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# Evidence: Obtaining Expert Testimony of Defendant Physician under Adverse Witness Statute

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ciency need not be sacrificed if adequate guidelines are placed upon the right to counsel. For example, counsel could be present to witness the proceedings, but not be allowed to interrogate witnesses, or otherwise interfere with the proceedings.<sup>48</sup> This general approach would protect the value of police lineups, and yet enable counsel to make an informed objection to lineup irregularities in later stages of the criminal procedure.

### Evidence: Obtaining Expert Testimony of Defendant Physician Under Adverse Witness Statute

Plaintiff instituted a medical malpractice suit alleging injury due to the negligence of defendant in administering X-rays. The trial court granted defendant's motion for a directed verdict since plaintiff had not presented any expert medical testimony to the jury. On appeal, plaintiff contended that he should have been allowed to qualify defendant as an expert and to elicit his expert medical testimony under Minnesota's adverse party rule.<sup>1</sup> The Minnesota Supreme Court *held* that plaintiff could not require expert testimony from defendant physician. *Hoffman v. Naslund*, 274 Minn. 521, 144 N.W.2d 580 (1966).

It has generally been held that one may not examine an adverse party under the rules of cross-examination in the absence of a statute which so provides.<sup>2</sup> When one calls an adverse party as a witness he is compelled to make that party his own witness,<sup>3</sup> with the result that the testimony is binding and the witness cannot be impeached.<sup>4</sup> However, a majority of the states have enacted adverse witness statutes which provide that

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48. The *Wade* decision made no reference to the role of counsel at lineups, but it is clear that the Court's primary concern was assuring his access to information regarding the procedures employed. The suggestion that counsel's activities be limited is therefore not inconsistent with the decision.

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1. MINN. R. CIV. P. 43.02. This rule provides that a party may call an adverse party during trial and may interrogate him by leading questions and impeach and contradict him on direct examination on all material matters as if he had been called by the adverse party. See FED. R. CIV. P. 43(b).

2. *DeLord v. Green*, 15 Del. 316, 40 A. 1120 (1894); see *State v. Gulbrandsen*, 238 Minn. 508, 57 N.W.2d 419 (1953); *White v. Southern Oil Stores*, 198 S.C. 173, 17 S.E.2d 150 (1941).

3. *Smellie v. Southern Pac. Ry.*, 212 Cal. 540, 555, 299 P. 529, 535 (1931).

4. See *In re Erickson*, 13 F. Supp. 853 (W.D.N.Y. 1936); *Smellie v. Southern Pac. Ry.*, 212 Cal. 540, 555, 299 P. 529, 535 (1931).

the adverse party may be called as a witness and questioned under the rules of cross-examination.<sup>5</sup> Since such witnesses are likely to be hostile and evasive, the method of questioning ordinarily used on cross-examination, including leading questions and impeaching the witness, is allowed.<sup>6</sup>

While all states having adverse witness statutes recognize the right of plaintiff to call a defendant physician in a malpractice action and examine him under the rules of cross-examination, many have limited the questions to those calling for statements of fact.<sup>7</sup> Thus, a physician may not be questioned as to the accepted standards of medical practice in his community or as to whether his actions deviated from those standards, a matter which calls for expert opinion.<sup>8</sup>

Some of the courts which deny a party the right to elicit expert testimony from the opposing party do so without attempting to justify their position by logic or reasoning.<sup>9</sup> Other jurisdictions, in reaching the same result, base their decision on two main arguments. First, it is unfair for the defendant to have to prove plaintiff's case,<sup>10</sup> and second, a physician has a property right in his expert opinion of which he would be deprived if compelled to testify.<sup>11</sup> The "unfairness" argument has been attacked on the theory that justice and expediency should not be abandoned for the sake of maintaining the "sporting" aspect of trial.<sup>12</sup> It has been pointed out that the "property

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5. *E.g.*, MINN. R. CIV. P. 43.02.

6. *Id.*

7. *Osborn v. Carey*, 24 Idaho 158, 132 P. 967 (1913); *Erickson v. Wilson*, 266 Minn. 401, 123 N.W.2d 687 (1963); *Hull v. Plume*, 131 N.J.L. 511, 37 A.2d 53 (Ct. Err. & App. 1944); *Hunder v. Rindlaub*, 61 N.D. 389, 237 N.W. 915 (1931); *Forthofer v. Arnold*, 60 Ohio App. 436, 21 N.E.2d 869 (1938).

8. *Osborn v. Carey*, 24 Idaho 158, 132 P. 967 (1913); *Erickson v. Wilson*, 266 Minn. 401, 123 N.W.2d 687 (1963); *Hull v. Plume*, 131 N.J.L. 511, 37 A.2d 53 (Ct. Err. & App. 1944); *Hunder v. Rindlaub*, 61 N.D. 389, 237 N.W. 915 (1931); *Forthofer v. Arnold*, 60 Ohio App. 436, 21 N.E.2d 869 (1938). *Contra*, *McDermott v. Manhattan Eye, Ear & Throat Hosp.*, 15 N.Y.2d 20, 26, 203 N.E.2d 469, 473, 255 N.Y.S.2d 65, 73 (1964).

9. *Erickson v. Wilson*, 266 Minn. 401, 123 N.W.2d 687 (1963); *Forthofer v. Arnold*, 60 Ohio App. 436, 21 N.E.2d 869 (1938).

10. *Osborn v. Carey*, 24 Idaho 158, 132 P. 967 (1913), *discussed in* 5 S. CAL. L. REV. 448 (1932). *Contra*, *Oleksiw v. Weidener*, 2 Ohio St. 2d 147, 207 N.E.2d 375 (1965).

11. *See Hull v. Plume*, 131 N.J.L. 511, 517, 37 A.2d 53, 56 (Ct. Err. & App. 1944). *But see McDermott v. Manhattan Eye, Ear & Throat Hosp.*, 15 N.Y.2d 20, 203 N.E.2d 469, 255 N.Y.S.2d 65 (1964).

12. *E.g.*, *McDermott v. Manhattan Eye, Ear & Throat Hosp.*, 15 N.Y.2d 20, 203 N.E.2d 469, 255 N.Y.S.2d 65 (1964).

right" argument<sup>13</sup> deserves support only when the person whose expert testimony is desired is not a party to the action. In such cases great inconvenience and unfairness could result to physicians called for the purpose of giving expert testimony.<sup>14</sup> However, when the expert is a party to the action, there is no inconvenience. Fairness dictates that the expert party should not have the right to remain silent if he has relevant information for the judicial proceeding.<sup>15</sup> The need to cross-examine a party who is a medical expert is particularly pressing because as a practical matter it is difficult to obtain the attendance and testimony of other physicians in medical malpractice suits.<sup>16</sup> The testimony of an expert in malpractice cases is vital because most courts require expert testimony in order for plaintiff to avoid a nonsuit.<sup>17</sup>

Perhaps in response to these arguments, state courts which have recently faced this issue have held that one should be able to elicit the expert testimony of an adverse party.<sup>18</sup> An example of the current trend is *McDermott v. Manhattan Eye, Ear and Throat Hospital*,<sup>19</sup> where the New York Court of Appeals allowed plaintiff to question defendant physician as to his expert

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13. Note, *Oleksiw v. Weidener: Eliciting Expert Testimony From Defendant Doctor In a Malpractice Suit*, 70 DICK. L. REV. 394, 397-99 (1966).

14. *McDermott v. Manhattan Eye, Ear & Throat Hosp.*, 15 N.Y.2d 20, 29, 203 N.E.2d 469, 474, 255 N.Y.S.2d 65, 73 (1964).

15. *Oleksiw v. Weidener*, 2 Ohio St. 2d 147, 207 N.E.2d 375 (1965). See *McDermott v. Manhattan Eye, Ear & Throat Hosp.*, 15 N.Y.2d 20, 28, 203 N.E.2d 469, 474, 255 N.Y.S.2d 65, 73 (1964). This is true only in civil suits as a defendant in a criminal action is specifically exempted from testifying against himself by the constitutional protection against self-incrimination. *Oleksiw v. Weidener*, *supra*; U.S. CONST. amend. V.

16. See, e.g., *Marrone v. United States*, 355 F.2d 238 (2d Cir. 1966). It is indeed difficult to expect one physician to condemn the actions of another physician in open court, especially when the latter is a leader in his field. *McDermott v. Manhattan Eye, Ear & Throat Hosp.*, 15 N.Y.2d 20, 27, 203 N.E.2d 469, 474, 255 N.Y.S.2d 65, 73 (1964).

17. *Bryant v. Biggs*, 331 Mich. 64, 71, 49 N.W.2d 63, 67 (1951); *King, The Adverse Witness Statute and Expert Opinion*, 4 WAYNE L. REV. 228 (1958); see 7 J. WIGMORE, EVIDENCE § 2090 (3d ed. 1940). In *Hoffman*, the Minnesota court required expert testimony in order for plaintiff to avoid a nonsuit. The standard applied in most malpractice cases, including *Hoffman*, requires scientific knowledge that can be provided only by expert medical witnesses.

18. *Dark v. Fetzer*, 6 Mich. App. 308, 149 N.W.2d 222 (1967); *Rogotski v. Schept*, 91 N.J. Super. 135, 219 A.2d 426 (App. Div. 1966); *McDermott v. Manhattan Eye, Ear & Throat Hosp.*, 15 N.Y.2d 20, 203 N.E.2d 469, 255 N.Y.S.2d 65 (1964); *Oleksiw v. Weidener*, 2 Ohio St. 2d 147, 207 N.E.2d 375 (1965); Annot., 88 A.L.R.2d 1186 (1963).

19. 15 N.Y.2d 20, 203 N.E.2d 469, 255 N.Y.S.2d 65 (1964), *rev'g* 16 App. Div. 2d 374, 228 N.Y.S.2d 143 (1962).

medical opinions. The court of appeals stated that the defendant doctor's knowledge of the proper medical practice and his awareness of any deviation from that standard in his case are as much matters of "fact" as are the examinations he made or the treatment he prescribed.<sup>20</sup> The court further stated that the purpose of the adverse witness statute—to permit the production of all pertinent and relevant evidence available from the parties<sup>21</sup>—is best fulfilled when plaintiff is allowed to elicit expert testimony from defendant. It would be difficult to argue that the issue of whether defendant deviated from the standard of medical practice in his community is not pertinent to a malpractice action.<sup>22</sup> In fact in the absence of such evidence, plaintiff's case would usually be dismissed.<sup>23</sup>

The *McDermott* court refused to accept the argument that to compel defendant to testify would be unfair and inconsistent with the adversary system, concluding that any detriment to the adversary system was outweighed by the ultimate requirement that each case be decided on the basis of all relevant and available material.<sup>24</sup> The court reasoned that the main objectives should be to arrive at a just decision and to use expedient means to attain such end.<sup>25</sup> It may well be argued that the court in *McDermott* recognized that it is optimistic to expect plaintiff to gain anything by seeking the expert testimony of the very doctor he is charging with malpractice, but nevertheless concluded that the decision whether to call an adverse party is one which should rest with the plaintiff.<sup>26</sup>

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20. In *Decker v. Pohlidal*, 22 Pa. D. & C.2d 631 (C.P. 1960), the court questioned whether any distinction can be made between questioning the defendant doctor as to details of his examination of the plaintiff (fact question) and his opinion, since as to the issue whether the doctor deviated from proper medical practice in that community fact and opinion are inextricably intermingled.

21. See also *State ex rel. Miles v. Brainin*, 224 Md. 156, 161, 167 A.2d 117, 119 (1961).

22. 15 N.Y.2d at 27, 203 N.E.2d at 473, 255 N.Y.S.2d at 72.

23. See note 17 *supra* and accompanying text.

24. See Friedenthal, *Discovery and Use of an Adverse Party's Expert Information*, 14 STAN. L. REV. 455, 487 (1962).

25. The court pointed out that if a defendant in a malpractice action testifies that his conduct conformed to the required standard his case is greatly strengthened and if he cannot so testify the plaintiff's case is strengthened. In either case the objectives of justice and expediency are achieved.

26. Perhaps plaintiff's objectives in calling defendant under the adverse witness statute are not as idealistic as they appear to be. In *McDermott* plaintiff hoped to prove her case by questioning the defendant as to the propriety of a corneal transplant in view of the condition of her eyes. Plaintiff was prepared to use the defendant's

A recent New Jersey decision<sup>27</sup> relied exclusively on *McDermott* as standing for a more "enlightened and practical view." Effectively overruling its prior position on this issue,<sup>28</sup> the court indicated that the current aim is to arrive at truth and justice rather than to "indulge in the niceties which have so often characterized evidence law in the past."<sup>29</sup> The Ohio Supreme Court has also followed the view expressed in *McDermott*, overruling its earlier decisions.<sup>30</sup> The court stated that the purpose of the adverse witness statute is to permit the production of all pertinent evidence in order that the trier of facts might have all information necessary to arrive at a just decision. The court then held that the purpose of Ohio's adverse witness statute<sup>31</sup> would best be met by following the *McDermott* line of reasoning. In analyzing its prior position and those of other states which prohibit one from eliciting expert testimony of an adverse party the court noted that the majority of these cases do not specify anything inherently wrong with examining the opponent as an expert and are general in their reasons for finding that expert testimony was not intended to be included in the statute. The Ohio court concluded that the only real basis for its prior holding on the issue was that it would not be fair or sporting to allow plaintiff to force defendant to become his expert. The court, in overruling its prior decisions, rejected the "unfairness" argument asserting that the question should not be one of fairness to the parties but rather one of fairness to society.<sup>32</sup> The court reasoned that since the withholding of relevant testimony obstructs the administration of justice, the duty to testify is owed to society, not to the parties in a specific lawsuit. The Ohio court also noted the absence of any statutory language which required the exclusion of expert testimony. The court

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authoritative text on the subject to induce him to give favorable testimony.

27. *Rogotzki v. Schept*, 91 N.J. Super. 135, 219 A.2d 426 (App. Div. 1966).

28. The *Rogotzki* case dealt with the right to elicit expert testimony from defendant physician during discovery, not at the trial stage. However, in persuasive dicta the New Jersey court stated that if it was called upon to reconsider the issue decided in *Hull v. Plume*, 131 N.J.L. 511, 37 A.2d 53 (Ct. Err. & App. 1944), a decision relied on by the Minnesota court in *Ericksen*, it would overrule the *Hull* case since its decision was somewhat less than an enlightened one.

29. 91 N.J. Super at 148, 219 A.2d at 432.

30. *Oleksiw v. Weidener*, 2 Ohio St. 2d 147, 207 N.E.2d 375 (1965) overruling *Wiley v. Wharton*, 68 Ohio App. 345, 41 N.E.2d 255 (1941) and *Forthofer v. Arnold*, 60 Ohio App. 436, 21 N.E.2d 869 (1938).

31. OHIO REV. CODE ANN. § 2317.07 (Baldwin 1964).

32. See 8 J. WIGMORE, EVIDENCE § 2192 (3d ed. 1940).

thus concluded that a party may be examined as to all relevant matter in issue when called under an adverse witness statute, regardless of whether expert testimony is involved.

On at least two occasions federal courts have been asked to decide whether expert testimony may be elicited under Rule 43(b) of the Federal Rules of Civil Procedure.<sup>33</sup> In *Thompson v. Lillehei*<sup>34</sup> the Eighth Circuit refused to rule on the issue, reasoning that plaintiffs had failed to show prejudice in the court's failure to allow them to elicit the expert testimony of defendant. Similarly, in *Marrone v. United States*<sup>35</sup> the Second Circuit refused to decide the question because plaintiffs had made no offer of proof and thus could not establish any prejudice in accordance with Rule 43(c).<sup>36</sup> Federal courts have been faced with the issue on numerous occasions in connection with questioning during discovery proceedings, and appear to be equally divided.<sup>37</sup>

The Minnesota Supreme Court was first presented with the issue in *Ericksen v. Wilson*.<sup>38</sup> The court held in *Ericksen* that plaintiff could not use the adverse witness statute to elicit expert testimony under the guise of cross-examination. The court stated its approval of the Idaho court's position<sup>39</sup> that if plaintiff desires to make his case by expert evidence from defendant himself, he must call him as his own witness. However, it should be observed that if plaintiff had to call defendant as his own witness it would effectively preclude any attempt by plaintiff to cross-examine him.<sup>40</sup> The Minnesota court, however, stated its conclusion without supporting argument or reasoning, relying on the rulings in the majority of jurisdictions which had previously considered the issue.<sup>41</sup>

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33. FED. R. CIV. P. 43(b); MINN. R. CIV. P. 43.02 is very similar.

34. 273 F.2d 376 (8th Cir. 1959).

35. 355 F.2d 238 (2d Cir. 1966).

36. FED. R. CIV. P. 43(c) provides that: "In an action tried by a jury, if an objection to a question propounded to a witness is sustained by the court, the examining attorney *may* make a specific offer of what he expects to prove by the answer of the witness." (Emphasis added.) It should be noted that this rule is the same as MINN. R. CIV. P. 43.03. It is indeed difficult to see where an offer of proof is made mandatory by this rule.

37. Compare *Russo v. Merck & Co.*, 21 F.R.D. 237 (D.R.I. 1957), and *Moran v. Pittsburgh-Des Moines Steel Co.*, 6 F.R.D. 594 (W.D. Pa. 1947), with *Beirne v. Fitch Sanitarium, Inc.*, 20 F.R.D. 93 (S.D.N.Y. 1957), and *Olsen v. St. Anthony Mach. Prods. Co.*, 18 F.R.D. 313 (D. Minn. 1955) Cf. MINN. R. CIV. P. 26.02 (prohibits discovery of expert opinion).

38. 266 Minn. 401, 123 N.W.2d 687 (1963).

39. *Osborne v. Carey*, 24 Idaho 158, 132 P. 967 (1913).

40. See note 6 *supra* and accompanying text.

41. See *Osborne v. Carey*, 24 Idaho 158, 132 P. 967 (1913); Wiley

In *Hoffman*, the Minnesota Supreme Court reasoned that since the jurisdictions on either side of the question are still roughly equal it was not inclined to take a position contrary to *Ericksen*. However, if the court is relying solely on outstate law, the outcome in *Hoffman* is questionable. Without exception, every state court which has been faced with this issue since *Ericksen* has allowed plaintiff to elicit the expert testimony of an adverse party, even if such holding necessitated overruling its prior position.<sup>42</sup> Thus if the Minnesota court is relying on outstate law it should have recognized that the outstate law at present is not the same as when *Ericksen* was before the court; there has been a distinct trend away from the *Ericksen* result.

Before stating its holding in *Hoffman* the Minnesota court mentioned that no offer of proof was made by plaintiff to disclose or indicate the type or degree of proof that he was seeking to establish by calling defendant as an adverse witness. This conceivably might be taken to indicate that if the court is again faced with this issue and an offer of proof has been made, then the eliciting of expert testimony from defendant would be allowed. The requirement of an offer of proof has been considered and correctly rejected by at least one state court<sup>43</sup> which held that questioning a party under the adverse witness statute is often exploratory and thus it would not be reasonable to require an offer of proof from the questioning party.

The Minnesota Supreme Court has previously stated that a plaintiff may prove his case by cross-examination of the defendant.<sup>44</sup> It has also acknowledged the fact that the adverse witness

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v. Wharton, 68 Ohio App. 345, 41 N.E.2d 255 (1941); Forthofer v. Arnold, 60 Ohio App. 436, 21 N.E.2d 869 (1938); Hull v. Plume, 131 N.J.L. 511, 37 A.2d 53 (Ct. Err. & App. 1944); McDermott v. Manhattan Eye, Ear & Throat Hosp., 16 App. Div. 2d 374, 228 N.Y.S.2d 143 (1962), *rev'd*, 15 N.Y.2d 20, 203 N.E.2d 469, 255 N.Y.S.2d 65 (1964).

42. With the exception of North Dakota, see *Hunder v. Rindlaub*, 61 N.D. 389, 237 N.W. 915 (1931), and Idaho, see *Osborne v. Carey*, 24 Idaho 158, 132 P. 967 (1913), where the issue in question has not been presented to these respective state courts since *Ericksen* was decided, the states relied on in *Ericksen* have abandoned their prior position and now allow plaintiff to elicit the expert testimony of defendant to use as a basis for a malpractice action against him. See *Rogotzki v. Schept*, 91 N.J. Super. 135, 219 A.2d 426 (App. Div. 1966); *McDermott v. Manhattan Eye, Ear & Throat Hosp.*, 15 N.Y.2d 20, 203 N.E.2d 469, 255 N.Y.S.2d 65 (1964); *Oleksiw v. Weidener*, 2 Ohio St. 2d 147, 207 N.E.2d 375 (1965). See also *Annot.*, 88 A.L.R.2d 1186 (1963).

43. *Lawless v. Calaway*, 24 Cal. 2d 81, 147 P.2d 604 (1944).

44. *Bylund v. Carrol*, 203 Minn. 484, 281 N.W. 873 (1938); see *Lawless v. Calaway*, 24 Cal. 2d 81, 147 P.2d 604 (1944); *Hull v. Plum*, 131 N.J.L. 511, 517, 37 A.2d 53, 56 (Ct. Err. & App. 1944).