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Right to Compel Testimony of Expert Witness Employed by Adverse Party

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RIGHT TO COMPEL TESTIMONY OF EXPERT WITNESS EMPLOYED BY ADVERSE PARTY

In *Thomaston v. Ives*,[1] the Supreme Court of Connecticut considered whether a litigant may call upon an adverse party's expert witness to testify. *Thomaston* involved a condemnation proceeding in which the state had hired an appraiser whose report was unfavorable to the state's position. The landowner, aware of the expert's opinion, sought to compel him to testify at trial. The court allowed his testimony. The court held that in eminent domain proceedings the owner of condemned property may compel a real estate appraiser employed by the state to testify if he is not offered as a witness by the state.[2] In so ruling, the court denied the state's contention that the expert's opinion was privileged and that its use depended on a contractual relation. The court held that there is a duty to arrive at a fair value of property in condemnation proceedings. This duty required that ". . . [a]ll material and relevant information which will assist the trier in determining the sum of money which will constitute that just compensation should, in justice to both parties, be made available to him."[3]

The *Thomaston* decision was limited in two respects. First, the opinion emphasized that the case did not involve an issue of pre-trial discovery.[4] Second, the court refused to extend the right to require expert testimony beyond eminent domain proceedings.

This Note will consider three questions raised in *Thomaston*: (1) the extent to which an expert can claim the attorney-client privilege; (2) the expert's right to receive additional compensation as opposed to his duty to testify; and (3) the right to

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1. 239 A.2d 515 (Conn. 1968).
2. 239 A.2d at 518.
3. *Id.*
4. Discovery (not all jurisdictions have extensive discovery provisions) is concerned with narrowing the issues and enabling an attorney to prepare himself to challenge an adverse party's case. During the trial, however, the attorney will probably already know the opinion of the adverse party's expert and seeks to get that opinion into evidence. The need to find one's own expert and to prepare for cross-examination of the opponent's expert witness are no longer present. Thus it has been said that the requirement of an expert witness to testify in pre-trial discovery does not lay a foundation for requiring him to testify at trial. 4 J. MOORE, FEDERAL PRACTICE ¶ 26.24 (2d ed. 1964). In addition most courts have been unwilling to extend the work product defense available to an attorney at pre-trial discovery to expert testimony of an adverse party's witness at trial. Nielson v. Brown, 232 Ore. 426, 374 P.2d 896 (1962). *See also* cases cited notes 20, 25, and 27 *infra*.

compel expert testimony as a matter within the discretion of the court.

I. The Attorney-Client Privilege

Cases applying the attorney-client privilege to expert testimony treat the expert as an intermediary between the client and his attorney and invoke the privilege on an agency theory.[5] Wigmore stated this agency relation as follows:

> A communication, then, by any form of agency employed or set in motion by the client is within the privilege. This includes . . . communications originating with the client's agent and made to the attorney. It follows, too, that the communications of the attorney's agent to the attorney are within the privilege, because the attorney's agent is also the client's sub-agent and is acting as such for the client.[6]

The cases which support an attorney-client privilege as encompassing expert testimony have necessarily expanded the definition of "agent" to include experts hired either by the client or attorney. This expansion is based on the theory that protection of such relationships is socially desirable as a "promotion of justice, public health, and social stability."[7] For example, *State v. 62.96247 Acres of Land*[8] involved a land condemnation proceeding in which an appraiser was employed by the state. But he also assisted the state's attorney in preparation of the case. The appraiser was not required to testify on behalf of the defendant landowner. The court resolved the issue of whether an attorney-client privilege was present by construing the expert as an agent of the state. The court upheld application of the privilege by ruling that an attorney-client privilege should not be strictly defined. Definition of the privilege should depend on an analysis of the fairness, necessity, and justice required to protect communications of an expert to an attorney necessarily made in reliance on the privilege. This desired protection will therefore not permit the landowner to make use of the state's preparation, such a use serving only to place a premium on laziness.[9] It should be noted, however, that the court also based its decision on the role of the expert as "assistant counsel" in the preparation of the case.

A similar adoption of the agency theory to invoke privilege is found in *San Francisco v. Superior Court*[10] which was an action for personal injuries against a city. The plaintiff's attorney re-

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5. San Francisco v. Superior Court, 37 Cal. 2d 227, 231 P.2d 26 (1951); State v. 62.96247 Acres of Land, 193 A.2d 799 (Del. 1963); Brink v. Multnomah County, 224 Ore. 507, 356 P.2d 536 (1960).
6. 8 J. Wigmore, Evidence § 2317 (McNaughton rev. 1961).
7. State v. 62.96247 Acres of Land, 193 A.2d 799, 807 (Del. 1963).
8. 193 A.2d 799 (Del. 1963).
9. *Id.* at 813.
10. 37 Cal. 2d 227, 231 P.2d 26 (1951).

quested an expert physician to examine the plaintiff. At trial the defendant attempted to call this expert witness, but the court did not require the expert to testify. The court held that the expert made the examination at the request of the injured party's attorney, making him an intermediary for communication between the injured party and the attorney. Even though no physician-patient privilege existed, the plaintiff was allowed to invoke the attorney-client privilege.[11] The privilege was extended in the belief that full disclosure of facts by the client to his attorney is desirable. The benefit thus derived justified the risk that unjust decisions may result from the suppression of evidence.[12] The expert, by transferring information from the client to the attorney, performed the role of an intermediary and the communication was therefore privileged.[13] When the communication originates with the expert, however, he is not transmitting a client's confidences and, contrary to Wigmore's description of the agency relation,[14] the privilege should not apply.[15]

Brink v. Multnomah County[16] involved eminent domain proceedings. The court again refused to require an expert employed by the adverse party to testify. While the Oregon court refused to recognize an appraiser-client privilege, the expert was made an agent under Wigmore's definition[17] and the attorney-client privilege was applicable. The court emphasized the adversary nature of the judicial system. The litigant who desired certain testimony had the opportunity and did present his own expert version of value. Further, to allow a litigant to prove his case through his opponent's preparation places a premium on laziness. In addition, the court stressed the role of the expert as a "Deputy District Attorney" in the preparation of the case.[18]

Assuming that an expert falls under Wigmore's definition of an agent,[19] it is necessary to examine the fundamental character-

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11. *Id.* at 237, 231 P.2d at 30.
12. *Id.*
13. People v. Donovan, 57 Cal. 2d 346, 369 P.2d 1 (1962), stated that the element of confidentiality existed in the San Francisco case because the patient, at the request of his attorney, revealed to the physician characteristics of both his mind and body which would normally be concealed. *Id.* at 356, 369 P.2d at 6.
14. 8 J. WIGMORE, *supra* note 6.
15. See note 28 and accompanying text.
16. 224 Ore. 507, 356 P.2d 536 (1960).
17. 8 J. WIGMORE, *supra* note 6.
18. 224 Ore. at 516, 356 P.2d at 540 (1960).
19. The leading authority which allows an expert the benefit of the attorney-client privilege assumes that he is an agent of the client or attorney. Cases cited note 5, *supra*. Wigmore states that exemptions from the

istics of the attorney-client privilege and its applicability to agents. Wigmore states that such an examination must start with the primary assumption of a general duty to testify, and that any exemptions from this duty are exceptional.[20] The cases cited expanding the attorney-client privilege to cover expert testimony have not adopted this strict application of the privilege. But such a construction seems more desirable in view of the effect of the privilege to exclude otherwise competent testimony. The strict view of the matter lends itself to the establishment of fundamental conditions necessary for the privilege to apply.[21]

One requirement for a privileged communication is that it must originate in the confidence that it will not be disclosed, such confidentiality being essential to the maintenance of the relation. There are cases which indicate that courts do not consider communications between real estate appraisers and condemning authorities confidential in this sense. In *Rancourt v. Waterville Urban Renewal Authority*[22] an expert engaged by the condemning authority to appraise the premises was required to testify on behalf of the landowner. The court did not sustain the applicability of the attorney-client privilege since opinion on the fair value of real estate does not require secrecy. "The opinion of the expert is a *fact* which the fact finders may be entitled to know. The cry of privilege does not stop the court and jury from hearing the opinion of the expert in the search for the truth."[23] The viewing of expert opinion as an unprivileged fact was similarly stated in *State v. Steinkraus*.[24] There an expert employed by the state to make an appraisal was required to testify on behalf of the landowner. In refusing to apply a claim of privilege, the court ruled that an expert's opinion is not a communication originating out of any professional confidence necessary for the privilege to exist. Instead, it is a fact which constitutes evidence and which cannot be communicated to the attorney in the expectation that it will be privileged.[25] However, as in *Thomaston v. Ives*, the court did limit its decision to the role of an expert appraiser in eminent domain proceedings.[26]

Another case illustration that communications of experts do

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general duty to testify are exceptional, and the investigation of truth necessitates restriction and not expansion of these exemptions. 8 J. WIGMORE, *infra* note 18. The examples of agents given by Wigmore do not include experts hired by the client or attorney (see 8 J. WIGMORE, *supra* note 6) and to expand his definition of agent to include experts seems to be contrary to the desire to restrict exemptions.

20. 8 J. WIGMORE, EVIDENCE § 2192 (McNaughton rev. 1961).
21. *Id.* § 2285.
22. 223 A.2d 303 (Me. 1966).
23. *Id.* at 305 (emphasis added).
24. 76 N.M. 617, 417 P.2d 431 (1966).
25. *Id.* at 620, 417 P.2d at 432.
26. *Id.* at 621, 417 P.2d at 433.

not originate in confidence is *People v. Donovan.*[27] In this eminent domain proceeding the California court refused to apply the privilege to the expert, even though it was conceded that the expert was an agent of the state and his communications to the state's attorney were privileged. Here the landowner did not seek a disclosure of that communication but only sought the opinion of the expert as to the fair market value of the property. The court found that this was an inquiry which goes to the matter of the appraiser's subjective knowledge and not his disclosures to the state's attorney. The knowledge was not privileged and did not acquire a privileged status merely by its communication to the attorney.[28] A subsequent California decision, *Oceanside Union School District v. Superior Court,*[29] interpreted *Donovan* as holding that an appraiser does not pass to the attorney information that has emanated from the client. Thus the appraiser is not transmitting a client's confidences.[30]

To find that an opinion formed by an expert becomes a fact which the trier of fact is entitled to know, and that communication of this opinion does not originate with the client, is an acceptable rationale that no confidential communication results. In addition, since an expert is hired with the intention that he will testify at trial, his communication to his employer does not originate in confidence but in anticipation of giving testimony. It is submitted that the better view is that the confidential relationship necessary to a claimed privilege does not exist between expert and attorney.

Wigmore's other conditions necessary for the creation of the attorney-client privilege require a relationship which ought to be "sedulously fostered," and an injury to this relationship by the disclosure of the communication greater than the benefit gained for the correct disposal of litigation.[31] There is no doubt but that the attorney-client privilege should be preserved. But courts have yet to find need for the general establishment of an employer expert privilege.[32] Some courts, however, have expanded the attorney-client privilege to include expert testimony.[33] In some

27. 57 Cal. 2d 346, 369 P.2d 1 (1962).
28. *Id.* at 355, 369 P.2d at 5; *see* State Highway Comm'r v. Earl, 143 N.W.2d 88 (S.D. 1966).
29. 58 Cal. 2d 180, 373 P.2d 439 (1962).
30. *Id.* at 189, 373 P.2d at 445. *But see* State v. 62.96247 Acres of Land, 193 A.2d at 815 (Del. 1963).
31. 8 J. WIGMORE, EVIDENCE § 2285 (McNaughton rev. 1961).
32. Cases cited notes 13, 19 *supra.*
33. Brink v. Multnomah County, 224 Ore. 507, 356 P.2d 536 (1960).

situations an expert's communication should be protected under this privilege. The cases noted earlier where experts acted as assistant counsel are good examples. But it generally appears that the privilege should not be expanded to encompass communications between the expert and his employer. One argument against such an expansion is that the benefit gained through expert testimony for the correct disposal of litigation outweighs the injury to the relationship between the expert and his employer. The impact of denying a privilege to expert testimony will not serve to destroy the role of the expert in litigation but will direct that role towards a more useful result.

II. Right to Demand Expert Fees

Whether an expert witness may refuse to testify for failure to receive adequate compensation was an issue also raised in *Thomaston v. Ives*. There the court distinguished between the duty of a witness to testify to factual matters within his knowledge and the requirement that he state his opinion as an expert. The court stated that the duty of every witness to testify to factual matters is not the dispositive factor when a party calls the opposition's expert to testify.[34] The alternatives, then, are whether the duty to testify to factual matters within one's knowledge should be extended to an expert's opinion, or whether the duty of an expert witness to attend trial and testify as to his opinion arises solely from contract.

Pennsylvania Co. for Insurances v. Philadelphia[35] is a leading case on this issue. There an expert was allowed to refuse to testify in the absence of prior agreement between the litigant and the expert. "[T]he private litigant has no more right to compel a citizen to give up the product of his brain than he has to compel the giving up of material things."[36] However, the court did state in dictum that a sovereign power may compel an expert to testify for the sake of public justice. *Stanton v. Rushmore*[37] was an attempt by a doctor to recover expert witness fees for testimony at trial for which the doctor had been subpoenaed. The court held the doctor was entitled to expert witness fees from the person who subpoenaed him. The knowledge and skill of experts are not the property of litigants, and neither justice nor public policy compels that this property be taken without the owner's consent.[38] It should be noted that the doctor was not asked to perform any type of examination by the subpoena but was asked to give his opinion as to facts already within his knowledge. A similar ruling

34. 239 A.2d at 517 (Conn. 1968).
35. 262 Pa. 439, 105 A. 630 (1918).
36. *Id.* at 442, 105 A. at 630.
37. 112 N.J.L. 115, 169 A. 721 (1934).
38. *Id.* at 116, 169 A. at 721.

is found in *Buchman v. State*,[39] a criminal proceeding in which the court called upon a physician to give his opinion. The Supreme Court of Indiana ruled that the physician may be required to testify to facts but cannot be required to testify as to his professional opinion without compensation. An expert's opinion is in the form of services and "no man's particular services shall be demanded without just compensation."[40]

Another case allowed an expert to demand additional fees for his testimony. In *People v. Thorpe*,[41] a tax certiorari proceeding, the relator subpoenaed an involuntary expert who had previously prepared an appraisal of the property. The court required the expert to testify to what he had seen on the premises, but did not compel him to answer any questions connected with his experience and judgment as an expert. The court in dictum mentioned that other states required experts to testify, but limited their testimony to opinions which they are able to give without study of the facts or other preparation.[42] The court found this rule quite unsatisfactory due to the inability of an expert to testify impromptu; however, such testimony is not impromptu since the general rule limits the testimony to opinions previously formed from facts of which the expert has knowledge.

It has been offered that an expert should not be entitled to additional compensation because, among other reasons, the expert is not asked to render professional services but merely to testify as to what he already knows or believes.[43] Some courts hold that an expert's previously formed opinion is an admissible fact to which he may be required to testify.[44] Jones, in his treatise, notes that some decisions hold permissible statutes authorizing the

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39. 59 Ind. 1, 25 Am. R. 619 (1877).

40. *Id.* at 11, 25 Am. R. at 623. The court stated that the services of a lawyer required to defend the indigent are similar to the services of an expert called by the court. Therefore, since the lawyer receives compensation for his efforts, so should the expert. The dissenting opinion, however, held that the role of the lawyer required to defend the indigent and the expert required to testify in court are dissimilar. "The one case is compelling one man to render services to another for his private good, the other is compelling him to render services to the State for the public good." 59 Ind. at 19 (1877) (dissenting opinion).

41. 296 N.Y. 223, 72 N.E.2d 165 (1947).

42. *Id.* at 225, 72 N.E.2d at 166.

43. 8 J. WIGMORE, EVIDENCE § 2203 (McNaughton rev. 1961), and cases cited note 50, *infra*.

44. Rancourt v. Waterville Urban Renewal Authority, 223 A.2d 303 (Me. 1966) (opinion of expert is a fact which fact finders may be entitled to know); Philler v. Waukesha County, 139 Wis. 211, 120 N.W. 829 (1909) (if from observation or hypothetical facts an expert has in mind an opinion, such opinion is a fact as to which he may be required to testify).

courts to allow experts extra fees. However, the prevailing view places experts under the same obligation to give testimony as other witnesses which, in the absence of special preparation, entitles them to the same fees.[45]

In *Flinn v. Prairie County*,[46] it was held that an expert who testified for the state could not demand compensation in addition to the usual witness fees unless he was compelled to make special preparation. The court referred to the duty of every witness to testify as to information pertinent to the issue, whether such information constitutes fact or opinion.[47] This duty, imposed upon lay and expert witnesses alike, was also found in *Dixon v. People*.[48] The court rejected the contentions of the expert on three grounds: (1) the actual loss of time while on the witness stand is equal between lay and expert witnesses; (2) the expert is not performing services but is merely making a statement as to what he already knows; and (3) in light of the first two reasons and the general duty of every witness to testify, the expert's testimony does not constitute particular services for which he should be compensated.[49]

A strong argument can be made that an expert's knowledge is his personal property and should be compensated when put to use. But such use contemplates special preparation imposed on the expert to enable him to arrive at an opinion. When such preparation is not needed or when the expert has already formed an opinion based on facts within his knowledge, the opinion is equivalent to a fact admissible in evidence. The expert's duty to testify to these facts should be no different than that of a lay witness.

Where an expert does not receive an additional fee for his testimony, the question may arise as to whether a litigant may require an expert employed by the adverse party to testify without paying him. The question is not simply a matter of what compensation experts should receive, but whether they are liable to compulsory process unless such compensation is tendered beforehand. If an expert is not entitled to additional compensation, he should be liable to compulsory process from either a litigant or the court.[50]

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45. 4 B. JONES, EVIDENCE § 879 (5th ed. 1958).
46. 60 Ark. 204, 29 S.W. 459 (1895).
47. *Id.* at 207, 29 S.W. at 460.
48. 168 Ill. 179, 48 N.E. 108 (1897).
49. *Id.* at 195-96, 48 N.E. at 110. The court ruled upon similar facts in *ex parte* Dement, 53 Ala. 389, 25 Am. R. 611 (1875), that an expert is required to testify as a matter of public duty, and his time as well as the time of a lay witness is claimed by the public as a tax paid to a legal system which protects his rights. *Id.* at 392, 25 Am. R. at 617.
50. San Francisco v. Superior Court, 37 Cal. 2d 227, 231 P.2d 26 (1951) (dictum); Logan v. Chatham County, 113 Ga. 491, 148 S.E.2d 471 (1966); Swope v. State, 145 Kan. 928, 67 P.2d 416 (1937); Nielsen v. Brown,

On the other hand, jurisdictions which grant an expert additional fees have stated that the duty of an expert witness to attend trial and testify is created by contract. Where an expert employed by one of the parties is called to testify by another, ". . . it is not only his privilege but his duty to refuse compensation from one of the parties where he has already accepted employment from the other. . . ."[51] Jurisdictions which refuse to grant an expert additional fees will not allow him to refuse to testify due to a prior contractual relationship. Instead, they create a duty to bring forth relevant information, even though it may be obtained through professional service rendered at the request and cost of another.[52]

III. Massachusetts Rule of Discretion

Massachusetts courts have treated the problem of compelling expert testimony differently, leaving the enforcement of the right to require testimony of an expert employed by the adverse party to the discretion of the court. *Ramacorti v. Boston Redevelopment Co.*[53] involved an eminent domain proceeding in which the landowner requested the testimony of an expert witness employed by the adverse party. The court stated a general rule: the expert can be required without the payment of fees to give an opinion already formed, even though the expert witness may be an employee of the adverse party. However, the important consideration in such a case is the fairness of such a requirement. Since the landowner has no difficulty in obtaining experts, it was not an abuse of discretion of the trial court to deny such testimony.[54] Such a rule of discretion could be used effectively to explain rul-

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232 Ore. 426, 374 P.2d 896 (1962); *see* Barnes v. Boatmen's Nat'l Bank, 348 Mo. 1032, 156 S.W.2d 597 (1941) involving a suit by a psychiatrist on a contingent fee contract. The court held that if the expert was to testify to matters already within his knowledge, a contract to pay him more than the ordinary witness' fee would be invalid. However, if the contract required him to make an examination and then testify, it would be valid to pay him for his work. *Id.* at 1038, 156 S.W.2d at 600-601.

51. Hickey v. United States, 18 F.R.D. 88 (E.D. Pa. 1952); *see* cases cited notes 32, 34, and 38 *supra.*

52. Cases cited note 47 *supra*; *cf.* Oleksiw v. Weidner, 2 Ohio St. 2d 147, 207 N.E.2d 375 (1965), involving a malpractice action in which the defendant was required to testify as an expert at the request of the plaintiff. The court, citing Wigmore, stated that if the expert's testimony provides facts which will aid the court in arriving at a just decision, he has a duty to testify, and this duty is owed to society and not to the individual parties. *Id.* at 149, 207 N.E.2d at 377.

53. 341 Mass. 377, 170 N.E.2d 323 (1960).

54. *Id.* at 379, 170 N.E.2d at 325.

ings in cases where the expert acted as an assistant counsel. It could also be an effective tool to balance the duty to refuse testimony due to a prior contractual relation with the duty of every witness to give relevant testimony. The determinative factors to be considered by the court in weighing these duties are the fairness to the parties and the amount of additional preparation, if any, necessary for the expert to render an opinion. However, analysis of the rule indicates that the Massachusetts courts have refused to require the expert to testify in the absence of a showing of necessity by the party calling him.[55] Such a strict construction of the fairness requirement may tend to limit the effectiveness of the rule of discretion.

THOMASTON V. IVES REVISITED

It is submitted that the attorney-client privilege should not be expanded to include expert testimony. The *Thomaston* court stated that the reasoning upholding such a privilege evinces a primary concern for the rights of the witness to which the ascertainment of truth is secondary. The ascertainment of the truth should be the primary concern of the courts, even though the court was unwilling to make a blanket statement to this effect. The attorney-client privilege should be strictly construed. The fact that an expert's communication neither originates with the client nor arises out of any confidential relationship indicates that experts should not fall under the protection of the privilege. This is true even if the expert is considered an agent of the client or attorney. Such a ruling can only increase the effectiveness of the role of the expert in producing relevant testimony.

Thomaston stated that there is a distinction between the duty of a witness to testify regarding factual matters and the duty of an expert witness to testify as to his opinion. This distinction involves the corresponding issue of whether an expert may be entitled to additional fees for his testimony. *Thomaston* held that an expert is under a duty to testify in eminent domain proceedings due to the necessity of the landowner to receive just compensation for his property. Such a holding adopts a rule of discretion, for the court, unwilling to deny the distinction between fact and opinion testimony, created a special rule designed to protect the landowner in eminent domain proceedings. This exercise of discretion may be the best way to balance the interests of the expert with the interests of the party calling him. In exercising this discretion the court should consider that the importance of the expert's prior contractual relationship is offset by these three factors: (1) the expert is only asked to testify as to what he already knows; (2)

55. *See* Roberson v. Graham Corp., 14 F.R.D. 83 (D.C. Mass. 1952) (property appraisal in connection with probate of an estate); Boynton v. Reynolds Tobacco Co., 36 F. Supp. 593 (D.C. Mass. 1941) (expert physician).

he has prepared his report with the anticipation of testifying; and (3) it is the duty of every witness to bring forth relevant testimony.

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