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Life Experience Matters

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The inter-generational tech knowledge gap presents a dilemma for the courts when distinguishing between lay opinion and expert testimony, explains Wes Porter of Golden Gate University School of Law.

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As trial courts continue to struggle with distinctions between lay and expert opinion testimony, growing disparities between jurors' level of technology savvy may further blur the line. The standard for opinion testimony properly offered by a lay witness is premised upon a rapidly evolving concept: the experiences of the average person in everyday life. Yet, the everyday life experiences for the Internet and technology-savvy twentysomethings typically differ dramatically from the life experiences of older generations (of course, exceptions abound). The varying common experiences, theoretically, may result in varying judicial determinations with regard to permissible lay opinion testimony.

LAY OPINION TESTIMONY

Ten years ago, when the federal rule governing lay opinions was amended, Congress defined lay opinions as opinions rationally based on the witness' perception, helpful to the jury's understanding of the facts and not based upon "scientific, technical or other specialized knowledge" (which is the definition of expert testimony under the rules). Courts further articulated a litmus test for lay opinion testimony as opinions informed by reasoning processes familiar to the average person in everyday life. If the witness' opinion derived from a sensory ability common to all, then it was a proper lay opinion; yet, if the opinion was based upon any "specialized knowledge," then it is governed by expert testimony rules and explicitly carved out from lay opinion territory.

Lay witnesses often hold, and may offer, opinions that could help the jury better understand the facts offered within their testimony. The lay opinion is really nothing more than an inferential extension of a witness' fact testimony. For example, it is more helpful for a non-expert witness to testify that someone "appeared worried," then to offer only the facts that support that conclusion. The average person of any generation is familiar with the characteristics and behavior of a worried person and the inference may help the jury more than the underlying facts alone. The logic is, had an average person (for our purposes, an average juror) perceived the same events, then they too reasonably could have inferred that the person appeared worried. It is a relatable event and the jury benefits from an opinion from a percipient witness, as someone who was actually there.

A TECHNOLOGICAL KNOW-HOW GAP

Generational differences are not novel, nor are they new to judicial interpretation. Courts have long been asked to pass on societal norms, the behavior of younger actors, and elusive "reasonable person" standards. Different generations have, and may always have, different tastes, interests and ideas (and relatedly, definite opinions about the tastes, interests and ideas of other generations), generally speaking. Yet, has there ever been a time when the technology presented so drastic a difference in what different generations would consider "average" life experiences?

For illustrative purposes, the modern examples of wireless technology and social media present a stark contrast between the common life experiences of today's college students and their parents — both of whom are potential lay witnesses and jurors. A

lay witness from one side of this technological gap could offer countless opinions potentially helpful to a jury; however, a juror from the other side of this gap may find these inferences unfamiliar and highly specialized. For the latter jurors, lay opinions about technology that has not been common or relatable in their lives may be no different than opinions about scientific methods and conclusions from experts.

As an example, a percipient witness could testify about facts relating to the download of a file to their phone, the RSS feed from a blog, "checking in" at a location on Facebook, metadata associated with a sent email, and deleted but not overwritten files on an iPad.

The factual testimony, like the testimony about the conduct discussed above, need not be common or familiar to average jurors. The same "digital native" witness, however, permissibly may offer an inferential lay opinion based upon his or her rational perceptions of these facts to assist the jury.

Lay opinions about technological advances, like other lay opinions, must be relatable and common to the average person's life experiences. To some jurors, these lay opinions about technology could assist them in the same way that the opinion that a person "appeared worried." To other jurors, lay opinions about technology simply do not relate to their life's experiences. Trial courts also may exclude opinions about technology as unhelpful to a jury with different life experiences. The judicial determinations on the issue are far less predicable and make planning a case presentation more challenging.

FACT TESTIMONY VERSUS INFERENTIAL LAY OPINIONS

Fact testimony need not be relatable to the common experiences of potential jurors. Yet, for lay opinions based upon the same facts, the opinion must resonate with everyday experiences of the "average person." In criminal cases, for instance, jurors routinely hear factual testimony about criminal conduct distinctly foreign to them. Prosecutors routinely couple this fact testimony with a law enforcement witness testifying based upon his or her experience about the criminal conduct. The law enforcement witness clearly offers "specialized knowledge," because the opinions involve matters decidedly outside of the average juror's life experiences. Accordingly, most courts today properly relegate these opinions to expert testimony.

Highly qualified witnesses, without any personal knowledge about the case, offering opinions based upon scientific or technical processes are easy to separate out as offering expert testimony. Unlike true experts offering scientific opinions based upon reliable processes and extensive disclosures, this type of expert, a professional testifying based primarily upon his or her experience, requires only watered-down disclosures and poses only a slight risk of viable reliability challenges. Courts have found that a simple letter, which outlines the witness' experience and opinions, is sufficient disclosure if the witness is later deemed an expert.

Historically, the problem with differentiating between expert and lay opinion testimony centered on a proponent's attempt to gain a strategic advantage at trial. A party that seeks to call a lay witness at trial, and evade disclosure requirements and judicial scrutiny for reliability, then elicits lay opinion testimony laced with "specialized knowledge" (what courts refer to as an "expert in lay witness' clothing"). As litigants, we are prepared to accept the trial court remedy of exclusion or the appellate remedy of reversal, because the lawyer knowingly sought to gain an advantage and lost. We can be less comfortable with the same remedies when the court's rulings turn on an evolving analysis of our average life experiences.

Courts now face new challenges in distinguishing expert and lay opinion testimony. The judicial determinations related to the generational gaps inherent in the overwhelming technological advances have less to do with the witness and more to do with the juror whom we have not met. Trial courts may decide differently based upon the perceived pulse of the average person's life experiences at any given time. Courts also may decide differently by determining whether the lay opinion will be helpful to the particular jury serving as the trier of fact.

Either way, the litigant who sponsors fact testimony about technological issues understood by only some may find a growing uncertainty in planning for related, more helpful lay opinion testimony. The litigant may treat lay opinions of this nature the same as it would an "experience" expert, the professional witness testifying primarily based upon his or her experience and offering factual testimony and "specialized knowledge." That is, the proponent could write the letter to opposing counsel describing the general nature of testimony and the lay opinions to be elicited at trial. A letter disclosure may provide flexibility to the court evaluating the testimony and it allows the sponsoring attorney to better plan his or her case presentation.

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