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Expert Medical Testimony And The Medical Expert

Samuel R. Gerber, M.D.

IN ORDER TO achieve better understanding between the medical and legal professions, it is necessary that there be complete frankness and open discussion of those factors which have provoked misunderstanding and grievances. The subject is here approached from a psychological viewpoint. There will be no attempt to outline a formula by which judges and juries should be governed in evaluating testimony of the medical expert; nor are there definite suggestions concerning the line of questioning the attorney should follow.

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Legal decisions can be just only when all of the facts are presented to and thoroughly understood by the court and jury. When a case involves questions

requiring specialized knowledge, it should be mandatory that testimony be offered by those familiar with the subject under consideration. To provide the court with this necessary information the law permits specialists qualified as experts not only to testify as to the facts under consideration but also to offer opinions on hypothetical questions. It is the expert witness who is called upon to give opinion evidence.¹ Expert witnesses are those who are skilled in any science, art, trade or occupation and are defined as: "Persons qualified to speak authoritatively by reason of their special training, skill, or familiarity with the subject."²

Under modern court procedures there are two factors which tend to thwart full and completely objective testimony by the expert witness. One factor is that at the present time in this country each litigant engages one or more experts to support his side of the question and to attempt to impress the judge and jury with the correctness of his stand, disregarding objectivity. If the expert were chosen by the court or a commission were set up for the purpose, it would obviate the natural feeling that the expert is, one might say, on one team. Such sentiment often leads to an unconscious

¹ "Opinion Evidence" is defined as "Evidence of what the witness thinks, believes, or infers in regard to facts in dispute, as distinguished from his personal knowledge of the facts themselves." BLACK'S LAW DICTIONARY 1244 (4th ed. 1951).

² *Id.* at 688.

bias or mental block on the part of the expert who dislikes to "let down" the side who engaged him.

The second factor thwarting objectivity is the process of eliciting all information by a technique of questions and answers designed to prove a preconceived conclusion of the questioner. The court would be better informed and the opinions more accurate if the scientific testimony were to be presented in the form of discourse with the obscure and debatable opinions clarified by answers to direct questioning.

HISTORY

So intimately is forensic medicine associated with the social development of man, and particularly with the recognition and punishment of crime, that it is difficult to trace its early development. In early Egyptian history there are few allusions to the part played by physicians in the detection of crime, but there appears to be no doubt that there was definite knowledge of poisons. Biblical laws made a distinction between mortal and dangerous wounds and contained provisions relating to virginity, marriage, adultery and other subjects of public medicine.

In early Greek history there are certain references to hygiene and state medicine scattered throughout the writings attributed to Hippocrates, including some speculation on the nature and growth of the infant and on the period of pregnancy. Medical men were consulted by magistrates most frequently on questions of public health, and there is some evidence that they were summoned to testify in courts of justice.

The laws of ancient Rome had their chief source and inspiration from those of Greece and were similar to them, but they embraced more important medicolegal problems. In the reign of Numa Pompilius, six hundred years before the Christian era, it was enacted that the bodies of all women who died during the last months of pregnancy should be opened so that the infant might be saved if possible. The first Caesar was reputedly brought into the world by incision of the abdomen, hence the term "Caesarean" operation. It was also enacted in the Twelve Tables that the infant in the mother's womb was to be considered as living and that all civil rights were to be secured to it. Legitimacy of an infant was limited to those whose birth occurred within ten months of the death or absence of the putative father.

It is recorded by Suetonius that the bloody remains of Julius Caesar when exposed to public view were examined by a physician named Antistius, who declared that out of twenty-three wounds inflicted only one, which perforated the thorax, was mortal.

It does not appear that there was any positive law which required the inspection of wounded bodies by a medical practitioner or that legislators required medical opinion before making laws. It is, however, recorded that

by the beginning of the empire, midwives were ordered by the praetors to examine pregnant women in judicial inquiries.

The origin of the connection between the sciences of law and medicine may be dated from the publication of the Institutes of Justinian (529-533 A.D.), which required the opinion of physicians in certain cases. The modern beginnings of forensic medicine may be said to originate in 1507, when the bishop of Bamberg drew up a penal code in which the services of medical men were to be utilized in all cases of violent deaths, a provision adopted almost immediately in Bayreuth, Anspach and Brandenburg. The other states of Germany resisted, but eventually Charles V in the Diet of Ratisbon in 1532 in the *Constituto Carolina* required evidence of medical men in all cases where their testimony could enlighten the judge or assist the investigation in such cases as personal injury, murder and pretended pregnancy. This can be considered as the date of the origin of recognition of the expert witness.

Italy was one of the early leaders in the development of forensic medicine. In 1602 an early work in the literature of this field appeared in Sicily by Fortunatus Fidelis.³

During the medieval centuries and later, numerous cities had physicians in their service as health officers. Under given circumstances these physicians also had to render expert opinion in the courts about medical questions, even if they concerned only the trial of a witch.⁴

DIVERGENT PHILOSOPHIES OF LAW AND MEDICINE

Webster's dictionary states: " Experts may be employed in legal proceedings as witnesses on matters to which ordinary observers could not without their aid form just conclusions."⁵ The expert witness does not always fulfill these objectives. Then, wherein does the fault lie? Most of it can be attributed to a lack of understanding on the part of the expert witness concerning the motivating principles of legal procedures and a lack of understanding on the part of the lawyer concerning the duties, capacities and limitations of the field of knowledge of the expert witness. Although this is generally true in respect to all expert witnesses in the field of sciences, it is perhaps more pronounced in regard to expert medical testimony. This is regrettable since justice is dependent to some extent on medical evidence in about one-half of the cases brought to appellate courts in the United States. Certain cities have found that frank discussions leading to mutual understanding of the objectives and limitations of the court and of the problems, philosophies and scope of knowledge of the ex-

³ 10 ENCYC. SOC. SCI. 274-278 (1937)

⁴ 215 NEW ENGLAND J. MED. 826 (1936)

⁵ WEBSTER'S NEW INT'L DICTIONARY 897 (2d ed. 1935).

pert witnesses have aided effectively the administration of justice and fostered reciprocal respect between the medical and legal professions.

It would be best to consider first what the underlying factors are which have resulted in alienating the mutual respect of the legal and medical professions regarding the processes which lead to just decisions. It would seem that the fundamental problem lies in correlating two divergent philosophies and, one might say, diatheses, which are the result of the vast differences in education and experience of the two professions. The physician is continually confronted with emergencies in which he must evaluate the situation for himself and make his own decisions, with only God and his conscience to review them. It is not true that physicians do not criticize each other and argue the wisdom of decisions; they do so, however, only among themselves because each knows that he too is vulnerable and that he also might be in the same position some day. On the other hand, the attorney is not faced with the urgency of immediate decisions in the emergency of life and death. He knows that his conclusions are not definitive but must be debated publicly by other members of his profession as adversaries. Therefore he is trained to expect his judgment to be questioned and feels no personal affront when the court rules that his reasoning is not in the best interests of justice. On the other hand, the physician, because of his personal relationship to his patient, feels that any doubt cast upon the expediency of his decisions constitutes a reflection upon his reputation and will undermine the confidence of the people, not only in himself but in the medical profession as a whole. So one often finds lawyers ridiculing each other and each other's witnesses. Doctors do not; they may differ, but they will not belittle each other. They may go into court separately, but they come out together, arm in arm and with the utmost respect for each other.

Due to this divergence in philosophies the attorney is often confronted with the problem of the medical expert who is apprehensive and antagonistic in cross-examination. In his own conscience the physician may know that his rationale may be open to question, but his training has been to maintain an appearance of self-reliance; therefore, he may defend his stand all the more vehemently.

The cross-examiner is affected by this. His natural course is to phrase his question in such a manner that it will be revealed to the court that other conclusions might have been reached by someone else of equal training and experience. In the best interest of justice, honest divergence of opinion in regard to diagnoses should be recognized, but the physician should not be subjected to implied attacks on his ability, skill and reputation.

COMPETENCY

One of the criticisms of medical expert witnesses most frequently heard

is that of competency. There are many factors involved here. Many believe that to be a competent medical expert witness one must be a specialist in the field of medicine involved. For example, they feel only a roentgenologist should testify on x-ray findings, an orthopedic surgeon on treatment of fractures, and so on. Others believe that a general practitioner has a more practical, comprehensive knowledge and is more objective in evaluations. There can be no set rules for qualifications of the expert witness. The complexity of the questions involved should determine whether or not a specialist should be called to testify. This is a decision that is entirely up to the trial court to decide. In the case of *Shuffield v. Taylor*,⁶ the patient-plaintiff, a minor 19 years old, sued a physician, claiming among other things that in performing a tonsillectomy some 15 years before, the physician removed the patient's uvula, palate and tonsillar pillars, causing loss of speech. The trial court gave judgment for the patient, but the Court of Civil Appeals of Texas reversed the judgment on the ground that the trial court erred in permitting the parents of the patient to testify that subsequent to the tonsillectomy the patient had no apparent disease of his mouth or throat and no disease of the head and ears. In the opinion of the Court of Civil Appeals the absence of such disease could be proved only by expert testimony and not by testimony of the non-expert parents. The patient appealed to the Supreme Court of Texas, which adopted the opinion that the testimony of the parents was admissible. The testimony did not come within the rules relating to expert testimony; it was a statement of fact to which the parents were competent to testify. The opinion of a lay witness who is familiar with a person is admissible concerning the state of that person's general health, strength and bodily vigor, his feebleness or apparent illness or his change in physical condition from one time to another. The parents were not called upon to make a diagnosis but to give testimony as to the apparent presence of any disease, not in a scientific sense but as a statement of a simple fact. The testimony, the court concluded, should not have misled the jury; hence the judgment of the Court of Civil Appeals was reversed and that of the trial court affirmed.

In *Pridgen v. Gibson*,⁷ an action for malpractice, the plaintiff alleged that the loss of sight in his eyes was proximately caused by the defendant's failure to use due care in the examination and treatment of the injured eye. The trial court dismissed the action. Error was claimed in excluding testimony by a general practitioner as an expert witness. The court held such testimony admissible. Physicians and surgeons are experts in medicine and surgery, and their opinions are admissible in evidence on questions strictly embraced in their profession and practice, even though they are not specialists in the particular disease which is the subject of inquiry.

In the case of *Hard v. Spokane Int'l Ry.*,⁸ an action for personal injuries,

the Supreme Court of Idaho held that the question as to the competence of the proposed expert must be determined in the first instance by the court and should be settled before he is allowed to testify. The admissibility of expert testimony is for the court; its weight is for the jury. If no objection is made as to the witness' being qualified when such testimony is offered, his competence as an expert cannot be raised for the first time on appeal.

Another case⁹ of interest was one in which testimony of autopsy findings was offered by the examiner who was not a physician by degree or license. An autopsy was performed at the direction of the county attorney. The examiner was not a graduate of any medical school, nor was he licensed to practice medicine in Montana. He was a minister who "had practiced medicine in practically all its phases" during seven years residence in the state. He had studied medicine for thirty years on the theoretical side, had medical books in his library, had visited hospitals, witnessed operations, attended medical lectures and frequented dissecting rooms. He testified as to the number and location of several gun-shot wounds and described with great particularity the course of the bullets. After testifying that the carotid artery and vagus nerve were the primary organs that were injured by a bullet that entered the neck, he said that the vagus nerve is the principal nerve controlling the heart and that injury to it would destroy the functions of the heart. Later, however, when he was asked the effect of the bullet wound in the neck, objection was made on the ground that he was not qualified to answer. Similar objection was made when he was asked whether two of the wounds might not have been made by the same bullet. Both objections were overruled. In sustaining the action of the trial court admitting the examiner's testimony, the Supreme Court of Montana said that the question was whether the witness who is called on to testify has the necessary experiential qualifications, regardless of how he came by them. The general rule is that any question as to the possession of the required qualifications by a particular witness is for the determination of the trial court. A decision of that court will not be reversed unless manifestly erroneous as a matter of law. The Montana Supreme Court could not hold that the trial court erred as a matter of law in admitting this testimony.

It becomes obvious then that the responsibility for properly qualifying the witness lies on the attorney's direct questioning. There should be specific questions concerning the pre-professional as well as professional training. Degrees and license dates should be stated but may not be sufficient alone.¹⁰ The witness should be questioned as to internships, residencies,

⁹ 125 Tex. 601, 83 S.W.2d 955 (1935).

⁷ 194 N.C. 289, 139 S.E. 443 (1927).

⁸ 41 Idaho 285, 238 Pac. 891 (1925).

⁹ State v. Harkins, 85 Mont. 585, 281 Pac. 551 (1929).

¹⁰ 2 WIGMORE, EVIDENCE § 569 (3d ed. 1940); 3 *Id.* § 687.

post-graduate courses, certifications by boards of specialists and awards and affiliations with professional societies. It is desirable to elicit information concerning the number of years of practice and the frequency of the particular type of case in question in the experience of the witness. Discretion should be exercised to avoid giving the impression to the jury that there has been emphasis on impractical specialization. The emphasis should be on the training, experience and specialized knowledge of the subject to be offered in evidence.

An example of how overemphasis on specialization may have a detrimental effect is seen in the case of *State v. Scruggs*.¹¹ The defendant was convicted of murder. At the trial a medical doctor was on the stand as a witness for the defendant. He qualified as an expert on roentgen-ray work. The defendant sought to elicit his opinion as to whether a fracture of the skull, such as was shown in the roentgenogram, could have resulted from the deceased having fallen and struck her head on a pole or small log offered in evidence. The judge refused to allow the witness to give his opinion; the defendant contended that this was error. The Supreme Court of Louisiana held that under the circumstances the trial judge's refusal was proper, even though the witness claimed to be qualified to answer.

The evaluation of expert testimony, as of all testimony, is a problem for the jury. In the case of *Spencer v. Quincy, O. & K.C.R. Co.*,¹² an action to recover damages for personal injuries, the following instruction was given at the request of the plaintiff:

An expert witness is one who is skilled in any particular art, trade or profession, being possessed of peculiar knowledge concerning the same acquired by study, observation and practice. Expert testimony is the opinion of such witness, based upon the facts in the case as shown by evidence, but it does not even tend to prove any fact upon which it is based, and before you can give any weight whatever to the opinion of the expert witnesses you must first find from the evidence that the facts upon which it is based are true. The jury is not bound by expert testimony, but it may be considered by you in connection with the other evidence in the case.

This instruction was taken bodily from *Smith v. Telephone Co.*¹³, wherein it was unqualifiedly approved. Nevertheless, the Supreme Court of Missouri held it was erroneous, at least as applied to the evidence in this case. There were several medical experts who testified with respect to the plaintiff's injuries. They had made physical examinations, "read" roentgen-ray pictures and from both had diagnosed the condition of the injured parts. The court said:

Their testimony consisted of a mixture of the facts they had observed and the inferences they had drawn from those facts. Neither a skilled lawyer nor a trained psychologist, much less a jury of laymen, could have separated with any sort of precision the fact testimony of these experts from their opinion testimony. The first part of the instruction could very prop-

erly have been given if the experts' opinions had been based solely on hypothetical facts; but the propriety of giving in any case the direction embodied in the last sentence is extremely doubtful. The opinion of an expert, when admissible at all, is evidence; sometimes it is the only evidence by which proof can be made, and its value as evidence is always for the jury. Besides, what reason can there be for singling out the testimony of experts for comment and caution when their testimony must be considered and weighed just like the testimony of other witnesses?¹⁴

In the case of *Lorrich v. Salvation Army, Inc.*,¹⁵ an action for personal injuries and illness suffered while the plaintiff was a resident in one of the defendant's homes, the plaintiff claimed that the defendant was negligent in serving food contaminated with typhoid bacilli, as a result of which he was rendered seriously ill. A physician testified that the typhoid carrier was found to be an employee who assisted in the preparation of foods for the home, and that it was his opinion that she probably contaminated food served to the plaintiff. The defendant claimed the trial court erred in instructing the jury to return a verdict for the plaintiff. It was held that the expert testimony, although unrebutted, did not entitle the trial court to direct a verdict since the members of the jury are the sole judges as to what weight the opinion of the expert is entitled to receive. They should be instructed to give such testimony just such weight as they deem it entitled to receive.

Within the medical profession, where there is a reluctance to testify in court, there are sometimes heard derogatory remarks concerning those who testify frequently as expert witnesses. The attitude seems to be that such men must be hard pressed financially to be coerced into this duty, or that they are not ethical because such testimony may involve an implied criticism of a fellow physician. Certainly this attitude is not conducive to assuring the court of the most competent expert witnesses. The fact that there are professional expert witnesses whose testimony may not be completely objective is recognized by the courts. The Supreme Court of Pennsylvania has said:

The professional expert, whose testimony we relate above, frequently appeared in court as a witness in personal injury cases, and the inference from his evidence is that he made the giving of testimony in such actions a business. One of the evils in the trial of personal injury cases is padding the claim with evidence of the professional medical expert. When considering a motion for a new trial, based on an excessive verdict, ordinarily but little weight should be given such testimony.¹⁶

¹⁴ 165 La. 842, 116 So. 206 (1928).

¹⁵ 317 Mo. 492, 297 S.W. 353 (1927).

¹⁶ 113 Mo. App. 443, 87 S.W. 71 (1905).

¹⁷ *Spencer v. Quincy, O. & K.C.R. Co.*, 317 Mo. 492, 503, 297 S.W. 353, 357 (1927).

¹⁸ 81 Ohio App. 317, 75 N.E.2d 459 (1947).

¹⁹ *Murphy v. Pennsylvania R. Co.*, 292 Pa. 213, 216, 140 Atl. 867, 869 (1927).

How can this evil be remedied and the most competent and objective testimony assured? To combat the sentiment that implied public criticism of a fellow physician is unethical, a change in the basic dogmatic philosophy, that infallibility must be maintained in the public eye, is necessary. Perhaps the medical profession has clung to an outmoded protective attitude in an era of cynicism. It should be said that there is a changing attitude in some medical schools regarding this philosophy. The courts and the legal profession have a responsibility in combating such a situation.

One of the greatest deterrents to medical expert testimony lies in the inconvenience to the witness who, by being detained, has a busy schedule upser. Suffering patients are kept waiting; as a result the physician must often work long into the night to recapture lost time. Seldom does it seem that the time spent in court was worthwhile when weighed against the service that could have been rendered at his usual duties. Time schedules are difficult and at times impossible to work out during court procedures, but every attempt should be made to insure against unnecessary detainment of the busy practicing physician.

PRE-TRIAL CONFERENCE

Another very important method for improving the quality of expert testimony, as well as for resolving misunderstandings and dissipating misconceptions which exist between the lawyers and doctors, is to be found in adequate preparation of the case. This should include pre-trial conferences between the attorney and the physician. Pre-trial conferences should be directed at more than merely eliciting perfunctory answers to questions asked with preconceived objectives on the part of the attorney. Too often the expert witness goes on the stand with knowledge that there are grounds for honest disagreement with his opinions. If he feels a partisan loyalty to the attorney who engaged his services and is dubious of that attorney's ability to conduct re-direct questioning so as to refute any apparent discrepancies brought out upon cross-examination, he will prove to be a poor witness. He will invariably take upon himself the task of trying the case by qualifying his answers, thereby furnishing more ammunition for the cross-examiner. Such a witness feels that he is on trial and that his reputation as well as that of his profession is at stake; therefore, he ignores objectivity.

On the other hand a comprehensive pre-trial conference will produce confidence on the part of the witness and the attorney. The attorney should ask the witness if there are textbooks or recently published works which substantiate his opinions. The attorney should have these on hand to use if necessary on re-direct questioning. He should know also whether or not there are contradictory opinions and on what basis the witness reached the conclusions and tenets which he maintains. Any study of medical

literature by the attorney should be under the guidance of a physician, or at least discussed with a physician. Certainly in the pre-trial conference the expert should be acquainted with all the facts likely to be introduced in evidence. The attitude of the patient who is examined by a physician with the prospect of litigation may not be as objectively honest as that of the patient who consults a physician solely for purpose of diagnosis. The patient may withhold certain pertinent facts.

If the pre-trial conference is to serve the best interests of justice, the physician and attorney must be completely honest with each other and must objectively consider all the evidence and complexities. There are some attorneys who "shop" around until they find a physician who will give them the answer they think will best serve their interests. Usually they do not give the physician all of the facts. The physician then finds himself placed in an embarrassing situation when he takes the stand and discovers the whole truth to be somewhat different from what he had been led to believe. The honest physician who has been so embarrassed in court takes a dim view thereafter of all attorneys and the duties of the expert witness.

The pre-trial conference should also include indoctrination for the expert witness. He should understand the legal restrictions and general procedures of a trial. Such thorough pre-trial conferences would do much to alleviate the estrangement of individuals in the medical and legal professions.

HYPOTHETICAL QUESTIONS

Physicians who testify as expert medical witnesses need to be indoctrinated in the rules governing hypothetical questions. If they do not understand these rules, they may err in basing an opinion on facts not incorporated in the hypothetical question.

The New York Court of Appeals has said:

We think it is not competent in any case to predicate a hypothetical question to an expert upon all of the evidence in the case, whether he has heard it all or not, upon the assumption that he then recollects it, for it would then be impossible for the jury to determine the facts upon which the witness bases his opinion, and whether such facts were proved or not. Suppose the jury concluded that certain facts are not proved, how are they, in such an event, to determine whether the opinion is not, to a great degree, based upon such facts? When specific facts, either proved or assumed to have been proved, are embraced in the question, the jury are enabled to determine whether the answer to such question is based upon facts which have been proved in the case or not, and whether other facts bearing upon the correctness and force of the answer are contained therein, or have been omitted from it; but in the absence of such a question the evidence must always be, to a certain extent, uncertain, unintelligible, and perhaps, misleading.²⁷

²⁷ *People v. McElvaine*, 121 N.Y. 250, 258-259, 24 N.E. 465, 467 (1890).

In the case of *Carruthers v. Phillips*,¹⁸ a medical witness called by the plaintiff was asked to assume that in the course of an operation for the suspension of a prolapsed uterus the operating physician placed and left gauze in the patient's bladder, and to state whether in so doing the physician exercised that degree of care and skill ordinarily used and exercised by physicians in the practice of surgery in that locality and under those circumstances. The witness answered in the negative. The defendant contended the question was improper because "it assumed as an absolute fact" that the operating physician had cut the bladder and placed gauze therein "when the evidence along that line was clearly speculative and conjectural." The Supreme Court of Oregon said:

It is the peculiar function of the hypothetical question to assume as an absolute fact alleged conditions or events if supported by evidence and to have an opinion based on the hypothesis. Plaintiff, in forming the hypothetical question, should not leave to speculation the facts upon which the opinion was to be based. If plaintiff asks a fair question based on substantial evidence, he may have the expert's opinion on any combination of facts he may choose. He need not include in the question all the details which appear in his own case and certainly cannot include the contradictory matter in his opponent's case. He may lay before the jury by hypothetical questions scientific inferences properly deducible from the facts supported by his evidence. The form of such questions is generally within the discretion of the trial court.¹⁹

The court concluded accordingly that it was proper for the trial court to permit the question propounded.

In *Frank v. Herancourt Brew. Co.*,²⁰ the evidence tended to show that the plaintiff, while employed by the defendant, was directed to varnish beer cases. The varnish contained methyl alcohol. The plaintiff claimed that the inhalation of these fumes caused his blindness. A physician testified that the blindness was caused by the death of the optic nerve, which was the natural result of inhalation of the methyl alcohol in the varnish. The defendant objected to this testimony of the expert because his opinion was not entirely predicated upon personal experience in the treatment of similar cases. The court determined that the expert testimony need not be based entirely upon personal experience. Knowledge gained from reading books of science, from experience with lower animals and from scientific investigation made along similar lines is a sufficient predicate for such expert testimony.

Although it is legally permissible to choose facts in phrasing a hypothetical question so that they conform to the questioning party's theory, it is bad practice to do so. Such questions are unfair to the witness who

¹⁸ 169 Ore. 636, 131 P.2d 193 (1942).

¹⁹ *Id.* at 644-645, 131 P.2d at 196.

²⁰ 5 Ohio L. Rep. 559 (Cin. Super. Ct. 1907).

wants to be completely objective. And they will most certainly cause the opposing attorney to retaliate with other hypothetical questions which may include such evidence as to produce answers which will be damaging to the case of the first attorney. Attorneys should expect the expert witness to be completely honest and objective and should direct the questioning accordingly.

TEXT BOOKS

In discussing the pre-trial conference it was said that the attorney should be provided with references which will support the testimony of his expert witness as well as those which may refute such testimony. It was also stated that attorneys should consult with the expert witness on any conclusions which he, the attorney, has drawn from reading such textbooks. This is important when hypothetical questioning is formulated from reading such literature and interpreted as the attorney believes it relates to his case. Perhaps it would be well here to review some of the rules governing the introduction of textbooks in court procedures.

Textbooks cannot be introduced to impeach a witness unless he is familiar with the writings or has stated that he based his opinion on such authority, specifically naming the textbook. The reason is that the author is not under oath and is not subject to the test of cross-examination.²¹

It is, however, proper to cross-examine an expert witness with reference to data which form, in whole or in part, the basis of an opinion expressed by him. When a particular authority had been relied on by the witness, it is proper to test his knowledge and the accuracy of his deductions by drawing his attention during cross-examination to the expressions of that particular authority. This is not permitted for the purpose of using the selected extracts as evidence but to enable the jury to weigh better the testimony of the expert.²²

An example of improper questioning is seen in the case of *State v. Shabane*.²³ In cross-examination, the attorney for the State directed a question to the expert, prefacing the question with "Now, doctor, isn't it a fact. " Counsel for the defendant objected on the ground that the State's attorney was reading from a book, but the objection was overruled. The witness answered "No, it is not a fact." Thereupon the State's attorney asked: "So, if such an authority as Wharton & Stille's Medical Jurisprudence states that it is a fact, would you say that they are wrong?" An objection to this

²¹ E.g., *Commonwealth v. Toddan*, 207 Mass. 259, 93 N.E. 809 (1911); *State v. Brunette*, 28 N.D. 539, 150 N.W. 271 (1914); 6 WIGMORE, EVIDENCE § 1700 (3d ed. 1940).

²² *Chezick v. Minneapolis, St. P. & S.S.M. Ry.*, 56 N.D. 553, 218 N.W. 217 (1928).

²³ 56 N.D. 642, 219 N.W. 132 (1928).

question was overruled. The doctor was not asked what medical books he had read on the subject, or whether he had read Wharton & Stille. Counsel for the defendant objected because the State's attorney revealed indirectly to the jury the theory of Wharton & Stille as opposed to that of the defendant's witness. The Supreme Court of North Dakota held the objection should have been sustained but that this testimony was not prejudicial under the circumstances of the case. It is permissible to prepare questions from medical books and to cross-examine a medical expert on the theory of medical works on which he claims to base his opinion; but it is not permissible to use medical books in opposition to medical expert testimony given on the stand because authors are not available for cross-examining.

An example of the use in cross-examination of a text cited by the witness is found in the case of *Lewis v. Johnson*.²⁴ An expert witness for the defendant testified that the patient's leg was suspended in a "Böhler fracture frame," that the witness had studied under Dr. Böhler and used his textbook, and that his, the witness' opinion, was in part based on the book. The plaintiff's counsel then sought to cross-examine the witness by use of Dr. Böhler's book. The trial court sustained an objection to the impeaching questions. The Supreme Court of California held this was improper, for the rule against such works as direct evidence is subject to the qualification that textbooks relied upon by an expert witness may be used as a foundation for impeaching cross-examination.

It is necessary that the expert witness state that he has deduced and based his opinions from the book cited and in the light of his own experience. It is not sufficient that he state that he concurs with the opinions of the author.²⁵

These rules may not hold true in less formal hearings, such as cases before industrial commissions. For example, in the case of *Nicotra v. Bigelow, Sanford Carpet Co.*,²⁶ a doctor stated that he could not answer a particular question from personal experience and then read to the commissioner a statement concerning the matter from a medical book. The employer contended that it was error for the commissioner to receive the statement in evidence, but the court held that this contention overlooks the nature of the hearing before the commissioner. A statute²⁷ provided that the commissioner shall not be bound by the ordinary common law or statutory rules of evidence or procedures, and he is therefore permitted great latitude in the admission of evidence. In another case,²⁸ the plaintiff's objection

²⁴ 12 Cal.2d 558, 86 P.2d 99 (1939).

²⁵ *Thompson v. Ammons*, 160 Ga. 886, 129 S.E. 539 (1925).

²⁶ 122 Conn. 353, 189 Atl. 603 (1937).

²⁷ CONN. REV. GEN. STAT. § 7447 (1949).

that the commission resorted to standard medical textbooks to form and justify its conclusions as to the nature and likelihood of idiopathic tetanus was held immaterial. "We are hardly in a position," said the Supreme Court of Wisconsin, "to supervise the acquisition or use by the commission of expert learning in various fields which call for administrative action on its part."²⁹

Frequently a medical expert is called upon to state what therapy he would have used in a certain hypothetical case. Since he must keep up-to-date, he will answer in the light of the most recent knowledge on the subject. But if the case in court had originated two years or more prior to the date of the trial, it is conceivable that his course of treatment at the earlier date would have been quite different. Too often on cross-examination an attorney quotes a recognized authority from a text written so long ago that the subject matter has been outdated.

Another frequently used tactic of the cross-examining attorney is to question the medical expert on detailed information which he does not have reason to keep fresh in his mind. Perhaps he hopes to discredit the expert in the minds of the jury. A story which was told at a National Coroners' Convention concerns such questions. A very able psychiatrist was on the stand in California. The defense attorney intended to question him on some detail of anatomy. He said: "Doctor, you studied human anatomy in school. Of course, you are familiar with anatomy?" The psychiatrist replied: "I *was*." The attorney asked him to explain what he meant by his answer in the past tense. Whereupon the witness replied: "There are just two classes of individuals who know all about anatomy. One is the professor in medical school, and the other is the student who just graduated from the course. I am neither."

RECORDS

The most frequent source of exasperation to the attorney is the apparent laxity many physicians seem to display in recording information which is important as evidence in court trials. At the time the patient consults the physician, the doctor is most interested in the medical details and often disregards dates, the exact location of the accident, other persons involved and matters that at the time seem irrelevant to him.

A highly successful medical witness whose records have always been something to be proud of keeps on his desk a thirteen-point check list:

1. Dates are accurately entered. Every visit is dated, as is every telephone call and conference.

²⁹ *Gmeiner & Grearson v. Industrial Comm'n*, 248 Wis. 1, 20 N.W.2d 543 (1945).

³⁰ *Id.* at 4, 20 N.W.2d at 545.

2. The source of the patient is written down. If the lawyer sent the patient to the office, that fact is entered.
3. The "how," "when" and "where" of the accident are completely explained.
4. Hospitalization data are obtained and entered in the history. Specifically, the doctor includes (a) the name of the hospital; (b) hour and date of admission and discharge; (c) whether sutures were inserted, and how many; (d) whether the patient was conscious, semi-conscious, unconscious, drunk, sober, walking or not, when admitted. The doctor includes this information in his record even though he can testify only to those facts of which he has personal knowledge.
5. The patient's own words are used in writing the history and complaints. For instance, if the patient says that last year she had an operation on the "womb" or an attack of "Bright's disease," it is written that way, and not as "hysterectomy" or "nephritis."
6. In all cases, no matter where the lesion is, five basic facts are recorded among the findings. These are height, weight, blood pressure, pulse, and the size and place of scars. Scars are measured preferably in inches.
7. Findings of the examining physician are carefully separated from information acquired from other sources. If the word "anxiety," for instance, appears in the examination, it must be so placed that it is apparent whether the doctor found that the patient showed anxiety or whether the patient said he suffered from anxiety.
8. Any items not in the doctor's handwriting are initialed by him. If the nurse took height and weight, the physician cannot testify that on that date the patient weighed so much; but if he can honestly say that the weight was taken at his request and under his supervision, he may testify about it. The doctor's initials serve to corroborate his statement.
9. The findings of a radiologist are entered in the record after the doctor has reviewed the films and confirmed the report. The doctor is then able to testify about his own interpretation of the x-ray.
10. The originals of all laboratory reports are kept in the file. The date on which such procedures were ordered is indicated in the doctor's handwriting, as well as the date on which the report was received and an abstract of the findings.
11. The financial data are either copied on the clinical record or, if separately kept, removed and attached to the record when it is brought to court. This includes bills sent and fees received, with dates, and a note of who actually paid the fees.
12. A carbon copy is retained of every record, report and letter sent out. There are no exceptions to this rule. If a report is filled out on a

form, the questions as well as the answers are entered on the carbon copy; the secretary should type the questions on the carbon copy.

13. At least once on the record, and more often if the patient is seen for a long period, a note is entered as to the extent of the disability. The disability should be judged by six indices: (a) How much does it impair earning capacity? (b) How much does it impair vocational efficiency? (c) How much does it impair employability, that is, the patient's chance of getting a new job with this defect? (d) What is the functional (physiologic) loss? (e) Is there any cosmetic defect? (f) Do the emotional effects of the accident cause any disability?³⁰

If the examination of the patient was not complete, the doctor should not be trapped into saying that it was. For example, the lawyer may ask the doctor how he tested the sense of smell. If he acknowledges that he did not do so, the lawyer may point out that smell functions through the first cranial nerve, and "do you mean to tell me that you didn't examine even the first cranial nerve?" Such a question is nonsense, but the doctor may not have the chance to show why. The best practice is to say that he made as complete an examination as the condition warranted.

The doctor should bring his records to court. If he does not have them, the jury may think that he doesn't keep records or that the records would contradict his testimony.

When the doctor refers to his records, he should say that he is "refreshing his recollection." That phrase is important. If he says he is reading from his records, the testimony may be thrown out of court, since the theory is that a witness testifies about what he knows and remembers. The court assumes that the doctor sees many patients and that he cannot remember details about all. But as he looks at his record, he does remember. The carbon copy of his report to the lawyer is often the best springboard for the doctor's testimony.

If records are brought into court and referred to by the witness to refresh his memory, they need not be the original records.³¹ However, if nothing will serve to refresh the doctor's memory, then his records may be offered in evidence. But in this latter situation they must be the originals and other conditions must also be met.³²

RULES OF CONDUCT

Most of the foregoing has been directed to attorneys and physicians. The following comments are directed to physicians as suggestions for their appearance in court:

³⁰ MEDICAL ECONOMICS 66-67 (March, 1947).

³¹ 3 WIGMORE, EVIDENCE § 760 (3d ed. 1940).

³² 3 *id.* § 749.

Dress, appearance and bearing are all under the observation of the jury. Quiet dignity, confidence and humility should be displayed.

Notify the court attendant that you have arrived and ask him to pass the information along to the counsel table.

Be scrupulously honest in testimony.

Do not argue.

Do not talk too much.

If you do not understand a question, or do not know the answer, say so.

Do not answer hostile counsel too quickly; give your lawyer a chance to object.

Combat the temptation to use technical terms. "I found a cut an inch long" is more effective than "Examination revealed a laceration 2.5 cm. in length." Many doctors cling to the idea that technical terms impress the jury, but actually most juries resent them.

Do not be partisan in attitude.

Do not try the case; let the attorney do that. If an honest answer to a question by the attorney for the opposite side seems to you to be damaging to the side on which you are testifying, do not hedge but give the honest, concise answer and trust your attorney to bring out the proper application for this case. This requires that the attorney have previous knowledge of such a possibility, and therefore there must be a pre-trial conference between the attorney and the medical expert.

Be convincing but do not be prejudiced or belligerent.

In conclusion it is hoped that this discussion in which the attorney and the physician can be indoctrinated in each other's problems will eventually result in the development of a plan for the choice of procuring and putting before the judge and the jury proper medical expert testimony which will be impartial and based on a complete analysis of all the medical facts pertaining to a particular case. This type of plan can be developed through the cooperation of the court, the bar and the medical associations, and through this means expert medical testimony can be placed on a firm foundation.

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