

Commentary: Deceptions to the Rule on Ultimate Issue Testimony

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Federal Rule of Evidence 704(b) (and state counterparts) bars opinion testimony on the effect of mental state on an element of a crime or defense. The application of the rule involves substantial judicial discretion. As the jurisprudence to date indicates, deceptions to the rule circumvent its application.

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In the article “Psychiatric Evidence on the Ultimate Issue,”¹ Dr. Alec Buchanan confirms what was predicted when Federal Rule 704(b) was adopted in 1984 to preclude psychiatrists or other expert witnesses from testifying as to whether a defendant’s mental state or condition affected an element of the crime or an element of the defense. Rudolph Guliani, then U.S. Attorney of Manhattan, in a statement in the reform hearings said “It would be all gobbledygook without the psychiatrist drawing a conclusion as to what he’s saying.”²

The Senate Subcommittee on Criminal Law explored a hypothetical: a mother on trial for her son’s murder claimed that she thought she was killing Satan. She asserted the insanity defense, claiming she was unable to appreciate the nature and quality or wrongfulness of her actions. During the discussion of this hypothetical, Dr. Seymour Halleck stated that the psychiatrist’s function is to explore the mother’s mental state and to report, if the finding confirms it, that she truly mistook her victim’s identity. Senator Arlen Specter then asked “But if you find that she thought she was killing the devil, would you not necessarily find that she did know what she was doing or that she did not intend to kill her child?”³

The Federal Rules of Evidence, when adopted in 1975, and their state-law counterparts, expressly allow expert testimony to embrace an ultimate issue of fact, so long as it is helpful to the trier-of-fact. Rule 704, as then adopted and before the addition of subsection (b) in 1984, abolished the common-law “ul-

timite issue rule.” According to the Advisory Committee’s notes, the common-law rule forbidding that type of testimony:

... was unduly restrictive, difficult of application, and generally served only to deprive the trier of fact of useful information. . . [Efforts to avoid the prohibition] led to odd verbal circumlocutions which were said not to violate the rule. Thus a witness could express his estimate of the criminal responsibility of an accused in terms of sanity or insanity, but not in the terms of ability to tell right from wrong or another more modern standard.⁴

However, in 1984, following the Hinckley trial, subsection (b) was added to Rule 704 to provide that the expert may testify only as to the defendant’s mental disease or defect and the characteristics of such a condition, and may not tender a conclusion as to whether that condition rendered the defendant unable to appreciate the nature and quality or the wrongfulness of his act. The provision bars “an opinion or inference as to whether the defendant did or did not have the mental state or condition constituting an element of the crime charged or of a defense thereto.” Under the amended rule (adopted also in most states), the latter is an “ultimate issue” to be determined solely by the jury on the basis of the evidence presented.

The legislative history explained the reason for the adoption of Rule 704(b)³:

The purpose of this amendment is to eliminate the confusing spectacle of competing expert witnesses testifying to directly contradictory conclusions as to the ultimate legal issue to be found by the trier of fact. Under this proposal, expert psychiatric testimony would be limited to presenting and explaining their diagnoses, such as whether the defendant had a severe mental disease or defect and what the characteristics of such a

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disease or defect, if any, may have been. The basis for this limitation on expert testimony in insanity cases is ably stated by the American Psychiatric Association:

[It] is clear that psychiatrists are experts in medicine, not the law. As such, it is clear that the psychiatrist's first obligation and expertise in the courtroom is to "do psychiatry," i.e., to present medical information and opinion about the defendant's mental state and motivation and to explain in detail the reason for his medical-psychiatric conclusions. When, however, "ultimate issue" questions are formulated by the law and put to the expert witness who must then say "yea" or "nay," then the expert witness is required to make a leap in logic. He no longer addresses himself to medical concepts but instead must infer or intuit what is in fact unspeakable, namely, the probable relationship between medical concepts and legal or moral constructs such as free will. These impermissible leaps in logic made by expert witnesses confuse the jury. . . . Juries thus find themselves listening to conclusory and seemingly contradictory psychiatric testimony that defendants are either "sane" or "insane" or that they do or do not meet the relevant legal test for insanity. This state of affairs does considerable injustice to psychiatry and, we believe, possibly to criminal defendants. In fact, in many criminal insanity trials both prosecution and defense psychiatrists do agree about the nature and even the extent of mental disorder exhibited by the defendant at the time of the act.

Much faith is put in the jury system to resolve disputes but, at the same time, rules of evidence screen the evidence that the jury may hear and opinion testimony is precluded that would "invade" the province of the jury (though it is not obliged to accept the testimony of any witness). The adoption of Rule 704(b) is a step back in the trend in the last half of the 20th century of permitting expert testimony on the ultimate issue (however that may be defined). Lay opinion continued to be excluded—lay witnesses are restricted to providing "facts."

Apparently, the first appellate decision to allow an expert to give an opinion on the ultimate issue was in 1942 by the Iowa Supreme Court in the case of *Grismore v. Consolidated Products Company*.⁵ A turkey raiser wanted to make his turkeys grow faster, and he yielded to the sales talk of the salesman of a food products company. The magic food was called "E Emulsion" and the turkey raiser contracted for quantities of it, which he fed to a great number of healthy poultry. Although the farmer was assisted by the salesman so as to administer the feed properly, the turkeys died in great numbers long before their normal execution date. As a result, a lawsuit was instituted. There was no question that the turkeys were dead. The sole issue for the jury to decide was what caused the deaths. The trial court permitted counsel for the turkey raiser to ask of an expert on turkey

raising, in substance, what, in his opinion, caused the deaths of the turkeys? To this question, vigorous objections were urged. The court thought the jury ought to know what the expert did think about it, overruled the objections and permitted the answer. The expert then placed the entire blame on "E-Emulsion." On appeal, in an opinion of 34 pages, the state supreme court ruled that the trial court was right to admit the testimony. Six leading cases of the jurisdiction were overruled by name, and an endless number of decisions were overruled by implication.

Before Rule 704(b) was added to the original test, the position taken by the Iowa Supreme Court was adopted in the Federal Rules in 1975. Rule 704 provided simply: "Testimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact." The restrictions by the adoption of 704(b) in 1984 have been applied inconsistently, as Dr. Buchanan points out in his article. The courts in some cases have interpreted 704(b) narrowly, while in others they have given it a broad scope.

To elaborate: In *United States v. Kristiansen*,⁶ the defendant failed to report to the halfway house where he was confined. He claimed that his addiction to cocaine prevented him from forming the requisite willful intent to escape, and called an expert witness to testify to that effect. The trial court would not let the defense ask questions pertaining to the ultimate issue in the case, which was whether the defendant appreciated the wrongfulness of his acts. A jury found that the defendant intended to escape, and he appealed his conviction. Writing for the Eighth Circuit Court of Appeals, Senior Circuit Judge Gerald Heaney first noted that the Circuit has approved "asking the expert whether the defendant was suffering from a mental disease or defect at the time the crime was committed." The trial court, however, had barred the question: "Would this severe mental disease or defect, which you've testified that Mr. Kristiansen has, if an individual has that, affect the individual's ability to appreciate the nature and quality of the wrongfulness of his acts?" The trial court sustained the prosecution's objection to the question, because it felt that the word "would" asked for an answer that reached the ultimate issue. Judge Heaney found that the question was proper under Rule 704(b) "because it relates to the symptoms and qualities of the disease itself and does not call for an

answer that describes Kristiansen's culpability at the time of the crime." Rule 704(b), Judge Heaney said, "was not meant to prohibit testimony that describes the qualities of a mental disease" (Ref. 6, p 1466).

The rule is thus that expert testimony concerning the nature of a defendant's mental disease or defect and its typical effect on a person's mental state is admissible. In *United States v. Davis*,⁷ the defendant, who attempted to establish an insanity defense based on a multiple personality disorder, objected to the testimony of a government expert that such a disorder does not in itself indicate that a person does not understand what he is doing. The court upheld the admission of this testimony since it "did not include an opinion as to Davis' capacity to conform his conduct to the law at the time of the robbery" (Ref. 7, p 276).

Similarly, in *United States v. Thigpen*,⁸ the testimony elicited by the government concerned the general effect of a schizophrenic disorder on a person's ability to appreciate the nature or wrongfulness of his actions and was allowed. In this case, the defendant was charged with making false statements concerning his criminal background when purchasing pistols and with illegally possessing these weapons. His sole defense was insanity.

In *United States v. Manley*,⁹ the court upheld the exclusion of opinion testimony by a defense expert where counsel inquired as to the mental capacity of a hypothetical person with each of the pertinent characteristics of the defendant. The court said that while Rule 704(b) does not bar an explanation of the disease and its typical effect on a person's mental state, "a thinly veiled hypothetical" may not be used to circumvent the rule (Ref. 9, p 1224).

It has been ruled that 704(b) bans expert opinions on all mental states forming an element of a crime or defense, not just on questions of insanity, such as premeditation in a homicide case, or lack of predisposition for entrapment. In *United States v. Valverde*,¹⁰ the government charged the defendant with conspiracy to escape from federal custody and offering bribes to deputy sheriffs. The defense offered the opinion of a corrections expert that the recorded conversations in which the defendant appeared to offer the bribes were "consistent with non-serious conversations between prisoners and guards." The trial judge excluded the expert testimony, and the jury returned a verdict of guilty. The Eighth Circuit, upholding the conviction, stated that the defen-

dant "essentially wanted to ask the expert to tell the jury whether his conversations with the guards were in fact bribery attempts" but the expert is precluded under 704(b).

In the prosecution of Captain Jeffrey MacDonald, a physician, for the alleged murder of his wife and children, expert testimony was offered to support the defense theory that another person committed the crime.¹¹ The proffered testimony that the defendant had a "personality configuration inconsistent with the outrageous and senseless murders of [his] family" was excluded, under Rule 403, as confusing and misleading, but Rule 704(b) apparently would not bar this kind of evidence. Testimony about a "personality configuration" is character evidence, well removed from intent or lack of it. A psychiatrist would not appear to violate 704(b) if he testified that the defendant was capable of "loving" or "caring" for people, which presumably would make it less likely that he committed a heinous crime.

Rule 704(b) is interpreted to prohibit only opinions that track the precise statutory language of the insanity defense. In *United States v. Edwards*,¹² the U.S. Eleventh Circuit observed:

In resolving the complex issue of criminal responsibility, it is of critical importance that the defendant's entire relevant symptomatology be brought before the jury and explained" [quoting a Fifth Circuit opinion in 1971]. . . . Congress did not enact Rule 704(b) so as to limit the flow of diagnostic and clinical information. Every actual fact concerning the defendant's mental condition is still as admissible after the enactment of Rule 704(b) as it was before. . . . Rather, the Rule "changes the style of question and answer that can be used to establish both the offense and the defense thereto." . . . The prohibition is directed at a narrowly and precisely defined evil. . . . Rule 704(b) forbids only "conclusions as to the ultimate legal issue to be found by the trier of fact" [Ref. 12, p 265].

In this case, the government expert testified, over objection, that people who are not insane can nevertheless become frantic over a financial crisis. The prosecution put the expert on the stand to dispute the defense psychiatrist's diagnosis. The government's expert explained why the defendant's behavior—his frantic efforts to pay bills, his manifestations of energy, his lack of sleep, and his feelings of depression—did not necessarily indicate an active manic state. The court concluded, "We think that the doctor played exactly the kind of role which Congress contemplated for the expert witness" (Ref. 12, p 265).

To conclude: Rule 704(b) is an unnecessary addition to the Rules of Evidence. Judges can rely on other evidentiary rules to minimize jury confusion and ensure that expert testimony assists the trier of fact. As with other types of evidence, the judge has the discretion to exclude expert testimony if it is found that its probative value is substantially outweighed by its prejudicial effect or that its admission would confuse the issues or create needless delay or waste of judicial resources. In actual fact, just as the common law "ultimate issue rule," 704(b) makes expert witnesses less useful to factfinders because it promotes indirect and incomplete testimony. It obscures a clear summation of the psychiatric viewpoint and promotes form of expression over substance. Ultimately, the rule simply ignores the principle that the

touchstone in the law of expert evidence is helpfulness.

References

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