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## SUMMARY AND EXPERT WITNESSES: A DISTINCTION WITH A DIFFERENCE

*Brandon L. Bigelow\**

Although there are significant differences between summary and expert witnesses, the two can easily be confused during trial. The problem of distinguishing the two is made no less severe because expert witnesses can be offered largely to summarize prior testimony given at trial, giving the party that proffers the expert an early opportunity to lay out its argument under the patina of “expert” testimony. Adding to the confusion, until recently summary witnesses could offer testimony based solely upon their experience and evade the disclosure and qualifications requirements for expert witnesses provided by the Federal Rules of Criminal and Civil Procedure and Evidence. The distinction between summary and expert witnesses is important because of differences in the kinds of testimony each is permitted to offer at trial.

Federal Rule of Evidence 701 was amended recently to address this very issue.<sup>1</sup> That rule previously limited lay witness testimony to opinions or inferences “(a) rationally based on the perception of the witness and (b) helpful to a clear understanding of the witness’ testimony or the determination of a fact in issue.”<sup>2</sup> As of December 2000, however, Rule 701 also requires that the opinion be “(c) not based on scientific, technical, or other specialized knowledge within the scope of Rule 702,” the rule governing expert witness testimony.<sup>3</sup>

Rule 701(c) goes a long way toward resolving confusion between summary and expert witnesses. This Article will demonstrate, however, that some issues linger even after the amendment to the Federal Rules of Evidence. Part I of this Article describes the various types of summary witnesses and the underlying reasons these witnesses are permitted to testify.<sup>4</sup> Although the distinction between summary and expert witnesses may be obvious as an academic matter, Part II reviews three federal cases to illustrate the difficulties trial courts face in applying the rules.<sup>5</sup> Finally,

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<sup>1</sup> See FED. R. EVID. 701 (as amended Dec. 2000).

<sup>2</sup> *Id.*

<sup>3</sup> *Id.*

<sup>4</sup> See *infra* notes 7-21 and accompanying text.

<sup>5</sup> See *infra* notes 22-46 and accompanying text.

Part III discusses the criticisms that prompted the Advisory Committee to revise Rule 701, and applies Rule 701(c) to the cases described in Part II to illustrate how the revised rule operates.<sup>6</sup> While the revised Rule 701(c) closes certain loopholes available through the use of summary witnesses, considerable room remains for play in the interstices of the rules governing expert witnesses.

## I. SUMMARY WITNESSES AND THEIR USES

A summary is typically presented as a chart, summary, or calculation, often presented by the witness who prepared it and is familiar with its contents; a summary can, however, simply take the form of a witness's oral testimony.<sup>7</sup> There are three types of summary evidence: (1) summaries of voluminous records as provided in Federal Rule of Evidence 1006; (2) pedagogical summaries of evidence allowed by the court through its discretion under Federal Rule of Evidence 611(a); and (3) "hybrid" summaries which do not meet the exact requirements of Rule 1006, but nevertheless so accurately reflect other evidence as to reliably assist the factfinder.<sup>8</sup>

Rule 1006 provides that the "contents of voluminous writings, recordings, or photographs which cannot conveniently be examined in court may be presented in the form of a chart, summary, or calculation."<sup>9</sup> Rule 1006 also requires that the original documents be made available to the other party at a reasonable place and time.<sup>10</sup> These charts are only admissible where the underlying documents they purport to summarize would be admissible.<sup>11</sup> Although the Federal Rules of Evidence do not explicitly allow – or require – the proponent of a summary chart to have the preparer come into court as a witness to explain the chart, courts have held that such testimony is within the broad discretion of the trial court to admit or exclude evidence.<sup>12</sup> These witnesses need not be experts to sift through pri-

<sup>6</sup> See *infra* notes 47-68 and accompanying text.

<sup>7</sup> FED. R. EVID. 1006 (declaring that voluminous writings, recordings or photographs may be presented as charts, summaries or calculations). See also *United States v. Jackson-Randolph*, 282 F.3d 369, 384-85 (6th Cir. 2002) (finding no abuse of discretion when district court allowed summary witness to use summary calculations); *Goldberg v. United States*, 789 F.2d 1341, 1343 (9th Cir. 1986) (allowing testimony of IRS agent to summarize extensive tax record).

<sup>8</sup> See, e.g., 6 WEINSTEIN'S FEDERAL EVIDENCE § 1006.04[2] (2d ed. & 2003 rev.); *United States v. Bray*, 139 F.3d 1104, 1111-12 (6th Cir. 1998) (explaining differences among types of summaries).

<sup>9</sup> FED. R. EVID. 1006.

<sup>10</sup> See *id.*

<sup>11</sup> See, e.g., *City of Phoenix v. Com/Systems, Inc.*, 706 F.2d 1033, 1037 (9th Cir. 1983)(sustaining district court allowance of summary testimony because underlying business records were admissible); see also 6 WEINSTEIN'S FEDERAL EVIDENCE § 1006[3].

<sup>12</sup> See, e.g., *United States v. Swanquist*, 161 F.3d 1064, 1073 (7th Cir. 1998) (finding no abuse of discretion when court allowed witness to testify regarding summary charts).

mary documents to derive their summary data, as long as they limit themselves to testimony about what the documentary evidence demonstrates.<sup>13</sup> Typically, the summary chart itself is accepted as evidence and given to the jury, although a minority of jurisdictions require that the judge instruct the jury that summaries are not themselves evidence.<sup>14</sup>

By contrast, pedagogical summaries typically are not admitted as evidence, and the jury must be instructed as such.<sup>15</sup> Pedagogical summaries are used merely as an aid to the jury by allowing a witness to review testimonial or other evidence that has been introduced during a trial.<sup>16</sup> These pedagogical summaries apparently serve the twin aims of Rule 611(a), the efficient “ascertainment of the truth” and the avoidance of “needless consumption of time,” a function assigned to the sound discretion of the trial judge.<sup>17</sup> A pedagogical summary witness, usually a case agent in a government prosecution, will review all of the preceding evidence and suggest what inferences might reasonably be drawn from that evidence.<sup>18</sup>

A third category is the secondary-evidence summary, which bears resemblance to both the Rule 1006 summary and the pedagogical summary.<sup>19</sup> These so-called “hybrid” summaries are received into evidence and may be examined by the jury during deliberation, but only to supplement the evidence they summarize.<sup>20</sup> In *United States v. Bray*, for exam-

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*See also* 6 WEINSTEIN'S FEDERAL EVIDENCE § 1006.05[4] (discussing admissibility of summaries without authentication by witness but stating that as a practical matter summary witness is useful).

<sup>13</sup> *See Swanquist*, 161 F.3d at 1073 (explaining witness in case did not act as expert but as summary witness “testifying simply as to what the government’s evidence showed”).

<sup>14</sup> *Compare, e.g., United States v. Baker*, 10 F.3d 1374, 1411 (9th Cir. 1993) (holding that summary charts admitted under Rule 1006 are evidence), *with Swanquist*, 161 F.3d at 1073 (holding that jury was properly instructed that summary charts are not evidence).

<sup>15</sup> *See, e.g., United States v. Bray*, 139 F.3d 1104, 1112 (6th Cir. 1998); *United States v. Johnson*, 54 F.3d 1150, 1158 (4th Cir. 1995) (“Whether or not the chart is technically admitted into evidence, we are more concerned that the district court ensure the jury is not relying on that chart as ‘independent’ evidence but rather is taking a close look at the evidence upon which the chart is based.”).

<sup>16</sup> *See, e.g., Bray*, 139 F.3d at 1112 (recognizing pedagogical device summaries as illustrative aids, not evidence).

<sup>17</sup> *See* FED. R. EVID. 611(a); *Johnson*, 54 F.3d at 1158 (finding trial judge acted within his discretion in admitting summary evidence).

<sup>18</sup> *See, e.g., Johnson*, 54 F.3d at 1158 (allowing detective to testify as to the contents of a summary exhibit). *See also Bray*, 139 F.3d at 1112 (allowing Postal Inspector to testify as to charts at trial).

<sup>19</sup> *See Bray*, 139 F.3d at 1112. In *Bray*, the court defines a secondary-evidence summary as one that is not entirely in compliance with Rule 1006, but is more than a mere pedagogical device. *Id.*

<sup>20</sup> *See id.* (recognizing that secondary evidence summaries can materially assist jurors in understanding complex evidence). *See also* 6 WEINSTEIN'S FEDERAL EVIDENCE § 1006.04[2] and cases cited.

ple, the Sixth Circuit made passing reference to secondary-evidence summaries, but cautioned that such summaries should be admitted only in unusual circumstances, and only where a summary of complex or difficult material is "so accurate and reliable" in the view of the trial judge that it would reliably assist the factfinder.<sup>21</sup> The Sixth Circuit has warned that such evidence should only be admitted with a limiting instruction to the jury that the summary is only as valid as the evidence it summarizes.<sup>22</sup>

## II. SUMMARY AND EXPERT WITNESSES: THREE ILLUSTRATIVE CASES

Judge Weinstein has observed that between these three categories, conflict exists as to whether the summary itself, or the underlying material it summarizes, should be admitted into evidence.<sup>23</sup> As a practical matter, however, Judge Weinstein goes on to note that "the jury is likely to treat charts, summaries, and calculations as evidence or proof of contents under Rule 1006 when it has not seen the original materials forming the basis of charts, summaries, or calculations."<sup>24</sup> A jury may not, however, view the witness offering a summary in the same manner, depending upon whether the witness is offered as a lay witness pursuant to Rule 701 or an expert witness pursuant to Rule 702.

In *Asplundh Manufacturing Division v. Benton Harbor Engineering*, in 1995, the United States Court of Appeals for the Third Circuit attempted to describe the boundary between Rule 701 lay witnesses and Rule 702 expert witnesses.<sup>25</sup> In that case, a city fleet maintenance supervisor examined a city owned and operated aerial lift shortly after the lift failed, killing the lift operator.<sup>26</sup> At trial, the supervisor testified that during his inspection of the equipment after the accident, he discovered a fracture in a metal rod in the lift.<sup>27</sup> Although not qualified as an expert, he further offered his opinion that the fracture was caused by metal fatigue.<sup>28</sup>

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<sup>21</sup> See *Bray*, 139 F.3d at 1112.

<sup>22</sup> See *id.*

<sup>23</sup> See 6 WEINSTEIN'S FEDERAL EVIDENCE § 1006.04[1].

<sup>24</sup> *Id.*

<sup>25</sup> See 57 F.3d 1190, 1201 (3d Cir. 1995).

<sup>26</sup> See *Asplundh Mfg. Div.*, 57 F.3d at 1193-94. After the accident the supervisor and his employees took apart and inspected the lift in the City of Portland's shop. *Id.* at 1194.

<sup>27</sup> See *id.* at 1194.

<sup>28</sup> See *id.* At trial the supervisor testified that the accident was attributable "to the way the rod was drilled through, and the fact that the rod eye was screwed on a threaded-two threaded surfaces." *Id.* He further testified that he "kn[e]w how other cylinders were configured differently," since he was a production control manager for a company that produced hydraulic cylinders." *Id.*

The Third Circuit concluded that the supervisor's opinion as to the cause of equipment failure was improperly admitted at trial.<sup>29</sup> Notably, however, the Third Circuit did not rule that lay witnesses could never offer testimony that resembled expert opinions.<sup>30</sup> Instead, the court in *Asplundh* suggested that Rule 701 intended to broaden the common law rule that absolutely barred lay witnesses from drawing conclusions that might be characterized as expert opinions.<sup>31</sup> The court held that for a lay opinion to be admissible, it must derive from a sufficiently qualified source to be reliable and helpful to the jury.<sup>32</sup> The court added that the trial judge should ensure the reliability of a lay opinion by examining the experience and specialized knowledge of the witness.<sup>33</sup> The court in *Asplundh* concluded that the supervisor had not demonstrated the requisite experience or knowledge.<sup>34</sup>

Like the lay witness offering an opinion, as suggested in *Asplundh*, a summary witness could be used in certain circumstances to offer what appears to be an expert conclusion, at least until recently. For example, in

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<sup>29</sup> See *id.* at 1204. Specifically the court concluded that the district court had wrongly applied Rule 701 in that it failed to require *Asplundh* to show "sufficient knowledge or experience and a sufficient connection between Jones's [the supervisor] special knowledge or experience and his opinion regarding the cause of the accident and the design of the hydraulic cylinder." *Id.* at 1204.

<sup>30</sup> See *id.* at 1204-05 (explaining unlikelihood of lay witness providing "meaningful opinion" for complicated "technical concept[s]" like metal fatigue). The *Asplundh* court noted that the lay witness that observed the equipment failure could not express an opinion that required the technical background possessed by an expert. *Id.* The court focused its discussion on the witness's lack of technical training in the field of metal fatigue, not any general rule preventing lay witnesses from providing opinions similar to expert opinions. *Id.*

<sup>31</sup> See *Asplundh Mfg. Div.*, 57 F.3d at 1195. At common law a non-expert witness was not allowed to draw any conclusions, but rather had to limit his testimony to the facts. *Id.* In *Asplundh*, the court recognized criticisms of the common law approach including that of Judge Learned Hand who stated "every judge of experience in the trial of causes has again and again seen the whole story garbled, because of insistence upon a form with which the witness cannot comply, since, like most men, he is unaware of the extent to which inference enters into his perceptions. He is telling the 'facts' in the only way that he knows how, and the result of nagging and checking him so often to choke him altogether, which is, indeed, usually its purpose." *Id.* The court concluded that criticisms such as these lead to the liberalization of the common law in the Federal Rules of Evidence. *Id.*

<sup>32</sup> See *id.* at 1201 (holding that Rule 701's requirement that the opinion be "rationally based on the perception of the witness" demands more than first hand perception, but also requires a rational relationship between the perception and the opinion).

<sup>33</sup> See *id.* (finding that the trial judge should "rigorously examine" the reliability of lay opinion). The court reasoned that lay witnesses with primary knowledge of the event can offer lay opinion so long as they can show they possess sufficient knowledge or experience to offer the opinion. *Id.*

<sup>34</sup> See *id.* at 1206. The court found that the district court failed to properly inquire as to the supervisor's knowledge and expertise that qualified him to offer an opinion as to the cause of the accident. *Id.* The court remanded the case to allow the district court to determine whether the supervisor possessed the requisite knowledge and experience. *Id.*

*United States v. Sutherland*, in 1991, the United States Court of Appeals for the First Circuit allowed a summary witness to testify not only as to how he made the calculations that supported a charge for tax evasion, but also what conclusions might be drawn from those calculations.<sup>35</sup> In that case, an IRS agent reviewed the financial records of a defendant and applied the "expenditures method" to prove additional tax due and owing.<sup>36</sup> During direct examination, the agent provided not only a summary of the underlying financial statements to prove the tax evasion charge, but also offered his opinion that "these excess expenditures were derived from net profits generated through the sale of illegal drugs."<sup>37</sup> He based that opinion on the evidence that had been introduced during trial.<sup>38</sup> The First Circuit held that the agent could take notice of the other evidence offered at trial to support his own conclusions because the expenditures method required the government to identify a likely source of income.<sup>39</sup>

Finally, an expert offered at the conclusion of a case can be used to considerable advantage, offering not only an expert opinion about issues involved in the case, but also summarizing all of the evidence introduced during the case-in-chief, effectively providing an expert opinion as to what conclusions might be drawn from all of the evidence at trial. For example, in *United States v. Johnson*, in 1995, the United States Court of Appeals for the Fourth Circuit affirmed a lower court conviction based in part upon the testimony of a detective qualified as an expert in modes of distributing, packaging, weighing, pricing, and using narcotics, including crack cocaine.<sup>40</sup> In that case, the prosecution called the detective at the end of its case-in-chief to present expert testimony concerning the organization of an alleged drug conspiracy and to summarize evidence presented by the preceding witnesses.<sup>41</sup> During his testimony, the detective relied upon an organizational chart he had prepared based on other evidence adduced at the trial.<sup>42</sup>

The Fourth Circuit conceded that the organizational chart did not rely upon any specialized knowledge of the detective, and thus could not come in under Rule 702.<sup>43</sup> Nevertheless, the court held that the district

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<sup>35</sup> See 929 F.2d 765, 780 (1st. Cir. 1991).

<sup>36</sup> See *id.* at 779-80.

<sup>37</sup> See *id.* at 780. In his testimony the IRS agent stated, "based on the only discussion I have heard of possible sources of other income has been from drug activities. As part of the answer I would therefore say in this case these excess expenditures were derived from the net profits from the sale of illegal drugs." *Id.*

<sup>38</sup> See *Sutherland*, 929 F.2d at 780

<sup>39</sup> See *id.* (holding government's use of summary witness was not improper).

<sup>40</sup> See 54 F.3d 1150, 1156-57 (4th Cir. 1995).

<sup>41</sup> See *id.*

<sup>42</sup> See *id.* at 1157-58. The detective offered "extensive" testimony and used the organizational chart to show drug transactions among the members of the conspiracy. *Id.*

<sup>43</sup> See *Johnson*, 54 F.3d at 1158. The organizational chart presented an illustration of

court could allow the jury to view the chart, with appropriate limiting instructions, based upon the broad discretion assigned to the trial judge by Rule 611(a).<sup>44</sup> The court in *Johnson* observed that the chart aided the jury in ascertaining the truth, and the judge had taken appropriate steps to ensure that the prejudicial effect of the chart did not outweigh its probative value to the jury.<sup>45</sup> The Fourth Circuit held that the district court had properly exercised its discretion because the prosecution took a week to present its evidence, called more than thirty witnesses, and took steps to ensure that the jury did not rely upon the chart as independent evidence.<sup>46</sup>

The court in *Johnson* addressed separately the issue of the detective's supporting testimony. The court found that some portions of the detective's testimony, like that concerning drug-related slang, clearly related to his expert knowledge; yet the detective also summarized the testimony of earlier witnesses without offering any opinion reflecting "specialized knowledge" as required under Rule 702.<sup>47</sup> The court noted, for example, that the expert added up the various weights of drugs possessed by the defendants which, although "likely helpful to the jury as a summary of the witnesses' recollections," did not draw upon the specialized knowledge the expert purported to offer under Rule 702.<sup>48</sup> The Fourth Circuit nevertheless again declined to exclude the expert's summary testimony, holding that the summary was useful to the jury, that cross-examination was an effective technique for neutralizing any prejudicial effect, and that the trial court could allow the testimony under Rule 611 (a).<sup>49</sup>

### III. REVISED RULE 701: PREVENTING SUMMARY WITNESSES FROM ACTING AS EXPERTS

*Asplundh* or *Sutherland*-type witnesses (a lay or summary witness offering essentially expert testimony) and a *Johnson*-type witnesses (an expert summarizing trial evidence as a pedagogical device for the jury)

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the relationship between the principals. *Id.* The detective conceded that he relied on the previous testimony of other witnesses in the creation of the chart. *Id.*

<sup>44</sup> *See id.*

<sup>45</sup> *See id.* at 1159-60.

<sup>46</sup> *See id.* at 1160. The district court stressed to the jury on at least two occasions that the chart merely presented what the government contended was proven in the case and that it was up to the jury to ultimately weigh the witness' creditability and the evidence on its own. *Id.*

<sup>47</sup> *See id.* at 1161-62.

<sup>48</sup> *See Johnson*, 54 F.3d at 1162.

<sup>49</sup> *See id.* In its conclusion the court stressed that in an ordinary federal drug prosecution the use of a summary witness and summary chart would not be permitted under Rules 702 and 611(a). 54 F.3d at 1162. The district court distinguished this matter due to the large number of witnesses, the extensive evidence and the instructions offered by the court. *Id.*

present related, but uniquely different, issues for courts. In both instances, the witness performs functions typically assigned to witnesses who qualify under other rules. The 2000 Amendments to Rule 701 have effectively foreclosed the use of summary witnesses as “surprise experts.” There remains, however, considerable tactical advantage to concluding with an expert to offer a pedagogical summary of all testimony at trial.

Until recently, there were advantages to designating a witness as a summary rather than an expert witness. Lay witnesses who drew essentially expert conclusions from the evidence, as suggested in *Asplundh*, could offer “surprise expert testimony.”<sup>50</sup> Although the *Asplundh* court ultimately did not allow the testimony of an equipment supervisor as to the cause of the equipment failure, other courts have allowed lay witnesses to offer essentially expert opinions based upon the experience and background of the witness.<sup>51</sup> For example, the IRS agent in *Sutherland* apparently testified as a lay witness who had sufficient background not only to apply the expenditures method to calculate unpaid taxes, but also to draw conclusions about the target’s source of income.<sup>52</sup>

Because summary witnesses are considered lay witnesses, they are not subject to the same disclosure rules for experts<sup>53</sup> or the judicial “gatekeeper” inquiry that ensures the reliability of expert testimony.<sup>54</sup> Under Rule 26(a)(2) of the Federal Rules of Civil Procedure, parties must disclose the identity of any expert witnesses upon whom they plan to rely at trial, and provide a report summarizing the intended testimony of the witness.<sup>55</sup> Moreover, these expert witnesses must be available for depositions or interrogatories, and to provide their opinions in advance of trial.<sup>56</sup>

Similarly, Rule 16(a)(1)(G) of the Federal Rules of Criminal Procedure requires that government prosecutors provide a summary of any expert evidence the government intends to introduce during trial, and Rule 16(b)(1)(C) imposes a reciprocal disclosure requirement upon defendants.<sup>57</sup> Neither the Federal Rules of Civil Procedure nor the Federal Rules

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<sup>50</sup> Gregory P. Joseph, *Emerging Expert Issues Under the 1993 Disclosure Amendments to the Federal Rules of Civil Procedure*, 164 F.R.D. 97, 108 (1996).

<sup>51</sup> See *id.* (citing *United States v. Gust K. Newberg Constr. Co.*, 1995 WL 383133 (N.D. Ill. 1995); *Hester v. CSX Transp., Inc.*, 61 F.3d 383 (5th Cir. 1995)).

<sup>52</sup> See *Sutherland*, 929 F.2d at 779-80.

<sup>53</sup> See FED. R. CIV. P. 26(a)(2) (disclosure of expert testimony); 26(b)(4) (expert depositions and discovery); FED. R. CRIM. P. 16(a)(1)(G), 16(b)(1)(C).

<sup>54</sup> See *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 141 (1999); *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 592-94 (1993). See also FED. R. EVID. 701 Advisory Committee Notes to 2000 Amendments (“Rule 701 has been amended to eliminate 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.”). See also FED. R. EVID. 702 (2000) (formalizing *Daubert* and its progeny).

<sup>55</sup> See FED. R. CIV. P. 26(a)(2)(A)-(C).

<sup>56</sup> See FED. R. CIV. P. 26(b)(4)(A)-(C).

<sup>57</sup> See FED. R. CRIM. P. 16(a)(1)(G), 16(b)(1)(C).

of Criminal Procedure impose a similar requirement upon lay witnesses, although parties in civil suits are required to provide witness lists and contact information at least thirty days before trial.<sup>58</sup> There is no reason, however, that a party in a civil suit would be able to anticipate the introduction of quasi-expert testimony on the basis of these disclosures.

Indeed, in the criminal context, in *United States v. Hicks*, in 1996, the Ninth Circuit held that Rule 1006 summary witnesses did not fall within the ambit of the Rule 16(a)(1)(E) —the predecessor to the present day Rule 16(a)(1)(G)— expert disclosure requirement.<sup>59</sup> The *Hicks* court pointed to the Advisory Committee Notes to the 1993 Amendment, which provided that the Rule 16(a)(1)(E) disclosure requirements did not extend to Rule 1006 witnesses.<sup>60</sup> The Advisory Committee Notes also stated, however, that this exclusion only operated “unless the witness is called to offer expert opinions apart from, or in addition to, the summary evidence.”<sup>61</sup> Despite this cautionary note, a summary witness might still have offered *Asplundh*-type lay witness conclusions based upon experience and training, as the testimony of the IRS agent in *Sutherland* implicitly demonstrates.<sup>62</sup>

The December 2000 Amendments to Rule 701 closed the *Asplundh* loophole by adding a requirement that lay witness opinion testimony not only (a) be rationally based on the perception of the witness and (b) be helpful to a clear understanding of the testimony or a fact in issue, but also be “(c) not based on scientific, technical, or other specialized knowledge within the scope of Rule 702.”<sup>63</sup> The Advisory Committee Notes to the 2000 Amendments explicitly cited *Asplundh* and explained that Rule 701(c) was added “to eliminate 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.”<sup>64</sup> The intent of the amended rule was to channel expert testimony back to Rule 702 and the appropriate procedural rules and reliability requirements.<sup>65</sup>

The reliability requirements referred to by the Advisory Committee are the December 2000 Amendments to Rule 702, which incorporated the judicially-fashioned rules governing experts that have evolved through *Daubert* and its progeny.<sup>66</sup> In addition to requiring that a witness demon-

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<sup>58</sup> See FED. R. CIV. P. Rule 26(a)(3).

<sup>59</sup> See 103 F.3d 837, 841 (9th Cir. 1996).

<sup>60</sup> See *id.*

<sup>61</sup> See FED. R. CRIM. P. 16, Advisory Committee Notes to 1993 Amendment.

<sup>62</sup> See *Sutherland*, 929 F.2d at 780.

<sup>63</sup> FED. R. EVID. 701 (c).

<sup>64</sup> *Id.* at Advisory Committee Notes to 2000 Amendments.

<sup>65</sup> See *id.*

<sup>66</sup> See FED. R. EVID. 702 Advisory Committee Notes to 2000 Amendments (citing *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993); *Kumho Tire Co. v. Carmichael*, 119 S.Ct. 1167 (1999)).

strate sufficient knowledge, skill or training to qualify as an expert, Rule 702 also requires that "(1) the testimony is based upon 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 facts of the case."<sup>67</sup> The Advisory Committee referred approvingly to the *Daubert* checklist as a guide for trial courts in assessing the reliability of expert testimony, noting that "the standards set forth in the amendment are broad enough to require consideration of any or all of the specific *Daubert* factors where appropriate."<sup>68</sup>

The amendment to Rule 701 was directed explicitly at testimony like that of the equipment supervisor in *Asplundh*. Rule 701(c) could potentially have operated to exclude the testimony of the IRS agent in *Sutherland*, too. In that case, the IRS agent applied accounting principles to determine that a defendant must have evaded taxes because his expenditures exceeded available income.<sup>69</sup> The agent likely should have been qualified as an expert in accounting to offer that testimony; in addition, however, the agent also was permitted to testify that, based upon the testimony of all other witnesses at trial, the target's additional income must have been derived from drug sources.<sup>70</sup> There was no indication, however, that the agent had training as an expert in drug operations or any other relevant field, and thus this quasi-expert opinion arguably violated both the qualifications and reliability requirements of Rule 702.<sup>71</sup> Moreover, the testimony offered by the IRS agent evaded the expert disclosure requirement of Rule 16(a)(1)(G), since he was not offered as an expert. By channeling such non-expert testimony back to Rule 702, revised Rule 701 also channels this testimony back to applicable rules of procedure, including pretrial disclosure under Rule 16(a)(1)(G). This allows the defense an opportunity to counter the expert opinion, either through adequately prepared cross-examination or through the presentation of a counter-expert.

Although the Advisory Committee has amended Rule 701 to close the loophole allowing lay witnesses to offer expert testimony, Rule 611(a) still allows experts to restate prior evidence as a pedagogical device without requiring a relation to the specialized knowledge of the expert, like the police detective in *Johnson*.<sup>72</sup> The 2000 Amendments to Rule 701 do not apply to him, because he is an expert qualified under Rule 702. Judge Weinstein deals only very briefly with these pedagogical-device summa-

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<sup>67</sup> See FED. R. EVID. 702.

<sup>68</sup> See *id.* at Advisory Committee Notes to 2000 Amendments.

<sup>69</sup> See *Sutherland*, 929 F.2d at 780. The IRS agent explicitly stated in his testimony that he believed the excess expenditures "were derived from the net profits from the sale of drugs." *Id.*

<sup>70</sup> See *id.*

<sup>71</sup> See *id.*

<sup>72</sup> See *Johnson*, 54 F.3d at 1161-62.

ries in his treatise on evidence, noting that at least six federal circuits allow introduction of these summaries under Rule 611(a).<sup>73</sup> He limits himself largely to cautioning that these summaries are properly understood more as “argument than evidence,” and thus should not be allowed into the jury deliberations.<sup>74</sup>

Eliciting summary evidence through an expert witness at the close of a case can be used to get a first “bite at the apple,” allowing a prosecutor (or a plaintiff) to make a closing argument to the jury at the end of their case-in-chief. An expert offering not only opinion testimony, but also a pedagogical summary, is arguably more persuasive than a lay witness offering the same summary testimony. For example, the detective in *Johnson* qualified as an expert with regard to the distribution, packaging, weighing, pricing, and use of narcotics.<sup>75</sup> Certainly a jury will be more inclined to accept the testimony of a witness designated by the court as an expert in the very areas in which he or she is summarizing prior testimony, even if the summary itself calls for no expert opinions. An expert who summarizes the testimony of a “snitch” implicitly endorses the snitch’s testimony, effectively undoing any damage done on cross-examination by allowing the expert to vouch for the witness. The court in *Johnson* recognized that much of the expert testimony in that case did not rely upon the specialized training of the detective; nevertheless, the court allowed the evidence in under Rule 611(a).<sup>76</sup>

#### IV. CONCLUSION

The 2000 Amendments to Rule 701 of the Federal Rules of Evidence have presumably foreclosed the ability of summary witnesses, like all other lay witnesses, to offer “surprise expert testimony,” channeling those witnesses back to Rule 702 and the procedural rules and reliability requirements imposed upon all experts. There do not appear to be, however, any analogous limits upon the ability of an expert to offer summary testimony, as long as the summary testimony meets the requirements under Rule 611(a) and as long as the expert will offer an opinion at least as to some matter within his or her area of expertise. Thus, while the 2000 Amendments to Rule 701 have eliminated some of the tactical advantages offered by summary witnesses, expert witnesses remain a powerful means to close a case with a pedagogical summary backed by the opinion of a qualified expert.

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<sup>73</sup> See 6 WEINSTEIN’S FEDERAL EVIDENCE § 1006.08[4] n.7 (citations omitted).

<sup>74</sup> See *id.* § 1006.08[4].

<sup>75</sup> See *Johnson*, 54 F.3d at 1156.

<sup>76</sup> See *id.* at 1162.

