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An Alternative to the Adversarial: Studies on Challenges of Court-appointed Experts

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Abstract

At present, experts have become a mainstay of modern litigation, although criticisms suggest that the problems of how to fit expert knowledge comfortably into the method of adversarial fact-finding are numerous, significant, and without simple solutions. Concerns about partisanship and lack of scientific competence by adjudicators to evaluate contradictory expert testimony have been widely recognized in the traditional use of party-called expert witnesses. While such concerns cannot be wholly ameliorated, there may be alternative mechanisms that can help. One solution would be to call for the use of neutral court-appointed experts, to create a nonpartisan source of expert knowledge. A system of neutral court-appointed experts is an advisory tribunal to the court that could deliver “those general truths, applicable to the issue, which they may treat as final and decisive.” However, no matter in which country, the choice of appointing neutral experts still seems to be a rare option for trial judges to consider and exercise. An obvious question would be: Why are neutral experts not used more frequently at trial? This paper did a study on court-appointed experts, with a focus on challenges that such mechanism faces. Part I examines problems in the traditional use of expert witnesses in an adversarial system. Part II discusses the incentives to make greater use of court-appointed experts in a typical adversarial system and to what extent such mechanism would solve difficulties within the traditional use of party-called expert witnesses. Part III further explores and analyzes obstacles that a typical neutral expert system nowadays encounters when it operates in practice. Taking all analysis together, Part IV makes an overall evaluation of the mechanism of court-appointed experts.

Key words: Adversarial system, court-appointed experts, expert knowledge, lay adjudicators

INTRODUCTION

Expert evidence is different. Expert witnesses can testify in ways that ordinary fact-witnesses may not. Fact-witnesses must have personal knowledge of the facts to which they testify – they must have had an opportunity to observe and must have actually observed these events.^[1] They are then expected to describe the facts at an appropriate level of detail, rather than simply resorting to unduly conclusory “opinions” about the events they witnessed.^[2] In contrast, an expert brings to bear a body of knowledge largely outside to the facts of the particular case. As one lawyer described, “[a]n expert is someone who wasn’t there when it happened, but who for a fee will gladly imagine what it must have been like.”^[3] They can lecture the adjudicator on the fundamentals of their field of expertise that would advance the adjudicator’s understanding of the facts in dispute.^[4] They can offer opinions in the courtroom based on their firsthand investigations or

information that others in the same field reasonably rely on, and to describe certain observations they have made with the aid of their expertise.^[5]

By testifying in this manner, experts are largely immune from perjury charges in practice. Traditionally, they also have been exempt from civil liability for errors in their testimony.^[6] None has professional regulation done a great deal to constrain expert testimony. For example, the overwhelming majority rule in the United States is that an expert need not be a member of a learned profession.^[7] Rather, experts may have a wide range of credentials based on their skills, training, education, or experience.^[8]

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CRITICISMS ON THE ADVERSARIAL MODEL OF EXPERT EVIDENCE

Criticism of expert testimony dates back to the middle of the nineteenth century,^[9] and it grew even sharper and more frequent over the following two centuries. To some extent, both the duration and intensity of these concerns are unsurprising. In essence, they reflect the awkward fit between expert knowledge, lay adjudicators, and an adversarial system.^[10] The most heard criticisms include the following.

Partisanship

Perhaps, the most frequent criticism of the traditional use of expert witnesses in an adversarial system was that experts too often became partisans, the hired mouthpieces for the parties' points of view instead of the objective spokesmen for scientific truth.^[11] In its most egregious form, payment from the parties produces the conscious bias seen in experts who will adapt their opinions to the needs of the lawyer who hires them. Occasionally, the fact that expert opinions literally are for hire becomes explicit in their testimony. While comparing to conscious bias in experts-for-hire, unconscious bias is even more dangerous. As Sir George Jessel pointed out over a century ago, "there is a natural bias to do something serviceable for those who employ you and adequately remunerate you."^[12] In criminal investigations, biases result from the close relationship between forensic experts and the police and prosecution, and the fact that forensic experts frequently know in advance what the investigators hope they will find and frequently have access to nonforensic case information.^[13] Of course, the same is true of defense experts in criminal cases.

In both the criminal and civil cases, lawyers can develop an affiliation with "their" experts, who have become an integral part of the team. In a process that has been called cultivation and likened to seduction,^[14] attorneys induce even the most honest expert to express an opinion or present information in a way that is literally true, but more favorable to their client's position than the expert, left to his or her own devices, would have chosen.^[15]

Alternatively, many of the most qualified experts refuse to testify.^[16] Discomfort and dislike go in both directions: "Experts in other fields see lawyers as unprincipled manipulators of their disciplines and lawyers and experts alike see expert witnesses – those members of other learned professions who will consort with lawyers – as whores. The best that anyone has to say about this system is that it is not as bad as it seems and that other methods may be worse."^[17]

If honest and unbiased experts tend to drop out of the litigation process at a greater rate than less reliable experts, this self-selection shrinks the pool of potential experts. However, more dramatic selection effects result from the decisions of the lawyers who swim through this pool to enlist experts on their clients' behalf, commonly known as "shopping for experts." In a given case, ordinary fact-witnesses are limited to the small number, who happens to have firsthand

knowledge of the relevant matter. Within the far larger market of experts on various subjects, lawyers routinely shop for the individuals they think will most persuasively present their point of view.^[18] Experts can be chosen for their persuasive and effective demeanor as much as for their skill and knowledge in the underlying area of expertise,^[17] and attorneys have every incentive to select experts who will be more advocates than educators.^[19]

Contradictory testimony

As with complaints about expert partisanship, legal commentators vociferously attacked expert testimony for so frequently being irreconcilable and contradictory. Too often, courtroom attendees were "entertained by the sad spectacle of two sets of experts giving solemn testimony in direct contradiction to each other."^[20] Even when experts testified to exactly opposite conclusions, they would often express absolute confidence in their opinions.^[21]

Commentators did recognize that there could be serious and legitimate disagreements among competent experts. Over 100 years ago, a judge on New York's highest court stated: "Medicine is not an exact science. There are innumerable questions within its domain which cannot be answered with certitude, and as to which practitioners of equal ability and integrity may differ in opinion."^[22] In a speech before New Hampshire's Medical Association, another judge expressed similar views: "Yes, it is a visible truth that doctors, as well as lawyers and ministers of the Gospel, do disagree. It would be marvelous and deplorable if they did not. If there were no disagreement, investigation, and experiment would cease."^[23] However, even if disagreement resulted from the good-faith pursuit of science rather than partisanship, it was nonetheless understood to be a serious obstacle to effective and rational decision-making of fact-finders. This dilemma caused the renowned USA federal judge Hand to label the use of party-controlled expert testimony "an anomaly" from which "serious practical difficulties arise."^[24]

The advocate's control at trial

In addition, many experts, as well as some legal commentators, blamed the craftiness of lawyers and the structure of the trial process for some of the expert's woes. As one prominent Boston physician described, "it is the duty of a witness on the stand to state the truth. It is the business of legal counsel to distort and suppress the truth, except so far as it suits their own purpose." The attorneys controlled what was asked, and in skilled hands, this gave them a great deal of power.

Incompetence of lay fact-finders

Inextricably linked with the widespread concern about the partisan nature of expert testimony is the worry that lay fact-finders, such as jurors in the United States legal system, lack the capacity to assess expert evidence rationally. "Juries are alleged to be intellectually incompetent to understand much expert evidence, to rely on superficial characteristics of the experts in judging their testimony, to abdicate their responsibility to evaluate the testimony, and to be confused by a battle of

experts.”^[25] Similar concerns also exist in judge bench trials. The anxiety is that judges who lack scientific background will become “one-eyed fact-finders” lacking depth perception and unable to distinguish powerful expert evidence from flawed or weaker expert proof.^[26]

These and other criticisms, such as the cost concern that widespread use of expert evidence increases litigation costs and prevents some meritorious cases from being heard, suggest that the problems of how to fit expert knowledge comfortably into the method of adversarial fact-finding are numerous, significant, and without simple solutions.

INCENTIVES TO MAKE USE OF COURT-APPOINTED EXPERTS AS A PROPOSED SOLUTION TO THE PROBLEMS IN ADVERSARIAL MODEL OF EXPERT EVIDENCE

Concerns about partisanship and fact-finders’ lack of competence to evaluate contradictory expert testimony have been recognized for the use of party-called expert witnesses was in its infancy. While they cannot be wholly ameliorated within an adversarial system, there may be mechanisms that can help. One method for improving the use of expert information in court is to adopt court-appointed experts, calling for the use of nonadversarial experts, to create a nonpartisan source of expert knowledge. Judge Hand, for example, proposed the creation of a system for neutral court-appointed experts, an advisory tribunal that could deliver to the jury “those general truths, applicable to the issue, which they may treat as final and decisive.”

Calls for the creation of some mechanism by which judges and juries could hear from neutral experts rather than (or, more typically, in addition to) partisan experts were commonplace, and legislative efforts matched up in this direction. For instance, Rule 706 of the USA Federal Rules of Evidence provides judges with the explicit authority to appoint an expert, either on its motion or on the motion of a party.^[27] Parties can be asked to submit suggestions to the court, but the court also “may appoint expert witnesses of its own selection.”^[27] Provisions are made to “advise the parties of the witness’ findings, if any,” and any party may call the court-appointed witness to testify or take his deposition.^[27] The judge has the discretion to disclose to the jury, the fact that a particular witness has been appointed by the court.^[28] The rule provides no guidance about when the appointment of a neutral expert is called for, implicitly leaving this judgment to the judge’s discretion.

In addition, the United States Supreme Court has reminded USA judges of their power to appoint experts. *Daubert v. Merrell Dow Pharmaceuticals, Inc.*,^[29] the USA Supreme Court’s 1993 opinion examining the admissibility of scientific evidence, alerts trial judges to “be mindful of other applicable rules” pertaining to expert evidence, and makes specific mention of the trial court’s Rule 706 “discretion to procure the assistance of an expert of its own choosing.” Justice

Stephen Breyer, concurring in *General Electric Co. v. Joiner*,^[30] pointedly quoted with approval an amicus brief from the *New England Journal of Medicine*, stating “Judges should be strongly encouraged to make greater use of their inherent authority to appoint experts.”^[31] More generally, Justice Breyer urged courts to make the use of the managerial techniques available to help them “overcome the inherent difficulty of making determinations about complicated scientific, or otherwise technical evidence,” including the use of pretrial conferences, special masters, specially trained law clerks, and court-appointed independent experts, and averred that with the variety of techniques available, “Daubert’s gatekeeping requirement will not prove inordinately difficult to implement.”

The United States Supreme Court is not the only supporter here. Since 1994, renowned USA 7th Circuit Court Judge Richard Posner, frustrated with the conflicting testimony of party-paid survey and statistical experts, has also urged district courts to appoint more experts under Rule 706 of federal rules of evidence.^[32]

PROCEDURAL AND ETHICAL OBSTACLES IN THE COURT-APPOINTED EXPERT SYSTEM

Despite the several sources of authority to call court-appointed witnesses or appoint technical assistants, by all accounts, judges exercise these powers infrequently within a typical adversarial system. A 1988 survey of USA federal district court judges found that only 20% of respondents had ever appointed an expert.^[33] Half of those had done so only once, and only four judges had used their Rule 706 authority on 10 or more occasions. The same survey found that 87% of judges who answered the question, and two-thirds of those judges who had never appointed an independent expert, believed that Rule 706 experts could be helpful in some circumstances.

The vociferous criticism of party experts, combined with the frequency with which commentators endorse nonpartisan expertise, leads to an obvious question: Why are neutral experts not used more frequently? Possible explanations include the following.

Difficulty in identifying an expert suitable for appointment

Judicial reluctance to appoint an expert may reflect the difficulty, if not the impossibility, of selecting “a truly neutral person.” Many judges feel not competent enough to evaluate the suitability of potential experts with the knowledge demanded in litigation or even know where to look. It may be that neither the public nor the judiciary believes that neutrality is even possible. If the so-called neutral experts will have their biases and blind spots, “why add the court’s expert, with his or her own partisan beliefs and commitments, to those of the parties?”^[34] A few of judicial comments below will reveal the depth of this concern:

- It is hard to find an impartial expert. When both parties have experts testifying, the judge may feel that another expert opinion will only add to the confusion

- In circumstances that are simply a matter of professional opinion, adding another opinion is unlikely to be helpful
- To appoint an expert is to decide the case. Few experts are truly neutral, and the expert will decide the case according to personal values. In most fields, there is no neutral
- It is difficult to find a neutral expert, and the judge is in no better position to judge the neutrality of the expert than the parties.^[35]

Accustomed to adversarialism

Accustomed to both adversarialism and evidentiary control, trial attorneys are generally unenthusiastic about court-appointed experts. Judges, too – many of them former trial attorneys – may be uncomfortable with the managerial role invited by the use of neutral experts and believe that it conflicts with their role within the adversary system. Many judges indicated that they would appoint a neutral expert only where the adversarial process had failed. Other judges deeply believe that if a lawyer fails to explain the basis for a case, that is his or her problem. A related reason for infrequent appointment of neutral experts is deference by the judge to objections by the parties. Many judges, citing deference to the parties as an important consideration, do not appoint experts without the consent of the parties.^[36]

Securing compensation for an expert

Another practical problem concerns the means of compensating an expert. Since the parties are usually assessed a fee for the services of a court-appointed expert, the judge must often order payment by the parties, and perhaps supervise the billing practices of the appointed expert. Many judges are hesitant to impose the additional costs of a court-appointed expert on the parties, while many lawyers find the process hard to justify to their clients when the client is paying for expert testimony already, particularly when the court-appointed expert may hurt the client's case, making the client even angrier.^[35]

Concerns of infallibility in court-appointed experts

Fear exists that juries will view the court-appointed expert as having “an aura of infallibility.”^[37] While some favor neutral experts precisely because of the deference that juries are expected to show to them, others, concerned that neutral experts will have their sources of bias and predispositions, worry that their influence will be too great, potentially transforming “trial by jury into a trial by witness.”^[38]

In addition, judges may hesitate to invoke their rules-provided authority to appoint their experts simply because the process is unfamiliar or because the use of this kind of technique inevitably raises questions. Since the rule is rarely invoked, there is little information concerning this process. This lack of familiarity on the part of some judges has led to some distrust: One judge remarked, “my guess is that it could be a pain in the ass.” Furthermore, effective appointment of an expert requires the court's awareness of the need for such assistance early in the litigation. Since the parties rarely suggest that the court appoint an expert, judges in practice sometimes realize

that they need assistance on the eve of trial when there is not sufficient time to identify and appoint an expert.

AN OVERALL EVALUATION OF THE COURT-APPOINTED EXPERT SYSTEM

Will the use of neutral experts increase in an adversary system? 100-year history of abstract enthusiasm and infrequent use of independent expertise in court suggests that dramatic change is unlikely, unless it is part of broader transformations in an adversarial legal process. Nonetheless, neutral experts can serve an important informational role, and the use of neutral experts should be encouraged in appropriate cases.

To what extent would the greater use of neutral experts solve the numerous difficulties with the present methods for using experts? While neutral experts would likely solve some significant problems, they would not be a panacea.^[39] One recurrent issue is whether genuine “neutrality” is even attainable. Total neutrality is probably both chimerical and unattainable, but it is nonetheless likely that judicious selection of experts who are not affiliated with either party would improve the overall quality of information available to the fact-finder. More generally, independent experts can be an effective check on partisan excess. Indeed, some judges report that the very threat of calling a neutral expert sometimes has a beneficial effect.

United States Supreme Court Justice Stephen Breyer has been a supporter of the greater use of independent expertise by courts. He has suggested that: “We need to learn how to identify impartial experts. Furthermore, we need to know how best to protect the interests of the parties and the experts when such extraordinary procedures are used. We also need to know how best to prepare a scientist for the occasionally hostile legal environment that arises during depositions and cross-examinations. In this stage of science, we must build legal foundations that are sound in science as well as in law. Scientists have offered their help. We in the legal community should accept that offer. We are in the process of doing so.”^[40]

CONCLUSION

It is fair to conclude an awkward fit exists between expert knowledge, lay adjudicators, and an adversarial system, and the problems of how to fit expert knowledge comfortably into the method of adversarial fact-finding are numerous, significant, and without simple solutions. While such problems cannot be wholly ameliorated within an adversarial system, one method for improving the use of expert information in court is to adopt court-appointed experts, calling for the use of nonadversarial experts, to create a nonpartisan source of expert knowledge. Nevertheless, by all accounts, judges exercise these powers infrequently within a typical adversarial system, and there are fundamental reasons behind this dilemma. Based on discussions and analysis aforementioned, inevitable procedural and ethical obstacles coexist with the court-appointed expert

mechanism when it operates in a typical adversarial system, which suggests that dramatic increase in the use of neutral experts in an adversary system is unlikely to happen, but it is nonetheless likely that judicious selection of experts would improve the overall quality of information available to the fact-finder.

Unlike the adversarial system world, countries with a typical inquisitorial system, such as China, always take the mechanism of court-appointed experts for grant. Nonetheless, a variety of procedural and ethical obstacles aforementioned in the court-appointed expert system such as concerns of neutrality, increased cost, and infallibility are universal, no matter it is an adversarial or an inquisitorial system. Taking a closer look of the mechanism of court-appointed experts and probing into its inherent, systematic defects have great immediate and far-reaching significance for inquisitorial countries as well.

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