

# The Legal Perspective

## A Response to Teri Horton's Comment Regarding Authentication

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(Editor's note: The Legal Perspective was written to provide further information regarding this interchange between Ms. Teri Horton and FAR CEO Theresa Franks, following Ms. Horton's comments on the article [Getting to the Truth of Authentication](#). We welcome any feedback from other readers.)

**Teri Horton:** "How is your visual connoisseurship going to get around the following? Federal Evidence Code – Rule 702 amended 12/1/2000 ARTICLE VII. OPINIONS AND EXPERT TESTIMONY Rule 702. Testimony by Experts. 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 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. Abstract: Dramatic changes in rules governing admissibility of expert testimony impact all areas of law. Rule 702 of the Federal Rules of Evidence and the evidence law of many states impose a requirement that judges admit expert testimony only if it is based on a scientifically sound foundation. So much for art experts and their visual 'feelings' of authentication."

**Theresa Franks:** "Thanks for your reply. There is more to this than meets the eye. I fear that you may have been given false information by your advisors. If I read correctly from the various public statements that have been made, you have as a partner one Tod Volpe (whose background and admissions of fraud, rip-off and general art crimes for which he was convicted, should lead you to at least be a little cautious). Here at FAR we are only interested in helping getting to the truth of the matter, establishing accurate provenance and ensuring valid authenticity. We will be publishing some more articles on the website soon. We work hard to expose and prevent art crimes of the type Tod Volpe so freely admits to in his book. This is the type of activity that muddies up the whole subject of art and which we are so against. For now we have addressed the specific points you mention regarding the Federal Rules of Evidence here: The Legal Perspective: A Response to Teri Horton's Comment Regarding Authentication. I hope this helps." Theresa Franks, CEO Fine Art Registry

**M**s. Horton correctly provides the portion of the Federal Rules of Evidence pertaining to expert testimony. There are also similar provisions in each state's own Rules of Evidence. The Rules of Evidence are the rules which a judge applies in deciding what testimony and other evidence (because testimony is, indeed, evidence – the most common and powerful evidence in any trial) will be 'admitted' – that is, will be permitted to be presented to the jury or, in a bench trial, to the judge, for consideration in reaching a conclusion as to the matter being tried.

The Rules of Evidence originated from ancient British common law rules and have been highly refined under American legal procedure. The rules are intended to make courtroom trials 'fair' by ensuring that only evidence which is relevant to the case at hand is heard by the jury; in other words, to preclude 'witch hunts' full of speculation and emotional presentations which are not pertinent to the facts at hand. However, judges do have considerable discretion in deciding whom to permit to testify on various points.

Most ordinary witnesses are not permitted to present abstract and opinion evidence. Despite what you might see on TV, there is really no such thing as a 'character witness' except in rare circumstances. No one can come on to the witness stand and say, "Gee, my neighbor Joe is a great guy and I know he'd never do a scandalous thing like this." Only witnesses who have personal knowledge of actual facts pertaining to an incident or event can testify, and even then they can only testify to what they saw with their own eyes and heard with their own

ears; they cannot testify as to their opinion or to what other people told them.

**T**he expert witness rule provides an exception to this rule about witnesses testifying as to opinion. As the rule says, when the jury – the 'trier of fact' – would be aided by technical explanation by someone with better knowledge than the average person on a particular point, the judge may allow a duly qualified expert to testify on that point. However, such an expert is held to a high standard of qualification. They must demonstrate their training and knowledge in the field, and when the matter is one of scientific certainty, they must have the proper academic and professional board credentials, licenses, professional association memberships, and so on. If there are standards in the field which are professionally applied to the situation at hand, then the person who wishes the expert to testify must demonstrate that all those standards were applied in that case.



Not all expert testimony is 'scientific,' and not all expert witnesses wear lab coats and carry clipboards and have name tags indicating multiple post doctoral degrees. I've been involved in a trial where a fuel oil deliveryman was duly qualified as an expert in how the hoses and vents on a fuel oil tank work, or were supposed to work and didn't in this one case. That witness had not completed high school – yet he had technical knowledge on this particular narrow subject upon which he was going to testify, and that knowledge assisted the jury in determining what had gone wrong, and who was responsible, when a fuel oil tank became overpressurized and burst.

In the field of art authentication, it's important to remember first off that most questions of art identification do not go to court. Rather, they are 'tried' in the court of public opinion and media, and ultimately in the marketplace with the question of whether a buyer is willing to believe or not believe the identification being offered by the seller. Ms. Horton has presented her painting to this court of public opinion, seeking the glare of media spotlight in such public venues as Geraldo and a movie by New Line Cinema. As such, she has made herself a 'public figure' and the identification a matter of public interest; therefore comments on her painting and its identification are matters of Constitutionally protected First Amendment free speech. In other words, because she has sought the public limelight, voicing an opinion on Ms. Horton's identification of this painting is fair ground for public debate, just exactly

as is the question of whether Mr. Bush is doing a fine job in Iraq or whether the Bears are the best team ever or a bunch of bums. Within this realm of public opinion, the Rules of Evidence do not apply.

If the Rules of Evidence did apply to the opinions expressed about the question of who painted Ms. Horton's painting, however, the information available in the media would be significantly less than has currently been published. Courts would indeed allow a qualified expert to testify as to their opinion of the origin of this painting – but ONLY if that expert was first duly qualified, not just generally in the field of 'art' but in the field of modern abstracts, and preferably in the works of Jackson Pollock particularly. In order to voice their opinion, that expert would have to walk the court through the steps which are standardly accepted in the field of art authentication: examination of pattern and pigment, material composition of canvas and paints, the type and manufacturing of the staples which hold the canvas to the wood frame, the kind of wood and its construction, the style, the brushstrokes, and all the other countless details which comprise a painting, not just as a creative vision, but as a physical construction. To qualify as an expert, the witness would testify as to their own training, academic and professional credentials, and then the steps acceptable in the field, and then the steps taken as to this painting. Then and only then might a court, at its discretion, allow the expert to testify as to his or her opinion regarding whether the painting is consistent with Pollock's works or not.

Ms. Horton dismisses such expressions as have been voiced at present as 'feelings'.

A court would not allow vague testimony regarding 'feelings'. My own impressions of the painting, for example, would never see the light of day in a court: I've looked at the thing long and hard and have my own opinions, but I don't remotely have the kind of training, lifelong study, or academic credentials to voice such an opinion in a legal setting. But the point is that a duly qualified expert would be accepted by a court and his or her testimony would not be a 'feeling' but a narrowly construed factual piece of

testimonial evidence expressing that expert's opinion, based on the reaching of that opinion through carefully following the accepted steps that are standard in the field. And at the end of the day, in such a case, it may be that experts at trial reach contrary opinions; ultimately, it is a jury that decides which to believe, and whatever the jury declares to be fact, is, to a legal certainty, a fact. The truth, from a legal standpoint, is whatever the jury declares it to be.

But were the question of the origins of Ms. Horton's painting to ever go to trial, the opinions of art experts would not be the only expert evidence presented to the



jury. A court would compel Ms. Horton to allow the painting to be properly inspected by many different scientific experts. Textile experts would no doubt attest to the canvas used, its composition, age, consistency or inconsistency with canvasses otherwise used by Pollock. Ditto regarding tool and metal experts as to the staples and other stretcher materials employed.

**A**nd given Ms. Horton's assertion that the lynchpin of this identification is a fingerprint, a duly qualified fingerprint expert would also testify. In order to qualify to testify regarding a fingerprint, such an expert would have to be a properly certified latent fingerprint examiner, with the academic training and know-

how to testify regarding fingerprints. The scientific standards for fingerprint examination and the qualifications for a latent print examiner to testify are very well established in the legal realm. In my extensive review of the public media reports regarding this painting, I have not yet seen any claim regarding fingerprint identification that has met the legal standards for admission of evidence of identification as I understand it from 20 years of working as a litigator; that is, I have not seen published a report by a certified latent fingerprint examiner, with appropriate legally acceptable qualifications, applying appropriate legally acceptable examination methods, as would ever see the light of day in a courtroom.

Ms. Horton is absolutely correct in her observation: Absent the proper qualifying base from which a court could conclude that such materials and forensic evidence is appropriately scientific expert testimony, such assertions regarding identification would indeed be considered by a court to be 'mere feelings,' and admission of that testimony would absolutely not be permitted. 🖋️

*Cindy Hill practiced for 20 years in criminal defense and environmental (public advocacy) litigation. She worked with expert witnesses – both as witnesses on her side and in cross-examining the other side's witnesses – throughout that 20 years of litigation experience, and as a founding board member of the Environmental Law Foundation for many years, she gave workshops to engineers and other environmental experts regarding how to present expert testimony, what it involves to be qualified as an expert, etc. She is licensed to practice law in Vermont and Massachusetts and in the federal district and appellate courts and the U.S. Supreme Court.*

