THE DEFENSE LINE

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When A Judge Says "Expert," The Jury Hears "EXPERT!!!"

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Featured Articles

When A Judge Says "Expert," The Jury Hears "*EXPERT!!!*"

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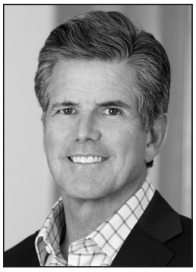

The attorney begins by asking foundational questions concerning the witness's qualifications. From the jury's perspective, they can see that the attorney appears to be building to something: "When did you obtain your doctorate?" "Have you ever been published in your field?" "And doctor, how long have you held that position?"…

Next, the attorney turns to the judge and tenders the witness as an expert in a particular field. From the jury's perspective, they see a break in the attorney's routine. They see the attorney halt his own questioning of the witness to suddenly, and in front of the jury, ask a question of the judge. And not just any question; the attorney asks that the judge — someone who has let every other witness testify without comment, praise, or criticism — to declare their witness an "expert."

Opposing counsel is then given the opportunity to object or conduct *voir dire*. Afterwards, and assuming the witness meets the requirements of Maryland Rule 5-702, the judge makes a declaration. From the jury's perspective, they see this honorifically titled person in a black robe who sits high in the courtroom (and takes no side in the case), make an affirmative statement about this witness. The jury sees the judge acknowledge this special witness as an "expert."

At the end of the trial, the jury must decide whether to accept or reject the opinion of this witness. But is a jury truly able to make an independent and uninfluenced decision after hearing the Court give its seal of approval and declaring this witness an "expert"?

The American Bar Association ("ABA") answer to this question is "no," and it denounces the practice of any court referring to these opinion witnesses as "experts" in the presence of the jury. ABA Civil Trial Practice Standard 14 states, "[t]he Court should not, in the presence of the jury, declare that a witness is qualified as an expert or to render an expert opinion, and counsel should not ask the Court to do so."[1]

We have found no good reason for courts to continue to follow the traditional Maryland approach of tendering a witness as an expert in the presence of the jury. We believe the time has come for Maryland to change the common practice of a court declaring a witness an "expert" in the presence of the jury. We advocate for our courts to adopt the ABA approach and conduct all offers and findings of expert status outside the presence of the jury. We welcome thoughts and comments on this approach.

The Meaning of "Expert"

The term "expert" is often used by the Maryland legal system to refer to a particular category of witnesses: those who have satisfied the criteria of Maryland Rule 5-702. Black's Law Dictionary defines "expert" as follows:

> Someone who, through education or experience, has developed skill or knowledge in a particular subject, so that he or she may form an opinion that will assist the fact-finder.[2]

Nothing in this legal definition denotes that the person is a master, or a genius, or an infallible being.

But this *legal* definition differs from the common-usage meaning of the term "expert," which often carries a greater degree of grandeur. The term "expert" was originally derived from the Latin term "expertus," which meant "well-proven, tested; **shown to be true**."[3] Unlike Black's Law Dictionary, Merriam Webster's Dictionary, defines "expert" as "one with the special skill or knowledge **representing mastery of a particular subject**."[4] In any video game or competition, "expert" is the most difficult setting at which one can play. Consequently, the common parlance usage of "expert" likely carries with it notions that exceed the minimum threshold requirements of Maryland Rule 5-702. To some, the term may even carry notions of absoluteness or incontrovertibility.

Moreover, the term "expert" is not just a noun, but also an adjective, communicating the speaker's belief or opinion about the degree of skill possessed by a particular person. A judge's declaration that a particular witness is testifying as an "expert" may unintentionally communicate to a juror that this neutral and learned magistrate believes a particular witness's testimony carries more weight or greater degree of truth.

The Law In Maryland

Under Maryland Rule 5-702, "[e]xpert testimony may be admitted … if the court determines that the testimony will assist the trier of fact." Nothing within that portion of the Rule requires that the trial court declare the witness to be an "expert" *in front of the jury* before permitting opinion testimony. Nothing within that Rule requires that the court make *any type* of declaration in front of the jury.

Maryland Rule 5-702 further provides that, in "making that determination, the court shall determine … whether the witness is qualified as an expert by knowledge, skill, experience, training, or education." *Id.* Nothing within this portion of the Rule requires that the judge inform the jury of his or her finding — or that the judge inform the jury of any belief by the court regarding the witness's knowledge, skill, or training. In fact, the ordinary practice is for a jury to hear only the admissible evidence, not the reasons underlying the admissibility ruling.[5]

We have found no Maryland statute, Rule, or appellate case in this State requiring the court to declare, in front of the jury, that a particular witness is an expert.

Continued on page 6

1 *ABA Civil Trial Practice Standard 14* (Aug. 2007) (available at https://www.americanbar.org/groups/litigation/policy/civil_trial_standards/).

2 *See* EXPERT, Black's Law Dictionary (11th ed. 2019).

3 *See* EXPERTUS, The Oxford Latin Dictionary 649 (1968) (emphasis added).

4 *See* EXPERT Merriam-Webster.com. 2011. https://www.merriam-webster.com (last visited March 6, 2022) (emphasis added).

5 Maryland Rule 5-104(c) provides, "[h]earings on preliminary matters shall be conducted out of the hearing of the jury when required by rule or the interests of justice."

(EXPERT) *Continued from page 5*

To the contrary, that position appears to be inconsistent with the advisements suggested under the Maryland Pattern Jury Instructions:

> Arguments about objections or motions are usually made out of the hearing of the jury, either here at the bench or after you have been excused from the courtroom. This is because **questions of law and admissibility of evidence do not involve the jury; they are decided by the judge.… You should draw no conclusions from my rulings, either as to the merits of the case or as to my views regarding any witness** or the case itself.[6]

The Court of Appeals has similarly opined, "[i]t is the policy of the law to protect the province of the jury from invasion by the court. The court must not assume the power of judging the credibility of witnesses or determining the weight of testimony in case of discrepancy."[7]

Though Maryland appellate courts have yet to address this issue — whether a trial court should declare the witness to be an expert in the presence of the jury — legal precedent in other jurisdictions establishes that such judicial recognition is inappropriate and may be prejudicial.[8]

Other Jurisdictions

Several circuits have adopted the ABA recommended approach, disallowing trial courts from recognizing witnesses as experts in the presence of the jury. The Sixth Circuit discourages the practice of a court declaring a witness "an expert" in the presence of the jury.[9] In *Johnson*, the Court of Appeals for the Sixth Circuit reasoned as follows:

> We pause here to comment on the procedure used by the trial judge in declaring before the jury that Officer Dews was to be considered an expert….**When a court certifies that a witness is an expert, it lends a note of approval to the witness that *inordinately enhances the witness's stature and detracts from the court's neutrality and detachment.***[10]

Courts in other circuits have reached similar conclusions. The Court of Appeals for the Eighth Circuit similarly commented:

> Although it is for the court to determine whether a witness is qualified to testify as an expert, there is no requirement that the court specifically make that finding in open court upon proffer of the offering party. **Such an offer and finding by the Court might influence the jury in its evaluation of the expert and the better procedure is to avoid an acknowledgement of the witnesses' expertise by the Court.**[11]

In the Seventh Circuit, the Court of Appeals did not address this issue directly but, in *dicta*, obliquely referenced the ABA process favorably:

> The judge, however, has a rule that an expert witness is not to be called an expert in front of the jury, lest the jurors be awed and think the witness infallible. Our court has not considered this rule as yet, but it has been accepted by other courts… and the ABA likewise recommends that trial courts not endorse witnesses as "experts."[12]

The Federal Rules of Evidence do not specify whether courts should declare witnesses to be "experts" in the presence of the jury. However, the Advisory Committee Note to the 2000 amendment to Rule 702 discouraged the court's use of the term "expert" in the presence of the jury:

> The amendment continues the practice of the original Rule in referring to a qualified witness as an "expert." … The use of the term "expert" in the

Continued on page 7

6 MPJI-Cv 1:1 INTRODUCTION, MPJI-Cv 1:1 (emphasis added).

7 *Singleton v. Roman*, 195 Md. 241, 246, 72 A.2d 705, 707 (1950) (emphasis added).

8 The Maryland Pattern Civil Jury Instructions does use and define the term "expert" for the jury:

> An expert is a witness who has special training or experience in a given field. You should give expert testimony the weight and value you believe it should have. You are not required to accept any expert's opinion. You should consider an expert's opinion together with all the other evidence.
>
> MPJI-Cv 1:4 EXPERT OPINION TESTIMONY, MPJI-Cv 1:4. Nonetheless, this broad statement at the end of trial is distinctly different than a judge singling out particular witnesses and labeling them as "experts" in front of the jury and immediately preceding the substance of those witnesses' testimony. *See also Johnson*, 488 F.3d at 698 (citing *Berry v. McDermid Transp., Inc.*, 2005 WL 2147946, at *4 (S.D. Ind. Aug.1, 2005) for the proposition that jury instructions should use the phrase "opinion witnesses" instead of "expert witnesses").

9 *See United States v. Johnson*, 488 F.3d 690, 697 (6th Cir. 2007).

10 *Id.* (emphasis added).

11 *See United States v. Bartley*, 855 F.2d 547, 552 (8th Cir.1988) (emphasis added).

12 *United States v. Lopez*, 870 F.3d 573, 583 (7th Cir. 2017).

(EXPERT) *Continued from page 6*

> Rule does not, however, mean that a jury should actually be informed that a qualified witness is testifying as an "expert." Indeed, there is much to be said for a practice that prohibits the use of the term "expert" by both the parties and the court at trial. **Such a practice ensures that trial courts do not inadvertently put their stamp of authority on a witness' opinion, and protects against the jury's being overwhelmed by the so-called "experts."**[13]

A few states have also adopted this approach, whereby the trial court refrains from declaring a witness to be an "expert" in the presence of the jury. The Supreme Court of Arizona, adopting this approach, observed as follows:

> By submitting the witness as an expert in the presence of the jury, counsel may make it appear that he or she is seeking the judge's endorsement that the witness is to be considered an expert.... **In our view, the trial judge should discourage procedures that may make it appear that the court endorses the expert status of the witness.**[14]

The Supreme Court of Kentucky used language that was even stronger than that in Arizona, stating:

> Great care should be exercised by a trial judge when the determination has been made that a witness is an expert. If the jury is so informed such a conclusion obviously enhances the credibility of that witness in the eyes of the jury. All such rulings should be made outside the hearing of the jury and **there should be no declaration that the witness is an expert.**[15]

Academic Publications

In addition to courts, several noted legal scholars have discussed the dangers accompanying the practice of a trial court declaring a witness to be an "expert" in the presence of the jury. McCormick on Evidence recognized the position that such an approach "might influence the jury in its evaluation of the expert and the better procedure is to avoid an acknowledgment of the witness's expertise by the court."[16]

The Honorable Judge Charles R. Richey of the United States District Court for the District of Columbia, published an oft-cited article, delineating the risks created when a court declares a witness to be an "expert" in front of the jury.[17] Judge Richey noted:

> One source of the term's prejudice is that the everyday meaning of the word "expert" … **every human being's ears pick up on the word "expert," giving the "expert" witness more attention and credence than any other witness or evidence.** In other words, to the jury an "expert" is just an unbridled authority figure, and as such he or she is more believable. Thus, in normal parlance, stating that someone is an "expert" not only speaks to his or her credentials, but also vouches for his or her credibility. This does not comport with fundamental fairness.[18]

Renown trial lawyer Irving Younger also emphasized how a court's declaration that a witness is an expert may impact a jury:

> [Y]ou say to the judge something like, 'Your Honor, I ask the court to declare Dr. Elko an expert in the field of physiology.' Now, you see, all you're doing is saying to the judge, 'Your Honor, with respect to…whether the expert can give his opinion, have I done it, Judge? Have I done it?' And, of course you've done it, so the judge says, 'Yes.'
>
> How does the jury hear it? The jury hears it as the judge certifying that your expert is an expert. The judge's authority begins to be associated with your expert's authority. And since the judge is the ultimate figure in the courtroom, it's a very nice phenomenon to have working for you."[19]

The MDC Expert List

The MDC expert list is designed to be used as a contact list for informational purposes only. It provides names of experts sorted by area of expertise with corresponding contact names and email addresses of MDC members who have information about each expert as a result of experience with the expert either as a proponent or as an opponent of the expert in litigation. A member seeking information about an expert will be required to contact the listed MDC member(s) for details. The fact that an expert's name appears on the list is not an endorsement or an indictment of that expert by MDC; it simply means that the listed MDC members may have useful information about that expert. MDC takes no position with regard to the licensure, qualifications, or suitability of any expert on the list.

Practical Application of the ABA Approach

Maryland courts can comply with the ABA approach by implementing a minor change to its traditional routine. Under the ABA approach, the tendering of an expert would proceed as follows:

1. Counsel proceeds in the ordinary course, questioning the witness as to their background, education, experience, and other qualifications;
2. Counsel does **NOT** inquire as to whether the witness has been recognized by any other courts as an expert;

Continued bottom of page 8

13 Fed. R. Evid. 702 advisory committee's notes to 2000 amendment (citations and internal quotation marks omitted) (emphasis added).

14 *State v. McKinney*, 185 Ariz. 567, 917 P.2d 1214, 1233 (Ariz. 1996) overruled on other grounds by *State v. Martinez*, 196 Ariz. 451, 999 P.2d 795 (2000) (emphasis added).

15 *Luttrell v. Commonwealth*, 952 S.W.2d 216, 218 (Ky. 1997); for additional authority, *see Osorio v. State*, 186 So. 3d 601, 610 (Fla. Dist. Ct. App. 2016) ("While this court and others have repeated the recommendation that trial courts ought to refrain from directly declaring the expert status of a witness in front of the jury.… Today we clarify that such practice is impermissible. Judges must not use their position of authority to establish or bolster the credibility of certain trial witnesses.").

16 *See* 1 McCormick on Evidence, § 13, at 69 n.14 (Kenneth S. Bround, et al. eds., 6th ed. 2006) (citation omitted).

17 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, 541, 544 (1994).

18 *Id.* (emphasis added).

19 Irving Younger, A Practical Approach to the Use of Expert Testimony, 31 Clev. St. L. Rev. 1, 16 (1982).

WE WANT YOU!

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The Judicial Selections Committee is in the midst of an active season, having recently conducted interviews for vacancies in Washington County, Caroline County, Charles County, Cecil County, Baltimore City, and the Maryland Court of Special Appeals. We encourage MDC members to participate by attending future judicial nominations interviews or by joining the Judicial Selections Committee!

If interested, please contact **Jennifer Alexander**, jalexander@mhlawyers.com, or her paralegal, **Natalie Kalmus**, nkalmus@mhlawyers.com.

(EXPERT) *Continued from page 7*

3. When counsel intends to tender the witness as an expert in a particular field, **he or she approaches the bench and makes the motion at the bench;**[20]
4. If there is no objection, **the motion is granted *at the bench*.** Counsel proceeds to question the witness;
5. If there is an objection to the witness's qualifications, the jury is excused so that *voir dire* and the ensuing hearing may be conducted outside the presence of the jury;
6. The trial then resumes in the ordinary course.

This change would mark little difference in procedure and create minimal delay in the proceeding of a jury trial.[21]

Conclusion

As the Supreme Court explained in *Daubert v. Merrell Dow Pharmaceuticals*, expert testimony "can be both powerful and quite misleading" because of the jury's "difficulty in evaluating it."[22] Does a court's declaration, in front of the jury, that a particular witness is an "expert" assist the jury in a benign way? Or does it unduly influence the jury's evaluation of that witness? We believe the time is ripe for Maryland to address this issue and adopt the approach suggested by the ABA. In our experience as defense trial counsel, we offer to the jury qualified experts who base their opinions on literature, experience, and training. The jury can make their own determination as to the weight they want to give our experts versus those advanced by plaintiffs. We feel confident that balance will tip in favor of the defense.

Respectfully, it is time for Maryland judges to stop saying "expert" in light of the fact that the jury may be hearing "EXPERT!!!"?

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Alex Carlson is an experienced trial attorney and associate at Waranch & Brown, LLC. His work focuses on defending medical malpractice claims and representing physicians and other health care providers in professional licensing matters.

The MDC Expert List

To downlaod the **MDC Expert List**, visit **www.mddefensecounsel.org** and click the red "Expert List" button in the left hand corner of the home page or access it from the directory menu.

[20] Some scholars advocate for the abolishment of the entire practice of *tendering* a witness as an expert altogether, instead waiting until the actual opinion testimony to ascertain whether there will be an objection to the witness's qualifications.

[21] Of note, nothing within the ABA approach prohibits trial attorneys from referring to a witness as an expert in closing remarks as it is proper argument and commentary. Of course this recommended procedure applies to all proffered experts—from both sides.

[22] 509 U.S. 579, 595 (1993) (internal citations omitted)