



- Lee Burgess: Welcome to the Bar Exam Toolbox podcast. Today, we’re doing another in our “Listen and Learn” series – this one on lay opinion and expert opinion testimony. Your Bar Exam Toolbox hosts are Alison Monahan and Lee Burgess, that’s me. We’re here to demystify the bar exam experience, so you can study effectively, stay sane, and hopefully pass and move on with your life. We’re the co-creators of the [Law School Toolbox](#), the [Bar Exam Toolbox](#), and the career-related website [CareerDicta](#). Alison also runs [The Girl’s Guide to Law School](#). If you enjoy the show, please leave a review on your favorite listening app, and check out our sister podcast, the [Law School Toolbox podcast](#). If you have any questions, don’t hesitate to reach out to us. You can reach us via the [contact form](#) on BarExamToolbox.com, and we’d love to hear from you. And with that, let’s get started.
- Lee Burgess: Hello, and welcome back to the “Listen and Learn” series from the Bar Exam Toolbox podcast! Today we will be focusing on Evidence and discussing lay and expert witnesses. Witnesses are important, as their testimony can serve as crucial evidence in a trial. However, in order for witness testimony to be admissible, the party presenting the witness must establish that there is a proper basis for the witness to testify in the matter. The standards for the basis of admitting witness testimony are found in the rules of Evidence.
- Lee Burgess: When it comes to witness testimony, a lay witness is any person who gives testimony in a case that is not called an expert. Lay witness testimony is admissible if the witness is, one, competent to testify – which competency is presumed unless rebutted; and two, the witness has personal knowledge of the matter.
- Lee Burgess: Lay witnesses usually are not allowed to offer opinions as part of their testimony. However, there are exceptions in which lay witnesses may offer opinion testimony. The instances in which lay witnesses can offer opinion testimony are if the layperson’s opinion is, one, rationally based on perceptions of a layperson; two, helpful to clearly understand the testimony or determine a fact, but the opinion testimony cannot be a legal conclusion; and three, the opinion is not based on scientific, technical, or other specialized knowledge.
- Lee Burgess: Now let’s look at an example modified from the [February 2012 California bar exam](#):
- Lee Burgess: “Peter sued Daniel in federal court for damages for injuries arising from a car accident under a claim of negligence. At trial, Peter called Veena, who was a passenger in his car during the incident, to testify. Veena testified that when she



was in Peter's car she told Peter she saw a black SUV behind them weaving recklessly through traffic.

Lee Burgess: Should Veena's statement be admitted?"

Lee Burgess: In this instance, we have a perfect example of a lay witness. Veena fits the two prongs required to be a lay witness. Veena is presumed to be competent to testify and nothing indicates that she is incompetent. Veena also has personal knowledge of the matter as she was present during the accident.

Lee Burgess: However, Daniel will argue that Veena's statement he was driving recklessly should be inadmissible, because the statement "reckless" is an opinion regarding his driving. As discussed above, lay opinions are not usually admissible. However, let's go through and see if this opinion that Daniel was driving "recklessly" would fit under the criteria for lay witness opinions.

Lee Burgess: So, for prong one we examine if Veena's statement is rationally based on perceptions of a layperson. Daniel could argue that Veena's statement is not rationally based on a perception of a layperson, because the term "reckless" is conclusory. Thus, the standards Veena considers to be reckless driving may vary greatly by person, and it is unclear and tenuous what would generally be considered reckless by laypersons.

Lee Burgess: In addition, going to prong two, since Peter is suing Daniel based on negligence, Daniel could argue that Veena's statement that Daniel was driving recklessly creates a legal conclusion and goes to one of the elements of negligence. Also, Veena's statement that Daniel was driving recklessly is not likely helpful to the jury, as it merely is Veena's conclusion based on observing Daniel swerving, which the jury could come to their own interpretation of Daniel's driving without Veena's opinion. Thus, Veena's testimony that Daniel was allegedly driving recklessly is not helpful to the jury, and also may be considered a legal conclusion and would not be admissible as opinion testimony.

Lee Burgess: Now going to prong three, Daniel can attempt to argue that in order to opine if someone was driving recklessly, one would require specialized or scientific knowledge from an expert witness, such as a highway patrol officer, who has experience in pursuing and eradicating reckless driving and speeding. However, there are probably factors to indicate if someone is driving recklessly that would not require specialized knowledge, such as if a driver was creating skid marks on the road, or almost crashing into other cars next to them, or running through red lights. Nonetheless, since the other two prongs are not met to qualify



Veena's statement as a lay witness opinion, her statement would be inadmissible.

Lee Burgess: Thus, although Veena likely would be able to testify to the weaving between the cars that she witnessed, Veena's testimony that Daniel drove recklessly will likely be rendered inadmissible, because Veena's statement that Daniel was driving recklessly is her opinion based on her observation that does not fit within the parameters of lay witness opinion testimony.

Lee Burgess: So, that was our run through on lay witnesses. Now let's dig into expert witness testimony. Often during trials, parties will want to present expert witness testimony to support or refute their claims.

Lee Burgess: Expert witness testimony is permitted when, one, a witness is qualified as an expert; two, the expert's opinion is helpful to the jury; three, the expert witness believes in the opinion to a reasonable degree of certainty; four, the expert opinion is supported by sufficient facts or data; and five, the opinion is based on reliable principles and methods that were reliably applied.

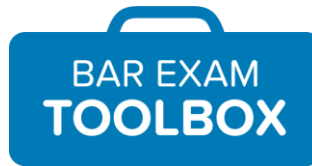
Lee Burgess: In order to determine the reliability of a certain principle or method the expert used, the factors to consider are, one, publication and peer review; two, the error rate; three, testability; and four, if it's generally accepted in the field.

Lee Burgess: Now let's work through a hypothetical modified from the [February 2019 California bar exam](#):

Lee Burgess: "Dave owns a house right next to Petra's house. Dave installed a large rainwater tank right at the border of his house and Petra's house, which leaked. One day, the water tank fell over onto Petra's property, landing on her retaining wall, which buckled. Petra sued Dave for negligence in federal court seeking \$100,000 to replace the retaining wall, claiming it failed because the water tank, weakened by leaks, landed on it.

Lee Burgess: At the jury trial, Dave called Gwen, Petra's gardener, who testified that she had met with Petra the day before the water tank fell and, while they inspected the retaining wall at issue, she saw it was old and had structural cracks that could cause it to fail, pointed this out to Petra, and told her that it would cost at least \$100,000 to replace it.

Lee Burgess: The jury returned a verdict in favor of Petra and awarded her \$20,000 in damages. Assume all appropriate objections and motions were timely made.



Lee Burgess: Should the court have admitted, (a) Gwen’s testimony that the retaining wall was old; and (b) Gwen’s testimony that the retaining wall had structural cracks that could cause it to fail and that it would cost \$100,000 to replace it?”

Lee Burgess: Let’s first analyze Gwen’s testimony that the retaining wall was old, and examine if either under expert or lay witness testimony Gwen’s statement may be admissible. Gwen is considered competent to testify and has personal knowledge of the wall, so would qualify as a relevant lay witness. However, Gwen’s statement that the retaining wall is old is an opinion. As discussed earlier, lay witnesses are not allowed to testify to an opinion. So let’s first check if Gwen’s opinion would qualify under expert witness testimony.

Lee Burgess: Here, Gwen is a gardener who is testifying about her inspection of the retaining wall with Petra. There are no indications or facts to demonstrate that Gwen would be an expert or qualified in assessing the age of the wall, or that she has a proper factual basis for her testimony. Thus, while the testimony that the wall is old would be helpful to the jury in determining whether the wall fell due to its age, it is unlikely that Gwen can meet the requirements to qualify as an expert witness. Thus, the testimony could not be properly admitted as expert witness testimony.

Lee Burgess: So, then let’s move on and assess if Gwen’s statement may be admissible as a lay witness opinion testimony. As we stated above, in order for a witness testimony to qualify as lay witness opinion testimony, it must be, one, rationally based on perceptions of a layperson; two, helpful to clearly understand the testimony or determine a fact (not a legal conclusion); and three, not based on scientific, technical, or other specialized knowledge.

Lee Burgess: Here, Gwen testified that the wall she observed was old. Her statement is clearly helpful in determining the quality of the wall, and lends to the question of if the wall fell due to Dave’s negligence or because of the age of the wall. Gwen’s statement that the wall was old could be based on perceptions of a layperson, as the age of a wall could be reasonably ascertainable by a layperson through different obvious cues that signal a wall’s age, such as cracks in the wall, plant growth or ivy surrounding the wall, and so forth. Gwen’s opinion does not appear to be based on any specialized knowledge. Thus, Gwen’s statement, although opinion, would be admissible under the exception as lay witness opinion testimony, and it is rationally based on a layperson’s perception, helpful to understand the testimony, and not based on any specialized knowledge.

Lee Burgess: Now let’s go to part (b) and evaluate Gwen’s testimony that the wall had structural cracks and it would cost \$100,000 to replace the wall. As analyzed



earlier, the facts only indicate Gwen is a gardener and nothing indicates that Gwen is an expert on walls, or a builder of walls, or has any experience or knowledge in the field of structural soundness of walls. Therefore, Gwen is not qualified to give opinion testimony on the structural soundness of the wall or the cost it would take to replace the wall. Therefore, the statement would not be admissible as expert witness testimony.

Lee Burgess: Now, we can go again and see if Gwen’s statement about the structural cracks and cost to replace the wall would fit as a lay witness opinion testimony. Although Gwen’s statements may be helpful to determine the quality of the wall, her opinions on the structural soundness of the wall and the cost to replace the wall are not matters that could reasonably be ascertainable by a layperson. It would very likely require some specialized knowledge or skills, such as a contractor or a builder, to ascertain such details. Therefore, the statements of the structural cracks and cost to fix the wall would not qualify as lay witness testimony.

Lee Burgess: Thus, the court should not have admitted the testimony regarding the structural cracks and cost to replace the wall, as there was no basis to admit such statements under expert testimony or lay witness opinion testimony.

Lee Burgess: Well, that’s all the time we have for today. If you enjoyed this episode of the Bar Exam Toolbox podcast, please take a second to leave a review and rating on your favorite listening app. And be sure to subscribe so you don’t miss anything. If you have any questions or comments, don’t hesitate to reach out to myself or Alison at [lee@barexamtoolbox.com](mailto:lee@barexamtoolbox.com) or [alison@barexamtoolbox.com](mailto:alison@barexamtoolbox.com). Or you can always contact us via our website [contact form](#) at BarExamToolbox.com. Thanks for listening, and we’ll talk soon!

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