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"THE BATTLE OF THE EXPERTS:" A NEW APPROACH TO AN OLD PROBLEM IN MEDICAL TESTIMONY

Larry W. Myers*

Over a century has passed since the poet mused,

When doctors differ, who decides
amid the milliard-headed throng?¹

Since then, the problem of conflicting medical testimony has become more rather than less serious. Poets can ponder, but the bench and bar must decide.

The testimony of medical experts is essential in establishing the extent of a plaintiff's injuries in personal injury litigation. Anglo-American jurisprudence assigns to the litigants the role of uncovering and producing evidence, much of which is provided by witnesses whose testimony usually favors the party who calls them. This is no less often the case where the witnesses are doctors produced by the plaintiff or defendant. When conflicting or contradictory medical testimony is presented, a phenomenon arises which often attains such noticeable proportions that it has been dramatically labeled "the battle of the experts."

The adverse consequences of this medical-legal phenomenon cause consternation among the litigants and the public, and are of constant concern to the courts and the two professions. In several jurisdictions, judicial, legal, and medical groups have collaborated to create programs aimed at resolving or minimizing these courtroom conflicts. One approach which has met with much success involves the establishment of neutral panels of outstanding specialists in various branches of medicine. These experts are available at the call of the court to perform examinations of plaintiffs in personal injury cases, to report their findings, and to testify, if necessary, in those cases where medical questions are in controversy.

This study seeks to ascertain whether such a program would promote the administration of justice in Nebraska.² It is in-

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¹ Sir Richard Francis Burton, *The Kasidah of Haji Abdu El-Yezdi*, Eighth Part, Couplet XXIX (1853).

² The present project was begun in the fall of 1964. Research and analysis have been conducted under the guidance of Professor Marcus L. Plant, Fall Seminar on Medico-Legal Problems, University of Michigan.

tended to discuss a general problem and to propose a specific solution. It only presumes to examine the performance of doctors after they enter the legal arena. The intent is to comment on medical testimony, not medicine itself, though often the two are inextricably intertwined. Since the purpose of the article is to put all relevant considerations before those who must deal with a problem which affects so many, research has been extended beyond the usual library investigation.

First, more than three hundred Nebraska judges, attorneys, and physicians were sent a questionnaire which asked whether they favored or disfavored the adoption of an expert panel plan for Nebraska.³ The results of this poll are noteworthy:

	For	Against	Undecided
Omaha-Lincoln Judiciary	6	0	1
Outstate Judiciary	6	3	0
Omaha Bar	27	27	2
Lincoln Bar	13	14	0
Outstate Bar	37	25	0
Medical Profession	29	3	1

Furthermore, theory and statistics have been leavened with the studied opinions of those who meet the problem every day and who will be most directly affected, for better or for worse, by any attempt to resolve it. These opinions reveal several important considerations which are not reflected by a simple yes-no poll: (1) Many outstate attorneys favor the expert panel plan in principle, but voted against its implementation in their districts because they feel that there are not enough medical experts locally available to insure its successful operation. (2) Most defense counsel favored the plan, while most plaintiff's counsel opposed it. Then, too, many of these opinions contain extremely interesting and well stated thoughts. Therefore, quotations from Nebraska judges, attorneys, and physicians have been liberally included

³ The responses to this survey are believed to be representative of the attitudes of those members of the medical and legal professions who are most closely concerned with the problem in Nebraska. The individuals surveyed were members of one or more of the following organizations: The Nebraska Association of Trial Attorneys; The Nebraska Orthopedic Surgeons, Neurological Surgeons, Radiologists, Psychiatrists and Neurologists in 11 *DIRECTORY OF MEDICAL SPECIALISTS* (11th ed. 1963); The Supreme Court Judges and the District Court Judges in *DIRECTORY OF ATTORNEYS OF THE STATE OF NEBRASKA* 6-8 (1964); Professors, Nebraska and Creighton Law and Medical Schools. The assistance rendered in the individual responses is gratefully acknowledged.

with the authorities and relevant data from other jurisdictions. The integrated composite of experience and thought thus obtained will hopefully present a fair and rational basis for appraising and resolving the medical-legal phenomenon known as "the battle of the experts."

I. THE HISTORICAL EXISTENCE OF THE PHENOMENON

The *British Medical Journal*, dated May 2, 1863, observed:

Medical evidence delivered in our courts of law has of late become a public scandal and a professional dishonour. The Bar delights to sneer at and ridicule it; the judge on the bench solemnly rebukes it; and the public stand by in amazement; and honourably minded members of our profession are ashamed of it.⁴

This criticism of the "battle of medical experts" in England was paralleled in the United States by the highest court in our land:

Experience has shown that opposite opinions of persons professing to be experts may be obtained to any amount; and it often occurs that not only many days, but even weeks, are consumed in cross-examinations, to test the skill or knowledge of such witnesses and the correctness of their opinions, wasting the time and wearying the patience of both court and jury, and perplexing, instead of elucidating, the questions involved in the issue.⁵

Unnecessary divergence in such testimony continued to increase at the turn of the century. In 1901, Judge Learned Hand noted that "the present system in the vast majority of cases . . . is a practical closing of the doors of justice upon the use of specialized and scientific knowledge."⁶ Dr. J. W. Courtney, in addressing the 1915 graduating class of the Harvard Medical School, warned that in personal injury cases "the army of witnesses on either side is generally appalling. . . . They are of two hostile camps, and prepared to attempt, under solemn oath, to uphold opinions diametrically opposed, yet supposedly derived from a single series of facts and observations."⁷ Commentators on the law of evidence have more recently deplored the tendency of medical experts to become the hired champions of one side or the other and have looked upon the kind of evidence thus adduced as one of the most unsatisfactory and unreliable implements of

⁴ Quoted in TURNER, *CALL THE DOCTOR* 2 (1959).

⁵ *Winans v. New York & E.R.R.*, 62 U.S. (21 How.) 88, 101 (1859).

⁶ Hand, *Historical and Practical Considerations Regarding Expert Testimony*, 15 HARV. L. REV. 40, 56 (1901).

⁷ Elliott & Spillman, *Medical Testimony in Personal Injury Cases*, 2 LAW & CONTEMP. PROB. 466 (1935).

judicial administration.⁸ The professions involved have considered the problem serious enough to warrant action. The American Medical Association officially recognized the problem of questionable conflicts in expert testimony and advocated possible solutions in 1926.⁹ The American Bar Association endorsed the New York method for resolving wide conflicts in medical testimony in 1956.¹⁰

Nor have courtroom skirmishes between medical experts escaped the critical attention of the Nebraska Supreme Court. In *Lincoln Tel. & Tel. Co. v. Smith*, the testimony was in direct conflict, and since the court could not accept both versions, it attempted on its own to take "the better view of the evidence."¹¹ *Flesch v. Phillips Petroleum Co.* revealed that "the trial in the district court on the main issue was a contest between expert [medical] witnesses."¹² In *Lowder v. Standard Auto Parts Co.*, the medical evidence was "diametrically opposite," and the trial was criticized for again showing that litigation can "degenerate into a medical experiment in judicial credulity and a judicial speculation on medical credibility."¹³

Judge Johnsen's partial concurrence emphasized:

[T]he antipodal disagreement of these experts on whether demonstrable physical conditions exist or not is disappointing and bewildering. . . .

....

The expert witness evil, which is a blight on judicial administration and a discredit to the medical profession, must sooner or later be faced.¹⁴

In *Schmidt v. City of Lincoln*, three prominent physicians testified that the claimant was not suffering from any disability attributable to the accident, but the court nevertheless found he was totally

⁸ 5 JONES, EVIDENCE § 2287 (2d ed. 1926); McCORMICK, EVIDENCE § 17 (1954); 2 WIGMORE, EVIDENCE § 563 (3d ed. 1940). See McCormick, *Science, Experts and the Courts*, 29 TEXAS L. REV. 611 (1951); Morgan, *Suggested Remedy for Obstructions to Expert Testimony by Rules of Evidence*, 10 U. CHI. L. REV. 285 (1943).

⁹ AMA DIGEST OF OFFICIAL ACTIONS 1846-1958, at 255-56 (1959).

¹⁰ [1957] 82 ABA ANN. REP. 184-85.

¹¹ 121 Neb. 711, 714, 238 N.W. 319, 320 (1931).

¹² 124 Neb. 1, 4, 244 N.W. 925, 926 (1932).

¹³ 136 Neb. 747, 756, 287 N.W. 211, 215 (1939) (opinion concurring in part and dissenting in part).

¹⁴ *Id.* at 756-57, 287 N.W. at 215.

disabled.¹⁵ *Crececius v. Gamble-Skogmo, Inc.*¹⁶ also evidenced extreme divergence of medical opinion. The plaintiff's three doctors testified that he suffered injuries that would eventually disable him and which would grow progressively worse during his life. On the other hand, testimony of the defendant's three doctors indicated "that there had been a complete recovery and that there are and will be no after effects."¹⁷ Cases such as these uncover "a painful canker in the body of the law of evidence which has been festering for many decades to the great discomfiture of doctor, lawyer, and layman alike."¹⁸

Medical disputes in the courtroom currently arise with sufficient regularity to cause concern among members of Nebraska's bench, bar, and medical profession. A mid-state district judge complains that "there are too many cases now in which there is a hopeless conflict in medical testimony." A Beatrice attorney advocates that "some procedure needs to be put into operation to get away from this senseless procedure whereby so-called experts are permitted to give conflicting testimony on the nature and extent of injuries. It is damaging to all concerned." An Omaha district judge likewise refers to "many disappointing experiences prior to and during litigation." An Omaha orthopedist is certain that "some solution need be sought to the occasional problem of conflicting medical testimony." A Lincoln district judge states that "the conflicts in medical testimony in personal injury cases are notorious obstacles in the administration of justice. Reform is needed urgently." This has been but a sampling of the evidence¹⁹

¹⁵ 137 Neb. 546, 290 N.W. 250 (1940).

¹⁶ 144 Neb. 394, 13 N.W.2d 627 (1944).

¹⁷ *Id.* at 405, 13 N.W.2d at 633.

¹⁸ 18 NEB. L. BULL. 350 (1939).

¹⁹ Some other cases illustrate this point. A Grand Island attorney: "I argued a Supreme Court case last week where great conflict of medical testimony was the issue. I closed another case in Holdrege last week which had been appealed because one doctor said the man was a permanent total disability case and the other found minor partial disability." A Fremont attorney: "Recently I had the actual case where one doctor testified that the injured had a serious injury that required an expensive operation. The other doctor testified that the injured had a minor injury that would respond to therapy."

But compare the following statements. A South Sioux City attorney: "We do not yet see the great conflict in competent medical opinions." A Beatrice attorney: "We do not have a serious problem here." A Fremont attorney: "Generally in this area medical witnesses are fair, and ordinarily there is a minimum of disagreement between medical witnesses." A Fremont attorney: "Seldom is there wide

that conflicts in medical testimony have become more serious and more deserving of close scrutiny. The "battle of the experts" continues to be fought in our courts.

II. THE CAUSES OF THE PHENOMENON

Before undertaking any solution, the potential causes of conflict in expert testimony, both legal and medical, must be closely analyzed.

A. NONMEDICAL CAUSES

Due recognition must be given to the fact that our legal system and its participants play a substantial role in perpetuating conflicts in medical testimony. An awareness of the nonmedical causes should add perspective to our examination of the medical causes.

(1) *Courtroom atmosphere and procedure*

An Omaha physician states that "much of the confusion produced by conflicting medical testimony arises from the ignorance of the medical profession about legal questions and how to conduct themselves in court." Dr. Manfred Guttmacher explains:

The courtroom setting, which is so familiar to lawyers, is to most physicians uncongenial, and in many respects even repulsive. . . . That truth, in legal cases in which medical issues are of paramount importance, should be reached by biased partisans noisily developing certain facts and skillfully concealing others, through resorting to esoteric and highly structured and restrictive formulas . . . is to him a baffling phenomenon.²⁰

One of these "restrictive formulas" is the hypothetical question, regarding which an Omaha physician remarks that "it has always seemed incongruous for a medical fact-seeking person to try to operate within a legal fact finding framework." It is indeed ironic, as Dean Wigmore observed, that the hypothetical question, which is truly one of the scientific features of the rules of evidence, should be the feature which most disgusts men of science with the law of evidence:

The hypothetical question, misused by the clumsy and abused by the clever, has in practice led to intolerable obstruction of

variance between our local doctors. There is sometimes with the 'expert' from another town. Generally, the doctors in a small town find agreement before they come to trial."

²⁰ GUTTMACHER, *THE MIND OF THE MURDERER* 119-20 (1960).

truth. In the first place, it has artificially clamped the mouth of the expert witness, so that his answer to a complex question may not express his actual opinion on the actual case. This is because the question may be so built up and contrived by counsel as to represent only a partisan conclusion. In the second place, it has tended to mislead the jury as to the purport of actual expert opinion.²¹

This possibility of misuse or abuse led Wigmore to urge that, unless required by the trial judge, the hypothetical question should be dispensed with. Indeed, there is a rule gaining wider acceptance today which provides for dispensing with the hypothetical statement of facts where the medical expert has firsthand knowledge of the facts upon which he is to base his opinion.²²

(2) *Difficulties in communication*

Communication problems based on interpretation of terms and questions exist both within and between the professions. Dr. Andrew S. Watson capsules this interprofessional problem as it exists in psychiatry:

There very often will be considerable disagreement between psychiatrists in the choice of labels, even though all may tend to agree on the clinical findings which they observe and which lead to the process of labeling. This is an important fact in evaluating the "battle of the experts." The "battle" often has to do more with the decision of labeling than it does with the observation and description of the elements which lead to the label choice.²³

Trauma is a term in personal injury litigation very susceptible to such exaggeration of confused theory.²⁴ Trauma has many dimensions and it is variously defined. It seems to blend with many subjects which are in themselves highly comprehensive and

²¹ 2 WIGMORE, *op. cit. supra* note 8, § 686, at 812, quoted in TRACY, *THE DOCTOR AS A WITNESS* 206 (1957). See also SPRINGSTUN, *DOCTORS AND JURIES* 87-88 (1934): "It is lamentable that the law does not require a hypothetical question to include each and all of the facts which have been testified to, for with some facts included and some omitted it is very easy to elicit from expert witnesses opinions which they would never give if all of the facts were before them."

²² MCCORMICK, *op. cit. supra* note 8, § 34. STETLER & MORITZ, *DOCTOR AND PATIENT AND THE LAW* 238 (4th ed. 1962).

²³ WATSON, *LAW AND PSYCHIATRY* 220-21 (1965). See Guttmacher, *The Psychiatrist as an Expert Witness*, 22 U. CHI. L. REV. 325 (1955); Weihs, *Eliminating the Battle of Experts in Criminal Insanity Cases*, 48 MICH. L. REV. 961 (1960).

²⁴ Trauma is used in two senses. "In one sense it is an event-in-time, or a cause. In another it is an effect, or a measurable change in an organism, mainly in man." CURRAN, *LAW AND MEDICINE* 203 (1960).

underdeveloped. Professor Curran states:

[T]he difficulty of communication here between lawyers and physicians can be traced again to basic methodology. The lawyer is thinking about the significance of events isolated for the purpose of logical study. The physician, on the other hand, is examining the events empirically or experimentally. He is interested only in what effect the event has on the body.²⁵

(3) *Effect of the interplay of trial tactics*

"The damages issue in a personal injury case is basically economic, not medical. Even those factors dependent on medical proof must be measured and evaluated in dollars and cents."²⁶ This evaluation reflects the accepted stratagem of lawyers in their role as professional partisans. That doctors, too, are aware of this aspect of the problem is evidenced by this opinion of a Lincoln orthopedist:

[A] lot of these problems in the courts come not so much from the fact that there is disagreement between the medical experts, as from certain attitudes on the part of the litigants. Their interest seems to be directed more at what can be done with the jury's attitude toward a given set of facts than what the actual set of facts is.

Carried to extremes, occasions often arise where claims are "so magnified and distorted that the medical witness who supports them can find little or no justification for his testimony in support of them."²⁷

B. MEDICAL CAUSES

(1) *Authentic individual differences of opinion may result from case to case, when medical knowledge does not provide clear-cut solutions.*

Assuming that the doctors involved are equally competent and speaking impartially with no thought of the effect of their words on the outcome of the litigation, there are areas such as differential diagnosis, causation, disability, and prognosis where

²⁵ *Id.* at 204.

²⁶ CURRAN, MEDICAL PROOF IN LITIGATION 180 (1961). An Omaha attorney concurs: "The problem in relation to the trial of personal injuries is not conflicting medical testimony so much as it is the value to be attached to a particular injury. Most often, both medical witnesses come up with the same injury, but each counsel seems to attach differing values to it."

²⁷ DONALDSON, THE ROENTGENOLOGIST IN COURT 162 (2d ed. 1954).

legitimate divergence in medical opinion exists.²⁸ Dr. James W. Brooke explains:

[D]ifferent doctors given the same set of circumstances but judging from different backgrounds of experience may honestly and competently arrive at different conclusions. By the same token differing estimates of disability may be submitted by each of several examining experts although it is quite likely that they will not be grossly different.²⁹

Granting that these conclusions are based on complex data and are opinions, not facts, polar disagreements still should not arise. Dr. Nicholas Gotten attests that the real difficulty in evaluating whiplash injuries is due to the complicating factor of monetary compensation: "[T]here was a wide divergence among the surgeons as to the severity of the injury and as to the future prospect of health. . . . Symptoms did not adjust to treatment . . . but improved after settlement of claims"³⁰

²⁸ Levy, *Impartial Medical Testimony—Revisited*, 34 TEMP. L.Q. 416 (1961). An Omaha district judge acknowledges this fact: "Most of our cases involve the spinous process. Contrary opinions may mirror medical uncertainty." Likewise, the trial fraternity recognizes cases where honest difference of opinion is normal. An Omaha attorney: "Our extended medical inquiry results where conclusions are difficult and where medical men of equal competence disagree." A Lincoln attorney: "Doctors are only human and have human failings. Additionally, medical science is not an exact science. A combination of the two factors leaves too much open for opinion." A South Sioux City attorney: "Medical science is still too much guesswork." A North Platte attorney: "I have the difficulty of not recognizing the practice of medicine as an exact science but quite to the contrary."

²⁹ BROOKE, IN THE WAKE OF TRAUMA 460 (1957). See also Eaton, *Viewpoint of the Traumatic Surgeon*, 13 MD. L. REV. 299, 304 (1953): "Given exactly the same facts, even conscientious experts can and will disagree with regard to their significance and potentialities" See also Smith, *Scientific Proof and Relations of Law and Medicine*, 18 ANNALS OF INTERNAL MEDICINE 450, 457 (1943): "[M]edicine is not an exact science, in its totality, but a mixture of science and art. There is much room for honest difference of opinion and for varying clinical judgments on open subjects."

³⁰ Gotten, *Survey of 100 Cases of Whiplash Injury After Settlement of Litigation*, 162 A.M.A.J. 865 (1956). A Fremont attorney: "The difficult personal injury cases here are those that involve whiplash or other soft tissue injuries where the doctors make few, if any, objective findings, yet the patient complains of considerable pain [I]t is very difficult to determine whether the plaintiff does have a disability." A North Platte attorney: "There are some cases where it is just beyond present medical knowledge to predict accurately or with reasonable assurance what the condition of the patient would be, say two years from trial." See Frankel, *The Use of Disinterested Medical Testimony*, 25 INS. COUNSEL J. 93 (1958). See also McNeal, *The Medical*

(2) "Schools of thought" legitimately exist in significant fields to compound the difficulty inherent in honest differences of opinion.

There are fields of medicine where medical opinions may be diametrically opposed and still be honest and sincere, because eminent and respectable medical authorities sharply disagree.³¹ This disagreement does not concern opinions which may vary from case to case, but rather involves steadily held conceptions or preconceptions, each of which is usually supported by impressive authority. The experts become partisan, not to an individual plaintiff or defendant, but to a point of view. Some of the better known examples are:

- 1) Whether a single mechanical trauma can produce cancer in a susceptible individual or aggravate pre-existing cancer?
- 2) Whether mechanical trauma can precipitate metastasis and thus convert what may be an otherwise favorable situation into a hopeless one?
- 3) Whether post-concussion syndrome has organic or functional causes or both? Whether the symptoms are neurotic or traumatic in origin?
- 4) Whether a normal appendix can be injured by means of a severe nonpenetrating blow to the abdomen?
- 5) Whether a real risk is involved in myelography?³²

There is also a lack of unanimity in theory concerning neoplastic diseases; myocardial infarction due to trauma; the effect of stress on coronary thrombosis; the effect of trauma on multiple sclerosis, Parkinson's Disease, and arthritis; and the importance of lumbago, sacroiliac, and lumbosacral strain versus that of ruptured intervertebral disc schools in diagnosing back injuries. It must be emphasized that the differences of opinion and disputes between schools of thought are not of the bar's making. They are the result of the self-commitment of individual physicians to particular medical theories. "They simply echo the controversies between men of unquestioned competence and integrity within the field of medicine itself."³³ However, cases revolving around

Expert Witness—Positive—Negative—Maybe, 25 INS. COUNSEL J. 528 (1958).

³¹ LONG, *THE PHYSICIAN AND THE LAW* 245 (1955); Lambert, *Impartial Medical Testimony: A New Audit*, 20 NACCA L.J. 25, 29 (1957).

³² Levy, *supra* note 28, at 420-24.

³³ *Id.* at 423. The alleged injury supported by some of the back strain schools was often described by defense counsel as "railroad spine"

such disputes are relatively infrequent.³⁴ When they have arisen, Nebraska courts have long admitted the testimony of practitioners from opposing schools of thought.³⁵

(3) *Actual incompetence and inequalities in competence*

All doctors who testify are not equally competent. Ten years ago, the first one hundred cases reviewed by the New York panel of experts were analyzed. "Ignorance" was "the most charitable interpretation" that could be assigned to many of the serious misinterpretations of X-ray findings, failures to examine spinal fluid in concussion cases, lack of myelogram reports, and electroencephalographic recordings in fracture cases.³⁶ Similar experiences in X-ray cases led a leading roentgenologist to conclude that "misinterpretation of anomalies of physiological changes by inexperienced men attempting to interpret films is another factor which brings many cases into court."³⁷

Contrary to the expectation which the preceding examples might engender, the present study suggests that incompetence is rarely a source of conflicting medical testimony in Nebraska courtrooms. However, the medical profession does recognize dif-

or "courthouse spine," which according to them would miraculously and spontaneously respond to the therapeutic qualities of a money payment.

³⁴ ALLEGHENY COUNTY (PA.) MEDICAL SOCIETY, MEDICAL-LEGAL COMMITTEE, RESEARCH AND INVESTIGATION INTO IMPARTIAL MEDICAL TESTIMONY PLANS 17 (1961) (hereinafter cited as MEDICAL-LEGAL COMMITTEE).

³⁵ *Bellheimer v. Rerucha*, 124 Neb. 399, 246 N.W. 867 (1933).

³⁶ ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK, SPECIAL COMMITTEE ON MEDICAL EXPERT TESTIMONY PROJECT, IMPARTIAL MEDICAL TESTIMONY 48 (1956) (hereinafter cited as SPECIAL COMMITTEE): "The most striking need for services became apparent in terms of x-ray interpretation. In the unexpectedly large total of 24 cases out of the 100 reviewed, errors in x-ray technique or interpretation on the part of the previous physicians were detected." Errors were due to misinterpretation of normal suture lines as fractures. In over one quarter of the concussion cases, no examination of the spinal fluid had been made, though it might have revealed xanthochromia or bloody fluid. In twenty-nine cases of fracture claims, no myelograms were reported; yet they might have been important to the accuracy of diagnosis of fracture of the spine and disc injury.

³⁷ DONALDSON, *op. cit. supra* note 27, at 162-63. See also Rhoads, *The Roentgen Ray and Medical Expert in the Hearing of Compensation Cases*, 30 AMERICAN J. ROENTGENOLOGY 47 (1933): "[T]he x-ray in the hands of an expert assists the diagnostician to avoid medical absurdities The x-ray should be in the hands of the roentgenologist when it comes into the field of litigation."

ferent degrees of skill among its members through boards of specialists and appointments to medical college faculties and hospital staffs. Though in a legal sense all experts must be "qualified" under state law,³⁸ some conflict undoubtedly does arise where a specialist is pitted against a general practitioner, since the former is presumptively the more competent, at least in his specialty.³⁹ This survey discovered no specific complaints of incompetence as reflected in medical testimony in Nebraska.

(4) *Intentional dishonesty or perjury*

Perjured medical testimony is apparently rare and relatively unimportant as a cause of evidentiary conflicts. "Both the medical and legal professions, composed predominately of honorable and dedicated men and women, are undeservedly stigmatized by a small outlaw fringe of brazenly unscrupulous practitioners"⁴⁰ Though the charlatan, "hireling," or "medical mouthpiece" usually becomes well-known, he occasionally contributes to scandalous verdicts.⁴¹

The problem is all but nonexistent in Nebraska. In the consensus of opinion, the spectre of fraudulent testimony seldom arises to haunt Nebraska courts, and Paladin-type doctors whose unwritten cards read "have loaded knowledge—will perjure" are noticeably rare.⁴² Equally applicable to Nebraska are the laudatory remarks of a Philadelphia lawyer:

[N]o such shotgun blast can be maintained with respect to prevailing conditions or procedures We are fortunate in having

³⁸ *Fries v. Goldsby*, 163 Neb. 424, 80 N.W.2d 171 (1956). In some parts of the country, part of the blame is the lack of discernment shown by some trial judges in evaluating the qualifications of a witness. See *Long*, *op. cit. supra* note 31, at 238.

³⁹ A North Platte attorney suggests, however, that this may not always be true: "[I]n my experience I have on occasion seen a lowly, common country doctor show up a big city, nationally known expert on some rather precise points of medicine. I can recall the testimony of a radiological expert that a femur could not possibly have been moved for years as it was rigid in relation to the pelvic structure and fixed by a bone fusion. The country doctor calmly pointed out that the femur had been laced in a 45 degree angle during the operation. So you see, it is difficult to say who the expert is."

⁴⁰ *SPECIAL COMMITTEE*, *op. cit. supra* note 36, at 8.

⁴¹ See *Dennison v. Wing*, 279 App. Div. 494, 110 N.Y.S.2d 811 (1952).

⁴² An Omaha attorney: "In the State of Nebraska, the existence of fraudulent claims at a trial court level is almost nill, and without expressing any disrespect for the great State of New York or New York City,

a Bar with a tremendous *esprit de corps* and a justified pride in its high standards, as well as much distinguished medical talent. The vast majority of attorneys in this jurisdiction, both plaintiff and defendant, and physicians as well, do not and will not stultify themselves⁴³

The medical mercenaries who may not be adverse to travelling the low path are so few that a program aimed specifically at distortion is unnecessary.⁴⁴

(5) Bias

Bias is the crux of the problem in Nebraska and across the United States.⁴⁵ Though lawyers are traditionally expected to display vigorous partisanship, the American Medical Association officially espouses the opposite standard for doctors:

The physician should testify solely as to the medical facts in the case and should frankly state his medical opinion. He should never be an advocate and should realize that his testimony is intended to enlighten rather than to impress or prejudice the court or the jury.⁴⁶

But a substantial number of doctors 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."⁴⁷ The advocate's attitude emerges in opinions expressed a little more strongly than the facts or the state of medical knowledge warrant or in the omission of needed reservations when convenient.⁴⁸

therein may lie the difference In this community we have extremely qualified and reputable doctors in at least 99% of our cases." An outstate attorney: "While it is true that we frequently have opposing and conflicting opinions of medical experts, these opinions do not have dishonest motivations" An Omaha attorney: "Actually, we have very few 'knave' doctors."

⁴³ Levy, *supra* note 28, at 429 n.48.

⁴⁴ See REPORT OF THE SUBCOMMITTEE ON IMPARTIAL MEDICAL TESTIMONY OF THE DISTRICT OF COLUMBIA, ABA SECTION OF JUDICIAL ADMINISTRATION (1960). N.Y. JUDICIAL CONFERENCE ANN. REP., LEG. DOC. NO. 90, at 78 (1964), reveals that a special committee of physicians and lawyers has been set up in New York County to expel the small number of members of each profession who transgress honest standards.

⁴⁵ Ford and Holmes, *The Professional Medical Advocate*, 17 Sw. L.J. 551 (1963).

⁴⁶ The National Interprofessional Code for Physicians and Attorneys, adopted in 1958 by both the ABA and the AMA.

⁴⁷ SPECIAL COMMITTEE, *op. cit. supra* note 36, at 7.

⁴⁸ A Scottsbluff attorney: "I find that many, if not most, doctors must be sorry that they did not become lawyers. They think they can do

The bias of the expert medical witness may at first favor the party for whom he testifies, regardless of whether the party is a defendant or a plaintiff. But by a perhaps unconscious process of reinforcement and selection this ordinarily evolves into a bias which favors a point of view. Thus, advocate doctors corresponding to the two sides of the counsel table emerge: "plaintiff's doctors" and "defendant's doctors." The conscious and unconscious reasons underlying these biased states of mind are many. Only some of the more obvious may be identified with certainty. Sympathy, friendship, misplaced loyalty, prior consultation with the party, ordinary financial attachments, special fees, or the physician's basic philosophy may help to color testimony in favor of one side or the other.⁴⁹ But whatever the reasons for their biases, the members of each category soon become well-known to the bar in their area and the process of selection and reinforcement goes on.⁵⁰

better than lawyers and frequently become advocates." A North Platte attorney: "The prime difficulty is in the physician leaving his professional field to become an advocate. As an example, in the past few days a medical report of a treating physician passed over my desk wherein the doctor, rather than confining himself to an expression of his medical opinion, took occasion to express the viewpoint that settlement should immediately be made with the patients." A Nebraska City attorney: "Doctors become opinionated in the diagnosis and treatment of some disorders and injuries. The specialist is particularly vulnerable—he becomes 'partial' and fails to read other symptoms which must be considered (for example, the orthopedist on the herniated disc)."

⁴⁹ STETLER & MORITZ, *op. cit. supra* note 22, at 294. A Holdrege attorney: "One problem is to eliminate pre-conceived and possibly pro-plaintiff or pro-defendant prejudices on the part of the medicos Possibly these prejudices develop during the man's practice, i.e., who hires him the most, but they are real factors." A Gering attorney: "[S]ome physicians tend to be very lenient in rating disability and others very conservative—this may be motivated by who pays them, but in other instances it represents a basic philosophy of the physician." An Omaha attorney: "Many doctors gain a reputation for being honestly bent in a way that also happens to be favorable to either plaintiff or defendant, i.e., some stress the possible complications more than others."

⁵⁰ A Lincoln district judge: "[T]he same medical witnesses testify in case after case for their price. They are skillful witnesses and expensive The need for reform is greater in our metropolitan area, as the usual family doctor is forthright, and the difficulties lie with the medical specialist It is only a key few that cause the problem." A Lincoln attorney: "The problem is serious only in Douglas, Sarpy and Cass Counties. There is no substantial segment of the medical profession in other parts of the state who distort opinion for gain. The few who do are known outside the area affected by metropolitan influence." A Scottsbluff attorney: "In the smaller com-

A prominent Boston lawyer vehemently criticized the situation in 1910:

[T]he regular court experts not only come to be tagged in court as "plaintiff's experts" or as "defendant's experts," but they come in their practice more or less unconsciously to get into a chronic one-sided medical point of view. Habitually, the plaintiff's expert sees or magnifies injuries, symptoms and resultant ill effects which the defendant's experts minimize . . . altogether. The plaintiff's expert has argued and reasoned himself into a frame of mind that sees in the given case just what the plaintiff's attorney needs. On the other hand, the defendant's expert sees a malingerer in every man who asks damages. It is the old story of bringing to the market what the market demands.⁵¹

A Kearney attorney recognizes that the same problem exists today:

Frankly, I have found most doctors do become slanted in their outlook on this matter of examination and, relatively soon in their practice, become identified with either the defendant's side of the bar or that of the plaintiff We utilize almost exclusively orthopedic surgeons, neurologists and internists from Omaha, Lincoln, Hastings and Grand Island—virtually all of these people have become rather definitely identified as either "plaintiff's doctors" or "defendant's doctors."

While a few Nebraska attorneys feel that the problem is unimportant in their areas,⁵² there is a general awareness of its existence with the usual result that plaintiff's lawyers disparage defendant's doctors,⁵³ defense counsel decry plaintiff's doctors,⁵⁴

munities you will find a great many plaintiff doctors and defendant doctors, and generally those that represent insurance companies and industries are defendant's doctors and those who do not are plaintiff doctors." A Holdrege attorney: "Every personal injury lawyer, on either side, knows who the 'defendant doctors' and the 'plaintiff doctors' are in his community and state."

⁵¹ Friedman, *Expert Testimony, Its Abuse and Reformation*, 19 YALE L.J. 247, 253 (1910).

⁵² A Fremont attorney: "In one recent case in which I represented the defendant, I found that the plaintiff's family doctor, who had treated her in addition to an orthopedic specialist, found far less injury in the plaintiff than did either the orthopedic specialist or the doctor whom I had examine the plaintiff on behalf of the defendant. The plaintiff failed to call the family doctor as a witness so I called him myself as a witness for the defendant." A Grand Island attorney: "Most local doctors are cooperative and testify without bias, prejudice or favoritism."

⁵³ An Omaha attorney: "Very frankly, some doctors have unconsciously become favorable to insurance companies, because in these days of Blue Cross and other related insurance programs, the services of most doctors are paid for by insurance companies." An Omaha attorney:

and the medical profession itself censures both sides.⁵⁵

III. SIGNIFICANCE OF THE PHENOMENON

The battle of the experts must be viewed in light of the fact that personal injury cases constitute at least eighty per cent of the litigation in most of our courts.⁵⁶ The compensation awarded victims of personal injury accidents in a recent year totalled nearly four billion dollars. The annual total will continue to be pushed upward by the increased claim consciousness of the American public.⁵⁷ Underscoring this fact are trends toward popularity of

"Each trial lawyer is also well-acquainted with a number of so-called defense doctors who will completely disregard the complaints of the examinee, as well as the history given in connection with the injuries sustained. Instead they are inclined to depend almost solely and entirely upon their own opinion as to pathology as represented in X-rays along with their observance of objective symptoms. Such defense physicians when faced with a history of pain will refuse to accept that history as true unless they find some objective symptom to substantiate it. In other words, stating it more simply in the language of the trial lawyer, they are the 'Doubting Thomases' who will not believe unless they can place their hands in the wound." A North Platte attorney: "The problem is that of impartiality. There are some doctors who tell me that my client is not injured and I believe it implicitly; but there are others who, in my judgment, are not worthy of belief. I represent primarily plaintiffs, but I'm sure defendant's counsel feels the same way." An outstate attorney: Our local doctors fall easy victims to the insurance companies who pay relatively small doctor's fees and then take them out of the patient's settlements."

⁵⁴ A North Platte attorney: "The prime difficulty lies in the tendency of physicians attending claimants to be immersed with the claimant's viewpoints as well as the claimant's asserted aches and pains." An Omaha attorney: "Like it or not, the plaintiff's personal doctor customarily views the medical picture in the light most favorable to his patient. This is the conscious or unconscious result of personal acquaintance, a still unpaid doctor bill or other reasons."

⁵⁵ An Omaha orthopedist: "I am personally acquainted with a number of highly competent physicians who do a good deal of courtroom work who, I think, are fairly prejudiced in cases in which they testify. I cannot feel they are serving the interests of justice with such an attitude." An Omaha orthopedist: "I avoid as much as possible going to court. This is not true of a small group of M.D.s who seem to enjoy going to court. Why?—often times when such a so-called expert is going to court you know he is a so-called 'defense doctor' or 'plaintiff doctor.'"

⁵⁶ Levy, *Impartial Medical Testimony*, 30 PA. B.A.Q. 348 (1959); Peck, *Impartial Medical Testimony*, 22 F.R.D. 21, 22 (1959). A Lincoln district judge verifies that "nearly 80% of our civil trials involve tort actions involving personal injuries."

⁵⁷ Conrad and Voltz, *The Economics of Injury Litigation*, 39 MICH. ST. B.J. 32 (1960).

pressing personal injury claims, expansion of tort liability, and a broadening concept of social responsibility tempered by a consideration of capacity to bear the loss.⁵⁸

Against this background, the importance of accurate medical testimony becomes increasingly important. Recovery in every personal injury case hinges at least partially on medical evidence. Indeed, it is estimated that seven out of ten personal injury cases are decided on medical considerations rather than legal ones.⁵⁹ This setting presents four possible injurious effects.

A. INJUSTICE TO INDIVIDUAL LITIGANTS THROUGH CONFUSION OF THE COURT AND JURY

Several years ago, a Nebraska Supreme Court justice expressed his frustration in trying to reconcile medical testimony disputes by remarking, "I, for one, feel the need of a compass."⁶⁰ Judge Hand believed that such insurmountable uncertainty is often manifest in the "august assemblage of our peers" when confronted with a complicated medical controversy.⁶¹ If judges may be thus confused, it is unrealistic to believe that juries are not. Conflicting medical testimony does not always hopelessly confuse the jury,⁶² but in many cases perceiving which doctors

⁵⁸ Knepper, *The Automobile in Court*, 17 WASH. & LEE L. REV. 213 (1960); Rassman, *Of Torts and Defendants*, 16 SW. L.J. 244 (1962); Survey, *Personal Injury Damage Award Trends*, 10 CLEV.-MAR. L. REV. 193 (1961).

⁵⁹ PECK, COURT ORGANIZATION AND PROCEDURES TO MEET THE NEED OF MODERN SOCIETY 15 (1958); Small, *Personal Injury Law: Law Schools Need To Give a Shot of Medicine*, 41 A.B.A.J. 693 (1955). A western Nebraska judge qualifies this point by explaining that "medical testimony only supplies a portion of the evidence which a jury needs to consider in determining dollar awards. As to pain and suffering, the testimony of the attending physician is the only authoritative expert testimony, although the nurse's is often more graphic." An Omaha attorney: "I would rather think that the conclusion reached by a doctor as to the extent of injury and its duration has little effect on the jury. Examples of this are the verdicts rendered in herniated disc cases involving men who have only skills for heavy labor. Juries have a tendency to award damages in varying degrees depending upon the visibility of the injury itself and the presentation of the day to day activities of the injured."

⁶⁰ *Lowder v. Standard Auto Parts Co.*, 136 Neb. 747, 757, 287 N.W. 211, 215 (1939) (separate opinion of Johnson, J.).

⁶¹ Hand, *Historical and Practical Considerations Regarding Expert Testimony*, 15 HARV. L. REV. 40, 56 (1901).

⁶² An Omaha attorney: "It has been my experience and is my firm conviction that a jury which has the benefit of the testimony of the plain-

have most accurately described the plaintiff's condition is a task which places the jury in the twilight zone between just and unjust decisions.

Knowing little or nothing about medicine themselves, they are ill-equipped to measure medical skill and knowledge. As far as partiality, that is so subtle and elusive that it can seldom be exposed in courts. Hence, the decision to believe one doctor over another is likely to be predicated upon nothing more substantial than courtroom manner, personality, or forensic ability.⁶³

Recent conferences with the federal judges in the Northern District of Illinois bear out this assertion. The testifying doctor who has the greater experience in the courtroom and who is the more eloquent may win the minds of the jurors over the doctor who may give more appropriately qualified but less eloquent testimony on the matter in question.⁶⁴ When men of medicine cannot convince their own brethren, a lay jury cannot be expected to consistently resolve the resulting uncertainties. Polar conflicts in medical testimony undoubtedly serve as a frequent source of confusion to jurors.⁶⁵

The confusion is no less apparent and much more regrettable where the confusing testimony is attributable to the bias of expert witnesses. Judge Jerome Frank wrote that "in the light of the fact that juries 'try the lawyers,' it is peculiarly true, in many a jury trial, that a man's . . . property often depends on his lawyer's skill or lack of it in ingratiating himself with the jury rather than on the evidence."⁶⁶ Where the existence or extent of

tiff's doctor, as well as the defendant's doctor, has a somewhat *uncanny knack* of ascertaining which of the two doctors is the more accurate and the more correct in his conclusion and will render its verdict accordingly."

⁶³ SPECIAL COMMITTEE, *op. cit. supra* note 36, at 6. N.Y. JUDICIAL CONFERENCE ANN. REP., LEG. DOC. NO. 94, at 113 (1959): "Thus, to a large extent personal injury litigation had come to rest upon the inexperienced judgment of a lay jury as to the highly technical and conflicting opinions of the particular medical witnesses called to support the opposing claims of the contending litigants who hired them."

⁶⁴ MEDICAL-LEGAL COMMITTEE, *op. cit. supra* note 34, at 14. See also SPRINGSTUN, *op. cit. supra* note 21, at 74: "When experts disagree no one knows how a jury reaches a conclusion. . . . There is a strong suspicion that such a conclusion is never reached, but that the jury simply ignores the expert evidence produced by both sides If experts cannot agree, certainly juries cannot be expected to agree."

⁶⁵ SHARTEL & PLANT, LAW OF MEDICAL PRACTICE 336 (1959); TRACY, THE DOCTOR AS A WITNESS 208 (1957).

⁶⁶ FRANK, COURTS ON TRIAL 122 (1949).

physical injuries is at issue, a man's property may depend as much or more upon the personality of his expert medical witness. Where the most persuasive witness also presents the most objectively accurate testimony, no injustice is done. But where the personal persuasiveness of the doctor is coupled with some degree of subjective motivation, this is no longer so. That the personalities of opposing counsel may influence the outcome of a jury trial is a perhaps unfortunate characteristic of the adversary system, but it is at least explicable within the context of that system. Lawyers are expected to be partisan advocates. But the expert medical witness is expected to be objective, and any substitution of personality for objective information is unjustified.

B. MISUNDERSTANDING AND DISSATISFACTION BETWEEN THE MEDICAL AND LEGAL PROFESSIONS

The reliance on partisan expert testimony has caused long standing professional discontent among doctors, lawyers, and judges.⁶⁷ Dr. Joseph Sadusk, Jr., states that despite an ever increasing need for expert medical testimony, "unfortunately, attorneys found that the average physician was loath to appear in court, due to the fact that he was cast into an atmosphere foreign to his training and philosophy."⁶⁸ This reluctance in many outstanding physicians is partially attributable to the battle of experts:

This spectacle has so distressed many good doctors that they have refused to have anything to do with litigation. They will neither hire themselves out as partisans nor be treated as if they had. Their withdrawal, unfortunately, has only smoothed the way for less able and upright members of the profession and thus compounded the evil.⁶⁹

⁶⁷ See notes 9 & 10 *supra*.

⁶⁸ Sadusk, *Obtaining Expert Advice in Professional Liability Cases*, Case & Com., Sept.-Oct. 1964, p. 1. Dr. Sadusk is past chairman of the Committee on Medico-Legal Problems of the American Medical Association.

⁶⁹ SPECIAL COMMITTEE, *op. cit. supra* note 36, at 8. The casting of the expert in the role of a partisan has caused some of the ablest physicians to shun the courtroom. Dr. Guttmacher testifies: "I am led to believe that the same reluctance on the part of leaders of the profession to testify in courts exists in all branches of medicine. . . . I can assert conservatively that more than ten per cent of psychiatrists refuse all courtroom employment and that another twenty per cent refuse employment as partisan experts—they are only willing to testify when cast in the role of neutral advisor to the court. . . . [I]n this dissenting third are to be found most of the leaders of American psychiatry." GUTTMACHER, *op. cit. supra* note 20, at 118-19.

This same atmosphere of conflict has taken its toll in Nebraska, as reflected by the number of outstanding doctors who abstain from appearing in court.⁷⁰ This reaction of reluctance sets in motion a vicious circle. Their refusal to participate voluntarily in litigation in turn tends to irritate the bar.⁷¹ It also increases the demand for those doctors who enjoy medical advocacy. Judge Yeager of the Nebraska Supreme Court emphasizes how seldom lawyers shun biased testimony:

I have had experience in this matter of expert testimony of medical witnesses in the area of selection. The only thing in that area that ever impressed me as of any great value was a *rare situation* when the parties wanted an unbiased testimony and agreed that the witnesses should know nothing about the controversy.⁷²

⁷⁰ A Lincoln neurological surgeon: "I personally rebel against the so-called 'battle of experts' in the courtroom. I absolutely refuse to testify as a partial medical witness in anyone's behalf. You are aware of the reticence of the physician to testify in court, I am sure. I must confess that I personally have testified in court only very infrequently the past several years. . . . This change in my attitude stemmed from attempts at discrediting me as a witness. I hasten to add, however, that the great majority of attorneys in Lincoln do not stoop to unkind tactics." A mid-state attorney: "At the present time there is a tremendous reluctance on the part of the *real medical experts* to become involved in lawsuits because of unpleasant experiences, loss of time and the fact that they are in a strange field." A McCook attorney: "The present adversary system by experts tends to produce contempt for witnesses who should substantially agree in their conclusions. This reflects discredit on otherwise competent doctors."

⁷¹ An Omaha attorney: "Doctors are becoming less and less cooperative as medical witnesses and are using all types of excuses to evade the duty which they owe to their patients to testify in their behalf in court." A Lincoln attorney: "Too often there is great difficulty on the part of a claimant in getting a medical expert to testify and to give to the attorneys the cooperation necessary before testifying. A doctor is usually extremely busy, reluctant to take the time that is required for proper preparation for testifying, resents being subjected to cross-examination, and extremely dislikes having his opinion pitted against those of his colleagues. . . . Unquestionably there have been some inequities that have arisen attributable directly to the reluctance of the medical witness to go to court." A Scottsbluff attorney: "The lawyers generally in western Nebraska are very much disappointed with local doctors. They seem to forget that they owe a duty to their patient to take time off to consult with lawyers and then to appear in court and give a direct unqualified opinion. Quite often the doctors become quite angry when they are required to give depositions or take any time away from their practice, and being angry, they do not make good witnesses."

⁷² Letter From Judge John W. Yeager, Nebraska Supreme Court, Nov. 28, 1964. (Emphasis added.)

This process culminates in adversaries seeking doctors who are "good witnesses" and who will support extreme positions.⁷³ It often results in attempts at impugning a doctor's testimony to counterbalance the anticipated insinuations from opposing counsel. Genuinely expert witnesses are brought into disrepute, and they and their well qualified colleagues thereafter refrain from undergoing the same experience.

C. DISILLUSIONMENT TO LAYMEN WHO ARE TOUCHED BY COURT PROCESS

Large discrepancies in medical claims are disappointing and bewildering to laymen and undoubtedly tend to diminish public faith in the medical profession's skill and scientific impartiality. "This has led to a belief by the laity . . . that any plaintiff with a poor case or any defendant with a poor defense, with sufficient use of the coin of the realm, may find a medical witness to support his claim or his defense."⁷⁴

There is the further public belief that, if the witness is skillful in his interpretation of the facts, he may influence the jury to render an unjust verdict. When they see minor injuries inflated into large recoveries and substantial injuries treated as if trivial, they tend to lose respect for the judicial process and its participants. "They see in too many accident cases that a trial is not a sober, logical search for the truth, but something that has deteriorated into an expensive, and sometimes cruel, game of chance."⁷⁵

D. LACK OF PRETRIAL SETTLEMENT AND SUBSEQUENT COURT CONGESTION

In many metropolitan courts across the country, the backlog of cases awaiting trial is one of the major causes of dissatisfaction

⁷³ A Lincoln district judge remarks, "The same witnesses testify time after time and for their price. They are skillful witnesses and expensive." An Omaha orthopedist verifies that "a small number of M.D.s seem to enjoy going to court." As long ago as 1876 an English judge commented on this inclination of a party to find not the best scientist, but the best witness: "[T]he result is that the Court does not get that assistance from the experts which, if they were unbiased and fairly chosen, it would have a right to expect." *Thorn v. Worthington Skating Rink Co.*, (M.R. 1876), reproduced in *Plimpton v. Spiller*, 6 Ch. D. 412, 416 (1877), quoted in *McCORMICK, EVIDENCE* § 17, at 35 (1954).

⁷⁴ *TRACY, op. cit. supra* note 65, at 208.

⁷⁵ *SPECIAL COMMITTEE, op. cit. supra* note 36, at 8. See also Botein, *Impartial Medical Testimony*, 328 *Annals* 75 (1960).

with the administration of personal injury litigation.⁷⁶ There is a connection between this condition and the battle of the experts. Settlements are not made fast enough or on a large enough scale to keep up with the flood of litigation. In many cases, the parties are unable to agree upon the nature of the injuries suffered by the plaintiff. If counsel were able to predict with reasonable assurance the medical findings which would be made in the event of trial, the areas of disagreement would be substantially narrowed.

It is always desirable to increase opportunity for settlements that tend to be equitable to both parties, but the related problem of court congestion which plagues many other jurisdictions does not exist in Nebraska. Delay becomes a serious matter only when counsel who are desirous of and ready for trial are unable to have their cases tried within a reasonable number of months.⁷⁷ Based on this criterion, Nebraska courts are doing a meritorious job in moving lawsuits. An Omaha defense attorney summarizes:

Actually, court congestion in Nebraska would have to be entirely based perhaps on the Douglas County-Omaha area, as we are the only large metropolitan area in which there is a big volume of trial litigation going on. Frankly, our local courts are doing an excellent job in moving lawsuits. Any plaintiff lawyer who desires and is pushing can have his client's case heard within an eight months period. This is actually soon enough.⁷⁸

⁷⁶ Delay in Detroit is presently three years. In Chicago, it is three to four years. A decade ago, court congestion in New York County had become so bad that negligence cases had to wait three or four years to be tried after issue was joined. But the bottleneck was only in personal injury litigation. See SPECIAL COMMITTEE, *op. cit. supra* note 36. Today there is general agreement among the judges of the New York Supreme Court's First Department that 80%-90% of the cases appearing on the calendar will never reach trial and only 3% will ever go to verdict. N.Y. JUDICIAL CONFERENCE ANN. REP., LEG. DOC. NO. 91, at 88 (1963).

⁷⁷ *Ibid.*

⁷⁸ A Lincoln attorney: "We have no congestion to speak of." A Kearney attorney: "We have no court congestion in this area." A Scottsbluff attorney: "Dockets are reasonably current in western Nebraska." The understatement of the survey was humorously written by an outstate county attorney: "We have no congestion in this county—over a period of the last fifteen years, our average number of jury cases in the district court has been less than one in two years. Anyone having a case at issue can get it tried as soon as the issues are made up."

IV. THE HISTORY AND RESULTS OF AMERICAN MEDICAL TESTIMONY PLANS—THE CASE FOR THE COURT-APPOINTED EXPERT SYSTEM

A. NONJUDICIAL MEDICAL TESTIMONY PLANS

The Minnesota Plan establishes what is essentially a policing technique.⁷⁹ Since 1940, it has been a cooperative effort by the Minnesota State Medical and Bar Associations. The medical association maintains a committee on medical testimony to review reports and testimony of medical witnesses. Whenever a judge, hearing officer, attorney, or physician suspects medical testimony is false or so clearly wrong as to reflect incompetence or undue partisanship, he may write a letter to the medical society. The committee reviews the transcript and various specialists express opinions on the testimony in question. If the charges are substantiated, the committee either sends a private reprimand to the physician or in more serious cases refers the matter to the State Board of Medical Examiners. The board may suspend or revoke a doctor's license.

The plan's effectiveness in its earlier years was definite and marked. From 1940 to 1956, the committee investigated thirty-four cases, censured witnesses in seventeen cases, and referred ten cases to the board of examiners. The board disciplined a witness in only one case. Few cases have been reported in recent years and only one case presently pends before the committee.⁸⁰

The Minnesota Plan warrants praise in that it makes doctors strictly accountable to their medical peers. The risk of discipline undoubtedly restrains exaggeration in medical testimony, but its influence is limited to the extent that members of either profession are reluctant to come forward and brand their fellow practitioners as unethical.⁸¹ Also, the plan is only curative, not preventive. Disciplining the witness after the trial is little consolation to the party harmed by the testimony.

On a lesser scale, the plan spread to the Illinois Medical Societies (where it apparently "died a natural death"⁸²), the Har-

⁷⁹ Hammes, *The Control of Medical Testimony—The Minnesota Experiment*, 28 MINN. MEDICINE 111 (1945); Anderson, *Medical Testimony in the Courts*, 43 J. AM. JUD. SOC'Y 79 (1959).

⁸⁰ Letter From Harold W. Brunn, Executive Secretary of the Minnesota State Medical Association, Nov. 19, 1964.

⁸¹ Barr, *Medical Testimony: Doctors and Lawyers Cooperate*, 41 J. AM. JUD. SOC'Y 78 (1957).

⁸² See McKnight, *The Minnesota Plan for Expert Medical Testimony*, 28 CHICAGO B. RECORD 179 (1947).

ris County (Texas) Medical Society, and the states of Washington and Kansas.⁸³

B. COURT-APPOINTED EXPERT SYSTEMS

The idea of the court-appointed expert originated in Roman law, which considered physicians more as *amicus curiae* or "friends of the court" than as witnesses. "*Medici proprie non sunt testes, sed est magis iudicium quam testimonium*" was Baldus' gloss on the Code Justinian.⁸⁴ It developed in the civil law countries of Europe, where the expert is part of the judicial system. He is an officer of the court and approaches medical testimony with a judicial mind, rather than as a zealous advocate.⁸⁵ The right of a common law court to call in witnesses on its own initiative was seen to arise from the inherent judicial power to do all possible to obtain evidence relevant to an enlightened judgment. Dean Wigmore describes the source of this right:

But the general judicial power itself, expressly allotted in every State constitution, implies inherently a power to investigate as auxiliary to the power to decide; and the power to investigate implies necessarily a power to summon and to question witnesses The trial judge, then, may call a witness not called by the parties, or may consult any source of information on topics subject to judicial notice⁸⁶

Since the turn of the century, American commentators and various organized groups have promoted programs to utilize experts appointed by the court.⁸⁷ The programs have been designed

⁸³ Another type of nonjudicial testimony plan that has grown up in the last decade is the expert witness and advisory panel plan for malpractice cases in San Diego, Los Angeles, and San Francisco. Medical panels review potential malpractice cases. If they agree with the claimant, they are committed to testify to this conclusion. If they disagree, the lawsuit has little chance of success. The bar is enthusiastic over the conscientious service rendered by the physicians and by the fact that more settlements now occur. The medical profession is pleased about determining its own standards and the fact that fewer questionable suits are commenced. For an excellent article on the details of the malpractice review plans, see Sadusk, *supra* note 68.

⁸⁴ ORDRONAUX, *THE JURISPRUDENCE OF MEDICINE* 125 (1869).

⁸⁵ Schroeder, *Problems Faced by the Impartial Expert Witness in Court: The Continental View*, 34 *TEMP. L.Q.* 378 (1961).

⁸⁶ 9 WIGMORE, *EVIDENCE* § 2484 (3d ed. 1940). NEB. CONST. art. V apparently grants such power.

⁸⁷ The American Medical Association approved the principle of the court-appointed expert in 1926. See note 9 *supra*; McCORMICK, *EVIDENCE* § 17 (1954); 2 WIGMORE, *EVIDENCE* § 563 (3d ed. 1940). The National

only for cases where findings by neutral experts would enhance the opportunity to clarify the issues and reach a just decision. The first plans were applied only to areas of the law where expert testimony was the key to the outcome of the dispute.⁸⁸ More recently, the idea has been incorporated into judicially administered plans affecting personal injury disputes.

(1) *The Model Expert Testimony Act as adopted in South Dakota*

In 1939, South Dakota adopted the proposal of the National Conference of Commissioners on Uniform State Laws.⁸⁹ The plan provides for expert witnesses in all areas of specialized learning. Court appointment of up to three experts may be made by the judge in both civil and criminal cases on his own motion or upon request after consultation with both parties. Parties share equally in the expense and both may call their own expert witnesses and cross-examine the court-appointed expert.

This statewide plan is not often requested by counsel. Nor is it frequently utilized by the circuit court judiciary, though most judges report having used it several times in either criminal, accounting, or personal injury disputes.⁹⁰ All judges concur

Conference of Commissioners on Uniform State Laws did so in 1937 in the form of the Uniform Expert Testimony Act, redesignated the Model Expert Testimony Act by the Conference in 1943. NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS 337 (1937). The Model Code of Evidence, American Law Institute, contains provisions similar to those in the Model Expert Testimony Act. MODEL CODE OF EVIDENCE rules 403-10 (1942). The American Bar Association, Section on Judicial Administration, endorsed the New York Program in 1956. See note 10 *supra*.

⁸⁸ Of these, the best known is the "Briggs Law" of Massachusetts, enacted in 1921, which subjects capital and repetitive noncapital offenders to psychiatric examination by one or more physicians selected by an official medical body. The reports have achieved such prestige that they are usually automatically accepted by the prosecution and the defense. MASS. ANN. LAWS ch. 123, § 100(A) (1957). See Overholser, *The History and Operation of the Briggs Law of Massachusetts*, 2 LAW & CONTEMP. PROB. 436 (1935).

⁸⁹ S.D. CODE §§ 36.0109-.0118 (Supp. 1960). The Supreme Court rule, adopted Sept. 12, 1942, effective Jan. 1, 1943, bears great resemblance to FED. R. CIV. P. 35 in giving the judge wide latitude in his discretion to call witnesses not called by either party. See also Sink, *The Unused Power of a Federal Judge To Call His Own Expert Witness*, 29 SO. CAL. L. REV. 195 (1956).

⁹⁰ Letters From Presiding Judge Frank Biegelmeier, South Dakota Supreme Court, and Circuit Judges Roy D. Burns, George A. Rice, Cyrus

that the plan is desirable and serves a useful purpose. The fact that the court has the power to call experts has a salutary psychological effect on experts who are called by the parties. A circuit judge expresses the real benefit of the plan:

The provision of the statute permitting court-appointed experts is a very good one although it is seldom used. It has a wholesome effect upon other experts who are called to testify as they are aware of the fact that the court has the power to call a disinterested expert or experts. That knowledge will keep them from coloring their opinions too much.⁹¹

(2) *Advisory panels in nonjury compensation proceedings*⁹²

(a) *The advisory panel to the Nebraska Workmen's Compensation Court*

The Nebraska Workmen's Compensation Court maintained a medical advisory board until the early 1940's. The board was authorized by general statutory provisions empowering the court to adopt all reasonable rules to carry out the intent and purposes of the act.⁹³ The legislature granted the compensation court express approval to dispense with the common law and statutory rules of evidence. The court could "upon their or its own motion, require the production of . . . any facts or matters which may be necessary to assist in a determination of the rights of either party" ⁹⁴ The panel of doctors enabled the court to

C. Puckett, Francis G. Dunn and Leslie R. Hersrud, Dec. 28, 1964, through Jan. 4, 1965.

⁹¹ Letter From Judge Cyrus C. Puckett, First Judicial District, Circuit Court of South Dakota, Dec. 31, 1964.

⁹² In a letter of Jan. 14, 1965, Visiting Professor J. Neville Turner of the University of Nebraska College of Law, who has tried many cases before English courts, explains that the British National Insurance Acts utilize an administrative panel of experts appointed by the state in determination of pensions for persons injured during employment. However, circuit courts (above \$1,100) presently countenance no such procedure in personal injury trials. Due to the expense of trials, most personal injury cases in England are tried *not by a jury, but by a judge sitting alone*. "A judge is less likely than a jury to be enchanted by a forensic battle, and indeed most barristers would feel that a display of disrespect for the medical profession would do no good to either their client's cause or their own reputation. Nonetheless, there is no doubt that where there is a conflict of medical testimony, no barrister would hesitate to strongly cross-examine a witness Almost invariably, the report of the insurance company's doctors is more favorable to the defence than that of the client's experts."

⁹³ NEB. REV. STAT. § 48-163 (Reissue 1960).

⁹⁴ *Ibid.*

investigate in such a manner as in its judgment was best calculated to ascertain the substantial rights of the parties.⁹⁵

The board rendered an important service in advising the court on difficult medical problems,⁹⁶ but during the early 1940's it was discontinued. Nebraska attorneys who practiced at the time now advance conflicting theories to explain the board's disuse,⁹⁷ and several recommend revival of the plan. Presiding Judge Albert Arms reveals the real reason behind discontinuation of the panel:

While we realize that such panels may be of some value in the larger cities in jury cases, our experience has led us to the conclusion that such panels would not be practical in Nebraska in compensation cases. . . . A judge of this Court after several years experience in hearing cases soon learns those doctors who go overboard conservatively in favor of the defendant and those doctors who are overly liberal in favor of their patients. We learn to give the doctor's testimony the weight to which it is entitled, and generally speaking, we find that a specialist in a particular field will be entitled to more credit than a general practitioner, who is quite often the employee's family physician.⁹⁸

A fair reading of this explanation indicates that the panel was abolished not because it was undesirable but merely because it was no longer considered necessary. Several years of experience enables the judiciary to properly evaluate biased medical testimony. Only a gradual learning process provides such discernment.

However, Judge Arms explains further:

This court does have the authority to appoint a doctor. We often do so in those disputed cases where there is a wide variance

⁹⁵ NEB. REV. STAT. § 48-168 (Reissue 1960). See Memorandum No. 8, Nebraska Workmen's Compensation Court, Oct. 21, 1941; DODD, ADMINISTRATION OF WORKMEN'S COMPENSATION 460-64 (1936).

⁹⁶ Hon. Larry E. Welch, Omaha Municipal Court, who served on the compensation court from 1935-1941, relates that during his tenure the medical advisory panel conducted an average of four examinations a week. The benefit of the board was that "it gave the court an opportunity to consult and receive professional education on difficult medical problems." Letter From Judge Larry E. Welch, Jan. 21, 1965.

⁹⁷ A Lincoln attorney: "The difficulty was that in every case the court-appointed expert decided the lawsuit . . . I assume that our experience is a pretty accurate demonstration of what would happen in the wider use of the court-appointed expert." *But see* Schmidt v. City of Lincoln, 137 Neb. 546, 290 N.W. 250 (1940), which rejected the expert's opinion, initially and on rehearing. A Lincoln attorney: "It was considered by plaintiffs to be too conservative."

⁹⁸ Letter From Presiding Judge Albert Arms, Nebraska Workmen's Compensation Court, Sept. 25, 1964.

in the testimony of doctors which renders it almost impossible in some cases for the court to make an intelligent finding.⁹⁹

Despite its extensive experience in resolving disputes which turn on medical testimony, the court often must resort to court-appointed experts. A fortiori conflicting testimony will perplex a jury in many cases, and a jury is not empowered to appoint its own experts to clear up the uncertainty. It must sift for itself the generally highly technical medical testimony and reach a conclusion without the help of the objective advice upon which the compensation court relies. The experience of that court suggests that a court-appointed panel would facilitate a jury's resolution of medical disputes.

(b) *The Utah Plan*

In 1941, the Utah State Medical Association and the State Industrial Commission collaborated to provide a panel to resolve medical questions concerning all occupational disease cases, especially silicosis. In 1955, its provisions were extended to workmen's compensation proceedings.¹⁰⁰ The industrial commission pays for the services of the panel of three and any costs incident to examination out of a fund financed by deposits made by employers on behalf of deceased workers who have left no dependents. This fund has not been materially reduced, although the commission has in some cases engaged experts from outside the state and even outside the United States.

The panel's findings are influential but not conclusive. If objections are filed to the panel's report, the commission is required to hold a hearing at which the objector may produce rebuttal medical testimony. This seldom occurs, and the medical examinations have aided in settlement of every case in which they have been used. Labor, industry, insurance carriers, and the commission strongly favor the program.¹⁰¹

⁹⁹ *Ibid.*

¹⁰⁰ Workmen's Compensation Law, UTAH CODE ANN. § 35-1-77 (Supp. 1963); Occupational Disease Law, UTAH CODE ANN. § 35-2-57 (Supp. 1963).

¹⁰¹ Letter From Otto A. Wiesley, Chairman of the Utah Industrial Commission and Utah Labor Relations Board, Nov. 10, 1964. The Utah Supreme Court has never reversed a case involving use of the panel.

(3) *Panels appointed by medical societies for judicial use in jury proceedings*

(a) *The New York Plan*

The New York Plan became operative in New York County in 1952 and in Bronx County two years later.¹⁰² It was originally conceived by the New York trial justices under the leadership of eminent judges, professors, and medical men.¹⁰³ Under the plan, the court is empowered to call a neutral expert from a list nominated by the local medical society. The expert examines the plaintiff and the medical reports of both parties and then reports his findings at pretrial hearing and, if necessary, at the trial.

The choice of doctors to serve on the panels is entrusted solely to the medical profession itself. A special joint committee of the New York Academy of Medicine and the New York County Medical Society chooses the doctors according to two specified requirements: acknowledged authority in the branch of medicine involved and no previous identification with defendants or plaintiffs in personal injury litigation.¹⁰⁴ The committee listed eighteen different panels and persuaded those chosen to serve.¹⁰⁵

¹⁰² N.Y. & BRONX COUNTIES SUP. CT. R. XI-12.

¹⁰³ Presiding Justice David W. Peck, Supreme Court of New York, Appellate Division, First Department; Professor Delmar Karlen, Research Director of the Institute of Judicial Administration, Inc.; Dr. Irving S. Wright, New York Hospital.

¹⁰⁴ McNally, *Impartial Medical Testimony Plan—Its Operation and Results*, 1960 INS. L.J. 95.

¹⁰⁵ ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK, SPECIAL COMMITTEE ON MEDICAL EXPERT TESTIMONY PROJECT, IMPARTIAL MEDICAL TESTIMONY 83 (1956), lists 18 categories in New York County:

<i>Specialty</i>	<i>Number of Doctors Available</i>
General Surgery	7
Plastic Surgery	4
Ophthalmology	3
Cardiovascular Diseases	5
Dermatology	3
Tuberculosis	4
Internal Medicine	5
Neurosurgery	10
Neurology	6
Psychiatry	4
Neuropsychiatry	6
Roentgenology	9
Orthopedics	15
Otolaryngology	4
Obstetrics and Gynecology	5
Genitourinary Diseases	4
Malignancy and Trauma	1
Endocrinology	2

The judiciary alone selects the cases for reference to the panel. If the medical reports of the parties differ widely in their analysis of the injuries during pretrial conference, the judge may consider a report by an impartial expert advisable. He then submits to the Medical Report Office a reference form describing the nature of the medical dispute and the type of specialist needed. The judge and the attorneys know which specialties are available, but not the names of the specialists. The clerk's files are confidential and organized on a rotating basis to prevent prediction of which name will next appear.

The attorneys then arrange with the clerk at the Medical Report Office to have a panel doctor examine the plaintiff. The parties must accept the first doctor on the list, unless he has been a participant in the treatment of the particular litigant. The parties then give their reports to the clerk, who is allowed to subpoena hospital records. In each case, the report of the expert's examination is sent in triplicate to the Medical Report Office to be distributed to the judge and the lawyers.

At a subsequent pretrial conference, the judge and attorneys discuss the case again in light of the new report. If settlement is not reached, either party or the judge may call the panel expert to testify. If he is called, the jury is told that he was appointed by the court. Either party may cross-examine him.

The Sloan and Ford Foundations financed the plan during its initial two years. Subsequently, the costs of the plan have become a regular part of the county budget. New York County annually appropriates \$15,000 for that purpose. The panel experts are requested to make the same charge for services as they would to a private patient of moderate means.¹⁰⁶

Most commentators consider the New York Plan successful.¹⁰⁷ In 1956, a special committee of the New York City Bar Association released the following report on the accomplishments of the plan:

1. The Project has improved the process of finding medical facts in litigated cases.

¹⁰⁶ For a detailed explanation of its organization and operation, see N.Y. JUDICIAL CONFERENCE ANN. REP., LEG. DOC. NO. 94, at 113 (1959).

¹⁰⁷ Barr, *Medical Testimony: Doctors and Lawyers Cooperate*, 41 J. AM. JUD. SOC'Y 78 (1957); Frankel, *The Use of Disinterested Medical Testimony*, 25 INS. COUNSEL J. 93 (1958); Martin, *Impartial Medical Testimony Project*, 28 INS. COUNSEL J. 612 (1961); Zeisel, Book Review, 8 STAN. L. REV. 730 (1956).

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.

In addition, the Project has provided an excellent, but all too rare, example of successful interprofessional cooperation. Doctors and lawyers, instead of bickering fruitlessly or merely talking about the need for cooperation, have worked together effectively in solving a common problem. And judges, instead of holding themselves aloof, have participated fully in the enterprise. The result has been better understanding among judges, lawyers and doctors, and mutual help. It is not too much to expect that the long-range effect will be increased public respect for both professions and increased public confidence in the administration of justice.¹⁰⁸

The results over the last decade corroborate this earlier report. The most recent comprehensive tabulation mirrors the New York experience over the eleven and one-half years ended June 30, 1964.¹⁰⁹

TABLE A

Item	New York County	Bronx County	Total
1. Case Referrals To Date	828	579	1407
Preference Referrals To Date	44	95	139
	872	674	1546
2. Resumed Conferences Pending	18	5	23
3. Cases Passed Upon At Resumed Conferences	699	405	1104
4. Cases Settled	595	422	1017
5. Transferred To Lower Court	17	10	27
6. Cases Tried	162	101	263
7. Cases In Which Examinations Were Held	836	641	1477
8. Cases In Which Examinations Are To Be Held	3	13	16
9. Cases Disposed Of Without Examinations	33	20	53

¹⁰⁸ SPECIAL COMMITTEE, *op. cit. supra* note 105, at 5.

¹⁰⁹ Letter From Leland Tolman, Director of Administration of the Courts, First Judicial Department, New York, and Carl Graziano, Administrative Assistant, Nov. 9, 1964.

TABLE B

(References to the Medical Report Office Jan. 1, 1964 to June 30, 1964.)

Item	New York County	Bronx County	Total
1. Pretrial	25	12	37
2. Trial Term	16	41	57
3. Preferences	0	10	10
4. Others	1	1	2
Totals	42	64	106

TABLE C

(References to Specialists on the Panel, Jan. 1, 1964 to June 30, 1964.)

Cases are sometimes required to go to more than one specialist.)

Item	New York County	Bronx County	Total
General Surgery	0	0	0
Plastic Surgery	0	0	0
Ophthalmology	4	3	7
Cardiovascular	2	5	8
Dermatology	0	0	0
Tuberculosis	0	1	1
Internal Medicine	0	0	0
Neurosurgery	10	6	16
Neurology	1	3	4
Psychiatry	0	0	0
Neuropsychiatry	5	4	9
Roentgenology	1	3	4
Orthopedics	12	32	43
Otolaryngology	3	3	6
Genitourinary	1	0	1
Obstetrics & Gynecology	0	1	1
Endocrinology	0	0	0
Allergy	1	0	1
General Dentistry	1	1	1
Tropical Medicine	0	0	0
Totals	41	62	102

Use of the panel has reportedly effected settlement in about seventy per cent of the cases in which it was used in the first department.¹¹⁰ It is true that the percentage of the cases referred to the medical office and ultimately tried to verdict is higher than is the percentage of all cases filed that go to verdict (usually between seven and ten per cent), but this does not detract from the significance of the settlement figures in cases that are referred. It must be remembered that these are the hard core, the most resistant to settlement, and the most persistent of all the cases on the calendar. When this fact is considered, the percentage which

¹¹⁰ N.Y. JUDICIAL CONFERENCE ANN. REP., LEG. DOC. NO. 90, at 169 (1964).

went to trial is remarkably low.

Financing of the project has saved the public more than it has cost. The special report originally estimated savings of \$2,250 for each trial; settlements have saved more than ten times the total amount spent for fees.¹¹¹ These figures take into account neither trial days saved through settlements during trial nor public savings effected through cutting down excessive claims against the city of New York, one of the major litigants in the court. The justices and the appropriating authorities estimate that, assuming very conservatively that cases settled would each take three trial days, the project saves substantially more than its cost.¹¹²

One very important feature of the plan is the provision which permits, but does not require, the trial justice or either party to call upon the medical expert to testify at the trial. This serves three primary ends. First, it provides for the judge and jury an impartial, expert, and informed factual basis for the formulation of final judgment on the extent of damages, thus aiding them to some extent in the difficult, technical job of reconciling conflicting expert opinions given by the partisan doctors for the opposing parties. Second, the very existence of the right, even though it is not exercised, has been responsible for many intangible and statistically immeasurable benefits. It serves to restrain partisan experts from presenting reports or, at the trial, misleading findings which they know or think can be publicly exposed on the witness stand by a respected member of the medical profession. Finally, the procedure is an intangible force for pre-trial settlement of the case. The plaintiff with an inflated claim or the defendant who denies all or any substantial damage when it clearly exists to some degree will be more truthful and reasonable at pretrial, if he has in his hands a neutral report on the injuries made by a highly respected practitioner chosen by the court on recommendation of responsible leaders of the medical profession, who, he knows, will testify at the trial. If this were not the understanding at pretrial, the value of the impartial expert would be greatly reduced.¹¹³

Based on this experience, it is the recent consensus among the judges of the first department that it would be in the interest of justice to extend the plan to those counties in New York

¹¹¹ SPECIAL COMMITTEE, *op. cit. supra* note 105, at 35.

¹¹² ALLEGHENY COUNTY (PA.) MEDICAL SOCIETY, MEDICAL-LEGAL COMMITTEE, RESEARCH AND INVESTIGATION INTO IMPARTIAL MEDICAL TESTIMONY PLANS 15 (1961).

¹¹³ N.Y. JUDICIAL CONFERENCE ANN. REP., LEG. DOC. NO. 94, at 7 (1959).

where such a medical panel is feasible.¹¹⁴ The basic idea of the New York Plan has spread to several other jurisdictions during the last decade.¹¹⁵

(b) *The Baltimore Plan*¹¹⁶

Baltimore adopted an analogous plan in 1955 under the aegis of Emory H. Niles, Chief Judge of the Supreme Bench of Baltimore. It differs from the New York Plan in four respects. First, the names of the doctors on the twenty-one panels (each panel consisting of three doctors) are neither kept secret nor published. Second, the plan is set in motion only upon request by a party. Third, a party's objection to any doctor named may motivate the judge, in his discretion, to replace that doctor with another. Finally, the cost is not borne by the public, but usually by the litigant calling the expert witness. The final word on use of the plan is left to the discretion of the judge. To encourage impartiality, the witness is not told which party is responsible for his appearance.

Initially, the plan was seldom employed. Its effectiveness has been limited because appointment of the impartial expert is dependent upon request by one of the litigants and upon the judge's discretion. Some of the judges have never used it. During the last few years, it has been helpful in aiding the medical fact-finding process, though its use has not increased substantially.¹¹⁷

(c) *The Philadelphia Plan*¹¹⁸

Through cooperation of the judges of the United States District Court and the Pennsylvania Medical Society,¹¹⁹ the "Phila-

¹¹⁴ N.Y. JUDICIAL CONFERENCE ANN. REP., LEG. DOC. NO. 91, at 90 (1963).

¹¹⁵ For references to sources outlining the spread of the idea throughout the United States, see KLEIN, JUDICIAL ADMINISTRATION AND THE LEGAL PROFESSION 393 (1963).

¹¹⁶ BALTIMORE SUPER. CT. GEN. R. PRAC. & P. 5-1 was devised in 1954 by a joint committee of the Maryland and Baltimore City Bar Associations and the State Medical Society.

¹¹⁷ Letter From Judge Emory H. Niles, Jan. 21, 1965. Judge Niles also emphasizes that the petition for use of the expert and the subsequent payment of the fee (never more than \$100.00) has been used most extensively by the defendant insurance companies. Plaintiffs do not utilize the procedure at all.

¹¹⁸ U.S. DIST. CT. (E.D. Pa.) LOCAL R. 22.

¹¹⁹ The medical society asked 170 experts to participate in this plan and 169 of them agreed to do so. MEDICAL-LEGAL COMMITTEE, *op. cit. supra* note 112, at 4.

delphia Federal" Plan became operative in 1958. Two features differ from the New York Plan. First, if there is objection to the first expert on the panel list, the doctor following him may be offered as an alternative. If counsel do not agree on the second expert, the judge then designates one of the two. Second, the doctor's fee is paid equally by the parties.¹²⁰

A report for the period ending September 8, 1964, regarding the 111 cases where applications have been made, reveals propitious results:¹²¹

1. Motion for appointment of doctor denied	9
2. Settled prior to appointment from the panel (The motion was denied in 6 cases due to delay in filing and the imminence of trial; the cases were subsequently settled.)	13
3. Case tried to verdict (In 15 of these, the verdict was consistent with the report of the neutral doctor; in the other 9, the jury's verdict was not consistent with the neutral doctor's report.)	24
4. Case submitted to jury (In 2 cases, the jury could not agree; the other 2 were settled during trial and juries were withdrawn.)	4
5. Case tried to verdict on the issue of damages (In 17 cases, there were plaintiff's verdicts; in 5 there were defendant's verdicts.)	22
6. Settlement reached after receipt of doctor's report (45 did not go to trial; 8 were settled during trial.)	53
7. Examination suggested by court rather than on motion by either party	4
8. Miscellaneous	4
9. Reports received and settlement discussions pending	2

Though the effect on court congestion has been negligible, the plan has been a substantial success in medical factfinding, medical testimony, and promotion of better understanding between the professions.¹²²

¹²⁰ See generally Comment, 32 TEMP. L.Q. 193, 200 (1959).

¹²¹ Letter From Judge Joseph S. Lord, III, United States District Court (E.D. Pa.), Nov. 17, 1964. The writer expresses gratitude to Judge Lord who, though not personally a proponent of the plan [see Lord, Book Review, 29 TEMP. L.Q. 473 (1956)], nevertheless expressed the opinion that the majority of the federal judges are satisfied with the progress of the Philadelphia Plan.

¹²² Van Dusen, *A United States District Judge's View of the Impartial Medical Expert System*, 32 F.R.D. 498 (1962).

(d) *The Chicago Plan*¹²³

The United States District Court judges in the Northern District of Illinois adopted a plan in 1959 virtually identical to the "Philadelphia Federal" Plan. The sole distinction is that the judge decides whether payment is to be made by one or both of the parties.

It is especially significant to note that the Illinois Supreme Court adopted the plan in 1961, providing for court-appointment of medical experts in the state courts. The Illinois State Medical Society is cooperating by establishing panels of experts to serve those courts, by reviewing the membership yearly, and by inquiring into the quality of the examinations, reports, and testimony of the panel members. In 1962, the State Medical Society, deeming impartial medical testimony "an important public service," established a \$5,000 fund for the payment of panel members. It now intends to appropriate another \$5,000.¹²⁴

The plan was utilized sixty-seven times during its first two years and eighteen times in 1964.¹²⁵ The Illinois State Medical Society is now collecting data, and indications are that their report will prove the plan is serving a useful purpose. The judges are unanimous in their enthusiasm for the plan.

(e) *The Los Angeles Plan*¹²⁶

This plan gives wide latitude to judicial discretion. First, the judge or either party may request examination by the neutral expert, but final decision in the matter is left to the judge. Second, if counsel for either party objects to the assignment of the expert, he is passed over and subsequent panel experts are considered until agreement is reached. At the trial, the judge again has discretion in allowing the expert to be called by the party originally requesting him. The plan originally prohibited

¹²³ U.S. DIST. CT. (N.D. Ill.) LOCAL R. 20, through cooperation of the Illinois State Medical Society and the Chicago Medical Society in conjunction with the federal judiciary. The superior and circuit courts of Illinois also adopted the plan. ILL. SUP. CT. R. 17-2.

¹²⁴ MEDICAL-LEGAL COMMITTEE, *op. cit. supra* note 112, at 11.

¹²⁵ Letter From Robert P. Steine, Chief Deputy Clerk, United States District Court (N.D. Ill.), Jan. 20, 1965.

¹²⁶ LOS ANGELES COUNTY SUPER. CT. R. 26, endorsed under CAL. CIV. PROC. CODE § 1871. The plan was established through cooperation of the Los Angeles County Medical Association and a committee of superior court justices.

the expert's court-appointment from being disclosed to the jury, unless counsel attempted "to impeach him by showing bias or prejudice." The rule was changed to allow disclosure of his court-appointment in all cases. Furthermore, he may be cross-examined by both sides or by the judge. Finally, the litigant originally requesting appointment pays all fees, unless the judge determines that the litigant is unable to pay, in which case county funds are used. The fee charged by the expert must conform to the scale established by the California Industrial Accident Commission.¹²⁷

Originally, the plan contained a unique and rather limiting feature providing that every case involving requests for the court-appointed expert had to be transferred to the chief judge for handling. This apparently is no longer the rule. The plan is credited with having stimulated settlement in numerous cases where the judge indicated that impartial examinations appeared to be needed. Judge Reginald I. Boudier states that during the first two years not a single case involving appointment went to trial.¹²⁸ Presiding Judge Kenneth N. Chantry reports that the plan is currently receiving extensive use, though no statistics are available.¹²⁹

(f) *The Cleveland Plan*¹³⁰

Under this plan, adopted in 1959, the judge invokes the panel only if the parties so agree. A panel of three experts conducts examinations at the request of the pretrial judge. Compensation is based upon a fee schedule established by the Academy of Medicine with court approval. A unique feature requires the parties' written stipulation that, if the case is tried, neither will mention that court-appointed experts participated during the pretrial period. This is the only operating plan which forbids identification of the court-appointed expert if he is called to testify.

¹²⁷ MEDICAL-LEGAL COMMITTEE, *op. cit. supra* note 112, at 9.

¹²⁸ *Id.* at 13.

¹²⁹ Letter From Presiding Judge Kenneth N. Chantry, Superior Court, Los Angeles, California, Nov. 27, 1964, explains that the superior court is the largest court of its kind. No statistics on the use of court-appointed experts have been kept because "it is obvious that it would require a monumental task, involving examination, investigation and study of thousands of cases tried over a period of five years, to attempt to ascertain and compile such statistics."

¹³⁰ CUYAHOGA COUNTY CT. C.P. R. 21(A), 21(B), established in cooperation with the Cleveland Academy of Medicine.

Results point to the weakness of the plan. More than a year after operation commenced, only four orders of the court had been issued.¹³¹ The plan is now a controversial issue among lawyers and doctors in Cleveland. No requests for court-appointed experts have been made in over a year, and the plan has apparently fallen into desuetude.¹³² Restriction to pretrial use, by refusal to identify panel members as such to the trial jury, has seriously limited the plan's effectiveness. In addition, the use of three independent examinations and the requirement that counsel for both parties consent to use of the plan have proven cumbersome.

(g) *The Pittsburgh Plan*¹³³

Since 1962, a plan virtually identical to the "Philadelphia Federal" Plan has operated in both the federal and state courts in the Pittsburgh area. It was activated after intensive research by the Medical-Legal Committee of the Allegheny County Medical Society. In over two years of operation, twenty-eight cases have been referred to the medical society's panel. Though no further statistics have as yet been compiled, recent reports indicate that the doctors have been most cooperative in serving on the panels, and the courts are well satisfied with its success in promoting settlements.¹³⁴

(h) *Summary of plans presently existing*

Several observations are evident upon close examination of the court-appointed expert plans.¹³⁵ The plans are used in a relatively small number of the total cases processed by a court. However, they are applied to those "hard core" cases which otherwise offer the least hope of settlement. These are the cases which would otherwise consume much of the time and resources of the courts.

Ideally, all cases in which medical testimony is widely divergent should be identified in the pretrial stage, and impartial ex-

¹³¹ The Cleveland Press, Nov. 30, 1960.

¹³² Letter From Chief Justice Arthur Day, Court of Common Pleas of Cuyahoga County, Ohio, Jan. 21, 1965.

¹³³ U.S. DIST. CT. (W.D. Pa.) LOCAL R. 5-III. The same rule was adopted by the Court of Common Pleas of Pittsburgh, in both instances through cooperation with the Allegheny Medical Society.

¹³⁴ Letter From Frederic W. Fagler, Executive Secretary of the Allegheny County Medical Society, Nov. 13, 1964.

¹³⁵ MEDICAL-LEGAL COMMITTEE, *op. cit. supra* note 112, at 13.

amination ordered promptly. Remarkable proof of the effectiveness of the plans is seen, however, in the substantial number of cases which have been settled after impartial examinations had been requested at a later point in the proceedings. The New York figures, for example, substantiate this proposition.

Perhaps the greatest contribution of the plans is their intangible effect on cases where they are *not* used. The influence of the plans may well lead to less divergence in the medical contentions of the parties. More reasonable medical conclusions are encouraged by the knowledge that a neutral factfinding apparatus is available.

The plans have generated great enthusiasm in the medical profession in most jurisdictions. Support and cooperation have been most evident in those most directly involved with the operation of the plans. An active interest has been stimulated in other jurisdictions presently considering adoption of impartial medical testimony projects.¹³⁶

V. THE CASE AGAINST THE COURT-APPOINTED EXPERT SYSTEM

The three arguments against the plan may be summarized as follows: (1) certain types of medical conflicts are currently beyond a reasonably certain medical resolution; (2) a totally qualified and impartial expert is inherently unattainable; and (3) the panel system subverts the adversary system through judicial embroilment in the controversy and through conditioning the jury to uncritical acceptance of the expert's opinion as medical fact.

A. CERTAIN TYPES OF MEDICAL CONFLICTS ARE CURRENTLY BEYOND A REASONABLY CERTAIN MEDICAL RESOLUTION

This argument premises that medicine is not an exact science. Many areas in medicine contain internal divisions of opinion

¹³⁶ San Francisco, Minneapolis, and the State of Wisconsin have either initiated or are presently considering such a plan. See Comment, 47 MARQ. L. REV. 522 (1964), which was specifically prepared for the Judicial Council of the State of Wisconsin at the request of the Wisconsin Supreme Court. The superior and county courts in Essex, Morris, Union, and Warren Counties, New Jersey, adopted a plan in 1961 on an experimental basis. N.J. SUP. CT. NEW PRAC. R. 4:25 A-1 to 4:25 A-114, effective September 11, 1961. Recent reports indicate that plans are also being considered in Massachusetts, Minnesota, Missouri, New Jersey, and the District of Columbia.

where "schools of thought" and different evaluation techniques make honest differences of opinion a normal state of affairs.¹³⁷ The finest specialists are unable to bridge these schisms with reasonable medical certainty. In this regard, an Omaha defense attorney remarks:

Where there is an honest dispute between doctors, an impartial doctor would not be of considerable help. As a practical matter, I wonder if it would not result in having two against one rather than one against one so far as medical testimony is concerned.

An outstate attorney observes: "The administration of justice would not be improved by the possibility of adding still a third opinion and thus injecting an extraneous issue into the litigation." A Grand Island attorney warns: "Assuming the parties call their own medical witnesses, adding the uncertainty of panel testimony would only add to the total confusion of the conflicting medical testimony." A Lincoln attorney forecasts the ensuing situation:

Parties would continue the practice of getting independent evaluation, producing their own experts and attempting to prevail against the court-appointed expert. In other words, the battle of the expert with the spectacle of knowledgeable people substantially varying in their opinions and evaluation would nonetheless continue.

Many fear that positive harm would result from introducing the court-appointed expert on the grounds that the case would then be judged by the fortuitous circumstance of his particular predilection to one school or technique. A doctor's individual background and all of his education, training, and experience have contributed to his total concept of medicine. They have made him "partial" toward personal conclusions and theories which differ in varying degrees from those of other doctors. An Omaha plaintiff's lawyer states:

The evaluation technique of many doctors, especially on partial-permanent disability questions, is sincere but highly divergent. . . . If the examination were, by the luck of the draw, conducted by a doctor whose evaluations tend to be highly liberal, the defense would be extremely unhappy. In the reverse situation, the plaintiff's attorney would be unhappy.

Chief Justice White capsules the ultimate objection:

Bias, prejudice and personal philosophy about the elements of pain and suffering would enter into the picture of appointment of the expert. Bitterness would be apt to develop. Lawyers would be producing experts battling two adversaries.¹³⁸

¹³⁷ Botein, *Impartial Medical Testimony*, 328 Annals 75 (1960).

¹³⁸ Letter From Chief Justice Paul W. White, Nebraska Supreme Court, Nov. 21, 1964. A western Nebraska judge cites an example: "The

The counterargument first emphasizes the New York and Chicago experiences, where cases involving "schools of thought" are hardly numerous.¹³⁹ Furthermore, this criticism of panel testimony in areas where the medical profession is not in unanimity assumes too much. Proponents of the argument think in terms of two evenly balanced schools of thought, instances of which are in actuality few and far between. For example, the overwhelming weight of competent medical authority disdains the view that cancer can be caused by a single blow.¹⁴⁰ No knowledgeable expert in this field now holds the view that such accidents either do or can cause a malignant tumor, yet there is an "opposite school" of thought. To ban the court-appointed expert from the legal arena here deprives the fact finder of an objective explanation of what modern medical thought on this particular medical subject really is. Such gross exaggerations and distortions are not unusual in modern courtrooms, and yet the lawyer seeking to establish his 100 to 1 shot will cry aloud that it is wrong to appoint an impartial expert because he might belong to the "opposite school." In these situations, the two-school argument is the "brain-child of lawyer-advocates" and has no sound basis in competent medical thought.¹⁴¹ Use of the court-appointed expert here would clip the wings of clever advocacy.

panel's opinion would not necessarily be more sound, since honest differences of opinion can and do occur. Recently an orthopedist mentioned in testimony that in the course of an exploratory operation to ascertain whether a disc was herniated, he and his consultant disagreed as to whether the disc was actually herniated. A panel's conclusion certainly would not be better. If both parties happened to disagree with the panel's conclusions and were permitted to cross-examine and to contradict, there would then be much more lengthy cross-examination and three sets of experts."

¹³⁹ MEDICAL-LEGAL COMMITTEE, *op. cit. supra* note 112, at 17.

¹⁴⁰ Griffin, *Impartial Medical Testimony: A Trial Lawyer in Favor*, 34 TEMP. L.Q. 402 (1961).

¹⁴¹ *Id.* at 408 n.6. The author cites outlandish examples where counsel has sought to correlate accidents and disability: "In addition to cases involving strict mechanical injuries, the writer has taken part in trials where accidents were said to have caused hypothyroidism, hyperthyroidism, pulmonary emphysema, diabetes, cancer of the liver, cancer of the rectum, lung cancer, coronary occlusion, myocardial infarct, emboli lodged in internal auditory artery, hernia, epilepsy, impotence, alcoholism, atrophy of brain and spinal cord, schizophrenia, paranoia, peptic ulcer, aneurysm of Circle of Willis, dermatitis, hypertension, and illitis, to say nothing of those common personality disorders seen daily in court, anxiety neurosis and conversion hysteria. If proof of causation is seemingly impossible, there is always aggravation."

In areas of legitimately differing evaluation techniques, where the variances are not gaping, the judge can always screen the use of court-appointed experts.¹⁴² However, if appointment should occur in cases where there is room for disagreement, the panel expert would undoubtedly be the first to testify that differing schools or techniques legitimately exist, to state the one to which he subscribes, and to explain the other. There is no reason why opposing counsel cannot ask the panel expert to explain the controversy involved, thus bringing genuine disagreement to the attention of the jury.¹⁴³ Finally, as an Omaha attorney suggests, the right of panel members to file "minority reports" would certainly identify the area as one open to authentic dispute.

B. A TOTALLY QUALIFIED AND IMPARTIAL EXPERT
IS INHERENTLY UNATTAINABLE

This argument suggests that even the most scrupulously objective physician might be wrong. In addition to the "he-might-be-wrong" approach, the very nature of the plan makes it unlikely that an opinion will be based on *all* the facts, since the court-appointed expert will not be brought into the picture until several months after the injury. A Lincoln attorney states: "Many injuries take some time to materialize and a 'one shot' examination of the patient would in many cases not enable the expert panel to arrive at a fair and just determination." An Omaha attorney points out:

[T]he treating physician has wider knowledge of the patient's background and a better realization of the effect of the injury on his patient. A panel necessarily would not have the realistic day to day contact that the attending physician has with pain and suffering.

A Lincoln attorney states:

A court-appointed expert would probably not have the advantage of observing the patient until an advanced stage of litigation. This would entail the problem that a court-appointed doctor may

¹⁴² Steuer, *The Judge Looks at the Impartial Doctor*, 26 POSTGRADUATE MEDICINE A-52 (Supp. 1959), in MEDICAL-LEGAL COMMITTEE, *op. cit. supra* note 112. The report notes a remark by Justice Steuer of New York to the effect that, if he realized in advance there were two schools of thought regarding the alleged injuries in a case, he would not call an impartial expert, since he is not interested in a discussion of the philosophy of basic medical problems.

¹⁴³ An Omaha physician notes that, even in difficult areas, such as whiplash, the panel would produce additional clarity. "Such a panel would help to distinguish between cases that have merit and those that do not."

not be able to make a fair evaluation in certain cases, not having the benefit of early observation of the injured party.

The counterargument replies that the mere fact that a panel expert might be wrong does not itself prove anything. We are dealing with expediency, not absolute certainty. As F. Hastings Griffin, Jr., states:

If the proponents of this approach were able to support either the proposition that an impartial will more often be wrong than right or the proposition that juries without impartialists to help them have a better chance of deciding correctly than juries with impartialists, then they would have something. But this writer has not seen anyone make a real try to support either of those propositions.¹⁴⁴

The reply to the argument that examination would be delayed until after pretrial merely emphasizes the fact that present defense examinations are often delayed so that the physician has no opportunity to measure pain and suffering. On balance, this is not a strong argument against the use of impartial panels, for there is no reason that the original attending physician cannot be called to fill in this information.

Even more basic, however, is the contention that "impartiality" is unobtainable.¹⁴⁵ A Lincoln orthopedist expresses the argument:

Theoretically an unbiased pontification should bring about a quick and proper solution to this problem. However, this is probably as mythical as the concept of "justice" itself. It is impossible to get a completely unbiased opinion. In fact, it has been said with considerable wisdom that an unbiased opinion isn't worth very much. By the very nature of the criteria for choosing the panel, a bias is introduced into the system. The proposed medical experts would all be taken from a certain stratum of society. They would almost undoubtedly come from the well-to-do. If they were private practitioners, they might be conservative in philosophy and be inclined to favor an insurance company over a plaintiff. They conceivably might be biased against the concept of "liability without fault." If the proposed expert witness were taken from the staff of a medical school he might be more liberal and possibly more inclined to favor a plaintiff rather than an insurance company. I may exaggerate, but these biases will be present to a greater or lesser degree in each person according to his personal orientation. These biases may also increase after a period of service by court-appointment.

¹⁴⁴ Griffin, *supra* note 140, at 407.

¹⁴⁵ Berry, *Impartial Medical Testimony*, 35 OKLA. B.J. 561 (1964): "[T]he ideal result being sought in the plan is *utterly unobtainable*. That impartial Utopian individual, from whose person and position must come this Impartial Medical Testimony, does not—may not—absolutely cannot—exist. *There simply ain't no such animal!*"

A Lincoln attorney emphasizes that "no matter how theoretically independent the expert may be, he is always influenced by his own prejudice, predilection and peculiar background." The stigma of partisanship would remain because, as an Omaha attorney states, "it is impossible to take the human element out of human affairs."

The blade conceivably could cut both ways—liberally for plaintiffs, or conservatively for defendants. A Scottsbluff attorney asserts the former:

[A]pparently unconsciously, doctors often are influenced by their impression of the man they are examining wholly aside from the objective symptoms they may find. If they like the patient, they will give more weight to his subjective symptoms than if not.

Others object that a conservative bias would develop. A Kearney attorney feels: "The panel of doctors would in all probability be conditioned to be conservative and defense minded by virtue of long standing procedures of insurance companies in defense of claims." A Norfolk attorney fears a "snap, indifferent attitude" on the part of the panel. An Omaha attorney elaborates:

It should be kept in mind that any panel of doctors [summoned] by the court would undoubtedly include physicians and surgeons on direct retainers with the large corporations such as the railroads, utility companies, etc., and who in the main would also be examiners for the life insurance companies. Under these conditions I doubt very much whether you could find very many people who would be willing to feel confident that they would obtain an unprejudiced opinion even though the examiner might feel that he "puts forth every effort to do so."

Even if an expert panel were initially impartial, many apprehend adverse long run tendencies. A Lincoln attorney warns that continuous examinations would tend "to harden the panel and after a while they would tend to minimize the extent of the injury due to the nature of their work."¹⁴⁸ An Omaha attorney predicts:

From my experience I doubt that a panel of physicians could, after receiving the volume of cases now flowing through our courts, remain completely neutral. My real feeling is that a panel of such experts would initially favor a plaintiff in a personal injury action. However, I am positive that after a flood of matters was submitted to them, they would soon find themselves feeling

¹⁴⁸ A Plattsmouth attorney: "Doctors, and I think lawyers as well, get what I call 'case hardened' and deal with so many cases of one type that the *human element* is lost. A broken leg becomes so common that it is looked upon with such casualness as a 'simple fracture.' Medicine, although advanced, is prone to label as malingering anything that cannot be diagnosed."

that everyone was litigation-minded and perhaps, even unknowingly, become partial to the defendants It might work initially, but over a long haul would not prove satisfactory from either litigant's point of view.

A Scottsbluff attorney warns against the obstacle faced by doctors who have been conditioned by court appearances:

I do not believe doctors can obtain a dispassionate view of these matters or a judicial attitude overnight. We see lawyers who become judges take a long time to get a true judicial attitude and give up their approach as an advocate. . . . The difference between the mental attitude of an advocate and a Judge is necessary, but hard to obtain. A doctor who does not do this regularly would probably continue to have an advocate's approach.

The counterargument first directs attention to the empirical results of the New York and Philadelphia plans.¹⁴⁷ Panel testimony has certainly not proved to be a one-way street favoring either side of the counsel table. The court-appointed expert has often discovered injuries not seen by the attending physician which have helped to increase the verdict. Secondly, even if the argument is taken at face value, "it is irrelevant to the issues in this discussion. Impartiality, within the meaning of the plan, is complete lack of identification with the parties in a lawsuit."¹⁴⁸ If the impartial medical expert meets this test and is of the caliber that he must be to become a member of a panel, his examination, report, and testimony will serve the purpose intended in the plan.

In other words, the *conscious* bias stemming from selection by and financial attachment to one party is completely eliminated. The fact that *unconscious* or built-in bias cannot necessarily be eliminated is of no great concern. Safeguards can easily be instituted to guard against undue influence from doctors previously identified with one side. Several Omaha lawyers suggest that to mitigate the likelihood of drawing a doctor with an honest bias, the panel might be selected from a list of five or seven, each party having the right to strike a certain number. This would resemble a *voir dire* for the panel members.

A professor at the University of Nebraska College of Law summarizes in one sentence the basic strength of the counterargument: "[O]n balance it would be an improvement." The problem here is not whether the court-appointed panel system will produce absolute justice. Nothing yet devised will do that. "The problem . . . is whether the plan will improve the chances

¹⁴⁷ See tables in text accompanying notes 108 & 121 *supra*.

¹⁴⁸ MEDICAL-LEGAL COMMITTEE, *op. cit. supra* note 112, at 17.

of reaching correct and therefore just findings of fact on medical questions. To state the problem is to answer it."¹⁴⁹

C. THE PANEL SYSTEM SUBVERTS THE ADVERSARY SYSTEM THROUGH JUDICIAL EMBROILMENT IN THE CONTROVERSY AND THROUGH CONDITIONING THE JURY TO UNCITICAL ACCEPTANCE OF THE EXPERT'S OPINION AS MEDICAL FACT

The judicial role of nonadvocacy is a deep-rooted tradition. In this regard, the argument is occasionally advanced that the panel system pulls the *judiciary* into the adversary arena in that the judge, having selected a witness, becomes "interested" in the case and, therefore, is no longer qualified to impartially conduct the proceedings.

This argument simply does not square with the operative facts. Departure from the concept of judicial detachment does not occur, because the judge himself does not select the panel member.¹⁵⁰ The judge merely calls upon the medical society to furnish an expert in the medical specialty involved. Under a confidential system, the judge knows neither the identity of the panel member in advance of his request nor the details of the expert's qualifications, until he receives the report or accepts the testimony.¹⁵¹

The gravest objections to the panel system have been offered by those who fear for the integrity of our adversary system of deciding ultimate issues of fact. One aspect of this fear is the possibility that the jury will look upon the court-appointed expert as wearing a cloak of infallibility and will blindly accept his opinion as the ultimate medical fact. An Omaha plaintiff's attorney states the argument:

It is the duty and obligation of the bar as well as the bench of this country to safeguard zealously the preservation of the right of trial by jury and to be acutely aware as to any move which would ultimately make inroads upon the jury's prerogative of deciding the fact issues in every case. . . . The appointment of a medical expert or panel would result in emphasis being placed upon the expert's court-appointed status to a point that would virtually make the court-appointed doctors the fact judges of medical issues.

An outstate attorney asserts: "This is tantamount to making the judicially designated expert the *sole judge* of the issue in con-

¹⁴⁹ Griffin, *supra* note 140, at 406.

¹⁵⁰ Polsky, *Expert Testimony: Problems in Jurisprudence*, 34 TEMP. L.Q. 357, 364 (1961).

¹⁵¹ MEDICAL-LEGAL COMMITTEE, *op. cit. supra* note 112, at 20.

troversty and taking the administration of justice and the trial of cases out of the hands of lawyers and placing it within the medical profession." His testimony will "exude an almost ineradicable odor of sanctity."¹⁵² The editor of *NACCA Law Journal* quoted with approval the appraisal of a leading authority: "[I]t is unfair to pin a badge of honor on one witness as having the full confidence of the court, and withholding it from another, patently labelling him as undeserving of confidence."¹⁵³ A legal educator criticizes the procedure as an attempt to equate certainty and competency with truth:

The authority role of the expert witness who has been identified to jurors as a member of a judicially selected impartial medical expert panel, has been substantially enlarged. In the context of the courtroom setting, such identification may too readily be taken to mean judicial certification on two counts: (a) professional ability as determined by judicial examination, and (b) strict impartiality of the witness.¹⁵⁴

Chief Justice White articulates the crucial distinction:

We are trying to adapt into the adversary system one of the devices that is many times an integral part of decision by administrative boards. Close cooperation and consultation between the experts on administrative boards in reaching a joint decision is probably an important thing when this method for determination of controversies is used. This will be either entirely or partially absent under an expert appointed system. We are dealing here with judicial procedure in which it is fundamental that the adversary system should have full play.¹⁵⁵

In a broader context, critics claim that the expert's usurpation of the jury's prerogative is a dangerous step toward erosion of the

¹⁵² Lord, Book Review, 29 TEMP. L.Q. 472, 474 (1956).

¹⁵³ Lambert, *Impartial Medical Testimony: A New Audit*, 20 NACCA L.J. 25, 28 (1957). NACCA, which changed its name to American Trial Lawyers Association at the 1964 fall convention, is the only notable organized group to oppose the panel systems. In appraising this opposition, see SHARTEL & PLANT, *THE LAW OF MEDICAL PRACTICE* 339 (1959): "[O]ne should bear in mind two things: (a) The NACCA group represents the plaintiffs' and claimants' point of view, and (b) juries tend to favor plaintiffs rather than defendants and any rule or law or procedure which curbs the free rein of the jury will always be opposed by the representatives of the plaintiff's side of the table."

¹⁵⁴ Polsky, *supra* note 150, at 362. See also Levy, *Impartial Medical Testimony—Revisited*, 34 TEMP. L.Q. 416, 426 (1961): "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, the medical formulation will be treated almost as a matter of law and that will be the end of the matter."

¹⁵⁵ See note 138 *supra*.

entire jury structure in our courts. The panel system is a formula attempt at "slot machine justice" which is no substitute for twelve men "tried and true." An Omaha attorney states, "If one carries the 'panel of experts' idea too far, then the next logical step is not to waste the time of highly qualified experts by trying to have them 'prove' their excellence to a jury of twelve average men" A North Platte attorney warns against roads headed toward "dishing out justice": "Should we not then also be required to have a so-called 'panel of experts' out of the total Bar so that trials involving personal injury cases may only be conducted by lawyers selected from such a panel? What does this do to the client's right to seek his own counsel?" In short, many fear that implementation of the panel system would open the door to further encroachments on the jury's function as the trier of fact:

In a situation such as this, where the technical harm lies hidden deep under a cover of what might appear to be *expediency, and the improvement of our plan of trial*, it is necessary that the judges and lawyers . . . be vigilant to see that the wrong path is not taken up, and followed away. First an Impartial Doctor. Then an Impartial Traffic Expert. Then an Impartial Safety Engineer. Don't you see where the thing, that you and I call "a fact question for the jury," is headed?¹⁵⁶

The counterargument first notes that the concept of the medical panel has been upheld against constitutional objections.¹⁵⁷ The plan does not contravene the constitutionally guaranteed right to trial by jury, because the seventh amendment is not a rigid command that old forms of practice and procedure be retained. Long ago, Mr. Justice Brandeis expressed the flexibility of that amendment:

It does not prohibit the introduction of new methods for determining what facts are actually in issue, nor does it prohibit the introduction of new rules of evidence. Changes in these may be made. New devices may be used to adapt the ancient institution to present needs and to make of it an efficient instrument in the administration of justice.¹⁵⁸

¹⁵⁶ Berry, *supra* note 145, at 565.

¹⁵⁷ The "Philadelphia Federal" Plan was upheld in *Hankinson v. Van Dusen*, No. 12,740, 3d Cir., Oct. 21, 1958, *cert. denied*, 359 U.S. 925 (1959) (order denying petition which sought to revoke order appointing doctor under Local Rule 22). See also *Porta v. Pennsylvania R.R.*, Civ. No. 21,293, E.D. Pa., *aff'd per curiam*, 272 F.2d 396 (3d Cir. 1959). The grounds of challenge were: (1) invalid exercise of the court's rule-making power; (2) denial of due process in imposing costs and fees on plaintiff; (3) tendency of jury to attribute quasi-judicial status to the impartial expert at trial; (4) medical witnesses cannot de facto be impartial.

¹⁵⁸ *Ex parte Peterson*, 253 U.S. 300, 309 (1920).

Second, it is argued that the panel procedure not only works within the spirit of the adversary process but actually strengthens that process by exposing more fully all the medical facts for evaluation by the jury and judge.¹⁵⁹ This argument stresses the successful experience with discovery procedures, which also remove some facets of litigation from the adversary process. "The Plan is essentially a further extension of Discovery Proceedings. The use of a Court-appointed expert . . . adds an additional skill or aid to [the] . . . fact-finding function"¹⁶⁰ It enables the court and jury to more accurately evaluate the facts within the essential framework of the adversary proceeding. The panel expert's only function is to give medical testimony in keeping with scientific truths, and it would seem that the court and jury should have the opportunity to hear all such testimony.

Third, all of the traditional safeguards are still present to insure the full rights of the adversaries. Parties may still call their own witnesses, and the court-appointed expert is still subject to cross-examination, "the greatest legal engine ever invented for the discovery of truth." On the other hand, the claim that the right of cross-examination still exists has been said to "ignore the litigative facts of life"¹⁶¹ or, as a Lincoln orthopedist explains, "The effect of court-appointment will not be overcome by cross-examination because it will be very difficult to impugn the integrity of a witness following his appointment by the court." But the contention that a lawyer cannot effectively cross-examine a panel expert is fiction, not fact:

The fact is that with the arrival of the impartial witness there has returned to the trial arena the *art* of cross-examination. . . .

Cross-examination has two basic approaches, the attack on the merits and the collateral attack. Little mileage can be made with the latter when the lawyer is examining a court-appointed expert. . . .

. . . .

The important thing is that a carefully conceived cross-examination, capitalizing on the impartial's objectivity, can serve the

¹⁵⁹ MEDICAL-LEGAL COMMITTEE, *op. cit. supra* note 112, at 19. See also Comment, 51 NW. U.L. REV. 761 (1957).

¹⁶⁰ Address by G. C. A. Anderson to the Section of Judicial Administration, American Bar Association, Aug. 26, 1956, in MEDICAL-LEGAL COMMITTEE, *op. cit. supra* note 112, at 28.

¹⁶¹ Levy, *Impartial Medical Testimony*, 30 PA. B.A.Q. 348, 358 (1959): "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."

purpose history has ascribed to our system, the bringing out of the truth. . . .

Upon the merits of a case cross-examination of the impartial can be helpful and effective, helpful in discovering the truth and effective when compared with cross-examination of the professional who spends his life in the witness box.¹⁶²

A return to cross-examination on the merits would abolish most of the sparring between doctor and cross-examiner which is so distasteful to the medical profession and would remove much of the element of chance from the litigation. Far-fetched theories would be quickly discredited, and a greater burden would be placed upon trial counsel to be well informed about current medical knowledge concerning the problem at issue.

Proper instruction by the court is an additional safeguard to the rights of the parties. Under the plan, the court would instruct the jury that the testimony of the court-appointed expert is to be considered together with that of all other experts and that the jury alone is the trier of the ultimate facts. Since those who object to the expert panel as an encroachment upon the jury's prerogatives must presumably do so because of a sincere faith in the integrity and reliability of juries, they could surely harbor no doubt that the jury would do exactly as the bench instructed. They cannot doubt that the jury would judge all experts on the merits, not because one talks more smoothly or because another is "cloaked in the exalted robe of the court."

Concealment of the expert's court-appointed status from the jury has been tried, but has been deemed neither wise nor successful.¹⁶³ The same detriment applies to limiting the function of the court-appointed expert to pretrial proceedings. If a panel of three or more doctors is used, the right to file minority reports would assure an open forum for the exchange of opinions.

Finally, the results in other jurisdictions should be noted. The New York and Philadelphia experiences particularly emphasize the fact that juries have not been led down a one-way street by the testimony of court-appointed experts.¹⁶⁴ Numerous ver-

¹⁶² Griffin, *supra* note 140, at 412.

¹⁶³ This is not deemed wise, however, on the basis of the Cleveland experience. Also, the fact of court-appointment could undoubtedly be conveyed to the jury in numerous ways by counsel.

¹⁶⁴ ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK, SPECIAL COMMITTEE ON MEDICAL EXPERT TESTIMONY PROJECT, IMPARTIAL MEDICAL TESTIMONY 34 (1956). See also Philadelphia Report, text accompanying note 121 *supra*, where nine of the twenty-four verdicts returned were not consistent with the neutral doctor's testimony.

dicts have mirrored total rejection of the panel expert's opinion. *Thus, there is little evidence to sustain a conclusion that the expert's testimony will prevail solely because of its source and totally apart from its merit.*

VI. THE PRACTICABILITY OF A NEBRASKA PLAN

Although the majority of trial attorneys across Nebraska approve of the basic idea of a Nebraska Plan, many express doubt concerning its feasibility. A Lincoln attorney summarizes this view:

What is proposed, while admittedly desirable, is probably too idealistic to be practical. . . . To adopt the suggested change I am afraid would put us in about the same position of the surgeon who reported a successful operation, but the patient died.¹⁶⁵

Examination of the specific prerequisites to the implementation of a Nebraska Plan will allow insight into the validity of this prediction. The successful inauguration and operation of a supreme court rule for the entire state, or for a local district rule, depends primarily upon three factors: (1) the selection of cases for reference to the panel; (2) the selection and cooperation of doctors; and (3) the provision of funds to finance the procedure.

A. THE SELECTION OF CASES FOR REFERENCE TO THE PANEL—THE PROVINCE OF THE JUDGE

A Beatrice attorney remarks that "if limited to cases in the *discretion of the judge*, the plan might be very effective." Under this approach, the role of the judge is to decide which cases warrant panel examination.¹⁶⁶ The attitude of the judiciary, of course, would play a leading role in the success of the project. The statistical vote and comments of the Nebraska district judges,

¹⁶⁵ An Omaha attorney: "In principle the thought is wonderful, but in practice I am fearful that it would not work." A North Platte attorney: "In principle I wholeheartedly agree with an impartial court-appointed medical panel theory. In practice, it will be a tedious, time consuming and difficult project to achieve."

¹⁶⁶ A groundwork in custom already exists for such referrals. An Omaha attorney: "[T]he defendant has a right to an examination. Sometimes the plaintiff will not agree to the defendant's choice of doctor. Then the matter is referred to the court, who then selects a doctor So you see, we do not end up very far from the suggested practice." A Grand Island attorney: "After hearing in a recent case, great conflict developed. I suggested to the court and the other attorney that we have an examination by an expert picked by the court. This was done and settlement was made on a basis of the court-appointed expert. It is, however, unusual for plaintiff and court to agree to such a move and also unusual for the plaintiff to accept the findings."

and particularly those in the Lincoln-Omaha area (where no negative votes were cast), indicates great willingness to utilize a panel system in cases where expert medical testimony is in serious conflict.

The decision as to whether a case is to be referred to the panel should be made sufficiently early in the proceeding to permit accurate appraisal of the medical facts and at the same time facilitate settlement before trial. An appropriate point in time might be the pretrial conference. By the time of the pretrial conference, disputes have usually reached a condition of relative maturity, so that the true extent of physical injury and its probable permanence can be accurately determined. Yet the event is not so long passed, nor the positions of the parties so firmly fixed, that impartial examination will not have a settling effect on opposing claims regarding the extent of the damages. Thus, during pretrial, with the lawyers for both sides before him, the issues clearly defined by the pleadings, and the medical reports of the doctors for both parties in his hands, the judge would decide whether the case was one of such sharp divergence of medical views as to justify reference to the panel. *Consent of the lawyers should not be required*, but requests for the panel should be encouraged. Once the panel has been invoked, the trial judge or either party should be permitted to call upon the medical expert to testify at the trial.

B. THE SELECTION AND COOPERATION OF A SUFFICIENT NUMBER OF QUALIFIED DOCTORS TO CONSTITUTE THE PANEL—THE ROLE OF THE MEDICAL SOCIETIES

The success of such a project is obviously dependent upon the existence and cooperation of the experts which it professes to provide. The task of selecting these experts should be entrusted to the medical profession itself. The experience in other jurisdictions¹⁶⁷ indicates that doctors of high calibre are willing, as a public and professional duty, to place their services at the court's disposal. The poll of Nebraska's leading specialists overwhelmingly confirms the existence of this cooperative attitude among doctors in all specialties represented.

(1) Omaha-Lincoln area

The existence of this two-city complex would lend itself readily to the implementation of a workable panel system, although

¹⁶⁷ See New York, Philadelphia and Chicago results, text accompanying notes 111, 119 & 124 *supra*.

it would necessarily be on a smaller scale than its metropolitan prototypes, with fewer physicians assigned to the roster for each specialized panel.¹⁶⁸ Once the local medical academies and societies have selected the names, tenure should be limited to assure the system new blood and to avoid undue burden on a few doctors. An Omaha orthopedist points out that "this area with two medical schools and their faculties would seem very suitable for this step." An Omaha defense attorney agrees:

I feel there would be cooperation, for in the metropolitan Omaha area we do not, as such, have a statutory county coroner. . . . Therefore, Nebraska Medical School, Creighton Medical School, Douglas County Hospital, etc., furnish a medical coroner on a rotation basis to actually perform autopsies and the like. They are therefore conditioned and should be willing to furnish medical experts for the purpose.

Over seventy-five per cent of the attorneys in Omaha and Lincoln believed that local medical groups would cooperate.¹⁶⁹ Over ninety-seven per cent of all the specialists polled concurred.¹⁷⁰ The acceptance was so enthusiastic in some medical quarters that many doctors went on to advocate extensions of the panel system.¹⁷¹ A Lincoln orthopedist summarizes the view of the medi-

¹⁶⁸ A Lincoln attorney: "We are in a community of 130,000 people, and there are two orthopedic clinics. In addition to this we have only two other independent doctors. Thus, as a practical matter, it would be impossible to have such a system." But certainly the manpower resources of both cities would be more than ample to furnish sufficient qualified experts on a rotating basis.

¹⁶⁹ A strong dissent was voiced by an Omaha attorney: "I doubt very much that the top medical men in the communities would be intrigued with the idea of serving on such a panel. They are so busy and making so much money that even at a cost of between \$100 and \$150 for an appearance of an hour or less in court, they are reluctant to appear because they can make more money in the operating rooms or in consultation. I feel, therefore, that the men who would consent to such service might not, perhaps, be the top men in the fields."

¹⁷⁰ On the other hand, the dissenting opinion of a Lincoln physician: "It would be difficult to get local medical groups to cooperate. Most M.D.s do medico-legal work because they want to, and it would be hard to get other men to go to court."

¹⁷¹ An Omaha orthopedist: "I would like to see all cases studied by such a panel prior to or instead of trial." An Omaha psychiatrist: "In addition to service as an examiner and witness, a specialist could serve as consultant to the court in some cases and also to the lawyers, advising as to types of investigation which are necessary, etc." A Lincoln orthopedist: "A legal medical unit composed of two or three judges or people trained in legal work should be established to set up the pretrial conference. These people should be well-trained in the field. This way we could get more done in pretrial examination than

cal men:

I would wholeheartedly be in support of a Nebraska Project of "Expert Medical Panels" that would be utilized in a "Friend of Court" approach. Furthermore, I sincerely believe that the great majority of the medical men and professional medical personnel would be in favor of such a project.

(2) *Outstate area*

Major manpower problems exist in the judicial districts outside the Omaha-Lincoln area.¹⁷² Implementation becomes more difficult further west. A North Platte attorney describes the obstacles:

The suggested medical expert testimony project would be unfeasible in a small district such as the 13th Judicial District. The basic reason that such a project would not be successful is the fact that we do not have all the medical "specialists" in this area which would be necessary to have on such a board. In situations where we do have such a specialist, if a board were created for a district, we would have to take the resident specialist probably because he would be the only one available. . . . In a small town, if the specialist is reasonably competent, I would assume that the general practitioner would abide by the specialist's judgment. In other words, even a reasonably competent specialist would "control" the thinking of a board of specialists in other medical areas or merely of general practitioners in the community.

A Lincoln attorney warns: "It would appear that outside of the metropolitan areas of Nebraska there would be problems in administering this program because of the scarcity of qualified specialists."¹⁷³ A professor at the University of Nebraska College

the way we are currently doing it." An Omaha psychiatrist: "I have long recommended that the court have its medical 'friends' report directly to the presiding justice, giving copies of his report to defense and prosecution."

¹⁷² CURRAN, LAW AND MEDICINE 360 (1960). Professor Curran, in considering the large numbers of medical practitioners in New York, asks: "Considering the size of the medical panels made available in these areas, what predictions can you make for the establishment of similar panels in other areas, urban and rural, in the United States?"

¹⁷³ A Sidney attorney: "Such a program might be difficult to implement in the outstate communities away from the medical centers. In this city, for example, there are only four medical offices. There are no specialists although we have very excellent doctors. No one doctor or office could serve as the impartial medical expert. There would undoubtedly be some reluctance on the part of the local doctors to second guess the treating doctor's analysis." A Scottsbluff attorney: "Like all plans, it depends on personnel. In a big city the personnel problem would not be nearly as difficult as in a smaller community. The

of Law summarizes:

The major problem outside the big city is in getting *enough different doctors* so that it would not amount to the same doctors handling all cases. That would be bad from everyone's point of view.

In addition, frictional problems with *local medical groups* are more noticeable outstate. A Grand Island attorney says:

[I]t would be most difficult to secure acceptance by doctors out this way. They are all too busy and I seriously doubt if the local medical association would take the time to set up the system or if the doctors would serve willingly. The few doctors who would or could take the time would be the least qualified ones. One would also have specific problems. For instance, there is one qualified orthopedist in our county and another in Adams County to the south. A case involving this field usually finds both men involved for one side or the other, and there would be little chance of cooperation between them.

Similarly, a Kearney attorney says:

I do not believe the competent M.D.s here would care for the plan, and the others would not be satisfactory. This is probably a good plan in the cities or federal courts.

A Scottsbluff attorney expresses a comparable view:

Basically, the medico-legal suggestion is good, but we are of the opinion that it would not work in a community of this size, but would work in the larger communities and cities. . . . Our County Bar Association has had several meetings with the doctors, and so far, their general impression is that they have not been sold on the idea. For that reason, all of them would probably refuse to act on the Boards.

Another Scottsbluff attorney explains:

We have problems with medical testimony because doctors do not like to testify and don't want to take the time necessary to adequately prepare themselves to testify.

In a community of this size (30,000), we have local specialists in only a few fields The appointments under the system would gravitate either to the men who enjoy testifying but who are not necessarily the best qualified or to the best qualified who nevertheless may be, and in some instances are, the worst witnesses.

Attorneys suggest two alternatives to alleviate the difficulties

probabilities of the physician having a patient of his who gets in litigation is sufficiently probable in a small community that the court would not be able to use the same physician as the court-appointed expert in every instance." A Kearney attorney: "Frankly, I doubt the competency of the medical personnel in a rural area such as this to qualify for such intended use."

concerning personnel and cooperation in these areas. First, a Blair attorney suggests that "in Nebraska it would be most practical to set up a medical panel in each judicial district rather than having them set up by city or county. The panel should consist of specialists whenever possible." Likewise, a Minden attorney argues that

having the panel drawn from the entire judicial district rather than from the county in which trial is to be had would be the most feasible for districts composed of multiple counties. In average size and smaller counties we do not have much personal injury work, whereas there is some of this type of litigation in each judicial district. It would further give a larger number of M.D.s from which the panel could be selected in the multiple-county judicial district.

The second alternative is to bring the experts to the area requiring them. The actual travelling required of such "traveling panels" could be reduced by having the plaintiff go to the panel site for examination. Only the panel member who was to testify would then be required to make the trip to the place of the trial. Outstate attorneys currently use this procedure, as a Kearney attorney verifies: "We use, extensively, orthopedic surgeons, neurologists and internists from Omaha, Lincoln, Hastings and Grand Island." A Beatrice attorney: "[A]t least some specialists might have to be imported." A Scottsbluff attorney: "[O]ur best results have been by having the client, if we are representing the plaintiff, examined by his local doctor and one in Denver, Cheyenne or Omaha."

There are two limitations on this idea. First, Chief Justice Paul White observes that

to appoint a roving board would probably create substantial local reaction in smaller communities of the state. The experts would undoubtedly come from Lincoln or Omaha and would be subjected to the reaction that an expert is somebody who is simply more than 50 miles from home.¹⁷⁴

Secondly, a western Nebraska district judge feels that "the cost of experts on the panel would be prohibitive to the average litigant."¹⁷⁵

¹⁷⁴ See note 138 *supra*.

¹⁷⁵ A Sidney attorney verifies: "If we have to bring in experts from the outside, their personal appearance probably could not be obtained and taking depositions would add to the expense of litigation unless the expense were paid from public funds." A Lincoln district judge: "[T]he travelling panel of doctors might result in prohibitive expense, unless they could be employed full time which would result in a real expense item." A western Nebraska judge: "Travel over this distance

C. THE PROVISION OF FUNDS TO FINANCE THE PROCEDURE

Essential to the success of any system is a workable method of financing it. A Lincoln district judge explains:

The problem in Nebraska would be securing the necessary funds to implement the program. There is always the expense involved in these instances which can be considerable. Litigants object to the present cost of litigation, and the propriety of using funds in private litigation presents difficulties in routine cases.¹⁷⁶

Several alternatives exist: (a) public funds; (b) tax the costs equally against both parties; or (c) tax the costs against one party only.

(1) *Public funds*

This method was favored by 29% of the district court judges, 19% of the outstate attorneys, 30% of the Lincoln-Omaha attorneys and 32% of the doctors. An Omaha attorney raises the basic issue:

It is very difficult to answer this financial question until we know what purpose we are serving. If it is one of overall justice, the expense should be borne by the public, but there are obvious shortcomings to this solution. On the other hand, if this project were completely developed and public funds were used, it is very conceivable that the expense saved by the Court could easily compensate for the expenditure along the lines of the medical testimony.¹⁷⁷

either for litigants or medical experts raises serious problems both of time and expense."

¹⁷⁶ SPECIAL COMMITTEE, *op. cit. supra* note 164, at 35, estimated: "Savings will be effectuated of more than 10 times the total amount spent for the fees of impartial experts." The fees for individual examinations, without trial testimony, through the first six years of the New York Plan ranged from less than \$20 for simple X-rays on one extreme to as much as \$200 for a few of the more elaborate and difficult assignments. Most of the fees were between \$50 and \$150. See N.Y. JUDICIAL CONFERENCE ANN. REP., LEG. DOC. NO. 94, at 9 (1959).

¹⁷⁷ An Omaha attorney dissents: "I can see no logical justification for any public body underwriting the expenses which a party may incur in furthering his individual and personal interests." Another Omaha attorney: "Such a program to aid indigent persons supported by public or foundation funds could be of considerable aid as there is no contingent fee arrangement available with respect to employment of doctors as expert witnesses." And still another Omaha attorney: "It would be quite difficult to finance such a project, mainly because of the Omaha Bar Association's experience in attempting to have a Legal Aid Society Office opened for indigent people in the Omaha area. After over ten years of attempting to finance legal aid in about every possible manner, we succeeded in establishing a Legal Aid Office, primarily through the financing of United Community Services."

The New York experience discussed above illustrates the reality of the latter prediction.

(2) *Both parties equally sharing the costs*

This method, which is now being used in the federal plans, is favored by 43% of the district judges, 53% of the outstate attorneys, 46% of the Omaha-Lincoln bar, and 53% of the doctors. An Omaha attorney summarizes the majority opinion: "I personally doubt that public finance or foundation funds could finance such a project. Although primarily engaged in insurance company defense work, I see no reason why the parties couldn't share the cost of furnishing an expert." An Omaha attorney dissents:

I can see no logical reason why the parties might be required to share the cost of such a system equally. . . . [T]his suggestion implies that the expert would be of equal value to both parties at all stages of the proceedings which cannot be the case.¹⁷⁸

(3) *Charge one specific party*

This method could result in charging either the prevailing party or the unsuccessful party in the judge's discretion, charging as costs, or charging the party who originally requests the expert, as in the Baltimore Plan. It was favored by 29% of the district judges, 28% of the outstate attorneys, 30% of the Omaha-Lincoln attorneys, and 15% of the doctors.

An Omaha attorney voices the objection: "I can see no logical reason why the successful litigant should be required to do so. . . . [T]his refutes the theory that the expert is to be independent and objective. Moreover, with respect to the second suggestion, who is to determine when a litigant is 'successful' and when he is not?" An Omaha district judge offers a modification: "Both parties should equally share the cost if the case is settled. The successful litigant should pay in the event the trial reaches a conclusion or it should be included with other costs and assessed as provided by statute."¹⁷⁹ It should be noted that the method of

¹⁷⁸ A Blair attorney: "It seems to me that making both parties share equally in the cost would be contrary to the idea that a witness should not be forced upon a person as far as expense is concerned." But see *Hankinson v. Van Dusen*, No. 12,740, 3d Cir., Oct. 21, 1958, cert. denied, 359 U.S. 925 (1959), where such an objection was rejected. A Lincoln attorney: "It would appear that both parties would benefit equally prior to trial and should therefore share the fees of the expert."

¹⁷⁹ An Omaha attorney: "If the unsuccessful litigant bore the cost after trial and both parties or the public shared prior to trial, it could settle some matters that should not go to trial." An outstate attorney: "I

having one side uniformly bear the costs has been utilized in the Nebraska Workmen's Compensation Court, which taxes the expense to the defendant when an independent examination and report have been required.¹⁸⁰

CONCLUSION

One overriding conclusion can be drawn from this study. "In the broader context, the debate about the medical expert plan represents only the waves on the surface of the human sea."¹⁸¹ The stronger, silent undercurrent is dissatisfaction on the part of the bench, the medical profession, and the majority of the bar with the current procedure surrounding medical testimony. The strict application of the lawyer's adversary standard to medical evidence breeds discontent. The testimonial battle of experts has grown to be a pressing interprofessional problem with wide public repercussions.

Our adversary system, a system developed in antiquity to provide for the resolution by laymen of the factual disputes of their peers, can be utilized to mislead. The court-appointed panel system offers a tool to help courts and parties attain an objective which often eludes them in the heat of battle—impartial medical testimony. The question is one of balancing value judgments. Distinguished members of the bar are at odds. Some feel that the battle of experts serves to educate the jury and bring us closer to the impartial verdict we all seek. Others believe that in many

cannot imagine why a successful litigant should contribute to the cost of securing such an impartial witness because the imposition of costs is a large factor in keeping spurious claims out of court. The unsuccessful litigant should pay the expert, his fee to be taxed as costs. However, to secure the cooperation of local medical groups public funds would have to be advanced before the expert was called, the public then being reimbursed by the unsuccessful litigant." A Fremont attorney: "Both parties should share, providing plaintiff has a reasonable liability case and is not bringing suit solely because of his injuries. The defense may not be interested in injuries if liability is questionable."

¹⁸⁰ Letter From Presiding Judge Albert Arms, Nebraska Workmen's Compensation Court, Sept. 25, 1964. An outstate district judge favors this approach: "If the litigants agree upon the use of a court-appointed expert, they could save the expense of calling experts of their own, and the cost could be divided between them. If they do not agree, it might be well to provide that the expense may be taxed as a part of the costs. In the usual case the costs would be taxed to the loser."

¹⁸¹ Samad, *The Doctor, Lawyer and Jury, or Gaffing at a Thing Called Truth in Personal Injury Litigation*, at 17, 1963 (unpublished manuscript in Akron College of Law Library).

cases the addition of the court-appointed expert would further this educational process and bring us still closer to that degree of positiveness which we will accept in an imperfect world as a substitute for truth. Dedicated medical men are willing to act as such witnesses to clear up Hippocratic shadows and to bring the truth into sharper focus for the jury. The legal and medical professions should weigh the advantages and disadvantages of the present adversary expert system carefully against those of the plans which are offered to modify it.

In the meantime, both professions should make a real effort to educate physicians concerning their responsibilities to the courts. A closer relationship and more frank discussions between the two professions can help to temper medical advocacy and encourage expert objectivity. When the professions set a standard that demands that a physician, testifying under oath in court, must state his opinion fairly and fully, without bias and without regard to the side that calls him, neither suppressing nor over-emphasizing any aspect of the case, they will have taken an important step toward providing the trier of fact with *real expert medical testimony*.¹⁸² And the parade of paid partisans will no longer come to the courtroom to do battle for a price.

[T]he time . . . [has] surely come for the professional expert to be taken out of the ranks of the ordinary witness with an inevitable bias in favour of the party who called him. He should be put upon a different plane, where his prime allegiance . . . [is] to the court and his undoubted duty in law to submit his findings of fact and conclusions fairly, fully and frankly for all to see.¹⁸³

¹⁸² Friedman, *Expert Testimony, Its Abuse and Reformation*, 19 Yale L.J. 247 (1910).

¹⁸³ Summary of presidential address by Sir Thomas Lund, Third Annual Meeting of the British Academy of Forensic Sciences, 106 SOL. J. 617 (1962).