

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if (1) the testimony is based on sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the case.

Fed. R. Evid. 702 (emphasis supplied).

Both Rules 701 and 702 were amended in 2000. With respect to Rule 702, the amendments were largely provoked by the Supreme Court's holding in Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579 (1993), and were intended to furnish "general standards that the trial court must use to assess the reliability and helpfulness of proffered expert testimony." Fed. R. Evid. 702 advisory committee's note (2000). Rule 701(c), on the other hand, was added to "clarify the distinction between lay and expert testimony." United States v. Garcia, 291 F. 3d 127, 139 n.8 (2d Cir. 2002). Yet as the Second Circuit has explained, the amendment "serves more to prohibit the inappropriate admission of expert opinion under Rule 701 than to change the substantive requirements of the admissibility of lay opinion." Id. In enacting the change, the Advisory Committee on the Federal Rules of Evidence also made clear that "[t]he amendment does not distinguish between expert and lay witnesses, but rather expert and lay testimony. Certainly, it is possible for the same witness to provide both lay and expert testimony in a single case." Fed. R. Evid. 701 advisory committee's note (2000) (emphasis in original) (citation omitted).

The notes of the Advisory Committee on the Federal Rules of Evidence describe the 2000 amendments to Rule 701 as aimed at two goals: "eliminating the risk that the reliability requirements set forth in Rule 702 will be evaded through the simple expedient of proffering an expert in lay witness clothing" and "ensur[ing] that a party will not evade the expert witness disclosure requirements set forth in Fed. R. Civ. P. 26 and Fed. R. Crim. P. 16 by simply calling an expert witness in the guise of a layperson." Id. According to the Advisory Committee, what separates expert and lay testimony is that "lay testimony results from a process of reasoning familiar in everyday life," whereas "expert testimony results from a process of reasoning which can be mastered only by specialists in the field." Id. (citation omitted).

Since the enactment of the above-described amendments, the Second Circuit has twice commented upon the question of how to classify a witness where he is testifying to his own perceptions, but those that have been filtered through his expertise. In United States v. Garcia, 291 F.3d at 127, the court assessed whether a district court erred in admitting the testimony of a drug dealer who conversed with the defendant in an alleged code where his testimony was offered to shed light on the meaning of that code. While ultimately ruling that the testimony was inadmissible and prejudicial to the defendant on the grounds that the government failed to lay a proper foundation, the court nonetheless suggested in dicta that to the extent the dealer's testimony was based on knowledge acquired through past

experience, "his opinion was not based on his perception of the situation as a participant in it." Garcia, 291 F.3d at 140 n.9. In that circumstance, the court announced, the government should have complied with the pretrial disclosure rules governing expert testimony. Id.

The Circuit contemplated the appropriate classification of a witness's testimony in greater detail in Bank of China v. NBM LLC, 359 F.3d 171 (2d Cir. 2004), where it considered whether the district court erred in admitting under Rule 701 the testimony of a Bank of China employee with years of experience in international banking who "was assigned to investigate defendants' activities at the tail-end of their scheme and after Bank of China stopped doing business with them." Id. at 181. The employee's testimony, however, focused not just on his investigation but also on the business community's customs and conventional understandings regarding what constitutes a normal and true trade transaction, what a "trust receipt" is and how it operates in the context of international commercial transactions, and whether an importer's presentation of a trust receipt to a bank to obtain a loan in the absence of real goods constitutes fraud. Id. at 180.

Noting that Rule 701(c) expressly precludes the admission of lay opinions that are "based on scientific, technical, or other specialized knowledge within the scope of Rule 702," Rule 701(c), Fed. R. Evid., the Second Circuit held that it was error to admit the employee's testimony as lay opinion testimony "to the extent [his] testimony was not a product of his investigation, but

rather reflected specialized knowledge he has because of his extensive experience in international banking." Bank of China, 359 F.3d at 182 (emphasis supplied). As such testimony was "not based entirely on [his] perceptions," it could not constitute lay testimony under Rule 701. Id. at 181. The court clarified, however, that the witness's "specialized knowledge, or that he carried out the investigation because of that knowledge, does not preclude him from testifying pursuant to Rule 701, so long as the testimony was based on the investigation and reflected his investigatory findings and conclusions, and was not rooted exclusively in his expertise in international banking." Id. (emphasis supplied). It also emphasized that since a witness may provide both lay and expert testimony within a single case, the witness's testimony regarding banking custom and practice, and the definition of terms used therein, could have been offered under Rule 702, so long as the plaintiff established reliability and disclosed the witness as an expert. Id. at 182.

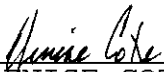
In the instant case, Andersen objects to the Lead Plaintiff's intent to call Stark ("Stark"), who operates a technical consulting firm that specializes in Essbase, as a witness at trial. Essbase was the computer system through which WorldCom's general ledger was maintained, and Stark's testimony will concern, inter alia, "the ease with which he was able to identify the improper line cost journal entries made at WorldCom during the fiscal year 2001." Andersen argues that given Stark's lack of personal knowledge of the events at issue, his testimony cannot be offered under Rule 701. Andersen further contends that

under Rule 37(c)(1), Fed. R. Civ. P., the Lead Plaintiff's failure to disclose Stark as an expert and provide an expert report "should preclude Lead Plaintiff from offering Stark's testimony at trial." For its part, the Lead Plaintiff acknowledges that it "retained" Stark to attend the inspection of WorldCom's general ledger that occurred in late December 2004 and to which the Underwriter Defendants and Andersen each sent their own teams. It argues, however, that Stark's testimony will merely "describe for the jury what it was like to access the Company's December 31, 2001 general ledger, and to describe what he saw."

Stark's testimony is properly characterized as expert testimony and shall be governed by the requirements of Rule 702. Although he will testify to his perceptions, he does so as a retained expert who was in essence conducting what amounts to a test. Because the general ledger was only accessible to the parties long after the deadline for expert reports, because it was Andersen who was responsible for creating the opportunity in December to review the general ledger, and because Andersen had equal access to the general ledger, the Lead Plaintiff will be given an opportunity to prepare a late expert report, and if Stark is properly qualified, he may testify at trial.

SO ORDERED:

Dated: New York, New York
March 24, 2005



DENISE COTE
United States District Judge