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THE PROFESSIONAL MEDICAL ADVOCATE

Logan Ford* and James H. Holmes, III†

I. INTRODUCTION

THE technological advancement of this country during the past three decades has tremendously enhanced the standard of living, contributed to the military strength, and generally resulted in scientific accomplishments heretofore unparalleled. Utilization of nuclear power, space exploration, modern transportation and communication media, continued industrial development, increasing demand upon the construction and building trades, and expanding production and manufacturing outputs have affected all segments of our way of life.¹ One of the concomitants of this technological advancement, which is of particular significance to the personal injury lawyer, is that the human being is increasingly exposed and subjected to the risk of bodily injury.² If injury does occur and the parties are unable to settle, the injured party generally seeks relief and requit from the tortfeasor through the medium of litigation. Personal injury accidents constitute the overwhelming majority of all docketed civil matters³ with a resulting tremendous monetary outlay in compensating the aggrieved victims.⁴ Some writers have noted a general trend toward an expansion of tort liability⁵

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¹ "The frontiers of the future lie invitingly ahead before us. We are in the era of scientific and technological discovery, all holding promise of contribution to the national welfare." Silverman, *We Must Broaden Our Scope*, 61 Com. L.J. 89 (1956).

"We shall add to our prestige and assume the place which is properly ours by adding new and lasting materials to that marvelous industrial structure of which our country is justly so proud." *Id.* at 90. Taubenfeld, *Nuclear Testing & International Law*, 16 Sw. L.J. 365 (1962).

² "It is estimated that there are approximately one and one-half million auto accidents and two million industrial accidents annually in this country. . . ." Sherbok, *The Expert Witness*, 31 *Dicta* 375 (1954).

³ Personal injury cases constitutes 75% of the litigation in the courts of the country. . . ." Peck, *Impartial Medical Testimony*, 22 F.R.D. 21, 22 (1959). "Approximately 75-80% of cases awaiting trial are personal injury cases. . . ." Levy, *Impartial Medical Testimony*, 30 Pa. B.A.Q. 348 (1959). "Since almost 90% of the civil cases in the city's courts are personal injury actions. . . ." Botein, *The New York Medical Expert Testimony Project—And Its Results To Date*, 5 La. B.J. 15, 16 (1957).

⁴ "In a recent year as a nation, we spent almost 4 billion in compensating victims of personal injury accidents." Conrad & Voltz, *The Economics of Injury Litigation*, 39 Mich. So. B.J. 32 (1960).

⁵ "The general trend has been toward an expansion of tort liability, a broadened concept of social responsibility, and a balancing of interests, with the latter often being measured in terms of capacity to bear the loss." Rassman, *Of Torts and Defendants*, 16 Sw. L.J. 244 (1962); Survey, *Personal Injury Damage Award Trends*, 10 Clev.-Mar. L. Rev. 193-312 (1961).

which, apparently, has been motivated by the public's increased claim consciousness.⁶ Although this may be true, a party's right to utilize every available process within our judicial structure to redress a wrong or establish a claim is firmly entrenched within our legal system, and no party should be condemned for instituting bona fide litigation.⁷

It is common sense that the facts most favorable to the respective causes advanced will be espoused during a lawsuit. This concept of adversary litigation forms the foundation of our legal system.⁸ Moreover, personal injury litigation has fostered the adversary system to a large degree. In seeking to establish the extent of damage in a personal injury action, it is generally incumbent upon the parties to solicit the assistance of various members of the medical profession. This sphere of testimony truly epitomizes the functioning of the adversary system because the opinions of medical experts may frequently confuse the jurors. Thus, the jury verdict often results from partisan advocacy utilizing two extremes of medical opinion.

Some courts and writers are of the opinion that this class of evidence is the most unsatisfactory and unreliable part of judicial administration.⁹ For example, the Illinois Supreme Court succinctly stated in *Opp v. Pryor*¹⁰ that the problem is a result of opinionated response to a pecuniary stimulus and, too often, the natural and ex-

⁶ "In addition, there has developed in the last decade an increased claim consciousness on the part of the American people. A general feeling has grown up that if something happens to injure a person or his property, someone else ought to pay for it, regardless of whether the injured person might have caused the damages himself." Knepper, *The Automobile in Court*, 17 Wash. & Lee L. Rev. 213, 216 (1960).

⁷ "The plaintiff is entitled to his day in court and is not to be condemned for invoking the processes of the court." Rassman, *supra* note 3, at 248.

⁸ "The Anglo-American adversary system is successful, to a large extent, because it is based upon the imperfect nature of man—a Christian concept. That is, an imperfect man may do anything to remain out of prison or to win a civil action. Therefore, there must be two men in our system, one on each side, who tend to keep one another in check." Nuss, *The Christian Lawyer*, 16 Sw. L.J. 262, 275 (1962).

⁹ "When considering a motion for a new trial, based on an excessive verdict, ordinarily but little weight should be given to evidence of the professional medical expert." *Murphy v. Pennsylvania R.R.*, 292 Pa. 213, 140 Atl. 867, 869 (1927). As stated by the court of appeals of Kentucky: "That the testimony of experts is frequently colored probably unconsciously, by bias and partianship, is recognized by the courts, and it is for that reason that they accord to it less weight than is given to other types of evidence." *Agsten v. Brown-Williamson Tobacco Corp.*, 272 Ky. 20, 113 S.W.2d 829, 831 (1938). "Under present procedure, where the medical testimony comes from no objective or necessarily qualified source, and only through the hirelings of the parties, partisan experts, medical mouth-pieces, the jury is more apt to be confused than enlightened by what it hears. It hears black from one expert, white from the other, a maximizing or minimizing of injuries in accordance with the interest of the source of payment for the testimony." Peck, *supra* note 3, at 22.

¹⁰ 294 Ill. 538, 545, 128 N.E. 580, 583 (1920).

pected outcome of the doctor's employment. One writer stated:

The regular court experts not only come to be tagged in courts as 'plaintiffs' experts or as 'defendants' 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 or 'pooh pooh' 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.¹¹

Although most doctors, if called upon to testify, adhere to the strict ethical standards of their profession, there are those whose conduct and lack of adherence to the established ethical norms leave an indelible stigma on the entire group. The latter have earned the title of "medical mouthpiece,"¹² or, if you will, the "professional medical advocate." The professional medical advocate is retained for his testimonial ability in specifically influencing the outcome of litigation; usually, he presents a plausible diagnosis based on half truth in such a manner that his finality of utterance is more convincing than his medical knowledge or scientific veracity.

It is indeed tragic that the results of a substantial number of cases are based upon evidence recognized to be unsavory and unsatisfactory. Theories have been propounded and suggestions made in attempting to purge personal injury litigation of this impediment. In some jurisdictions, courts have the power to appoint or call expert witnesses in their respective fields of medicine from a panel chosen by the leaders of medical societies, bar associations, and the judiciary.¹³ Some have criticized such a procedure because it detracts from the functioning and principles of the adversary system; others believe that it is a satisfactory method of resolving the medical testimony entanglement.¹⁴ It is not the purpose of this Article to argue the pros and cons of the medical panel, committee plan, or required physical examinations because the lawyer must operate under the procedural aspect of the law as it exists in Texas. In workmen's compensation cases involving occupational diseases, the Texas courts have the power to appoint a medical committee of three doctors to examine

¹¹ Friedman, *Expert Testimony, Its Abuses and Reformation*, 19 Yale L.J. 247, 253 (1910).

¹² See note 9 *supra*.

¹³ Peck, *supra* note 3; McCormick, *Science, Experts and the Courts*, 29 Texas L. Rev. 611, 624 (1951).

¹⁴ Levy, *supra* note 3; cf. Peck, *supra* note 3.

the claimant and submit a report in open court.¹⁵ Also, the Industrial Accident Board may require an employee to submit to an examination. Furthermore, if the employee or insurance carrier requests, he is entitled to have a doctor of his own selection present to participate in the examination.¹⁶ Since there is no provision for medical committees, panels, or required physicals in the litigation of bodily injury cases in Texas except as heretofore mentioned, presentation of expert medical testimony in its most credible form must be made within the boundaries of the evidentiary rules. One of the best tools of the trial advocate's trade in testing the credibility of an adversary's expert medical witness is cross-examination. If confronted during the trial with a professional medical advocate, much can be done from an impeachment standpoint merely by revealing that the witness is a professional expert.

II. SCOPE OF CROSS-EXAMINATION

In challenging or testing the credibility of a witness, it is recognized in Texas¹⁷ and other jurisdictions¹⁸ that the extent of examination rests within the discretion of the trial judge. His ruling on such matters does not constitute grounds for reversal unless an abuse of discretion is found by the reviewing court. In a majority of jurisdictions, the discretionary function is vividly defined because cross-examination is limited to matters elicited from the witness on direct examination.¹⁹ Under the majority concept, however, it would certainly appear that a party would not be limited to testing the credibility of an expert witness solely on the basis of his expertise and

¹⁵ Tex. Rev. Civ. Stat. Ann. art. 8307, § 13(g) (1956), states:

Where a case of occupational disease is pending in any court of this state, upon the motion of either party, or upon its own motion, the court shall appoint a Medical Committee consisting of three (3) doctors duly qualified in the diagnosis and treatment of occupational diseases and licensed to practice in the state, and shall direct the employee to submit to examination, including clinical and X-ray examination, as the Medical Committee may require or deem advisable. The Medical Committee shall report its findings and conclusions in open court, and such may be rebuttable. The court shall pass on the reasonableness of the fees, costs, and other expenditures of the Medical Committee, which fees shall be taxed as costs.

¹⁶ Tex. Rev. Civ. Stat. Ann. art. 8307, § 4 (1959).

¹⁷ "The matter of cross-examination, including the conduct and extent thereof, being left largely to the discretion of the trial judge, his ruling will not be disturbed if not arbitrarily and unreasonably made." *Varnado v. City of Groves*, 329 S.W.2d 100 (Tex. Civ. App. 1959) *error ref. n.r.e.*; *Texas Employers' Ins. Ass'n v. Garza*, 308 S.W.2d 521 (Tex. Civ. App. 1958) *error ref. n.r.e.*; *Story v. Partridge*, 298 S.W.2d 662, 665 (Tex. Civ. App. 1957) *error ref. n.r.e.*

¹⁸ *Evansville City Coach Line v. Roger*, 122 Ind. App. 119, 99 N.E.2d 435 (1951); *Madsen v. Obermann*, 237 Iowa 461, 22 N.W.2d 350 (1946); *Mattfeld v. Nester*, 226 Minn. 106, 32 N.W.2d 291 (1948); 58 Am. Jur. *Witnesses* § 621 (1948).

¹⁹ 58 Am. Jur. *Witnesses* § 627 (1948).

qualifications, which most assuredly would be developed on direct examination or stipulated.

Texas does not require a party to confine questions on cross-examination entirely to matters brought out on direct.²⁰ Moreover, it is generally stated that cross-examination may properly extend to any matter relevant to the issues between the parties.²¹ In defining the permissible scope of cross-examination of an expert witness, the rules are liberalized not only as to the relevancy of the issues between the parties, but also as to matters touching on the credibility of the expert.²² The credibility of any witness revolves around the "stock that may be put in his testimony"; generally, he may be attacked through examination as to bias, interest, hostility or prejudice, qualifications, knowledge of facts and defects, or limitations in perception. In questioning a medical expert, the cross-examiner should direct his attack toward the factors of bias, interest, and prejudice exemplified by the expert's reputation for testifying. The position of the hireling and his interest in the litigation can best be disclosed to the court and jury in this manner. Cross-examination in the following areas will achieve the result of exposing a professional witness; it should be noted, however, that questions pertaining to opinions rendered while testifying in other lawsuits are neither admissible nor the proper subject of cross-examination:

1. The number of times the witness has testified for an attorney who is involved in the litigation;
2. The number of times the witness has testified for a particular party to the litigation or his connection with a particular party to the litigation;
3. The number of times the witness has testified generally;
4. The fees received for testifying in past litigation or the case at bar.

A. Number Of Times The Witness Has Testified For An Attorney Who Is Involved In The Litigation

As early as 1907, in the case of *Horton v. Houston & T.C. Ry.*,²³ a Texas court permitted the cross-examination of a doctor as to the number of times he had testified for the attorney who represented

²⁰ *Preston State Bank v. National Union Fire Ins. Co.*, 320 S.W.2d 184 (Tex. Civ. App. 1958). The Dallas Court of Civil Appeals stated, "that in Texas an adversary in his cross-examination is not limited to matters covered by direct examination." *Id.* at 187, citing *Rhine v. Blake*, 59 Tex. 240 (1883) and *Wentworth v. Crawford*, 11 Tex. 64 (1853).

²¹ *Grocers Supply Co. v. Stuckey*, 152 S.W.2d 911 (Tex. Civ. App. 1951) *error ref. w.o.m.*

²² See note 21 *supra*; *Texas Employers' Ins. Ass'n v. Hale*, 188 S.W.2d 899 (Tex. Civ. App. 1945), *affirmed*, 144 Tex. 432, 191 S.W.2d 472 (1946); *Barton Plumbing Co. v. Johnson*, 285 S.W.2d 780 (Tex. Civ. App. 1955) *error ref.*

²³ 103 S.W. 467 (Tex. Civ. App. 1907) *error ref.*

the claimant. The appellant in the *Horton* case assigned as error the latitude allowed appellee's attorney in the cross-examination of the doctor called to testify as to the extent of the claimant's injuries. In an effort to show interest and bias on the part of the physician, counsel asked if he had previously testified for claimants in other damage suits in which the appellant's attorneys represented the plaintiffs. The court stated: "Certainly on cross-examination counsel should have been permitted to ask such questions as if answered in the affirmative would have shown that the doctor had been habitually called by plaintiff's attorney. . . ."²⁴ Subsequently, in *St. Louis & S.F. Ry. v. Clifford*,²⁵ the court acknowledged the decision in the *Horton* case although appellee's counsel did not attempt to prove such facts and the court did not rule directly on the admissibility of such testimony. In a more recent decision,²⁶ the court of civil appeals also acknowledged the validity of this type of cross-examination when it stated:

The argument with respect to Dr. Falkenstein's presence then as a witness being due to his respect for the truth was a reasonable and proper deduction from the obvious attempt on the part of appellant to portray the doctor to the jury as a witness interested in helping appellee's counsel . . . by having testified for him in many cases.²⁷

Courts of other jurisdictions have also adjudged such examination to be within the realm of the credibility of the witness and properly admissible.²⁸ For example, the Virginia Supreme Court, in *Virginia Linen Service v. Allen*,²⁹ was requested to set aside a verdict on the grounds of after-discovered evidence. The request was based upon information that the plaintiff's doctors had participated in four damage suits in 1955 prior to the then present suit and one thereafter with the firm representing the plaintiff, in which they testified or were prepared to testify as plaintiff's witnesses. In overruling the motion to set the verdict aside, the court held that evidence of the relationship alleged could have been admitted only to impeach the

²⁴ *Id.* at 469.

²⁵ 148 S.W. 1163 (Tex. Civ. App. 1912) *error ref.*

²⁶ *Texas Employers Ins. Ass'n v. Johnson*, 323 S.W.2d 345 (Tex. Civ. App. 1959) *error ref. n.r.e.*

²⁷ *Id.* at 351.

²⁸ The propriety of eliciting the fact that a witness has testified in other cases for the party for whom such witness testifies in the case at bar has been recognized. A similar rule has been recognized as to the cross-examination of a physician as a witness for plaintiff in an action for personal injuries, in respect of testimony by such physician in other actions in which he was called as a witness by the attorney for plaintiff in the present action. See 98 C.J.S. *Witnesses* § 560 (1957); 70 C.J. *Witnesses* § 1188 (1935).

²⁹ 198 Va. 700, 96 S.E.2d 86 (1957).

character and discredit the testimony of the doctors. The court further stated:

It would serve the interests of the medical profession and aid in maintaining its high standards if doctors who testify would heed the admonition recently given by a member of their profession, that they avoid allowing themselves to be labeled a plaintiff's doctor or a defendant's doctor, and to remember at all times that he is a witness and not an advocate.³⁰

B. Number Of Times The Witness Has Testified For A Particular Party Involved In The Litigation Or His Connection With A Particular Party To The Litigation

In *Highway Ins. Underwriters v. Dempsey*,³¹ the court was confronted with the propriety of cross-examination as to the extent of business dealings between the doctor and the insurer. The court stated:

Our courts have held on numerous occasions that 'it is competent, on the cross-examination of a witness, to elicit facts which tend to show the bias, prejudice, or friendship of the witness for the party for whom he testifies, and to show hostility toward the party against whom he is called.' . . . The appellee was attempting to do no more than to show that Dr. Dupre had an interest in the result of the trial or, at least, to show that he had a connection with the appellant which, unconsciously or otherwise, could materially affect the weight to be given his testimony.³²

Moreover, in a personal injury action arising from a train wreck, the appellee in *Gulf C. & S.F. Ry. v. Bell*³³ established that a medical witness was and had been the local surgeon of the railway for one year.³⁴

The doctor called as a witness by the defendant in *Metropolitan St. Ry. v. Houghton*³⁵ testified on cross-examination that "at the time of the alleged injury I represented the three street railway companies here, the Metropolitan, Rapid Transit, and Consolidated. I am subject to call in cases of this kind if the street car companies think

³⁰ *Id.* at 91.

³¹ 232 S.W.2d 117 (Tex. Civ. App. 1950) *error ref. n.r.e.*

³² *Id.* at 119.

³³ 93 Tex. 632, 58 S.W. 614 (1900). The court overruled appellant's assigned error on this point but did not comment. The implication arises from this decision that questions may be propounded which evidence a doctor's tendency to testify on one side of the docket or the other and for a certain party. If this implication is not justifiable, the rule is supported by the decision in *Highway Ins. Underwriters v. Dempsey*, 232 S.W.2d 117 (Tex. Civ. App. 1950) *error ref. n.r.e.*

³⁴ *Gulf C. & S.F. Ry. v. Bell*, 93 Tex. 632, 634, 58 S.W. 614, 621 (1900).

³⁵ 134 S.W. 422 (Tex. Civ. App. 1911) *error ref.* The case was reversed because of the exception to the ruling of the trial court in disallowing counsel for the appellant to rehabilitate the doctor on redirect by setting forth that more cases are settled by appellant on the witness' recommendation than are litigated.

my testimony important. I do testify for the defendant in a great many cases. I testify the truth as nearly as I can."³⁶ No objection was taken to such examination; however, the appellate court inferentially approved the interrogation, for it stated that the testimony "was evidently brought out to show a hostility on the part of the witness to plaintiff's case, and a bias on his part in favor of the railroad company."³⁷

The decisions of the courts of other states lend analogous support to this line of examination. Moreover, it should be kept in mind that cross-examination to test the credibility of a medical witness is not restricted by the cases to utilization against the medical expert. Any expert whose character as such is subject to impeachment and whose testimony is not above dispute is the proper subject for such examination. The Arkansas Supreme Court upheld questions addressed to expert engineers on cross-examination, the answers to which revealed that they had been used frequently and principally as expert witnesses by the appellant and other such companies.³⁸ The Supreme Court of Alabama, in a stream pollution case involving damage to riparian properties, held that the trial court should have allowed the cross-examination of appellee's expert which tended to establish that the witness had testified for appellee in other cases of a similar character and relating to the same stream.³⁹ In a case which did not involve the testimony of an expert witness, the Vermont Supreme Court nevertheless allowed counsel to elicit from the witness that this was not the first time he had testified in behalf of the defendant.⁴⁰ An Oregon case, involving the appropriation of land by the Oregon Highway Commission, permitted inquiry into the number of times the appraiser had testified previously for the Highway Commission. The court found the examination to be proper and commented on the bias inherent in expert testimony as a whole.⁴¹ Three Illinois Supreme Court cases indicate that counsel may establish the number

³⁶ *Id.* at 423.

³⁷ *Ibid.*

³⁸ *St. Louis, I.M. & S. Ry. v. McMichael*, 115 Ark. 101, 171 S.W. 115 (1914).

³⁹ *Jones v. Tennessee Coal, Iron & R.R.* 202 Ala. 381, 80 So. 463 (1918).

⁴⁰ The court stated: "The plaintiff was permitted to show in the cross-examination of an adverse witness, that it was not the first time he had testified in behalf of the defendant. Nothing more appears regarding the matter. It was within the discretion of the court to permit the inquiry." *Wellman v. Carpenter*, 86 Vt. 490, 86 Atl. 497 (1913).

⁴¹ "More latitude is permitted in the cross-examination of expert witnesses than is the case with ordinary witnesses, because expert testimony is viewed with some suspicion. The natural bias which the expert may have in favor of the party who employed and is paying him is the chief cause for the discredit that has been cast upon expert testimony as a whole." *State v. Superbilt Mfg. Co.*, 204 Ore. 393, 281 P.2d 707, 713 (1955).

of times a witness has testified for a particular party in similar cases⁴² and the number of cases in which the witness has testified for similar parties.⁴³

C. Number Of Times The Witness Has Testified Generally

Although the courts have upheld the propriety and relevancy of cross-examination that discloses the number of times that the witness has testified generally, it would seem that this would not be as damaging from an impeachment standpoint as the previous examples of interrogation unless it can be shown that the witnesses' testimony is habitually received in behalf of either plaintiffs or defendants. This conclusion is based upon the assumption that a jury would be reasonably justified in not inferring bias or prejudice in the testimony of the witness if his former experience in testifying has been from both sides of the docket. Such a status would lend objectivity to his analysis or diagnosis and reflect a lesser degree of partisanship than would be present if he had previously testified on numerous occasions for the attorney of the plaintiff or a particular party to the controversy. In *Young v. Texas & Pac. Ry.*,⁴⁴ counsel for plaintiff attempted to cross-examine the defendant's medical witness as to the number of cases in which he had testified and on the point that on those occasions he consistently denied the plaintiff's injury. Objection to the examination was lodged by the defendant and sustained by the trial court, to which ruling the plaintiff alleged error. The record expressly disclosed that the witness testified extensively as to his relation with the appellee and, further, that he had testified for plaintiffs as well as defendants. The court held that from the testimony the doctor's position was before the jury and that they were qualified to pass on any question of bias or prejudice. It would appear that if the question had been restricted to the realm of the number of times the witness had testified and had not queried the diagnosis on those occasions, it would have been error to preclude the question and answer; but whether it would have constituted grounds for reversal is less likely, especially in view of the completeness of the doctor's testimony regarding his relation with appellee. However, as will be discussed later, medical witnesses' professional opinions given while testifying in other lawsuits are not admissible and thus would render the courts ruling valid as to the latter part of the question.

⁴² *City of Chicago v. Van Schaack Bros. Chemical Works*, 330 Ill. 264, 164 N.E. 486, 490 (1928); *Plambeck v. Chicago Ry.*, 294 Ill. 302, 128 N.E. 513 (1920).

⁴³ *McMahon v. Chicago City Ry.*, 239 Ill. 302, 88 N.E. 223, 225 (1909).

⁴⁴ 347 S.W.2d 345 (Tex. Civ. App. 1961).

The appropriateness of a portion of plaintiff counsel's argument to the jury in a workmen's compensation case was before the court in *Transport Ins. Co. v. Cossaboon*.⁴⁵ The comments in argument centered around the testimony of one of the appellant's medical witnesses. The attorney stated, "Had he heard? Had heard of the clientele that Dr. Gault had built up of representing 184 insurance companies?"⁴⁶ The court of civil appeals held: "All things considered, the trial court must have had some reason for making the statement he did in answer to the objection, in which the trial court pointed out that attorneys have a right to make reasonable deductions from the testimony of witnesses. The point is overruled."⁴⁷ From the foregoing comment of the trial court, it can certainly be concluded that the doctor's character as a witness had been aired during the trial, upon which counsel indulged in reasonable comment. If an attorney is properly allowed comment on a doctor's background in closing argument, assuming it to be before the court and jury, then it would be no less proper to permit cross-examination as to his partisanship. A case squarely on point in this area is *Traders & Gen. Ins. Co. v. Robinson*,⁴⁸ which holds that it is permissible to establish through cross-examination the number of times a medical witness has testified for plaintiffs. In the *Robinson* case, appellant was allowed to elicit on cross-examination from the appellee's medical witness the fact that he had testified for plaintiffs in numerous injury actions in approximately twelve cities throughout the state. The appellate court, in acknowledging the permissibility of such interrogation, stated: "It is the settled law of this state that a party to a suit has the right to cross-examine an adverse witness in order to show interest, bias, or prejudice to affect his credibility and a wide latitude is allowed in such matters."⁴⁹ Two other Texas cases concur in authorizing the extension of cross-examination of an adverse expert witness to the number of times he has testified for plaintiffs⁵⁰ and to the point in time when the witness last testified for a plaintiff in a damage suit.⁵¹

In turning to authorities of other jurisdictions, it is indeed interesting to review five decisions handed down by the Pennsylvania Supreme Court on petitions of excessive verdicts. In these cases, de-

⁴⁵ 291 S.W.2d 746 (Tex. Civ. App. 1956) error ref. n.r.e.

⁴⁶ *Id.* at 748.

⁴⁷ *Id.* at 749.

⁴⁸ 222 S.W.2d 266 (Tex. Civ. App. 1949) error ref.

⁴⁹ *Id.* at 269.

⁵⁰ *Gulf, C. & S.F. Ry. v. Stewart*, 164 S.W. 1059 (Tex. Civ. App. 1914) error ref.

⁵¹ *San Angelo Water, Light & Power Co. v. Baugh*, 270 S.W. 1101, 1104 (Tex. Civ. App. 1925) error *dism.*

cided over a period of approximately twenty years, the court readily acknowledged the partisan character and bias inherent in the testimony of one particular doctor. Beginning with *Murphy v. Pennsylvania R.R.*,⁵² the court stated: "The professional expert, whose testimony we relate above, frequently appeared in court as a witness in personal injury cases, and the inference from his evidence is that he made the giving of testimony in such actions a business."⁵³ Following this decision three interim cases ensued, two of which verdicts were held to be excessive based on the failure of the jury to properly scrutinize this doctor's testimony,⁵⁴ and the other granting a new trial based on the lack of credible medical testimony in the plaintiff's behalf.⁵⁵ Finally, in *Libengood v. Pennsylvania R.R.*,⁵⁶ the court stated: "The jury's error on the side of excessiveness may be attributed to their too ready acceptance of the testimony of the plaintiff's medical expert without giving it the especially careful scrutiny to which it should have been subjected as this court has heretofore cautioned upon a number of occasions. . . ."⁵⁷ In a more recent decision, a lower Pennsylvania court⁵⁸ ascribed to the view that it is permissible for defendant's counsel to cross-examine the expert medical witness of the plaintiff as to the number of recent personal injury actions in which he had testified for plaintiffs. The ruling rested on the premise that any evidence upon which a logical inference such as bias may be based will be received in the absence of some specific rule excluding it.

Even though it is clear that evidence of this nature may be drawn from an expert witness, the phraseology of the questions should be reviewed in cases arising in federal courts in order not to fall within the decisions of *Southwest Metals Co. v. Gomez*⁵⁹ and thus preclude the interrogation because of indefiniteness and remoteness.

D. Fees Received For Testimony In Litigation

In attempting to convince the jury that an expert witness, medical

⁵² 292 Pa. 213, 140 Atl. 867 (1927).

⁵³ *Id.* at 867.

⁵⁴ *Doran v. Pittsburgh Ry.*, 343 Pa. 204, 22 A.2d 826, 829 (1941); *Tauber v. Borough of Wilkensburg*, 309 Pa. 331, 163 Atl. 675 (1932).

⁵⁵ "In order to supply the deficiency in their proof as to the cause of the abortions, plaintiffs called a professional expert witness, who had been testifying in the courts of Allegheny County as an expert for thirty years. . . ." *Nickolls v. Personal Fin. Co.*, 322 Pa. 67, 185 Atl. 286, 287 (1936).

⁵⁶ 358 Pa. 7, 55 A.2d 756 (1947).

⁵⁷ *Id.* at 759.

⁵⁸ *Kelly v. Pittsburgh Rys.*, 95 Pitt. Legal J. 437 (C.P. 1947).

⁵⁹ The question asked by counsel, to which the objection sustained, was, "Do you make it a habit of appearing for plaintiffs in these personal injury cases?" 4 F.2d 215, 218 (9th Cir. 1925). But Texas authorities appear to allow this line of interrogation. See notes 44, 45, 48, 50 *supra*.

or otherwise, is a professional testifier, examination as to the fees charged in past cases should not be overlooked; such interrogation indirectly reveals the number of times an expert has taken the witness stand. Cases are in conflict in Texas as to revealing the remuneration an expert received for testimony given in prior lawsuits. The court, in the *Horton* case,⁶⁰ permitted counsel to establish that the physician testifying for the plaintiff was compensated in prior cases contingent upon the recovery of damages. A relatively recent decision involving condemnation matters likewise held permissible the cross-examination of an expert appraiser from the standpoint of fees charged for testifying in other condemnation cases for the Housing Authority of the City of Dallas.⁶¹ Contrary decisions have been rendered by courts in *St. Louis & S.F. Ry. v. Clifford*⁶² and *Gulf C. & S.F. Ry. v. Stewart*.⁶³ In the latter cases, it was held that the trial judge did not abuse his discretion in refusing to admit evidence tending to show the doctor's custom regarding his fees for testifying in previous cases. However, the doctor's relationship with the plaintiff in the *Clifford* case was adequately and fully covered, probably instilling the belief in the court that the trial judge's ruling was not unreasonable. In the *Stewart* case, the court merely voiced the opinion that such matters are immaterial, but readily conceded that the inquiry would have been relevant to the issues in the principal case. If the language of the *Horton* case, dealing with fees charged in past litigation, cannot be relied upon as authority in this area, it would appear to be a very thin line of distinction to allow such cross-examination of an appraiser in a condemnation case and foreclose the procedure to counsel when cross-examining a doctor in personal injury litigation.

E. Opinions Rendered While Testifying In Other Lawsuits

In cross-examination as to opinions rendered in other lawsuits, as in the area of remuneration, the opportunity would appear to be present to indirectly elicit the number of times a witness has testified; the number of opinions rendered would be commensurate to the number of times he has appeared at the courthouse. Although the courts will permit counsel to develop the *number of times* an expert has rendered an opinion for one party or another, they are reluctant to allow counsel to pursue or develop the basis, text, or contents of such previous opinions in

⁶⁰ 103 S.W. 467, 468 (Tex. Civ. App. 1907) *error ref.*

⁶¹ *City of Dallas v. Riddle*, 325 S.W.2d 955, 957 (Tex. Civ. App. 1959) *error ref. n.r.e.*

⁶² 148 S.W. 1163 (Tex. Civ. App. 1912) *error ref.*

⁶³ 164 S.W. 1059 (Tex. Civ. App. 1914) *error ref.*

testing the expert's credibility. Again, the *Horton* case⁶⁴ is authority for disallowing impeachment evidence which inquires into the correctness of the doctor's opinions given in previous damage suits. Moreover, in the *Robinson* case,⁶⁵ the court held that the appellant's attorney could not question appellee's doctor as to previous reports made to the Industrial Accident Board setting forth specific injuries identical to or of the same general nature alleged by the plaintiff. The rationale of the ruling is abundantly clear because cross-examination would be unduly prolonged and involve matters of questioned relevancy and materiality.

III. CONCLUSION

It is readily apparent that the scope of cross-examination is highly discretionary with the trial court, but even in this area the function becomes axiomatic when judicial precedents light the way for the exercise of discretion. Trial counsel should not overlook the means at his disposal to reveal the true character of the professional medical advocate or any expert who responds solely to a pecuniary stimulus and disregards the ethics of human decency.

The adversary system itself has done much to crush fraud and imposition;⁶⁶ however, a relatively few professional expert witnesses continue to unethically influence litigation. Bar associations and medical societies throughout the country have recognized the problem as it exists, and the Statements of Principles⁶⁷ which were adopted by the State Bar of Texas, the Texas Association of Osteopathic Physicians and Surgeons, and the Texas Medical Association evidence the concern. The Honorable Meier Steinbrink has set forth the responsibilities of the medical witness as follows:

The medical expert witness . . . must bend every effort towards the discharge of his duties in a manner that will reflect credit on himself and on the great profession which he represents. He should never forget that his testimony is given to instruct and inform the court and jury with regard to some vital point in issue and it is no less important that he approach the case wholly uncommitted in opinion than that the jurors should. Any individual who contributes even in the slightest to a relaxation of public confidence in the administration of justice commits a serious transgression against society. A physician who, under the impetus of a more or less substantial retainer, refuses to abide by rules laid down for us by the highest courts, cannot avoid the realization that his conduct inflicts grave harm, not alone upon his profession, but

⁶⁴ See note 60 *supra*.

⁶⁵ See note 48 *supra*.

⁶⁶ Smith, *Law and Science*, 19 Texas L. Rev. 414, 418 (1941).

⁶⁷ 26 Texas B.J., No. 1 (1963).

upon one of the most vital forces that makes for good government—the true administration of justice. Perjury is a crime, but it is no less wrong for a physician to exaggerate or minimize symptoms and conditions described, to relate wilfully a partial truth which prevents an accurate appraisal by the jury or to confuse the issue by introducing factors which have no scientific relevance to the subject litigated. As a member of a learned and public calling, he must be governed by rules which transcend the distinction between legal and moral wrongs.⁶⁸

If the ethical responsibilities set forth therein were adhered to by the members of both professions, the human limitations of the practitioners would succumb to legal and moral right.

⁶⁸ Steinbrink, *The Medical Witness*, 6 Brooklyn L. Rev. 155, 157, 158 (1937).

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