

1911

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Edward J. McDermott

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### Recommended Citation

Edward J. McDermott, Needed Reforms in the Law of Expert Testimony, 1 J. Am. Inst. Crim. L. & Criminology 698 (May 1910 to March 1911)

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## NEEDED REFORMS IN THE LAW OF EXPERT TESTIMONY.

EDWARD J. McDERMOTT.<sup>1</sup>

The subject of expert testimony continues to excite attention, because the gross abuses of it are too patent to be denied with any plausibility; and therefore a remedy must be found. In cases involving a murder, a will or a personal injury, the need of the evidence of experts is clear; and yet such evidence is often ridiculous or disgraceful.

In spite of the penalty prescribed for perjury, ordinary witnesses often swear to falsehood for themselves or for others. The extent of the evil is astonishing. If witnesses who are allowed only a petty sum for their attendance in court and who are testifying only to what they are supposed to have seen or heard—only to actual facts within their knowledge and the knowledge of others—if such witnesses swear falsely in spite of the law and public opinion, how much greater is the danger of false testimony from witnesses who are paid large sums of money, whose compensation is generally contingent on the success of their side, who testify merely as to their theories and opinions and who of necessity are practically free from any danger of ever being punished for perjury. As laymen are generally ignorant of the sciences and of the truth or falsity of scientific or professional theories which vary from time to time and are often incapable of being clearly shown to be true or false, public opinion can have little weight in keeping experts to the path of truth. The courts have practically no chance to punish a man for swearing to an unsound theory or for misstating his real opinion. A charlatan or a corrupt expert can always say that he has truthfully given his opinion, and he can always find plausible grounds for his inaccurate or even extravagant theories. It is hard for the public and almost impossible for a jury of inexperienced laymen to distinguish between a clever charlatan and a learned expert, or between a shrewd, positive expert that is paid to distort scientific facts and theories

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<sup>1</sup>Of the Louisville Bar, and vice-president of the Kentucky State Bar Association. This address was delivered before the Kentucky State Medical Association, September 27, 1910.

and a conscientious, exact student of his profession who will misrepresent nothing and will not be positive where positiveness is impossible. The best men of a profession may easily distinguish between the honorable and the dishonorable in their ranks, but the best men are often silent or helpless under the present system.

As litigants can prove ordinary facts only by the testimony of witnesses that happened to observe those facts, it is wise to allow the litigants to produce such of the witnesses as they may choose, for all are presumed competent to tell what they saw or heard and may be caught in perjury; but when hired witnesses are to be produced merely to offer their own opinions or conclusions as to the facts to be inferred from the facts related by others there is more need for circumspection and supervision by the court. There is usually not much trouble when experts merely prove the settled axioms or principles or even the probable theories of their science. The chief trouble arises when such experts, partly usurping the functions of the court or jury, give their conclusions on hypothetical questions or on the testimony of litigants or other witnesses. Here the danger of error or bias is great; and the only possible punishment for dishonesty is the contempt of honorable and competent men of the profession.

What are the remedies?

*First.* Each profession—especially the medical profession, which is called on most for expert testimony—must try to create a strong opinion in its ranks and in its public associations in favor of higher ethical standards, and must frown down its weak or corrupt members that allow themselves to be misused or besmirched as false or foolish witnesses. Every doctor of that sort brings discredit on his betters. This part of the reform you must work out by creating a sound sentiment among your members. Every doctor that, for money or for friendship, becomes a partisan and foolish or dishonest witness should feel the weight of your displeasure.

*Second.* The courts must be induced to inquire more fully into the qualifications of pretentious experts and to handle, with more care and strictness, this class of evidence, which is often useful and which can sometimes be corruptly used with success and impunity. This part of the reform must be accomplished by the lawyers and the courts. I must frankly say that many lawyers do not want any such reform. They feel that they often need

## EXPERT TESTIMONY.

you to pull their chestnuts out of the fire, even if you do get your fingers burnt.

*Third.* Legislation must be devised to strengthen the court's control of opinion-witnesses and to prevent selfish and unscrupulous litigants from getting much benefit by hiring charlatans or cranks or dishonest but shrewd and plausible men of sufficient learning and experience to enable them all the better to deceive a jury. In the Federal courts and in those states that allow the judge, as in England, to instruct the jury on the law questions involved and to review and comment on the evidence, expert evidence may be fairly well handled without new acts of the legislature. But in Kentucky and many other states the judge's sphere is so narrowly limited that legislation is necessary.

We cannot accept the European theory that the experts appointed by the court should not be subject to cross-examination; but the courts should strictly prevent any abuse of the privilege. A real and candid expert who has prepared himself for the test has nothing to fear from cross-examination so long as the court requires it to be conducted with courtesy.

The law of evidence is under the control of the legislature and the courts, though in criminal cases the Constitution gives the defendant the right to be confronted by the witnesses against him. Our code and statutes now restrict the rights of a litigant as to the production of his proof. They fix the qualifications and compensation and, in some cases, the number of ordinary witnesses and the form of direct-examination and cross-examination. The legislature has even a clearer right to regulate the selection and compensation of experts who are to give their opinions or conclusions, though many lawyers believe that the constitution has not allowed the legislature to take from a party the right to choose his own experts.

It seems to me clear that the legislature has the power (1) to regulate the selection or calling of experts or opinion-witnesses and (2) to regulate their compensation. It also seems clear to me that the Legislature, in the interest of truth and for the protection of both the medical and legal professions, should regulate both the selection and the compensation of such witnesses. The disreputable doctor and the disreputable lawyer and their client now have such an unfair advantage of their reputable adversaries that truth and justice are too often trampled down. As litigants with most money at their command may get the greatest

number of experts and the most expensive experts, the court should have the right: (1) to prescribe a list of eligible men; (2) to limit the number to be called, and (3) to fix the compensation. No witness in any case should have a contingent fee. He should not have his compensation depend upon the success of his testimony or his side. That is too great a temptation to partisanship. It may be wise (in the interest of the poor) to allow a lawyer to be employed on a contingent fee; for he is not a witness—he is not swearing to the right of his side—but there is no excuse for allowing a *witness* to be so tempted by self-interest to deviate from the truth where a deviation is so easy and is never punishable, in the expression of a mere theory or opinion. Even contingent fees of lawyers in damage suits, and perhaps in other cases, should be subject to the scrutiny and control of the courts to prevent hardship and injustice to the poor in whose interest such fees are supposed to be allowed. Moreover, if a list of eligible experts be prepared before it is known for whom or even in what case they will be called, there is less likelihood of bias or unfairness in the selection by the court.

In a strong and interesting address by Judge William Schofield before the Suffolk (Mass.) Medical Society on October 30, 1909, and published in July, 1910, in the *Journal of the American Institute of Criminal Law and Criminology*, it is said that the best experts would not serve for the scant compensation likely to be allowed by the court. The court could compel them to serve; but compulsion would probably never be necessary, because most experts would be willing to serve for the sake of truth and for the sake of their calling. Many able men serve in public office for a compensation far below what they could make in private business. Under existing conditions a real expert dislikes to be put forward in competition with a charlatan or a dishonest member of his profession.

It is objected that the courts ought not to be allowed to make up a list of eligible men because the number required would be considerable and because the appointment (being desirable) would subject the judges to "solicitation." This objection partly answers the preceding objection. Moreover, the judges (though free to choose for themselves) could be aided in this task by the suggestions or advice of the best experts in their profession and by their associations highest in rank. A list of medical experts might be furnished to the judges by the state board of health or state med-

ical association and the judges could add to or take from that list at will.

It is also objected that the judges cannot be assumed to have special knowledge of the qualifications of experts. It surely may be assumed that men intelligent enough and well enough acquainted in the community to become judges will, at their leisure and with outside advice, have a better chance than a jury to discover who are genuine experts and who are unfit or untrustworthy. A judge may, from time to time, hear different experts as witnesses and may learn of their work and reputation from others, and so may form a fair estimate of their qualifications; but a jury in the hurry and excitement of a trial, with no previous knowledge of the men and with no disinterested advice, must quickly decide on the merits of the conflicting experts and on the weight to be given them, respectively. It is no wonder that they are often deceived. When insanity or a hidden internal injury is feigned by a living party or when the condition or behavior of a dead testator is misrepresented, and when some unqualified or dishonest doctor has spun nice theories and given plausible reasons for his side, it is not surprising that a jury, ignorant of his nature and qualifications, may give him more weight than the superior expert of the other side.

Sir James F. Stephen, in his "History of the Criminal Law of England," recommends that medical experts of both sides confer with each other before giving their testimony. If they wanted only to bring out the truth, nothing could be better. If a party in any judicial proceeding is to be allowed to summon experts of his own selection, then, to prevent surprise to the other side, he should be compelled to state, before the trial, who his experts are and where they live, and he should also state briefly what is to be the general nature of their testimony. With such notice the opposite party can be prepared to meet incompetent or untrustworthy men and false or doubtful but plausible theories. In olden times the courts did not try to prevent a meritorious litigant from being beaten by a mere surprise; but the legislature and the courts now try to prevent such an undeserved overthrow by a surprise. If truth or justice is to be our aim, no advantage must be allowed to unnecessary concealments or mere tricks.

Again it is objected that, if a list of eligible men is appointed by the court and if the parties are nevertheless allowed to call their own experts, the parties will continue to select their own

experts. Not when it is observed by lawyers (as it will be) that juries will not give to unaccredited experts, selected and paid by a party for partisan testimony, as much attention or weight as is given to experts long before approved by the court without reference to the controversy on trial. The difference will be made apparent to the jury.

It is also objected that where communications with a physician are privileged a party would not consult the physician on the court's list lest such a communication be held not privileged. But the statute could make them privileged in every case. If the case be clear the party ought not to complain that all the impartial experts are against him. If it be doubtful, impartial experts will differ.

Finally it is objected that no distinction, in selection or the method of compensation, should be made between medical and other experts. And yet we are also told (as experience also tells us) that medical experts are needed oftener by far than all other experts put together. Here is a valid reason for a difference of treatment.

For the last session of our legislature I prepared two bills, one to regulate expert testimony and one to regulate the plea of insanity in criminal cases. The former was prepared and presented at the request of the Kentucky state bar association and was approved by the Louisville bar association. In the hurry of a session of sixty days neither bill had a fair chance for consideration and neither passed. Some lawyers that make a specialty of criminal cases or damage suits naturally desired a continuance of the old abuses and quietly opposed the bills. The substance of these two bills was published in the July number of the *Journal of the American Institute of Criminal Law and Criminology* referred to above.<sup>2</sup>

Nothing could better illustrate the need of such legislation than the fact that after George B. Warner had been sentenced to be hanged for the murder of Pulaski Leeds, superintendent of the L. & N. Railroad Company, in 1903, in Louisville (*Warner v. Commonwealth*, 84 Southwestern Rep. 742), Warner escaped the day before the time set for his execution by having a jury summoned to pass upon his sanity and by being adjudged of unsound mind. He was sent to the asylum and in a short time walked away and was not heard of for several years. Lately he was discovered in

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<sup>2</sup>See the JOURNAL, pp. III, III2.

## EXPERT TESTIMONY.

the West and was brought back to Kentucky at great expense to the state; and, after he had pleasantly sojourned there for a short time he concluded to walk away again and did so, and is once more at large, and whether sane or insane he is a menace to peaceable and innocent men. The case of Thomas Buford, who assassinated Judge Elliott for an unfavorable opinion of the Court of Appeals in 1879, was a similar disgrace. These cases show the need of legislation similar to that outlined in the bills mentioned above. In New Jersey we have another illustration of the manner in which venal experts can be used by rich murderers to save their necks on a flimsy plea of insanity. Charlton murdered his wife in a most brutal manner in Italy and he escaped to New York and was captured on the steamer. He has been put under the examination of experts hired by his family to make out a case of insanity for him, and he may not be punished for his crime.

That some reform is imperatively demanded must be clear to every sensible man. Though I am by no means inclined to insist upon the particular measure prepared by me, some bill of that sort should be presented again to the legislature and should be earnestly and successfully urged by a committee of this association. Something must be done to give better protection to human life, to create a greater respect for the law and for science, and to prevent ignorant or unscrupulous men in law or medicine from lessening the efficiency and dignity of our calling.