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Rule 701: Opinion Testimony by Lay Witnesses

RULE 701: OPINION TESTIMONY BY LAY WITNESSES

Federal Rule of Evidence 701 states:

> 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 and (b) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue.[1]

Rule 701 governs the admissibility of opinions or inferences of a lay witness who is not testifying as an expert.[2] However, the admissibility of such lay opinion testimony depends on satisfying two requirements. First, the opinion or inference must be "rationally based on perceptions of the witness."[3] Second, "the lay opinion testimony must be 'helpful' to the trier of fact in understanding the testimony of the witness or in determining a fact in issue."[4] Thus, "lay opinions are not 'helpful' under the Rule whenever the jury can readily draw the necessary inferences and conclusions without the aid of the opinion."[5] This is illustrated in

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1. FED. R. EVID. 701.

2. MICHAEL H. GRAHAM, FEDERAL PRACTICE AND PROCEDURE § 6631, at 228 (1992).

3. FED. R. EVID 701(a).

4. GLENN WEISSENBERGER, WEISSENBERGER'S FEDERAL EVIDENCE § 701.4, at 340 (2d ed. 1995). Furthermore, the advisory committee's note states in pertinent part:

> [N]ecessity as a standard for permitting opinions and conclusions has proved too elusive and too unadaptable to particular situations for purposes of satisfactory judicial administration. . . . If, despite these considerations, attempts are made to introduce meaningless assertions which amount to little more than choosing up sides, exclusion for lack of helpfulness is called for by the rule.

FED. R. EVID. 701 advisory committee's note (citation omitted).

5. GLENN WEISSENBERGER, WEISSENBERGER'S FEDERAL EVIDENCE § 701.4, at 341. *See, e.g.*, United States v. Rea, 958 F.2d 1206 (2d Cir. 1992). The *Rea* court stated:

> [W]hen a witness has fully described what a defendant was in a position to observe, what the defendant was told, and what the defendant said or did, the witness's opinion as to the defendant's knowledge will often not be "helpful" within the meaning of Rule 701 because the jury will be in

United States v. Dicker,[6] where the Third Circuit distinguished between the admissibility of a witness' interpretation of "code words" and clear statements. The court stated that "interpretation of code words by a witness is permissible," where the testimony relates to the meaning of words which would not be readily comprehended by the average person.[7] The court explained that in the case of clear statements, such interpretation is not permitted as is "barred by the helpfulness requirement of both Fed. R. Evid. 701 and Fed. R. Evid. 702."[8]

In *Beech Aircraft Corp. v. Rainey*,[9] the United States Supreme Court held that "Rule 701 permits even a lay witness to testify in the form of opinions or inferences drawn from her observations when testimony in that form will be helpful to the trier of fact."[10] In *United States v. Rivera*,[11] the Second Circuit recently interpreted

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as good a position as the witness to draw the inference as to whether or not the defendant knew.

Id. at 1216.

6. 853 F.2d 1103 (3rd Cir. 1988).

7. *Id.* at 1109.

8. *Id.*

9. 488 U.S. 153 (1988). In *Beech Aircraft*, plaintiffs' spouses, a Navy flight instructor and a student, were killed when, during training exercises, their Navy aircraft crashed. *Id.* at 156. Plaintiffs allege that the crash was caused by "some defect in the aircraft's fuel control system," whereas defendants asserted pilot error as the cause. *Id.* at 156-57. The cause of the accident could not be determined with certainty because of the extensive damage and lack of survivors. *Id.* at 157. Therefore, both sides relied primarily on "expert testimony" to prove their case. *Id.* For the defendants, this expert testimony took the form of a "JAG Report" which contained findings of fact, opinions, and recommendations. *Id.* Plaintiffs objected to the use of such a report, asserting that it was inadmissible under Federal Rule of Evidence 803(8)(C) as lacking trustworthiness. *Id.* at 169. However, the Supreme Court allowed such testimony in as trustworthy, holding that such testimony was permissible under "the general approach of relaxing traditional barriers to 'opinion' testimony" pursuant to Rules 701 through 705, since it would be helpful to the trier of fact in determining the cause of the accident. *Id.*

10. *Id.* at 169.

11. 22 F.3d 430 (2d Cir. 1994). Here, the court found that the testimony of a lay witness against a co-conspirator as to the operations of an organization designed to distribute heroin was admissible under Rule 701. *Id.* at 434. Even though the witness "did not create all of the records that were introduced, her

Rule 701 in stating the requirements for a lay witness to testify as to opinions. The court noted that Rule 701 applies to lay witness testimony where the witness had firsthand knowledge or observed the event[12] and that "[t]he trial court's decision to admit lay testimony will be overturned only if it constitutes an abuse of discretion."[13] Moreover, in *United States v. Rea*,[14] the court determined that:

> [t]here are a number of objective factual bases from which it is possible to infer with some confidence that a person knows a given fact. These include what the person was told directly, what he was in a position to see or hear, what statements he himself made to others, conduct in which he engaged, and what his background and experience were.[15]

Generally, under Rule 701, a lay witness may testify in the form of an inference or opinion:

> (1) when an expression of the witness' personal knowledge could be conveyed in no other form, (2) when a witness formed an accurate total impression, although unable to account for all the details upon which it was based, or (3) most importantly, when an accounting of the details alone would not accurately convey the total impression received by the witness.[16]

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testimony showed that she had first-hand knowledge of the organization's record-keeping methods," thereby satisfying the first requirement of the rule and fulfilled the second requirement by being "helpful to the jury's understanding of the operations of the organization." *Id.* at 434-35.

12. *Id.* at 434. *See, e.g.*, United States v. Urlacher, 979 F.2d 935 (2d Cir. 1992). The court upheld the admission of opinion testimony of a lay witness in order to help the jury understand the "confusing and disjointed discussions" on tape recordings of conversations between the defendant and the lay witness, in light of the fact that the lay witness had firsthand knowledge of the conversations. *Id.* at 939.

13. *Rivera,* 22 F.3d at 434.

14. 958 F.2d 1206, 1214 (2d Cir. 1992) (holding that testimony of a lay witness concerning whether the defendant knew that he was participating in a tax evasion scheme was inadmissible on the ground that it was not helpful to the jury).

15. *Id.* at 1216.

16. *See* GRAHAM, *supra* note 2, § 6631, at 232-33 (citations omitted).

Specifically, the topics on which lay witnesses have been permitted to express an opinion include "[t]he appearance of persons or things, identity, the manner of conduct, competency of a person, feeling, degrees of light or darkness, sound, size, weight, distance and an endless number of things that cannot be described factually in words apart from inferences."[17] Furthermore, "[a]bsolute certainty on the part of the lay witness is not required."[18]

In New York, as a general principle, lay persons may testify to facts, but are not permitted to testify as to their own opinions, inferences, or conclusions because it is believed that such inferences arising from the facts should be left to the purview of the jury.[19] However, lay persons are permitted to give opinion evidence "only when the subject matter of the testimony was such that it would be impossible to accurately describe the facts without stating an opinion or impression."[20] Under present law, "[c]onfusion has resulted because this restrictive standard involves not only the difficult task of differentiating between fact and

17. *Id.* at 235 (quoting Ladd, *Expert Testimony*, 5 VAND. L. REV. 414, 417 (1952)); *see, e.g.*, United States v. Paiva, 892 F.2d 148, 157 (1st Cir. 1989) (holding that the trial court correctly admitted opinion testimony by a lay witness that a white powder was in fact cocaine and stated "[a]lthough a drug user may not qualify as an expert, he or she may be competent, based on past experience and personal knowledge and observation, to express an opinion as a lay witness that a particular substance perceived was cocaine or some other drug.").

18. *See* GRAHAM, *supra* note 2, § 6631, at 232.

19. *See* People v. Russell, 165 A.D.2d 327, 332, 567 N.Y.S.2d 548, 551 (2d Dep't 1991), *aff'd*, 79 N.Y.2d 1024, 594 N.E.2d 922, 584 N.Y.S.2d 428 (1992). The trial court held that "under the proper circumstances, a lay witness, even though not an eyewitness to the crime, may be allowed to express his or her opinion that the individual depicted in a photograph is the defendant." *Id.* at 336, 567 N.Y.S.2d at 553.

20. Kravitz v. Long Island Jewish-Hillside Medical Ctr., 113 A.D.2d 577, 581-82, 497 N.Y.S.2d 51, 55 (2d Dep't 1985) (holding that lay opinion testimony by a doctor, not a psychiatrist, indicating whether his patient was a truthful person was inadmissible because there was no issue as to the plaintiff's veracity).

opinion, but also between opinions which are necessary and those which are not."[21]

The Second Department recognized this change in *People v. Russell*.[22] In *Russell*, the court stated that "lay opinion testimony may be admissible when the subject matter of the testimony is such that it would be impossible to accurately describe the facts without stating an opinion or impression."[23] Furthermore, the court explained that in reaching its determination about whether to admit such lay opinion testimony, a court "may consider a variety of factors, including whether the lay opinion testimony would be of assistance to the jury . . . and whether a sufficient foundation has been established to show that the opinion is rationally based upon the perception of the witness . . . ."[24] Thus, "[a]n ordinary witness may express his opinion whenever the facts involved are such that merely describing them is not sufficient to enable a judge or jury to form proper conclusions about them."[25]

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21. THE NEW YORK STATE LAW REVISION COMMISSION, A CODE OF EVIDENCE FOR THE STATE OF NEW YORK, § 701, at 160, Comment (1991). New York's Proposed Code of Evidence, an attempt to codify New York evidence law, would allow a lay individual to provide testimony in the form of opinion or inference only where such testimony is "rationally based on the perception of the witness, and helpful to a clear understanding of the testimony of the witness or the determination of a fact in issue." *Id.* at 159.

22. 165 A.D.2d at 327, 567 N.Y.S.2d at 548.

23. *Id.* at 335, 567 N.Y.S.2d at 553. The court held that non-eyewitness testimony concerning the identification of the defendant, an alleged bank robber, through photographs taken by the bank's security camera was admissible testimony since "all the essential preconditions for the admission of the opinion evidence were satisfied." *Id.* at 336, 567 N.Y.S.2d at 554.

24. *Id.* at 336, 567 N.Y.S.2d at 553-54. Moreover, the court stated that the trial court "may also wish to instruct the jurors at the time the evidence is introduced that the opinion is merely an aid to their decision based upon all the facts and circumstances of the case and that they are entitled to either accept or reject it." *Id.* at 336, 567 N.Y.S.2d at 554.

25. GARY SHAW, CANUDO ON EVIDENCE LAWS OF NEW YORK 192 (1995). *See, e.g.*, Matter of Sanchez, 141 Misc. 2d 1066, 1067, 535 N.Y.S.2d 937, 938 (Fam. Ct. Bronx County 1988) (stating that "[l]ay witnesses have been permitted to give expert opinions on areas of general knowledge such as the emotional state of people being observed.").

In conclusion, the difference between the admissibility of opinion testimony by lay witnesses in New York and under the Federal Rules of Evidence focuses on whether the testimony is necessary or simply helpful in the case at hand. In New York, lay witnesses are restricted to testifying to a report of facts and can only testify as to opinion when, from the nature of the subject matter, more specific evidence cannot be obtained.[26] Rule 701 has no such requirement. Opinion testimony by a lay witness is admissible under Rule 701, which simply requires that it must be rationally based on that witness' perceptions and must help the jury to clearly understand the testimony.[27] However, it should be noted that under the Federal Rules of Evidence, lay opinion testimony, otherwise admissible under Rule 701, may be prohibited by the trial court "if the probative value of the testimony is sufficiently outweighed by the considerations set forth in Rule 403."[28]

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26. *See Russell*, 165 A.D.2d at 335, 567 N.Y.S.2d at 553.

27. FED. R. EVID. 701.

28. *See* WEISSENBERGER, *supra* note 4, § 701.4, at 341; *see also Rea*, 958 F.2d at 1216, where the court stated:

> [E]ven those lay opinions that pass Rule 701's dual test of admissibility may be excluded by the court under Fed. R. Evid. 403 if the court determines that the admission of the opinion will be cumulative or a waste of time, or that its helpfulness is substantially outweighed by the danger of unfair prejudice to the party opposing admission of the evidence.

Id.