Alabama Rules of Evidence

Article VII. Opinions and Expert Testimony

Rule 701.

Opinion testimony by lay witnesses.

If the witness is not testifying as an expert, the witness's 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's testimony or the determination of a fact in issue.

Advisory Committee's Notes

Traditional common law, including that in Alabama, generally has precluded a lay witness from giving an opinion. The law has required that the witness place all the facts before the trier of fact, thus placing the trier of fact in just as good a position as the witness to draw a conclusion in the matter. Indeed, it has been said that permitting a lay witness to give an opinion preempts the role assigned to the jurors. *Boatwright v. State*, 351 So.2d 1366 (Ala.1977); C. Gamble, McElroy's Alabama Evidence § 127.01(2) (4th ed. 1991).

The rule excluding opinion evidence has been under consistent attack through the years. Professor Morgan argued that it merely furnishes the basis for both foolish appeals and foolish reversals. E. Morgan, Basic Problems of Evidence 220 (1963). Dean Wigmore argued for its total abolition. 7 J. Wigmore, Wigmore on Evidence § 1929 (Chadbourn Rev. 1978). Criticism of this rule finally led to Fed.R.Evid. 701, which vests the trial court with discretion to permit lay witnesses to give opinions but only under certain conditions.

Alabama Rule of Evidence 701, like its identical counterpart under the Federal Rules of Evidence, permits lay witnesses to give opinions whenever two conditions are met. First, the opinion must be rationally based upon the perception of the witness. This is no more than a restatement of the "firsthand knowledge rule," found in Ala.R.Evid. 602, tailored to opinions. No lay witness may give an opinion based upon facts that the witness did not personally observe. Second, a lay witness with firsthand knowledge may give an opinion only if it is helpful to a clear understanding of the witness's testimony or to the determination of a fact in issue. A fair amount of discretion is vested in the trial judge regarding the determination of whether opinions are helpful. It is clear, however, that opinions should be excluded as not being helpful if they are "meaningless assertions which amount to little more than choosing up sides." Fed.R.Evid. 701 advisory committee's note. Assertions that one is "liable," "guilty," or "at fault" generally would not be helpful and thus would properly be excluded. See *United States v. Ness*, 665 F.2d 248, 249-50 (8th Cir.1981) (proper to preclude opinion that defendant had no intent to "hurt" the bank from which he allegedly misappropriated funds); *United States v. Baskes*, 649 F. 2d 471, 478 (7th Cir.1980), cert. denied, 450 U.S. 1000 (1981) (holding it not helpful for a witness to be allowed to testify that conduct was "unlawful" or "wilful"); *Scheib v. Williams-McWilliams Co*., 628 F.2d 509, 511 (5th Cir.1980) (trial court did not abuse its discretion by precluding lay opinion that a dredge tender was "dangerous").

The common law of Alabama has seen the evolution of many exceptions that allow opinion evidence notwithstanding the general rule of exclusion. The committee contemplates that most, if not all, of those exceptions will be recognized under Rule 701, under the analysis that in those situations the opinions are "helpful" to the trier of fact. Alabama has long recognized, for example, that a lay witness may give an opinion when the witness is unable to relate the facts to the jurors well enough to place the jurors in as good a position as the witness was in to reach an opinion or to draw a conclusion. Some would call this the "collective facts" exception to the opinion evidence rule. See *Matthews Bros. Constr. Co. v. Lopez*, 434 So.2d 1369 (Ala.1983) (lay witness permitted to give opinion as to freshness or age of skidmarks); *Sanford v. Sanford*, 355 So.2d 365 (Ala.1978) (lay opinion as to value); *Jones v. Moore*, 322 So.2d 682 (Ala.1975) (lay opinion as to another's mental capacity); *Burke v. Tidwell*, 211 Ala. 673, 101 So. 599 (1924) (lay witness allowed to testify that another was "drunk"); C. Gamble, McElroy's Alabama Evidence §§ 127.01(3), 128.01 (lay witness's opinion that another was sane), 128.02 (lay opinion that another was insane), 128.03 (attesting witness's opinion as to mental capacity of a testator), 128.10(2) (admissibility of lay opinion as to the actual bodily condition of another), 128.10(3) (admissibility of lay opinion as to the apparent bodily condition of another), 128.10(4) (lay opinion as to one's own bodily condition) (4th ed. 1991).