ADVOCACY IN THE PREPARATION AND PRESENTATION OF MEDICAL EVIDENCE

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"When doctors differ, who decides
amid the milliard-headed throng?"

—Sir Richard Francis Burton, The Kasidah of Haji Abdu El-Yazdi, Section VIII, Couplet XXIX (1853).

The Problem

It has been estimated that actions involving personal injuries account for seventy-five percent of all cases pending in the courts today[1] and that seven out of ten litigated personal injury cases turn upon medical considerations rather than legal questions.[2] The increasing volume of personal injury litigation, with greater emphasis than ever before being placed upon the medical evidence, has had profound effects upon the legal and medical professions. Today's personal injury attorney is often required to be as familiar with the post-concussion syndrome as he is with the doctrine of proximate cause; he must frequently spend more hours in the libraries of medicine than in the libraries of law; and he must gain, through research and consultation with physicians, a thorough understanding of the injuries suffered by the plaintiff, including diagnosis, treatment, and prognosis, if he is to properly advocate the cause of his client—whether he be on the plaintiff's or on the defendant's side of the table. There is no doubt that the legal profession is meeting the need for greater medical knowledge, not only by the individual efforts of its members, but also by the exchange and dissemination of information through medico-legal institutes, medico-legal journals, and national associations of attorneys whose practices consist primarily of personal injury cases. The result is the appearance of "a bastard profession, fifty percent law, fifty percent medicine,"[3] whose ranks have been divided by specialization into "plaintiffs' counsel" and "defense counsel."

The medical profession, in turn, has felt the effects of the increasing volume of litigation, the emphasis placed upon medical evidence, and the specialized advocacy of the bar. The legal advocates, divided into two camps, have frequently enlisted the aid of those in

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1 Peck, "Impartial Medical Testimony," 22 F.R.D. 21, 22 (1958).

2 Small, "Law Schools Need to Give a Shot of Medicine," 41 A.B.A.J. 693 (1955).

3 Belli, "Direct and Cross-Examination of Medical Witnesses," 24 Tenn. L. Rev. 511, 518 (1956).

the medical profession who will best serve their respective positions in the preparation and presentation of the medical evidence with the result that many experts are now classified by the personal injury bar as "plaintiffs' doctors" or "defendants' doctors."[4] The common employment of those physicians, known by counsel to be of the view or inclination favorable to their respective positions, has resulted in the appearance of the "medical advocate" and in irreconcilable conflicts in medical testimony in many areas where such conflicts should not exist. These developments have not only focused attention upon the wisdom of permitting laymen to resolve medical questions, but they have already led in some jurisdictions to the creation of the "impartial medical expert" selected and sponsored by the court instead of by the litigants.

Extreme advocacy has thus created a problem which threatens to limit, if not eventually to destroy, the adversary method of resolving issues in this field of medical evidence. To preserve that system, to maintain a proper relationship between the two professions, and to merit the confidence of the public in both, there must be limitations upon advocacy in the preparation of the medical evidence and upon its presentation at the time of trial. It is not the purpose of this article to recommend particular procedures for the most effective preparation of such evidence, or trial techniques for its presentation, but rather to suggest areas wherein advocacy must be used and others wherein it must be discarded in order to create the balance necessary for the survival of the adversary method of determining medical issues.

Preparation of the Medical Evidence

An attorney who neglects to thoroughly prepare the medical aspects of his case is as deficient in his representation as one who neglects to investigate the facts of the accident in question. Advocacy in this area demands all of the initiative, imagination and ability possessed by the attorney. It includes far more than seeking a report from an attending physician and a summary of the hospital records. It requires consultation with the attending physician, a thorough study of the hospital records and, usually, a great deal of medical research by the attorney. Until the language barrier between attorney and physician has been eliminated, there obviously can be no adequate preparation for trial. The study of medical texts and literature is not only a prerequisite to the preparation of the attorney's own case, but it is equally essential for the ability to successfully challenge the "medical

[4] Brown, "Unethical Medical and Legal Practices in Personal Injury Litigation," 95 Am. J. Surg. 695 (1958); Stetler, "Growing Need for Medicolegal Cooperation," 116 Ill. Med. J. 144 (1959).

advocate" who may appear for the other party. It is here that advocacy, in the form of toil and perseverance, needs to be employed to a greater extent than ever before.

In a multitude of personal injury cases the injured person has not been examined or treated by a specialist, and in some cases he has not yet sought treatment from any physician. His attorney and, at a later stage, the attorney for the defendant, is frequently faced with the necessity of recommending or selecting a specialist for the purpose of making an examination to determine the nature and extent of the injuries, their causal connection to the accident, and the prognosis for recovery. Advocacy here must have its limitations. The attorney has a responsibility, not only to his client but to his profession as well, to select for this purpose a competent and unbiased expert and not one whose reports and testimony have earned him the distinction of being a "medical advocate" for plaintiffs or for defendants. It is, of course, recognized that no doctor can be completely objective in his examination and evaluation of a patient and that the most respected leaders in their particular specialties will, because of their personal backgrounds, training, and many other factors, frequently differ to some degree as to their conclusions.[5] There is, however, a small group of doctors who, by reason of zealous exaggeration or extreme conservatism, have justifiably earned the stamp of "advocate" and to whom claimants are referred, not because of a confidence in their ability, but because of an assurance that the forthcoming report will be "favorable." Such doctors become "professional experts" whose appearance in the courtroom is so frequent that attorneys feel compelled to caution them against displaying familiarity with the courtroom procedure and personnel and to suggest "that they act like any other witness would under the circumstances, so that the jurymen will feel that they are on the same level, that it isn't necessarily a professional witness."[6]

The problem of the "professional expert" is not new. Over thirty years ago the Supreme Court of Pennsylvania observed:

> The professional expert, whose testimony we relate above, frequently appeared in court as a witness in personal injury cases, and the inference from his evidence is that he made the giving of testimony in such actions a business. One of the evils in the trial of personal injury cases is padding the claim with evidence of the professional medical expert.[7]

More recently, the modern expert medical witness and his influence upon the jury was well described in the following language:

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[5] Donley, "Why Medical Experts Disagree," 36 Rhode Island Med. J. 436 (1953); 36 Med. Economics 62 (1959).

[6] Transcript of Proceedings of NACCA Medico-Legal Seminar, Hartford, Conn., Nov. 1958, p. 99.

[7] Murphy v. Pennsylvania R.R., 292 Pa. 213, 216, 140 Atl. 867, 869 (1927).

> An expert medical witness is an important part of the technique in personal injury litigation. He generally is a persuasive, fluent, impressive witness, able to make the jury understand that what he is telling them is the product of years of educational preparation and medical experience, with particular reference to and emphasis on the specialty involved. He will name his colleges and universities, his degrees, the medical societies to which he belongs, the national specialty groups to which he has been admitted, the hospitals in which he has interned or externed, and the hospital staffs on which he has held positions. Having thus made his introduction, he will state his findings upon examination of the plaintiff and, by means of a long hypothetical question devised for that purpose, will relate the cause of the pathological condition to the accident and give his prognosis. That he is being paid by one side is always skillfully lost in casual answers to cross-examining cynical questions by a modest shrug indicating that a charge is made per hour or day, which seems wholly inconsistent to the large proportions from which his great capacities emerge. Thus is set the basis for the jury's finding on damages. . . . They, [medical witnesses] as much as the lawyers, shattered the aerial limits of verdicts in personal injury cases and made hundreds of thousands grow where only thousands grew before.[8]

Statistics concerning the "professional expert" are, of course, fragmentary, and only in recent years have there been efforts to record the appearances of well-known "medical advocates." A startling example, however, is the doctor who appeared in court three hundred times in one year.[9] In personal injury actions against railroads, which constitute only a fraction of the entire field, it is not unusual to find doctors who, within a relatively short period, have appeared in well over a hundred cases; and, in at least one instance, an appearance of the same doctor in over five hundred cases has been noted.[10]

The selection and use of the "medical advocate" is not within the realm of legitimate advocacy on the part of the attorney. Extreme advocacy in this area results in (1) widening the legitimate areas of medical dispute with radical and irreconcilable opinions on basic medical issues; (2) decreasing settlement possibilities with resulting increase in litigation and court congestion; (3) criticism of the process whereby the jury is given the task of resolving such conflicts; (4) inter-professional criticism; and (5) in some cases, the possibility of actually retarding rehabilitation of the injured party.[11]

Assuming the selection of a well qualified, unbiased medical expert, advocacy on the part of the attorney is again essential in the

8 Kemeny v. Skorch, 22 Ill. App. 2d 160, 170, 159 N.E.2d 489, 493 (1959).

9 Symposium—"The Medical Witness in Court," 1 Am. Pract. 595 (1957).

10 Association of American Railroads, Claims Research Bureau.

11 Brown, *supra* note 4.

subsequent phases of the pre-trial preparation of the medical evidence. This, of course, includes conferences with the doctor well in advance of trial in order that the medical issues can be thoroughly discussed, that questions resulting from the attorney's basic medical research can be resolved, and that the attorney can be directed to the most recent and most authoritative medical literature. At later conferences the basic outline of the testimony should be reviewed, the hypothetical questions carefully examined, and the use of demonstrative evidence explored. Such preparation is of critical importance if the evidence is to be presented in a clear, understandable and effective manner and if the legal advocate is to be prepared to recognize any exaggerations, omissions, and discrepancies in the medical testimony offered by the opposite party.

Presentation of the Medical Evidence

> We found a scirrhous adenocarcinoma of the small intestine with metastasis to parietal peritoneum and serosa of the greater part of the intestinal tract. Adenocarcinoma is a type of cancer. We also found multiple obstructions of the small intestine due to tumor infiltrations and adhesions. There was a double enterostomy opening near the midline with a healed rectus incision on either side.

The above testimony prompted a reviewing court to caustically remark that, "This simple language was for the benefit of the laymen,"[12] and it illustrates the importance of translating medical evidence into terms which the jury can readily understand. Advocacy demands an ability on the part of counsel to perform this task, and it can be done only after the attorney has gained a complete understanding of the terminology involved through his pre-trial research and consultations. Increased ability on the part of counsel and resulting improvement in the reduction of medical language to comprehensible terms meets, in part at least, one of the objections to our present system, *viz.*, the lack of ability on the part of the jury to understand, much less resolve, disputed medical testimony.

In this connection, the use of visual aids such as medical charts, illustrations, models, positive X-rays and other exhibits may be of real assistance to the jury. Plaintiffs' counsel have undoubtedly been the leaders in the use of medical demonstrative evidence,[13] but it is believed that the same tools are of equal assistance and importance to defense counsel. The use of such evidence depends upon its relevancy, materiality and, of most importance, its emotional effect.[14] Here, too,

[12] Prudential Ins. Co. of America v. Lowe, 313 Ky. 126, 129, 230 S.W.2d 466, 468 (1950).

[13] See, e.g., 2 Belli, Modern Trials §§ 268-279 (1954).

[14] Yegge, "How Much 'Blood' May A Jury See," 1959 Ins. L.J. 215 (1959); Annot., 58 A.L.R.2d 689 (1958).

advocacy must have its limitations and should not be carried to the extreme of employing exhibits and techniques whose probative or illustrative values are outweighed by the possible inflammatory reactions. The use of medical instruments,[15] movies of operations[16] and other similar practices normally fall within the latter category.[17]

It is well known that many doctors have a fear of the courtroom, based in part upon the prospect of a cross examination which frequently takes the form of a direct challenge to the doctor's ability and credibility. The average doctor is not prepared, by training or temperament, for such assaults,[18] and frequently his courtroom experience results in bitterness and distrust for the legal profession and the system which permits such practices. All too frequently such cross examinations are neither necessary nor helpful. The nature and extent of the cross examination of a medical expert should depend upon two factors: first, the nature of the witness and his testimony and, second, the extent of the preparation made by the attorney. If the doctor is well qualified, confines his testimony to his particular specialty, testifies honestly and without exaggeration, then certainly the cross examination should be far more limited than in the case of the "medical advocate." Just as thorough preparation will enable the attorney to recognize the extreme testimony from the "medical advocate" or "professional expert," so will it enable him to prepare and present an effective cross examination of that witness. The extreme medical testimony, whether it be offered by the plaintiff or by the defendant, must be challenged and the witness who gives it discredited. The task of the attorney in this respect is not easy, but the difficulty is in inverse proportion to the degree of exaggeration and to the amount of pretrial preparation. The approach should be determined, the basic ques-

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15 Winters v. Richerson, 9 Ill. App. 2d 359, 132 N.E.2d 673 (1956); Taylor v. Kansas City So. Ry., 364 Mo. 693, 266 S.W.2d 732 (1954). *But see* McMann v. Reliable Furniture Co., 153 Me. 383, 140 A.2d 736 (1958).

16 Melvin M. Belli, a leading exponent of the use of demonstrative medical evidence, states: "It is in situations such as these that the practical, though certainly not scientific, rule of thumb applies; these matters are left to the trial judges' discretion. Presently, although the author knows of no appellate decision, the trial court discretion may very well be that most surgical procedures offered in evidence by means of colored motion pictures would be refused." Belli, *supra* note 13, at § 272.

17 Hinshaw, "Use and Abuse of Demonstrative Evidence: The Art of Jury Persuasion," 40 A.B.A.J. 479 (1954); Note, "A Legal Penumbra; When Does Demonstrative Evidence Become Prejudicial?" 6 Syracuse L. Rev. 160 (1954).

18 1 Adelson, DeWitt, Gerber, Moritz & Schroeder, "Physician in the Courtroom," Law-Medicine Series, 67-68 (1954); Herrman, "Dr. Witness," 29 Del. St. Med. J. 8 (1956); Stetler, "You, Doctor, Will Be a Witness," 1957 Med. Tr. Tech. Q. 247 (1957); Stetler, "Medical-Legal Relations—The Brighter Side," 2 Vill. L. Rev. 487 (1957).

tions prepared, and the supporting medical texts and literature gathered well in advance of the trial.[19]

With respect to cross examination, therefore, advocacy at the trial is vitally important. If unrestrained and misdirected, it injures not only the client's case but the relationship of the two professions as well. If properly employed to challenge the "medical advocate," it not only serves the client but contributes to the maintenance of the adversary system by discrediting and discouraging extreme medical testimony.

The Role of Advocacy—Past and Future

It is submitted that extreme advocacy, particularly in the employment and use of the modern "professional expert," has been largely responsible for the mounting dissatisfaction with the present system of resolving medical issues by the adversary process. It is also submitted that any lack of advocacy on the part of counsel in medical research and preparation contributes to the problem. If the emphasis is not changed, the role of advocacy will deservedly be reduced, if not eliminated, from the medical aspects of personal injury litigation. Efforts to solve the problem by the creation of court sponsored experts are gaining momentum and deserve the attention of all members of the bar who are concerned with correcting the abuses which have arisen.

Impartial Medical Testimony—The New York Plan

For many years the judiciary and the professional organizations have been deeply concerned with the quality of expert testimony and the problem of extreme advocacy in the presentation of medical evidence. Proposals have run the gamut from "let well enough alone,"[20] to appeals to conscience[21] to the withdrawal of scientific issues from the jury's consideration.[22] One of the oldest proposals, and one which has been widely approved, is the appointment by the court of a neutral expert witness whose report and findings, while not conclusive, are

[19] Stichter, "Interrogating the Medical Expert," 21 Ohio Bar 177 (1948); Tullar, "The Doctor and the Court," 14 Ariz. Med. 71 (1957).

[20] Foster, "Expert Testimony—Prevalent Complaints and Proposed Remedies," 11 Harv. L. Rev. 169 (1897).

[21] Stryker, "A Consideration of the Need of Legislation Bearing Upon the Question of Expert Testimony," 28 N.Y. St. J. Med. 243 (1928); Williams, "The Doctor as a Witness," 56 N.Y. St. J. Med. 1440 (1956).

[22] Eliott & Spillman, "Medical Testimony In Personal Injury Cases," 2 Law & Contemp. Prob. 466 (1935); Smith, "Scientific Proof and Relations of Law and Medicine," 10 U. Chi. L. Rev. 243 (1943); Forum—"The Medical Witness and Medical Testimony In Negligence and Malpractice Cases," 54 N.Y. St. J. Med. 1957 (1954).

given great weight by reason of his competency and impartiality.[23] In 1926 the House of Delegates of the American Medical Association adopted resolutions recognizing the need for a system which would eliminate the abuse of medical testimony and endorsed the principle of the court appointed medical expert.[24] In 1937 the National Conference of Commissioners on Uniform State Laws drafted and promulgated the Model Expert Testimony Act[25] which would permit a judge in any case to appoint one or more experts, not exceeding three in number, to examine the plaintiff, file a report and testify at the trial.[26] The Model Act, as such, has met with little success and only one state has adopted it in its entirety.[27] With the increasing volume of personal injury litigation, however, and with increasing advocacy in the presentation of medical evidence, the basic concept of court appointed experts has made substantial progress in recent years. The most important application has been the formation and development of the New York Medical Expert Testimony Project.

In 1952 the justices of the Supreme Court of New York County, concerned about the problems created by the presentation of medical evidence through partisan experts, solicited the suggestions and assistance of the bar associations and medical societies in that community. The result was the creation of the Medical Expert Testimony Project. The problem sought to be resolved was well stated in the report of the special committee of the New York City bar association on this project. After noting the varying degrees of competency among doctors, the committee observed:

> Nor are all doctors equally impartial. Some are above suspicion. A few are corrupt. In between are a number who become infected with bias when called as witnesses in the conventional way. Cast in the role of partisans, subjected to hostile cross-examination, and paid by one side, they tend to color their testimony. Their opinions may be expressed a little more strongly than the facts or the state of medical knowledge warrant and needed reservations may be omitted when convenient. As experts, they receive not ordinary witness fees, but special compensation, sometimes very

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[23] Proposals for court appointed experts have been made for many years. See, e.g., Herschel, "Services of Experts In The Conduct of Judicial Inquiries," 21 Am. L.R. 571 (1887); Washburn, "Testimony of Experts," 1 Am. L. Rev. 45 (1866).

[24] Digest of Official Actions 1846-1958 of the American Medical Association, 255.

[25] The Act was approved by the National Conference of Commissioners on Uniform State Laws in 1937 as a Uniform Act and was redesignated as a Model Act in 1943.

[26] Model Expert Testimony Act, §§ 1-10, 9A U.L.A. 351 (1957).

[27] South Dakota, S.D. Code, tit. 36, c. 36.01 (Supp. 1952). The Model Code of Evidence, adopted and promulgated by the American Law Institute, contains provisions similar to those in the Model Expert Testimony Act. Model Code of Evidence Rules 403-410 (1942).

> substantial in amount. Too often their testimony reflects the partisan source from which their testimony comes.[28]

Under the New York procedure, the judge conducting a pre-trial conference has the right, pursuant to a special rule of court, to order an examination of the injured person by a member of a panel of medical specialists selected by the New York Academy of Medicine and the New York County Medical Society.[29] There are fifteen panels of various specialists, and the name of the specialist within each panel who will conduct the examination is selected by rotation. Although the available specialties are known, the judge and the attorneys do not know in advance the name of the particular specialist who will be so selected. The judge describes the medical dispute and indicates the type of specialist needed for the examination and the selection is then made by an assistant special deputy clerk in charge of the medical report office. The findings of the specialist and his report, copies of which are received by the court and the attorneys, form the basis for a further pre-trial conference. It is at this stage that an important objective of the plan is often realized, *viz.*, the settlement of cases by the readjustment of positions due to the influence of the impartial specialist's report.

If the case is not settled, the specialist may be called by the judge or by either of the parties to testify, and his position as a court appointed expert is made known to the jury. He may be cross examined, just as any other expert witness, and neither party is precluded from presenting his own specialist to support his position or to contradict

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[28] Impartial Medical Testimony, A Report By a Special Committee of the Association of the Bar of the City of New York on the Medical Expert Testimony Project 7 (1956) (hereinafter cited as the New York Project Report).

[29] The rule, effective December 1, 1952, provides: "1. There is established in the Supreme Court for the County of New York an office to be known as the Medical Report Office.

2. In any personal injury case in which, prior to the trial thereof, a justice shall be of the opinion that an examination of the injured person and a report thereon by an impartial medical expert would be of material aid to the just determination of the case, he may, after consultation with counsel for the respective parties, order such examination and report, without cost to the parties, through the Medical Report Office of the Supreme Court, New York County. The examination will be made by a member of a panel of examining physicians designated for their particular qualifications by the New York Academy of Medicine and New York County Medical Society. Copies of the report of the examining physician will be made available by the clerk of the Medical Report Office to all parties.

3. If the case proceeds to trial after such examination and report, either party may call the examining physician as a witness or the trial justice may, if he deems it desirable to do so, call the examining physician as a witness for the court, subject to questioning by any party, but without cost to any party." 12 Nichols-Cahill, New York Civil Practice Acts 542 (1959 Supp. 108).

the testimony of the court appointed expert. The fee of the impartial medical witness is paid from court funds.[30]

The New York plan, now well beyond the experimental period, appears to be firmly established as a part of the trial procedure in New York and Bronx Counties. With varying modifications it has also been adopted in Baltimore, Maryland, Los Angeles, California, and by the United States District Courts for the Eastern District of Pennsylvania and the Northern District of Illinois.[31] In Cleveland, Ohio, the concept of impartial medical testimony has been adopted to a limited extent by a rule of court effective November 9, 1959, which contains drastic modifications of the New York plan. The most unusual feature of the Cleveland rule is the restriction of the use of impartial experts to the pre-trial stage and a prohibition against informing the jury that a medical panel plan has been utilized.[32]

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[30] New York Project Report 13-35.

[31] Anderson, "Medical Testimony In the Courts," 43 J. Am. Jud. Soc'y 79 (1959); Anderson, "Unbiased Medical Expert Testimony—An Actuality," Proceedings of Medicolegal Symposiums sponsored by the Law Department and Committee on Medicolegal Problems of the American Medical Association, 102 (1955); Niles, "Impartial Medical Testimony," 29 Del. St. Med. J. 247 (1957); Court Congestion, Dec., 1959. For a description of the various projects and a review of the progress being made in the formulation of Interprofessional Codes see Barr, "Medical Testimony: Doctors and Lawyers Cooperate," 41 J. Am. Jud. Soc'y 78 (1957). The rule of the United States District Court for the Eastern District of Pennsylvania was tested by a petition for a writ of mandamus and prohibition in Hankinson v. The Pennsylvania R.R., Civil Action No. 21051. The petition was denied by the Court of Appeals for the Third Circuit in Hankison v. VanDusen, No. 12740 and the Supreme Court of the United States denied certiorari in Hankinson v. Van Dusen, 359 U.S. 925 (1959).

[32] Rule 21A of the Court of Common Pleas of Cuyahoga County provides: "Pre-Trial Medical Panel. In any personal injury case in which, at or during pre-trial, the Pre-Trial Judge, after consultation with counsel for the respective parties, shall be of the opinion that an examination of the injured person and a report thereon by a panel of medical experts would be of material aid to the just determination of the case, he may order an examination and report, without cost to the parties.

Upon being advised of such order, the Academy of Medicine shall proceed to designate three (3) medical experts to constitute a medical panel to conduct such examination and report thereon in writing at the earliest practicable date. In any case in which counsel for the respective parties represent to the Judge that an examination by all three panel members is either impracticable or too time-consuming, the Judge may direct that the examination shall be conducted by one panel member whose findings and report shall be submitted to the other two members of the panel who, in turn, shall review the same and appropriately record their approval or disapproval in whole or in part. In the event one or both of said reviewers should not be in accord with the findings and report of the examining physician, a written report so stating, together with the reasons therefor, shall be submitted.

All reports by any panel named hereunder shall be forwarded to the proper officers of the Academy of Medicine of Cleveland for transmission to the Pre-Trial Judge who made the original order with copies sufficient in number for counsel in the case.

The merits of the impartial medical expert system have been widely debated, and it undoubtedly is one of the most important and most controversial innovations in the traditional process of resolving issues before the jury in an adversary manner. It has, however, obtained the approval and encouragement of organizations in both professions.[33] Proponents of the court appointed medical expert plan claim the following accomplishments:

1. It has improved the process of finding medical facts in litigated cases.
2. It has helped to relieve court congestion.
3. It has had a prophylactic effect upon the formulation and presentation of medical testimony in court.

Before a Pre-Trial Judge shall order an examination and report by a panel of medical experts as provided herein, the parties, by their respective counsel shall stipulate in writing (1) that in the event the cause is tried, neither side shall make any reference to the fact that a medical panel plan had been utilized at or during pre-trial or to the fact that any medical witness appearing at the trial had previously served as such panel member; and (2) that in the event of a breach of such commitment, the trial Judge shall be authorized to immediately declare a mistrial.

If the case proceeds to trial after such examination and report, either party may call any member of the panel as a witness at the expense of such party on the usual fee basis incident to the employment of medical experts.

No physician shall be designated by the Academy of Medicine of Cleveland to serve on the panels provided for herein unless (1) he is an acknowledged expert in the field which he is to represent and (2) he is willing to accept compensation for his services under a fee schedule established by the Academy of Medicine of Cleveland with the approval of the court.

The foregoing Rule shall be effective November 9, 1959 and shall remain effective for a period of two years thereafter."

The operation of the Cleveland rule would appear to depend upon the willingness of the parties to enter into the described stipulation. The original plan, as proposed by the Cleveland Academy of Medicine, did not contain such a provision. Report of the Rules Committee to the Chief Justice and Judges of the Court of Common Pleas, Cuyahoga County, September 28, 1959.

[33] The House of Delegates of the American Bar Association approved a resolution in 1957 which provides, in part, as follows: "*Resolved,* that the American Bar Association adopt a national program, to be implemented at the local level, of fostering the creation and employment of panels of impartial medical experts, under court aegis, in the pre-trial consideration and trial of personal injury cases especially in those communities where there is a volume of personal injury litigation in the courts and where there is a sufficient number of qualified doctors available to constitute a panel.

That the panel be selected by professional bodies on the basis of professional qualifications;

That the panel be employed at the pre-trial and trial stages of such cases." 82 A.B.A. Rep. 185 (1957).

See also Resolution of the House of Delegates of the American Medical Association, supra note 24, and Editorial, "Impartial Medical Testimony," 168 J.A.M.A. 50 (1958).

4. It has proved that the modest expenditure involved effects a large saving and economy in court operations.
5. It has pointed the way to better diagnosis in the field of traumatic medicine.[34]

It is submitted that one of the greatest virtues of the impartial medical witness procedure is its deterrent effect upon the "medical advocate." Recognizing this as "the least tangible, but possibly the most important, effect of the project," the New York Project Committee has said:

> While no statistics can be compiled and no cases cited, it seems highly probable that the very existence of the Project, in newly initiated cases, tends to deter doctors and lawyers from making consciously false or grossly exaggerated medical claims. Such claims can be exposed more readily than heretofore and under circumstances that might prove, at the least, embarrassing for those concerned. Doctors cannot sell slanted medical reports without the consciousness that their work may be reviewed by the leaders of their profession. They cannot bargain to give favorable testimony without the realization that they may be confronted in court by a highly skilled specialist and come off second best, risking their professional reputations in the process. Lawyers can no longer rely, with any semblance of confidence, on false or inadequate medical reports to gain settlements, or on false medical testimony to win trials. They cannot fail to be more insistent upon receiving and being guided by honest and competent medical opinions.[35]

There are many opponents of the impartial medical witness plan who very ably point out its defects. The two most often advanced criticisms are:

1. Medicine is not an exact science and in many areas there are legitimate, recognized differences of opinion among the highest qualified specialists. For this reason, and because concepts in traumatic medicine are ever changing, it is grossly unfair to select at virtual random a doctor who may adhere to a par-

[34] New York Project Report 5; Botein, "The New York Medical Expert Testimony Project—and Its Results to Date," 5 La. B.J. 15 (1957); Frost, "Impartial Medical Testimony," 1960 Ins. L.J. 17 (1960); "Symposium—The Impartial Medical Testimony Plan," 97 Am. J. Surg. 672 (1959).

[35] New York Project Report 27-28. "It is impossible to estimate the number of cases that are settled because one of the parties fears to expose his medical claim to the scrutiny of an impartial expert. There are certain facts that will defy precise statistical measurement. For example, how many cases were settled because one side feared that referral to an impartial expert would disclose the falsity of his medical claim; or what is the ratio of cases in which puffing of injuries is discouraged by fear of possible disclosure; or what prophylactic effect does the Medical Panel have on the excesses of that small band of disreputable lawyers and doctors I referred to earlier." Botein, supra note 34 at 21.

ticular school of thought and to present him under the aura of a court appointed, court sponsored expert whose opinion unquestionably carries great weight with the jury.[36]

2. The impartial medical expert procedure is an encroachment upon the traditional adversary system and is a direct step toward the transformation of trial by jury into an administrative proceeding.[37]

Certainly there is some merit in the first of these contentions. It must be conceded that there are areas of medicine wherein the most competent and most unbiased authorities disagree and it is likewise true that the chosen "impartial" expert enjoys a considerable advantage, by virtue of his known sponsorship by the court, in influencing the jury toward his point of view. The fact that he makes known a divergence of opinions and is subject to cross examination may serve to reduce that advantage but it is doubtful that it destroys it.

With respect to the encroachment upon the adversary nature of trial by jury, the New York plan has been defended as simply being an extension of the trend toward pre-trial discovery[38] and a better technique for obtaining the ultimate object of litigation—truth and justice between the parties. It is forcefully argued that traditional form and ritual must yield to any improvements necessary to achieve that goal.[39]

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36 Lambert, "Impartial Medical Testimony: A New Audit," 20 NACCA L.J. 25 (1957). Emile Zola Berman, in a panel discussion on impartial medical testimony conducted by the Committee on Trial Tactics of the Section of Insurance Law of the American Bar Association, stated: "It is to be noted that these disputes in the courtroom with some references being made as indicating wide variances between paid protagonists, especially those in connection with the effects, both organic and psychological following head injuries as well as the controversies with respect to the relation of trauma and disease, are not of the bar's making. They are merely echos of the raging controversies in the field of medicine itself." 1956 Proceedings of the Section of Insurance Law 277. See also, Berman, "A Lawyer Looks At the Doctor," 24 Ins. Counsel J. 418 (1957).

37 "The whole process of judgment, whether by judge or jury, is shot through with controversy. Most impartial judges disagree. Medical formulations should not be made matters of law. Whether a given cause results in a disease or disability should ultimately be decided as a question of fact. By whom? Your reaction to the proposals being discussed depends in large measure on your answer. My position is that the plan to eliminate controversy on this question of fact will eliminate judge and jury." Harry Gair, in panel discussion, *supra* note 36 at 304. See also, Forum "The Medical Witness and Medical Testimony In Negligence and Malpractice Cases," *supra* note 22.

38 Anderson, "Medical Testimony In the Courts," *supra* note 31.

39 Peck, "Impartial Medical Testimony" 22 F.R.D. 21 (1958). It should also be noted that, historically, the summoning of experts to aid the court appears in the records as early as the fourteenth century. By the eighteenth century, however, the party system of experts had become firmly established. Rosenthal, "The Development of the Use of Expert Testimony," 2 Law & Contemp. Prob. 403 (1935).

It is the opinion of the author that the selection of a medical witness by the court and the presentation of such a witness under the auspices of the court is in fact a substantial alteration of the adversary nature of jury trials in personal injury cases. It is also believed that this erosion of advocacy has been the direct result of an abuse of advocacy on the part of attorneys in the preparation and presentation of the medical evidence and on the part of doctors who, by submission to the role of "medical advocates," have made the need for reform a pressing problem. It is submitted that the best system would be one which eliminates extreme advocacy but yet retains the framework of an adversary proceeding for the evaluation and determination of questions which are legitimately subject to dispute and conflicting opinions.

The impartial medical expert procedure attacks the problem of incompetency and extreme advocacy after much of the damage has been done but before an ultimate attempt is made by the jury to resolve strongly conflicting opinions. The problems created by the "medical advocate" culminate in the courtroom, but they originate long before that time. The partisan attitude of "plaintiffs' doctors" and "defendants' doctors" is initially reflected in exaggerated reports to the attorneys, with the result that battle lines are drawn based upon these tenuous foundations, settlement demands and offers are couched in terms of widely separated "medicals," and the consequences are lawsuits, prolonged delays, court congestion, and all of the other ramifications of extreme advocacy. An elimination of the problems created by the "medical advocate" may, therefore, depend upon curative procedures aimed at the roots rather than the branches, and it is here that the medical societies have an opportunity again to be of great service. They have willingly provided the "impartial medical witness" in an effort to resolve conflicts at the trial. It seems that an "impartial medical review" of reports and testimony would not only complement this procedure but would have a more direct and widespread effect in deterring advocacy among members of the medical profession. The most notable effort in this direction has been made in Minnesota.

Impartial Medical Review—The Minnesota Plan

In 1940 the Minnesota Medical Association created a Committee on Medical Testimony for the purpose of reviewing court cases in which it appeared that the medical witness had assumed the role of partisan to the point of distorting the true medical facts of the case. Under the Minnesota plan the judge or attorney or accusing doctor must submit in writing a brief statement to the Committee, giving the

name of the doctor to be investigated as well as information pertaining to the case in order that the entire transcript of the trial can be obtained. Only the chairman of the committee knows the identity of the complainant. The Committee of six members then reviews the transcript which is obtained at the expense of the state medical association and calls upon members of the various specialties to appear before the Committee and express their opinions regarding the testimony in question. The Committee has no disciplinary or judicial power, and it is only in extreme cases that the matter is referred to the State Board of Medical Examiners which has the power to suspend or revoke the doctor's license. In most cases the matter is handled by an informal conference with the doctor in question.[40]

During a sixteen year period following commencement of the plan, thirty-four cases were investigated. Ten were of sufficient gravity to be submitted to the State Board of Medical Examiners where disciplinary measures were instituted. The report in one case was sent directly to a judge of the state supreme court who had requested the examination. In six cases the testimony was found to be satisfactory, in which event the doctor was not informed of the investigation. In seventeen cases the testimony was determined to be questionable or extremely partisan and the doctor under investigation was interviewed by a member of the committee. Of those cases, the results in sixteen proved satisfactory. In the seventeenth case there was no improvement in the doctor's expert testimony and with the next complaint he was referred to the State Board of Medical Examiners for disciplinary action.[41]

The Minnesota plan, followed in a limited number of jurisdictions, has been considered by some to be an unsuccessful effort to solve the problem of conflicting medical testimony.[42] From the viewpoint of individual cases, it admittedly is of no aid in resolving disputes or settling claims, and it is operative only after the damage to the litigant as a result of improper medical testimony has been done. It does, however, have the unquestioned merit of attempting to solve the problem of the medical advocate by the restraining influence of the medical societies exerted upon their own members. It does not interfere with the adversary character of the trial, and hence those prob-

40 Hammes, "The Control of Medical Testimony—The Minnesota Experiment," 28 Minn. Med. 111 (1945).

41 "Impartial Medical Testimony," address by Ernest M. Hammes, Sr., M.D. Regional Meeting of the American Bar Association, Baltimore, Md., October 11, 1956.

42 Medicine and the Law, 160 J.A.M.A. 1334 (1956); See also, Stetler, "Medico-Legal Relations—The Brighter Side," supra note 18; Marcus, "The Minnesota Plan—A Study of Cross-Purposes," 6 Law. Guild Rev. 648 (1946); Slobe, "The Minnesota Plan—Another View," 7 Law. Guild Rev. 227 (1947).

lems which properly involve disputed areas of medicine are left to the judgment of the jury, without the influence of a court sponsored expert. The Minnesota plan seeks only to correct the abuse of the adversary proceeding by making available the means for reviewing the conduct of a doctor who permits advocacy to affect and color his testimony. It is certainly not as radical as the New York plan, but both approaches—the impartial testimony and the impartial review—have the basic merit of tending "to deter doctors and lawyers from making consciously false or grossly exaggerated medical claims."[43]

Combination of the Impartial Review and the Impartial Expert

It seems possible to correlate the best features of both the New York plan and the Minnesota plan and still preserve the traditional framework of our adversary system. Each plan, in its original form and standing alone, has weaknesses and defects which might be overcome if the merits of each are combined in a unified program designed to eliminate the "medical advocate" and irreconcilable opinions on basic medical questions.

The creation by local and statewide medical societies of medico-legal committees for the express purpose of furthering competent and impartial medical testimony in our courts is an important part of any such program.[44] Such committees should review not only questionable testimony from court records, as in the Minnesota plan, but they should also review exaggerated, partisan medical reports when called to their attention. Such reports are far more common than distorted medical testimony and they lay the foundation for all of the problems sought to be later resolved by the impartial medical expert procedure. Certainly the medical profession desires to eliminate the "professional expert" from its ranks, and it can do this by the tremendous influence of its members upon their fellow doctors, by suspension of membership in societies, and, in extreme cases, by suspension or revocation of licenses. Committees designed for the elimination of advocacy and incompetency in the preparation and presentation of medical evidence undoubtedly have a salutary effect upon the doctor who is called upon to make an examination, submit a report, and perhaps ultimately to testify on behalf of one of the parties. Advocacy in the medical profession should also be discouraged by the use of professional meetings,

[43] New York Project Report, supra note 28.

[44] The House of Delegates of the American Medical Association suggested in 1934 that each state medical society cooperate with its bar association in an effort to correct the situation whereby two men of equal distinction in medicine would give diametrically opposite statements to questions that are asked at a trial. Digest of Official Actions 1846-1958 of the American Medical Association, 256.

medical journals, and other means of disseminating information concerning the problem and of making the doctor aware of his responsibilities in the administration of justice in personal injury cases. An example of the use of medical journals for this purpose is the Bulletin of the Academy of Medicine of Cleveland which has an announced policy of publishing verbatim transcripts of testimony selected by an Academy committee, together with the name of the doctor who testified, but without editorial comment.[45]

A modification of the New York plan, eliminating the presentation of the impartial medical expert to the jury as a court sponsored expert, would retain many of the advantages of that procedure and yet preserve the adversary nature of a jury trial. The availability of such panels and their use through the pre-trial stages of litigation is very important, not only because of the deterrent effect upon the "medical advocate," but also for their assistance in reconciling differences, narrowing areas of dispute and encouraging settlements. This is one of the modifications which have recently been adopted in Cleveland.[46] The use of the pre-trial impartial expert should not, however, be dependent upon an agreement by the parties but should depend instead upon the judgment of the court in each case. Objections to the use of such an expert would be eliminated if he is not identified as a court selected or court sponsored expert but is still subject to being used as a witness by either party. While such a procedure would admittedly lack the force of the New York plan in effecting settlements, the prime object in any plan should not be the elimination of court congestion by forcing settlements, but rather the elimination of the grossly exaggerated and improper opinions of the "medical advocate." If the selection of the pre-trial medical expert can be keyed to and combined with a system of impartial review by the medical societies it would seem that the ultimate purpose would be better accomplished, and the source of the problem would be attacked rather than its effects.

With closer attention by the medical societies to exaggerated reports and testimony, with restraint on the part of referring attorneys and examining doctors, and with the aid of the pre-trial impartial medical expert, those conflicts which have plagued the courts and the professions should be narrowed to legitimate, unbiased differences of opinion. Those areas should, it seems, be left open for a determination in the traditional adversary manner.

An integral part of any attempt to obtain impartial medical testimony is the role played by the attorney. He must not carry advocacy

[45] Editorial, 43 Bull. Cleve. Acad. Med. 16 (1958).

[46] *See supra* note 32.

to the extreme of making his selection of a doctor dependent upon a known willingness to send a "favorable" report. He must, at the same time, increase his role as an advocate in the field of medical research and preparation. To the extent that he devotes his efforts to such preparation, he is equipped not only to evaluate and present his own case, but he is also able to combat any exaggerated medical testimony which may possibly survive the restraint of the medical societies and the influence of the pre-trial impartial medical expert.

Summary and Conclusion

Advocacy in the preparation and presentation of medical evidence has reached a point where efforts to correct abuses are being made with varying degrees of success. The need is apparent, but there is a danger that extremes in this direction will result in a virtual foreclosing of the adversary process in areas of medicine which should still be subject to that historical means of evaluation. Advocacy on the part of the attorney is essential in the research and preparation of the medical evidence, but not in the selection of the "medical advocate" who should be eliminated by the plans advanced thus far, or by a combination of means to accomplish that purpose. The adversary system is vitally important and should be maintained, but it bears in this area, largely within itself, the seeds of its own destruction as well as the means for its preservation and improvement.