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Lay Opinion Testimony Under FRE 701: Admission and Exclusion Challenges

WEDNESDAY, JANUARY 22, 2020

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Lay Opinion Testimony Under FRE 701: Admission and Exclusion Challenges

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Rule 701 Background

- Per common law, the jury is responsible for interpreting the evidence and drawing conclusions.
 - Lay witnesses can testify to facts, not to opinions, inferences, or conclusions
 - Exceptions:
 - The information was too complex and required expert assistance
 - Shorthand expressions by witness deemed necessary (opinions concerning size, color, physical condition, etc.)
- Criticisms:
 - Sometimes arbitrary distinctions between facts and opinions, as there is a gradient here
 - Often difficult for witnesses to convey testimony to the jury without making some inferences
 - Restrictions are ultimately unnecessary
- Disputes of this nature resulted in trivial appeals and frequent reversals, so Congress intervened and enacted FRE 701 for lay witness testimony

Rule 701 Requirements

- Federal Rule of Evidence 701 admits opinion testimony by lay witnesses
- In the case of lay witnesses, opinion testimony is limited as:
 - Rationally based on the witness's perception
 - Helpful to clearly understanding the witness's testimony or determining facts
 - Not based in scientific, technical, or otherwise specialized knowledge
- Given the requirements, Rule 701 encourages witnesses towards specifics to facilitate the fact finding process and establish witnesses' personal knowledge

Rationally Based on Witnesses' Perception

- Incorporates personal knowledge standards
- Testimony must be predicated on concrete facts within witnesses' observation and recollection

Helpful to Clearly Understanding Testimony or Determining Facts

- Consider the need for testimony in resolving the dispute, credibility of the underlying facts, witness's ability to convey material, and jurors' abilities to understand the underlying facts and make inferences

Not Based in Scientific, Technical, or Specialized Knowledge

- Added to eliminate chance of blurring between lay witnesses and expert witnesses and corresponding evasion of respective rules

Interplay with FRE 702

- Dependent on the basis for the proposed testimony
- Rule 702 concerns admissibility requirements for expert opinion testimony, in which the opinion must meet reliability standards
 - Before trial, the expert witness's identity and at least a summary of their report must be disclosed
- If the witness is not operating on specialized knowledge but instead on their own perceptions, they can avoid Rule 702 admissibility thresholds as per Rule 701

Rule 701 Opinions v. Impermissible Speculation

- Courts has broad discretion in resolving disputes on this
- Lay witnesses can testify opinions when:
 - The witness's personal knowledge can't be conveyed in other forms
 - When rehashing details on their own couldn't convey the witness's complete understanding
- Acceptable topics: understanding of a statement's meaning, identifying individuals, and describing a person's physical state

Court of Appeals Split on FRE 701

CA5, CA10, and CA11

- Hold that lay opinion testimony is admissible, even if based solely on information gathered during an after-the-fact investigation
- Under this interpretation, Rule 701's first-hand experience requirement is met if the person testifying took part in an investigation, even if they don't have first-hand knowledge, and the lay opinion is based on examination of materials
- Arguments against are limited to weight and relevance
- Relevant in the terrorism and drug cases, and with overview testimony

CA7 and CA9

- Hold that lay opinion testimony is admissible in certain cases, when based on a mixture of first- and second-hand knowledge
- Cases generally center around interpretation of recorded and/or intercepted conversations and identification in surveillance photographs

CA1, CA2, CA3, CA4, and CA8

- Hold that lay opinion testimony is inadmissible unless the witness personally participated in or contemporaneously observed the subject of their testimony
- Cases center on the interpretation of coded language and/or jargon

CA6 and CADDC

- Yet to rule on this issue
- Speculation that they would join with CA1, CA2, CA3, CA4, and CA8

Relevant Case Law

Donlin v. Philips Lighting North America Corp. (2009) – CA3

- Donlin sued Philips for employment discrimination, after it failed to hire her for a full-time position. A jury awarded Donlin \$164,850 in damages, and Philips appealed on both liability and damages. The Third Circuit affirmed the jury’s findings of liability, but remanded on the damages
- Philips appealed the damages, arguing that the District Court’s analysis rested on a flawed admission of testimony under Rule 701
 - Donlin provided specialized or technical testimony regarding her compensatory damages, not just about her actual earnings, but with estimated lost earnings and pension benefits and adopting hypothetical measures concerning the years she intended to work
 - Third Circuit ruled Donlin did not meet the threshold for personal knowledge, as she had been a temporary employee for less than a year and did not develop “in-depth knowledge of the company’s salary structure, advancement opportunities, pay raises, or employee patterns”

Lightning Lube, Inc. v. Witco Corp., 4 F. 3d. 1153 (3rd Cir., 1993)

- Appeal of a civil action originating in New Jersey, in which Lightning Lube Inc. obtained a jury verdict of \$11.5M in compensatory damages and \$50M in punitive damages against Witco Corp., after accusing it of breaching its supply agreement and destroying Lightning Lube's relationship with its franchisees to benefit a competing business Witco had started.
- Lightning Lube alleged that, because of Witco's actions, its existing franchisees were compelled into abandoning it or withholding payments. Without cash flow, owner Ralph Venuto was forced to sell assets for far less than their value
- The Third Circuit allowed Venuto to testify regarding his lost future profits and harm, even though his testimony concerned a specialized field and involved speculation about future performance, because he met the threshold for personal knowledge
 - In-depth experience with contracts and his business's operations and competition

Hypothetical Example

Scenario

- In a divorce case, the central asset is a small business owned and operated by the husband
- The husband, testifying truthfully, ultimately underestimates the value of his business. The wife is concerned the asset will be undervalued to her husband's benefit
- **If her attorney recommends she not hire an expert, can the wife provide lay testimony on the business's valuation as per FRE 701?**

Answer

- No carved out exception for non-owner spouse, unlike for business owners themselves
- Still, no absolute barrier to prevent testimony. Parties should attempt to prove their circumstances meet a sufficient threshold for personal knowledge

Sources

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Pepper Allgood, *Navigating Admissibility and Disclosure Requirements for Lay and Expert Opinion Testimony*, 2016.

James Welch, *Valuing the Business: Opinion Testimony by Owner's Spouse in Divorce Cases*, McNees Wallace & Nurick LLC, 2011.

Thank You

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Lay Opinion Testimony Under FRE 701: Admission and Exclusion Challenges

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January 22, 2020

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Witnesses testify using
OPINIONS, CONCLUSIONS & GENERALITIES

- "He was drunk as a skunk"
- "Its was freezing outside that night"
- "The car was speeding"

Lay Opinion Rule: Generally

- The lay opinion rule does not prohibit this testimony altogether
- Lay opinion testimony is admissible if enables the jury to better understand the witness's observations and perceptions
- Three varieties of opinions

First Variety of Opinions – Lay Opinions

- Lay witness opinions are conclusions, generalizations and characterizations to communicate what they have seen
- Admissible *IF* rationally based on the witness's perception and the characterization provides a better understanding of that testimony
- Reasonable person standard -- is this the kind of characterization people commonly would make based on what was observed?

Second and Third Variety of Opinions

Skilled and Expert Opinions

- Skilled witness opinions based on experience and training
 - This testimony is based on witness observations and perceptions *and* assist the jury.
- Expert witnesses offer opinions not based on personal knowledge but specialized knowledge and expertise.

Always Inadmissible

- Speculation
- Legal conclusion
- Credibility

Foundation

- Opinion testimony based on personal knowledge and observation of the incident
 - The sufficiency of the testimony goes to its weight, not admissibility.
 - Testimony of a reasonable person based on actual observations and perceptions
- A rational opinion is typically based on the witness's experience
 - A skilled witnesses must establish the nature of that experi•ence
- The lay opinion will assist the jury in order to better grasp a witness's testimony
 - Objections to lay opinion testimony must address foundation

Skilled Witnesses

- A lay witness with experience in an area beyond that of an average juror
- Based on personal knowledge
- Law enforcement officers
- Opinions based on reason, personal observation and experience

Special Circumstance: Mental Condition

- Prohibited from testifying to another's state of mind regarding intent, guilt or innocence

Physical Condition

Lay opinions describing an individual's physical characteristics:

- Identity
 - Resemblance
 - Bodily condition
 - Intoxication
 - Appearance
 - Age
- Lay opinion testimony regarding the witness' physical condition
 - Lay opinion testimony regarding personal knowledge of the condition of an object or location

VALUE

- Lay opinion testimony permitted regarding the value of property, goods or services

SPEED AND DISTANCE

- Lay opinion testimony permitted regarding estimates of speeds and distances.
- Based on experience with automobiles and driving and the observation of the vehicle.

NO SPECULATION, NO CONJECTURE

- Prohibition on witness testimony regarding facts not observed
- General conclusions beyond the scope of a witness's actual observations and perceptions
- Prohibition on another individual's state of mind

NO LEGAL CONCLUSIONS OR OPINIONS

- He's guilty
- Unit 2 was at fault
- That witness is a liar!

CASE STUDIES

REMINDER: THE RULES OF EVIDENCE ARE THE SAME IN CRIMINAL AND CIVIL CASES

People v. Thompson 2016 IL 118667

Did the trial court properly admit lay opinion identification testimony of four witnesses (including law enforcement witnesses) who identified the defendant as the person depicted in a surveillance video and still photos taken from the crime scene?

Lay opinion identification testimony is admissible if (a) the testimony is rationally based on the perception of the witness and (b) the testimony is helpful to a clear understanding of the witness's testimony or a determination of a fact in issue. Lay opinion identification testimony is helpful where there is some basis for concluding the witness is more likely to correctly identify the defendant from the surveillance recording than the jury.

A showing of sustained contact, intimate familiarity or special knowledge of the defendant is not required. Rather, the witness must only have had contact with the defendant, that the jury would not possess, to achieve a level of familiarity that renders the opinion helpful.

People v. Thompson 2016 IL 118667

We adopt a totality of the circumstances approach and agree with the above authorities that the following factors should be considered by the circuit court in determining whether there is some basis for concluding the witness is more likely to correctly identify the defendant:

1. The witness's general familiarity with the defendant
2. The witness's familiarity with the defendant at the time the recording was made or where the witness observed the defendant dressed in a manner similar to the individual depicted in the recording
3. Whether the defendant was disguised in the recording or changed his or her appearance between the time of the recording and trial
4. The clarity of the recording and extent to which the individual is depicted.

The absence of any particular factor does not render the testimony inadmissible.

People v. Thompson 2016 IL 118667

The extent of a witness's opportunity to observe the defendant goes to the weight of the testimony not its admissibility.

Lay identification testimony is admissible but may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice.

This testimony does not invade the province of the jury because the jury is free to reject or disregard such testimony and reach its own conclusion regarding who is depicted in the surveillance recording.

When the State seeks to introduce lay opinion identification testimony from a law enforcement officer, the circuit court should afford the defendant an opportunity to examine the officer outside the presence of the jury. This will provide the defendant with an opportunity to explore the level of familiarity as well as any bias or prejudice. Moreover it will allow the circuit court to render a more informed decision as to whether the probative value of the testimony is substantially outweighed by the danger of unfair prejudice.

United States v. Beck 418 F.3d 1008

Did the trial court properly deny defendant's motion to exclude evidence of photograph identification and in court witness identification and defendant's probation officer from providing lay opinion testimony identifying him as the person depicted in a bank surveillance photograph?

United States v. Beck 418 F.3d 1008

A lay witness may give an opinion regarding the identity of a person depicted in a photograph if that witness has had sufficient contact with the defendant to achieve a level of familiarity that renders the opinion helpful.

A lay witness's testimony is rationally based within the meaning of Rule 701 where it is based upon personal observation and recollection of concrete facts.

The extent of a witness's opportunity to observe the defendant goes to the weight of the testimony not its admissibility.

United States v. Beck 418 F.3d 1008

Whether a lay opinion is helpful depends on the totality of the circumstances including the witness's familiarity with the defendant's appearance at the time the crime was committed, the witness's familiarity with the defendant's customary manner of dress, whether the defendant disguised his or her appearance during the offense or altered his or her appearance before trial and whether the witness knew the defendant over time and in a variety of circumstances such that the witness's lay identification testimony offered the jury a perspective it could not acquire in its limited exposure to the defendant.

The absence of any single factor will not render testimony inadmissible because cross-examination exists to highlight potential weaknesses in lay opinion testimony.

United States v. Jackman 48 F.3d 1

Did the trial court properly deny defendant's motion to suppress lay opinion identification testimony because it was not helpful to the jury, not susceptible to cross-examination and presented dangers of unfair prejudice that substantially outweighed its probative value?

Such testimony is admissible when the witness possesses sufficiently relevant familiarity with the defendant that the jury cannot also possess and when the photographs are not either so unmistakably clear or so hopelessly obscure that the witness is no better suited than the jury to make the identification.

Testimony by those who knew the defendant over a period of time and in a variety of circumstances offers to the jury a perspective it could not acquire in its limited exposure to defendants.

Defendants are often confronted with witnesses who possess knowledge of the defendant's past criminal history, knowledge that cannot be introduced by the prosecution.

Although such knowledge could potentially be a source of bias infecting the witness's testimony, we know of no evidentiary doctrine that would ordinarily exclude such testimony simply because cross-examination by the defendant about that knowledge could be highly damaging to his case. The defendant's decision not to cross-examine these witnesses on this issue was not ordained by the court but was instead a tactical decision.

State v. George 206 P.3d 697

Did the trial court properly admit law enforcement lay opinion identification testimony from a surveillance video?

A witness must testify based on personal knowledge and a lay witness may give opinion testimony if its is (1) rationally based on the perception of the witness and (2) helpful to a clear understanding of the testimony or fact in issue.

A witness may not offer opinion testimony by a direct statement or by inference regarding the defendant's guilt, but testimony is not objectionable simply because it embraces an ultimate issue the trier of fact must decide.

A lay witness may give opinion testimony as to the identity of a person in a surveillance photograph as long as there is some basis for concluding that the witness is more likely to correctly identify the defendant from the photograph than is the jury.

Opinion testimony identifying individuals in a surveillance photos runs the risk of invading the province of the jury and unfairly prejudicing the defendant. But opinion testimony may be appropriate

when the witness has had sufficient contacts with the person or when the person's appearance before the jury differs from his or her appearance in the photograph.

United States v. White 639 F.3d 331

Did the trial court properly admit lay opinion identification testimony from defendant's sister and ex-girlfriend that he was depicted in a still photograph taken from a bank surveillance video capturing a robbery?

A lay witness opinion is admissible if it is rationally based on the perception of the witness and helpful to a clear understanding of his testimony or the determination of a fact in issue.

Both witnesses were very familiar with the defendant and their opinions were rationally based on their perceptions. The opinion testimony also helped establish a fact issue - the identity of the bank robber. The opinion testimony did not usurp the jury's function because the jury was free to believe or disregard the testimony. The issue of the defendant's identity was left to the jury for its ultimate determination.

United States v. Dixon 413 F.3d 540

Did the trial court properly exclude lay witness opinion testimony from the defendant's son and former wives that he was the individual depicted on bank surveillance video?

The trial court properly excluded the lay witness identification testimony because although the witnesses were familiar with the defendant's general appearance the remaining factors weighed in favor of exclusion. There was insufficient evidence that the witnesses were familiar with the defendant's appearance at the time of the offense or that the defendant had altered his appearance prior to the trial. Additionally, the surveillance photograph was not particularly poor or grainy and it fully depicted the suspect's body.

The court ruled correctly that the testimony would not significantly aid the jury in determining whether the person in the surveillance photograph was the defendant. The court correctly excluded lay opinion testimony from a third witness holding that there were important areas of potential bias that could not be explored on cross-examination without bringing in highly prejudicial information concerning the defendant.

United States v. LaPierre 998 F.2d 1460

Did the trial court err when it admitted police officer testimony that the defendant was the individual depicted in a bank surveillance photo?

The admission of a police officer's lay opinion testimony was error because the jury was able to view the surveillance photos and make an independent determination.

While lay opinion testimony of this sort is sometimes permissible, the use of lay opinion identification by policemen or parole officers is not to be encouraged, and should be used only if no other adequate identification testimony is available to the prosecution.

United States v. Paiva 892 F.2d 148

Did the trial court properly admit lay opinion testimony that the substance recovered by the witness was cocaine?

The trial court properly admitted the lay opinion witness testimony.

The witness's testimony was based on her past experience with cocaine and her personal observations, the appearance and taste of the substance found.

The witness's opinion was rationally based on her own perceptions and would assist the jury in understanding her testimony. Lay opinion testimony is not limited to areas within the common knowledge of ordinary persons.

The individual experience and knowledge of a lay witness may establish his or her competence, without qualification as an expert, to express an opinion on a particular subject outside the realm of common knowledge.

United States v. Carlock 806 F.2d 535

In a conspiracy prosecution, did the trial court properly admit lay opinion witness testimony that union referrals were conducted improperly?

A proper foundation was established and thus the testimony was properly admitted. The witnesses were secretaries in the organization with personal knowledge of the facts on which their opinions were based.

A third secretary's proffered lay opinion testimony, however, was properly barred by the trial court. This testimony was based on an invoice with no showing of a basis for her opinion beyond her work in the office. The court could not conclude that this testimony was based upon facts within her personal knowledge sufficient to make her opinion more than an educated guess.

Unlike expert opinion, where the opinion is the product of applying special skill in some art, trade, or profession acquired apart from the case, lay opinion expresses a conclusion drawn from observations in circumstances where it is impractical, if possible at all, to recount the observed factual components of the opinion.

The common illustrations are an expression of opinion by a lay observer of a car's speed or a person's expression or emotional state. Because these opinions draw upon the facts in the case itself, they are more easily confronted than are expert opinion, whose source is often extraneous to the case at trial.

THANK YOU.
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ADDITIONAL MATERIALS.

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January 22, 2020

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