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Money and the Expert Witness: An Ethical Dilemma

I will first argue that expert testimony is essential to the administration of justice. I will then attempt to demonstrate that the legal system is hostile to expert testimony. The last subdivision deals with payment for expert testimony.

The law differentiates sharply between the material witness who gives factual testimony and the expert witness who gives merely opinion testimony. Opinion testimony is considered by the law as inferior, whereas material testimony from a reputable eyewitness is viewed in the law with high regard.

The law operates on the presumption that the material witness can offer the fact finder more help in arriving at "the truth" than the expert witness. The legal literature contains many critical comments about the unreliability of expert testimony which goes beyond mere mistrust of opinions and views expressed by mortals. It is often emphasized in the law that the expert witness is an inferior witness because he merely reconstructs; he was not there when the event took place. Many a cross-examiner has approached me on the witness stand with what he considered to be a devastating question: "Doctor, you were not there when Mr. Jones killed Mrs. Jones?" Being there is naively considered a requirement for the comprehension of what took place when Mr. Jones fired the fatal shot. It never occurs to these critics of expert testimony that the astronaut who was there is much less knowledgeable about outer space than the astronomer who was not.

The expert witness is mistrusted because he appears for or against a party in litigation, whereas the material witness is all too often viewed as an impartial, unpaid observer, dedicated to the determination of truth.

The distinction between opinion and factual testimony is one more example of the many fictions created by the law. Expert testimony and the testimony of an eyewitness are both opinions based on a variety of data and influenced by many factors. Being there by no means insures accurate appreciation of what has happened. The material witness is often an "interested party" to a higher degree than the retained expert witness can ever be. The ordinary witness holds strong convictions which he firmly believes. He expresses his views through the description of concrete settings. The expert, on the other hand, utilizes abstractions and generalizations to express his opinions. The expert is like a painter, recreating reality, whereas the ordinary witness is comparable to a photographer. The uninformed assume that a photograph is merely a replica of reality, free of the creative spirit of the photographer. The expert witness is less likely to be interested in the outcome of the litigation than the material witness. The possible interest of an expert in the outcome of a case is quite visible and frequently exaggerated.

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The greatest asset of an expert witness is his professional competence and credibility; he guards them jealously and avoids anything which would undermine these underpinnings of his career. True enough, there are some pseudo-experts who lack competence or credibility, but their feet of clay soon become common knowledge and their effectiveness is minimal. More perilous to the administration of justice is the occasional expert witness whose motivation, bias, and other failings are unknown. He appears in the legal sky like a comet, burning brightly but very briefly, never to be seen again. The forensic expert witness, on the other hand, is comparable to a star whose location, brightness, and various other attributes are easily determined and rather constant.

It is not uncommon for me to face a cross-examiner armed with transcripts of my testimony in similar cases going back ten or more years. He might also have articles I have written or tape recordings of lectures I have given. I do not recall ever having been shown to be significantly inconsistent, and unfortunately I find myself with increasing frequency faced with the most devastating cross-examination question of them all: We have no questions of this witness.

A forensic expert witness who testifies inaccurately is not only guilty of perjury but also stands convicted of self-destructiveness and plain stupidity. He puts in jeopardy his entire career for a momentary advantage. The forensic expert witness, whether fingerprint expert or psychiatrist, lives in horror that he might make an erroneous diagnosis and appear incompetent. Self-cross-examination is the hallmark of all true expert witnesses.

There appears to be little doubt, at least in my mind, that a forensic expert witness is of greater usefulness to the administration of justice than the nonforensic expert witness and the material witness. Why then is the forensic witness not held in the esteem he so rightly deserves? The primary reason for the need to degrade expert testimony, in my opinion, is power struggle. Increased involvement of experts in litigation becomes a factor in the outcome of a trial and lessens the relative power of the lawyers involved. "Keep everybody out of courtroom except lawyers, litigants, and laymen" is the perennial battle cry of the legal profession. This tripartite coalition of lawyers, litigants, and laymen is firmly united against invasion by outsiders, no matter how knowledgeable.

Obviously, lawyers are not unique in their sense of territoriality; all professions like to exclude outsiders from intrusion into their domain. What distinguishes lawyers from other professionals is that they have the necessary means to implement their wishes. Lawyers have power to enact their views into rules of evidence, statutory requirements, or judicial pronouncements. "Experts need not apply" is the hidden message contained in various rules of evidence and judicial opinions which speak of the fallibility of expert testimony, the state of the art, and the inability of particular applied science to provide absolute certainty. These criticisms are at times taken at face value and the experts respond with collective mea culpas about the inadequacy of their respective sciences. Every science is forever short of the elusive goal of self-imposed perfection. Every scientific answer creates new questions and pushes farther the unreachable goal of ultimate understanding. Science is always imperfect when measured by its own standards. The validity of a science in scientific terms is not the paramount issue in the litigation process. The relevant question is not how valid a scientific opinion is in an absolute sense, but how it compares to the other data which are available to determine the outcome of litigation.

After Jack Ruby was condemned to death, the legal process required that it be determined whether he was sane enough to be executed. I examined him and reached the opinion that he suffered from paranoid schizophrenia, and therefore was not healthy enough to be executed. On the other side of this dispute, the testimony was offered by a few prison guards who played cards with Mr. Ruby and testified that he cheated

and, therefore, was sane. There is scientific evidence to the effect that psychiatric diagnoses in a certain percentage of cases are inaccurate. I am not aware of any study showing jail guards *ever* to be inaccurate in their diagnostic determinations; nevertheless, I am not prepared to admit that jail guards are superior sources of information as to the state of mind of defendants. Nevertheless, I was prevented from offering my testimony on behalf of Mr. Ruby by a variety of legal considerations. The testimony of the jail guards was duly received. Mr. Ruby ultimately resolved the controversy as to his suitability for execution by dying of natural causes.

Lawyers frequently argue that experts are to be kept in their respective places lest they commit the mortal sin of encroaching upon the sacrosanct province of the jury. The ultimate protection from the invasion of the jury's territory would be achieved by excluding all witnesses, since they all trespass on the ultimate issues. The alibi witness who states that the accused could not have been where the crime has occurred does, in fact, address himself to the issue of guilt and innocence, which the lawyers tell us is the exclusive province of the jury.

Another tactic used against acceptance of expert testimony is to ascribe to the experts controlling powers over the minds of the jurors. The expert is described as omnipotent and then promptly rendered impotent through a variety of legal devices. The following is a good example of such castration of expert testimony [*1*].

Lawyer: Would you state in your opinion whether there was a causal connection between the mental illness and the crime?
Doctor: In my opinion, there probably was.
Court: No, not probably. I want your expert opinion, not probability. Either you have an expert opinion or you do not.
Doctor: Well, my expert opinion is I do not know for sure.
Court: No, no. That doesn't answer the question.
Lawyer: Just give us your opinion—was there a causal connection between the crime and the mental disease?
Doctor: I believe there was.
Court: No, not what you believe. You must answer the question, doctor.
Doctor: Does your Honor mean yes or no?
Court: Does that mean you do not have an expert opinion?
Lawyer: Do you have an opinion, Doctor?
Doctor: Yes, I do.
Lawyer: Now, would you give us your opinion?
Doctor: May I say this—
Court: No, you must answer the question and nothing else.
Doctor: Yes, and I would like to tell the Court—
Court: No, I don't want anything but an answer to this question.
Lawyer: Will you give us your opinion again, Doctor?
Doctor: My opinion is that the crime which [the defendant] committed was very likely the result of mental illness.
Court: No, now he begins to say "I believe."
Lawyer: Was there a causal connection between the mental disease and the crime?
Court: No, don't start that all over again. Answer the question.
Doctor: In my opinion there was.

A criticism frequently voiced against expert witnesses is the so-called battle of the experts. The nonforensic members of various professions find the battle of the experts to be an embarrassing spectacle, to say the least. The lawyers use the battle of the experts issue to argue that experts are either unscientific or dishonest, or possibly both.

"You can always find an expert to disagree with another expert," lawyers say with a great deal of scorn. And what in the name of Darwin, Einstein, and Freud is so unusual about that! Experts always have and always will disagree with each other on certain issues. Let us also not forget that we are dealing here with litigation, which is a dispute about some factual issues conducted under the adversary rule. Let us imagine

for a moment that a professional society would impose on its members the requirement to testify in a court of law only when they agree with each other. Lawyers across the land would protest against usurpation of judicial powers, conspiracy of silence, perversion of justice, and various other offenses against the republic.

In November of 1975, CBS presented a TV program dealing with the assassination of President Kennedy. The president-elect of the American Academy of Forensic Sciences, a distinguished forensic pathologist, James Weston, M.D., and Cyril Wecht, M.D., a former president of the Academy and also a distinguished pathologist, were featured as experts. These two eminent men, after twelve years of study, expressed diametrically different opinions on certain very significant issues arising from the autopsy performed on the body of President Kennedy. Does this difference of opinion of two distinguished scientists raise doubts as to the state of knowledge of pathology? Or should we question the integrity of these two gentlemen? Those of us who have the privilege to know these two men have no doubt about their integrity, and no physician would dare to question the validity of pathology as a science. Why then a difference of opinion? Philosophers [*2*] tell us that

> The opposite of an opinion may be reasonably maintained, whereas the opposite of that which is known must be in error or a falsehood and, therefore, untenable.

A distinction is then to be made between knowledge and opinion.

Knowledge is generally accepted, and at a given time irrefutable. Opinion is required where knowledge is not possible. Where we have knowledge, we do not need opinion. The assertion that the earth is round was an opinion in times of Copernicus; it is knowledge at the present time. Till the 1960s, this knowledge was based on scientific inferences, accepted on faith by the general public. At the present time, the fact that the earth is round is popular knowledge based on photographs taken from outer space. To paraphrase Freud: the goal of science is to create knowledge where there was opinion. That which is contingent, variable, confused, and obscure is the object of opinion. Whenever we have irrefutable facts, there is no controversy and no need for opinion. We have the knowledge that President Kennedy is dead and do not require expert opinion on this issue. We also know what was the cause of death, namely, gunshot wounds. We do not have irrefutable proof as to the number of bullets fired and whether Oswald was the only assassin at work; therefore, we have reasonable and divergent opinions on this issue.

It is safe to be a dispenser of knowledge, but it takes courage and fortitude to offer opinion. The scientific opinion giver is an explorer, an intellectual adventurer, viewed with ambivalent admiration.

Science is the noncommonsense approach to reality; science is based on an extension of reasoning beyond common sense. One could, in fact, define science as knowledge which makes no common sense. The law, in its reliance on legal fact finders, whether judge or jury, has established common sense as its outer perimeter of inquiry into reality. The horizon of common sense of the legal fact finders is occasionally expanded by the introduction of scientific information into the litigation process through opinion testimony from the experts.

There is a need for expert testimony because reasonable approach to evidence requires in some cases more than common sense. Product liability litigation, malpractice, criminal investigation, and insanity defense are but a few instances where expert testimony is essential for the adjudication of a dispute. In some cases, the absence of expert testimony insures miscarriage of justice. Nevertheless, lawyers go on fighting valiantly to keep the experts away, or at least to minimize their influence by discrediting the experts in advance. A useful weapon in this struggle has been money. There are two approaches which can be used to keep experts away: either failure to pay the experts for their work or making payment a bitter pill to swallow.

The expert witness is often accused of being mercenary since he renders a service for money. There seems to be an implicit expectation that the expert witness should be motivated only by altruism and the noble aim to further justice. An expert witness, to remain beyond suspicion, should be like that lady of whom G. Eliot [3] said: "She had ... nothing sordid or mercenary; in fact, she never thought of money."

No one is more horrified by the mercenary interests of the expert witnesses than the lawyers, whose services are not entirely free from mercenary taint. Being paid for services rendered in a courtroom is viewed as offensive, but it seems entirely honorable to be paid for services rendered in the operating room or an office. Yet a physician motivated chiefly by desire for profit would be much more successful in the privacy of his office than in the public setting of a trial. The same physician who in the courtroom is suspected of being deceitful and mercenary is considered reliable and trustworthy in his office. He renders a service for a fee in each instance. It seems less than respectable to offer forensic services for payment but above reproach to be paid for surgical procedures, psychotherapy, or any other kind of medical service. Yet the unscrupulous surgeon could cut for money and the unscrupulous psychiatrist could subject a patient to the dangers of psychotherapy for money. There is little legal interest in these possibilities.

Is the health of the citizens less in need of protection from unscrupulous practitioners than the litigating lawyers? Why is a physician viewed as an honorable gentleman as long as he restricts his services to his office and stays away from the courtroom? Does mere geographical relocation transform the noble physician into a corrupt hireling? I am told of an episode, the accuracy of which I cannot confirm, which illustrates this problem. A very gruff judge said to an expert witness: "Aren't you ashamed to be seen here in court so often?" The expert replied: "Why no, your Honor, I always thought it was a very respectable place!"

Any witness can be in error or testify for evil reasons; however, both error and bad motives are never as repugnant as when they are being paid for. It seems that the motive behind the evil is what matters. Money as a motive is least acceptable. A prostitute is in ill repute because she takes money. If a woman engages in the same activities for other motives, the criticism is much less severe. The hired killer is viewed with utmost disdain; a political terrorist who kills innocent victims in cold blood meets with much less disapproval. One runs much less risk of disapproval regardless how evil are the deeds if no money changes hands. Aristotle recognized this fact more than 2000 years ago [2, p. 377]:

> Again, if one man commits adultery for the sake of gain and makes money by it while another does so at the bidding of appetite, though he loses money and is penalized for it, the latter would be held self-indulgent but the former is unjust but not self-indulgent; evidently, he is unjust by reason of his making gain by his act.

Thus, the expert witness is faced with the choice of being held in ill repute or being in financial ill health. Most expert witnesses seem to choose a middle-of-the-road approach by arriving at a tolerable compromise between these two extremes, that is, little ill repute combined with little money. Could it be that the lawyers who consider the courtrooms as their private turf focus on the payment for services rendered as a device to discredit and keep away outsiders?

I am told that a plenary address should end with an inspirational message. I will, therefore, conclude by describing to you the characteristics of an ideal expert, so that all of you may aspire to such an exalted state.

An ideal expert is a person of national reputation in his field of expertise; he is knowledgeable in the law and has a unique talent of being persuasive in the courtroom. At the same time, he testifies in a court of law rarely, if ever, so that he is beyond suspicion of being a professional witness. He is an extremely busy person, as

befits a professional of his outstanding reputation. On the other hand, he is ready to present himself in the courtroom on a moment's notice. The ideal expert is a person of high integrity and independent wealth. He charges modest fees for his valuable services and then patiently waits to be paid from the proceeds of settlement if he appears for a victorious plaintiff, or depends on the gratitude of an acquitted defendant. On the other hand, if the plaintiff or defendant on whose behalf the expert was called did not prevail, our ideal expert understands and accepts that it is the client who is responsible for payment for services rendered and not the lawyer. In other words, the ideal expert rarely gets paid. In fact, the ideal expert is someone who does not get paid at all. He has "no monetary interest in the litigation"; he testifies out of the desire to further the cause of justice and its humble servants, the lawyers.

An expert witness is, therefore, frequently asked when he gives his testimony: "Witness, are you being paid?" If he answers in the affirmative, it becomes immediately known that he is an incurable optimist and a fool. Moreover, he has been exposed as someone who has been hired, which makes his ethics suspect. The reality is that all professionals in the courtroom are hired and paid, except for the plaintiff's attorney, who is merely a partner to the matter being litigated. It is, therefore, my practice when asked: "Doctor, are you being paid?" to reply "Aren't we all!" Unfortunately, this statement is not entirely true. The forensic expert often enough either does not get paid or receives inadequate remuneration for his services.

I have accumulated dozens of cases where lawyers and courts have failed to pay where any other citizen or agency would have no option but to pay for work performed.

It is generally known that some lawyers are guilty of not paying for the services which they have requested from experts. There is little doubt that attorneys are at least as reluctant to pay their bills as other people. I will not address myself to any inherent characteristics of lawyers which would predispose them to avoid payment for services for which they have contracted, but I would like to call your attention to certain institutional arrangements which make it possible for lawyers to avoid paying bills where others do not have such an option.

Clearly, the lawyer has a great advantage over other citizens if he chooses not to pay his bills. This advantage becomes even magnified when the services were rendered by an expert witness in connection with litigation. Lawyers who work on contingency fees secure services of various experts, particularly physicians, and then delay, avoid, or arbitrarily set the amount which is paid for the services rendered.

Various court rules dealing with payment for expert services are blatant self-serving arrangements by lawyers for lawyers. A lawyer may subpoena an expert and get away with paying $6.00 for expert opinion. He need not prepay for testimony because court rules prohibit it, and so on and so forth. All this takes place under the color of protecting due process; it is only incidental that it also lines the pockets of lawyers.

Lawyers and judges have extracted from professionals services with no or inadequate compensation. This is detrimental to the administration of justice since it discourages competent professionals from becoming involved in forensic matters. It behooves the Academy to go on record as supporting appropriate compensation of experts. Furthermore, I propose that a standing committee be appointed which would concern itself with appropriate compensation for expert testimony. Such a committee would also arbitrate any disputes that might arise between a member of the Academy and the service-requiring person or agency.

References

[1] *Durham v. United States,* 214 F.2d 862.

[2] Hutchins, R. M., Ed., *Great Books of the Western World,* Vol. 2, Encyclopedia Britannica, Inc., Chicago, 1952, pp. 303, 307.

[3] *Webster's Dictionary of Synonyms,* G. & C. Merriam Co., Springfield, Mass., 1951, pp. 543–544.

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Ethical Practices as They Pertain to the Discipline of Toxicology

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