EXPERT AND LAY OPINION TESTIMONY

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Requiring compliance with the expert witness discovery rules is critical to effective trial preparation. Challenging insufficient expert notice letters or motions through the timely filing of exceptions to deficient expert notices is a necessary step in ensuring compliance with the Rules.

While reference to the Rules is mandatory, knowing what is necessary and important in your specific case requires particularized consideration of the facts of your case and then a consideration of the following:

1. ***The identity of the expert witness.*** Frequently one sees a general notice indicating that a witness, later to be identified, will testify as an expert. Such is not in compliance with the Rule. You cannot assess the qualifications of a proffered expert witness to offer an opinion in a particular area of expertise without both the identification of the witness and an analysis of the proffered witness's training, qualifications and experience in the area of expertise as to which the expert opinion testimony is to be offered.

2. ***Is the area of "expertise" an accepted field for the offering of "expert" testimony?*** Not accepting as an "automatic" that a particular area of expertise is accepted as appropriate for expert testimony should be an ongoing matter. For how many years was comparative bullet lead analysis testimony uncritically permitted in criminal cases until the Court of Appeals in *Clemons v. State,* 392 Md. 339, 896 A.2d 1059 (2006) held that it failed the *Frye-Reed* test.

3. ***What is the basis for the opinion testimony?*** Do you have the testing procedure protocol, the underlying test results and do you know the specific testing that was conducted in this instance? Do you have the analyst's bench notes and a complete copy of the expert's work file?

4. ***What is the opinion?*** Perhaps the most critical question – what is the expert going to opine? It is not sufficient to have an understanding of a general opinion. Insist on the specific opinion as it relates to the facts in your case. Many expert notices are only in boilerplate form or only provide limited information regarding the details and scope of the expert's opinion. Insist upon a detailed and particularized summary of the opinion to be offered by the expert witness.

Maryland Rule 4-263(d)(8) is the discovery rule governing experts. The rule requires that as to each expert consulted by the State's Attorney in connection with the action that the State produce:

> (A) the expert's name and address, the subject matter of the consultation, the substance of the expert's findings and opinions, and a summary of the grounds for each opinion;

(B) the opportunity to inspect and copy all written reports or statements made in connection with the action by the expert, including the results of any physical or mental examination, scientific test, experiment, or comparison; and
(C) the substance of any oral report and conclusion by the expert.

Consultation puts the discovery rules in motion, not simply intended use by the State. The rules governing the State's discovery obligations does not condition the discovery of scientific tests upon their admissibility as evidence, or upon a showing that the results of the tests are material to the preparation of the defense and intended for use by the State. Pantazes v. State, 141 Md.App. 422, *cert. denied*, 368 Md. 241, *appeal after new trial*, 376 Md. 661 (2001).

While the discovery rules with respect to experts are reciprocal in most respects, the rules are not reciprocal with respect to disclosure of the identity of experts "consulted" by the defense. The State has an affirmative obligation to disclose the opinions offered by any expert that has been consulted by the prosecution regardless of whether the prosecution intends to call that witness or not. With respect to the defense, the only obligation is with respect to experts that the defense intends to call at the trial.

SUMMARY OF APPELLATE OPINIONS DISCUSSING RULE 4-263(d)(8); EXPERT WITNESS DISCLOSURES & LAY OPINION TESTIMONY

State Fails To Meet Discovery Obligations

In Hutchins v. State, 339 Md. 466 (1995), the State consulted with experts in buying and selling used automobiles. The State gave the expert documents that the defendant relied upon to show a good faith purchase and asked the experts to be ready to give rebuttal testimony. Thus the State was seeking information from experts pursuant to the rules, and thus was required to disclose the experts to the defendant, even if the State's experts did not testify until rebuttal. The State is required, when requested, to disclose conclusions reached by each expert consulted by the State regardless of whether that expert will ever be called to testify.

In Simpson v. State, 214 Md.App. 336, *cert. granted*, 2014 WL 340712 (opinion pending), it was error for the court to admit lay opinion based upon specialized knowledge, skill, experience, training, or education when the State has failed to classify it as expert testimony and to provide the defendant reports or statements of experts, and the expert's name and address, the subject matter of the consultation, the substance of the expert's findings and opinions and a summary of the grounds for each opinion without any necessity of the defendant's request.

In Smith v. State, 196 Md.App. 494, *cert. granted*, 418 Md. 587, *reversed*, 423 Md. 573 (2010), it was error where the State, by merely informing a murder defendant, before calling the witness to testify, that an expert in forensic pathology would be a rebuttal witness and that the defendant had not yet been provided with the expert's opinion, failed to comply with rule requiring pre-trial disclosure of conclusions of experts consulted by the State.

In Hutchinson v. State, 406 Md. 219 (2008), it was error to allow the State to call a forensic nurse examiner to render an expert opinion that the complainant's injuries were

consistent with rape, without the State first disclosing in discovery the witness's testimony, as required by the discovery rules, in a rape prosecution. The error was not harmless in light of the fact that there were no eyewitnesses to the events beyond the defendant and the complainant, and the forensic nurse was the only witness to have performed a gynecological exam on the complainant following the alleged rape. Furthermore, the forensic nurse's testimony bolstered the credibility of the complainant's allegations and was not merely cumulative of other evidence presented.

Lay Opinion Testimony

In cases where the State has failed to provide expert notice of a witness in discovery, it will require defense counsel to be on alert during trial for testimony that the State tries to elicit from a witness in the guise of lay opinion.

Maryland Rule 5-701 (lay testimony) states that: "If the witness is not testifying as an expert, the witness's testimony in the form of opinions or inferences is limited to those opinions or inferences which are (1) rationally based on the perception of the witness and (2) helpful to a clear understanding of the witness's testimony or the determination of a fact in issue."

By contrast, Maryland Rule 5-702 (expert testimony) states that: "Expert testimony may be admitted, in the form of an opinion or otherwise, if the court determines that the testimony will assist the trier of fact to understand the evidence or to determine a fact in issue. In making that determination, the court shall determine (1) whether the witness is qualified as an expert by knowledge, skill, experience, training, or education, (2) the appropriateness of the expert testimony on the particular subject, and (3) whether a sufficient factual basis exists to support the expert testimony."

In general, the following areas have been held by the Courts to be proper subjects of **lay testimony**:

Odor of Marijuana: An expert is not required to identify the odor of marijuana. No specialized knowledge or experience is required in order to be familiar with the smell of marijuana. In re Ondrel M., 173 Md.App. 223, 243 (2007).

Intoxication: A police officer could give lay opinion that defendant was drunk, under the influence of alcohol, and highly impaired by alcohol. Warren v. State, 164 Md.App. 153 (2005).

Reasonable Articulable Suspicion: A police officer does not need to be an expert to render an opinion on his basis for reasonable articulable suspicion to conduct a pat-down. Matoumba v. State, 162 Md.App. 39 (2005).

Appearance of Nervousness: A police officer's lay opinion that defendant appeared nervous was admissible. Jones v. State, 132 Md.App. 657 (2000).

Appearance of an Object: The detective was permitted to give lay opinion that bag found in defendant's home was similar to those used by telephone company based on detective's first-hand knowledge. Rosenberg v. State, 129 Md.App. 221 (1999).

Witness Not Qualified To Offer Lay Opinion

In some instances, the proponent of "lay testimony" is not able to meet its burden. In Bey v. State, 140 Md.App. 607, 625 (2001), a detective was offered to give his lay opinion as to whether the defendant was under the influence of PCP. The detective was a 15-year police veteran who has had contact with many people under the influence of PCP. But the detective testified that a person under the influence of PCP could exhibit a wide range of behavior and emotion and the detective had only been in contact with the defendant for a short period of time. Given the wide range of behavior a person under the influence of PCP may exhibit, and the limited information available to the detective about the defendant the detective was not qualified to express his opinion. In addition, any opinion expressed would not have been helpful to the jury.

Likewise, it was impermissible for state troopers to give lay testimony that the substance in a baggie which the defendant ingested was crack cocaine as this was not based on first-hand or personal knowledge, but rather, just on the troopers' training and experience enabling them to perceive the visual characteristics of suspected cocaine. Robinson v. State, 348 Md. 104 (1997).

Expert Opinion Testimony Proper

In general, the following areas have been held by the Courts to be the subject of **expert testimony**:

Drug Transactions: Police officer's testimony concluding that a particular series of events constituted a drug transaction based on their training and experience was "expert testimony" subject to 4-263(d)(8) and 5-702. Ragland v. State, 385 Md. 706, 725-26 (2005).

Drug Operations: police officer could testify as an expert in drug operations that photographs depicting the defendant with stacks of money and expensive cars were 'trophy photographs' of kind frequently used by mid-level drug dealers to impress and recruit subordinates. Lucas v. State, 116 Md.App. 559, *cert. denied*, 348 Md. 206 (1997).

Drug Codes: police officer could testify in drug prosecution that numerical data retrieved from defendant's pager constituted a method in which the defendant communicated with drug sellers and buyers, and the codes used. Shemondy v. State, 147 Md.App. 602, *cert. denied*, 373 Md. 408 (2002).

Gangs: testimony about the history, hierarchy, and common practices of a street gang is permissible expert testimony. Gutierrez v. State, 423 Md. 476 (2011).

PWID: expert opinion that the drugs found in plastic bags in car "were going to be distributed" was not improper comment on defendant's state of mind at time of arrest because it related to the quantity and packaging of the drugs rather than explicitly or implicitly conveying the defendant's intention. Pringle v. State, 141 Md.App. 292, *cert. denied*, 367 Md. 723, *cert. granted*, 368 Md. 239, *reversed*, 370 Md. 525, *cert. granted*, 538 U.S. 921, *reversed*, 540 U.S.

366 (2001). Also, an FBI agent's expert testimony that packaging of the drugs found in defendant's car was consistent with a professional, out-of-town organization and that the semiautomatic guns in the car were the type generally used by drug dealers was relevant and admissible in prosecution for possession of heroin and cocaine with intent to distribute. Diaz v. State, 129 Md.App. 51, *cert. denied*, 357 Md. 482 (1999).

HGN: Police officer's testimony regarding the administration and observations of a horizontal gaze nystagmus test was "expert testimony" subject to 4-263(d)(8) and 5-702. State v. Blackwell, 408 Md. 677, 695 (2009). But, it is impermissible for a police officer to testify, even as an expert, as to his opinion that a defendant's BAC level is a specific quantity. Wilson v. State, 124 Md.App. 543 (1999). In Schultz v. State, 106 Md.App. (1995), the prosecution failed to make the necessary showing that a police officer administering the HGN test was qualified to administer the test. The officer testified to having received training at the police academy 5 years previously and having administered field sobriety tests 100 times, but there was no indication of the nature of the training, whether it was proper, whether it was supervised by a certified instructor, or whether the officer himself had been certified to administer the test.

K-9 Detection: Police officer's testimony regarding his observations of a canine that had been trained to detect the presence of fire accelerants was "expert testimony" subject to 4-263(d)(8)(A) and 5-702. Simpson v. State, 214 Md. App. 336 (2013). Likewise, testimony of police officers in murder prosecution regarding cadaver dogs was expert testimony. Clark v. State, 140 Md.App. 540, *cert. denied*, 368 Md. 527 (2001).

Cell Phone Tracking: Police officer's testimony interpreting cell phone records, cell site location, and cell tracking technology is expert testimony. Wilder v. State, 191 Md.App. 319, 368 (2010); Coleman-Fuller v. State, 192 Md.App. 577, 619 (2010).

Eyewitness Identification: may be admissible as expert testimony if the testimony will be of real appreciable help to the trier of fact in deciding the issue presented. Bomas v. State, 412 Md. 392, 416 (2010).

Fingerprint Examination: is expert testimony. Wise v. State, 132 Md.App. 127, *cert. denied*, 360 Md. 276 (2000).

Psychiatric Profile: expert witness may testify to defendant's psychiatric profile, from which the jury may infer that defendant was suffering from the symptoms of that psychiatric disorder on the date in question. White v. State, 142 Md.App. 535 (2002).

Sexual abuse: clinical social worker in prosecution for child sexual abuse permitted to testify as expert that child's behavioral problems were consistent with abuse, because it was not an assertion of belief in truth of victim's testimony, but rather was an opinion on cause and effect relationship between abuse and disorders that child suffered from. Hall v. State, 107 Md.App. 684, *cert. denied*, 342 Md. 473 (1996). *See also*, Yount v. State, 99 Md.App. 207, *cert. denied*, 335 Md. 82 (1994).

PTSD: expert in sexual abuse prosecution may describe PTSD or rape trauma syndrome when offered to show lack of consent or to explain behavior that might be viewed as inconsistent with happening of event such as delay in reporting or recantation by victim; but it may not be offered to establish that the offense occurred or to say that the victim suffered from PTSD as a result of sexual abuse. Hutton v. State, 339 Md. 480 (1995).

Gunpowder Residue: expert opinion on number of gunpowder particles that would be deposited on a hand was admissible in prosecution for conspiracy to murder. Jones v. State, 132 Md.App. 657, *cert. denied*, 360 Md. 487 (2000).

Position of Gunman: Forensic pathologist's testimony in felony murder prosecution as to positions of gunman and victim when second shot was fired was relevant to charges of first-degree premeditated murder or second-degree intent to kill murder, and layperson could not be expected to calculate where those involved were standing. Bates v. State, 127 Md.App. 678, *cert. denied*, 356 Md. 635 (1999).

Proof of Handgun: Firearms expert opinion that weapon recovered from defendant's residence was a handgun within meaning of Maryland law was admissible in murder prosecution, evidence of handgun under Maryland law was complicated. Braxton v. State, 123 Md.App. 599 (1998).

A Cardinal Rule – No Opinion Testimony As To Truth Or Falsity of Other's Testimony

Remember, every witness is prohibited from testifying that, in his or her opinion, testimony given by another witness is true, or that it is false. This prohibition applies during direct or cross-examination, to expert and non-expert testimony. Hall v. State, 107 Md.App. 684, *cert. denied*, 342 Md. 473 (1996); Robinson v. State, 151 Md.App. 384, *cert. denied*, 377 Md. 276 (2003).

Practice Pointers

It is not sufficient to simply rely upon the affirmative obligation of your adversary to provide notice regarding proposed expert testimony. It is important to keep the issue at the top of the trial preparation agenda as it is frequently more difficult to respond to untimely expert notice than other forms of discovery.

When you receive notice of proposed expert testimony, review the notice carefully. Many of the notices being provided by the prosecution start out as boilerplate notices and are not particularized to the specific facts of your case. Such notices may identify a list of possible witnesses, i.e. providing a list of drug analysts or a list of possible "so called" drug experts. When a notice is received that seems to be a generic, boilerplate type of expert notice, either not identifying the expert or providing a list of possible expert witnesses, it is time to promptly file an exception to the sufficiency of the notice.

Rule 4-263(h) requires that expert notice be provided by the State within 30 day of appearance of counsel or the defendant's first appearance in court. The Defendant must provide

expert notice no later than 30 days before the first scheduled trial date. Unlike other forms of discovery, it seldom happens that the initial expert disclosure deadline is met by the State. It may be wise to file a motion to compel discovery pursuant to Rule 4-263(i) asking that the Court compel compliance with the Rule and submit a proposed Order with a deadline for compliance and the sanction of exclusion of the evidence if the deadline is not met. While tolerance in demanding compliance with deadlines in this area may be appropriate as a real world recognition of the difficulty in getting expert analysis and testing completed within the time set out in the Rule, it is wise to start a paper trail to document the fact that you have been "gently prodding" the prosecution to meet its expert disclosure obligations. At some point, if the disclosure obligations have still not been met, you are then in a much better position to demand a judicial sanction. Such an approach seeks to balance professional courtesy, reasonable deadlines and the need to have compliance with the State's discovery obligations sufficiently in advance of trial for the defense to be able to properly prepare to confront the expert testimony.

Some prosecutors, in an effort to comply with the Rule, will provide to defense counsel the identity of the expert witness, the witness' contact information and offer defense counsel the opportunity to speak directly with the witness regarding the proffered expert testimony. In one respect, this may afford the opportunity for defense counsel to have a better exploration of what the witness will say and the basis for the witness' testimony. The approach has, however, certain drawbacks. What the expert witness tells you in an informal conference is not documented. If there is an issue as to whether the expert witness later is testifying consistent with the opinion expressed to you by the witness during your conference with the witness, it will be difficult for the court to resolve such a dispute. Is the expert seeking to offer an opinion that is different from what was provided to you or in addition to the opinion expressed to you in your conference? If you choose to pursue the informal route, consider a post-conference documentation of what the expert witness said to you by letter to the prosecutor and/or to the prosecutor and the expert summarizing what you believe you have been told and inviting any corrections or modifications to your memorialization of what you were told.

In other instances, it may be wise to forego the informal discovery conference with the expert and insist on a written detailed notice that summarizes the scope and content of the expert's testimony. In a conference with the expert, just as you are sizing up the expert and attempting to understand the basis for the expert's testimony, the expert will be evaluating you. During the course of the conference with the expert you will likely also be educating the expert as to areas that you may pursue in cross-examination. You may decide that it is better not to so educate the expert, particularly if you believe that the expert is not fully qualified in the proffered area of expertise, that the expert's opinion is not well founded or simply that you do not want to highlight or forecast your cross-examination strategy.

Spend some time educating yourself in the witness' area of expertise. You may not became an "expert" in the same sense as the witness, but you can do a lot to advance your understanding of the area of expertise at issue. Focus your examination using the rules and examination skills to keep the expert in line and don't permit the witness to stray beyond the scope of the notice. Be prepared and be alert. And remember, the expert may know his or her area of expertise, but in trial the witness must operate in your area of expertise – the courtroom.