From a Federal Perspective:
Laid or Screwed? - How to Tell the Difference
(Lay vs. Expert Police Testimony)

Invariably, each case that we defend originates from law enforcement intervention, and putting the government's case to task often requires confronting law enforcement witnesses in the courtroom. At trial, the essence of the government's case usually rises and falls on the testimony and credibility of its officers and agents. Many times the police witness' testimony blurs the evidentiary line between lay and expert testimony. Savvy defense practitioners who recognize the distinction and challenge the witness' dual capacity may be successful in foreclosing the testimony and hamstringing the prosecution.

In federal practice, there are some clear examples of agent witnesses who mix fact and expert testimony. Such as, IRS agents (who may also be accountants or CPA's) routinely investigate not only tax-based crimes but also participate as adjuncts to other agencies by developing the money laundering aspect of a drug or gambling prosecution. In that capacity, the IRS agent examines myriad financial records and preforms a net worth analysis of the defendant's known and/or suspected assets. When the net worth analysis reveals that the defendant could not support his/her lifestyle with legitimate, reported funds, this proof become the crux of the resulting money laundering and tax evasion allegations, as well as a forfeiture claim targeting the assets themselves. Finally, just when you thought it couldn't get any worse, the IRS agent's net worth analysis becomes a kind of *ipso facto* corroboration for the underlying drug or gambling case against your client (i.e., the only explanation for the assets is that the defendant must be a drug dealer or bookie). Clearly, when the IRS agent testifies, the byproduct is a blend of fact and expert testimony, and the effect is particularly damaging to the defense.

In a more universal context, we routinely hear federal agents from all agencies (DEA, FBI, ATF, SS, etc.) testify about how their vast experience enabled them to divine that the defendant's seemingly innocuous conduct was actually conspiratorial "counter-surveillance" or had some other sinister meaning. In wiretap or other surreptitious recording cases, agents commonly offer their interpretation of "drug talk," assigning nefarious meaning to seemingly plain language. When officers testify as such, they unfailingly combine fact and expert testimony.

In narcotic cases, federal courts have generally allowed government agent expert testimony to describe the characteristics and operating methods of drug dealers; however, the testimony has been limited to explaining the "use and meaning of codes and jargon developed by drug dealers to camouflage their activities" or interpreting physical evidence that is properly before the jury.[1] Courts have expressed discomfort when the law enforcement expert witness takes the extra step of drawing a conclusion as to the significance of that conduct or evidence in [a] particular case."[2]

There is case law discouraging the admissibility of a law enforcement officer's testimony when the agent testifies in a dual role - as an expert and fact witness. "Although this type of 'dual testimony is not objectionable in principle,' the government confers on law enforcement officials in this position an 'aura of special reliability and trustworthiness surrounding expert

testimony, which ought to caution its use.'"[3] This aura poses a particular risk of prejudice "'because the jury may infer that the agent's opinion about the criminal nature of the defendant's activity is based on knowledge of the defendant beyond the evidence at trial.'"[4]

Moreover, when a law enforcement official testifies as both a fact and an expert witness, the danger that his expert testimony will stray from "applying reliable methodology and convey to the jury ... [his] 'sweeping conclusions' about [a defendant's] activities" is particularly acute.[5] The temptation to stray from the scope of the officer's expertise is heightened if he/she also functions as a fact witness, thereby raising concerns about juror confusion under Rule 403. When a law enforcement official testifies about the facts of a case *and* offers expert opinions, "a juror understandably will find it difficult to navigate the tangled thicket of expert and factual testimony from the single witness, thus impairing the juror's ability to evaluate credibility."[6]

Accordingly, the testimony of any law enforcement agent who functions as both a fact and an expert witness is susceptible to the risks posed by such dual testimony. District courts must "avoid falling into error by being vigilant gatekeepers of such expert testimony to ensure that it is reliable and not substantially more unfairly prejudicial than probative."[7]

As defense practitioners, we must watch for law enforcement testimony that embraces dual roles and challenge its admissibility on a number of bases. The following is a non-exclusive list of suggested challenges to dual testimony.

First, try to exclude testimony where the witness' opinion would be based on an interpretation of incomplete information, yielding an inherently unreliable, inaccurate and misleading result.

Secondly, raise the jury's inability to segregate the testifying officer's recounting of investigatory facts as an eye-witness from his/her rendering of an expert opinion about the meaning of those facts, and the jury's confusion when assessing the multi-faceted credibility of the officer and the weight to be given his/her testimony in varying roles.

Thirdly, it could be argued that, in cases where the proof of guilt is thin, there is a greater risk that the government would misuse the testimony or mislead the jury with dual testimony. By highlighting the balancing test under Rule 403, it can also be argued that the expert opinion testimony poses a grave risk of unfair prejudice that substantially outweighs any probative value and that the jury is likely to glean more confusion than clarity from the testimony.

Fourth, in cases where the proof of guilt is scant, it could also be argued that expert law enforcement testimony would be tantamount to opining the defendant's guilt of the offenses charged in the Indictment - a true constitutional infringement.

Clearly, there a number of potentially viable evidentiary and constitutional challenges to the testimony of law enforcement witnesses who seek to occupy roles as both experts and eye-witnesses. By exploring these potential limitations in a Motion in Limine or in jury out hearings, it is possible to lessen the impact of some of the most devastating law enforcement testimony and

better the defendant’s odds of acquittal.

1. *United States v. Cruz*, 363 F.3d 187, 192-93 (2nd Cir.2004); *Amorgianos v. National Railroad Passenger Corp.,* 303 F.3d 256, 265 (2nd Cir.2002); *United States v. Boissoneault,* 926 F.2d 230, 232-33 (2nd Cir.1991); *See also Daubert v. Merrell Dow Pharm.,* 509 U.S. 579, 597, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993); *Campbell v. Metro. Prop. and Cas. Ins. Co.,* 239 F.3d 179, 184 (2nd Cir.2001); Fed.R.Evid. 702 advisory committee’s note (2000 Amendments)(discussing the application of Rule 702 to a law enforcement official’s expert testimony).

2. *Cruz*, 363 F.3d at 194; *See, e.g., United States v. Dukagjini,* 326 F.3d 45, 54 (2nd Cir.2003)(noting that testimony admissible under Rule 702 may nevertheless implicate issues under Rule 403).

3. *Cruz*, 363 F.3d at 194 (*quoting United States v. Feliciano,* 223 F.3d 102, 121 (2nd Cir.2000))(*citing Dkagjini,* 326 F.3d at 53 (*quoting United States v. Young,* 745 F.2d 733, 766 (2nd Cir.1984) (Newman, *J.,* concurring))).

4. *Cruz*, 363 F.3d at 194 (*quoting United States v. Brown,* 776 F.2d 397, 401 n. 6 (2nd Cir.1985) and *Young,* 745 F.2d at 766 (Newman, *J.,* concurring)).

5. *Dukagjini,* 326 F.3d at 54.

6. *Cruz, supra (citing Dukagjini,* 326 F.3d at 54).

7. *Cruz,* 363 F.3d at 196 *(quoting Dukagjini,* 326 F.3d at 56).