PGCBA NewsJournal

Newsletter of the Prince George's County Bar Association, Inc.

www.pgcba.com *October 2014*

INSIDE THIS ISSUE

President's Message

Dear Colleagues,

The mission of the Prince George's County Bar Association is to represent the legal profession and to serve its members and the community by promoting justice, professional excellence, collegiality and respect for the law. As the Honorable Thomas Love retires from the bench we thank him for his unfaltering commitment and dedication to this mission.

I am proud to report that the mission of the Bar Association related to serving the community has been achieved beyond measure. The PGCBA Traffic School - A Driver Improvement Program and Defensive Driving Course - is celebrating its 20th year with Judge C. Philip Nichols, Jr. at the helm! The profits from Traffic School are utilized to support non-profit 501(c) entities whose mission serves citizens of Prince George's County. This year the Public Service Project Committee reviewed 21 applications making sure the criteria are met. The Committee then recommended to the Board of Directors recipients and sums. This year the Board of Directors approved a total of $7,000 in grants to seven entities that support citizens of Prince George's County! The following organizations will receive a $1,000 grant from the Bar Association: Court Appointed Special Advocate, PGC, Inc.; Greater Baden Medical Services; Foundation for the Advancement of Music (FAME); Family Crisis Center of Prince George's County; Liberty's Promise; Maryland Legal Aid (Prince George's Office); and the Boy Scouts of America. Thank you to the Public Service Project Committee for your efforts in helping make these grants of the Bar Association possible.

For the upcoming month, activities encompassing all aspects of the legal profession are planned for our members to further the mission of the Bar Association. On October 2 the Honorable Tiffany H. Anderson will provide a 2014/2015 Legislative Update as part of the Bar Association's Brown Bag Lunch Series. Next, don't miss the General Membership Meeting on October 14 to be held at the Newton White Mansion. The featured speaker is one of our own, Chief Judge John Morrissey. As well, we will be welcoming the three new Associate Judges of the District Court of Maryland Fifth District: Honorable Clayton Anthony Aarons, Honorable Ann Louise Wagner Stewart, and Honorable Brian Charles Denton. On October 23 the Bench to Bar Panel Series will continue with a discussion on Cross Examination lead by the Honorable

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Next Big Event!

Post Election Event

November 13, 2014
6:00 PM

at the Show Place Arena
Guest Speaker:
Senator Thomas "Mike" Miller
See page 13.

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PGCBA Mission Statement

...to represent the legal profession and to serve its members and the community by promoting justice, professional excellence, collegiality and respect for the law.

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Publication Deadline 10th of preceding month. Approved advertising accepted; rates submitted upon request. Statements or opinions expressed herein are those of the authors and do not necessarily reflect those of the Prince George's County Bar Association, its Officers, Board of Directors or the Editor. Publishing an advertisement does not imply endorsement of any product or service offered.

President's Message, con't

Erik H. Nyce and the Honorable Joseph L. Wright. The discussion begins at 4 p.m. in the Courthouse followed by a Night Out with Government Attorneys Happy Hour at the Old Town Inn. We are not finished yet! On October 30 a Young Lawyers Happy Hour will be hosted at the offices of Sasscer, Clagett & Bucher beginning at 5:30 p.m. In addition to all these events, don't forget to take advantage of the Bar Association's Lawyer Referral Service, Mentor Program, Ethics Hotline, Client Mediation, and Lawyers in Need services. I hope to see you at the upcoming events, and I hope that you take advantage of your membership benefits.

Finally, make sure you like us on Facebook.

Denise

COMMITTEE CHAIRS;

We want your articles!

Submit them to Ben Woolery before the 10th of the month at benwoolery@verizon.net

Welcome New Members!

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Law Office of Gladys Weatherspoon, LLC

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"The PGCBA is glad to have you as our new members!"

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BROWN BAG LUNCH

November 6, 2014
12:00 PM
Lawyer's Lounge 3rd Floor
Duvall Wing

Speaker: TBD

Topic:
"TBD"

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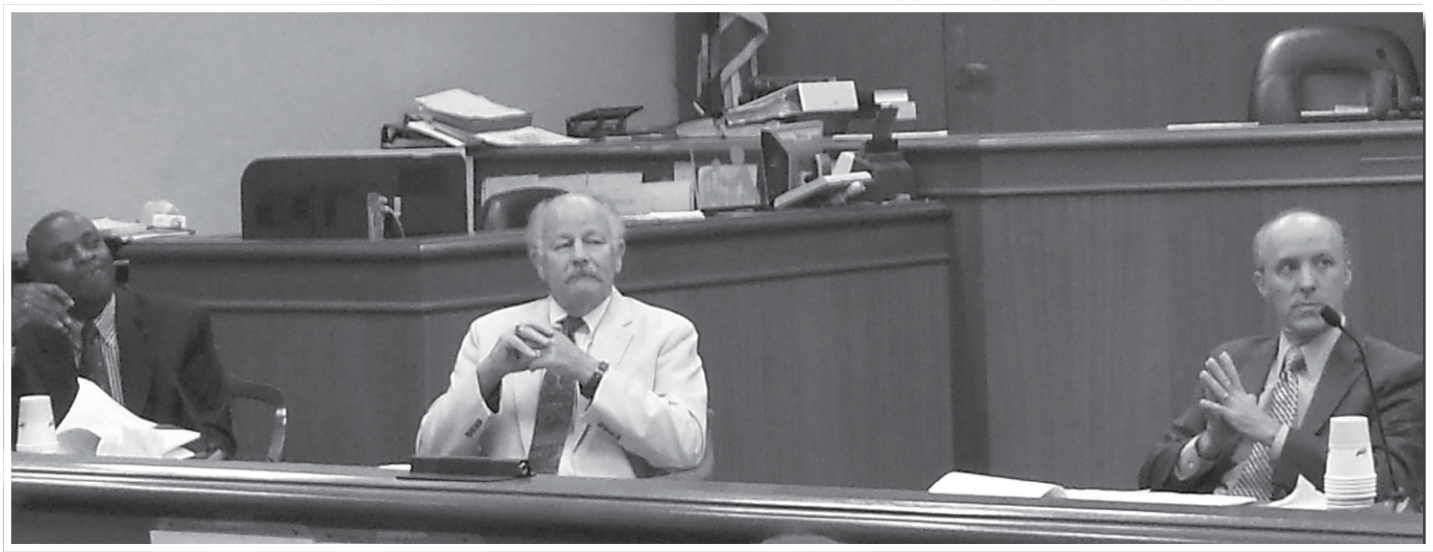
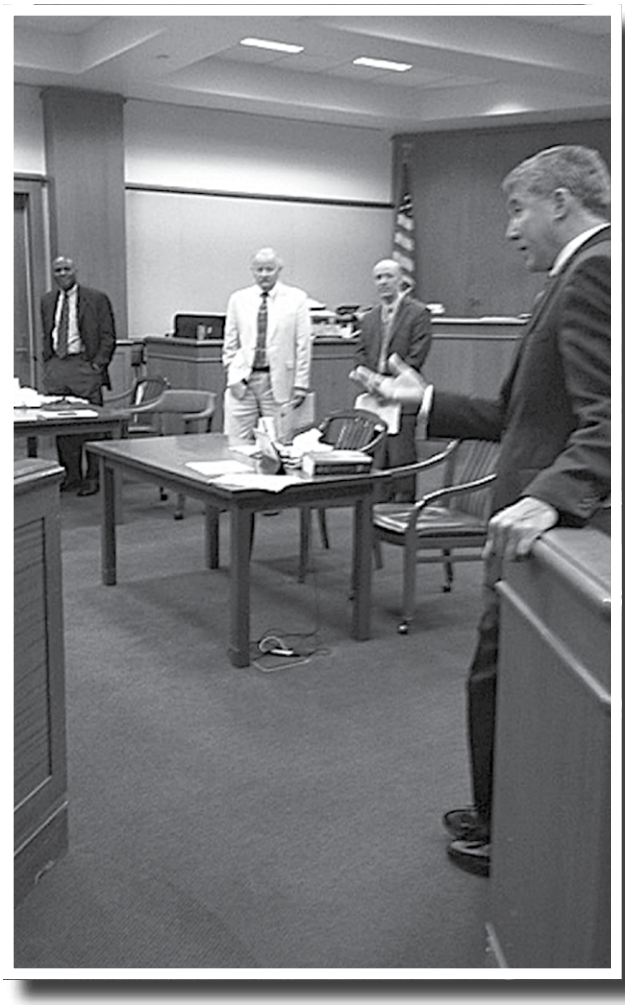
Bench to Bar
September 18, 2014





Thank you Judge Larnzell Martin, Judge Albert Northrop and Attorney Michael Schreyer for kicking off our 2014 Bench to Bar Series with an active discussion on "Expert Witnesses – When You Need Them and the Applicable Rules," moderated by Judge Erik H. Nyce.

Chief Judge John Morrissey

Guest Speaker

Our Newly Appointed Judges

As *Special Guests*

The Honorable Clayton A. Aarons

The Honorable Brian C. Denton

The Honorable Ann L. Wagner-Stewart

Membership Meeting

October 14, 2014

6:00 pm

Newton White Mansion

Reservations Required
$50 Members until October 6th $60 After - $60; Non Members $60 until October 6th $70 After
Make checks payable to PGCBA

RSVP 301-952-1442 or rhadden@pgcba.com

Dual Role Testimony – Bolding Not Blurring the Line

by Robert C. Bonsib, Esq. and Megan E. Coleman, Esq.


In this article we discuss the admission of testimony by law enforcement agents serving the dual role of both a lay and expert witness.

As a defense attorney, it is always frustrating when a law enforcement witness is permitted to offer opinion testimony interpreting common everyday words as being laden with a criminal purpose, yet courts routinely permit such opinion testimony. Counsel have a responsibility to ensure that such witnesses are controlled and are not permitted to offer wide ranging opinion testimony that often seems to resemble nothing more than the officer's opinion as to the defendant's guilt.

What safeguards, then, are necessary to adequately ensure that a law enforcement officer, testifying in a dual capacity role, does not conflate the officer's expert and fact testimony, particularly when the officer relies on his personal knowledge of the investigation to support his expert opinion, as often happens when an officer decodes language in a drug investigation? A number of federal courts have offered guidance as to how to best attempt to distinguish fact testimony from expert testimony and how best to instruct the jury as to its responsibilities in evaluating these different types of testimony when a witness offers "dual capacity" testimony. While the discussion in this article focuses on cases in the federal courts, the analyses and conclusions reached by those courts should be equally persuasive when the issue arises in the state courts.

Opinion testimony by a lay witness in federal court is dictated by Fed. R. Evid. 701 whereby:

> 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 determining a fact in issue; and
> (c) not based on scientific, technical, or other specialized knowledge within the scope of Rule 702.

Expert testimony by a witness in federal court is dictated by Fed. R. Evid. 702 in which:

> 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.

Rule 701 clearly states that the opinion is limited to one that is "not based on scientific, technical, or other specialized knowledge within the scope of Rule 702." The problem arises when the Government wants to introduce a witness who is testifying as a lay witness to facts based on the witness's perception, and also as an expert witness. This has become a regular occurrence in drug prosecutions where the lead investigator of the drug operation testifies to his investigation and facts that he has observed and perceived, as well as offers opinions to the meanings of drug terminology used by the conspirators based upon the investigator's training and experience generally as a drug investigator.

The Federal Courts of Appeals are guided by a Committee Note in the 2000 Amendments to Fed. R. Evid. 702 that says:

> For example, when a law enforcement agent testifies regarding the use of code words in a drug transaction, the principle used by the agent is that participants in such transactions regularly use code words to conceal the nature of their activities. The method used by the agent is the application of extensive experience to analyze the meaning of the conversations. So long as the principles and methods are reliable and applied reliably to the facts of the case, this type of testimony should be admitted.

The Federal Courts of Appeals have allowed such testimony, but have recognized that there is a heightened risk of allowing case agents to testify as experts in a dual capacity and that fundamental fairness requires appropriate safeguards to be employed with this kind of testimony. See, e.g., United States v. Dukagjini, 326 F.3d 45, 56 (2d Cir. 2002) ("We have been aware of the heightened risk of allowing case agents to testify as experts, but nevertheless have permitted such testimony"); United States v. Garcia, 752 F.3d 382 (4th Cir. 2014) ("[S]afeguards adopted by the district court to avoid the substantial risk of prejudice inhering in the jury's receipt of the decoding expert's testimony were inadequate"); United

Dual Role, Cont'd

States v. Thomas, 74 F.3d 676, 682 (6th Cir. 1996) ("when a police officer testifies in two different capacities in the same case, there is a significant risk that the jury will be confused by the officer's dual role"); United States v. Parra, 402 F.3d 752, 760 (7th Cir. 2005) ("there is a greater danger of undue prejudice to the defendants when a witness testifies as both an expert and a fact witness...."); United States v. Freeman, 498 F.3d 893, 903 (9th Cir, 2007) ("[W] we are concerned that a case agent who testifies as an expert receives "unmerited credibility" for lay testimony…we are also concerned that [expert] was called upon by the government to give his opinion as to the meaning of numerous words and conversations, regardless of whether his testimony, at points, was speculative or unnecessarily repetitive").

In order to try to minimize the risk and the prejudice to the defendants, the Courts have begun to apply safeguards. The problem is that there is no standardized protocol for judges to follow in establishing safeguards in such a case. Safeguards that have emerged include the following:

(1) Laying a proper foundation for expert testimony;
(2) Giving a cautionary instruction to the jury informing them of dual role testimony;
(3) Establishing a clear line of demarcation which in some instances includes making the witness take separate trips to the stand;
(4) Prefacing questions by "in your experience"; and
(5) Adequately cross-examining the witness in both capacities.

An Overview of the Safeguards

(1) Laying a Proper Foundation for Opinion Testimony

For instance, in the Fourth Circuit there have recently been cases discussing what constitutes an adequate foundation to permit a witness to offer opinion testimony.

In United States v. Garcia, 752 F.3d 382, 395 (4th Cir. 2014), the Fourth Circuit found a "fundamental flaw" where the agent's testimony lacked foundations for each interpretation testified to, so much so that the Court concluded that the record fails to demonstrate the requisite reliability in the execution of the agent's claimed methodology.

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In that case, "an illustrative example of utter absence of any foundation for more than simply a few" coding interpretations was when the agent interpreted "show time" to mean "heroin." Id. at 395. The agent gave no further explanation regarding the term, she did not explain that she had seen the term used in her investigation, or in her previous experience, and there was no explanation as to what, in the context of the call led her to believe that "show time" meant heroin." Id. Although the agent stated from time to time that a term had been seen in other calls during the investigation, that bare assertion was "no explanation for the threshold interpretation." Id. at n. 11. The agent also testified that the use of "2" by the conspirators means either $200 or $2,000 but there is no indication in the record why the agent's expert methodology reasonably leads her to conclude that the same term means $200 in one instance, but $2,000 in another. Id. at 396.

Although the district court was appropriately careful in its initial examination of the agent's qualifications to testify as an expert, it failed to maintain its "gatekeeper" role throughout that testimony, and the Government did little, if anything, to protect the generous ruling it had obtained from the district court from morphing into error. Id. at 396.

Not only must the agent explain his methodology, but he also must reliably apply any methods and principles to the facts throughout the course of his expert testimony. See, United States v. Wilson, 484 F.3d 267, 276 (4th Cir. 2007) (citing F.R.E. 702 advisory committee note ("So long as the principles and methods are reliable *and applied reliably* to the facts of the case, this type of testimony should be admitted.") (emphasis added in Wilson)).
In Wilson the Fourth Circuit said the detective offered very few instances of an interpretation of the meaning of a conversation without offering any reliable explanation as to why he opined that the conversation meant what it did. Wilson, 484 F.3d at 276. In determining that the methodology was reliably applied in the vast majority of instances, the Fourth Circuit looked at how the detective explained that he repeatedly heard certain words in the investigation, that "when you hear [a] word time and time again…then there's a pattern that develops. And when that pattern develops, that ultimately shows you what they're talking about." Id. at 277-278.

(2) Cautionary Instruction to Jury informing Jury of Dual Role testimony

The type of cautionary instruction to be given to the jury varies case to case. The best practice, as noted in the Sixth Circuit, is to require an actual dual role instruction that the jury "consider the agent's dual roles in determining what weight, if any, to give to his expert testimony." United States v. Tocco, 200 F.3d 401, 419 (6th Cir. 2000). The Sixth Circuit said in United States v. Lopez-Medina that even though a jury instruction stated that testimony of government agents "is not entitled to any greater weight" and that defense counsel may "try to attack the credibility of a law enforcement agent witness on the grounds that this or her testimony may be colored by a personal or professional interest in the outcome of the case;" this instruction was not sufficient because it did not address the particular concerns that may arise when an officer gives expert opinion testimony. United States v. Lopez-Medina, 461 F.3d 724, 743-44 (6th Cir. 2006). This is because it does not guard against mistakenly weighing opinion testimony as if the opinion were fact, nor does it instruct the jury that they are free to reject the opinions given, nor does it address the additional risk of bias in forming expert conclusions regarding one's own investigation. Id. The instruction given was insufficient to guard against the risk of confusion inherent when a law enforcement agent testifies as both a fact witness and as an expert witness. Most recently, the Sixth Circuit said that "A proper instruction informs the jury that the witness has 'testified to both facts and opinions' and reminds them of the different ways to assign 'proper weight' to each" and that "absent a proper instruction, the jury might think that the witness's role as a fact witness somehow enhances his credibility as an expert, or vice-versa." United States v. Willoughby, 742 F.3d 229, 239 (6th Cir. 2014).

By contrast to the exacting safeguard that the Sixth Circuit requires in its cautionary instruction, the Fourth Circuit has been less rigorous in its requirements, and ultimately its applications.

In United States v. Baptiste the Fourth Circuit, recognized that the instruction given fell somewhere below the one given in Lopez-Medina, but still found it sufficient. 596 F.3d 214, 218-19 (4th Cir. 2010). In Baptiste, the jury was instructed:

> [I]t has been established that there may be expert testimony with respect to the method and means of drug packaging and drug distribution as well as the use of slang terms in terms of drug explanations. Having said that, that just means that this witness has been qualified as an expert whereas most times witnesses are not permitted to give their opinions. One exception to that is in the area of expert opinion where a witness is permitted to give his expert opinion. But it's for you to accept, reject or whatever in terms of whether you accept that testimony or not and certainly, [defense counsel] can challenge certain opinions in his cross-examination. But Mr. Russell has been qualified, Detective Russell has been qualified as an expert and is accepted as such by the Court and so accordingly, he is permitted then to give his opinion as an expert.

United States v. Baptiste, 596 F.3d 214, 218-19 (4th Cir. 2010).

This instruction does nothing to highlight

the different between expert and lay testimony offered by the same witness. It does not guard against mistakenly weighing opinion testimony as if the opinion were fact.

(3) Clear Line of Demarcation

The Courts have not been consistent in applying a clear line of demarcation. In some cases it is required that two separate trips to the witness stand should be taken by the witness, and in others, it is sufficient that one trip is taken so long as the fact testimony is separated from the expert testimony.

In United States v. Anchrum, 590 F.3d 795, 803-04 (9th Cir. 2009), the district court agreed to separate the testimony of the witness into two distinct phases. The prosecutor and defense counsel conceded that the prosecutor would do the fact section first and then say "now I'm going to ask you expert questions." The two phases were in fact separated temporally and the prosecutor said "Agent Solek, I'd like to shift gears here a little bit and talk about some of your education, professional training, and law enforcement experience." Id.

In United Stats v. Tocco, 200 F.3d 401, 419 (6th Cir. 2000), the agent's dual roles were emphasized to the jury by the fact that he testified at two different times, once early in the trial as a fact witness, and again at the conclusion of trial as an expert witness. In United States v. York, 572 F.3d 415, 425 (7th Cir. 2009), "[t]he protective steps taken in this case were not the model of how to handle a witness who testifies in a dual capacity." Although the Court instructed the jury on how to evaluate opinion testimony from witnesses with special knowledge or skill, this instruction came at the end of the trial. The Seventh Circuit noted it would have been far more effective for the court to have explained Brown's dual role to the jury before Brown testified and then flag for the jury when Brown testified as a fact witness and when he testified as an expert. Id. at 426. What gave the Seventh Circuit "the greatest cause for concern" was the structure of the agent's testimony. Although the Government began the examination by signaling to the jury that the agent was relying on his expertise and not his knowledge of the investigation, the Government quickly switched back to questioning the agent about the investigation, "which of itself might not have been problematic, had the government not decided, several moments into Brown's factual testimony, to go back and question Brown about a few more code words." Id. "Seamlessly switching back-and-forth between expert and fact testimony does little to stem the risks associated with dual-role witnesses. Even more problematic was the way in which the government prefaced these questions: 'Based on your experience of crack cocaine investigations *and in this investigation in particular*.'" Id. (emphasis in original). The Seventh Circuit said "[t] his phrasing explicitly mixed Brown's dual bases of knowledge, leaving the jury to wonder who was testifying, Brown-the-expert or Brown-the-case-agent." Id.

In Garcia, though the Government was instructed to "be clear in their questions" whether they were asking the agent to testify based on facts versus expertise, this direction did not work so well for the Government in Garcia who moved the agent back and forth between expert and fact testimony, with no distinction in the Government's questioning or in the agent's answers. Garcia, 752 F.3d at 392. The Fourth Circuit said in light of the court's earlier assertion that counsel would clearly distinguish the two types of testimony, the jury reasonably might have assumed that all of the agent's testimony in response to questions asking for her expert opinion was indeed based on her decoding expertise. Id. at 393. In Garcia, there were multiple occasions in which the Government prompted the agent to assert information garnered from her participation in the investigation, having nothing to do with her decoding expertise. For instance, in response to a question about coded language on a call based on her experience, the agent answered that when Powell uses term "show time" he is letting Coley know he has heroin. Without any further explanation of the term "show time" or warning that the Government was shifting from Dayton's expertise to factual knowledge, the prosecutor then asks Dayton "now how were Montgomery and Coley identified as participants in calls that we've just seen or heard" and Dayton's response had nothing to do with expertise and everything to do with factual knowledge as investigator in this case. Id. at 393. It was also apparent to the Fourth Circuit from the Government's appellate brief, that the agent used her personal knowledge of the investigation to form, and not simply to confirm, her expert interpretation where the Government wrote: "Dayton also looked to actual seizures of heroin in case to form basis of her expert opinion." Id. at 393 (internal citation omitted). Likewise, the Fourth Circuit found in Garcia that the "government seems earnestly to contend that simply by including in its questions to Dayton the agent answer only based on her expert opinion" somehow insulates the agent's testimony from ordinary scrutiny under Daubert, but it is bootstrapping of the worst kind to suggest to a jury that it should believe that everything a witness says is based on expertise gained from independent knowledge and experience in the absence of a record demonstrating as much. Garcia, 752 F.3d at 394, n. 10.

(4) Questions Prefaced by "In your experience…"

Another example of safeguards being inconsistently applied is whether counsel must lay a predicate in their question by asking "in your experience" when eliciting expert versus lay testimony.

The Seventh Circuit, without noting which safeguard was most important, concluded that confusion was "adequately alleviated" where in addition to other safeguards, the Government prefaced the agent's expert testimony by asking him to interpret the coded language's meaning "based on his

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Dual Role, Cont'd

expertise." United States v. Farmer, 543 F.3d 363, 371 (7th Cir. 2008).

In the Ninth Circuit, it was generally apparent to the jury when the witness was testifying as an expert because the prosecutor would preface his questions with the phrase "based on your training and experience." United States v. Man Nei Lui, 402 F. App'x 235, 236 (9th Cir. 2010) (unreported).

(5) Adequate Cross-Examination of the witness in both capacities

The adequacy of the cross-examination of the dual capacity witness has been considered by some courts, including the Fourth Circuit.

In Baptiste, the Fourth Circuit concluded that the cross-examination did little to contribute to the distinction between lay and expert opinion. Baptiste, 596 F.3d at 225.

In United States v. Farmer, the Court said that a safeguard could be defense counsel's cross-examination of the agent about his expert opinion which would further clarify testimonial capacities for the jury. 543 F.3d 363, 371 (7th Cir. 2008).

In United States v. Reed, Ninth Circuit concluded that the full cross-examination of the detective testifying as both a lay and expert witness left little risk of confusion for the jury. United States v. Reed, 575 F.3d 900, 922, n.16 (9th Cir. 2009).

The Disclosure and the Discovery Process

Federal Rule of Criminal Procedure Rule 16 regarding expert witnesses requires that the government provide a written summary of any testimony that the government intends to use under Rules 702, 703 or 705. To properly set up the parameters for opinion testimony, a demand for firm and specific compliance with the federal discovery rule for expert testimony is essential.

In the District of Maryland, compliance with the discovery rules is generally accomplished through the execution of a written discovery agreement with the government in which the parties agree not to file formal motions under Rule 16 and the parties agree to comply with the requirements of the Rule. The timing of the compliance varies. The completeness of a compliance with the rules including the detailed nature of the notice as to the subject matter and substance of the opinion testimony can always vary. Diligence in demanding compliance with the discovery agreement requires written requests for compliance with specificity as to why you believe the government's response is deficient. This process either results in compliance with the discovery agreement or, if the government still fails to fully comply with the terms of the discovery agreement, provides the good faith paper trail necessary before the filing of a formal motion seeking compliance with the Rule. The requirements of the Rule are reciprocal. The defense as well as the government must timely comply with the requirements of the Rule.

To properly assess whether the opinion testimony is admissible, discovery of not only the scope of the proposed testimony is necessary, but disclosure of the proffered witness's background and experience is essential to assess whether the opinion testimony is being offered through one who has the necessary qualifications to offer testimony in the specific area that has been identified as the subject matter of the proffered testimony.

What does this all mean?

While the cases discussed in the article support the admission of dual role testimony, the lesson to be learned is that your responsibility does not end with the Court's ruling as to the admissibility of expert testimony or lay opinion testimony. The Courts have noted how the admission of opinion testimony can be a slippery slope. Law enforcement witnesses may not fully appreciate the limits of what is appropriate, or worse yet, they may purposely try to inject their opinions as to the defendant's guilt in their responses to questions. Each question and each answer must be evaluated on its own merits and objections made timely when the line is crossed. Curative instructions and suggestions to the court as to how to help the jury delineate what they must evaluate as fact testimony from expert testimony is an ongoing process. A reading of the Garcia case is suggested as a great primer on the issues present with the "dual capacity" witness.

Robert C. Bonsib, Esq. is a partner and Chair of the PGCBA Federal Practice Committee and Megan E. Coleman is an Associate at MarcusBonsib, LLC in Greenbelt, MD and both concentrate their practice in the defense of state and federal criminal matters.
Email: robertbonsib@marcusbonsib.com – megancoleman@marcusbonsib.com
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Lead by the Honorable Erik H. Nyce
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BREAKING THE FOURTH WALL: A LAWYER'S VIEW ON POP CULTURE | *by Bryon S. Bereano*

Look, I am just as surprised as you are. I can't believe President Bowman asked me to write a second article after she saw the first one. However, who am I to say no to the President of the PGCBA so here we go.

I am not sure when it started but I have been fascinated for some time with what song eventually becomes the official song of the summer. Now let me get the usual caveats out of the way. Music is great and wonderful, but any discussion about music is subjective. What sounds good to you may sound like nails on a chalkboard to the next person. Anyone who has kids, especially, knows this cycle. The music we listened to was real music and our parents had no idea what they were talking about and the music that our kids listen to now is horrible and is nothing like the great music we had back when we were young. (Although to be fair, that is true for me. The 1980's has to have some of the best music ever. Michael Jackson in his prime, Bruce Springsteen, Madonna, Run-DMC, Beastie Boys just to name a few!!) This is certainly true about songs that come out during the summer. They tend to be more sugary and catchy and might not have the same musical "substance" that your typical favorite song has.

Here is another caveat. You will not see any mention of country music in this article. I'm sorry. I like to think that I am pretty diverse musically in terms of things that I will listen to. I just can't do country. Plus, people that are country music fans already know that they do not get any love on the radio and their songs will rarely, if ever, get mentioned as a song of the summer.

The other important aspect of the song of the summer is the memory or the feeling that you get when you hear it years later. Some songs you may think of as summer songs but do not qualify technically as summer songs. For example, my senior year of high school, all I can remember about our senior year beach week trip was MC Hammer's, "U Can't Touch This." (Official spelling). It was everywhere on the radio, the phrase was on every t-shirt shop in Ocean City and it was referenced just about everywhere. However, the song was released in April and therefore, it does not make any official song of the summer lists. Officially, the song of the summer for 1990 was Mariah Carey's "Vision of Love" (Note, I might dedicate an entire column to Mariah Carey in the future), but I would argue that MC Hammer was still a bigger song. Others that year included songs by New Kids on the Block, Billy Idol, En Vogue and Johnny Gill. (Right now, everyone who is under the age of 30 and reading this article is asking themselves, "who?") To qualify as an official summer song, I referenced the good folks over at Billboard where they list the top 10 summer songs from 1985-2013. The list is determined by using the highest ranking and most played songs on the radio from Memorial Day Weekend through Labor Day weekend and where they appear on Billboard's Hot 100 list during the summer.

I am not going to list each of the songs that Billboard has determined to be the song of the summer since 1985. That is why you all have smart phones with internet access and can kill time waiting for the Judge to take the bench. (Make sure you silence those cell phones while you are in court!). There are some observations I would like to make. Last year's song of the summer was pretty obvious. You would have to be living in a cave to not have heard Robin Thicke, with T.I. and Pharrell's "Blurred Lines." Some of the other songs of the summer have been one hit wonders. I include 2012's Carly Rae Jepson's "Call Me Maybe" and 2011 LMFAO's "Party Rock Anthem" in that category. Other observations that are interesting, at least to me, are, Mariah Carey (there she is again), Katy Perry and Jay-Z are tied with the most songs of the summer with two. (Jay-Z, to be fair, was a collaborator on his two songs, one with Rihanna for "Umbrella" and one for "Crazy in Love" with some artist named Beyoncé. You may have heard of her.) If you want to be a judge on the NBC show "The Voice," have a song of the summer. Christina Aguilera, Gwen Stefani, Usher and Pharrell all have either a song of the summer or have collaborated on one. Finally, since 2000, nine of the songs of summer have either been sung by or significantly featured female artists.

So what was the song of the summer for 2014? According to Billboard, my ears and my wife, it was Iggy Azalea and Charlie XCX's "Fancy." Love it or hate it, that song was everywhere. In fact, Iggy was very busy this summer as she also appeared on the #3 song for the summer, "Problems" with Ariana Grande. (Which, morally my Wife would suggest cannot be the song of the summer since it is a blatant rip off of Jay-Z's great song "99 Problems.") It seemed like Top 40 Stations were dominated by female artists and their songs of the summer. Everyone has different musical tastes. Obviously the official "song of the summer" is usually a Top 40 Pop song that acts as guilty pleasure. Hopefully, you have your own song of the summer that reminds you of good times that you had with family and friends and years from now when we are listening to music downloaded onto our brains directly from the cloud, you will hear your own personal song of the summer and it will bring back great memories.

Next month we will be in the heart of fall, which means one thing: Football. We will discuss the topic Football Movies and TV shows, provide some helpful hints to improve your tailgating experience, and continue to laugh at the Dallas Cowboys.

SUBMISSION DEADLINE: 10TH OF THE MONTH

The deadline for submissions is October 10th for the November Newsjournal.

A Revival of the Bar Association's Mentoring Program | *by Donnell Turner*

"None of us got where we are solely by pulling ourselves up by our bootstraps. We got here because somebody - a parent, a teacher, an Ivy League crony or a few nuns - bent down and helped us pick up our boots."
- Thurgood Marshall

In 1978, the Prince George's Bar Association established a program to provide, on an informal basis, a means whereby members who had general questions relating to a particular area of law or practice could call upon a fellow member of the Association for limited guidance and direction. Experienced attorneys volunteered as panel members in various special areas and, upon request, provided assistance to junior or less experienced attorneys with such tasks as drafting basic pleadings, gave insight regarding various experts in the field, offered invaluable professional and ethical advice, and otherwise served generally as a good sounding board on a variety of legal and professional issues. Unquestionably, the program constituted an acknowledgment that attorneys in the course of their particular practice area would inevitably encounter some problem or obstacle in their work and could therefore better navigate through those obstacles by speaking with more seasoned attorneys in the same practice areas or attorneys who had previously experienced similar work situations. Indeed, the program, known as Cooperative Guidance, captured the importance of mentorship as well as provided an opportunity for attorneys to leave their mark on the legal profession, just as the selfless Old Man recognized both of these virtues in the "The Bridge Builder," the famous poem written by Will Allen Dromgoole. Thus, the Old Man, who managed to cross a chasm during his journey but then paused to build a bridge for those behind him who might encounter the same chasm, explained his reasons to a stranger who failed to comprehend why the Old Man did not simply forge ahead after making the crossing:

"Good friend, in the path I have come," he said,
"There followeth after me today
A youth whose feet must pass this way.
This chasm that has been naught to me
To that fair-haired youth may a pitfall be.
He, too, must cross in the twilight dim;
Good friend, I am building the bridge for him."

In recent years, interest in the Association's Cooperative Guidance Program has waned, despite the fact that those in the legal profession are as much in need of guidance as anytime in the past. Indeed, unfortunately, there are numerous examples of inexperienced attorneys, incivility, and the lack of professionalism in all areas of legal practice in courthouses throughout Maryland. That is why the Association's Board of Directors recently approved a plan to reestablish a new mentoring program for new and relatively new practitioners in Prince George's County. The new Mentoring Program will seek to pair an experienced lawyer who possesses a high level of professionalism and significant experience in a particular practice area, with a new or less experienced attorney to guide the latter in developing his or her knowledge of the law, the skills necessary to be an effective practitioner, and professional judgment. Moreover, the objectives of the Mentoring Program are to expose mentees to the high standards of professionalism to which we have dedicated ourselves and to which we all strive to achieve in our legal community, promote collegiality among members through the exercise of ethical and civil behavior, and introduce new practitioners to the resources available through our bar association. Participants will be matched according to their practice areas and the locations in which they work or live.

Whether you are a solo practitioner, an associate in a firm, or a government attorney, the Association wants to give you an opportunity to benefit from the mentoring experience. If you are interested in participating as either a mentor or mentee, please visit the Association's website and download the appropriate application for the Mentoring Program. Your answers to the questions on the forms will establish whether you are eligible to participate in the program, and will enable me to pair you with the right practitioner.

I hope that you will consider participating in this invaluable new Mentoring Program. I look forward to meeting and working with all of you who ultimately decide to participate.

Donnell W. Turner
Deputy State's Attorney
State's Attorney's Office
for Prince George's County

Lisa Marie Riggins, Esq.

The Karp, Frosh law firm is pleased to announce that Lisa Marie Riggins has joined the firm and will be resident in our Rockville Office. She is a member of the bar in Maryland, D.C. and Virginia and is a former Montgomery County prosecutor.

Mrs. Riggins attended Fordham law school and is married to NFL legend, John Riggins.

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7 Challenges and Considerations to Keep in Mind when Representing Non-English Speaking Clients | *by Sandra Guzman*

Although traditionally America is a very monolingual society, the percentage of our non-English speaking population, or those with limited knowledge of the English language, is growing rapidly. In fact, the number of people in the United States who speak a language other than English at home has nearly tripled over the past three decades![1] As attorneys, we are often faced with the challenge of representing such individuals with different linguistic and cultural background from the court and potentially ourselves. As a bilingual (Spanish/English) attorney, I have experienced these challenges on numerous occasions and can offer my insight when being faced with such scenarios.

1. **Listen, Listen, Listen**– The first step in providing fair and accurate representation to anyone, is a clear understanding of your client's situation. When introducing a language barrier or even a slight difference, this becomes a challenge on its own. Ask numerous questions and listen to the whole story repeated. This becomes especially important if you yourself do not speak their language. Taking the extra time to repeat your questions another way and listen for inconsistencies assists in ensuring that nothing gets lost in translation.

2. **Think about the Translator** – Most often, in situations involving a non-English speaking client, a translator will be required for some or all of the court proceedings. Even the best translator adds an additional factor for consideration in your case. As such, here are a few considerations when selecting your translator:

    a. Translator Dialect – make sure your translator not only speaks the langue, but also the dialect of your client. These subtle differences can make a dramatic impact on the meaning in many cases.

    b. Client Pauses-make sure that you instruct your client that they must speak in short phrases and continue to pause so that the translator is able to communicate everything accurately.

3. **Be Aware of Cultural Differences** – The vast majority of the time you are representing a non-English speaking client, in addition to pure language differences, there will be culture differences to overcome. An Oregon Supreme Court Task Force reported that "The dominant culture of this ... nation is reflected in its courts. Largely non-minority judges and court staff do not understand the cultures of minorities who appear in the courts." [2] Consider this throughout each step of the process and take steps to clarify and point out cultural difference where necessary.

4. **Anticipate Additional Costs** – Representing a non-English speaking client can be more expensive, even for non-complex cases. Attorney L. Richard Brinkman Jr. recommends obtaining a family member or friends to help cut down on the cost where possible. He says "Be aware that using an interpreter slows down communications, requiring all matters to take a longer time. Billing for this extra time may be difficult, and you must decide how to confront this problem in each case. Of course, more complex matters will require more highly skilled interpreters. Certain matters of litigation or more complex transactions may require actual translations of documents. This will be a great expense to the client if the client does not have someone to perform the services."[3] Even if you speak the same language as your client, a translator will still be required for parts of the process within the court, so keep this in mind as you assess probable costs.

5. **Use the Full, Correct Name** – This may seem elementary, but small mistakes can be surprisingly common and troublesome when representing a non-English speaking client simply due to cultural differences. Often the attorney, court clerk, or other individual miss-spells the name of the represented individual due to unfamiliarity, which ends up wasting time and causing hassle.[4] To complicate matters, in some other cultures, individuals will offer their family name first so it is important to identify and spell out their full legal name, including their middle name, and, if possible, verify it with multiple official documents from the outset.

6. **Prior preparation** – Pre-trial interviews with your non-English speaking client or witnesses can be extremely helpful to the outcome of your case. It helps the

1 Camille Ryan, "Language Use in the United States: 2011" http://www.census.gov/prod/2013pubs/acs-22.pdf, (August 2013).

2 Oregon Judicial Department, Report of the Oregon Supreme Court Task Force on Racial / Ethnic Issues in the Judicial System: Office of the State Court Administrator, 73 Oregon Law Review 823-947 (Spring 1994).

3 L. Richard Brinkman Jr., "Representing Non-English Speaking Clients" http://www.americanbar.org/newsletter/publications/gp_solo_magazine_home/gp_solo_magazine_index/nonenglishclients.html (February 2007). First published in 2006 Missouri Bar Solo and Small Firm Conference, Missouri Bar Association, 2006.

4 L. Richard Brinkman Jr., "Representing Non-English Speaking Clients" http://www.americanbar.org/newsletter/publications/gp_solo_magazine_home/gp_solo_magazine_index/nonenglishclients.html (February 2007). First published in 2006 Missouri Bar Solo and Small Firm Conference, Missouri Bar Association, 2006.

client or witness become familiar and comfortable with the process. All of this will protect your client or witnesses credibility in court and eliminate distractions from the actual case.[5]

7. **Beware Culture Bound Terms** – Just because words have been translated, either by yourself or an interpreter, it does not always mean that meaning has been clearly communicated. A perfect example of this is your client being read their Miranda rights. They may have heard the technical words, but not fully understand that it meant they were not obligated to talk to the police or that the information they shared could be used to prosecute them.[6] Keep this in mind as you prepare your case, during the proceedings, and during your communication with your clients. Along these lines, I typically try to avoid using acronyms or legal terminology without first explaining exactly what they mean to my client. These can go over the head of an English-speaking layperson, let alone someone who needs it translated!

These are just a few of the considerations to keep in mind when representing a non-English speaking client, but you will find that as you begin to think along these lines, other details will come to mind. As with anything, the more experience you have, the more smooth and natural the process will go.

Sandra Guzman is a bilingual attorney licensed to practice law in the State of Maryland. She has focused her practice in the area of domestic law for nine years.

5 Mary Lou Aranguren, "Representing non-English Speaking Clients: 10 Points Attorneys Should Know" http://www.courts.alaska.gov/language/ten-points.pdf (April 1998)

6 María Cristina Castro, "Effective Communication with Non-English Speaking Clients" http://apps.dpa.ky.gov/library/manuals/inter/effective.html

LAWYER REFERRAL SERVICE REPORT: 08/15/14-09/15/14

NUMBER OF CALLS: 530

NUMBER OF REFERRALS: 317

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4. FAMILY
5. WILLS & ESTATES

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OVER A CENTURY OF SERVICE

Prince George's County Bar Association's MEMORIAL SERVICE

November 20, 2014
4:00 PM

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Upper Marlboro, MD

Members remembered are:
Eugene Mattison
Roger Milstead
Paul B. Klein
David H. Gwynn
Leo "David" Ritter, Jr.
Wayne K. Curry

The Honorable Sheila R. Tillerson Adams, Administrative Judge will preside

"Dear Colleagues:

On November 20, 2013, I had the privilege of presiding over the Annual Memorial Service of the Prince George's County Bar Association. A solemn yet moving ceremony for families and friends in attendance. "

"…the only thing missing was YOU, the members of the Bar Association. Where were YOU?"

"We are deserving of our Bar Association coming together for a brief pause to document our professional career and ensure that the record of that ceremony is made a permanent part of the records of this Court. "

"I believe the families of each of our memorialized colleagues should feel the support of our Bar Association, whether you know that particular colleague or not."

"So, I implore you all to mark your calendars now for November 20, 2014. Your presence will not only honor our colleagues, but will be a true gift to the families that they leave behind."

"Thank you for your attention to this matter."

Excerpts from December 4, 2013 letter from Administrative Judge Sheila R. Tillerson Adams

William D. Missouri, Chair, PGCBA Memorial Committee
Chief & Administrative Judge
7th Judicial Circuit of MD (Retired)

Some Key Points for Appellate Advocates

by Judge Michele D. Hotten, Court of Special Appeals of Maryland

Logic and precision are significant factors in thinking like a lawyer. Coherence is often a factor in thinking like a writer. How do you draw upon these factors to develop an effective appellate brief or outline a meaningful oral argument?

If the objective is to persuade an appellate court to find in your favor, the Court must be able to appreciate, with clarity, the relief you are seeking; why you are seeking it; that the Court possesses the requisite authority to entertain that relief; that it is the fair and just result; and that the result is consistent with the fabric of Maryland jurisprudence. The following suggestions may guide you in your quest.

- Let your brief reflect a patient spirit with a logical flow that recognizes the appellate panel considering it
- Outline your brief before you draft
- Frame your issues to reflect depth, not superficial nonsense
- The tone and tenor of your brief is as critical as its substance
- Edit, edit, edit your brief and hold fast to clarity
- Be scrupulously accurate, particularly regarding your record, your statutory/rule references, and case authority cite
- Express the appropriate standard of review(s) in your brief
- Do not exaggerate/embellish your facts or the import of the holding in the case law you cite
- Ensure that your brief includes a Statement of the Case, Question(s) Presented, Statement of the Facts and Procedural Background, Standard(s) of Review, Argument, then Conclusion

Oral Argument Pointers

- Be mindful of the time constraints for oral argument
- Know your record, applicable case law, statutes, and rules
- Know your case and that of your opponent
- Strike the balance between reading your argument and memorizing it. That way, you can focus more on your presentation, delivery and questions from panel
- Emphasize the strongest points for your position and get "to the heart of the case" during argument
- Be open and flexible. Your presentation should flow like water
- Strategically control the passion of your arguments and the simplicity of the issues
- Prepare an outline of your arguments and concentrate on principles and reasons
- Open and close your arguments powerfully, but do not overstate your position
- Strategically address the weakness in your case
- Review the briefs of other appellate practitioners involving other cases and other courts
- Practice, Practice, Practice!
- Brevity, Brevity, Brevity!
- Be effective and gracious within the time allotted
- Push your strongest argument
- Keep your summaries short and focused (no long narrative)
- Don't talk over the panel judge who is asking a question
- Each question posed by the panel is important even if you are unable to appreciate it
- Listen attentively
- Each question posed to you during oral argument is relevant and material. Treat each question accordingly - respond to the questions asked
- You only have one opportunity to make a first impression, so make it count - remember that the Court does not want to lose an opportunity to develop the law in a meaningful way
- Oral argument is a valuable opportunity to be heard - the exchange between you and the appellate panel should flow smoothly as much as possible. Accordingly, carefully outline your argument in advance, mindful that the appellate judges may interrupt with questions
- Be as clear and concise as possible in all your communications with the Court
- Be respectful to the panel

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Speakers: Hon. Thomas Pryal & Deena Hausner, Esq. **When:** October 1**,** 2014; 6 - 8:30 pm

LEG 519 - Tips and Tricks to Effectively Resolve E-Discovery and Computer Forensic Issues: Focus on solutions to the difficulties, issues, and decisions that attorneys face in competently and cost-effectively handling e-discovery. Learn what you must and cannot do in getting evidence admitted and excluded and much more. Tips for project management for both requesting parties and producing parties. Gain insight when handling technical difficulties from computer forensic experts. *$55.00 (add'l $10.00 if out of county resident)*

Speakers: Marc Hirschfeld, Esq. & Dawn Blanche **When:** October 23**,** 2014; 6 - 8:30 pm

Where: Room 100, Center for Applied Learning Technologies (CALT) Building (for both of above)

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LEG 518 - Business Law for Non-Business Lawyers: Make sure you have all the facts so you can confidently advise clients on which business entity is in their best interest through panel discussions and role play. Learn the rules to raising capital for small and medium size businesses. Gain insight on fiduciary duties and learn how to avoid the pitfalls of business dissolution. *$65.00 (incls. $10.00 out of county resident fee)*

Speakers: Frank R. Goldstein, Esq., Janice Rockwell, Esq. Jeffrey McEvoy, Esq. & David S. Greber, Esq. **When**: October 14**,** 2014; 4 – 7 pm

Where: Delaplaine Visual Arts Center, 40 S. Carroll St., Frederick, Maryland

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** Note: This course satisfies Title 17 continuing education requirements and MPME mandate for continuing education in ethics training.*

Speaker: Kate Quinn, Esq. **When**: November 12, 2014 6 – 8:15 pm

Where: Room 253, Careers (CRSC) Center

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Deadline for Submission: 10th of
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Prince George's County Bar Association
PGCBA *NewsJournal*
14330 Old Marlboro Pike
Upper Marlboro, MD 20772

ADDRESS SERVICE REQUESTED

Happy Hour

OCTOBER 30, 2014

Young Lawyers Happy Hour
5:30 PM
Offices of Sasscer, Clagett & Bucher