SMU | Dedman School of Law

SMU Law Review

Volume 64 | Issue 4 Article 3

2011

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IT must have been in 1990 that I received a phone call from Dan Shuman, who introduced himself and said he would like to talk with me about a research idea. I had not known Dan and still do not know what prompted his call to me, but we met shortly thereafter. Dan explained to me that he thought there was a need for empirical research on the use and possible abuse of expert witnesses. He said that, within the legal community, there was much anecdote and speculation about how expert witnesses were used, but there was a paucity of research on how they were actually used. He asked if I would like to work with him on a research paper that explored how experts were actually used.

I agreed, and that began a long friendship and a multi-year research collaboration that resulted in a series of articles on expert witnesses[1] and an article exploring both juror behavior and judicial selection.[2] The part of the article on juries and judicial selection may have been our most controversial since it used a review of empirical research to challenge commonplace assumptions that merit selection of judges depoliticized the selection of judges and that judges selected through merit selection were better quality judges than were elected judges. In reference to our exploration of the role of juries and judicial elections, we concluded:

> Whatever the reason or reasons for elitist attacks on popular involvement in the legal process, the interesting finding of social science research is not only that "things are better off than I had

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1. Anthony Champagne, Daniel Shuman & Elizabeth Whitaker, *An Empirical Examination of the Use of Expert Witnesses in American Courts*, 31 JURIMETRICS J. 375 (1991) [hereinafter *Part 1*]; Daniel W. Shuman, Elizabeth Whitaker & Anthony Champagne, *An Empirical Examination of the Use of Expert Witnesses in the Courts—Part II: A Three City Study*, 34 JURIMETRICS J. 193 (1994) [hereinafter *Part 2*]; Daniel W. Shuman, Anthony Champagne & Elizabeth Whitaker, *Assessing the Believability of Expert Witnesses: Science in the Jurybox*, 37 JURIMETRICS J. 23 (1996) [hereinafter *Part 3*]; Daniel W. Shuman, Anthony Champagne & Elizabeth Whitaker, *Juror Assessments of the Believability of Expert Witnesses: A Literature Review*, 36 JURIMETRICS J. 371 (1996) [hereinafter *Literature Review*]; Anthony Champagne, Danny Easterling, Daniel W. Shuman, Alan Tomkins & Elizabeth Whitaker, *Are Court-Appointed Experts the Solution to the Problems of Expert Testimony?*, 84 JUDICATURE 178 (2001).

2. Daniel W. Shuman & Anthony Champagne, *Removing the People from the Legal Process: The Rhetoric and Research on Judicial Selection and Juries*, 3 PSYCHOL. PUB. POL'Y & L. 242 (1997).

> feared"[3] in reference to popular involvement in the process, but also that elitist reforms do not create clear improvements in the process and may even eliminate desirable consequences flowing from popular involvement. . . . The key point stressed by most social science research on public forms of involvement in the litigation process—whether it be popular selection of judges or juries—is that generally speaking the people do a reasonable job in evaluating the information available to them, whether it is trial testimony or judicial candidates.[4]

It was what we said about judicial selection in the article that was most controversial. Interestingly, what we wrote was long before the publication of a body of recent research which makes the same finding—that every system of judicial selection is a highly political process and that merit selection does not clearly result in higher quality judges over elected judges, even though different judicial selection systems produce different characteristics of judges.[5]

The bulk of our work, however, focused on expert witnesses. We quickly developed a routine for working together. Dan loved to meet at a coffee shop roughly halfway between SMU and my university. I initially thought that location was chosen because it was a convenient location for the two of us. I soon discovered, however, that Dan practically used that coffee shop as an office. It was not unusual for him to have several meetings scheduled with various collaborators, students, and alumni all morning long. In those coffee shop meetings, Dan would sketch out how he saw the research developing, and I would write the initial draft. At the beginning of our research collaboration, I wondered how far afield from his ideas I could go without irritating him, but he gave me wide latitude. Dan would take the draft, add and subtract items, and polish the article. Dan proved to be easy to work with, unlike some other co-authors I have had. At an early point in our research, Dan believed that we needed a litigator to help us understand how experts were used in trial. He told me that he had the perfect litigator, a former student who was very bright and could help us understand how litigators actually used experts. That was when Elizabeth (Betsy) Whitaker was brought into the research project.[6]

At another point, Dan thought that a comparison of court-appointed and privately retained experts would add to our research. I wondered

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3. The quotation is, of course, from JIMMY BUFFETT, CHANGES IN LATITUDES, CHANGES IN ATTITUDES (ABC Records 1977). It should come as no surprise that this was put in the article by Dan.

4. Shuman & Champagne, *supra* note 2, at 258.

5. Probably the most important of these recent studies are: CHRIS W. BONNEAU & MELINDA GANN HALL, IN DEFENSE OF JUDICIAL ELECTIONS (2009) and Stephen J. Choi, G. Mitu Gulati & Eric A. Posner, *Professionals or Politicians: The Uncertain Empirical Case for an Elected Rather Than Appointed Judiciary*, 26 J.L. ECON. & ORG. 290 (2010).

6. Betsy's election as President of the State Bar in 2003–2004 was probably not due to this research collaboration, though Dan and I would have gladly taken credit for her election.

how we could possibly get access to enough judges, lawyers, and experts for such a study. It turned out that we had no problem. I quickly learned that Dan had an enormous network of friends, colleagues, and former students. If there was an issue that needed exploring or a question that needed an answer, Dan knew someone who could help. We spoke with numerous family lawyers, expert witnesses, and family court judges and explored the use of court-appointed versus privately retained experts in child custody cases. Interestingly, although the family lawyers often complained about court-appointed experts, the judges and the experts were quite favorable about court appointment versus private retention.[7]

While we were researching the use of expert witnesses, Peter Huber published *Galileo's Revenge*. Dan was very excited about the book which was a study of "junk science" in the courts. The book provided numerous examples of how science was misused in the courtroom and how judges were misled by this bad science. Huber argued that "junk science" led to wildly inappropriate damage awards.[8] Dan thought our research would provide a better sense of science in the courtroom—the more mainstream reliance on expert testimony rather than the selective cases used in Huber's book. In mainstream lawsuits, Dan thought it was important to know whether the "junk science" discussed by Huber was pervasive. Or, to put it another way: were experts commonly misused in court?

In a series of articles published in *Jurimetrics*,[9] we explored this question. Our initial study surveyed expert witnesses, lawyers employing experts, judges hearing cases involving the experts, and jurors in civil cases who heard the expert testimony. The study was limited to Dallas County. However, we had some interesting findings in our preliminary study. While experts testified in a majority of the civil cases we examined, most of the cases involved experts on only one side which, of course, cast doubt on the belief that trials are battles of experts. Nor did we find a group of professional experts who were provided by expert referral firms and who commanded large fees. Most of the experts were not professional witnesses, and though many experts did testify frequently, they were not part of an individual lawyer or a firm's stable of experts. While lawyers tended to be unhappy with the fees the experts commanded, their pay was actually consistent with their incomes as non-witnesses. The experts proved not heavily dependent on a lawyer for their financial support. Most interestingly, we found a conflict between the adversarial system and the scientific method. Lawyers wanted experts who had integrity, but they also wanted experts who were not tentative. Comparison shopping for experts by lawyers was occurring, and lawyers did frequently coach experts to present their findings in the most favorable light. We found that "[m]any lawyers seem to want what is often impossible for experts to

7. Champagne, Easterling, Shuman, Tomkins, & Whitaker, *supra* note 1.

8. PETER W. HUBER, GALILEO'S REVENGE: JUNK SCIENCE IN THE COURTROOM (1993).

9. *See* JURIMETRICS articles, *supra* note 1.

give: they want personable, attractive experts who have integrity, are articulate, have strong credentials, are willing to be coached, and draw firm conclusions that support the lawyer's position."[10]

The Dallas study was expanded in a survey of judges, lawyers, and experts in Baltimore, Seattle, and Tucson. In many ways our findings paralleled those of the Dallas County study. Again, we found support for the criticism that the legal system asked conflicting roles of experts where they were both expected to play the role of impartial scientist and to provide favorable testimony for the side that retained them. However, while experts were chosen and used as advocates by the retaining lawyers, the world of experts was not dominated by a group of highly paid professional experts who offered their services to the highest bidder. And, contrary to popular myths about the retention of expert witnesses, we found little use of advertisements by experts in marketing their services, little evidence of fees charged by experts that were disproportionate to the income of the expert's occupation, and few experts who were professional experts in the sense that they earned most of their incomes from testifying.[11]

Working with SMU law students and University of Texas at Dallas graduate students, our third empirical study surveyed former jurors in Dallas County civil cases. While the popular image is of naïve jurors who are influenced by superficial considerations or are deferential to experts from high-status occupations, we found instead a "portrait of a thoughtful juror who seeks to reach rational, case-specific decisions about experts."[12] In particular, we found that jurors evaluated experts on the basis of their qualifications, their familiarity with the case, their quality of reasoning, and whether they were impartial in their testimony.[13]

At the same time as our third empirical study, we surveyed the literature on juror assessments of the believability of expert witnesses. We found the literature on this subject to be very limited. That literature review, however, found several important points about what caused jurors to believe experts. First, there was considerable juror suspicion of expert testimony. Jurors were quick to disregard experts they perceived as "hired guns." Jurors were most likely to believe experts that had done some independent research on the subject and were not limited in their conclusions to the information provided by the retaining lawyer. Of special importance were communications skills. Jurors wanted experts who could convey technical and complex information in a nontechnical and understandable way. Indeed, communication skills and clarity of presentation proved among the top characteristics of experts that made them believable to jurors.[14]

10. *Part 1*, *supra* note 1, at 375, 391–92.
11. *Part 2*, *supra* note 1, at 193, 206.
12. *Part 3*, *supra* note 1, at 23, 30.
13. *Id.* at 26.
14. *Literature Review*, *supra* note 1, at 371, 380–82.

As Dan's illness worsened, he asked Betsy Whitaker and me to join him for dinner. When we asked how he was doing, Dan told us that, if he had a choice, he would want to die in his eighties in a plane crash as he was returning from Europe, but he wasn't given that choice. He was still full of ideas, and some months after that dinner, he told me that he had a research idea that he was exploring and would like to work with me if a grant came through. His illness did not defeat him. Dan continued his work and his interest in looking at the law from an empirical perspective. For Dan, it was not enough to know what the casebooks said or what statutes said; he wanted to learn how the law really did work.