EXPERTS IN THE COURTHOUSE: PROBLEMS AND OPPORTUNITIES*

REMARKS AT THE MILTON HANDLER ANTITRUST REVIEW

NOVEMBER 29, 2005

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I. INTRODUCTION

It is an honor and a pleasure for me to be here today. I was a member of the Antitrust and Trade Regulation Committee of the Association of the Bar of the City of New York more years ago than I care to remember, so being here, in the words of that famous scholar, Yogi Berra, is *déja vu* all over again. I would like to take this opportunity to talk about two areas that I have spent a great deal of time thinking about lately: the problems posed by certain expert witnesses and judges' real need for expert input in our increasingly complex society. Although this is relevant to all lawyers, I believe it has special importance for antitrust lawyers, whose cases often revolve around the sorts of complex and technical issues that economists and other experts are called upon to elucidate.

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II. TRENDS IN EXPERT TESTIMONY

In recent years, there has been an explosion in the volume of expert testimony produced at trial. The Supreme Court's decision in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*[1] is, more than anything else, a symptom of this new phenomenon. Although there is a dearth of empirical data on the total amount of expert testimony, the evidence that does exist is striking. According to one study, at least one expert testified in eighty-six percent of all civil jury trials in the California Superior Courts over a two-year period, with an average of 3.3 experts per trial.[2] According to another study, the number of experts regularly testifying in Cook County, Illinois increased by more than 1,500 percent over a fifteen-year period.[3]

We can attribute this upsurge, in large part, to the fact that lawsuits today are more complex than they have ever been. Securities fraud suits, for example, raise incredibly complicated issues of accounting and economics. Product liability actions against drug companies confront questions of toxicology, pharmacology, epidemiology, and statistics. Antitrust cases often turn on economic evidence. Lawyers and judges alike feel ill-equipped to handle such issues alone, and it makes sense that they would look to experts for guidance. But, there are two other, sometimes less benign factors driving the radical increase in expert testimony.

III. THE EXPERT WITNESS INDUSTRY

First, locating expert witnesses and the giving of expert testimony both have become big business. Dozens of expert witness referral services have sprung up in recent years. Type "expert witness" into Yahoo or Google and you will

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[1] 509 U.S. 579 (1993).

[2] Samuel R. Gross, *Expert Evidence,* 1991 WIS. L. REV. 1113, 1119 (1991).

[3] Michael D. Green, *Expert Witnesses and Sufficiency of Evidence in Toxic Substances Litigation: The Legacy of Agent Orange and Bendectin Litigation,* 86 NW. U. L. REV. 643, 669 n.123 (1992) (indicating that the number of experts increased from 188 to 3,100 between 1974 and 1989).

have your choice of any number of referral agencies, each offering thousands of experts in hundreds of different fields, from embalming and cremation to bicycle accident reconstruction to tractor-trailer maintenance. These referral services are like "headhunters" in the employment context, as they get paid for matching litigants with experts.[4] Further, the experts themselves command hundreds, if not thousands, of dollars per hour for their services.

As the expert witness industry has become increasingly lucrative, expert witnesses and expert witness brokerage firms have begun to compete vigorously for business. Competition among expert witnesses is not in itself troubling, as we do live in a capitalist society. However, in their desire to get hired and to earn fees, some experts have become increasingly willing to tell lawyers exactly what they want to hear. In fact, some expert referral services use this as a selling point. One such firm promised that "[i]f the first doctor we refer doesn't agree with your legal theory, we will provide you with the name of a second prospective expert."[5] Another firm's advertisement offered: "If experts have stated that they find no liability . . . let us analyze the case for you."[6]

I certainly do not mean to suggest that the promise of big money has turned all experts into corrupt hucksters who will say anything to make a buck. A number of superbly qualified and intellectually honest men and women have offered expert testimony in my courtroom in recent years. But all too often we see a race to the bottom. In a survey conducted by the Federal Judicial Center, both judges and attorneys responded that the most frequent problem with expert witnesses was their tendency to "abandon objectivity

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[4] L. Timothy Perrin, *Expert Witness Testimony: Back to the Future,* 29 U. RICH. L. REV. 1389, 1412 (1995).

[5] Edward L. Holloran, III, Note and Comment, *Medical Malpractice Litigation in Florida: Discussion of Problems and Recommendations,* 26 NOVA L. REV. 331, 355 n.158 (2001) (internal quotations omitted).

[6] Tim Cramm, Arthur J. Hantz & Michael D. Green, *Ascertaining Customary Care in Malpractice Cases: Asking Those Who Know,* 37 WAKE FOREST L. REV. 699, 720 n.91 (2002) (internal quotations omitted).

and become advocates for the side that hired them."[7] In a somewhat dated Louisiana case, a defense expert in a workers' compensation case was asked for his opinion as to whether the claimant was a malingerer.[8] He responded, "I wouldn't be testifying if I didn't think so, unless I was on the other side, then it would be a post-traumatic condition."[9]

There have been other serious examples. A professor of obstetrics and gynecology at Northwestern University was indicted for perjury and obstruction of justice for his allegedly false testimony in the *Dalkon Shield* litigation.[10] The doctor, who received hundreds of thousands of dollars in fees, testified that, based on experiments allegedly conducted under his supervision, he believed that the Dalkon Shield was not unreasonably dangerous.[11] He later admitted, however, that he had not conducted or supervised any actual experiments on the Dalkon Shield.[12] Today's *New York Times* contains a story about a radiologist who reportedly gave opinions in asbestos cases for more than 76,000 claimants at $125 apiece.[13] Moreover, the article reported that a federal judge in Texas found that the radiologist first testified that 1,807 plaintiffs in the asbestos cases had conditions consistent only with asbestosis and not silicosis, but later gave opinions in the silicosis cases that the same 1,807 plaintiffs had symptoms that included evidence of silicosis.[14]

Even putting aside the potential for outright falsification, an expert's desire to accommodate a lawyer's demands is

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[7] Carol Krafka et al., *Judge and Attorney Experiences, Practices, and Concerns Regarding Expert Testimony in Federal Civil Trials*, 8 PSYCHOL. PUB. POL'Y & L. 309, 328 tbl.6 (2002).

[8] Ladner v. Higgins, Inc., 71 So. 2d 242, 244 (La. Ct. App. 1954).

[9] *Id.*

[10] *See* Philip Shenon, *Professor is Charged with Lying For Maker of Birth Control Device,* N.Y. TIMES, Mar. 4, 1988, at A1.

[11] *Id.*

[12] The physician was acquitted of perjury and the court declared a mistrial as to the obstruction charge. See *id.*

[13] *See* Jonathan D. Glater, *Reading X-Rays in Asbestos Suits Enriched Doctor,* N.Y. TIMES, Nov. 29, 2005, at A1.

[14] *Id.*

dangerous. Lawyers want experts who will express unwavering certainty about their conclusions: Eighty-four percent of lawyers surveyed in a recent study said that the adamancy of an expert's support for the lawyer's position was an important consideration in the expert selection process.[15] Experts are well aware of this overwhelming preference. The same study showed that sixty-four percent of experts believe that the willingness to draw firm conclusions was important to being retained.[16] The desire to please lawyers often leads experts to overstate the certainty of their conclusions and to gloss over important nuances in an effort to present the most uncompromising support for the lawyers' position.

IV. THE INCREASE IN WITNESS ADVOCATES

Along with the increasing willingness of experts to adopt opinions favored by their lawyers, a second factor has contributed to the increase in the use of expert witnesses. Expert testimony on lay matters that juries would be capable of understanding on their own is becoming more and more common as lawyers realize that experts can be used to an enormous tactical advantage, above and beyond whatever specialized knowledge they bring to bear. Instead of simply providing information and analysis on complicated topics, experts can also argue from the witness stand. Understandably, the prospect of having a person with gravitas and an impressive *curriculum vitae* lecture from the stand on the merits of a client's position is too tempting for most lawyers to ignore. I was confronted with this tactic in *In re Rezulin Products Liability Litigation*, a multidistrict litigation arising out of the sale of a diabetes drug that allegedly caused liver injuries.[17]

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[15] *See* Daniel W. Shurman et al., *An Empirical Examination of the Use of Expert Witnesses in the Courts—Part II: A Three-City Study,* 34 JURIMETRICS J. 193, 201 (1994).

[16] *Id.* at 202.

[17] *In re* Rezulin Prods. Liab. Litig., 309 F. Supp. 2d 531 (S.D.N.Y. 2004).

In *Rezulin*, the plaintiffs engaged a number of physicians to testify that the conduct of the defendant drug company had been unethical.[18] This proposed testimony was based not on any claimed expertise in ethics, whatever its relevance, but on the physicians' personal, subjective views—or, as one physician put it, "'a personal opinion' about 'the behavior of the pharmaceutical companies.'"[19] Several of these experts intended to testify about the corporate defendant's state of mind as well. I excluded all of this testimony because it did not meet the reliability and relevance requirements of Federal Rule of Evidence 702 and *Daubert*. In addition, allowing the experts to take the stand would have permitted them "improperly to assume the role of advocates for the plaintiffs' case."[20] The proposed state of mind testimony would have allowed the plaintiffs' experts to take another inappropriate role as well: that of the jury.[21] As Judge Bechtle explained in excluding similar testimony in *In re Diet Drugs*, "[t]he question of intent is a classic jury question and not one for experts."[22]

Years ago, when I was in private practice, I encountered an even more blatant example of the strategy of using the expert as an advocate. In a professional negligence case against an investment banking firm, the plaintiff proposed to call a law professor to testify as an expert to opinions on a variety of issues, none of them helpful to my client. When my partner asked him at his deposition what exactly he purported to be an expert on, the professor responded in essence that he was an expert in that case. To my mind, experts like these are not really expert witnesses—that is, experts in some area of knowledge beyond the ken of the average juror—at all. They are expert witnesses only in the sense that they are experts at being witnesses and advocates. They are more like the "compurgators" or "oath

[18] *Id.*

[19] *Id.* at 543 n.27.

[20] *Id.* at 546.

[21] *Id.* at 545-47.

[22] *In re* Diet Drugs Prods. Liab. Litig., No. MDL 1203, 2000 U.S. Dist. Lexis 9037, at *29 (E.D. Pa. June 20, 2000).

helpers" of old who testified in wagers of law, a form of trial by ordeal that predated the modern jury trial. An oath helper had no special knowledge and did not testify about the facts of the case. He or she testified only that the oath given by the accused was trustworthy and that the accused, in the oath helper's opinion, was a credible person.

The increasing use of these modern oath helpers is troublesome. Although they often testify to matters that juries are capable of understanding without assistance, there is a significant risk that juries and even judges will be swayed by their credentials, their advocacy, and their often professorial manners.[23] Moreover, wealthier litigants are able to hire more expensive experts. Thus, the misuse of expert testimony can further exacerbate the disparities of access and resources already endemic to modern litigation.

To be sure, I am not suggesting that genuine experts whose testimony is necessary for the elucidation of complex matters should be excluded if they happen to be effective on the witness stand. I suggest only that judges should do their part in confining expert testimony to subjects on which it really is warranted and in keeping those who are nothing more than paid witness advocates off of the witness stand.

V. MEETING THE GENUINE NEED FOR EXPERTISE

Let me turn now to another problem that judges increasingly are encountering. It is a problem not with too much purported expertise, but with too little. Judges frequently need to understand and to pass judgment on technical material and issues that are beyond their lay knowledge and experience. The means of getting the sort of expert input we need leave a good deal of room for improvement.

[23] *See* Marvin J. Garbis, *Aussie Inspired Musings on Technological Issues—Of Kangaroo Courts, Tutorials and Hot Tub Cross-Examination,* 6 GREEN BAG 2D 141, 142 (2002) (discussing an Australian judge's views on problems with expert testimony).

To start with the obvious, expert testimony in the traditional mold of the clash of party-hired experts often is inadequate. For one thing, we frequently need to understand the technical material long before a case gets to trial, and thus, before there is opportunity for full preparation on each side, let alone cross-examination. Even where we have full cross-examination of competing expert witnesses, we are not always as capable as we would like to be in reaching reliable, reasoned decisions. This problem can be especially acute in attempting to resolve *Daubert* challenges to the admissibility of expert testimony, where we often are confronted with conflicting expert testimony as to whether the opinions of one side or both are sufficiently reliable to place before the trier of fact.[24]

One option available to a judge faced with a case involving an unfamiliar science or technology is for the parties, or their experts, to tutor the judge on the complex issues present in the case. This is a good way for judges to learn the fundamentals of a particular discipline in a classroom-like setting, rather than in a courtroom. Often, this approach works better than having the judge piece together the basics from the often diametrically opposed party expert reports and testimony. Federal Rule of Evidence 706 offers another option: authorizing district judges to appoint experts of their own selection, who may testify in court or present written findings subject to cross-examination by the parties.[25]

However, tutorials and Rule 706 experts have limited application. Most obviously, neither allows for the sort of ongoing, interactive guidance that would be helpful to judges in many cases. This sort of guidance certainly would have been helpful to me in the *Rezulin* litigation. Accordingly, I think judges should begin to think seriously about a third option: appointing experts in particular cases to serve as scientific or technical advisors to the court. The role of such

[24] The qualifications of expert witnesses and the reliability and admissibility of their testimony frequently are raised by motions in limine.

[25] FED. R. EVID. 706.

an advisor could vary from case to case. One possibility is to have an advisor counsel the judge on technical matters, to answer the judge's questions as they arise, and to help the judge evaluate the party experts' testimony by, among other things, identifying areas of agreement and explaining the differences in assumptions or approaches underlying the conflict.[26] In other words, an expert advisor might act like a specially trained law clerk, providing advice and guidance to help steer the judge away from the pressures of the adversarial process.

This idea, I hasten to add, is not originally mine. I am pleased to tell you that it first came to my attention as a result of an antitrust case. In 1950, Judge Charles Wyzanski made one of the first—and most famous—uses of this inherent power when he selected Carl Kaysen, a young Harvard economics professor, as his law clerk for the seminal antitrust case, *United States v. United Shoe Machinery Corp.*[27] Kaysen later recalled that when defense counsel challenged his appointment, Judge Wyzanski responded that "he was not obliged to notify counsel when he read books on economics," and therefore, he could not see how counsel could "properly object to his talking privately to an economist in the role of law clerk in pursuit of the same kind of information and analysis he might seek from books."[28]

Kaysen's clerkship lasted two years, during which time he attended the *United Shoe* trial daily and discussed the case with the judge several times a week.[29] Years later, Judge Wyzanski recalled that during these discussions Kaysen:

> often enabled me to see the relevance of the evidence in a way that I who had no economic background would not otherwise have appreciated. Profiting

[26] Ellen E. Deason, *Court-Appointed Expert Witnesses: Scientific Positivism Meets Bias and Deference,* 77 OR. L. REV. 59, 84-90 (1998).

[27] *See* United States v. United Shoe Machinery Corp., 110 F. Supp. 295 (D. Mass. 1953).

[28] Carl Kaysen, *In Memoriam: Charles E. Wyzanski, Jr.*, 100 HARV. L. REV. 713, 714 (1987).

[29] *Id.*

> from these insights I sometimes put to the witnesses questions which I might not otherwise have asked . . . . In other words, . . . the record was broadened and deepened as a result of the education that I received.[30]

Although Kaysen did not write the *United Shoe* opinion, Judge Wyzanski later explained that "the music was [his]."[31]

In more recent and less storied cases, both the First and Ninth Circuits have held that courts have inherent power to use expert advisors in complex cases.[32] Some district court judges have done just that.[33] The arguments in favor of such a practice are substantial. First, and most significantly, expert advisors allow judges access to information and advice untainted by partisanship. As Judge Ward put it, an expert advisor can be "a second set of ears for the court and a teacher who, unaffected by his having been called as a witness by one side or the other, can explain the technical significance of the evidence presented."[34] Like tutorials, expert advisors offer judges the opportunity to learn the basic principles of complex disciplines from a trusted instructor, rather than from the diverging explanations of party experts. This approach is more likely to provide judges with needed information and more closely resembles complex problem-solving techniques used outside of the adversarial system. As one commentator noted, "[i]f you need an architect, a dermatologist, or a plumber, you do not commission a pair of them to take preordained and opposing positions on your problem."[35] Instead, "you take care to find an expert who is qualified to advise you in an objective

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[30] Deason, *supra* note 26, at 84 n.103.

[31] *Id.* at 140 n.333.

[32] Ass'n of Mexican-American Educators v. California, 231 F.3d 572, 590-91 (9th Cir. 2000); Reilly v. United States, 863 F.2d 149, 155 n.4 (1st Cir. 1988).

[33] Krafka, *supra* note 7, at 327.

[34] Leesona Corp. v. Varta Batteries, Inc., 522 F. Supp. 1304, 1312 (S.D.N.Y. 1981).

[35] John H. Langbein, *The German Advantage in Civil Procedure,* 52 U. CHI. L. REV. 823, 837 (1985).

manner; you probe his advice as best you can; and if you find his advice persuasive, you follow it."[36] Judges can approach complicated cases in much the same way.

Second, expert advisors can help reduce disparities between the parties' respective resources. Some litigants lack the resources to hire well-trained experts or even any experts at all. This creates a risk that the judge or jury will be swayed by the testimony of an expert for the wealthier party. Expert advisors can help alleviate this problem by presenting potential counter-arguments and a more balanced analysis to the judge. This is especially helpful in cases of broad public interest where expert advisors can strengthen the voice of disadvantaged litigants.

Finally, the use of expert advisors may encourage partisan experts to take less radical positions. Party experts may be more tempted to press extreme arguments when they know that their only potential challengers are the experts retained by the opposing party. In contrast, when the court appoints its own expert advisor, party experts may take more middle-of-the-road positions. It is possible that the judge's mere threat to appoint an expert advisor "exerts a sobering effect"[37] on party experts, deterring them from espousing extreme views. There is reason to hope that "the availability of the procedure in itself [would] decrease . . . the need for resorting to it."[38]

Despite these benefits and the considerable academic and judicial support for the use of expert advisors, some commentators have expressed skepticism. First, some commentators worry that the use of court-appointed expert advisors would subvert the adversarial process by blurring the line between the court's role as the neutral decision maker and the parties' roles as presenters of evidence. This worry is not particularly troubling. The fact of the matter is that judges must decide technical and scientific cases. The question is whether judges should employ a means to

[36] *Id.*

[37] FED. R. EVID. 706 advisory committee's note.

[38] *Id.*

facilitate informed decisionmaking when they lack the specialized knowledge for fluency in the subject matter presented for decision, or instead should be forced to struggle through the material as best they can and pick one of two highly partisan presentations. More knowledge rather than less is highly desirable.

Second, some critics worry that court-appointed experts may not be as impartial as would be expected. As one commentator warned, party affiliation is only one source of expert bias.[39] Even court-appointed experts may be loyal to entities funding their research, universities employing them, or other people or institutions holding agendas that experts feel the need to promote. Moreover, the analogy that I laid out above between an impartial expert witness appointed by a judge and a law clerk is imperfect. Law clerks tend to be hired directly from or shortly after completing law school, and thus, are at a stage in their careers when they are likely to be free of the institutional biases that often develop by representing particular industries or types of clients. Law clerks also deal in subject matter—legal research and reasoning—intimately familiar to the judge. Scientific and technical experts, even if otherwise impartial, typically would be more experienced in their fields, may have developed loyalties to particular schools of thought or modes of analysis, and would be dealing in matters largely foreign to the judge. Without adversarial checks, critics warn that there is less likelihood that these biases will be revealed.

This is a legitimate concern, but one that may be readily addressed. As is done in the selection of arbitrators, an expert advisor should be appointed only after furnishing the parties with the proposed advisor's *curriculum vitae* and an opportunity to object. Other measures could be formulated, such as requiring the proposed advisor to certify his lack of any financial interest that might be affected by the outcome of the litigation. The result is detection and avoidance of obvious or systematic bias.

[39] Deason, *supra* note 26, at 101-16.

Third, some commentators are troubled by the risk that a judge would unduly defer to a court-appointed advisor and would do so in circumstances in which the parties lack the ability to expose errors and biases through cross-examination of the advisor. This concern is not baseless, but it is important that it not be exaggerated. While most judges are not technically proficient, they are able to distinguish between relatively uncontroversial background information that permits one to reach a reasoned conclusion on a hotly contested technical issue on which the parties and their own experts have been fully heard, and the opinion of a court-appointed advisor. And while the possibility of undue deference cannot be eliminated entirely, the question is whether the risk is sufficiently great to outweigh the benefits of more frequent use of expert advisors. From a societal perspective, is it preferable to take the chance that a judge might unduly defer to an impartial court-appointed expert, or to have important scientific and technical matters decided by judges who are not fluent in the specialized knowledge that must be brought to bear to reach quality decisions? In at least one important respect, this question appears to have been answered in favor of more technical resources for judges. The Court of Appeals for the Federal Circuit, which has exclusive jurisdiction over patent appeals, has a full-time staff of technical advisors to assist the judges with complex matters, and the judges of that court frequently employ law clerks with scientific and technical backgrounds.[40] It is

[40] *See, e.g.*, John B. Pegram, *Should There Be a U.S. Trial Court with Specialization in Patent Litigation?* 82 J. PAT. & TRADEMARK OFF. SOC'Y 766, 789 (2000) ("The Federal Circuit also benefits from the assistance of law clerks with science or engineering degrees, and a central staff of technical advisors."); John B. Pegram, *Should the U.S. Court of International Trade Be Given Patent Jurisdiction Concurrent with That of the District Courts?* 32 HOUS. L. REV. 67, 130 (1995) ("Of course, the Federal Circuit benefits from the assistance of law clerks with science or engineering degrees and a central staff of technical advisors."); Richard H. Seamon, *The Provenance of the Federal Courts Improvement Act of 1982,* 71 GEO. WASH. L. REV. 543, 553 n.75 (2003) ("Unlike other federal courts of appeals, the Federal Circuit has statutory authority to employ a small staff of technical advisors . . . primarily to help the judges with complex

difficult to understand why district courts should lack the ability to employ similar resources in appropriate cases.

The issues presented above are only a sample of those raised by this important subject. It is time for the profession and the Rules Advisory Committees to consider the matter in depth. We need an informed debate about the costs and benefits of making expert advisors available to judges in appropriate cases. Assuming that the ultimate decision is to allow the practice to continue and to grow, procedures are needed to deal with issues of disclosure, disqualification for interest or bias, and compensation.

questions that arise in patent cases."); Carl Tobias, *The White Commission and the Federal Circuit,* 10 CORNELL J.L. & PUB. POL'Y 45, 51 (2000) ("The Federal Circuit is the only appeals court that Congress has specifically authorized to employ a staff of technical advisors to assist the judges in resolving the complicated issues that patent disputes frequently involve.").