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Handling the Expert Medical Witness

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HANDLING THE MEDICAL WITNESS

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IT is not my intention to attempt to discuss in detail the exhaustive subject of expert medical testimony. Such a detailed discussion lies within the province of one trained in the law. My purpose is merely to set forth some of the personal experiences and impressions gained from 35 years of continued and frequent attendance in court as a medical witness. My opportunity to observe the workings of the wheels of justice has not been confined to the American form of jurisprudence—it has also extended to the English system from whence it derives. These long and tedious vigils in the halls of justice have given me ample opportunity to observe and evaluate court procedures in general, attorneys in particular and, incidentally, witnesses and jurors. It has been a most interesting psychological study. Any references to the legal problems concerned with the appearance of a medical witness in court are culled from a somewhat thorough investigation of the literature on the subject. The reason for this investigation was that I might be more intelligently informed in the matter, and thus acquire a better understanding of my duties and responsibilities, as well as the limits within which my testimony would be competent. It is my personal belief that medical schools fail to devote sufficient attention to medical jurisprudence insofar, at least, as it applies to the physician's appearance in court. As a result, doctors called upon to testify as experts are unaware of the bounds within which their testimony may be given, as well as the latitude which permits them to give full effect to their opinions.

Having lived under two flags, I have naturally compared the American system of jurisprudence with that pertaining in British courts of law. While deeply impressed with the pompous dignity, the wigs and gowns, the medieval ceremonials and the more rapid administration of justice which characterize the courts of England, the conviction remains that notwithstanding its contrasting informality and comparative slowness of action, the American procedures are more fitted to our democracy, and maintain a closer relation to the original idea of trial by one's peers. In the exercise of broader powers and discretionary attitude of its presiding judges, as well as the authority assumed in the conduct of the trial, comments on the weight of evidence and instructions to the jury, the

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federal court follows more closely the English pattern. Throughout the British Empire, all courts of justice are held in very high regard. Respect for the law and fear of the swift consequences of its violation dominate the mind of the average British citizen. Criticism of the honesty of English jurists, in or outside the court room, is considered lese majeste, and is punished severely. The unfortunate incidents which occasionally mar court trials in America tend to shock the foreign observer. True, these incidents are isolated cases, but, if the prestige of the courts and of the law is to be upheld and preserved, all attorneys must at all times unite in maintaining the high standards of their calling and continue to foster the dignity of trials. To the lay observer, state court procedure appears to require some modification. One cannot escape the conviction that judges are handicapped in the performance of certain duties which appear clearly to lie within their province. Legal limitation and fear of judicial error are no doubt at fault. In marked contrast to the practice of our federal courts, state judges are deterred from commenting upon the weight of evidence or the credibility of witnesses. It follows that juries, admittedly ill equipped, receive little or no guidance in these matters. This rule is not as rigidly adhered to in all of the states. In California the trial court may comment upon the evidence as a whole or upon the testimony or credibility of the witness providing the courts comment is temperate and fairly made. Thus, the comment of the court is not confined to a colorless recital by way of summing up the facts. My information reveals that in federal trials, while the court may not direct a verdict of guilty in criminal cases, it may at all times either directly or indirectly analyze and comment upon the weight of evidence, and express its views with regard to the testimony of witnesses leaving the ultimate determination of the issues of fact fairly to the jury. The reaction of the layman to these divergencies is that some middle ground could be found which would expedite trial and promote justice to a greater degree.

Expert Testimony

The original purpose of expert testimony is obvious. It is permitted in order to aid in the elucidation of certain issues in the case, which elucidation is only possible by the testimony of witnesses possessing special knowledge not to be obtained from the average individual. The general rule is that opinion evidence is not admissible;[1] in other words, the witness must testify to facts within his knowledge or those derived from his own perception. While it is

[1] Mundo, *The Expert Witness*, p. 1; Jones, Evidence, § 1242, p. 2283.

true that from necessity the conclusions of certain witnesses are admissible in matters of identity, quantity, value, time, distance, velocity, heat, cold and others; as well as questions concerning various mental and moral aspects of humanity; namely, temper, anger, fear, excitement, intoxication, veracity and general character: such testimony is conclusion evidence and based upon evidentiary facts. The general rule of opinion evidence is flagrantly broken in the case of expert medical testimony. Such testimony permits the consideration and credence by the jury of opinions and conclusions based upon facts not necessarily within the knowledge or observations of the expert, but introduced in evidence by other witnesses and presumed to be true. Its limitations appear to be very broad. Once having qualified and while his competency remaining unchallenged, it permits the witness by hypothesis and assumption of facts either testified to at the time of his direct examination, or upon promise of later proof, an expression of opinion not only as to the injury or episode being the proximate cause of the present disability and a belief as to the permanency of the litigant's present condition; it also allows statement of belief as to the probable or even possible future onset of remote effects.[2] At this point, therefore, medical expert testimony enters the field of prophecy. It has appeared to me that this matter of prophecy is at times permitted to go too far. Belief as to probable exacerbations or remote results in the individual's mental and physical state without evidence that such a development is already apparent, appears unreasonable and is obviously double speculation.[3] Thus, to say that any nervous disorder resulting from an injury or shock may at some distant future time probably or possibly result in insanity, is to assume the role of prophet. Medicine is a changing and progressive science, and the last word in therapeutics today may not be the last word tomorrow; however such speculation appears to be permissible.

Hypothetical Question

Webster defines hypothesis as "A tentative theory or supposition provisionally adopted to explain certain facts, and to guide in the investigation of others." This definition defines the mechanics, at least, of hypothetical inquiry. As I understand it, the theory and supposition must be in the case, and the facts supporting them must

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[2] Block v. Milwaukee Street R. Co., 89 Wis. 371, 61 N.W. 1101 (1895); Hanton v. Omro, 122 Wis. 337, 99 N.W. 1051 (1904); Faber v. Reiss Coal Co., 124 Wis. 554, 102 N.W. 1049 (1905); Sundquist v. Mad. R. R., 197 Wis. 83, 221 N.W. 392 (1928).

[3] Schweitzer, Negligence Actions, p. 376, n. 1; Griswold v. N. Y. etc. R. C., 115 N.Y. 61. 21 N.E. 226 (1889).

have been testified to, before a basis may be established for the propounding of the hypothetical question. The ground work for such question is, of course, a simple matter for the attorney whose purpose it is to offer it later in the trial. In framing such an interrogation a great deal of care and effort must be spent. To attempt to recite extemporaneously the facts desired is often a confusing and unsatisfactory method of handling it. While in court I usually hear two constant objections by opposing counsel to the hypothetical questions submitted to me. First, that the question recites facts not shown in the evidence, and second, that the question does not contain all of the facts in the case. A promise to introduce the missing facts later in the case appears to be sufficient to invalidate the first objection. As to the second, it would appear that the question need not include any particular number of facts, it may assume any one or more facts whatsoever, and need not cover all of the factors which the questioner alleges in his case. The questioner is entitled to the witness' opinion in any combination of facts that he may choose. It is often convenient and even necessary to obtain that opinion upon a state of facts falling short of what he or his opponent expects to prove because the questioner cannot tell how much of the testimony the jury will accept; . . . For reasons of principle then, and to some extent of policy, the natural conclusion would be that the questioner need not cover in his hypothesis the entire body of testimony put forward on that point by him or by the opponent, but may take as limited a selection as he pleases and obtain an opinion on that basis. Such is the orthodox doctrine as applied to most courts.[4] On the other hand, other authorities are of the opinion that generally speaking a hypothetical question should state all the facts relevant to the formation of an opinion . . . there is no exclusive formula . . . and the matter of form is largely discretionary to the trial court.[5]

At this point may I, as a layman, offer a word of caution as to the length of the hypothetical question. Often one hears a question covering several pages of foolscap and containing so much material that the attorney himself cannot remember it. Under these circumstances it is difficult to believe that the jury at its conclusion is in any better position. Limited to essential facts, clearly and intelligently cited, upon which the jury may know the premises upon which the opinion is to be given, it appears to be more effective. One prominent trial lawyer tells me that he adopts the rule of writing the question carefully and as concisely as possible, committing

[4] 1 WIGMORE, EVIDENCE, § 682, p. 778.
[5] 3 JONES, EVIDENCE, p. 2427-28.

it to memory and then tearing up the written version. His argument is that unless he can remember it, he is certain that the jury cannot do so. The effect of medical expert testimony upon the jury has intrigued me. After speaking to many jurors, I am now convinced that its effect is greater than I formerly believed. This, of course, depends a great deal upon the manner in which this evidence is given, and is concerned with the apparant honesty of the witness, the firmness of his conclusions and, above all, his employment of language as intelligible as possible to laymen serving as jurors. Many expert witnesses forget that the jury exists, and address their answers to the questioner. His replies should be directly aimed at the jury, and he should, if necessary, change his position in the witness chair in order that they may hear distinctly what he says.

At this point let me discuss that individual who is at once the trial and despair of judges and opposing counsel, and the white haired boy of the trial attorney who engages his services.

THE EXPERT WITNESS

It must be born in mind that a physician who qualifies as an expert must expect to be judged by a different standard than the physician who gives evidence as an ordinary witness. By this is meant that from the latter we have no right to expect more than average knowledge of the issues in the case. From the former we have a reason to demand an opinion based upon a larger personal experience and scientific familiarity with the issues involved. An interesting point occurs in connection with this latter statement. Objection may be raised to an expert witness as to the bookish source of his knowledge; first, because it implies a lack of skill and experience as affecting his expert capacity for judgment; and second, because it involves accepting as a knower of a given fact one who has not really observed it for himself, but is trusting in the opinions of others. In other words, it is an objection against the witness' experience on the quality of his knowledge. To deny the competency of a physician who does not know his facts from personal observation in similar cases is to reject medical testimony almost in its entirety . . . Medical science is a mass of transmitted data; general relations are rare which are the result of one man's personal observations exclusively; and the law cannot expect its petitioners to obtain these rare persons.[6]

There appears to be no precise general rule as to how the skill of a witness must be acquired. According to decisions in Michigan

[6] 1 WIGMORE, EVIDENCE, § 687, p. 782.

a witness may express an opinion upon certain matters even if his knowledge is derived from study alone.[7] Wigmore agrees with the above rule, feeling apparently that the knowledge however acquired is a question relating only to the weight of the evidence given.[8] The Supreme Court of Wisconsin holds that the opinion of an expert must, in addition to knowledge, be derived from experience. The logic of this position is that since books themselves cannot be read in evidence, extracts from them should not be permitted from the lips and memory of the expert.[9] I raise this question because of an occurrence in a personal injury suit within my knowledge. The question involved a case of a rare pathological condition of the eye in which an expert from Milwaukee was called to testify by the plaintiff. Upon admission that the witness had never seen a similar case in his experience, a plea of lack of competency was upheld and the witness was not permitted to testify. The decision of the trial court as to competency lies within its own discretion, and unless founded upon some error of law, serious mistake or abuse of discretion, its ruling is not reversible.[10] Relative to competency, it must be remembered that section 147.14(2) (Wis. Stat. 1941) provides "that no person shall have the right to testify in a professional capacity except when duly licensed in Wisconsin; except those licenced in other states may testify in Wisconsin, when such testimony is necessary to establish the rights of residents of this state in a judicial proceeding and expert testimony of licensed practitioners of this state sufficient for the purpose is not available.

Another difficulty encountered by the expert witness is the objection that his opinion given as the result of his examination of the plaintiff or defendant, as the case may be, is in part based upon hearsay; in that he must rely upon the patient's own statements as to the history and symptoms and that such hearsay testimony is not valid. Such limitation is apparently the rule in Wisconsin, although in other states the rigidity of this practice does not pertain. As Wigmore logically states, the exclusion of information so obtained and its basis in the formation of the expert's opinion does in strictness exclude all medical testimony based upon personal examination.[11] Thus the witness is confined in testifying only as to the objective symptoms. A qualified expert can, however, overcome

[7] People v. Thacker, 108 Mich. 652, 66 N.W. 562 (1896).
[8] 1 WIGMORE, EVIDENCE, § 569.
[9] Soquet v. State, 72 Wis. 659, 40 N.W. 391 (1888); Zuesdorf v. Grotsky, 195 Wis. 253, 218 N.W. 186 (1928).
[10] 3 JONES, EVIDENCE, § 1317-1318.
[11] 1 WIGMORE, EVIDENCE, § 688, p. 783-784 . . . "Those who object to testimony of the sort where considered must expect to surrender the medical witness stand to veterinary surgeons exclusively."

this handicap by enumerating many of the subjective findings and by increasing his powers of observation and giving proper expression to them. It would appear to be a case of much ado about nothing as an experienced attorney can readily present the history, symptoms and any other missing facts in hypothetical form for the expert's conclusions.

Prerequisites for the Medical Expert

It goes without saying that he should be absolutely honest and unbiased in his testimony, and thoroughly familiar with the medical aspects of the case in which he is testifying. This should be done by preparing himself by looking up the general literature on the matter and for his own information familiarizing himself with the opinions of authorities who may have written upon the subject. To this must be added his professional background and standing in the community in which the action rests, or his medical reputation throughout the state if he is from the outside. He should display ready understanding and even anticipation of the questions propounded, and possess sufficient ability to take care of himself as far as possible without protection from the attorney engaging his services. He must, however, avoid the delusion that he is a medical jurist. He should at all costs retain great composure and control of his temper, and be definitely courteous and patient under cross examination. He should, as previously stated, speak distinctly and slowly, and in terms as intelligible as possible to the jury. Technical terms, unless explained, are lost upon jurors and nullify the effect of his testimony. In enumerating the qualifications I would emphasize preparation. To my mind this is very essential. One should never enter a lawsuit as an expert witness without thoroughly acquainting himself not only with the gross medical facts involved, but with the anatomy, physiology and other allied subjects connected with them. My personal preparation includes an effort to anticipate the possible questions that may be asked me by the opposing attorney. Needless to say most of these questions are never asked, but should they be, I expect to be in a position to have a ready answer. It may appear paradixical, but it is nevertheless true that many intelligent and well educated physicians fail to make good witnesses. This results from shyness, fear, or lack of ability to express themselves logically. On the other hand, many physicians of mediocre attainments, with alert minds and plenty of self assurance may make a good showing. The danger in the latter case lies in the possibility of disaster at the hands of an attorney who is well prepared medically and with experience in this type of cases. Wise

cracking and other forms of subtle humor should be strictly avoided by the witness. On the other hand an attitude of abject humility or what may be termed the "Uriah Heap complex" is equally to be deplored.

The Question of Partisanship

The question of partisanship, as evidenced by the invariable conflict of opinion by experts on both sides of the case, has often been discussed. A physician should refuse to testify in cases where any doubt exists in his mind as to the correctness of the position assumed by attorneys or other medical witnesses. I am glad to say that having advanced my views and objections to the medical theory of the case, no attorney has ever insisted in his demands for my services or attempted to influence my convictions or decisions to testifying. As a general rule no one has a right to question the honesty of the medical witness. It is true that one may unconsciously become partisan, due, no doubt, to the fact that he is certain that whatever conclusions he testifies to will be contradicted by the doctor testifying on the opposite side. There may be, and are, many honest differences of opinion in medical matters, and it is very hard to get away from one's own convictions. Some witnesses become dogmatic and are unwilling to admit that any opinion other than their own can possibly be correct. The contradictory form of expert testimony as evidenced by those testifying on opposite sides of the case has become proverbial, and several suggestions have been made for its correction.

I find that under Section 357.12 of the Wisconsin Statutes, the judge of the trial court in criminal cases may, after notice to the parties and a hearing, appoint one or more disinterested qualified experts, not exceeding three, to testify at the trial. Under this section, these experts are required to subscribe to a special oath and their compensation is fixed by the court and paid by the county upon the court's order constituting a part of the costs of the action. They are, of course, subject to cross examination by both parties who may also summon other expert witnesses at the trial. Why this practice cannot be extended, even in modified form, in civil cases is hard to fathom. For many years efforts by eminent members of the bar and the several professions have endeavored to have enacted by the various legislatures, laws authorizing the court to appoint its own experts, especially when there appears, as is frequently the case, wide differences between the experts for the plaintiff and defendant, differences which tend to completely confuse and confound both the court and the jury.

In certain foreign countries, as in Germany for example, the expert is chosen by the court from a list of scientific and highly qualified members of the various professions. A penalty is attached for disregarding the summons, and the commonwealth provides a moderate fixed compensation, together with expenses, for appearance and testimony in court. The medical expert's position becomes thereby an official one; in fact he is thus made an officer of the court. It is regarded an honor and distinction to be so designated, and there is attendant on the office every courtesy and dignity to which its responsibilities entitle it. The utmost care is observed in the selection of physicians and surgeons as official experts, so that only men of known special scientific attainments, personal integrity and possessing the ability to clarify complex problems, are chosen.[12] Section 1871 of the California Code of Civil Procedure provides: "When it shall be made to appear to any court or judge thereof, either before or during the trial of any action or proceeding, such court or judge may, on motion of any party, or on motion of such court or judge, appoint one or more experts to investigate and testify at the trial of such action or proceeding relative to the matter or matters as to which such expert evidence is, or will be, required, and such court or judge may fix the compensation of such expert." The commission on the administration of justice in New York State has proposed similar legislation, and it would appear that the trend is definitely in the direction of the appointment of experts by the courts.

Qualifications Admitted

I believe that many attorneys err in failing to emphasize the qualifications of their expert. "Qualifications admitted" has come to have a familiar sound to me. This short cut method of qualifying an expert has two principal objections. First, the counsel whose witness you are misses an opportunity to impress the jury with any qualifications including medical training, membership in recognized medical societies, period of practice, general experience; as well as familiarity with the issues in similar cases. Secondly, "It must be born in mind that once having stipulated the witnesses qualifications the opposing attorney is barred from later attempting to impeach the competency of the expert and complaint cannot be made on appeal that he was not qualified." [13]

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[12] California State Bar Journal, May, 1937.
[13] McGuire v. Baird, 9 Cal. (2d) 353, 70 P. (2d) 915 (1937).

Cross Examinations of Experts

Unless properly prepared the average attorney is gambling with odds in the cross examination of a competent medical expert insofar, at least, as the technical medical details of the case are concerned. Attorneys frequently engaged in personal injury cases are of course an exception to this statement. Proper preparation with the aid of some competent medical man prior to the cross examination is imperative. I do not mean by this that the opposing attorney should entirely refrain from cross examination. Inconsistencies and contradictions and conclusions clearly illogical should be questioned and questioned severely.

"Yes or No"

The medical witness is frequently instructed to answer a question "yes" or "no." Compliance with such a demand may be impossible. If such is the case, the witness should so state. If ordered by the court to do so without being permitted to give the reasons for his answer, it is a simple matter for counsel to ask him on redirect to give the reasons for such an answer, and to explain the conclusions or premises which required him to do so. Such an opportunity cannot be withheld.

The common law rule is that scientific books may not be read to the jury as evidence, because the statements therein contained are wanting in the sanctity of an oath, are made by one not present, and who is not liable to cross examination. While the common law rule has been modified by statute in many states to allow certain scientific books to be received in evidence, the rule of exclusion still prevails as to medical books.[14] Mortality tables for estimating of the probable life of a party, the given age, chronological tables, tables of weights, measures and currency and the like, are admissible to prove facts of general notoriety and interest in connection with such subjects as may be involved in the trial of a cause.[15] But medicine is not considered as one of the exact sciences: it is of the character of inductive sciences which are based on data which each successive year may correct and expand, so that what is considered a sound induction last year may be considered an unsound one this year.[16] In some jurisdictions it has been held that the medical witness may reinforce his opinion from a stated condition by showing that certain textbooks upon the subject are in accord with his views.[17] Such a practice in my opinion is dangerous, for the witness

[14] Mundo, The Expert Witness, p. 87.
[15] Wagar v. Schuyler, 1 Wend. 553 (1827).
[16] Wharton, Evidence, § 665.
[17] Louisville R. Co. v. Howell, 147 Ind. 266, 45 N.E. 584 (1896); Pinney v. Cahill, 48 Mich. 586, 12 N.W. 862 (1882).

may be discredited upon cross examination from extracts read from such authorities and contradictory statements or those subject to varying interpretations are to be found in the same textbooks. It is generally held, however, that the use of medical texts to prove a fact in issue is improper. It has been my lot on several occasions to face attempts by opposing counsel to read statements from textbooks by authorities about whose standing there could be no question, and then requested to state whether I agreed or disagreed with the theories they embrace. A competent witness will refuse to be drawn into any such trap. Counsel must be expressly limited in references to only such treaties as have been used or referred to by the witness upon his direct examination.[18] The witness may refresh his memory by referring to X-rays, charts made by him or under his direction and notes taken by him at the time when the matter was fresh in his memory. The rule respecting notes is that the witness is allowed to refresh his memory by anything written by himself or under his direction at the time when the fact occurred, immediately thereafter or at any time when the fact is fresh in his memory. Unless necessary, notes should not be used. If notes are used, they must be produced so that the adverse party may see them and cross examine the witness upon them as he chooses. They may be read to the jury.[19]

Before leaving the subject of expert testimony, may I suggest the abandonment of a policy which I think is undesirable. I have reference to having counsel's own medical witness sitting behind him and coaching him during the examination of the other attorney's medical expert. Physicians regard this as not being strictly ethical, and there is no question in my mind that it has a distinctly injurious psychological effect upon the jury. Not only is it unsatisfactory in technique, but it is an admission of counsel's own weakness, and gives the impression of not being good sportsmanship.

THE LAWYER FROM THE LAYMAN'S VIEWPOINT

May I begin by saying that collectively and individually I hold the members of the legal profession in the highest regard. In my contacts with them throughout the state, I have been impressed by their high character and honesty of purpose. It is my belief that the State of Wisconsin is outstanding in the caliber and professional integrity of its Bar. This is in great part due to the judiciary, for the character and ability of the judge reflect upon the members of

[18] Schweitzer, *op. cit.*, p. 386-387, n. 1, 388, 389.
[19] Mundo, *op. cit.*, p. 47; Braxten v. Brown, 197 Minn. 511, 267 N.W. 489 (1936); Wright v. Upsilon, 303 Ill. 120, 135 N.E. 208 (1922); People v. Schepps, 217 Mich. 406, 186 N.E. 508, 21 A.L.R. 658 (1922).

his circuit. Among lawyers there appears to me to be a great degree of consideration for each other and a large absence of the petty jealousy that exists in other professions, including the medical fraternity. Personally, I have experienced nothing but courtesy and kindness from the Bar as a whole, and while I know that to many of them I have at times been very trying, they have never failed to treat me with respect and consideration. Therefore, anything that I may say will indicate no desire on my part to be disrespectful or unkind. It is sometimes interesting, however, and even profitable to see ourselves as others see us. Hence these observations of a layman.

Preparation

One thing is apparent with some attorneys, and that is their lack of preparation. This arises either from the fact that they are too busy and have insufficient help, or from neglect. They enter court without definite strategic plans and even familiarity with the legal angles involved, as well as an absence of understanding as to what their own witness will testify to. In some cases cross examination has all the ear marks of a fishing expedition and some of them should be members of the Isaac Walton League. Many attorneys of mediocre ability can make a confrere with definitely greater legal experience look sick by the simple expedient of thoroughly preparing his case. The most successful members of the Bar of my acquaintance are usually those with whom preparation is a ritual. I would much prefer not to be associated with the attorney who calls me up the night before a case to discuss the important matter of the medical testimony. On the other hand, it is a joy to work with one who is sufficiently interested to discuss these details two or three times before putting me on the witness stand.

Over Examination

Another matter that has intrigued me greatly is the yen some attorneys possess for over examination. How frequently one sees witnesses tied up completely and with the record in excellent shape, only to have the effect of their answers destroyed by continued questioning. Having obtained an answer that is entirely satisfactory to his case, some attorneys persist in asking the same question in several different forms, until finally the answer is so modified as to be hardly recognizable. A satisfactory answer is an asset worth preserving. Why attempt to paint the lily? Equal danger appears to lie in failing to sufficiently examine the witness. This was brought forcibly to my mind in a murder case in which I was retained by the state. An eminent psychiatrist and excellent witness

was on the stand. In spite of advice to the contrary, the prosecutor read to him two long detailed hypothetical questions, and instructed him to answer "yes" or "no" to both. His strategy was then to turn him over to counsel for the defense in the full expectation that he would be cross examined, and in this way enabled to elaborate his answers. These were the only two questions asked him. The result was unfortunate. The attorney for the defense simply said, "No questions, doctor" and the witness left the stand. Thus the testimony of an outstanding expert, brought many miles for the specific purpose of tearing the defense apart, was completely thrown away. Moral: don't depend on the other fellow to try your case.

Another thing that is noticeable to an onlooker is the eternal leading that goes on in the examination of witnesses. My rough guess is that a large majority of the questions asked are leading. This has become such a habit with some attorneys that when they are called on it, they are often at a complete loss to frame the question in a non-leading manner, and are often aided by the court in their dilemma.

Conscientious Objectors

A psychological understanding of the judge, as well as the jury would appear essential. Many attorneys acquire psychological knowledge from experience, but often at the expense of many disasters that might have been avoided. No doubt legal psychology is a part of the curriculum of every law school. If not, it should be, and also emphasized. Some attorneys seem to have an affinity for objecting and objecting eternally. To one who is not versed in legal lore, most of these objections appear to be trivial. An experienced trial attorney of my acquaintance, when asked by me why he did not object to a certain question, informed me that no matter how irrelevant or immaterial, he never objected so long as the question did no harm to his case. He felt that he got along with the judge a great deal better by following this rule. It is used by some attorneys to confuse and confound opposing counsel. Whether this is effective or not I do not know. It is not only the constant objections which delay the trial and tire the judge, but the exceptions to the judge's ruling one occasionally hears that are irksome and annoying. Since exceptions are, in this state deemed taken to adverse rulings, they are unnecessary—why rub his Honor's fur the wrong way?

With the passing of the years, it has been noticeable that the explosive and noisy type of oratory is gradually fading from the scene; it seems to have disappeared with the crinoline and the political torch light parades. Occasionally one still hears it, but it has

lost much of its former effectiveness. Side remarks made by one attorney to another, remarks that are intended to be humerous but which are frequently bitter and vindictive are still with us. Beyond causing momentary amusement, they have little favorable effect upon the average juror. This type of vaudeville would never be permitted in an English court room. It tends to lower the dignity of the court. Some judges, strange to say, are very tolerant in this regard.

Cross Examination, Material and Otherwise

An expert witness needs a long memory, for one is not infrequently confronted with prophecies made at previous trials. A somewhat amusing, but nevertheless tragic, incident occurred a short time ago which illustrates this point. It occurred in federal court in a case with which I was associated. One of the witnesses for the government, an eminent and distinguished professor of one of our large universities, was on the stand. The opposing counsel (with no text books in sight) read to him a long statement which he had written on his scratch pad. The question covered a theory closely related to the issue in the case. When he had finished he asked the witness whether he did not believe that the statement was a fair one, and covered the situation thoroughly. The witness could hardly wait for the completion of the statement and question, and immediately replied, "I utterly disagree with that theory—in my opinion it is not correct." The attorney looked at him intently for a moment and then said, "You are sure, doctor, that you disagree entirely with that statement?" The witness answered, "Yes." "That is strange, doctor, because that is an exact copy of a paragraph contained in a text book of which you are the author, and which is in general use among medical students and practioners." The judge immediately called for the book, which was produced, and the witness was required to read the paragraph in question and state whether it did not coincide word for word with the excerpt which had been read to him.

I have had my full share of questions that are irrelevant and immaterial. It has often amazed me not only that these questions should be asked, but that they should be permitted by the trial judge. Some of them call for a facetious answer, although this should be avoided if possible. The classic answer of Dr. Joseph Collins of New York is an example: Q. "As a matter of fact, doctor, you are an alienist pure and simple?" A. "Yes, an alienist moderately pure, but not simple." Let me quote one or two irrelevant queries which come to my mind. Q. "You testify in all of Attorney Jones's cases, don't you doctor?" A. "I am not in a position to an-

swer that question intelligently, because I am not aware of how many cases Attorney Jones has. Q. "How far North, how far South, how far East and how far West have you traveled to testify for Attorney Smith?" Where is the relevancy in a question of this type? Q. "You are a personal friend of the attorney on the other side, are you not doctor?" The implication in such a question is obvious, and the answer equally illuminating. The question as to the size of the fee the expert witness expects to get in a given case, while not frequent, occassionally present itself. Its object is evidently to demonstrate interest and bias, and in that respect is, of course, proper. In the majority of cases, the matter of compensation has not been discussed between the attorney and the witness at the time of the question, but an answer to this effect does not appear to be sufficient. Then comes the query, "How much are you in the habit of receiving for testifying in court?" This would appear irrelevant, as the compensation received in some previous trial has certainly no bearing on the present case. The best way to handle this question is to answer it frankly and responsively, and let the matter end there. Occasionally one runs into trick questions and the witness must be on his guard. In a certain case I had testified that in my opinion the injury in question was permanent, and I knew of no treatment or operation that could correct it. On cross examination the opposing attorney asked me these questions — "You say, doctor, that nothing can be done to cure this man?" My answer was "Yes"—"You don't believe that Christian Science could do anything for him?". My answer was—"I really couldn't say, for though I have a deep respect for Christian Science, I am not familiar with its operation in conditions of this nature." This apparently did not satisfy him. "Will you say positively that Christian Science could not cure him?" My answer was—"I would make no such statement, because as I have already stated, I am not familiar with it, although I have heard of some remarkable results that it has accomplished." As I stepped down from the stand and passed the attorney I whispered to him—"How many Christian Scientists have you on the jury?" He smiled and answered—"Only two." This was a clear case of fishing, but my legal friend had forgotten the repeated admonition and cardinal rule for fishermen, enunciated by the late Isaac Walton,—"First, know your fish." (—the gentleman apparently mistook me for a sucker.) The question was, of course, improper and should have been objected to. No expert of one school of healing can be questioned about any other school with which he is unfamiliar.

My purpose in presenting this paper has been to record some of the experiences, impressions and reactions derived from a close observation of court procedures over a period of many years. It is only proper that a medical expert witness should be concerned with those phases of the law regarding competency, the use of medical texts, opinion evidence, hypothetical inquiry and other legal questions which directly affect him as a witness. Such knowledge, even though lacking in profundity, is in my opinion necessary to enable a medical expert to perform his function intelligently and effectively provide his services, and to aid the court and jury in promoting justice.

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