The Honorable Robert E. Blackburn
United States District Judge
for the District of Colorado
Presents
The Five Rules of Evidence
That Trial Lawyers Must Master

October 4, 2013

Topic 1: Lay opinion under Rule 701 (vs. expert opinion under Rule 702).

- Fed. R. Evid. 701: **Opinion Testimony by Lay Witnesses**

  If a witness is not testifying as an expert, testimony in the form of an opinion is limited to one that is:

  (a) rationally based on the witness's perception [*cf.* Rule 602 **Need for Personal Knowledge**];

  (b) helpful to clearly understanding the witness's testimony or to determining a fact in issue; and

  (c) not based on scientific, technical, or other specialized knowledge within the scope of Rule 702.

- Admission of lay opinion no longer grounded in necessity, but, instead, in helpfulness.

- Rationale for admitting lay opinion:

  - The primary purpose of Rule 701 is to allow non-expert witnesses to give opinion testimony when, as a matter of practical necessity, events which they have personally observed cannot otherwise be fully presented to the court or the jury. See, Weinstein's Evidence P 701(02) (1977). ***Randolph v. Collectra matic, Inc.***, 590 F.2d 844, 846 (10th Cir. 1979).

  - Lay opinion

    - admissible when events cannot otherwise be fully presented

    - is shorthand rendition of observed facts

    - summarizes complex or difficult facts

- Rationally based on the witness's perception
    - No irrational leaps of logic;
        - prisoner with no medical knowledge not entitled to testify that his tooth fell out because he was not permitted to exercise outside his cell
        - after years of casual observation of the moon, I conclude that it is, indeed, made of green cheese
- Must be helpful
    - Helpful if witness in better position than jury
        - witness in better position than jury to opine that driver driving recklessly
        - witness in better position than jury to identify person from surveillance footage
        - witness in better position than jury to identify person's voice from audio recording
    - Helpful if bald recitation of facts does not convey complete understanding of them to the jury
        - lay opinion that person was "out of control" was proper lay opinion because a cold rendition of facts about person's expressions and actions inadequate to convey what witness observed
        - lay opinion that shooting was accidental was proper lay opinion because of difficulty of articulating all factors that would lead to the conclusion that the person did not intend to fire the gun
    - Not helpful where the evidence is clear and the jury is perfectly capable or perceiving, understanding, and interpreting it
    - Not helpful where the evidence relates to an issue, such as credibility of witnesses, that is usually reserved for the jury
    - Not helpful where the opinion merely tells the jury how to decide the case
    - Not helpful where the testimony is mere speculation

    - Not helpful where the evidence is an opinion or inference of law

- Must not be based on scientific, technical, or other specialized knowledge within the scope of Rule 702, i.e., lay opinion must not be expert opinion in disguise.

    - Lay opinion that is quintessentially expert opinion, i.e., opinion based on scientific, technical, or other specialized knowledge, spuriously evades scrutiny for reliability under *Daubert* and its progeny and the pretrial disclosure requirements of Fed. R. Civ. P. 26 and Fed. R. Crim. P. 16.

- Examples of admissible lay opinion (*See* ***Asplundh Mfg. Div., a Div. Of Asplundh Tree Expert Co. v. Benton Harbor Engineering***, 57 F.3d 1190, 1196-1198 (3d Cir. 1995) for instances in which lay opinion admissible):

    - The appearance of persons or things
    - The identity of persons
    - The manner of a person's conduct
    - The competency of a person
    - The degrees of light or darkness
    - The nature of sounds the witness heard
    - The size of a person or an object the witness saw
    - The weight of a person or an object the witness saw
    - Distances a witness perceived in connection with a variety of events the witness may attempt to describe for the trier of fact
    - The speed at which a vehicle was traveling
    - The mental or emotional state of another individual
    - The health of another individual
    - The age of another person
    - The role of a person in an enterprise or conspiracy
    - Controlled substances based on odor or appearance
    - The value of real and personal property
    - The negligence, *vel non*, of another person
    - The policy or practice of a person or entity
    - The standard of care and causation in medical malpractice case
    - The contents of business records

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Topic 2: Eight bases for impeachment:

- Defects in the ability to observe, remember, and recount (relevant to means of knowledge, ability to observe, and strength of memory);

- Self-contradiction, i.e., prior inconsistent statement (Rule 613) (*cf*. Rule 612);

- Third-party contradiction;
- Bias or improper motivation;
- Character for veracity (Rule 608);
- Specific instances of conduct probative of truthfulness (Rule 608(b));
- Felony/crime of dishonesty conviction (Rule 609); and
- Similar Transactions (Rule 404(b)) (See, *e.g.*, ***U.S. v. Cerno***, 529 F.3d 926, 936-37 (10th Cir. 2008))

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Topic 3: Bases for expert testimony

- Fed. R. Evid. 703: **Bases of an Expert's Opinion Testimony**

  An expert may base an opinion on facts or data in the case that the expert has been made aware of or personally observed. If experts in the particular field would reasonably rely on those kinds of facts or data in forming an opinion on the subject, they need not be admissible for the opinion to be admitted. But if the facts or data would otherwise be inadmissible, the proponent of the opinion may disclose them to the jury only if their probative value in helping the jury evaluate the opinion substantially outweighs their prejudicial effect.

- Rule 703 is bipartite with two distinct parts requiring separate and sequential consideration.
  - Part 1: the acquisition and the kinds of facts that may be used by an expert witness:
    - An expert witness may acquire facts for the formulation of an expert opinion in any of the following ways:
      - by personally perceiving the facts;
      - by hearing the facts as reported or proffered at trial (*cf*. Rule 615 "Excluding Witnesses," i.e., sequestration. Thus, I permit experts in the courtroom during testimony as "a person whose presence . . . [is] essential to presenting the party's claim or defense.");

- by obtaining the facts outside the courtroom by means other than personal perception:

    - out-of-court discussions with lay people or experts, including lay and expert witnesses; and

    - out-of court review of relevant information in transcripts of depositions, hearings, or trial, other reports, learned treatises.

    - Some examples of acceptable extrinsic sources include:

        - interviews
        - third-party reports
        - scientific theories and test results
        - clinical and other studies
        - technical publications
        - business, financial, and accounting records
        - economic statistics
        - other expert opinions
        - general knowledge or experience

    - However, courts have held that it was unreasonable for putative expert witnesses to rely on the following types of facts and data:

        - unsubstantiated facts, data, or assumptions
        - facts or data contrary to uncontroverted facts of record
        - erroneous facts or data
        - speculative facts or data
        - data derived solely for purposes of litigation
        - facts or data lacking probativity

- An expert witness may rely on facts even if inadmissible "if experts in the particular field would reasonably rely on those kinds of facts or data in forming an opinion on the subject." The test is reasonable reliance by experts in the field at issue.

    - Thus, a foundational question becomes: do experts in this particular field rely on the facts or data at issue in forming an opinion on the subject.

    - Do not confuse or conflate Rules 703 and 702. Rule 702 makes

clear that the sufficiency of the basis of an expert's testimony is to be decided under Rule 702. Rule 702 sets forth the overarching requirement of reliability, and an analysis of the sufficiency of the expert's basis cannot be divorced from the ultimate reliability of the expert's opinion. In contrast, the "reasonable reliance" requirement of Rule 703 is a relatively narrow inquiry. When an expert relies on inadmissible information, Rule 703 requires the trial court to determine whether that information is of a type reasonably relied on by other experts in the same field. If so, the expert may rely on the information in reaching an opinion. However, the question whether the expert is relying on a *sufficient* basis of information – whether admissible information or not – is governed by the requirements of Rule 702.

- Part 2: the bipartite requirements for disclosing otherwise inadmissible facts to the jury:
    - "[T]he proponent of the opinion may disclose them [inadmissible facts] to the jury only if their probative value in helping the jury evaluate the opinion substantially outweighs their prejudicial effect." (*Cf.* To exclude relevant evidence under Rule 403, its probativity must be substantially outweighed by unfair prejudice.)
        - Note that this prohibition applies only to the proponent of the opinion, not to the opposing party who is free to disclose inadmissible underlying information on cross-examination as to basis. Moreover, if the opponent "opens the door" by disclosing inadmissible information, the proponent is free to refer to it during redirect examination.
        - In multi-party cases, the proffer by one party of an expert whose testimony is also beneficial to other parties then each such party is considered a proponent within the meaning of Rule 703.
        - The two issues that comprise the *sine qua non* to disclosure:
            - will the inadmissible facts help the jury to evaluate the expert opinion?
            - if so, does the probativity – the focal point of relevance – of those inadmissible facts substantially outweigh their prejudicial effect?
    - *Cf.* ***Wilson v. Merrell Dow Pharm., Inc.***, 893 F.2d 1149, 1152 (10th Cir. 1990) (Rule 703 allows experts to reveal the bases of their opinions during

direct examination, even if hearsay, if the facts or data are of a type reasonably relied upon by others in the same field of expertise; "hearsay is admitted for the limited purpose of informing the jury of the basis of the expert's opinion and not for proving the truth of the matter asserted"); ***United States v. Affleck***, 776 F.2d 1451, 1457-1458 (10th Cir. 1985) (expert witness's recitation, during testimony laying groundwork for opinion, of his recollection of out-of-court conversations with others during course of review of defendant's financial records was proper because information expert obtained in that manner was obtained in manner customarily relied on by other experts in field and hearsay was admitted solely for purpose of informing jury of basis for expert's opinion.)

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Topic 4: Character evidence not admissible to prove conduct. Fed. R. Evid. 404(a)(1)

- Fed. R. Evid. 404(a)(1): Evidence of a person's character or character trait is not admissible to prove that on a particular occasion the person acted in accordance with the character or trait.

- Fed. R. Evid. 405: **Methods of Proving Character**

  (a) By Reputation or Opinion. When evidence of a person's character or character trait is admissible, it may be proved by testimony about the person's reputation or by testimony in the form of an opinion. On cross-examination of the character witness, the court may allow an inquiry into relevant specific instances of the person's conduct.

  (b) By Specific Instances of Conduct. When a person's character or character trait is an essential element of a charge, claim, or defense, the character or trait may also be proved by relevant specific instances of the person's conduct.

- Evidence Rule 404 governs the admissibility of character evidence. Character is a generalized description of a person's disposition or a general trait, such as honesty, temperance, or peacefulness.

  - Character is not synonymous with habit, which is treated in Rule 406. Habit is more specific than character. Habit denotes a regular practice of responding to a particular kind of situation with a specific type of conduct.

  - Character is also distinct from reputation. Character is what a person is, while reputation is what other people think a person is.

- The rationale underlying this exclusionary rule, commonly termed "the propensity rule,"

is that, although such evidence may be relevant under Rule 401, its prejudicial effect often outweighs its probative value.

- However, a person's particular character trait may be a material, consequential fact that, under the substantive law, determines the rights and liabilities of the parties. Character evidence in such a case is not subject to exclusion under Rule 404. This is because it is not being offered to prove that a person acted in conformity therewith on a particular occasion, but rather because the character trait itself is significant as an element of a crime, claim, or defense.

    - For example, in a civil action against an employer, parent, or owner who allowed another person to operate his or her vehicle, evidence of other accidents caused by the driver is admissible if the plaintiff claims that the owner was negligent in entrusting the vehicle to the driver, since the driver's "character for driving" is then in issue. Evidence of the driver's character would therefore be admissible.

    - In an action for defamation action, the plaintiff's reputation for honesty is directly at issue when the defendant has called the plaintiff dishonest.

- When evidence of a person's character or character trait is admissible, then under Rule 405(a) it may be proved by testimony about the person's reputation or by testimony in the form of an opinion.

    - On cross-examination of the character witness, the court may allow an inquiry into relevant specific instances of the person's conduct.

- When a person's character or character trait is an essential element of a charge, claim, or defense, then under Rule 405(b) the character or trait may also be proved by relevant specific instances of the person's conduct.

- In a criminal case it is reversible error to exclude evidence of a defendant's reputation for truth and veracity, or honesty and integrity, or as a law-abiding citizen.

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Topic 5: Admission of “business records” under Fed. R. Evid 803(6)

- Fed. R. Evid. 803: The following are not excluded by the rule against hearsay, regardless of whether the declarant is available as a witness:

    (6) **Records of a Regularly Conducted Activity**.

    A record of an act, event, condition, opinion, or diagnosis if:

(A) the record was made at or near the time by--or from information transmitted by--someone with knowledge;

(B) the record was kept in the course of a regularly conducted activity of a business, organization, occupation, or calling, whether or not for profit;

(C) making the record was a regular practice of that activity;

(D) all these conditions are shown by the testimony of the custodian or another qualified witness, or by a certification that complies with Rule 902(11) or (12) or with a statute permitting certification; and

(E) neither the source of information nor the method or circumstances of preparation indicate a lack of trustworthiness.

- Paragraphs (A), (B), and (C) of subdivision (6) to Rule 803 constitute the foundational predicate for admission as a record of a regularly conducted activity:
    - Thus, to be admissible as an exception to rule against hearsay as a “business record” under Rule 803(6) the court, discharging its duties under Fed. R. Evid. 104(a) without regard to the rules of evidence, except those on privilege, must be satisfied that the following conditions have been shown conjunctively:
        - that the record of the underlying act, event, condition, opinion, or diagnosis was made at or near the time of the act, event, condition, opinion, or diagnosis; and
        - that the record was made by someone with knowledge or from information transmitted by someone with knowledge of the underlying act, event, condition, opinion, or diagnosis; and
        - that the record was kept in the course of a regularly conducted activity of a business, organization, occupation, or calling; and
        - that the making of the record was a regular practice of that activity.
    - All these conditions must be shown by the testimony of the custodian of the record or another qualified witness, or by a certification that complies with Rule 902(11) or (12) or with a statute permitting certification.
    - If you can not remember the *sine qua non* for admission, then either use the bullet points above as a “cheat sheet” or take the text of the rule with you to the podium.

- Recurring issues:

    - Personal knowledge under Fed. R. Evid. 602 ("A witness may testify to a matter only if evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter.") A witness possesses the requisite personal knowledge to testify about the contents of business records if the witness has personally reviewed the records. "**In *Bryant v. Farmers Ins. Exch.***, 432 F.3d 1114 (10th Cir.2005), we held that Rule 602 permitted a **lay witness** to testify about the contents of a list of audit reports. As we explained, '[s]ince [the witness] personally examined these audit reports, she had personal knowledge of their content.' *Id.* at 1123." ***United States v. Nacchio***, 519 F.3d 1140, 1156 (10th Cir. 2008) (*overruled on other grounds)*

    - Hearsay within hearsay under Fed. R. Evid. 805 ("Hearsay within hearsay is not excluded by the rule against hearsay if each part of the combined statements conforms with an exception to the rule.") In ***U.S. v. Blechman***, 657 F.3d 1052, 1064-66 (10th Cir. 2011), the government at trial admitted over the hearsay objection of Mr. Blechman an AOL record and PACER records as business records to prove the truth of the matters asserted in these documents – namely, that Blechman was the registered owner of the "rablechman@aol.com" e-mail address and that Blechman was associated with PACER account "RB 1071," which someone used to access fraudulent bankruptcy cases in Tennessee. On appeal the Tenth circuit held:

        - that the trial court's admission of the disputed records as business records under Rule 803(6) was error because the putative records contained the inadmissible hearsay described above;

        - that the records feature "double" or "layered" hearsay in the form of unverified user-input information;

        - that double hearsay in the context of a business record exists when the record is prepared by an employee with information supplied by another person – an outsider;
        - that the Tenth Circuit recognizes one exception to the general rule: information provided by an outsider that is included in a business record may come in under the business records exception "[i]f the business entity has adequate verification or other assurance of accuracy of the information provided by the outside person."

            - that In the context of identity information provided by an outsider, the Tenth Circuit has identified "two ways to demonstrate this 'guarantee[ ] of trustworthiness': (1) proof that the business has a policy of verifying [the accuracy of information provided by

> someone outside the business]; or (2) proof that the business possesses 'a sufficient self-interest in the accuracy of the [record]' to justify an inference of trustworthiness."

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Extra goodies – no charge:

- The Federal Rules of Evidence (cited as Fed. R. Evid.) Are comprised of 11 articles containing a total of 63 rules of evidence. In turn, the rules of evidence are divided into rules, subdivisions, and paragraphs. Thus, a reference to Fed, R. Evid. 103(a)(2) is a cite to paragraph 2 of subdivision (a) of Rule 103.

- Get a pocket edition of the current Federal Rules of Evidence and never leave home without it.

- Think sequentially. Cultivate the habit of analyzing proffered evidence in relation to its logical relationship to the most common evidentiary objections:

    - authenticity (Rules 901 and 902)
    - personal knowledge (Rule 602)
    - relevance (Rules 401, 402, and 403)
    - hearsay (Rules 801(c), 802, and 803)
    - opinion (Rules 701, 702, and 703)
    - character (Rules 404(a) and (b))

- Be prepared to object; anticipate; do not bloviate. Remember the three BSs of objecting: be succinct; be sincere; be seated. Do not speechify; cite a rule, case, or secondary authority; or use a traditional label.

- Remember the modern trend in evidence is to admit. Know that Rules 401, 402, and 403 are rules of inclusion, not exclusions.

- In jury trials we increasingly presume the positive synergistic effects of the sagacious profundity of the jurors acting collectively.

- There's no crying in baseball, and there's no crying in court. Don't pule or kvetch; ask for a limiting instruction under Rule 105.

- Under the 2011 amendments, in Fed. R. Evid. 801(d)(2), the term, "admission of a party-opponent" has been scrapped in favor of "an opposing party's statement."

- Pair your objections (in the alternative):

- 801(c)-802 and 602;
- 401-402 with 403

- Eschew the obvious objections that needlessly interrupt examination and adversely affect persuasion:

    - Leading questions on direct examination (Rule 611(c)): introduce the question with “what,” “where,” “who,” “why,” “when,” “how”

    - Assumes facts not in evidence: introduce the question with

        - “what, if anything,” etc,
        - “how, if at all,” etc.
        - “where, if any where, etc.
        - “who, if anyone,” etc.
        - “when, if at all,” etc

    - Lack of personal knowledge (Rule 602): introduce the question with “if you know,” etc.

- When may you lead your witness:

    - According to Dean McCormick the following circumstances or contexts justify the use of leading questions other than during cross-examination:

        - To elicit preliminary matters, e.g., name, address, occupation, etc.;

        - To elicit matters not substantially in dispute;

        - To introduce or suggest a subject or topic (as distinguished from and opposed to a particular answer or response);

        - To elicit or develop, when necessary, testimony from a child, see ***U.S. v Littlewind***, 551 F.2d 244(8th Cir. 1977); and

        - To assist a witness whose memory is "exhausted."

- Simplify Rule 702: Memorize this little ditty: “Sufficient facts and data, reliable method, reliably applied.”

- Examples of improper examination from recent litigation [During one case, during the examination of one witness, as taken directly from my notes at trial.]

    - Counsel's clumsy, desultory, and repetitive style of direct examination

borders on the painful – physically, intellectually, and legally

- Habitual direct examination by improper leading questions

- Habitual direct examination by statements of counsel – not by proper questions

- Endless compound questions

- Prolix questions (Foe example: a question of 51 words – the question was so big, it had its own zip and area codes)

- Use of grammatically and syntactically incorrect questions (Mixing negative and positive)
- Desultory examination via "stream of consciousness"

- Repetitive questions involving the inappropriate recapitulation of the previous question and answer

- Inability to identify exhibits by exhibit number or by correct exhibit number

- Conducting examination like a deposition – consistently violating the objection protocol prescribed by me in my Trial Preparation Conference Order

- Abusive objection practice

- Habitually starting a question and then stopping to begin another question
- Very few "clean" questions where the question is asked without digression or the use/injection of additional, unnecessary words
- Generally, clumsy and disorganized examination of experts, resulting in the needless consumption of time. Let your expert be the expert

- Requesting or requiring a witness with no personal knowledge of a document to read excerpts from the document to the jury or comment on or testify about excerpts from the document

- Discussing the contents of a document before it has been admitted in evidence

- Requesting or requiring that a witness read aloud a portion of a document to refresh recollection

- 2013 Amendment [Effective December 1, 2013, absent contrary Congressional action.]

    - Rule 803(10) has been amended in response to ***Melendez-Diaz v. Massachusetts***, 557 U.S. 305 (2009). The ***Melendez-Diaz*** Court declared that a testimonial certificate could be admitted if the accused is given advance notice and does not timely demand the presence of the official who prepared the certificate. The amendment incorporates, with minor variations, a "notice-and-demand" procedure that was approved by the ***Melendez-Diaz*** Court.

        - [Text of subdivision (10) effective until December 1, 2013, absent contrary Congressional action.] (10) Absence of a Public Record. Testimony--or a certification under Rule 902--that a diligent search failed to disclose a public record or statement if the testimony or certification is admitted to prove that: (A) the record or statement does not exist; or (B) a matter did not occur or exist, if a public office regularly kept a record or statement for a matter of that kind.

        - [Text of subdivision (10) effective December 1, 2013, absent contrary Congressional action.] (10) Absence of a Public Record. Testimony--or a certification under Rule 902--that a diligent search failed to disclose a public record or statement if:
(A) the testimony or certification is admitted to prove that
(i) the record or statement does not exist; or
(ii) a matter did not occur or exist, if a public office regularly kept a record or statement for a matter of that kind; and
(B) in a criminal case, a prosecutor who intends to offer a certification provides written notice of that intent at least 14 days before trial, and the defendant does not object in writing within 7 days of receiving the notice--unless the court sets a different time for the notice or the objection.