THE USE OF EXPERT WITNESSES IN GAMBLING CASES

Robert M. Jarvis [*]

I. INTRODUCTION

While gambling cases frequently turn on the testimony of expert witnesses,[1] and many individuals now hold themselves out as gambling industry

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[*] Professor of Law, Nova Southeastern University (jarvisb@nova.edu). The research for this article closed on July 1, 2021.

[1] In this respect, gambling lawsuits are no different from other types of lawsuits. As Melvin Belli, the famed trial lawyer, observed years ago: "[The] counsel who chooses to proceed without an expert may be flirting with malpractice." Melvin M. Belli, Sr., *The Expert Witness: Modifying Roles and Rules to Meet Today's Needs*, 18 TRIAL 34, 35 (July 1982).

For a case in which the government was criticized for not calling a gambling expert, *see* Commonwealth v. Dent, 992 A.2d 190, 199 n.2 (Pa. Super. Ct. 2010) (Colville, J., dissenting) ("It is worth noting that, in *[Commonwealth v.] Two Electronic Poker Game Machines*, [465 A.2d 973 (Pa. 1983),] in order to prove that the machines at issue in that case were illegal gambling devices, the Commonwealth offered an expert witness who 'testified that no skill was involved in playing the game.' *Two Electronic Poker Game Machines*, 465 A.2d at 978. In my view, had the Commonwealth offered similar evidence during Appellants' hearing, it would have met its burden of proof.").

For a case in which the testimony of multiple gambling experts fails to persuade the court, *see* Grand Casino Biloxi v. Hallmark, 823 So. 2d 1185 (Miss. 2002) (casino's failure to preserve evidence overrode experts' opinions that a slot machine had tilted and, therefore, the plaintiff had not won a progressive jackpot). *See also* State v. 26 Gaming Machines, 145 S.W.3d 368 (Ark. 2004) (although government's expert witness testified that machines were gambling devices, trial court did not err in disagreeing with the expert).

For gambling cases in which an expert's testimony did more harm than good, *see, e.g.*, Echeverry v. Jazz Casino Co., L.L.C., 988 F.3d 221 (5th Cir. 2021) (casino's expert impeached at trial by his deposition testimony); Lee v. Oceans Casino Cruises, Inc., 983 So. 2d 791 (Fla. Dist. Ct. App. 2008) (questionable employment history of gambling ship's expert contributed to the jury's decision to find for the plaintiffs). *See also* Planet Hollywood (Region IV), Inc. v. Hollywood Casino Corp., 80 F. Supp. 2d 815, 870 (E.D. Ill. 1999) ("With all due respect to Mr.

Leonard, who undoubtedly possesses expertise in certain areas, the Court [in this trademark case] does not believe that Mr. Leonard possesses any special expertise—beyond that of the Court or any other fact finder—on the question of what casino customers might find confusing or what might cause them to associate one entity with another.").

For an odd case in which the the plaintiffs and defendants relied on the same expert, *see* Sullivan v. Fox, 235 Cal. Rptr. 5, 11 n.5 (Ct. App. 1987) ("It is noteworthy that the opinions of this attorney, I. Nelson Rose, figured in the showings made by both sides.").

When both sides hire experts to give opinions on the same issue, the resulting "battle of the experts" must be resolved by the trier of fact. *See, e.g.*, Borries v. Grand Casino of Miss., Inc. Biloxi, 187 So. 3d 1042 (Miss. 2016) (in a property damage case, experts disagreed over whether water-based casinos were properly designed); McCarran Int'l Airport v. Sisolak, 137 P.3d 1110 (Nev. 2006) (in an eminent domain case, experts disagreed over whether the respondent's land was a viable casino site); Tibbetts v. Van de Kamp, 271 Cal. Rptr. 792 (Ct. App. 1990) (in a declaratory judgment action, experts disagreed over whether Texas Hold'em was legal in California); Sun Light Prepaid Phonecard Co., Inc. v. State, No. 2000CP401559, 2012 WL 7782574 (S.C. Com. Pl. Jan. 7, 2012) (in a forfeiture case, experts disagreed whether the plaintiffs' phonecard machines were illegal gambling devices).

Not every case requires expert testimony. *See, e.g.*, Holland v. State, No. 69883, 2017 WL 881951, at *1 (Nev. Ct. App. Feb. 24, 2017) ("While Holland argues there was not substantial evidence regarding Kemp's injury and whether Holland acted in self-defense, we conclude the State adduced sufficient evidence at trial by way of the victim's testimony and the casino surveillance video. Expert witnesses are not required to prove Kemp suffered prolonged physical pain . . . . Furthermore, Kemp's testimony and surveillance video rebutted Holland's contention that he was acting in self-defense."); State v. Heffner, 110 P.3d 219, 223 (Wash. Ct. App. 2005) ("The mere fact that the evidence involved arithmetic does not require that an expert present or rebut the calculations. Moreover, Mr. Heffner [a casino dealer accused of cheating,] does not claim that there was any likelihood that an expert would have materially assisted defense counsel in the preparation or presentation of his case . . . . [Thus, the trial] court did not abuse its discretion when it denied Mr. Heffner's request for an expert at public expense.").

Similarly, a party is always free to waive his or her right to call expert witnesses. *See, e.g.*, Moore v. Trump Casino Hotel, 676 F. Supp. 69 (D.N.J. 1986) (allowing a *pro se* plaintiff in a Title VII race discrimination case to proceed without expert witnesses).

experts,[2] almost nothing has been written about the use of such experts.[3] This is true despite the prediction that the demand for gambling experts will increase as internet betting becomes more popular.[4]

To learn more about how gambling experts are used, the present author has: (1) examined the websites of expert witness search firms with rosters that include gambling experts; and (2) looked at U.S. cases in which gambling experts have played a significant role.[5] This research affirmed that this is an area deserving more study.

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[2] A good example is Mark C. Nicely, a San Francisco casino game developer. On his website, he indicates that he has prepared "50+ types of game/gambling analysis reports" and had "30+ expert witness engagements." NICELY DONE DEFENSE, https://nicelydonedefense.com/ (last visited Sept. 28, 2021). He is also a "featured expert" on the websites of various expert witness search firms. *See, e.g.*, *Casino & Gaming Industry Expert Witnesses*, JURISPRO EXPERT WITNESS DIRECTORY, https://www.jurispro.com/category/casino-and-gaming-industry-s-153 (last visited Sept. 28, 2021); *Expert Witnesses & Forensic Consultants Directory: Gaming & Casinos*, LEXVISIO EXPERT WITNESSES & LITIG. SUPPORT, https://www.lexvisio.com/expert-witnesses/gaming-and-casino (last visited Sept. 28, 2021); *Gaming & Gambling Expert Witness Listings*, SEAK EXPERT WITNESS DIRECTORY, https://www.seakexperts.com/specialties/gaming-gambling (last visited Sept. 28, 2021). For a case in which Nicely was accepted as a gambling expert, *see* Gagliardi v. Comm'r, 95 T.C.M. (CCH) 1044, 1052 (2008) ("We find Mr. Nicely to be credible and rely on his expert opinion.").

[3] A brief discussion regarding the admissibility of expert witness testimony in Hong Kong gambling cases can be found in David Leonard, *The Expert in Hong Kong and Mainland China*, THE EXPERT IN LITIGATION AND ARBITRATION 321, 332 (D. Mark Cato ed. 1999).

Most of the other works that exist focus on expert witnesses testifying in compulsive gambling cases. *See, e.g.*, I. Nelson Rose & Martin D. Owens, INTERNET GAMING LAW 137 (1st ed. 2005) ("Heymann was able to find expert witnesses who could testify a compulsive gambler is easily identifiable during the course of casino play."); Garry Smith & Rob Simpson, *Gambling Addiction Defence on Trial: Canadian Expert Witness Perspectives*, 3 INT'L J. CRIMINOLOGY & SOCIO. 319 (2014); Valerie C. Lorenz, *Compulsive Gambling and the Expert Witness*, 34 J. FORENSIC SCI. 423 (1989); Valerie C. Lorenz, *On Being the Expert Witness for the Compulsive Gambler Facing Legal Charges*, 4 J. GAMBLING BEHAV. 320 (1988).

[4] *See* Mehjabeen Rahman, *Experts of the Future: 4 Areas of Emerging Litigation*, EXPERT INST. (Feb. 12, 2021), https://www.expertinstitute.com/resources/insights/experts-future-4-areas-emerging-litigation/.

[5] In addition to court cases, gambling experts also have appeared in arbitration disputes. *See, e.g.*, WALTER T. CHAMPION, JR. & I. NELSON ROSE, GAMING LAW IN A NUTSHELL 257 (2d ed. 2018) ("In 2004, one of the co-authors, Prof. Rose, was hired by the Federal Government of Mexico to be an expert witness in the first dispute heard under NAFTA (North American Free Trade Agreement) involving slot

II. FEDERAL RULES OF EVIDENCE

Discussions regarding expert witnesses normally begin with Article VII ("Opinions and Expert Testimony") of the Federal Rules of Evidence ("FRE").[6] Article VII leads off with Rule 701, which prohibits non-experts from offering opinions that are "based on scientific, technical, or other specialized knowledge within the scope of Rule 702."[7]

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machines. An American company, Thunderbird, complained that Mexico had closed down its gaming parlor while letting identical parlors remain open nearby. The legal dispute revolved around whether the machines were games of skill—the NAFTA tribunal agreed with Prof. Rose's analysis that they were not.").

In Town of Windsor Locks (Conn.) v. Nat'l Ass'n of Gov't Emp., Local RI-194, 98 Lab. Arb. Rep. (BNA LA) 1015 (1992) (Halperin, Arb.), a civilian police dispatcher was terminated for on-the-job gambling. Subsequently, the dispatcher's union filed a grievance, arguing that because the dispatcher was a pathological gambler, his firing was illegal. To support its position, the union proffered an expert witness. In response, the town contended that the expert "lacked appropriate educational credentials, used imperfect testing methods that lack validity and does not have the qualifications to be accepted as an 'expert.'" *Id*. at 1018. The town then proffered its own expert. Unsurprisingly, "the Union maintain[ed] that the witness used by the Town, in contrast with its expert, was absolutely unqualified to render a decision with regard to whether or not the Grievant was a compulsive gambler as he had no experience in the field of compulsive gambling behavior." *Id.* Ultimately, however, the squabble over these experts proved irrelevant. Finding that the town had waited too long to impose discipline, the arbitrator ordered the dispatcher reinstated without back pay. *Id.* at 1019.

[6] Because the evidence rules in most states follow the FRE, they are not separately discussed in this article. *See* Marquette University Law Library, *Court Rules Research Guide: State Court Rules*, https://libraryguides.law.marquette.edu/c.php?g=318621 (last updated Sept. 26, 2017, 2:50 PM) ("Many states have rules of evidence modeled after the Federal Rules of Evidence. A comparison of federal and state evidence rules can be found in tables in *Federal Rules of Evidence Service*. *Weinstein's Federal Evidence* includes a chart of states that have adopted Federal Rules of Evidence with analysis of each state's provisions and case citations.").

In Lobell v. Grand Casinos of Miss., Inc.-Biloxi, No. 1:08cv521–LG–RHW, 2010 WL 4553563 (S.D. Miss. Nov. 3, 2010), a casino moved to disqualify the plaintiff's expert because he was not a licensed engineer. In rejecting the casino's motion, the court found that both the FRE and the Mississippi Rules of Evidence authorized the expert's testimony.

[7] FED. R. EVID. 701(c).

Non-experts are permitted to give opinions if they are "rationally based on the witness's perception" and "helpful to clearly understanding the witness's testimony or to determining a fact in issue." *See* FED. R. EVID. 701(a)–(b). *See also* Heyman v. Massler, No. 84 Civ. 888 (BN), 1991 WL 125259, at *6 (S.D.N.Y. June

Rule 702(a) permits an expert witness to testify if "the expert's scientific, technical, or other specialized knowledge will help the trier of fact . . . understand the evidence or . . . determine a fact in issue."[8] To qualify as an expert, a person must have specialized "knowledge, skill, experience, training,

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28, 1991) ("[Although] Franco . . . was not qualified as an expert witness on Spanish law, [he] was obviously knowledgeable concerning Spanish casino license application procedures"); Christian C. Onsager, *We Don't Need No Stinkin' Hired Guns: The Effective Use of Lay Witness Opinion*, 28-4 AM. BANKR. INST. J., (2009) at 34.

[8] FED. R. EVID. 702(a).

In *Agbasi v. State*, the trial court refused to allow the defendant's expert to testify after finding that his testimony would not help the jury determine whether the defendant tried to cheat while playing blackjack at a casino. In upholding this decision, the Nevada Supreme Court wrote:

> Agbasi contends that the district court abused its discretion by rejecting his expert witness because the witness "had the requisite formal schooling, proper licensure, employment experience, practical experience, and specialized training" to offer opinions as to whether the play was confusing and whether Agbasi merely mimicked the action of the player next to him when placing his bet.We review a district court's decision to admit or exclude expert testimony for an abuse of discretion. . . . Expert testimony is admissible if (1) the expert is qualified in an area of "scientific, technical or other specialized knowledge," (2) the expert's specialized knowledge will "assist the trier of fact to understand the evidence or to determine a fact in issue," and (3) the expert's testimony is limited to the scope of his or her specialized knowledge. . . . It is axiomatic that the purpose of expert testimony "is to provide the trier of fact [with] a resource for ascertaining truth in relevant areas outside the ken of ordinary laity." Townsend v. State, 103 Nev. 113, 117, 734 P.2d 705, 708 (1987).
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> The district court considered prospective defense expert Thomas Flaherty's testimony and counsels' arguments during a hearing outside the presence of the jury. The defense argued that Flaherty was an expert on casino table games, he had reviewed the surveillance video of the play, and he could expertly opine that it was possible that Agbasi became confused during the action at the gaming table. However, the district court found that Flaherty did not have special knowledge that would assist the trier of fact to determine whether Agbasi intentionally placed the bet and determined that Flaherty was not an expert. We conclude that Agbasi has not demonstrated that the district court abused its discretion by excluding this witness.

Agbasi v. State, No. 63477, 130 Nev. 1147, slip op. at *2 (Nev. Apr. 10, 2014).

or education" in the field at issue.[9] In providing testimony, an expert "may base [his or her] opinion on facts or data in the case that the expert has been made

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[9] FED. R. EVID. 702.

In *United States v. Cross*, the court found that an attorney lacked the necessary qualifications to testify as a gambling machine expert:

> [T]he court considers whether [Michael] Alexander may testify as an expert witness on matters of fact concerning the video gaming devices of the type rented by Muncie Coin. On this matter, the court finds [Vicky] Strickland's expert summary and proffer of Mr. Alexander's testimony insufficient. First, Ms. Strickland points to Mr. Alexander's former positions of prosecutor and sheriff as his expert qualifications. Both of these positions suggest qualification and/or experience, if any, to render an opinion regarding the ultimate legal question of whether the video gaming devices are legal under Indiana law. No inference can be reasonably made that these positions elevate Mr. Alexander to the level of an expert on factual matters regarding the video gaming devices, particularly as to how the devices work or whether they are games of skill. Mr. Alexander's "affidavit" suggests that his expertise may be grounded in his "experience." It states that in preparation for his representation of John Neal in Neal's replevin action, he "research[ed] . . . the operation of video gaming machines," (Alexander "Aff." ¶ 5), and "Neal was forthright with me concerning the way in which gambling devices were operated." (*Id.* ¶ 9.) The latter statement suggests that Mr. Alexander's opinion as to how the devices work or whether they are games of skill is based solely on what Neal told him. But even the "affidavit" is short on providing sufficient information upon which the court could conclude that Mr. Alexander qualifies as an expert witness regarding factual matters regarding Muncie Coin's video gaming devices.

United States v. Cross, 113 F. Supp. 2d 1282, 1285 (S.D. Ind. 2000) (footnote omitted). *See also* Nolan v. Grand Casinos of Biloxi L.L.C., 309 So. 3d 572 (Miss. Ct. App. 2020) (injured casino patron's expert witness was barred from testifying due to his lack of specialized training).

For a case in which a casino employee was accepted as an expert, *see* Johnson v. State, 784 So. 2d 991 (Miss. Ct. App. 2001). In explaining its decision, the court wrote:

> The State called as an expert witness Wanda Vasser, an employee in the surveillance department of one of the casinos. The trial court rejected defense counsel's objection that Vasser did not qualify as an expert. She testified as to certain details shown on the video from the parking lot surveillance camera. Johnson argues

> that this was error because the witness allegedly had no particular knowledge of the interpretation of film which was superior to that of the jury. She was, in his view, merely a lay witness being allowed to testify as an expert . . . .
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> "It is not necessary that one offering to testify as an expert be infallible or possess the highest degree of skill; it is sufficient if the person possesses peculiar knowledge or information regarding the relevant subject matter which is not likely to be possessed by laymen." *Henry v. State*, 484 So.2d 1012, 1015 (Miss.1986).
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> In order to decide whether Vasser had the necessary expertise, we examine her testimony. On voir dire she stated that she had received three years of on-the-job-training regarding video surveillance and interpretation. Her testimony also revealed that she was trained on how to identify specific objects and events from the casino surveillance cameras.
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> The testimony indicated that she had taken several different videos in order to make the tape that was shown to the jury. Irrelevant sections of several hours of tape were omitted in order to prepare the relevant sections for use in the courtroom. Vasser said the tape that combined scenes from different cameras accurately revealed what occurred that night. No appellate argument is made regarding the propriety or accuracy of that editing.
>
> Vasser described the location of the cameras and then was asked to step down from the witness chair and explain what was being seen as the tape was played. She told the jurors where in the parking lot different scenes on the tape were located, such as the employee entrance, back parking lot, and other locations. There was a clock display on the tape, shown in military time such as 23:57 for one scene. She explained the meaning of that. The film was somewhat blurry. At one stage she said to the jury "see the white [sic] get out of the car? That's somebody in a white shirt," and then says that particular scene "is where the [robbery] supposedly took place."
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> This witness never attempted to identify anyone who appeared in a scene on the film. Instead, she described locations, time, and the general mechanics of how the edited film was made.
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> Because of her experience with video surveillance, she was able to locate and interpret the events as they were recorded by the casino surveillance camera. We find this to be technical knowledge which assisted the jury in understanding the evidence. That is the purpose of Rule 702 and we find no error.

Id. at 993.

aware of or personally observed."[10] Although an expert cannot tell a jury what result it should reach, an expert's opinion is "not objectionable just because it

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[10] FED. R. EVID. 703.

In *Shuffle Tech Int'l, LLC v. Scientific Games Corp*., the court used Rule 703 to brush aside a challenge to one of the plaintiff's experts:

> The second expert witness whose testimony defendants challenge is William Zender, who will provide testimony regarding why casinos prefer machine shuffling of cards to hand shuffling; why casinos are unlikely to use pre-shuffled cards as a substitute for shuffling machines; and why casinos will not substitute electronic table games for games that use decks of playing cards. *See* Pls.' Resp. to Defs.' Mot. to Exclude Testimony of William Zender at 3. Zender is a former enforcement officer with the Nevada Gaming Commission. He has 35 years of experience in the casino industry and has worked as a dealer, pit boss, floor manager, owner, operator, director, and board member at casinos. In addition, he has consulted and lectured extensively on casino table gaming and card shuffling issues and has authored publications and taught courses on these topics. The Court concludes that Zender is sufficiently qualified to testify on the points on which plaintiffs offer him . . . .
>
> Zender's extensive experience in the casino industry provides a more-than-sufficient basis for him to render opinions on the topics in question. In addition, Zender's report sufficiently explains the basis for his conclusions; he does not simply provide an unsupported "bottom line." Finally, the Court overrules defendants' contention that Zender is doing little more than communicating hearsay. It is true that certain aspects of his opinions are based on what he has learned in the business, and some of that may include matters that he has been told by others. But that does not make his opinions inadmissible. The same likely could be said about any expert whose testimony is based on experience rather than science, but as indicated experience-based testimony is admissible if adequately supported (as Zender's is). And to the extent Zender is relying on what he has been told by others during his decades working in the business, the Rules make it clear that an expert may rely on otherwise inadmissible facts or data if experts in his field would reasonably do so (which is the case here), *see* Fed. R. Evid. 703 . . . .

Shuffle Tech Int'l, LLC v. Scientific Games Corp., No. 15 C 3702, 2018 WL 2009504, at *3–4 (N.D. Ill. Apr. 29, 2018).

In *People v. Medure*, the court held a suppression hearing in an illegal bookmaking case. The defendants asked that their expert witness be allowed to listen to the testimony of the government's expert witness. Although the prosecutors

embraces an ultimate issue."[11] However, an expert witness must "disclose those facts or data" on which he or she has relied if asked to do so on

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objected, the court, relying on Rule 703, granted the defendants' request:

> While the Federal Rules of Evidence provide that a fact witness must be excluded on the request of a party as a matter of right, an expert witness, that is "a person whose presence is shown . . . to be essential" may not be so excluded (Fed. R. Evid., Rule 615[3]). Moreover, the Federal Rules of Evidence provide that an expert may base his opinion on facts or data obtained "at or before the hearing" (Fed. R. Evid. 703; *see also, Mayo v. Tri-Bell Industries*, 787 F.2d 1007 (5th Cir., 1986)). This permits expert witnesses to base opinions on the testimony of other witnesses.

People v. Medure, 683 N.Y.S.2d 697, 699 (Sup. Ct. 1998).

[11] FED. R. EVID. 704(a).

In People v. Zitka, the defense claimed that the government's expert had invaded the province of the jury. In rejecting this argument, the appellate court wrote:

> [Susan] Hernandez-Zitka challenges the testimony of two witnesses who testified that defendants' cafés were illegal gambling operations. Mark Laberge, a regulations officer with the MGCB [Michigan Gaming Control Board], was asked to explain, in his words, what an Internet café was. He replied, "An illegal casino." After defense counsel objected, the trial court struck the term "illegal" from his response. Later, after Laberge discussed his visit to Fast Lane, how he was given a café user account and access to the Sweepstopia.com website, and how he was able to obtain cash from the café when he won games on the website, he was asked what he looked for to determine whether gambling was occurring. Laberge replied, "Was there consideration, was there chance, and was there a prize." He then testified that he found all of these elements in this case. When defense counsel objected, the trial court stated that counsel would be able to cross-examine Laberge about this opinion.
>
> Laberge's initial response that Internet cafés are illegal casinos was improperly phrased in terms of a legal conclusion. However, the trial court adequately cured this error by quickly striking the objectionable portion of his response. Defense counsel assented to this remedy. Thus, Hernandez-Zitka cannot now claim that this remedy was insufficient . . . . With respect to the later testimony, Laberge's statement that the Fast Lane operation shared the characteristics of consideration, a game of chance, and a prize with other gambling establishments was not an improper comment on the ultimate question of Hernandez-Zitka's guilt. While this testimony supported a finding that defendants' cafés were

gambling operations, this question was left to the jury to determine. As with the first comment, defense counsel was also permitted to cross-examine the witness regarding the bases for his conclusions that the characteristics of a gambling operation existed. Therefore, Hernandez-Zitka is not entitled to relief.

Hernandez-Zitka also argues that the prosecutor improperly elicited similar testimony from John Lessnau, the manager of the criminal investigation section for the MGCB. Lessnau was qualified as an expert witness in the field of illegal gambling. After discussing the same three elements of consideration, chance, and a prize, Lessnau also discussed Sweepstopia.com, stating that it did not have a gambling license. He then testified about his investigation into the Internet sites accessed by the customers at defendants' cafés, and stated that roughly 80 percent of the traffic went to Sweepstopia.com. Over defense counsel's objection, Lessnau was then asked about his opinion of Sweepstopia.com, and he testified that the website was operating illegally. This was not improper expert testimony because Lessnau testified about his opinion concerning the website, not defendants' cafés. This answer could have led the jury to find that because a majority of defendants' customers visited this website, the cafés were also conducting illegal gambling operations. However, Lessnau did not provide this legal conclusion about defendants' cafés or their guilt.

After explaining sweepstakes and how they differ from a lottery, and that Michigan does not have an exception for "internet sweepstakes café" operations from [its] general ban on unlicensed gambling, Lessnau was asked his opinion about defendants' operations:

> Q: Okay. Having been to both—to all three locations here, were they internet sweepstakes cafés, in your opinion?
> A: They were illegal gambling operations.

Defense counsel immediately objected, stating, "Your Honor, if the court could clarify that the jury is going to make the ultimate decision. That this is one witness' (sic) opinion, if the court would clarify that for the jury." The trial court replied that it had already so instructed the jury twice and that the jury would receive further instructions about its duty to determine the weight and credibility of all of the evidence. The trial court later provided such an instruction.

As with Laberge's testimony, the remedy that defense counsel sought was sufficient to cure any prejudice . . . . The court's instructions made it clear to the jury that it would ultimately

> decide whether defendants' businesses were illegal gambling operations. "Jurors are presumed to follow their instructions," and jury instructions are presumed to "cure most errors." People v. Mahone, 294 Mich. App. 208, 212, 816 N.W.2d 436 (2011).

People v. Zitka, Nos. 349491 & 349494, 2020 WL 7310514, at *8–9 (Mich. Ct. App. Dec. 10, 2020), *appeal denied*, 959 N.W.2d 527 (Mich. 2021), *and appeal denied sub nom.* People v. Hernandez-Zitka, 959 N.W.2d 527 (Mich. 2021), *petition for cert. filed* (U.S. Aug. 31, 2021) (No. 21-403).

Although the same argument was made in *F.A.C.E. Trading, Inc. v. Dep't of Consumer & Indus. Servs.*, the court declined to rule on the question:

> In support of the BSL's (Bureau of State Lottery) motion for summary disposition, the BSL submitted affidavits from a gaming expert witness, Nelson Rose, and expert witnesses from the BSL, Robert Blessing and Michael Peterson. Before the summary disposition hearing, FACE filed separate motions to strike the testimony of the expert witnesses. In each, FACE claimed that the expert witnesses improperly offered ultimate legal conclusions that Ad-Tabs were illegal lotteries.
>
> We conclude that there is no evidence that the circuit court relied on the opinions of any expert witnesses. Although the circuit court did not rule on FACE's motion in limine to exclude the affidavits of the expert witnesses, the circuit court did not admit the affidavits into evidence. The circuit court's June 3, 2004, opinion does not mention the expert witnesses. More importantly, the circuit court's opinion is supported by the applicable statutes and relevant case law . . . . The circuit court's opinion relies on either case law or statute, and not on any expert witnesses. Moreover, FACE has not pointed to any aspect of the circuit court's opinion that indicates that the circuit court relied instead on the opinions of the expert witnesses in rendering its decision. Because there is no indication that the circuit court considered affidavits from the expert witnesses in rendering its decision, we cannot conclude that the circuit court committed error.

F.A.C.E. Trading, Inc. v. Dep't of Consumer & Indus. Servs., 717 N.W.2d 377, 389–90 (Mich. Ct. App. 2006).

cross-examination.[12] Although experts are typically hired by the parties, courts have the option of appointing its own experts.[13]

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[12] FED. R. EVID. 705.

In *United States v. Angiulo*, the government's expert witness was an FBI agent. While testifying about the defendants' participation in an illegal gambling operation controlled by a mob family, he was permitted to keep secret the names of his confidential informants. On appeal, the First Circuit found that this did not violate Rule 705:

> At trial, the defendants maintained that allowing Agent Nelson to testify without disclosing the identities of informants would violate Rule 705 of the Federal Rules of Evidence, which requires expert witnesses to disclose facts and data underlying their opinions on cross-examination. They also argued that they would be deprived of their Sixth Amendment rights to fully cross-examine the witness because they would not be able to ascertain or test his credibility without knowing the sources of his information. While preserving an objection that none of his testimony should be allowed, the defendants agreed to the court's instruction to Agent Nelson that he not answer any questions on direct examination that would be based upon information provided by informants whose identity he could not disclose on cross-examination.
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> The defendants contend that the court's instruction to Agent Nelson failed adequately to protect their confrontation rights for the following reasons: Agent Nelson was entrusted to sort out, in his own mind, those opinions grounded upon information that he was willing to disclose and those grounded upon sources he could not disclose; as such, to the extent that some of the sources he would not disclose had provided information that contradicted the opinions he was otherwise willing to express, the defendants were deprived of information that would allow them to test the credibility of his testimony on cross-examination. We disagree.
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> Although the defendants claim that the jury could not have believed otherwise than that Agent Nelson based his opinion that they were close associates of the Patriarca Family on the wide range of informants with whom he had conferred, including those whose identities he would not reveal, Agent Nelson testified that his particular opinion regarding these defendants' relationship to the organization was based only upon tape recordings played at trial. Tr. vol. 29, p. 112. Moreover, the defendants were given wide-ranging opportunities to cross-examine Agent Nelson on his opinions and the factual bases underlying them. Under these circumstances, we find no merit in the defendants' contention that Agent Nelson's testimony was admitted in violation of Rule 705's

Because juries tend to place great weight on the opinions of expert witnesses,[14] trial judges are required to assess the *bona fides* of such witnesses

> requirement that experts disclose, on cross-examination, factual sources underlying their opinion testimony. *See United States v. Hensel*, 699 F.2d 18, 39 (1st Cir. 1983). Nor do we find the defendants' rights to adequate cross-examination of this witness under the Confrontation Clause in any way threatened by the procedures followed. *See, e.g.*, *Delaware v. Fensterer*, 474 U.S. 15, 106 S. Ct. 292, 88 L. Ed. 2d 15 (1985); *United States v. Bastanipour*, 697 F.2d 170, 176–77 (7th Cir. 1982).

United States v. Angiulo, 847 F.2d 956, 974 (1st Cir. 1988) (footnotes omitted).

[13] FED. R. EVID. 706. As paragraph (e) explains, a court's decision to appoint an expert "does not limit a party in calling its own experts."

Rule 706 is rarely used. One observer (a Pennsylvania state court trial judge) believes this is a mistake and has called on judges to be more willing to appoint experts. *See* Bradford H. Charles, *Rule 706: An Underutilized Tool to be Used When Partisan Experts Become "Hired Guns,"* 60 VILL. L. REV. 941 (2015).

In a case involving a gambling ship's injured deckhand, the court pointed out that the normal taxing-of-costs rules do not apply to court-appointed experts:

> Plaintiff objects to the proposed witness fee of $1,000.00 for Dr. Robert Swiggett, who was an expert witness for Port Richey Casino, Inc. but was not appointed by the Court. The Court cannot tax witness fees in excess of the amount set forth in 28 U.S.C. § 1821(b) unless the witness was court-appointed . . . . Because § 1821(b) limits witness fees to $40.00 per day, and Defendant's itemized list of witness fees indicates one day of attendance, Port Richey Casino, Inc. is entitled to recover a witness fee of $40.00.

Morris v. Paradise of Port Richey, Inc., No. 8:07-CV-845-T-27TBM, 2009 WL 10708013, at *1 (M.D. Fla. June 1, 2009).

[14] Of course, just how much weight a jury places on a specific expert witness's testimony depends on both what the expert says and how he or she says it. *See* Sanja Kutnjak Ivković & Valerie P. Hans, *Jurors' Evaluations of Expert Testimony: Judging the Messenger and the Message*, 28 L. & SOC. INQUIRY 441 (2003). As a result, numerous books have been written to explain how to prepare an expert witness and how to be an effective expert witness. *See, e.g.*, JANET S. KOLE, HOW TO TRAIN YOUR EXPERT: MAKING YOUR CLIENT'S CASE (2020); STEVEN LUBET & ELIZABETH I. BOALS, EXPERT TESTIMONY: A GUIDE FOR EXPERT WITNESSES AND THE LAWYERS WHO EXAMINE THEM (4th ed. 2020); CECIL C. KUHNE III, A LITIGATOR'S GUIDE TO EXPERT WITNESSES (2d ed. 2019). *See also* Jim Dedman, *12 Pivotal Movie Scenes with Lessons for Lawyers*, ABA J., https://www.abajournal.com/gallery/pivotal_scenes/987 (last visited Sept. 27, 2021)

before allowing them to testify. A trio of U.S. Supreme Court decisions has fleshed out this gatekeeping function,[15] which has become known as the

(analyzing the climatic final trial scene in the 1992 movie "My Cousin Vinny," during which two expert witnesses go head-to-head in a murder case).

[15] *See* Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579 (1993) (explaining that the test for admitting expert witnesses is a flexible one); General Electric Co. v. Joiner, 522 U.S. 136 (1997) (on appeal, a trial court's decision to admit or reject an expert witness should be upheld unless there has been an abuse of discretion); Kumho Tire Co. Ltd. v. Carmichael, 526 U.S. 137 (1999) (deciding that a trial court must evaluate all expert witnesses, including non-scientists).

Daubert and its progeny grant considerable discretion to trial judges. As such, only clear error will cause an appellate court to reverse a trial court's decision regarding the admissibility of expert testimony. *See, e.g.*, Singson v. Norris, 553 F.3d 660 (8th Cir. 2009) (upholding a ruling permitting government's expert to testify that tarot cards often are used by inmates to gamble); Murray v. Marina Dist. Dev. Co., 311 F. App'x 521 (3d Cir. 2008) (upholding a ruling prohibiting the plaintiff's expert from testifying that the casino's security system was inadequate); United States v. Ly, D.C. No. CR-96-00085-LDG, 1998 WL 141334 (9th Cir. Mar. 25, 1998) (upholding a ruling permitting the government's expert to testify that the defendants' actions while playing mini-baccarat did not constitute "normal play"); Bright v. Addison, 171 S.W.3d 588 (Tex. Ct. App. 2005) (upholding a ruling permitting plaintiff's expert to testify that the defendants' breach of an Aruban casino management contract caused the plaintiffs to suffer $3.7 to $4.2 million in damages). *See also* State v. Yip, 987 P.2d 996 (Haw. Ct. App. 1999) (although the government's expert probably should not have been allowed to discuss the defendant's assertion that his activities constituted legal social gambling, the trial court's decision to let in such testimony was a harmless error).

Even before *Daubert*, however, appellate courts were reluctant to second-guess trial courts. *See, e.g.*, United States v. Pinelli, 890 F.2d 1461 (10th Cir. 1989) (upholding a ruling permitting the government's expert to testify about illegal gambling businesses); United States v. Whitaker, 372 F. Supp. 154 (M.D. Pa. 1974), *aff'd*, 503 F.2d 1400 (3d Cir. 1974) (same); Commonwealth v. Boyle, 189 N.E.2d 844 (Mass. 1963) (same).

In *People v. Derrick*, 259 P. 481 (Cal. Ct. App. 1927), the trial court allowed the government to call two police officers as expert witnesses. On appeal, its decision was upheld:

> With regard to the first assignment [of error], certain slips of papers, eight in number, were found by the officers in a tin cup in a cigar box back of the barber chair operated by defendant. On these slips of paper were written figures and names more or less unintelligible to persons inexperienced in the methods of gambling. On the reverse side of the papers were some figures which may or may not have had reference to the wager recorded on the first side.
>
> Two policemen who were called by the prosecution

> testified that they had worked on the gambling detail in San Diego—one for a period of two years and the other for a period of four years; that they had become familiar with the expressions, symbols, and characters used by bookmakers in recording bets on horse races; [and] that each slip of paper found was the record of a wager of money on a horse race, with some identification of the person laying the bet.
>
> This last testimony was admitted over the objection of defendant, who elicited from the witnesses that they could not say what the figures on the reverse side meant. He now contends that the witnesses should have been able to decipher the entire instrument (both sides) before they could testify as experts. We conclude from appellant's argument that his objection to the reception of this evidence is based upon the thought that if the witnesses could not decipher the whole they were not qualified to decipher a part; a conclusion which does not follow from the premise.
>
> For example, suppose the reverse side had been written in Chinese laundry marks, or Sanskrit, it certainly would not be contended that it was any part of the first side or that familiarity therewith was necessary foundational knowledge to an interpretation of the gambling symbols. The testimony of the witnesses, in substance, that they did not know what the figures on the back of the slip meant, was in effect a statement that the figures did not relate to the subject-matter set down on the front. The record contained on the first side of the slips was complete in itself. That being the case, familiarity with the reverse side was in no way essential.
>
> The trial court is vested with a broad legal discretion in determining the qualifications of one who offers himself as an expert witness, and without manifest error, which we do not find in this instance, the ruling must be sustained.

Id. at 481–82 (paragraphing inserted for improved readability).

"*Daubert* standard."[16] This standard replaced the earlier, and more stringent, "*Frye* standard."[17]

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[16] For more about the *Daubert* standard, *see, e.g.*, DAVID M. MALONE, DAUBERT RULES: MODERN EXPERT PRACTICE UNDER DAUBERT AND KUMHO (2013); Daniel J. Capra, *Symposium on Forensic Expert Testimony, Daubert, and Rule 702*, 86 FORDHAM L. REV. 1463 (2018); Michael D. Wade, *Using Fed. R. Evid. 702 and Daubert*, 20 W. MICH. UNIV. COOLEY J. PRAC. & CLINICAL L. 121 (2019). *See also* Wells v. SmithKline Beecham Corp., 601 F.3d 375 (5th Cir. 2010) (trial court properly rejected the plaintiff's expert witnesses, who sought to testify that the prescription drug Requip could cause compulsive gambling, because their conclusions did not satisfy the *Daubert* standard).

For a case that used *Daubert* to limit the testimony of an injured casino patron's expert, *see* Sweiger v. Delaware Park, L.L.C., No. S11C–10–020, 2013 WL 6667339 (Del. Super. Ct. Dec. 9, 2013).

[17] *See* Frye v. United States, 293 F. 1013 (D.C. Cir. 1923) (expert testimony was not admissible unless it was based on scientific methods that were generally accepted by experts in the relevant field).

Although the court in *City of Atlantic City v. Ace Gaming, L.L.C*. does not specifically mention *Frye*, it is clear from its discussion that it excluded the casino's proffered expert because of *Frye* (New Jersey did not adopt *Daubert* until 2018—*see In re*: Accutane Litig., 191 A.3d 560 (N.J. 2018)):

> Mr. Bellis was initially offered as an expert witness in "the difficulties in generally operating . . . a casino in the Atlantic City market during the time period, the years operating in that environment, financially, competitively and . . . with respect to small, isolated, landlocked, multi-level, low or no amenity facilities," [Transcript May 10, 2005 at 27, lines 10-25; *Id*. at 28, line 1] and prepared a report that was offered in evidence. On the objection of Atlantic City, the court refused to accept Mr. Bellis as an expert finding that, (1) his intended expert testimony would not necessarily aid the court, (2) the basis for his proposed expertise was not a recognized discipline, and (3) he did not possess sufficient specialized knowledge to express and explain an expert opinion. State v. Kelly, 97 N.J. 178, 208, 478 A.2d 364 (1984). Accordingly, his report was excluded. Mr. Bellis did testify as a fact witness, although his testimony was found to be of minimal relevance and was given little weight by the court.

City of Atlantic City v. Ace Gaming, L.L.C., 23 N.J. Tax 70, 78 (2006).

In 2019, Florida became the most recent state to discard *Frye* and adopt *Daubert*. *See In re* Amends. to Fla. Evidence Code, 278 So. 3d 551 (Fla. 2019). As a result, only five states still adhere to *Frye*: Illinois, Minnesota, New York, Pennsylvania, and Washington. *See* J. L. Hill, *The States of Daubert After Florida*, LEXVISIO (last updated May 6, 2020), https://www.lexvisio.com/article/2019/07/09/the-states-of-daubert-after-florida.

III. ETHICS OF EXPERT WITNESSES

Although all expert witnesses are biased to some extent,[18] the use of "professional experts" and "hired guns" exacerbates matters.[19] Nevertheless, the

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[18] Ethical expert witnesses recognize this fact and make a conscious effort to fight it. An English academician who did a lot of gambling expert witness work once observed:

> As in any other consulting situation, a certain amount of identification with the aims of the client is inevitable; it is fortunate that probability and statistics are basically mathematical in content, since the constraints of mathematics act as a brake on over-enthusiasm. It cannot, however, be denied that a conscious change of attitude was needed to effect the change-over from helpful consultant to objective expert witness . . . . This ambiguity of roles did create a conflict, which presumably can only be resolved by individual witnesses in their own way.

F. Downton, *Experience as an Expert Witness in Gambling Cases*, 26 THE STATISTICIAN 163, 171 (1977). Downton's gambling expert witness work was remembered in his obituary:

> The sad and untimely death of Frank Downton on 9 July 1984 at the age of 59 will be a source of sorrow to his many friends in the Society and elsewhere. A familiar and influential presence on the statistical scene, his rare combination of theoretical insight and practical judgement, and his mordant wit, will be greatly missed . . . . He was much in demand as an expert witness in cases against gaming establishments. Indeed, it was rumoured that when he was known to be appearing as a witness the defendants immediately pleaded guilty.

Henry Daniels, *Obituary: Frank Downton 1925-84*, 148 J. ROYAL STAT. SOC'Y (SERIES A: GENERAL) 65, 65 (1985).

[19] As has been explained elsewhere:

> The problems arising from expert testimony are made worse by the existence of "professional expert witnesses" and "hired guns." Professional expert witnesses are those who make a large portion of their living by offering trial consultation services and by testifying in court. Often, these experts will testify about issues that go beyond their levels of expertise. A hired gun refers to an expert witness that is willing to testify based on the needs of the party that hires him, that is, the expert's opinion can be bought.

Laura Kirshner, *Professional Expert Witnesses and the Problem of the Hired Gun*, SOC. L. LIBR., Jan. 20, 2012, at 1–2 (footnotes omitted), http://socialaw.com/docs/default-source/judge-william-g.-young/judging-in-the-american-legal-system---december-2011-january-2012/final-paper_kirshner.pdf?sfvrsn=4. *But see The Expert Witness as Gun, Gunfighter, and Gatekeeper*, EXPERTPAYS (Sept. 6, 2020), https://expertpays.com/the-expert-witness-as-gun-gunfighter-and-gatekeeper/ (arguing that there is nothing wrong with an expert being a hired gun).

In *In re* SRC Holding Corp., 352 B.R. 103 (Bankr. D. Minn. 2006), *aff'd in part and rev'd in part*, 364 B.R. 1 (D. Minn. 2007), *rev'd in part and dismissed in part sub nom*. Leonard v. Dorsey & Whitney LLP, 553 F.3d 609 (8th Cir. 2009), a tribal casinofinancing project went awry. When some of the loan participants raised the possibility of filing a legal malpractice lawsuit, others decided to ask the target law firm (Dorsey) for its opinion. As explained by the bankruptcy court, Dorsey anticipated that it might be sued so it hired an expert who was willing to testify that Dorsey had done nothing wrong:

> In the meantime, Dorsey found itself in yet another difficult situation. That same month, May 2002, Bremer [Business Finance Corporation] made a demand on Marshall [Investments Corporation] to poll the loan participants on whether they should commence a malpractice action against Dorsey. Marshall, which just like Miller & Schroeder [the deal's investment banker], seems never to have understood just how conflicted Dorsey was, asked Dorsey to give Marshall an opinion on whether to accede to that demand. In response, rather than telling Marshall that it was in no position to opine on its own negligence, [two Dorsey partners] prepared a memorandum to be sent to [Jerome] Tablovich, John Jagiela and [Steve] Erickson at Marshall. Not surprisingly, the memorandum recommended against such action. The memorandum was reviewed before it was sent by [Dorsey partner John] Thomas. It begins:
>
> > We should note at the outset that we are hardly disinterested in this matter or in the decision that Marshall may make in response to Bremer's request. Nevertheless, in our role as your counsel we will, as best we can, give you our objective analysis of the request and the effect such an action would likely have on the other participants.
>
> Tab 114, Exhibit 114. The memorandum proceeds to reiterate the line that Dorsey had been taking ([National Indian Gaming Commission] approval was never necessary and besides it did not make any difference because the casino never made money *and Dorsey had a friendly expert witness ready to so testify if needed*).

In re SRC Holding Corp., 352 B.R. at 162 (emphasis added).

ABA's Model Rules of Professional Conduct are almost totally silent on expert witnesses, merely pointing out that "[t]he common law rule in most jurisdictions is . . . that it is improper to pay an expert witness a contingent fee."[20] As a result, various expert witness codes of conduct have been adopted[21] or proposed over the years.[22] Of course, many professional organizations have their own codes of ethics that bind their members when testifying as an expert witness.[23] In addition, incompetent or negligent expert witnesses now can be sued for malpractice in many jurisdictions.[24]

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[20] *See* ABA MODEL R. PROF. CONDUCT 3.4 cmt. 3 (2020). Commentators have repeatedly noted the ABA's lack of guidance. *See, e.g.*, Neil J. Wertlieb, *Ethics Issues in the Use of Expert Witnesses*, 24 PROF. LAW. 35 (2017); Joseph Sanders, *Expert Witness Ethics*, 76 FORDHAM L. REV. 1539 (2007); Steven Lubet, *Expert Witnesses: Ethics and Professionalism*, 12 GEO. J. LEGAL ETHICS 465 (1999).

[21] *See, e.g., Code of Ethics*, FORENSIC EXPERT WITNESS ASSOCIATION, https://forensic.org/page/codeofethics/ (last visited Dec. 21, 2021).

[22] Robert Ambrogi of IMS Consulting & Expert Services, for example, has proposed a code of ethics for expert witnesses and another one for lawyers who hire expert witnesses. *See* Robert Ambrogi, *Proposed: Expert Witness Code of Ethics (2009)*, ILL. INST. OF TECH. (Feb. 2009), https://ethics.iit.edu/ecodes/node/5013; Robert Ambrogi, *Proposed: A Lawyer's Code of Expert Ethics (2009)*, ILL. INST. OF TECH. (2009), https://ethics.iit.edu/ecodes/node/5014.

[23] This is particularly true in the medical field. *See, e.g.*, Anjelica Cappellino, *Medical Expert Witnesses: Guidelines for Ethical Conduct*, EXPERT INST. (June 23, 2020), https://www.expertinstitute.com/resources/insights/medical-expert-witnesses-guidelines-for-ethical-conduct/ (discussing the expert witness codes of the American Academy of Pediatrics, American Board of Urology, American Medical Association, and American Society of Anesthesiologists). For a collection of such codes, *see* PHILIP J. CANDILIS ET AL., FORENSIC ETHICS AND THE EXPERT WITNESS 179–206 (2007). *See also* Andre Moenssens, *Ethics: Codes of Conduct for Expert Witnesses*, 2 WILEY ENCYCLOPEDIA OF FORENSIC SCI. 957 (Allan Jamieson & Andre Moenessens eds. 2009).

[24] *See, e.g.*, Michael Flynn, *Expert Witness Malpractice*, 42 AM. J. TRIAL ADVOC. 15 (2018); Laurie Strauch Weiss, *Expert Witness Malpractice Actions: Emerging Trend or Aberration?*, 15:2 PRAC. LITIGATOR 27 (2004); Carol Henderson Garcia, *Expert Witness Malpractice: A Solution to the Problem of the Negligent Expert Witness*, 12 MISS. C. L. REV. 39 (1991); Leslie R. Masterson, *Witness Immunity or Malpractice Liability for Professionals Hired as Experts?*, 17 REV. LITIG. 393 (1998).

IV. WEBSITES OF EXPERT WITNESS SEARCH FIRMS

One way to approach the present topic is to look at the websites of expert witness search firms.[25] For example, the website of ForensisGroup, a California-based company, provides the following description of gambling experts:

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[25] An "expert witness search firm," also known as an "expert witness locator," is a company that maintains a roster of expert witnesses and helps law firms find appropriate experts for their cases. *See, e.g.*, Urgent v. Technical Assistance Bureau, Inc., 255 F. Supp. 2d 532 (D.V.I. 2003) (expert witness search firm that failed to provide an expert could be sued for breach of contract); First Nat'l Bank of Springfield v. Malpractice Res., Inc., 688 N.E.2d 1179 (Ill. 1997) (expert witness search firm's contingent fee contract violated public policy); Dupree v. Malpractice Res., Inc., 445 N.W.2d 498 (Mich. Ct. App. 1989) (same); *In re* Certain Lands, 128 N.Y.S. 999 (App. Div. 1911) (same).

For a profile of Russ W. Rosenzweig, the founder of the Round Table Group, which claims to be the world's largest expert witness search firm and uses the slogan "the Expert on Experts," *see* Dinesh Ganesarajah, *Building the World's Largest Expert Witness Search Firm*, PRESCOUTER (June 2013), https://www.prescouter.com/2013/06/building-the-worlds-largest-expert-witness-search-firm. The Round Table Group's website currently lists 23 gambling experts. *See* ROUND TABLE GROUP, https://www.roundtablegroup.com/browse-by-topic/?ex=gambling&st= (last visited Sept. 13, 2021).

Expert witness search firms are neither licensed nor regulated by any governmental entity, and there appears to be no comprehensive list of them. As a result, it is impossible to say how many expert witness search firms exist. While some expert witness search firms have large staffs and work in all fields, *see, e.g.*, TASA GROUP, https://www.tasanet.com (last visited Sept. 13, 2021), one also can find small shops with clearly defined niches. For example, Teklicon, Inc., which is based in San Jose, California, describes itself as follows: "We exclusively support intellectual property matters requiring a technical expert with testifying experience. Unlike the large expert witness search firms who are generalists, we are a boutique firm specializing in patent matters. By holding a narrow focus, we are quick and precise in finding the right expert." *What We Do*, TEKLICON, https://www.teklicon.com/about/company (last visited Sept. 13, 2021). Regardless of their size, most expert witness search firms also provide a variety of other trial-support services. *See, e.g.*, *Services*, COURTROOM INSIGHT, https://www.courtroominsight.com/home) (last visited Sept. 13, 2021).

Many lawyers use more informal methods to locate expert witnesses. In a recent article, for example, a New Orleans defense lawyer provided these suggestions:

> Ask colleagues—both in your firm and elsewhere—for recommendations. Contact DRI [the Defense Research Institute, a voluntary bar association for defense lawyers] substantive law committee members or those in your local defense or trade organization for recommendations. DRI's own resources, such as

> Gaming expert witnesses may be sought out for numerous cases, since gaming activities often involve games of chance and must operate within the boundaries of several different laws. Gaming expert consulting may provide valuable information for cases involving such issues as bowling alley management, the sports industry, accounting and other financial matters, fraud, hospitality management, hotel and resort operations, the gaming industry, gambling operations, tourism security and safety, and various further disciplines involved with gaming, as each may become the center of a gaming-related lawsuit. In addition to gambling, gaming may also refer to video games, which would involve experts from the software industry and other related fields.
>
> Gaming expert witnesses are often experienced working with gambling in casinos, which involves cards, dealers, and other aspects of gaming. Such settings must operate within the boundaries of federal regulations and meet regulatory compliance, as failing to adhere to the required regulatory procedures would be a violation of law and grounds for possible lawsuits. Gaming experts have often worked in police and law enforcement as a means of ensuring legal gaming activity in casinos and other gaming locations.
>
> Gaming expert witnesses with a background in the videogame industry may be sought out for cases involving patent analysis, intellectual property, software engineering, mobile devices and other electronic devices, and additional related issues.[26]

LexVisio, a Washington, D.C.-based company, has a similar write-up on its website:

> the committees' "Community" pages for posting requests for recommendations, or the DRI Expert Witness Database, can prove great starting points.

Megan S. Peterson, *Finding the Right Expert: Expert Witness Retention and Management in Personal Injury Litigation*, DRI FOR THE DEFENSE, at 22–23 (Jan. 2020). *See also* Sultan v. Earing-Doud, 852 So. 2d 313, 315 (Fla. Dist. Ct. App. 2003) ("Doud's counsel conducted an extensive search for another expert, including contacting thirty-three potential experts as well as employing two expert witness search firms. Another law firm . . . contacted Doud's counsel in August 2002 and referred him to Dr. Donlon who [Doud's counsel ended up hiring].").

[26] *Gambling Expert Witnesses*, FORENSISGROUP, https://www.forensisgroup.com/expert-witness/gaming (last visited Sept. 13, 2021).

> Gaming and Casino expert witnesses provide opinions on compliance with state gaming regulations, allegations of negligence and enabling gambling addictions. [C]asino experts . . . may consult on issues of food poisoning, premises liability (e.g., slip and fall), negligent security (e.g., robbery of patrons), and use of excessive force by casino security. [G]aming experts . . . may consult on allegations of shaved payouts and gambling machine malfunctions, allegations of fraudulent lottery schemes, defrauding ticket sellers, manipulating odds and allegations of other failures to comply with state lottery regulations. These experts may also testify in matters of online gaming, off-shore gambling and Native American gaming regulations. Other professionals . . . may have specific expertise in compulsive gambling, self-exclusion policies and responsible gambling procedures, including patrons who are visibly drunk and dram shop violations.[27]

Cahn Litigation Services, a New York-based company, explains the following on its website:

> Casino gaming expert witness candidates typically have experience and knowledge in casino gambling, online gambling, sports betting, casino operation, gaming hardware and/or gaming law. Cahn Litigation Services is frequently called upon by legal professionals to locate expert witnesses that can support casino gaming matters. An expert witness chosen may be a member of an industry organization such as the American Gaming Association (AGA), North American Gaming Regulators Association (NAGRA), or the International Association of Gaming Regulators (IAGR).
>
> In the U.S., each state has its own laws regarding gambling, however illegal gambling is a federal crime. Gaming law is a set of regulations encompassing multiple areas of law including criminal law, regulatory law, constitutional law, administrative law, company law, and contract law. Native American gaming, or tribal gaming, are operations on U.S. Indian reservations where states have limited ability to regulate activities, as codified by the Indian Gaming Regulatory Act of 1988.
>
> Matters that could require casino gaming expertise could involve intellectual property, such as patent infringement, copyright, or trade secret misappropriation. Experts in

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[27] *Expert Witnesses & Forensic Consultants Directory: Gaming & Casinos*, LEXVISIO, https://www.lexvisio.com/expert-witnesses/gaming-and-casino (last visited Sept. 13, 2021).

> gambling could also assist in criminal or regulatory compliance issues.
>
> Litigation support by a casino gaming expert witness could include an investigation, an expert report, expert opinion, and expert witness testimony at a trial. In a high-profile case, or litigation involving a significant financial stake, a law firm may request a specialist with prior expert testimony experience. In addition, clients often seek a casino gaming industry expert for pre-litigation consulting work.[28]

On its website, JurisPro, another California-based company, offers the following description of compulsive gambling experts:

> [A] compulsive gambling expert witness . . . may opine on issues including gambling addiction, gambling, and problem gambling. They may also provide reports and testimony on impulse control disorder, pathological gambling, illegal gambling, multi-state gambling, and out-of-control gambling, among other topics.[29]

As these websites collectively make clear, experts are advertised as being useful in a wide range of gambling cases.

V. U.S. CASE LAW

A second approach to the present topic is to review reported cases in which gambling experts have played a significant role. Based on various Lexis and Westlaw searches, it appears that U.S. gambling experts have found the most work in four types of cases:

1) Police raids on illegal gambling businesses: in these cases, experts typically are used to establish or refute the government's claim that the defendant was operating an illegal gambling business.[30]

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[28] *Casino Gaming Expert Witnesses*, CAHN LITIG. SERV., https://www.cahnlitigation.com/expert-discipline/casino-gaming (last visited Sept. 6, 2021).

[29] *Compulsive Gambling Expert Witnesses*, JURISPRO EXPERT WITNESS DIRECTORY, https://www.jurispro.com/category/compulsive-gambling-s-629 (last visited Sept. 6, 2021).

[30] *See, e.g.*, United States v. Strickland, 113 F. Supp. 2d 1276 (S.D. Ind. 2000) (the government gave the defendants sufficient notice that it intended to call expert witnesses to prove that the defendants were operating an illegal gambling business); United States v. Kohne, 358 F. Supp. 1053 (W.D. Pa.), *aff'd sub nom.* Appeal of Denham, 485 F.2d 679 (3d Cir. 1973) (same); Damani v. State, 667 S.E.2d 372 (Ga.

2) Actions involving pathological gamblers: in these cases, experts typically are used to establish or refute the defendant's claim that his or her conduct was fueled by a gambling addiction.[31]
3) Tax audits of gamblers: in these cases, experts typically are used to establish or refute the defendant's claim that he or she has deductible gambling losses.[32]

2008) (decision of the appellate court was vacated because the experts' opinions regarding whether seized machines were illegal gambling devices failed to make it into the record); Mullins v. State, 198 S.W.3d 504 (Ark. 2004) (although an expert testified that the defendant's machines were not gambling machines and the jury acquitted the owner based on a "mistake of law," the trial judge did not err in ordering machines forfeited).

In these sorts of cases, a police officer often serves as the government's expert. The practice of using cops as expert witnesses in gambling prosecutions dates to the 1890s. *See* Anna Lvovsky, *The Judicial Presumption of Police Expertise*, 130 HARV. L. REV. 1995, 2017 (2017) ("In the field of gambling, a vice crime traditionally entrusted to special units, prosecutions as far back as the 1890s featured police officers testifying as experts on the significance of betting notations and policy slips.").

For more than a decade, whenever the State of Alabama seized suspected illegal gambling machines, it employed Robert Sertell, a New Jersey casino instructor nicknamed "Father Slots," as its expert. When Sertell died in 2014, just weeks before such a case was set to go to trial, the state was forced to ask for a delay so that it could look for another expert. *See Death of Gambling Expert Could Delay Trial Over VictoryLand Raid*, ASSOCIATED PRESS (Jan. 13, 2019, 6:31 PM), https://www.al.com/wire/2014/05/death_of_gambling_expert_could.html. After a hurried search, the government picked Bill Holmes, a former FBI agent from Virginia, as Sertell's replacement. *See Alabama AG Gets New Expert for Casino Trial*, ASSOCIATED PRESS (June 18, 2014, 4:31 PM), https://www.apr.org/post/alabama-ag-gets-new-expert-casino-trial. Following a four-day bench trial, the judge, believing that the government had engaged in selective prosecution, entered judgment in favor of the defendants. On appeal, however, the Alabama Supreme Court reversed and ordered the machines forfeited. *See* State v. $223,405.86, 203 So. 3d 816 (Ala. 2016).

[31] *See, e.g.*, United States v. Sadolsky, 234 F.3d 938 (6th Cir. 2000) (based on his expert's testimony, a criminal defendant was entitled to a reduced sentence due to his pathological gambling); United States v. Liu, 267 F. Supp. 2d 371 (E.D.N.Y. 2003) (same); *In re* Huynh, 379 B.R. 865 (Bankr. D. Minn. 2008) (an expert witness's conclusion that a debtor suffered from pathological gambling was insufficient to overcome the trustee's conclusion that the debtor was concealing assets).

[32] *See, e.g.*, *In re* Berardi, 276 B.R. 388 (Bankr. E.D. Pa. 2002), *aff'd*, 70 F. App'x 660 (3d Cir. 2003) (expert testimony proved that a debtor had used unreported income to buy chips at two Atlantic City casinos); Coleman v. Comm'r, 120 T.C.M.

4) Lawsuits arising out of casino operations: In these cases, experts typically are used to establish or refute the plaintiff's claim that the casino failed to follow proper safety procedures.[33] Experts are also used in lawsuits involving the collection of casino gaming markers,[34] alleged cheating by casino players,[35] and suspected money laundering at casinos.[36]

VI. CONCLUSION

This article merely scratches the surface, and much more research needs to be done on the use of expert witnesses in gambling cases. Among the questions that should be investigated are:

(1) What types of gambling cases benefit the most from expert witnesses?;
(2) What are the best methods for finding a qualified gambling expert?;
(3) What constitutes a reasonable expert fee in a gambling case?;
(4) What does a gambling expert need to do to satisfy *Daubert*?;

(CCH) 278 (2020) (expert testimony proved that a taxpayer had sustained substantial gambling losses); Mancini v. Comm'r, 117 T.C.M. (CCH) 1062 (2019), *appeal dismissed for lack of jurisdiction*, No. 19-72438, 2019 WL 8301169 (9th Cir. Dec. 17, 2019) (although expert testimony proved that a taxpayer's compulsive gambling was exacerbated by the prescription drug Pramipexole, the taxpayer failed to substantiate his gambling losses); Stone v. Comm'r, No. CV044001070S, 2007 WL 586799 (Conn. Super. Ct. Feb. 7, 2007) (expert testimony proved that a slots player was not a professional gambler entitled to deduct his gambling losses).

[33] *See, e.g.*, Kusmirek v. MGM Grand Hotel, Inc., 7 F. App'x 734 (9th Cir. 2001) (testimony of an expert witness was insufficient to prove that a casino's valet parking procedures were inadequate); Kawamura v. Boyd Gaming Corp., No. 2:13-CV-203 JCM, 2015 WL 4622622 (D. Nev. Aug. 3, 2015) (expert witness could opine that an attack on a patron was caused by a casino's lack of adequate security); Early v. N.L.V. Casino Corp., 678 P.2d 683 (Nev. 1984) (trial court erred in taking a personal injury case away from the jury where the plaintiff's experts established that the casino had inadequate security). *See also* CHARLES A. SENNEWALD, FROM THE FILES OF A SECURITY EXPERT WITNESS 23–32 (2014) (author describes a case in which he testified as an expert witness for the plaintiff, who had been robbed while returning to his vehicle in a casino's parking lot).

[34] *See, e.g.*, Wynn v. Francis, No. B245401, 2014 WL 2811692 (Cal. Ct. App. Jun. 23, 2014).

[35] *See, e.g.*, State v. Bethea, No. A-3256-13T3, 2015 WL 4112161 (N.J. App. Div. July 9, 2015).

[36] *See, e.g.*, State v. Rust, 405 P.3d 869 (Utah Ct. App. 2017).

(5) What can courts do (in addition to *Daubert*) to ensure that unqualified gambling experts are prohibited from testifying?; and
(6) What are the best ways to present, attack, and rehabilitate a gambling expert's testimony?[37]

[37] Professor John Warren Kindt, a well-known gambling foe, already has given some thought to these questions: "In finding potential expert witnesses in gambling related cases, plaintiffs' attorneys [are] well-advised to 'follow the money' and then specifically determine the history and extent of direct and indirect funding sources for considerations involving legal impeachment." John Warren Kindt, "*The Insiders" for Gambling Lawsuits: Are the Games "Fair" and Will Casinos and Gambling Facilities Be Easy Targets for Blueprints for RICO and Other Causes of Action?*, 55 MERCER L. REV. 529, 537 (2004) (footnotes omitted).