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The Expert Witness: A Dilemma

Witnesses in courts of law may generally be divided into "fact" witnesses and expert witnesses. The law relative to fact witnesses for the most part is well defined, but the law relative to expert witnesses differs considerably in the various jurisdictions. An expert witness in litigation is very often a physician by training. Even though most situations involve a physican as the expert witness, the basic questions of law to be explored will concern other professionals who, by the nature of their training, possess special knowledge. Engineers, attorneys, accountants, judges, and psychiatrists are examples. Conceivably, it could be applicable to nonprofessionals who by virtue of experience or occupation possess a specialized knowledge which could serve as the basis for an expert opinion.

From a conservative position of constitutional law, if such expert opinion does indeed possess all the indicia of property, then the due process provisions of the 14th Amendment to the United States Constitution would prohibit the exacting of such testimony from experts without compensation.

Because most situations involve the physician, that role will be discussed, although the legal principles involved would be applicable to an expert who is not a physician. A physician who is called to give expert testimony relative to a patient whom he has treated could be in a diferent position than a physician called to testify in a matter of which he had no factual knowledge. It is expected, of course, that both would be justly compensated for their time. However, the treating physician may possess a "duty" to testify for his patient while the nontreating physician could feasibly decline to be involved.

The question of the rights of expert witnesses has been decided by a supreme court ruling in eight States: Colorado, Florida, Illinois, Indiana, Iowa, Kansas, Nebraska, and Pennsylvania [*1–8*]. In each of the decisions, except Nebraska, the absolute right of an expert witness to be paid for his time and knowledge was affirmed.

Because the issue is complex and has not been clarified in most jurisdictions, the current status in Texas will be discussed. Though details may vary, certain basic principles of law are salient and will obtain in other states.

Texas law regarding enforcement of subpoenas of fact witnesses is well defined; the position of the expert witness, however, is unclear and often confusing. Neither the physical appearance nor the manner of serving subpoenas in Texas allows the recipient to ascertain whether he is being called as a witness of fact or as an expert witness. The legal question of enforcement could arise at one of two points: (a) the individual

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receiving the subpoena could refuse to respond or (b) he could respond but refuse to answer questions presented to him as an expert. This article will address itself to the impasses which can face the expert who, because he is refused just compensation for his time and work, chooses the second course.

In some jurisdictions, unlike Texas, the expert need not appear in court when no provision has been made for his compensation, nor is he to be judged in contempt of court for failure to respond to subpoena under such circumstances [*9*]. The law of Texas regarding compensation of expert witnesses is unsettled. The only case bearing directly on the issue is *Summers v. Texas* (1879) [*10*]. In this case, a physician had examined a corpse and was later subpoenaed to give expert testimony as to whether the death was the result of a self-inflicted wound or of a wound inflicted by the defendant. The court found that while the physician could not be forced to perform the examination, it had already been performed and he had been compensated. It was found that the report was an innate and inseparable part of the examination itself which constituted a fact to which he must testify. The impact of this finding was to alter the status of the physician in question from that of expert witness to that of fact by judicial fiat.

Let us consider the situation in which the physician has been subpoenaed to give expert testimony regarding a criminal defendant. According to *Summers* the expert, having already examined the defendant, could be compelled to give "fact" testimony about the results of that examination. His compensation as a fact witness would then be determined by an existing Texas statute [*11*] to be the same as that of any other witness to fact. A problem arises, however, when the expert witness is called on to provide testimony regarding what the defendant is capable of doing, that is, whether in the future he would be capable of that conduct which would otherwise be culpable but, in the case at hand, might be deemed excusable because of his mental state. To compel the physician to testify in this case would be a departure from the rule of *Summers* in that the present and future are the areas of scrutiny and must be examined by the vehicle of hypothetical questions. In *Summers*, questions pertained to past history and were directed toward factual information already in the possession of the compensated witness.

The present conflict over the rule of *Summers* resides in the question of whether the expert witness must testify as to the results of his examination with all the ramifications thereof, or whether the examination itself is a "fact" and all testimony given over and above the facts of the examination are indeed expert testimony for which compensation must be made. If the first interpretation holds, it would seem that any physician, having examined a criminal defendant or the plantiff in a personal injury suit will, in effect, have placed himself at the mercy of a litigant to be called into court at any time without compensation.

It is well known that a fact witness may not generally give opinion evidence and that he may not speculate. He does little more than give direct responses to questions posed by the attorneys about disputed factual matters. Expert witnesses, by virtue of their role in litigation, do one or more of the following: (a) draw upon fact and express professional opinion, (b) reach conclusions, (c) respond to hypothetical questions, (d) explain professional procedures to the court or jury, or (e) require modification or amplification of a particular question when a simple yes or no answer would not suffice to properly reflect a plenary expert and professional view.

The testimony of an expert witness is based on his special training or experience. In some instances his expertise has been regarded as having all the indicia of property. A Pennsylvania ruling states that "the private litigant has no more right to compel a citizen to give up the product of his brain than he has to compel the giving up of material things" [*11*]. If the benefits to be derived from this particular expertise or skill are attended with all the character of property, then it would seem that, unless compensation

is made, the witness will have been deprived of his property without due process of the law. This patently violates the rights secured each citizen under the 14th Amendment to the United States Constitution. If an expert witness simply refuses to testify on the grounds that he does not care to work and is nevertheless subpoenaed, he can raise the 13th Amendment to the United States Constitution on an involuntary servitude basis and declare that he is being impressed into the service of the state.

The right of a defendant in a criminal case to compulsory process of witnesses, guaranteed by the 6th Amendment to the United States Constitution, was cited recently in *Flores v. State* [*12*]. A physician, director of a criminal investigation laboratory, refused to testify unless retained as an expert. The Court of Criminal Appeals held the trial judge to be in error in refusing to instruct the witness to testify under penalty of contempt. This situation is not unlike *Summers* in that a director of a criminal investigation laboratory had been paid to perform tests. The test results then constituted facts to which the physician was obligated to testify. It should further be noted that in *Flores,* the physician refused to testify, an act tantamount to refusing to respond to a subpoena. We believe that had he agreed to testify and restricted his answers to questions of fact the trial judge would have been in error had he held him in civil contempt for refusal to answer hypothetical questions.

The problem seems to be one of reconciling the right of the litigant to the compulsory process of witnesses with the rights of those witnesses. The right of compulsory process on the criminal side of the docket is secured by the 6th Amendment, as we have pointed out; in civil cases it is secured by the powers of the courts to enforce subpoenas. This right may extend to both fact and expert witnesses, but when a person is subpoenaed to testify as an expert, unless he is justly compensated for his efforts, serious questions arise with respect to his own constitutional rights.

On first impression this would appear to present a problem as the defense would not wish to risk the creation of a "hostile expert." It is also true that some statutory provision does exist for the compensation of expert witnesses in indigent cases [*13*], although the amount of funds available for obtaining expert testimony is limited. In practice, these funds are most commonly expended in obtaining psychiatric examination or psychological testing to determine, for example, whether an accused is culpable, whether there exist psychological data which could mitigate a sentence, or whether the individual should be placed on probation and, if so, under what conditions.

The situation has arisen, and doubtless will arise again, in which the expert witness has declared that the compensation provided is inadequate for the services demanded, or that his services are not for sale at any price. In either of these instances, the courts could look to reasonable sufficiency as opposed to the adequacy of the compensation, much as they do in determining questions regarding consideration in contract disputes. It is possible that an expert, called to give testimony for which compensation is provided by statute, can be compelled to give testimony over his objection on the basis that the statute is calculated to reasonably compensate the witness even though the amount provided statutorily may be far lower than the prevailing rate in the community at the time. These statutes could, however, be construed as permissive rather than directive in nature, thus providing the funds if the courts should find an expert willing to serve in exchange for the compensation offered.

If the expert under consideration is a medical expert, his professional ethics combined with pressure from his medical societies and the general desire of the "good citizen" to assist in the judicial process would prevent a recalcitrant physician from demanding an exorbitant fee in an indigent case. The method of determining a fair and reasonable fee should follow certain guidelines.

1. No expert witness can ethically accept a contingent fee, that is, he cannot agree to testify with his fee based on the outcome of the case. To do so would bring his

testimony into question as colored by the need of a victory to assure compensation. Therefore, he must either be compensated in advance or definite provisions must be made in advance for his compensation.

2. A fair and reasonable charge could be calculated on an hourly basis, perhaps with a certain minimum charge. This would include the total time from the witness' leaving his office until his return.

3. Where the expert must travel out of the city with the expectation of being unable to return that same day, then it may be reasonable to charge a minimum per diem fee for room and board calculated on a reasonable basis for the costs in that area.

The power of any court to cite a recalcitrant witness for contempt is divided into two distinct categories, one criminal and the other civil. In criminal contempt the individual is cited for a transgression already committed and is punished by a fine or incarceration or both. In civil contempt the individual is usually incarcerated for that which he has failed to do, namely, to comply with an order of the court, and the punishment is limited to incarceration. The expert witness in this situation, according to the language of *Gompers v. Buck's Stove and R. Co.* [*14*], carries with him the keys with which he may unlock the jail at any time simply by yielding to the demands of the court. The latter contempt situation is interlocutory in character and is unappealable [*15*].

At first examination, this would seem to offer the sincere reluctant expert witness no option other than the mercy of the court. He has an alternative, however. For a judge to cite a witness for contempt and order him jailed until he complies with the court's order, it is essential that the demands of the judge be reasonable and that he have authority in law to make such demands. If the expert witness should believe that the court cannot meet these criteria he can test the validity of such a citation collaterally by way of an application for a writ of habeas corpus [*15*]. From criminal district courts the writ will lie in the court of criminal appeals, but from civil district courts, except in domestic matters, the writ will not lie in the civil appeals courts and must be filed directly with the state Supreme Court [*16*].

The legal dilemma raised in this article could be resolved through several means. An interprofessional agreement incorporated into statute similar to that in California [*17*] could be designed. California Government Code Section 68092.5 states inter alia:

> A person who is required to testify before any court or tribunal as to any expert opinion shall receive reasonable compensation for his entire time required to travel to and from the place where the court or other tribunal, or in the taking of a deposition, the place of taking such deposition, is located and while he is required to remain at such place pursuant to subpoena.

A test case could be established and the issue appealed to the proper court for judicial determination. Communities could agree on a standard method of dispensing with such problems through working with the respective professional associations.

In conclusion, it seems that this knotty problem will be resolved only with difficulty and will require a definitive statute or adjudication. Failing this, the local bar association, medical society, and judiciary could work out mutually acceptable methods of reasonably compensating the subpoenaed expert witness.

References

[*1*] *Lamont v. Riverside Irrigation District,* 498 P.2d (1972).
[*2*] *Tiedke v. Fidelity and Casualty Co. of N. Y.*, 222 So.2d 206, 210 (1969).
[*3*] Ill. Sup. Ct. R. 17-2 (5 Sept. 1961) (Impartial Medical Experts).
[*4*] *Dills v. State,* 59 Ind. (1877) (also note that the State Constitution contains "No man's particular services shall be demanded without just compensation").
[*5*] *Snyder v. Iowa City,* 40 Iowa 656 (1875).
[*6*] *Womer v. Aldridge,* 125 P.2d 392, 1942.
[*7*] *Peek v. Ayre's Auto Supply,* 155 Neb. 233, 51 N.W.2d 387 (1952).

[8] *Pennsylvania Co. for Insurance v. Philadelphia,* 262 Pa. 439, 442 (1918).
[9] Re *Hays,* 200 N.C. 133, 156, S.E. 791, 73 A.L.R. 1179; Revised Code of Ohio, Sec. 2317.18, (.20) contempt.
[10] *Summers v. Texas,* 5 Crim Rep 365 (1879).
[11] V.R.T.C.S., Art. 3708
[12] *Flores v. State,* 491 S.W.2d 144 (Tex. Crim. App. 1973).
[13] Tex. Family Code Ann. § 51.10(1973).
[14] *Gompers v. Buck's Stove and R. Co.,* 221 U.S. 418, 31, Super. Ct. 492, (1911).
[15] *Gardner v. State,* 352 S.W.2d 129 Texas (1961), ex parte Cardwell, 416 S.W.2d 382, Sup. Ct. Texas (1967).
[16] V.R.T.C.S., Art. 1737; ex parte *Jackson,* 113 Tex. 58, 252 S.W. 149 (1923); VACS Art. 1924a; ex parte *Craddock,* 452 S.W.2d 954 (Civ. App. 1970), no writ.
[17] Calif. Government Code Sec 68092.5 (Compensation of Expert Witnesses).

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