

Oath-Sayers

BY JOSEPH P. McMENAMIN, MD, JD

OUR JUSTICE system has always needed physicians to serve as witnesses, and it probably always will. Doctors have traditionally been called upon to testify to such questions as the cause of death, the extent of an injured person's medical problems, the competency of a testator to write a will and numerous other similar issues. Only physicians are adequately trained and educated to shed light on these matters, and the vast majority of physicians do so with perfect candor and professionalism much to the benefit of society. We should all be grateful that doctors are willing to assist the finder of fact to do what the law needs it to do.

Over the last generation or so, however, a class of physicians has appeared whose contribution to society is much less clear. I refer to physicians who devote substantial portions of their professional time to soliciting and capitalizing on opportunities to participate as experts for litigants. For these doctors, testifying is a business, often highly remunerative, and sometimes of apparently greater importance to the physician than the practice of medicine. There are many names for these individuals, ranging from the mildly critical to the unprintable. I shall choose a middle ground, and for purposes of this article call them oath-sayers.

Doctors are by no means the only professionals engaged in oath-saying. Engineers of all varieties,

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design experts, scientists and pseudoscientists, psychologists, premises security experts, accident reconstructionists, handwriting and documents analysts and others too numerous to mention ply their trades as well. But doctors are my biggest concern, first because it is my privilege to represent real doctors against those accusing them of malpractice; second, because as a doctor myself and a disciple of the ethos of medicine, I value the integrity of medicine and believe that all doctors should as well.

In medicine, there are plenty of gray areas—questions on which, as the law puts it, reasonable minds can disagree. The disagreements can be general (the value of "tight" control in diabetes) or specific (whether to explore Mr. Smith's abdomen). Legitimate differences among well-trained doctors of good will are not only inevitable, but ultimately beneficial, since from these disagreements arises the research that eventually provides new and better approaches to patient care. Entering the lists on one side of such controversies or the other does not an oath-sayer make. It is, rather, a willingness to advocate for fringe positions for pay that is the hallmark of the oath-sayer—and the mark of Cain.

Oath-saying is big business. Corporations whose whole *raison d'être* is finding experts advertise regularly in the legal literature. Some of these organizations provide their services on a contingent fee basis. In other words, the larger the recovery for the plaintiff, the larger the fee for the organization. This is not an arrangement calculated to foster a dispassionate search for truth. In some cases, individual physicians advertise in the legal press, as do members of other professions, to invite the

readership's business. Oath-sayers eager to get new business by advertising are likely to be eager to retain business by testifying to suit the perceived needs of counsel.

Oath-sayers are thus willing to make statements that would never be published in peer-reviewed journals or be taken seriously by medical professionals. For example, an oath-sayer may be willing to testify that he knows the cause of a plaintiff's cancer. Various "causes" are espoused; "free radicals" are one currently popular example. The oath-sayer then testifies that exposure to substance X—where X is defined as whatever defendant's product is made of or from—entails exposure to free radicals and so a risk of cancer. The oath-sayer knows that cancer is not one disease, that the state of human knowledge does not, in general, permit one to identify "the cause" of cancer, that to the extent "causes" can be found they are often interrelated, and that few, if any, reputable scientists share his opinion. The oath-sayer is undeterred.

Medico-Legal Symbiosis. An incestuous relationship sometimes develops in a given geographic area between plaintiffs' counsel and local medical experts, particularly in personal injury litigation. Persons claiming to have been injured on the job, in automobile accidents or in falls present to certain physicians known "on the street" for their willingness to "help" plaintiffs. These doctors diagnose some physical malady in the absence of any demonstrable pathology and then refer the patient to counsel for representation. Should the prospective plaintiff present first to the lawyer, he then refers the case to one of the doctors in this network for evaluation and

care—a doctor that the lawyer knows from past experience will testify the “right way” when the time comes. Multiple physician visits ensue, typically featuring ultrasound, heat or cold treatments, physical therapy and other treatments for vague soft tissue injuries over a protracted period of time, thereby building the medical “specials” in the case. When the time comes to try the case, just as predicted, the doctor testifies as counsel needs.

From this arrangement, the doctor gets his fee, as well as his chance to appear as plaintiff’s oath-sayer and hence to earn additional fees. The attorney gets his clients, and the patient-plaintiff gets his lottery ticket. Everyone wins. Except, of course, society and the justice system.

In asbestos litigation, an industry unto itself, a board-certified internist well-known to defense counsel gives a good example in another field. This individual routinely offers opinions not only about pulmonary medicine, in which he has had no subspecialty

training, but also about radiology and pathology. This internist also does “research” into asbestos-related illness financed entirely by plaintiff firms and labor unions. He claims that he was “grandfathered in” as an ILO (International Labor Organization) “B reader” even though there is no “grandfather clause” for “B reader” status. This internist travels about in a tractor trailer equipped to do pulmonary function tests and roentgenographic examinations, and solicits patients at industrial facilities. Whatever portion of his fee for services is not covered by a given worker’s health coverage is paid by a plaintiff’s law firm, which typically has its representative on the premises during the screening examination, to facilitate referrals.

The Masters of All Trades. A hallmark of the oath-sayer is a willingness—even an eagerness—to testify outside his field of training. The asbestos expert above is one example. In medical malpractice cases, this phenomenon is all too common. A

family practitioner testified that she knew the standard of care for an orthopedic surgeon because (a) she had taken a course in orthopedics 20 years earlier in medical school; (b) she had observed orthopedists care for her children’s various orthopedic problems; and (c) she had discussed the case two weeks prior to trial with an orthopedist over dinner. This same witness opined that she also knew the standard of care for pathologists and neurosurgeons, and offered similar bases for her claims. No hospital in the United States would offer her privileges, of course, in any of these fields, but that was no impediment in the mind of the witness. The oath-sayer sees it as his office to advocate for the client, not to pay homage to the truth.

Have Degree, Will Travel. Where I grew up, an expert was defined as “anyone 50 miles from home.” Perhaps in part for this reason, but mainly because he must bring his goods to market, the oath-sayer tends to be peripatetic. One expert I have personally examined has testi-



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fied in every state in the Union east of the Mississippi and in most of those west of it. Another example is a physician who maintains a private airplane, the better to keep his busy deposition schedule in the many parts of the country where he testifies. The oath-sayer appears in more courtrooms than the average trial lawyer, although typically the number of courtroom appearances is dwarfed by the number of depositions given. In medical malpractice, frequent-flyer miles allow the oath-sayer to ply his trade without the knowledge of doctors in his referral base, permitting him to see a few patients in between trials.

The Oath-Sayer and Medical Malpractice

A plaintiff alleging malpractice must have an expert to establish the standard of care, a breach of the standard of care, and a causal connection between the alleged breach and the complained of harm. A doctor testifying as a rare event for a plaintiff he thinks has been mistreated may be sincere and may even be testifying out of some sense of duty. Oath-sayers, however, are merely merchants. Like lawyers, they try to persuade. In our system, that is what lawyers, unlike witnesses, are supposed to do. Unlike a lawyer, who is there as everyone knows to advocate for his client, the oath-sayer wears the garb of objectivity and the mantle of science. For the oath-sayer, truth is neither the end nor the means. Indeed, it is often an obstacle—but seldom a substantial one.

The Diagnostic Magicians. One of the commonest theories asserted against malpractice defendants is failure to diagnose. The typical oath-sayer demands the diagnostic prowess of an Osler.

An OB/GYN who had never seen a case of hypoglossia-hypodactylia syndrome nevertheless testified that it was a breach of the standard of care for another OB/GYN, performing an ultrasound for dating at approximately 20 weeks' gestation, to fail to make that diagnosis antena-

tally. Another OB/GYN testified that a fellow practitioner similarly breached the standard of care in failing to diagnose congenital listeriosis antenatally where the only clue was a very mild, apparently viral URI in the mother. An infectious disease consultant at a tertiary care center who had never diagnosed torsion testis similarly testified that it was a breach of the standard of care for a family practitioner in the community to fail to make that diagnosis in a young man with abdominal pain. Just as the Monday morning quarterback never loses a game, the oath-sayer never misses a diagnosis.

The Great Communicator. Another popular theory against physicians is failure to obtain informed consent. In Virginia, expert testimony is needed to proceed under this theory, because a doctor need reveal only that which other reasonably prudent physicians in his specialty would have revealed under the same or similar circumstances. The oath-sayer would have the jury believe that the reasonable physician teaches the patient enough to enable him to sit for Part I if not Parts II and III of the National Boards. That a particular complication is rarely encountered is of no moment. Whatever information the defendant may have divulged, it wasn't enough for the oath-sayer.

The Scholar. Oath-sayers offer pedantic criticisms of their targets, entirely unrealistic under the circumstances. One source of such superciliousness may be academia, although in my experience most oath-sayers are not academicians. A general surgeon in a rural area begged his patient to accept transfer to a tertiary care center for management of a large abdominal aortic aneurysm involving the renal arteries. The patient refused because a relative had died at that same center in the recent past. The surgeon felt he had no choice but to take the patient to his small community hospital's OR, where he operated for many hours with no help except from the scrub nurse and a surgical technician for the simple reason that

no other help was available. The patient survived, and finally accepted transfer to the referral center after complications developed. The expert, a vascular surgeon who had never practiced outside a Mecca, complained about the type of suture material chosen, and the surgeon's failure to get help, among other things. The oath-sayer, accustomed to support from fellows and house-staff, did practice the defendant's specialty (surgery), but confined his work to his subspecialty (vascular), and worked under circumstances wholly different from those that confronting the defendant.

IN VIRGINIA, the itinerant oath-sayer may encounter at least somewhat more difficulty in qualifying as an expert than is true in some other jurisdictions:

Any physician who is licensed to practice in Virginia shall be presumed to know the statewide standard of care in the specialty or field of medicine in which he is qualified and certified. This presumption shall also apply to any physician who is licensed in some other state of the United States and meets the educational and examination requirements for licensure in Virginia. An expert witness who is familiar with the statewide standard of care shall not have his testimony excluded on the ground that he does not practice in this Commonwealth. A witness shall be qualified to testify as an expert on the standard of care if he demonstrates expert knowledge of the standards of the defendant's specialty and what conduct conforms or fails to conform to those standards and if he has had active clinical practice in either the defendant's specialty or a related field of medicine within one year of the date of the alleged act or omission forming the basis of the action.

Va. Code Ann. § 8.01-581.20.

In principle, this statute means that the expert should at least practice the defendant's own specialty.

That did not prevent the infectious disease subspecialist mentioned above, however, from testifying against the family practitioner in the torsion testis case.

A few years ago, defense counsel could often keep oath-sayers out of Virginia courts. However, gradual legislative erosion of the obstacles the law had traditionally erected against these witnesses made the courts less willing to exclude them. Today, Virginia sees oath-sayers in her courts as never before. Moreover, the future does not look bright. The Virginia Trial Lawyers Association and other special interests lobby the General Assembly every year to lower even further the qualifications Virginia requires. To the extent they succeed, we are certain to see even more oath-sayers in the future.

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Cross-examination, of course, is the traditional tool by which opposing counsel can unmask oath-sayers.

Juries may take some interest in evidence, if it can be obtained, that a high percentage of the oath-sayer's income comes from testifying, or that he testifies exclusively for plaintiffs, or that he has testified on prior occasions for plaintiffs' counsel. Recently, a circuit court judge ordered an oath-sayer to produce his tax returns so that some of these issues could be explored. Many oath-sayers have scores, even hundreds of old deposition transcripts from which useful impeachment material can often be extracted. Some have extensive bibliographies, another useful source of information. One court once allowed me to subpoena a sanitized version of the OR log at the hospital where plaintiff's expert practiced, so I could test his claim that he did more than 1,000 vascular procedures per year. (He didn't.) Nevertheless, if a court decides that a proffered oath-sayer is indeed an expert, a threshold that as noted is not very high today, he is permitted

to express his opinion, and a jury is entitled to believe it. Accordingly, I believe that more must be done to alleviate the problem.

First of all, MSV and doctors generally must resist with stubborn zeal any effort to liberalize further the law of experts in Virginia. Otherwise, the oath-sayers will prosper and multiply. I would encourage MSV to go further, and to seek to amend the law to make it harder, as it once was, for oath-sayers to pull medical wool over judicial eyes.

A second, more aggressive step would be to publish in medical literature, without editorial comment, transcripts of testimony demonstrably untrue. The witness should be fully and accurately identified. The members of a given specialty should learn to recognize their oath-sayers, and learn what these individuals have to say. Funding agencies and professional societies should too.

Third, the specialty societies should have the power and the obli-



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gation to strip an individual certified in a given specialty of his board certification if, by virtue of his testimony, he demonstrates an unequivocal departure from accepted thinking within that specialty, or if he testifies in a way that demonstrates that he does not understand his limits as a practitioner of that specialty. If one can lose board certification by failing a recertifying exam, there is no reason why the opinions expressed by an oath-sayer cannot likewise serve as a crucible.

I propose further that in a given geographic area, individuals recognized as genuine experts by their peers be identified. In each malpractice case, one of their number would be chosen to testify as "the" expert on the issues relevant to his specialty in that case. The list could be maintained in alphabetical (or any other) order, and those participating would take turns in strict rotation. The expert's fee would be paid 50/50 by plaintiff and defendant. This would tend to encourage objectivity and en-

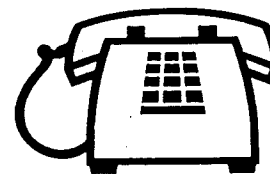
able the expert to aid the trier of fact as in theory he is supposed to do.

Some states now provide criminal penalties for those who misrepresent their academic credentials. [See, e.g., Fla. Stat. Ann. §§817.566 and 817.567 (West Suppl. 1993)]. Virginia could do the same. There may also be merit in capping fees experts can charge, and in excluding any expert who earns more than, say, 10% of his income by testifying. A creative, if somewhat radical proposal would be to establish a "science court," presided over by a judge trained in science or some technical field. These steps might improve the chances that the finder of fact does not become instead a finder of fiction.

Conclusion

By virtue of his knowledge, skill, training, and experience, a physician has much to offer the finder of fact. Indeed, in many kinds of cases, physician testimony is absolutely indispensable for just resolution of a

dispute. Nothing contained in this article should be construed as a denial of the need for and the value of legitimate expert opinion. On the other hand, medicine needs to understand that the doctor's role in court is not to serve as an advocate—we have lawyers for that—but as a source of information helpful to the finder of fact. We need to curb, if we cannot eliminate, the oath-sayer, both to preserve the integrity of the profession and to serve the interests of justice. Medicine has done too little to police the activities of these individuals in the past. It is time to act.



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