Medical Expert Testimony and Ethics of the Medical Expert

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Cyril H. Wecht received his M.D. degree from the University of Pittsburgh and his J.D. degree from the University of Maryland. He is certified by the American Board of Pathology in anatomic, clinical, and forensic pathology, and is a Fellow of the College of American Pathologists and the American Society of Clinical Pathologists. He has served as the elected Coroner of Allegheny County (Pittsburgh) since 1996, and was also Coroner from 1970 through 1980.

He is a Clinical Professor at the University of Pittsburgh Schools of Medicine, Dental Medicine, and Graduate School of Public Health, and an Adjunct Professor at Duquesne University Schools of Law, Pharmacy, and Health Sciences. He has served as President of the American College of Legal Medicine and the American Academy of Forensic Sciences, and also as Chairman of the Board of Trustees of both the American Board of Legal Medicine and the American College of Legal Medicine Foundation. He is the author of more than 450 professional publications; an editorial board member of 20 national and international medical-legal and forensic scientific publications; and editor of 36 professional books, including a 5-volume set, FORENSIC SCIENCES (Matthew Bender Publishing Co.), and two 3-volume sets, Handling Soft Tissue Injury Cases and Preparing the Winning Medical Negligence Cases (Juris Publishing Co.). He has also written three books for the general public—Cause of Death, Grave Secrets, and Who Killed JonBenet Ramsey (all published by Dutton/Penguin)—in which he discusses his involvement in many famous cases.

Dr. Wecht has organized and conducted Postgraduate Medical-Legal Seminars in more than 50 countries throughout the world in his capacity as Director of the Pittsburgh Institute of Legal Medicine. He has personally performed approximately 14,000 autopsies, and has supervised, reviewed, or been consulted on approximately 30,000 additional post-mortem examinations. He has provided testimony in civil and criminal cases in approximately 30 states and in several foreign countries.
MEDICAL EXPERT TESTIMONY

AND

ETHICS OF THE MEDICAL EXPERT

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Various studies and surveys undertaken by different groups during the past several years have consistently indicated that 70 to 80 percent of all civil litigation involves medical and scientific evidence and testimony. Keeping in mind the fact that there are hundreds of thousands of new personal injury actions, workers' compensation and disability claims filed each year in the United States, one can readily appreciate the full extent and scope of involvement of physicians and other scientists in the civil legal processes. On the criminal side of the ledger, all homicides, of course, require medical testimony, and many other criminal actions, such as rape, child abuse, and illicit drug cases frequently are dependent upon medical and scientific evidence, also.

Not surprisingly, the overwhelming majority of physicians are extremely critical and puzzled by the fact that civil and criminal trials involving medical and scientific expert testimony frequently result in the presentation of diametrically opposed views and conclusions, producing embarrassment and occasional ridicule for the entire scientific community. It is understandable that people not trained in the law would feel this way, for they do not understand the basic and traditional principles and rationale of the adversary approach inherent in the English common law system. As a matter of fact, even some intelligent individuals who are familiar with this historical background are also critical of the adversary approach insofar as medical expert testimony is concerned.
In most of continental Europe, Asia, and Africa, the truly aggressive and confrontational adversary system we are accustomed to in the United States is little known and infrequently used. For the most part, in those foreign countries, there are court-appointed medical and other scientific experts who present their findings to the court prior to and during trial. They are seldom, if ever, challenged by another medical expert. The American adversary system is anathema to attorneys and jurists, as well as physicians and forensic scientists in those countries, who feel that the truth is often submerged, or even ignored, during the course of courtroom histrionics and dramatic tactics.

The majority of physicians who are subpoenaed to testify as treating doctors view their scheduled day in court with much trepidation. Even many medical and scientific expert consultants who have much courtroom experience view an appointment in the witness box with dismay. Leave aside the prospect of endless delays, inadequate notice, and the last-minute phone call to postpone the long-time, carefully arranged event; and forget the occasional unpaid or greatly delayed payment of fees and reimbursement of travel expenses. Even without these irritations, the courtroom is seen as an alien, sometimes hostile, place. What causes lasting anger among medical and scientific expert consultants is a system that does not permit them to say what they want to say — a process that seems to be something other than a search for objective truth. There is a philosophic basis for this. Since absolute, incontrovertible truth is unknowable, the best a Court can do in an imperfect world is seek out probability (i.e., "reasonable medical certainty or reasonable medical probability").
The origins of an adversarial system contesting an unevenly weighted game of chance are lost in antiquity. A moral/religious aspect was conferred by the rule which forbade a defendant to give evidence on his own behalf (it was assumed he would lie and therefore consign his soul to purgatory). In criminal courts the expert, and particularly the medical expert, came to play an increasingly prominent role for the simple reason that experts were perceived as bringing the promise of certainty.

The trouble is that objectivity and independence are often chimeras or, more pertinently, exist only in the mind of the party benefitting from the apparent expertise. For example, in homicide cases, since the local pathologist and other forensic specialists called on behalf of the Prosecution know that an expression of doubt about a key issue may result in the acquittal of the accused, there exists a pressure to play down, if not deny, the possibility of error. Combine this with the basic underlying premise of our adversarial system, namely, that “truth” will emerge through conflict - doctor against doctor, lawyer against lawyer, defendant against policeman -- and the philosophical problem can be easily understood.

In contract, physicians do not work in this way – indeed, the idea of confrontational medicine is absurd. What are the consequences? It may be difficult to find doctors prepared to criticize the findings of other doctors of similar status within the same field. It is even more difficult to find doctors prepared to criticize more eminent specialists within the same
field; and, if junior and senior physicians are all in the same department or hospital, then it is almost impossible.

The real problem is that the adversarial system is not a search for truth, nor does it pretend to be. Until and unless this is recognized, no amount of lawyer-bashing, nor rule-changing, will lead to any substantial improvement in the delivery of the justice system.

Once the attorney has consulted experts, the issue of how effective they will be on the stand remains. What makes experts effective is related to the ambiguous feelings many jurors have about experts in general.

On the one hand, jurors sometimes feel they are being asked to make a decision they are not qualified to render, especially in complex cases. Jurors are grateful to experts who explain case issues simply, clearly, and in a way that helps them make a reasonable decision. On the other hand, jurors are disturbed by the concept that an attorney can hire someone to back up almost any position. This concern is reinforced when both sides bring out highly qualified experts who presumably know everything there is to know about the field in question but who contradict each other on every point. The notion of the "hired gun" runs counter to jurors' sense of justice.

Jurors are likely to question an expert's motives for testifying, and that means that the risk of them seeing an expert as a "hired gun" is always present. A motivation that jurors are more comfortable with is an expert's desire to help them understand what they need to understand in order to make a just decision.
Explanation versus advocacy. What jurors want from experts is an explanation. When they feel they are getting an argument instead, their tendency is to begin counterarguing in their own minds, to resist the expert's efforts to be persuasive. For persuasion to work, it must be self-persuasion. In other words, it is what listeners tell themselves that is most compelling. If they feel an expert should not be advocating in the first place, jurors tend to tell themselves why the expert is wrong and why he or she should not be acting like lawyers. As a result, the jurors will not accept what the expert is saying.

Since jurors are so uncomfortable with experts acting like lawyers, they are relieved when they hear an expert who does not appear to be arguing for a particular point of view, but who is simply explaining the facts. For example, in one case, a juror explained why experts for the one side won the credibility battle: "They didn't have an ax to grind. They are just everyday Joes out on the job. They just called it as they saw it."

Investment in the case. Experts who are perceived as not being invested in the case outcome and who are not overly aggressive, arrogant, or defensive on the stand are perceived as more credible. Emotional investment with uncontrolled zeal or passion could prove damaging. One juror in a class action suit was critical of an expert because "when the other lawyers were questioning him on cross-examination, he started to get a little irate. He got a little more emotional than he should have." As this comment indicates, experts who become defensive and fail to remain levelheaded during cross-examination can lose their effectiveness.
"Trust me." Since experts, by definition, know and understand concepts that jurors presumably know very little or nothing about, they are saying, to some extent, "Trust me."

As noted above, jurors don't necessarily find impressive resumes meaningful and often question an expert's motives. Thus, trust is not necessarily a given simply because of an expert's excellent qualifications.

Jurors are not just evaluating the witnesses' expertise, they are also evaluating their honesty and character. Due to the "hired gun" factor, questions about why experts are testifying and how they feel about it may take on more importance than how much the experts know. Factors such as how relaxed the experts are and whether they make eye contact with the jurors can have a large impact in building credibility.

A juror in a recent case described an expert she found credible:

He was always facing the jury and talking right at us and just kind of had humorous mannerisms about him. He seemed to be believable. ...I guess we kind of keyed in on the character of people as the days progressed. ...I don't think we formed any opinions as to the outcome of the verdict, but we formed opinions as to the personalities during the day.

Conversely, a juror who thought an expert had been paid to give certain testimony explained that this was in part due to the witness's demeanor during cross-examination, when he would not make eye contact with the attorney questioning him. Other jurors describe experts who appear to testify only so they can pick up their check and go home. Rather than show the kind of neutrality that jurors value, they show apathy.
If witnesses testify by videotape, jurors can be so bothered by the implication that it was not worth the experts' time to attend the trial in person that they pay little attention to the content of the testimony.

The role of a medical-legal consultant is interesting, challenging, and intellectually gratifying. It is also quite frequently frustrating, difficult, and occasionally unpleasant. A medical expert who understands the adversary nature of the civil and criminal justice systems in the U.S. does not realistically expect to have his written opinions and oral testimony go unchallenged. There is nothing wrong with an intelligent, probing cross-examination that is designed to point out weaknesses and inaccuracies in the conclusions and opinions of the other side's medical consultants and witnesses. And, if opposing counsel genuinely believes the expert is deliberately lying or distorting known facts and fundamental scientific truths, then it is understandable and acceptable that cross-examination may have to be hard-hitting, brutal, and even vicious.

However, in the overwhelming majority of instances in the U.S. today, medical experts' opinions are expressed in a reasonable, honest, and credible manner. To a great extent, as with diagnoses and opinions arrived at by physicians in purely therapeutic, non-adversarial situations that have no medicolegal overtones, there is some element of subjectivity involved. After all, we are not dealing with mathematical equations, chemical reactions, physics formulas, or astronomical calculations. Medicine is a combination of art and biological science. Consequently, reasonable people may differ in their opinions within
the realm of medicine. It depends on the nature of the problem and the specialty involved. There should not be much subjectivity involved in the conclusions and opinions of a competent forensic pathologist regarding the trajectory of a gunshot wound, or the location and measured quantity of a subdural hematoma. On the other hand, there could be a great deal of subjectivity incorporated within the opinion of a psychiatrist as to whether a defendant is competent under the M’Naghten Rule.

A medical expert who is honestly expressing his opinions does not enjoy being personally abused and professionally insulted. No decent, sensitive person appreciates being verbally attacked by a stranger, especially when he has not done anything to provoke such an assault and is essentially helpless to fight back by virtue of the unequal positions inherent in the respective roles of witness and attorney within the arena of the courtroom.

What qualifications and criteria should be employed in determining whether someone is a true expert in his/her field of medical or forensic scientific endeavor? Should these qualifications be construed differently based upon where the expert comes from, and on whose side of the case he/she is testifying? Is there a rational basis and ethical justification for a forensic scientist being considered professionally sacrosanct, intellectually unassailable, and infinitely sagacious in his/her jurisdiction when called upon by the local prosecutor; whereas that same person testifying for the defense in another jurisdiction is collaterally attacked in a vicious fashion and made to appear as if he/she is nothing more than a “professional prostitute” or a “gun-for-hire”?
Substantive differences of opinion and intellectual challenges are appropriate and necessary in our adversarial system. However, probing (even "blistering") cross-examination on substantive issues is vastly different from vituperative, caustic attacks of an ad hominem nature.

What should be the professional responsibility (if any) of a top-level professional forensic scientist, (e.g., medical examiner, crime lab director, etc.) in jurisdiction A if the prosecutor in his/her jurisdiction calls and asks for "dirt" about another top-level professional from jurisdiction B who has been retained by defense counsel? At what point do personal morality and professional ethics take precedence over adversarial expediency?

In a malpractice case the attorney representing the defendant doctor will often turn to the local medical society and other local physicians specializing in the same field for advice and suggestions as to how to uncover damaging information about an out-of-town expert. Phone calls will be made to the consultant's community to find out what kind of person he is, what his professional reputation is, and what he is like on the witness stand. Of course, all positive information and favorable opinions will be readily ignored or discarded; but anything of a negative nature, no matter how petty, irrelevant, or ancient, will be eagerly recorded and prepared for use in a collateral attack, or voir dire examination, of the plaintiff's expert at the time of trial.

Similarly, in a murder case, the district attorney will ask his local medical examiner or coroner what he knows about the independent out-of-town consultant. The prosecutor
will also contact the district attorney in the area where the defendant’s expert practices in
order to obtain whatever damaging or compromising information may be available, and
another inquiry may be directed to the national district attorneys’ office for the same
purpose. Was there ever an autopsy performed by this pathologist in which his diagnosis
was subsequently challenged or proven to be incorrect? Has he ever been publicly criticized
by the local news media or admonished by the other government officials? Have any
members of his staff, or any of his professional colleagues, accused him of any improper
conduct? Thus, a dossier, or investigative file, is compiled against the outside expert just
as if he were the subject of a criminal investigation. Time, effort, and expense are not
problems for the politically ambitious and aggressive district attorney. He will never have
to answer to anyone concerning this kind of surreptitious, clandestine undercover operation,
for he represents the “forces of law and justice”. Malice, viciousness, and ruthlessness are
not matters that will ever prey upon his conscience or cause him any public discomfiture
in the future.

Simultaneously, while these covert activities are underway, the defense attorney in
a prominent malpractice lawsuit or the district attorney in a notorious homicide case will
frequently do everything possible to thwart and delay the independent expert in his efforts
to obtain all the records, investigative reports, and physical materials involved in the specific
legal action. A complete and thorough review and analysis of the issues in controversy will
require the forensic pathologist to study all medical reports, hospital records, police and
crime lab reports, scene photographs, post-mortem protocol, microscopic tissue slides, autopsy pictures, special test results, and copies of other experts' opinions (if permitted under the local civil or criminal rules of pre-trial discovery). Often the attorney who has retained the outside consultant will have to file special motions in court to gain access to some of these materials, and some judges will grant only a qualifying order that requires the out-of-town expert to view and examine slides, tissues, clothing, photos, and other physical items at the office of the local coroner or medical examiner, or hospital. Thus, the plaintiff in a malpractice action, or the defendant in a homicide case, is subjected to unnecessary additional expense, and the independent consultant is put to the bother of an extra trip that he rarely can expect to be fully compensated for from the standpoint of all the time he will have to spend in traveling to a distant community.
Medical and scientific expert consultants – MSEC

1. Medical expert consultants should follow the standards of their respective disciplines. They should apply any methods, technical skills, scientific and other areas of specialized knowledge to legal issues and questions.

2. Medical expert consultants should strive to keep current and maintain competence in their own and closely related disciplines.

3. Medical expert consultants should formulate opinions in an honest and unbiased manner. They should strive to be objective in examining medical questions from all reasonable perspectives and seek all relevant obtainable data that could distinguish among plausible alternative possibilities.

4. Medical expert consultants should diligently avoid any conflicts of interest. They should strive for independence in order to protect their objectivity. Any potential conflicts of interest should be disclosed. Work on any related cases should be avoided or discontinued if objectivity may be compromised.

5. Medical expert consultants should undertake cases and give opinions only in their areas of expertise, based upon their education, training, and experience.

6. It is essential to recognize that honest differences of opinion exist and do not imply unethical behavior by either expert. The legal adversary system includes opposing attorneys seeking out experts with favorable opinions. Medical expert consultants should not be
blamed unfairly for unpopular verdicts, honest differences of opinion, or the vagaries of the legal system.

7. Passionate negative personal or professional feelings against an opposing disagreeing expert or attorney should not constitute the basis for unethical behavior or biased opinions.

8. Medical expert consultants should present their opinions to the trier of fact in concise understandable language, but not to the point of oversimplification and loss of precision. Medical expert consultants should strive to be as accurate as possible and avoid distortion and exaggeration. Every reasonable effort should be made to ensure that others (including attorneys) do not distort the medical expert consultant's opinions.

9. Medical opinions should not be based on undisciplined bias, personal advantage, or a desire to please an employer or an attorney.

10. When a medical expert consultant accepts any privileged information from an attorney, care should be taken to ensure that all such information is kept confidential and does not reach the opposing side. After accepting such information, medical expert consultants should not provide their services to the opposing side unless legally ordered to do so. Medical expert consultants should inform attorneys not to make payment or provide privileged information, if they wish to retain the option to be employed by the opposing side.

Experts can be unwittingly manipulated by attorneys who provide them with false, misleading or incomplete information. An expert who relies on such evidence can be easily discredited in court, and his credibility can be impugned.
Avoid being manipulated. At the outset, review everything that has been sent to you. Determine if any important items are missing. Do not proceed or conclude your review and analyses until you have received all pertinent and necessary data and materials.

Make sure the reports you have received aren’t missing something that should be there.

No matter what you’ve been given, always ask what additional records and materials are extant. You don’t want to see them for the first time in court when the opposing attorney cross-examines you on them.

If there is anything missing that you definitely feel you should examine and be familiar with, make your request for it in writing. For example, in a pathology case, it may be necessary to examine the microscopic autopsy tissue slides. If these are not provided, ask for them in writing. This way when it goes to court, you can at least point out that you did make the request, and you did realize the evidence might be important.

Deliberate malevolent manipulation is not common, but it can happen in any case. Be especially aware of this possibility when the stakes are high. The incentive to distort evidence is greater when there is a lot of money or jail time on the line. So, play devil’s advocate. Ask yourself what would the other side be doing? What are they looking for? Most importantly, keep your professional eyes and ears open, and make certain that you get all the available information you can before you render your final opinion.