The use and misuse of expert evidence in the courts

An edited transcript of a panel discussion at the AJS midyear meeting, March 6, 1993.

Introduction

Experts in litigation are used to testify on a variety of complex medical, technological, economic, scientific, and other issues. The role of the expert, according to Federal Rule of Evidence 702, is to "assist the trier of fact to understand the evidence or to determine a fact in issue."

Despite this aspiration, a constellation of issues involving various aspects of expert evidence has developed in the legal community. Thoughtful observers raise questions about, for example, standards of admissibility, the use and misuse of opposing experts hired by the parties, and the impact of expert evidence on fact finders. These concerns are understandable, and perhaps even predictable, when one sees the use of experts in court as a collision of values: those of the adversary system, searching for truth by having each side tell its story, versus the scientific method, where findings are couched as hypotheses, other researchers are encouraged to dispute those findings, and final truth is neither expected nor defined.

The debate about standard of admissibility is most notably rooted in the Supreme Court's 1923 *Frye* deci-

sion, which requires "general acceptance" in the relevant scientific field as the basis of the expert opinion. The general acceptance standard was modified in the more liberal enactment of the Federal Rules of Evidence in 1975. For example, Rule 703 permits the expert evidence to be based on data or facts "reasonably relied upon" by experts in the particular field. However, in 1991 the Council on Competitiveness, chaired by Vice-President Dan Quayle, focused national attention on this issue when it recommended a more restrictive, "widely accepted" standard for expert testimony. Foes of both *Frye* and the Quayle report point out that consensus in science can take years to achieve, and others further argue that keeping nonconsensual scientific information from a jury can infringe on a litigant's Seventh Amendment right to a trial by jury. Supporters of *Frye* contend that a lesser standard leads to "junk science" in the courtroom.

Although it didn't settle the issue definitively, a June 1993 Supreme Court decision (*Daubert v. Merrell Dow Pharmaceuticals, Inc.* No. 92-102) rejected *Frye* and gave judges increased responsibility for screening out ill-founded or speculative scientific theories. The Court held that judges should focus on the reasoning or methodology behind the scientific testimony rather than on whether the conclusions of an expert witness have won general acceptance. However, the Court provided little specific guidance for undertaking this review.

The hiring and preparation of experts by opposing attorneys has led to charges that an expert really is a "hired gun," telling only that portion of the truth that helps the side of the attorney who is paying the witness. Sometimes several experts are used by each side, leading to the "battle of the experts." In these situations, critics say, expert evidence becomes disputed evidence and a possible source of confusion for judges and juries. As a response to these perceived problems, the Arizona Supreme Court has established rules (sometimes referred to as the Zlaket Rules) limiting the number and use of experts.

Others have charged that expert witnesses undermine the adversary system by usurping the fact-finding role of the judge or jury. They say that when confronted with complex issues, jurors in particular are willing to defer to the guidance of experts.

Some reforms have been suggested. One is the use of court-appointed experts. Proponents say such experts would be untainted by a partisan selection and preparation process, and would be able to offer truly unbiased evidence. The use of court-appointed experts is permitted in the federal courts and in more than 30 states and territories.[1]

However, a recent study found that, at least at the federal level, court-appointed experts are rarely used.[2] Only in extraordinary circumstances were the federal judges studied willing to appoint experts. Some judges acknowledged that a court-appointed expert might be helpful in resolving a conflict, but felt it was more important "to maintain the adversarial system and the control exercised by the parties in the presentation of the evidence."[3]

At the American Judicature Society midyear meeting on March 6, 1993, a panel consisting of a federal trial judge, an Arizona Supreme Court justice, a criminal defense attorney, a civil litigator, an expert witness, and an academic brought their varying perspectives to a discussion of the use, misuse, and systemic impact of expert witnesses in court.

The panel was moderated by Professor Michael Tigar of the University of Texas School of Law. The discussants included attorney Stanley M. Chesley of Cincinnati; Professor Samuel R. Gross of the University of Michigan School of Law; criminal attorney Robert J. Hirsh of Tucson, Arizona; Judge Marilyn H. Patel, U.S. District Court for the Northern District of California; Thomas N. Thomas, M.D., a psychiatrist from Phoenix, Arizona; and Justice Thomas A. Zlaket, Supreme Court of Arizona.

—Kathleen Sampson, Director
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Psychiatric testimony

Professor Michael Tigar: An expert is someone who wasn't there when it happened, but who for a fee will gladly imagine what it must have been like. And therein lies some of the difficulty. We have assembled a panel that is going to mix it up about this issue. The emphasis is not going to be on rhetoric, but upon concrete proposals for dealing with the problem of expert testimony.

We are going to start with a hypothetical involving psychiatric testimony. It is a death penalty case. In the punishment phase the state offers the testimony of a psychiatrist who, after interviewing the defendant for two hours in jail, gives his opinion that the defendant will be dangerous in the future. The psychiatrist is a medical doctor and board certified in psychiatry. Tom, this is your colleague, what do you think of that?

Dr. Thomas N. Thomas: Not much. Psychiatrists are grossly inadequate in predicting future behavior. I think judges are more accurate at predicting who will be dangerous and who will not be than psychiatrists who are so learned in human behavior. They know a lot more about people than we do.

Tigar: Bob Hirsh, if you are trying that case for the defendant, how do you make use of that insight? Do you move to strike it, do you try to cross-examine it, do you put this witness up?

Robert J. Hirsh: I take the trial lawyer's view that if you have an expert who really doesn't have a well-founded claim, you are going to be able to destroy that claim in cross-examination. You present your own experts, and then the trier of fact makes the determination.

Tigar: Judge Patel, before an expert can testify in your court under the Federal Rules, the proponent of the expert testimony has to show that the expert is qualified, that the field of expertise is one that is generally recognized, and that the source of information on which the expert relies is of a type commonly relied on by experts in this field. But suppose you had an attack in which the opponent had their own expert who said not, "I'll testify against him," but, "you shouldn't receive it." Are the existing procedures adequate for you to make a decision?

Judge Marilyn Patel: I think they

1. Gross, *Expert Evidence*, 1991 WIS. L. REV. 1113, 1190-1191.
2. Cecil and Willging, *Defining a Role for Court-Appointed Experts*, 4 FJC DIRECTIONS 6 (August 1992).
3. *Id.* at 8.

are. We are not terribly reluctant, or at least some of us are not terribly reluctant, to use them in civil cases. I think we always get just a little more cautious with criminal cases. We tend to get more cautious when the rights of criminal defendants are at stake. But if this is being proposed by the state, I would conduct an evidentiary hearing before the trial to determine whether or not the proponents of that evidence would be allowed to have it admitted. I have done this in a diminished capacity case, and did it with a defense witness who was going to testify about a certain kind of test that I understood the experts in the field would say was essentially unreliable and not used with any general acceptance. I think that in the type of case in the hypothetical, experts in the field could not reasonably rely on the facts and data. And therefore it may be possible to exclude it under the Federal Rules. Federal judges do have the authority to do that. Some of us sometimes get a little queasy, and sometimes the courts of appeals are more willing to let that evidence in.

Tigar: Stan, in the plaintiffs' cases that you've handled, are you seeing increasing challenges to your efforts to use scientific evidence—where there is this threshold evidentiary hearing even before the jury is going to hear a word of the expert about whether or not the expertise should come in?

Stanley M. Chesley: Yes.

Tigar: Do you like it?

Chesley: No, not at all. I believe that the jury system works, and I think that we should put more faith in the jury system. As long as there is some basic threshold as to the credibility of the witness, it is the jury's function to decide as the trier of the facts. I believe that with too much tinkering, too much control by the court, and too many threshold questions you end up having a mini-trial.

Tigar: Do you think a part of what we are hearing here is that the adversaries are not reliable choosers of experts because, after all, they are advocates and maybe can't be trusted? Is there a resource disparity question? Should we solve that by having the court appoint the psychiatrists or experts?

Professor Samuel Gross: I don't think courts could appoint psychiatrists now. They have authority under the Federal Rules, and Judge Patel tells me she has done it, but most judges don't. In fact, it is not a solution that works, even given that it has been available for 30 or 40 years or more. I don't think that judges are going to do this unless we have an entirely new system, and I don't think that judges are the people to appoint experts.

I think having neutral experts is a very good idea, but the system embodied in Rule 706 of the Federal Rules, and in comparable rules in most states, that says to judges, "If you want to, you can take a step that is very foreign to your position and contrary to your training, choose a witness yourself, and prepare, control, and present this witness to the parties for cross-examination," does not work well. Once in a while you get a judge like Marilyn Patel who does it in one case out of 100, but about 70 to 80 percent of federal judges have never appointed a single expert. And in state courts there are probably even fewer than that.

Patel: I think there is an alternative to the court-appointed expert. You can determine by some threshold evidentiary hearing whether or not the evidence should be permitted in the first place.

Limits on experts

Tigar: Up to now we have been talking about thresholds that are used in determining whether experts should be admitted. Arizona has confronted the issue from a different direction. The last major civil case I was involved in, the plaintiff spent $5 million on getting one expert ready. He was deposed for 23 days. The second expert they had was deposed for six days. Justice Zlaket, could that happen in Arizona?

Justice Thomas Zlaket: No, under the rules that went into effect in Arizona July 1, 1992, each side is allowed one expert; one expert per issue, per side, period. Each deposition is limited to four hours. That's all. If you can't take a deposition in four hours, you ought to find another line of work. I say that every time I speak, and every time I say that people boo, hiss, throw things, and call me names.

Now what about the complex case? Complex cases were never intended to be adjudicated under these new rules. In the true complex case the lawyers are expected to go before the trial judge, explain that it is a complex case, explain why it is complex, why there ought to be more discovery, and why more experts are needed than the rules provide. The trouble with that is when you ask lawyers how many complex cases they have in their offices, they all have complex cases. If you ask a group of lawyers, "How many of you have a complex case right now in your office," every hand goes up. Some of those lawyers have nothing but red car, blue car cases, and I have yet to see one of those that was complex. In 27 years of trying cases, and I was a defense lawyer for 17 years and a plaintiffs' lawyer for 10, and had a pretty varied practice, I'll bet I handled less than 10 truly complex cases. And so I am a little stunned when I see the number of complex cases that are floating around out there among practicing lawyers. I think there is something else going on here, and it might well be—I shudder to think—economics.

Tigar: So the Arizona rules simply say four hours per deposition, one expert on an issue, that's it. Now, I turn to my friend Robert Hirsh here, and I say that in all these criminal cases we have defended, we have never taken the other side's expert's depositions for more than four hours, have we?

Hirsh: The one nice aspect about criminal justice in Arizona is that you can interview the state's witnesses. I was thinking as Thomas was talking about a three-day interview I had with the state's psychiatrist. There were diminishing returns. I have to tell you, Tom, it did diminish after five or six or seven hours until there was nothing but bitter argument back and forth.

Tigar: I recently had an experience in a case where the expert was going to be deposed for six days. I represented one of six defendants, and one of my colleagues said, "OK, how many of the six hours do you want?" I said I want an hour, because in an hour I will know as much as I'll need to know to cross-examine if I am going to see him at trial. What do you think about that?

Chesley: I think it is terrific. And let me give you another side of this. Ben

Civiletti and I are in a case together with Judge Thomas Lambros who has a program called "sprint." That is a fancy name for "simplified pretrial informational transactions." It started in asbestos, and it works. We are going to use it in a very complex case. You interview the witnesses, not under oath, for a maximum of four hours. Based on that interview, you make the decision whether or not you even need the deposition. In the Middle District of Tennessee, they have a procedure where the witness isn't even subject to direct examination. You read a report, and then that witness is subject to cross-examination.

My view is that the Arizona system is very workable and very real. I think that this business of wearing down or intimidating an expert for six days is meant not to gain information but to try and spook that expert so that he or she doesn't want to testify or be involved in the litigation. And the only ones that survive are the professional witnesses as opposed to witnesses who may or may not have ever done a deposition or been in a case before. They may be incredibly qualified in the field, but have been harassed to such a point that when they walk in to testify, they have been so intimidated they are ineffective.

Tort cases

Tigar: We have a consensus that these Arizona rules regarded as draconian by the lawyers in your state, Justice Zlaket, are an OK idea.

Well let's return to the field of controversy. Dr. Thomas, the cases that seem to excite a lot of anger and anxiety are toxic tort cases. Do you think there is a broad-gauge notion that the causation issues in these cases are so difficult that the present evidentiary rules are just inadequate to filter out what juries should and shouldn't hear? Stan has the opinion that basically the jury system works and that this is not as much of a concern as some people say.

Thomas: First of all, I don't know anything about toxic tort, but I have seen juries deliberate. I share Stan's faith in the jury system. However, I sometimes see them try to figure out, is this expert believable? And sometimes I see experts testify to things that, honest to God, if I told them to my residents, they would hoot me out of the classroom. And these experts testify to juries without consequence. Nobody is going to haul that transcript down to the Board of Medical Examiners for review. There is no one to set this doctor down and say, "Doctor, you testified that this person who was carrying a blood level of cocaine above that at which fatal outcome commonly occurs was not under the influence of cocaine. Do you tell that to your addicted patients?" So there are no consequences, but I think there ought to be.

Tigar: The idea that in our lives our behavior as professionals has consequences for which we are answerable is one of the things that holds us together, that defines us. You are saying that for experts who are testifying about these issues, there aren't consequences in the ordinary sense?

Thomas: Not that I am able to perceive.

Tigar: Judge Patel, in a complex civil case where the adversary system might yield two sets of views in which issues of both scientific reliability and credibility are at issue, would you take the option of appointing an expert to explain what the words mean and what the concepts are about?

Patel: Maybe on a case-by-case basis, depending upon what I think based on reviewing preliminary motions or what I have seen of the proposed expert's testimony. But very rarely would I do that. I have appointed experts in a few cases where the bloodletting was just so extensive and the cost so enormous that I thought that bringing some sensibility to the whole thing and appointing an independent expert would accomplish exactly what it usually accomplishes—settlement. One of the things that judges and case managers have to be very concerned about is getting a case resolved as soon as possible. And it is not merely a question of, going to the jury and maybe the jury will filter it out. It is also a question of, should this case go to the jury or should these experts go to the jury?

Court-appointed experts

Tigar: Sam, you have pointed out that the notion of consequences doesn't work, people don't get disciplined for testifying a certain way. Would the notion of the appointed expert have some utility as a reality check for the parties?

Gross: If you could find some way of bringing in an expert whose introduction to the case, loyalty, compensation, preparation, and knowledge is not controlled by the parties, it might.

I have seen something like that happen. I was involved in a capital case once where we had another form of reality check. An expert on the opposing side had testified several times saying things I was convinced he would be embarrassed to say in front of anybody who knew the field. He was a social psychologist, and rather than do what I could have done, which was embarrass him with cross-examination, I got several very distinguished people in the field to come and sit in the courtroom. During a conference in judge's chambers, these people went up and said, "Hi, I am Sam Levin. You probably heard something about me, and I just came here because I am interested in this case." He sort of looked around star struck, shook their hands, and then didn't repeat any of the dumb things he said previously.

You want to make sure that people know there are consequences in the group with which they identify. But what was striking about this person was that he continued to testify on the same issue in other cases and reverted immediately to his previous ways once he didn't have the audience right there.

Tigar: In the Baptist church, it is called backsliding.

Gross: I have spoken to experts who as academics once in a while testify who have told me things they said and then sort of grin sheepishly and say, "Of course I would never say that in an article."

Tigar: I can just imagine the judge saying, "Well, I will solve this problem. I will appoint the expert, and I will grade papers on both sides."

Chesley: Having the court appoint the expert gives a heavy weight to that expert because he or she carries the imprimatur of the court in the eyes of the jury. One judge I know did that as a means to resolve a lot of asbestos cases, and I think 9 out of 10 times the jury went with the court-appointed expert and disbelieved both side's experts on

the theory that the court is fair.

I have seen another approach, an interesting effort to try and get a complex tort case solved. There was a lot of confusion on what this expert business was all about, so the judge had a seminar he called the "expert expert seminar." He and his staff brought in both sides' experts so he could become oriented as to what the science was all about, to try and move the case toward settlement, and to let each side see the strengths and weaknesses of their experts. It was an all-day seminar. We were not allowed to ask any questions, but his staff were allowed to ask questions. Seeing all the experts together in the same room for a whole day was a very educational process. It was a lot better than what you got from depositions, and you also saw the areas that the court was interested in. None of it could be used in evidence in the case, but I will say that it prompted me to put together a settlement. But I think the court-appointed expert is really a very heavy hammer that can create a serious problem no matter which side you are on.

Zlaket: I might point out that the heavy-handed hammer is effective sometimes, but only in the hands of judges with lifetime appointments. Those of us who don't have lifetime appointments are often reluctant to use that hammer, especially in states where there is a process that allows the lawyers to rate us for purposes of retention. It shouldn't be like that, but it is. And it is even more of a problem in the state of Texas where they elect judges. The judges are truly politicians, and they make political decisions.

Neutrality and integrity

Tigar: Why don't we take questions from the floor to make sure that what we are saying is interesting to folks? Questions, observations?

Audience member: I have testified as an expert, and I am a little worried about consequences. I always thought, "Gee, what if one of the transcripts in this deposition is given to a colleague." I think of the consequences, and I want to be true to what I think is the right thing. I confess I haven't testified that often, so I guess I am not really an expert expert witness, because I always thought there could be consequences.

Thomas: You are a good expert witness—you are an honest expert witness, and there are many such. It is not, of course, the case that all experts are unconcerned about the consequences. I have spoken to other experts who say that when they testify as an expert they imagine what is being said is being published in an article about them. I have spoken to people who take it very seriously and are extremely concerned about it.

Tigar: Tom, you don't think a large number of your colleagues are concerned about consequences?

Thomas: Well, there are fantasy consequences. The real consequences don't exist. There are many who are terrified of colleagues. But that is the only thing that brings fear into their hearts. But in terms of pragmatic reality I am not aware of any case where an expert is going to be brought before the Board of Medical Examiners for testifying to medical theory that simply is baloney.

Hirsh: I think the idea of a neutral expert is an oxymoron. I don't think that anybody, any expert, can ever be neutral. These people always take positions, and part of the adversarial process is examining them. I think the idea of a court-appointed expert is very dangerous since, as Stanley suggests, that person carries extra credentials because that individual was appointed by the court.

Gross: Neutral is probably as loaded a term as court-appointed, which is obviously the most loaded because it suggests that this person has the authority to judge. The quality of the expert that I think is important is that the expert be nonpartisan. The experts we typically see, with very few exceptions, are retained by partisans, paid by partisans, prepared by partisans, and controlled by partisans. You need experts who are nonpartisan, however they are chosen—they don't have to be chosen by the judge. And they still may have peculiar points of view that don't reflect a consensus in the field. If you have experts who are nonpartisan, whoever brings them into court, they don't have to be the only expert on the topic. There is nothing in Rule 706 or any other rules that says that if you have a nonpartisan expert you only can have one.

Tigar: But the point that Bob is making is one that was made by Dr. Bernard Diamond, who founded the Forensic Psychiatry Board, in an article titled "The Fallacy of the Impartial Expert" in the *Archives of Criminal Psychodynamics*. The point is that everybody who decides something then is a partisan of that position. In that sense there is no such thing as a neutral witness. And in any adversary system we just don't see them because everybody is a partisan of their truth, whatever that truth is and however they manage to get it to court.

Gross: Which is true, of course, of eyewitnesses to shootings.

Tigar: Absolutely!

Gross: But we don't select them from a universe of thousands of available eyewitnesses. We don't pay them—it would be a crime in most states to pay them—we don't spend hours and months and years preparing them. And they don't get to do it repeatedly in case after case and become extremely polished professional presenters.

Experts are something different. In fact, my view is that it simply is a mistake to think of experts as witnesses. They present information. Historically, they have become identified in courtrooms as witnesses. But you could just as easily think of them as judges, and in some systems they are considered jurors. You could think of them as lawyers, which is not far from how some of them behave, but we have come to think of them as witnesses and applied the rules that apply to other witnesses to experts. It is a perfectly arbitrary choice. The easiest and most accurate thing to do is say it is a separate category of information, to say this is expert information, not subject to the same rules, and not deal with it as though we are dealing with witnesses who swear to tell the truth about things they saw because they were there.

Panelist: Are we not talking about an underlying problem that probably involves integrity?

Chesley: Well, it is not just a question of integrity. It goes to the crucible of cross-examination, to the truth-seeking process that we pursue in the courtroom, to the adversary system

that is employed. Even in the cross-examination of an expert, and, perhaps, especially in the cross-examination of an expert, you can have expert witnesses who have wonderful integrity. They truly believe what they say is true. But the most striking example is not the psychiatrist. The most striking example is the most common use of experts in civil litigation today—medical doctors. You can line up three orthopedic surgeons, give them the same injuries. One of them can't understand why the plaintiff isn't high jumping tomorrow, another thinks the plaintiff has got a broken back and will be paralyzed forever, and the third is somewhere in between. All of them have integrity, all of them are board certified. It is a particular philosophical bent that they have, not a lack of integrity. How do you reach that philosophical bent if you don't allow the cross-examination, or if you put the court's imprimatur on one of those experts by making him or her a court-appointed expert. That to me is the real problem with expert testimony, not so much a lack of integrity.

Gross: If you are a trial lawyer and have a choice between the orthopedic surgeon who is going to say, just because he is paid, your client is never going to walk again even though he doesn't believe a word of it, and the orthopedic surgeon who says your client is never going to walk again and is going to be a cripple for life because she believes it, you are going to choose the one who believes it. You will typically be able to find that person when you have 30 yellow pages of orthopedic surgeons to look through. You can typically find people who will take reasonable and sometimes very unreasonable positions out of honest conviction.

The Zlaket Rules in Arizona are very useful for some purposes, but not for others. If your claim is that a mother's taking aspirin has caused limb reduction birth defects, you may have 20,000 epidemiologists who say that is nonsense and one who says, "Oh yeah, that can happen." And the Zlaket Rules to some extent magnify this. If you didn't have them you would have in court maybe two who say that it can't ever happen and one that says that it can. But that will be an honest person. The person who says aspirin can cause birth defects will not typically be a charlatan.

Tigar: Will the ordinary rules provide a sufficient safeguard in Professor Gross's case, in which one lone expert is willing to stand up in court and say, "Listen, I have studied this and I am every bit as academically qualified as the 20,000 who disagree with me. And I say the plaintiff is entitled to prevail?" In that case, are the rules adequate?

Patel: I am going to have to speak from the standpoint of the Federal Rules. I think the Federal Rules are adequate, although I know there are some proposals to change them. Obviously, a lot of this depends upon the quality of the lawyering. And I worry about that less in the civil context. I worry about it a lot more in the criminal context. We don't have a lot of Bob Hirshes; we have a lot of people who are often relatively mediocre and who may not have the ability to cross-examine the way that Bob Hirsh would cross-examine and lay open at the trial level the fallacies and other problems. I think that judges in the federal system at least can keep out at the threshold level of an evidentiary hearing some of that evidence, and I think that judges should do that. The rules are adequate. It really depends upon the judge's willingness to use them. And if you have lifetime tenure you may have more willingness to do it than somebody who has to run for election or reappointment.

Chesley: I think the rules work very well. There are a lot of built-in safeguards, and there is also a practical safeguard. Take the example of the orthopedist. The plaintiff is stuck with his or her treating orthopedist. Usually the lawyer had nothing to do with the selection of that orthopedist. If you bring in a new orthopedist, the jury is going to ask, "Where is the treating orthopedist?" Juries are smart. So there is an example of how the system works that is not written in the rule book. By the practicalities of the legal system and the jury system, you sometimes don't have the option to go out and get the one who says that the person has a permanent disability. You are bound with what you have by virtue of the facts.

My view is that if it is not broken, don't fix it. I am concerned about all the tinkering and attempting to go back to the *Frye* rule, which I think is impossible. For example, for years and years there was a belief in the scientific community that low levels of radiation were not harmful. That is how they taught radiology, that's what they taught in the medical schools. For years people who testified that low levels of radiation were dangerous or any level above zero was dangerous were not accepted in the medical community and, therefore, would not ever qualify to testify in a case under the *Frye* rule. I wonder if Louis Pasteur would have been able to testify under the *Frye* rule. There are breakthroughs in science, and there are new areas of science. DNA was not an accepted test at first. Therefore, it would never have been accepted if you go back to a *Frye* rule or tinker with the present rules.

Video simulations

Tigar: Judge Patel raises the question about these criminal cases, and let me give you a modified real hypothetical. The prosecution is able to go out and hire someone to make a video cartoon reconstruction of a crime, which is very expensive. The defendant went across the Golden Gate Bridge, and shot and killed his brother. Marin County prosecutors have a video recreation of this event. Now those recreations are subject to a great deal of question.

Panelist: Did the defense counter with one of their own?

Tigar: No. There is an admissibility question. But in criminal cases where the prosecution can have access to this kind of evidence, should there be additional controls beyond what the adversary system can provide?

Panelist: Theoretically there should be an equality of arms in criminal cases. Unfortunately, there is not, and I think Judge Patel hit the nail on the head with this. We do have a problem in terms of quality of advocacy. I think when you have court-appointed lawyers, they get overwhelmed. I don't mean to brand all court-appointed as not being particularly effective, but young, inexperienced lawyers when confronted with experts don't know how to handle them. I think we do have some real injustice that takes

place. Theoretically, if we follow the underpinnings of American justice where there is an equality of arms, where even the court-appointed lawyers are able to hire experts who are able to have the same sort of resources that the prosecution has, the system will work. But unfortunately it doesn't go that way because there are a lot of other issues, politics, and other things that are involved in the trial of these criminal cases.

Patel: Do we get so fascinated with technology that we forget to ask the threshold question, "Will this aid the trier of fact?" Or, is it in fact going to be likely to confuse? Why in a case like that is it not adequate to tell the story through witnesses?

Hirsh: I think that depiction is devastating from the defense perspective. People are very much tied in emotionally to television and to cartoons and pictorials. I don't know what happened in that case, but I could see where that would be devastating. If I were the defense lawyer, I would sure want to have my own cartoon.

Ed Hendricks (American Judicature Society Board of Directors): Bob raises a question that I'd like to pursue. One of the things AJS is concerned about is accessibility to the system. I have talked with Dr. Thomas about this. In terms of expert testimony, and given the fact that these people testify for a fee, I would like to know what the panel thinks about the impact on poor people, near poor, and the middle class in civil cases, and indigents in criminal cases. Is it a fair system in terms of experts?

Tigar: We have introduced these terribly expensive simulations. When you have that kind of resource that potentially can be committed to the use of experts, what do the Zlaket Rules tell us? I mean beyond one expert and four-hour depositions, can they solve these problems that have to do with accessibility and with the ability of jurors to use their natural wits aided by lawyers to unravel what they are being told?

Zlaket: You have to understand that the rules in Arizona were passed in response to the complaint that civil litigation has become so expensive that it is now out of the reach of most middle-class Americans. For a long time we were concerned with providing legal services to the poor, but then we realized that we are all poor when it comes to hiring a lawyer to litigate a case. And so these new rules were not addressed directly at problems of expert witnesses, they were addressed at expense and making the system affordable and accessible. That is the reason why we adopted a one expert witness per issue, per side rule. You know what has been happening. I hire one so you hire two and then I go find a second one, well you better get three. And pretty soon we have multiple experts testifying to the same thing and charging horrendous amounts of money and therefore making the civil justice system accessible only to the very rich or the corporations of this country.

I am extremely concerned with what Judge Patel has identified as a problem and what I think is the most serious problem facing our justice system today, and that is the fact that the quality of advocacy in criminal cases is not very good and the resources are not available to people charged with crimes, who are usually represented by public defenders, to match this war of experts, this expert testimony.

I don't know what the answer is going to be to the increase of expert witness fees we are seeing. Michael, you mentioned a case in which you were involved that had $5 million worth of expert fees. In the last civil case I tried before I went on the bench, the other side spent $525,000 for experts. If you have a truly complex case under these rules, one where you really do need multiple experts because the subject matter is so esoteric that no jury could possibly reach a just result without the assistance of an expert, then the trial judge has the power under the rules to say I am going to permit more than one.

This is a policy question that ought to concern everybody who is in the business of seeing that our system does justice, because I am not sure we have been doing it with the numbers of experts and the subjects they now testify about. Those of us who are a little older remember the day when experts were very rare in litigation. In the last 10 or 15 years this profession has seen an expert witness on almost every subject. We are calling experts on everything. Things we used to think were pretty clear, we could prove without experts, not any more. The first thing you do is run out and hire an expert, and that has given birth to a whole cottage industry of expert witnesses.

Judge Judith Chirlin (AJS Board of Directors): The comment that I wanted to make is about the judge picking a somewhat neutral expert. I have been a trial judge for eight years, and I have done criminal and civil cases that run the gamut, and I can't think of one where I felt that at the beginning of the case I knew enough, anywhere near what the lawyers knew about the case, to be able to judge who the appropriate expert would be. That's the real vice that I see in the judge appointing a so-called neutral. The judge just doesn't know enough about the case.

Gross: Judges in this system have a very high caseload and very little information. They are not supposed to be proactive, they are supposed to be reactive. You are not supposed to go out and gather information. The way state counterparts to Rule 706 are written in effect tells the judge to do something that is not the judge's role.

There have been attempts, that have uniformly failed, to create systems for the appointment of nonpartisan experts. The most famous was one in New York where a local medical society put together a panel of doctors, and if the judge wanted a doctor—typically to help in settlement—of a personal injury case the judge would say, "Next from the panel." Those were not used. They just atrophied from lack of use and died.

The rules that now exist give an opportunity, especially in big cases, in complicated cases, and especially for federal judges who have life tenure, to do what some call managerial judging that in some cases involves control over selection and monitoring of experts. Judge Jack Weinstein does this type of thing in some of his cases—Agent Orange is the most famous, but not the only one. But that is very rare, and it doesn't touch the run of the mill cases where you get yet another red car, blue car case and the question is, is it worth $100,000 or $3 million? You don't know a thing about those cases

when you pick them up as a judge. And I don't think the system provides any one method of dealing with it.

I want to say something about money here. The money involved is frequently very high. Who pays it? Individuals in this country retain attorneys in civil cases, and with very few exceptions pay for them by contingency fees. So this comes out of the judgments, or the lawyers pay for it, or the doctors eat it. But usually the lawyers pay for it. But in the usual case that settles, and in the cases that go to trial and result in plaintiff judgments, it comes out of the plaintiffs' recovery. And plaintiffs are typically undercompensated. In small injury cases they are frequently overcompensated, but for large catastrophic injuries, plaintiffs frequently receive inadequate compensation and then find out that a lot of that goes not just to plaintiffs' lawyers but to experts and to the deposition of experts, and to court reporters' fees for deposing them for 20 hours or 100 hours or however long they depose outside of Arizona. That eats up other people's real money. You know somebody is paying for it.

A juror's view

Audience member: The longer I listen, the more nervous I become. I may be the only person in the room who has served on a jury, and I did it at about this time last year. It was a fairly simple criminal case, and there were expert witnesses. At some point jurors have to decide what's right, who is telling the truth. And believe me, when we went in to talk about that, none of us knew. The lawyer for the defendant had presented his case very well, the lawyer for the plaintiff had presented his case very well, and we had to decide whom to believe. And we didn't get a whole lot of help from anybody in that process. Now if there is no jury, the judge has to decide.

I am a layperson, not an attorney, and maybe I am naive, but I believe that judges have access to more information than juries do. And when you talk about rules of trial procedure, I know you want the jury to be blind, I know you want them to not have too much, and I understand that. But I don't think you give them enough.

Hirsh: Could I ask you a question as a juror? You sorted it through? You walked into the jury room, and you felt the experts hadn't helped much? But eventually you were able to do some consensus building and worked it all through, and you came out with a unanimous verdict. And when you walked out of that jury room with your verdict, you felt very strongly that you had resolved the problems.

Audience member: That's where you are wrong. We didn't feel very strongly about it. And we are still very nervous that we might have made the wrong decision.

Tigar: We have exactly five minutes left, which means that the panelists can each have a shot.

Thomas: First of all, you commented on an expert who said, "Well, you know, I really wouldn't publish that in an article." Here is an expert who, in my view, is admitting that he has perjured himself. And there is no consequence for that. And I don't know what to do about it, but there should be consequences. Second, if you are going to be in the courtroom, you should be there for free in a significant proportion of your work. In fact, the way I met Ed Hendricks was because I called up his firm—I was amazed at what his firm was doing. And I said, "Listen, can I help?" And that is why I am here.

Finally, there are a 100 new theories (and that is a gross underestimation) that come into the literature every day. Of those, 2 or 3 percent ultimately are proven after years of debate as valid. There is right and wrong, and it is not until it all settles out that it becomes scientific truth, if you will. I have so many times seen jurors exposed to stuff that I know is absolute crap, but I can't do anything about it. I think jurors ought to know that there is one expert who says such and such and 20,000 others who say so and so. They ought to know far more than they are allowed to know.

Patel: Getting back to this wonderful layperson's analysis of some of the problems, and to throw a little bit of terrible reality into all of this, I usually talk to jurors after the trials, and it is amazing how many times they say, "Well, there was an expert on one side, or three experts on one side, three experts on the other, and we knew they were all paid, so we sort of discarded what they said and came to our own conclusion based on our own common sense." Lawyers ought to talk to jurors about the wisdom of all that expertise.

In the federal system, we are fortunate in that we get our hands on very early in the case. We are able to sit down with the attorneys and find out exactly what is going on in the case and monitor it throughout. When I have appointed experts, I get the names of experts from the attorneys themselves. I have used them in a complicated patent case where both sides wanted to get at the jury with all of their wonderful but slanted approach to the glossary that the jurors should have. I got an impartial expert that both parties agreed to who just explained the fundamentals, the glossary, and gave them the information so that at least what is common and understood and agreed to by all parties is presented without any slant. So there are lots of things we can do to make it more understandable for jurors. And, as I said, it does have the wonderful side effect of usually helping to resolve cases before trial.

New theories

Gross: I want to amplify on what Dr. Thomas said about new theories. In the 19th century, there was a new theory that came along, the theory of evolution. And for a while it was very controversial, and early on I imagine Darwin would have had a hard time being qualified to testify to it. There were other controversial theories at the time too. Phrenology had about the same level of acceptance then; so did a theory called mesmerism, which most of you probably never heard of. Through the mid-part of this century, there was a commonly accepted theory of medicine called the theory of traumatic cancer, that cancer could be caused by traumatic injuries. That was eventually proven to be false. Nobody seriously advocates this anymore. That was testified to a lot in courts, and it was probably appropriate because for a while it represented people's best guess at how some tumors occurred. What is shocking, however,

is that it was thoroughly discredited by the 1940s, and you couldn't find anybody who would say a respectable thing about it by the late 50s, and yet you find occasional cases into the 60s, and a couple in the 70s, in which large judgments were returned on the basis of this theory.

The translation of science into the courtroom is so uneven that when you talk to people in other countries about it, they are sometimes shocked. They say, "Well, we know you have problems figuring out whether the light was red or the light was green when the bus entered the intersection, nobody could know that, but do you really have to tolerate people saying these things to jurors that they can get into serious trouble for if they say it in a seminar?"

Last thing, there is another set of costs to this that nobody has mentioned. One of the most common terms that people use to describe expert witnesses—judges and lawyers alike—is whores, prostitutes. Nobody in the system, criminal or civil, is subject to this sort of abuse, not even criminal defendants get bad mouthed quite as much as experts do. And the idea that we should have a system in which we treat psychiatrists, medical doctors, engineers, scientists with this sort of disrespect is bizarre. It has all sorts of consequences. It means we get what we pay for. We pay for whores, we get whores. It also means that lots of people won't do it. As a result, you have this sort of crawl to the bottom. You get extremely competent, extremely honest people who work in the courts as experts in all fields, but they frequently get disgusted, and after they have done it three or four times they say, "I have paid my dues and I am going to leave." And then on the other hand, you get a person who could care less what Dr. Thomas or any other psychiatrist thinks of him and who spends his life polishing his Marcus Welby appearance so that he can seduce jurors.

There are protections built into the system, and in the hands of Judge Patel I think they work pretty well. But they don't work in general. That is, there are lots and lots of cases where you could say, "Well, if there had been equal resources on both sides it would not have been a problem. If the judge had had the time to identify it in advance and call a conference of experts it would not have been a problem. If you had appointed a nonpartisan expert, this could have been sorted out." But that doesn't happen.

The value of experts

Tigar: Stan, I have a feeling that you disagree with some of what has just been said.

Chesley: I think it is very cynical to say that experts are prostitutes. I was called upon to be an expert in a burn case. I was qualified to testify on the valuation of burn cases for money, based upon my experience handling burn cases. The federal court felt that I was qualified to testify. I didn't feel that I was a prostitute, I didn't feel that I was a whore. I felt I had knowledge of the kind of emotional scarring over and above the burn scarring that the woman who was badly burned had. The only issue that went up to the Sixth Circuit was whether an attorney was qualified to testify as to the valuation of burn cases, and the Sixth Circuit said I was.

I am finding that more cases are settling today. Costs have always been the problem. I have been shouting about the costs of litigation as a plaintiff for 25 years. Now that I am hearing that the cost of litigation is costing defendants too much, we are going to get a lot more cases settled. For the first time, the scorched earth policy of a lot of defendants has come full circle by virtue of asbestos and Dalkon Shield, and they are saying, "Wait a minute, can we simplify this? We like a sprint system, we like simplified discovery." And pretty soon the Arizona rule will be liked also, not by the lawyers, but by the clients. And the clients control the defendants' side on the budget making.

I believe the system works and the jury system works, and we should give more credit to the fact finders. My problem is the second guessing that is now going on in the front end on the threshold issues, and on the back end by the court, that invade the province of the jury. I believe jurors want to do the right thing. And I believe they do have an ability to do the right thing. And I think that we should not worry about the testimony that goes in. The important factor is, let it play out in the courtroom, let good lawyers do their thing and let good experts testify, and it will be seen through. "You will be able to determine," I tell the jury. "You may not feel really solid, but the one thing to feel good about is you are able to resolve litigation." And if we can't resolve it by settlement, resolve it in court.

Zlaket: I have discovered that this whole issue of expert witnesses is a very partisan one. And to some extent our views on it are shaped by the side of the fence we are on. Also, to some extent our views are shaped by our respective talents and abilities. You must know after hearing Stan Chesley speak this morning that he is obviously devastating in the courtroom and does not fear an expert on the other side. He probably has his way with them regularly. Not all lawyers have that talent, and I worry that if judges don't get into this fray early, not just federal judges, but state judges, with some decisive action, we are not going to be able to stem the tide of this proliferation of expert testimony that all too often costs a lot of money and doesn't really lead us to the ends of justice which we are all supposed to be serving. This is something we all ought to continue to talk about, but I am not sure there are any answers yet.

One last thing. The committee that passed these new rules in Arizona explored one very novel idea—we couldn't make it fly but I throw this out to you. How about a rule that says no experts should be paid more than "X" dollars an hour? You want to see that cottage industry disappear? Stop what some of these people are making for coming into the courtroom. They are making more money than many other segments of our society.