LAY AND EXPERT OPINION EVIDENCE

Judge Jennifer Gee (ret'd)

September 13, 2023

National Association of Hearing Officials

With Thanks to Judge Toni Boone

TWO TYPES OF WITNESS TESTIMONY

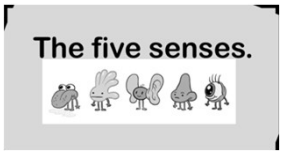
- Fact (lay) Witness Testimony
- Expert Witness Testimony

Federal Rule of Evidence Rule 701 – Opinion Testimony by Lay Witnesses

a) Rationally based on witness' perception
b) Helpful in understanding testimony or determining act in issue
c) Not based on scientific, technical or specialized knowledge

Witness Perception/Personal Knowledge

- What the witness heard, saw, smelled, tasted or touched
- Not speculation
- Absolute certainty not required



Lay Witness Testimony Prerequisites

- Personal knowledge relating to issues
- Observed or perceived event/circumstance
- Can recall and report observations
- Understands the duty to tell the truth
- Not claiming to have specialized or technical knowledge to make them an expert

P sues D for negligence arising from an auto accident. P alleges the accident was caused by D's careless driving. W is the eyewitness.
Can W testify that:

a) D was driving recklessly?
b) D was driving negligently?
c) D was driving erratically?

Eyewitness / Lay Opinion

- Driving recklessly or negligently?
  - Legal conclusions, technical terms in the law
  - Terms carry specialized meaning in the law
- Driving erratically?
  - Based on W's actual observations – wandering behavior
  - Descriptive term

Lay Witness Observations

Foundation necessary to establish observation is accurate and reliable.

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Basis **for** Lay Testimony

- Appropriate foundation required
  - Witness' prior experience/ familiarity with issue
    - Handwriting, drunken behavior
  - Personal Observation
    - Actually observed the incident

LIMITS ON LAY OPINION

- Cannot be based on scientific, technical or specialized knowledge
- BUT may be based on specialized experience – Heavy amphetamine users allowed to testify a substance was amphetamine – *United States v. Westbrook,* 896 F.2d 330 (8th Cir. 1990)

ADMISSIBLE LAY OPINION TESTIMONY

- Person's apparent physical health
- Apparent alcohol or drug impairment
- Approximations of speed of travel, distance, or size of matters observed,
- What a heard noise was; *e.g.* gunshot, crash
- Opinion on smells (explosives, accelerants)

Witness' Sense of Smell

- P's attorney asks W, the witness, "You said there was a smell after the accident. What was that smell? W answers "It smelled like burning high grade oil."
- Defense attorney objects. What would you rule?

ADMISSIBLE LAY OPINION TESTIMONY

- A person's demeanor (nervous, angry, etc.)
- Value of the witness's own property
- Witness's own motive, intent or knowledge
- Age and parentage of person known to them
- Ownership/possession of item they know of
- Value of the witness' work or service

Lay Witness Opinion based on Observation

- Lay witnesses allowed to testify that the vestibule where the plaintiff slipped was safe. *Getter v. Wal-Mart Stores, Inc.*, 66 F.3d 1119 (10th Cir. 1995), cert. denied 516 U.S. 1146 (1996)

Lay Opinion as to Mental State

A lay witness can offer an opinion as to another person's state of mind if it is based on personal observations of that person's behavior. *United States v. Goodman*, 633 F.3d 963, 966-969 (10th Cir.) (testimony about defendant's declining mental health)

Permissible Lay Testimony

Value of business by the business owner

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

Lay Witness Expert Testimony

Can a lay person ever offer expert testimony?

Lay Witness Expert Testimony

United States vs. Christian, 673 F.3d 702, 709-710 (7th Cir. 2010) - FBI Officer testifies as lay witness about defendant's arm movements and as an expert about the significance of the arm movements.

EXPERT OPINION TESTIMONY

Federal Rule of Evidence 702 – Testimony by Expert Witnesses

a) Expert's testimony will help the trier of fact
b) Testimony is based on sufficient facts or data
c) Testimony is based on reliable facts or data
d) Expert has reliably applied the principles and methods to the facts of the case

Judge decides whether an expert can testify.

EXPERT WITNESSES

Do expert witnesses testify before you?

SCIENTIFIC OR EXPERT TESTIMONY EVIDENCE

- Often involves so called battle of the experts, AKA hired guns
- Resolves itself into who has the best argument

IS AN EXPERT WITNESS NECESSARY?

Only if scientific, technical or other specialized knowledge will help trier of fact to determine fact in issue. Witness must:

(a) Testify on matters outside the common experience to facilitate understanding;
(b) Have greater knowledge, skill, and/or information on the matter than fact-finder.

Expert testimony vs Common Knowledge

- Rule 702 excludes an expert's testimony if it is within the common knowledge of the ordinary layperson. *Persinger v. Norfolk & Western Ray. Co.*, 920 F.2d 1185, 1188 (4th Cir. 1990) (Similar rulings in the 2nd, 4th, 8th, and DC Circuits)

EXPERT OPINION TESTIMONY MUST BE:

- Relevant to the facts in issue
- Witness is qualified to give expert opinion
- Based on sufficient facts or data
- Underlying principles/methods reliable
- Expert applied principles/methods correctly
- Opinion testimony was not speculative

Expert Testimony Not Needed

- To testify about the truth of another witness' testimony. *United States v. Hill*, 749 F.3d 1250, 1255-63 (10th Cir. 2014)

Expert's Opinion Not Allowed If

- The expert is not qualified.
- *Conroy v. Vilsack*, 707 F.2d 1163, 1170 (10th Cir. 2013) (expert had not written or researched the issue she was to testify about)

Expert's Opinion Not Allowed if

- Expert's opinion is not based on accurate facts.
- *Conroy v. Vilsack*, 707 F.2d 1163, 1170 (10th Cir. 2013) (expert's opinion was based on inaccurate facts about the case)

EXPERT WITNESSES

If an expert witness testifies before you, how do you determine whether the expert is competent to testify on the topic at hand?

QUALIFYING AN EXPERT

- Burden on proponent
- Opposing counsel can voir dire
- Must qualify with sufficient specialized knowledge

QUALIFYING AN EXPERT (cont'd)

Subject matter is appropriate

a) Opinion concerns specialized knowledge
b) Opinion is beyond a fact finder's common knowledge or experience

Testimony must be helpful to the fact-finder

Testimony must be sufficiently reliable

a) *Frye* test
b) *Daubert* test

ISSUES WITH SCIENTIFIC OR EXPERT WITNESSES

- Undocumented Experts – Impressive resume but no real peer-reviewed work
- Documented expert with irrelevant experience – Nobel laureate
- Political Appointee Expert – Expertise based on prior political appointment
- Don Quixote Expert – Expert in everything, master of none

FOUNDATION FOR EXPERT WITNESSES

- Curriculum vitae or resumé with education, specialized technical training, experience, etc.
- Foundation questions concerning the qualifications of the purported expert are asked for the trier-of-fact to determine if he/she is or they are indeed an "expert" (questioning is known as *voir dire*).

QUESTIONS AN ALJ MIGHT ASK AN EXPERT:

- What type of experience? (Is the expert a "doer" or do they manage doers?)
- Have they taught in their area of expertise?
- Conferences: Did they merely attend or did they participate as presenters?
- Have they published articles on subject?

QUESTIONS AN ALJ MIGHT ASK AN EXPERT:

- How does their background relate to issues?
- Does their work directly involve matters about which the case is concerned?
- Have they testified as expert in similar cases?
- What are they being paid to testify?

TYPES OF EXPERT WITNESSES

Technician/Examiner:

- Has training and experience applying known techniques.
- Uses complex equipment (but doesn't necessarily understand the science or engineering that makes the equipment work)

Example: Operator of a Breathalyzer

TYPES OF EXPERT WITNESSES

Practitioners:

- Have a combination of education and experience making them capable of analyzing and interpreting information.
  Example: Vocational experts can offer opinions on when a person might return to work, what a person can be trained to do, how long it will take to train them, etc.

TYPES OF EXPERT WITNESSES

Specialist:

- Professional whose job has specific characteristics.
- Has a significant educational background specific to his/her specialty as well as certification or other credentials issued by professional organization.

Example: Civil engineer can testify to whether a structure was designed and created safely.

TYPES OF EXPERT WITNESSES

Scientist:

- Conducts or has conducted empirical research
- Experiments to verify research validity
- Applies complex scientific techniques
- Are commonly published in their field

Example: Nuclear physicist

WEIGHING EXPERT WITNESS TESTIMONY

The expert witness had to be tethered to the witness stand because of the "hot air" effect.

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ASSIGNING WEIGHT TO EXPERT TESTIMONY

1. What did *voir dire,* cross-examination reveal?
2. Is credible opposing evidence in the record?
3. Does witness have an interest in testifying subjectively? (Being paid? How much?)
4. How did expert respond to hypothetical questions?
5. Was the testimony definite or speculative?

IS IT POSSIBLE FOR ONE WITNESS TO PROVIDE BOTH LAY (FIRST-HAND OBSERVATION) AND EXPERT TESTIMONY?

YES, ONE EXAMPLE OF MANY:

United States v. Figueroa-Lopez,
125 F.3d 1241, 1246 (9th Cir. 1997)

- FBI agent testified that the defendant was acting suspiciously without being qualified as an expert
- BUT the same FBI agent had to be qualified as an expert with "specialized knowledge" to testify that the defendant's behavior was consistent with drug trafficking.

TESTS OF SCIENTIFIC / EXPERT TESTIMONY EVIDENCE

- Frye (Frye v. U.S., 293 F. 1013 (D.C. Cir. 1923)) and
- Daubert (Daubert v. Merrell Dow Pharmaceuticals, 509 U.S. 579 (1993))
- Daubert hearings

Frye Test (Some states)

- Proponent must show the expert's theory and scientific evidence have been *generally accepted* within the relevant scientific community. (Frye v. U.S., 293 F. 1013 (D.C. Cir. 1923))

Factors in Daubert Test (Federal courts and some states)

- Can the expert's theory be tested and assessed for reliability
- Has the theory been subject to peer review and publication

Factors in Daubert Test (cont'd)

- What is the known or potential rate of error for the theory
- Existence and maintenance of standards and controls
- Is the theory generally accepted in the scientific community

Non-Scientific Expert Testimony

Daubert standard can apply to non-scientific testimony.

Kumho Tire Co. v. Carmichael, 526 U.S. 137, 119 S.Ct. 1167 (1999) (standard applies to non-scientist experts such as engineers)

Federal Rule of Evidence – Rule 703

- Expert opinion can be based on:
  - Facts or data expert observed or was made aware of either at trial or outside the court
  - Facts or data need not be admissible as long as experts in the field would rely on those types of facts or data

Expert Opinion and Hearsay

- Can be based on hearsay evidence
  - *United States v. Thornton*, 642 F.3d 599,606-07 (7th Cir. 2011) (expert could rely on manufacturer's documents about where ammunition was made)
  - *Boim v. Holy Land Foundation for Relief and Development*, 549 F.3d 685, 702-05 (7th Cir. 2008) cert. denied, 558 U.S. 981 (2009) (expert relied on web sites he attributed to Hamas and unsigned notes by a U.S. foreign service officer from a criminal trial in Palestine)

Federal Rule of Evidence – Rule 704

a) An expert's opinion is not objectionable just because it reaches the ultimate issue to be decided by the fact-finder
b) Exception in criminal cases

Example of Expert Opinion on Ultimate Issue

- *United States vs. Winkle*, 477 F.3d 407, 416-17 (6th Cir. 2007) – Bank examiner trained in check kiting schemes allowed to testify check kiting took place in criminal case.

Expert Opinion Based on Disputed Ultimate Facts

- Expert's opinion that police officers were negligent not allowed because based on disputed facts. *Shahid v. City of Detroit*, 889 F.2d 1543, 1547-48 (6th Cir. 1989)

Federal Rule of Evidence – Rule 705

Unless ordered otherwise, an expert may state an opinion – and give the reason for it – without testifying to the underlying acts or data. The expert may be required to disclose those facts or data on cross-examination.

Expert Testimony Stricken Based on Inadequate Basis

An expert's testimony was properly stricken when cross examination revealed that his opinion was based on an inadequate basis. *United States v. Sepulveda*, 15 F3d 1161, 1183 (1st Cir. 1993), cert. denied 512 U.S. 1223.

Excellent Resource

Courtroom Evidence Handbook
by Steven Goode and Olin Guy Welborn III
West Academic Publishing

Questions?
Comments?

THANKS FOR YOUR TIME

Feel free to contact me at
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if you have any questions.