

# ALBUQUERQUE CRIMINAL LAWYER BLOG

PUBLISHED BY  
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May 3, 2011

## **Defendants Have the Right to Pretrial Interview of State's Expert Witnesses But...**

Rule 5-503 of New Mexico District Court Rules of Criminal Procedure requires that any State witnesses be made available for pretrial interview by the defense. There are comparable rules for both Metropolitan Court and Magistrate Court. The New Mexico Court of Appeals case of *State v. Curtis Harper* lays down some guidelines on the application of the Rule. In so doing, it also added a significant level of confusion.

The *Harper* case involved charges of criminal sexual penetration of a minor. Among the State's witnesses was an expert psychologist. The State failed to make the expert available for interview by the defense despite several direct orders from the district court judge to do so. The State's reason for refusing the interview was that the defense had failed to pay the doctor's expert witness fees. The district court judge determined that Rule 5-503 overrode any such considerations anMay 3, 2011

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The Court of Appeals ruled that the State did have duty to provide the witness for interview. The Court ruled that the requirements of Rule 5-503 were unconditional. The Court ruled that once the State undertakes the duty to provide interviews, those interviews must be provided. The Court suggested that the State obtains some advantage by taking on responsibility for the interviews since the State is then present and can hear the questions asked by the defense and prepare accordingly. The State cannot both insist on participation in the pretrial interview process and refuse to make its witnesses available.

The Court specifically addressed the State's position that an expert could be withheld from the defense until expert witness fees were paid. The Court stated that this position was unacceptable and that the prosecutor could not stand as a "preemptive guarantor of the fee." The Court then stated that any prosecutor engaging in this conduct would see its case suffer the consequences.

So far so good for the defendant's 6th Amendment rights to confrontation of witnesses. It appeared the Court was moving toward a ruling that would disallow hoisting the expense of the State's experts on to the defense and that such behavior would result in the suppression of the expert's testimony. Unfortunately, the Court declined to do either.

Instead, the Court suggested that the defense could and would in fact be compelled to pay expert witness fees in order to interview the State's expert witnesses in a criminal case. In the end, the Court also stated that the failure of the State to provide the interviews in direct violation of the district court's orders to do so was not so prejudicial to the defendant as to merit suppression.

In the end, the whole judicial exercise was rendered rather meaningless. The Court in essence stated that the rules requiring the State to make witnesses available to the defense were unconditional; that an expert could not be withheld for failure to pay fees; and that the State's case would suffer in the event that it failed to abide by the rule.

After saying all this, the Court then ruled such behavior would not result in suppression. The ruling is quite puzzling as it is hard to see how the State's case has suffered despite clear violation of both the rules of procedure and the Court's own dictates. The ruling in fact simply added confusion to an already confusing area of criminal procedure.

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