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The Roles of Attorneys as Courtroom Experts: Revisiting the Conventional Limitations and Their Exceptions.

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ARTICLE

David S. Caudill

The Roles of Attorneys As Courtroom Experts: Revisiting the Conventional Limitations and Their Exceptions

Abstract. This Article examines whether attorneys should be allowed to testify as legal experts, especially in the legal malpractice context. This Article starts by addressing the unclear distinction between questions of law and fact and reviews several recent cases that prohibited expert legal testimony. Next, this Article addresses some general exceptions to the prohibition against expert legal testimony, such as questions of complex and uncertain law. Finally, this Article examines the use of legal experts in legal malpractice cases.

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I. INTRODUCTION

[D]ecisions which have held expert legal testimony to be admissible—for one reason or another[—] . . . are properly considered somewhat as “sports” of evidence law in which a district court’s error is compounded on appeal.¹

While it would be an exaggeration to say that a debate over the propriety of expert legal testimony raged between 1984 and 1994, there was noticeable scholarly activity during those years concerning the tension between the blackletter prohibition against expert legal testimony and the actual appearance of legal experts testifying in courts.² Explanations offered for allowing expert legal testimony include: a “minority rule,”³ mistakes of precedent,⁴ plausible exceptions, such as testimony involving mixed questions of law and fact,⁵ and “judges [using] their common sense and apply[ing] the criteria for admissibility on a case-by-case basis to determine when expert legal testimony will be helpful.”⁶ However, recent decisions suggest the blackletter prohibition is as strong as ever,⁷ such that Fifth Circuit anomalies allowing expert legal testimony, like *United States*

1. Thomas E. Baker, *The Impropriety of Expert Witness Testimony on the Law*, 40 U. KAN. L. REV. 325, 353, 355 (1992). Professor Baker’s “anecdotal impression is that [expert legal testimony] is not infrequently allowed,” but he is opposed to the practice. *Id.* at 325.

2. See Michael P. Ambrosio & Denis F. McLaughlin, *The Use of Expert Witnesses in Establishing Liability in Legal Malpractice Cases*, 61 TEMP. L. REV. 1351, 1370–90 (1988) (discussing the practical and ethical implications of using expert witnesses in malpractice cases); Thomas E. Baker, *The Impropriety of Expert Witness Testimony on the Law*, 40 U. KAN. L. REV. 325, 325–45 (1992) (arguing that the use of expert legal testimony is impermissible); Wilburn Brewer, Jr., *Expert Witness Testimony in Legal Malpractice Cases*, 45 S.C. L. REV. 727, 728–29 (1994) (claiming that the use of expert witnesses in legal malpractice cases is highly problematic); Charles W. Ehrhardt, *The Conflict Concerning Expert Witnesses and Legal Conclusions*, 92 W. VA. L. REV. 645, 645 (1990) (addressing the increased use of expert legal testimony); Charles M. Leibson, *Legal Malpractice Cases: Special Problems in Identifying Issues of Law and Fact and in the Use of Expert Testimony*, 75 KY. L.J. 1, 19–20 (1986) (lamenting the overuse of expert legal testimony because it invades the province of the court); cf. Note, *Expert Legal Testimony*, 97 HARV. L. REV. 797, 798 (1984) (questioning the prohibition against expert legal testimony).

3. See Thomas E. Baker, *The Impropriety of Expert Witness Testimony on the Law*, 40 U. KAN. L. REV. 325, 355 (1992) (conceding that one might describe the quantity of cases allowing expert legal testimony as a “minority rule”).

4. See *id.* (arguing that the cases allowing expert legal testimony “may best be characterized as mistakes of precedent” rather than a “minority rule”).

5. See *Mega Child Care, Inc. v. Tex. Dep’t of Protective & Regulatory Servs.*, 29 S.W.3d 303, 309 (Tex. App.—Houston [14th Dist.] 2000, no pet.) (“An issue involves a mixed question of law and fact when a standard or measure has been fixed by law and the question is whether the person or conduct measures up to that standard.” (citing *Crum & Forster, Inc. v. Monsanto Co.*, 887 S.W.2d 103, 134 (Tex. App.—Texarkana 1994, no writ))).

6. Note, *Expert Legal Testimony*, 97 HARV. L. REV. 797, 814 (1984). “There should be no strict rule of law prohibiting expert legal testimony.” *Id.*

7. See *infra* Part II.B. (discussing recent cases prohibiting expert legal testimony).

v. Garber,⁸ have been “limited by the Fifth Circuit virtually—but not quite—to the point of being overruled”⁹ and rejected in other federal circuits.¹⁰ Nevertheless, other decisions suggest a certain elusiveness in that prohibition.¹¹

The purpose of this Article is to identify and explore several problematic applications of the prohibition against expert legal testimony, namely: (1) testimony concerning complex areas of law; (2) testimony about unsettled areas of law; (3) legal malpractice testimony on whether an attorney–client relationship exists; and (4) testimony regarding ethical rules of conduct. Part II surveys recent cases that reflect an idealized view of the prohibition against expert legal testimony, while Part III confirms that there are indeed recognized exceptions that challenge the notion that expert legal testimony is or should be prohibited. In Part IV, the Article first highlights the conventional use of experts in legal malpractice cases and the problem of the common experience exception to the need for lawyer experts. Part IV then considers the question of whether expert testimony concerning ethics rules should be prohibited, and the presumption that expertise is not needed to determine the existence of the attorney–client relationship. Part V concludes that there are justifiable exceptions to the idealized picture regarding the distinction between admissible (fact) and inadmissible (law) testimony by lawyers.

II. THE STRONG, IDEALIZED DISTINCTION BETWEEN FACT AND LAW

Th[e] distinction [between questions of law and questions of fact] has proved

8. *United States v. Garber*, 607 F.2d 92 (5th Cir. 1979) (en banc). *Garber* reversed a district court’s refusal to admit expert testimony on taxation. *Id.* at 93–95. The trial court excluded the expert after determining that the characterization of income under the Internal Revenue Code was a question for the court, not the jury, to decide. *Id.* at 95. On appeal, a majority of the Fifth Circuit allowed the expert legal testimony, reasoning that the expert could provide an interpretation of the tax law that would support the defendant’s claim that she did not intend to conceal taxable income. *Id.* at 99. Notably, four judges supported two dissenting opinions. *Id.* at 101, 109 (Ainsworth, J., dissenting) (Tjoflat, J., dissenting).

9. Thomas E. Baker, *The Impropriety of Expert Witness Testimony on the Law*, 40 U. KAN. L. REV. 325, 360 (1992); see *United States v. Daly*, 756 F.2d 1076, 1083–84 (5th Cir. 1985) (refusing to apply *Garber* and excluding expert legal testimony); *United States v. Burton*, 737 F.2d 439, 444 (5th Cir. 1984) (declaring that expert legal testimony was restricted to cases like *Garber* with “unique, indeed near bizarre, facts”); *United States v. Herzog*, 632 F.2d 469, 473 (5th Cir. 1980) (declining to extend *Garber* in another criminal tax matter).

10. See *United States v. Curtis*, 782 F.2d 593, 599 (6th Cir. 1986) (declining to follow *Garber*); *United States v. Ingredient Tech. Corp.*, 698 F.2d 88, 97 (2d Cir. 1983) (same). See generally Thomas E. Baker, *The Impropriety of Expert Witness Testimony on the Law*, 40 U. KAN. L. REV. 325, 360–61 (1992) (discussing other circuits’ refusals to follow *Garber*).

11. See *infra* Part III (explaining exceptions for complex and unsettled law).

elusive and unworkable in practice.¹²

The historical apprehension toward allowing expert legal testimony is based on the notion that the realms of fact and law should remain separate. However, this ideal is far from the reality that many courts face, as questions of fact and law are often inseparable. Part II will first explore the opaque distinction between fact and law, and then will turn to an examination of recent cases that have prohibited expert legal testimony. Part II will conclude with an analysis of the advantages and disadvantages of expert legal testimony.

A. *Unclear Lines Between Fact and Law*

Ideally, lawyers should only testify as experts on factual issues to help juries understand the facts.¹³ Judges instruct the jury on the law¹⁴ and are presumed to have sufficient legal expertise.¹⁵ For example, lawyer experts are virtually required in legal malpractice litigation but not to testify as to

12. Note, *Expert Legal Testimony*, 97 HARV. L. REV. 797, 798 (1984).

13. See *Peterson v. City of Plymouth*, 60 F.3d 469, 475 (8th Cir. 1995) (explaining that expert testimony should only be allowed if it “will assist the trier of fact to understand the evidence or to determine a fact in issue” (quoting FED. R. EVID. 702)); cf. *Innes v. Howell Corp.*, 76 F.3d 702, 711 (6th Cir. 1996) (citing *Stiver v. Parker*, 975 F.2d 261, 273 (6th Cir. 1992)) (discussing the expert witness’s role to “guide the jury as to the relevant standard of care in the profession” by explaining a lawyer’s duties and what may be considered a breach of those duties); *Hirschberger v. Silverman*, 609 N.E.2d 1301, 1304–05 (1992); *Lazy Seven Coal Sales, Inc. v. Stone & Hinds, P.C.*, 813 S.W.2d 400, 406 (Tenn. 1991); Michael A. DiSabatino, Annotation, *Admissibility and Necessity of Expert Evidence As to Standards of Practice and Negligence in Malpractice Action Against Attorney*, 14 A.L.R. 4th 170 (1982 & Supp. 1995)); *United States v. Ellsworth*, 738 F.2d 333, 336 (8th Cir. 1984) (“[The expert’s] opinion does not appear to be based upon a ‘sound factual foundation,’ nor does his opinion appear to be based upon ‘an explicable and reliable system of analysis’” (quoting *State v. Kim*, 645 P.2d 1330, 1336 (Haw. 1982))). See generally FED. R. EVID. 703 (stating that experts must form their opinions “on facts or data”).

14. See *Nieves-Villanueva v. Soto-Rivera*, 133 F.3d 92, 99 (1st Cir. 1997) (alteration in original) (“It is black[]letter law that ‘[i]t is not for witnesses to instruct the jury as to applicable principles of law, but for the judge.’” (quoting *United States v. Newman*, 49 F.3d 1, 7 (1st Cir. 1995))); *Adalman v. Baker, Watts & Co.*, 807 F.2d 359, 366 (4th Cir. 1986) (“[U]nder our system it is the responsibility—and the duty—of the court to state to the jury the meaning and applicability of the appropriate law . . .”), *abrogated on other grounds by Pinter v. Dahl*, 486 U.S. 622 (1988). Judges provide juries with invaluable background on applicable law via jury instructions. See *Billings Leasing Co. v. Payne*, 577 P.2d 386, 391 (Mont. 1978) (noting that “[j]ury instructions are crucial to a jury’s understanding of a case”).

15. See *Nieves-Villanueva*, 133 F.3d at 100 (internal quotation marks omitted) (stating that “the special legal knowledge of the judge” makes expert testimony on legal conclusions unnecessary (quoting 7 WIGMORE ON EVIDENCE § 1952 (Chadbourne rev. 1978))); *Marx & Co. v. Diners’ Club, Inc.*, 550 F.2d 505, 509–10 (2d Cir. 1977) (establishing that legal experts are not needed because “[t]he special legal knowledge of the judge makes the witness’ testimony superfluous” (citation omitted)).

the law. Rather, they testify as to the factual practices of attorneys in the geographic locale¹⁶ of the defendant attorney to help “the jury understand a special professional standard of care that is different from the ‘reasonable person’ standard used in ordinary negligence cases.”¹⁷

In reality, however, there are numerous exceptions to the ideal, which calls into question any clear distinction between law and fact. Indeed, in 2003, Professors Ron Allen and Michael Pardo elucidated the mythical dimension of that distinction after acknowledging that “it is the legal system’s fundamental and critical distinction” and that “[s]ignificant consequences attach to whether an issue is labeled ‘legal’ or ‘factual.’”¹⁸

The importance of the distinction, however, “is surpassed only by its mysteriousness.”¹⁹ The United States Supreme Court has admitted that the distinction is “elusive,”²⁰ “slippery,”²¹ and of “a vexing nature,”²² while also acknowledging that the Court has not provided clear guidance²³ and that no rule could “unerringly distinguish a factual finding from a legal conclusion.”²⁴ The main reason for this disarray is that there is essentially no “qualitative or ontological difference” between law and fact;

16. Some courts require that legal experts in malpractice cases practice in the same community or county as the defendant attorney while others would admit an expert who practices in the same state, and in some federal cases, an expert on national professional standards of care might be admissible. See Michael P. Ambrosio & Denis F. McLaughlin, *The Use of Expert Witnesses in Establishing Liability in Legal Malpractice Cases*, 61 TEMP. L. REV. 1351, 1363–65 (1988) (recognizing various approaches to the “geographic element of the standard of care”); Wilburn Brewer, Jr., *Expert Witness Testimony in Legal Malpractice Cases*, 45 S.C. L. REV. 727, 757–60 (1994) (describing different courts’ approaches to “the locality rule”).

17. *Innes*, 76 F.3d at 711. Perhaps reflecting jurisdictional variations, “expert opinions have [sometimes] been expressed on the issues of legal error, causation[,] and damage.” 4 RONALD E. MALLIN & JEFFREY M. SMITH, LEGAL MALPRACTICE § 36.19 (2011 ed.).

18. Ronald J. Allen & Michael S. Pardo, Essay, *The Myth of the Law–Fact Distinction*, 97 NW. U. L. REV. 1769, 1769 (2003).

19. *Id.*

20. *Id.* (quoting *Miller v. Fenton*, 474 U.S. 104, 113 (1985)) (internal quotation marks omitted).

21. *Id.* (quoting *Thompson v. Keohane*, 516 U.S. 99, 110–11 (1995)) (internal quotation marks omitted).

22. *Id.* (quoting *Bose Corp. v. Consumers Union of U.S., Inc.*, 466 U.S. 485, 501 (1984); *Pullman-Standard v. Swint*, 456 U.S. 273, 288 (1982)) (internal quotation marks omitted); see *Bose Corp.*, 466 U.S. at 501 (asserting that despite the distinction’s “vexing nature,” its importance cannot be underestimated (citation omitted)).

23. Ronald J. Allen & Michael S. Pardo, Essay, *The Myth of the Law–Fact Distinction*, 97 NW. U. L. REV. 1769, 1769 (2003) (citing *Williams v. Taylor*, 529 U.S. 362, 385 (2000)); see *Miller v. Fenton*, 474 U.S. 104, 113 (1985) (“We acknowledge that the Court has not charted an entirely clear course in this area.”).

24. Ronald J. Allen & Michael S. Pardo, Essay, *The Myth of the Law–Fact Distinction*, 97 NW. U. L. REV. 1769, 1769 (2003) (quoting *Pullman-Standard*, 456 U.S. at 288).

“there are only pragmatic differences.”²⁵ These differences are reflected in three dichotomies between: (1) conventional meanings of law and fact; (2) judge and jury; and (3) general matters and specific, localized phenomena.²⁶ “[F]unctional considerations underlie the decision to label any given issue ‘legal’ or ‘factual.’”²⁷ “[T]he decision . . . [is] based on who should decide it under what standard, . . . not . . . on the nature of the issue.”²⁸

Professors Allen and Pardo consider the muddled distinction in numerous doctrinal contexts²⁹—but their compelling analysis applies to the prohibition against expert legal testimony, where “the legal system [also] makes pragmatic allocative choices in the guise of principled analysis.”³⁰ For example, in contract disputes,

judges apply law to fact and also decide issues concerning the construction and meaning of contracts. Despite the fact that the inferences drawn in answering these questions relate to the underlying factual occurrence, . . . judges retain decision-making authority—often under the misleading rubric that these issues are ones of law. . . . [T]he primary reason for [this] historical practice is . . . juror illiteracy. Although that is a pretty good reason . . . , it bears no relationship at all to whether the issue is “legal” or “factual,” which is just our point—the labels are applied after the pragmatic allocative decision is made.³¹

Likewise, in commercial cases involving claims of unconscionability, a matter of law for the courts under the Uniform Commercial Code (UCC), jurors are denied “participation on what one would think are obviously basic fact-finding functions”—“inferences drawn from extrinsic evidence such as bargaining power, available alternatives, and education of the parties.”³² “Perhaps judges are better fact[]finders in commercial litigation—because of complexity . . . —but this does not make ‘legal’ issues out of factual issues unless the term simply refers to those issues

25. *Id.* at 1770.

26. *Id.* at 1769–70. For example, if “an issue is conventionally regarded as legal, is usually decided by the judge, and involves highly general matters like appropriate standards of conduct, it will likely be thought of as a” legal question, and the reverse is true. *Id.* at 1770.

27. *Id.*

28. *Id.* at 1771.

29. *See id.* (discussing “cases involving punitive and compensatory damages, patents, the First Amendment, . . . criminal law, . . . negligence, contracts, and appellate review”).

30. *Id.* at 1778.

31. *Id.* at 1782 (footnotes and citations omitted).

32. *Id.* at 1783.

better decided by one decision-maker than another.”³³ This is not, therefore, to assert that our “analytically empty” concept of law is not “pragmatically important,”³⁴ but “most legal issues are factual” (insofar as the state of the law is a fact),³⁵ and any coherent distinction “is not one between law and fact; it is one between the facts that the law, by its own conventions, calls ‘law’ and the ones it calls ‘facts.’”³⁶

B. *Recent Cases Prohibiting Expert Legal Testimony*

The general prohibition of expert legal testimony is confirmed in many recent cases. The basis for this rule is that experts should not be able to testify on legal issues because they are within the province of the judge. Thus, the distinction between fact and law is especially relevant when courts decide whether to allow expert testimony. However, this distinction starts to lose its clarity when factual issues are intertwined with legal issues.

1. *Conclusory Legal Statements*

The rule that expert legal testimony is prohibited finds support in

33. *Id.*

34. *Id.* at 1784.

35. *Id.* at 1790. “There are only facts: some for the judge to decide, and some for the jury to decide . . .” *Id.* at 1806.

36. *Id.* at 1771, 1805. Another recent “fair and serious challenge to claims that law and fact can be understood separately” is offered by Michael Phillis, an Australian scholar, who, like Professors Allen and Pardo, questions analytical attempts to distinguish law from fact “independent of functional or institutional concerns.” Michael Phillis, *What Values Separate Law and Fact?* 1–2 (Oct. 14, 2011) (unpublished manuscript), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1955688. Phillis warns, however, that in adopting a pragmatic distinction, “it seems too simplistic to say that judges simply decide whether a question is one of law based on arbitrary preferences; therefore, values should be central and lead us to a strategic account “in terms of function or institutional competence.” *Id.* at 2, 6.

The strategic model . . . will reflect constitutional value-judgments and reveal assumptions in the general case of what is special about courts, in particular the kinds of values that courts are thought to embody or protect which other bodies do not.

....

[F]act and law are not distinct from the uses to which they are put. . . . Obviously this view would give no stable content to the categories of law and fact, . . . but if we are willing to accept a lower standard of objectivity (and I think we simply must), then . . . the main discussion is not happening at the categorical level, but is rather based on less conceptually clear values and functional assumptions or observations.

Id. at 4–5, 14–15. But because this argument only undermines the analytical approach, Phillis prefers to “see the distinction between law and fact as addressing two questions: how do our structures of thinking about law drive and constrict the meaning of the distinction between law and fact, and what meaning or function *should* the distinction have?” *Id.* at 15.

Brainard v. American Skandia Life Assurance Corp.,³⁷ an unsuccessful suit brought by unsophisticated investors against an insurance company and several financial advisors.³⁸ One issue in the case was whether the financial advisors were agents for the insurance company; an expert testified that an agency relationship existed.³⁹ The trial court rejected the expert's opinion as a mere "conclusory assertion about ultimate legal issues,"⁴⁰ and the decision was affirmed on appeal.⁴¹ The court of appeals declared that "an expert opinion must 'set forth facts' and, in doing so, outline a line of reasoning arising from a logical foundation."⁴² However, the expert's affidavit merely "employ[ed] broad and dramatic language without substance or analysis."⁴³

*Schmidt v. City of Bella Villa*⁴⁴ confirmed a similar requirement for fact-based expert opinions. In this § 1983⁴⁵ case, an arrestee sued the city and its police chief on the basis that the manner in which a tattoo was photographed violated the arrestee's rights.⁴⁶ The trial court rejected the plaintiff's expert police testimony concerning police practices, in part because much of the expert's testimony consisted of improper legal conclusions about the reasonableness of the procedures under the Fourth Amendment instead of permissible fact-based opinions.⁴⁷ The appellate court held that there was no abuse of discretion because "[the expert's] report [was] devoid of any standards and explanations that would assist the

37. *Brainard v. Am. Skandia Life Assurance Corp.*, 432 F.3d 655 (6th Cir. 2005).

38. *Id.* at 658, 660, 667.

39. *Id.* at 661–62.

40. *Id.* at 663 (quoting *Viterbo v. Dow Chem. Co.*, 826 F.2d 420, 422 (5th Cir. 1987)) (internal quotation marks omitted). *But see Stang v. ThreeQuarters LLC*, No. A09-0104, 2009 WL 3172203, at *3 (Minn. Ct. App. Oct. 6, 2009) (rejecting a challenge to expert testimony as being merely conclusory because the affidavit presented specific facts).

41. *Brainard*, 432 F.3d at 664.

42. *Id.* (quoting *Am. Key Corp. v. Cole Nat'l Corp.*, 762 F.2d 1569, 1579–80 (11th Cir. 1985)).

43. *Id.* Expert opinions being challenged as conclusory will generally require specific facts to survive a court's scrutiny. *See Hayes v. Douglas Dynamics, Inc.*, 8 F.3d 88, 92 (1st Cir. 1993) ("Where an expert presents 'nothing but conclusions—no facts, no hint of an inferential process, no discussion of hypotheses considered and rejected', such testimony will be insufficient to defeat a motion for summary judgment." (quoting *Mid-State Fertilizer v. Exchange Nat'l Bank*, 877 F.2d 1333, 1339 (7th Cir. 1989))); *Stang*, 2009 WL 3172203, at *3 (including expert testimony because it provided specific facts to support its conclusion).

44. *Schmidt v. City of Bella Villa*, 557 F.3d 564 (8th Cir. 2009).

45. *See* 42 U.S.C. § 1983 (2006) (providing a cause of action to individuals who have their constitutional rights infringed by a governmental actor).

46. *Schmidt*, 557 F.3d at 567–68.

47. *Id.* at 570 (citing *Peterson v. City of Plymouth*, 60 F.3d 469, 475 (8th Cir. 1995)).

trier of fact in contextualizing his opinions.”⁴⁸

In both cases discussed above, the court was faced with conclusory statements about ultimate legal issues that were “without substance or analysis”⁴⁹ or were “not fact-based opinions.”⁵⁰ This suggests that some legal conclusions would be admissible as part of a fact-based analysis.⁵¹ For example, *Brainard* explains that “[a]n expert who supplies nothing but a bottom line supplies nothing of value to the judicial process.”⁵² *Schmidt* refers to the expert’s report as not having any helpful standards and explanations.⁵³

2. Other Cases Demonstrating the General Prohibition

“An expert is not allowed to testify that a particular legal standard, or legal term of art, has been met.”⁵⁴

Brainard and *Schmidt* introduce the notion of mixed questions of law and fact, which are conventionally prohibited and exemplified “when a standard or measure has been fixed by law and the question is whether the person or conduct measures up to that standard.”⁵⁵ Although there are cases where experts were allowed to testify concerning mixed questions of law and fact,⁵⁶ the Federal Rules of Evidence do not suggest that such

48. *Id.* (citing *United States v. Ellsworth*, 738 F.2d 333, 336 (8th Cir. 1984)).

49. *Brainard v. Am. Skandia Life Assurance Corp.*, 432 F.3d 655, 664 (6th Cir. 2005).

50. *Schmidt*, 557 F.3d at 570.

51. *See id.* (implying that expert legal testimony may be admissible if it is fact-based); *Brainard*, 432 F.3d at 664 (same). The Federal Rules of Evidence embrace this notion of expert testimony based on fact, requiring expert opinions to be “based on sufficient facts or data.” FED. R. EVID. 702 (emphasis added).

52. *Brainard*, 432 F.3d at 664 (alteration in original) (quoting *Mid-State Fertilizer Co. v. Exch. Nat’l Bank*, 877 F.2d 1333, 1339 (7th Cir. 1989)) (internal quotation marks omitted).

53. *Schmidt*, 557 F.3d at 570. *See generally Ellsworth*, 738 F.2d at 336 (holding that expert testimony must be based on sound factual foundations and an “explicable and reliable system of analysis”).

54. *Smith v. Childs*, 437 S.E.2d 500, 506 (N.C. Ct. App. 1993).

55. Charles W. Ehrhardt, *The Conflict Concerning Expert Witnesses and Legal Conclusions*, 92 W. VA. L. REV. 645, 651 (1990). *But see Amakua Dev. LLC v. Warner*, No. 05 C 3082, 2007 WL 2028186, at *11–12 (N.D. Ill. July 10, 2007) (“In other words, an expert may offer his opinion as to facts that, if found, would support a conclusion that the legal standard at issue was satisfied, but he may not testify as to whether the legal standard has been satisfied.” (quoting *Burkhart v. Wash. Metro. Area Transit Auth.*, 112 F.3d 1207, 1212–13 (D.C. Cir. 1997)) (internal quotation marks omitted)); *Grismore v. Consol. Prods. Co.*, 5 N.W.2d 646, 663 (Iowa 1942) (“When a standard, or a measure, or a capacity has been fixed by law, no witness whether expert or non-expert, nor however qualified, is permitted to express an opinion as to whether or not the person or the conduct, in question, measures up to that standard.”).

56. *See Harris v. Pac. Floor Mach. Mfg. Co.*, 856 F.2d 64, 67–68 (8th Cir. 1988) (permitting an expert to explain a set of legal criteria to the jury and the things he would consider in determining

testimony is allowable.⁵⁷

For example, in *Nationwide Transport Finance v. Cass Information Systems, Inc.*,⁵⁸ the plaintiff finance company intended to introduce the testimony of an expert to explain the application of the UCC to the factoring industry.⁵⁹ In response to the defendant's motion, the trial court struck all portions of the expert's report discussing "the law and its application," but not those portions discussing "industry conditions, standards, and practices" or factoring where no law was cited or applied.⁶⁰ The Ninth Circuit held that even if the expert's proposed legal testimony correctly represented the law,⁶¹ the district court did not err because the

if the criteria were met, but prohibiting him from giving his conclusion about whether the criteria was met); *United States v. Kinsey*, 843 F.2d 383, 387 (9th Cir. 1988) (internal quotation marks omitted) (affirming admission of expert testimony on whether a defendant was "involved in the distribution of . . . cocaine"), *overruled on other grounds by* *United States v. Nordby*, 225 F.3d 1053 (9th Cir. 2000); *United States v. Fogg*, 652 F.2d 551, 556–57 (5th Cir. Unit B Aug. 1981) (allowing an expert to testify as to the tax treatment of certain income based on the underlying facts because the testimony "did not attempt to assume the role of the court" and "were placed in the proper perspective"); *Amakua Dev. LLC*, 2007 WL 2028186, at *11–12 (conceding that mixed questions of law and fact are likely problematic but allowing mixed testimony because "if the factual assertions were unmoored from the underlying legal framework, they would be potentially irrelevant and/or misleading"); *cf. Kinsey*, 843 F.2d at 387–89 (ruling that the trial court did not abuse its discretion by admitting expert testimony on an ultimate issue because it was not unfairly prejudicial). See generally Charles W. Ehrhardt, *The Conflict Concerning Expert Witnesses and Legal Conclusions*, 92 W. VA. L. REV. 645, 654–55 (1990) (citing numerous examples from 1978 to 1988). But see *Smith*, 437 S.E.2d at 506 ("An expert is not allowed to testify that a particular legal standard, or legal term of art, has been met." (citing *HAJMM Co. v. House of Raeford Farms, Inc.*, 403 S.E.2d 483, 488–89 (N.C. 1991))).

57. See FED. R. EVID. 702 (stating that opinion testimony must have a basis in fact and assist the fact finder in understanding a disputed fact, implying that mixed-question testimony may not be allowable); Charles W. Ehrhardt, *The Conflict Concerning Expert Witnesses and Legal Conclusions*, 92 W. VA. L. REV. 645, 655 (1990) ("The silence of the Federal Rules on the admissibility of these opinions could lead counsel and the court to believe that the restrictions on mixed question[s] of law and fact are no longer effective."). Professor Ehrhardt goes on to state that "the Advisory Committee to the Federal Rules apparently intended that the distinction between an ultimate factual issue [(allowable under Federal Rules of Evidence 704(a))] and a mixed question of law and fact [(traditionally restricted)] continue." Charles W. Ehrhardt, *The Conflict Concerning Expert Witnesses and Legal Conclusions*, 92 W. VA. L. REV. 645, 652 (1990); see FED. R. EVID. 704(a) ("An opinion is not objectionable just because it embraces an ultimate issue."); see also *id.* R. 704 advisory committee's notes (cautioning that "[t]he abolition of the ultimate issue rule does not lower the bars so as to admit all opinions" because "opinions must be helpful to the trier of fact" and evidence that wastes time is excluded).

58. *Nationwide Transp. Fin. v. Cass Info. Sys., Inc.*, 523 F.3d 1051 (9th Cir. 2008).

59. *Id.* at 1056. The plaintiff company was claiming, *inter alia*, intentional interference with a contractual relationship and offered an expert on the UCC and commercial law in support of its theory. See *id.* (claiming that the defendant stepped into the shoes of the shipper as the account debtor).

60. *Id.* (internal quotation marks omitted).

61. See *id.* at 1058 (stating that the proposed testimony on the applicability of the UCC was

expert's "legal conclusions . . . invaded the province of the trial judge."⁶² While references to terminology from applicable law and references to facts couched in legal terms are allowed in expert testimony,⁶³ the expert is not allowed to instruct the jury on legal issues.⁶⁴

In contrast, even as *Greenberg Traurig of New York, P.C. v. Moody*⁶⁵ confirmed the prohibition against expert legal testimony and the permission to use legal terminology in fact-based opinions, the meaning of mixed questions of fact and law was a bit different. *Greenberg* was a Texas case brought by investors against a law firm for negligence and failure to warn.⁶⁶ The court confirmed that experts cannot offer testimony on pure legal questions but stated that experts may apply legal terms to the factual dispute.⁶⁷

The court of appeals considered this notion of applying legal terms to be a "mixed question of law and fact"⁶⁸ that occurs when a "standard . . . [is] fixed by law and the question is whether" the standard has been met.⁶⁹ Mixed question testimony is allowed if it is "limited to the relevant issues," is "based on proper legal concepts," and is otherwise "helpful to the trier of fact."⁷⁰

However, the court of appeals concluded that the trial court had erred

not a correct statement of the law).

62. *Id.* at 1059.

63. *See id.* ("[A] district court does not abuse its discretion in allowing experts to use legal terminology."); *Swift v. United States*, 866 F.2d 507, 510 (1st Cir. 1989) (acknowledging that juries may not only decide issues of pure fact, but the "[a]pplication of the legal . . . standard to the circumstances of a particular case is [also] a function ordinarily performed by, and peculiarly within the competence of, the fact[]finder."); *see also* *Peckham v. Cont'l Cas. Ins. Co.*, 895 F.2d 830, 836–37 (1st Cir. 1990) (citing *Swift*, 866 F.2d at 510) (explaining that juries may properly hear expert testimony to determine whether a legal standard applies to certain facts); *Marshall v. Perez Arzuaga*, 828 F.2d 845, 850–51, 850 n.8 (1st Cir. 1987) (determining that a jury may listen to an expert's tire-failure analysis to help it determine whether negligence was reasonably foreseeability); *cf.* *First Nat'l State Bank of N.J. v. Reliance Elec. Co.*, 668 F.2d 725, 731 (3d Cir. 1981) (allowing an expert and scholar on the UCC to explain how UCC provisions should apply to several ambiguous documents subject to the litigation).

64. *Nationwide Transp.*, 523 F.3d at 1059 (citing *Hangarter v. Provident Life & Accident Ins. Co.*, 373 F.3d 998, 1017 n.13 (9th Cir. 2004)).

65. *Greenberg Traurig of N.Y., P.C. v. Moody*, 161 S.W.3d 56 (Tex App.—Houston [14th Dist.] 2004, no pet.).

66. *Id.* at 67.

67. *Id.* at 94.

68. *Id.* (citing *GTE Sw., Inc. v. Bruce*, 998 S.W.2d 605, 619–20 (Tex. 1999)).

69. *Id.* (citing *Mega Child Care, Inc. v. Tex. Dep't of Protective & Regulatory Servs.*, 29 S.W.3d 303, 309 (Tex. App.—Houston [14th Dist.] 2000, no pet.)).

70. *Id.* (citing *GTE Sw.*, 998 S.W.2d at 619–29; *Louder v. De Leon*, 754 S.W.2d 148, 149 (Tex. 1988) (per curiam); *Lyondell Petrochemical Co. v. Flour Daniel, Inc.*, 888 S.W.2d 547, 554 (Tex. App.—Houston [1st Dist.] 1994, writ denied)).

in allowing the testimony of a law professor and a former Texas Supreme Court justice.⁷¹ Professor Long testified about fiduciary duties and conspiracy law,⁷² and Justice Wallace testified about a lawyer's disclosure and withdrawal duties when the attorney discovers client fraud as well as testifying about their source in the Texas disciplinary rules.⁷³ Their testimony comprised over half of the plaintiffs' case.⁷⁴ The court determined that defining applicable legal principles is the role of the trial court, and the trial judge should not have allowed "his role as the legal expert in the courtroom to be usurped or diminished by" attorney experts.⁷⁵ This is especially true when they "are cloaked with the authority associated with being a learned legal scholar, a law school professor, or a former supreme court justice."⁷⁶

Regarding legal testimony as an invasion of the province of the court, in *United States Aviation Underwriters, Inc. v. Pilatus Business Aircraft, Ltd.*,⁷⁷ an insurer and aviation company brought a products liability suit against an airplane manufacturer.⁷⁸ The plaintiffs presented the testimony of an expert who explained that federal aviation regulations required pilot-operating handbooks to provide a procedure for shutting down and restarting an engine in flight.⁷⁹ The defendant claimed that this testimony invaded "the province of the court," and the court of appeals agreed: "To the extent [the expert] was explaining the content of the regulation, he was merely repeating the jury instruction. . . . [S]uch testimony . . . violates the rule against experts testifying as to the law

71. *Id.* at 95.

72. *Id.* at 94-95.

73. *Id.* at 95. For a discussion on testimony regarding rules of professional conduct, see Part IV.C.

74. *Id.* at 99-100. The plaintiffs had sixteen days of expert testimony, most of which was given by Professor Long and former Justice Jefferson. *Id.* at 100. In fact, Professor Long's testimony alone lasted for eight and a half days. *Id.*

75. *Id.* at 99; accord *Marx & Co. v. Diners' Club, Inc.*, 550 F.2d 505, 509-10 (2d Cir. 1977) ("It is not for [expert] witnesses to instruct the jury as to applicable principles of law, but for the judge."); see *United States v. Zipkin*, 729 F.2d 384, 387 (6th Cir. 1984) (stating that the role of the trial judge is to decide the law in a given case, and emphasizing that it is impermissible to assign that role to a jury by allowing the submission of expert testimony on relevant controlling legal principles); cf. *Specht v. Jensen*, 853 F.2d 805, 808 (10th Cir. 1988) (holding that "testimony which articulates and applies the relevant law . . . circumvents the jury's decision-making function by telling it how to decide the case.").

76. *Greenberg Traurig*, 161 S.W.3d at 99.

77. *U.S. Aviation Underwriters, Inc. v. Pilatus Bus. Aircraft, Ltd.*, 582 F.3d 1131 (10th Cir. 2009).

78. *Id.* at 1136.

79. *Id.* at 1150.

governing the jury's deliberations."⁸⁰

Another case involving testimony concerning federal regulations, *Pelletier v. Main Street Textiles, LP*,⁸¹ was brought to recover damages for injury to a forklift driver.⁸² The trial court excluded the testimony of the plaintiff's expert concerning the applicability of Occupational Safety and Health Administration (OSHA) regulations and industry safety practices.⁸³ On appeal, the court noted: "[T]he general rule is that it is the judge's role, not a witness's, to instruct the jury on the law. . . . For this reason, and to avoid jury confusion, the district court . . . acted well within its discretion in excluding expert testimony about the applicability of OSHA regulations."⁸⁴ The plaintiff cited cases where experts were permitted to testify about applicable law, but the court concluded that those cases were "inapposite because they involve situations in which the proper interpretation of the law is itself a factual issue . . . , as when the defendant claims that his interpretation of the law was reasonable, even if incorrect."⁸⁵ By contrast, the plaintiff offered testimony "to show what the regulations meant, not to show what he thought they meant."⁸⁶

An example of this distinction between what a regulation means versus what someone thinks it means is found in *Gomez v. Rivera Rodriguez*.⁸⁷ In *Gomez*, a § 1983 suit against a city and several city officials,⁸⁸ the trial court excluded the testimony of an expert on the basis that he was "interpret[ing] the law for the jury," thereby infringing on the trial judge's role.⁸⁹ The First Circuit, however, held that "the court below went too far

80. *Id.* at 1150–51.

81. *Pelletier v. Main St. Textiles, LP*, 470 F.3d 48 (1st Cir. 2006).

82. *Id.* at 50.

83. *Id.* at 54.

84. *Id.* at 54–55 (citations omitted); see *Nieves-Villanueva v. Soto-Rivera*, 133 F.3d 92, 99 (1st Cir. 1997) ("It is black[letter] law that '[i]t is not for witnesses to instruct the jury as to applicable principles of law, but for the judge.'" (quoting *United States v. Newman*, 49 F.3d 1, 7 (1st Cir. 1995)), *superseded by statute on other grounds*, Crime Control Act of 1990, Pub. L. No. 101-647, 104 Stat. 4789)); cf. *N. Heel Corp. v. Compo Indus., Inc.*, 851 F.2d 456, 468 (1st Cir. 1988) (noting that district judges have considerable leeway to exclude expert opinions on questions of law in a variety of instances and higher courts prefer not to intrude on the discretion of trial courts and will therefore reverse only if "manifest—and damaging—error" exists (citing *Indep. Nail & Packing Co. v. Mitchell*, 343 F.2d 819, 823 (1st Cir. 1965))).

85. *Pelletier*, 470 F.3d at 55 (citing *Gomez v. Rivera Rodriguez*, 344 F.3d 103, 115, 119 (1st Cir. 2003); *United States v. Garber*, 607 F.2d 92, 96–98 (5th Cir. 1979) (en banc)).

86. *Id.*

87. *Gomez v. Rivera Rodriguez*, 344 F.3d 103 (1st Cir. 2003).

88. *Id.* at 106. The plaintiffs alleged they were fired from their jobs with the municipality due to their political affiliations. *Id.* The jury found in favor of the plaintiffs and awarded them substantial damages, but the First Circuit reversed the decision. *Id.*

89. *Id.* at 114 (alteration in original) (internal quotation marks omitted).

when it banned [the expert] from testifying *at all* on the ground that his testimony would embody inadmissible legal opinion.”⁹⁰ Even assuming the general rule is that legal opinion testimony is *per se* inadmissible,⁹¹ the expert was a fact witness explaining the legal advice he gave to the mayor; that testimony was admissible for the purpose of demonstrating the Mayor’s grasp of the law and his resulting state of mind.⁹² There is a “clear line between permissible testimony on issues of fact and testimony that articulates the ultimate principles of law governing the deliberations of the jury” and, in this case, the expert’s “testimony clearly falls on the sunny side of this line.”⁹³

Finally, in *Carrelo v. Advanced Neuromodulation Systems, Inc.*,⁹⁴ a district court granted a motion to strike the plaintiffs’ expert testimony because it invaded the province of the court and the jury.⁹⁵ Plaintiffs alleged negligence and products liability after the surgical implantation of a medical device,⁹⁶ and their expert testified that the claims were not preempted pursuant to the Food, Drug, and Cosmetic Act.⁹⁷ The reviewing court concluded that because the expert’s testimony told “the jury what decision to make,” the expert did not fulfill his role in “providing an opinion . . . to enable the jury to reach its own determination.”⁹⁸

90. *Id.*

91. *But see id.* at 114 n.6 (stating that “[t]here is a good reason to believe that” the case relied upon by the trial court to exclude the expert’s testimony did not announce a *per se* rule against legal opinion testimony (citing *Nieves-Villanueva v. Soto-Rivera*, 133 F.3d 92, 100 (1st Cir. 1997))). The First Circuit explained that even if there was such a *per se* rule, “that rule would not be implicated in these circumstances” because “the rationale for excluding legal opinions is directed at excluding testimony as to ultimate legal conclusions”—for example, witnesses cannot testify “that an appointment was made in violation of the law,” “that a search was . . . illegal,” or “that contractual obligations have a particular legal effect.” *Id.* at 114 (citing *Nieves-Villanueva*, 133 F.3d at 99; *Specht v. Jensen*, 853 F.2d 805, 808 (10th Cir. 1988); *Marx & Co. v. Diners’ Club, Inc.*, 550 F.2d 505, 508 (2d Cir. 1977)).

92. *Id.* (citing *United States v. Cavin*, 39 F.3d 1299, 1309 (5th Cir. 1994)).

93. *Id.* at 115 (quoting *Specht*, 853 F.2d at 808) (internal quotation marks omitted).

94. *Carrelo v. Advanced Neuromodulation Sys., Inc.*, 777 F. Supp. 2d 315 (D.P.R. 2011).

95. *Id.* at 318 (“Although an expert may opine on an issue of fact within the jury’s province, he may not give testimony stating ultimate legal conclusions based on those facts.”).

96. *Id.* at 319.

97. *Id.* at 320–21; *see Worthy v. Collagen Corp.*, 967 S.W.2d 360, 366–72 (Tex. 1998) (illustrating the complexity of federal preemption law and giving an in-depth analysis of its intricacies). *See generally* 21 U.S.C. § 360k(a) (2006) (prohibiting any state from establishing any requirement regarding “device[s] intended for human use” that is contrary to the Food, Drug, and Cosmetic Act).

98. *Carrelo*, 777 F. Supp. 2d at 320–21.

C. *Advantages and Disadvantages of Admitting Expert Legal Testimony*

The aforementioned cases confirm the conventional limitation on expert legal testimony, whether applying a legal standard (mixed question of law and fact) or explaining the law. However, regarding the application of a legal standard to facts, commentators speculate that expert legal testimony is admitted in some cases due to a combination of: (1) the Federal Rules of Evidence “relax[ing] many . . . common law restrictions on expert testimony” (which may lead to a “tendency . . . to interpret opinions applying legal standards in the same relaxed manner”);⁹⁹ (2) the “great discretion afforded trial judges by the appellate courts”;¹⁰⁰ and (3) “helpfulness to the jury” as the ultimate test for admission of expert testimony.¹⁰¹ As to testimony concerning substantive law, Professor Charles Ehrhardt notes:

The rationale for excluding testimony on substantive law is different from that used to exclude testimony . . . which involves a mixed question of law or fact; it is not that the testimony would not be helpful to the finder of fact, but rather that the testimony would not be helpful to the trial judge who . . . rule[s] on questions of law and instruct[s] the jury thereon. The judge is presumed to have special competence in this area.¹⁰²

Professor Ehrhardt concedes, however, that legal testimony could help the jury, especially because (1) the jury instructions may not be fully comprehended,¹⁰³ (2) an “expert may be more effective than the court in explaining the applicable law to the jury,”¹⁰⁴ and (3) “cross-examination is available.”¹⁰⁵ These are compelling arguments.

99. Charles W. Ehrhardt, *The Conflict Concerning Expert Witnesses and Legal Conclusions*, 92 W. VA. L. REV. 645, 655 (1990).

100. *Id.* at 656.

101. *Id.* at 657. Professor Ehrhardt also mentions the Fifth Circuit’s admonition in *In re Air Crash Disaster*, 795 F.2d 1230, 1233 (5th Cir. 1986), that trial judges should not be tempted “to answer objections to receipt of expert testimony with the shorthand remark that the jury will give it ‘the weight it deserves,’” because it “can mask a failure by the trial judge to come to grips with an important trial decision.” Charles W. Ehrhardt, *The Conflict Concerning Expert Witnesses and Legal Conclusions*, 92 W. VA. L. REV. 645, 656 (1990).

102. Charles W. Ehrhardt, *The Conflict Concerning Expert Witnesses and Legal Conclusions*, 92 W. VA. L. REV. 645, 665 (1990) (footnotes omitted).

103. *Id.* at 666.

104. *Id.* at 671.

105. *Id.* at 672. Professor Ehrhardt discusses the Tenth Circuit’s seeming approval of a brief statement on relevant law, but not broader legal testimony. *Id.* at 669 (citing *Specht v. Jensen*, 853 F.2d 805, 809–10 (10th Cir. 1988) (en banc)). “Apparently the amount of testimony concerning the law is being disapproved.” *Id.* When discussing policy considerations, Professor Ehrhardt seems to agree: “Permitting an expert to make a short statement concerning the relevant law . . . may enable the jury to better understand the significance of the facts” *Id.* at 671.

Nevertheless, Professor Ehrhardt warns of a risk of misleading and confusing the jury due to another explanation of the law which might seem to conflict with the court's instructions, as well as a likelihood that each party will call an expert on the law and those experts may not be able to "agree on an identical statement of a substantive legal principle."¹⁰⁶ Finally, Professor Ehrhardt identifies the most important reason to exclude legal opinions of experts: allowing them would be "inherently inconsistent with our judicial system."¹⁰⁷ This is because "[t]here is a real danger that the jury would look to the expert . . . for their instructions on the law" instead of looking to the judge.¹⁰⁸ Additionally, "[p]ermitting a lawyer to testify to legal principles, rather than arguing them as counsel, . . . deprives the judge of the give and take with counsel that has been helpful in judges arriving at correct determinations."¹⁰⁹

This Article may be the lone commentary that views Professor Ehrhardt's parade of horrors as grasping at straws, especially when he adds a concern that courts are being "overrun with experts . . . [who] have taken over the courtroom," and even worries that "some judges have apparently adopted" a "let-it-all-in" philosophy regarding expert testimony.¹¹⁰ This Article agrees with Professor Ehrhardt's justifications for allowing expert legal testimony in situations when it would be helpful to the jury but takes less comfort in the conventional assumption that expert legal testimony is never helpful to judges.

III. GENERAL EXCEPTIONS

[P]ermitting the expert to testify on the applicable law might permit a more thorough, and often more understandable, explanation of the legal principles.¹¹¹

In some circumstances, some courts recognize exceptions to the general rule forbidding legal experts. For example, in cases involving complex or unsettled (or uncertain) law, legal expertise has been allowed to assist the jury with fulfilling their role as fact finder.

106. *Id.* at 672. Professor Ehrhardt identifies a risk that the jury could be put in the judge's position when they choose which expert opinion is correct. *Id.* at 672-73.

107. *Id.* at 673.

108. *Id.*

109. *Id.* (footnotes omitted).

110. *Id.* (internal quotation marks omitted). "Permitting expert testimony concerning the law would be the final step in turning the courtroom over to experts." *Id.* at 674.

111. *Id.* at 666.

A. *Complex Law*

The conventional rule against expert legal testimony is difficult to sustain when the legal standard or term of art is complex and difficult to understand. For example, in *United States v. Davis*,¹¹² the defendant was convicted of Indiana Medicaid fraud for overbilling, substitute billing, and miscoding.¹¹³ On appeal, the defendant argued that it was reversible error to allow the testimony of an Indiana Medicaid employee who explained the interpretation of program rules.¹¹⁴ At trial, when the defendant objected to the witness interpreting laws, the judge replied that the expert could not testify about the meaning of the law but that she could testify “to how it’s enforced, how it’s interpreted, how it’s distributed to people in the form of manuals[,] and so forth.”¹¹⁵

The Seventh Circuit concluded that an expert is not permitted to “incorrectly state the law or opine on certain ultimate legal issues”¹¹⁶ and that it would be “an abuse of discretion to allow a ‘battle of the experts’ to opine about whether . . . federal safety standards [were met] when the experts [could not] even agree on what the applicable laws were.”¹¹⁷ On the other hand, the Seventh Circuit followed an earlier ruling that allowed experts to testify about how regulations are enforced and “whether transactions comply with regulations.”¹¹⁸ Thus, there was no abuse of discretion in admitting the expert’s interpretation of the law.¹¹⁹

In fairness to critics like Professors Ehrhardt and Baker, it is difficult to

112. *United States v. Davis*, 471 F.3d 783 (7th Cir. 2006).

113. *Id.* at 785–86.

114. *Id.* at 786.

115. *Id.* at 789. The plaintiff called an Indiana Medicaid employee who was an expert on reimbursement for mental health services to explain how the program interpreted a specific reimbursement provision. *Id.* at 788–89. The defendant lodged a continuing objection to “witnesses, such as this one, interpreting laws,” claiming that the testimony invaded the province of the jury. *Id.* at 789. The trial court responded by informing counsel that his objection was based on the “erroneous premise” that she was testifying on the law’s meaning. *Id.* Rather, the expert was testifying, and allowed to testify, about how government agencies apply rules. *Id.*

116. *Id.* (citing FED. R. EVID. 704; *United States v. Turner*, 400 F.3d 491, 499 (7th Cir. 2005)).

117. *Id.* (citing *Bammerlin v. Navistar Int’l Transp. Corp.*, 30 F.3d 898, 900–01 (7th Cir. 1994)). “[W]hen two competing experts offer differing opinions that are based on fact and law, the jury should not be left adrift to consider the credibility of the experts to come to a conclusion about the law.” *Id.*

118. *Id.* (citing *United States v. Owens*, 301 F.3d 521, 526–27 (7th Cir. 2002)). Note the seeming inconsistency between the statement that experts can testify as to “whether transactions comply with regulations” and the statement in *Gomez* that “a witness cannot testify that an appointment was made in violation of the law.” *Id.*; *Gomez v. Rivera Rodriguez*, 344 F.3d 103, 115 (1st Cir. 2003).

119. *Davis*, 471 F.3d at 789.

discern the distinction between (1) prohibited testimony on ultimate legal issues such as the “meaning of the law”¹²⁰ and (2) allowed testimony on the compliance with regulations or how the law is enforced or interpreted.¹²¹ This distinction is difficult because one typically thinks of an interpretation as giving a meaning. However, one can sympathize with a trial judge who finds expert legal testimony to be “helpful in cases . . . involving complex statutes.”¹²²

Many cases allow testimony to explain complex law to the jury.¹²³ For example, in *United States v. Universal Rehabilitation Services, Inc.*,¹²⁴ the witness “provided qualified expert testimony regarding the Medicare reimbursement system and how it functioned, and such testimony assisted the jury in understanding the rules and regulations.”¹²⁵ Likewise, in *Wright v. Williams*,¹²⁶ the court needed an attorney to explain the highly technical and specialized transaction involved when purchasing a vessel.¹²⁷ Moreover, in *Nika v. Danz*,¹²⁸ an expert not only testified regarding the reasonableness of a decision not to file a seemingly frivolous suit, but also testified about “the legal implications of plaintiff’s contributory negligence . . . because a jury would not [otherwise] be able to understand the issues.”¹²⁹ Finally, in the cases that allow fact-based expert testimony concerning customs and practices in an industry, such as banking, “the line between admissible and inadmissible expert testimony . . . often becomes blurred when the testimony concerns a party’s compliance with customs

120. *Id.* (quoting Transcript of Record at 187, *United States v. Davis*, 471 F.3d 783 (7th Cir. 2006) (No. 05-3481)) (internal quotation marks omitted).

121. *Id.* (quoting Transcript of Record at 187, *United States v. Davis*, 471 F.3d 783 (7th Cir. 2006) (No. 05-3481)).

122. *United States v. Universal Rehab. Servs., Inc.*, No. CRIM 94-147, 1996 WL 297575, at *10 (E.D. Pa. May 31, 1996), *aff’d*, 205 F.3d 657 (3d Cir. 2000).

123. However, in the trial of John Edwards for misuse of campaign funds, when Edwards called former Federal Election Commission Chairman Scott Thomas to testify about federal election law, U.S. District Court Judge Catherine Eagles limited his testimony, finding that “[i]t just doesn’t seem that complicated to me” and “[i]t just seems to me like a substitute for closing argument.” Josh Gerstein, *John Edwards Trial Judge Nixes Expert Testimony*, POLITICO (MAY 15, 2012, 10:11 AM), <http://www.politico.com/news/stories/0512/76271.html>.

124. *United States v. Universal Rehab. Servs., Inc.*, No. CRIM 94-147, 1996 WL 297575 (E.D. Pa. May 31, 1996), *aff’d*, 205 F.3d 657 (3d Cir. 2000).

125. *Id.* at *10.

126. *Wright v. Williams*, 121 Cal. Rptr. 194 (Ct. App. 1975).

127. *See id.* at 200 (pointing out that the case “illustrates the need for the aid of experts” to evaluate the attorney’s performance of a service “in the highly specialized area of admiralty law”).

128. *Nika v. Danz*, 556 N.E.2d 873 (Ill. App. Ct. 1990).

129. *Id.* at 887.

and practices that implicate legal duties.”¹³⁰ Thus, experts have been permitted to testify with respect to banking industry customs *and* to “provide background information to help the jury determine whether the bank’s conduct warranted status akin to a holder in due course.”¹³¹

Clearly, the backdrop to these decisions is the premise that the trial court possesses broad discretion in “rulings on the admissibility of expert opinion evidence,” and such rulings must be sustained unless clearly erroneous.¹³² The leeway given to trial judges to determine what will aid the jury helps explain instances where expert legal testimony is permitted.¹³³ But it is not enough to call these anomalies or sports, except in the name of a clear, conventional distinction between law and fact.¹³⁴

B. *Unsettled or Uncertain Law*

Testimony that helps jurors understand unsettled or uncertain law is another general exception to the prohibition against expert legal testimony. In *United States v. Garber*,¹³⁵ a tax evasion case, the district court refused to admit both the testimony of a tax lawyer and the testimony of a certified public accountant on the issue of whether certain income was taxable.¹³⁶ In a controversial en banc decision, the Fifth Circuit emphasized the defendant’s claim that reasonable doubt existed regarding the taxability of the income: “In 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.”¹³⁷ Professor

130. *Berkeley Inv. Grp., Ltd. v. Colkitt*, 455 F.3d 195, 218 (3d Cir. 2006).

131. *Id.* (citing *First Nat’l State Bank v. Reliance Elec. Co.*, 668 F.2d 725, 731 (3d Cir. 1981)).

132. *Brainard v. Am. Skandia Life Assurance Corp.*, 432 F.3d 655, 663 (6th Cir. 2005) (quoting *Viterbo v. Dow Chem. Co.*, 826 F.2d 420, 422 (5th Cir. 1987)); *accord Pelletier v. Main St. Textiles*, 470 F.3d 48 (1st Cir. 2006) (discussing the district court’s discretion to exclude expert testimony).

133. *See First Nat’l*, 668 F.2d at 731 (affirming the district court’s decision to allow expert testimony pointing to the court’s broad discretion in making admissibility decisions); *see also Nika*, 556 N.E.2d at 887 (supporting the trial court’s decision and allowing expert testimony based on the jury’s inability to understand the issues presented without the testimony); Note, *Expert Legal Testimony*, 97 HARV. L. REV. 797, 797 (1984) (announcing helpfulness as a main guiding principle in determining whether to allow expert testimony).

134. *See generally* Note, *Expert Legal Testimony*, 97 HARV. L. REV. 797, 814 (1984) (concluding that “[a]llowing expert legal testimony will to some extent obviate the need for maintaining the crucial yet elusive distinction between questions of law and of fact”).

135. *United States v. Garber*, 607 F.2d 92 (5th Cir. 1979) (en banc).

136. *Id.* at 94–96.

137. *Id.* at 99 (citations omitted).

Baker, deeming the *Garber* opinion to be a confusing curiosity, has meticulously traced the limitation of its holding¹³⁸ “to its bizarre facts—where the level of uncertainty approached legal vagueness.”¹³⁹

However, in *Bergstrom v. Noah*,¹⁴⁰ the court allowed an antitrust law expert to testify that the law was unclear and, as a result, the defendant’s alleged malpractice in bringing an antitrust action was reduced to a mere error in judgment without liability.¹⁴¹ The court confirmed an exception to the rule against expert legal testimony “where the law is unsettled and subject to interpretation with very little guidance from a court of last resort and involving issues upon which attorneys with enlightened minds could disagree.”¹⁴²

A similar case, *Cianbro Corp. v. Jeffcoat & Martin*,¹⁴³ involved a malpractice claim for failure timely to foreclose a mechanic’s lien, brought in a federal court following a state court action that resulted in the lien being dissolved.¹⁴⁴ Two different statutes in South Carolina seemed to set two different limitations periods, and the malpractice defendant complied with one of them but not the other.¹⁴⁵ The district court noted that a state court judge (relying on a Master-in-Equity’s report) ruled that the lien was dissolved, after which a state circuit court (on appeal) overruled that decision and held the lien valid.¹⁴⁶ This holding was reversed on appeal to the South Carolina Court of Appeals, which was affirmed by the Supreme Court of South Carolina, resulting in the lien being dissolved.¹⁴⁷ However, there was a strong dissent by a supreme court justice rejecting any interpretation of the statute of limitations supporting dissolution of the lien.¹⁴⁸ As these circumstances impliedly exemplified a situation of unsettled and uncertain law, the district court denied Cianbro Corporation’s motion for summary judgment and suggested that Jeffcoat

138. Thomas E. Baker, *The Impropriety of Expert Witness Testimony on the Law*, 40 U. KAN. L. REV. 325, 355–60 (1992).

139. *Id.* at 360 (quoting *United States v. Daly*, 756 F.2d 1076, 1083 (5th Cir. 1984)) (internal quotation marks omitted).

140. *Bergstrom v. Noah*, 974 P.2d 531 (Kan. 1999).

141. *Id.* at 559–60.

142. *Id.*

143. *Cianbro Corp. v. Jeffcoat & Martin*, 804 F. Supp. 784 (D.S.C. 1992), *aff’d*, 10 F.3d 806 (4th Cir. 1993) (per curiam).

144. *Id.* at 785.

145. *Id.* at 787.

146. *Id.*

147. *Id.* at 787–88.

148. *Id.* at 788.

would not be liable in a malpractice action because he reasonably followed one of the two applicable statutes of limitations.¹⁴⁹

As to the necessity for expert testimony, the plaintiff relied on the common-knowledge exception to the need for expertise,¹⁵⁰ but the district court saw the necessity for expertise on the standard of care, including evidence “that Jeffcoat should have recognized that [the statute he relied upon] was subject to another reasonable interpretation.”¹⁵¹ The testimony required of an expert attorney in this case would have involved a discussion of the law and its multiple interpretations.¹⁵² Thus, commentators conclude that while testimony about the standard of care and its breach are admissible, and testimony regarding the law is not admissible, “[i]t sometimes becomes difficult to distinguish between questions of law and questions of fact[] because questions that pertain to the lawyer’s conduct necessarily contain both factual elements and elements regarding the lawyer’s understanding of the law.”¹⁵³

This exception to the prohibition against legal expertise can be rationalized as not really allowing testimony as to the law but rather allowing a narrower discussion of the lawyer’s *understanding of the law* (and what the lawyer did, a factual inquiry) and whether it was reasonable in light of the factual aspects of the standard of care established by the

149. *Id.* at 789, 794. In particular, the district court stated:

[T]here is no question but that Jeffcoat fully complied with the plain language of [one of the statutes] in filing the foreclosure action. However, it is clear that Jeffcoat’s interpretation of [that statute] is incorrect in light of the subsequent supreme court decision and, as the law now stands, he failed to file the foreclosure action in a timely manner, thereby causing the mechanic’s lien to be dissolved. It is equally clear, however, that prior to the . . . decisions in [the state courts], there was no reported judicial interpretation of when a foreclosure suit needed to be filed . . . and there was no indication that the plain language of [the statute followed by Jeffcoat] was not to be followed. Moreover, there is no evidence in the record that Jeffcoat acted other than in complete good faith in his efforts on behalf of Cianbro.

Id. at 789.

150. The common experience exception relieves the need for expert legal testimony in malpractice cases when “the untutored eye can discern blundering of an egregious and uncomplicated sort.” *Id.* at 791 (citing *Wagenmann v. Adams*, 829 F.2d 196, 220 (1st Cir. 1987)). Here, the plaintiff was attempting to use this exception to show the lawyer’s negligence because a juror could understand what it means to let the statute of limitations run. *Id.* This exception will be discussed in detail in Part IV.B.

151. *Id.* at 793.

152. See generally *id.* at 787–88 (deciding that the plaintiff needed to present expert testimony to establish his malpractice claim because of the uncertain law).

153. Wilburn Brewer, Jr., *Expert Witness Testimony in Legal Malpractice Cases*, 45 S.C. L. REV. 727, 761 (1994).

expert.¹⁵⁴ As such, Baker's warnings about such an exception seem a bit exaggerated:

If the jury is allowed to hear evidence regarding the applicable law and its interpretation, where will the proverbial line ultimately be drawn? When questions regarding the admissibility of evidence arise, should the litigants present expert legal testimony on the applicable law and permit the jury to make the evidentiary ruling? Should we allow the litigants to present all relevant evidence and permit the confused jurors to decide the outcome without any judicial guidance, relying as best they can on experts hired by both sides? . . . The door cannot be opened without addressing all of these questions. . . . Until a persuasive argument is made that submission of expert legal testimony has a benefit that cannot be achieved by another alternative [e.g., the attorneys' arguments; the judge's research], courts should refuse to admit it before the jury.¹⁵⁵

One could just as easily ask whether we should prohibit all expert legal testimony even where it assists the judge's guidance and helps the jury to be less confused.

IV. LEGAL EXPERTISE IN LEGAL MALPRACTICE LITIGATION

[O]veruse of expert testimony, invading the province of the court, is a prevalent feature of attorneys' malpractice cases. . . .

The scope of permissible testimony by expert witnesses . . . is a debate not yet resolved by a discernible trend in the decisions. . . . [E]xpert testimony is not permissible on issues of law. Nevertheless, experts are being permitted to testify about such questions.¹⁵⁶

A. *The Conventional Framework*

The appearance of attorneys as experts is most common, and virtually required, in attorney malpractice litigation.¹⁵⁷ This need for expert

154. *See id.* (recognizing that, while determining questions of law is outside the purview of expert testimony, experts can seem to encroach into this realm by framing their testimony in terms of determining "how lawyers conducted themselves in light of the prevailing situation" (citing 2 RONALD E. MALLIN & JEFFREY M. SMITH, *LEGAL MALPRACTICE* § 27.16 (3d ed. 1989 & Supp.1993))). Thus, experts can avoid the proscription on giving testimony on points of law by referring to factual instances indicative of legal points. *Id.*

155. Thomas E. Baker, *The Impropriety of Expert Witness Testimony on the Law*, 40 U. KAN. L. REV. 325, 363 (1992).

156. Charles M. Leibson, *Legal Malpractice Cases: Special Problems in Identifying Issues of Law and Fact and in the Use of Expert Testimony*, 75 KY. L. J. 1, 19-20 (1986) (footnotes omitted).

157. *See* *Streber v. Hunter*, 221 F.3d 701, 724 (5th Cir. 2000) ("Breach of the standard of care must generally be proven by expert testimony" (citing *Geiserman v. MacDonald*, 893 F.2d 787, 793 (5th Cir. 1990))); *Geiserman*, 893 F.2d at 793 (recognizing that only a professional in the field

testimony to establish the relevant standard of care may seem contradictory in light of the general rule that expert witnesses are not to testify as to what the law is but only to assess the facts as to how the attorney acted in relation to the law.¹⁵⁸ Commentators have therefore alluded to the “substantial confusion . . . regarding the proper subject and scope of expert testimony.”¹⁵⁹

The issue of breach of a duty involves questions of both law and fact The duties owed by the attorney to a client . . . most often are implied by operation of law Expert testimony is used to define the standard of care . . . by explaining how attorneys conduct their affairs under given circumstances.¹⁶⁰

In this ideal framework, the judge instructs the jury on matters of law regarding “the law of negligence, the duty of a lawyer [in a specific situation, e.g., to prepare for trial] . . . , and the lawyer’s obligations to practice according to the prevailing standards of other lawyers in the area.”¹⁶¹ On the other hand, the expert would testify as to the standard of care not in terms of a legal duty, but “what lawyers do in their practice” and “how the community of lawyers handle such cases.”¹⁶² However, in some cases, the complexity of the law and how it relates to the lawyer’s conduct can be so inextricably interwoven that an expert will need to explain the law in the process of relating the standard of care.¹⁶³ The standard of complexity as

would be capable of determining the appropriate standard of care and whether the same was met in a given situation (quoting 2 RONALD E. MALLIN & JEFFREY M. SMITH, *LEGAL MALPRACTICE* § 27.15 (1989 ed. & Supp. 1993)); Wilburn Brewer, Jr., *Expert Witness Testimony in Legal Malpractice Cases*, 45 S.C. L. REV. 727, 728 (1994) (explaining that, because the standard of care against which an attorney’s conduct is measured is determined by reference to how other attorneys exercise care, “lay persons would not be able to determine those standards or measure the [attorney’s] conduct against them without the assistance of expert testimony from one in the same profession”).

158. See Wilburn Brewer, Jr., *Expert Witness Testimony in Legal Malpractice Cases*, 45 S.C. L. REV. 727, 760–62 (1994) (stating that expert legal testimony in malpractice cases is usually framed in terms of “how the community of lawyers handle such cases,” and not on any specific legal requirements, to avoid application of the general rule against expert legal testimony).

159. *Id.* at 729 (citing Thomas E. Baker, *The Impropriety of Expert Witness Testimony on the Law*, 40 KAN. L. REV. 325, 345 (1992); Charles W. Ehrardt, *The Conflict Concerning Expert Witnesses and Legal Conclusions*, 92 W. VA. L. REV. 645 (1990); Charles M. Leibson, *Legal Malpractice Cases: Special Problems in Identifying Issues of Law and Fact and in the Use of Expert Testimony*, 75 KY. L.J. 1 (1986–87); Note, *Expert Legal Testimony*, 97 HARV. L. REV. 797 (1984)).

160. *Id.* at 730.

161. *Id.* at 760–61 (emphasis added).

162. *Id.* at 760; see Geiserman, 893 F.2d at 793–94 (explaining that expert testimony in legal malpractice cases should address what lawyers in the community do (the standard of care) and what the lawyer in question did (whether there was a breach of that standard)).

163. Wilburn Brewer, Jr., *Expert Witness Testimony in Legal Malpractice Cases*, 45 S.C. L. REV. 727, 761 (1994). These situations create mixed questions of fact and law. *Id.* For a detailed

a basis for allowing some expert legal testimony raises the question of whether a lawyer expert is even required in legal malpractice cases where the defendant attorney is clearly liable.

B. *The Common Experience Exception to the Necessity of Expertise*

Expert testimony can be unnecessary when “the negligence is so obvious as to be ‘within the ambit of common knowledge and experience, so that no special learning is needed to evaluate the conduct of the defendant.’”¹⁶⁴ In these cases, establishing the standard of care is unnecessary because the defendant lawyer “is so grossly ineffective that his lack of professionalism is plain to see.”¹⁶⁵ Examples include: clearly defrauding a client;¹⁶⁶ ignoring the client’s requests and failing to do minimal discovery;¹⁶⁷ failing to keep a client informed regarding the need for independent counsel in a conflict situation;¹⁶⁸ and failing to provide a termite report in a residential real estate transaction.¹⁶⁹ However, “for every such case, either the facts in another case will suggest a different result or some other court will simply disagree with where the line should be drawn Thus, . . . there is no bright-line test to determine when expert testimony is required.”¹⁷⁰

discussion of mixed questions, see *supra* Part II.B.3.

164. *Cianbro Corp. v. Jeffcoat & Martin*, 804 F. Supp. 784, 791 (D.S.C. 1992) (quoting *Pederson v. Gould*, 341 S.E.2d 633, 634 (S.C. 1986)), *aff'd*, 10 F.3d 806 (4th Cir. 1993). This is one of five exceptions to the requirement of experts for legal malpractice cases. Thomas E. Baker, *The Impropriety of Expert Witness Testimony on the Law*, 40 U. KAN. L. REV. 325, 342 n.111 (1992). The other exceptions are: (1) actions based on *res ipsa loquitur*; (2) when the defendant provides the expert testimony; (3) Federal Rule of Evidence 803(18) provides the expert evidence; and (4) a bench trial. *Id.* at 342 n.111; see *Zick v. Krob*, 872 P.2d 1290, 1294 (Colo. App. 1993) (stating that an expert was not necessary to establish the standard of care in a bench trial).

165. *Wagenmann v. Adams*, 829 F.2d 196, 220 (1st Cir. 1987).

166. See *Day v. Rosenthal*, 217 Cal. Rptr. 89, 102 (Ct. App. 1985) (holding that an attorney’s conduct was so irresponsible that no expert was required or even appropriate), *superseded by statute on other grounds*, CAL. CIV. PROC. CODE § 340.6 (Deering Supp. 2012), *as recognized in Laird v. Blacker*, 235 Cal. App.3d 1795 (Ct. App. 1991).

167. See *Wagenmann*, 829 F.2d at 219–20 (explaining that the attorney seemed to do nothing to protect his client who had been arrested and incarcerated in a mental institution).

168. See *Betts v. Allstate Ins. Co.*, 201 Cal. Rptr. 528, 545 (Ct. App. 1984) (stating that when a verdict in excess of policy limits was returned, attorney did not recommend settlement or independent counsel); see also *Hill v. Okay Const. Co.*, 252 N.W.2d 107, 116–17 (Minn. 1977) (remarking that an expert is not required when a conflict of interest is obvious).

169. See *Lane v. A.J.M. Oustalet*, 873 So. 2d 92, 98–99 (Miss. 2004) (holding that failure to disclose that a house was infested with termites did not require expert testimony).

170. Wilburn Brewer, Jr., *Expert Witness Testimony in Legal Malpractice Cases*, 45 S.C. L. REV. 727, 739 (1994). *Lenius v. King* provides an example of this complexity. There, the complexity of mechanic’s liens required expert testimony, 294 N.W.2d 912, 914 (S.D. 1980), but the dissent said it “does not take a Philadelphia lawyer to figure out that letting actions lie dormant over six

For example, in *Koeller v. Reynolds*,¹⁷¹ no expert testimony was presented in a successful claim for failure to file a personal injury suit, an obvious shortcoming in most circumstances.¹⁷² On appeal, however, the court recognized that the defendant attorney had a statutory duty to file only “legal and just” actions, and the defendant attorney testified at trial that he did not believe the suit was just, so this was not a case “where malpractice [was] clear.”¹⁷³ The outcome on appeal seems to have been based on the *complexity* of the attorney’s various duties (i.e., duty to prosecute a claim but contemporaneous duty to avoid frivolous claims), as the court said that any shortcomings would not have been “plain to laymen without the testimony of those trained in the profession.”¹⁷⁴

C. *Legal Malpractice Exceptions*

1. Rules of Professional Conduct

Even though the Model Rules of Professional Conduct, as adopted in almost every jurisdiction, are the governing ethical standards for attorneys, the Scope confirms that they do not provide the basis for a malpractice suit.¹⁷⁵ Moreover, because they are generic, they are not necessarily relevant to establish a local duty of care in malpractice cases.¹⁷⁶ Thus, in *Lazy Seven Coal Sales, Inc. v. Stone & Hinds, P.C.*,¹⁷⁷ the court rejected

years . . . is a breach of standards.” *Id.* at 915 (Dunn, J, dissenting).

171. *Koeller v. Reynolds*, 344 N.W.2d 556 (Iowa Ct. App. 1983).

172. *Id.* at 558.

173. *Id.* at 561. Some commentators have stated that *Koeller* shows that “[o]pting to present a malpractice claim without expert testimony is inherently risky.” Michael P. Ambrosio & Denis F. McLaughlin, *The Use of Expert Witnesses in Establishing Liability in Legal Malpractice Cases*, 61 TEMP. L. REV. 1351, 1375–76 (1988).

174. *Koeller*, 344 N.W.2d at 561.

175. See MODEL RULES OF PROF’L CONDUCT scope (2002) (“Violation of a Rule should not itself give rise to a cause of action against a lawyer . . .”). Every jurisdiction except for California has adopted the Model Rules. *Alphabetical List of States Adopting Model Rules*, Am. Bar Ass’n, http://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/alpha_list_state_adopting_model_rules.html (last visited May 20, 2012). However, California has still adopted the principle that the rules do not establish a legal malpractice action. See CAL. RULES OF PROF’L CONDUCT R. 1-100 (1992) (“These rules are not intended to create new civil causes of action.”).

176. See Michael P. Ambrosio & Denis F. McLaughlin, *The Use of Expert Witnesses in Establishing Liability in Legal Malpractice Cases*, 61 TEMP. L. REV. 1351, 1363–65 (1988) (acknowledging different geographic considerations made by courts in establishing a standard of care); Wilburn Brewer, Jr., *Expert Witness Testimony in Legal Malpractice Cases*, 45 S.C. L. REV. 727, 757–60 (1994) (explaining that courts differ in what is considered the locality for determining the standard of care).

177. *Lazy Seven Coal Sales, Inc. v. Stone & Hinds, P.C.*, 813 S.W.2d 400 (Tenn. 1991).

expert testimony that a lawyer violated the provisions of the Georgia Code of Professional Conduct because it did not provide evidence “of the degree of knowledge, skill, prudence, and diligence which is commonly possessed . . . by lawyers practicing . . . in that jurisdiction.”¹⁷⁸ Nevertheless, most “courts allow testimony on ethical violations,”¹⁷⁹ though rarely as the basis for a finding of malpractice as a substitute for expert testimony.¹⁸⁰ However, these courts often do allow ethics testimony as *some* evidence of an attorney’s breach of the standard of care (to supplement expert testimony on the standard of care)¹⁸¹ or as a rebuttable presumption of malpractice.¹⁸²

Even recognizing that expert legal testimony on the Model Rules of Professional Conduct does not establish the standard of care and should not give the impression that a breach of the ethical rules is actionable,¹⁸³ there should be no blanket prohibition on expert legal testimony concerning the Model Rules. Even if a judge properly instructs the jury on the Model Rules, most jurors, for example, “would have no idea how defense attorneys customarily resolve or deal with . . . the delicate balancing of [conflicting] interests required when an attorney represents both the insured and the insurer in a liability case.”¹⁸⁴ Allowing an attorney to explain the breach of duty in a malpractice case by explaining

178. *Id.* at 407.

179. Michael P. Ambrosio & Denis F. McLaughlin, *The Use of Expert Witnesses in Establishing Liability in Legal Malpractice Cases*, 61 TEMP. L. REV. 1351, 1362 (1988); see *Fishman v. Brooks*, 487 N.E.2d 1377, 1382 (Mass. 1986) (noting that expert testimony regarding the duty of care based on a disciplinary rule is allowed).

180. See *Day v. Rosenthal*, 217 Cal Rptr. 89, 102 (Ct. App. 1985) (stating that the violations of the defendant attorney were so egregious that no expert testimony was needed), *superseded by statute on other grounds*, CAL. CIV. PROC. CODE § 340.6 (Deering Supp. 2012), *as recognized in Laird v. Blacker*, 235 Cal. App. 3d 1795 (Ct. App. 1991); Michael P. Ambrosio & Denis F. McLaughlin, *The Use of Expert Witnesses in Establishing Liability in Legal Malpractice Cases*, 61 TEMP. L. REV. 1351, 1387–88 (1988) (arguing that this holding does not create an “ethical violation” exception to the need for expert testimony, but rather is an example of the “common knowledge” exception).

181. See *Fishman*, 487 N.E.2d at 1382 (“Of course, an expert on the duty of care of an attorney properly could base his opinion on an attorney’s failure to conform to a disciplinary rule.”); see also Michael P. Ambrosio & Denis F. McLaughlin, *The Use of Expert Witnesses in Establishing Liability in Legal Malpractice Cases*, 61 TEMP. L. REV. 1351, 1362 n.52 (1988) (listing cases where a court allowed the introduction of evidence of ethical violations).

182. See Michael P. Ambrosio & Denis F. McLaughlin, *The Use of Expert Witnesses in Establishing Liability in Legal Malpractice Cases*, 61 TEMP. L. REV. 1351, 1362 n.55 (1988).

183. See *Miami Int’l Realty Co. v. Paynter*, 841 F.2d 348, 352–53 (10th Cir. 1988) (stating that a violation of the rules of professional conduct “does not create a private right of action” and “[t]he canons of ethics are not binding on the courts and do not have the force of law” (quoting *Bryant v. Hand*, 404 P.2d 521, 522 (Colo. 1965)) (internal quotation marks omitted)).

184. Wilburn Brewer, Jr., *Expert Witness Testimony in Legal Malpractice Cases*, 45 S.C. L. REV. 727, 744 (1994).

and interpreting the ethical rules involved in the complex situation of representing an insured defendant, after being hired by an insurance company with interests in the outcome of the trial, could only be considered a mistake if one insists that expert legal testimony is prohibited as an encroachment on the judge's role in the trial.

2. Existence of an Attorney–Client Relationship

In a legal malpractice case, a preliminary issue is whether an attorney–client relationship exists.¹⁸⁵ This inquiry is a question of fact that is “based on application of the particular jurisdiction’s legal requirements,” which “is a question of law for the court.”¹⁸⁶

Some courts view the question of whether an attorney–client relationship was formed as one easily within the understanding of an ordinary juror. In *Innes v. Howell Corp.*,¹⁸⁷ the court viewed that inquiry as a “simple question of contract formation.”¹⁸⁸ In so doing, the court stated that no specialized testimony was necessary for the jury to make an informed finding regarding the existence of an attorney–client relationship because jurors are capable of determining mutuality of assent without expert advice.¹⁸⁹ The court further noted the “truly . . . unfortunate” result that would obtain “if specialized legal knowledge were required for reasonable laypersons to ascertain whether they are actually being represented by counsel.”¹⁹⁰

However, the existence of an attorney–client relationship is difficult to discern, given that formalities and fees are not required, the words and actions of the parties must be analyzed (i.e., the relationship can be implied by conduct), and initial consultations can result in an attorney–client relationship.¹⁹¹ For example, in a recent e-mail announcement for an

185. See *Innes v. Howell Corp.*, 76 F.3d 702, 711 (6th Cir. 1996) (explaining that a plaintiff seeking to recover in a legal malpractice case must, as a preliminary matter, demonstrate the existence of an attorney–client relationship).

186. Michael P. Ambrosio & Denis F. McLaughlin, *The Use of Expert Witnesses in Establishing Liability in Legal Malpractice Cases*, 61 TEMP. L. REV. 1351, 1356 (1988). Ambrosio and McLaughlin argue that this conventional understanding, in addition to the ability of jurors to understand the factual issues, makes expert testimony on the existence of an attorney–client relationship unnecessary. *Id.*

187. *Innes v. Howell Corp.*, 76 F.3d 702 (6th Cir. 1996).

188. *Id.* at 711.

189. See *id.* at 712 (“A jury does not need an expert to tell it whether there has been mutual assent for a contract.”).

190. *Id.*

191. See Michael P. Ambrosio & Denis F. McLaughlin, *The Use of Expert Witnesses in Establishing Liability in Legal Malpractice Cases*, 61 TEMP. L. REV. 1351, 1356 n.18 (1988) (listing a sample of case law to illustrate that an attorney–client relationship can develop without formalities,

ABA Section of Litigation CLE ethics webinar, the promotional description stated in part: "Lawyers would argue they know who their clients are. . . . But increasingly, the law governing lawyers has identified 'accidental' clients: those clients that lawyers had little or no idea existed."¹⁹² In addition, in the December 2011 edition of the *Texas Bar Journal*, William Chriss answered an inquiry concerning the possibility of attorney liability for giving legal advice at a party:

As for malpractice, generally the existence of an attorney–client relationship is a prerequisite for suit Note that the only consent required of the lawyer is that he consent to "provide legal services." Thus one might claim that merely giving the advice manifests a consent to do just that, provide legal services. This . . . is . . . the reason to avoid giving free legal advice, at cocktail parties or elsewhere.¹⁹³

The notion that the formation of an attorney–client relationship is a simple question within the ordinary layperson's experience is easily challenged, and expert legal testimony should be allowed in certain cases to allow the jury to decide this difficult question.

V. CONCLUSION

[T]he law–fact distinction can be manipulated from either direction: facts can be law and law can be factual. Of course, if the distinction does not really exist, this is not a surprise. The recognition of this point effectively undermines the notion that the law is operating with a coherent law–fact distinction and strongly suggests that the supposed dualism in types of adjudication questions is false.

....

This does not mean that the doctrinal distinction between "law" and "fact" is unimportant; it merely means that it must be decided functionally. . . . This is precisely why the cases on the distinction are so apparently haphazard rather than orderly; there is no algorithm for generating correct conclusions

without payment, without explicit acknowledgement, and without progressing beyond the initial consultation (citing *Hashemi v. Shack*, 609 F. Supp. 391, 393 (S.D.N.Y. 1984); *Hughes v. Paine, Webber, Jackson & Curtis Inc.*, 565 F. Supp. 663, 669 (N.D. Ill. 1983); *Page v. Fraizer*, 445 N.E.2d 148, 152 (Mass. 1983); *Togstad v. Vesely, Otto, Miller & Keefe*, 291 N.W.2d 686, 692–93 (Minn. 1980); *George v. Canton*, 600 P.2d 822, 827 (N.M. Ct. App. 1979)).

192. E-mail from Am. Bar Ass'n Section of Litigation to author (Nov. 16, 2011, 17:30 EST) (on file with *St. Mary's Journal on Legal Malpractice & Ethics*). The e-mail advertised "'Larry Fox and Susan Martyn on Ethics: Accidental Clients and Lawyers in the Job Market,' a Live Webinar to be broadcasted on Dec, 13, 2011." *Id.*

193. William J. Chriss, *What Is Your Liability If You Give Legal Advice at a Party?*, 74 TEX. B.J. 999, 999 (2011).

about which is which, and so the courts muddle along attempting to rationalize a process whose primary purpose is allocative. . . .¹⁹⁴

While the prohibition against expert legal testimony is frequently echoed in judicial opinions and scholarly commentary,¹⁹⁵ there are (and should be) recognized exceptions.¹⁹⁶ And while the judiciary is presumed to need no expert legal testimony¹⁹⁷ and the jury is presumed to get all the law it needs from the judge's instructions,¹⁹⁸ the inconsistent application of the prohibition demonstrates the genuine need, in some circumstances, for expert legal testimony.

194. Ronald J. Allen & Michael S. Pardo, Essay, *The Myth of the Law-Fact Distinction*, 97 NW. U. L. REV. 1769, 1789, 1806 (2003).

195. See *Nationwide Transp. Fin. v. Cass Info. Sys.*, 523 F.3d 1051, 1059 (9th Cir. 2008) (rejecting the argument that expert testimony about legal conclusions should be admissible); *Brainard v. Am. Skandia Life Assurance Corp.* 432 F.3d 655, 663 (6th Cir. 2005) (noting that an expert opinion must be more than an assertion of legal issues (citing *Viterbo v. Dow Chem. Co.*, 826 F.2d 420, 422 (5th Cir. 1987))); *Greenberg Traurig of N.Y., P.C. v. Moody*, 161 S.W.3d 56, 94 (Tex. App.—Houston [14th Dist.] 2004, no pet.) (holding that an expert is prohibited from testifying to questions of law); *Wilburn Brewer, Jr., Expert Witness Testimony in Legal Malpractice Cases*, 45 S.C. L. REV. 727, 760 (1994) (“[A]n expert should not testify about the law or offer any legal conclusions.” (citing *Adalman v. Baker, Watts & Co.*, 807 F.2d 359, 368 (4th Cir. 1986), *abrogated by Pinter v. Dahl*, 486 U.S. 622 (1988); *Practical Offset, Inc. v. Davis*, 404 N.E.2d 516, 521 (Ill. App. Ct. 1980); *Hacker v. Holland*, 570 N.E.2d 951, 953 (Ind. Ct. App. 1991); *Chocktoot v. Smith*, 571 P.2d 1255, 1257 (Or. 1977) (en banc))).

196. See *United States v. Davis*, 471 F.3d 783, 789 (7th Cir. 2006) (allowing expert testimony on matters of law due to complexity); *Bergstrom v. Noah*, 974 P.2d 531, 556–60 (Kan. 1999) (admitting expert testimony when the issue involved and unsettled or uncertain law); Michael P. Ambrosio & Denis F. McLaughlin, *The Use of Expert Witnesses in Establishing Liability in Legal Malpractice Cases*, 61 TEMP. L. REV. 1351, 1356 n.18 (1988) (citations omitted) (providing cases where the issue was whether an attorney–client relationship existed). Instead of recognized exceptions, per Allen and Pardo’s formulation, there are functional allocations that seem to ignore the strong distinction between law and fact. See Ronald J. Allen & Michael S. Pardo, Essay, *The Myth of the Law-Fact Distinction*, 97 NW. U. L. REV. 1769, 1771 (2003) (arguing that the decision to consider an issue factual or legal is not based on the nature of the issue but rather on a determination of who should decide the issue—judge or jury).

197. See *U.S. Aviation Underwriters, Inc. v. Pilatus Bus. Aircraft, Ltd.*, 582 F.3d 1131, 1150–51 (10th Cir. 2009) (holding that the trial court abused its discretion by allowing an expert to testify as to the meaning of a federal regulation because the testimony invaded the court’s authority); *Greenberg Traurig*, 161 S.W.3d at 94 (noting that expert testimony is for the jury and that the trial judge still provides guidance on the law to the jury).

198. See *U.S. Aviation*, 582 F.3d at 1150–51 (stating that the jury receives its instructions on the law from the judge); Charles W. Ehrhardt, *The Conflict Concerning Expert Witnesses and Legal Conclusions*, 92 W. VA. L. REV. 645, 673 (1990) (discussing the danger of expert legal testimony undermining the judge’s role in instructing the jury on matters of law).