

Art v. Science Instruction

The instruction below was approved in *United States v. Starzecpyzel*, 880 F. Supp. 1027, 1050-51 (S.D.N.Y. 1995) in connection with handwriting comparison in a case in which the District Court, held that: (1) forensic document examination expertise was outside scope of *Daubert* ; (2) forensic document examiner's testimony is admissible as "skilled" testimony; and (3) possible prejudice deriving from possible perception by jurors that forensic testimony met scientific standards of reliability did not require exclusion of testimony.

To prevent possible prejudice deriving from possible perception by jurors that forensic document examiner's testimony meets scientific standards, however, the court held that the jury should be instructed, in advance of forensic testimony, that forensic document examiners offer practical, rather than scientific expertise.

The instruction proposed by the court was as follows:

You are about to hear the testimony of a forensic document examiner, who claims special qualification in the field of handwriting comparison, including the detection of forgeries.

Witnesses are usually permitted to testify only as to matters within their direct experience, such as what they saw or what they did on a particular occasion. Witnesses are not generally allowed to express their opinions. However, some individuals are permitted to offer their opinions because they have acquired a skill, through their training, education or experience, that few members of the general public possess. Such witnesses are frequently referred to as "experts" or "expert witnesses."

For example, in a lawsuit relating to a collision between vessels in a harbor, jurors might find it helpful to hear the opinions of one or more witnesses who have no direct connection to the lawsuit, but have spent years piloting vessels in that harbor. No one would regard the harbor pilot as having "scientific" knowledge of piloting. Nor does referring to the harbor pilot as an "expert" or an "expert witness" suggest anything more than knowledge or skill, acquired through years of experience, that may prove useful to you as jurors.

Just because a witness is allowed to offer opinion testimony does not mean that you must accept his or her opinion. As with any other witness, it is up to you to decide whether you believe this testimony and wish to rely upon it. Part of that decision will depend on your judgment about whether the witness's training and experience are sufficient for the witness to give the opinion that you heard. You may also consider such factors as the information provided to the witness, and the reasoning and judgment the witness employed in coming to the conclusion that he or she testified to.

Forensic document examiners, as a group, may develop skills not possessed by members of the general public, skills that may give rise to opinions useful to you in your deliberations. A forensic document examiner may spend a substantial amount of time looking at handwriting samples, in many cases focusing on signatures. In the course of their work, forensic document examiners may have acquired skill in identifying significant similarities and differences between real and forged writings.

The Court has studied the nature of the skill claimed by forensic document examiners, and finds it to be closer to a practical skill, such as piloting a vessel, than to a scientific skill, such as that which might be developed by a chemist or a physicist. That is, although forensic document examiners may work in “laboratories,” and may rely on textbooks with titles like “The Scientific Examination of Documents,” forensic document examiners are not scientists – they are more like artisans, that is, skilled craftsmen.

The determination that a forensic document examiner is not a scientist does not suggest that this testimony is somehow inadequate, but it does suggest that his or her opinion may be less precise, less demonstrably accurate, than, say, the opinion of a chemist who testifies as to the results of a standard blood test.

In sum, the Court is convinced that forensic document examiners may be of assistance to you. However, their skill is practical in nature, and despite anything you may hear or have heard, it does not have the demonstrable certainty that some sciences have.

You may accept a forensic document examiner's testimony in whole, or you may reject it in whole. If you find that the field of forensic document examination is not sufficiently reliable, or that the particular document examiner is not sufficiently reliable, you are free to reject the testimony in whole. You may also accept the testimony in part, finding, as one possible example, that while the forensic document examiner has found significant similarities and differences between various handwriting samples, his or her conclusion as to the genuineness of a particular writing is in error, or is inconclusive. In any event, you should not substitute the forensic document examiner's opinion for your own reason, judgment, or common sense. I am not in any way suggesting what you should do. The determination of the facts in this case rests solely with you.

United States v. Starzeczyel, 880 F. Supp. 1027, 1050-51 (S.D.N.Y. 1995)

This instruction can be used in its entirety or split up into pieces or rewritten in a manner that is consistent with the admissibility or the *in limine* rulings in your case.

An example of a rewrite for the testimony of a fingerprint examiner is as follows:

You are about to hear the testimony of a forensic fingerprint examiner, who claims special qualification in the field of fingerprint comparison, including the comparison

of partial prints or latent prints recovered from the scene with known prints obtained under controlled circumstances from individuals.

Witnesses are usually permitted to testify only as to matters within their direct experience, such as what they saw or what they did on a particular occasion. Witnesses are not generally allowed to express their opinions. However, some individuals are permitted to offer their opinions because they have acquired a skill, through their training, education or experience that few members of the general public possess. Such witnesses are frequently referred to as “experts” or “expert witnesses.”

For example, in a lawsuit relating to a collision between boats in a harbor, jurors might find it helpful to hear the opinions of one or more witnesses who have no direct connection to the lawsuit, but have spent years piloting boats in that harbor. No one would regard the boat pilot as having “scientific” knowledge of boating. Nor does referring to the boat pilot as an “expert” or an “expert witness” suggest anything more than knowledge or skill, acquired through years of experience that may prove useful to you as jurors.

Just because a witness is allowed to offer opinion testimony does not mean that you must accept his or her opinion. As with any other witness, it is up to you to decide whether you believe this testimony and wish to rely upon it. Part of that decision will depend on your judgment about whether the witness’s training and experience are sufficient for the witness to give the opinion that you heard. You may also consider such factors as the information provided to the witness, and the reasoning and judgment the witness employed in coming to the conclusion that he or she testified to.

Fingerprint examiners, as a group, may develop skills not possessed by members of the general public, skills that may give rise to opinions useful to you in your deliberations. A fingerprint examiner may spend a substantial amount of time looking at latent or partial prints and comparing them with known or full prints. In the course of their work, forensic fingerprint examiners may have acquired skill in identifying significant similarities and differences between partial prints and known prints.

The Court has studied the nature of the skill claimed by fingerprint examiners, and finds it to be closer to a practical skill, such as piloting a boat, than to a scientific skill, such as that which might be developed by a chemist or a physicist. That is, although fingerprint examiners may work in “laboratories,” fingerprint examiners are not scientists – they are more like artisans, that is, skilled craftsmen. They are individuals whose opinions rest on their experience and training and not on scientific research undertaken in a specific field of study.

Fingerprint examination rests on the theory that no two people have the same fingerprint. Though this claim is widely assumed to be true, it has not, this contrary to popular belief, been conclusively established.

The determination that a fingerprint examiner is not a scientist does not suggest that this testimony is somehow inadequate, but it does suggest that his or her opinion may be less precise, less demonstrably accurate, than, say, the opinion of a chemist who testifies as to the results of a standard blood test that has been developed using scientific methods and validated.

The fingerprint examiner's testimony is [his/her] subjective opinion. It should not be considered by you as conclusive fact, but should be weighed along with all the evidence that you have heard in this case. [His/her] opinion should be treated the same as any other evidence, which means that you are free to give it the weight you believe it deserves. You may accept or disregard it in whole or in part.

In sum, fingerprint examiners may be of assistance to you. However, their skill is practical in nature, and despite anything you may hear or have heard, it does not have the demonstrable and empirical certainty associated with sciences such as chemistry or physics.

An example of a rewrite for firearms examiner is as follows:

You are about to hear the testimony of a firearms examiner, who claims special qualification in the field of toolmark comparison, including the comparison of spent bullets and cartridges with a specific firearm.

Witnesses are usually permitted to testify only as to matters within their direct experience, such as what they saw or what they did on a particular occasion. Witnesses are not generally allowed to express their opinions. However, some individuals are permitted to offer their opinions because they have acquired a skill, through their training, education or experience that few members of the general public possess. Such witnesses are frequently referred to as "experts" or "expert witnesses."

For example, in a lawsuit relating to a collision between boats in a harbor, jurors might find it helpful to hear the opinions of one or more witnesses who have no direct connection to the lawsuit, but have spent years piloting boats in that harbor. No one would regard the boat pilot as having "scientific" knowledge of boating. Nor does referring to the boat pilot as an "expert" or an "expert witness" suggest anything more than knowledge or skill, acquired through years of experience that may prove useful to you as jurors.

Just because a witness is allowed to offer opinion testimony does not mean that you must accept his or her opinion. As with any other witness, it is up to you to decide whether you believe this testimony and wish to rely upon it. Part of that decision

will depend on your judgment about whether the witness's training and experience are sufficient for the witness to give the opinion that you heard. You may also consider such factors as the information provided to the witness, and the reasoning and judgment the witness employed in coming to the conclusion that he or she testified to.

Firearms examiners, as a group, may develop skills not possessed by members of the general public, skills that may give rise to opinions useful to you in your deliberations. A firearms examiner may spend a substantial amount of time looking at spent bullets and cartridges and comparing them with bullets and cartridges fired from a specific firearm. In the course of their work, firearms examiners may have acquired skill in identifying significant similarities and differences between the toolmark patterns left on spent bullets and cartridges.

The Court has studied the nature of the skill claimed by firearms examiners, and finds it to be closer to a practical skill, such as piloting a boat, than to a scientific skill, such as that which might be developed by a chemist or a physicist. That is, although firearms examiners may work in "laboratories," firearms examiners are not scientists – they are more like artisans, that is, skilled craftsmen. They are individuals whose opinions rest on their experience and training and not on scientific research undertaken in a specific field of study.

Firearms examination rests on three assumptions: (1) The assumption that individual firearms leave marks on the bullets and shell casings after being fired from the firearm that are unique to that individual firearm; (2) that these individual marks are permanent and will not change over time; and (3) that firearms examiners can discern the difference between individual marks unique to that firearm and marks created as a result of the manufacturing process and thus shared by other firearms subjected to the same manufacturing process. These assumptions have not, contrary to popular belief, been conclusively established.

The determination that a firearm examiner is not a scientist does not suggest that this testimony is somehow inadequate, but it does suggest that his or her opinion may be less precise, less demonstrably accurate, than, say, the opinion of a chemist who testifies as to the results of a standard blood test that has been developed using scientific methods and validated.

The fingerprint examiner's testimony is [his/her] subjective opinion. It should not be considered by you as conclusive fact, but should be weighed along with all the evidence that you have heard in this case. [His/her] opinion should be treated the same as any other evidence, which means that you are free to give it the weight you believe it deserves. You may accept or disregard it in whole or in part.

In sum, firearm examiners may be of assistance to you. However, their skill is practical in nature, and despite anything you may hear or have heard, it does not have

the demonstrable and empirical certainty associated with sciences such as chemistry or physics.