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> Experience has shown that opposite opinions of persons professing to be experts may be obtained to any amount; and it often occurs that not only days, but even weeks, are consumed in cross-examinations, to test the skill or knowledge of such witnesses and the correctness of their opinions, wasting the time and wearying the patience of both court and jury, and perplexing, instead of elucidating, the questions involved in the issue (*Winans*).

The problems that the American judicial system encounters with expert witnesses have been with the system for a very long time. Because of the tendency noticed by lawyers about the availability of expert witnesses, many describe them by saying, "an expert is . . . a kind of intellectual prostitute ready to sell his opinion and enlist in the service of the side that pays him" (Friedman). The reason that lawyers have this extremely negative view of expert witnesses is simple: the lawyers created the problem.

In describing how to prepare an expert for trial, it is advised that the expert not be allowed to examine the evidence until fully aware of the case theory of the attorney hiring them. Young attorneys are advised to ". . . not press the expert to reach a conclusion, even orally, before she is thoroughly conversant with the case and an advocate of the client's cause" (Daniels). This obviously slants the opinion of the experts, as they are told what counsel is looking for and then asked if it is there. Experts seeking repeat business will be adept at integrating the theory of the case to their interpretation of the evidence.

Lawyers even maintain a pernicious influence on the evidence examined by the experts. They serve as the conduit for information to the expert, and lawyers, in zealously representing their clients, may not pass all the available information to the expert in order to further skew the expert's professional opinion (Gross).[1] It is in ways like this that lawyers "*assist* the expert witness in his evaluation" (Pavalon, 5; emphasis added). This advice is combined in preparing experts for cross-examination when these witnesses are reminded of the adversarial system and that they should not be shaken from their role as part of the litigation team. After all, "[the expert witness'] function is to snow the jury"

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[1] I was unable to find an article published on the subject since 1992 that did not refer to this work.

(Grutman and Thomas). The famed litigate Melvin Belli commented once that "if I got myself an impartial [expert] witness, I'd think I was wasting my money" (in Specter).

All of the criticism of expert witnesses can be funneled to the uses that lawyers construct for them. Calling experts in order to have a Ph.D. say that the bright red stop buttons on escalators make them attractive for small children to play with is just one example of the trivial issues that experts are called to testify about (*Carroll*).[2] The fact that experts are considered "whores of the Court" necessitates that lawyers be considered the "johns." Experts are a commodity, bought, sold, and traded like any other. Test rides can be arranged whereby an expert is brought in and examines the evidence. If counsel does not like the conclusion, the experts are prohibited from testifying about their investigation unless called by the side that hired them. The creation of the expert witness privilege allows the side with the most resources to track down the most qualified experts in the field and place them on retainer, as consultants, in case their testimony for the other side would damage the case. The defensive strategy of expert witness is part of the reason litigation is so prohibitively expensive.

In a study by Professor Samuel Gross, it was found that over eighty-six percent of trials involve the use of expert witnesses, and that these trials average 3.3 experts apiece (Gross, 1119). Furthermore it was discovered that "most expert testimony is given by repeat performers" (*Ibid.*, 1120). This is not surprising, given the creation of national clearinghouses of expertise, such as the back pages of the *National Law Journal*. In these pages one will find numerous referral services for experts through advertisements such as the one from the Medical Quality Foundation, which "promises that its '1,150 board certified, eminently qualified' medical experts 'can effectively double the monetary value of your case' " (*Ibid.*, 1132, note 58).

The advantage for lawyers in these services is that they get a higher quality of witness. The expertise issue is sidelined because the important thing is for people with "Doctor" in front of their name to confidently project an aura of assuredness when stating opinion "to a reasonable degree of certainty" and to maintain that image on cross-examination, which practice on the stand assists. "Some people may be geniuses, but because they lack training in speech and theater, they have great difficult conveying their message to a jury" (*Ibid.*, 1133). The fact that lawyers must consider persuasiveness at least equal to qualification is indicative of the problem which the expert witness system has currently established. Experts are treated as unbiased witnesses who report on the

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[2] Other examples of this type of trivial issues that experts are called to testify about can be found in Perrin.

conclusions of their objective investigations. But experts are neither unbiased nor objective.

Article 7 of the Federal Rules of Evidence allows experts to testify to inadmissible hearsay as long as that hearsay is "of the type reasonably relied on by experts in the field" (*Federal Rules of Evidence*, 703). Any counselors worth their hourly wage can extend that definition to anything. The same rules of evidence allows the experts to testify to the ultimate issue. This means that experts are allowed to use legal terminology that the jury will be instructed to follow.

Of course, there is no accepted method of instructing juries to resolve disputes between expert witnesses. Judges tell juries to trust their instincts and their opinion of the testimony, meaning that style prevails over substance. Stylistic concerns prevail in the testimony of experts as well. Flat declaratives from the stand are more persuasive than qualified conditional propositions. Factual and interpretive accuracy is cast aside for the sake of painting a clear picture of the case for the jury. Juries are persuaded by clarity which cuts through the quagmire of assumptions made by experts.

Lawyers have supported the emergence of mercenary expert witnesses who overstate their conclusions for the sake of persuasion. Judges have watched this occur while being essentially powerless to stop it, given the incredible latitude the Rules of Evidence grant to those individuals whose specialized knowledge or experience is deemed beneficial to the determination of facts. Once experts are recognized as such, they are allowed to make conclusions, to announce the contents of evidence otherwise inadmissible under 801 (Hearsay), and to make pronouncements as to the ultimate issue. The free-ranging ability of expert witnesses must be limited.

It is possible to create a method of ensuring that juries are informed of viable and applicable theories in the relevant fields of knowledge, while not being swamped in the mind-numbing details of intradisciplinary disputes. The first step would be to place the findings of all expert witness evaluations under the dictates of discovery. This would eliminate expert shopping, whereby attorneys keep cycling through experts until one is found who agrees with counsels' theory of the case. Removing the privileged communication status from the investigation of expert witnesses would be beneficial as well.[3] This links with placing the findings

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[3] In this consideration I am referring to outside consulting experts only. A person's family physician, while qualified in many situations as an expect, would still be bound by the doctor patient privilege. The distinction between a consulting physician and a treating physician could become difficult; however, the adoption of the consulting expert standard would greatly clarify fields of expertise other than medical.

of expert witnesses under the rules of discovery so that experts can be compelled to testify against the client who originally consulted them.

The heart of the reform would be to shape the character of expert testimony away from the adversarial mind set. The use of court-appointed experts has been proposed by many, including Gross, but as he wisely commented, that change would be too drastic a present to succeed (Gross, 1220). Even the attempt to remove experts from the pernicious effects of partisanship would be difficult to manage. However, with the ever-expanded perception that serving as a expert witness is not honest employment, some change is absolutely vital in order to preserve what little faith is left in the system (*Ibid.*, 1115).

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