EXPERTS' DAY IN COURT

In an age of litigation, the proper role of the paid specialist provokes increasing debate.

FROM LEFT: SARAH PUTNAM; PAUL HOSEFROS/THE NEW YORK TIMES; SARAH PUTNAM

From left: Thomas Ferguson of M.I.T.; Nina Cornell, an economic consultant, and Michael Saks of Boston College. All express reservations about the extensive use of experts in court.

By John A. Jenkins

"WHEN WAS THE LAST time before today that you can recall testifying?" the lawyer asked.

"Last week some time," the doctor replied.

"And how many times did you testify last week?"

"I recall, once. May have been more than one. I recall one."

Dr. Lawrence I. Kaplan, a Manhattan psychiatrist and neurologist, testifies in court as an expert medical witness so often that he does not keep track of the cases. When he is asked, as he was recently, to testify under oath to the number of court cases he is involved in every year, he can only guess: 25 to 35 as a witness; several hundred more as a consultant and prospective witness.

"I don't tout myself as an expert witness," explains Dr. Kaplan, who also teaches at the Mount Sinai Medical Center. "I practice medicine, and I teach it. But if you've been in practice as long as I have" — he graduated from the New York University medical school in 1943 — "lawyers find out about you and want you to help them. It's a matter of word of mouth."

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And a matter of money. Two days a week, Dr. Kaplan sees patients sent by lawyers. Based on his own courtroom estimates, he earns as much as $200,000 a year doing this, in addition to his income from teaching and practicing medicine. He charges $750 to $1,000 to examine a lawyer's client and prepare a six-page report; $2,500 or more for each day of court testimony.

"Some experts are one-sided," Dr. Kaplan says. "I am not. I see patients for both *plaintiff and defense* lawyers." He evaluates psychiatric and neurological disabilities and gives his opinion on their cause and effect. For instance, is the patient's back problem the result of an automobile accident, or is it just old age? If his report favors the lawyer's case, Dr. Kaplan may be called to testify. If it's unfavorable, the lawyer gets another expert. "There is no question that I have considerable income from that aspect of the practice," Dr. Kaplan says, but, he adds, in essence, he provides a service that is in great demand.

In civil and criminal cases alike, hiring an expert witness can be as important as hiring a lawyer. As lawsuits have proliferated, so has the number of experts whose testimony can make or break a case in court. Literally thousands of experts are available for testimony — doctors, engineers, economists and firearms experts as well as experts specializing in such esoterica as street-gang subculture, tree failures, bite-mark identification, sheep psychology and forensic meteorology. They represent a

major part of the American litigation industry. Their importance in lawsuits is growing as technological advances enable courts to dispose of cases by using scientific tools instead of less-reliable intuitive means, and as science itself becomes the issue in public-policy lawsuits over health and safety hazards. "I've paid experts as much as $5,000 a day," says Harvey Weitz, a Manhattan lawyer and former president of the New York State Trial Lawyers Association. "Without them, I have no case, and they know it. Almost anything today calls for an expert witness."

"Experts are very, very important," explains Judge Patrick E. Higginbotham of the United States Court of Appeals for the Fifth Circuit, in Dallas. "They teach you. They can explain things to a jury that no ordinary citizen is experienced in. Someone has got to be able to translate a complicated, scientific subject into terms that laymen can understand."

Even though the vast majority of experts fulfill that ideal, it is not always realized. Some legal observers and scholars have found that:

- Attorneys often don't know how to locate competent experts, or make effective use of them.
- Clients sometimes cannot afford to hire the right experts and thus must drop meritorious cases.
- Experts are frequently torn over the ethical dilemma of loyalty to their clients versus loyalty to the truth.
- "Battles of experts" seldom occur in criminal cases because the defense lacks the prosecution's resources.
- Flimsy evidence from prosecution experts often isn't rebutted.
- Vested-interest funding of academic research may subtly bias the scientific literature that expert witnesses rely on.

In their recent study for the National Center for State Courts on the use of scientific evidence in litigation, Richard Van Duizend, a senior staff attorney for the Virginia-based center, and Michael J. Saks, an associate professor of social psychology at Boston College, say expert testimony at its best "is not subject to the limitations of human perception, memory, bias, or interest." Ordinarily, only experts may testify as to their opinions or conclusions — testimony that otherwise would not be admissible in court. An expert witness's testimony can be given just as much weight as an eyewitness's. In fact, a 1974 study of judges and lawyers conducted by the Colorado-based Forensic Sciences Foundation showed expert testimony is usually given more weight.

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The courts of 14th-century England were the first to bestow favored status upon experts. Initially, experts in such fields as shipping and accounting were called as witnesses by the court, but as the adversary system evolved in the United States, the court-appointed experts gradually were replaced by experts working for one of the parties to a dispute. The judicial response was a certain wariness. In an 1884 decision, the New York Court of Appeals solemnly counseled that the "impartial, unbiased judgments of 12 jurors of common sense and common experience" would generally produce a more just outcome "than by taking the opinions of experts, whose views cannot fail to be warped by a desire to promote the cause in which they are enlisted." Six years later, the appeals court urged reliance on "real facts" instead of those propounded by scientific experts.

Yet the historic rationale for the use of expert witnesses endures, and they are permitted to speak so authoritatively because they are deemed to be serving not a client so much as the cause of truth.

In Britain and Europe, the judge frequently hires the expert and decides how he will be used. Even then, experts are usually brought in only when they can testify to objectively verifiable facts, rather than offering just an opinion.

The use of experts in the United States reflects the character of an adversary system of justice unique to this country. Each party has the

'In virtually every case in which experts end up on the witness stand, there are vast possibilities for honest differences of opinion,' notes one lawyer. The idea, then, is to find an expert with a compatible opinion.

power to call witnesses it thinks will be persuasive. Indeed, the widespread use of lay juries often reduces the judge to the passive role of an evidentiary referee.

A few experts have proposed that the American judiciary return to the original model of choosing its own experts. But even this seemingly modest proposal may be flawed, Judge Higginbotham suggests. "It's a tool that can be used," he observes, "but it's fraught with hazard. If someone is presented as the court's expert, he might take on trappings that weren't intended. His opinions might be no more reliable than those of the prosecution or defense experts, and yet the jury might give them more weight."

Another Federal judge says he is unalterably opposed to judicial experts on procedural grounds. He fears ex parte contacts that would prejudice an expert on one side or the other.

"The problems won't be solved by permitting judges to hire their own experts, for the simple reason that those experts usually are not testifying to facts susceptible to an objective determination," says Irving Younger, a Washington lawyer and former Cornell Law School professor who is a leading authority on the rules of evidence. "They're giving an opinion. Impartiality has nothing to do with it."

"Unlike any other country, we submit many issues to the courts that don't turn on factual determinations at all," Mr. Younger explains, "Should I.B.M. be broken up? Is it good for America to break up A.T. &T.? We pretend those are factual questions and call economists to testify, but they're simply a matter of opinion. And in virtually every case in this country in which experts end up on the witness stand, there are vast possibilities for honest differences of opinion.

"In a case where opinions can reasonably differ on a question, each lawyer simply scouts around until he finds an expert who has an opinion that comports with his client's interest. Experts can testify in good faith and still be testifying to opposites."

Even physicians, once accused of engaging in a "conspiracy of silence" when the issue involved testifying against colleagues, seem to have accepted this unique characteristic of the American judicial system. A report prepared last month by the American Medical Association's Committee on Professional Liability, but not voted on at the time of this writing, says the medical profession's former collective silence now has been "displaced by the deafening roar of a marketplace in which numerous physicians are competing for the opportunity to testify."

"It's a lucrative endeavor," says Dr. Raymond Scalettar, chairman of the A.M.A. committee and a past president of the Medical Society of the District of Columbia. "I find it very disheartening. I have no way of quantifying this, but I know there's a cadre of physicians who are supplementing their income by testifying against other physicians."

The A.M.A. has said it is ethical for its members to testify as expert witnesses as long as they do not become courtroom partisans. In a policy statement, however, the group expressed concern about the impact of doctors "who make it part of their occupation" to testify frequently.

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In the criminal case against John W. Hinckley Jr., who made an assassination attempt on President Reagan, the prosecution and defense together spent an estimated $350,000 to $450,000 to hire opposing teams of experts. Psychiatrists for the defense contended that Mr. Hinckley was insane at the time of his attack and therefore not guilty; the prosecution experts testified, unsuccessfully, to the opposite. What ensued was a classic "battle of experts,"

but as criminal cases go it was quite unusual for just that reason.

Two decades ago, only 3 percent of criminal cases had counterposed prosecution and defense experts. In virtually all the other cases, the prosecution expert was unchallenged. Comparable statistics for more recent years have not as yet been collected, but even if that figure has doubled or tripled in the ensuing decades, the problem is still acute.

"So much of the prosecution's evidence is weak, yet the defense doesn't rebut it," asserts Professor Saks, who has both testified as an expert witness and conducted extensive research on how juries decide cases. To illustrate the effects of such one-sided testimony, he cites a nationwide study that found 51 percent of police crime labs misidentified paint samples, 71 percent erred in conducting blood tests and 28 percent misidentified firearms.

"My point is, here's where the adversary system ought to be doing its best," Professor Saks explains. "The defense ought to be finding these errors. But the defense frequently doesn't do that. It may be that the aura of science intimidates criminal defense attorneys. It may also be that they assume the prosecution's experts are competent.

"The defense also has to have time and money if it is to challenge the prosecution experts," he adds. "In a multimillion-dollar civil case, money to pay experts is no problem. But a public defender may have a foot-high stack of files for cases he has to try the next day! He can't possibly do them justice, and the prosecutor is probably under the same pressure. The states don't even have public defenders, and they usually don't allow an indigent defendant to hire an expert as a matter of right. He has to get the judge's permission. Maybe the judge will grant it, maybe he won't."

In the Federal courts, a district judge's permission is needed if an indigent's attorney wants to hire experts. Even then, the district judge may only authorize payment of $300. A chief judge of the court of appeals must give his approval if the total payments for experts exceed that.

Mr. Van Duizend and Professor Saks found one court that required plaintiffs to present the testimony of both a doctor and an economist in even the most routine person-

al-injury cases. Those who didn't had their cases dismissed. Yet the cost of retaining the two, coupled with the attorney's fee, made it financially unrewarding to take claims of less than $10,000 to trial, even if victory appeared assured. A plaintiff with a solid case might be forced to settle out of court for a lesser amount.

"It's a barrier to entry for people of limited means — there's no question about that," says Judge Joyce Hens Green of the Federal District Court in Washington, referring to the paucity of funds available to hire expert witnesses. "Many people simply can't afford an expert."

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In litigation, the high cost of expert testimony can give a distinct advantage to the side that has money. Some believe, however, that hiring an authority to testify, or keeping him on retainer against that prospect, can create residual effects.

The American Telephone and Telegraph Company, to take a prominent example, pays millions of dollars yearly for research services from academics and consultants who perform economic studies and, occasionally, testify on A.T.&T.'s behalf, in court or before Congressional committees and regulatory bodies. The question thus arises: Does A.T.&T.'s heavy funding of "pure" economic research important to it bias the body of scholarly literature experts rely upon when they testify for A.T.&T.?

"No question about it," answers Thomas Ferguson, an assistant professor of political science at the Massachusetts Institute of Technology who has been studying the politics of economic regulation. "Often, the only people who will finance an academic study are the people who have a very particular viewpoint. They have the money, and they can use it to subtly deform the growth of knowledge. Unpopular theories don't get funded or are snuffed out. An otherwise promising theory is abandoned in the light of a single apparently strong objection. I've seen it happen. In the long run, this even affects who is in the community of experts, and that's an important point, too. Nobody's being 'bought off' in a crude sense. But bias is built in."

Kenneth H. Militzer, A.T.&T.'s chief economist, says it is unfair to accuse A.T.&T. of contributing to bias in the economic literature. "If research looks promising to us, we fund it. If it doesn't look promising, we don't," he explains. "The other side does the same thing."

But, as Nina W. Cornell, a Washington economic consultant, sees it, "In all the years of A.T.&T.'s economic research, certain questions got asked and certain questions didn't get asked." Mrs. Cornell, who was formerly the Federal Communications Commission's chief economist, believes that A.T.&T.'s academic authorities purposely stayed away from touchy studies of what she calls the corporation's "predatory" behavior in its competitive markets, and that courts and rate-setting bodies rarely heard balanced presentations because A.T.&T. had cornered the market for experts. "Even now," says Mrs. Cornell, who works for the MCI Telecommunications Corporation and the GTE Sprint Communications Corporation, both A.T.&T. rivals, "the A.T.&T. competitors are just beginning to scratch up enough money to pay someone to come up with data to contest A.T.&T."

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People who cannot find an authority on their own have another recourse: They can turn to one of several businesses that serve as matchmaker between expert and litigant.

The largest of the expert-witness agencies is also the only one that promises to provide an expert in any specialty — from "accident reconstruction" to "zoning." The Technical Advisory Service for Attorneys operates out of homey offices on a main thoroughfare in Fort Washington, Pa. The agency's two owners moved their company to its present site from downtown Philadelphia some years back because they were tired of commuting. Since most of TASA's business is done over the telephone, location was of little importance.

The business, founded in 1961, is flourishing: TASA reports an annual growth rate of 15 percent. It provides witnesses to plaintiff and defense attorneys in more than 7,000 cases a year, indexing by computer its experts-for-hire into 3,400 separate classifications.

"They're a marriage broker," says Frank Fabozzi, a Fordham University economics professor who frequently gets testifying jobs through TASA. "It's a needed

service because it saves attorneys valuable time in finding competent experts. TASA does a good job, and the nice thing about them is, they're honest."

An attorney for the American Medical Association says the group can't stop its members from signing up with an expert-witness broker. Such an action would amount to an illegal boycott. A.M.A. publications, however, refuse to accept advertisements for such services. "We have many members who object to seeing these kinds of ads," the attorney says.

The Medical Quality Foundation in Reston, Va., established by Dr. H. Barry Jacobs, analyzes malpractice actions for plaintiffs' lawyers and provides them with expert medical witnesses. Dr. Jacobs, 41 years old, became a legal consultant after a 1977 conviction for Medicare and Medicaid fraud; he served 10 months of a two-year prison term and lost his licenses to treat patients in Maryland, Virginia and the District of Columbia. (His Maryland license has since been reinstated.) According to Dr. Jacobs, his "consulting staff" of 550 physicians and 4,000 engineering experts has handled 6,000 cases for 4,000 law firms since he founded his company.

For $200, Dr. Jacobs will review a lawyer's case and advise him whether malpractice is indicated. He doesn't testify, though — his felony conviction would almost surely come out on the stand. Instead, for a fee of at least $600, he will arrange for a physician certified by a medical board to prepare a report as well as be available to testify. If the expert is called, he receives $1,800 a day plus travel expenses.

If a client finds those costs prohibitive, Dr. Jacobs can accommodate him on a contingent-fee basis, much as plaintiffs' lawyers do in malpractice suits. In effect, Dr. Jacobs, who promises to find an expert to testify, will earn an agreed-upon share of the amount the client wins. Two alternative plans guarantee him either 20 percent or 30 percent of the total amount of any judgment or settlement.

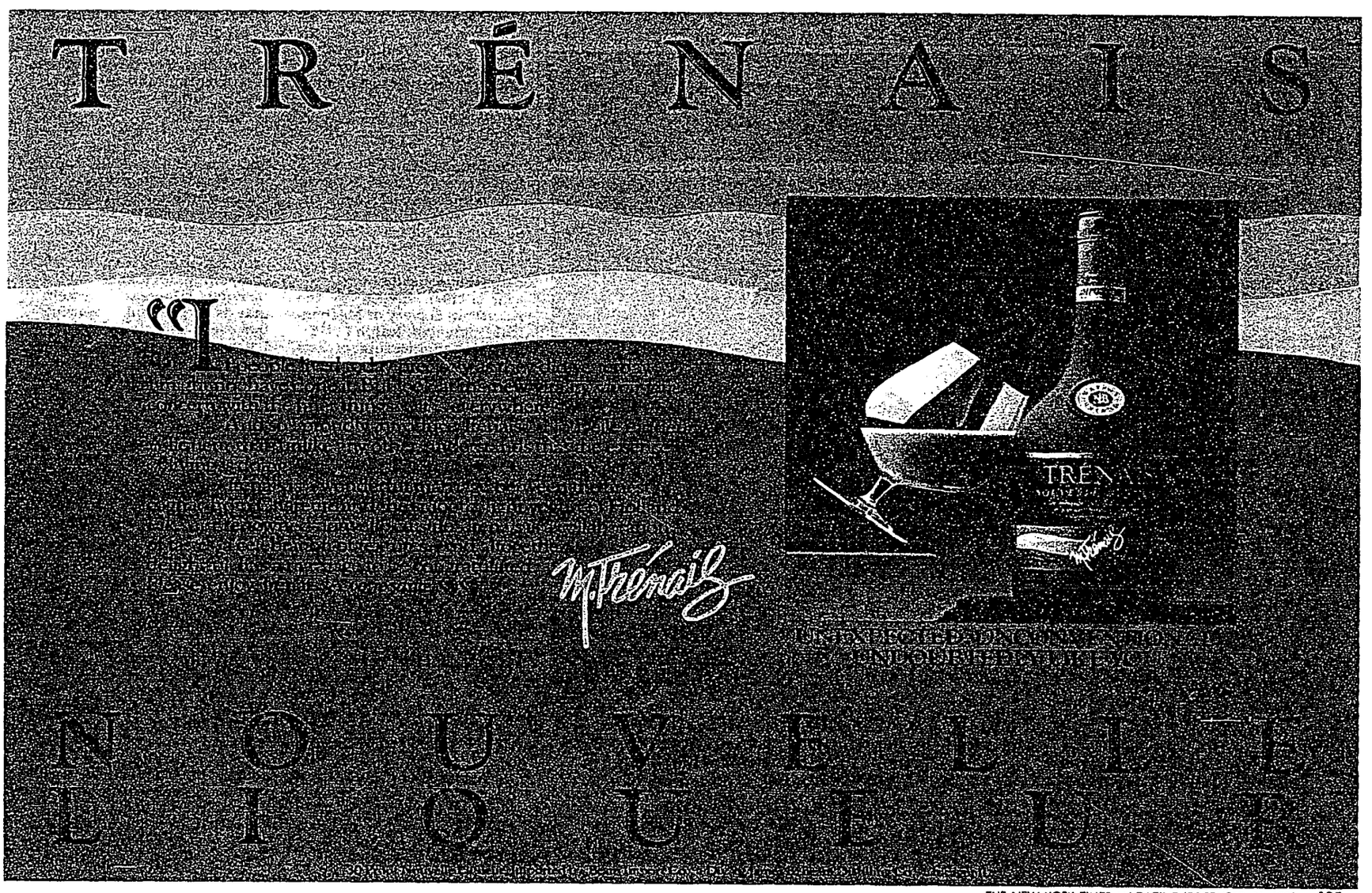
The courts have strict rules against contingent-fee testimony by experts. Otherwise, experts might have a incentive to slant, if not falsify, their testimony. But Dr. Jacobs keeps the entire contingent fee for himself — should there be one — and pays his expert a flat fee. Advertising for his foundation touts this contingent-fee arrangement as being approved by the bar (the American Bar Association has issued a favorable ethical opinion on the practice). Dr. Jacobs says he has 150 such cases pending.

Dr. Ronald E. Gots, a physician whose National Medical Advisory Service in Bethesda, Md., also provides expert medical witnesses for lawyers, strenuously objects to any contingent fees for experts. "It affects objectivity," he says. "If either the organization that provides the expert, or the expert himself, has a contingent arrangement in the case, you've essentially eliminated the possibility of objectivity. For example, if we worked on a case for a contingent fee — which we would never do — and a case came through the door that was potentially a $5 million case, even though there was marginal liability or questionable liability, you could always find somebody who would testify in that case. I despise contingent fees for nonlawyers. We're not advocates. It is our job to be objective analysts."

A few years ago, Dr. Jacobs also was the medical director of a "smoker's clinic" in suburban Washington. Few knew of his role, however, because he advertised and sought patient referrals from other doctors under the name "John Rolls 3d, M.D.," which he says he chose because it was "a snappy name. More Aryan. Not Jewish." During sworn testimony in a 1981 deposition, Dr. Jacobs said he used the name because he otherwise feared "immediate prejudice" from fellow physicians. "It's a registered tradename," Dr. Jacobs testified. "I am he . . . I'm officially registered in the Fairfax County [Virginia] court as Harvey Barry Jacobs and John Rolls. . . .

"Q. But the doctors that received this letter didn't know who you were when you signed it John Rolls 3d.

"A. So be it. The courthouse does."



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Dr. Arnold I. Charow, an ear, nose and throat specialist in Mount Vernon, N.Y., lost his license to practice medicine in New York in 1982 after it was found he had prescribed unnecessary surgery. (He recently also lost his license to practice in New Jersey.) The 43-year-old physician now operates a company in Greenwich, Conn., that advertises legal consulting and witness-finding services for medical malpractice.

Robert J. Militana, a former medical student, also runs a malpractice witness agency, the Medical-Legal Consulting Service in suburban Washington, that has attracted some of its prospective clients through newspaper ads promising "financial assistance" for the parents of children with cerebral palsy or other birth injuries. The ads list a post office box number for the American Palsy Society; the society shares the same address with the Medical-Legal Consulting Service, which provides malpractice witnesses for a flat fee or on a contingent-fee basis. A spokesman for Mr. Militana says the two companies are simply "trying to help people."

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Sometimes the justice system itself gets the better of the witnesses in their attempts to be impartial — its adversarial nature almost invariably forces them to mimic the role of the advocates that hired them.

In a 1977 speech to the American Society of Mechanical Engineers, Ralph L. Barnett, an engineering professor at the Illinois Institute of Technology who has testified often as an expert witness, said, "If you're really trying to tell the truth, the whole truth and nothing but the truth, you will find that the courtroom is just about the hardest place in the world to comply with these three things which you have sworn to do before you start your testimony."

From the court's point of view, as Judge Higginbotham explains, "One of the problems we have with expert witnesses is that our adversary system gets another participant, another champion. Sometimes that's done by experts almost without apology, but far more often it comes from a human tendency to identify with the side that you're testifying for. Even the most conscientious expert can get caught up in it: When the other side challenges you on the stand, the natural tendency is to respond in kind. People who don't view themselves as advocates become just that, and the danger is that an inexperienced jury may not be able to detect this partisan cast. A jury might be bamboozled."

"Lawyers go through a seduction process with their experts," adds Massachusetts Superior Court Judge Robert J. Hallisey. "They try to get them to go as far as they can in their direction. You have some experts who are trying to play it straight, and others who are prostitutes, but the guy who is trying to play it straight is at a disadvantage. He hedges and qualifies things on cross-examination, and as a result doesn't seem as convincing as the charming faker who might be testifying for the other side."

Yet others contend that the witness process is self-correcting. "The system is working," asserts Philip H. Corboy, past chairman of the American Bar Association's litigation section. "There is no problem. The system itself has the anti-abuse mechanism in it. The best method of preventing abuses among expert witnesses is by lawyering — the cross-examination — and that's where it is handled. You combat any testimony that has any taint to it through the tyranny of cross-examination. That's the lawyer's job."

Indeed, many court observers and legal scholars see the growing use of experts as compelling evidence of a thriving adversary system that is successfully serving the needs of litigants. Prof. Laurens Walker of the University of Virginia Law School recalls that when he first began, under a National Science Foundation grant, to study different ways of conducting trials, he felt certain that the European model of a nonadversary system would ultimately be the one most preferred. Instead, his randomly selected subjects in the United States, France, West Germany and Britain overwhelmingly chose the American system.

"People felt better about the outcome of their case — win or lose — when they controlled the process by defining the issues, collecting the evidence and calling their own witnesses, including experts," Mr. Walker explains. "The parties only wanted the court to do the one thing they couldn't do themselves: provide a mandated outcome."

And American juries oblige — with the frequent assistance of experts for hire. ■