

Expert?

By: Lance Hester, Dec 2006

Watch out for sneak attacks by fact witnesses. Not uncommonly, a prosecutor will call a police fact witness and will, along the way, begin questioning him about his “training and experience” and ultimately, will attempt to elicit various conclusions he made while investigating the case based on his training and experience.

These opinions must be carefully scrutinized by defense counsel because often times such are offered in the same style as “expert” testimony is offered. If the witness hasn’t been previously identified as an expert, this testimony must be excluded. And it’s likely going to be the defense attorney’s job to point out what is going on. Besides disclosure as an expert, the court rules require a summary of the expert’s anticipated opinions.

In a recent trial I argued that if a previously undisclosed expert opinion was admitted, my client would be entitled to a mistrial or a significant recess as I should be entitled to retain my own expert to analyze the same evidence and to critique the investigator’s opinion.

In that scenario, using ER 701, 703, 403 and 407, the court was convinced that the investigator was not an expert and that his opinion would be barred.

End

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