

HISTORICAL REVIEW

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Albert S. Osborn wrote extensively on the examination of questioned documents, however his passion was the pursuit of justice. He struggled, as we still do today, with the effect of "hired gun" experts on the perception of expert testimony held by the judiciary and the negative impact such experts have on the just resolution of disputes in courts of law. While it is obvious that experts who lack objectivity and play the role of advocate to their client's cause, regardless of the field

that they pursue, have and continue to hurt the cause of justice, they are enabled by the lawyers who knowingly use them. "The Abuses of Expert Testimony and the Development of the Expert Witness" is an article of frustration. To some, what is expressed in this article will be viewed as laughable idealism. The message, however, is one which reminds us of the intended end product of our judicial system.

The Abuses of Expert Testimony and the Development of the Expert Witness

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A contentious trial is defined as a legal controversy between two parties in which two opposed advocates are each endeavoring to prove, by witnesses, by argument, and by cross-examination of opposing witnesses, that the contention of his particular client is correct. The theory of the law is that by this conflicting, contentious process the truth will be brought out and justice served. The conflicting contentions of the two parties of course cannot both be true, so that, whether he knows it or not, one of the advocates is endeavoring to defeat proof of what is the fact.

One of the unwritten presumptions of the law is that neither advocate knows whether or not the contention of his client is a true contention. This theoretical and often amusing assumption is a convenient legal fiction that tends to excuse any desperate effort, no matter what facts the evi-

dence has developed. There are many defenders of the contentious trial who say that the advocate must believe and set upon his client's story to the bitter end, no matter what happens. Law writers and judges have said in the most definite manner that the advocate has no right to consider the interests of justice if those interests conflict with interests of his client. Of course it is a dangerous theory and especially dangerous to the advocate himself. It is only a short step from an essentially dishonest act for another to an actual dishonest act for himself.

Unless he is mentally incompetent, the defense attorney in many cases of course knows well enough whether or not his client is guilty and if, in a civil case involving a disputed document, for example, one advocate must use doubtful testimony of suspected witnesses, and must go to the third and least reliable and most incompetent expert before he finds one who will agree with him and assist him, it can hardly be said that he has no intimation of the fact that he represents a fraudulent claim. The fact is that too often, if

Editor's Note: This article, provided by the Osborn family library, was written by Albert S. Osborn more than 60 years ago. It is unknown whether this article was ever published or presented.

not usually, he knows all about the case and is seeking assistance that will help him in his effort to prevent the proof of the facts in the case that are against the interests of his client. When he "shops around" for eyewitnesses and confirmatory testimony and an expert who will confirm the contention of the claimant, the advocate is not endeavoring to find the fact but to find evidence that will help him to win. He is not thinking about ethics but about success.

This is a fair statement of the conditions that exist in many cases, and no legal fiction or hair-splitting excuse is quite high enough and quite wide enough for the advocate against the facts to hide behind. He is plainly helping fraud to win for his own profit. It is possible to represent a guilty man in an entirely proper way and prevent an unfair and illegal conviction, but this is not the method followed in many cases. The defense may, in fact, be as dishonest as the act for which the defendant is being tried. In many fraudulent civil cases the advocate is an active partner on a contingent fee in what he knows is a fraudulent undertaking. This is a highly disagreeable but entirely correct statement.

The methods of using expert testimony in these contentious trials naturally show certain flagrant abuses. As is well known, the law sanctions the use of expert testimony when a legal controversy, or a phase of the evidence in a suit, involves a question of science or any technical problem which the ordinary person, like a juror, for example, does not understand. In these cases, it is permissible to bring into court, from his laboratory or his library, the spectacled man of science who is permitted by the law to give his opinion on the technical point in controversy.

Theoretically, this mild man brought in from another field is called in to aid in proving a contested point in a trial and, after rendering his opinion, he is supposed to go quietly back to his studying, measuring and testing. If, however, it is his first experience in court, he will learn to his surprise that a contentious trial is not a scientific performance where all of those concerned are, like a true scientist, desirous of learning and showing the truth. If he is entirely without experience as a witness, he may, figuratively speaking, be torn to pieces on cross-examination even if he has given honest and entirely correct testimony. He may go back to his work an abused, insulted, and enraged man who was not permitted by the strange court rules to protect himself from the attack of a trained opponent, experienced and pre-

pared to humiliate, annoy, confuse, and trip him even on his own specialty.

This weakening or destroying of testimony and the resulting prevention of proof is the important part of the work of the defense attorney who defends a guilty man, or of an advocate of a client who is seeking in a contentious trial to collect a fraudulent claim. When, therefore, in these cases it becomes necessary to prove certain important technical facts against the active and trained opposition of the opposing advocate, who is there primarily to prevent proof, the necessity has arisen for qualified technical witnesses, usually referred to as experts, who not only have technical ability but who also have had court experience. It is not because of special technical knowledge alone but because of experience and qualifications as a witness that the same specialist is called on cases to San Francisco, to Los Angeles, to Pam Beach, to San Juan, Puerto Rico, to St. Johns, Newfoundland, to Vancouver, British Columbia, and to hundreds of places in between.

These trained men meet the experienced advocate on more nearly balanced terms; they know something of the game as it is played. When this special witness gives an opinion on the technical problem in controversy, he is prepared to explain and defend that opinion when attacked by the advocate, as he is sure to be. The qualified and experienced witness is not only prepared to defend himself, but is prepared to illustrate and give reasons for the opinion he expresses and show why one part to the controversy is right and one part is wrong. In contrast with the old rules, the witness is now allowed a surprising freedom in most courts¹.

As a rule, this attempt to destroy honest testimony by unfair cross-examination and unfair argument is not so freely permitted in English courts, where there is an experienced judge who has control of the proceedings and in a contentious trial does not represent a party but represents justice. The trained witness, however, usually is prepared to meet these savage attacks of the advocate without the aid of the judge and, being familiar with court rules and more familiar with the technical subject under discussion than the advocate, often has a distinct advantage over his opponent. In the leading textbooks on the subject, the lawyer is generally advised not to cross-examine the qualified and experienced expert witness on his own specialty.

In order to meet this formidable technical proof and offset the effect of correct and persuasive tes-

timony, the advocate against the facts has developed his own strategy; he has not meekly surrendered. He has found and assisted in training a technical expert who will support his client and thus bring about a direct conflict in the expert testimony that is the basis for an insincere argument that none of it deserves consideration. He thus discredits his own witness.

The dishonest witness, like the dishonest argument, is a direct product of dishonest advocacy. These so-called expert witnesses with dull consciences often are employed for the explicit purpose of defeating justice. They have been persuasively led by the advocate to do the best they can for his desperate client even though, in the unexpressed opinion of the witness himself, the client's claim is not an honest claim. When these witnesses testify contrary to their belief, they of course are committing perjury, but they are led to think that it is a kind of modified, legal perjury.

Some of these false witnesses are just ignorance pretenders, others are outright criminal perjurers and are known to be just what they are to those who employ them. They are merely tools of the advocate and stand ready to help in the attempt to prevent the proof of the facts. These surprising conditions, described here in this bald manner, are not known to the general public but are known to those who know what goes on in courtrooms.

By this use of corrupt and incompetent witnesses, correct expert testimony is sometimes nullified and made ineffective. This result does not, however, necessarily follow when subjects are being considered regarding which convincing reasons can be given for the opinion expressed and effective illustrations of the facts can be furnished². A dishonest witness of this kind also necessarily carries his own reputation with him and in many cases can be effectively cross-examined on his record³. The opinions of these pretenders can sometimes be successfully attacked on the actual case in hand if the opposing lawyer is properly informed and prepared, which however is not always the case.

Unfortunately, even a few men with scholastic degrees, who sometimes are connected with reputable companies and even in some instances with reputable institutions of learning, have been corrupted in a kind of subtle manner and led to think that they are at least partly justified, like the lawyer, in endeavoring to promote the interests of the client who employs them. They, like the ad-

vocate, are no doubt to some extent ethically color-blind. The witness of course knows he is doing an improper act but he also knows that the only distinction between him and the advocate is the fact that he takes an oath which, however, he may look upon as a mere empty form.

The advocate many times is in fact much more guilty than the witness, perhaps not in a technical religious sense but in a real sense, because in many of these cases against the facts he misrepresents, suppresses evidence, suborns perjury, and in every way possible endeavors to defeat justice. He ignores, or probably has never heard of, the admonition of Quintillion who, writing in the First Century, said, "Nor is the attorney under the necessity of making his eloquence a safe harbor for every pirate ship." Unfortunately, in this land of liberty and license, advocacy often develops a convenient code of ethics that enables every pirate to find a harbor.

It is hardly necessary to say that there are in every jurisdiction high class, competent attorneys who do not suborn perjury and represent fraud and enter into partnership with crime. These exemplary men are made all the more necessary by the abuses that have grown up around what is described as the "administration of justice" by means of the contentious trial. The protection and promotion of injustice in too many instances would be a more appropriate description of much of what is done.

Those deserving members of the legal profession who are attempting to remedy the abuses should be aided and encouraged in every proper way. These corrupt practices should, however, be more emphatically and explicitly condemned by the honorable men in the profession. Discussions of the subject usually are of a mild and apologetic character that do not go to the root of the abuses. Some of the most bitter discussions of the subject of expert testimony have come from defense and claim case advocates whose profits have been lessened by qualified and honest expert witnesses whose testimony they were unable to destroy. These unethical practitioners will not approve the treatment of the subject in this article.

On account of the nature of the problem in many kinds of cases it is impossible for an expert witness to give convincing reasons for an opinion, or even any reasons whatever that can be understood by the ordinary hearer, and it is in this field, especially of medical and alienist expert testimony, that the main abuses of expert testi-

mony exist. When one doctor testifies that a passenger who fell off from a street-car step and was injured will never recover, and another doctor, with an equal number of degrees and the same general preparation, says that the victim will recover in a few months, a jury, or a judge, hearing such a case, has not been assisted in any way but only confused. This is the kind of problem that has brought most discredit upon expert testimony and upon those who use it.

Expert testimony regarding disputed documents, in certain cases at least, can be illustrated and demonstrated to an intelligent jury or a qualified scientific-minded judge. Testimony of this kind is not mere opinion. This testimony is to be judged, as Professor Wigmore significantly says in the Second Edition of his great work on Evidence (year?), by its "convincingness."⁴ Within the memory of many lawyers this testimony in most cases was of the same class as medical and alienist testimony, that is, it was a mere opinion. In these old cases two witnesses gave conflicting opinions without reasons, and of course the testimony, like many other kinds of expert testimony, was practically worthless.

The fakir expert in any field, and the desperate advocate, of course prefer the bare opinion, but courts now severely criticize this kind of testimony in disputed document cases and, in effect, say that if no reasons are given that the opinion has little value. This enlightened practice has made the incompetent and dishonest expert less useful in preventing proof and has created the necessity for competent specialists who not only can prove the facts but who can withstand the fierce attacks of opposing advocates. The reasoning requirement may also expose the thin fallacies of incorrect or corrupt testimony⁴.

The question naturally arises as to what can be done, if anything, to correct the abuses connected with the subject. It has been suggested that the expert should be selected by the court and, in effect, become a judicial officer. There are valid objections to these so-called "official experts." In some instances they would decide the case and if their official position in effect protected them from proper cross-examination, grave abuses easily might arise.

Proper cross-examination is an indispensable part of the administration of justice. The Michigan Supreme Court⁵ decided that a law authorizing such an official expert was unconstitutional. The California practice is perhaps the least objectionable. This plan gives permission to the

court to call in an expert but this expert is subject to cross-examination the same as any other witness.

Whatever changes are made, and no matter how the contentious advocates may protest, the abuses connected with the subject of expert testimony in a contentious trial will not be entirely eliminated until a real representative of justice is present at every trial in the person of a high-minded, competent presiding judge with full power to guide and control the proceeding.

Most of the abuses of expert testimony grow directly out of the abuses of advocacy. There have been hundreds of criticisms of expert testimony in the law books and law magazines with hardly a reference to this fact, that the abuses of expert testimony have grown directly out of the abuses of advocacy in the contentious trial.

It is well known that there are honest and capable doctors, chemists, alienists, gun experts, engineers, document experts, and patent experts, and the necessary reform will be brought about when legal procedure and legal ethics use and protect these able and conscientious men who can assist in promoting justice. As it is, tradition, if not legal ethics, excuses and even defends the advocate who employs and protects the unworthy witness and attacks, misrepresents, and insults the competent and conscientious witness.

References

Wigmore, Professor John H. (1923). *Wigmore on Evidence*, Second Edition, Par. 2014.

Legal Citations

1. *Venuto v. Lizzo*, 148 App. Div. 164, 132 N.Y.S. 1066. *Wakeley v. State*, 225 N. W. 45.
2. *Hirshfeld v. Dana*, 223 Pac. 451. *Boyd v. Gosser*, 78 Fla. 64; 82 So. 758. *Baird v. Shaffer*, 101 Kans. 585; 166 Pac. 836. *In re O'Connor's Estate*, 105 Nebr. 88; 179 N.W. 401. *McKay v. Lasher*, 121 N.Y. 477; 24 N.E. 711. *Johnson Service Co. v. Mac Leron*, 127 N.Y.S. 432; 148 App. Div. 677.
3. *In re Bromley Estate*, 219 N.Y.S. 701.
4. *In re Henry's Estate*, 276 Pa 511; 120 Stl. 454.
5. *People v. Dickinson*, 184 Mich. 148; 129 N.W.199 (1910).