuit has retreated from the broad pronouncements of Garber. In United States v. Burton, 737 F.2d 439 (5th Cir. 1984) the Fifth Circuit affirmed the trial court's exclusion of testimony from a tax professor that defendant's theory of taxation was plausible but not legally accepted. The Burton Court held that Garber should be read no more broadly than its facts and that evidence of legal uncertainty need not generally be received in cases where the defendant was unaware of the law. Such evidence is admissible only in cases involving a level of uncertainty "approaching legal vagueness" or in cases addressing a "novel or unusual

The position staked out by Garber has been rejected by the Ninth Circuit. In United States v. Scholl, __ F.3d. __, 1999 WL 140731 (9th Cir., March 17, 1999), the Ninth Circuit recently reaffirmed that that part of United States v. Brodie, 858 F.2d. 492 (9th Cir. 1988) holding expert testimony about the state of the law inadmissible as an invasion of the role of the judge remained good law despite the fact that the Court in United States v. Morales, 108 F.3d 1031 (9th Cir. 1997) had overruled Brodie's analysis of Rule 704(b). [5] Scholl, __ F3d. at __, 1999 WL 147031 at * 6. Importantly, in so holding, the Scholl Court took pains to note that the testimony proferred by the Scholl defendant was as to "the confusing state of the tax and accounting law -- *not as to Scholl's individual confusion*." Id. (emphasis added). The clear implication of this statement is that if the Scholl defendant had proffered evidence of his own confusion as to the state of the tax laws, expert testimony might have been appropriate. [6] However, in the next passage, the Scholl court also held, that "testimony concerning the reasonableness of Scholl's belief that he could net out wins and losses calls for a legal conclusion. As such, it is inappropriate matter for expert testimony." __ F.3d. at __, 140731, * 6 (citations omitted). [7]

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application of the law." 737 F.2d at 444. In United States v. West, 22 F.3d 586 (5th Cr. 1994), the Fifth Circuit went so far as to state that "[i]n prior cases, we have 'limited Garber to its bizarre facts-- where the level of uncertainty [of the applicable law] approached legal vagueness.'"(citations omitted).

[5] See Mary McNamara and Edward W. Swanson, *supra, Forum,Vo*l. 26, No. 2 at page 70.

[6] Support for this conclusion derives from the fact that Brodie relied on the Sixth Circuit case of United States v. Curtis, 782 F.2d 593 (6th Cir. 1986) which rejected Garber only for the proposition that juries may find that uncertainty in the law can negate willfulness even where the defendant is unaware of the uncertainty. Id. at 599. The Curtis court held that:

> Willfulness is personal. It relates to the defendant's state of mind. It does not exist in the abstract. Unless there is a connection between the external facts and the defendant's state of mind, the evidence of the external facts is not relevant.

Id. at 599. Other Courts have issued similar rulings. See, e.g., United States v. Harris, 942 F.2d 1125, 1132 n. 6 (7th Cir.1991) (noting that where the defendant or his tax advisors may have subjectively, but wrongly, seen an ambiguity, the defendant may present evidence to the jury demonstrating the basis of the erroneous, good faith belief).

[7] But see, Curtis, 782 F.2d at 594-95. Although the Curtis court disallowed expert testimony on the issue of confusion of the law, it did allow expert testimony by a CPA that defendant's practice of making payments to himself from his wholly owned corporation constituted the extension of non-taxable loans, which were common and legitimate tax-planning opportunities. Id. at 594. Thus, although the Curtis defendant was deprived of the ability to sponsor further expert testimony that the law governing treatment of corporate distributions to shareholders was unsettled and complex, he was able present key legal conclusions as to the legality of the transactions at issue. This is a good example of how, through focusing on the establishment of key predicate facts, a defendant can nonetheless use an expert to place

It should be noted nonetheless that the Ninth Circuit has allowed, albeit reluctantly, limited use of expert testimony to explain complex regulations. In United States v. Unruh, 855 F.2d 1363 (9th Cir. 1987), *cert. denied*, 488 U.S. 974 (1988), a case the Ninth Circuit amended on rehearing after handing down the decision in Brodie, the Court issued the following cautionary statement in a check-kiting and misappropriation of bank funds case where an FDIC bank examiner testified as to the meaning of a particular bank regulation governing bank board approval of loans:

> We have condemned the practice of attempting to introduce law as evidence. See Cooley v. United States, 501 F.2d 1249, 1253-54 (9th Cir.1974), cert. denied, 419 U.S. 1123, 95 S.Ct. 809, 42 L.Ed.2d 824 (1975); see also Marx & Co. v. Diners' Club, Inc., 550 F.2d 505, 509-10 (2d Cir.), cert. denied, 434 U.S. 861, 98 S.Ct. 188, 54 L.Ed.2d 134 (1977). The problems of using experts to displace the role of the trial judge are exacerbated here because the case is complex and an expert may receive undue attention from the jury. However, we have reviewed Johnson's testimony carefully. It correctly explains Regulation O. The trial judge's decision to let the testimony in, rather than explaining Regulation O in his instructions to the jury, is justified by the aid that it gave the jury in understanding other evidence presented as part of the prosecution's case. Any error on this point was not prejudicial.

Id. at 1376.

In any event, while it seems clear that under Brodie and Scholl, the Ninth Circuit prohibits use of expert testimony on confusion as to the state of the law as an invasion of the province of the jury (at least without a showing that the defendant was aware of the confusion) the same prohibition would not apply to presenting such evidence in a pretrial motion to dismiss on the grounds that the indictment does not state an offense against the defendant. See Grand, *supra*, for an appendix of exemplars of declarations which have been used in litigated cases. Even if such a motion does not prevail, however, as Grand points out,

> [T]he proffering of expert affidavits on the confused state of the law or the reasonableness of defendant's stated understanding thereof may influence the trial judge's jury charge. If not, having proffered the expert testimony in the form of concise affidavits from well-recognized experts in the field can have real benefit on appeal. Such affidavits will become part of the record on appeal where they may serve as a basis for the reviewing court to consider whether the case should been prosecuted at all. Once the reviewing court harbors such a doubt it will be more attentive in reviewing claims of error below.

Grand, *supra*, at 147-48.

Substitution for Testimony by the Defendant

The Ninth Circuit has unequivocally held that an expert may testify on matters of defense

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authoritative legal conclusions before the trier of fact.

It would seem that despite statements in Scholl, in a case where, as in tax cases, the mens rea element requires willful violation of the law, expert testimony on the reasonableness of a defendant's beliefs is relevant to negating willfulness, i.e., establishing good faith. See Grand, *supra*, at 143-44.

in lieu of the defendant. In United States v. Rahm, 993 F.2d 1405 (9th Cir. 1993), the Court rejected the government's argument that a defendant charged with possession of and attempt to pass counterfeit currency had to testify to her visual lack of acuity in order to provide foundation for the expert's testimony on that subject. The Court emphatically stated:

> The rule the government suggests would eviscerate several constitutional rights. Rahm, like all criminal defendants had the right not to testify. By choosing not testify, she did not forfeit her right to present a defense or introduce testimony. Rahm had the right to the presumption of innocence. The government was required to prove each element of the crimes charged beyond a reasonable doubt. Defense testimony calling into question the proof of any such element is proper. Here, the government's proof of knowledge was entirely circumstantial; the prosecution asked the jury to infer knowledge from Rahm's possession of the ninety-nine bills and her attempt to use one of them for a purchase. Nonetheless, the government would deny Rahm the right to present circumstantial evidence of lack of knowledge and to present her own inferential argument -- that perceptual difficulties, coupled with her remaining in the store for fifteen minutes, should lead the jury to infer that she did not know the money was counterfeit. The government is not entitled to such an unprecedented and unfair advantage. [The expert's] testimony was not improper simply because Rahm herself had not testified to her lack of knowledge.

Id. at 1414. The Rahm court reversed defendant's conviction and remanded for a new trial based on the trial court's exclusion of the expert testimony.[8]

Accordingly in cases where a defendant has a prior record or would make a poor witness, the expert witness may fulfill the role of an effective substitute for testimony of the defendant. [9]

The Case-Investigator Expert as Enhanced Witness

Criminal defense counsel are long familiar with the difficulty of counteracting expert testimony introduced through case agents who have been sitting at counsel table throughout the course of the trial. Hybrid use of the case agent as both fact witness and expert witness enhances the case agent's credibility in both roles: The case agent qua expert has more credibility because he or she can base an opinion on the facts of the case and the case agent qua fact witness exudes a certain gravitas because he or she is also presented as an expert.

The government's "blended" use of case agents is particularly effective in white-collar prosecutions. As Pamela Bucy notes in her article, not only does the case agent's dual role "enhance his stature both as a fact witness and an expert witness", but case agents, by virtue of their investigation, represent "land mine" witnesses capable of deploying otherwise inadmissible hearsay on the ground that such evidence is of a type reasonably relied on by other experts in the field, as provided in Rule 703 of the Federal Rules of Evidence. Bucy cites the Tenth Circuit

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[8] Rahm, like United States v. Morales, 108 F.3d 1031 (9th Cir. 1997) was a case tried and successfully appealed by the San Francisco Federal Defender's Office, by then Assistant Federal Public Defender, Brian Berson.

[9] See Grand, *supra*, at page 146-147 for an excellent discussion of the use of expert testimony as substitution for the testimony of a defendant.

case of United States v. Affleck, 776 F.2d 1451 (10th Cir. 1985) as a particularly vivid example of the use of such enhanced witnesses. Id. at 409. In Affleck, the trial court admitted testimony by a government accountant, qualified as an expert, as to the financial status of the defendant's company and whether any misrepresentations had been made to investors. In preparation for his testimony, the accountant examined records and interviewed a number of people including other accountants who had worked for defendant's company, former employees and the trustee in bankruptcy. On the stand, the expert testified as to "what he had been told by those who he had interviewed." Id. at 1456. Admission of this hearsay was permitted because such conversations "are of the type reasonably relied on by other experts in the accounting field in a case such as this." Id. at 1457.

Another case cited by Bucy as showing the enhanced power of the case agent expert is Lewis v. Rego, 757 F.2d 66 (3d Cir. 1985). In Lewis, a product liability suit which arose out of the explosion of propane cylinder, the trial court blocked the flow of inadmissible hearsay through the case agent back door. The Court of Appeal reversed, holding that the trial court erred in excluding the expert's testimony as to the content of a report prepared by another expert and the conversation between the testifying expert and the report-preparing expert regarding the report. Id. at 135. The Third Circuit held that the expert could testify about this hearsay because both the report and the conversation were "the kind of material on which experts in the field base their opinions."

Even if hearsay does not come in on the expert's direct testimony, however, counsel face particularly thorny problems in judging how far to go on hypothetical-based cross examination without triggering a hearsay-laden refutation. For example, a hypothetical-based cross examination of a billing practices expert in a health care fraud case which incorporates assumptions of defendant's lack of knowledge of certain regulations could open the door to damaging hearsay from third parties as to what they told defendant of billing requirements.

The awesome power of the case agent witness can and should be harnessed by the defense. In health care fraud cases, for instance, a *defense* billing expert should interview the billing clerks responsible for submitting allegedly improper bills to determine if they received instructions from the defendant, or if they were acting on their own interpretation of often incomprehensible billing guidelines.

Finally, we note an innovative way to use experts even in a case where no opinion testimony can be used. Defendants may be able to call experts to present summary evidence of testimony or documentary evidence in much the same manner as government case agents do. The benefits of doing so in the appropriate case can be great. For instance, calling an accountant with impressive credentials (such as prior experience as an IRS agent) to present summary evidence of voluminous tax records, but no opinion thereon could add to the force of presentation of otherwise dry material and could act as a mid- trial summation of the defense case from a source that the jury is apt to credit more than defense fact witnesses. Such use of an expert is at least feasible in light of the Ninth Circuit opinion in United States v. Baker, 10 F3d 1374 (9th Cir. 1993). In Baker, the trial court admitted prosecution expert testimony by an FBI Special agent who was a certified accountant to establish the "substantial proceeds" element of a continuing criminal enterprise as set forth in 21 U.S.C. § 848. The Baker case was, in the words of the Ninth Circuit, "one of the lengthiest and costliest trials in this nation's history." It spanned a period of sixteen months, involved fifteen defendants, 250 witnesses and thousands of

exhibits. The FBI agent had sat at counsel table throughout and had taken notes of the testimony which she converted into a 134 page summary which was published to the jury for illustrative purposes during her testimony. Over objection by the defense that the agent's testimony, inter alia, allowed the prosecution an impermissible early summation, the trial court admitted the testimony under Rules 1006 and 702 as summary evidence, with limiting instructions that it could not be considered as substantive evidence. Id. at 1411.

The Ninth Circuit held that the evidence was not properly admitted under either Rule 1006 or Rule 702, but that it was admissible as a valid exercise of the trial court's discretion under Rule 611(a) (control over mode of presentation). Id. at 1412. Nevertheless, the Court noted the existence of troubling bolstering issues with use of government experts to summarize factual data:

> Permitting an "expert" witness to summarize testimonial evidence lends the witness' credibility to that evidence and may obscure the jury's original evaluation of the original witnesses reliability. In this case, although Agent Besse did not expressly testify to the veracity the underlying data, the exhibits that she prepared did not cover all the events presented in the government's case, but only those that Agent Besse believed to be sufficiently specific or reliable. Thus, Agent Besse's selective summary itself constituted a subjective determination of reliability, and the original testimony, an attack on the credibility of which formed the core of the defense's case, was assumed to be true. Furthermore, a summary of oral testimony is generally the purpose and province of closing argument, and we believe that it would have been more appropriate for the prosecutor to present Agent Besse's summary exhibits and valuations in his closing remarks.

Id. at 1412. The Ninth Circuit's rationale suggests that if summary evidence is not selectively prepared and steers clear from summarizing oral testimony, an "expert" may be used to present it to a jury.

The Kumho Caveat

As noted in the previous article, the Supreme Court's recent ruling in Kumho Tire Co. v. Carmichael, __ U.S. __, 119 S.Ct. 1167 (1999) made it clear that the "gatekeeper" obligation defined in Daubert applies not just to scientific testimony but to all expert testimony, whether it be based on scientific, technical or other specialized knowledge. Id. at 1171. [10] Accordingly, agents or defense experts supplying modus operandi/customary practice testimony based on specialized knowledge must now pass a threshold admissibility test under Daubert.

Notwithstanding the application of Daubert analysis to all species of expert testimony, however, the Court held that the trial court should have broad latitude in determining reliability,

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[10] The Court noted that "it would prove difficult, if not impossible" for judges to administer evidentiary rules differently as between scientific and technical knowledge because technical disciplines often rest on scientific knowledge. Nor, the Court observed, were such distinctions useful. Whether expert testimony focuses on scientific observations or the application of scientific theory, it often will rest on experience unfamiliar to the jury. Accordingly, the trial judge's function is to ensure that the specialized testimony is reliable and relevant and can help the jury to evaluate the unfamiliar experience at issue. Id. at 1174.

noting that "a trial court should consider the specific factors identified in Daubert where they are reasonable measures of the reliability of expert testimony" but that Daubert analysis should not choke the court's ability "to avoid unnecessary 'reliability' proceedings in ordinary cases where the reliability of an expert's methods is properly taken for granted. . . ." Id. at 1176. Accordingly, it would appear that the more the proferred testimony rests on scientific precepts, the more rigorous the gatekeeper analysis must be and vice versa.

While Kumho's reiteration of judicial discretion in the case "ordinary" non-scientific expert testimony bespeaks continued liberal standards of admissibility, in those cases where the proffered expertise rests on assessment of empirical data, such as analysis of trends in the stock market, Kumho suggests that the proponent of the testimony may have to withstand a more stringent gatekeeper analysis. Obviously, these evidentiary threshold questions apply regardless of which party is sponsoring the witness.

Conclusion

For too long, prosecutors have dominated the defense in use of experts in white collar cases. Much of this dominance derives from the fact that white collar cases often are difficult to defend and sometimes involve conduct which no expert would sanction But much also derives from outdated and narrow notions of the uses to which an expert may be put in the service of the defense. The encroachment of the criminal law into traditionally civil areas such as health care and pensions requires white collar practitioners to rededicate themselves to aggressive use of experts so that they can do a competent job of defending their clients. In addition to the enhanced ability to present hearsay, use of experts allows the defense to display the rigorousness of its investigation, a strategy that can counteract the perception of the government's investigation as being neutral. For those with the funds to do so, having the expert become in effect, a defense case agent with privileges at counsel table, would add heft to an aggressive defense presentation. At bottom, a crisp expert analysis synthesizing expertise and ground level interviews of key witnesses shows confidence in the defense case and has unique power to legitimize the defense in the eyes of the jury.