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Bernard S. Meyer

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SOME PROBLEMS CONCERNING EXPERT WITNESSES †

BERNARD S. MEYER *

THIS discussion concerns (1) to what extent discovery may be had concerning the adversary's expert and his report and when the deposition of such an expert may be taken, and (2) when a party may use the opposing party's expert or the opposing party himself as an expert at the trial. By engaging in this discussion, I pose as an expert on experts. I, therefore, thought I had best first ascertain what an expert is. I found many and varying definitions, some familiar, others not. Thus, we all recall Nicholas Murray Butler's definition (though we may not be expert enough to recall that he was the one who said it) of an expert as a man who knows more and more about less and less. Less familiar perhaps is Mr. Dooley's description of the war expert as "a man ye niver heerd iv befure. If ye can think iv annywan whose face is onfamilyar to ye an' ye don't raymimber his name, an' he's got a job on a pa-aper ye didn't know was published, he's a war expert."

But, I digress. Turning to discovery and deposition, I note first that this area is another illustration of the resistance of bench and bar to procedural change. As we

† An address delivered before the National Conference of State Trial Judges on August 1, 1967.

* Justice of the Supreme Court of the State of New York, Nassau County.

examine the reasons that have been given for *not* allowing discovery or deposition, you will see that most of them have little substance. Moreover, strong arguments can be made for a liberal discovery and deposition policy, subject to protective supervision by the court. Nonetheless, there is little evidence of liberality aside from the practice that has developed in some federal circuits, and Maryland's Rule of Procedure 410(c)(2) which provides for discovery of:

a written report of an expert, whom the opposing party proposes to call as a witness, whether or not such report was obtained by the opposing party in anticipation of trial or in preparation for litigation. If such expert has not made a written report to the opposing party, such expert may be examined upon written questions or by oral deposition as to his findings and opinion.

What are the advantages of a liberal policy? First, I suppose I should define what I mean by a liberal policy. Such a policy would provide that except for good cause shown no party may call an expert witness unless his adversary has been notified a specified time (not less than thirty days) in advance of trial of the name and address of the expert to be called and has received a statement of the expert's qualifications and a copy of his report. It would further provide that with the permission and subject to the conditions fixed by the court, the deposition of an opponent's expert could be taken. Subject to further study concerning the problems that might be created by so providing, it might permit a party to take the deposition of his own expert. Such a deposition could then be used at the trial in lieu of the witness, against any party who had notice of the deposition and an opportunity to cross-examine; but, to provide sufficient time for preparation of cross-examination, the rule should state that at the option of any opposing party, cross-examination could be deferred for a period not exceeding thirty days.

Probably the most startling part of that proposal is the provision that a party may take the deposition of his own expert witness. Yet, I am informed that Virginia has a rule so permitting, and that in the Ninth Federal

Circuit such a system has been used and has worked well. It appears to have a number of very real advantages. All of us are aware of the problems involved in getting expert witnesses into court. The fees charged by experts, at least in metropolitan areas, have made trial of even the run of the mill negligence action, involving injuries of any complexity, difficult for all but the richest litigants, and the increase in fees can be charged in good part to the time required of the expert in traveling to and from the trial, awaiting the call to the stand, and responding to examination and cross-examination. I have tried one case involving a claim of traumatic cancer in which the experts on either side were the heads of the appropriate departments in two of New York's leading hospitals. Each was to receive \$500 for his court appearance, but neither could accommodate his schedule to the courts. We finally ended up with a stipulation, believe it or not, that I would read to the jury the qualifications of each expert and the hypothetical question and would inform the jury that the plaintiff's expert would answer the question "yes" and the defendant's "no." The parties saved \$1,000 in fees and a mistrial was avoided, but how the jury could have made an intelligent selection between the two I do not know. They brought in a verdict for the defendant, so I had no opportunity to find out.

Had the proposed rule been in effect, the problem could have been avoided. The doctors' schedules would have been accommodated by bringing the court reporter to them, and most likely the fees would have been less. I say most likely because, though the rule necessarily contemplates a two-stage deposition in order to give the opposing party time to consult his own expert before proceeding with cross-examination, the probability is that the deposition of the experts on both sides would be taken and in such a case examination and cross-examination of both would probably proceed at the same session.

I can envisage at least two problems that may reduce the practicability of the proposal. The first is that the jurors do not see the witness. When we finally graduate

to video-tape that problem will disappear. Until then, when a party has an expert who projects, as they say, who is a smooth, persuasive talker, he will want the expert personally present in the courtroom. The second is that the trial proof of foundation facts may fail. In such an event it may be necessary to call the expert at the trial notwithstanding his deposition, and that involves a possible continuance or mistrial, added expense and possible embarrassment to the expert on his trial cross-examination because of opinions expressed in his deposition. Some types of cases will lend themselves more readily to this technique than others. Further study along these lines, and inquiry into the experience in Virginia and in the Ninth Circuit is surely advisable before a final rule is formulated, but I suggest that there are too many possible advantages to reject the procedure out of hand.

The purposes and advantages of the other parts of the proposed procedure are rather obvious. Furnishing name, address and qualifications in advance of trial makes it possible to inquire concerning the expert's background. I know of at least one case in which a gentleman who testified that he was a graduate of a named engineering school withdrew when shown a telegram from the university stating that he had never attended its engineering school. That was possible in that case because his testimony took several days and the defense was being handled by a nationwide insurance carrier. There is no reason to protect a charlatan against exposure, and there is no real hardship in requiring that qualifications be furnished, for most experts who spend any substantial amount of time in court have printed or mimeographed qualification sheets available. Indeed, time may be saved if the parties can agree simply to mark the qualification sheets in evidence and let the jury consider them as an exhibit in the jury room.

Furnishing a copy of an expert's report to the opponent and permitting the opponent to take the expert's deposition concerning it does away with surprise, permits the opponent more adequately to prepare his cross-examination, probably will result in a better prepared case on

both sides and a more clearly formulated issue for the jury and a shorter trial when the matter finally comes to trial, and, since it reduces the guesswork involved in evaluating a case, may very possibly result in settlement of the case. Since we have, or at least we say we have, long ago abandoned the game theory of trials, and since the search for the truth will obviously be advanced by requiring exchange of reports and allowing examination of the opposing expert, the law should long ago have advanced to this stage.

Why, then, has it been so slow to move? In large part the answer must be resistance to change, rather than logic, for many of the reasons given border on the disingenuous. Thus, it is said that the expert is simply communicating information to the attorney on behalf of the client and, therefore, the attorney-client privilege applies. While it is true that the attorney-client privilege protects both the attorney and the client from having to disclose what was communicated between them, it is certainly not true that the client by the simple device of reciting facts to his attorney can forestall examination of himself before trial as to those facts, or their recital in a required pleading such as a bill of particulars. No more should the expert (in his role as the conduit for communication between the attorney and the client) be able to immunize himself from disclosure concerning the facts communicated by him, nor, since his opinion will become one of the operative facts at the trial, concerning that opinion.

Again, it is said that the expert is an assistant to the attorney, and, therefore, his report is within the work product rule. Of course, that rule is qualified, not absolute, so that if, for example, it can be shown that the report relates to an item that was consumed or dismantled in the process of examination by the expert, disclosure of it would be ordered. In the ordinary case, however, there is no such necessity. Normally the opposing party has an equal opportunity to obtain his own expert's report. Nonetheless, work product should not frustrate disclosure of an expert's report and opinion, for the rule essentially is one

protecting the efficiency and morale of the legal profession, and the interests of the client and of justice, by denying disclosure to opposing counsel of an attorney's theories and strategy. The rule is not ordinarily carried beyond theories and strategy to the protection of evidence. Though it is used to protect statements taken by investigators from witnesses, the expert's report appears distinguishable from a witness' statement. In any event, to analogize the two, while it may protect the report, it cannot protect the expert from examination any more than would the fact that a witness had given a statement to one party prevent his examination before trial by the other.

Whether we speak of the absolute attorney-client privilege or the qualified work-product privilege it is, it seems to me, the height of unfairness to apply either to proscribe pre-trial disclosure of expert opinion. To do so is to permit a party to rely upon privilege to thwart pre-trial examination and then rely upon the expert's privileged testimony to prove his case at the trial. The testimony is either privileged or it is not. If such privilege as exists is going to be waived for purposes of trial, it must be waived also for purposes of pre-trial disclosure. I would go no further in recognition of arguments based on privilege or work-product than to limit application of the proposed rule or policy to an expert, or the report of an expert, who will be called to testify at the trial. It is reasonable, it seems to me, to exclude the non-testifying advisor because his function will usually be limited to finding the holes in the opponent's case, rather than the furnishing of any affirmative part of his employer's case. But it is wholly unreasonable to preclude effective cross-examination of an expert at the trial by withholding disclosure of his opinion and the data supporting it until the trial. Effective cross-examination is precluded, in my opinion, even in those jurisdictions in which the cross-examiner is entitled, after completion of the direct testimony, to a copy of the expert's report for use in cross-examination, for preparation under courtroom tension and in the few minutes available can never be adequate.

But it is said it is unfair to the expert who has a property right in his opinions to permit them to be taken without compensation. The short answer is that except as the questioning on examination before trial goes beyond the expert's report (in effect, except as the examiner seeks to make the expert his own witness, about which I shall have more to say later), the expert has already been paid by his employer for the time and effort necessary to gather the foundation facts and formulate the opinion. While he will not have been paid for the time consumed in the examination itself, there is no reason why he cannot be. If he is, I would suggest that initially the cost should be split between the parties, so that the expert's employer will not be tempted to arrange with the expert for a fee so high as to discourage his opponent from seeking examination, and so that the opponent will not be unduly prolix in his examination. Ultimately, the entire cost of the deposition should be deemed a taxable disbursement to be paid by the losing party.

Some courts on the basis of the supposed unfairness to the expert permit examination of an expert only as to facts within his personal knowledge, but not as to his opinions and conclusions. As already demonstrated, there need be no unfairness to the expert in eliciting his opinions, and no other basis for such a limitation withstands analysis. So far as I am aware, none of the disclosure rules expressly limit disclosure to facts. While some rules limit disclosure to evidence, expert opinions are, of course, admissible in evidence. It is conceivable that by requiring disclosure at too early a stage, when the expert has not fully developed the facts or formulated his opinion, his examination could prove embarrassing to him at the trial, but that objection relates to the time at which disclosure of opinion should be allowed, not to whether it should be allowed at all.

Finally, it is said that it is unfair to the litigant who employs an expert to order disclosure because (1) it permits his opponent to "manufacture" evidence in rebuttal and (2) it penalizes the diligent and puts a premium on laziness. The first contention ignores the fact that without

disclosure concerning plaintiff's expert's qualifications, his opinion and the basis for it, defendant will be hard put to meet the threat of "manufactured" or excessively partisan expert testimony presented by plaintiff. If, on the other hand, disclosure is required, plaintiff is not at the same disadvantage if defendant attempts to "manufacture" expert rebuttal, for plaintiff will be entitled in advance of trial to disclosure of defendant's expert's qualifications and opinions.

The second contention, though requiring more extended analysis, is no more persuasive. It is conceivable that a plaintiff may seek to examine a defendant's expert before trial in order to be able to prove his case without the expense of hiring his own expert, but as a practical matter the probability of such a maneuver is not great. In any event, adequate protection exists in the rule, hereafter discussed, limiting the right of one party to call as his witness an expert employed by the other, and additional protection can be afforded by requiring plaintiff to certify before he is permitted to see defendant's expert's report or to examine the expert before trial whether he intends to call an expert at the trial. It is also conceivable that a defendant may, after disclosure of plaintiff's expert's report and opinion, decide that he does not need to bring in an expert because plaintiff's expert's testimony can be met by cross-examination. A defendant willing to gamble on the effectiveness of cross-examination may, it is true, save some expense as a result of disclosure, but this is true of all disclosure and can hardly be classified as "unfair."

The basic concept of our system of pleading and practice is that a party is entitled to know in advance what he must be prepared to meet. The components of any claim or defense are law, fact and opinion. To require disclosure of legal theory in the pleadings and of facts in bills of particulars, examinations and interrogatories, and deny disclosure of expert opinion is more unfair than disclosure can ever be. Any attempt to harass or embarrass by the timing or extent of examination of an expert can be dealt with by protective order, and any statute or rule

incorporating the suggested policy can establish a two-stage process, in the first of which each party would present the name and qualifications of all the experts he intends to call or a certificate that he intends to call none. Should he, thereafter, seek permission to call an expert, his prior certification would be a factor to be weighed by the court in ruling upon the request.

My conclusion, based on the foregoing analysis, is that a statute or rule incorporating the suggested policy will have salutary effects upon trials and is long overdue.

So far we have been considering the right to pre-trial disclosure as a means of defining the issue and making effective cross-examination possible. We turn now to the question of whether a party may call the opposing party or the opposing party's expert as his own expert witness. I put to one side cases refusing to permit such testimony on cross-examination because beyond the scope of the direct examination, since they do not deal with the merits of the question.

The point of departure for most courts confronted with the problem is the cases dealing with the question whether an expert may be compelled to testify. Almost without exception those cases agree that an expert cannot be required, even under subpoena, to render an opinion that requires study or preparation, for example, by the doing of an autopsy, but can be required, even without compensation, to testify to matters of fact. The divergence in the authorities comes in the area of matters of opinion that do not require additional study or preparation. Those courts that refuse to compel an expert to testify, or to testify without compensation, as to such opinions, do so on the basis of the unfairness to the witness because (1) he has a property right in his special skills which he may only be required to give up by agreement, or (2) "only the most eminent are competent to answer *ex tempore* and defend impromptu opinions upon cross-examination, but none, without reflection upon his professional ability, may confess ignorance," or (3) an undue burden would be placed upon those individuals who achieve the greatest

eminence in a particular science, art or profession. Those that hold that an expert must testify as to such opinion take the position that the expert is under the same public duty as the lay witness; that it is no more unfair to require an expert to give opinion evidence within his competence (provided he does not have to do special preparation for it) without compensation other than the usual witness fee than it is to require a lay witness to testify concerning facts within his knowledge.

When the expert involved is the opposing party, the courts are about evenly divided on whether he can be required to testify concerning matters of opinion. Those that hold he cannot do so on the basis of the general rule that an expert cannot be compelled to give an opinion. Those that hold that he can differentiate the adverse party expert from the ordinary expert. It is now the universal rule that an adverse party may be called as a witness and examined as freely and fully as any other witness. The reason for the rule is that all pertinent and relevant evidence available should be adduced in the interests of justice. The expert opinion of the adverse party who was involved in the occurrence in suit is highly relevant and is readily available, whereas, at least in malpractice actions (the type of action in which, for the most part, the question arises), the testimony of a disinterested expert very often is not available because most doctors are reluctant to testify against another doctor. There is no inherent unfairness in allowing a party to prove his case through the testimony of his adversary; the adversary expert is not required to do added preparation since the facts are already within his knowledge; he will not be embarrassed by having to defend an impromptu opinion, for he will have had ample time to study the matter; and there is no possibility that he will be unduly burdened by being repeatedly called. For me, the logic and simple justice of that reasoning is unanswerable. Note, however, that even the enlightened courts who adhere to it, hold, emphasizing the availability element, that refusal to permit an adversary expert to be questioned as his opponent's witness concerning his pro-

fessional opinion is not prejudicial error when another opinion witness is available to the opponent. I take issue with that conclusion, however. Though an adversary expert will not often give opinion evidence favorable to his opponent, when he does it constitutes not only opinion evidence but an admission to which the jury may be expected to give greater weight, and the opponent is, therefore, in a very real sense prejudiced. To exclude the adversary's admittedly relevant opinion simply because it is cumulative is to overlook completely that factor.

The problem is more difficult when the expert called is not the adversary himself but a person hired by the adversary. If, as sometimes occurs, he has been designated by both or all parties, there is, of course, no question that any party may call him as a witness. But assume that he has been employed by only one party to advise concerning his side of the case and has rendered an opinion adverse to his employer's interests; may he then be called as a witness by the opposing party? On the grounds that to permit him so to be called puts the expert in the unethical position of serving two masters, and will be detrimental to proper trial preparation because parties will be reluctant to engage experts if they can be so used, and in some instances on the basis of attorney-client privilege or the work-product rule, the general rule is that he may not be so called. The cases indicate, however, that here too availability plays a part. Thus, if it can be shown that no other expert can be obtained, use of the adversary's expert as his opponent's witness may be permitted.

Moreover, if we change the facts but slightly and assume that the expert is employed to examine the opposing party or the opposing party's property, the result may be different. Thus, a doctor employed by defendant, not to advise whether defendant was guilty of malpractice, but to examine the plaintiff and evaluate his injury has, in several cases, been held subject to call as plaintiff's witness notwithstanding any ethical problems involved in his having been paid by defendant. The rationale is that by submitting to examination plaintiff has furnished the evidence

upon which the doctor's opinion is based and disclosure should not be a one-way proposition with defendant using the doctor's report if favorable to him but suppressing it if not.

The law with respect to use of the adversary's expert as a witness is still evolving. Whether the exceptions to the rule against allowing such use will eventually swallow up the rule, it is still too early to say. But I suggest that the considerations involved are economic rather than ethical. An expert called by the opposing party testifies not under retainer but under compulsion; the opposing party is not in any real sense a master that he serves, nor, unless he testifies to a different opinion than he reported to his employer, has he done anything unethical. Seldom will an expert be called by an opposing party who has not seen his report, so there is little likelihood of any such unethical conduct. In final analysis then, the only real embarrassment to the expert arises from the possibility that his employer may decide not to use him in the future. If that results, however, it will, unless I am overly cynical, be because he submitted too many reports favorable to his employer's opponents, not because in any one of those cases he repeated in public and under oath what he had previously informed his employer in private. I do not mean to imply that the answer to the problem will necessarily be different if ethical considerations are omitted from the reasoning process, but simply that it is more logical and more realistic to do so.

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