Theodore Roosevelt Inn of Court

Expert Witness Program

November 16, 2009

Expert Witnesses in State Criminal Court

Timing of Expert Disclosure

- Upon demand by either Prosecution or Defendant:
    - Party shall make available any report, document or test made by a witness that the party intends to call or introduce at trial. *See* Criminal Procedure Law §§ 240.20(1)(c)/240.30(1)(a).
- Duty to disclose
    - At a pre-trial hearing where a witness will testify: each party at the conclusion of the direct examination of each of its witnesses, shall upon request give any written or recorded statement which relates to the witness' testimony. *See* C.P.L. § 240.44.
    - At trial: after jury is sworn in and before prosecutions opening remarks, prosecution should make available to defense any written or recorded statement by a person who prosecution intends to call as a witness at trial. *See* C.P.L. § 240.45(1)(a).
        - After prosecutions direct case and before defendants direct case, defendant must give to prosecution any written statement of a witness defense plans to call at trial. *See* C.P.L. § 240.45 (2)(a).
- Demand to produce shall be made within thirty days after arraignment and before the trial. *See* C.P.L. § 240.80(1).
    - Refusal to comply with a demand to produce shall be made within fifteen days of service of the demand to produce. *See* C.P.L. § 240.80(2).
    - Absent a refusal, a compliance shall be made fifteen days of the service of the demand or as soon as possible thereafter. *See* C.P.L. § 240.80(3).

Discovery Issues

- What must be disclosed: any written report or scientific test by the testifying expert or any notes made by the police regarding the witness testimony even if the witness will not be called upon at trial and that testimony is considered Brady material. *See* C.P.L. § 240.20.

    - For example, a non-testifying expert witness gives the police a report that is beneficial to the defense (Brady material)

- Differences between consulting and testifying

    - There is a continuing duty to disclose relevant information. *See* C.P.L. § 240.60. A written report by the non-testifying expert must be turned over if it is concerning a test done by the expert (see Criminal Procedure Law 240.20). A written report by a police officer about a conversation with an expert must be turned over if it is Brady material. The conversations may become Rosario material under C.P.L. 240.40 if either the police officer or the expert witness testifies.

    - Notes taken by an ADA about a conversation with a non-testifying expert may be considered work-product and not turned over unless it is exculpatory material. If it is exculpatory, and therefore Brady material, the notes must be turned over.

        - Attorney's work product means property to the extent that it contains opinions, theories or conclusions of the prosecutor, defense counsel or members of their legal staffs. *See* C.P.L. 240.10(2).

- Depositions of other party's expert:

    - Does not happen in state criminal court. Each party has the right to cross-examine testifying witnesses at trial.

Privilege Issues

- Preserving/Destroying Inadvertently Disclosed Information

    - Not applicable to state criminal court: there are the guidelines of production.

    - However, a prosecutor must do everything he can to turn over required materials under Rosario and Brady and if not there can be sanctions or a new trial may be ordered.

        - There is a continuing duty to disclose if a party finds either before or during trial additional material subject to discovery. He must promptly comply with the demand for disclosure or refuse to comply where refusal is authorized. *See* C.P.L. § 240.60.

    - Refusal to give witnesses information may occur where the information is outside the scope of Brady or Rosario and the information sought is attorney work product. *See* C.P.L. § 240.35.

- What is Expert Testimony?

- The testimony if an expert witnesses may be received when such testimony would be helpful and an opinion expressed on any issue when such an opinion would be helpful. *See* Delong v. Erie, 60 N.Y.2d 296 (1983); People v. Cronin, 50 N.Y.2d 430 (1983).
  - It is the discretion of the trial judge to allow testimony and appellate review is not warranted unless there was an abuse of discretion. *See* People v. Cronin, 60 N.Y.2d 430, 433 (1983).
- Expert should possess requisite skill, training, education, knowledge or experience from which it can be assumed that information is reliable. *See* Mattot v. Ward, 48 N.Y.2d 455 (1979).
  - Expert may be qualified to testify from actual experience, observation or study. *See* Karasik v. Bird, 98 A.D.2d 359 (1984).
- The Court of Appeals has made it clear that opinion evidence must be based on facts in the record or those personally known to the witness. He cannot reach his conclusion by assuming material facts not supported in the evidence. *See* Cassano v. Hagstrom, 5 N.Y.2d 643, 646 (1959).
  - Later cases have allowed an expert to base his opinion on professionally reliable sources or information derived from witnesses subject to cross-examination at trial. *See* People v. Jones, 73 N.Y.2d 427, 430 (1989); People v. Sugden, 35 N.Y.2d 453, 461 (1974); People v. Stone, 35 N.Y.2d 69, 75-76 (1974).
  - In Hambsch v. NYCTA, 63 N.Y.2d 723, 726 (1984), characterized the two exceptions, professionally reliable sources and information elicited subject to cross-examination as limited.
- If an expert's testimony is based on professionally reliable sources, the trial judge must be satisfied that the info used is generally accepted in the profession as reliable. *See* Hamsbsch v. NYCTA, 63 N.Y.2d 723 (1984).
  - To determine whether the particular science or opinion is generally accepted, the court may conduct a Frye hearing before trial. Frye v. U.S., 293 F. 1013, 1014 (1923).
- Reliability is established:
  - When it is generally accepted as notorious that the court can take judicial notice of it without conducting a hearing
  - When it is established by reference to legal writings and judicial opinions. *See* Matter of Lahey v. Kelly, 71 N.Y.2d 135, 144 (1987)
  - Or through a Frye hearing at which the proponent may establish admissibility by offering evidence of acceptance, including the

expert's own testimony. *See* People v. Altweiss, 48 N.Y.2d 40, 49-50 (1979).

- Presently, in New York, the Court of Appeals has endorsed the use of a Frye hearing to determine if novel science is generally accepted within the scientific community as articulated in *Frye*. *See* People v. Wesley, 83 N.Y.2d 417, 435 (1994). The test of reliability is not whether a particular procedure is unanimously endorsed by the scientific community, but whether it is generally accepted as reliable. *See* People v. Middleton, 54 N.Y.2d 42, 49 (1981).
- In New York, the standard for acceptance is whether the science or opinion is generally accepted within the scientific community. *See* People v. Wesley, 83 N.Y.2d 417.
- Once the Frye question is satisfied (whether the science is generally accepted within the scientific community) the focus moves from the general reliability to the specific reliability of the procedures followed to generate evidence proffered and whether they establish a trial foundation for the reception of evidence at trial. *See* People v. Wesley, 83 N.Y.2d at 439.