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# Impeaching the Professional Expert Witness by a Showing of Financial Interest

Michael H. Graham\*

Gentlemen of the jury, there are three  
kinds of liars,—the common liar, the d-d  
liar, and the scientific expert.<sup>1</sup>

The professional expert witness advocating the position of one side or the other has become a fact of life in the litigation process. Practicing lawyers can quickly and easily locate an expert witness to advocate nearly anything they desire. In each part of the country, if you need an expert medical witness to state that plaintiff suffered a whiplash injury, call expert X; if you need a medical expert to dispute that fact, call expert Y. The use of the expert witness has become so prevalent that certain expert witnesses now derive a significant portion of their total income from litigated matters. This article deals with the extent to which it is now permissible to establish that a "professional expert" called to testify in a particular matter is biased because of financial interest.<sup>2</sup> Effective cross-examination of a professional expert witness

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<sup>1</sup>Foster, *Expert Testimony-Prevalent Complaints and Proposed Remedies*, 11 HARV. L. REV. 169 (1897). Attributed to an unidentified trial lawyer who, having encountered unsuccessfully his adversary's expert witness, began his closing arguments with the quotation.

<sup>2</sup>3A J. WIGMORE, EVIDENCE § 945 (J. Chadbourn rev. 1970) differentiates bias from interest as follows:

Three different kinds of emotion constituting untrustworthy partiality may be broadly distinguished—bias, interest, and corruption:

Bias, in common acceptance, covers all varieties of hostility or prejudice against the opponent personally or of favor to the proponent personally.

Interest signifies the specific inclination which is apt to be produced by the relation between the witness and the cause at issue in the litigation.

Corruption is here to be understood as the conscious false intent which is inferrible from giving or taking a bribe or from expressions of a general unscrupulousness for the case in hand.

The kinds of evidence available are two:

(a) the circumstances of the witness' situation, making it "a priori" probable that he has some partiality of emotion for one party's cause;

(b) the conduct of the witness himself, indicating the presence of such partiality, the inference here being from the expression of the feeling to the feeling itself.

Because of the close relationship of the terms bias and interest as applied to remuneration of expert witnesses, they are used interchangeably throughout this article.

While the thrust of this article deals with the exploration upon cross-examination of the expert witness for bias caused by financial interest, the doctrine of excluding facts offered by extrinsic evidence is not applicable to bias impeachment—extrinsic evidence may, where appropriate, be admitted. *Id.* §948. It is anticipated however that extrinsic evidence will rarely be required; the expert witness at trial will almost certainly confirm what was disclosed upon

requires a broad construction of counsel's right to inquire into the financial interest of the expert witness.

#### THE "VENALITY" OF THE EXPERT WITNESS

The problem of combating the unscrupulous expert witness deserves the serious concern of all participants in the litigation process. The Advisory Committee's Note to Rule 706 of the Federal Rules of Evidence states the issue as follows:

"The practice of shopping for experts, the *venality* of some experts, and the reluctance of many experts to involve themselves in litigation, have been matters of deep concern."<sup>3</sup>

The "venality" of some experts—such a nasty word. Webster's Third Unabridged Dictionary defines venal as "capable of being bought or obtained for money or other valuable consideration; made matter of trade or barter; salable; user; open to corrupt influence and esp. bribery; mercenary. . . ." In other words, a paid whore. It is no wonder that expert witness venality is today a matter of deep concern.

Unfortunately, neither the image possessed by experts nor the concern generated by expert venality is a recent phenomenon. As early as 1858, none other than the United States Supreme Court in *Winans v. New York & Erie Railroad*<sup>4</sup> felt compelled to speak to the question: "Experience has shown that opposite opinions of persons professing to be experts may be obtained to any amount." Some years later, the Illinois Supreme Court noted that all too

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discovery. See notes 24 and 77 *infra*. The likelihood of the witness testifying inaccurately with respect to such facts upon discovery is extremely small. The potential damage to the career of the expert witness from being caught in a falsification of verifiable facts far outweighs the potential for impeachment of credibility resulting from truthful disclosure.

<sup>3</sup>Advisory Committee's Note to FED R. EVID. 706 (emphasis added). Rule 706, entitled "Court Appointed Experts," provides the court the right on its own motion to appoint an "impartial" expert witness. The rule goes on to provide for a method of dealing with compensation to the expert and disclosure of the fact of appointment of the court's expert to the jury. The appointment of the so-called "impartial" expert witness has long been advocated as the solution to the problem of biased expert witnesses. See, e.g., the citations contained in Advisory Committee's Note. However, in practice significant practical problems are created when the procedure is employed. See Levy, *Impartial Medical Testimony—Revisited*, 34 TEMP. L.Q. 416 (1961). As a result, the actual appointment of a court expert witness is a relatively infrequent occurrence.

<sup>4</sup>62 U.S. (21 How.) 88, 101 (1858). *Accord*, *Schlagenhauf v. Holden*, 379 U.S. 104 (1964) (Douglas, J., dissenting).

And a doctor for a fee can easily discover something wrong with any patient—a condition that in prejudiced medical eyes might have caused the accident. Once defendants are turned over to medical or psychiatric clinics for an analysis of their physical well-being and the condition of their psyche, the effective trial will be held there and not before the jury. . . . The defendant is at the doctor's (or psychiatrist's) mercy; and his report may either overawe or confuse the jury and prevent a fair trial.

*Id.* at 125.

often the ease with which an expert may be found to support the theory of either party is due to the fact his opinion is simply the natural and expected result of his employment.<sup>5</sup> Early commentators also spoke out. In an excellent article in the *Harvard Law Review*, Judge Foster concluded that as of 1897 "bias or inclination in favor of a party by whom the witness is employed, is probably the most frequent complaint of all against the expert witness; and the inclination or partiality is often characterized by terms indicating dishonesty and corruption."<sup>6</sup> Professor Hines added the following observation:

It is often surprising to see with what facility and to what an extent [experts'] views can be made to correspond with the wishes or interests of the parties who call them . . . [T]heir judgment becomes so warped by regarding the subject in one point of view that even when conscientiously disposed, they are incapable of expressing a candid opinion. . . . They are selected on account of their ability to express a favorable opinion, which, there is great reason to believe is in many instances the result alone of employment and the bias growing out of it.<sup>7</sup>

Throughout the years, similar sentiments have continued to be echoed by both courts and commentators. The testimony of experts has been described as "suspect,"<sup>8</sup> "of the lowest order,"<sup>9</sup> and "the most unsatisfactory part of judicial administration."<sup>10</sup> The intensity of such criticism seems to have grown as changes in the litigation process have rendered the partisan nature of experts an even more serious problem.<sup>11</sup> Of course, the use and importance of the expert witness has also increased with the great expansion of litigation in the products liability and medical malpractice areas. A dramatic illustration of the dimensions of the problem of the unscrupulous expert in the medical malpractice area is the recent disclosure of alteration, fabrication, and loss of

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<sup>5</sup>Opp v. Pryor, 294 Ill. 538, 545-46, 128 N.E. 580, 583 (1920).

<sup>6</sup>Foster, *supra* note 1, at 171. This article contains many references to other discussions of the problems occasioned by expert witnesses in the late 1800's.

<sup>7</sup>Statement by Professor Hines at 135 J. FRANKLIN INST. 309, *quoted in* Foster, *supra* note 1, at 170.

<sup>8</sup>State Highway Comm'n v. Superbilt Mfg. Co., 204 Ore. 393, 406, 281 P.2d 707, 713 (1955).

<sup>9</sup>Buttman v. Christy, 197 Iowa 661, 669, 198 N.W. 314, 317 (1924).

<sup>10</sup>Opp v. Pryor, 294 Ill. 538, 545-46; 128 N.E. 580, 583 (1920).

<sup>11</sup>See generally Long, *Discovery and Experts Under the Federal Rules of Civil Procedure*, 39 WASH. L. REV. 665, 674 (1964). Long attributes the increased risk of false testimony from expert witnesses in part to the fact that they testify to opinions, not facts, and are therefore immune from prosecution for perjury. See also Darling v. Charleston Hosp., 33 Ill. 2d 326, 335, 211 N.E.2d 253, 259 (1965); Graham, *Discovery of Experts Under Rule 26(b)(4) of the Federal Rules of Civil Procedure: Part Two, An Empirical Study and a Proposal*, 1977 U. ILL. L.F. 169, 189 n.44.

medical records and charts while in the possession of defendants.<sup>12</sup> While the prevalence of such practices is disputed,<sup>13</sup> its seriousness is highlighted by the fact that medical experts are believed by many to be the most scrupulous group of expert witnesses regularly testifying.<sup>14</sup>

Enactment of the Federal Rules of Evidence and state codifications modeled thereon have served to exacerbate the difficulties faced by counsel opposing the testimony of the venal expert witness. Pursuant to rule 702<sup>15</sup> almost everyone is qualified as an expert in one field or another. If the witness has scientific, technical or specialized knowledge including knowledge gained through experience which will be of assistance to the trier of fact, the witness is an expert. Once qualified as an expert, pursuant to rule 704<sup>16</sup> the witness may testify to such knowledge in the form of an opinion even if the opinion embraces the ultimate issue to be decided by the trier of fact. Not only is nearly everyone an expert qualified to give an opinion, rule 705<sup>17</sup> per-

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<sup>12</sup>For example, a woman was admitted to a hospital for delivery of a child. The mother at the moment of birth developed respiratory failure and cardiac arrest. The mother brought a medical malpractice action claiming that her injury resulted because she had not been adequately monitored. Photocopies of the mother's hospital records showed close monitoring consistent with the defendant's claim of no malpractice. Later, plaintiff obtained the baby's charts which contained a carbon copy of the mother's delivery room record. Comparing these two charts revealed significant alterations had been made in the mother's chart and that the injury had in fact been caused by a failure to monitor her condition. Gage, *Alteration, Falsification and Fabrication of Records in Medical Malpractice Actions*. 1976 CAL. TRIAL. L.J. 61.

<sup>13</sup>Some attorneys opine that it is nearly routine and customary for doctors to review and "correct" their records whenever they are advised that a malpractice suit is in the offing; others feel that such incidents are frequent.

Our own experience suggests that the problem is sufficiently widespread and of such a serious nature that it should not be overlooked in any malpractice case. *Id.* at 66.

<sup>14</sup>See Graham, *Discovery of Experts Under Rule 26(b)(4) of the Federal Rules of Civil Procedure: Part Two, An Empirical Study and a Proposal*, 1977 U. ILL. L.F. 169, 189 n. 44.

<sup>15</sup>FED. R. EVID. 702:

#### TESTIMONY BY EXPERTS

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

<sup>16</sup>FED. R. EVID. 704:

#### OPINION ON ULTIMATE ISSUE

Testimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact.

<sup>17</sup>FED. R. EVID. 705:

#### DISCLOSURE OF FACTS OR DATA UNDERLYING EXPERT OPINION

The expert may testify in terms of opinion or inference and give his reasons therefore without prior disclosure of the underlying facts or data, unless the court requires otherwise. The expert may in any event be required to disclose the underlying facts or data on cross-examination.

Compare the rule with *Opp v. Pryor*, 294 Ill. 538, 545, 128 N.E. 580, 583 (1920): "The objections to that character of evidence can only be overcome or obviated by control by the court of the witness and the examination and such supervision as will at least fairly present the facts upon which an opinion is called for."

mits the expert to give his opinion on the ultimate issue without first disclosing the underlying facts or data on which his opinion is based. If this was not enough, pursuant to rule 703<sup>18</sup> the underlying facts or data forming the basis of the opinion not only need not have been admitted into evidence, they need not even be admissible into evidence if reasonably relied upon by experts in the particular field in forming opinions upon the subject. Finally, counsel opposing the testimony of the expert witness may find in preparing to cross-examine the expert as to his opinion upon an ultimate issue, unsupported by disclosure on direct examination of facts or data, that full discovery as to such underlying facts and data is unavailable.<sup>19</sup>

The Federal Rules of Evidence thus deal all the cards to the party proffering the expert witness; the testimony of the expert can be introduced in almost any manner the party chooses.<sup>20</sup> The Rules provide to the witness a significant opportunity to persuade the trier of fact of the opinion he has been paid to convey. In particular, the potential for increased effectiveness of both the scrupulous and unscrupulous expert is fostered by (1) removal of the hypothetical question requirement,<sup>21</sup> (2) the revision of the rules of evidence to enable an expert to state his opinion without prior disclosure of his basis,<sup>22</sup> and (3) the fact that the expert basis need not even be admissible into evidence if reasonably relied upon by experts in the field.<sup>23</sup> The Rules place the ball in cross-examining counsel's court—the burden is on opposing

<sup>18</sup>FED. R. EVID. 703:

**BASES OF OPINION TESTIMONY BY EXPERTS**

The facts or data in the particular case upon which an expert based an opinion or inference may be those perceived by or made known to him at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence.

<sup>19</sup>See generally Graham, *Discovery of Experts Under Rule 26(b)(4) of the Federal Rules of Civil Procedure: Part One, An Analytical Study*, 1976 U. ILL. L.F. 895.

<sup>20</sup>See *Hearings on Proposed Rules of Evidence Before the Special Subcomm. on Reform of Fed. Crim. Laws of the House Comm. on the Judiciary*, 93d Cong., 1st Sess. 355-56 (Supp. 1973).

Presentation may consist of anything from a full presentation (e.g., qualification, basis, opinion, reasoning) to a bare bones presentation.

For example, one can envision the following dialogue immediately after the expert had been qualified as an orthopedic surgeon:

- Q. Doctor, do you have an opinion based upon a reasonable degree of medical certainty as to the extent [of] permanent disability suffered by the plaintiff as a result of this automobile accident?
- A. Yes.
- Q. What is your opinion?
- A. She is totally permanently disabled.
- Q. Thank, you doctor, that is all.

*Id.* at 356. Note that rule 705 permits the proffering party to hold in reserve segments of the expert's testimony to be unleashed by the expert upon cross-examination by opposing counsel.

<sup>21</sup>See Advisory Committee's Note to FED. R. EVID. 705.

<sup>22</sup>See note 17 *supra*.

<sup>23</sup>See note 18 *supra*.

counsel to explore the underlying facts, data, and assumptions, and otherwise discredit the testimony of the incorrect and/or dishonest expert witness during the cross-examination.<sup>24</sup>

In combating testimony of the expert witness, opposing counsel must rely upon his skill in probing at weaknesses in the basis and reasoning of the witness whether or not disclosed upon direct, without letting the witness reinforce his direct testimony in the process. He must do this with an expert witness more familiar with the subject matter.<sup>25</sup> Of course, counsel also has available the use of learned treatises<sup>26</sup> to assist him in fencing with the witness. Unfortunately fencing with the witness is the impression the cross-examination of an expert witness often leaves with the jury, an impression trial counsel would prefer to avoid. The difficulty in conducting a successful destructive cross-examination is compounded by the growing number of experts whose livelihood is dependent in large part upon the litigation process.<sup>27</sup> Such experts with their vast amount of litigation experience become exceptionally proficient in the art of expert witness advocacy.<sup>28</sup>

<sup>24</sup>See note 17 *supra*. The Advisory Committee's Note to rule 705 provides:

If the objection is made that leaving it to the cross-examiner to bring out the supporting data is essentially unfair, the answer is that he is under no compulsion to bring out any facts or data except those unfavorable to the opinion. The answer assumes that the cross-examiner has the advance knowledge which is essential for effective cross-examination. This advance knowledge has been afforded, though imperfectly, by the traditional foundation requirement. Rule 26(b)(4) of the Rules of Civil Procedure, as revised, provides for substantial discovery in this area, obviating in large measure the obstacles which have been raised in some instances to discovery of findings, underlying data, and even the identity of the experts. Friedenthal, *Discovery and Use of an Adverse Party's Expert Information*, 14 STAN. L. REV. 455 (1962).

For a discussion of the role and availability of discovery of expert witnesses under rule 26(b)(4), see generally Graham, *Discovery of Experts Under Rule 26(b)(4) of the Federal Rules of Civil Procedure: Part Two, An Empirical Study and a Proposal*, 1977 U. ILL. L.F. 169. For authority permitting discovery solely for purposes of impeachment, see C. WRIGHT & A. MILLER, *FEDERAL PRACTICE AND PROCEDURE: CIVIL* § 2015 (1970); 4 MOORE'S *FEDERAL PRACTICE* § 26.56 (2d ed. 1976). *Contra*, Russell v. Young, 452 S.W.2d 434 (Tex. 1970).

<sup>25</sup>This is most certainly true at the outset of litigation. However, with thorough painstaking preparation trial counsel can acquire a mastery of the subject even surpassing that of the expert witness.

<sup>26</sup>See, e.g., FED. R. EVID. 803(18).

<sup>27</sup>In some instances the expert witness has more trial experience than counsel conducting the cross-examination.

<sup>28</sup>The performances of such professional witnesses are brilliantly described in Kemeny v. Skorch, 22 Ill. App. 2d 160, 159 N.E.2d 489 (1959).

An expert medical witness is an important part of the technique of 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

In summary, effective cross-examination of the professional expert is often extremely difficult under the best of circumstances. The subject matter is within the expertise of the witness, not the attorney. The experienced expert is at ease with the material and capable of making fine line distinctions between the current situation and those raised in the questions of examining counsel. For these reasons among others it has been questioned whether even a well executed cross-examination of the unscrupulous expert, coupled with contradiction by a reputable expert, will be appreciated by the jury.

A glib and unscrupulous expert witness with no qualification in his professed field other than a willingness to sell any opinion to anyone who wants it will frequently out sell the conscientious, well-trained and careful expert who gives no opinion that he cannot back up. The concept that the [jury] can detect a fraud is absurd.<sup>29</sup>

#### ESTABLISHING FINANCIAL INTEREST

Faced with the difficult task of conducting a destructive cross-examination of a professional expert witness through attack upon the expert's qualifications, basis, assumptions or reasoning, the availability of impeachment of the expert witness through a showing of bias due to financial interest takes on additional importance. With respect to probing upon cross-examination the financial interest of the adversary's expert witness, it is universally recognized that pecuniary interest is a proper subject of cross-examination because it establishes bias in favor of the party by whom a witness is being remunerated. The latitude permitted counsel on cross-examination in exploring the expert witness's financial interest is stated to be within the discretion of the trial court; only where this is a clear abuse of discretion will the trial court's determination be overturned.<sup>30</sup> Given the

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devised for that purpose, will relate the cause of the pathological condition to the accident and give his prognosis.

The fluency of the contemporary doctor is a matter of amazement and perhaps envy to the professional supposed to have a monopoly on the use of language. It was not long ago that the spate of literature—fictional, biographical, scientific and historical—that issued from the pens of wielders of the scalpel and distributors of capsules startled literary critics. One, with a touch of bitterness, ventured to say that to become a successful writer it was necessary to have a medical degree. Even so, little did the nonlitigating public know the true rhetorical masterpieces that came from the lips of medical experts on the witness stand and how they, 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.

*Id.* at 170-71, 159 N.E.2d at 493-94.

<sup>29</sup>Statement from an attorney quoted in Graham, *Discovery of Experts Under Rule 26(b)(4) of the Federal Rules of Civil Procedure: Part Two, An Empirical Study and a Proposal*, 1977 U. ILL. L.F. 169, 189 n.44.

<sup>30</sup>See generally *United States v. Dwyer*, 539 F.2d 924, 927 (2nd Cir. 1976); *United States v. Wixom*, 529 F.2d 217, 220 (8th Cir. 1976); *United States v. Fairchild*, 526 F.2d 185, 187 (7th Cir. 1975), cert. denied, 425 U.S. 942 (1976); *H.I. Holding Co. v. Dade County*, 129 So. 2d 693,



foregoing discussion of the position of expert witnesses in the litigation process,<sup>31</sup> one would instinctively feel that courts universally accord counsel wide berth in cross-examining an expert witness<sup>32</sup> as to bias based upon financial interest. However, such appears not to be the case. As strange as it may seem, reported decisions indicate that the litigation process has yet to permit counsel to bring to bear upon the expert witness the full force of such impeaching cross-examination.

#### A. Inquiry Generally Permitted

Turning first to those areas in which courts are in general agreement that inquiry is proper, it may be established that an expert is being paid for his testimony in the instant trial<sup>33</sup> which may include the services he performed which enable him to testify.<sup>34</sup> Moreover, inquiry is properly addressed to the amount of compensation an expert is receiving for testifying or for his time,<sup>35</sup>

694-95 (Fla. Dist. Ct. App. 1961); *Weaver v. Georgia Power Co.*, 134 Ga. App. 696, 215 S.E.2d 503, 504 (1975); 3A J. WIGMORE, EVIDENCE § 944 (J. Chadbourne rev. 1970); MCCORMICK'S HANDBOOK OF THE LAW OF EVIDENCE §§ 24, 29 (E. Cleary's 2d ed. 1972). The first three decisions interpret FED. R. EVID. 403 which provides:

#### EXCLUSION OF RELEVANT EVIDENCE ON GROUNDS OF PREJUDICE, CONFUSIONS, OR WASTE OF TIME

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

<sup>31</sup>See notes 3-29 *supra* & text accompanying.

<sup>32</sup>With respect to the wide latitude generally permitted on cross-examining an expert witness, see *Standard Oil Co. v. Moore*, 251 F.2d 188 (9th Cir. 1957), *cert. denied*, 356 U.S. 975 (1958); *Gwathmey v. United States*, 215 F.2d 148 (5th Cir. 1954).

<sup>33</sup>See, e.g., *Shaughnessy v. Holt*, 236 Ill. 485, 86 N.E. 256 (1908); *Chicago City Ry. v. Handy*, 208 Ill. 81, 69 N.E. 917 (1904). See also cases discussed in note 36 *infra*.

<sup>34</sup>*McNemar v. New York, Chi. & St. L. R.R.*, 20 F.R.D. 598 (W.D. Pa. 1957); *Commonwealth v. Simmons*, 361 Pa. 391, 65 A.2d 353 (1949). In practice many expert witnesses refuse to admit that they are being paid "for their testimony"; they state that they are being paid solely for their time. See *Weaver v. Georgia Power Co.*, 134 Ga. App. 696, 215 S.E.2d 503 (1975); *State v. Creech*, 229 N.C. 662, 51 S.E.2d 348 (1949).

<sup>35</sup>See, e.g., *State v. Howington*, 268 Ala. 574, 109 So.2d 676 (1959) (in condemnation proceeding, court did not abuse discretion in permitting cross-examination of state's expert witnesses as to the amount paid to them per day for testifying); *Niven v. State*, 190 Ark. 514, 80 S.W.2d 644 (1935) (not error to require medical expert in murder case to testify to fee expected for his testimony as such); *Camp v. State*, 31 Ga. App. 737, 122 S.E. 249 (1924) (trial court should have permitted defendant accused of embezzling to show the expert accountant was being paid twenty dollars per day by prosecution for time consumed as a witness); *Shaughnessy v. Holt*, 236 Ill. 485, 86 N.E. 256 (1908) (allowed questions to physician as to amount he received for testifying as an expert); *Butman v. Christy*, 197 Iowa 661, 198 N.W. 314 (1924) (handwriting expert in will contest should have been allowed to answer what his charges were); *Alford v. Vincent*, 52 Mich. 555, 19 N.W. 182 (1884) (plaintiff properly permitted to show physician put on the stand by defendant as an expert witness being paid twenty-five dollars for his attendance); *Wakeley v. State*, 118 Neb. 346, 225 N.W. 42 (1929) (in forgery case, the trial court erred in its refusal to allow cross-examination of state's handwriting expert as to his fees); *Commonwealth v. Simmons*, 361 Pa. 391, 65 A.2d 353, *cert. denied*, 338 U.S. 862 (1949) (in murder trial, proper to allow cross-examination of psychiatrist called by defendant as to how much he received as a fee for the examination and for his appearance in court); *Grutski v. Kline*, 352 Pa. 401, 43 A.2d 142 (1945)

and that this amount exceeds the statutory witness fee.<sup>36</sup> It matters not that the amount of an expert's fee is stipulated in advance or determinable in the future;<sup>37</sup> compensation has a direct and vital bearing upon his credibility and in either event may be established. Accordingly even if an expert has not yet been paid, he may be cross-examined as to the amount he expects to receive,<sup>38</sup> the method he'll use to determine the amount he will charge<sup>39</sup> and whether the amount is contingent upon the outcome of the litigation.<sup>40</sup>

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(plaintiffs were entitled to show what compensation defendant's doctors were receiving); *Redevelopment Auth. v. Asta*, 16 Pa. Commw. Ct. 576, 329 A.2d 300 (1974) (the amount of compensation paid to expert witness may have a definite effect upon their credibility). *Contra*, *Pandula v. Fonseca*, 145 Fla. 395, 199 So. 358 (1941); *Weaver v. Georgia Power Co.*, 134 Ga. App. 696, 215 S.E.2d 503 (1975); *Current v. Columbia Gas*, 383 S.W.2d 139 (1964) (while permitting inquiry into details of compensation rests largely within the discretion of the trial court, in the absence of unusual circumstances, the better rule is to limit the showing to the fact that payment is being made).

<sup>36</sup>*Chicago City Ry. v. Handy*, 208 Ill. 81, 69 N.E. 917 (1904) (it is competent to show that a witness has charged or expects to receive greater compensation than the fee allowed by statute); *Fetty v. State*, 118 Neb. 169, 223 N.W. 955 (1929) (an expert witness may be interrogated as to the amount of fees paid or promised to be paid him in excess of the legal fees provided by statute for ordinary witnesses).

<sup>37</sup>*Grutski v. Kline*, 352 Pa. 401, 43 A.2d 142 (1945); *Reed v. Philadelphia Transp. Co.*, 171 Pa. Super. 60, 69, 90 A.2d 371 (1952).

<sup>38</sup>*Id.* See also *Highway Ins. Underwriters v. Ampsey*, 232 S.W.2d 117 (Tex. Ct. App. 1950) (proper to establish on cross-examination that insurance company hiring doctor as expert witness owed him several thousand dollars).

<sup>39</sup>*Redevelopment Auth. v. Asta*, 16 Pa. Commw. Ct. 576, 329 A.2d 300 (1974); *Grutski v. Kline*, 352 Pa. 401, 43 A.2d 142 (1945).

<sup>40</sup>In *McNemar v. New York, Chi. and St. L. R.R.*, 20 F.R.D. 598 (W.D. Pa. 1957), the court states:

Nor is it to be disputed that the court in its discretion may allow counsel to cross-examine an expert witness as to the amount he has received, is to receive, or expects to receive for treatment, examination or testifying, for such information has a possible bearing upon the witness's impartiality, credibility and interest in the result.

*Id.* at 600. See *West Skokie Drainage Dist. v. Dawson*, 243 Ill. 175, 90 N.E. 377 (1909) (in action brought by district to condemn right of way for ditch, attorney should have been permitted on cross-examination to ask engineer about his interest in the result of the suit and if he had not been promised "considerable money" if the proceedings went through); *Volpe v. Perruzzi*, 122 N.J.L. 57, 3 A.2d 893 (1939) (trial court should have permitted following question proffered to doctor on cross-examination: "Does the outcome of this case determine whether or not you get paid?"); *Redevelopment Auth. v. Asta*, 16 Pa. Commw. Ct. 576, 329 A.2d 300 (1974) (if the expert witness's fee is in any way related to the size of the verdict or the number of proprietries involved, then the jury is entitled to consider that relationship in weighing the expert's testimony); *St. Louis & S.F. Ry. v. Clifford*, 148 S.W. 1163 (Tex. Ct. App. 1912) (Defendant's counsel attempted to develop proof that doctor had received percentage of recovery in previous case and that he had made some arrangement in the present case. On appeal, court stated the question of whether such inquiry should be permitted was clearly within the rule of *Horton* and therefore left to the discretion of trial court); *Horton v. Houston & T.C. Ry.*, 46 Tex. Civ. App. 639, 103 S.W. 467 (1907) (To show interest of physician, counsel asked whether he had testified for plaintiffs in many cases brought by attorneys for plaintiff in present case. Physician admitted testifying in several, but was unable to remember how many. Counsel then named cases, his questions also tending to elicit the fact physician's fees in named cases were dependent upon recovery of damages. On appeal, such questioning was held to be proper).

The question of whether the Code of Professional Responsibility adopted by the American Bar Association on August 12, 1969, may constitutionally prohibit contingent fees in Disciplinary

Moreover, a refusal to permit inquiry with respect to the details of the arrangement for compensation with respect to the expert's testimony in the instant trial may constitute clear abuse of discretion and reversible error.<sup>41</sup>

Examining counsel may also inquire of an expert as to how he originally became involved in the case.<sup>42</sup> While it is generally deemed irrelevant and unduly prejudicial to reveal that the defendant is insured or that the plaintiff's claim has been subrogated by an insurance company, since a witness's interest, bias, or prejudice is never irrelevant, the opposing party may not be deprived of showing interest, bias, or prejudice arising by virtue of the expert's relationship with a party even if that party is an insurance company.<sup>43</sup>

In addition to showing an expert's financial interest in the instant case and how the expert became employed, a continuing relationship may be shown if the relationship gives rise to an inference of bias in favor of the party calling the expert. Thus, it is proper to show that the expert is an

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Rule 7-109 C is a matter of current dispute. See *Person v. Association of Bar of New York*, 554 F.2d 534 (2d Cir. 1977), rev'g 414 F. Supp. 144 (E.D.N.Y. 1976) (summary declaration of unconstitutionality). In the course of its opinion, the Second Circuit stated:

Disciplinary Rule 7-109 C was promulgated to insure that judicial proceedings in New York were free of false testimony which might result if expert witnesses were paid on a contingent fee basis. Expert testimony, by its very nature, concerns areas of knowledge with which the ordinary juror and the court are unfamiliar, and perjured expert testimony is particularly difficult for a juror to detect. New York has adopted DR 7-109 C to lessen the likelihood of false expert testimony. The rule is not invalid because it cannot prevent all perjured expert testimony. . . .

Person has advanced arguments why it might be desirable to alter the present rule in order to facilitate litigation by less affluent litigants. He points out that cross-examination would reveal whatever financial stake a witness has in the outcome of litigation. He notes that experts often have ongoing business relationships with the parties who retain them and therefore, in an indirect sense, frequently have a stake in the outcome of litigation although their fee is not contingent and thus not covered by DR 7-109 C. Other experts, although retained on a "fixed fee" basis, often do not expect to receive payment unless the party for whom they testify is successful. These are factors which may indicate the desirability of legislative change, but they do not constitute sufficient grounds for invalidating the current canon or rule.

554 F.2d at 538-39.

<sup>41</sup>*Butman v. Christy*, 197 Iowa 661, 198 N.W. 314 (1924) (in will contest, where hand-writing expert was only testimony which refuted testimony of three eyewitnesses who claimed to have seen decedent sign the will, it was reversible error where cross-examination was not permitted as to the terms of his employment); *Duffy v. Griffith*, 134 Pa. Super. Ct. 447, 4 A.2d 170 (1939) (reversible error where trial judge refused to permit inquiry within reasonable limits as to the amount of the witness's compensation for testifying).

<sup>42</sup>See note 43 *infra*.

<sup>43</sup>Thus, in *Allen B. Wrisley Co. v. Burke*, 203 Ill. 250, 67 N.E. 818 (1903), a personal injury action, the court permitted a showing on cross-examination that the defendant's doctor has been employed to make an examination of the plaintiff for purposes of becoming a witness although in developing such proof it was incidentally shown that the doctor was paid by an insurance company. Similarly, in *Schuler v. St. Louis Gas Co.*, 322 Mo. 765, 775, 18 S.W.2d 42, 46 (1929), counsel was permitted to inquire of a consulting engineer, "At whose request did you go down there to make this inspection?" despite the fact the answer happened to be defendant's insurer. See *Majestic v. Louisville & N. R.R.*, 147 F.2d 621 (6th Cir. 1945); *Houfbrug v. Kansas City Stockyards Co.*, 283 S.W.2d 539 (Mo. 1955); *Price v. Yellow Cab Co.*, 443 Pa. 56, 278 A.2d 161 (1971); and cases cited notes 40 and 41 *supra*.

employee of the calling party<sup>44</sup> or an employee of the true party in interest.<sup>45</sup> In addition, counsel upon cross-examination is entitled to bring to the attention of the trier of fact that the expert witness has testified previously on behalf of the calling party;<sup>46</sup> prior testimony gives rise to both an inference of friendliness to the party and an inference of bias in favor of the party based upon an expectation of future employment. Similarly, inquiry is proper with respect to the number of times an expert witness has testified for the attorney of a particular party.<sup>47</sup>

### B. *Inquiry Only Sometimes Permitted*

If counsel desires to proceed further with cross-examination directed at exposing financial interest of the expert witness, his right to proceed is at best

<sup>44</sup>*E.g.*, *Majestic v. Louisville & N. R. R.*, 147 F.2d 621, (6th Cir. 1945).

Under this rule the fact that a witness is employed by a party to the suit is regarded as a relevant circumstance to be considered by the jury as showing bias or interest and a *fortiori* where the witness is an employee of a party who has an interest in the recovery, his employment may be shown for the same reason.

*Thurber Corp. v. Fairchild Motor Corp.*, 269 F.2d 841 (5th Cir. 1959). See generally *McCORMICK'S HANDBOOK OF THE LAW OF EVIDENCE* § 40 (E. Cleary's 2d ed. 1972); 3 J. WIGMORE, *EVIDENCE* §§ 948-49, at 500-01, 966-69 (3d ed. 1940).

<sup>45</sup>*Genest v. Odell Mfg. Co.*, 75 N.H. 509, 77 A. 77 (1910). The court held it proper for plaintiff to show that the doctor called by defendant was an employee of defendant's insurer.

<sup>46</sup>See *Gwathmey v. United States*, 215 F.2d 148, 159 (5th Cir. 1954) (appellants were permitted to elicit from expert witness his admission that he had testified for government in prior proceedings); *Jones v. Tennessee Coal, Iron & R.R.*, 202 Ala. 381, 80 So. 463 (1918) (in suit for damages for pollution of stream, plaintiff should have been permitted to show witness had frequently testified for the defendant in cases of similar character); *St. Louis, I.M. & S. Ry. v. McMichael*, 115 Ark. 101, 171 S.W. 115 (Ark. 1914) (plaintiff properly allowed to ask engineers called as experts whether they had frequently been called by defendant); *B.I. Sutton v. State Highway Dept.*, 103 Ga. App. 29, 118 S.E.2d 285 (1961) (held reversible error where trial court refused to permit cross-examination of witness as to whether he had testified as an expert in other condemnation cases tried in the same court); *State v. Horman*, 188 Minn. 252, 247 N.W. 4 (1933) (it was proper to inquire whether state's witness had testified for the state on similar occasions); *Central Lumber Co. v. Porter*, 139 Miss. 66, 103 So. 506 (1925) (court should have permitted question as to number of times physician had testified for defendant); *Zarisky v. Kansas City Pub. Serv. Co.*, 239 Mo. App. 396, 186 S.W.2d 854 (1945) (plaintiff inquired of defendant's expert medical witness as to the number of times he had previously testified for the Kansas City Public Service Co. in personal injury litigation); *Carlson v. Kansas City*, 282 S.W. 1037 (Mo. 1926) (if witness served as physician for defendant or was called by defendant sufficient number of times to give rise to inference of friendliness between witness and defendant, jury was entitled to know it).

<sup>47</sup>If in fact [the expert witness] has spent a good part or most of his time in the employ of the government as an expert appraisal witness, and if in fact his testimony is of such a nature that special counsel for the Government regularly uses him as a witness, it seems to us the jury was entitled to know this for the reason stated. Since his testimony consisted mainly of his expert opinion as to values, the jury had the right to consider whether this regular employment has a tendency to create a bias in favor of the Government.

*Gwathmey v. United States*, 215 F.2d 148, 159 (5th Cir. 1954). See, e.g., *Henry v. Landreth*, 494 S.W.2d 114 (Ark. 1973); *Ager v. Baltimore Transit Co.*, 132 A.2d 469 (Md. App. 1957) (counsel for defendant in personal injury case properly permitted to inquire of one of plaintiff's medical experts as to the number of times he examined persons referred to him by plaintiff's attorneys); *Lammert v. Wells*, 13 S.W.2d 547 (Mo. 1928).

unclear. For example, courts have reached differing conclusions as to the propriety of inquiry directed at the amount of compensation the witness has received from the same party over a period of time. Some decisions have refused to permit such inquiry fearing that it would open the door to a lengthy explanation by the expert of the services rendered in justification of the fees received.<sup>48</sup> However, Illinois, courts have adopted the sounder approach and have allowed such inquiry as proper exploration of bias brought about by financial interest.<sup>49</sup> In *Kerfoot v. City of Chicago*,<sup>50</sup> a special assessment had been levied for street repairs. In order to show the value of the benefit which had accrued, the city of Chicago called several experts all of whom acknowledged that they had been similarly employed by the city and paid for their services in the past and that they expected to be paid for their services in the present suit. The Illinois Supreme Court held that questions inquiring as to how much each witness had received for his prior services as a witness and specifically how much each witness had received in the last year from the city of Chicago should have been permitted:

It would manifestly be important, in determining the credit to be given to these witnesses and the value of their opinions, to know whether they were receiving only fair and ordinary compensation for their time, or whether the employment was of such a character, and the compensation such, as to make it desirable that the employment should continue, and that the city should be fully satisfied with the opinions given.<sup>51</sup>

If inquiry upon cross-examination is expanded ever so slightly to a comparison between the income received from testifying for the same party and from other sources, apparently even the Illinois Supreme Court draws the line.<sup>52</sup>

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<sup>48</sup>See *People v. Tomalty*, 111 P. 513 (Cal. App. 1910) (the trial court did not allow questions as to the amount the expert called by the state, in a criminal case, had been paid for both this case, and over the last year. This was upheld on the grounds that a showing that an expert had been employed and paid by the state only would have opened the door for a long examination as to the kind and extent of services rendered); *State v. Superbilt Mfg. Co.*, 204 Ore. 393, 281 P.2d 707 (1955) (question as to the amount received in unrelated cases improper, would require that expert to be allowed to show fees he charged were justified); *Zamsky v. Public Parking Auth.*, 378 Pa. 38, 105 A.2d 335 (1954) (earnings of an expert witness from other services performed to the defendant is purely a collateral matter and the testimony is not admissible to affect the expert's credibility).

<sup>49</sup>See *City of Chicago v. Van Schaack Bros. Chem. Works, Inc.*, 330 Ill. 264, 161 N.E. 486 (1928); *Kerfoot v. City of Chicago*, 195 Ill. 229, 63 N.E. 101 (1902).

<sup>50</sup>195 Ill. 229, 63 N.E. 101 (1902).

<sup>51</sup>*Id.* at 235, 63 N.E. at 103.

<sup>52</sup>In *Gordon v. Chicago*, 201 Ill. 623, 66 N.E. 823 (1903), an expert had testified with respect to compensation to be received in the instant case and with respect to the amount of compensation he had received in the previous year testifying for the city. *Accord*, *City of Chicago v. Van Schaack Bros. Chem. Works, Inc.*, 330 Ill. 264, 161 N.E. 486 (1928). The Illinois Supreme Court upheld the trial court's sustaining of objections to further questions (1) compar-

Unfortunately reported decisions also display disagreement as to whether a party may demonstrate bias on the part of the expert by showing that the expert frequently testifies for one particular category of party, e.g., personal injury claimants suffering from similar injuries<sup>53</sup> or insurance companies defending such claims, and never for the other side. While few reported decisions have considered this question, the more recent decisions have tended to uphold the use of such questions or at least hold that the trial court could in its discretion permit such inquiry.<sup>54</sup> The older decisions primarily arising in Illinois disagree.<sup>55</sup> Disappointingly many of the reported decisions in this area simply state the court's conclusion as to whether or not the questioning is proper without any indication of the court's reasoning. Turning to the older line of authorities, in *Chicago City Railway v. Smith*,<sup>56</sup> a trial court sustained an objection to the following question addressed to a medical expert called by the plaintiff: "Isn't it the principal part of your professional industry to be in consultation with attorneys, to hunt up these claims, or, whether you hunt them up or not, secure them, and in consultation with them have an arrangement with them for contingent fees?" The bar to this line of questioning was upheld by the Illinois Supreme Court stating that while an expert could be cross-examined as to his motives, feelings, and prejudices, it was not error to refuse to allow cross-examination to be extended to cases having no connection with the case being tried. The only authority cited in support was *Chicago & Eastern Illinois Railroad v. Schmitz*,<sup>57</sup> wherein the Illinois Supreme Court had upheld the preclusion of cross-examination of a doctor as to professional opinions he had given in other personal injury suits against one or more of the appellant railways. *Schmitz* also approved a bar to questions on the direct examination of other defense witnesses seeking to elicit evidence that plaintiff's doctor was interested as a medical man in a large number of personal injury suits against corporations. Relying solely on these two decisions the Illinois Supreme Court in *McMahon v. Chicago City Railway*<sup>58</sup> held that the trial court had erred when it permitted a question as to the number of times the doctor had testified as an expert for the street car lines of Chicago as opposed to testimony for this defendant only. The court held that the question should have been limited to the number of times he

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ing the expert's annual income from testifying for the city with the amount he had made in his regular real estate business and (2) inquiring of the amount in absolute dollar terms he had made in the real estate business. The court found both rulings proper stating merely that the expert's income from his private business was irrelevant.

<sup>53</sup>There is rumored to be a doctor in Illinois who performs a certain type of surgery with great frequency often on referral from other doctors not willing themselves to perform surgery they believe to be unnecessary.

<sup>54</sup>See notes 56-75 *infra* & text accompanying.

<sup>55</sup>See notes 56-63 *infra* & text accompanying.

<sup>56</sup>226 Ill. 178, 80 N.E. 716 (1907).

<sup>57</sup>211 Ill. 446, 71 N.E. 1050 (1904).

<sup>58</sup>239 Ill. 334, 88 N.E. 223 (1909).

testified for the appellant railway; clearly a distinction without merit. The Illinois Supreme Court has not ruled on the issue since. However, in *Plambeck v. Chicago Railways*<sup>59</sup> it held that a comparison of times testified exceeded the proper scope of cross-examination. In *Plambeck* a police officer, a non-expert, called by the railway company, was cross-examined to show he had testified "in behalf of the street car company" about five or six times previous to this trial and had never been called by an injured person to testify.<sup>60</sup> The Illinois Supreme Court stated, "Under the previous holdings of this court it was proper cross-examination to have the witness testify how many times he had testified previously for [the railway company]. This was as far as the [plaintiff] was entitled to go with this cross-examination. It was improper cross-examination to elicit from the witness the fact he never testified in court for a person injured."<sup>61</sup> While the clear intent of such inquiry was to show that his sympathies were with the railway company, the court found that the mere fact he had never testified for an injured party was not a proper basis for drawing such an unfavorable conclusion. This decision was relied upon by an Illinois Appellate court in *Schoolfield v. Witkowski*<sup>62</sup> in finding improper (without explanation) inquiry upon cross-examination of plaintiff's doctor concerning the number of times the doctor had testified in the previous year and whether his testimony was not always for plaintiff, the "person seeking to gain money."<sup>63</sup>

The decisions prohibiting such inquiry are not limited to Illinois. For example, in the Ninth Circuit decision of *Southwest Metals Co. v. Gomez*,<sup>64</sup> the question, "Do you make it a habit of appearing for plaintiffs in these personal injury cases?" was held to be properly sustained "on the ground that the question was too indefinite and called for the conclusion of the witness, if for no other reason."<sup>65</sup> In *Mixon v. Willard*,<sup>66</sup> a federal district court opinion, it was held not to be an abuse of discretion to sustain the objection to a question addressed to a physician in a hearing before the Bureau of Employees' Compensation as to whether he had ever arrived at a conclusion in any case which was adverse to an insurance company. The court did state that "the deputy commissioner might have allowed plaintiff to pursue this line of questioning further in an attempt to show possible bias," although such refusal did not constitute a denial of due process.<sup>67</sup>

Courts which have permitted cross-examination inquiring into prior testimony on behalf of a particular category of party have apparently ac-

<sup>59</sup>294 Ill. 302, 128 N.E. 513 (1920).

<sup>60</sup>*Id.* at 305, 128 N.E. at 514.

<sup>61</sup>*Id.*

<sup>62</sup>54 Ill. App. 2d 111, 203 N.E.2d 460 (1964).

<sup>63</sup>*Id.* at 126, 203 N.E.2d at 467.

<sup>64</sup>4 F.2d 215 (9th Cir. 1925). This case was criticized in 3A J. WIGMORE, EVIDENCE § 961, at n.2 (3d ed. 1940).

<sup>65</sup>4 F.2d at 218.

<sup>66</sup>120 F. Supp. 232 (S.D.N.Y. 1954).

<sup>67</sup>*Id.* at 234.

cepted the contention that the prior testimony for one side or another is relevant to a showing of bias. Unfortunately, such decisions similarly contain little explanation. Texas appears to have adopted the sounder view of permitting cross-examination of an expert to show that he regularly testifies on behalf of a particular category of party. In *Traders & General Insurance Co. v. Robinson*<sup>68</sup>, the court permitted cross-examination of plaintiff's doctor as to the numerous personal injury cases in which he had testified for plaintiffs, including the listing of a dozen places where he had testified in similar cases. In *Martin v. Liberty Mutual Insurance Company*,<sup>69</sup> the trial court was found to have erred when it excluded the following questions addressed to the defendant's doctor on cross-examination: "You examine patients for insurance companies quite often don't you doctor?" and "Do you testify for a lot of insurance companies, doctor?"<sup>70</sup> However, such error was found not to be reversible. And in *Barrios v. Davis*<sup>71</sup>, the court relying on *Traders* and *Martin*, upheld the interrogation of a doctor as to the number of times he testified, counties where tried, fees charged, amount collected by him in one year from attorneys in cases referred to him, and his reputation as a doctor who testified on behalf of the injured. The court in approving such questions stated:

The law is well settled that on cross-examination a witness may be questioned as to facts or acts tending to show bias, interest, or prejudice, and that questions relative to interest, bias or prejudice are never collateral or immaterial, and further that in the use of cross-examination to show interest or bias or prejudice the greatest latitude is allowed, the scope in any particular instance being a matter largely within the discretion of the trial court.<sup>72</sup>

In *United States v. Abrams*,<sup>73</sup> an attorney charged with fraudulent practices before the immigration board called as an expert witness another attorney who also specialized in immigration law. The Second Circuit held it was within the permissible scope of cross-examination to show the attorney had previously testified as a defense expert in two similar cases since it was relevant on the issue of bias. The Arkansas Supreme Court has held that it is not prejudicial error to allow plaintiff to ask engineers called as defendant's experts whether or not they had frequently been called by the appellant railway and other railways to testify as experts.<sup>74</sup> The Missouri Supreme Court

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<sup>68</sup>222 S.W.2d 266 (Tex. Ct. App. 1949). It was held to be within the discretion of the trial court to refuse a detailed cross-examination of the medical records for such cases.

<sup>69</sup>388 S.W.2d 27 (Tex. Ct. App. 1965).

<sup>70</sup>*Id.* at 31.

<sup>71</sup>415 S.W.2d 714 (Tex. Ct. App. 1967). *Barrios* was cited with approval in *Russell v. Young*, 452 S.W.2d 434 (Tex. 1970).

<sup>72</sup>415 S.W.2d at 716.

<sup>73</sup>427 F.2d 86 (2d Cir. 1970).

<sup>74</sup>*St. Louis, I.M. & S. Ry. v. McMichael*, 115 Ark. 101, 171 S.W. 115 (1914).



thus held that the jury is entitled to know everything that might affect the credibility of the witness, including his relationship with parties interested in the result of the case.<sup>75</sup>

#### CONCLUSION AND RECOMMENDATION

How far may counsel proceed with cross-examination directed at establishing bias based upon financial interest? If cross-examination is directed at establishing bias through financial interest, it will generally be permitted if it is directed at establishing (1) financial interest in the case at hand by reason of remuneration for services, (2) continued employment by a party or (3) the fact of prior testimony for the same party or the same attorney. When it comes to questions directed toward establishing (1) the amount of previous compensation from the same party, (2) the relationship between the expert's income from testifying on behalf of a party or a category of party and total income of the expert, or (3) the mere fact of prior testimony most frequently on behalf of other persons or entities similarly situated, the cases indicate disagreement.

It is urged that the permissible scope of cross-examination of an expert witness should include each and every one of the foregoing areas of inquiry. Inquiry should be permitted, for example, into whether an expert frequently testifies for one particular category of party and into the *percentage* of his livelihood derived from acting as an expert witness for such party or category of party.<sup>76</sup> Such information is clearly relevant to establishing bias on the part of the expert witness in favor of the party proffering the witness.<sup>77</sup> Sufficient

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<sup>75</sup>*Schuler v. St. Louis Can Co.*, 322 Mo. 765, 18 S.W.2d 42 (1929). The court held proper the following cross-examination of a doctor testifying for the defense as to the nature and extent of plaintiffs' injuries:

- Q. Doctor, you are regular physician for practically every company in the City of St. Louis, down here at 309 South Broadway?
- A. Yes, sir.
- Q. And you make your living, and have for a number of years, at the behest of insurance companies, haven't you?
- A. Yes, sir. (Objection, ruling and exception.)
- Q. You may answer, Doctor.
- A. Practically all the companies doing business here.
- Q. How is that?
- A. Practically all the companies doing business here.

See *id.* at 775, 18 S.W.2d at 46.

<sup>76</sup>Note that only the percentage of income earned by the expert witness from testifying for a particular party or type of party need be disclosed for effective cross-examination. In most cases, ascertainment of a percentage figure is unlikely to be unduly burdensome. Moreover, it is within the court's discretion in protecting the witness from harassment and unnecessary embarrassment, to prohibit inquiry directed at absolute amounts earned from the litigation process and more importantly inquiry requesting total income of the expert. See, e.g., FED. R. EVID. 611(a)(3). See generally *DaSilva v. Moore-McCormack Lines, Inc.*, 47 F.R.D. 364, 365 (E.D. Pa. 1968) ("Some approximation of the total billings of one medical expert over a reasonable period might be proper.") (dictum)

<sup>77</sup>It is anticipated that counsel will be free to and will in fact explore such matters at the deposition of the expert witness. See also note 24 *supra*.

safeguards exist to prevent any abuse which might arise from the availability of such cross-examination. Where the frequency with which an expert testifies for one particular category of party is asserted to be simply the natural consequence of his profession, e.g., a treating doctor in a small city who is often called by personal injury plaintiffs, and not necessarily an indication of any bias, such fact could be established on redirect examination of the witness.<sup>78</sup> Alternatively, prior to trial a motion in limine for an order barring a particular line of cross-examination could be presented to the court. The availability of each line of inquiry establishing financial interest will in each case ultimately be within the discretion of the trial judge who can refuse to permit such inquiry whenever its probative value is substantially outweighed by the danger of undue prejudice or confusion of the issue.<sup>79</sup> It is questionable whether a court in the exercise of its discretion should permit inquiry directed solely at the total number of court appearances of the expert witness. Unless such court appearances are also shown to be (1) on behalf of the same party or (2) on a comparative basis, most frequently in favor of a particular category of parties or (3) preliminary to a showing of percentage of income earned from expert testimony for a party or category of parties in relation to total expert income,<sup>80</sup> it probably does not sufficiently establish bias to be

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<sup>78</sup>State v. Angie, 431 S.W.2d 431 (Tex. Ct. App. 1968).

<sup>79</sup>See, e.g., FED. R. EVID. 403, note 30 *supra*. See also United States v. 472.93 Acres of Land, 455 F.2d 1242 (3rd Cir. 1972); note 68 *supra*.

For a discussion that completely "misses the boat" see McNenar v. New York, Chi. & St. L. R.R., 20 F.R.D. 598 (W.D. Pa. 1957). The court in virtually barrin all significant respects both discovery and cross-examination of a medical witness related to the expert's financial interest apparently feels what the cross-examiner needs to effectively deal with an expert witness is "love, sweet love."

An impelling factor, to which the court as a practical necessity must give some weight, is the added contingency of a working relationship between the medical and legal professions. Expert medical witnesses who presently are engaged in wide and varied practices, whose time is highly limited and burdened with the treatment and care of waiting patients, should not be unduly abused and harassed by counsel for either side. In the field of negligence and Federal Employers' Liability Act litigation, both plaintiffs and defendants depend largely upon expert medical testimony. This dependence requires an attitude of mutual respect on the part of both lawyer and doctor.

To subject members of the medical profession to interrogatories requiring long and arduous perusal of records dating back to previous years, on matters of collateral nature, and in no way relating to diagnosis and treatment of the patient in question, in my judgment, will create an antipathy between the professions which may materially jeopardize the administration of justice.

Parenthetically, in this connection, I have always felt that in order to establish a working and cohesive relationship between the bar and the medical profession, the establishment of Codes of Ethics for the two professions in litigation matters should be effectuated by the adoption of an interprofessional code of conduct and practice.

*Id.* at 601.

<sup>80</sup>See also note 77 *infra*. Note that establishment of the percentage of the expert's overall income derived from testifying without reference to its source does tend to impeach the witness's competency, *i.e.*, the expert does not actually work in his field; he is a true professional expert witness. Counsel must, however, be extremely cautious in employing financial interest impeachment not clearly indicating a bias in favor of one side. For example, if cross-examining counsel

permitted when weighed against the danger of unfair prejudice and confusion of the issue.

Although the unreliability of expert testimony is a matter of common knowledge among courts and litigators, the non-litigating public, of which juries are composed, is often ignorant of this fact. Cross-examination is the principle safeguard a party has against an unscrupulous expert called by his opponent. Wide latitude must be given examining counsel if cross-examination is to be effective. The decision as to whether to explore this avenue of impeachment, bias based upon financial interest, should be left to trial counsel. What is being advocated is not the blanket employment of such techniques, only their availability. In some cases, such impeachment will be effective; in others it will probably backfire.<sup>81</sup> For example, if the expert makes 60% of his living testifying for a certain category of defendants, cross-examination disclosing this fact will assist the jury in properly evaluating the expert's testimony. Members of the jury would most certainly like to be aware of such a fact.

Hopefully, assurance of the availability of such inquiry will also lead to a higher quality of expert testimony. If the full force of financial interest bias impeachment can be brought to bear, parties might begin to seek experts who could not be effectively subjected to such cross-examination. Experts might therefore be encouraged to testify for both sides<sup>82</sup> and to perform actual work in their alleged areas of expertise. If the expert in fact testifies for both sides, it is natural to assume that chances that he will provide truthful testimony, or at least testimony which he honestly believes to be truthful, will be enhanced.<sup>83</sup>

One final observation. There is an overall paucity of reported decisions in this area. If trial lawyers wish to be able to develop these lines of cross-

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attempts to impeach solely by showing the number of times the expert has testified, assuming this line of cross-examination is permitted, it is not too difficult for the expert with the aid of his counsel to convey to the jury that the reason he is called so often to testify is that he is the "best" expert available. If the expert can add truthfully on redirect that he appeared in court on behalf of both plaintiffs and defendants, the attempt at cross-examination may have done little but bolster the witness.

<sup>81</sup>See text accompanying note 20 *supra*.

<sup>82</sup>See 5 NICHOLS' ON EMINENT DOMAIN, § 18.45 (Supp. 1968). See also *McMahon v. Chicago City Ry.* 239 Ill. 334, 88 N.E. 223 (1909). The Court states:

The witness had already answered without objection that he had testified in some fifteen cases as an expert in the preceding three months. This question sought to show in how many of these cases he had testified for street railway companies, and he answered ten; that in some of the fifteen cases he testified for the plaintiff and not for the defendant. Counsel for appellee was seeking to show by the cross-examination that the doctor always testified for defendant corporations. His answers showed the contrary, and hence could not have been hurtful to appellant.

*Id.* at 341, 88 N.E. at 225.

<sup>83</sup>We say all this to put in its true perspective the role of this particular type of witness. He is part of the trial apparatus of a personal injury case. As such, every possible step should be taken to channel his contribution in a direction that will serve the ends of justice.

*Kemeny v. Korchor*, 22 Ill. App. 2d 160, 171, 159 N.E.2d 489, 494 (1959).

examination when they feel it appropriate, they must start forcing courts to rule upon the propriety of such inquiry. Where trial judges refuse to permit inquiry, the issue should then be pursued, where possible, on appeal. Although it is unlikely that a reversal will often be obtained on the grounds of clear abuse of discretion, the appellate court may take the opportunity to advise the trial court to permit broad inquiry on cross-examination directed at establishing the financial interest of the professional expert witness. If trial counsel fail to raise and pursue this issue, they have nobody but themselves to blame for the confused and unsatisfactory state of the current law.

