



Engineering Sciences Section – 2011

C12 Differing Perspectives on the Use of Experts in an Adversarial Litigation System: Are Experts Misunderstood & Misused? Are Court Appointed Experts the Ultimate Answer?

John Nixon, MBA, ARC, PO Box 66, Bippus, IN 46713; Joseph M. Parise, JD*, Public Defender's Office, 715 North 11th Street, #404, Moorhead, MN 56560; and Ronald R. Scott, MS*, 37881 North 10th Street, Phoenix, AZ 85086*

After attending this presentation, attendees will gain knowledge of techniques that may be utilized to understand an expert's perspective of the litigation process, maximize expert performance, and minimize the risk of bad feeling at the end of a project. The improper use of experts will be discussed from the perspective of an attorney, and case studies will be employed to illustrate techniques employed to mischaracterize expert opinions to the advantage of the opposing side. The undesirable effects of the adversarial process upon the relevancy, reliability, and validity of scientific evidence, and its ultimate value to the finder of fact, will be discussed. Additionally, the pros and cons of utilizing a court appointed expert will be discussed from the perspective of an expert who has been retained in that function.

This presentation will impact the legal and forensic science communities by drawing attention to how easily forensic experts can be misused, and impress that all stakeholders (experts, attorneys, plaintiffs, defendants, and the courts) must share responsibility to ensure that experts are properly utilized, with the goal of presenting relevant, reliable, and valid science in the courtroom. If adopted, the techniques described in this presentation will impact the way that attorneys and courts interact with experts, help them maximize expert usefulness, and improve post project harmony, thereby improving the litigation process for all participants.

Many attorneys view scientific experts as quirky, twitchy, socially inept geeks with personality disorders. In many instances they are correct. Attorneys work their way through a process of expert/consultant administration. This begins with research, and then moves through selection, engagement, casework, deposition, and trial. There are many human interactions along the way, and these are primarily between the expert, the retaining attorney, and his law firm. However, the importance of interactions with other parties should not be overlooked, and it is common for experts to interact with the retaining attorney's client, other experts, the opposing attorney, opposing attorney's client, and the court.

Many of these human interactions relate to issues of scheduling, estimates, milestones, report content, deposition & trial preparation, travel & accommodation, payment, and general administration of the project. An attorney is a project manager, and as such needs finely honed personnel management skills.

These complex multiple party interactions, and multiple activities, are a recipe for a strained relationship between expert and retaining attorney. This potential is amplified by the inherent differences in personality traits between attorneys and experts. While stereotypes are not 100% applicable, it is reasonable to assume that most attorneys are objective driven organizers with outgoing personalities, whereas most scientific experts tend more towards the absent minded, somewhat disorganized, introverted type of personality.

It is vitally important to realize that just because there is no open animosity or adverse feedback from an expert, this does not mean that he or she is happy. That introverted personality and an inherent dislike of conflict, means that even thoroughly disgruntled experts may not communicate their dissatisfaction to the retaining attorney. With the correct approach an attorney can, to a large extent, avoid expert dissatisfaction, and simultaneously create an atmosphere of trust whereby an expert will feel comfortable discussing potential problems before they develop into case busting nightmares. The advantages for all parties involved are significant.

Irrespective of personality traits, adherence to a few simple guidelines, and an understanding of the expert's mindset and project perspective, will greatly assist the attorney in achieving his objectives, minimizing stress on the expert, and building and sustaining a relationship that will benefit future projects.

All aspects of the litigation process will be discussed, as viewed through the expert's eyes. From initial contact and interview, through provision of information, analysis, liaison with other parties, reporting, deposition and trial preparation, and trial testimony and cross examination. Checklists of what to do, and what not to do, when dealing with an expert, will be presented.

An Attorney's View on Expert Testimony - Keeping It Relevant,

Reliable, and Valid: Virtually every homicide case that results in a trial includes testimony from a forensic pathologist about the autopsy performed, the detailed findings, and the conclusions drawn as to cause and manner of death. Sometimes an inadmissible opinion testimony will be elicited and admitted, even when there is proper objection by opposing counsel. In one jurisdiction, the medical examiner who performed the autopsy in a recent case was asked by the prosecutor, and was allowed by the trial court, to opine as to whether the decedent's injuries were inflicted by the perpetrator with intent to kill, even though case law in that jurisdiction



Engineering Sciences Section – 2011

for the last fifteen years or more held an inference of intent to kill a matter for the jury, not an expert, to draw.

In the same jurisdiction, a young man was recently indicted by a grand jury for first degree murder in the death of his infant son, who was chronologically three months old at time of death, but biologically only

five weeks old, having been born at 32-weeks gestation. The child was unresponsive when the parents brought him to the hospital, he never recovered and died within four days of his collapse, after support efforts were discontinued. Both mother and father reported that the child appeared fine the day of his collapse, while both parents were home with him. While the mother left the home for about 45-minutes to pick up food for dinner, the child was in the care of the father and went into arrest. Upon the mother's return, the child was taken to hospital. The mechanism of death was an hypoxic-ischemic encephalopathy due to cardiopulmonary arrest. The child had established subdural bleeding and cortical vein thrombosis at the time of his arrest. The child had no skull fractures and little evidence of impact trauma (a tiny area of intra-scalp bleeding above the left ear). The medical examiner performing the autopsy opined that the cause of death was traumatic head injury and the manner of death as homicide. The grand jury heard from, inter alia, the child's paediatrician, who testified that it is not medically possible for the child to have sustained injury prior to the mother leaving the home on the day of his arrest, and from the medical examiner, who testified that "the history we have, normal infant up until a certain point would suggest that the injury occurred at that point." In rendering this opinion, the medical examiner discounted the significance of the histological evidence (iron stains of the SDH and the CVT were markedly iron positive). The medical examiner mischaracterized the findings and opinions of the forensic pathologist retained by the defense, whose written report concluding that the manner of death was undetermined was introduced as an exhibit by the prosecuting attorney; and he misrepresented medical intervention procedures utilized during the child's last hospitalization (testifying that a "shunt *** was placed to remove hemorrhage or blood from the head"; when in fact it, was a Camino bolt, which was used to insert a pressure monitor into the brain), which, whether or not intentionally done, was done in the context of downplaying the significance of the markedly iron positive SDH and CVT.

The case studies in this presentation, although illustrating just a couple of examples of how the expert can be misused, should inspire forensic scientists and jurists to strive for the presentation of relevant, reliable, and valid science in the courtroom.

The Court Appointed Expert: The adversarial litigation system employed in the US, and many other countries, pits opposing experts against one another in an often unpleasant battle that results in personal attacks, and ultimately tarnishes both individuals, and their profession. Courts have the authority to appoint an independent expert of their own

- a third expert to mediate between the two experts employed by the opposing parties in the litigation. The pros and cons of court appointed experts will be discussed from the perspective of an expert who has acted in that capacity.

Expert-Attorney Relationships, Expert Misuse, Court Appointed Experts