Is the Witness a Fact Witness or an Expert?
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We have all listened to a witness testify, whether in court or in a deposition, where the witness starts to offer opinions as to liability or damages. You should probably ask yourself, what do you do next? While witnesses may testify as hybrid fact and expert witnesses, it is always helpful to know both the distinctions between such testimony and the requirements of each.

Fact witnesses may give opinion testimony if they are based on the rational perception of the witness and are helpful to a clear understanding of the fact issue. In contrast, expert witnesses must be qualified by knowledge, skill, experience, training or education in an area of scientific, technical or other specialized knowledge. Not all witnesses are one or the other. For example, what type of witness is the bank president who has specialized knowledge of the banking industry or the investigating officer who has specialized knowledge of accident reconstruction? It may depend on your ultimate goal in the case and at which counsel table you sit.

Litigation is becoming more specialized. A dispute over a foreclosure on real property does not require the same type of witnesses as the personal injury case involving a motor vehicle accident; yet each of them may have hybrid witnesses. These witnesses will provide both fact testimony that may lead to valuable and useful expert testimony without the need to incur the costs of retained experts. A bank president who can explain the intricacies of the foreclosure process used within his bank may prove very useful when attempting to convince a jury that a foreclosure was proper. An investigating police officer who has investigated and reconstructed hundreds of accident scenes may be very useful in explaining the contributing factors listed on a particular accident report and which of them may be relevant in the jury’s deliberations.

A person with specialized knowledge may testify about their own observations under Texas Rule of Evidence 701 and may also testify about the theories, facts and/or data used in their specific area of experience under Rule of Evidence 702. Unfortunately, a distinct line cannot be drawn between lay opinion and expert testimony. All perceptions are based on experience and each must be evaluated within the confines of the facts presented and the witnesses’ experience. Generally, a lay witness, whose testimony does not require significant expertise to interpret or explain and which is not based on a specialized knowledge, will be permitted to testify as to their individual experiences and observations. When a jury may not fully understand the evidence or if the jury is not able to reach a determination of a fact issue without the assistance of a witness with specialized knowledge, it is then that expert witness testimony may be required. Indeed, it is even possible for an expert witness to provide lay opinion testimony based on their own observations and experiences.

Courts have a great deal of discretion in determining whether or not a witness qualifies as an expert or whether their opinions are simply that of a lay person. In order for a witness to testify as an expert, the court must determine whether there is an issue for which expert testimony is needed to assist the jury. If so, the court must determine whether the chosen witness is qualified to be an expert.

General specialized knowledge is not sufficient by itself to qualify a lay witness as an expert. As was demonstrated in My Cousin Vinny, the witness must have particular expertise in a relevant area and the witness must have expertise or practical knowledge of the specific question at issue, not simply general knowledge in the area. For example, an expert neurologist may be able to give expert testimony regarding his treatment of patients who may have suffered a stroke and may also testify as to his hospital’s protocol with respect to such treatment; but without qualifying him as an expert, the doctor cannot opine on the protocols utilized by other hospitals for such treatment as there is no basis for such opinion. The lesson is to listen to the testimony, research the witness and determine whether the testimony is lay testimony or expert testimony. Each case will be different.