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The “Fix”

By Richard J. Gimpelson, MD

We all know that the “Fix” is a bad thing when it refers to sports, but when it refers to future Medicare payments, it is highly desired and needed for the future of medical care in the United States. For years Congress and the President have failed to “Fix” the way physicians are paid for providing valuable care to senior citizens and disabled citizens through Medicare. For years physicians have lived under the threat of steep cuts in Medicare payments only to be tossed a bone of hope at the last minute.

Unfortunately, every time the bone is tossed, the future cut in Medicare payment goes up. There is always the possibility that the bone will not be tossed and the cut will go into effect.

I will describe several scenarios below, using family practice as the examples since family practitioners are the first line of medical care. Without them I believe there could be chaos in the delivery of medical care in the United States.

The average net income for a family practitioner in 2011 was $158,000. Overhead runs 50-70%. Let’s graph the numbers.

Now let us look at what happens if Medicare payment is reduced 32% which is what will happen if there is no “Fix” on 1/1/2013. This could happen since the federal government is looking for ways to save $1.5 trillion over the next 10 years. Everyone knows that “wealthy” physicians can afford to give up some of that lucrative income.

Since insurance companies often base their reimbursement on Medicare, it is likely that they will also reduce payments to physicians by 32%. Also realize that overhead will rise 2% (a conservative estimate).

The results:
Physician C is out of business. Physician B gets a part-time job doing insurance physically. Physician A continues to work, but fires all employees and posts a sign in the office “Gratuities Not Included with Charge for Care.”

Now do not worry since a posting on CNN Health from CNN.com references an article from the Annals of Family Medicine. This article claims that total health care costs will surpass total average family income in less than 20 years. So, almost no one will be able to go to a physician anyway.

The solution is a new specialty: “Diseases of the Rich”

This all reminds me of my experience when I interviewed for an OB/GYN residency. At one medical center the chairman of the OB/GYN department noted that I worked at my father’s scrap yard from the age of 10 through my college graduation. His exact words: “It’s good to have a job you can fall back on if you don’t make it in medicine.”

<table>
<thead>
<tr>
<th>Physician</th>
<th>New Gross Income (32% Reduction)</th>
<th>Overhead (2% Increase)</th>
<th>New Net Income</th>
</tr>
</thead>
<tbody>
<tr>
<td>A</td>
<td>$214,880</td>
<td>$161,160</td>
<td>$53,720</td>
</tr>
<tr>
<td>B</td>
<td>$268,600</td>
<td>$241,740</td>
<td>$26,860</td>
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<tr>
<td>C</td>
<td>$358,133</td>
<td>$368,666</td>
<td>($17,906)</td>
</tr>
</tbody>
</table>

Hmm, now let’s see. Below are recent posted scrap metal prices. Prices vary depending on market demand. MAYBE HE WAS RIGHT!

### Buying Price

<table>
<thead>
<tr>
<th>Metals</th>
<th>Buying Price (per lb.)</th>
</tr>
</thead>
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<tr>
<td>Aluminum Cans</td>
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<tr>
<td>Yellow Brass</td>
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<tr>
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<td>#2 Copper Wire</td>
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<tr>
<td>Lead</td>
<td>$0.29</td>
</tr>
<tr>
<td>Stainless Steel</td>
<td>$0.55</td>
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### Selling Price

<table>
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<th>Metals</th>
<th>Selling Price (per lb.)</th>
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<tr>
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<tr>
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<td>Lead</td>
<td>$0.75</td>
</tr>
<tr>
<td>Stainless Steel</td>
<td>$1.50</td>
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</tbody>
</table>

Dr. Gimpelson, a past SLMMS president, is co-director of Mercy Clinic Minimally Invasive Gynecology. He shares his opinions here to stimulate thought and discussion, but his comments do not necessarily represent the opinions of the Medical Society or of Mercy Hospital. Any member wishing to offer an alternative view is welcome to respond. SLMM is open to all opinions and suggestions.

On Humor

I had rather have a fool to make merry than experience to make me sad.
(Wm. Shakespeare, As You Like It)

Laugh! Even if you are hurt or it hurts, Laugh! Laughing is good for you. It exercises lots of muscles, relieves stress and leaves you feeling good. Sure, it is difficult to laugh in the face of adversity, but more often than not, the bad times will pass. If you can keep “good humor,” you may even live longer and recover from illness faster. (And even if you don’t, it will seem like it.) So smile, chortle, giggle, laugh! The other saying about laughter also pertains: “Laugh and the world laughs with you.”

Dr. Knopf is editor of Harry’s Homilies. He is an ophthalmologist retired from private practice and a part-time clinical professor at Washington University School of Medicine.
Lawsuit Reform: Issues & Possible Solutions

Introduction: The Broken Medical Liability System

Reliable Medical Justice Is Key to Bending the Health Care Cost Curve
Health courts would be presided over by expert judges dedicated full-time to resolving medical liability disputes
By Philip K. Howard, Common Good, Brooklyn, N.Y.

Grisham’s The Litigators Portrays Broken Liability System
Novel tells of small-time lawyer filing a class-action lawsuit against a pharmaceutical manufacturer
By Arthur Gale, MD

The Adversarial System of Expert Witness Testimony
System can influence witnesses to give an incomplete view of the truth resulting in a ‘battle of the experts’
By Erol Amon, MD, JD

News

SLMMS Launches Member Find a Member Promotional Campaign

Nominations Open for SLMMS 2013 Offices

Science Fair Winners Announced

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The “Fix”

President’s Page: Robert McMahon, JD, MD
Physician Expert Witnesses and the Search for the Truth

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Physician Expert Witnesses and the Search for the Truth

Experts should assist in understanding complex medical issues

Nearly all physicians agree that physicians who provide expert witness testimony should be held to the same standards and sanctions as they would be practicing in an office or hospital setting.

It’s complicated. This issue of St. Louis Metropolitan Medicine contains articles discussing expert witnesses in medical cases plus health-care courts which are a possible means of providing neutral expertise.

Experts are supposed to assist a finder of fact in understanding complex issues outside the realm of ordinary education and experience. Medical care presents complex, demanding situations that are addressed in real time. When poor outcomes occur (or are perceived), care is scrutinized and analyzed in a fault-and-blame setting often by experts with no accountability or review. There are something like 13,000 diseases, syndromes and injuries classified by the World Health Organization, with 6,000 medications and 4,000 medical and surgical procedures to treat them.

Medical education can include four years of college, four years of medical school, and three to ten years of residency and fellowship training leading to a subspecialty career. Even then, these subspecialists, clearly qualified as experts in their defined area, are only part of a complex care team. These subspecialists can and do disagree about care.

In a courtroom, the judge is the legal expert. The determination of expertise on any subject is made by the judge after preliminary presentation of qualifications and generally accepted principles of reliability and validity of the underlying area of expertise. Generally, great latitude is given in qualifying experts since the trier of fact (the jury in most medical cases) can make an assessment of the validity and reliability of the opinions presented (that is, whether they believe the expert, or what weight to give to the opinions expressed). The jury determines facts within the confines of the evidence presented, including expert opinions, according to instructions provided by the judge. A juror’s individual expertise has no role in the determination of facts.

Medical expert testimony on issues beyond specialty or beyond experience is not valid or reliable. Nearly all physicians agree that physicians who provide expert witness testimony should be held to the same standards and sanctions as they would be practicing in an office or hospital setting. Expertise should be subject to stringent scientific scrutiny.

Experts should not undermine or dispose of the responsibility of the jury in deciding facts – they should assist in understanding complexity.

Experts are subject to cognitive (unconscious) bias in an adversarial system. Obviously the “hired gun” who deliberately sells an opinion on demand, and consciously and deliberately provides false or misleading opinion and testimony, is a low creature who violates multiple principles of ethics and law. It is hoped that this is a rare situation that will result in severe consequences for the offender. More problematic is the cognitive bias produced by compensation for an opinion the expert will increasingly believe to be true. There is no provision for neutral assessment and opinion in our current system. The St. Louis Metropolitan Medical Society supports alternatives to the current medical negligence lawsuit system in part to promote this goal.
Experts who derive income from testimony and have no local responsibilities may be viewed skeptically by jurors. When past testimony has been predominantly skewed to one side or the other, the jury should have access to that information. It should be obvious that expert opinions that do not support the position of the party hiring the expert and records of these opinions do not surface in court and are never revealed.

There is no free, searchable, national database or repository that summarizes the position an expert physician witness has taken in lawsuits. The complexity of lawsuits and the multiplicity of experts makes this a difficult proposition. In a deposition, without documentation of the previous testimony, challenging the expert’s past positions is a tactical gamble. Out-of-state physicians may qualify as experts without a medical license in Missouri. The Board of Healing Arts has no registry or record of their testimony, and really no authority over their conduct.

It is complicated! Neither the current medical negligence lawsuit system or health courts should surrender decision-making to professional expert witnesses. Access to neutral, unbiased opinions to assist fact finding is the ideal.

For more information: Twitter @mcmahonjdmd #slmms #lawsuitreform.
The Medical Liability Crisis

Physicians and their patients continue to face serious challenges from the medical liability system. For physicians, the current system leads to meritless lawsuits, increases liability premiums, causes physicians to practice defensive medicine, and limits their ability to communicate with their patients. For patients, the current system limits access to health care, leads to additional tests and treatments, increases health care costs, and creates a communication barrier between the patient and the physician. In the following articles, we look at issues related to lawsuit reform and possible solutions.

Medical liability by the numbers:

61% of physicians age 55 and older have been sued at some point during their careers.

51% of obstetricians/gynecologists under age 40 have been sued.

9 out of 10 surgeons age 55 and older have been sued.

$62.4 billion the 2012-2021 reduction in the federal deficit if medical liability reform were enacted.

64% of claims filed against physicians are dropped or dismissed.

$70 to $126 billion per year the cost of defensive medicine according to a 2003 study.


Resources

American Medical Association
www.ama-assn.org/go/liability

American Tort Reform Association
www.atra.org

Common Good
(advocate for health courts)
www.commongood.org

St. Louis Metropolitan Medicine | June/July 2012
A $2.6 trillion a year and rising – or 18% of GDP – the American health care system is driving the country toward the fiscal brink. While there is no shortage of prescriptions to find savings – e.g., reduce reimbursement rates, negotiate drug prices, crack down on fraud – the main cost driver that must be addressed is a health care culture that equates more care with better care. To control costs, the incentives of patients and providers must be realigned toward prudence.

Nowhere is the need for this new paradigm more evident than in the area of medical liability where doctors’ justified distrust of medical justice (which has an error rate of 25%) leads them to prescribe and perform treatments for no other reason than to prevent lawsuits. Defensive medicine is estimated to cost anywhere from $45 billion to over $200 billion a year. To stem this waste, America needs a legal system that can reliably distinguish good care from bad.

The need for medical liability reform – to not only control health care costs – is an issue on which most health care policymakers and practitioners and the American public agree. A 2009 Clarus Research Group poll taken during the health care reform debate found that 83% of the electorate wanted Congress to address medical liability as part of any reform package. The exact form reform should take is where divergence emerges, with many on the right calling for caps on damages and others for such reforms as early offer programs, apology statutes, and safe harbors for following practice guidelines.

While there are merits to each of these proposals, none creates the essential condition necessary for doctors to stop practicing defensively: reliability. Caps, for instance, control for the size of an award, but they don’t protect doctors who did nothing wrong. Instead, what’s needed is a new legal framework: a system of specialized health courts.

The health court concept originated with Common Good, the nonpartisan government reform coalition that I chair, in collaboration with the Harvard School of Public Health and with funding from the Robert Wood Johnson Foundation. Their signature feature would be expert judges dedicated full-time to resolving medical liability disputes. These judges would consult with neutral experts, compensated by the court, and make written rulings that would provide guidance on proper standards of care and set precedents on which both patients and doctors could rely.

As with similar administrative courts that exist in other areas of law – for tax, workers’ compensation, and vaccine liability disputes, among others – there would be no juries. To assure fairness, each ruling could be appealed to a new medical appellate court.

In addition to providing greater reliability, health courts would be much more efficient than the current system, which now takes an average of five years to resolve a claim. They would also make claims cheaper to adjudicate, as opposed to 54% of each award going to attorneys’ fees and court costs as is the case today. Moreover, a health court system – that makes medical liability disputes less adversarial and dehumanizing – would create the conditions necessary to improve patient safety, including improving communication between providers. No longer would a doctor be afraid to consult with colleagues on the appropriate course of action.

By Philip K. Howard
Common Good,
Brooklyn, N.Y.
The health court concept has been endorsed by every legitimate health care constituency, including medical societies, patient safety organizations, and consumer groups like AARP. It is also supported by thought-leaders such as the New York Times’ David Brooks; current and former government officials such as New York City Mayor Michael Bloomberg; Senators Joe Lieberman and Mike Enzi, former Senator Bill Bradley, and Representatives Jim Cooper and Mac Thornberry; and, according to Clarus, 67% of the American electorate.

Health courts were recommended by four bipartisan deficit-reduction commissions last year, including Simpson-Bowles, as a significant way to control health care costs. And both likely major-party presidential candidates have endorsed health courts.

President Obama endorsed health courts in a March 2010 letter to Congressional leaders, as well as in his FY12 budget proposal in which he allocated $250 million for states to implement medical liability reforms, including health courts. In an op-ed in USA Today on March 22, 2012, former Massachusetts Gov. Mitt Romney wrote, after also advocating for caps, that “the federal government should also encourage states to pursue additional reforms such as specialized health care courts or other alternatives for resolving conflicts.”

The one constituency that opposes health courts—trial lawyers—is also unfortunately one of the nation’s most powerful. The very ad hoc nature of today’s medical justice that health courts would eliminate is what sustains the trial bar. Former Democratic National Committee Chair Howard Dean attributed the lack of any meaningful medical liability reform in the Affordable Care Act to its authors’ unwillingness to take on trial lawyers, adding: “And that is the plain and simple truth.”

Controlling the cost of health care is a moral imperative— for patients, for those who must pay for the care, and for our nation’s fiscal health. Creating a reliable system of medical justice is necessary to controlling those costs, and health courts are essential. The only question is: Will the public or the trial lawyers prevail?

Mr. Howard, a lawyer, is Chair of Common Good (www.commongood.org), the nonpartisan government reform coalition dedicated to restoring common sense to America. He is the bestselling author of The Death of Common Sense and, most recently, Life Without Lawyers.

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Sometimes a fictional work can have a greater impact in exposing the wrongs of society than a scholarly study. A couple of examples come to mind: The novel 1984 by George Orwell exposed the evils of a totalitarian society. Uncle Tom’s Cabin by Harriet Beecher Stowe exposed the evils of slavery. The popular novelist John Grisham has recently written a satirical novel, The Litigators, that exposes some of the more egregious wrongs of our legal system.

Although Grisham may not be in the same class as the aforementioned authors, his influence should not be underestimated. He has sold over 250 million copies of his books which have been translated into 29 languages. Furthermore Grisham, a lawyer, has had hands-on experience in the law, having practiced his profession for 10 years in a small Mississippi town. He knows well the mindset of his fellow lawyers and the clients whom they serve. Like most satires The Litigators has a serious message. It delivers a stinging critique of the American legal system and the cupidity and venality of personal injury lawyers and the clients whom they represent.

The Litigators is about product liability. Product liability is, in my view, the flip side of medical liability. Both involve plaintiffs who claim injuries – on the one hand from a product and on the other hand from a doctor. Both use paid-physician expert witnesses and both require juries untutored in science or medicine to determine liability.

The story unfolds in a two-man law office in a run-down neighborhood in southwest Chicago. The firm has one secretary and a dog, AC, short for ambulance chaser. One of the lawyers, Wally Figg, a tragic-comic figure, is the chief protagonist of the novel. Wally learns about a class action lawsuit being filed against the manufacturers of a cholesterol-lowering drug called Krayoxx. He decides to leave the daily grind and make a fortune by finding clients injured by Krayoxx.

Wally cannot afford to advertise on radio or TV. So he sends solicitation letters to 3,000 former clients going back 20 years asking them if they or anyone they know ever took Krayoxx. He uses the obituary section of newspapers and funeral home directors to find potential clients. He places brochures throughout the city.

His first contact is the widow of a former client who weighed 320 pounds at the time of his death at age 48. At first she is reluctant to become a party to the suit. But Wally paints in glowing terms a picture of the all money she’ll come into if she only signs a piece of paper. Wally also offers her a commission for every client she finds. The crafty widow finally agrees to find other clients but at a price steeper than what Wally offers and paid up front and in cash. Wally’s greed is contagious.

Eventually Wally secures eight clients and files a lawsuit against the manufacturers of Krayoxx. He is invited to a meeting of mass tort lawyers in Las Vegas where the lead attorney boasts that the potential pool of injured or dead could be as high as half a million! Grisham wryly comments: “The news – of so much misery and suffering – was well received around the table.”

Next, an expert tells the assembled lawyers that the loss to the pharmaceutical company that makes Krayoxx could be at least $5 billion. “Wally was fairly certain that he was not the only one at the table who did a quick multiplication: 40 per cent (the contingency fee) of $5 billion. The other (lawyers) seemed to take it in stride. Another drug, another war with Big Pharma, another massive settlement that would make them even richer. They could buy more jets, more homes, more trophy wives.”

After the meeting the lead attorney offers Wally a ride home in his brand new gleaming G650 private Gulfstream jet. “Wally had read about rich trial lawyers and their private jets but it had never crossed his mind that he would see the inside of one.”

During the ride home the lead attorney explains the nuts and bolts of a product liability suit. The attorney explains: “No big deal, (it’s) pretty routine legal work. Keep in mind, Wally, that the defense firms see this as a gold mine too, so they work the cases hard.”
The class action lawyers then swing into action. There is no snipping of obituary columns out of newspapers. There is no hanging around “low-end funeral parlors or passing out brochures at fast-food joints.” They hire a screening company composed of “medical technicians” who do nothing but travel the country running echocardiograms on an assembly line basis usually in strip malls on people “who were clamoring to profit from … the latest mass tort attack.” To the chagrin of the mass tort lawyers the incompetent medical team, led by an incompetent doctor, found that Krayoxx did not cause significant valvular heart damage.

In my opinion this is the book’s major weakness. Grisham accurately describes mass screening of potential plaintiffs. They are patterned after the mass screenings for asbestosis. In that mass tort scam radiologists and pulmonary specialists hired by personal injury class action lawyers read chest X-rays as showing asbestosis in over 95% of the plaintiffs. When independent academic radiologists at Johns Hopkins Medical Center read the exact same films they found evidence of asbestosis in less than 5% of cases. (Gitlin et al., Academic Radiology 2004)

In his book Lawyer Barons, law professor Lester Brickman, a leading authority on mass tort-suits, states: “contingency fees … drive some lawyers to screen hundreds of thousands of potential mass tort litigants and to hire technicians and doctors to generate largely phony medical reports …”

I believe that The Litigators would have delivered a much stronger message if Grisham had the hired expert witness physicians render “phony medical reports” as they did in reality with asbestosis.

The book ends with a farcical trial. The mass tort lawyers disappear after the negative reports from the screeners and a negative report that appeared in the New England Journal of Medicine. Wally and his team are left to try the Krayoxx case before a federal district judge with pitiful plaintiffs and equally pitiful expert witnesses. Grisham does not hesitate to show his scorn for these so called expert witnesses referring to one “as nothing more than a rubber stamp for the mass tort bar” and the other as “a nut job who who’ll say anything for a buck.” He also takes a dig at lay juries. When a defense witness from the pharmaceutical company talks about his research, most of the jurors “appeared brain dead, thoroughly numbed by this futile exercise in civic responsibility. If this is what made a democracy strong, God help us.”

Can books like The Litigators affect the public’s opinion of lawyers and our system of justice? Public opinion polls show that they do. Can books like The Litigators bring about reform? It’s unlikely, at least in the near future. There is no board of registration for the legal profession as there is for medicine, engineering, and every other profession. The legal profession is the only profession that regulates itself, primarily through the judiciary. Trial lawyers have successfully fought expert witness, contingency fee, and loser-pay reforms. They have fought health courts – mainly by claiming they are unconstitutional. The profession guards its turf closely. And it maintains the status quo by making huge financial contributions to national and state politicians.

Correcting our broken liability system may seem like a hopeless task. Books like The Litigators tell the American public and the entire world just how broken it is. When physicians and the public get discouraged about reforming the system, it may be worthwhile to recall a quotation from Winston Churchill: “You can always count on Americans to do the right thing – after they’ve tried everything else.”

Dr. Gale is a past president of SLMMS and frequent contributor to St. Louis Metropolitan Medicine.
Overview

Medicine employs an open, cooperative, yet tightly constrained scientific methodology interested in discovering the truth. In contrast, the American legal system uses a relatively hidden, more creative, adversarial approach in which the courts and jurors unearth the truth to the best of their abilities. The attorney’s primary goal is to use the adversarial system to win his or her case rather than to search for scientific truths. Attorneys have the ethical duty to advocate zealously for their client regardless of the limitations in their case. Whereas scientific unknowns remain as unanswered questions still seeking answers, legal disputes must always be conclusively decided on and finality reached regardless of the quality and quantity of evidence presented. To achieve the primary goals of their clients, attorneys are generally schooled in methods of advocacy, debate and political sciences.

Legal causation is generally different from medical causation. In medicine, causation is complex and depends on multiple factors. To establish scientific proof using evidenced-based medicine, physicians often rely on controlled clinical trials with mathematic probabilities that strive to explain the observed results by isolating the study i.e., experimental variable and by minimizing the occurrence of happenstance or chance. Causation is further strengthened when these results are independently reproducible.

In law, however, the focus is not science. The heart of the matter is the attribution of responsibility. Therefore, by necessity, the law commences a retrospective investigation of the particular conduct of particular persons. Evidence law states that evidence is relevant if it has “any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.” This evidence must be pertinent to the case and help the jury make a final decision. Here, the 51% standard is clearly being invoked to persuade the jury.

The Four Elements of Professional Negligence

The four elements that must be proved in professional negligence lawsuits are duty, breach, causation and injury. Each element must be proved by the preponderance of evidence standard. Expert witnesses are often relied upon to provide this evidence.

Multiple experts may be used to prove each element independently. In contrast to fact witnesses, experts are the only witnesses permitted to reflect, opine and pontificate in court. Initially, a standard-of-care expert introduces testimony and educates the jury on a) what the appropriate medical practice is or should be and b) whether the defendant’s conduct falls within the standard of care. Causation experts may be used to establish whether the alleged breach legally caused the alleged injury “within a reasonable degree of medical certainty.” Economic experts may argue over the degree of damages, life expectancy and projected future costs.

Ultimately, all four elements must be linked together for the plaintiff to prevail, with each element being proved by a preponderance of the evidence. When a physician defendant has no legal duty to the patient, the suit will fail to go forward. When the defendant can show that the standard of care was met despite an adverse outcome (maloccurrence), the defendant should prevail. If the defendant breached a standard of medical care owed to the plaintiff, but the breach did not cause or was unrelated to the injury, then the plaintiff should not be able to recover any damages.

Our system of justice relies on opposing parties and their at-
The Adversarial System and Its Use of Experts

The adversarial system of litigation is the cornerstone of the American justice system. Ideally, if two equally matched (by intelligence, experience and resources) attorneys zealously and competently represent their clients within the bounds of ethical and legal rules and if there are perfectly neutral judges and juries, then the correct result should be reached.

The reasoned basis for the adversarial system is that true facts will emerge under a vigorous attempt of each party to advance its own favorable evidence (interpretation of historical facts) while attempting to limit admissibility or limit the credibility of its opponent’s evidence. The trier of fact (judge or jury) assesses the evidence and unearths the “real truth.” Ultimately, a conclusion must be reached and one side loses.

In this system, however, there is no obligation to present all the facts—only those favorable to a particular side. The attorneys are not under oath. The judge often does not take an active role and simply remains a neutral referee ruling on admissibility of evidence and other legal issues as they arise. Each side is presumed to look after their own interests and to define the scope of relevant evidence. The court is not interested in reviewing evidence that the parties do not present. Jurors are also passive participants who are usually unable to ask clarifying questions.

Expert witnesses for both sides present their opinions regarding the evidence previously produced. Moreover, the expert offers his or her opinion as evidence. Testimonial and other evidence is tightly controlled and shaped to various degrees by the opposing attorneys. As a result (and not infrequently), it is an incomplete view of the truth.

There are important stages that litigation will pass through: the witness must be located and induced to testify, the witness must be prepared for testifying, the testimony must be presented, and the testimony must be evaluated.

Gross described the inevitable process as follows. Opposing attorneys select experts who will advance or develop their theory of the case. The expert need not have any previous contact or previous knowledge of the case; however, he or she needs to be other than minimally qualified by minimal legal requirements. Experts are often selected from a large pool, not based on an impartial assessment or expert stature but based on what they will say and how they will say it. Next, the expert witness is highly remunerated by the hiring counsel. These witnesses become too readily available, and many advertise their services. Experts whose incomes depend heavily on testimony tend to please, otherwise, they would not be rehired or recommended for future cases.

Perhaps worst of all, this system of expert witness selection breeds contempt from lawyers, judges and other physicians. Concurrently, it breeds contempt for the adversarial system of law and its lawyers. The impartial or unfavorable expert view may even be strategically deselected in preference of another. Being highly remunerated and eager for recommendations or repeat engagements by the hiring attorney may explain why the expert witness may shift from objectivity and become an advocate for his or her side.

(continued on next page)
The lawyer in the adversarial system is a purveyor of evidence. The lawyer’s responsibility is to present evidence—only the evidence that favors his side—and to present it skillfully. A lawyer who intends to present an expert for testimony prepares the witness to his or her benefit. As a result, the expert may spend significant time preparing to testify, especially if the situation is complex.  

As the preparation takes place, the expert has a motive to construct defenses against the opposing lawyers because the work is done in anticipation of battle, under threat of counterattack. The expert is subject to camaraderie as when working on a difficult project. The expert may become dependent on the lawyer for preparation to make his or her testimony successful and to seek protection against a formidable enemy. Hours of this type of preparation, perhaps more than payment, may push the expert to identify with his litigation team. In deposition preparation, experts for both sides may be instructed to not volunteer information and to view litigation as a fight in which he or she must take sides.

Proffered evidence is often probed for uncertainty, unreliability, bias, inconsistency, ability to mislead, and lack of relevance. On cross-examination, an attorney may ask leading (misleading) questions in such a manner and form as to be testifying while asking a series of very narrow questions, advancing his or her client’s viewpoint. This practice can often lead to simplified, abbreviated and distorted answers by the expert.

Furthermore, on cross-examination, physician witnesses can be aggressively challenged with personal attacks on their fund of knowledge, their objectiveness, their competency, their credentials, their character and endurance. Aggressive cross-examination should be expected from opposing counsel because the attorney hopes that the expert witness will be rattled and lose his or her cool. Such cross-examination is all done in an attempt to diminish the impact of the opposing expert’s testimony. This confrontation should be met with a high degree of professionalism and poise, but could with a loss of equanimity it could be met with varying degrees of anger and argumentation depending on the witnesses’ personal sense of resentment.

The problem of conflicting experts and the battle of the experts was summed up in a 1901 article by Judge Learned Hand in a paradox: “How can we expect jurors to decide between experts when the jurors’ ignorance is the premise for allowing the expert to testify in the first place?” Furthermore, Judge Hand states: “One thing is for certain, they will do no better with the so-called testimony of experts than without, except where it is unanimous.”

To truly assist in the administration of justice, the expert should be taught the partisan imperfections inherent in the adversarial system, some of which are aforementioned.

Most important, an expert must bring to bear the positive forces of integrity, responsibility, professionalism and ethics. The truth should be told candidly to the hiring attorney. Ideally, the expert should approach every question with independence and objectivity. Professional expert testimony should rise above selection and financial pressures. Partisan preparation (and resulting identification with a party) is a more subtle form of hiring an expert advocate and is more difficult to counter. Nonetheless, meeting certain qualifications and following certain ethical guidelines as described objectively by most professional organizations should assist the quest for objectivity.

Conclusion

In conclusion, objective experts with integrity will always be needed for court procedures. Many critics maintain that expert witness testimony reform is needed since many experts are not objective and leave much to be desired. Is the source of evil the
adversarial system (with free reign to promote partisan views)? Is the source of evil intrinsic to unprofessional partisan experts? Can the system, if unable to properly regulate physician testimony and attorney zealousness, be improved on to achieve its true purpose: pursuing justice for the litigants, regardless of their wealth and whether they are politically well connected?

We deeply value expert information in most contexts except, ironically, in litigation when it is often regarded with a great deal of suspicion. Expert information is used by countless decision makers—from patients when they choose between medical doctors or by clients when choosing between attorneys for legal representation, or by Congress or even the President when considering proposed weapons systems or monetary policy. In each case, the ultimate decision maker, whoever it may be, must come to terms with the need to act on the basis of expert information that he or she is not competent to fully understand.

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