

THE OPINION RULE

1. Introduction

We all speak in generalities, opinions, conclusions and characterizations. Witnesses do also -- testifying that Bob was drunk, it was a hot evening, he was driving too fast, and the road was dark. It would be folly to try to prevent such testimony, and the opinion rule reflects this reality. Opinions of all kinds are admissible as long as they help the jury understand what the witness saw.

Opinions come in three basic types, the first two of which fall under Rule 701 and are covered in this chapter:

- a) Lay witness opinions are the kind of conclusions, generalizations and characterizations that ordinary people make to communicate what they have seen. They are admissible as long as they are rationally based on the witness's perception and the characterization is helpful to a clear understanding of their testimony. Rationality is a reasonable person standard -- is this the kind of characterization people commonly would make based on what was observed?
- b) Skilled witness opinions are the kind of conclusions people make based on their experience (often from their occupation) -- that a car's tires are worn and should be replaced or graffiti is a gang sign. Like other lay opinions, they characterize what the witness has seen and are admissible if rationally based on the witness's perception and helpful to the jury. The difference is that their experience is taken into account in deciding whether the opinion is "rational" -- is this the kind of opinion a person familiar with auto repair would make? There is no clear dividing line between lay and skilled opinions.
- c) Expert witnesses may testify to a broad range of opinions and conclusions and, unlike lay and skilled witnesses, do not need personal knowledge. They are separately discussed in the next chapter.

Three kinds of opinions are improper in all situations -- speculation without facts, legal conclusions, and opinions about the credibility of witnesses.

2. Foundation

(A) *Personal knowledge.* A witness's opinion must be based on personal knowledge and observation of the events and characterize them. The foundation may be laid either from the witness's own testimony or from the context. No particular quantum of knowledge required, and the adequacy of a witness's observations supporting a conclusion is a question of weight, not admissibility.

(B) *Rational basis.* The opinion must be rationally based on information available to the witness. To be rational, an opinion must be the type of opinion a reasonable person would form based on the observation, e.g., an eyewitness's opinion that driver could not have avoided the accident. No specific foundation testimony is required; this is a decision for the court based on the circumstances.

(C) *Experience.* Whether an opinion is rational depends in part on the witness's experience. We usually look to common experience, and assume that everyone can characterize soup as hot or cold. For skilled witnesses, a foundation must be laid describing what kind of experience they have that is not common. Police officers can give their opinion that a home had been burglarized if they have experience investigating burglaries; a dock worker can say that a pallet was overloaded and top-heavy if the worker has experience loading pallets.

(D) *Helpfulness.* The opinion will help the jury understand a witness's testimony or determine a fact in issue. This is not a question of relevancy, but of whether the opinion will help give substance and clarity to underlying facts which are difficult to articulate. Common situations include:

- (1) When a witness's perceptions cannot realistically be expressed in any other form, e.g., that noises sounded like gunshots.
- (2) When a witness formed an overall impression but is unable to recount all the details on which it is based; e.g., he looked drunk to me.
- (3) When describing details alone would not accurately convey the total impression received by the witness, e.g., that the defendant looked like he was faking crying.

In general, however, details are preferred over conclusions as the testimony draws nearer to the cases's central issues.

(E) *Special circumstances.* If the opinion concerns a person's mental condition, the value of goods or services, or the identity of a person or object based on comparison, the witness must demonstrate specialized knowledge gained over time; e.g., to state opinion as to caliber of a gun, a witness must show familiarity with guns.

(F) How to object. Because Rule 701 is a rule of admissibility, you cannot object simply because the witness is stating an opinion. You must argue that the foundation for one or more of these criteria has not been laid. For example:

- a) **Personal knowledge.** A witness testifies that she called the police because the neighbors were having a fight. You could object to the characterization "fight" for lack of foundation to show that the witness had any personal knowledge of what was going on in the neighbors' apartment.
- b) **Experience.** A 7-year-old child testifies that the defendant's car was going 60 miles an hour. You could object for lack of foundation that a young child has the necessary experience to make the opinion reliable because the child does not drive a car.

c) **Rationality.** A witness testifies she was 3 blocks away on a dark night and caught a glimpse of the defendant and he looked drunk. You could object for lack of foundation that the witness could rationally reach that conclusion because a typical person could not discern intoxication under those circumstances.

3. Skilled witnesses

(A) *In general.* Under a technical reading of the evidence rules, there is no such thing as an “expert” on a matter of common knowledge. Experts are connected to fields of specialized knowledge only. Rule 702. However, lay witnesses who have extensive experience with a particular subject beyond that of most jurors may be able to give helpful opinions about that subject based on their personal experience. Such a witness is called a “skilled” witness, and is permitted to testify to a broad range of opinions as long as they are based on personal knowledge and not reviewing a file. Examples from the cases include:

- A experienced nurse could testify as to how she personally interpreted a fetal heart monitor.
- An experienced martial arts teacher who viewed a fight could testify that the defendant had probably stabbed himself.
- An experienced automatic door technician could testify about the operation of a door he had personally serviced.

(B) *Law enforcement officers.* The skilled lay witness rule has been invoked most often in the case of experienced law enforcement officers. For example:

- An experienced crime scene technician who had searched hundreds of cars could give an opinion that the defendant’s car had recently been cleaned.
- Police officers who had become familiar with the smell of toluene, the intoxicant in glue-sniffing, could testify that the substance used by defendant smelled of toluene.
- An experienced police officer who had worked on 250 drug cases could give his opinion as to whether the amount of drugs found indicated they were for individual use or sale, but could not testify to what amount would get someone high because he lacked personal experience.

Opinions from skilled witnesses must be rational, based on personal observation and experience, and not overly speculative. *See Davis v. State*, 948 N.E.2d 843, 847 (Ind. Ct. App. 2011) (detective’s opinion that defendant having \$466 in small bills was indicative of drug dealing was too speculative; money could have come from numerous sources).

4. Mental Condition

In general, a witness may not give an opinion on another person's state of mind or mental processes, such as intent or malice. Such an opinion would be pure speculation. The one exception seems to be mental conditions that have outward manifestations, such as sanity and emotional states. A special foundation is required: the witness must have known and personally

observed a person over a reasonable period of time. A person who knows the decedent and who was present at the time a will was drafted may state an opinion as to the decedent's mental competency; a spouse may testify to the emotional condition of the other spouse. Courts do not generally allow a witness to give an opinion concerning intent, guilt or innocence of a criminal defendant.

5. Physical Condition

(A) *Human condition.* Lay witnesses may state opinions concerning the physical condition of another person whom they observed; e.g., identity, resemblance, bodily condition, intoxication, state of health, hostile appearance and age.

(B) *Declarants' own condition.* A witness may state an opinion as to his or her own physical condition including the cause of pain or injury.

(C) *Condition of objects.* A witness with personal knowledge of the condition of an object may characterize that condition through opinion testimony, such as that an apartment appeared to have been ransacked.

6. Value

Witnesses who are familiar with property, goods or services may give an opinion of their value. Although this type of opinion usually concerns a witness's own property, a witness who is able to establish both familiarity with the property and a factual basis for being able to estimate its value, may give an opinion. All opinions of value, even of a witness's own property, must have a factual basis and not be just speculation.

7. Speed and Distance

Witnesses may give estimates of speeds and distances. To give an opinion concerning the speed of an automobile, a witness must be an adult who has experience with automobiles and must have observed the vehicle or object. Absent special expertise, a witness may not estimate speed based only on the sound of a vehicle.

8. Speculation and Conjecture

(A) *General rule.* Witnesses who lack personal knowledge of the underlying facts because they did not observe or cannot remember them, may not speculate about the events. This rule is most commonly violated when a witness with knowledge of a few facts tries to draw a broad general conclusion that goes beyond the witness's limited factual knowledge. *See Glasscock v. State*, 576 N.E.2d 600 (Ind. Ct. App. 1991) (car dealer improperly testified that there were only two or three cars similar to defendant's in the county).

(B) *Speculation about another's state of mind.* By definition, no witness can know what is on another person's mind. Speculation about states of mind such as intent, anger, and hatred are generally improper.

9. Legal Conclusions

Witnesses may not state legal opinions. Examples include:

- That the accused is guilty.
- That the defendant's vehicle was not in compliance with DOT regulations.
- Statement of belief that a witness had committed perjury.
- That a codefendant was not charged because there was insufficient evidence.

However, witnesses may use legal terms without violating this rule when those terms also have common meaning. A witness may call an incident a "robbery," or characterize a driver as "drunk," because these are common terms ordinary people use to characterize events.