

MPF
FILED

STATE OF SOUTH CAROLINA)
COUNTY OF BERKELEY)
CLERK OF COURT)
STATE OF SOUTH CAROLINA,)

Plaintiff,)

-versus-)

MICHAEL COLUCCI,)

Defendant.)

IN THE COURT OF GENERAL SESSIONS
FOR THE NINTH JUDICIAL CIRCUIT
INDICTMENT NUMBER: 2016-GS-08-02603
WARRANT NUMBER: 2016A0810400692

**MOTION IN LIMINE TO EXCLUDE
REFERENCE TO ANY WITNESS AS
"EXPERT" IN THE PRESENCE OF THE
JURY**

Michael Colucci ("M. Colucci") seeks an Order from this Court preventing the State from referring to any witness as an "expert" in the presence of the jury. Any such reference would create substantial unfair prejudice by serving to bolster the credibility of the witness and to further potentially bolster the credibility of other witnesses or evidence, which in turn would invade the province of the jury.

Although there does not appear to be a South Carolina case directly on point, courts in multiple jurisdictions have determined that it is improper for any witness to be referred to as an "expert" in the presence of the jury. The American Bar Association, in Section 14 of its Civil Trial Standards, states that, "The court should not, in the presence of the jury, declare that a witness is qualified as an expert or to render an expert opinion, and counsel should not ask the court to do so.

Numerous courts have adopted this guidance, including the Sixth and Eighth Circuit Courts of Appeals. The Seventh Circuit has also approvingly discussed the approach set forth by the ABA. In *United States v. Johnson*, 488 F.3d 690, 697-98 (6th Cir. 2007), the Sixth Circuit articulated a

compelling analysis for adoption of the practice, stating,

We pause here to comment on the procedure used by the trial judge in declaring before the jury that Officer Dews was to be considered an expert. Other courts have articulated good reasons disapproving of such practices, with which we agree. See, e.g., *United States v. Bartley*, 855 F.2d 547, 552 (8th Cir. 1998) (noting that “[s]uch an offer and finding by the Court might influence the jury in its evaluation of the expert and the better procedure is to avoid an acknowledgment of the witnesses’ expertise by the Court”); *State v. McKinney*, 185 Ariz. 567, 917 P.2d 1214, 1233 (Ariz. 1996) (observing that “[b]y submitting the witness as an expert in the presence of the jury, counsel may make it appear that he or she is seeking the judge’s endorsement that the witness is to be considered an expert . . . In our view, the trial judge should discourage procedures that may make it appear that the court endorses the expert status of the witness. The strategic value of the process is quite apparent but entirely improper”). When a court certifies that a witness is an expert, it lends a note of approval to the witness that inordinately enhances the witness’s stature and detracts from the court’s neutrality and detachment. “Except in ruling on an objection, the court should not, in the presence of the jury, declare that a witness is qualified as an expert or to render an expert opinion, and counsel should not ask the court to do so.”

Id.

The Court went on to state that the better practice was that proponent of the witness should pose qualifying and foundational questions and proceed to elicit opinion testimony. Upon an objection, the court should allow voir dire questions to be posed regarding the witness’s qualification. “The court should then rule on the objection, to the extent practicable, so as to prevent inadmissible evidence from being suggested to the jury by any means.” *Id.* at 68 (6th Cir. 2007).

Similarly, the Eighth Circuit has noted that,

Although it is for the court to determine whether a witness is qualified to testify as an expert, there is no requirement that the court specifically make that finding in open court upon proffer of the offering party. Such an offer and finding by the Court might influence the jury in its evaluation of the expert and the better procedure is to avoid an acknowledgment of the witnesses’ expertise by the Court.

United States v. Bartley, 855 F.2d 547, 552 (8th Cir. 1988).

The Seventh Circuit, in *United States v. Lopez*, 870 F.3d 573,580-81 (7th Cir. 2017), was faced with a situation in which the trial court had ruled that certain proposed opinion testimony was admissible, but also ruled that the parties were prohibited from referring to the witness as an “expert” in front of the jury. The Court rejected the argument that it was reversible error to prohibit such a designation, stating that the practice was apparently the standing practice before that particular court and was followed by other courts in that district. The Seventh Circuit noted that, “[t]here is a danger in every case that upon hearing the title “expert” – particularly if it comes from the Court itself – a jury may assign inappropriate weight and credibility to that witness’s testimony in comparison to that of others.”

For the reasons stated above, prohibiting the use of the term “expert” is necessary and appropriate to ensure the Defendant’s right to a fair trial.

Respectfully submitted,

J. SCOTT BISCHOFF, II
WILLIAM S. MCGUIRE
ADAMS & BISCHOFF, LLC
171 Church Street, Suite 360
Charleston, SC 29401
Telephone: (843) 277-0090
E-mail: scott@adamsbischoff.com

ANDREW J. SAVAGE, III
SAVAGE LAW FIRM
15 Prioleau Street
Charleston, SC 29401
Telephone: (843) 720-7470
E-mail: andy@savlaw.com

ATTORNEYS FOR MICHAEL COLUCCI

BY:



J. SCOTT BISCHOFF, II
SC Bar Number: 74285

Charleston, South Carolina

April 23, 2025

LUNASHARK MEDIA: EMPOWERING
VICTIMS' VOICES THROUGH FOIA

COURTESY OF
LUNASHARK MEDIA

COURTESY OF AN ANONYMOUS FOIA
AROUND AND FIND OUT SPONSOR