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A Practical Approach to the Use of Expert Testimony

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ADDRESS

A PRACTICAL APPROACH TO THE USE OF EXPERT TESTIMONY*

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I. INTRODUCTION

I NEED HARDLY URGE THE IMPORTANCE OF EXPERT WITNESSES. With ever increasing frequency, trials in the state and federal courts, civil and criminal, tort and otherwise, turn upon expert witnesses. It is fair to say that it is impossible for a lawyer to proceed with any confidence these days unless that lawyer has a very good grasp of the considerable body of law that has been developed with respect to expert witnesses. By a considerable body of law, I refer specifically to segments of three separate structures of doctrine: that part of the law of evidence with respect to expert witnesses; the very important part of the law of professional responsibility with respect to expert witnesses; and finally, a very considerable part of the law of trial advocacy for trial technique.

It is my purpose here to weave together those three bodies of law so as to provide you with a recapitulation of what the trial lawyer needs to know when coping with the problem of expert witnesses.

I will raise the questions that a lawyer is likely to put to himself when preparing a case involving expert witnesses, followed by an explanation of how to deal with the expert witness in court. After raising particular issues, I will sketch out the answer that you will find, and since we need to look at some particular jurisdiction, I will pay attention to the federal jurisdiction and the twenty or so states that have enacted the Federal Rules of Evidence. Then, by way of contrast, I will refer to some New York cases, simply because first, I know them best; second, New York has not enacted the Federal Rules of Evidence; and third, New York is, I suppose, the major jurisdiction on the other side of the road from the Federal Rules of Evidence. New York tends to take a different view from the federal view on many of these topics, and an examination of the New York approach will provide an educational contrast to the Federal Rules.

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II. THE NEED FOR EXPERTS: THE PRE-TRIAL PERIOD

The first question is this: How do you identify or recognize an issue in connection with which it will be proper to call an expert to the stand? I suppose it never occurred to me that the question was there to consider because, at least in my experience as a judge, in just about every case it was beyond argument that it was proper to call an expert.

Take, for example, a "spleen-out" case where the main issue is the amount of damages. The plaintiff's attorney will call an expert who will testify that the spleen plays a vital, though as yet unidentified, role in the body's immunilogical system. The expert will testify that without a spleen this little boy has a life expectancy of a great big question mark, and the case is worth at least half a million dollars. The defendant's attorney will call an expert with equal credentials to testify that the spleen is left over from the days when we were fishes; it is a vestigial organ like the appendix. It is of no significance whatsoever. The little boy is just as good now as he was before he was run over; he is probably *better* now as a matter of fact—maybe he ought to pay *us*.

Now, on an issue like that, obviously, expert witnesses are necessary because the jury is totally incapable of resolving the question of damages, which turns upon some assessment of the importance of the spleen.

But take a different kind of case. Suppose you have a two-lane highway, and in the middle of the night, two cars approach each other on the highway travelling in opposite directions. Each car is driven by a lone driver, and there are no bystanders. Suddenly, there is a head-on collision. When the smoke clears, one car is over here, and the other is over there. There are skid marks and debris on the highway and two dead drivers. One estate sues the other estate. Now remember, there are no passengers, no survivors and no bystanders. With respect to liability, the decisive question is: On which side of the road did the collission occur? Once you decide on which side of the road the collision occurred, you know which driver had gone on the wrong side of the road and you know who's in the right and who's in the wrong. I have given you the facts of a case that came up in the United States District Court in North Dakota in 1954.[1]

The estate that was on the plaintiff's side of the table called an expert in accident reconstruction. Nobody would argue his credentials. The expert undertook to tell the jury that based upon his analysis of the skid marks, the debris, where the cars ended up, etc., the collision occurred in the northbound lane, which means, of course, that the driver who was heading south had gone over on the wrong side of the road. Immediately, defense counsel leaped to his feet and protested, "objection, not a

[1] Ern v. Consolidated Freightways, 120 F. Supp. 289 (D.N.D. 1954).

proper subject for expert testimony." "Objection overruled," said the federal judge, "the expert may testify."[2]

I have given you the facts of that federal case, but simultaneously I have given you the facts of a New York State case.[3] The accident reconstruction expert was called. The objection was made, "This is not a proper subject for expert testimony," and the trial judge overruled the objection. The trial judge's overruling of the objection was reversed, however, by the appellate court.[4] This is not ancient history; this was just a few years ago.

Now, if the federal judge decided that the expert may testify, and the state judge decided that the expert may not testify on the very same issue, the keen legal thinkers will recognize that probably two different rules are at work. The federal judge, who made his decision back in 1954, was, of course, not working under the Federal Rules of Evidence.[5] He was working against the background of a fair number of federal decisions articulating the rule which was later codified in Federal Rule 702,[6] and which is followed in those states which enacted the Federal Rules of Evidence. It is a relaxed kind of rule which is not very demanding. It opens the door quite wide to the receipt of expert testimony. The federal rule might be stated as follows: "If the expert's testimony will help the jury, it's admissible." In that highway collision case, obviously it is going to help the jury to have the expert explain to them how he figures out the force vectors and the like.

The state rule, the so-called New York rule, is more demanding. It is a stringent rule which closes the door considerably to the receipt of expert testimony. Under the New York rule, the expert may not testify merely because his opinion will help the jury, but only when his opinion is *necessary* to the jury. That is a very different test from the federal rule. The argument on the side of the lawyer who wants to keep the expert off the stand will be that perhaps it will be helpful to the jury to have the expert give his opinion, but it is not necessary or essential. A lay jury can manage to figure this out for themselves.

The ramifications of the difference between the federal rule and the New York rule can be illustrated with two cases:

First case: It is my habit, whenever I talk about this case to groups of lawyers, judges or lay people, to ask them to be the judge. I am going to

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[2] *Id.* These statements are characterizations of the events which transpired at trial and are not direct quotations. This style will appear throughout this Address.

[3] Stafford v. Mussers Potato Chips, Inc., 39 A.D.2d 831, 333 N.Y.S.2d 139 (1972).

[4] *Id.*

[5] The Federal Rules of Evidence did not become effective until 1975. FED. R. EVID. 1103.

[6] *See* FED. R. EVID. 702.

give you the facts of a real case. I am going to give you everything you need to know to make the decision. You are a federal judge, so the standard is that the expert may testify if it will help the jury. You have been presiding for some weeks over a serious and highly publicized criminal case. You are on your mettle on all criminal cases. This case is extremely special due to its wide notoriety.

The prosecution's principal witness has testified in essence that the defendant is guilty. He knows this to be so due to his own knowledge, because he saw the defendant do what was alleged in the indictment. This prosecution witness has been cross-examined for days and he has not budged one bit from his testimony.

The defendant has taken the stand and has insisted that he did not do it, and that the prosecution witness is lying. The defendant has been cross-examined extensively and he has not budged one bit from his testimony.

There is corroborating evidence on both sides but it is about equal in weight and balances out. What the jury ultimately has to do is assess the credibility of the prosecution witness and the defendant. If they believe the former, the verdict is guilty. If they believe the latter, the verdict is not guilty.

You are now at rebuttal. You are resting comfortably in the robing room at about quarter to ten in the morning, ready to go onto the bench at ten o'clock, having your cup of coffee, your cigar, your morning brandy or whatever it is you need to wake you when there is a knock on the door. Your heart skips a beat. Who walks in but counsel on both sides and the court reporter. The defense counselor makes the following application:

"Your Honor, of course, understands that this case boils down to a matter of the jury assessing the credibility of those two witnesses. In that connection, your Honor, we have an expert outside who we propose to put on the stand this morning. We are raising with you the question whether you will overrule us if we put that expert on the stand. The expert is a psychiatrist, but this is no ordinary psychiatrist. This expert is the immediate past president of the American Psychiatric Association and is a Professor of Psychiatry at the Cornell Medical School. He has just been appointed Professor of Medicine at the Harvard Medical School and Chief of Psychiatry at Massachusetts General Hospital. He has studied medicine at Johns Hopkins and psychiatry in Vienna and Zurich. He is unquestionably the pre-eminent American psychiatrist. This man has never clinically examined the prosecution witness, but he has observed him on the stand. He knows the facts of the witness' life. The witness is a professional writer. The psychiatrist has read virtually every word this witness has ever published. He is willing to take the stand and state, as his professional opinion, that the prosecution witness is suffering from a personality disorder, characterized by a tendency to make false accusations and tell lies. "Your Honor, I see that you're

laughing. With all deference," says defense counsel, "I remind your Honor that it's not your job to assess the credibility of the witness. It is your job simply to rule upon my application. May I call the witness to the stand?"

Government counsel, of course, says, "This is the first time in the history of Anglo-Saxon jurisprudence that such a thing has ever been suggested."

What is your rule? May the witness testify? May the witness not testify? Now, don't call for the law clerk. There is nothing to look up in the library. All that you need to know is that the test, in a federal court, is whether the expert will help the jury. This is probably the twenty-fifth time I have put this question to groups of people, both the professionally sophisticated and otherwise, and the outcome is always the same: A very large majority says, "I will not allow the witness to testify." I think it is because all of us tend to respond to the basis of our own reaction to the psychiatrist. We think that it's a joke and so we won't let him testify, but that is not our job. Defense counsel had a valid point. Our job is simply to apply the federal rule, which is a very relaxed one, with respect to the propriety of the expert testifying.

That is a real case, and it is as far as any judge has gone, to my knowledge, in applying the federal rule. The psychiatrist was named Carl Binger. The judge was named Henry Goddard. The witness about whom the psychiatrist was going to testify was named Whitaker Chambers. And the case, of course, is *United States v. Hiss*.[7]

The judge ruled quite properly on the basis of federal law that the psychiatrist could testify.[8] If ever you have to argue for the propriety of calling an expert, the case is far beyond anything you are likely to encounter.

Dr. Binger did testify, and his cross-examination was one of the bloodiest scenes ever played out in an American courtroom. To this day, I am positive that Alger Hiss rues the judge's favorable decision. It would have been much better for Alger Hiss if the judge had said, "I will not allow this man to testify," because of the boomerang effect. The prosecution so cut up Dr. Binger that it could not help but have an effect on how the jury assessed the rest of the case. This, of course, was the second trial, the one in which the jury found Alger Hiss guilty.[9]

Now, I said that I would talk about two cases. That was my federal case. Let me give you a fairly recent New York case to show you how the New York rule really has a cutting edge. Assume that you are in a jurisdiction not bound by the federal rule, and that if you research the

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[7] 88 F. Supp. 559 (S.D.N.Y.), *aff'd*, 201 F.2d 372 (2d Cir. 1950), *cert. denied*, 340 U.S. 948 (1951).

[8] *Id.*

[9] *See* United States v. Hiss, 107 F. Supp. 128 (S.D.N.Y. 1952), *aff'd*, 201 F.2d 372 (2d Cir.), *cert. denied*, 345 U.S. 942 (1953).

issue you will discover that it has never been litigated in your state. The issue has been litigated in New York, and the New York rule has been followed in decisions in other states. But for the most part, the matter has never come up because lawyers have not realized that it is there to be raised. If you are arguing on the top of the rostrum, an open question in this jurisdiction, let me show you how much progress you can make with it.

The case is *Kulak v. Nationwide Mutual Insurance Co.*[10] Mrs. Kulak is the victim of an automobile accident. She sues her tort-feasor and her tort-feasor, of course, has automobile insurance. These are not the exact numbers but this is essentially what happens. A day or so before the jury is to be picked to try that case, plaintiff's counsel goes to defense counsel who really is the insurance company's lawyer, and says: "Look, John, liability in this case is absolutely clear, and short of a miracle, you can't win on liability." "Agreed," says the defense counsel. Plaintiff's counsel continues, "And the specials are thus and so, and the pain and suffering obvious. Look at the deformed arm and all the rest of it. It seems to me that the jury verdict here is going to be in the range of a quarter of a million dollars. You've got a one hundred thousand dollar policy. Pay me ninety thousand dollars, take back ten thousand dollars to the claims adjuster, and the game is over." Defense counsel says, "No. Let's go to trial."

They go to trial. Was the plaintiff's assessment of liability correct? Absolutely, as the jury resolves the case against the defendant. Was the plaintiff's view of damages correct? Absolutely, the verdict was for one quarter of a million dollars.

What does defense counsel do? He says, "Win some, lose some." He pays out one hundred thousand dollars, puts the policy on the table, and walks away, leaving the plaintiff one hundred fifty thousand dollars short. The defendant has no assets, except for the insurance policy, which has been placed on the table. Does that mean the plaintiff can do nothing to collect the additional one hundred fifty thousand dollars? Of course not, because the defendant does have an additional asset: He has his own claim against *his* insurance company for unreasonable refusal to settle and the claim is assignable.

The defendant assigns to the plaintiff the defendant's claim against his own insurance company, takes a general release, and then goes home. The plaintiff brings a second lawsuit, not against his tort-feasor but against his tort-feasor's insurance company, seeking to collect the additional one hundred fifty thousand dollars on the theory that it is the appropriate damages given the insurance company's unreasonable failure to settle.

What is the substantive rule? No lawyer or insurance company has a crystal ball. There is no legal obligation to predict accurately what the

[10] 40 N.Y.2d 140, 351 N.E.2d 735, 386 N.Y.S.2d 87 (1976).

outcome of the case will be, but there is a legal obligation to act reasonably. So the question is: Did the insurance company act reasonably when it turned down the plaintiff's proposal of the ninety thousand dollar settlement? That is what the jury in the second trial must decide.

In that second trial, the plaintiff calls two experts. The first expert states, "I am experienced in this field of work." Everybody agrees that he is experienced. There is no question about his credentials or his expertise. The expert continues, "And in this field of work, this is how you assess the likely size of the verdict." The first expert tells the jury in that second trial about the formula for predicting the amount of the jury verdict in that type of case.

Then, the second expert takes the stand and says to the jury, "Working with the formula the first expert gave us, and feeding in the numbers from the first trial, what the specials were and what the lost earnings were and so on, you come out with the following answer." In short, he indicates that what the defense counsel did was *not* reasonable because he should have expected a verdict in the range of a quarter of a million dollars.

The highest court of New York reverses on the ground that while it was proper for the first expert to testify, it was not proper for the second expert to testify.[11]

So you see what I meant a moment ago when I talked about being able to make some progress here. You can, in some cases, keep out the other side's expert, assuming that it has not been resolved in your jurisdiction.

The reasoning of the New York Court of Appeals is as follows: The man in the street, who is, after all, our juror, cannot possibly know what these formulas are. For that reason, the first expert was properly allowed to testify, because the rule is that the expert may testify if it is necessary to the jury, and, obviously, this was necessary to the jury. But once the jury had the formula of the first expert, it was a matter of elementary school arithmetic to feed in the numbers and do whatever calculations were necessary to come out with an answer. It is helpful to have the second expert do the arithmetic for you on the blackboard, but it is *not essential.* Since it is not essential, the second expert should not have been allowed to testify. Hence, the verdict is reversed and we send it back for a new trial.[12]

The second issue is of interest, generally, to those lawyers concerned about the ethical position of lawyers. I am amazed that lawyers, generally, are unaware of developments in the last few years on this point. The question is a very practical one, but it invokes professional responsibility

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[11] *Id.*

[12] *Id.*

and legal ethics in connection with expert witnesses: How do you secure the appearance of the expert in court?

Of course, most of you practice in a setting where this is never a problem. The expert is, of course, paid. It is his time. He earns a living that way, and he must be paid. The attorney makes the arrangements to pay him and he comes to court. We speak within the family; there is nothing shameful about it. Most of the time the expert is kind of a "house expert," someone whom we have used before. Many of you have a "stable" of experts, ten or fifteen doctors, who are indeed doctors in the sense that they have licenses to practice medicine, but practicing medicine is just sort of a complimentary term for what they do. These are doctors who prefer to be in court. They are very good at it; they enjoy it. They all look like Spencer Tracy; they make an infallible impression upon the jury and each side then produces somebody drawn from that group of experts. In the normal situation, you just call up somebody, you work things out financially, and the expert appears in court.

But suppose you can't work it out? Let us suppose, for example, that you are a lawyer practicing for a public interest law firm. You need an expert and you do not have the money to pay him. What can you do? Well, if you are covert, the first thing that will occur to you is to talk to the expert over the phone. The expert has just told you that he will be glad to come to court to testify and his opinion is helpful to your side of the case, but he has to be paid and his fee will be five hundred dollars. As an ingenuous but realistic lawyer, you say: "Doctor, I'm afraid we don't have the five hundred dollars."

The expert says, "Well, in that case, good luck to you, but I guess I'm not going to be there in court."

You say, "Doctor, don't hang up. We don't have the five hundred dollars but tell me, are you by any chance a gambling man?"

The doctor may well respond, "Well, now that you mention it, I like to go to Las Vegas every weekend."

"Well, doctor, I make no promises, of course, but if we win this case, there will be a pot of gold at the end of the rainbow, and ten percent of that pot of gold will be yours."

"Well," says the doctor, "that's a different story. It's a gamble, like you say, and we may lose. The thing is that if we do win, I've got ten percent of the pot of gold. You've got a deal."

Do you have a deal? Yes, I suppose you do have a deal. Is the lawyer also in trouble? You bet your life he is in trouble! Disciplinary Rule 7-109(C) states that the retaining of an expert on a contingent basis is an unprofessional act.[13] It is not that you can argue it either way. You have done something unethical when you retain an expert on a contingent basis and you are going to be in trouble. The reason is this: If you per-

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[13] MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 7-109(C) (1981).

mit lawyers to retain experts on a contingent basis, that will encourage litigation. That is really what it says. Isn't that absurd? We allow lawyers to be retained on a contingent basis precisely because it will encourage litigation. That is the whole idea. If you are cynical, you say the whole idea is to permit lawyers to earn a living. If you are not cynical, you say that the idea is to permit poor people to come to court and get their problems decided. Yet we say that an expert may not be retained on a contingent basis because that would encourage litigation.

An argument can be made that the real point of Disciplinary Rule 7-109(C) is that it discriminates ambiguously between rich litigants and poor litigants. Rich litigants can retain an expert. A poor litigant will not be able to retain an expert because he does not have the money and because he is actively forbidden to retain the expert on a contingent basis. If you think this is a haywire argument, please note that it has been raised once, and the United States District Judge before whom it was raised agreed with the argument and declared Disciplinary Rule 7-109(C) unconstitutional under the equal protection clause.[14] He was Judge Duling of the Eastern District of New York. Judge Duling, however, was reversed on appeal,[15] so the only decision which has considered the constitutionality of Disciplinary Rule 7-109(C) held that it is not unconstitutional under the equal protection clause.

Again, for lawyers, this is not an issue of merely theoretical, academic or general interest. One of the reasons you have so much trouble getting an expert if you are without resources is that an expert is in a different position from an ordinary witness. That different position might be phrased as follows: The ordinary or lay witness, for example, the bystander who happens to see the two cars collide, has an *obligation* of citizenship to come to court and give the judge and jury his perceptions. That obligation is invoked or triggered merely by serving upon John Q. Bystander a subpoena and tendering a ministerial witness fee of two dollars and fifty cents, or whatever it is in your jurisdiction. If he does not come, several things will evolve. If necessary, a policeman will go out and bring him to court.

The common law, however, has said that an expert witness is in a very different position. The expert witness has an opinion. The common law traditionally regards the expert witness' opinion as his private property. He may give it away, he may sell it, but it may not be compelled. The perceptions of John Q. Bystander may be compelled, but the expert witness' opinion may not be compelled. I heard in the very early days in New York, and I daresay it is the same in every other jurisdiction, that if you purport to serve a subpoena upon an expert to obtain his opinion and tendered the expert the two dollar and fifty cent witness fee, he

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[14] Person v. Association of Bar of City of New York, 414 F. Supp. 139 (E.D.N.Y. 1976), *rev'd*, 554 F.2d 534 (2d Cir.), *cert. denied*, 434 U.S. 924 (1977).

[15] 554 F.2d at 534.

will tear it up, he will disregard it, and if you have the temerity to ask the judge to send a policeman to go out and arrest him, you will be laughed out of court.

For example, you are a young attorney, you do not know much about how these things work but you have your first case, and lo and behold, it is a spleen-out case with no issue on liability. The question is simply the amount of damages. In particular, what is the significance of the spleen? You go to the public library and you discover that on the faculty of the New York University Medical School is a man who won the Nobel Prize about fifteen years ago for work on the physiology of the spleen. His view is that the spleen *does* play a vital role in the body's immunilogical system and without a spleen, your client has a significantly diminished life expectancy.

So, you call him up and ask, "Will you come to court, doctor?" "No," he replies, and since you can't ethically propose a contingent contract, you say to yourself, "I'll serve him with a subpoena, give him a subway token and then he will have to come to court and tell me about the work for which he won the Nobel Prize in medicine." Of course, he won't come to court until you dare to ask the judge to hold him in contempt or have him arrested. The judge will have none of it. But the traditional and well-settled view of this situation is in the process of change. It is so recent that I cannot tell you how far it will go, but I can tell you the authority upon which I stand when I say that it is in the process of change. It's a marvelous case and I cannot explain why it has not been more widely noted in the literature. It is a decision that arises out of the IBM antitrust case that has been on trial before a judge in the Southern District of New York for six years.[16] I have not misspoken. The trial is in its seventh year. The trial! Nonjury! Not pre-trial, not motions, not discovery. Seven years of trial! And if you ask me what in heaven's name are they trying for seven years, I must tell you that I do not know. The lawyers don't know and the judge doesn't know and not even God by this time knows. It is impossible to comprehend what in heaven's name has been going on for seven years. But, there you are.

I daresay that all of you do not have more than a mere bowing acquaintance with the way an antitrust case is tried these days. Take the IBM antitrust case. It is a civil action. The government says, "Let's break it up. They are too big. They have monopoly power." As to factual issues, as we recognize factual issues, there is no dispute. How many electric typewriters did IBM sell in 1977? Look at the records. Nobody quarrels with it. How many computers did they sell? All of that is not in controversy. What is in controversy—what they have been trying for seven years—boils down to matters of opinion. Do they have monopoly

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[16] *See* Kaufman v. Edelstein, 539 F.2d 811 (2d Cir. 1976). *Accord* Carter-Wallace, Inc. v. Otte, 474 F.2d 529 (2d Cir. 1972), *cert. denied*, 412 U.S. 929 (1973).

power? Are they too big? That is what you try in an antitrust case. It works this way, and it is no different from a major court case: The plaintiff—in this instance, the government—will call fifty percent of the economics professors in the United States. Each and every one of them will testify that IBM is a kind of "King Kong" in the business world. It is an enormous enterprise whose power represents a threat to the survival of the republic. What you have to do is break it up instantly! When it is the defendant's turn, they call the other fifty percent of the economics professors, each and every one of whom testifies, "Not IBM, it's kind of a 'Mom and Pop' store. Therefore, you should leave them alone."

About the third or fourth year of trial, the government heard about three men, and when they heard about these three men, the little hairs on the backs of their necks stood up. These three men were not professors in economics but did have graduate degrees in economics or business administration. Do you know what they were? They were investment bankers. One was a senior partner in one of the major accounting firms. These were business people who, as a part of their own business activities, had made a lengthy study of the computer industry in order to better advise their own clients. Significantly, each of them had come to the conclusion that it would inure to the economical health of the computer industry to break up IBM. Now you see why the government's hackles stood on end. Here are three men who are *not* academic, who are probably registered Republicans, and who are on record that IBM ought to be broken up. These are witnesses made by heaven.

The government approaches these three men. They are not associated in business. They are different people working for three different investment banking houses, but the conversation with each of them was the same. The government goes to them and says, "Will you testify?"

"No."

"Why? Do you want to be paid? Name your price. It doesn't matter. We just print the money. We'll print some more for you."

These three men say, "We know that is the way you do it, but that's not the point. No matter what you pay us we're not going to court because first, it's inconvenient; second, it's undignified; third, it's a lawyer's kettle of fish; and fourth, we just don't want to be in the position of helping the government in this case even though we are on record that it would work to the economic well-being of the computer industry to break up IBM."

So the government says, "What do we do now?" They have a brain session and cause a subpoena, an ordinary witness subpoena, to be served upon each prospective witness.

Now, these fellows are not helpless. They're members of investment banking firms, so each of them calls the Wall Street law firm that represents his employer and tells the Wall Street law firm, "Hey, I got this

subpoena. What should I do with it? They tried to subpoena me as an expert."

Many of you have had dealings with Wall Street law firms or Wall Street-type law firms, so you know the reaction of the Wall Street law firm. The senior partner, upon being told what has happened, says over the telephone, "That's a problem."

Before the sun has set and come up one more time, a task force has been organized. The senior partner, two middle level partners, five junior partners, seven associates, twelve paralegals and thirty secretaries work twenty-four hour shifts among them to prepare a motion to quash the subpoena. After running up approximately $175,000 in time charges, they've got the motion to quash the subpoena.

You've got the three motions all before Judge Edelstein and, to everybody's amazement, Judge Edelstein denies the motions. He says, "No. They're going to have to come testify." The federal practitioners in the room know that there's a problem as to whether you can appeal such a ruling. Maybe you can, maybe you cannot, because appealability of interlocutory orders is a currently unresolved issue in the federal courts. So, to be on the safe side, they filed a notice of appeal and simultaneously moved in the Second Circuit for an extraordinary writ in the nature of a mandamus. The style of the case is *Kaufman v. Edelstein*;[17] Kaufman was one of the three men who made the motion for mandamus, and Edelstein was the judge. The panel that settled that case was made up of three judges as experienced and distinguished as any three judges in the United States, Henry Friendly, Murray Gurfein and William Mulligan. These are men of vast experience as practicing lawyers, as well as judges, as good as judges ever get to be. They unanimously affirmed Judge Edelstein, not on procedural grounds, but on the merits of the question.[18]

The following is a fair summary of the opinion written by Judge Friendly. The old common law idea that an expert's opinion is his private property, to give away, sell or withhold as he wished, must yield to the reality of modern litigation. With ever increasing frequency, litigation, these days, turns upon the testimony of experts. It follows, then, that to say to an expert, "You can withhold your opinion at will," is as much as to say to an expert, "You may obstruct justice whenever you please to do so."

It is time to equate the status of the expert witness to the status of the ordinary witness. If the ordinary witness has an obligation of citizenship to give the jury his perceptions, then the expert witness has some kind of obligation of citizenship to give his opinions to the judge or jury. Therefore, we hold that these men's testimony is compellable. Of

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[17] 539 F.2d 811 (2d Cir. 1976).

[18] *Id.*

course, the client has to pay something more than the ministerial witness fee for the testimony. The circuit court handled that very sensibly—they said, "We're not going to talk about that at this time; we're going to leave it to the witnesses and the government to work out. If they can't work it out, then come back to us." I am informed, unofficially, that the amount of the witness fee was never the problem. It was finally agreed what the compensation would be and the three men did testify.

Now, reverting to my status as a law professor, let me try to predict the future. I can't really predict the future, but I can point to the two rules which may evolve, one of which will represent the trend of doctrinal development.

One rule: *Kaufman v. Edelstein* will become an important case ultimately leading to a reformulated rule. An expert witness may be compellable, subject only to the parties agreeing on the amount of compensation, and if they cannot agree, the judge will decide upon reasonable compensation. Putting that aside, you can get an expert to court the same way you get an ordinary witness to court, by serving him with a subpoena.

The other rule: We all know cases which fit this pattern. Twenty years from now, *Kaufman v. Edelstein* will be nothing more than a historical curiosity. It will be understood that *Kaufman v. Edelstein* is not the precedent of general application. As courts like to put it, it must be limited to its facts, which means *Kaufman v. Edelstein* is authoritative only the next time the government sues IBM, the case is being tried by Judge Edelstein and the three men, one of whom is named Kaufman, decline to come and testify as experts. Otherwise, it doesn't mean anything to anybody.

My hunch is that the former is more likely to become the prevailing approach. Lest I be accused of having misled any court, in *Kaufman v. Edelstein*, the experts had already done the work preliminary to arriving at an opinion, so all that was required of them was to come to court and *repeat* the opinion to the jury.

What do you do when you've got an expert whose expertise makes it possible for him to do the work that will lead to an opinion, but he has not yet done the work? Is there any way of compelling him to do the work so as to get him to court with his opinion? On that, *Kaufman v. Edelstein* is absolutely silent and all we can do is guess. That is enough discussion, perhaps more than enough, for the question of getting the expert to come to court.

III. USE OF EXPERT TESTIMONY IN COURT

We are now in court. We have an issue on which it will be proper for the expert witness to testify and we have arranged for the expert to be in court. Now what happens? Of course, what happens is the direct examination of the expert, followed by the cross-examination of the expert

and concluded by final argument to the jury about the credibility of the expert. Those major matters represent the three other questions I would like to address.

A. *Qualifying the Expert Witness*

The next question is: What is there to say about the direct examination of an expert? Were this a group of lawyers who are not in court every day, I would pronounce something like this: If you went to law school as long ago as I went to law school, almost everything we learned in evidence about the direct examination of an expert is no longer the law. There has been a revolution in the development of the law of evidence with respect to matters that come up on the direct examination of an expert, at least in the federal courts. Likewise, in those states which follow the Federal Rules of Evidence, the trial attorney must be up-to-date in his knowledge of the rules of evidence because he cannot function on the direct examination of an expert without having those rules right in his hand. So, let me review them with you, talk about the Federal Rules of Evidence and give you a couple of cases to illustrate them.

You begin the direct examination of an expert, any kind of an expert, any kind of case, with a qualifying of the expert. You qualify the expert in the first part of the direct examination. To qualify the expert means to ask the questions designed to show that the expert possesses expertise, that is, an expert by reason of education, experience, independent work, or whatever it may be.

I don't think I ever had a lawyer in front of me that didn't know you began the direct examination of an expert by qualifying him. But almost no lawyer seemed to take sufficient advantage of the opportunity for advocacy by qualifying the expert. All attorneys seemed to go through it mechanically, pro forma, as if they were doing it by rote.

This is a grave mistake. It is an advocate's mistake as well as a technical mistake. It is based upon a partial view of what you're doing when you qualify the expert. These lawyers knew that when you qualify an expert, in a manner of speaking, you are talking to the judge. And you're saying to the judge something like, "Your Honor, doesn't this witness possess expertise beyond that of the man or woman in the street?," hence making it proper for this witness to give his opinion under the expert witness exception to the nonopinion rule. It tells the judge, "Let him give his opinion."

It is almost impossible not to persuade the judge to let the expert give his opinion. It takes very little to qualify as an expert in that sense. You need not be a Nobel Prize winner. If the issue is an issue of medicine, all you need do is show that this person has a license to practice medicine. In many jurisdictions a license is not necessary—that the witness is a graduate of a medical school will suffice. That he has not yet practiced, that he's yet to win a Nobel Prize in medicine, goes to the *weight* of his opinions, not to the competence of it, and not to the judge.

For example, if you need an expert witness to testify against General Motors or Ford on how the braking system of an automobile operates, you do not need a Ph.D. in automotive mechanics from M.I.T. A mechanic from the gas station down the road that has been doing this kind of work for thirty years will be allowed to give his opinion. Whether the jury buys the opinion is a different story. So, it's almost impossible to fail to persuade the judge to allow the witness to give his opinion which is perhaps why the lawyers don't work very hard at it. They sleepwalk their way through.

But that's only a part of what's going on. It is just one of the two things that you are doing. When you qualify an expert, you are talking to the judge in the manner that I described. But simultaneously, you are talking to the jury and you are saying to the jury something like, "Ladies and gentlemen, listen to this expert's credentials. Have you ever heard anything so impressive in your life?"

By the end of the case you will be arguing to the jury that it ought to *accept* your expert's opinion. I will return to this later, but never forget that the one thing the jury cannot become is a physician or an economist or an engineer. They cannot master the substance of whatever the discipline is that's involved. They have got to assess credibility by using other things that are accessible to them. And one of the things that is accessible is qualifications, or weighing your expert's qualifications against those of the other expert. So you've got to work at it. You don't sleepwalk your way through what you've prepared as carefully as you've prepared everything else. There's no one right way to do it, obviously. Everything depends upon the expert, the feel of the courtroom, who's the judge, who's the opponent, what's going on in the jury room, etc. But you do your best to develop it and build it and end at a high point, assuming you're lucky enough to get Dr. Elko, that's my Nobel Prize winner, into court. Do something with it, begin with junior high school where he began, when he came to the United States and how he had to learn English before he could go to work as a biochemist and all those years of long nights in the laboratory, working, working, cranking, cranking, publishing, publishing, and finally at the end, a doctor as a result of all this work.

"Have you received any professional recognition from your colleagues in the field of medicine?"

"Oh, well—."

"Come on, Doctor."

"Well, since you insist, I guess so. I have received some sort of—a couple of years ago, I won the Nobel Prize."

Of course that's the point at which to end your qualifying, because you've come to the climax. Sometimes it's nice to wrap it up in a pink ribbon. It draws the line to show that that first part of the direct is over and it serves as adequate purpose as well. You won't do it with every case, but sometimes you might consider it.

Turning to the judge, after Dr. Elko has announced that he won the

Nobel Prize a few years ago, you say to the judge something like, "Your Honor, I ask the court to declare Dr. Elko an expert in the field of physiology."

Now, you see, all you're doing is saying to the judge, "Your Honor, with respect to that first thing that's going on, whether the expert can give his opinion, have I done it, Judge? Have I done it?" And, of course you've done it, so the judge says, "Yes." How does the jury hear it? The jury hears it as the judge certifying that your expert is an expert. The *judge's* authority begins to be associated with your expert's authority. And since the judge is the ultimate figure in the courtroom, it's a very nice phenomenon to have working for you.

What's happening on the other side? Well, this is elementary. On the other side, of course, you don't want the jury to hear about those credentials, assuming that the credentials are of any substance. So the instant they call the expert, you know it's Dr. Elko, you know he won the Nobel Prize, you know that the judge is going to let him testify. What can you do to keep that from the jury? Leap to your feet the instant Dr. Elko's name is called, and what do you say? You begin with, "Judge, let's save time. There's no need to spend a half hour reviewing Dr. Elko's credentials. I am perfectly prepared here and now to stipulate that Dr. Elko is an expert and entitled to give his opinion under the expert witness exception to the nonopinion rule."

I deliberately would say it in jargon so that the jury doesn't know what I'm stipulating. What the judge should do, I guess, is look over at the proponent. Now, suppose you are the proponent. What do you say? You say, "Oh, no, no, no." The reason you say this is because of the twofold function of this process. The opponent is only stipulating as to the first function, *i.e.*, the expert's credentials, *not* to his credibility. The proponent would ask his adversary, "Are you prepared to stipulate the *credibility* of Dr. Elko?"

"Of course not."

"In that case, your Honor," say you, as the proponent, "I decline the concession and I assert a right to put Dr. Elko's credentials before the jury."

Now, I wonder whether any of you have run into this problem: The judge says, "Wait a minute. I run my court and when there's a chance to save time, I save time. I refuse to let you develop the credentials. You must accept the concession and proceed directly to the substantive part of the direct." This problem has been addressed by a federal court.

It is a reversible error for the trial judge to insist that the proponent accept the concession, and for the trial judge to refuse to allow the proponent to develop the credentials.[19] Unstated in the decision, but obviously implicit, is the situation where you've got a concession and you decline it, the judge can put a reasonable limit on the time you spend on

[19] Murphy v. National R.R. Passenger Corp., 547 F.2d 816 (4th Cir. 1977).

the credentials. He can say, "All right, Counsellor, go ahead and do it, but, please, two minutes, not two days." Whatever is reasonable, it's impossible to say.

1. The Ultimate Issue Rule

In qualifying the expert, and whatever kind it is, ultimately the expert is going to give you his opinion. What if the opinion deals with an ultimate issue? You have a problem. Well, remember what I said. If you went to law school as long ago at least as I went to law school, the law is very different from what you learned. I seem to recall a day in the course of Evidence when the teacher stood up front, and said, "Ladies and gentlemen, the cases are legion in all jurisdictions, that even though everything else is proper for the receipt of the expert's opinion, if the opinion deals with an ultimate issue, the opinion is not admissible. You can't have an opinion on an ultimate issue." And then some bright young person's hand went up and the professor said, "Yes, what do you have to say?"

The student said, "Professor, you can't have an opinion on an ultimate issue, but what's an ultimate issue?"

The professor said, much as Potter Stewart once said, "I can't define it, but I recognize it when I see it." You know it when it comes along. You can talk around it, but you can't really define it. And the only way I can characterize it is this: An ultimate issue is a factual question which, once answered, decides the case. It *is* the ball game. And if you look at it that way, you will recognize what it is. In the head-on collision case, federal and state, with which we started, the question was on which side of the road did the collision occur, and that is the ultimate issue in those circumstances. Once you answer that question, the case is over, at least with respect to liability. There is nothing else to talk about.

The professor was right. You can't define it, but you can recognize it when you see it. The cases *were* legion in all jurisdictions holding that an opinion on an ultimate issue was inadmissible. Those cases are just about universally recorded as outmoded. I cannot say that in every jurisdiction you will find a case overruling those old cases, but if you raise the question, I am sure that will be the court's decision. The old cases are rejected as anachronisms; the better view, the contemporary view, is that an opinion on an ultimate issue *is admissible*, as long as everything else is appropriate for admissibility, of course.[20] This is the unwritten law of every state, with only a few exceptions.

In a very recent federal case coming up from the Fifth Circuit[21] the defendant was charged with maintaining a premises for the purpose of taking bets on horses without having paid the necessary tax to the

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[20] FED. R. EVID. 704.

[21] United States v. Masson, 582 F.2d 961 (5th Cir. 1973).

treasury. A bookie is supposed to have a tax stamp. Now, in effect, he's running a bookie joint without the necessary tax. The defendant concedes that the apartment in question was his apartment. He concedes that he did not pay the tax. The only issue in the case is whether he was maintaining that apartment as a bookie joint. That was the *only* issue. And on that issue, the prosecution's evidence consists of a few reels of tape, recordings of what was being said over the defendant's telephone lines for a period of some weeks. Those recordings were made pursuant to lawful wiretaps. The only difficulty is that when you listen to these recordings, they are audible in the physical sense, but they are absolute gibberish with respect to really comprehending them for a reason which I do not know.

First, I must tell you that the only vice to which I am immune is gambling. It makes no sense at all why it is pleasurable to so many people; hence, I know nothing about the technology of gambling. I gather from the opinion, however, that it is just unthinkable for a bettor to call a horse parlor and say, "Two dollars on Whirlaway in the fourth at Aqueduct." There's a whole language that is used, not even the dialect of English; it is a separate language, totally opaque to the outsider. That's what you hear on these tapes, so that when you play them to the jury, it might as well be Oedipus Rex in the original Attic Greek. The ordinary listener does not know what it means.

The government offers to call to the stand an expert, a policeman, a revenue agent, who's spent his life running around the bookie joints. Now, he has no personal knowledge of this case. He will testify solely and purely as an expert to this effect: "I listened to these tapes, and I tell you that what you hear is the language of placing bets on horses." Once that opinion comes in, the case is over—obviously, the defendant loses. If you keep the expert testimony out, the defendant wins.

Defense counsel, remembering those old cases about which his law school teacher in Evidence told him, leaps up and he says, "I object. It's an ultimate issue." And the judge says, "You're right. It's an ultimate issue, but your objection is overruled. An opinion on an ultimate issue is admissible."[22]

Take a different example. This is a decision of the highest court of New York. The claim is defective design, that is, that the product was designed in such a way as to be unsafe and that the state of the art at the time the product was designed permitted the design of a safer product. The state of the art is the ultimate issue.

An expert, whose credentials are not being questioned, testified that the product was not as safely designed as the state of the art would allow.[23] Twenty-five years ago, it would have been startling to suggest

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[22] FED. R. EVID. 704.

[23] Lancaster Side & Block Co. v. Northern Propane Gas Co., 75 A.D.2d 55, 427 N.Y.S.2d 1009 (1980).

that such an issue was admissible. You hear cries of "ultimate issue," "intruding upon the province of the jury," etc., etc. "No, no, no not at all," says the New York Court of Appeals. Remember, we're not working with the Federal Rules of Evidence, but with common law evidence.

That's perfectly proper although it is an ultimate issue. The jury is pre-projected, of course, but it's something the jury may hear and may take into account. That's what the case is all about. You must distinguish always the ultimate issue, which is proper, from the expert who says to the jury, "The plaintiff should win this case, or the defendant should win this case." That is *never* proper. No expert may ever tell the jury what the verdict *should* be,[24] because the verdict involves an application of the law that the judges should explain to the jury, to the facts that have been developed, including the expert's opinion on an ultimate issue. But applying the law is exclusively the responsibility of the jury; no expert is competent to testify to that.

To illustrate this, take a real case, which was not reported apparently because the Supreme Court of Arkansas directed that it not be reported. A lawyer, aware of my interest in the matter, sent me a copy of the relevant pages of the transcript. Arkansas has either enacted or followed the federal rules on this point. This is a criminal case, and the prosecutor that is involved called a deputy sheriff and had him testify that he, the deputy sheriff, is an expert criminal investigator, that he investigated the allegations of this indictment, and that they are true. When they revive defense counsel, in a small weak voice, he says, "I object, your Honor." The judge says, "Oh, no. Your objection is overruled. That's an ultimate issue, to be sure, but it's proper for an expert to testify to an ultimate issue." There is a conviction, an appeal and then it is reversed by the Supreme Court of Arkansas. This, however, is not an ultimate issue. This is an *expert* telling the jury *what the verdict should be.* No expert can testify to that. You've got to distinguish between the the ultimate issue and what the verdict must be.

2. Certainty of the Expert Opinion

Well, so much for the opinion upon an ultimate issue. This brings us to what is philosophically and legally perhaps the most interesting of the questions that I will discuss: How certain must the expert be? This is a matter which the courts have handled in a way that I find very satisfactory, in that it is consistent with common sense and what philosophers and scientists have told us to be the nature of the universe in which we live. Let me use the physician as the expert witness around whom I will weave what I have to say on this topic. Everything I say about the physician is transferable to the economist, the engineer or other expert witnesses.

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[24] H. LIEBENSON, YOU, THE EXPERT WITNESS 44-45 (1962).

Medicine, like every other discipline, is less than an exact science. Medicine may rest upon some sciences which are exact. I suppose anatomy is exact, and much of biochemistry is exact, but when you put it all together, as any doctor will tell you in an honest or drunken moment, what you have is medicine, not quite a science but more nearly an art. It is highly probable that when you do certain things, other things will happen, but it is by no means 100% certain.

Suppose that you have a physician on the witness stand and he has an opinion whatever it may be. Putting aside the terminology in which you couch the question, if you ask him, "Are you 100% certain?" his candid answer will be, "No, I am not 100% certain. I cannot be 100% certain of anything in medicine."

What does the law require as the requisite degree of certainty? Simply, let's put it on a numerical scale. Now, obviously, the expert has to have *some* degree of conviction in his opinion, so it's got to be more than zero. Actual certainty is the certainty that we really only have when it's a definition. For example, two plus two equals four, because we define four as what you get when you put two and two together. That is 100% certain. We understand that in the world of litigation, you will never have an expert who can be 100% certain. We are on the continuum from zero to 100%. Where must the degree of conviction rest if the court is to allow its opinion to come in?

Let's begin with a hypothesis. Perhaps the expert has to be fifty percent certain and the verbal equivalent of fifty percent certainly would be, I suppose, maybe yes, maybe no, and it's about equally weighted on either side. Just about every court that has been called upon to decide this question has held properly, in my "opinion," that the requisite degree of conviction must exceed fifty percent. It's got to be more than a possibility. Reason? Anything is possible. Absolutely anything is possible. Any philosopher will tell you that. It is possible that the Almighty created the rivers, this planet and all of us five seconds ago as we came in from coffee, creating us with our memories already in our minds. It's possible, not likely, but possible. Since anything is possible, to permit an expert to testify on the basis of fifty percent conviction does not make any molds, it does not move things along. It can be one way, or it can be the other way, we just don't know.

So, at this point, we understand it has got to be more than fifty percent. But of necessity, it will be less than 100%, which obviously points us to what we've got to do. I suppose that in numbers, seventy-five percent would be, in words, probable—more than possible, but less than certain. It must be probable so that whatever the words in which he couches it, the expert may be in a position to say, "The degree of the conviction I have, my opinion, is that it's probable."

It is for that reason, I suppose, that most practicing lawyers who interrogate experts, especially with respect to physicians, have a certain locution. It's a mere formula in which they ask the expert for his opin-

ion, and I have nothing against formulas. They signal to the judge that the lawyer is aware of the rule of law that requires the expert to be seventy-five percent certain, and you use the formula so that the judge recognizes what is going on. I think the formulas are pretty much the same in all states, but they may vary in detail. In New York, in both the state and the federal court, the formula that you will hear day in and day out when a physician is on the stand, goes something like this: "Now Doctor, do you have an opinion which you can give us with a fair degree of medical certainty as to blah, blah, blah?"

A fair degree of medical certainty is the formula. But what is a "fair" degree? It's a weasel word. It can mean almost whatever you want it to mean. Then what's a "fair degree of certainty"? I thought certainty was 100%. So, a fair degree of 100% is not certain.

Another difficult problem is distinguishing a "medical certainty" from some other kind of certainty. You can criticize it when you take it apart as a magician would, but I really don't mean to criticize it. It serves its purpose, even though you are using words that are devoid of meaning when you say to an expert physician, "Doctor, do you have an opinion that you can give us with a fair degree of medical certainty?"

It's as if you are saying to the judge, "Hi, Judge. See, see, I know. He's going to give us his opinion in accordance with the rule that requires it to be about seventy-five percent on the scale." There's no reason not to do it that way. In New York, however, we had a very important lawsuit in which the intermediate appellate court published a splendid opinion.[25] Those judges are very good, perhaps superior to our Court of Appeals judges. This case was on an interesting point of practice: Is the formula required? Assume, for the sake of argument, that on the degree of conviction, the expert meets the minimum seventy-five percent. He really thinks that it's more probable than not probable. But for one reason or another, the formula has not been used. Is the formula required? It's rather an amusing situation in a very important case. Let me take a moment to tell you about it.

Lesson number one is that when you prepare an expert, be sure that you prepare him on that little formula that we lawyers take for granted. Remember, the expert, the physician, unless he's been around courtrooms a lot, has no idea that the formula signifies something very important to the judge. It's a way of saying to the judge that the expert's degree of conviction meets the legal standard. Be sure that your expert is aware of that; otherwise, the layman might believe that "probable" means about the same as "possible." One does not really distinguish very carefully between the two. This case is *Ward v. Kovaks*,[26] and it involved a young woman, unmarried, in her early twenties, who's very attractive. She was earning a fairly good salary as an executive assis-

[25] Ward v. Kovaks, 55 A.D.2d 391, 390 N.Y.S.2d 931 (1977).

[26] *Id.*

tant downtown, and she decided to take her two-week vacation at Fire Island. Many of you have been there; all of you, I daresay, know it by reputation. It's a swinger's paradise, off the south shore of Long Island. She spent her two weeks on the beach at Fire Island swinging, and in the course of a swinging session, she cut her finger. It was more than you would put a bandage on and forget about, but it was not severe enough to require a trip to the hospital. She went to a local physician and the local physician did whatever he does and sent her home.

She woke up that night and the finger had swollen enormously, and the hand was throbbing and the pain was murderous. She realized that she was in trouble and managed to get to the mainland of Long Island to a hospital where she was diagnosed as having a fulminating streptococcus infection. That means, in layman's terms, that the streptococci had just gotten out of control, and, as some of you know, this situation is life-endangering.

The hospital used heroic measures and they controlled the infection and ultimately cured her. However, she was left with a claw-hand which is permanently disabled and terribly disfiguring. She can't work at her job any more, and she claimed that her condition was due to the doctor's malpractice.

Although there are many issues to this case, the issue that concerns me is the response by the doctor's insurance carrier; for ease, I will just refer to the doctor. The doctor's response is that he did not commit malpractice, and the reason that he gave for this fulminating infection was that the woman's blood stream was full of LSD. She wasn't just "swinging" during her vacation. She was chock full of LSD, and the defense calls as an expert witness a nice young man who spends all of his waking hours in a laboratory. He's a laboratory physician; he doesn't treat patients. He's a scientist, and he's been working on the effects of LSD on the body's system. He has not been properly prepared. He takes the stand and says, "In my opinion, though we're working on this, when you have LSD in the blood stream in the quantity that the plaintiff did, your ability to resist bacterial invasion is substantially reduced. That's the reason for this fulminating infection: her own ingestion of LSD."

The cross-examiner now stands up to cross-examine and senses that the doctor has not been prepared on the significance to lawyers of those magic words. The cross-examination goes this way. "Really," he says, "Doctor, you're not sure, are you? No, of course you can't be sure."

"It's possible."

"Of course, it's possible." And he sits down, figuring as soon as he leaves the stand he's going to strike.

On redirect: "When it's possible, it's probable?"

"That's right."

Recross. "When you say it's possible, it's probable."

"That's right." Back and forth they go, each one feeding the magic word to the doctor and the doctor totally unaware there is a difference.

To a layman in this respect, there's no difference between possible and probable, and they go back and forth.

The opinion is very well done. I can tell you that the requisite degree of conviction is *probability*, or seventy-five percent if you want to use numbers, but no particular formula is required. It's handy to have the formula. It saves a lot of trouble. But if you don't have the formula, what the court must do is look at the expert's testimony as a whole and in the context of the case and decide whether it was the fair intention of the expert to say it's *probable*. The court concluded that the expert really meant to say it's *probable*. The court concluded that the expert really meant probable in this case; hence, the motion to strike the expert's testimony was properly denied.

B. *Permissible Bases of Expert Opinion*

The next point is a favorite of mine. I regard this particular portion of the federal rules as the single most radical thing in the entire codification, and the *wrongest* thing in the codification. I think this is crazy, indefensible, but there it is, and people who are senior and better than I obviously think that it's a good idea. In any event, we've got to live with it. Moreover, not only is this the law in a federal rule jurisdiction, but it is increasingly the law in nonfederal rule jurisdictions. In my own state of New York, the highest court has adopted this provision to the federal rules by way of judicial fiat, not by the official adoption of the rules.

The next point is the issue of the permissible bases of an expert's opinion. I'm going to put it in question form. Upon what may an expert rely? I think the clearest way to show you what's been happening in the last few years is to begin with the common law and then proceed to the federal rules. I will tell you about the New York decision, more or less following the federal rules, and then point out some of the dangers here. When I say "common law," I mean the background rule which used to be followed in all jurisdictions and, of course, would still be followed in a number of jurisdictions today. The background rule is that an expert's opinion had to rest upon data in the case.[27] They can say the same thing in different words. Everything upon which the expert relies must be supported by evidence. You want to be very pompous about it? There must be enough proof from which a reasonable juror could find the fact to be so as to everything upon which the expert relies. And to say it one last time in algebra, because it's easier that way, if the expert says, "Here's my opinion, and I rest it upon A, B and C," A, B and C must be in evidence. There's got to be proof in the record from which a reasonable juror could conclude that A, B and C are the packets. If he says, "Here's my opinion, and I rest upon A, B, C, D, E and F," and the first three are in evidence, and the latter three are not in evidence, an objection to the opinion will be sustained.

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[27] 3 WEINSTEIN'S EVIDENCE ¶ 703[01] (1981).

Just briefly, the analytics of it go this way: Since ultimately the opinion goes to the jury because it will help them or be necessary to them, depending upon which rule you follow, the opinion must rest exclusively upon the evidence in the case, because it's the evidence in the case that the jury is trying to understand. If the opinion of the expert goes beyond the evidence in the case, the opinion is immaterial. It has nothing to do with the jury's work, and so we don't let the jury hear it.

I'll show you how applying the common law rule would work with the simplified facts of a real case, the kind you work with day in and day out.

Expert physician: issue, fibrosis. What ailed an elderly lady? What was wrong with her when she came to the doctor? The doctor's testimony, simplified, goes this way: "I am a general practitioner, a family doctor. I specialize in the skin and its contents, as a general practitioner once said. And I think that was a lovely way to put it. But, since I try to know about everything, I can't know too much about any one thing. In any event, the lady comes to me and there's obviously something wrong with her. My job is to figure out what. I conducted a physical examination. One of the things I did was feel the back of her neck and the neck muscles were in spasms." There's fact A. That's proof that the muscles were in spasms.

"Next, I looked down her throat and I saw red patches." There's fact B. Spastic, spasm muscles, red patches. He saw it, he felt it. We've got A and B.

"I found nothing else remarkable. And on the basis of A and B, I could not arrive at a diagnosis. So what I did was send her out to three specialists, a neurologist for a nerve workup, a hematologist for blood chemistry work and a roentgenologist, for certain x-rays. They did their work and sent me their reports. After I read their reports, I was able to arrive at a diagnosis."

Now, the proponent is going to ask what his diagnosis is. You see analytically where we are. This diagnosis rests upon five pieces of data: A, spastic muscles, in evidence; B, red patches, in evidence; C, what the neurologist found; D, what the hematologist found; and E, what the roentgenologist found, not in evidence. Those men have not testified and their reports are plainly hearsay.

"Objection," says the opponent.

Says the judge, "Where are those three guys?"

The response from the plaintiff's counsel is, "Oh, you know, I don't know judge. I've even—." His honor says, "Forget about the rule against hearsay. Maybe you have their reports in your file and you can show the reports to the other lawyer."

"Judge, I lost the file." So, His Honor, in his well-nigh limitless wisdom, says, "The objection is sustained. The expert cannot give his opinion because three-fifths of what the expert rests the opinion on is not in evidence. It's absolutely inexcusable."

That case, if one is interested, is called *Sirico v. Cotto*.[28] The opinion was written and published in New York. Now, I do want to urge you to read it because I wrote it myself. Apart from my mother and me, nobody has ever read it. That was 1971. It was eleven years ago, and that was the law of New York, the common law rule. The expert's opinion could come in *only* if each item of data was supported by evidence in the record.

The question remains, *should* the common law rule limiting the opinion to matters supported by the record be preserved? There had developed a considerable body of scholarly criticism of that rule, and the scholarly criticism went this way: The rule is very expensive, because it means that the proponent, to go back to my case, who wants to prove that simple general practitioner's diagnosis, is going to have to call not only the general practitioner, but the three specialists, with all of the time and effort and expenses and all of that. Wouldn't it be better to have a rule of evidence, that is, common rule, which accepts the rule that governs the practice of the people in the discipline represented by the witness on the stand? Should not the rule of evidence be congruent with the physician's practice? When physicians practice medicine, it's taken for granted that the general practitioner receives and relies upon the reports of the specialists. So, should not the rule of evidence be enacted to make it possible for the general practitioner to stand to testify in the manner parallel to the way in which he practices medicine in his office down the street?

The view had carried the day and culminated in Federal Rule of Evidence 704.[29] I think I can give the rule to you for all relevant purposes in the exact words. The opinion may go beyond the evidence so long as it is reasonable to do so. Reasonable is the word and that is the only limit or standard that we have.

The word "reasonable" is understood to be a statement of two factors. First, is it customary in the expert's field to rely on this information? And then, assuming it is customary, the judge has a check or balance function. It may be customary, but the judge has to decide that the "custom" is a reasonable one.

So, to go back to my issue, "Doctor, did you send the patient out to the neurologist, the hematologist, a roentgenologist?"

"Yes."

We assume they're not going to testify.

"Doctor, after reading their reports and taking into account the two findings you made upon clinical examination, were you able to arrive at a diagnosis?"

"Yes."

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[28] 324 N.Y.S.2d 483 (N.Y. City Civ. Ct. 1971).

[29] FED. R. EVID. 704.

Now, Doctor, is it customary in the field of medicine for the general practitioner or the family doctor to rely upon the reports he receives from specialists?"

"Yes."

You wouldn't do it this way in practice, but you do make the point clear.

"And Judge, I submit that it's reasonable for the general practitioner to follow that custom."

And I think the judge would say, "Yes, I think it is reasonable. Doctor, what's your opinion?"

And here it comes, even though three-fifths of the material upon which the opinions rest are not in evidence.

I said I'd tell you about a New York case which adopted that rule.[30] It is a criminal case, which is even more surprising. The defense is insanity. It's now rebuttal. The prosecution calls a psychiatrist whose opinion is that the defendant was sane at the time in question. Let me cut through to the essential fact.

"Dr. Psychiatrist, upon what do you rely?"

He says, "I rely on A in evidence, B in evidence and C in evidence." But also, although it's only one out of four items, the doctor says this was important: "I also rely upon a statement I was given by the defendant's girlfriend about their intimate relation." This statement is not in evidence and is unknown to the jury. Although the girlfriend had testified about a different phase of the case, she had not been asked anything about the statement or about her personal relations with the defendant.

The statement itself cannot go into evidence. Nevertheless, the New York Court of Appeals, the highest court in New York, held that the psychiatrist's opinion was admissible.[31] It is a dual holding for reasoning having to do with the law of New York. The opinion is by the Chief Judge, Charles Brytel, who is a great technician and knows how to do these things. One of the aspects of the holding is that since the rule to be followed in the second sentence of Federal Rule of Evidence 703[32] makes a lot of sense, it is adopted for New York. Granted, the girlfriend's statement was not in evidence and was unknown to the jury, but it is customary for psychiatrists to rely upon such statements about people's personal affairs. The court saw nothing unreasonable about it; therefore, the expert's opinion was admissible.

Now do you realize what this means? I can do little more than raise questions because most of the questions are unanswered. The expert

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[30] People v. Sugden, 35 N.Y.2d 453, 323 N.E.2d 169, 363 N.Y.S.2d 923 (1974).

[31] *Id.* at 456, 323 N.E.2d at 171, 363 N.Y.S.2d at 925.

[32] FED. R. EVID. 703 provides in pertinent part that "if of a type reasonably relied on by experts in the particular field in forming opinion or inferences upon the subject, the facts or data need not be admissible in evidence." *Id.*

opinion gets in, even though some or all of the data upon which the opinion rests is unknown to the jury. How does the jury assess the opinion? How do you attack the opinion? If the opinion gets in, does that open the door for you to put in the underlying data, assuming that will help you? I don't know. Is this a kind of new exception to the rule against hearsay? Maybe. Can you argue that, in addition to opening the door to the adversary, it opens it to the proponent? For example, "Judge, the rule says I can put the opinion in. I want the jury to be able to assess the credibility of the opinion, so why shouldn't I be allowed simply to help them assess the credibility of the expert? Why shouldn't I be allowed to put in the underlying data, be it hearsay, double hearsay, whatever it may be?"

How far do you go with it? The following does not concern a reported decision, but it is a real transcript sent to me by a lawyer who knew of my interest in it. The case is a private antitrust suit in the federal court brought under the federal rules. The plaintiff claimed that the defendants monopolized the business of selling golfing equipment at retail. The plaintiffs called an economist to testify that, in his opinion, there was a monopoly in this line of commerce. The following came out of cross examination: "Mr. Economist, on what do you rely?"

"Well, I rely principally upon what I was told by somebody I met at a cocktail party. I don't know his name," he said, "But I met him at the cocktail party, and he said he's a retailer in the field and he told me about the way things were. And that is what I relied upon."

"Well," the judge said, "That's over the line. That's neither customary nor reasonable. I won't allow it."

Where do you draw the line? And perhaps more to the point, I just told you that came out on cross-examination. Perhaps the most troublesome aspect of Rule 703 opening the door to opinions resting upon things not in evidence is what you deal with when you put Rule 703 together with Rule 705.

How do you physically bring out the expert's opinion? You qualify them, to recapitulate. The opinion may deal with an ultimate issue, but that's not going to be a problem. The expert is prepared to tell you that, though we can't be 100% certain, it's at least seventy-five percent certain. We will pass for the moment the question of the bases of the expert's opinion.

Now, how do you bring it out? The problem first presented itself to common law lawyers and common law judges, two centuries ago, when the universally applied rule was that the opinion had to rest entirely upon data supported by evidence. And so, the mechanical problem was how do you elicit the opinion to make it possible for the judge and your opponent to be certain that everything is supported by evidence in the record? The resolution of that mechanical problem was, as we all know, the hypothetical question. Except in very rare cases in which an expert had personal knowledge of the underlying facts, we use the hypothetical

question. For example, consider again Dr. Elko, our Nobel Prize winner in spleens. He also, by the way, has a Ph.D. in chemistry. He is not a medical doctor, so he could not possibly have done the surgery or anything of that sort. "Dr. Elko, I'm going to ask you to assume certain things. A little boy, eight years old, as a result of being hit by a car at a school crossing is taken to the hospital." The adversary says, "Is there evidence of that?"

"Yes."

Check. Judge does the same.

"At the hospital, he is diagnosed as having a ruptured spleen. The surgeon removes the spleen in an uneventful splenectomy."

"Is there evidence?" "Yes," answers the proponent. Check.

"The little boy makes an eventful recovery except for a small scar of no cosmetic significance. He is now fine, of course, he has no spleen."

"Is there evidence of that?" Check.

"Doctor, assuming those to be the facts, do you have an opinion which you can give us with a reasonable degree of physiological certainty as to the significance to that little boy of the fact that he no longer has a spleen?"

"Yes."

"What is that opinion?"

And you're in the business. When you do away with the rule requiring everything to be supported by evidence *pro tanto*, you do away with the need for the hypothetical question. The hypothetical question has itself been the subject of a good deal of scholarly criticism based on the notion that lawyers have come to abuse the hypothetical question.

No lawyer worth his salt on either side of the table would dream of asking Dr. Elko that hypothetical in the manner in which I just did. The way I just did it is perfectly okay for the textbook illustration and okay for the record, but it does nothing for the jury. Every lawyer of any experience knows that the hypothetical question is a wonderful way of summing up to the jury without really summing up, so that he gets to do it again in two days when it's really summing up time. It's a presumption, and it's usually the plaintiff's bar that's doing it this way. Very effective personal injury lawyers would spend at least half an hour asking that hypothetical question.

There's no requirement that everything in the hypothetical be relevant to the opinion so long as, under the old rule, everything is supported by evidence. "Doctor, I'm going to ask you to assume certain facts. When Johnny got up that morning, Doctor, the sun was out, birds were chirping in the trees. Doctor, he came down to the kitchen at 7:35; you know what he said to his mother, Doctor? 'What's for breakfast.'"

And on and on. And by the time the hypothetical is over, the jury is weeping and we're weeping too. You know what it is, but naturally, the jurors don't know what it is.

The scholar says, "This is not the purpose the hypothetical was intended to serve. We don't want jurors weeping in the jury box. It makes

a terrible mess. No, no, no." Practicing lawyers, however, like hypotheticals for the reason I have suggested.

Now, here's where we were a little while ago—Rule 705 telling you that you don't need to use the hypothetical and put it together with Rule 703, that the expert's opinion need not rest exclusively upon material in evidence—and see what the proposal can do. Assume it's a private treble damage action. You've qualified the expert as an economist. You know the rest of the direct examination is one question long.

"Doctor, professor, do you have an opinion as to whether the defendant is a monopolist?"

"Yes."

"What is that opinion?"

"He's a monopolist."

"Oh." Sit down.

The rules tell you, the opponent, that if you wish to explore the underlying data, you may do so on cross-examination. With all deference, whoever wrote that provision never cross-examined anybody, because anybody who's ever cross-examined in a real trial knows that cross-examining a witness is approximately like crossing a mine field. You will not be alive when you get to the other side unless you have a map to begin with, and even then you may not make it.

So, here we are. The guy says he's a monopolist and the proponent sits down. We're the opponent. Now, what do you do? You say, "What do you base your opinion on? Is it based on what somebody told you at a cocktail party?"

Maybe the judge won't rule the way that other judge did, that it's unreasonable. What if you say, "What do you base that on?"

"What somebody told me at a cocktail party."

"Oh, Judge. I move to strike that."

And the judge maybe says, "You asked for it, counsellor. You've got it."

Now what do you do? Maybe tactically the best thing to do if the opponent does that on his direct examination is, "No questions." There's no questions on cross and then shrug it off to the jury: "What was it about? The man was on the stand for ten seconds. He didn't tell you anything. It has no weight. It has no substance."

Well, maybe that's not tactically the shrewd thing to do. Then what *do* you do? I don't know. I think it's an insolvable problem in trial tactics or technique and it's a problem created for us by the insufficiently perceptive way in which Article 7 of the Federal Rules of Evidence dealing with expert testimony has been drafted.

One last example to this. I saw swine flu cases being tried all around the country.[33] Those cases are now being decided and they're going

[33] "Guillian-Barre Syndrome."

various ways, depending upon the evidence. In an opinion that I had a chance to study carefully and that for some unaccountable reason is not reported,[34] Judge Finesilver decided the case for the government essentially on the issue of causation. There is a paragraph in the opinion, however, which discusses the way to analyze the evidential problems presented when the plaintiff calls his expert to the stand. Plaintiff's expert was a physician and the opinion ultimately was going to be that what happened to this plaintiff was caused by the injection of the anti-toxin. Ultimately, the judge rejected that.

The basis of the opinion was a line of clinical tests as to the relationship between the anti-toxin and the development of the syndrome. Under the rules applicable to the admissibility of scientific tests, those tests were not admissible. The judge said so. However, the doctor says, "I relied on those tests in coming up with my opinion."

It is customary for doctors to rely upon tests which are not yet fully clinically accepted. Even though the tests themselves are not admissible, it is permissible for the expert to give an opinion based upon these tests which I won't let myself hear and I wouldn't let the jury hear. There's a strange kind of internal inconsistency there. Imagine if you had a jury. Have you ever seen a juror raise his hand? I've seen it several times. And the juror says, "Judge, the doctor says it's his opinion that the swine flu anti-toxin caused the syndrome and he bases it on certain tests. We haven't heard about the tests. Can we hear about them?"

"No."

"Why?"

"They're not generally accepted among scientists."

So, the juror says, "So why can we hear the expert when we can't hear what he relies on? What's going on here? If the law says that, sir, then the law's an ass, sir."

C. *Cross-Examination of the Expert Witness*

First and foremost, under the general heading of cross-examination of an expert, always remind yourself as you plan the cross-examination of the opposing side's expert that an expert is, to begin with, a witness like any other: Any mode of impeachment that would be proper of an ordinary witness is proper, even though this fellow is an expert. Now, most of the time, there is nothing that you can do. There is no ammunition for it, but one time out of a hundred, there will be something that you can do. And the way to remember it is to use that as sort of the first item on your checklist. Forget that he's an expert. He's just John Q. Bystander.

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[34] *See In re* Swine Flu Immunization Products Liability Litig., Lima v. United States, 508 F. Supp. 897 (D. Colo. 1981).

What can I do? For example, I sat in what we think was the busiest metropolitan trial court in the world and it was before no-fault and comparative negligence. Very rarely was there a genuine issue on liability. You know as well as I that the fight is over damages, whether it's a thousand dollar case or a half million dollar case. And on that, I incorporate by reference what I said earlier. We all know the plaintiff's bar has its doctors and the defendant's bar has its doctors. Lawyers see these doctors day in and day out, and get to know the routine. They all testify exactly the same. Plaintiff's doctor says, "Permanently disabled, basket case, we'd bury him except we get a jiggle every time we give it a shake, you know."

On the defense side, "He's as good as he ever was; he's a malingerer."

The jury figures, "Ah."

The jury sees these guys only once. We see them day in and day out and we forget that it looks a little different if you're seeing them only once.

I have presided over cases in which a certain doctor had testified for the plaintiff at least twenty times, always the same way. "The plaintiff is destroyed by this accident. We would bury him but we can't."

I will call the doctor "Smith," because that was his real name. I must say that in the eyes of the jurors, seeing Dr. Smith for just one time, he was awfully impressive. He looked like Spencer Tracy, he knew how to talk to them. He sat on that witness stand and when the key question came, you know, "Doctor, we have an opinion, explain it." He turned to the jurors and he crossed his legs and he looked at them with his clear blue eyes and there was nothing that he might ask them to do that they would refuse him. He just emanated that kind of fatherly part.

Twenty times I had him in my court and twenty times defense counsel was absolutely feckless on cross-examining him. The cross-examination accomplished nothing—it was worse than if you had just left him alone. In the twenty-first case, I'm sitting there minding my own business. Dr. Smith tells his usual story. Defense counsel gets up like a tiger out of the thicket, and his first question is, "Dr. Smith, have you ever been convicted of a crime?"

And I start getting ready, "Counsellor, you can't ask that question without a good-faith basis." But before I can open my mouth, Dr. Smith, who has been told you've got to be candid about everything, replies, "Yes, I have been."

And the lawyer continues, "Was that in federal court or state court?"

"Federal court."

"Was it a felony or a misdemeanor?"

"It was a felony."

"What felony was it?"

"Income tax evasion."

"Were you found guilty after trial, or did you plead guilty?"

"I plead guilty."

"What was your sentence?"
"A year in jail."
"Did you serve it?"
"Yes."

Can you imagine, twenty defense lawyers let that guy present himself to the jury as if he were Spencer Tracy. Only the twenty-first remembered that an expert is a witness like any other. You've got the ammunition, you can impeach him as you can an ordinary witness. And the guy is a felon, a federal felon. *Shame* on those twenty lawyers who didn't make it their business to find out so they could tell the jury about it! That's my first item on cross-examination. Never forget to look whether there is anything you can use as to *any* witness.

Second, there are, in addition to the usual or traditional or orthodox methods of impeachment, two special methods of impeachment available only with respect to experts. They are available in the federal court, they are available in all states that follow federal practice, and there may be one or two states that permit only one of these two. But, by and large, all states permit both. For an example of these methods, consider *Ruth v. Fenchel*,[35] which is little more than an essay on these two modes of impeachment and all of their ramifications. It was decided by the New Jersey Supreme Court, and the author of the opinion is William J. Brennan, Jr., now a Supreme Court Justice.

The two methods of impeachment, when trial lawyers get together to talk shop, are usually collectively described as "impeachment out of treatise." By "treatise" we mean any printed source: a textbook, a treatise, an article in a journal or whatever it may be. To demonstrate this, I find that it makes sense to take an absolutely absurd example which makes it very clear, and we don't have to worry about following the facts.

Assume that the witness is a physician who has testified on direct examination that, in his opinion, the appendix is on the left side of the body. Now, we all know that this is wrong, the appendix is on the right side of the body. Now, let's see how we can impeach him out of treatise. Suppose this guy wrote a textbook on anatomy and on page 100 it says, "The appendix is on the right side of the body." Can we use it? Certainly. Is there anything unusual about it? No. This witness has just said something different from what he said in his textbook. So it's impeachment of the witness by a prior inconsistent statement.

If you have an ordinary witness, may you impeach him with somebody else's inconsistent statement? A on the stand says one thing, Z says something else. Can you tag A with Z's contradictory statement? No, you just can't—it's not permitted by the rules with respect to impeaching an ordinary witness. But when the witness is not ordinary,

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[35] 21 N.J. 171, 121 A.2d 373 (1956).

when the witness is expert, there are circumstances in which you can impeach him with what somebody else said, so long as it's in the treatise, textbook, article or whatever it may be, and so long as you do the necessary thing first. There are two ways of doing it. First, you must ask the preliminary question, not necessarily in these words, as long as the essence of it is the same: "Doctor, in the course of getting ready to testify in this case, did you consult this book, *Gray's Anatomy*," or whatever book we are using. It doesn't have to be those words, but it's got to add up to that. "Did you consult, did you read, did you refer to, did you glance at or look at it?" If he says, "No," you're dead in the water. Go to something else. If he says, "Yes," that's all that is required to use the argument. You have laid the foundation. And the best way to proceed at that point is to turn to the judge, simply for reasons of etiquette, and say, "Your Honor, may I read to the jury from page 100?" The judge presumably says, "Yes," if he knows what's going on. You now turn to the jury and you simply say, "Reading from page 100 of *Gray's Anatomy*, quote, 'the appendix is on the right side of the body,' close quote." Slam the book shut, sneer at the witness. This is not likely to happen, because the witness is usually not dumb. Axiom number one of all trial lawyers is assume the other lawyer is smarter than you, so you've got to make it up in hard work.

The other lawyer knows what you know. I don't mean that people lie, but the witness will not say yes to that question. He will not tell you that he consulted the book. That is why, as Brennan points out in *Ruth v. Fenchel*,[36] there was later developed the second way of doing it, a response to the reality of what happened in trial. The witness is not going to concede that he consulted the book, so you've got another way of doing it. "Doc, do you see this book, *Gray's Anatomy*?"

"Yes."

Again, it doesn't have to be those words, but it has got to add up to, "Is this book authoritative?" That's lawyer talk. I wouldn't ask it that way in front of the jury. But—

"Is this the bible? Is this the standard reference? Is this what all doctors look at when they have got to look up a question of anatomy?"

If he says "No," you're dead in the water. If he says, "Yes," you've got him. Now, proceed the same way.

"Your Honor, can I read to the jury from page 100?"

"Sure."

Turn to the jury and read from page 100.

The Federal Rules make it express that when you use either of these modes of impeachment and you do get the necessary affirmative answers that you can read to the jury, and that's what you do. You do not visibly put the book into evidence. You simply read the passage that

[36] *Id.*

you're interested in to the jury and the jury has it read back by the stenographer, if need be, but they do not get the book physically to look at for themselves in the jury room or otherwise.

Second, you've got him in your ball park, playing your ball game by your rules. Shame on you if you can't score a few points. But you're not going to reduce him to tears, of course, but you can score a few points. Not, "Doctor, is this book authoritative?" No, of course not. You know who the other side's expert is going to be. It is in the rules. Just ask for his name in an interrogatory. If you get it, go to the medical directory. Find out where he went to medical school. If you have access to a big city library or medical school library, you probably will be able to get the catalog for that medical school for the very year he took the course. And it's the custom, as you know, for medical school catalogs to print the name of the textbook that's being used. So you go back and you get the very volume that he used.

"Doctor, did you go to medical school? When you went to this medical school, did you by any chance take a course in anatomy? Did you pass it? Did they have a book in that course? Is this the book?"

"That's the book."

"Oh, this is the book used for that course?"

Obviously, he's got to say, "Yes, it's authoritative."

Suppose, however, that you use one or the other of these modes of impeachment and you read to the jury from page 100 of *Gray's Anatomy*, "the appendix is on the right side of the body." Let me tell you what this does to the evidentiary posture of the case. At common law, these modes of impeachment are available. Suppose you use them. You use them successfully. You put before the jury the statement in the book about the appendix being on the right side of the body. Do you have a hearsay problem? At common law, no, because the statement in the book is, of course, an out-of-court statement, but an out-of-court statement is hearsay only if offered to prove the truth of what it asserts. And the common law analysis is that the statement from the book does not come in to prove the truth of what it asserts. It does not come in to prove that the appendix is on the right side of the body. It comes in *solely* as bearing upon the *credibility of the expert* you are impeaching. That's why you have no hearsay problem whatsoever. But you also have no evidence that the appendix is on the right side of the body. You have got the witness' testimony on direct that it is on the left side of the body. The statement from the book suggests that he doesn't know what he's talking about, but there is no *affirmative* evidence that it is on the right side of the body. And if you have the burden either of going forward or of proof with respect to that issue, you will, by common law, be required to call your own expert to testify that the appendix is on the right side of the body.

That is the common law analysis. Under the Federal Rules, all kinds of marvelous things are available to you, and the place to look is Federal

Rule 803(18)[37] or your state rule equivalent if your state has enacted the Federal Rules. There are no fewer than four possibilities under 803(18). Not all of them are universally noted by lawyers, and potentially each of them is very useful.

Possibility number one: You can impeach the other side's expert in the manner that we have described. Under 803(18), when you read from page 100 that the appendix is on the right side of the body, you are doing two things simultaneously. First, what you are doing in common law is impeaching the expert. The out-of-court statement comes in as affecting the expert's credibility. But simultaneously, it comes in to prove the truth of what it asserts, so that at the end of the cross-examination, you have not only discredited the other side's expert, but you have also put affirmative evidence before the jury that the appendix is on the right side of the body.

Now, number two. You call your own expert and, under 803(18), you can use a treatise affirmatively. You say to your own expert, "Doctor, is this book authoritative?"

"Yes."

You may now read to the jury whatever is relevant and it comes in to prove the truth of what it asserts, so that you have got your expert's live opinion supported by the material in the book.

The third situation is rare, but one can imagine a case in which it would happen. You are not cross-examining the other side's expert and you do not have an expert yourself, but the book is sufficiently well-known that the judge will take judicial notice that the book is authoritative. As to *Gray's Anatomy*, the most recent edition, I suppose that is so. It's hard to think of a judge who would not be aware that this is the standard. If the judge will take judicial notice that it is authoritative, you may read to the jury what you want and it comes in to prove the truth of what it asserts. It may lack a certain sex appeal, but this method takes the place of a living witness.

The fourth situation is implicit in the rule. I have not seen the reported case for which it was done but, obviously, there is no doubt it can be done under the rule. For example, you would like to be able to call Dr. Elko, that Nobel Prize winner, but for one reason or another, you can't. He's sick, or maybe he's dead. You can't get him to come to court. The work for which he won the Nobel Prize is an article, and one paragraph to that article states the matter with which you are concerned as clearly as it can be stated. If only you could get that to the jury to prove the truth of what it asserts, you would be in business. The other side is not calling an expert, so you can't do the first method. You are not calling an expert so you can't do the second one. The article is not so well-known that the judge would take judicial notice of its authoritative nature.

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[37] FED. R. EVID. 803(18).

You call an expert, not a physiologist, not a physician, but a *medical librarian* whose testimony, not in these words, of course, adds up to, "I don't even know what a spleen is. I'm not a doctor. I don't know anything about it. But I do know about the literature of medicine and I do know that this is the thing you look at when you want to learn about the physiology of the spleen." Your expert testifies, not to the underlying fact, but to the authoritativeness of the treatise. You may now read to the jury whatever you want from the treatise and it comes in to prove the truth of what it asserts. You realize that you can get some sex appeal out of that. If the librarian is prepared properly, the librarian will say, "This is what you look at, because the author of it won the Nobel Prize for this article." The jury now starts to pay attention. Your reading from the article is almost as good as having the Nobel Prize winner on the stand—all under 803(18).

To conclude on this subject, you must also prepare *your* own expert to meet this kind of cross-examination. Remember, you are working on the assumption that the other lawyer knows as much as you do, the other lawyer has worked through the literature and knows what in the literature contradicts your expert's opinion. And he's going to know how to use either or both of these modes of impeachment. I will make three suggestions.

First, unless he is an expert who knows his way around courts and is familiar with how lawyers operate, you have got to do whatever you have to do to persuade the expert that you understand, that in every discipline, there will be contradictions in the literature. Nothing is unanimous. Everybody disagrees on everything of any importance. In my experience, experts who are not familiar with how lawyers operate are reluctant to tell you that. They are afraid that you are going to cry or lose heart in the case or send them home or something of that sort. Make sure they understand. You are quite grown-up and you are aware that there is no unanimity. Make sure that your expert tells you what in the literature differs from or contradicts his opinion. Then you work with him on getting ready to meet it.

Suggest to your expert that when the other lawyer pulls out a book or the learned journal, your witness should very politely say, "Just a minute, Counsel. May I see the book?" Now, you see, this is danger-free. Nothing can go wrong. And, so long as he asks politely, the lawyer will automatically hand him the book or the judge will say, "Give him the book."

Your expert takes a second or two to look at the book. Now, what is he looking for? The book is not a counterfeit; that's only in the comic books. But as you all know as well or better than I, there is no discipline whose practitioners appear on the witness stand, as expert witnesses, that is not exploded. Medicine itself may not be exploded, but the sciences upon which medicine rests or what physics were in the early years of this century have changed drastically. Literally every day ma-

jor discoveries are being made. All you have to do is read the science reports in the papers with all the extraordinary things that are being done. Physics appears to be about to go into a revolution: engineering, mathematics, everything is changing. The consequence? New editions come off the presses very frequently. And, in my experience, once you suggest it to him, "You are an expert and while we agree with you, that while *Gray's Anatomy* is generally authoritative, it's only the recent edition that is authoritative. The others are of historical interest." Just think of the treatises we lawyers use. You have a problem with evidence, where do you go for the ultimate legal answer? Do you go to the first or second edition? Of course not. They are outmoded. You make it your business to be looking at the third edition with the various supplements that have come out. The practice is the same in all professions. What your expert is doing when he looks at the book is to be sure that it is the current edition. So the book is *"Jones on Recombinant DNA*, fifth edition," but the sixth edition came out last month and no doctor will look at anything other than the current or up-to-date edition of learned medical treatises.

If it is the current edition, no harm is done and we proceed. If it's not the current edition, he simply gives the book back, says, "What's the question?"

The lawyer says, "My question, Doctor, is whether that book, *Jones on Recombinant DNA*, is authoritative?"

"No." That should be it, just, "No." The lawyer will be nonplussed. And what he will do because he is nonplussed is say, "What do you mean? How come? How dare you say that it is not authoritative."

And your expert, in the gentlest manner possible, should respond, "Well, you see, Counsellor, no doctor, just as no lawyer, would look at anything other than the most recent edition. If it is not the most recent edition, it is not authoritative. And, Counsellor, that book you have in your hand is outmoded. It is not the most recent edition."

And the lawyer says, "Oh." And puts the book away and your expert has taught your opposing counsel something in the jury's presence. That's a wonderful way to enhance your own expert's credibility.

Suppose nothing like this is available—the book is up-to-date and there is something contradictory in the book. How do you handle that? Well, your expert says it is authoritative and the other lawyer reads it to the jury. You have got to prepare for this on redirect examination. You cannot be winged or wonged. You can't extemporize it. You have got to work it out in advance. If my experience is any guide, juries find this explanation persuasive. Contradictory things go right to the juror. So, now on redirect, "Doctor, on direct examination, you said that your opinion was A, B, C?"

"That's right."

"And we hear on cross-examination that the treatise says X, Y, Z?"

"That's right."

"Do you wish to change the testimony you gave on direct."

"No."

"Do you wish to correct your statement that the book is authoritative?"

"Absolutely not."

So you set it up for the jury. Then the way I like to do it is, "Doctor, I think you had better explain that to the jury." Then get out of the way and sit down. And if you've prepared him, he will know how to explain it, and the explanation should go something like this: "The book is perfectly authoritative. But, you see, books have to be written about the typical or the usual case. That book is a perfectly accurate description of what you will usually find. But every once in a while, maybe one time out of a million, you get the unusual, the unique case; and that is what we have here. It is extraordinary and that is why it is beyond what the author of the book wrote about."

If this explanation comes out the right way, listen to the jury box, and you will hear an "Ahhh" from the jurors. It is involuntary on their part and it is a manifestation of two things. First, the expert's explanation is intuitively persuasive. It is consistent with the juror's sense of the way the world works. You know, as they know, that nothing is absolutely perfect, there is always the exception. Obviously, books cannot be written about the exceptions; they have got to be written about what the authors *usually* find. Second, in all seriousness, you know why the jurors go, "Ahhh!" They're saying to you, "Thanks." You have given them a profound, psychic pleasure, and they're grateful. And do you know what that pleasure is? It's the pleasure of being able to go home and say to the wife or husband, "I'm on jury duty, but not on an ordinary case. This is one for the books. I mean, they'll be talking about this forever, and I'm on the jury." They can feel this way, and they will make it up to you.

D. *Arguing the Expert's Credibility*

At this point, let me briefly introduce the next subject. What I have been doing for six and a half years is putting my feet up on my desk and looking out the windows at the trees and the snowstorms, and speculating, surmising what comes into your mind. And what it is you speculate about is the stuff to which you have devoted your life. I'm a trial lawyer, in all of its aspects: try them, judge them, teach them about it.

One of the things that has intrigued me is that lawyers, both English and American, for approximately three centuries, have been trying jury cases in the way we are familiar with the trial of jury cases. If we brought Lord Mansfield back to life he would be able to preside over a case coming to trial next week. Bring Abraham Lincoln back to life, put him in your courtroom, and absolutely nothing except the

stenographer's machine would be unusual. He would recognize everything else.

For three centuries we have been trying cases, and we know virtually nothing about what actually persuades a juror because very few of us are ever in the jury room. In some states, lawyers do occasionally serve on juries, but that's so rare that it is hardly worth counting. None of us ever listens in and there is no video-tape that we can play back. We have a certain amount of data from mock trials but, of course, a mock trial is a mock trial and the jury knows that it's a mock trial. You can't be sure that you are getting an accurate view of how a real juror would respond to this case if it were a real case. Beyond that we have anecdotes and war stories, the things we tell each other at cocktail parties. Yes, that's useful, and it really raises the question, "Do you know what goes on?" I don't purport to know what goes on, but I have been thinking about it. I want to put before you some thoughts that occurred to me on the question of what persuades the jury to accept or reject the credibility of an expert.

First, I take it for granted that a factor the jury can never use is what you might call the substance of the opinion itself. The jurors cannot become physicians or economists or engineers. No matter how carefully you do it, no matter how long the judge gives you to do it, you cannot teach jurors how to be doctors and economists and engineers within the time given and the limitations that apply.

So, what do they rely upon? In my experience, the jury does a very good job of assessing the credibility of an expert. I have a religious faith in jurors, but how do they do it?

Recently, I came across the first published writing of Learned Hand. He was a lawyer a year and a half out of Harvard Law School. He had returned to Elizabethtown, New York, up in the Adirondacks, where his father and uncle had practiced. He set up a practice with his cousin, Augustus, and he was invited to speak to the Albany Bar Association, that being forty miles down the road. He made a speech on expert witnesses and the speech was printed in the journal of the Albany Bar Association. It came to the attention of the Editors of the Harvard Law Review and they thought it was so good that they reprinted it.[38]

What do you think it's about? It's about expert witnesses. What aspect of expert witnesses? The one we've just touched upon. How in Heaven's name can you justify what we did? We allowed the expert to testify to begin with because the jury needs the expert's help. They don't have that expertise. Each side calls an expert and they almost always testify to diametrically opposed things. Then we say to the jury, "Having permitted you to hear these experts because you know nothing

[38] Hand, *Historical and Practical Considerations Regarding Expert Testimony*, 15 HARV. L. REV. 40 (1901).

about it, you must now decide which one is worth believing." The process is illogical and totally internally inconsistent. The only thing Hand could suggest was a court-appointed expert to resolve the differences between the two, and as we know, that just turns a two dimension problem into a three dimension one, which solves nothing.

Here is my speculation regarding what moves a jury as to expert witness credibility. If there is anything to this, its a rough guide on how to argue it in summation.

First, jurors cannot become doctors, engineers or economists. But jurors are eminently capable of weighing qualifications, of weighing one expert's qualifications against another's. Only if the differences are gross or major will it count to the jury. Minor differences of the kind we lawyers fuss around with mean nothing to them. But where on the one hand you have the fellow who won the Nobel Prize in medicine and on the other hand somebody's brother-in-law who got out of medical school last week and has yet to take the examination, that's a gross difference. It's worth arguing those vast differences because a juror will respond to it and he'll remember it. Another reason to work very hard on your qualifications; you want to use the affirmative force to work for you.

Second, also touched upon in connection with preparing to meet impeachment out of a treatise, jurors have a certain intuition or common sense or lay view of how the world works. You have got to do your best to make sure that your expert testifies in a manner that at least is not inconsistent with their view of how the world works. If the other side's expert has testified to something that you sense is just not something the jury intuitively can accept, drive that home. So how do you know how jurors view the world? Well, that is part of the trial lawyer's obligation. You go to the movies for professional reasons, not for entertainment, because that's what people are looking at. You read popular magazines, popular novels and talk to the man on the street and do your best to become an expert on the man on the street's view of things.

Third, do not neglect, though you've got to do it tactfully, the expert's personality, his presence, his appearance—all of those things. You understand what I mean by the word "personality"—the jury cannot become a physician, et cetera, but they have with their own eyes seen the experts. They have heard them, they have seen how they part their hair and the kind of clothes that they wear. The jury will respond to that, and you have got to lead them artfully to respond to that.

Just one brief anecdote drawn from my own experience in the early days when I was prosecuting cases in the U.S. Attorney's office. About the best case I tried, in the sense that had we been able to sell tickets I would have retired then and there, was a case in which the defendant was charged with the interstate transportation of stolen property, the Dagot painting. The defendant allegedly stole the Dagot painting and took it down to Texas where presumably he was going to sell it to the international illegal art market. And you know what the defense was?

Temporary insanity. And do you know what the basis of that claim was? The defendant, in the order of a painting, had been in a long-standing homosexual relationship which had then broken up. In the turmoil that tended upon breaking up of that relationship, the defendant, in order to strike back at his former lover, stole the painting which belonged to the lover and which he knew had a certain symbolic importance to the other fellow in their relationship. This is not wholly out of relevant possibility. You understand, also, that the case turned on the expert testimony of the psychiatrist. The defendant admits he did what he did, but he said he was so upset that he was not responsible for it. We called the psychiatrist who said he was sane, and they called a psychiatrist who said he was insane. I am walking around the night before summation at home trying to figure out what in Heaven's name to say to the jury. The shrinks were of equal credentials, so you don't want to argue that. At two in the morning it hit me that, quite by accident, the government psychiatrist, and that was my side, looked like Van Johnson. He had light red hair and a freckled complexion and an open expression on his face. This was sheer good fortune. He had testified in plain English, no jargon, no nonsense. He just looked like the boy next door who happened to go on to medical school, and because he couldn't stand blood, he became a psychiatrist.

The other side's shrink, of at least equal credentials, did not look that way. I am not going to tell you how he looked, but it hit me that there was an argument I should make. Now remember, I was twenty-six years old, and I was foolhardy enough to do things I'm not sure I would do now. It was 1960. I ask you to remember that that was a presidential election year. I ask you to remember who ran against whom. I represent to you that I made the following argument in almost exactly these words to the jury. "Ladies and Gentlemen, the prosecution has called Dr. Smith and the defense has called Dr. Jones. And they have told you about their credentials, and their credentials are about equal and there is nothing for me to say about that. They have given you their opinion. Dr. Smith says he's sane, and Dr. Jones says he is not sane. And we're not psychiatrists, we're in no position to assess the merits of the opinion. But you know, each doctor was on the stand for at least half a day. You saw what they looked like, you heard their voices, you heard how they spoke. Now, let me ask you, which one would you buy a used car from?" End of argument.

I went on to something else. There was no commotion from defense counsel; the judge sat there quietly and the jurors are still with me. Defense counsel's expert looked exactly like Richard Nixon. It's not his fault but, you know—the beard, the funny nose and the hair. I don't want to get into any political arguments. Actually, I was introducing the way they were introduced. It struck me that this expert had the kind of appearance which suggested that he ought to be indicted on something. So

that's what I was playing upon. So remember that you might have a case in which you can play upon appearances.

Finally, the single most important factor affecting the jury's assessment of the credibility of your witness, expert or otherwise, is *your* credibility. Lawyers have an enormous effect upon juries, and if the jury has decided that you are a straight-shooter, they will assume that you have called honest witnesses.

So we end with perhaps where we should have begun: Rather than experts, project at all times and in all circumstances to the jury that you are an honest man or woman who happens, by ill-fortune, to be a lawyer. Get that across and you will win your case.