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Theory and Operation of the American Legal System

American Legal Theory

Both law and medicine are dramatic. Many radio dramas, television shows, and movies are based upon either medicine or law because what physicians and attorneys do is sometimes the stuff of high drama. Court is especially dramatic because a trial is, in a very real sense, a piece of theatre. A trial occurs when two parties who disagree over some matter present themselves before an independent party for a judgment that is binding upon the parties that disagree. The American judicial system arrives at that judgment, called the verdict, through an adversarial trial system. You may think of an adversarial trial system as a civilized version of trial by combat. In order to understand the legal proceedings in a courtroom, it is critically important to understand the theory and practice of the adversarial trial system. The method by which every trial in the United States is conducted hangs on this adversarial approach to justice.

The legal system in the United States is founded on the principle that a dispute is settled most fairly when the following three things occur.

1. Each side presents its evidence publicly.
2. The evidence is presented in the presence of the party that has been accused of wrongdoing.
3. The evidence for each side is presented in a forum where the opposing side can then vigorously challenge the merit, or even truth, of the evidence just presented.

Several points that merit discussion derive from this adversarial approach. Foremost is that the purpose of court is not, as many believe, to find out the truth in a case. This fact often comes as a surprise to those unfamiliar with court, and it echos the point made in Chapter 1 concerning the completely different approaches that physicians and attorneys take toward solving a problem. Physicians try to reach the “correct” diagnosis, whereas attorneys, who are not

specifically trying to find truth in a case, are not trying to reach a “correct” anything. What is the purpose of court, if not to establish truth? The purpose of court is to settle a dispute in a civilized way, thus preventing vendetta. (The civilized solution to vendetta is the point of Aeschylus’s *Orestia* trilogy.) Do not think that the legal system has no interest in establishing the truth in court, for it does. The legal system considers that the truth in a case is most likely to be determined by an adversarial approach including all three elements listed above. With truth should come a fair verdict. Court is considered civilized and is respected because, in general, the truth is made clear by public review of the evidence, and thus the United States has been largely spared the atrocities of vigilante justice.

The adversarial nature of the legal system also explains why an attorney can practice first on the side of prosecution and then on the side of defense. Whichever side the attorney represents, he is still helping to settle a dispute in the time-honored method of the legal profession.

The adversarial system makes clear why court can be such an unpleasant experience for those individuals who testify concerning evidence that they witnessed. The legal system is designed to allow the attorney representing one side to strive mightily, as if in combat, to reveal errors or flaws in the witness’s testimony. Unfortunately, human nature being what it is, the valid testimony of a truthful witness can be rendered useless if that witness flinches in the heat of adversity. Therein lies the germ of what can make testifying unpleasant. No physician is a stranger to having his opinion challenged, whether by his colleagues in a weekly morbidity and mortality conference or in an academic setting. But physicians, like other professionals, chafe at having their opinion challenged publicly by someone who is not a colleague and in a way that allows the truth of the physician’s words to be overpowered by a moment’s lapse during trial by combat. Perhaps it will take some of the sting out of the experience to remember that when the United States was drawing up its laws governing court, the founders chose the adversarial system to redress what they considered an injustice of the English system. English courts at the time of the American Revolution heard evidence, but any man accused of a crime was excluded from hearing the evidence brought against him at his own trial. The American system sought to correct this injustice against one accused of a crime not only by assuming that a man is innocent until proven guilty but also by allowing the man accused to hear the evidence against him as it came from the lips of the witnesses. Moreover, the accused man’s advocate in court—that is, his attorney—could challenge the statements of the witnesses on behalf of the accused. Seen in this light, the adversarial system does not seem such a bad thing, but it can be hard to remember that fact when you are a witness in the hot seat. (Incidentally, the right of the accused to hear all the evidence against him explains why you cannot simply fax the pertinent surgical pathology report to court. You must appear before the accused so that you can be questioned.)

American Legal Theory in Operation

The Dramatis Personae

There can be no theatre without players, and in an adversarial trial as described above there are four main types of players. Any trial will have a judge, who presides over the courtroom. One or more attorneys represent each side in the dispute. The witnesses are called one at a time and asked to present their story of what happened before the judge and, in most cases, to the jury, who will render the verdict. The judge, the attorneys, the witnesses, and the jury are the players in a trial.

The Jury

Recall that in an adversarial system the evidence is presented publicly. Since the entire public cannot be present in the room, the jury of citizens represents the public. A jury of your peers is not a jury of your professional peers but rather a jury of your peers as a human being and citizen (this point will be discussed in greater detail below). In a jury trial, it is this corporate body of citizens that will decide the verdict based on the evidence presented in court. The jury is chosen before the trial begins, with input from the attorneys representing each side. The attorneys for each side will interview the prospective jurors, looking to see which individuals might be especially sympathetic to their cause and which individuals might be prejudiced against their cause. The attorneys for each side may challenge a prospective juror with questions designed to bring out the bias that they suspect in that prospective juror. If the prospective juror exhibits sufficient bias, then the attorney will ask the judge to strike that prospective juror from the jury. The judge will decide whether to strike the juror or not. The attorneys for each side also get a certain number of peremptory strikes; that is, the attorney can strike a prospective juror for whatever reason the attorney wishes without recourse by the attorney for the other side or by the judge. Of course, each side in the dispute is granted the same number of peremptory strikes. Three peremptory strikes is a common number, and these trump cards must be played carefully. If you are the one on trial, then you are permitted to sit in the court at the table with your attorney while jury selection takes place. Some attorneys who represent physicians in malpractice cases like for the physician to be present during jury selection. A good physician is skilled in sizing up individuals quickly, as is a good attorney. By having the defendant physician by his side, the attorney gains an extra set of eyes to look for subtle signs that might indicate a prejudiced juror.

In one case, the physician noticed that a potential juror frowned and looked angry whenever “doctor” or “physician” was spoken. After bringing this to the

attorney's attention, the attorney used one of his peremptory strikes to remove the individual from the jury pool. In another case, a prominent criminal defense attorney was called to jury duty as a citizen in a criminal trial. The defendant's attorney was certain that the prosecuting attorney would use a peremptory strike to remove the prospective juror who was an attorney. The prosecutor, however, believed that the attorney in the jury pool was fair-minded and that he would judge the case based on the evidence presented. The defense attorney did sit on the jury and was chosen as the foreman. The jury, led by the attorney, found the defendant guilty.

All phases of a trial are important to the outcome, and jury selection is an early round of gamesmanship in the process.

Physicians on trial for malpractice are prone to complain that the jury that will try them is not composed of professional peers. A jury of one's peers stems from the practice in feudal times in England of having serfs and commoners tried in courts that were the sole province of the nobility. Recall that with the Norman conquest the nobility were of French descent while the serfs and commoners were Anglo-Saxons, so the feudal system was a way for those in power to ensure that things stayed that way—a form of apartheid. In time, the concept emerged that commoners should be judged by a jury of other commoners, their peers, rather than by a jury of noblemen. Never was a jury of peers meant to imply that physicians should be judged by physicians any more than that criminals should be judged only by other criminals.

Because a jury that would sit in judgment of a physician will not be a jury of his professional peers, comment is often made that attorneys want naive jurors who are easily led to a conclusion. There is a grain of truth to this, but attorneys know that a jury composed entirely of sheep does neither side any good because sheep cannot lead themselves. Likewise, a jury composed only of leaders will get bogged down. (Imagine a jury composed entirely of departmental chairmen trying to come to an agreement.) A workable jury has one or two leaders on it. A fictional example of a workable jury is Reginald Rose's play "Twelve Angry Men," later made into a movie starring Henry Fonda.

Beware of thinking that the members of a jury are unschooled in medicine. Although unlikely to have formal training, they are Americans who doubtless watch television news or read the paper. When a prominent politician has an operation, there is often a diagram of the procedure in the paper. Important medical articles are commonly reported and discussed in the media on the day they are released in a medical journal, sometimes accompanied by sophisticated medical illustrations. The members of the jury have a degree of medical sophistication not enjoyed by citizens fifty years ago. That is to your benefit as a medical witness—the jury is that much more likely to understand and be interested in the medical matters you will discuss.

The members of a jury may not all be physicians, but they all have a life and it does *not* consist of spending weeks on a bench in a courtroom. Most jurors have jobs and families, and they are eager to fulfill their duty and return to their

routine. Establishing facts in a trial is often dry and boring. The members of the jury take a dim view of anyone who wastes their time, so do not waste their time. The attorneys are the ones most likely to make the trial last overly long, so the attorneys have the most to lose by not moving the trial along at a reasonable pace.

The Judge

The judge is in charge of the trial and the courtroom. He is, in fact, the sole authority in the courtroom. The judge sets the tone for the courtroom and thus for the trial. Some judges are grave and formal; some are friendly and relaxed. Regardless of the judge's demeanor, his word is law in the courtroom, and he has armed guards, in the form of bailiffs, to back him up. The role of the judge in the courtroom is much like the role of the head surgeon in an operating room—each has a duty to maintain order, and whatever either one wants, he gets. The judge presides over the trial. Any disagreement between the two attorneys will be settled by the judge. If the judge wishes to do so, then he may interrupt the trial and ask the witness a question. It is not the place of a witness to talk to the judge, so as a witness or defendant you would do well to follow the maxim of “Do not speak unless spoken to.” If the judge should choose to talk to you, then he is properly addressed as “Your Honor.” If the judge is the sort to make small talk, and he wishes to make small talk with you, then you are welcome to chat, but always with respect and on topics removed from the trial. It is very important that you never alienate, anger, or otherwise cause the judge to become hostile to you. Remember that the judge sets the tone of the courtroom; if he comes to dislike you, the jury will quickly pick up on it, and things will go ill for you, no matter what your role in the trial.

Judges are professionals, and they generally understand that expert witnesses are professionals with demands upon their time in addition to a trial. Judges certainly expect a professional to respect the time of the judge and everyone in the courtroom, but with that in mind, judges usually will try to schedule a trial or organize the expert witness's appearance in trial so that the expert witness will be able to keep other professional commitments, such as scientific meetings or a busy clinical practice. Having said this, however, it remains true that a few judges will demand that they come first no matter what other obligations you may have. Every forensic pathologist knows of a case where a physician scheduled to present at a scientific conference was forced to cancel his presentation so that he could testify in a judge's court at that same time. To best avoid such an unpleasant occurrence, it is important to let an attorney who has called you to testify know your travel obligations as soon as you know of them yourself.

Judges try to protect expert witnesses from unduly harsh questioning or attacks in court, but at the same time a judge realizes that confrontation is the name of the game in trial. In other words, the judge will not strive to protect an expert witness from having his feelings hurt.

In a malpractice trial, some of the evidence that will be presented will undoubtedly come from expert witnesses. The concept of an expert witness will be discussed later in this chapter, but for now it is sufficient to say that expert witnesses will testify about complicated medical matters. In addition to the responsibilities and authority mentioned above, the judge presiding over a malpractice case has the responsibility of deciding whether the testimony of a given expert witness will be admitted into court. This authority stems from a legal ruling, known as the Daubert ruling, concerning unethical expert witness testimony.¹ Some judges consider that the attorneys are responsible for presenting the judge with sufficient evidence that the science their expert witness will discuss is sound, as opposed to quackery. Other judges, however, take a more hands-on approach to evaluating the scientific soundness of witnesses scheduled to testify before them. At present, a malpractice suit will probably be handled with less direct involvement by the judge. Judges hearing complicated class action lawsuits may get more involved in expert witness evaluation, however. Because half of all expert witnesses now testifying in federal court are physicians, the following few paragraphs will discuss the reasons why a judge might choose to actively involve himself in evaluating the science proposed by expert witnesses.

A judge presiding over a civil lawsuit that is expected to last for months and to involve many expert witnesses, such as a class action lawsuit filed for injuries related to silicone breast implants, may call a meeting with the expert witnesses scheduled to testify before him so that the judge can hear what each witness has to say in an unsworn conference prior to trial.² Most expert witnesses are professional, reasonable people who can sit together and discuss a matter, each presenting his viewpoint in a professional way without being unduly swayed by the viewpoints of others. By meeting with the expert witnesses, the judge gains a better understanding of the scientific issues involved, which enables the judge to define the issues in the case in his own mind and thus organize the trial to present the science to the jury most effectively. Furthermore, such a meeting allows the expert witnesses and judge to agree on common ground so that time is not wasted in court arguing over something that everyone actually agrees upon. Any conflicting opinions that threaten to erupt into conflict can be handled privately, too, rather than in the courtroom. Unlike the attorneys presenting evidence in a trial, the judge is not on a side, just as the expert witness should not be on a side. The judge is there to organize and maintain order in the trial, and the expert witnesses are there to instruct the jury in what the jury needs to know. Both the judge's objectives and the goals of the expert witnesses can be expedited by a meeting of the judge with the expert witnesses.

By reviewing the reports of expert witnesses that attorneys plan to call, a judge can limit the number and kind of expert witnesses called in a trial if, for example, the judge finds the science spurious or that two experts are essentially saying the same thing for the same side (thus avoiding duplication in the trial). Review of the reports also makes clear to the judge any area in which he needs a little tutoring, such as epidemiology, so the judge can ask the attorneys to pro-

vide him with a half-day course pertinent to the topic the judge needs to understand.

A judge has the authority to require an expert witness expected to testify before him in a trial to provide the judge, long before the trial, with a written report summarizing the opinions of the expert witness and the scientific bases for those opinions. The expert witness must sign the report, of course, and along with the report he must also submit a current copy of his curriculum vitae, a list of all the cases he has testified in for the past four years, and a disclosure of his compensation for participating in the case in point. All this information that has been submitted to the judge, and thus to the court, is admissible into court during the trial.

A judge who has gotten as involved as the judge discussed above will be the sort of judge to pay close attention to what is going on in his court. If the judge believes that neither attorney has asked a question that needs to be asked in order for the jury to understand the issue, then the judge can ask the question. Or, if the judge thinks an answer is too complicated, then the judge may gently remind the expert witness to please explain this concept to the court so that anyone can understand it. Either of these occurrences may well happen in a simple malpractice trial as well. It is rare, but not unknown, for the judge to give the members of the jury an opportunity to question the expert witness directly to clarify the jury's understanding of the case.

The Attorneys

Attorneys in a trial are advocates for clients or for entities, such as a corporation or the state. Going back to the concept of trial by combat, if you had to fight hand-to-hand to achieve victory and had the opportunity to choose a representative for you, you would choose the strongest, meanest representative that you could. Strong is not so important in court. In court, you need someone to represent you who knows all the intricate rules of battle. That someone is an attorney. You could represent yourself in court, and occasionally someone does, but it is usually to that person's detriment. Even attorneys do not represent themselves. Just as we say "The physician who treats himself has a fool for a patient," attorneys say "The lawyer who represents himself has a fool for a client."

Most attorneys practice within either civil or criminal law, although some do both sorts of work. It is likely that the attorneys representing each side know each other professionally, and possibly socially. Since the attorneys know each other, it is small wonder that they will enter the court together, joking and laughing. When the trial begins, they go at each other with no holds barred and then, when the day ends, they leave court chatting as amiably as when they entered. To them the battle of words waged in court is all in a day's work, and it is work that they enjoy or else they would not do it. It is as though attorneys are friends who really enjoy playing rough, "no autopsy, no foul" basketball together on a regular basis. To put it in the words of one attorney, "The only thing

that I as an attorney enjoy more than really sticking it to an attorney who is an enemy of mine in court is really sticking it to one of my friends.”

Because an attorney is the advocate of his client, the attorney must abide by his client’s wishes. This can be important because if the client wants to accept an offer made to settle the case, then the attorney must do so.

A young woman reached into a public fountain at a shopping mall to retrieve a pacifier that her baby dropped and was electrocuted. The mall, the city, and the electric company were all sued for wrongful death. As the trial was beginning, the defendants made an offer to the family of five million dollars. The relatives wanted to accept, but their attorney, who was working on a percentage of the money the family would be awarded in damages, tried to discourage the family, saying that they stood to win far more. The family asked was it not also true that they could walk away with nothing, and the attorney was forced to concede that possibility. The family then said that five million dollars was more money than they knew how to count, and it sounded like plenty to them. The attorney was not happy about it, but he had to abide by his client’s wishes, and the case was settled for five million dollars.

The Witnesses

Witnesses will be called by means of a subpoena by both sides in a trial. A subpoena is an order that compels a witness to appear in court. Each witness is called to tell what he saw or heard or otherwise sensed that is pertinent to the trial. Each witness is called to the witness stand one at a time to tell his tale. The witness will first be sworn in. Each judge has a different way of having witnesses swear to tell the whole truth and nothing but the truth. Some judges administer the witness’s oath themselves, while in other courtrooms the witness is sworn in by a bailiff or by the court reporter. Once a witness is on the stand, he will be the focus of questions from the attorneys representing each side until all the attorneys are finished asking questions. The order in which the attorneys get to ask questions is set and never varies. The witness is first asked questions by the attorney representing the side that called the witness to testify. This phase of the questioning is called direct examination. Since the witness is being questioned by the attorney who wants to hear what the witness has to say, direct examination should be a smooth ride. The attorney representing the other side may or may not object to something done by the attorney questioning the witness, and any objection will be handled by the judge. When the direct examination is completed, the attorney conducting the direct examination will say “No further questions, Your Honor.” The attorney advocating the other position may now ask questions of the witness. This second phase of the questioning is called cross-examination. Cross-examination is usually more harrowing than direct examination because the attorney cross-examining the witness will try to discredit, or at least make unimportant, the portions of the witness’s testimony that are damaging to the position of the cross-examining attorney’s client. The attorney who handled direct questioning may or may not object to something done

by the cross-examining attorney while he is questioning the witness, and any objection will again be handled by the judge. When the cross-examination is completed, the attorney conducting it will say “No further questions, Your Honor.” It is now possible for the attorney who directly examined the witness to ask more questions (re-direct examination) to clarify matters brought up during cross-examination in a way that is favorable to the direct examiner’s client. If the attorney chooses to engage in re-direct examination, then the opposing attorney will be allowed to re-cross-examine the witness. This exchange can go back and forth *ad infinitum*, although it rarely happens more than twice. If, on the other hand, the attorney who began the examining chooses not to ask any questions following cross-examination, he will say “No further questions, Your Honor.” When each attorney states that he has no further questions, the witness is excused.

In general, in most states no witness may hear the testimony of any other witness before he himself testifies. If a witness were to hear someone else’s testimony, it might cause him to change his own version of what happened. Hearing another witness’s testimony is grounds for a mistrial, as is two witnesses talking together out in the lobby of the court while each waits to testify. Form the good habit of not talking about the case with anyone in the courthouse who is a witness or whom you do not know. It is permissible to talk with the attorney who called you concerning what you witnessed prior to testifying, as often occurs during a break, or recess, in the trial. In some instances, it is permissible to talk with the attorney representing the opposing side, too, but check with the attorney who called you first. After the judge excuses a witness from further testimony, the witness may sit and watch the rest of the trial if he desires.

Types of Witnesses—Fact and Expert

There are two types of witnesses—fact witnesses and expert witnesses. Fact (or evidentiary or material) witnesses saw, heard, or were otherwise directly involved in the matter that is being disputed in court. In a medical case, a fact witness is one who actually saw the patient, either as the attending physician, as a consultant, or as part of the support staff. Any procedure done or any notes or reports generated by the physician will likely be the major reason for the testimony. When the physician’s opinion about the case is sought to any significant extent, then the physician is testifying as an expert witness. Expert witnesses rarely, if ever, were direct witnesses of the event in question. Nevertheless, because the court (that is, the judge) finds that the expert witness has special training or experience that is not common to all individuals, the expert is allowed to use his special training to help make understandable things that would not be obvious to the jury or judge. Experts are not needed for the obvious. An example should help make the distinction clear.

An oncologist might be sued by the relatives of a deceased patient for failing to disclose a side effect of chemotherapy that hastened the patient’s death. In that case, the pathologist who made the diagnosis of malignancy might be called

to testify that the patient did have such and such a cancer. Provided that all the pathologist is asked to do is to read his diagnosis from the surgical pathology report and to affirm that the report just read is his own work, with his signature at the bottom, the pathologist would be testifying as a fact witness because he is testifying about something that he did. The pathologist would not be asked about the actions of the oncologist because that would be a matter of speculation for the pathologist. Another oncologist, however, who was never involved in the patient's care, might be brought in by the attorney representing either side in the lawsuit to comment on the care provided by the oncologist who has been sued. The oncologist who never saw the patient would be an expert witness, bringing his special expertise to the case to help the jury better understand the issue.

An expert witness differs from a fact witness in a very important way: the expert witness may offer his opinion on what happened in court, and his opinion has legal worth.

As an example, a man is accused of murder in a criminal trial for shooting the decedent. The attorney representing the accused man offers a plea of self-defense, saying the dead man was coming at his client with a gun. A fact witness might have been around the corner and heard the two men scuffle, then a moment's silence followed by a gunshot. All that the fact witness heard will be admitted into court and is important information. But the fact witness who heard the events will not be asked for his opinion about what happened. If the fact witness were to say "I know the man who is accused of this crime, and I believe he is lying," then such a remark would be stricken from the court record. The forensic pathologist can offer his opinion on the matter, however, since he is an expert witness. In effect, the pathologist could say, "I was not there, I do not know what transpired firsthand, but my examination at autopsy showed a single gunshot entrance wound in the back of the decedent, and in my opinion the decedent was not coming at the accused with a gun."

If you are called to court to testify, be sure that you ask the attorney who called you what sort of questions he is going to ask you. Not only will you be properly prepared, but you will not jump to the wrong conclusion. If all that is required of you in court is to confirm that you did receive a biopsy from Patient X submitted by Dr. Y, then it is a waste of your time to conduct an exhaustive search of the medical literature.

Ancillary Players

The judge, jury, attorneys, and witnesses are the main players in a trial. Less visible roles are played by the bailiff and the court reporter.

The role of the bailiff is to maintain order in the court, by force of arms if necessary. Sometimes it *is* necessary for the bailiffs to stop a fight when the jury makes known its verdict. At least one defendant who smuggled a gun into court in Jefferson County, Alabama was shot and killed by the bailiff when the defendant pulled the gun during the trial.

The court reporter keeps the transcript of what is said in the trial. Reading a transcript reinforces the dramatic nature of a trial, for it looks like the script of a play.

Attorney: What is your name?

Witness: My name is Greg Davis.

Attorney: How are you currently employed?

Witness: As Associate Medical Examiner for this county. *And so on...*

The final players in the courtroom are those people who choose to come and witness the trial as part of the public. Most trials are open to the public. Those who attend are usually relatives of the party on either side and perhaps, if the trial is deemed newsworthy, a reporter for a newspaper and a television cameraman for a local news show.

Types of Trials—Civil and Criminal

We have already mentioned civil and criminal disputes, but we should discuss each in more detail. In a civil dispute, no crime has been committed, instead, one party seeks recompense for harm that he believes the other party caused him. The party who initiates the lawsuit is the plaintiff, and the party against whom the suit is brought is the defendant. The plaintiff bears the burden of proof to establish with evidence that he has been wronged. The standard for establishing proof of a civil wrong is that “the preponderance of the evidence” must indicate that the plaintiff’s contention is correct. Presumably as little as 51% of the evidence counts as a preponderance. Malpractice suits are civil suits.

A criminal dispute occurs when a crime has been committed. The party initiating a criminal case is “the people of the state of X.” Those “people” are represented by the jury in a criminal trial. That is why the prosecuting attorney at a criminal trial has no client at his table—his “client” is sitting as the jury. The accused in a criminal trial is also a defendant. The standard for establishing proof of the defendant’s guilt is that the evidence presented must make it clear to the jury “beyond reasonable doubt” that the defendant committed the crime.

References

1. Daubert v Merrell Dow Pharmaceuticals, Inc, 113 SCt 2786 (1993).
2. Weinstein JB. Expert witness testimony: a trial judge’s perspective. *Neurol Clinics* 1999;17:355-61.