

Legal Expert Witnesses

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The jury in the John Edwards case is still deliberating. Although I haven't followed the case closely, I found very interesting one evidentiary ruling that took place during the trial. Recall that the case concerns almost a million dollars that two of Edwards' friends provided to pay the expenses of, and to hide, Edwards' pregnant mistress during Edwards' presidential campaign. The issue is whether the money was a campaign contribution under federal law. If so, Edwards failed to report it. Edwards contends that the money was a personal gift, and that he would have wanted to hide his mistress from, for example, his wife whether or not he was running for president.

During the defense case, Edwards sought to call Scott Thomas, a former Federal Elections Commissioner. According to [this](#) news story, Thomas was expected to testify "that the payment of medical and other expenses of a candidate's mistress isn't a campaign-related expense." And according to [this](#) piece, he testified during voir dire that the donations "did not qualify as federal campaign contributions under existing federal law." United States District Judge Catherine Eagles – a former North Carolina superior court judge – excluded the testimony, apparently on the grounds that federal election law was not so complicated that the jury needed Thomas's assistance to understand it, and that the testimony was an improper opinion akin to a closing argument.

The federal cases that I was able to find quickly suggest that Judge Eagles' ruling was proper. *See, e.g., United States v. Lupton*, 620 F.3d 790 (7th Cir. 2010) (trial judge properly excluded testimony of legal expert about lawfulness of defendant real estate broker's conduct in negotiating kickbacks for himself in connection with the sale of a building; the only legal expert in a federal courtroom is a judge); *United States v. Stewart*, 433 F.3d 273 (2nd Cir. 2006) (trial judge properly "prevented a securities law expert from testifying about the legality of [the defendant's] trade" because "an opinion that purports to explain the law to the jury trespasses on the trial judge's exclusive territory"). There may be contrary cases out there; if you know of them, please let me know or post a comment.

What does state law say about the subject of expert legal testimony? Here are a few North Carolina cases that bear to varying degrees on the issue:

- *State v. Linney*, 138 N.C. App. 169 (2000). Prejudicial error to allow clerk of court to testify that the defendant, an attorney, committed a breach of fiduciary duty in connection with his handling of an estate. An expert may not testify that a legal standard has or has not been met. That is a determination to be made by a properly instructed jury.
- *Norris v. Zambito*, 135 N.C. App. 288 (1999). Trial court properly declined to consider an affidavit concluding that officers were negligent in their pursuit of a suspect. It is the province of the court to determine the law and to instruct the jury on it.
- *Smith v. Childs*, 112 N.C. App. 672 (1993). Even in a legal malpractice action, a legal expert witness "is not allowed to either interpret the law or to testify as to the legal effect of particular facts," as "[a]llowing expert testimony on these matters would amount to a jury instruction on the applicable law, thereby improperly invading the province of the court."
- *HJMM Co. v. House of Raeford Farms, Inc.*, 328 N.C. 578 (1991). Expert witness testified that there was a fiduciary duty between two parties and that one party breached that duty. The testimony was improper because it concerned a legal conclusion rather than a fact.

Of course, none of the foregoing completely precludes the use of legal expert witnesses. There may be circumstances, such as in connection with ineffective assistance of counsel claims, in which testimony from a legal expert witness is essential to establish a standard of care. And, footnote 12 of *Connick v. Thompson*, ___ U.S. ___, 131 S.Ct. 1350 (2011), refers with apparent approval to the testimony of a criminal law expert on a *Brady* issue. But it does seem that testimony to the effect that the defendant's conduct was lawful or did not violate a particular statute is generally improper.