

4. OPINION

Lay & Expert

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§400 In General

In most jurisdictions and under the Federal Rules, both lay witnesses and expert witnesses are allowed to render opinions. These opinions can range from a lay witness’s opinion as to the character of truthfulness of another witness to opinions on the ultimate issue in a case rendered by experts. Before any opinion can be received into evidence, however, a proper foundation must be laid for its admission. The following sections detail the foundational elements for lay witness opinions and expert witness opinions, respectively.

§410 Lay Witness

At common law, only expert witnesses were allowed to express opinions. A lay witness was barred from giving his opinion; rather, he was limited to testifying about things he perceived.

The common law eventually evolved. Many jurisdictions, as well as the Federal Rules of Evidence, now allow for lay witness opinion testimony in certain circumstances. Generally, all that need be shown to have a lay witness express an opinion is that the opinion is (a) rationally based on the perception of the witness and (b) helpful to either a clear understanding of his testimony or the determination of a fact which is in issue.

A witness providing the lay opinion usually gives the jury a rather ordinary inference instead of recounting a series of perceptions which would add up to the inference. For example, the witness might testify that a woman seemed sad rather than testify about her facial expressions, body posture, tears, and so on.

The lay witness is still precluded from rendering an opinion beyond the realm of common experience. Those opinions are left to experts. Furthermore, the lay witness may not give an opinion on a matter of law.

What constitutes expert testimony, or an opinion on a matter of law, is a legal determination which is to be made by the judge. The weight which is to be given to the lay opinion, however, rests with the trier of fact.

The December 2000 amendments to Rule 701 make it clear where the line between opinions that may be rendered by lay persons and those that may be rendered solely by experts is drawn. The amendment also is designed to prevent circumvention of any pretrial disclosure requirements relating to expert witnesses. *See* Fed.R.Civ.P. 26(a)(2). Subdivision (A) of that rule requires the disclosure of “the identity of any person who may be used at trial to present evidence under Rule 702, 703 or 705 of the Federal Rules of Evidence.”

Subdivision (B) of that rule also requires that a detailed written report be submitted from every “witness who is retained or specially employed to provide expert testimony in the case or whose duties as an employee of the party regularly involved giving expert testimony.” Accordingly, every witness who will offer expert testimony is subject to Rule 26 disclosure.

Prior to the amendments to Rule 701, however, the question was raised as to whether a lay witness with particular expertise could tes-

tify under Rule 701 to what was essentially expert testimony while at the same time avoiding the disclosure requirements of Rule 26(a)(2). The amendment to Rule 701 ends this confusion by making clear that if a witness is offering expert testimony, the admissibility of the evidence will be reviewed under Rule 702 even if the witness is named as a so-called “lay witness” as opposed to an “expert witness.” The amended language of the rule now states as follows:

If the witness is not testifying as an expert, the witness’ testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness, (b) helpful to a clear understanding of the witness’ testimony or the determination of a fact in issue, and (c) not based on scientific, technical or other specialized knowledge within the scope of Rule 702.

Accordingly, under the amendment:

- The test will be the subject matter of the testimony – *i.e.*, if the testimony conveys “scientific, technical or other specialized knowledge,” then the testimony will be judged under Rule 702, not 701;
- When judged under 702 (as opposed to 701), the Fed.R.Civ.P. 26(a)(2) disclosure requirements must be met; and
- The reliability requirements of Rule 702 also apply.

See amendments to Rule 702 codifying *Daubert v. Merrill Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993) and *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 119 S. Ct. 1167 (1999). *See also*, §420.

Elements

The following foundational requirements are proper in most jurisdictions, as well as under the Federal Rules of Evidence, when you are attempting to elicit opinion from a lay witness.

- The testimony is based on the witness’ perception.
- The testimony is helpful to the trier of fact (judge or jury) in either:
 - understanding the witness’ testimony, or
 - determining an issue of fact in the case.
- The witness has an opinion.
- The witness is in a position to testify regarding that opinion.
- The witness’ opinion is the best way (or a helpful way) for the trier of fact (judge or jury):
 - to understand the witness’ testimony, or

- to understand an issue in the case (i.e., the facts cannot be described in sufficient detail to convey to the jury the substance of testimony without the use of opinions or conclusions).
- The witness is rendering an opinion within the realm of common experience.
- The witness is not offering an opinion based on scientific, technical or other specialized knowledge within the scope of Rule 702.
- The witness is not giving an opinion on a matter of law. *See* FED. R. EVID. 701.

The common law provides a more restrictive test for when an opinion may be rendered by a lay witness. Under the common law, the following foundation must be laid before a lay witness may render an opinion:

- The testimony is based on the witness' perception.
- The testimony is necessary to the judge or jury in either:
 - understanding the witness' testimony, or
 - determining an issue of fact in the case.
- The witness has an opinion.
- The witness is in a position to testify regarding that opinion.
- The witness' opinion is the only way for the judge or jury to understand either the witness' testimony or an issue in the case.
- The witness is rendering an opinion within the realm of common experience.
- The witness is not rendering an opinion on a matter of law or on an ultimate issue in the case.

Tactics

Whenever you attempt to use lay witness opinion testimony, there will be objections. It is within the court's discretion to admit opinion testimony from a lay witness. That discretion will not be disturbed unless the judge was clearly erroneous.

If you seek admission of the lay witness opinion, stress that the foundation requirements have been met:

- The testimony is based on the witness's perception.
- The testimony is helpful to the judge and jury.
- The opinion is the best way for the witness to testify.
- The opinion is not merely gratuitous.
- The opinion is within the realm of the lay witness's common experience.
- The opinion is not one based on scientific, technical or other specialized knowledge that would come within the scope of Rule 702.