Impartial Medical Testimony
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COMMENTS

IMPARTIAL MEDICAL TESTIMONY*

This article deals with the use of impartial medical expert witnesses in personal injury actions. It will consider the need for such experts, the various plans which have been devised to utilize the impartial expert, the administration of these plans and a summary of the good and bad points of the various plans.

There is widespread dissatisfaction with the manner in which medical testimony is presented in personal injury litigation. This dissatisfaction is by no means a recent development. In 1915, Dr. J. W. Courtney, addressing the graduating class at Harvard Medical School, said: "The present mode of procedure in our courts, in so far as medical testimony is concerned, is not a particularly edifying one."1 This early expression of disapproval has been elaborated on by both doctors and lawyers alike. The basic causes of this dissatisfaction are that the traditional adversary system has caused parties in an action to select the "best witness" rather than the best scientist; the present system allows partisan expert testimony for the plaintiff to be countered by partisan expert testimony for the defendant with a resultant "battle of experts" leaving the jury hopelessly confused.2 These two problems frustrate the attainment of truth and justice in a given case. A further cause of discontentment with the present handling of expert testimony is the time consumed in presenting it. The serious backlog of cases on many court calendars has caused great concern.3 It is estimated that about 80% of the civil jury cases in this country are personal injury cases,4 and a majority of the issues in these cases turn on medical questions.5 The time spent in litigating these cases is an important factor in court congestion.

The first two reasons for dissatisfaction with the present approach mentioned above are closely related. The medical testimony on the part of the plaintiff will often consist in testimony by the family physician or personal physician of the plaintiff who treated him subsequent to the injury. There may also be experts called in to substantiate the testimony of the attending physician. The testimony of the former is sub-

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*This article was prepared for the Judicial Council of the State of Wisconsin in response to a request from the Wisconsin Supreme Court to the Judicial Council for research on the topic of impartial medical testimony.
1 Quoted by Frederic E. Elliott and Ramsay Spillman in "Medical Testimony in Personal Injury Cases, 2 LAW AND CONTEMP. PROB. 466 (1935).
2 MCCORMICK, EVIDENCE §17 (1954).
subject to being partisan and biased because of subtle influences that might encourage him to seek any objective finding to support the claims of the injured party. The patient expects the doctor to be sympathetic, and the physician is anxious to be of help. Loyalty and friendship may cause the physician, consciously or unconsciously, to make his testimony favor the side that calls him.

It has been pointed out that in considering the testimony of the treating physician, it must be borne in mind that a civil trial is not totally unlike a private fight and that "partisanship is infectious and doctors are human in that regard. The worst that can be said of treating physicians is that they will not give their patients the worse of it on a close medical question."

The situation is not regarded the same for a physician who has been retained by the attorney and not by the patient. These men are not generally selected because of their impartiality. The New York Report, after pointing out that some doctors are above suspicion and a few are corrupt, goes on to state that:

[In between are a number who become infected with bias when called as witnesses in the conventional way. Cast in the roles of partisans, subjected to hostile cross examination and paid by one side, they tend to color their testimony. Their opinions may be expressed a little more strongly than the facts or state of medical knowledge warrant; and needed reservation may be omitted when convenient. As experts, they receive not ordinary witness fees, but special compensation, sometimes very substantial in amount. Too often their testimony reflects the partisan source from which their compensation comes.]

This problem of the plaintiff building a case to maximum effectiveness by a careful selection of expert witnesses is met by a similar approach from the defendant, often an insurer with a group of consistently retained medical experts. The defendant's evidence is also often partisan. The result is that an array of witnesses for each side will be paraded before the jury. This "battle of experts" or "medical-legal tournament" has been dramatized by one judge:

ACT I. Q. Doctor A, as expert for the plaintiff, to what degree, in your opinion is the plaintiff disabled?
   A. He is totally and permanently disabled.

ACT II. Q. Doctor B, as expert for the defendant, to what degree, in your opinion is the plaintiff disabled?
   A. He is not disabled at all. He could work if he wanted to. He is a malingerer and a loafer.

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8 Botein, supra note 3.
9 Special Committee of the Association of the Bar of the City of New York on the Medical Expert Testimony Project, Impartial Medical Testimony 7 (1956) (hereinafter cited as Special Committee).
10 Address by Emory H. Niles before the Section of the Judicial Administration
This, of course, represents the most extreme situation. But less extreme divergences of opinion are commonplace. Witnesses in the adversary system have the tendency to give testimony favorable to the side which has called them, and perhaps they soothe their consciences by "leaving it to the jury." ¹¹

The jury of laymen, confronted with the task of ascertaining the truth from the morass created by the conflicting and often complex technical expert opinions is helpless. The best that can be done, it seems, is to evaluate the opinions in terms of the personality of the witness giving it. Thus, the "battle of experts" leads to a search for the "best" witness. "Medical advocacy, guided by legal advocacy, becomes a marketable commodity." ¹²

This unhealthy situation is also one of the most basic causes of congestion in the courts. Many personal injury cases go to trial simply because of the irreconcilable medical opinions presented by the experts for both parties. The time spent on these cases is out of proportion to the number of cases. ¹³

Further evidence of the dissatisfaction of the present method of handling the medical testimony is the distaste which many in the medical profession have for court appearances.

Opposing counsel frequently infers incompetence, carelessness, untruthfulness and bias, and leaves the doctor frustrated and outraged with the condition made worse by court decorum which prevents expression of his feelings. Is it any cause for wonder that the average doctor is unwilling to appear in court and be subjected to such an inquisition. ¹⁴

A further reason why doctors dislike court appearances is inconvenience caused when they wait to be called as a witness.

Thus the use of partisan expert medical witnesses in the adversary system has caused a "battle of experts" which frustrates the basic purpose of expert testimony—that is, to inform the jury on matters not within their knowledge. Furthermore, court congestion can be traced to the use of partisan experts.

It was mentioned above that this problem is not one that has recently arisen. Solutions for the problem have not been lacking either.

**Suggested Solutions**

The solutions have varied. One of the more widespread is that medical and bar associations educated their respective members as to

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¹³ *Special Committee, op. cit. supra* note 9, at 9.

their responsibilities in the administration of justice. This may lead
to tolerance of, but not a solution for, the problem.\footnote{\textit{Judicial Conference of Michigan, Impartial Medical Testimony in Civil Actions}, in \textit{Medical Legal Committee, supra} note 3.}

A second approach has been to set a higher standard for competency
in experts. At present a properly licensed general practitioner is able
to testify in court,\footnote{See \textit{Wis. Stat. §147.14(2) (a) (1961).}} perhaps on subjects requiring specialized medical training. In Wisconsin, the court must be satisfied that the witness is
a medical expert.\footnote{\textit{Wis. Stat. §147.14(2) (b) (1961).}} It has been suggested that this policy may increase
the caliber of the medical witness who testifies in court, but it does not

The suggestion has been made that an increase in the fee paid an
expert witness may encourage the willingness on the part of qualified
physicians to testify.\footnote{\textit{Special Committee, op. cit. supra} note 9, at 10.} But here problems are encountered in the areas
of partisanship and the doctors' willingness to be made subject to cross-
examination.

Another proposed solution to the problem under discussion is the
one adopted in Minnesota. It consists of disciplinary measures used by
professional groups for doctors and lawyers who are suspected of
falsifying claims. It has been pointed out that this is not effective in
the area of competency.\footnote{\textit{2 Wigmore, Evidence} §553 (3d ed.).}

A much more extreme approach is that a jury of experts decide the
case. Here there are severe constitutional difficulties.\footnote{\textit{Ibid.}}

The suggestion that a panel consisting of a legal expert, a medical
expert and a layman be set up to arbitrate medical claims is subject to
similar objections.\footnote{\textit{212 Wigmore, Evidence} §563 (3d ed.).}

Perhaps the most common answer offered to the problems involved
in presenting expert evidence is that the court resort to its common law
power of calling expert witnesses.\footnote{\textit{9 Wigmore, Evidence} §2484 (3d ed.).} This power has received much
recognition in the United States.\footnote{\textit{Wis. Stat. §957.27 (1961). See also, Beuscher, A Code of Evidence for Wis-
consin—Expert Witnesses, 1945 Wis. L. REV. 593 (1945).}} Some states have codified this power
making it applicable to specific situations. For example, in Wisconsin,
the court may appoint an expert in a criminal case involving the issue
of sanity.\footnote{\textit{McCormick, Evidence} §17, n. 13 (1954).}

This idea—that the court has the power to call its own expert wit-
nesses—was the foundation for the Model Expert Testimony Act ap-
proved in the year 1937 (adopted only in South Dakota)\footnote{\textit{MCCORMICK, EVIDENCE} §17, n. 13 (1954).} and the
more recent Uniform Rules of Evidence (approved only in the Virgin Islands and the Panama Canal Zone). Rule 59 of the Uniform Rules of Evidence provides that in the event the judge determines that the appearance of an expert is desirable, he shall make this fact known to the parties and issue an order to show cause why an expert should not be appointed. After a hearing on the matter, the judge will request nominations. If the parties agree on a particular expert or experts the judge shall appoint him or them. If the parties do not agree, the judge makes his own selection. The expert must first consent to act before his appointment is effective. The judge shall set out the duties of the expert in a conference with the expert and the parties. The expert shall advise the parties of his findings and may be called to testify by the judge or by the parties. He may be examined and cross examined by each party. The parties may call their own expert witnesses in addition to the court appointed expert. The expert appointed by the court is paid a reasonable fee, determined by the court, paid equally by each party as part of the costs of the action. This is provided for in Rule 60 of the Uniform Rules of Evidence. There is also provision made that "the fact of the appointment of an expert witness by the judge may be revealed to the trier of the facts as relevant to the credibility of such witness and the weight of his testimony." This provision is one that has caused sharp criticism. The argument is that this allows a cloak of infallibility to be placed around the expert with the result that the finding of the jury will correspond to the opinion of the expert.

The most recent solution to the problems encountered in presenting expert medical testimony are the impartial medical expert systems. The following pages will involve a detailed study of these various systems. The idea behind these systems does not radically differ from the idea upon which the Uniform Rules of Evidence were based: the court has the power to call its own expert witnesses. What does clearly differentiate these various plans from the Uniform Rules is the procedure established so that the court can utilize expert witnesses. These various plans take hold of the idea embodied in the Uniform Rules, project it specifically into the area of personal injury litigation and provide an effective, practical implementation of the idea. Since this implementation is the highlight of these plans, the manner in which it is effectuated under the various proposals will be given close consideration.

**Impartial Medical Testimony Systems**

The first place in which a program was established was New York County. The New York County Medical Expert Testimony Project was set up in 1952 with the aid of two $20,000 grants.

27 Uniform Rules of Evidence §61.
Basically, the idea behind the Medical Expert Testimony Project was to set up panels of neutral, outstanding physicians in various specialized branches of medicine. These experts would be available at the call of the court to make medical examinations of plaintiffs in personal injury cases, report their findings, and, if necessary testify, in those cases in which the medical aspects were controversial and substantial.29

The project was set up as a pilot experiment for a two year period. The first step in implementing the idea, after financing had been secured, was to select the experts who would serve on the panels set up under the project. This was handled by the medical societies. The requirements for membership on the panels were that the doctor must be a recognized and leading authority in the branch of medicine involved and not be identified by reason of his previous practice as an expert for either plaintiffs or defendants. The areas of medicine in which a panel of experts was required and the number of doctors to serve on the panel was determined by the Justices of the Supreme Court (New York trial court). The doctors selected came primarily from the staffs of large hospitals and the faculties of medical schools. The doctors responded to the invitation to serve on a panel in a willing spirit.30 The number of panels established was fifteen31 with membership varying from one (malignancy and trauma panel) to fifteen (orthopedics panel). The total number of doctors serving was ninety-seven.

The next step was to set up the legal framework within which the panels were to function. This was done by a special rule of the Appellate Division of the Supreme Court, First Department. The rule is as follows:

1. There is established by the Supreme Court for the County of New York an office to be known as the Medical Report Office, which shall be in charge of a deputy clerk of the Supreme Court.
2. In any personal injury case in which, prior to the trial thereof, a justice shall be of the opinion that an examination of the injured person and a report thereon by an impartial medical expert would be of material aid to the just determination of the case he may, after consultation with counsel for the respective parties, order such examination and report, without cost to the parties, through the Medical Report Office of the Supreme Court, New York County. The examination will be made by a member of a panel of examining physicians designated for their particular qualifications by the New York Academy of Medicine and New York County Medical Society. Copies of the report of the ex-

29 Special Committee, op. cit. supra note 9, at 3.
31 Panels were: general surgery, plastic surgery, ophthalmology, cardiovascular diseases, dermatology, tuberculosis, internal medicine, neurosurgery, neurology, psychiatry, neuropsychiatry, roentgenology, orthopedics, otorhinolaryngology, obstetrics and gynecology, genitourinary diseases, malignancy and trauma, endocrinology. Special Committee, op. cit. supra note 9, at 83.
A examining physician will be made available by the clerk of the Medical Report Office to all parties.

3. If the case proceeds to trial after such examination and report, either party may call the examining physician as a witness or the trial justice may, if he deems it desirable to do so, call the examining physician as a witness for the court, subject to questioning by any party, but without cost to any party. 32

The next important step to be taken was to devise a method for selecting cases for referral to the panel. The Justices of the Supreme Court felt that this should be accomplished early in the history of the litigation so that an accurate examination could be made and also so that the possibility of settlement before trial could be increased. 33

It was decided that the possibility of referral to a medical panel would be considered when the case came up on the regular pre-trial calendar. At the pre-trial conference the judge has before him the medical report of the doctors for plaintiff and for defendant and other reports if there are any. If these reveal a substantial variance as to the nature and extent of the injury suffered, and the judge believes using a panel examination would be helpful, he orders a referral. Consent of the attorneys is not necessary.

The judge, without knowledge of the names of the doctors on a panel, indicates the particular panel to which referral is to be made and points out the conflicting reports as they appear from the records before him. The pre-trial conference is then adjourned until the panel doctor's report is completed.

The attorneys for the litigants go to the Medical Report Office where the examination is arranged. The clerk, working in this office, takes the name of a doctor serving on a particular panel and schedules an examination after consulting the doctor and the parties as to a mutually convenient time. The names of the doctors on a panel are kept confidential and they serve on a rotation basis. 34

The clerk then sends a letter to the doctor confirming the appointment and setting forth instructions to the doctor. The set of instructions for the doctor state that he is in complete control of the examination and may allow or exclude the attendance of attorneys for the parties. The doctor is authorized to order whatever tests he deems necessary. 35

The medical reports available at the time of the pre-trial conference are supplied to the expert. He may request additional hospital records that he feels are needed and they are subpoenaed to the doctor's office. These reports are sent to the doctor's office enough in advance to assure maximum familiarity with the case on the part of the expert. 36

32 Id. at 14.
33 Judicial Conference of the State of New York, op. cit. supra note 30.
34 Special Committee, op. cit. supra note 9, at 15-16.
35 Id. at 90.
36 Id. at 16.
The examination itself is similar to the ordinary physical examination. Treatment is not the object of this examination, naturally. At the conclusion of the examination, the doctor prepares his report in triplicate. These are sent to the Medical Report Office along with a bill for the expert's services. The report is forwarded to the court and the attorneys.

What use is then made of the report? At the resumed pre-trial conference it is used to effectuate a settlement if possible. Perhaps, as a result of the report having been made, the parties will agree to submit the case to a court of more limited jurisdiction (city court: $6000 jurisdictional limit). There is also the possibility that the case may follow the normal course to trial.\(^3\)

In the event that the trial does come about, it is possible that the expert may be called to give oral testimony regarding the finding of his examination. This may be done by the court or by either of the parties. This is said to be allowed with three primary objectives in mind:

1) Judge and jury will have an "impartial, highly informed factual basis" to aid them in resolving conflicting medical opinions.
2) It will serve as a deterrent to anyone who may consider using misleading or false medical opinions—the risk: exposure by an outstanding medical expert.
3) It is often a catalyst for settlement at the pre-trial for both plaintiff and defendant will reconsider their claims when the expert's report and possibly his testimony are available.\(^3\)

In the event that the expert is called to give testimony at a trial, this is arranged by the Medical Report Office, with the utmost consideration given to the doctor and his busy schedule.

The doctor appears as an expert witness and the fact that he is court appointed is made known to the jury. If called by a party he may be cross examined by opposing counsel. The judge may ask any questions he thinks pertinent. The ordinary rules of evidence are applicable. The one possible exception to this being the rule prohibiting a party from impeaching his own witness, although the point has not been decided.\(^3\) At the conclusion of the case the expert's bill which he submitted earlier, if approved as is typical, is paid from Project funds.

It is important to note that after the initial two year period of the pilot project had passed, the program of impartial medical testimony was continued, financed by public funds as a part of the regular court budget. Also the program was adopted in Bronx County in October, 1953. This is interjected here because in discussing results, figures from both counties may be used.

What are the results of the project? The New York Report, in

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\(^3\) Id. at 18.

\(^3\) JUDICIAL CONFERENCE OF THE STATE OF NEW YORK, op. cit. supra note 30.

\(^3\) SPECIAL COMMITTEE, op. cit. supra note 9, at 19.
discussing the results of the Project, lists as the most important effect to be noted the influence the Project has had on cases in which it was not utilized. The rationale of this statement is the great probability that exists that many spurious claims were discouraged by the possibility that an expert from the panel may be called in to expose the improper claim, and, naturally, embarrass those making the claim.40

Another of the results of the use of the impartial expert—and a more tangible one—is the disposition of cases without trial.

In the initial two years of the project—it’s experimental stage—238 cases were referred.

... out of a total of 238 referred to impartial experts, 129 can be regarded as having been thus far disposed of without complete trial in the Supreme Court. ... One hundred and two were settled before trial, 18 were settled during trial, and eight were transferred to the City Court. In only 18 cases has trial been completed.41

Ninety-one cases were still pending. The Report assumes that the Project could be credited with eliminating one-fifth of the number of trials in the two counties in which it is used.

The impact of the use of panels of doctors is difficult to gauge when considered in the light of the doctor giving testimony in court. The New York Report indicates that the most noticeable feature of having the impartial doctor testify in court is the treatment he received there. Although the expert is subject to cross examination and is often cross examined (perhaps extensively) the type of cross examination has changed. It is concerned mainly with further exploring the results of the doctor’s examination and report. Gone from the examination is the embarrassment and harassment stemming from a cross examination directed at the expert’s motives and his competency.42 A leading New York doctor remarked:

When I have been asked to testify, I have been extended every courtesy. At no time was my professional standing challenged, nor was there any attempt to imply that my testimony was anything but the truth.43

The costs of the program are the final point for consideration in the discussion of the results of the New York Project. In the first two years of the Project $20,383.35 was expended for examination fees and fees for testifying. The report considered that if attention is paid only to the number of days in trial saved by dispositions attributable to the project (other benefits aside) the Project saved 10 times the amount paid out in fees to the experts. This was on the basis that each

40 Id. at 27-28.
41 Id. at 30.
42 Id. at 32-33.
The fees for trial testimony have ranged from $25 in one case to $400 in another. In all, 80 fees were charged (more than the number of cases since sometimes two or more panel specialists testified in one case). The fees in only 4 were less than $100. Thirty-nine charged from $100 to $150, 20 ranged between $150 and $200 and 16 were $200 or over.\footnote{SPECIAL COMMITTEE, op. cit. supra note 9, at 92-100.}

The Report succinctly summarized the accomplishments under the Project:

1. The Project has improved the process of finding medical facts in litigated cases.
2. It has helped to relieve court congestion.
3. It has had a wholesome prophylactic effect upon the formulation and presentation of medical testimony in court.
4. It has proved that the modest expenditure involved effects a large saving and economy in court operations.
5. It has pointed the way to better diagnosis in the field of traumatic medicine. Unlike the others listed above, this accomplishment is an unexpected dividend, which was not in contemplation when the Project was initiated.\footnote{JUDICIAL CONFERENCE OF THE STATE OF NEW YORK, op. cit. supra note 30. These figures are for New York and Bronx Counties through 1957.}

Since the New York Medical Expert Testimony Project was the forerunner in the use of impartial medical expert panels, the discussion of similar plans in different locales will be limited to a general discussion of the particular plans, noting differences between the specific plan discussed and the New York Plan.

The next place where a plan of impartial medical testimony was adopted was Baltimore.

The Honorable Emory H. Niles, Chief Judge, Supreme Bench of Baltimore stressed that the Baltimore Plan is founded on the common law power of the judge to call his own expert witnesses. The system does not have the complete administrative system that New York has; the matter is handled much more informally. The medical society drew up lists of men they felt were qualified to serve on the particular panels. The lists are not published but they are not kept secret. The motion to utilize an expert from one of the panels must be made by one of the parties. The judge when informed of this reveals the names of the doctors (usually three) on a particular panel to the parties. A party's objection to a particular panelist may cause that panelist to be dropped from consideration, but this matter rests within the discretion of the judge. This varies from the plan of rotation of panel members em-
ployed in New York. The judge informs the panelist of his appointment and one of the lawyers is given the duty of arranging the examination. The doctor's reports, in triplicate, are sent to the judge, who gives a copy to each of the parties. This procedure eliminates many of the functions of New York's Medical Report Office. If a settlement cannot be effectuated, the panel expert may be called as a witness by the parties. The fact that he is a court appointed expert is made known to the jury. The impartial expert may be cross examined by the parties and they may also call other experts.

The Baltimore Plan is different from New York's in that the cost is not borne by the public, but is usually borne by the litigant calling the expert witness, but the judge has some discretion here. The panel expert does not know who has requested his examination and opinion. The party requesting an expert is required to pay an approximate fee into court. When the expert is paid, the payment comes through the clerk of court.47

The plan has not been used greatly. It has been pointed out that the weaknesses are the use of an impartial expert must be initiated by one of the parties, and even then, it is in the judge's discretion to call a panel expert.48

The first federal court to adopt a plan of impartial medical experts was the district court for the Eastern District of Pennsylvania. This was done by court rule pursuant to Rule 83 of the Federal Rules of Civil Procedure as an implementation and extension of Rule 35 of the Rules of Civil Procedure. Rule 22 of the United States District Court for the Eastern District of Pennsylvania reads as follows:

A. In any personal injury case in which prior to the trial thereof, a judge shall be of the opinion that an examination of the injured person and a report thereon by an impartial medical expert or experts would be of material aid to the just determination of the case, he may, after consultation with counsel for the respective parties and after giving counsel a hearing, if such hearing be requested by either counsel, order such examination and report. The examination will be made by a member or members of a panel of examining physicians designated for their particular qualification by the Medical Society of the State of Pennsylvania after consultation with a committee appointed by the President of the Pennsylvania Bar Association and with the court. Copies of the report of the examining physician will be made available to all parties.

B. The compensation of the expert or experts shall be fixed by the judge ordering the examination and shall be paid equally by each party to the litigation unless such judge, in his discretion orders payment to be made otherwise in order to meet special factual situations.

47 Niles, supra note 10.
48 MEDICAL LEGAL COMMITTEE, op. cit. supra note 3, at 6.
C. If the case proceeds to trial after such examination and report, either party may call the examining physician or physicians to testify or the trial judge may, if he deems it desirable to do so, call the examining physician or physicians as a witness or witnesses, subject to questioning by any party but without compensation by any litigant.

This rule has been challenged on two occasions, the objection to the rule being it violated the Seventh Amendment to the United States Constitution, providing for the right to a jury trial in civil actions. The rule was upheld on both occasions.49

The plan may be put into use when the judge feels that it will materially aid a just determination of the case. The parties are given an opportunity to have a hearing on the matter. The doctors making the examination were selected by the State Medical Association. Because of the larger territory where the plan can be used there are three lists of panels of experts in a particular specialty. The panels serve in different geographical regions according to where the plaintiff can be conveniently examined by the doctor in his office.50 The Clerk of Courts office handles the list of panel experts, which are kept confidential and used in a general rotation basis. If the first name given is objected to by one of the parties, then a second name is given. If there is an objection to this name, then the judge will designate one of the two.51 The expert, after making the examination and report, may be called to testify by the judge or the parties and may be cross examined.

The feature that differs most from the New York Plan is the manner of payment. In the Eastern District the doctor's fee is paid equally by the parties in the general case.52 This provision has been attacked as an unconstitutional deprivation of property without due process of law, but to no avail.53

The results of the Pennsylvania plan after 23 months are:

- 24 Cases are settled by examination and report short of trial
- 10 Cases are settled after the doctor testified at the trial
- 27 Cases are in the process of procedure
- 61 Cases total.54

A similar rule has been adopted in the district court for the Northern District of Illinois. The primary difference being that the fees of

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49 Van Dusen, The Impartial Medical Expert System: The Judicial Point of View, 34 Temple L. Q. 1, 9 (1961). The cases were Hankinson v. Van Dusen and Kraft, 359 U.S. 925 (1959), denying certiorari; Porta v. Penna Railroad Company (Civil Action No. 21293 in U.S. District Court, Eastern District of Penn.), aff'd, 272 F. 2d 396 (3d Cir. 1959) (a per curiam decision stating that the record revealed no error).

50 Van Dusen, id. at 6.

51 Medical Legal Committee, op. cit. supra note 3, at 4.

52 Comment, supra note 14, at 200.

53 Ibid.; the case was Hankinson, supra note 49.

54 Address by the Honorable Julius H. Miner to the Illinois State Medical Society, Committee on Medical Services and Public Relations, May 24, 1960, in Medical Legal Committee, op. cit. supra note 3.
the expert are paid by the plaintiff and/or the defendant as directed by the court. The fee is usually one which the expert would charge to a patient of moderate circumstances in private practice.55

The state of Utah has adopted a plan of impartial medical testimony in cases involving occupational diseases and workman's compensation. The Industrial Commission calls the expert from a list prepared by the medical society. The experts are divided into panels, headed by a chairman, and the specialists serve in rotation. The fees are paid by the Industrial Commission from a fund made up of the deposits of the employer. The Commission is inclined to accept the experts' opinion, but a hearing may be had if there are objections. Normal appeal remedies are available.56

Cleveland has adopted a plan of impartial medical panels with a unique feature. The experts (a panel of three is used) report is limited to pre-trial use. At trial no mention can be made of the fact that an impartial expert was used or that a witness at the trial served on such a panel. If this is done a mistrial is declared.

It is to be noted that a panel can be used only if the parties agree. Compensation of the experts is based on a schedule set up by the medical society and approved by the court.

The plan was used four times in the first year of operation. The reasons for its infrequent use are listed as inability to identify impartial experts as such to the jury inconvenience of using three panelists, and the requirement that the parties must agree to the use of the expert.57

Los Angeles has also adopted a plan of impartial medical testimony. It follows the typical pattern with some exceptions. No expert panelist will be used unless all the parties agree to his selection. During trial, the party who requested the expert initially may call him, but he will appear only if the judge approves. The expert's fee is in accord with a schedule set up by the California Industrial Accident Commission. It is paid by the party asking for the witness, but if he is unable to pay the county assumes the obligation. A serious limitation in all cases where an expert is employed is that the Chief Judge must handle the entire case.58

The discussion of the various plans has basically involved their dissimilarities with the New York Plan. The accompanying chart will show the basic similarities of the various planes.

Pros and Cons

One final point remains for discussion: What are the criticisms of

55 Id. at 9.
56 Ibid.
58 Medical Legal Committee, op. cit. supra note 3, at 8.
59 Id. at 9.
the idea of the use of impartial medical expert panel programs? The following pages will present a bird's eye view of the basic arguments, pro and con, of impartial medical testimony.

Generally speaking, the arguments in favor of the program are phrased in terms of the need for an improvement in our present system. These were presented earlier in this report and will be recapitulated here. The battle of experts or the medical-legal tournament has led to various evils: There is a tendency to select the more personable rather than the more expert and scientific medical witness; too much time is wasted under this system and court calendars have become congested; the wide divergence of medical opinion reflects poorly on the medical profession; the ascertainment of truth—the primary purpose of having experts—is frustrated.

The arguments in favor of the impartial plans stress that under these plans highly specialized and competent testimony will be put into evidence. Further, the savings to the taxpayer, especially under those plans in which public funds are used, is urged as a reason for initiating a plan of impartial medical testimony.

There are three standard arguments against the use of the impartial expert.

The first of these is that medical science is not an exact science. There are vast areas of medicine where science is uncertain, still experimenting. Medical views have changed—what was once thought improper may now be preferred. There are areas of black and white, but there are also large areas of gray, where even the most renowned experts may honestly disagree. To say that these honest differences of opinion reflect bias is a "sinister and unfortunate suggestion implicit in the plan." To equate impartiality with the possession of a monopoly on the correct medical answer is an obviously naive approach. 59

The answer to this argument agrees that the impartial expert may not always be right. It points out that the adversary system and the impartial system may both produce the wrong answer. But the chances of getting the correct answer are much greater with the impartial medical testimony plan. This hypothetical has been used to exemplify the answer:

Assume your son has been hit by an automobile and is lying on a hospital bed. Resident A thinks the boy's leg should be amputated. Resident B thinks it can, at some risk to the boy's life, be saved by treatment. Assume also that you have plenty of time to cogitate and act. You can go near-by and get twelve members of society whose minds are uncluttered with any information about the medical problem and get them to decide who's right A or B. In the process you can freely use all your years of learning and experience fully to examine and cross-examine before

your twelve "jurors" both Doctor A and Doctor B. On the other hand you have the alternative of following the opinion of one of the city's leading experts on the very medical dilemma which you face, a man who has spent his life studying and working with it, a man whom the State Medical Society tell you is as knowledgeable on the intricacies of the problem as anyone they have to suggest. Which method of solving your problem are you going to adopt?60

The second major criticism of the plans is that in many areas of medicine there are different schools of thought which will condition and predetermine the medical expert's answer to a problem. The proper answer will then turn on which expert's name is next in rotation and what school of thought he belongs to on a particular medical issue.

...the validity of the litigant's complaints will be judged by these conceptions or preconceptions even though a substantial body of medical thought may differ. The injured plaintiff will be judged by the fortuitous circumstances of the 'impartial' doctor's school of thought.61

The answer to this argument first advances the proposition that there are not nearly so many honest splits of medical opinion as the opponents of the plan would lead one to believe. The answer counter argues that the proposition may be more disastrously settled by a jury, advised of the various schools of thought, attempting to solve the conflict themselves. "Coin tossing" is a phrase often used in this connection.62 It is suggested that an impartial and informed expert would be the one most likely to state the difference of opinion and the reasons therefor.63

The objection most strenuously raised by the opponents to the plan is that once the jury knows that the expert is court appointed, he will be seen as wearing a cloak of infallibility and the jury will follow whatever opinion is espoused by the impartial expert. It has been put that the expert opinion "exudes an almost ineradicable odor of sanctity."64

Since membership on the panel is represented as the quintessence of objectivity and as the criterion of reliability and valid opinion, it is obvious that in the overwhelming number of cases the panel doctor will simply come to court, deliver his judgment, his medical formulation will be treated almost as a matter of law and that will be the end of the matter.65

The answer given this argument is three pronged; the impartial expert will be the most candid about the areas of difficulty and uncer-

62 Griffin, supra note 60, at 409-411.
63 SPECIAL COMMITTEE, op. cit. supra note 9, at 33.
64 Lord, supra note 61, at 473-74.
65 Levy, supra note 59, at 426.
tainty; the parties are still free to call their own expert witnesses and finally, the expert may be cross examined. 66

This latter answer is said to "ignore litigative facts of life. . . ." A party doesn't cross examine court appointed experts and hope to convince a jury that the expert is wrong. 67

Furthermore it is a curious twist to denominate the jury as incompetent to decide medical issues under our present adversary system, yet competent and qualified to reject the pronouncement of the court's specially appointed oracle, labeled by court sanction as giving the best possible proof. The likelihood is overwhelming that his testimony will prevail, not because of its validity but because of its source. 68

So run the chief arguments, pro and con, of a novel approach to a serious legal problem. What the answer to this problem is remains uncertain. If it is decided that the use of the impartial medical expert program is the best solution for a particular jurisdiction, what must be done?

Basic Requirements

Both the New York Report and the Allegheny Report set out the fundamental ingredients of a successful system of impartial medical testimony. New York's Report lists but three requirements: financing by neutral funds, a pre-trial (or equivalent) set up, and the cooperation of local medical groups. 69 The Report indicates that the plan need not be confined to metropolitan areas. However, it would appear that it may be difficult in less densely populated areas to get the real heart of the plan—sufficient qualified experts. Although the less populous areas may not have the problem of court congestion to any great extent, the underlying problem of the quality of medical testimony may be present and perhaps more acute in these areas. It may be noted too that the plan of impartial experts has not withstood any test in non-metropolitan districts.

The Allegheny Report is more elaborate in its litany of requirements. The recommendation is that first the medical societies be responsible for the selection of the experts and that the list of panel members be confidential and based on a rotating system. Further, the judge or the parties should be allowed to call a panel expert into a given litigation. The expert should have available to him all facilities for necessary tests. Contact between expert and parties' attorneys should be discouraged. There must be freedom for the parties to call their own experts. The right to cross-examine should be available to the judge and to the parties. The fee should be comparable to that the expert would

66 SPECIAL COMMITTEE, op. cit. supra note 9, at 33.
67 Levy, supra note 59, at 427.
69 SPECIAL COMMITTEE, op. cit. supra note 9, at 36.
receive from a private patient in moderate circumstances, but the source of payment (if not borne by neutral funds) should be kept from the expert until the litigation is complete. The Report stresses that the key to a successful plan is that the jury be told that the witness is an impartial expert chosen and appointed by the court.\textsuperscript{70}

One final observation: If a plan of the type discussed in this article is adopted, there must be a strenuous program of education among the bar, the bench and the medical profession. The successful implementation of a program of impartial medical testimony demands not only a thorough scheme of education but maximum interprofessional cooperation.

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\textsuperscript{70} \textit{Medical Legal Committee}, \textit{op. cit. supra} note 3, at 22-23.