

2013

## You Must Be This Qualified to Offer an Opinion: Permitting Law Enforcement Officers to Testify as Laypersons Under Federal Rule of Evidence 701

Kim Channick

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### Recommended Citation

Kim Channick, *You Must Be This Qualified to Offer an Opinion: Permitting Law Enforcement Officers to Testify as Laypersons Under Federal Rule of Evidence 701*, 81 Fordham L. Rev. 3439 (2013).

Available at: <https://ir.lawnet.fordham.edu/flr/vol81/iss6/9>

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## NOTES

### **YOU MUST BE THIS QUALIFIED TO OFFER AN OPINION: PERMITTING LAW ENFORCEMENT OFFICERS TO TESTIFY AS LAYPERSONS UNDER FEDERAL RULE OF EVIDENCE 701**

*Kim Channick\**

*Every day, in courtrooms across the United States, law enforcement officers testify in criminal and civil trials. Often an officer is certified as an expert witness and, accordingly, can provide opinions to the court based on his or her law enforcement expertise. Other times, the officer offers testimony as a layperson. In the latter situation, Federal Rule of Evidence 701 controls the officer's lay opinion testimony. This Rule was first adopted to remedy a problematic common law practice of universally prohibiting lay opinion testimony. As the Rule stands now, all lay witnesses, including law enforcement officers, must limit their opinions to ones that are based on their personal perceptions and that are helpful to the fact-finder.*

*Courts, however, are split regarding where to draw the line when lay officers are asked to provide lay opinion testimony about an investigation. In particular, courts have disagreed over the question of when a lay officer may provide opinion testimony about the meaning of recorded phone calls. This Note explores the three approaches the federal circuit courts take to this question. To resolve the split, this Note suggests that an amended version of the Second, Fourth, and Eighth Circuits' approaches be adopted. These circuits hold that officers' lay opinion testimony must be restricted to instances of true first-hand knowledge to ensure that jurors are not prejudiced by unqualified and unhelpful testimony.*

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#### INTRODUCTION

We have all recounted hilarious or dramatic events that fell flat as stories. Sometimes “you had to be there,”<sup>1</sup> and the retelling does not quite capture the moment. Indeed, many life experiences can be difficult to fully recreate

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1. *United States v. Garcia*, 413 F.3d 201, 212 (2d Cir. 2005).

solely with words. Yet we often ask witnesses to do just that: use facts alone to convey complex scenarios and experiences.

In our system, the jury or the judge, sitting as fact-finder, decides questions of fact.<sup>2</sup> To assist in the proper determination of disputed facts, plaintiffs and defendants provide the fact-finder with concrete evidence. Simultaneously, courts police this evidence, enforcing procedural and evidentiary rules that act to maintain fair and nonprejudicial trials. Witness testimony is one main way that the fact-finder obtains information about the situation in question. Although witnesses are generally required to speak in terms of facts,<sup>3</sup> the reality that sometimes “you had to be there” often means that witnesses are unable to provide an explanation of a situation with facts alone. Thus, under the right circumstances, witnesses—both lay and expert—are permitted to provide opinions or make inferential statements that will enable the witness to paint the most accurate possible picture of the situation.<sup>4</sup>

While in some instances allowing lay witnesses to offer opinions will better convey the “whole story,” this practice can also raise concerns about invading the province of the jury<sup>5</sup> or opening the door to otherwise inadmissible evidence.<sup>6</sup> Federal Rule of Evidence 701, which dictates the admissibility of lay opinion testimony, limits the circumstances when laypersons may offer opinions in order to avoid exactly these types of concerns.<sup>7</sup> Under Rule 701, lay opinion testimony must be (a) “rationally based on the witness’s perception,” (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.”<sup>8</sup> While some lay opinion testimony will unquestionably satisfy these requirements, other testimony presents harder questions of admissibility, testing the boundaries of the Rule.

This Note will explore the issues that Rule 701 raises by examining how opinion testimony restrictions are applied to the testimony of law enforcement officers in criminal cases. In these cases, law enforcement officers may possess knowledge of the various investigation methods that were used, the people involved, and the essential timeline of the investigation process. Frequently, testimony about these matters is relevant

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2. BLACK’S LAW DICTIONARY 671 (9th ed. 2009) (defining “fact-finder” as “[o]ne or more persons—such as jurors in a trial or administrative-law judges in a hearing—who hear testimony and review evidence to rule on a factual issue”).

3. See 1 KENNETH S. BROUN, MCCORMICK ON EVIDENCE § 11, at 56 (6th ed. 2006).

4. See FED. R. EVID. 701.

5. See 29 CHARLES ALAN WRIGHT & VICTOR JAMES GOLD, FEDERAL PRACTICE AND PROCEDURE § 6253, at 109–10 (1997).

6. See *United States v. Freeman*, 498 F.3d 893, 898 (9th Cir. 2007) (noting that the appellant argued that the lay opinion testimony allowed the prosecution to admit otherwise inadmissible hearsay); Mary Morton, Note, *The Hearsay Rule and Epistemological Suicide*, 74 GEO. L.J. 1301, 1305 (1986) (arguing that the lay opinion rule makes it impossible to ban all hearsay).

7. See FED. R. EVID. 701 advisory committee’s note (1975 adoption).

8. FED. R. EVID. 701.

and admissible as based on personal perception. Questions begin to arise, however, when law enforcement officers are asked to testify beyond the strict boundaries of their personal perception to help the fact-finder overcome that “you had to be there” feeling.

At times, such officers are certified as experts under Federal Rule of Evidence 702 and may provide opinion testimony based on both experience with the case in question and knowledge obtained in the course of their law enforcement career.<sup>9</sup> In other situations, law enforcement officers are not qualified as experts but are permitted to offer lay opinion testimony under Rule 701.<sup>10</sup> The reasons for eliciting lay opinion testimony, rather than qualifying the officer as an expert, vary. Sometimes the officer cannot meet the requirements of Rule 702, which were established in the seminal case *Daubert v. Merrell Dow Pharmaceuticals, Inc.*<sup>11</sup> In other cases, it may be more efficient to use lay opinion.

Whatever the reason, the decision to offer lay opinion testimony of law enforcement officers gives rise to several vexing and recurring questions. When does a law enforcement lay witness possess enough personal knowledge to provide opinions about various aspects of a case? What kind of testimony do we want the jury to hear from these witnesses? The purpose of testimony is to provide the fact-finder with information that is helpful to deciding the facts of the case. Does allowing a law enforcement officer who has investigated a case to provide his opinion about certain pieces of evidence or the case as a whole accomplish this goal or merely substitute the jury’s assessment of the evidence with the law enforcement officer’s assessment?

This Note addresses the three-way circuit split regarding whether lay opinion testimony is admissible under Rule 701 for law enforcement officers who testify regarding an investigation of which they only have general and often after-the-fact knowledge.

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9. Rule 702 reads as follows:

A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if:

- (a) the expert’s scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;
- (b) the testimony is based on sufficient facts or data;
- (c) the testimony is the product of reliable principles and methods; and
- (d) the expert has reliably applied the principles and methods to the facts of the case.

FED. R. EVID. 702; *see also* Brian R. Gallini, *To Serve and Protect? Officers As Expert Witnesses in Federal Drug Prosecutions*, 19 GEO. MASON L. REV. 363, 373 (2012) (describing the application of Rule 702 to a law enforcement officer testifying as an expert regarding code words in a drug transaction); Anne Bowen Poulin, *Experience-Based Opinion Testimony: Strengthening the Lay Opinion Rule*, 39 PEPP. L. REV. 551, 554 (2012) (“Law enforcement officers are routinely permitted to testify as experts based on their law enforcement experience.”).

10. *See, e.g.*, *United States v. Jayyousi*, 657 F.3d 1085, 1102 (11th Cir. 2011); *United States v. Zepeda-Lopez*, 478 F.3d 1213, 1221–22 (10th Cir. 2007).

11. 509 U.S. 579, 589–90 (1993).

The cases analyzed in this Note consider this question by examining Rule 701(a), Rule 701(b), or, in some instances, both. Courts that focus on Rule 701(a)'s requirement that lay opinion testimony be "rationally based on the witness's perception,"<sup>12</sup> consider the nature of the witness's relationship with the situation in question.<sup>13</sup> These courts discuss, either directly or indirectly, whether the witness's personal experience with the evidence rises to the level of "first-hand knowledge or observation."<sup>14</sup> Courts that instead focus on Rule 701(b)'s requirement that lay opinion testimony be "helpful to clearly understanding the witness's testimony or to determining a fact in issue,"<sup>15</sup> consider whether the witness's supposed personal knowledge contributes any useful information to the jury's understanding of the case.<sup>16</sup> While circuit courts discuss the issue in different ways, the underlying inquiry is the same. Courts ask whether the lay witness's knowledge of the situation enhances the fact-finder's ability to properly decide the case.

Part I of this Note will provide background information about Rule 701. This includes a discussion of the Rule's common law origins, the adoption of the Rule, the meaning of the Rule's three requirements, and the Rule's real-world applications. Part II will explain the conflict among the circuits regarding nonexpert law enforcement officers providing opinion testimony about investigations. Finally, Part III will argue that, while the jury should have access to the information it needs to make an accurate decision, this information should be meaningfully limited to exclude unqualified and unhelpful testimony that invades the province of the jury.

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12. FED. R. EVID. 701(a).

13. *See, e.g., Jayyousi*, 657 F.3d at 1103; *United States v. Johnson*, 617 F.3d 286, 292–93 (4th Cir. 2010); *United States v. Rollins*, 544 F.3d 820, 831–32 (7th Cir. 2008); *United States v. Freeman*, 498 F.3d 893, 902, 904–05 (9th Cir. 2007); *United States v. Garcia*, 413 F.3d 201, 211–12 (2d Cir. 2005); *United States v. Peoples*, 250 F.3d 630, 641 (8th Cir. 2001).

14. FED. R. EVID. 701 advisory committee's note. Courts often disfavor the use of legislative history for a variety of reasons. *See* Eileen A. Scallen, *Interpreting the Federal Rules of Evidence: The Use and Abuse of the Advisory Committee Notes*, 28 LOY. L.A. L. REV. 1283, 1284–87 (1995). However, some scholars have suggested that the Advisory Committee notes for the Federal Rules of Evidence do not have the same problems as other forms of legislative history and, therefore, should be given considerable weight. *See* Edward W. Cleary, *Preliminary Notes on Reading the Rules of Evidence*, 57 NEB. L. REV. 908, 913 (1978) ("[The Advisory Committee notes] must be taken to represent the thinking of [Congress] as the equivalent of a committee report effectively serving as the basis of legislation."); Scallen, *supra*, at 1287–93 (discussing the "[s]pecial [q]uality of the Advisory Committee and [i]ts [n]otes"). Many courts interpreting Rule 701 seem to agree with this assessment, as several of the cases analyzed in this Note make specific reference to Rule 701's Advisory Committee note. *See, e.g., Jayyousi*, 657 F.3d at 1120–21; *Garcia*, 413 F.3d at 211; *Peoples*, 250 F.3d at 641 n.3. These continued references to the Advisory Committee note suggest that courts agree with and follow the Advisory Committee's interpretation of Rule 701.

15. FED. R. EVID. 701(a).

16. *See, e.g., Jayyousi*, 657 F.3d at 1103; *United States v. Zepeda-Lopez*, 478 F.3d 1213, 1221–22 (10th Cir. 2007); *Garcia*, 413 F.3d at 210.

## I. FROM COMMON LAW TO RULE 701: THE EVOLUTION OF LAY OPINION TESTIMONY IN THE UNITED STATES

Part I of this Note outlines the evolution of lay testimony in the American court system. Part I.A focuses on the common law's dismissal of lay opinion testimony, as well as the problems the common law approach created. Part I.B examines the rejection of the common law approach and the adoption of Rule 701. Part I.C analyzes the three provisions of Rule 701, highlighting how the Rule is commonly interpreted. Part I.D. addresses the critiques of Rule 701 and the responses to these critiques. Finally, Part I.E provides an overview of the most common uses of Rule 701.

### A. Common Law Lay Testimony

Under Rule 701, lay witnesses—witnesses not qualified as experts—are allowed to offer opinion or inferential testimony when they possess certain personal knowledge of the situation in question and when the nature of the testimony is such that opinions or inferences provide something of value to the trier of fact.<sup>17</sup>

However, at common law, lay testimony differed significantly from the admissible lay testimony of today.<sup>18</sup> Despite providing the origins for the American opinion rule, British courts were markedly less restrictive of opinion testimony than their American counterparts, allowing lay witnesses to offer opinions that were based on personal knowledge.<sup>19</sup> Conversely, at common law, the American court system did not permit lay witnesses to provide opinions.<sup>20</sup> Instead, laypersons were allowed to relate only facts, or as one judge explained, state that which “they had seen, heard, felt, smelled, tasted, or done.”<sup>21</sup> This restrictive approach to lay testimony stemmed from

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17. BLACK'S LAW DICTIONARY, *supra* note 2, at 1741 (defining “lay witness” as “[a] witness who does not testify as an expert and who is therefore restricted to giving an opinion or making an inference that (1) is based on firsthand knowledge, and (2) is helpful in clarifying the testimony or in determining facts”).

18. *See Asplundh Mfg. Div. v. Benton Harbor Eng'g*, 57 F.3d 1190, 1195–99 (3d Cir. 1995) (providing a general history of the evolution of lay opinion testimony and explaining that Rule 701 demonstrates “a movement away from the courts' historically skeptical view of lay opinion evidence”).

19. *See* 1 BROWN, *supra* note 3, § 11, at 51–52; Herman Edgar Garner, Jr., Comment, *Opinion and Expert Evidence Under the Federal Rules*, 36 LA. L. REV. 123, 124 (1975).

20. *See Conn. Mut. Life Ins. Co. v. Lathrop*, 111 U.S. 612, 618 (1884) (explaining that impression and opinion testimony of nonexpert witnesses regarding sanity are inadmissible, even where the witness provides rationales for the statements); JAMES FITZJAMES STEPHEN, A DIGEST OF THE LAW OF EVIDENCE 141 n.1 (George Chase ed., 2d ed. 1912) (“It is a general rule that witnesses must give evidence of facts, not of opinions.”); *see also Asplundh Mfg. Div.*, 57 F.3d at 1195 (noting that common law lay witnesses were not allowed to “draw conclusions which could be characterized as opinion testimony”); Charles R. Richey, *Proposals To Eliminate the Prejudicial Effect of the Use of the Word “Expert” Under the Federal Rules Evidence in Civil and Criminal Jury Trials*, 154 F.R.D. 537, 542 (1994).

21. Richey, *supra* note 20, at 542; *see also Asplundh Mfg. Div.*, 57 F.3d at 1195 (quoting Judge Richey's explanation of lay opinion testimony at common law).

a general skepticism toward the reliability of laypersons' opinions,<sup>22</sup> as well as a belief that it was the jury's job to form opinions, not the witnesses'.<sup>23</sup>

Further, the common law lay testimony rule relied on the misguided principle that facts and opinions are "readily distinguishable."<sup>24</sup> In practice, however, this distinction is not easily made,<sup>25</sup> as any recollection of facts is in some way "the product of inference as well as observation and memory."<sup>26</sup> The following is an example of the way in which even seemingly factual testimony is actually full of inferential and opinion-based statements:

A jury trial. A witness, on direct examination, is describing an automobile accident:

Q. What happened then?

A. The lady in the car that got hit stumbled out of her car and fell in a faint.

Defense counsel: Move to strike the opinions of the witness. Let him state the facts.

22. See 9 W.S. HOLDSWORTH, *A HISTORY OF ENGLISH LAW* 212 (1926) ("[T]he judge is to give an absolute sentence, and therefore ought to have more sure ground than thinking." (quoting *Adams v. Canon*, (1622) 73 Eng. Rep. 117 (K.B.) 118 n.15) (internal quotation marks omitted)); Richey, *supra* note 20, at 542; see also *Asplundh Mfg. Div.*, 57 F.3d at 1195.

23. JAMES BRADLEY THAYER, *A PRELIMINARY TREATISE ON EVIDENCE AT THE COMMON LAW* 524 (1898).

24. 1 BROUN, *supra* note 3, § 11, at 53 (arguing that the "basic assumption" behind the distinction between fact and opinion "is an illusion"); see also 3 STEPHEN A. SALTZBURG ET AL., *FEDERAL RULES OF EVIDENCE MANUAL* § 701.02, at 701-4 (10th ed. 2011) (discussing "[t]he [v]ague [d]istinction [b]etween [o]pinion and [f]act"); 4 JOHN HENRY WIGMORE, *A TREATISE ON THE ANGLO-AMERICAN SYSTEM OF EVIDENCE IN TRIALS AT COMMON LAW* § 1919, at 112 (2d ed. 1923) (arguing that when it comes to distinguishing facts from opinion "no such distinction is scientifically possible"). Famous evidence scholar John Henry Wigmore was quite vocal in his general distaste for the common law opinion rule, asserting that the rule was "developed with a[] . . . peculiar rigidity and stolid disregard of practical consequences." *Id.* § 1929, at 123. Moreover, Wigmore prophesized that "the [o]pinion rule will in substance disappear." *Id.* § 1929, at 124. Judge Learned Hand shared Wigmore's disapproval of the opinion rule, calling it "the most annoying rule in its application that I know." Learned Hand, *The Deficiencies of Trials To Reach the Heart of the Matter*, in 3 *LECTURES ON LEGAL TOPICS* 89, 98 (1926).

25. See FED R. EVID. 701 advisory committee's note ("[T]he 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."); H. Patrick Furman, *Opinion Testimony: Lay, Expert, or Something Else?*, 37 *COLO. LAW.* 33, 33 (2008) (discussing the problem of distinguishing "fact" from "opinion").

26. 1 BROUN, *supra* note 3, § 11, at 53; see also WILLARD L. KING & DOUGLASS PILLINGER, *A STUDY OF THE LAW OF OPINION EVIDENCE IN ILLINOIS* 8 (1942) ("The American courts have had a great struggle with a rule which appeared to require them to admit statements of fact and exclude all inferences of the witness. Such a rule is quite impossible of application: all statements contain inferences."); JOHN MACARTHUR MAGUIRE, *EVIDENCE: COMMON SENSE AND COMMON LAW* 24 (1947) (concluding that, at least in part, all "assertions are opinions"); THAYER, *supra* note 23, at 524 ("In a sense all testimony to matter of fact is opinion evidence; *i. e.*, it is a conclusion formed from phenomena and mental impressions.").

The Court: Strike them out. The jury will disregard that answer. [To the witness:] You must state the facts and not your conclusions regarding them. You can't give the jury your opinion as to which car got hit, whose car it was, how the lady got out of the car or why she fell, if she did fall,—you must state the facts.<sup>27</sup>

Judge Learned Hand provided a famous and eloquent criticism of the common law lay opinion rule, stating that “[t]he line between opinion and fact is at best only one of degree.”<sup>28</sup>

The impossibility of definitively distinguishing facts from opinions created two main problems for common law lay testimony. First, when relating factual situations, witnesses struggled to omit all opinion-based or inferential language, as this type of language naturally permeates witnesses' efforts to provide a detailed description of a situation.<sup>29</sup> Accordingly, lay witnesses often unwittingly overstepped the line between fact and opinion, making the process of lay witnesses testifying an exceedingly difficult one.<sup>30</sup>

A lay witness who is asked to explain how an individual reacted to a situation would most naturally respond that the individual was mad, sad, happy, etc. Under the common law rule, however, a witness was not allowed to state the emotion he or she reasonably inferred the individual to be experiencing.<sup>31</sup> Instead, the witness would need to provide a list of physical characteristics to demonstrate the individual's emotions.<sup>32</sup> For example, instead of testifying that a person appeared angry, common law lay witnesses were required to state that person had a furrowed brow or a red face.<sup>33</sup>

Second, the common law lay testimony rule also created the problem of endless litigation over the question of whether testimony constituted fact or

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27. KING & PILLINGER, *supra* note 26, at 1.

28. *Cent. R. Co. of N.J. v. Monahan*, 11 F.2d 212, 214 (2d Cir. 1926); *see also* *Beech Aircraft Corp. v. Rainey*, 488 U.S. 153, 168 (1988) (repeating Judge Hand's remark regarding the difference between facts and opinions).

29. *See* FED. R. EVID. 701 advisory committee's note (emphasizing the struggle witnesses experienced when attempting to speak without any opinions or inferences); *United States v. Garcia*, 413 F.3d 201, 211 (2d Cir. 2005) (explaining that often it is difficult for witnesses “to describe the appearance or relationship of persons, the atmosphere of a place, or the value of an object by reference only to objective facts”).

30. *See Cent. R. Co.*, 11 F.2d at 214 (observing that “the witness cannot comply [with the common law lay witness rule], since, like most men, he is unaware of the extent to which inference enters into his perceptions”); Hand, *supra* note 24, at 97–98 (1926) (“I know of [no rule] more baffling to a witness, who has been accustomed to proceed exactly in that fashion in proving his points outside of court.”); *see also* *Asplundh Mfg. Div. v. Benton Harbor Eng'g*, 57 F.3d 1190, 1195 (3d Cir. 1995) (citing Judge Hand's criticism regarding the unnecessary difficulty the common law lay witness rule placed on witnesses).

31. *See* 4 WIGMORE, *supra* note 24, § 1917, at 101 (explaining that, at common law, judges frequently would say to a witness “we want what you *know*, not what you *think* or *believe*” (internal quotation marks omitted)).

32. 3 SALTZBURG ET AL., *supra* note 24, § 701.02, at 701-5.

33. *See id.*

opinion,<sup>34</sup> a distinction that proved impossible to determine consistently.<sup>35</sup> Wigmore explained that the attempt to distinguish facts from opinions did “more than any one rule of procedure to reduce our litigation towards a state of legalized gambling.”<sup>36</sup>

Despite the procedural problems that the common law rule created, courts were slow to abandon the strict opinion-fact distinction.<sup>37</sup> Initially the rule was only relaxed in extreme cases of necessity.<sup>38</sup> Over time, however, concerns about the functionality of the lay witness rule increased.<sup>39</sup> Additionally, the American court system experienced a “general liberalization” of all evidentiary rules that acted to keep evidence from the fact-finder.<sup>40</sup>

### B. *The Adoption of Rule 701*

In 1975, given the problems experienced under the common law opinion rule, Rule 701 was adopted.<sup>41</sup> The adoption of Rule 701, however, did not represent a sudden shift in preference from factual testimony to opinion testimony. Even under Rule 701, witnesses are still encouraged to provide testimony in the form of facts as often as possible.<sup>42</sup> The continued

34. See FED. R. EVID. 701 advisory committee’s note (addressing the century spent litigating the difference between facts and opinions); *Asplundh Mfg. Div.*, 57 F.3d at 1195 (noting the “numerous appeals” that resulted from the strict fact-opinion distinction); 2 EDMUND M. MORGAN, *BASIC PROBLEMS OF EVIDENCE* 195–96 (1954) (stating that the bar on lay opinion testimony resulted in “many foolish reversals and still more foolish appeals”).

35. See 3 CHRISTOPHER B. MUELLER & LAIRD C. KIRKPATRICK, *FEDERAL EVIDENCE* § 7:1, at 748 (3d ed. 2007) (describing the inadmissibility of lay opinion testimony as a “mischievous . . . instrument of review”); 4 WIGMORE, *supra* note 24, § 1929, at 124 (arguing that the common law opinion rule was in part problematic because of “the utter impossibility of a consistent application of the rule, and the consequent uncertainty of the law”).

36. 4 WIGMORE, *supra* note 24, § 1929, at 124.

37. See 1 BROUN, *supra* note 3, § 11, at 53.

38. See *Grismore v. Consol. Prods. Co.*, 5 N.W.2d 646, 655 (Iowa 1942) (finding that opinions are admissible in the case of necessity); *Balt. & O. R. Co. v. Schultz*, 1 N.E. 324, 332 (Ohio 1885) (finding that lay witnesses may give opinions only where the opinion is “necessary to the due administration of justice” and provides material information about the issue in question); *Graham v. Pa. Co.*, 21 A. 151, 153 (Pa. 1891) (concluding that, where facts are sufficient to describe a situation, opinions will be inadmissible); 2 MORGAN, *supra* note 34, at 191 (using Rule 401 of the American Law Institute’s Model Code—which states that a witness may not offer opinion if “the witness can readily and with equal accuracy and adequacy communicate what he has perceived to the trier of fact without testifying in terms of inferences or stating inferences”—to demonstrate the then-current state of opinion testimony); see also 1 BROUN, *supra* note 3, § 11, at 53–54.

39. See *Asplundh Mfg. Div.*, 57 F.3d at 1195.

40. *Id.*

41. See JACK B. WEINSTEIN & MARGARET A. BERGER, *WEINSTEIN’S EVIDENCE MANUAL STUDENT EDITION* § 10.02[1], at 10-9 (9th ed. 2011); D. Garrison Hill, *Lay Witness Opinions*, 19 S.C. LAW. 34, 36 (2007) (“With the adoption of the Federal Rule of Evidence 701 in 1972, the federal courts retreated from their longstanding hostility towards lay opinion evidence.”).

42. See 1 BROUN, *supra* note 3, § 11, at 56; 3 MUELLER & KIRKPATRICK, *supra* note 35, § 7:2, at 749 (arguing that the conditions put on lay testimony under Rule 701 represent “a mild rule of preference” that usually lay witnesses should testify with facts and not opinions or inferences).

emphasis on facts over opinions reflects the ultimate goal of all evidence, which is to provide the fact-finder with the best information and details upon which an independent opinion can be formed.<sup>43</sup>

When Rule 701 was initially adopted in 1975 it contained the following language:

If the witness is not testifying as an expert, his 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 his testimony or the determination of a fact in issue.<sup>44</sup>

Soon after the Rule was adopted, the desirability of refinement became evident. Following the adoption of the Federal Rules of Evidence, both lay witnesses, under Rule 701,<sup>45</sup> and expert witnesses, under Rule 702,<sup>46</sup> were permitted to give opinions.<sup>47</sup> This eliminated the fundamental advantage of offering a witness as an expert.<sup>48</sup> Moreover, under the original version of Rule 701, attorneys often had significant discretion to determine whether to offer an experienced witness as an expert or as a layperson,<sup>49</sup> as some courts allowed opinion testimony “based on scientific, technical, or other specialized knowledge”<sup>50</sup> under Rule 701, viewing the distinction between Rule 701 and Rule 702 with general indifference.<sup>51</sup>

At times, lawyers chose to admit a witness as a layperson in order to avoid special procedural barriers placed on expert witnesses.<sup>52</sup> Laypersons were not required to go through “expert-discovery obligations” and, further, did not experience the same scrutiny of their reliability that judges often inflicted upon expert witnesses.<sup>53</sup>

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43. See FED. R. EVID. 701 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.”); 1 BROWN, *supra* note 3, § 11, at 56; 3 MUELLER & KIRKPATRICK, *supra* note 35, § 7:1, at 747, § 7.2, at 749–50; Garner, *supra* note 19, at 123 (highlighting the strong emphasis the American court system has placed on providing the fact-finder with the “best evidence possible” to determine an issue).

44. FED. R. EVID. 701 (1975) (subsequently amended).

45. FED. R. EVID. 701.

46. FED. R. EVID. 702.

47. PAUL F. ROTHSTEIN, FEDERAL RULES OF EVIDENCE 502 (3d ed. 2012).

48. *Id.*

49. See *id.* at 501.

50. FED. R. EVID. 701.

51. See, e.g., *Greenwood Ranches, Inc. v. Skie Constr. Co.*, 629 F.2d 518, 522 (8th Cir. 1980) (allowing ranch operator-owner to testify as a lay witness to the value of crops); *S. Cent. Livestock Dealers, Inc. v. Sec. State Bank of Hedley*, 614 F.2d 1056, 1061–62 (5th Cir. 1980) (permitting the financial officer for a feedlot to testify about the value of the feedlot’s assets and liabilities as a layman under Rule 701 and as an expert under Rule 702); see also ROTHSTEIN, *supra* note 47, at 503; WEINSTEIN & BERGER, *supra* note 41, § 10.02[2][c], at 10-14.

52. ROTHSTEIN, *supra* note 47, at 502.

53. *Id.*

However, two important Supreme Court cases in the 1990s, *Daubert*<sup>54</sup> and *Kumho Tire Co. v. Carmichael*<sup>55</sup> increased the standards for expert testimony, requiring that the reliability of an expert's methods be tested prior to admission.<sup>56</sup> Accordingly, in 2000, the language of Rule 701 and Rule 702 was amended, both to codify the standards that the Supreme Court set for expert testimony<sup>57</sup> and to prevent "proffering an expert in lay witness clothing."<sup>58</sup>

Under the new Rules, parties should not be able to avoid either the reliability requirements of Rule 702<sup>59</sup> or "the expert witness pretrial disclosure requirements of Federal Rule of Civil Procedure 26 and Federal Rule of Criminal Procedure 16."<sup>60</sup>

### *C. Interpreting the Provisions of Rule 701*

This part explores the three provisions of Rule 701, explaining how each plays a part in the functioning of the Rule and the restricting of lay opinion testimony. This part highlights both the interpretations of Rule 701 that enjoy general acceptance, as well the interpretations that have received a mixed reception.

The current version of Rule 701 reads as follows:

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;
- (b) helpful to clearly understanding the witness's testimony or to determine a fact in issue; and
- (c) not based on scientific, technical, or other specialized knowledge within the scope of Rule 702.<sup>61</sup>

Notably, while the sections below attempt to explain the meaning of each prong of Rule 701, the Rule provides judges with significant discretion to determine what constitutes admissible lay opinion testimony.<sup>62</sup>

54. 509 U.S. 579 (1993).

55. 526 U.S. 137 (1999).

56. See Edward J. Imwinkelried, *Evaluating the Reliability of Nonscientific Expert Testimony: A Partial Answer to the Questions Left Unresolved by Kumho Tire Co. v. Carmichael*, 52 ME. L. REV. 19, 20–23 (2000); Poulin, *supra* note 9, at 558–59.

57. See Poulin, *supra* note 9, at 559.

58. FED. R. EVID. 701 advisory committee's note (2000 amendment).

59. *Id.*; see also 4 JACK B. WEINSTEIN & MARGARET A. BERGER, WEINSTEIN'S FEDERAL EVIDENCE: COMMENTARY ON RULES OF EVIDENCE FOR THE UNITED STATES COURTS § 701.03[4][b], at 701-31 (Joseph M. McLaughlin ed., 2d ed. 2013) (explaining that the reliability requirement of Rule 702 stems from the Supreme Court's decision in *Daubert*).

60. 4 WEINSTEIN & BERGER, *supra* note 59, § 701.03[4][b], at 701-31 (citing FED. R. CIV. P. 26; FED. R. CRIM. P. 16).

61. FED. R. EVID. 701. This version of Rule 701 also reflects amendments that were made to the Rule in 2011. However, the changes made to the Rule in 2011 were purely stylistic in nature and were not intended to have any effect on the practical application of the Rule. See *id.* advisory committee's note (2011 amendment).

### 1. Rule 701(a) and the Requirement That Testimony Be Rationally Based on the Witness's Perception

In analyzing the meaning of Rule 701(a), it is more accurate to separate the provision into two distinct requirements.<sup>63</sup> First, 701(a) requires that lay opinion testimony be based on the “witness’s perception.”<sup>64</sup> Second, the witness’s testimony must be “rationally based” on this perception.<sup>65</sup>

Rule 701’s Advisory Committee note characterizes a “witness’s perception” as “the familiar requirement of first-hand knowledge or observation.”<sup>66</sup> The requirement that a witness testify based on first-hand knowledge, otherwise referred to as personal knowledge, is not unique to Rule 701 and, in fact, finds its origins in medieval law.<sup>67</sup> Moreover, personal knowledge also appears in Rule 602, which requires that all layperson testimony, whether expressing an opinion or not, be founded in personal knowledge.<sup>68</sup>

The emphasis on personal knowledge stems from “the law’s usual preference that decisions be based on the best evidence available.”<sup>69</sup> Some distortion occurs each time the events of an incident are retold; thus making testimony directly from the person who perceived the incident the most reliable version.<sup>70</sup> Moreover, where a layperson is offering an opinion, courts want to be sure that the individual rests his assertion upon a “competent foundation.”<sup>71</sup>

What it means to possess “first-hand knowledge” of something is not entirely clear. Indeed, this question lies at the heart of this Note’s inquiry.<sup>72</sup> However, despite the difficulty of determining the outer bounds of first-

62. 29 WRIGHT & GOLD, *supra* note 5, § 6253, at 116 (“By leaving the concepts of opinion and inference undefined, the drafters bestowed upon the courts considerable discretion to determine the scope of Rule 701.”).

63. *See* Poulin, *supra* note 9, at 560 (explaining that Rule 701 can be divided into “four hurdles”).

64. FED. R. EVID. 701.

65. *Id.*

66. *Id.* advisory committee’s note.

67. *See* 1 BROUN, *supra* note 3, § 11, at 52 (“The early courts demanded that witnesses speak only ‘what they see and hear.’”).

68. 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. Evidence to prove personal knowledge may consist of the witness’s own testimony. This rule does not apply to a witness’s expert testimony under Rule 703.”); *see also* 3 MUELLER & KIRKPATRICK, *supra* note 35, § 7:2, at 750, § 7:3, at 751.

69. 3 WEINSTEIN & BERGER, *supra* note 59, § 602.02[1], at 602-3; *see also* 1 BROUN, *supra* note 3, § 10, at 47 (common law emphasized the “most reliable sources”); Dale A. Nance, *The Best Evidence Principle*, 73 IOWA L. REV. 227, 227 (1988) (going beyond the requirement of original documents, Nance argues that principles of evidence dictate that parties should always offer the court “the best evidence reasonably available on a litigated factual issue”).

70. 3 WEINSTEIN & BERGER, *supra* note 59, § 602.02[1], at 602-3.

71. Garner, *supra* note 19, at 126.

72. *See infra* Part II.

hand knowledge, there are several forms of first-hand knowledge that are generally accepted as sufficient to satisfy Rule 701(a).

First, the actual “observations of [an] event or situation” clearly fall within the definition of first-hand knowledge.<sup>73</sup> In these situations, lay opinion testimony is often described as little more than a shorthand account of a situation<sup>74</sup> where the witness is able to give useful and descriptive inferential statements instead of reciting exhaustive, detailed facts.<sup>75</sup> Similarly, a witness’s perception may also be based on a collection “of personal observations over time.”<sup>76</sup>

Courts also often admit lay opinion testimony that is based on the witness’s first-hand perception of the incident in question coupled with background knowledge obtained “through earlier personal observations.”<sup>77</sup> Some courts take Rule 701 even further, allowing witnesses to provide

73. 4 WEINSTEIN & BERGER, *supra* note 59, § 701.03[1], at 701-5.

74. *See* Asplundh Mfg. Div. v. Benton Harbor Eng’g, 57 F.3d 1190, 1196 (3d Cir. 1995); 1 BROWN, *supra* note 3, § 11, at 54; 4 WEINSTEIN & BERGER, *supra* note 59, § 701.03[1], at 701-5.

75. *See, e.g.*, United States v. Rodríguez-Vélez, 597 F.3d 32, 40–41 (1st Cir. 2010) (admitting lay opinion testimony that the defendant and two others “had the strongest say” in staffing a drug surveillance tower, when the testimony was given by a witness who had participated in the narcotic conspiracy in question); United States v. Lane, 591 F.3d 921, 926 (7th Cir. 2010) (finding that an officer who searched the defendant’s home could provide an opinion about which bedroom the defendant lived in); United States v. Yannotti, 541 F.3d 112, 125–26 (2d Cir. 2008) (upholding the admittance of a co-conspirator’s lay opinion testimony about the meaning of his accomplice’s words in an intercepted phone call).

76. 4 WEINSTEIN & BERGER, *supra* note 59, § 701.03[1], at 701-6.1 to -7; *see, e.g.*, United States v. Whitten, 610 F.3d 168, 179 n.3 (2d Cir. 2010) (allowing a former gang member to testify to the effects an act of violence generally would have on a gang member’s status); United States v. Holmes, 229 F.3d 782, 788–89 (9th Cir. 2000) (concluding that six meetings with the defendant, lasting at least thirty minutes each, formed a sufficient basis for the lay witness to offer an opinion about whether the defendant was the individual in bank surveillance photographs); United States v. Williams, 952 F.2d 1504, 1518 (6th Cir. 1991) (holding that lay witnesses were allowed to give their opinions about the sheriff’s political power, when the testimony was based on extensive experience with the sheriff over a considerable period of time).

77. 4 WEINSTEIN & BERGER, *supra* note 59, § 701.03[1], at 701-7; *see, e.g.*, United States v. Gaines, 170 F.3d 72, 76–78 (1st Cir. 1999) (finding the trial court’s admission of lay opinion testimony proper, where the witness opined about the meaning of recorded calls in which the witness participated); Haun v. Ideal Indus. Inc., 81 F.3d 541, 548 (5th Cir. 1996) (admitting lay opinion testimony from an employee that the employer was “phasing out” older employees, where testimony was based upon various experiences throughout the employee’s time at the company). Under this interpretation of 701(a), a court may allow homeowners and owners or officers of businesses to provide opinion testimony “about the value of the home or business.” 4 WEINSTEIN & BERGER, *supra* note 59, § 701.03[1], at 701-9; *see also, e.g.*, Versai Mgmt. Corp. v. Clarendon Am. Ins. Co., 597 F.3d 729, 737 (5th Cir. 2010) (concluding that a company president was permitted to provide “a broader range of testimony than a traditional lay witness” because of the knowledge obtained from her position); Christopher Phelps & Assocs., LLC v. Galloway, 477 F.3d 128, 137–38 (4th Cir. 2007) (finding that a homeowner could opine as to the value of his property). Rule 701’s Advisory Committee note made clear that the 2000 amendment was not intended to affect this type of testimony. *See* FED. R. EVID. 701 advisory committee’s note (2000 amendment). The Advisory Committee rationalized that such statements are not based on “experience, training or specialized knowledge,” but rather on the individual’s “particularized knowledge” that comes from her position. *Id.*

opinions based on “specialized knowledge obtained in his or her vocation or avocation.”<sup>78</sup> However, at least one scholar, Anne Poulin, argues that this form of opinion testimony is wrongly admitted under Rule 701.<sup>79</sup> She contends that courts that admit “experience-based” testimony without sufficient scrutiny permit the jury to hear “unreliable and unwarranted opinion testimony.”<sup>80</sup>

Moving beyond the personal perception requirement, Rule 701(a) also requires that a lay witness’s testimony be “rationally based” on this first-hand knowledge.<sup>81</sup> The standard for a rational basis is not a high one.<sup>82</sup> Under this requirement a lay witness’s opinion must be reasonably based on the situation in question<sup>83</sup> and be free from “irrational leaps of logic.”<sup>84</sup> In other words, the witness must use “everyday” logic to reach her opinion.<sup>85</sup> Moreover, where lay opinion is based on the witness’s first-hand observation in conjunction with her personal knowledge, the witness may need to show that she indeed possesses the requisite knowledge to provide the stated opinion.<sup>86</sup> Importantly, a lay witness is generally not permitted to use personal knowledge as the rational basis for the answer to a hypothetical question.<sup>87</sup>

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78. 4 WEINSTEIN & BERGER, *supra* note 59, § 701.03[1], at 701-10; *see, e.g.*, *United States v. Maher*, 454 F.3d 13, 23–24 (1st Cir. 2006) (finding that a police officer’s opinion testimony, which was “[b]ased on [his] participation in numerous narcotics cases,” was admissible as lay testimony). Questions remain regarding the extent to which the 2000 amendments to Rules 701 and 702 prevent the admission of this kind of testimony. *See* 4 WEINSTEIN & BERGER, *supra* note 59, § 701.03[1], at 701-13.

79. *See* Poulin, *supra* note 9, at 554.

80. *Id.*

81. FED. R. EVID. 701.

82. 3 MUELLER & KIRKPATRICK, *supra* note 35, § 7:3, at 754.

83. *See* 3 SALTZBURG ET AL., *supra* note 24, § 701.02[4], at 701-9.

84. 4 WEINSTEIN & BERGER, *supra* note 59, § 701.03[2], at 701-17 to -18.

85. FED. R. EVID. 701 advisory committee’s note (2000 amendment) (distinguishing lay opinion from expert opinion by characterizing lay testimony as “result[ing] from a process of reasoning familiar in everyday life” (quoting *State v. Brown*, 836 S.W.2d 530, 549 (Tenn. 1992)) (internal quotation marks omitted)); *see also, e.g.*, *United States v. Garcia*, 413 F.3d 201, 215 (2d Cir. 2005) (“[A] lay opinion must be the product of reasoning processes familiar to the average person in everyday life.”); *Alexis v. McDonald’s Rests. of Mass., Inc.*, 67 F.3d 341, 347 (1st Cir. 1995) (excluding lay opinion testimony, where no basis was provided for the opinion that the employee in question acted with “race-based animus”); *United States v. Cox*, 633 F.2d 871, 875–76 (9th Cir. 1980) (finding inadmissible impression testimony that did not rationally flow from the facts provided); 4 WEINSTEIN & BERGER, *supra* note 59, § 701.03[2], at 701-17 n.16 (“Rational connection means [that a] normal person would form [the same] opinion from those perceptions.”).

86. For example, to testify that something smelled like dynamite, the witness must first establish that, based on prior experiences, she knows the smell of dynamite. 1 BROUN, *supra* note 3, § 11, at 57 n.30; *see also, e.g.*, *Eason v. Barber*, 365 S.E.2d 672, 674–75 (N.C. Ct. App. 1988) (allowing a seventeen year old with nine months of driving experience and a eighteen year old with fifteen months of driving experience to testify to the speed of a vehicle).

87. *See, e.g.*, *United States v. Henderson*, 409 F.3d 1293, 1300 (11th Cir. 2005) (holding that lay witnesses are not permitted to answer hypothetical questions and noting that the distinguishing quality of an expert witness is the entitlement to answer hypothetical questions); *Teen-Ed, Inc. v. Kimball Int’l, Inc.*, 620 F.2d 399, 404 (3d Cir. 1980)

## 2. Rule 701(b) and the Requirement That Testimony Be Helpful to the Fact-Finder

The second prong of Rule 701, 701(b), requires that lay opinion testimony be “helpful to clearly understanding the witness’s testimony or to determining a fact in issue.”<sup>88</sup> This limitation has been liberally interpreted in accordance with the modern trend of permitting the fact-finder to hear opinion testimony.<sup>89</sup> The most common situations when lay opinion testimony is considered helpful include when “[t]he lay witness is in a better position than the trier of fact to form the opinion,”<sup>90</sup> when stating the facts alone would be inadequate to provide the jury with a “complete understanding” of the situation,<sup>91</sup> or when “[t]he witness has specialized information” unavailable to the fact-finder.<sup>92</sup>

However, not all lay opinions fall within the definition of helpfulness. There are several categories of lay opinion testimony that are commonly not

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(characterizing the “essential difference” between an expert witness and a lay witness as the ability to answer hypothetical questions); *see also infra* note 102 and accompanying text. *But see* Poulin, *supra* note 9, at 575 (arguing that it would be inaccurate to assert that lay witnesses can never answer hypothetical questions and offering an example of a hypothetical that a lay witness could conceivably answer).

88. FED. R. EVID. 701.

89. *See* 4 WEINSTEIN & BERGER, *supra* note 59, § 701.03[3], at 701-21 (“[Rule 701] reflects the modern trend to allow the admission of opinion testimony, provided that it is well founded on personal knowledge and susceptible to specific cross-examination.” (quoting *Joy Mfg. Co. v. Sola Basic Indus. Inc.*, 697 F.2d 104, 111 (3d Cir. 1982))).

90. 4 WEINSTEIN & BERGER, *supra* note 59, § 701.03[3], at 701-21; *see also, e.g.*, *United States v. Shabazz*, 564 F.3d 280, 286–87 (3d Cir. 2009) (admitting testimony of the defendant’s accomplice that the defendant was the individual in surveillance video, where the witness participated in the events the video depicted); *United States v. Kornegay*, 410 F.3d 89, 95 (1st Cir. 2005) (finding that a detective’s identification of the defendant met the helpfulness prong of Rule 701, where the detective observed the defendant six times “for the sole purpose of distinguishing him from his twin brother”).

91. 4 WEINSTEIN & BERGER, *supra* note 59, § 701.03[3], at 701-23; *see, e.g.*, *United States v. Koon*, 34 F.3d 1416, 1430 (9th Cir. 1994) (allowing statements of opinion that the defendant was “out of control” at the time of the incident because it would be difficult to convey through facts alone), *rev’d in part on other grounds*, 518 U.S. 81 (1996); *Virgin Islands v. Knight*, 989 F.2d 619, 629–30 (3d Cir. 1993) (holding that eyewitness testimony that the shooting was accidental was admissible as lay opinion because it would be difficult to accurately articulate why the gun did not seem to be fired on purpose); *United States v. McCullah*, 745 F.2d 350, 352 (6th Cir. 1984) (admitting testimony that described the location in question as “hidden”); *see also* Poulin, *supra* note 9, at 564 (explaining that a lay witness may use opinion both “to express information that cannot be conveyed through a bare factual account” and to “enrich understanding by adding depth and clarity to [her] account”).

92. 4 WEINSTEIN & BERGER, *supra* note 59, § 701.03[3], at 701-24; *see also, e.g.*, *United States v. Ayala-Pizarro*, 407 F.3d 25, 28–29 (1st Cir. 2005) (permitting testimony from the arresting officer regarding drug points of distribution and heroin packaging because of the nature of his position in a neighborhood with drug points). Precedent in this area is of questionable value in light of the 2000 amendments to Rule 701. *See* 4 WEINSTEIN & BERGER, *supra* note 59, § 701.03[1], at 701-13. For a more complete discussion of the 2000 amendments to Rule 701, *see supra* notes 45–60 and accompanying text. Also, for additional supporting cases, *see* 4 WEINSTEIN & BERGER, *supra* note 59, § 701.03, at 701-21 to -24 nn.26–28.

considered to satisfy the helpfulness prong of Rule 701. These include instances when “[t]he evidence is clear and the trier of fact is perfectly capable of perceiving, understanding, and interpreting it”;<sup>93</sup> the witness testifies about an issue that generally the fact-finder alone should determine;<sup>94</sup> or the witness offers an opinion about the law.<sup>95</sup>

While courts generally find that lay opinion testimony is admissible under Rule 701 even when the opinion is not necessary for the jury’s decision-making process,<sup>96</sup> judges still maintain significant discretion in determining when to admit lay opinion testimony.<sup>97</sup> Accordingly, the helpfulness requirement acts as a tool for judges to control which lay opinion testimony to admit or exclude.<sup>98</sup>

### 3. Rule 701(c) and the Bar on Scientific, Technical, or Specialized Knowledge

Finally, 701(c), as explained above,<sup>99</sup> was implemented in 2000 to better draw the line between lay testimony and expert testimony,<sup>100</sup> limiting lay testimony to opinions “not based on scientific, technical, or other specialized knowledge within the scope of Rule 702.”<sup>101</sup> Further, under 701(c) lay witnesses generally cannot provide opinions in response to a hypothetical question,<sup>102</sup> as their opinions can be based only on the actual situation of which they possess first-hand knowledge.

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93. 4 WEINSTEIN & BERGER, *supra* note 59, § 701.03, at 701-26; *see also, e.g.*, *United States v. Sanabria*, 645 F.3d 505, 515–16 (1st Cir. 2011) (excluding a lay witness’s testimony that she did not believe the defendant’s story because the jury was in “a far superior position” to make that determination based on the evidence before it); *Hester v. BIC Corp.*, 225 F.3d 178, 184–85 (2d Cir. 2000) (finding testimony that the supervisor’s actions were racially motivated to be inadmissible because the witness was in no better position to make this determination than the jury).

94. 4 WEINSTEIN & BERGER, *supra* note 59, § 701.03[3], at 701-27; *see also, e.g.*, *United States v. Gaines*, 170 F.3d 72, 81 (1st Cir. 1999) (holding that questions of credibility are for the jury alone); *United States v. Forrester*, 60 F.3d 52, 63 (2d Cir. 1995) (asserting that the jury determines credibility).

95. 4 WEINSTEIN & BERGER, *supra* note 59, § 701.03[3], at 701-28. For additional supporting cases see *id.* at § 701.03[3], at 701-26 to -27 nn.30–33.

96. Poulin, *supra* note 9, at 557–58; *see also* FED. R. EVID. 701 advisory committee’s note (“[N]ecessity as a standard for permitting opinions and conclusions has proved too elusive and too unadaptable to particular situations for purposes of satisfactory judicial administration.”); 1 BROUN, *supra* note 3, § 11, at 55 (explaining that “Federal Rule of Evidence 701 codifies ‘convenience’ as the standard” rather than necessity).

97. *See* 3 SALTZBURG ET AL., *supra* note 24, § 701.02, at 701-4 to -5; Garner, *supra* note 19, at 127.

98. *See* 4 WEINSTEIN & BERGER, *supra* note 59, § 701.03[3], at 701-21.

99. *See supra* notes 45–60 and accompanying text.

100. *See* Poulin, *supra* note 9, at 559.

101. FED. R. EVID. 701; *see also id.* advisory committee’s note (2000 amendment).

102. *See, e.g.*, *Certain Underwriters at Lloyd’s v. Sinkovich*, 232 F.3d 200, 203–04 (4th Cir. 2000) (finding error where the lower court allowed the lay witness to answer hypothetical questions); *Teen-Ed, Inc. v. Kimball Int’l, Inc.*, 620 F.2d 399, 404 (3d Cir. 1980) (describing the fundamental difference between testimony under Rule 701 and Rule 702 as the ability to answer hypothetical questions); *see also* 4 WEINSTEIN & BERGER, *supra* note 59, § 701.03[4][a], at 701-31; *supra* note 87 and accompanying text.

*D. Responses to Rule 701's Potential Problems*

While the same concerns that existed at common law remain regarding the appropriate role of opinions in lay testimony, Rule 701's Advisory Committee note assures that mechanisms exist to prevent the liberalization of the opinion testimony rule from having detrimental effects on fact-finder determinations.<sup>103</sup> First, the general nature of the adversary system will continue to encourage lawyers to present the most factually detailed cases possible in an effort to convince the jury of their arguments.<sup>104</sup> Despite the inclusion of lay opinion testimony, the jury remains the ultimate decider of what testimony amounts to compelling evidence. Commentators and courts maintain that juries are fully capable of giving broad opinions not based in fact the proper weight and consideration.<sup>105</sup> This opinion, however, is not held universally, as some argue that juries are not impervious to influential opinion testimony.<sup>106</sup> At least one commentator has pointed to opinion testimony from law enforcement officers as particularly problematic in terms of invading the jury's independent review of the evidence.<sup>107</sup>

Second, the Advisory Committee note defends the liberalization of the opinion rule by arguing that cross-examination and closing statements inherently function to highlight any unreliable or illogical assertions a witness may make.<sup>108</sup> Such mechanisms thereby decrease the influence of lay opinion testimony.<sup>109</sup> Finally, the Advisory Committee note asserts that when the mechanisms of the adversary system prove insufficient to exclude

103. FED. R. EVID. 701 advisory committee's note.

104. *See id.* (“[T]he detailed account carries more conviction than the broad assertion . . . .”); 4 WIGMORE, *supra* note 24, § 1929, at 124 (“[I]nference amounts in force usually to nothing unless it appears to be solidly based on satisfactory data.”).

105. *See* *Grismore v. Consol. Prods. Co.*, 5 N.W.2d 646, 656 (Iowa 1942) (finding that, whether fact or opinion, the jury has full rein to accept or reject a witness's testimony); 1 BROUN, *supra* note 3, § 12, at 62 (describing the notion that opinion testimony will usurp the role of the jury as “illogic”); 4 WIGMORE, *supra* note 24, § 1920, at 115–16 (arguing that opinion testimony does not invade the province of the jury because the jury has the power to reject the opinion and embrace its own view of the evidence); *see also* Garner, *supra* note 19, at 126.

106. *See* 29 WRIGHT & GOLD, *supra* note 5, § 6252, at 109–10. Wright and Gold noted: Nineteenth Century evidence law often assumed that juries lack ability to detect unreliable evidence. If that assumption is correct, then a jury would be unable to reject unreliable lay opinion. In this sense . . . the jury might be unable to prevent usurpation of its power to draw inferences from the evidence. However, Rule 701 simply rejects this pessimistic view of jury ability.

*Id.*

107. Deon J. Nossel, *The Admissibility of Ultimate Issue Expert Testimony by Law Enforcement Officers in Criminal Trials*, 93 COLUM. L. REV. 231, 249 (1993) (arguing that expert testimony from law enforcement officers may unconsciously influence jurors' perceptions of the defendant and lead jurors to accept the officer's conclusions based entirely upon the officer's qualification as an expert). While Nossel's article specifically analyzes expert law enforcement testimony, the same arguments apply to officers in the cases studied in this Note. *See infra* Part III.A.

108. *See* FED. R. EVID. 701 advisory committee's note.

109. *See id.*; Hand, *supra* note 24, at 98 (suggesting that the “analysis of the basis for the witness's conclusions” should be done during cross-examination).

baseless opinion testimony that “amount[s] to little more than choosing up sides,” the testimony will likely fail the helpfulness prong of the Rule and be ruled inadmissible.<sup>110</sup>

*E. Practical Application of Rule 701*

One of the most valuable cases for understanding the common uses of Rule 701 is *United States v. Yazzie*.<sup>111</sup> The defendant, Johnny Yazzie, Jr., was charged with statutory rape.<sup>112</sup> Under the federal statutory rape statute, Yazzie was permitted to present the defense that he reasonably believed the minor was at least sixteen years old at the time of the incident.<sup>113</sup> To support his belief, Yazzie presented several witnesses who agreed that the victim seemed to be at least sixteen years old.<sup>114</sup> The trial court ruled that these witnesses could not testify as to their opinion that the victim seemed to be of a certain age and required the lay witnesses to provide only factual observations, such as the fact that she smoked cigarettes or wore make-up on the night of the incident.<sup>115</sup>

On appeal, the Ninth Circuit held that testimony regarding the victim’s apparent age was admissible under Rule 701.<sup>116</sup> The court concluded that the perception of someone else’s age is exactly the kind of testimony that may be valuable to a jury but is “difficult to put into words” without expressing a certain level of opinion.<sup>117</sup> The court further emphasized that “age is a matter on which everyone has an opinion” and, accordingly, is the type of testimony that is well suited for admissibility under Rule 701.<sup>118</sup>

As *Yazzie* demonstrates, in certain circumstances the most valuable lay testimony will be testimony in the form of an opinion. Additional examples of typical Rule 701 opinion testimony include the identification of a

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110. FED. R. EVID. 701 advisory committee’s note.

111. 976 F.2d 1252 (9th Cir. 1992); *see also* *Asplundh Mfg. Div. v. Benton Harbor Eng’g*, 57 F.3d 1190, 1196 (3d Cir. 1995) (calling *Yazzie* “[p]erhaps the best judicial description of” Rule 701 testimony); 3 SALTZBURG ET AL., *supra* note 24, § 701.02, at 701-6 (finding *Yazzie* to contain a “valuable application of Rule 701”).

112. *Yazzie*, 976 F.2d at 1253. *See generally* 3 SALTZBURG ET AL., *supra* note 24, § 701.02, at 701-6 to -8 (summarizing *Yazzie*).

113. *Yazzie*, 976 F.2d at 1253.

114. *Id.* at 1254.

115. *Id.*

116. *Id.* at 1255.

117. *Id.*

118. *Id.* at 1256.

person,<sup>119</sup> a vehicle's speed,<sup>120</sup> an individual's emotional<sup>121</sup> or mental state,<sup>122</sup> and the status of someone's health.<sup>123</sup>

## II. APPLYING RULE 701 TO LAW ENFORCEMENT OFFICERS' LAY OPINION TESTIMONY

In criminal prosecutions, it is common for law enforcement officers to testify as to the specifics of the criminal investigations in question, as well as to law enforcement related issues more generally.<sup>124</sup> As with all testimony, for a law enforcement officer to provide general opinion testimony that does not derive from personal knowledge, but rather from scientific or specialized knowledge, he must be certified as an expert.<sup>125</sup> Whether a law enforcement officer is certified as an expert witness depends largely on the officer's ability to satisfy the requirements of Rule 702.<sup>126</sup> This Note examines the instances when a law enforcement officer is not certified as an expert and, accordingly, is limited to providing layperson testimony.

As explained in Part I.C, witnesses are only permitted to offer lay opinion testimony when they meet Rule 701's requirements of personal perception and helpfulness.<sup>127</sup> All the circuit courts agree that some lay opinion testimony from law enforcement officers is admissible under Rule 701.<sup>128</sup> For example, in many of the cases that this Note analyzes, the law enforcement officer is interpreting recorded conversations.<sup>129</sup> Courts agree that an individual who took part in the conversation should be permitted under Rule 701 to testify as to the conversation's meaning.<sup>130</sup> Such witnesses were able to "see and judge facial expressions and body language of the other participants" and, therefore, possess a unique perspective on the situation, which a jury simply listening to the recorded conversation would

119. *See, e.g.*, *Sanders v. United States*, 809 A.2d 584, 596 (D.C. 2002) (admitting lay opinion testimony identifying the individual in a surveillance video).

120. *See, e.g.*, *United States v. Carlock*, 806 F.2d 535, 552 (5th Cir. 1986) (citing the speed of a car as a "common illustration[]" of lay opinion testimony).

121. *See, e.g.*, *United States v. Meling*, 47 F.3d 1546, 1556–57 (9th Cir. 1995) (finding that no error existed where lay witnesses were permitted to testify as to the defendant's emotional state at the time of the incident in question).

122. *See, e.g.*, *Diestel v. Hines*, 506 F.3d 1249, 1271 (10th Cir. 2007) (holding that lay testimony can be sufficient evidence to establish an individual's sanity).

123. *See, e.g.*, *Singletary v. Sec'y of Health, Educ. & Welfare*, 623 F.2d 217, 219 (2d Cir. 1980) (permitting a lay witness to testify about the state of his father's alcoholism).

124. *See Nossel, supra* note 107, at 231.

125. *See* FED. R. EVID. 702.

126. *Id.*

127. *See supra* Parts I.C.1–2; *see also* FED. R. EVID. 701.

128. *See* 4 CLIFFORD S. FISHMAN & ANNE T. MCKENNA, *WIRETAPPING & EAVESDROPPING: SURVEILLANCE IN THE INTERNET AGE* § 41.24 (2012).

129. *See* *United States v. Jayyousi*, 657 F.3d 1085, 1101–02 (11th Cir. 2011); *United States v. Johnson*, 617 F.3d 286, 293 (4th Cir. 2010); *United States v. Peoples*, 250 F.3d 630, 640 (8th Cir. 2001).

130. *See* 4 FISHMAN & MCKENNA, *supra* note 128, § 41.24, at 41–38 to –39 & n.3 (quoting *Peoples*, 250 F.3d at 641).

not have.<sup>131</sup> Thus, such testimony satisfies both the personal perception and helpfulness prongs of Rule 701.

This Note explores the less clear-cut scenario where a law enforcement officer who possesses general knowledge of the case's investigation, gained largely or entirely from an after-the-fact review of investigation materials, is asked to testify as a lay witness about specifics of the investigation. Three approaches to this type of situation have emerged within the federal circuit courts.

Part II.A explores the approaches of the Tenth and Eleventh Circuits,<sup>132</sup> which have embraced the broadest reading of Rule 701. These circuits allow a law enforcement officer to testify about the specifics of an investigation based solely on an after-the-fact review of the investigation materials.<sup>133</sup> Part II.B outlines the pertinent lay opinion decisions in the Seventh and Ninth Circuits.<sup>134</sup> Both circuits have allowed law enforcement officers to testify about specific aspects of an investigation where the officer's after-the-fact knowledge of the event in question was combined with first-hand knowledge of related information.<sup>135</sup> Finally, Part II.C focuses on the Second, Fourth, and Eighth Circuits' narrow interpretations of Rule 701.<sup>136</sup> These circuits have refused to admit law enforcement officers' lay opinion testimony where the testimony was not based on personal, first-hand knowledge of the specific event in question that extended beyond simply reviewing the investigation record.<sup>137</sup>

#### A. Tenth and Eleventh Circuits: The Broadest Readings of Rule 701

The Tenth and Eleventh Circuits' interpretations of Rule 701 allow lay opinion testimony from law enforcement officers who have general knowledge of the investigation in question, without requiring personal perception of the actual events about which the witness is testifying.<sup>138</sup> The controlling cases in these circuits are *United States v. Zepeda-Lopez*<sup>139</sup> and *United States v. Jayyousi*.<sup>140</sup>

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131. *Id.*; see also *supra* note 90 and accompanying text.

132. See *Jayyousi*, 657 F.3d 1085; *United States v. Zepeda-Lopez*, 478 F.3d 1213 (10th Cir. 2007).

133. See *Jayyousi*, 657 F.3d at 1101–04; *Zepeda-Lopez*, 478 F.3d at 1221–23.

134. *United States v. Rollins*, 544 F.3d 820 (7th Cir. 2008); *United States v. Freeman*, 498 F.3d 893 (9th Cir. 2007).

135. See *Rollins*, 544 F.3d at 830–33; *Freeman*, 498 F.3d at 904–05.

136. *United States v. Johnson*, 617 F.3d 286 (4th Cir. 2010); *United States v. Garcia*, 413 F.3d 201 (2d Cir. 2005); *United States v. Peoples*, 250 F.3d 630 (8th Cir. 2001).

137. See *Johnson*, 617 F.3d at 292–93; *Garcia*, 413 F.3d at 211–15; *Peoples*, 250 F.3d at 639–43.

138. See *Jayyousi*, 657 F.3d at 1102; *Zepeda-Lopez*, 478 F.3d at 1215.

139. 478 F.3d 1213 (10th Cir. 2007).

140. 657 F.3d 1085 (11th Cir. 2011).

1. *United States v. Janyousi*

In *Janyousi*, the Eleventh Circuit allowed FBI Agent John Kavanaugh to testify as a lay witness to the meaning of supposed coded words used in calls between the defendants.<sup>141</sup> During his testimony, Agent Kavanaugh made many observations, providing testimony such as that the words “football” and “soccer” actually meant “jihad” and the word “sneakers” actually meant “support.”<sup>142</sup> The agent based his testimony entirely on his after-the-fact review of the investigation materials.<sup>143</sup> This included “read[ing] thousands of wiretap summaries plus hundreds of verbatim transcripts, as well as faxes, publications, and speeches” over a five-year period.<sup>144</sup> Although the intercepted calls were mostly in Arabic, Agent Kavanaugh did not speak that language,<sup>145</sup> and someone else provided the translations into English.<sup>146</sup> His testimony was based largely on documents that were already admitted into evidence.<sup>147</sup>

The Eleventh Circuit first addressed the appellants’ argument regarding Rule 701(a).<sup>148</sup> Appellants asserted that the agent’s opinion testimony should be deemed inadmissible “because he was not present during all of the intercepted calls and he did not have a rationally based perception of what the individuals meant when they used the code words.”<sup>149</sup>

In response, the Eleventh Circuit emphasized that it had never found that a lay witness must “particip[ate in] or observ[e] . . . a conversation to provide testimony about the meaning of coded language” within the conversation.<sup>150</sup> The court further asserted that lay witness testimony was admissible even where “the witness was not involved in the activity about which he testified.”<sup>151</sup>

The court cited two other Eleventh Circuit cases to support this proposition,<sup>152</sup> characterizing both cases in an entirely different manner than the dissent.<sup>153</sup> According to the *Janyousi* court, the Eleventh Circuit had held in *United States v. Hamaker*<sup>154</sup> that a FBI financial analyst possessed sufficient first-hand perception to provide lay opinion testimony,

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141. *Id.* at 1104. It is important to note that in *Janyousi* the Eleventh Circuit quotes Rule 701’s Advisory Committee note, *id.* at 1120–21, which states that 701(a)’s limitation that lay witness testimony be “rationally based on the witness’s perception.” FED. R. EVID. 701(a) advisory committee’s note. This speaks to the “familiar requirement of first-hand knowledge or observation.” *Id.*

142. *Janyousi*, 657 F.3d at 1095.

143. *See id.*

144. *Id.* at 1102.

145. *Id.* at 1122 (Barkett, J., concurring in part and dissenting in part).

146. *Id.*

147. *Id.* at 1102 (majority opinion).

148. *Id.*

149. *Id.*

150. *Id.*

151. *Id.*

152. *Id.* at 1102–03.

153. *Id.* at 1124 (Barkett, J., concurring in part and dissenting in part).

154. 455 F.3d 1316 (11th Cir. 2006).

where the analyst “simply reviewed and summarized over seven thousand financial documents.”<sup>155</sup> Further, the *Jayyousi* court explained that in *United States v. Gold*,<sup>156</sup> the Eleventh Circuit concluded that a lay witness possessed first-hand knowledge when the witness’s knowledge was based on his “own examination of . . . store[] records.”<sup>157</sup>

The court argued that the testimony in both cases satisfied the requirements of Rule 701(a) because the testimony was “‘rationally based’ on [the witnesses’] perception of business records.”<sup>158</sup> Analogizing Agent Kavanaugh’s knowledge of the investigation to the facts in *Hamaker* and *Gold*, the Eleventh Circuit found that the agent’s “testimony was also based on a review of documents and ‘rationally based on [his] perception.’”<sup>159</sup>

The court distinguished the agent’s testimony from testimony that simply summarizes admitted evidence by highlighting that the agent reviewed “thousands of documents, many of which were not admitted into evidence.”<sup>160</sup> Moreover, the majority found that the agent’s extensive knowledge of the investigation enabled him to understand the supposed coded language in a way that the less knowledgeable jury would be incapable of doing.<sup>161</sup>

Emphasizing further the agent’s cumulative knowledge of the investigation, the majority also addressed Rule 701(b)’s requirement of helpfulness.<sup>162</sup> According to the majority, Agent Kavanaugh’s opinion testimony satisfied this requirement because his inferences about the meaning of the alleged coded language would “help[] the jury understand better the defendants’ conversation that related to their support of international terrorism because [the jury] ‘would likely be unfamiliar with the complexities’ of terrorist activities.”<sup>163</sup>

The *Jayyousi* decision also contained an opinion from Judge Rosemary Barkett concurring in part and dissenting in part.<sup>164</sup> Judge Barkett strongly disagreed with the majority’s lay-opinion-testimony analysis,<sup>165</sup> concluding that Agent Kavanaugh’s testimony was not rationally based on any “first-hand knowledge or observation,” but instead was based entirely on his general involvement in the case.<sup>166</sup> In the course of this argument, the

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155. *Jayyousi*, 657 F.3d at 1102 (majority opinion) (quoting *Hamaker*, 455 F.3d at 1331–32) (internal quotation marks omitted).

156. 743 F.2d 800 (11th Cir. 1984).

157. *Jayyousi*, 657 F.3d at 1102–03 (quoting *Gold*, 743 F.2d at 817) (internal quotation marks omitted). For the dissent’s conflicting analysis of *Hamaker* and *Gold*, see *infra* notes 167–69 and accompanying text.

158. *Jayyousi*, 657 F.3d at 1103 (quoting FED. R. EVID. 701(a)) (citation omitted).

159. *Id.* at 1103 (quoting FED. R. EVID. 701(a)).

160. *Id.*

161. *Id.*

162. *Id.* (quoting FED. R. EVID. 701(b)).

163. *Id.* (quoting *United States v. Awan*, 966 F.2d 1415, 1430–31 (11th Cir. 1992)).

164. *Id.* at 1119 (Barkett, J., concurring in part and dissenting in part).

165. *Id.*

166. *Id.* at 1121–22 (emphasis omitted) (quoting FED. R. EVID. 701 advisory committee’s note).

dissent asserted that the court's reliance on *Gold* and *Hamaker* was erroneous.<sup>167</sup> First, the dissent found *Gold* to be inapplicable because the case involved the "long-standing practice" of allowing business owners "to testify to the value or projected profits of the business."<sup>168</sup> Second, *Hamaker* did not provide precedent because the court was only answering whether the witness in question was an expert and never discussed whether reviewing business records satisfies the first-hand knowledge requirement of Rule 701.<sup>169</sup>

The dissent found it particularly problematic that Agent Kavanaugh's general involvement in the case was his only basis for providing testimony regarding the "'true meaning' of the defendants' words."<sup>170</sup> The agent described no specific knowledge or perception that he possessed to make him more capable than the jury of interpreting the phone calls.<sup>171</sup>

Moreover, the dissent argued that opinion testimony should be admissible under Rule 701(a) only when the witness has "personally experienced an event and therefore ha[s] the ability to describe [his] layperson's perception of the event that the jury cannot otherwise experience for itself."<sup>172</sup> Indeed, the unique characteristic of this type of knowledge, according to the dissenting opinion, is that the witness uses his "sensory and experiential observations that were made as a first-hand witness to a particular event."<sup>173</sup>

Turning to the specific instance of a law enforcement officer testifying about the meaning of a conversation, the dissent gave the following definition for first-hand knowledge:

A law enforcement officer's lay opinion about the meaning of a conversation is based on his or her *first-hand* knowledge when he or she is either (1) a personal participant in a conversation as an undercover agent, or (2) a listener to a conversation while observing a defendants' behavior in real time to coordinate the conversation with the conduct.<sup>174</sup>

The dissent further stated that the facts of *Jayyousi* were "materially indistinguishable" from the facts of *United States v. Peoples*,<sup>175</sup> in which the Eighth Circuit found that such law enforcement testimony was

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167. *Id.* at 1124.

168. *Id.* (quoting FED. R. EVID. 701 advisory committee's note (2000 amendment)); *see supra* note 77 and accompanying text.

169. *Jayyousi*, 657 F.3d at 1125.

170. *Id.* at 1122.

171. *Id.*

172. *Id.* at 1120.

173. *Id.*

174. *Id.* at 1123.

175. 250 F.3d 630 (8th Cir. 2001).

inadmissible.<sup>176</sup> The dissent also cited *United States v. Garcia*,<sup>177</sup> a Second Circuit case that stands for the same general proposition.<sup>178</sup>

On the issue of the helpfulness requirement of 701(b), the dissent further disagreed with the majority's characterization of Agent Kavanaugh's opinion testimony as "'helpful'" within the meaning of Rule 701.<sup>179</sup> As the dissent explained, while "a witness simply agree[ing] with the contentions of one side" may be helpful in some sense of the word, Rule 701 is not intended to allow lay witnesses to give testimony that does nothing more than "give one side's understanding of the evidence."<sup>180</sup>

## 2. *United States v. Zepeda-Lopez*

In *Zepeda-Lopez* the Tenth Circuit came to the same conclusion as the Eleventh Circuit regarding Rule 701, allowing FBI Special Agent John Barrett to testify that it was the defendant's voice on audiotapes and image in a videotape.<sup>181</sup> While the parties had already stipulated to the existence of a drug conspiracy, the question remained whether defendant Jesus Salvador Zepeda-Lopez was a member of the conspiracy.<sup>182</sup> Of the six telephone calls admitted into evidence, Zepeda-Lopez admitted that his voice was on three of them but denied that his voice was on another call.<sup>183</sup> Agent Barrett, the prosecution's only witness, testified as to which voices on the tapes belonged to Zepeda-Lopez.<sup>184</sup> The agent provided similar testimony regarding Zepeda-Lopez's alleged image in a video.<sup>185</sup> Agent Barrett's testimony was based solely on his review of the same tapes that were offered into evidence.<sup>186</sup>

The defendant argued for the exclusion of the agent's testimony because Agent Barrett "lacked personal knowledge of Mr. Zepeda-Lopez's voice and appearance"<sup>187</sup> and "had an inadequate basis" for the identifications.<sup>188</sup> Further, the defendant asserted that the jury was just as capable as the agent to determine whether it was the defendant's voice in the recorded calls and

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176. *Jayyousi*, 657 F.3d at 1124 (citing *Peoples*, 250 F.3d at 641). For a complete discussion of the opinion in *Peoples*, see *infra* Part II.C.1.

177. 413 F.3d 201 (2d Cir. 2005).

178. *Jayyousi*, 657 F.3d at 1124 (citing *Garcia*, 413 F.3d at 212). For a complete discussion of the opinion in *Garcia*, see *infra* Part II.C.2.

179. *Jayyousi*, 657 F.3d at 1125.

180. *Id.*; see also FED. R. EVID. 701 advisory committee's note ("If . . . 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.").

181. *United States v. Zepeda-Lopez*, 478 F.3d 1213, 1215 (10th Cir. 2007).

182. *Id.*

183. *Id.* at 1215–16.

184. *Id.* at 1215.

185. *Id.* at 1217.

186. *Id.* at 1215–17.

187. *Id.* at 1219.

188. *Id.* at 1220 (quoting Brief of Defendant Appellant at 13, *Zepeda-Lopez*, 478 F.3d 1213 (No. 05-4246)) (internal quotation marks omitted).

the defendant's image in the video and, therefore, the testimony was not helpful.<sup>189</sup>

The court addressed the appeal by analyzing Agent Barrett's testimony under Rule 701(b), making no mention of the defendant's Rule 701(a) argument.<sup>190</sup> The court relied in part on the Tenth Circuit's holding in *United States v. Bush*.<sup>191</sup> In *Bush*, a law enforcement officer identified the defendant in recorded calls after having conducted at least three face-to-face interviews with the defendant in question.<sup>192</sup> Finding that the trial court had not abused its discretion, the court in *Zepeda-Lopez* held that, like in *Bush*, Agent Barrett's testimony satisfied the helpfulness prong of Rule 701 because the agent had an opportunity to review the videotapes "many times."<sup>193</sup>

The Tenth Circuit concluded its discussion of Rule 701 by restating the district court's instruction to the jury that it should consider the truth value of all admitted evidence, including testimony.<sup>194</sup> In particular, the district court asserted that the jury should consider witnesses' "relationship to the government or the defendant" and "their opportunity to observe or acquire knowledge concerning the facts about which they testified."<sup>195</sup>

#### *B. Seventh and Ninth Circuits: The Moderate Readings of Rule 701*

The Seventh and Ninth Circuits have taken a somewhat different approach than the Tenth and Eleventh Circuits to lay opinion testimony based on after-the-fact reviews. Where a law enforcement officer's after-the-fact knowledge of the event in question is combined with related first-hand knowledge, these circuits have allowed the officer to offer lay opinion testimony.<sup>196</sup> The controlling cases in these circuits are *United States v. Freeman*<sup>197</sup> and *United States v. Rollins*.<sup>198</sup>

##### 1. *United States v. Freeman*

In *Freeman*, the Ninth Circuit found no error where the district court admitted a detective's lay interpretations of recorded phone calls.<sup>199</sup> Detective Bob Shin, the prosecution's lead witness,<sup>200</sup> opined on the meaning of the supposed drug jargon used between defendant Kevin Freeman and two of his alleged co-conspirators.<sup>201</sup> The detective explained

189. *Id.* at 1222.

190. *Id.*

191. *Id.*

192. *Id.* (citing *United States v. Bush*, 405 F.3d 909, 918 (10th Cir. 2005)).

193. *Id.*

194. *Id.* at 1222–23.

195. *Id.*

196. See *infra* notes 204–06, 212–13 and accompanying text.

197. 498 F.3d 893 (9th Cir. 2007).

198. 544 F.3d 820 (7th Cir. 2008).

199. *Freeman*, 498 F.3d at 904–05.

200. *Id.* at 898.

201. *Id.*

that while there was no explicit reference to cocaine, the calls indeed referenced cocaine-related drug transactions.<sup>202</sup> Though not a party to the conversations, Detective Shin based his testimony on his “direct perception of several hours of intercepted conversations—in some instances coupled with direct observation of [the suspects]—and other facts he learned during the investigation.”<sup>203</sup>

Finding that Detective Shin satisfied the requirements of Rule 701, the Ninth Circuit stated that the detective’s perception of the conversations amounted to “direct knowledge.”<sup>204</sup> Further, the court noted that throughout his testimony, the detective attempted to “explain his reasoning and the basis for his opinion.”<sup>205</sup> This basis included “context and his knowledge of the investigation as it was unfolding.”<sup>206</sup>

## 2. *United States v. Rollins*

Following the approach of the Ninth Circuit, the Seventh Circuit in *Rollins* admitted lay opinion testimony from DEA Agent John McGarry regarding the general meaning of recorded telephone conversations.<sup>207</sup> The agent testified that based on the recorded calls, he believed that defendant James E. Rollins, Sr. was supplying Richard Pittman with cocaine obtained from James Rollins, Jr.<sup>208</sup> Agent McGarry’s testimony was based both on his review of the recorded calls and his subsequent surveillance of the conspirators and interviews with witnesses familiar with both the conspiracy and the defendants.<sup>209</sup> Agent McGarry testified that through surveillance the case agents often were able to confirm their suspicions about the meaning of the recorded calls.<sup>210</sup> The witness interviews further provided Agent McGarry with information to enlighten his understanding of the recorded calls.<sup>211</sup>

Upon outlining the several bases for Agent McGarry’s testimony, the Seventh Circuit determined that the agent possessed a sufficient foundation for providing lay opinion testimony about the recorded calls.<sup>212</sup> The court characterized his knowledge as both “first-hand perception of the intercepted phone calls” and “personal, extensive experience with this particular drug investigation.”<sup>213</sup> In the course of its analysis, the Seventh Circuit explicitly disagreed with the Second Circuit’s conception of

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202. *Id.*

203. *Id.* at 904–05.

204. *Id.* at 904.

205. *Id.* at 900.

206. *Id.*

207. *United States v. Rollins*, 544 F.3d 820, 831 (7th Cir. 2008).

208. *Id.* at 828.

209. *Id.* at 831–32.

210. *Id.* at 832.

211. *Id.*

212. *Id.*

213. *Id.* at 831–32.

permissible lay opinion testimony as explained in *United States v. Grinage*.<sup>214</sup>

The Seventh Circuit also distinguished *Rollins* from its decision in *United States v. Oriedo*<sup>215</sup> by explaining that the agent's testimony in *Oriedo* was impermissible because it was not based solely on knowledge gained from his investigation of *that* case.<sup>216</sup> Regardless of this distinction, however, the Ninth Circuit conceded that Agent McGarry's "testimony approach[ed] the line dividing lay opinion testimony from expert opinion testimony."<sup>217</sup>

*C. Second, Fourth, and Eighth Circuits:  
The Narrowest Readings of Rule 701*

The Second, Fourth, and Eighth Circuits have limited admissible lay opinion by more narrowly interpreting the definitions of first-hand knowledge and helpfulness.<sup>218</sup> First-hand knowledge in these circuits requires a substantial personal relationship to the event in question, such as through observation or participation.<sup>219</sup> The controlling cases in these circuits are *United States v. Peoples*,<sup>220</sup> *United States v. Garcia*,<sup>221</sup> and *United States v. Johnson*.<sup>222</sup>

1. *United States v. Peoples*

In *Peoples*, the Eighth Circuit held that FBI Special Agent Joan Neal's testimony about recorded telephone conversations and prison visitations was inadmissible because she lacked first-hand knowledge of the conversations at issue.<sup>223</sup> Xavier Lightfoot was arrested and charged with robbery.<sup>224</sup> During his pretrial incarceration Lightfoot learned that his former roommate, Jovan Ross, was cooperating with law enforcement.<sup>225</sup> According to the government, Cornelius Peoples feared that if Ross continued to cooperate with law enforcement, Peoples' role in the robbery would be revealed.<sup>226</sup> The government theorized that, in response Ross's

214. *Id.* at 832; see *infra* note 253 and accompanying text (explaining that *Garcia* affirmed the holding in *Grinage*).

215. 498 F.3d 593 (7th Cir. 2007) (finding testimony impermissible where a lay law enforcement officer was asked about the general use of a certain type of baggie).

216. *Rollins*, 544 F.3d at 832–33.

217. *Id.* at 833.

218. See *United States v. Johnson*, 617 F.3d 286, 293 (4th Cir. 2010); *United States v. Garcia*, 413 F.3d 201, 213 (2d Cir. 2005); *United States v. Peoples*, 250 F.3d 630, 641 (8th Cir. 2001).

219. See *Johnson*, 617 F.3d at 293; *Garcia*, 413 F.3d at 213; *Peoples*, 250 F.3d at 641.

220. 250 F.3d 630 (8th Cir. 2001).

221. 413 F.3d 201 (2d Cir. 2005).

222. 617 F.3d 286 (4th Cir. 2010).

223. *Peoples*, 250 F.3d at 639–42.

224. *Id.* at 634.

225. *Id.*

226. *Id.*

cooperation, Peoples and Lightfoot entered into an agreement to pay someone to kill Ross.<sup>227</sup>

During the trial, the government played conversations between Lightfoot and Peoples that were recorded when Peoples visited Lightfoot in jail.<sup>228</sup> While the recordings played to the jury, Agent Neal was allowed to opine as to the meaning of the speakers' words.<sup>229</sup> She interpreted both allegedly coded language and statements made in plain English.<sup>230</sup> For example, when a recording of Lightfoot asking for a loan was played, Agent Neal testified that Lightfoot had "need[ed] a loan to pay the hit man to actually murder Ross."<sup>231</sup>

The court found that Agent Neal's testimony was improperly admitted as Rule 701 lay opinion testimony,<sup>232</sup> because Agent Neal neither personally observed the activities that the conversations concerned nor heard or observed the conversation itself.<sup>233</sup> Instead, the court described Agent Neal's knowledge of the matter as based only on an after-the-fact investigation and "not on her perception of the facts."<sup>234</sup> The Eighth Circuit characterized this type of testimony as "a narrative gloss" on the facts of the case, comprised entirely of her opinion about the conversations' meanings.<sup>235</sup>

Indeed, despite admitting the lay opinion testimony of Agent Neal, the lower court recognized that the testimony should be viewed differently than normal witness testimony.<sup>236</sup> Acknowledging that it was possible that Agent Neal's testimony was inadmissible under Rule 701, the lower court instructed jurors to consider the testimony not as evidence but as "snippets of early argument from the witness stand."<sup>237</sup> The Eighth Circuit found that this instruction had no basis in the Federal Rules of Evidence and served the practical function of making inadmissible testimony admissible.<sup>238</sup>

The court pointed to Rule 602 in order to emphasize that a lay witness must possess "personal knowledge of the matters about which she testifies."<sup>239</sup> Accordingly, the court offered only three circumstances when law enforcement officers can provide lay opinion testimony regarding recorded conversations.<sup>240</sup> These included "when the law enforcement

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227. *Id.*

228. *Id.* at 634–35.

229. *Id.* at 640.

230. *Id.*

231. *Id.* (internal quotation marks omitted).

232. *Id.* at 641–42.

233. *Id.* at 640.

234. *Id.* at 641.

235. *Id.* at 640 ("[F]or example, she testified that when one of the defendants referred to buying a plane ticket for Ross, he in fact meant killing Ross.").

236. *See id.* at 641.

237. *Id.* at 640–41 (quoting *United States v. Peoples*, No. 98-00149-01/02-CR-W-6, 2000 WL 97180, at \*1 (W.D. Mo. Jan. 25, 2000)) (internal quotation marks omitted).

238. *Id.* at 641–42.

239. *Id.* at 641. For the full text of Rule 602, see *supra* note 68.

240. *Peoples*, 250 F.3d at 641.

officer is a participant in the conversation, has personal knowledge of the facts being related in the conversation, or observed the conversations as they occurred.”<sup>241</sup> Additionally, the court made a point to distinguish lay opinion testimony from expert testimony, stating that “[l]ay opinion testimony is admissible only to help the jury or the court to understand the facts about which the witness is testifying and not to provide specialized explanations or interpretations that an untrained layman could not make if perceiving the same acts or events.”<sup>242</sup>

## 2. *United States v. Garcia*

Similar to the Eighth Circuit in *Peoples*, the Second Circuit’s *Garcia* decision held that DEA Agent Paul Klemick’s opinion testimony was inadmissible because the agent’s testimony was neither based on his personal perceptions<sup>243</sup> nor helpful to the jury.<sup>244</sup> The prosecution admitted into evidence several recorded phone calls between defendants Yuri Garcia and Francisco Valentin, as well as conversations between the two defendants and other members of the alleged drug conspiracy.<sup>245</sup> Following the admission of these calls, Agent Klemick was asked to testify regarding the roles he believed Garcia and Valentin played in the conspiracy.<sup>246</sup> The prosecution asked Agent Klemick to testify based on his general experience with the investigation.<sup>247</sup> Subsequently, the agent testified that his opinion was grounded on the recorded phone calls, as well as the law enforcement database and surveillance.<sup>248</sup>

The Second Circuit found several problems with admitting this testimony under Rule 701. First, the court found that Agent Klemick’s testimony failed to meet the requirements of 701(a) because it was not “based on the witness’s personal perceptions.”<sup>249</sup> Quoting Rule 701’s Advisory Committee note, the court emphasized that the “‘traditional objective’” of Rule 701 is to provide the fact-finder with “‘an accurate reproduction of the event’ at issue,” an objective that may sometimes require admitting inferential or opinion testimony from laypersons.<sup>250</sup> However, the court emphasized the distinction between a law enforcement officer’s lay opinion testimony that is based on personal perceptions and lay opinion testimony

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241. *Id.* The holding from *Peoples* was cited approvingly in the Sixth Circuit case *United States v. Ganier*, 468 F.3d 920, 927 (6th Cir. 2006). There, the court, relying in part on *Peoples*, determined that testimony regarding computer software required specialized knowledge that only an expert witness could provide. *Id.* This decision suggests that the Sixth Circuit is likely to follow the approach of the Eighth Circuit if presented with a similar case involving law enforcement testimony.

242. *Peoples*, 250 F.3d at 641.

243. *United States v. Garcia*, 413 F.3d 201, 211–12 (2d Cir. 2005).

244. *Id.* at 215.

245. *Id.* at 208–09.

246. *Id.* at 212.

247. *Id.* at 209.

248. *Id.*

249. *Id.* at 211.

250. *Id.* (quoting FED. R. EVID. 701 advisory committee’s note).

that is based on the entirety of an investigation.<sup>251</sup> The Second Circuit explained that Agent Klemick's opinion testimony did not meet the requirements of 701(a) because it "drew on the total information developed by all the officials who participated in the investigation" and "was not limited to his personal perceptions."<sup>252</sup> Summarizing and affirming the holding in *Grinage*, the Second Circuit explained that this type of opinion testimony does not fall within Rule 701 because it does "not present[] the jury with the unique insights of an eyewitness's personal perceptions."<sup>253</sup>

Second, the court found that Agent Klemick's testimony was not helpful under Rule 701(b) because it did little more than summarize the admitted evidence in a way that told the jury how to decide the case.<sup>254</sup> The Second Circuit concluded that procedural limitations are placed on opinion testimony specifically to ensure that witnesses do not invade the province of the jury.<sup>255</sup> The court further emphasized that if such testimony were admissible, jurors reviewing evidence would be unnecessary, as witnesses simply would hand them the proper analysis.<sup>256</sup>

### 3. *United States v. Johnson*

Citing *Peoples* in its decision, the Fourth Circuit in *Johnson* found that DEA Agent Randy Smith's lay opinion testimony about the meaning of recorded phone calls was inadmissible based on his lack of personal perception.<sup>257</sup> At trial, Agent Smith testified to the meaning of four phone calls, which allegedly pointed to defendant Walter Johnson's involvement in a drug conspiracy.<sup>258</sup> The phone calls were between Johnson and an individual named Mayo Pickens, who provided cocaine in the area.<sup>259</sup> Agent Smith was not a participant in the investigation's surveillance and did not "listen[] to all of the relevant calls in question."<sup>260</sup> Instead, the agent based his testimony regarding the phone calls on "information from interviews with suspects and charged members of the conspiracy *after* listening to the phone calls."<sup>261</sup> The court further noted that the prosecution had elicited testimony regarding the agent's "credentials and training," despite not attempting to certify him as an expert.<sup>262</sup>

The court characterized the knowledge obtained from the suspect interviews as "second-hand information" and the conclusions he formed as

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251. *Id.* at 212.

252. *Id.*

253. *Id.*

254. *Id.* at 210.

255. *Id.* at 210–11.

256. *Id.* at 214.

257. *United States v. Johnson*, 617 F.3d 286, 292–93 (4th Cir. 2010).

258. *Id.* at 288–89.

259. *Id.*

260. *Id.* at 293.

261. *Id.*

262. *Id.*

a result of this information to be “post-hoc assessments.”<sup>263</sup> Further, the court analogized *Johnson* to the facts of *Peoples*, finding that Agent Smith similarly lacked first-hand knowledge about the investigation in question and provided no more than “a narrative gloss that consisted almost entirely of her personal opinions of what the conversations meant.”<sup>264</sup>

### III. REINING IN THE USE OF LAY OPINION TESTIMONY TO ACHIEVE RULE 701’S OBJECTIVES

Jurors are intended to be fair and impartial triers of fact. Accordingly, they should never possess first-hand knowledge of the events surrounding the case they decide. First-hand accounts, however, provide valuable insight into the facts and circumstances of a disputed situation. Lay witnesses, therefore, play the vital role of explaining their own first-hand knowledge,<sup>265</sup> in hopes of providing the jury with as realistic a re-creation of the events as possible.<sup>266</sup> Despite the clear value of lay opinion testimony, however, our legal system, through the adoption of Rule 701, has demanded limits to such testimony.<sup>267</sup>

This part discusses the flaws and merits of the circuit courts’ approaches to limiting law enforcement officers’ lay opinion testimony and analyzes the extent to which each approach to Rule 701 aligns with the Rule’s objective as stated in the Advisory Committee note. The Advisory Committee note explains that the Rule is intended to help “put[] the trier of fact in possession of an accurate reproduction of the event.”<sup>268</sup> This objective, along with the remainder of the Rule’s Advisory Committee note, should be closely followed.<sup>269</sup>

Parts III.A and III.B highlight the errors in the Seventh, Ninth, Tenth, and Eleventh Circuits’ approaches, arguing that the lay opinion holdings of these circuits should not be followed. Part III.A explains that, by reading Rule 701 to include law enforcement officers who complete only after-the-fact reviews, the Tenth and Eleventh Circuits have undermined the objective of the Rule and opened the door for prejudicial testimony. Part III.B underscores that the approaches of the Seventh and Ninth Circuits similarly run counter to Rule 701’s Advisory Committee note, despite appearing to require greater first-hand knowledge. While the law enforcement officers in these circuits may need to possess related first-hand

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263. *Id.*; see also C. Rauch Wise, *It Means What It Needs To Mean: Combating Drug Jargon Testimony*, 35 CHAMPION 28, 29 (2011) (approving of the decision in *Johnson* and concluding that, “[i]f the rule were otherwise, a case agent could interview the witnesses, listen to the tapes, and then testify that based upon the telephone conversation and the facts of the case, the defendant was involved in a conspiracy”).

264. *Johnson*, 617 F.3d at 293 (quoting *United States v. Peoples*, 250 F.3d 630, 640 (8th Cir. 2001)) (internal quotation marks omitted).

265. See FED. R. EVID. 701 advisory committee’s note.

266. See *id.*; *supra* notes 70–71 and accompanying text.

267. See FED. R. EVID. 701; *supra* notes 42–43 and accompanying text.

268. FED. R. EVID. 701 advisory committee’s note.

269. See *supra* note 14 and accompanying text.

knowledge, in the end, their knowledge of the event in question is still after-the-fact and is therefore insufficient to satisfy Rule 701. Finally, Part III.C emphasizes the merits of the Second, Fourth, and Eighth Circuits' approaches to Rule 701, explaining why an amended version of these courts' analyses should be followed. These circuits limit law enforcement testimony under Rule 701 in a manner that serves the Rule's true purpose and helps prevent the jury from hearing unqualified, unhelpful testimony.

*A. The Problem of Overadmitting Lay Opinion Testimony  
in the Tenth and Eleventh Circuits*

The Tenth and Eleventh Circuits have permitted law enforcement officers to provide lay opinion testimony even where the officer possesses only after-the-fact knowledge of the specific event in question.<sup>270</sup> Admittance of such testimony constitutes a very broad interpretation of Rule 701(a)'s personal perception requirement<sup>271</sup> and Rule 701(b)'s helpfulness requirement.<sup>272</sup> Such a reading of Rule 701 results in an overly inclusive lay opinion rule. More specifically, the approaches of the Tenth and Eleventh Circuits wrongly ignore the preference for providing the jury with facts over opinions whenever possible,<sup>273</sup> thereby admitting lay opinion that unreasonably extends the reach of Rule 701, threatens the province of the jury, and provides an unfair advantage to the prosecution. Accordingly, the approaches of the Tenth and Eleventh Circuits conflict with the purpose of Rule 701 and should not be followed.

As explained in Part II.A.1, in *Jayyousi* a law enforcement officer testified as a lay witness after having preformed only an after-the-fact review of the investigation materials.<sup>274</sup> Addressing Rule 701(a) first, the court in *Jayyousi* explained that the Eleventh Circuit had never required a lay person testifying about allegedly coded language to participate in or observe the conversation in question.<sup>275</sup> The court extended this assertion further, stating that lay witnesses do not need to be involved in events to testify about them.<sup>276</sup> Meanwhile, the Tenth Circuit in *Zepeda-Lopez* wholly ignored the Rule 701(a) issue, despite the appellant's argument that the testifying agent did not have the requisite personal knowledge to support his visual and audio identifications.<sup>277</sup> Concluding that the lower court did not abuse its discretion in admitting the agent's lay opinion testimony,<sup>278</sup> the Tenth Circuit found no error in the agent basing his lay opinion testimony on nothing more than his after-the-fact review of the

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270. See *United States v. Jayyousi*, 657 F.3d 1085, 1102–04 (11th Cir. 2011); *United States v. Zepeda-Lopez*, 478 F.3d 1213, 1220–23 (10th Cir. 2007).

271. FED. R. EVID. 701.

272. *Id.*

273. See *supra* note 42 and accompanying text.

274. *Supra* note 143 and accompanying text.

275. See *supra* note 150 and accompanying text.

276. See *supra* note 151 and accompanying text.

277. See *supra* notes 187, 190 and accompanying text.

278. See *supra* note 181 and accompanying text.

same videotape and recorded phone calls that were submitted into evidence.<sup>279</sup>

The Advisory Committee note for Rule 701 states that a “witness’s perception” means the witness’s “first-hand knowledge or observation.”<sup>280</sup> The Tenth and Eleventh Circuits did not suggest in either *Jayyousi* or *Zepeda-Lopez* that the testifying agent actually observed the incident in question. Accordingly, these circuits must believe that an after-the-fact review of investigation materials meets the definition of first-hand knowledge.<sup>281</sup>

Based on this interpretation, it appears that, in the Tenth and Eleventh Circuits, any investigating officer is qualified to offer lay opinion testimony if he merely reviews materials that pertain to the investigation. An interpretation with this result wholly ignores the reason for requiring first-hand knowledge for lay opinion testimony, which is to ensure that only individuals who actually perceived an incident are permitted to give opinions about it.<sup>282</sup> As the dissent in *Jayyousi* explained, witnesses should not provide lay opinion testimony unless they “personally experienced an event and therefore have the ability to describe their layperson’s perception of the event that the jury cannot otherwise experience for itself.”<sup>283</sup> Individuals who personally perceived an event are uniquely qualified to offer lay opinion because they possess “sensory and experiential observations” otherwise unavailable to the jury.<sup>284</sup> The dissent’s statement points to one of the essential elements that sets a lay witness apart from a jury member: a first-hand knowledge of what occurred, which cannot be replicated by simply reviewing the documents in evidence.<sup>285</sup>

More specifically, a law enforcement officer such as Agent Kavanaugh in *Jayyousi* or Agent Barrett in *Zepeda-Lopez* does not possess information that will increase the accuracy of a jury’s understanding because simply reviewing documents is essentially the same task that is given to the jury. That the witness has also reviewed the evidence and can offer his or her own opinion about its significance does not mean that the witness has first-hand knowledge of the events any more than the jury has first-hand knowledge.

The court in *Jayyousi* attempted to counter the argument that the agent’s testimony simply summarized admitted evidence by explaining that the agent reviewed thousands of documents, including those that were not submitted into evidence.<sup>286</sup> However, as the dissent in *Jayyousi* argued, and as this Note contends, general knowledge of an investigation does not

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279. See *supra* note 186 and accompanying text.

280. FED. R. EVID. 701 advisory committee’s note; see *supra* Part I.C.1.

281. Indeed the court in *Jayyousi* even quotes the Advisory Committee note when discussing Rule 701. See *supra* note 141 and accompanying text.

282. See *supra* notes 69–70 and accompanying text.

283. *Jayyousi*, 657 F.3d at 1120 (Barkett, J., concurring in part and dissenting in part).

284. *Id.*

285. See *supra* note 90 and accompanying text.

286. See *supra* note 160 and accompanying text.

provide a sufficient basis to offer a lay opinion regarding the specific events of an investigation.<sup>287</sup> To hold otherwise undermines Rule 701 testimony. Indeed, lay testimony based on reviewing documents in evidence does not fall within any of the commonly accepted forms of a “witness’s perception” explained in Part I.C.1.

The Tenth and Eleventh Circuits’ approaches to law enforcement lay opinion testimony also provide an unfair tool for the prosecution. As contended above, by effectively eliminating the first-hand knowledge requirement of Rule 701, it appears that a law enforcement officer need only review an investigation’s case file to then offer opinion testimony about the case. Providing the prosecution with this type of tool unfairly advantages the government, as the defendant is unlikely to be able to produce a similarly situated law enforcement officer to testify to an alternative interpretation of the investigation.

When examined under Rule 701(b)’s helpfulness requirement, the flaws of the Tenth and Eleventh Circuits’ analyses are further demonstrated. In *Jayyousi* the court argued that Agent Kavanaugh’s testimony was helpful because the agent was able to interpret the conversation within the wider context of the investigation as a whole.<sup>288</sup> Employing a similar argument in *Zepeda-Lopez*, the Tenth Circuit found that Agent Barrett’s opinion testimony was helpful because he had the opportunity to review the videotape and audiotapes several times.<sup>289</sup>

While Rule 701 testimony is not wholly limited to “necessary” testimony,<sup>290</sup> it is limited to testimony that increases the accuracy of the jury’s understanding.<sup>291</sup> Both courts, however, improperly defined “helpfulness” under Rule 701(b). Neither Agent Kavanaugh in *Jayyousi* nor Agent Barrett in *Zepeda-Lopez* was helpful under Rule 701(b) because the jury was as capable as the witness to determine the significance of the evidence in question.<sup>292</sup> Accordingly, such witness testimony is in direct conflict with Rule 701’s Advisory Committee note, which states that testimony should be deemed inadmissible if it “amount[s] to little more than choosing up sides.”<sup>293</sup> The dissent in *Jayyousi* supported this assertion, finding that because the testimony in question was about facts already before the jury, the witness did nothing more than state the prosecution’s understanding of the facts.<sup>294</sup> Where sufficient facts exist for a jury to

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287. See *supra* note 166 and accompanying text.

288. See *supra* notes 162–63 and accompanying text.

289. See *supra* note 193 and accompanying text.

290. See *supra* note 96 and accompanying text.

291. FED. R. EVID. 701 advisory committee’s note; see *supra* notes 90–92 and accompanying text.

292. See *supra* note 93 and accompanying text.

293. FED. R. EVID. 701 advisory committee’s note; see also *supra* note 110 and accompanying text.

294. See *supra* note 180 and accompanying text.

make its decision, wholly unnecessary lay opinions should not be admitted.<sup>295</sup>

Finally, the approaches of the Tenth and Eleventh Circuits should not be followed because they allow lay opinion testimony that threatens to invade the province of the jury. While some scholars have rejected the argument that lay opinion testimony will usurp the function of the jury,<sup>296</sup> this concern deserves greater attention,<sup>297</sup> particularly where the witness in question is a law enforcement officer providing opinions based on an after-the-fact review of the investigation. When a law enforcement officer did not actually participate in or observe the situation, prosecutors may present the officer's general knowledge of the case or professional experience as the basis for his opinion.<sup>298</sup> In many ways, this framing dresses up a lay witness in an expert witness's clothes, suggesting that the witness has such substantial knowledge of the case that he is qualified to testify about an aspect of which he was not involved.<sup>299</sup> This form of testimony threatens to invade the province of a jury in the same way that some have argued expert testimony does.<sup>300</sup> Analogizing authoritative lay witnesses with expert witness, jurors may, whether consciously or unconsciously, accept authoritative lay witnesses' opinions without performing a proper, independent assessment of the evidence.<sup>301</sup> Accordingly, special care should be paid to the decision to admit law enforcement officers' lay opinion testimony, a care that the approaches of the Tenth and Eleventh Circuits do not demonstrate.

The approaches of the Tenth and Eleventh Circuits should be disregarded in light of their overly broad interpretations of Rule 701(a) and Rule 701(b).

*B. Continuing Problems of an Overly Inclusive Lay Opinion Rule Found Under the Moderate Interpretation of Rule 701*

While the Seventh and Ninth Circuits, at first, appear to correct the problems of the Tenth and Eleventh Circuits regarding the personal perception requirement of Rule 701(a), closer examination reveals that these circuits continue to embrace interpretations of Rule 701(a) that run counter to the Rule's purpose and, thus, should not be followed.

Both *Freeman* and *Rollins* involved officers testifying regarding the meaning of recorded phone calls.<sup>302</sup> In both cases, just as in *Jayyousi* and *Zepeda-Lopez*, the testifying officer did not actually observe or participate

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295. See *supra* note 93 and accompanying text.

296. See *supra* note 105 and accompanying text.

297. See *supra* notes 254–55 and accompanying text.

298. See, e.g., *United States v. Jayyousi*, 657 F.3d 1085, 1103 (11th Cir. 2011); *United States v. Johnson*, 617 F.3d 286, 293 (4th Cir. 2010); *United States v. Rollins*, 544 F.3d 820, 831–32 (7th Cir. 2008); *United States v. Freeman*, 498 F.3d 893, 902 (9th Cir. 2007); *United States v. Garcia*, 413 F.3d 201, 212 (2d Cir. 2005).

299. See *supra* notes 206, 213 and accompanying text.

300. See Nossel, *supra* note 107, at 249.

301. See *id.*

302. See *supra* notes 199, 207 and accompanying text.

in the recorded conversation in question.<sup>303</sup> Accordingly, in relation to the specific events about which the officers testified, the witnesses in *Freeman* and *Rollins* possessed no more first-hand knowledge or experience than the officers in *Jayyousi* and *Zepeda-Lopez* and were therefore no closer to having personally perceived the event. However, unlike *Jayyousi* and *Zepeda-Lopez*, the officers in *Freeman* and *Rollins* did obtain first-hand knowledge *subsequent* to hearing the recordings, which helped inform their understandings of the conversations' meanings.<sup>304</sup> This subsequent knowledge included conducting surveillance<sup>305</sup> and interviewing persons of interest.<sup>306</sup> Both the Seventh and Ninth Circuits offered this subsequent first-hand knowledge as further evidence that the officer was qualified under Rule 701(a) to provide testimony about the meaning of the recorded calls.<sup>307</sup>

Under a proper reading of Rule 701, however, this form of first-hand knowledge does not enhance an officer's qualification to testify because it does not increase the officer's first-hand perception of the conversation itself. To provide lay opinion testimony about a specific aspect of an investigation, courts should require an officer to have personally perceived the subject of the testimony.<sup>308</sup> Merely possessing related information that influences the officer's understanding of the event is not sufficient. Examining an analogous set of facts, the Fourth Circuit in *Johnson* explained that interviews with suspects were only second-hand information in reference to the meaning of the recorded calls in question.<sup>309</sup> In other words, the only possible source of first-hand knowledge regarding an event is personal perception of the event itself. Lay opinion testimony based on any other information constitutes nothing more than "post-hoc assessments."<sup>310</sup>

If the Rule was otherwise, as the approaches of the Seventh and Ninth Circuits encourage, the lay opinion rule would remain overly broad and result in the same negative consequences outlined in Part III.A. This is because none of the personal perception problems explained above would be solved. An individual who did not personally perceive an event would still be testifying to its significance.

Moreover, the officers in *Freeman* and *Rollins* would likely be able to provide lay opinion testimony about the interviews and surveillance— independent from interpreting the recorded conversations—because they personally perceived the interviews and surveillance, as Rule 701 requires. It would then be for the jury to decide whether the combination of these pieces of evidence—the recorded calls, the surveillance, and the

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303. See *supra* notes 203, 209 and accompanying text.

304. See *supra* notes 203, 209–10 and accompanying text.

305. See *supra* notes 203, 210 and accompanying text.

306. See *supra* note 209 and accompanying text.

307. See *supra* notes 205–06, 213 and accompanying text.

308. See *supra* notes 172, 233–34 and accompanying text.

309. See *supra* note 263 and accompanying text.

310. See *supra* note 263 and accompanying text.

interviews—constituted evidence of criminal activity. Additionally, the prosecution could use both the opening and closing statements to argue the connection between these pieces of evidence.<sup>311</sup> Moving away from the approaches of the Seventh and Ninth Circuits, therefore, would not deprive the jury of any necessary information and would prevent a detrimental reading of Rule 701.

*C. Creating Meaningful Limitations for Law Enforcement  
Lay Opinion Testimony Under Rule 701*

Departing from the overly inclusive approaches of the Seventh, Ninth, Tenth, and Eleventh Circuits, the approaches of the Second, Fourth, and Eighth Circuits provide valuable guidance for the proper interpretation of Rule 701(a) and 701(b), maintaining a focus on the Rule’s objective, as well as the other principles outlined in the Advisory Committee note.<sup>312</sup> First, this Note recommends that courts embrace an augmented version of the Rule 701(a) test for first-hand knowledge outlined in *Peoples*,<sup>313</sup> which will align with the dissenting opinion in *Jayyousi*.<sup>314</sup> Second, this Note supports an approach to Rule 701(b) that follows the *Garcia* court’s analysis.

*Peoples*, *Garcia*, and *Johnson* each promote interpretations of Rule 701(a) that help solve the problems associated with an overly inclusive lay opinion rule as outlined in Part III.A and Part III.B. Most importantly, these circuits embrace a definition of first-hand knowledge that recognizes the purpose behind the personal perception requirement of Rule 701(a)<sup>315</sup> and ensures that only those who are properly qualified offer lay opinions. To begin, in *Garcia* the court emphasized that Agent Klemick did not have first-hand knowledge of the recorded calls in question because his opinion was based not on his personal perceptions but on the “total information developed by all the officials who participated in the investigation.”<sup>316</sup> The court concluded that this did not serve Rule 701’s objective of providing a

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311. See 75A AM. JUR. 2D *Trials* § 444, at 32 (2007) (“[During closing argument c]ounsel is granted wide latitude to discuss the merits of the case, both as to the law and facts, and is entitled to argue his or her case vigorously and to argue all reasonable inferences from the evidence.”).

312. The First Circuit, *Keller v. United States*, 38 F.3d 16 (1st Cir. 1994), and Third Circuits, *Hirst v. Inverness Hotel Corp.*, 544 F.3d 221 (2008), could be interpreted as falling within this grouping of circuits. However, as neither circuit has addressed this issue with specific reference to law enforcement officers, they remain outside the scope of this Note. See generally Emily Jennings, Comment, *Witness History As Juries Become History: How the Eleventh Circuit Allowed the Opinions of Law Witnesses To Overtake the Duty of the Jury in United States v. Jayyousi*, 54 B.C. L. REV. E. SUPP. 145 (2013), [http://bclawreview.org/files/2013/04/11\\_Jennings.pdf](http://bclawreview.org/files/2013/04/11_Jennings.pdf) (discussing the Rule 701 circuit split and reaching a similar conclusion).

313. See *supra* notes 240–41 and accompanying text.

314. See *supra* note 174 and accompanying text.

315. See *supra* notes 69–71 and accompanying text.

316. *United States v. Garcia*, 413 F.3d 201, 212 (2d Cir. 2005).

more “accurate reproduction of the event”<sup>317</sup> because it offered no “unique insights of an eyewitness’s personal perceptions.”<sup>318</sup> *Johnson* took a similar stance, finding testimony based on purely after-the-fact investigation to be “post-hoc assessments.”<sup>319</sup>

With the fundamental concepts from *Garcia* and *Johnson* in mind, this Note turns to *Peoples* to provide a more concrete test for when law enforcement testimony meets the requirements of Rule 701(a). In *Peoples*, a case that had substantially the same facts as *Jayyousi*,<sup>320</sup> the Eighth Circuit found an officer’s lay opinion testimony to be inadmissible because she did not personally perceive the recorded conversations in question.<sup>321</sup> The court concluded that such testimony amounted to no more than a “narrative gloss” of the facts of the case.<sup>322</sup> The court then outlined the three specific instances when a law enforcement officer may testify about the meaning of a recorded conversation.<sup>323</sup> The list is as follows: “when the law enforcement officer is a participant in the conversation, has personal knowledge of the facts being related in the conversation, or observed the conversations as they occurred.”<sup>324</sup>

While the first and third prongs of this test are self-explanatory, the meaning of the second prong is somewhat less apparent. To clarify, the second prong is not satisfied when a law enforcement officer obtains knowledge regarding the conversation *subsequent* to hearing the conversation, such as in the Seventh and Ninth Circuit cases.<sup>325</sup> Instead this prong refers to individuals who possess personal knowledge of the conversation’s content because of past experiences with the subject at issue.<sup>326</sup> In *Peoples*, the court cited *United States v. Saulter*,<sup>327</sup> a case where a former drug dealer who had personal knowledge of the drug conspiracy discussed in the recorded calls was permitted to provide opinion testimony about the call’s meaning.<sup>328</sup> The Fourth Circuit in *Johnson* further confirmed this conception of the second prong.<sup>329</sup> Analogizing its facts to the facts in *Peoples*, *Johnson* explicitly found that information gathered subsequent to hearing a recorded call was insufficient to qualify a law enforcement officer to give lay opinion testimony about the conversation’s meaning.<sup>330</sup>

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317. *Id.* at 211 (quoting FED. R. EVID. 701 advisory committee’s note).

318. *Id.* at 212.

319. *United States v. Johnson*, 617 F.3d 286, 293 (4th Cir. 2010).

320. *See supra* note 176 and accompanying text.

321. *See supra* note 223 and accompanying text.

322. *United States v. Peoples*, 250 F.3d 630, 640 (8th Cir. 2001).

323. *See supra* note 240 and accompanying text.

324. *Peoples*, 250 F.3d at 641.

325. *See supra* notes 203, 209–10 and accompanying text.

326. *See Peoples*, 250 F.3d at 641 (citing *United States v. Saulter*, 60 F.3d 270, 276 (7th Cir. 1995)); *see also supra* note 77 and accompanying text.

327. *Peoples*, 250 F.3d at 641.

328. *Saulter*, 60 F.3d at 276.

329. *See supra* notes 263–64 and accompanying text.

330. *See supra* note 264 and accompanying text.

While the second prong differs somewhat from the test seen in the Seventh and Ninth Circuits, this Note argues that, realistically, it poses substantially the same threats to the integrity of the testimony before the jury. Alternatively, the dissent in *Jayyousi* contended that the requirement of first-hand knowledge is only satisfied where the law enforcement officer was “either (1) a personal participant in a conversation as an undercover agent, or (2) a listener to a conversation while observing a defendants’ behavior in real time to coordinate the conversation with the conduct.”<sup>331</sup> This more limited test accounts for the potential problems that the second prong would create and, in the end, does not prevent any necessary testimony from being admitted.<sup>332</sup>

The two categories outlined in *Peoples*, and reiterated in the *Jayyousi* dissent, should be extended to all law enforcement officer testimony because they are broad enough to encompass all scenarios when an officer would properly offer lay opinion testimony, while narrow enough to help exclude testimony that is not actually based on first-hand knowledge. Accordingly, confining law enforcement lay opinion testimony will help solve the various problems associated with lay officer testimony. First, the two distinct categories help ensure that testimony does not, as the court in *Garcia* explained, “dr[a]w on the total information developed by all the officials who participated in the investigation.”<sup>333</sup> Officers will need to point to a specific experience in which they personally perceived the event in question. Second, the categories prevent parties from disguising testimony based on specialized knowledge, which should be certified under Rule 702,<sup>334</sup> as testimony based on the general knowledge of an investigation. Because under this approach general knowledge will not be a sufficient basis for lay opinion testimony, officers again will need to show more specific first-hand knowledge to testify as a layperson. As a whole, the categories will help to guarantee that only those who possess specific, identifiable first-hand knowledge of an event are allowed to offer testimony about its significance, resulting in fairer trials with less prejudicial testimony.

Further, the interpretation of Rule 701(b) outlined in *Garcia* should be the controlling interpretation. Most importantly, the Second Circuit in *Garcia* explains that lay opinion testimony cannot simply summarize admitted testimony.<sup>335</sup> While Rule 701’s Advisory Committee note already supports this point,<sup>336</sup> the principle must be adhered to more strictly, as done in *Garcia*. If complete evidence is already before the jury, an officer must not be permitted to unnecessarily offer opinions, which do little more

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331. *United States v. Jayyousi*, 657 F.3d 1085, 1123 (11th Cir. 2011).

332. *See supra* Part III.B.

333. *United States v. Garcia*, 413 F.3d 201, 212 (2d Cir. 2005).

334. *See supra* note 9 and accompanying text.

335. *See supra* note 254 and accompanying text.

336. *See* FED. R. EVID. 701 advisory committee’s note.

than unduly influence the jurors to agree with the prosecution's case.<sup>337</sup> A complete bar on this form of testimony should be executed.

In an effort to avoid usurping the jury's duties and to maintain the fairest possible trial, all circuits should embrace the Second, Fourth, and Eighth Circuits' approaches to Rule 701.

#### CONCLUSION

As the influence of the common law has waned, the role of lay opinion testimony in the American court system has significantly increased.<sup>338</sup> Generally, this change has been positive, responding to the obvious problems that a strict fact-opinion distinction created.<sup>339</sup> Indeed, lay opinion testimony provides the jury with a clearer understanding of what occurred in a given situation and, therefore, helps the jury properly determine disputed facts.<sup>340</sup> However, the existence of Rule 701 in and of itself demonstrates that lay opinion testimony must have a limit of some kind. Because of Rule 701's fairly vague wording, judges possess great discretion to determine the admissibility of lay testimony that lies within the Rule's gray areas.<sup>341</sup> In each situation, judges must determine whether the lay witness possesses sufficient "perception" of the situation, as well as whether the testimony is "helpful" to the trier of fact.<sup>342</sup>

However, the Seventh, Ninth, Tenth, and Eleventh Circuits have strayed too far from the original meaning and purpose of Rule 701. Their approaches have allowed unqualified and unnecessary testimony from law enforcement officers to reach jurors. At least where officer testimony is at issue, the approaches of these four circuits need to be abandoned, and an augmented version of the approaches of the Second, Fourth, and Eighth Circuits should be embraced. These three circuits have placed meaningful limitations on officers' lay opinion testimony, generally striking the appropriate balance between allowing the jury to hear testimony and preventing witnesses from usurping the jury's function.

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337. See *supra* notes 255–56 and accompanying text.

338. See *Asplundh Mfg. Div. v. Benton Harbor Eng'g*, 57 F.3d 1190, 1195 (3d Cir. 1995) (explaining that Rule 701 demonstrates "a movement away from the courts' historically skeptical view of lay opinion evidence").

339. See *supra* Part I.A.

340. See *supra* note 91 and accompanying text.

341. See 29 WRIGHT & GOLD, *supra* note 5, § 6253, at 116.

342. FED. R. EVID. 701.