

# I Object!

– James Eckert, Esq.

## Experts

"I am Criswel, I know all. By the year 1990 people will be driving flying cars, coffee will be sent into your home via laser beam, and anytime the weather turns bad people will turn to each other and say 'You did that!'" What can experts give their opinion about? If it's TV, they can say anything about anything, but unlike TV, court is supposed to be dull.

"Expert opinion testimony is used in partial substitution for the jury's otherwise exclusive province which is to draw conclusions from the facts. It is a kind of authorized encroachment in that respect..." (*People v Drake*, 7 NY3d 28, 32 [2006]), though jurors can accept or reject an expert's opinion. The key issue is what can experts give opinions on?

An expert cannot become a "conduit for hearsay" (*People v Goldstein*, 6 NY3d 119, 126 [2005]), so a prosecutor cannot relay, as part of the underlying basis for an expert's opinion, hearsay which is otherwise inadmissible (and yes, statements made to an expert are offered for their truth if they are to be repeated at trial). Police can give expert testimony regarding how drug transactions work, but they cannot usurp the jury's function and give expert testimony as to whether the instant case was a drug transaction, e.g. cop sees apparent exchange on the street between defendant and another, cop can't say "that was a sale" (*People v Brown*, 97 NY2d 500 [2002]). As the Court of Appeals said in *Brown*, however:

"In *People v. Lee*, 96 N.Y.2d 157 [2001], we recently restated the long-standing general rule that 'the admissibility and limits of expert testimony lie primarily in the sound discretion of the trial court.' The role of the trial court is to 'determine when jurors are able to draw conclusions from the evidence based on their day-to-day experience, their common observation and their knowledge, and when they would be benefited by the specialized knowledge of an expert witness'". The court went on to say "Here, despite a general objection to the People's offer of expert testimony, defendant did not object to the limiting instruction, nor did she seek to limit the scope of the sergeant's testimony in any way. As to the latter, the court nevertheless properly precluded the sergeant from opining that defendant sold drugs to the undercover officer or even that defendant's specific actions or behavior were consistent with participation in a street drug sale" (97 NY2d at 505).

An expert can explain things which are not within the ordinary knowledge of jurors, but the expert cannot then opine on the guilt of the defendant in this case. Things to be aware of:

- limit the expert to their area of expertise, the coroner can't tell you how fast a car was going when a crash occurred;

- keep the expert as far from "the ultimate question" as you can. This is flexible, a coroner can say what killed someone, and what didn't, but cannot say what was intentional.

- if an expert is also a fact witness, e.g. undercover cop on the drug trade, keep this in mind and seek to limit the testimony before it begins. There is a greater danger here of opinion veering into rendering a verdict.

- get a limiting instruction, sooner is better.

- any time an appellate court says "discretion", there are few real rules. Jurors decide whether the defendant is guilty or not, experts merely help by explaining how the world works. They don't help by deciding who is guilty.

This is a complex area of law which can't be explained in a few paragraphs. Whole books have been written on the topic, I'm pretty sure, though the only one I can think of right now is "Expert Knob Twiddlers", which is technically a game.