The Law of Evidence in Washington

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Rule 701.

OPINION TESTIMONY BY LAY WITNESSES

SYNOPSIS

§ 701.01 Text of Rule 701

Rule 701. OPINION TESTIMONY BY LAY WITNESSES

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, (b) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue, and (c) not based on scientific, technical, or other specialized knowledge within the scope of rule 702.

§ 701.02 Task Force Comment 701

[Deleted effective September 1, 2006.]

This rule is the same as Federal Rule 701. It is essentially a rule of discretion and differs from previous law more in form than substance. The rule requires the trial judge, on the basis of the posture of the particular case, to decide whether concreteness, abstraction or a combination of both will be most effective in enabling the jury to ascertain the truth and reach a just result. In applying the rule, it should be kept in mind that its purpose is to eliminate time-consuming quibbles over objections that would not affect the outcome regardless of how they were decided. The emphasis belongs on what the witness knows and not on how he is expressing himself. Weinstein's Evidence § 701[02] (1975).

In several recent cases the Washington Supreme Court has cited section 401 of the Model Code of Evidence as controlling the admission of lay opinion testimony in Washington. *See Church v. West,* 75 Wash.2d 502, 452 P.2d 265 (1969) and 5 R. Meisenholder, Wash. Prac. § 341 (1975 Supp.). Section 401 would usually yield the same result as decisional law predating it. Some examples of admissible opinion testimony are: the speed of a vehicle, the mental responsibility of another, whether another was "healthy", the value of one's own property, and the identification of a person. Meisenholder § 341 (1975 Supp.).

Differences between existing Washington law and rule 701 are largely matters of form rather than substance. Although Model Code section 401 assumes that the witness may generally testify in terms of inference and opinion, the court may require the testimony to be stated in nonabstract detail if it finds that the witness is capable of doing so satisfactorily and that the statement by the witness of his conclusory inferences might mislead the trier of fact. Rule 701 approaches the problem in reverse. It assumes that the witness will give his testimony by stating his observations in as raw a form as practicable, but permits him to resort to inferences and opinions when this form of testimony will be helpful. Both rules give the trial court a wide latitude of discretion. As a practical matter, rule 701 is unlikely to change Washington law. *See* Meisenholder § 343.

The subject matter of rule 701 is analyzed in greater detail in J. Powell & R. Burns, *A Discussion of the New Federal Rules of Evidence,* 8 Gonz. L. Rev. 1, 14–16 (1972).

§ 701.03 FRE Advisory Committee's Note

The rule retains the traditional objective of putting the trier of fact in

possession of an accurate reproduction of the event.

Limitation (a) is the familiar requirement of first-hand knowledge or observation.

Limitation (b) is phrased in terms of requiring testimony to be helpful in resolving issues. Witnesses often find difficulty in expressing themselves in language which is not that of an opinion or conclusion. While the courts have made concessions in certain recurring situations, necessity as a standard for permitting opinions and conclusions has proved too elusive and too unadaptable to particular situations for purposes of satisfactory judicial administration. McCormick § 11. Moreover, the practical impossibility of determining by rule what is a "fact," demonstrated by a century of litigation of the question of what is a fact for purposes of pleading under the Field Code, extends into evidence also. 7 Wigmore § 1919. The rule assumes that the natural characteristics of the adversary system will generally lead to an acceptable result, since the detailed account carries more conviction than the broad assertion, and a lawyer can be expected to display his witness to the best advantage. If he fails to do so, cross-examination and argument will point up the weakness. See Ladd, *Expert Testimony,* 5 Vand.L.Rev. 414, 415–417 (1952). 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.

The language of the rule is substantially that of Uniform Rule 56(1). Similar provisions are California Evidence Code § 800; Kansas Code of Civil Procedure § 60-456(a); New Jersey Evidence Rule 56(1).

§ 701.04 Editor's Analysis

[1] Comparison to Prior Law

Commentators predicted that Rule 701 would be unlikely to change Washington case law. *See* R. Meisenholder, 5 *Washington Practice, Evidence* § 343 at 326 (1975). It differs from previous law more in form than in substance.

In fact, Rule 701 has not changed the ultimate admissibility of opinions; the old approach still appears to have some vitality. Prior to adopting the Washington Rules of Evidence, the Washington Supreme Court had cited Section 401 of the Model Code of Evidence as controlling the admission of lay testimony in Washington. *See Church v. West,* 75

Wash. 2d 502, 452 P. 2d 265, 269 (1969). That approach allowed a witness to testify in terms of inferences and opinions. However, the court required the testimony to be stated in concrete terms if the witness was capable of doing so and if the conclusory inferences might mislead the trier of fact. Rule 701, likewise, assumes the witness will testify in terms as factually based as possible, and may state opinions or draw inferences when (a) based on first-hand information or personal observation, and (b) the testimony will be helpful to the trier of fact.

The trial judge has the discretion, under ER 701, to decide whether concreteness, abstraction, or a combination of both from a lay witness will be most effective in enabling the jury to ascertain the truth and reach a just result. Comment 701. In doing so, the judge may still employ concepts or terms, used as terms of art in the past, such as whether the witness's opinion is a form of "collective facts or sense perceptions" (admissible) or mere conjecture or speculation (inadmissible), or whether the witness would be unable to break his or her testimony into "more elemental sense perceptions" without becoming "tongue-tied" (admissible).

Under those concepts, and still true under the more general standard of ER 701, courts have permitted lay opinions as to matters such as speed, height, weight, distance, state of mind of another, intoxication or drug influence, physical appearance or condition, and identity. *See State v. Kinard,* 39 Wash. App. 871, 696 P.2d 603, 606 (1985).

As recently as 1979, the Court of Appeals relied on *Church v. West,* 75 Wash. 2d 502, 452 P. 2d 265 (1969) as authority. However, the court appeared to adopt the Rule 701 approach while citing *Church* to allow "inferences or impressions, provided that the inferences are drawn from observations which are difficult to describe precisely." *In re Luntsford,* 24 Wash. App. 888, 604 P.2d 195, 196 (1979). Under this test, the *Luntsford* court determined that an opinion regarding a father's interactions with his child was permissible, whereas an opinion by the same witness as to whether petitioner was a "good father" was not a permissible inference and not admissible under the *Church* approach. *Luntsford,* 24 Wash. App. at 891, 604 P.2d at 197.

[2] Admissible Lay Opinions

Since adoption of the Washington Rules of Evidence, courts have admitted opinions as to the value of property and as to physical condition.

The pre-Rules cases *allowing* lay opinion testimony on various subject matters, since they were more restrictive than the Rules, are almost certainly good authority under ER 701. K. Tegland, 5A *Washington Practice, Evidence* § 287 (2d ed. 1982).

Some pre-Rules cases *disallowing* lay opinion may no longer be good authority because of the intent of ER 701 to allow lay opinion liberally.

In the cases on opinion as to valuation, Washington has clearly adopted the ER 701 approach. A witness must have sufficient acquaintance with the property in order to form an opinion of its value. *Kammerer v. Western Gear Corp.,* 27 Wash. App. 512, 618 P.2d 1330, 1333 (1980). An opinion as to fair rental value based on previous rents charged may also be admitted pursuant to ER 701. *Eastlake Constr. Co. v. Hess,* 33 Wash. App. 378, 655 P.2d 1160, 1162 (1982).

In *Bennett v. Dep't of Labor and Industries,* 95 Wash. 2d 531, 627 P.2d 104 (1981), the court restated an earlier ruling that lay witnesses may testify to aspects of an injured person's physical disability that are "observable by their senses and describable without medical training, and further that an injured person can testify regarding the subjective aspects of an injury and to the physical limitations of his physical movements." 95 Wash. 2d at 533–34. In an earlier case, involving injuries resulting from a ski lift accident, the court ruled that the Evidence Rules should not prevent the plaintiff from comparing the pregnancy and birth of her first child, prior to the accident, with that of her second child, subsequent to the accident. Although the court agreed that the challenged question—asking the plaintiff whether, during pregnancy, she had problems resulting from the ski lift accident—may have called for a medical conclusion by a lay witness, it reasoned that "under properly formulated questions, plaintiff is qualified to explain differences in pain or discomfort in the two births." *Egede-Nissen v. Crystal Mountain, Inc.,* 93 Wash. 2d 127, 137, 606 P.2d 1214 (1980).

A nonexpert witness may even, under proper conditions, testify regarding a defendant's mental state. *See State v. Stoudamire,* 30 Wash. App. 41, 631 P.2d 1028, 1031 (1981); *see also State v. Crenshaw,* 98 Wash. 2d 789, 659 P.2d 488, 492 (1983). In *Crenshaw,* the court allowed Letha Guthrie, a lay witness for the prosecution, to testify as to the defendant's behavior the day before he decapitated his new wife. The witness had a substantial opportunity to observe the defendant, having employed him on her farm the day before the crime, and having loaned him the ax. Guthrie testified that the defendant appeared sane and offered her opinion that he was "very nice" at the time he borrowed the ax, which was shortly after stabbing his wife 24 times with a knife and inflicting a fatal wound. The Court of Appeals held

that, by establishing Guthrie's relationship with the defendant and eliciting details of her encounter with him on the day of the crime, the state established enough facts to form a sufficient basis for her opinion. *State v. Crenshaw,* 27 Wash. App. 326, 617 P.2d 1041 (1980). The Court of Appeals also affirmed the admission of a police chief's opinion as to the defendant's sanity at the time of the offense, writing, "It is well established in Washington that a lay witness may testify concerning the sanity or mental responsibility of others, so long as the witness's opinion is based on facts he personally observed, and the witness has testified to such facts." 27 Wash. App. at 332–33. *Compare United States v. Gonzalez-Carvajal,* 189 F. App'x 666 (9th Cir. 2006) (holding that the district court did not abuse its discretion by excluding a witness's lay opinion testimony concerning the defendant's mental capacity under FRE 701 since there was no indication that the witness had any contact with the defendant at or near the time of the offense).

The courts have gone beyond physical condition and mental state in upholding the admission of the following examples of lay opinion: (1) a police detective's testimony that defendant's wife seemed "not so concerned" about her daughters and "more protective" of defendant, because it was "rationally based on the perception of the witness" (*State v. Warren*, 134 Wn. App. 44, 138 P.3d 1081, 1085 (2006)), *review granted*, 161 Wn.2d 1001 (2007); (2) a correction officer's decision to report a confrontation between the defendant and a witness "[b]ecause [he] felt there was a threat involved." *State v. King*, 135 Wash. App. 662, 145 P.3d 1224, 1228 (2006), *review denied*, 161 Wn.2d 1017, 171 P.3d 1056 (2007); (3) that a burglary "looked staged," (*State v. Kunze,* 97 Wash. App. 832, 988 P.2d 977, 980 (1999)); (4) about the unusual "posings" of murder victims (*State v. Russell,* 125 Wash. 2d 24, 882 P.2d 747, 752 (1994)); (5) the opinion of a truck driver as to fuel consumption and the route of a truck (*State v. Lass,* 55 Wash. App. 300, 777 P.2d 539, 541 (1989)); (6) the opinion of a woman that her child's vaginal region did not "look its natural color" (*State v. Walker,* 38 Wash. App. 841, 690 P.2d 1182, 1185 (1984)); and (7) an opinion that stains on a towel appeared, from prior experience, to be semen (*State v. Ferguson,* 100 Wash. 2d 131, 667 P.2d 68, 72 (1983)).

In *State v. Kinard,* 39 Wash. App. 871, 696 P.2d 603 (1985), the court upheld testimony that a burglary victim's attacker "sounded black to me." The victim had lived in the South for several years and on a military post overseas, and testified that, from these experiences, she perceived blacks as having a certain inflection or accent. The Court of Appeals stated: "The trial court is vested with wide discretion under ER 701. Comment, ER 701. While

Mrs. Cardell's testimony probably could have been given in a more raw form by way of a detailed description of her assailant's accent and inflection, there was no prejudicial error. Mrs. Cardell's testimony could have been scrutinized on cross-examination, but it was not." *Kinard,* 39 Wash. App. at 874.

It is at least questionable whether the testimony in *State v. Kunze,* 97 Wash. App. 832, 988 P.2d 977, 980 (1999) (burglary "looked staged"), *State v. Ferguson,* 100 Wash. 2d 131, 667 P.2d 68, 71 (1983) (stains on towel appeared to be semen), and *State v. Kinard,* 39 Wn. App. 871, 696 P.2d 603, 605 (1985) (attacker "sounded black to me") should be considered lay opinion testimony. Given the expertise necessary to form the stated opinions, it would seem that determination of admissibility would be more appropriate under ER 702.

It is also important to note that whether lay opinion testimony is admissible or not may depend on whether the trier of fact is the judge or the jury. In *State v. Read,* 106 Wash. App. 138, 144–145, 22 P.3d 300, 303 (2001), a bench trial for murder in which the defendant claimed self-defense, several eyewitnesses offered their opinions as to the validity of this defense theory. The appellate court concluded that although this was improper lay opinion testimony, the fact-finding judge "is presumed not to have considered the inadmissible lay opinions." The court noted that "a liberal practice in the admission of evidence is followed in this state, supported, as it is, with a presumption on appeal that the trial judge, knowing the applicable rules of evidence, will not consider matters which are inadmissible when making its findings." Thus, the judge has great discretion in admitting lay opinion testimony in a bench trial.

[3] Inadmissible Lay Opinions

Despite the liberal admissibility of lay opinions under ER 701, counsel should still be able to keep out opinions that are unduly speculative or conclusionary (i.e., not "rationally based on sense perceptions"), or are not helpful to the jury (e.g., that "invade its province"). For example, if a witness states that he saw the defendant's car 15 feet before it entered the intersection and it was traveling 75 mph, the opinion should be excluded, not because it expresses an opinion as to speed, but because 15 feet is too short a distance to *rationally* perceive the difference between 50 mph and 75 mph.

Likewise, in *State v. Stoudamire*, 30 Wash. App. 41, 631 P.2d 1028 (1981), the court upheld the exclusion of a witness's testimony as to the defendant's sanity because the witness, who had encountered the defendant for about a minute and a half in a park near the time the defendant committed the murder, "did not have sufficient time to observe Stoudamire to formulate an

opinion." 30 Wash. App. at 47. It should be noted, however, that in light of the great amount of discretion accorded the trial judge, it is at least arguable that admission of the testimony would also have been upheld, since even a minute and a half may be enough if the observable physical manifestations are sufficiently severe. In *Stoudamire,* the witness testified that, during the minute and half encounter, Stoudamire's body was "jerking strangely, that his gait was irregular and disjointed, and that his eyes were rolled back in his head." The court stated that "[d]espite the severity of the symptoms Stoudamire was exhibiting, we cannot say that there is 'a clear showing of abuse of discretion, that is, discretion manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons.' *State ex rel. Carroll v. Junker,* 79 Wash. 2d 12, 26, 482 P.2d 775 (1971)." *Stoudamire,* 30 Wash. App. at 47.

Because opinion testimony on credibility of the defendant, the victim, or another witness invades the province of the jury, it should be excluded. In determining whether statements constitute impermissible opinion testimony, the court will generally consider the circumstances of the case, including the type of witness involved, the specific nature of the testimony, the nature of the charges, the type of defense, and the other evidence before the trier of fact. *State v. Demery*, 144 Wash. 2d 753, 30 P.3d 1278, 1282 (2001). Admitting impermissible opinion testimony regarding defendant's guilt may be reversible error because admitting such evidence "violates [the defendant's] constitutional right to a jury trial, including the independent determination of the facts by the jury." *Demery*, 144 Wash. 2d 753, 30 P.3d at 1282 (quoting *State v. Carlin*, 40 Wash. App. 698, 701, 700 P.2d 323 (1985), *overruled on other grounds by City of Seattle v. Heatley*, 70 Wash. App. 573, 854 P.2d 658 (1993)); *see also Dubria v. Smith*, 224 F.3d 995, 1001–02 (9th Cir. 2000) (suggesting that the admission of taped interviews containing police statements challenging the defendant's veracity may also violate the defendant's right to due process); Editor's Analysis ER 608(a), § 608.05[1][b].

However, in *State v. Kirkman*, 159 Wash. 2d 918, 155 P.3d 125 (2007), the Supreme Court of Washington reversed the Court of Appeals, which held that testimony of a physician and a police detective were impermissible opinions on the alleged child victim's credibility and their admission was manifest constitutional error. The doctor testified that the child gave a "clear and consistent history of sexual touching with appropriate affect" and her history was "clear and consistent" with "lots of detail." *Kirkman*, 155 P.3d at 131–32. The detective testified that he gave a competency test during an interview with the child, that the child could distinguish between the truth

and a lie, and that she promised to tell the truth. In addition to rejecting the Court of Appeals' conclusion that the statements were opinions on the credibility of the witness, the court also ruled that "[m]anifest error requires a nearly explicit statement by the witness that the witness believed the accusing victim." *Kirkman*, 155 P.3d at 135. As the testimony in this case was not an issue of constitutional magnitude, the defendant had waived his right to argue the issue on appeal by failing to object at trial.

See also State v. King, 131 Wash. App. 789, 130 P.3d 376 (2006) (published in part), where Division One held that the testimony of a CPS investigator and a detective that they tested the nine-year-old child molestation and rape victim's competency to determine his ability to tell the truth, and that the victim agreed to tell the truth in his interview, did not infringe on the jury's role to determine credibility because the witnesses did not explicitly state they believed the victim. *Accord State v. Warren*, 134 Wn. App. 44, 138 P.3d 1081 (2006), where Division One held the testimony of a child interview specialist and a detective was not manifest constitutional error that impermissibly invaded the province of the fact finder; the court distinguished the testimony from detective's testimony in *Kirkman*, in that neither the interview specialist nor the detective testified that he evaluated S.S.'s "competency, made a determination of S.S.'s ability to tell the truth, or believed S.S. was telling the truth." However, the court concluded that even if the testimony in *Warren* were indistinguishable from that in *Kirkman*, the admission of the testimony without objection was not manifest constitutional error that Warren could challenge for the first time on appeal. *Warren*, 138 P.3d at 1088.

See also State v. Carlson, 80 Wash. App. 116, 906 P.2d 999, 1005 (1995) (error to permit a physician to testify as a lay expert that a child had been molested when the physician had examined the child but had no first-hand knowledge of molestation); *State v. Farr-Lenzini,* 93 Wash. App. 453, 970 P.2d 313, 316 (1999) (admission of state trooper's testimony that defendant was attempting to elude trooper held to be error as improper opinion on the core issue of defendant's state of mind); *Mitroff v. Xomox Corp.,* 797 F.2d 271, 275 (6th Cir. 1986) (error to admit statement of assistant personnel manager for defendant that pattern of age discrimination existed at company; statement was not rationally based on sense perceptions); *Ashley v. Hall,* 138 Wash. 2d 151, 978 P.2d 1055, 1059 (1999) (lay witness's opinion that an auto accident involving a child pedestrian was unavoidable was admitted in error because it was a conclusion and was unsupported by the witness's limited observations).

Opinions are inadmissible if not based on the witness' personal knowl-

edge. There is a particular danger that this requirement will be overlooked when a witness testifies in both a lay and expert capacity. For example, in *United States v. Freeman*, 498 F.3d 893, 901–905 (9th Cir. 2007), a detective interpreted ambiguous phrases from the defendant's telephone conversations based on an interview that he conducted with one of the conversation participants. The detective also offered opinions about the telephone conversations that were speculation, such as the reason that the defendant wanted to get off the phone. The Ninth Circuit held that the trial court abused its discretion by allowing a detective to rely upon hearsay and speculate without personal knowledge. See also Editor's Analysis ER 702, § 702.04[4] for discussion of the particular risk of prejudice when a law enforcement officer testifies as both and expert and lay witness.

Moreover, opinions that are not helpful to the jury may be excluded. *See United States v. Henke*, 222 F.3d 633, 636 (9th Cir. 2000) (lay opinion testimony of one witness regarding defendants' knowledge of a false revenue reporting scheme would not assist the jury, who, unlike the witness, "had the benefit of several years of discovery, investigation, and litigation to flesh out the facts").

Thus, testimony that the defendant was the person appearing in surveillance photographs was disallowed in *State v. Jamison,* 93 Wash. 2d 794, 613 P.2d 776, 780 (1980). The court held that, because the jury itself was able to compare the defendant's appearance with the surveillance photographs, the witness's knowledge of the defendant's appearance put the jury "in no better position to make that critical determination." Therefore, the opinion testimony impermissibly invaded the jury's province. The opinion stresses the general principle, however, that opinion testimony on identification based on knowledge of a defendant's appearance at or near the time of taking a surveillance photograph is admissible when that opinion "can actually assist the jury in correctly understanding matters that are not within their common experience." *Jamison,* 93 Wash. 2d at 798, citing *State v. Batten,* 17 Wash. App. 428, 437, 563 P.2d 1287 (1977).

See, e.g., State v. Hardy, 76 Wn. App. 188, 884 P.2d 8, 10 (1994) (a police officer's identification of a man in a surveillance video did not improperly invade the province of the jury; because he had known the man for six years and the video was not very clear, his opinion provided useful information); *United States v. Henderson,* 68 F.3d 323, 326 (9th Cir. 1995) (same, with officer having known bank robbery suspect for 15 years).

In *United States v. Beck*, 418 F.3d 1008 (9th Cir. 2005), the Ninth Circuit assessed the extent of prior contact between a witness and a defendant that is sufficient to render a witness's lay opinion admissible under FRE 701. The

court held that whether a lay opinion is "helpful" depends "on a totality of the circumstances," including the witness's familiarity with the defendant's appearance at the time the crime was committed, the witness's familiarity with the defendant's customary manner of dress, whether the defendant disguised his or her appearance during the offense or altered his or her appearance before trial, and "whether the witness knew the defendant over time and in a variety of circumstances, such that the witness's lay identification testimony offered to the jury a perspective it could not acquire in its limited exposure to the defendant." *United States v. Beck* 418 F.3d at 1015. The court also noted that "the absence of any single factor will not render testimony inadmissible." *United States v. Beck*, 418 F.3d at 1015.

Accordingly, the Ninth Circuit determined that a district court abused its discretion in admitting the testimony of a special investigative agent who identified a figure in a prison surveillance video as the defendant because the agent did not have sufficient contact with the defendant to render his testimony "helpful" to the jury. *United States v. Kane*, 146 Fed. Appx. 912 (9th Cir. 2005). Though the agent testified that he had spoken with the defendant at least twice, he could not provide testimony as to the duration or circumstances of any direct encounter with the defendant. As a result, the Ninth Circuit concluded that the agent's level of familiarity with the defendant fell short of *Beck* and FRE 701's requirement of helpfulness.

Since speculation, as opposed to opinions based on sense perceptions, is not permitted, counsel should be particularly on guard against improper conclusions couched in terms of a permissible lay opinion. Commonly encountered examples include statements such as "I *think* it was the defendant:" "my best *impression* is that she was going 45 mph," and "I *believe* the platform was over two feet wide." Such statements should be probed to determine whether, although somewhat uncertain, they are rationally based on personal observation, or are guesses or speculation without an adequate factual basis. *See, e.g., State v. Easter,* 130 Wash. 2d 228, 922 P.2d 1285, 1288 (1996) (testimony by police officer that defendant's silence prior to his arrest was indicative that he was a "smart drunk," was evasive, "wouldn't talk," and was hiding something went beyond opinion and was more pejorative; the trial court, therefore, violated defendant's Fifth Amendment right to remain silent by admitting the testimony).

Rule 702.

TESTIMONY BY EXPERTS

SYNOPSIS

§ 702.01 Text of Rule 702

Rule 702. TESTIMONY BY EXPERTS

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

§ 702.02 Task Force Comment 702

[Deleted effective September 1, 2006.]

This rule is the same as Federal Rule 702 before the December 1, 2000 amendments, and is consistent with previous law giving the court broad discretion to determine whether a witness is qualified to express an expert opinion. *See State v. Tatum,* 58 Wash.2d 73, 360 P.2d 754 (1961).

The Washington Supreme Court has more recently cited section 401 of the Model Code of Evidence as governing the admissibility of expert testimony. *See Church v. West,* 75 Wash.2d 502, 452 P.2d 265 (1969). However, the results and language of these opinions indicate that in effect the Court interprets section 401 in line with the prior general Washington case law. 5 R. Meisenholder, Wash. Prac. § 351 (1975 Supp.).

§ 702.03 FRE Advisory Committee's Note

An intelligent evaluation of facts is often difficult or impossible without the application of some scientific, technical, or other specialized knowledge. The most common source of this knowledge is the expert witness, although there are other techniques for supplying it.

Most of the literature assumes that experts testify only in the form of opinions. The assumption is logically unfounded. The rule accordingly recognizes that an expert on the stand may give a dissertation or exposition of scientific or other principles relevant to the case, leaving the trier of fact to apply them to the facts. Since much of the criticism of expert testimony has centered upon the hypothetical question, it seems wise to recognize that opinions are not indispensable and to encourage the use of expert testimony in non-opinion form when counsel believes the trier can itself draw the requisite reference. The use of opinions is not abolished by the rule, however. It will continue to be permissible for the

expert to take the further step of suggesting the inference which should be drawn from applying the specialized knowledge to the facts. See Rules 703 to 705.

Whether the situation is a proper one for the use of expert testimony is to be determined on the basis of assisting the trier. "There is no more certain test for determining when experts may be used than the common sense inquiry whether the untrained layman would be qualified to determine intelligently and to the best possible degree the particular issue without enlightenment from those having a specialized understanding of the subject involved in the dispute." Ladd, *Expert Testimony,* 5 Vand.L. Rev. 414, 418 (1952). When opinions are excluded, it is because they are unhelpful and therefore superfluous and a waste of time. 7 Wigmore § 1918.

The rule is broadly phrased. The fields of knowledge which may be drawn upon are not limited merely to the "scientific" and "technical" but extended to all "specialized" knowledge. Similarly, the expert is viewed, not in a narrow sense, but as a person qualified by "knowledge, skill, experience, training or education." Thus within the scope of the rule are not only experts in the strictest sense of the word, e.g. physicians, physicists, and architects, but also the large group sometimes called "skilled" witnesses, such as bankers or landowners testifying to land values.

§ 702.04 Editor's Analysis

[1] Comparison to Prior Law

Whether a situation calls for the use of expert testimony should be determined on the basis of assisting the trier of fact. The two questions typically posed under ER 702 are: (1) whether the witness qualifies as an expert; and (2) whether expert opinion would be helpful to the trier of fact on the issue in question. Both determinations are regarded as primarily factual issues, governed by ER 104(a). *See* **Editor's Analysis, ER 104;** *see generally* K. Tegland, 5A *Washington Practice, Evidence* § 288 (2d ed. 1982 & Supp.).

Under prior law, the test was generally assumed to contain three elements: (1) whether the subject was beyond the ken (or common understanding) of the average juror; (2) whether the expert was qualified by education and training to express an opinion on the subject; and (3)

whether the expert was able to testify to a reasonable degree of probability or certainty. As discussed in [2], below, the first element is now subsumed under ER 702's "helpful to the jury" rubric. If the subject is within the common understanding of the average juror, expert testimony is unlikely to be "helpful."

The second element is basically unchanged, other than adding "experience" to the bases for obtaining expertise. *See, e.g., State v. Toomey,* 38 Wash. App. 831, 690 P.2d 1175, 1178 (1984) (juvenile probation officer qualified by 11 years' experience in that position to express expert opinion that neither time nor facilities in juvenile system were sufficient to treat the defendant effectively); *State v. Avendano-Lopez,* 79 Wash. App. 706, 904 P.2d 324, 327 (1995) (not error to qualify police officer as an expert to explain "the arcane world of drug dealing and certain drug transactions"); *State v. Campbell,* 78 Wash. App. 813, 901 P.2d 1050, 1055 (1995) (not error to allow testimony from the state's "gang experts" about the codes of conduct and other social dynamics in gangs); *State v. Simon,* 64 Wash. App. 948, 831 P.2d 139, 142 (1991) (not error for trial court to qualify detective as expert and allow testimony as to prostitute's relationship with pimp-boyfriend, when detective investigated street prostitution, over 400 prostitution-related crimes, and over 50 "promoting prostitution" cases, for over six years); *Channel v. Mills,* 77 Wash. App. 268, 890 P.2d 535, 538 (1995) (it was error to exclude testimony of an engineer merely because he was unlicensed in the state); *Taylor v. Baseball Club of Seattle, L.P.*, 132 Wash. App. 32, 130 P.3d 835, 839–40 (2006) (testimony of professional baseball pitching coach properly admitted as he was qualified to testify as expert on athletes' preparation for games). *But cf. Hedlund v. White,* 67 Wash. App. 409, 836 P.2d 250, 253 (1992) (not error for trial court to exclude plaintiff husband's testimony as to cost of removing silt from a slough where husband arguably not qualified as an expert). *See also State v. Murphy,* 35 Wash. App. 658, 669 P.2d 891, 894 (1983); *Massok v. Keller Indus.*, 147 F. App'x 651 (9th Cir. 2005) (holding that the district court did not abuse its discretion under FRE 702 in a product liability action against a ladder manufacturer by determining that the plaintiff's expert witness was not qualified because he had never tested any loads on the plaintiff's ladder, had never designed ladders or written on the subject, did not have a Ph.D, and based his conclusions on inadequate testing).

The trend in Washington courts to admit experienced-based expert testimony is consistent with the practice of federal courts in the Ninth