Gang Experts: Best Practices and Avoiding Pitfalls

Catherine Kuo Dick
Trial Attorney
Organized Crime and Gang Section
Criminal Division
U.S. Department of Justice

I. Gang Experts: When Should You Use One?

Since the 1980s, gang experts have become an increasingly commonplace sight in federal courtrooms. A gang expert's testimony has advantages and disadvantages: on the one hand, the expert can provide a comprehensive overview of the gang and introduce jurors to a criminal world they would not otherwise understand.[87] A poised, effective expert at the beginning of your case can set the stage for the rest of your evidence, some of which may come from less-than-articulate cooperators. And in the RICO context, an expert alone may be able to establish the existence of the enterprise.[88] On the other hand, an expert is almost sure to draw legal challenges at the trial level, as well as scrutiny and potentially reversal on appeal.[89] The question that frequently arises in cooperator-driven cases is: why use a gang expert if you have cooperators who can testify about much of the same information?

The answer will, of course, depend on the facts of your case and charges to be proven. You may not need or want a gang expert, but where a gang is national or transnational in nature, a gang expert may be uniquely able to explain the inner workings where a cooperator, or even a series of cooperators, cannot. For instance, the average 19-year old member of MS-13 will not know the lengthy history of MS-13: its origins in 1980s Los Angeles, how it spread to the Northern Triangle region of Central America, and to other areas of the United States, and the consequences of that history. A gang expert, by contrast, who has sifted through a variety of evidence and reached an independent judgment about the origins and spread of MS-13, can explain to a jury how and why MS-13 members on the East Coast coordinate with one another through leadership in El Salvador, where MS-13 on the West Coast typically does not take direction from El Salvador. That background may be important to understanding the structure of the gang and communications facilitating the criminal activity in your case.

The same 19-year old MS-13 cooperator may also lack a nuanced understanding in other critical areas. For instance, he might testify in absolute terms that MS-13 has rigid rules, *e.g.*, murder is a requirement of membership. A different cooperator might then testify that he was required to participate in extortion, robberies and beatings, but not murder, to become a member. A gang expert with a longer view and deeper knowledge of the history of the gang can explain that MS-13 rules sometimes vary by region or circumstance: where a region is less active or where a clique has lost members and needs to build up its ranks, it may ease the usual requirements for membership or put on hold the requirement until

[87] *See, e.g.,* United States v. Tocco, 200 F.3d 401, 419 (6th Cir. 2000) ("[E]vidence regarding the inner-workings of organized crime has been held to be a proper subject of expert opinion because such matters are 'generally beyond the understanding of the average layman.'") (quoting United States v. Espinosa, 827 F.2d 604, 611 (9th Cir. 1987), *cert. denied,* 485 U.S. 968 (1988)).
[88] *See* United States v. Palacios, 677 F.3d 234, 249 (4th Cir. 2012) (testimony expert was sufficient for reasonable jury to determine MS-13 was a RICO enterprise).
[89] *See* United States v. Mejia, 545 F.3d 179, 199 (2d Cir. 2008) (expert's reliance on and repetition of out-of-court testimonial statements violated Sixth Amendment's Confrontation Clause).

after formal membership is granted (effectively allowing the member to owe a debt of violence to be fulfilled later). An MS-13 expert can therefore ensure that jurors will understand that these differences are not, as a defense attorney might argue in a RICO case, contradictory or inconsistent with MS-13 operating as a single enterprise. Rather, the variations remain consistent with MS-13's overarching goal of controlling communities through fear and violence.

The decision of whether to use a gang expert will ultimately be a judgment call based on a number of factors, including the need to provide the jury with an understanding of the gang beyond that of your cooperators, recordings, or other evidence, and the availability of a witness with the requisite qualifications. Should you decide to call a gang expert, certain questions will help you to define the scope of your expert's testimony, employ best practices in introducing that testimony, and avoid the potential for traps or overreach.

II. Best Practices and Avoiding Pitfalls: Defining the Scope of and Foundation for Your Gang Expert's Testimony

A. Relevance and Reliability: What Purpose Does Your Expert Serve and What Does Your Expert Know About the Gang?

The first question to ask is why are you calling an expert and what purpose your expert's testimony will serve. Will he or she testify about the history of the gang, its hierarchy and structure, the symbols and coded language of its members? All of the above?[90] By first identifying the type of testimony to be introduced, you can then identify a clear rationale and basis for how that testimony will help you navigate the initial objections that defense counsel will undoubtedly make. As a threshold matter, the defendant is likely to argue under Federal Rule of Evidence 401 and Federal Rule of Evidence 403 that the prejudice of the gang affiliation evidence against him outweighs its probative value.[91]

Courts have held that gang affiliation evidence is relevant for a variety of reasons:

- Evidence of relationships in a conspiracy.[92]
- Intent and motive.[93]

---

[90] *See, e.g.,* United States v. Mejia, 545 F.3d 179, 190 (2d Cir. 2008) ("[L]aw enforcement officers may be equipped by experience and training to speak to the operation, symbols, jargon and internal structure of criminal organizations"); United States v. Feliciano, 223 F.3d 102, 109 (2d Cir. 2000) (upholding gang expert testimony about "the structure, leadership, practices, terminology, and operations of [the gang] Los Solidos").

[91] *See* United States v. Abel, 469 U.S. 45, 54 (1984) ("Assessing the probative value of common membership in any particular group, and weighing any factors counseling against admissibility is a matter first for the district court's sound judgment under Rules 401 and 403 and ultimately, if the evidence is admitted, for the trier of fact.")

[92] Courts will likely be skeptical of the relevance of gang affiliation evidence where no conspiracy is charged or other direct connection exists between membership and the crime charged. *See* United States v. Newsom, 452 F.3d 593, 602–03 (6th Cir. 2006) (gang tattoo not relevant to felon in possession of firearm charge). *See, e.g.,* United States v. Ford, 761 F.3d 641, 649 (6th Cir. 2014) ("Evidence of gang affiliation is relevant where it demonstrates the relationship between people and that relationship is an issue in the case, such as in a conspiracy case"); United States v. Archuleta, 737 F.3d 1287, 1293–94 (10th Cir. 2013) (collecting "prior cases where conspiracy is charged that gang-affiliation testimony may be relevant"); United States v. Alviar, 573 F.3d 526, 538 (7th Cir. 2009) ("[E]vidence of Latin King handshakes, symbols, colors, and tattoos tended to establish gang membership or affiliation, and it was proper for the government to prove gang membership as part of the conspiracy"), *cert. denied*, 559 U.S. 916 (2010).

[93] *See* United States v. LaFond, 783 F.3d 1216, 1222 (11th Cir. 2015) (defendants' membership in white supremacist gang relevant to intent and motive in attacking white inmate with black cellmate); United States v. Ozuna, 674 F.3d 677, 681 (7th Cir. 2012) ("[E]vidence of gang affiliation was admissible, from the beginning to show bias, interest, or motive").

- Identity.[94]
- Impeachment.[95]
- Bias.[96]

Your expert's reliability will depend on his familiarity with your gang, not just general gang practices as, "[g]iven the variation in practices among different gangs, a gang expert's testimony on these relevant subjects is *reliable* only insofar as it is based on significant experience with the gang about which the expert is testifying."[97] Furthermore, if your expert is not familiar with the gang in your area, it will be crucial to tie together the relevance of his expertise to the facts of your case. In *United States v. Rios,* the defendants challenged a Latin Kings gang expert's relevance and reliability, as he had no specific knowledge of the Latin Kings in Holland, Michigan.[98] The Sixth Circuit held the expert's testimony was relevant because he properly opined on the national organization of the Latin Kings, and the government was able to link the local group to the national organization through other testimony.[99]

B. Avoiding *Crawford* Problems: Has Your Expert Exercised Independent Judgment?

Your expert will undoubtedly have formed opinions, in part based on the testimonial statements of cooperating witnesses, confidential informants, and others. Admission of those statements on their own would present a problem under *Crawford v. Washington*, 541 U.S. 36 (2004), in which the Supreme Court held that the Confrontation Clause permits the introduction of "[t]estimonial statements of witnesses absent from trial…only where the declarant is unavailable, and only where the defendant has had a prior opportunity to cross-examine."[100] However, an expert witness may base an opinion on inadmissible evidence "[i]f experts in the particular field would reasonably rely on those kinds of facts or data in forming an opinion on the subject."[101]

Rule 703 and the Confrontation Clause "can be reconciled if the expert exercises 'independent judgment' in assessing and using the hearsay (and other sources) to reach an expert opinion."[102] "[C]ourts have agreed that it is the process of amalgamating the potentially testimonial statements to inform an expert opinion that separates an admissible opinion from an inadmissible transmission of testimonial statements."[103] "An expert witness's reliance on evidence that *Crawford* would bar if offered

---

[94] *See* United States v. Ellison, 616 F.3d 829, 833 (8th Cir. 2010) (evidence of defendant's membership in "West Side Hustler" gang relevant to showing defendant was likely to wear gang color green as bank robber did); United States v. Easter, 66 F.3d 1018, 1021 (9th Cir. 1995) ("[E]vidence tending to show identity, such as the gang-related connections between the defendants, the mastermind of the crime, and the getaway car, was very probative.")

[95] *See* United States v. Ellison, 616 F.3d 829, 833 (8th Cir. 2010) (evidence of gang affiliation impeached defendant's testimony that he was not a member of "West Side Hustler" gang, wore green clothing as bank robber did or bandana or knew gang color was green); United States v. Hankey, 203 F.3d 1160, 1171–73 (9th Cir. 2000) (evidence regarding gang code of silence relevant for purposes of impeaching witness's credibility by showing of bias or coercion).

[96] *See* United States v. Takahashi, 205 F.3d 1161, 1165 (9th Cir. 2000) (evidence that defendant and exculpatory witness were members of gang that required oath of total loyalty was relevant to issue of bias). *See also Ozuna*, 674 F.3d 677; *Hankey*, 203 F.3d 1160.

[97] United States v. Rios, 830 F.3d 403, 414 (6th Cir. 2016), cert. denied sub nom. Casillas v. United States, 137 S. Ct. 1120 (2017).

[98] *Id*. at 415.

[99] *Id*.

[100] *Id*. at 59.

[101] FED. R. EVID. 703.

[102] United States v. Garcia, 793 F.3d 1194, 1212 (10th Cir. 2015), (quoting United States v. Kamahele, 748 F.3d 984, 1000 (10th Cir. 2014), cert. denied, 136 S. Ct. 860 (2016)).

[103] *Rios*, 830 F.3d at 403.

directly only becomes a problem where the witness is used as little more than a conduit or transmitter for testimonial hearsay, rather than as a true expert whose considered opinion sheds light on some specialized factual situation."[104]

It is crucial to protect your expert's testimony by first, laying a foundation establishing that the basis of your expert's testimony encompasses far more than just testimonial hearsay statements.[105] Your expert should be able to articulate the variety of non-testimonial hearsay evidence on which he or she based his or her opinions, including non-testimonial statements that do not implicate *Crawford*. Examples of non-testimonial statements include:

- Co-conspirator wiretap calls.[106]
- Statements to a government informant.[107]
- 911 calls and other statements taken under emergency circumstances.[108]

Other types of evidence on which your expert has likely relied to form his or her opinions include: (1) personal observation on patrol, on surveillance, or through the execution of search or arrest warrants; (2) formal and informal training; (3) interaction with other law enforcement, and (4) any other experiences that informed his or her conclusions.[109] Laying foundation that the expert relied on all of this information will help protect your expert's testimony from challenges both in the trial court and on appeal.[110]

Second, the testimony itself must convey the expert's independent judgment and should not specifically reference any particular testimonial facts learned from interviews.[111] Here, generality is the expert's friend: "[a]n important consideration in distinguishing proper testimony from parroting is the generality or specificity of the expert testimony."[112]

What does the exercise of independent judgment mean practically speaking? If your expert testifies, "Homeboy Flaco told me that MS-13 has at least 10 cliques in this area," you will almost

---

[104] United States v. Johnson, 587 F.3d 625, 635 (4th Cir. 2009).
[105] United States v. Palacios, 677 F.3d 234, 243–44 (4th Cir. 2012) (no *Crawford* violation, even if expert's opinion was "based, in part, on testimonial hearsay" because expert had relied on "other sources of his extensive knowledge about MS-13[] to form an independent opinion" and "did not specifically reference any [testimonial hearsay] during his expert testimony").
[106] *See* Crawford v. Washington, 541 U.S. 36, 56 (2004) (statements in furtherance of a conspiracy are "by their nature" not testimonial); United States v. Ciresi, 697 F.3d 19, 31 (1st Cir. 2012).
[107] *See* Davis v. Washington, 547 U.S. 813, 825 (2006).
[108] *See Id.* at 821 ("[S]tatements are non-testimonial where they are made to police under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency.").
[109] *See, e.g.,* United States v. Vera, 770 F.3d 1232, 1239 (9th Cir. 2014) (bases of agent's expert opinion included experiences on patrol, contact with gang members as deputy sheriff in jail, formal classroom training, and training as member of task force, homicide investigator, and gang suppression detective).
[110] *See, e.g.,* United States v. Palacios, 677 F.3d 234, 244 (4th Cir. 2012) (approving gang expert where bases of gang investigator's expertise included "extensive gang culture training, interaction with other law enforcement officers who specialize in gangs, personal observation through surveillance and executing search warrants, and '[h]undreds and hundreds …, if not thousands' of interviews with MS-13 member and victims of MS-13 gang violence").
[111] *See* United States v. Kamahele, 748 F.3d 984, 998 (10th Cir. 2014) (inquiry is whether "the expert" simply parroted a testimonial fact learned from a particular interview").
[112] United States v. Garcia, 793 F.3d 1194, 1213 (10th Cir. 2015), cert. denied, 136 S. Ct. 860 (2016). *See also* United States v. Ayala, 601 F.3d 256, 275 (4th Cir. 2010) (approving of experts who "offered their independent judgments, most of which related to the gang's general nature as a violent organization and were not about the defendants in particular").

certainly have a *Crawford* problem. Your expert should be able to testify that she came to the independent judgment, consistent with her experience and observation, that there were at least 10 cliques in your area from a variety of evidence that she's gathered, both testimonial and non-testimonial, *e.g.,* gang graffiti with clique names, victim statements, wire evidence, field stops, search warrant evidence reflecting particular clique, etc. Certainly no matter what her opinion, she should not simply repeat back any particular testimonial statement of any particular person upon whom that opinion was based.[113]

C. Dual Witness Problem: Was Your Expert Part of the Investigation?

The next question to ask is whether your proposed expert is or could be a fact witness in your case. An expert who has been either exposed to the facts of your case or is expected to testify concerning them as a lay witness presents a dual witness issue. The Second Circuit in *United States v. Dukagjini*, 326 F.3d 45 (2d Cir. 2003), identified multiple areas of concern where a case agent also testifies as an expert, including an "aura of special reliability" and "unmerited credibility" conferred on the witness's lay/fact testimony by his expert status and juror confusion and difficulty in discerning "whether the witness is relying properly on his general experience and reliable methodology, or improperly on what he has learned of the case."[114]

The Fourth Circuit's decision in *United States v. Garcia*, 752 F.3d 382 (4th Cir. 2014) provides a cautionary tale in using an expert who has factual knowledge of the investigation. The agent was proffered as a decoding expert who could opine on "the meaning of coded references in several [wiretap] calls used by the conspirators, when discussing drug trafficking over the phone."[115] The agent had also been part of the investigation, both having monitored the wire calls in the case involving the discussion of drug trafficking and having debriefed several cooperators.[116] The trial court noted two potential problems with her testimony: "the need to distinguish between her lay fact testimony based on her personal knowledge, on the one hand, and her expert opinion testimony based on her training and investigatory experience, on the other; and (2) ensuring that she was testifying on the basis of her experience and expertise in coded language, and not simply repeating what cooperators or witnesses told her."[117] Despite noting these issues, the conviction was reversed by the Fourth Circuit because there were "inadequate safeguards to protect the jury from conflating [the expert's] testimony as [an] expert and fact witness."[118] In particular, the Circuit noted that while some of the agent's decoding testimony was based on her expertise and some based on her factual knowledge as an investigator, the distinction was not made for the jury: "there were repeated instances of [the agent] moving back and forth between expert and fact testimony, with no distinction in the Government's questioning or in [the agent's] answers."[119] Furthermore, because the agent testified to having debriefed three co-conspirators in the case whom she "specifically identified as contributing to her 'understanding of the coded language used in this case,'"[120] the Circuit stated that "it was incumbent upon the Government to demonstrate that [the agent] was not merely channeling information and statements by non-testifying participants in the conspiracy into the trial record."[121] As a result of the dual witness issues and a failure to demonstrate requisite reliability in

---

[113] *See* United States v. Pablo, 696 F.3d 1280, 1288 (10th Cir. 2012) ("If an expert simply parrots another individual's out-of-court statement, rather than conveying an independent judgment that only incidentally discloses the statement to assist the jury in evaluating the expert's opinion, then the expert is, in effect, disclosing that out-of-court statement for its substantive truth.").
[114] *Dukagjini,* 326 F.3d at 53–54.
[115] *Garcia*, 752 F.3d at 386.
[116] *Id*. at 387.
[117] *Id*. at 387.
[118] *Id*. at 392.
[119] *Garcia*, 752 F.3d at 392.
[120] *Id*. at 394.
[121] *Id.* at 395.

the expert's decoding method itself, the Circuit reversed and remanded.[122]

Similarly, in *United States v. Rios*, 830 F.3d 403 (6th Cir. 2016), the Sixth Circuit held that a dual witness gang expert "strayed into testimony that [was] potentially problematic when he testified about specific criminal actions" as opposed to testifying "within the appropriate scope of gang-expert testimony, as it focused on the traditional areas in which a gang expert can testify—history, organization, and unique terminology or symbols."[123] The failure of the court and witness to delineate between his fact and expert testimony was also problematic as "[s]eamlessly switching back-and-forth between expert and fact testimony does little to stem the risks associated with dual-role witnesses."[124] And finally, the Circuit faulted the trial court's failure to explain that the jury could consider the expert's status as a key fact witness for the government in evaluating the credibility of his expert testimony.[125] While the *Rios* Court ultimately found the error to be harmless,[126] the various pitfalls are evident in using a dual witness.

Given the inherent legal issues in a dual witness, the best practice is to use an expert who has not been part of your investigation. You may not have that option, however, where your gang is a smaller, local crew, and almost all of the potential experts have had direct contact with your case. To the extent your expert has direct knowledge of the investigation—whether or not she testifies as a lay witness as well—you should lay careful foundation that she derives expertise from information that is unrelated to the case, so there is no question as to whether she is simply "channeling information" about it.[127]

If your expert is also testifying as a lay witness, you and the Court should employ additional safeguards to ensure that the expert and fact testimony do not become intermingled either in fact or in the jury's mind.[128] Such steps should include the following:

- Bifurcation of lay/fact and expert testimony;
- Instruction to jury as to what type of testimony will be given prior to the testimony;
- Instruction that jury not give undue weight to witness's fact testimony because of his status as an expert; and
- Instruction that jury can consider expert's status as a fact witness in evaluating the credibility of his expert testimony.

III. Conclusion

Gang experts can offer a wealth of knowledge to your jury and even establish an element of proof—the existence of the enterprise—in a RICO trial. And much like a jury address, the gang expert can give structure to and context to evidence coming in through multiple witnesses, further reinforcing

---

[122] *Id*. at 395–96.
[123] *Id*. at 415.
[124] *Id*. at 416 (quoting United States v. York, 572 F.3d 415, 426 (7th Cir. 2009)).
[125] *See Rios*, 830 F.3d at 414–415 (citing United States v. Tocco, 200 F.3d 401, 418 (6th Cir. 2000) (approving that "dual roles were emphasized to the jury by the fact that [agent] testified at two different times" and "the district court instructed the jury, both before he gave his opinion and again in the jury charge, that it should consider [the agent's] dual roles in determining what weight, if any, to give [the] expert testimony")).
[126] *Id*. at 416–17.
[127] *See Garcia*, 752 F.3d at 395.
[128] *See, e.g.* United States v. Martinez, 657 F.3d 811, 817 (9th Cir. 2011) (approving of dual testimony where court instructed "three times on the difference between percipient and expert testimony"); United States v. Anchrum, 590 F.3d 795, 803–04 (9th Cir. 2009) (trial court "avoided blurring the distinction between [the agent's] distinct role as a lay witness and his role as an expert witness" when it "clearly separated [the agent's] testimony into a first 'phase' consisting of his percipient observations and a second 'phase' consisting of his credentials in the field of drug trafficking and expert testimony regarding the modus operandi of drug traffickers").

your theory of the case. By carefully delineating the scope of your expert's testimony and laying a solid foundation, you can avoid potential legal pitfalls while taking advantage of law enforcement expertise to help your jury understand the inner workings of organized crime.

ABOUT THE AUTHOR

❑ **Catherine Kuo Dick** is a Trial Attorney in the Criminal Division's Organized Crime and Gang Section (OCGS). Prior to OCGS, she was an Assistant Chief with the Criminal Division's Fraud Section. Her current practice is in violent gang prosecutions and RICO, with a particular focus on MS-13 and on the national and international coordination of MS-13 investigations and prosecutions in the United States and in the Northern Triangle.