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THE USE OF WRITTEN DIRECT TESTIMONY IN
JURY TRIALS: A PROPOSAL

Abraham P. Ordover*

The trial court is an escape valve for the excessive heat generated by conflicts within the society. Its role is to resolve disputes pursuant to procedures calculated to permit a full and fair hearing to the litigants. It is widely known among members of the bar that a lawsuit is not a scientific investigation for the discovery of truth. Rather, it is a mechanism by which society seeks to resolve the disputes which arise between or among its members and/or institutions. The litigants frame the issues and determine the matters to be studied. They marshall their own evidence and present only those facts which are of immediate moment and persuasive significance in the context of their case. Ordinarily, no search for broader truths is either attempted or permitted in this forum.

Although truth may be beyond the litigator's grasp, reasonably just settlements of disputes are not. At trial, such resolutions are left to the trier of fact. They depend upon the facts presented and the clarity and persuasiveness of the presentation. It is here that the process frequently comes apart, for the traditional modes of presentation of facts in our trial courts are inappropriate in many modern disputes.

Litigation in the trial courts is a reflection of the society from which the conflict originates. Our society is monstrously technical and produces rather complicated disagreements. The mere mention of terms such as antitrust or products liability, or any of a host of scientific phrases or technical words of art concerning anything and everything from atomic physics to automotive parts is enough to activate a blank stare in all of us save one who

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1. Exceptions to this expansive view are most frequently found when courts seek to alter judicial notice of "legislative facts." See, e.g., Davis, An Approach to Problems of Evidence in the Administrative Process, 55 Harv. L. Rev. 364 (1942); C. McCormick, HANDBOOK OF THE LAW OF EVIDENCE § 331 (2d ed. 1972) [hereinafter cited as McCormick]. For the most part this practice occurs in appellate courts, as seen in cases like Miranda v. Arizona, 384 U.S. 436 (1966) and Brown v. Bd. of Education, 347 U.S. 483 (1954).

2. It has also been characterized as "[a] competition of inconsistent versions of facts and theories of law." R. Keeton, TRIAL TACTICS AND METHODS xi (1973) [hereinafter cited as Keeton].

3. Id. at 319.
happens to be an expert in that minute area of human concern to which the word or expression may have meaning.

We are a society of experts. We are beset by them and are ourselves the besetters, depending upon the particular matter at issue. We are a mass society in which change is a constant, turmoil the normal way of things, and complexity an unpleasant by-product. When a conflict arrives in court it is usually a complicated affair requiring the use of expert testimony for an understanding of the facts at issue.\(^4\)

Unfortunately, the procedures which we employ in our trial courts are poorly suited to the presentation of scientific, technical, or even complex facts.\(^5\) These procedures have evolved to a state where they are uniquely geared to the convenience of counsel and not to the enlightenment of the judge and jury. This can readily be seen by an almost religious cleaving to the question and answer method of direct interrogation. In order to preserve the opportunity to object, we have foregone the lucidity of the direct narrative presentation.\(^6\) In the case of the expert witness or even the complicated fact witness, all too often the result is a baffled jury. In the guise of insulating the jury from objectionable matter we instead succeed in insulating it from the facts.

If the jury is to understand the facts of a convoluted trial, a different method of presenting direct testimony must be employed. Such a presentation must place emphasis on clarity. It must preserve the right of counsel for legitimate objection while removing those which are merely captious and wasteful. It should eliminate the propensity of some attorneys toward gamesmanship. It must provide an expanded opportunity for cross-examination and persuasive argumentation. A premium must be placed on putting the facts before the jury in a comprehensible manner.

The proposal which follows calls for the utilization of written narrative direct testimony in appropriate jury cases. These would include cases involving a substantial degree of sophisticated, technical evidence. Resistance to the introduction of written evidence is largely based upon traditional adversary concepts of jury

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5. See 3 Wigmore § 767.
6. See, e.g., Levin & Cramer, Trial Advocacy 129 (1968); Keston 321.
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trials and the hypertechnical forms of objections which have evolved to “protect” the jury within this framework. The aim of this proposal is to place factual exposition at the forefront of trial considerations while protecting the jury both from “tainted” evidence and from ourselves.

The use of written testimony demands rethinking in a number of areas including scope of discovery, trial preparation, the relationship of counsel to witness, the role of the court and, certainly not least, the application of some of the technical rules of evidence at trial. While reanalysis is always painful, it is immeasurably more painful to participate in a tangled trial where the jury is befuddled by the evidence largely because our forms result in a clumsy presentation.7

I. THE PROPOSAL

A. Method of Operation

(1) The trial judge shall have the discretion to permit or require expert, skilled, or other complicated testimony to be prepared in written form prior to the trial and to be presented in narrative form before the court and/or jury in any case where such a presentation will serve the interests of justice.8

(2) In any case where testimony prepared prior to trial is to be presented narratively at trial, the court shall require that the full text of such testimony and all exhibits thereto be disclosed to opposing counsel within a reasonable time prior to trial to insure that adequate opportunity for a voir dire examination

7. This procedure, limited to expert witnesses, is approved in Rule 408 of the Model Code of Evidence [hereinafter cited as the Model Code]. It has recently been adopted in Section 907.07 of the Wisconsin Evidence Code effective January 1, 1974. See infra pp. 72-73. The need for a more comprehensible method of introducing direct evidence in technical and complex matters is an outgrowth of the undue reliance placed upon oral question and answer presentation in jury cases. 2 K. Davis, Administrative Law Treatise, § 14.16 (1958). Such ritualistic reliance has been criticized by the commentators as being wasteful, cumbersome, inefficient, and ill suited to the presentation of technical data. McCormick § 17; 3 Wigmore § 767. Their valid criticisms go to the enormous expense of technical testimony in time and money. Of greater significance is the fact that given the expenditure, juries are not being presented with facts in an orderly, clear, and intelligible manner. The proposal herein provides a method for dealing with the problem. This procedure is also endorsed in Weinstein, Korn & Miller, New York Civil Practice, § 45-236.

and preparation of cross-examination of the witness is provided.6

(3) The *voir dire* examination of the witness shall be held in the presence of the trial judge or a master, and a complete record shall be made thereof. He shall rule on all evidentiary and other objections to the testimony in advance of trial in order that the narrative presented at trial be free of technical objections. At the *voir dire* examination, counsel may inquire of the witness as to the source of and the basis for any and all statements made in the prepared testimony and shall state all evidentiary objections thereto.7

(4) In the interests of justice and judicial economy, and to the extent practicable, the court, in its discretion, may require that in cases where both or all parties intend to use prepared testimony, all such testimony shall be made available to all parties at or about the same time.

(5) The rulings of the court on such objections are interlocutory as if made at trial, and shall not be appealable until after final judgment.8 Objections not made at the *voir dire* hearing shall be deemed waived in the same manner as objections available but not made at trial.9

B. Method of Preparation

(1) The witness may prepare his or her testimony with the assistance of counsel and such other persons as may be required to present a clear and accurate account of the facts and/or opinions involved.10 All persons assisting the witness and their roles

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10. The purpose of this provision is to overcome the fears of unfair advantage which many lawyers believe to exist where disclosure is made on the basis of priority and lacks mutuality. The proposal follows the spirit of Rule 4, Civil Rules of the United States District Courts for the Southern and Eastern Districts of New York, which was designed to eliminate the abuses of priority. The spirit of this rule has been adopted in Fed. R. Civ. P. Rule 26(d).


13. The assistance of persons other than the witness in preparation of expert testimony has long been recognized. See, Model Code, Rules 405(d) and 408.
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in the preparation shall be fully disclosed in the testimony.\textsuperscript{14}

(2) Counsel are encouraged to assist in the preparation of the testimony to insure clarity of presentation.

(3) The prepared testimony of a witness shall be accompanied by an affidavit swearing to or affirming such testimony. Such affidavit shall be presented with the narrative prior to trial.

C. Method of Presentation

(1) The trial court shall have the discretion to regulate the method of presentation to the jury.\textsuperscript{15} After the witness is sworn, the court may circulate copies of the direct testimony of the witness to the jury for its reading and inspection. Thereafter, the court may direct the witness to read the testimony to the jury or, in an appropriate case, to dispense with the reading and enter the narrative in the record as direct testimony of the witness upon his or her adoption thereof. Thereafter, the witness shall be exposed to live cross-examination within the presence of the jury.\textsuperscript{16}

(2) The court, in its discretion, shall regulate the order of proof as between witnesses with prepared direct testimony and other witnesses who render direct testimony live with the objective of conducting a clear and orderly presentation of the facts.

II. THE PROPOSAL: ITS BACKGROUND AND BENEFITS

Although portions of the proposal are new, the concept is not a novel one. In 1937, the \textit{Uniform Expert Testimony Act} included a provision for permitting court appointed experts to read their reports into evidence subject to objections as to admissibility.\textsuperscript{17}

\footnotesize{\textsuperscript{14} The need for this requirement is obvious. \textsuperscript{15} This is a power which the courts already have. \textit{See}, \textit{e.g.}, \textit{Proposed Federal Rules}, Rule 611(a); \textit{McCormick} § 5; \textit{6 Wigmore} § 1867. \textit{See also}, \textit{Model Code}, Rule 105, which spells out the powers of the courts in detail. \textsuperscript{16} The requirement of live cross-examination is indispensable to the working of the proposal. Moreover, the availability of cross after disclosure of the testimony in advance plus the \textit{voir dire} should remove any lingering doubts as to confrontation clause problems. \textit{See}, \textit{e.g.}, \textit{Nelson v. O'Neill}, 402 U.S. 622 (1973); \textit{California v. Green}, 399 U.S. 149 (1970); \textit{Bruton v. U.S.}, 391 U.S. 123 (1968); \textit{Barber v. Page}, 390 U.S. 719 (1968); \textit{Douglas v. Alabama}, 380 U.S. 415 (1965); \textit{Pointer v. Texas}, 380 U.S. 400 (1965). \textsuperscript{17} Section 6, \textit{Uniform Expert Testimony Act} of 1937, \textit{Handbook of the National Conference of Comm. on Uniform State Laws and Proceedings} at 343 (1937) [hereinafter cited as \textit{Uniform Expert Testimony Act}]. The section was patterned after a 1923 Rhode Island Statute, Gen. Laws, 1923, Ch. 342, § 5003 and a 1931 Wisconsin enactment, Stat., 1931 S. 357,12. Similar proposals were advanced by the America Institute on Criminal Law in 1914 and The Committee on Jurisprudence and Law Reform of the American Bar Association in 1926.}
In 1942, the drafters of the *Model Code of Evidence* noting that the law regarding opinion and expert evidence required substantial revision, proposed that in the court's discretion, all expert reports be read in evidence. The sole rationale for this suggestion was "[t]he desirability of presenting such testimony to the jury in a connected narrative and the most lucid form is obvious . . . ."

Although the desirability of such a clear presentation seemed "obvious" to the nation's leading practitioners and legal scholars, it apparently was less obvious to the bench and bar. The requirements of Rule 408 of the *Model Code of Evidence* have not been widely adopted by the states nor are they to be found in the current Proposed Federal Rules of Evidence. The *Uniform Rules of Evidence* also failed to specifically adopt the procedure but there is some indication that the drafters considered the matter to be one of inherent judicial power and permissible under the rules as drafted. Wisconsin, however, has adopted the approach.

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18. Introductory Note to Chapter V., Model Code.
19. Model Code, Rule 408.
20. Id., Comment on Rule 408. See also Comment to Section 6 of the Uniform Expert Testimony Act at 343. Other added attractions might lie in judicial economy and enhanced opportunities for settlement.
21. The Committee on Evidence for the Model Code included Professors Morgan, McCormick, Maguire and Ladd; Judges Learned Hand, Augustus Hand, Wyzanski and Patterson. For the full roster see Model Code at iii. The Chief Consultant was Dean Wigmore, id. at v.
23. Proposed Federal Rules, Art. VII, 56 F.R.D. 183, 281 (1973). The drafters of the Proposed Federal Rules have noted their opposition to any widespread use of prior prepared statements as substantive proof. See Advisory Committee note to Rule 801 (d)(1). The author does not disagree with this view. The Committee's position was not taken in regard to the proposal suggested here or any similar procedure such as the one suggested in Model Code § 408. Indeed, the rules as to expert testimony in Article VII are quite liberal. Rather, the Committee's comment seems to express a fear that the hearsay exceptions for prior statements of the witness embodied in Rule 801 (d)(1) could be a vehicle for dispensing with oral testimony entirely. No such proposal is suggested here. The Committee does recognize that a witness may adopt an out-of-court statement and not be barred by hearsay. See Advisory Committee note to Rule 801 (d)(1). This recognition is shared by the author and would permit the procedure suggested here. Accord, Model Code § 503(b) and Uniform Rules, Rule 63(1). See text and notes infra at pp. 80-81. The drafters' fear that Model Code § 503(b) and Uniform Rules, Rule 63(1) would lead to widespread use of prepared testimony has not been justified. See McCormick § 251, p. 603.
24. Uniform Rules, Comment to Rule 59. See also Uniform Rules, Rule 63(1) which would permit the suggested procedure.
in its Rules of Evidence scheduled to take effect on January 1, 1974.\textsuperscript{25}

It is submitted that trial judges in most jurisdictions have the discretion to implement the procedures proposed herein without further legislation since virtually every jurisdiction in the United States grants its courts wide discretion in determining how trials are to proceed.\textsuperscript{26} To accomplish the aims of the proposal, judges must take a more activist approach to the conduct of trials. Frequently, the court leaves matters of presentation largely in the hands of counsel for fear of unduly intruding upon counsel’s domain.\textsuperscript{27} This is a fundamental misapprehension. The responsibility here lies entirely with the trial judge. Though the game or sporting theory of trials puts the judge into the position of referee or umpire, this is not the proper role for the court. The proper role is seen in the English practice where the judge actively participates as “director of the proceedings and as an administrator of justice.”\textsuperscript{28}

The failure to employ the written narrative in jury trials is not attributable to a lack of familiarity with the approach. Lawyers have long used similar presentations and procedures in connection with matters litigated before various federal regulatory agencies.\textsuperscript{29} Moreover, the written direct is routinely employed by stipulation in civil nonjury cases when the testimony is likely to be of a technical and complicated nature.\textsuperscript{30} The use of this type of presentation has been specifically approved in the

\textsuperscript{26} Rule 26 of the Federal Rules of Civil Procedure and Rule 43 of the Federal Rules of Criminal Procedure generally require that testimony be taken orally in open court. These Rules are based upon sixth amendment confrontation requirements. Advisory Committee Introductory Note to Article VIII, Proposed Federal Rules. The proposal suggested here meets confrontation requirements. See note 16 supra. In jurisdictions which require specific legislation, common law rules of evidence may be altered by legislation provided no constitutional rights are affected. The litigant generally has no vested or constitutional right in the maintenance of a rule of evidence. See, e.g., Adams v. New York, 192 U.S. 585 (1904); cf. Bandini Petrol Co. v. Superior Ct., 284 U.S. 8 (1931).
\textsuperscript{28} 3 Wigmore § 784 at 188.
\textsuperscript{29} See note 38 infra; see also K. Davis, Administrative Law Treatise §§ 14, 16 (1958); Corber, Written Evidence in Administrative Proceedings: A Plea for Less Talk, 6 U. Rich. L. Rev. 197 (1972).
Administrative Procedure Act, 31 recommended by the Attorney General's Committee on Administrative Procedure, 32 and recommended for use by experts in trials of complicated or protracted cases. 33

There are significant benefits to be gained by the use of the written narrative statement. The Attorney General's Report noted that written direct evidence would greatly benefit the litigants in effecting expedition, economy, accuracy and convenience. 34 The report, which specifically called for the use of "canned testimony" for technical matters, observed that: 35

Lengthy testimony of a complex character is not easy to comprehend in the hearing room nor can satisfactory cross-examination follow immediately upon its conclusion. A far better understanding of the evidence and a great saving of time and expense would be attained if the method above described were employed.

To be sure, many administrative hearings are held for the purpose of rule or rate making. The agency is presumed to possess a high degree of technical experience and may even go beyond the record and take in "legislative facts" 36 in the decision-making process. Their labors are made substantially less difficult by the use of written evidence. The fact that administrative hearings may be distinguished from jury trials, however, is no excuse for not borrowing tested methods of presenting proof where jury trials would benefit from the borrowing. 37

Matters adjudicated by administrative agencies are just as important to the contestants as those involved in trials by jury. Indeed, where money is at issue the matters are strikingly simi-
lar.38 Yet we condone, indeed require a procedure involving written presentations in one case39 and oral presentations in the other.40

Dean Wigmore has attacked the apparent prohibition on the use of written testimony.41 Although he recognizes the risk of fabrication and coaching, 42 he believes that where expert testimony is involved, the risk is slight,43 and is more than outweighed by the benefits of lucidity, accuracy and increased comprehension that would be gained. He favors the free use of such testimony.44

38. Rule 77 of the General Rules of Practice applicable to litigation before the Interstate Commerce Commission permits the witness, with approval of the Hearing Officer, to read his testimony, including expressions of opinion as well as statements of fact, into the record. Moreover, his written report may be received in evidence as an exhibit, provided that it contains no argument. The procedure requires that the witness give a copy to his opposition and file it with the commission on a schedule to be fixed by the Hearing Officer. The Hearing Officer has the discretion to require a live presentation if in his opinion the memory or demeanor of the witness may be of importance. 49 C.F.R. § 1100.77 (1972).

In addition, the Interstate Commerce Commission maintains a shortened or modified procedure in certain rate cases which upon consent of the parties does away with all oral appearance of witnesses. 49 C.F.R. §§ 1100.45-1100.54 (1972). For a discussion of this procedure see 2 K. Davis, ADMINISTRATIVE LAW TREATISE § 14.16 (1958).

The Civil Aeronautics Board also requires that evidence be presented in written form wherever feasible in its economic proceedings 14 C.F.R. § 302.24(b) (1972), and requires that in mail rate and certain other proceedings all direct evidence be submitted in written form. 14 C.F.R. §§ 302.1312 and 302.1412 (1972).

The Department of Agriculture has long used a written procedure for claims under a certain amount (recently increased from $1,500 to $3,000) in connection with perishable agricultural commodities 7 U.S.C.A. § 49f(C) (1972), and allows for the use of affidavits 9 C.F.R. § 202.11(e)(4) (1973); 17 C.F.R. § 0.11(e)(4) (1973) and shortened procedures 99 C.F.R. 202.17 (1973), 17 C.F.R. §§ 0.17, 0.67 and 0.90 (1973) where the parties so stipulate.

39. To the litigant money doesn't alter its character because awarded by an agency rather than a jury. Compare Richardson v. Perales, 402 U.S. 389 (1971) with Long v. U.S. 59 F.2d 602 (4th Cir. 1932) and White v. Zutell, 263 F.2d 613 (2d Cir. 1959), all of which are discussed infra at pp. 78-79.

40. E. Morgan, BASIC PROBLEMS OF EVIDENCE 58 (4th ed. 1963); 3 Wigmore §§ 740 and 787 at 212.

41. Id. at 212. The opportunity for voir dire and cross should suffice to handle fabrication and coaching problems even with the fact witness as distinct from the expert.

42. Id. Wigmore notes that some jurisdictions ban the use of the written narrative pursuant to an overly restrictive view of the past recollection recorded rule. 3 Wigmore §§ 738, 740. Under the restrictive rule, contemporary recordings will be admitted only if the witness lacks a present recollection. United States v. Riccardi, 174 F.2d 883 (3d Cir.), cert. denied, 337 U.S. 941 (1949); Russell v. Hudson River Ry. Co., 17 N.Y. 134, 140 (1858); 3 Wigmore § 738. The better rule favors admissibility by a recognition that the contemporary document is likely to be more trustworthy than the witness' present recollection. This
The Handbook of Recommended Procedures for the Trial of Protracted Cases, adopted by the Judicial Conference of the United States, specifically calls for the use of new techniques and devices to improve accuracy and expedite decision in cases involving scientific, technical or economic issues. Among the procedures called for is the use of written summaries of testimony given to the court and adversary in advance of trial.

The proposal set out above is largely patterned after the procedure fashioned in the celebrated case of Trans World Airlines v. Hughes. As the parties approached the trial of the action after many years of discovery, motion practice, and appeals, it was apparent that the matters to be tried were so rife with technical detail concerning the economics of the commercial air transport industry that if traditional methods of trial practice were followed, the evidence would be incomprehensible. Moreover, it was clear that ordinary courtroom presentation would make cross-examination of the various expert witnesses a hopeless and empty gesture. A procedure, similar to the proposal outlined above was evolved from the realization that the case could not be tried in the normal, accepted fashion. It was born of necessity and largely promulgated as the case went along. Once it was agreed that expert evidence would be taken in written, narrative form for the purpose of direct, all direct evidence proceeded to be presented in that fashion—expert and general factual testimony alike.

45. Id. at 416.
46. Id.
47. Id.
48. The author was heavily involved in the preparation and trial of this matter for some ten years. Citations to this case are too numerous to list. Relevant citations for the purpose of this article are found infra in notes 51 and 52.
49. The written form worked equally well with “expert” and “fact” witnesses. The distinctions between such witnesses are becoming more hazy with the passing years. We have even arrived at a recognition that “fact” witnesses really may give opinion evidence. Proposed Federal Rule 701.

The lay witness with complex testimony has specifically been included in the proposal as a matter of policy. It is just as important that his or her testimony be clearly understood by the jury as well as the experts, indeed it is more important. The barriers to receiving such lay testimony in written form are much the same as in the case of the expert. Both are well prepared by counsel in advance of trial and have reached understandings with
Voir dire examination of the witnesses permitted the making of objections and cleansed the record of inadmissible testimony. With the benefit of a written direct, cross-examination was well prepared and generally incisive. The testimony itself was more thoughtful and complete than it would have been if orally delivered pursuant to question and answer.

Counsel and the witnesses for both parties were considerably better prepared than they would have been under ordinary circumstances. The written narrative form required far greater attention to detail. By its nature, it called for a refinement of analysis that is simply absent in the oral presentation. Moreover, the close relationship of counsel to the project, frequently, though not always, resulted in a presentation in language which could be understood by the trier of the fact.

In this particular instance, the trier was a special master of great acumen but with no previous experience in this technical field. The form of presentation coupled with well prepared cross-examination enabled him to understand the evidence being presented. He demonstrated this fully in a report of 323 pages containing his trial findings. The procedure had the added value of assisting a number of reviewing courts in understanding and following the proceedings below.

Opponents of this type of procedure will point out that what may be very well for an administrative agency, or a judge sitting in a non-jury case or even a special master, is not advisable in a jury case. Somehow a jury case is different. The jury must be protected. Protected from what is a proper question. Surely, the
counsel at that time. As to credibility, both must be tested in the same fashion. That the lay witness may be more partisan is arguable, but even if that be true, his credibility can be tested on cross much as it is today. The proposal has little effect on the credibility of the lay witness save as to permit a better prepared cross to attack it.

The proposal is not, however, an invitation to commit all lay testimony to writing. The type of lay fact witness contemplated is one whose testimony is not unlike that of the expert under the same circumstances. It will ordinarily involve difficult economic or technical industry matters or a set of facts so tangled that the ordinary presentation must be dispensed with in order that the jury understand the testimony.

50. Hon. Herbert Brownell, former Attorney General of the United States. 51. Trans World Airlines v. Hughes, 308 F. Supp. 679, 682 (S.D.N.Y. 1969). 52. Id., Trans World Airlines v. Hughes, 312 F. Supp. 478 (S.D.N.Y. 1970), aff’d 449 F.2d 51 (2d Cir. 1971), rev’d on other grounds, 409 U.S. 363 (1973). 53. Indeed, only one case has been found where the court exercised its discretion and permitted the witness’ written testimony to be read to the jury. There, the witness’ power of speech had been affected. How the witness could be effectively cross-examined under these circumstances was not answered by the court which proceeded on the assumption that it could be done. See Ward v. City of Pittsburgh, 353 Pa. 156, 44 A.2d 553 (1945).
proposal offered here would afford the jury greater protection against "tainted" evidence than now exists, since the testimony would be cleansed prior to its presentation. Moreover, wasteful, confusing and time-consuming objections would be removed from the sight and hearing of the jury.

Insulation of the jury from technical objections and prejudicial evidence are only a part of the story, for these matters are but procedural incidents of our traditional beliefs as to how a jury trial ought to be conducted. It is desirable that jury trials proceed with dignity and some solemnity with due regard for tradition.\(^4\) Such legitimate concerns however, should not be used as an argument for the maintenance of trial procedures which render clear factual presentations impossible.

In *Richardson v. Perales*\(^5\) the Supreme Court upheld the admissibility of physicians' reports in a proceeding under the Social Security Act involving a claim for disability insurance benefits. There, the written reports of several physicians were received in evidence to defeat the claim despite the fact that the physicians were not orally interrogated either on direct or cross-examination. The Court deemed the reports substantial evidence despite their hearsay character and permitted their use in agency proceedings.

In commenting on the procedure employed by the agency, the Court noted:\(^6\)

There emerges an emphasis upon the informal rather than the formal. This, we think, is as it should be, for this administrative procedure, and these hearings, should be understandable to the layman claimant, should not necessarily be stiff and comfortable only for the trained attorney, and should be liberal and not strict in tone and operation. This is the obvious intent of Congress so long as the procedures are fundamentally fair.

These same concepts ought to apply with even greater force in jury cases. *Perales* is an interesting example because the concern of the litigant (money) and the controlling question of law (admissibility of written reports) are common both to agency proceedings

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54. That we fulfill this desire only infrequently may be a symptom of the bar's attitude toward the trial process. The lack of regard lawyers have for the institution and perhaps for each other is manifested on a daily basis in courtrooms throughout the country. See, e.g., Berger, *A Sick Profession*, 27 Fed. B.J. 228 (1967).


56. 402 U.S. at 400-401.
Written Direct Testimony and jury trials. The Supreme Court, in affirming the agency decision to admit the written reports, relied heavily on two cases permitting the adversary use of expert medical reports made and kept in accordance with the business records statute: In Long v. United States and White v. Zutell, which were both tried to juries, the admission of medical reports in evidence, pursuant to an exception to the hearsay rule for records kept in the regular course of business, was permitted. It is important to point out here that in Perales and White the medical reports had been specifically prepared for litigation while in Long it had been prepared in anticipation of litigation. In no case were the experts called upon to testify by the proponents of their reports and in all, agency and jury trial alike, the reports were admitted as substantive proof of the facts. The courts reasoned, however, that since opposing counsel had the opportunity to call and examine the witnesses but chose not to do so, they had effectively waived their hearsay objections. This is arguably illogical for it places the burden of presenting evidence on the wrong shoulders; but that aside, if written evidence may be received before a jury without the oral adoption by the preparer and with no cross-examination, a fortiori it ought to be received where the preparer adopts it and is cross-examined. In requiring the expert to adopt his testimony and be cross-examined upon it, the proposal affords greater protection to the jury than now exists, while encouraging far greater clarity than is generally apparent in today's trials. It is good public policy to protect a jury from prejudicial evidence, but care must be taken not to over-protect it to the point that the essential facts cannot be understood. Years of "protection" have resulted in placing unreasonable barriers between the jury and the proceedings it views, between the court and the citizenry it is to serve.

57. See infra notes 38 and 39.
59. 59 F.2d 602 (4th Cir. 1932).
60. 263 F.2d 613 (2d Cir. 1959).
61. See also Korte v. New York, N.H. & H.R. Co., 191 F.2d 86 (2d Cir.), cert. denied 342 U.S. 868 (1951); Terrasi v. South Atlantic Lines, 226 F.2d 823 (2d Cir. 1955) and cases cited at 825.
63. The courtroom is a place where people come into close contact with their government. Indeed, other than in military service, paying taxes and parking violations, the courtroom may be the only place where actual substantial contact is effected. For the citizen, it may be the most important governmental contact of his life. Yet, as all trial
The proposal would have the effect of bringing down some of these barriers while allowing discretion in the judge to erect them again where necessary. Use of the narrative form would by definition end the laborious question and answer direct, place a premium on cross-examination and end the fiction of the leading question objection. Where objections are made to the direct, the court will be able to rule with the perspective of the entire testimony before it. This will result in rulings of a more substantive and less formalistic nature.

Thoughtful attorneys will raise questions of significance with regard to the procedure advocated above. Some will wonder how a jury of lay people will be able to comprehend the written narrative. The proposed procedure does not guarantee comprehension, but it does make it more likely. The juror who fails to understand the question and answer direct will have a far better opportunity to understand the evidence if it is presented in a lucid, logical manner without breaks for objection. He will have the opportunity to read and hear the testimony simultaneously. Ideally, it will be written in plain English with suitable definition of terms. Moreover, the cross-examination will certainly be more intelligible and easier to follow than is now the case.

In the following pages, further questions of moment concerning this procedure are discussed seriatim. They include the narrative versus the ritual form of interrogation, demeanor and credibility, leading questions and discovery. Before moving on to these issues, the question of hearsay must first be put to rest.

III. HEARSAY

To some, the adoption of an out of court statement, albeit a sworn one, for the purpose of proving the truth of the matter asserted, may sound like hearsay. The issue need not be so viewed, particularly if attention is paid to the purposes of the hearsay rule. The rule seeks to exclude certain out-of-court statements because their reliability cannot be tested by our traditional method of cross-examination. By definition this is not the case here. If anything, the cross here will be better prepared than in

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the ordinary case. At least the opportunity for it will be greater. In the hearsay situation, the declarant may be unavailable for examination, hence his statement is considered inherently unreliable unless the circumstances of his utterance or act supply the requisite reliability. Thus, we admit all manner of extra-judicial statements and actions as exceptions to the hearsay rule or as nonhearsay for purposes other than as substantive proof.

Since, under the suggested procedure, the declarant is available, testifies under oath, and is subject to cross, none of the reliability problems found in hearsay cases is apparent. Recognizing this, the authorities do not include this type of presentation as one running afoul of the rule against hearsay. In another view, the witness can be seen as actually presenting his evidence in court for the first time, his prepared narration having no independent significance. In this view, there is no out of court assertion at all and therefore no hearsay.

IV. THE NARRATIVE STATEMENT VS. "TRADITIONAL" QUESTION AND ANSWER

Direct examination of a witness through the use of the strict question and answer method is perhaps the most difficult skill the neophyte practitioner must learn. The difficulty of the art lies not in learning when a question is leading or calls for hearsay information or transgresses other evidentiary formulations, but rather that the whole ritual is quite contrary to that which we practice in daily life.

Ordinarily, we listen to one relating a tale of woe, interrupting only to keep the relator on the track or because we fail to understand a certain point of the narrative. This is not simply good manners, it is good sense. What is sought is the witness'

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65. Lack of demeanor evidence is one of the grounds for the hearsay objection. McCORMICK § 245 at 582. As to the effect herein see infra pp. 88-86. 66. This is the basis of most of the exceptions to the hearsay rule. See note 68 infra. 67. See, e.g., Proposed FEDERAL RULES, Rules 803, 804; McCORMICK, Chs. 24-34. 68. Nelson v. O'Neil, 402 U.S. 622 (1971); California v. Green, 399 U.S. 149, 158 (1970); MODEL CODE, Rule 503(b); UNIFORM RULES, Rule 63(1). 69. See ADVISORY COMMITTEE Note to Rule 801(d)(1), Proposed FEDERAL RULES. There it is phrased: "If the witness admits on the stand that he made the statement and that it was true, he adopts the statement and there is no hearsay problem." MODEL CODE, Rule 503(b) and UNIFORM RULES, Rule 63(1) are to the same effect. See also Douglas v. Alabama, 380 U.S. 415, 420 (1965). 70. McCORMICK § 246 at 584; Proposed FEDERAL RULES, Rule 801(c); UNIFORM RULES, Rule 63; MODEL CODE, Rule 501(2). 71. See infra pp. 88-89.
basic story. To be sure, missing details and memories must be supplied by jogging the mind with questions. Interrogation *ab initio*, however, may tend to confuse the basic details. Where technical or highly complex matters are at issue the method frequently fails.72

Trial courts are given wide discretion in the matter of how testimony is to be presented.73 Despite this discretion, the tenor of hundreds of decisions indicates that most of the bar is convinced that the question and answer method of eliciting direct evidence is somehow derived from our ancient past and is, therefore, not to be unduly fiddled with. The primary reason set forth for the use of this approach is to preserve opposing counsel’s right to make timely evidentiary objections.74 It would seem that the method was conceived for the convenience of the lawyers. In practice this is certainly the case, for no more inconvenient method for witness and jury can be imagined. Even assuming, once one is well schooled in the rigors of question and answer direct interrogation, that it works well enough for us, we must still ask ourselves whether what is best for us is best for our trial system. Both our assumptions, that the method is proven by age and that since it suits counsel it is best for the system, are false, and have been criticized by observers for years.

Dean Wigmore notes that the standard objection to the narrative form is of relatively recent origin and relies on petty technicalities.75 He states:76

There is in the minds of courts and practitioners an obsession that the natural way of giving testimony is the dangerous way. The practice now goes to absurd excess. A healthy view of the subject would banish the obsession and would restore the natural method as the usual one, thus obtaining more reliable testimony and a notable economy of time in trials.

Professor McCormick points out that the narrative form is likely to be more complete and accurate in its representation of facts than the question and answer method.77 A view of the older cases indicates that the traditional method of eliciting direct testimony

72. Note 7 *supra*.
73. Note 15 *supra*.
74. 3 Wigmore § 767.
75. *Id*.
76. *Id* at 148-150.
77. McCormick § 5 at 7 and materials cited in n.2; see Gardner, *The Perception and Memory of Witnesses*, 18 Corn. L.Q. 391, 404 (1923).
written direct testimony was not via the question and answer but through the narrative form.\textsuperscript{78}

In \textit{Northern Pac. Ry. Co. v. Charless},\textsuperscript{79} counsel directed his witness to “[t]urn to the jury, and tell them the facts in this case. . . .and tell them the complete story.”\textsuperscript{80} Although no specific objection was made to this question, counsel thereafter objected during the narrative to various details asserting that they were incompetent, hearsay, and immaterial. The trial court responded that:\textsuperscript{81}

\ldots [T]he taking of the witness’ testimony in the narrative form would be the best way of getting at what he knew or could state concerning the matter at issue; that it would save time . . . and would perhaps furnish to the jury a more connected statement of the matter to be told as it occurred and took place.

In affirming the ruling of the trial court the Ninth Circuit cited \textit{Chitty}, the leading text of the day, to the effect that: “[i]t is certainly the practice . . . to desire the witness to give his own account of the matter . . . .”\textsuperscript{82}

Practitioners have also complained of an undue reliance upon the question and answer technique. Some have questioned the historical accuracy of judicial assumptions that interrogation was the older recognized form. Arthur Howard, Jr. in his article aptly titled: “\textit{Why Can’t I Tell My Story?”},\textsuperscript{83} notes that \textit{Swift’s Digest}, first published in 1810, states: “In the examination of witnesses . . . the proper mode is to permit them in the first place to tell their stories in their own language.”\textsuperscript{84} The length to which we go to protect ourselves from a narrative, coherent story is illustrated by the recent case of \textit{Hutter Northern Trust v. Door County Chamber of Commerce}.\textsuperscript{85} There an attorney with no courtroom experience appeared \textit{pro se} as plaintiff and sought to

\begin{itemize}
  \item \textsuperscript{78} Northern Pac. R. Co. v. Charless, 51 F. 562 (9th Cir. 1892) rev’d on other grounds 162 U.S. 359 (1896); Mobile, J. & K.C.R. Co. v. Hawkins, 163 Ala. 565, 51 So. 37 (1909); People v. Davis, 6 Cal. App. 229, 91 P. 810 (1907); Thresher v. Stonington Sav. Bank, 68 Conn. 201, 36 A. 38 (1896); Goldsmith v. Newhouse, 19 Colo. App. 1, 72 P. 809 (1903); Horton v. State, 123 Ga. 145, 51 S.E. 287 (1906); King v. Andrews, 30 Ind. 429 (1868).
  \item \textsuperscript{79} 51 F. 562 (9th Cir. 1892) rev’d on other grounds 162 U.S. 359 (1896).
  \item \textsuperscript{80} Id. at 570.
  \item \textsuperscript{81} Id.
  \item \textsuperscript{82} Id., citing \textit{Chitty}, \textit{3 Practice of the Law} 894 (1835).
  \item \textsuperscript{83} 26 CONN. B.J. 183 (1952).
  \item \textsuperscript{84} Id. at 183.
  \item \textsuperscript{85} 467 F.2d 1075 (7th Cir. 1972).
\end{itemize}
state his case in the narrative form. Of 1,210 pages of transcript only 100 contained admitted testimony. Defense counsel insisted that plaintiff ask himself the questions rather than testify narratively and the court agreed. Plaintiff attempted to do this and was greeted with over 1,800 objections the majority made without stated grounds but nevertheless sustained. As a result, most of plaintiff’s testimony was excluded, the trial court directing a verdict for the defendant.

The Seventh Circuit reversed, noting that the excluded evidence was essential to the plaintiff’s case. It ruled that the trial court did have the discretion to require the question and answer form but that it had gone too far here. Apparently, the defense claimed on appeal that, inter alia, plaintiff’s questions to himself were leading. The Court of Appeals stated: “[I]t is difficult to see how a question propounded by a witness who is examining himself can rationally be objected to as leading.”

One wonders how the bench and bar became committed to the interrogation method and why we adhere to it so rigorously. The answer probably lies in our own developed expertise. In the arena of the courtroom, counsel are the experts and usually dominate the proceedings. As in all other fields of expertise, we become enamoured with our own technical rituals and forms. The overuse of the question and answer method is not simply the “petty technicality” that Dean Wigmore describes. It is frequently that, to be sure, but it is more. It is a reliance upon a tool of our expertness; a way of baffling the uninitiated. It is our own form of mathematical equation developed uniquely for our use. As experts, we have tended to ignore the larger implications inherent in the use of our own procedures. The courtroom is not our private preserve for the playing out of lawyers’ games. It is a forum for the just resolution of private disputes. When all of those private disputes are totalled and seen in perspective, the public nature of our preserve becomes very clear indeed. Thus, our forms must serve everyone, not merely our own convenience. Whatever benefits there may be in the question and answer form, they are outweighed by the narrative when an expert or complicated fact witness is testifying. Here the need for clarity must be primary

86. Id. at 1080.
87. Id. at 1078.
88. Note 75 supra.
89. To be sure, the ordinary narrative varies from the present proposal in terms of spontaneity. Though it is lacking here, there is little question but that in the case of the
or there can be no just, intelligent decision by the jury. As Professor McCormick notes, "... the need for eliciting what the witness knows in the most vivid and accurate way is an interest to be balanced against the need of the adversary for a fair opportunity to object."

As stated previously, the basis of the opposition to the narrative form is the need to preserve technical objections and insulate the jury from hearing tainted testimony. The proposal offered herein would accomplish this by requiring a voir dire examination of the witness' written narrative prior to the trial. In this context, counsel may raise all technical objections after a thorough reading and analysis of the proffered evidence. The court is given the opportunity to rule on suspect passages beforehand and to have them excised where appropriate. Thus, the testimony heard and/or read by the jury is devoid of objectionable material and of burdensome, time-consuming objections as well. The jury is given the opportunity to hear and read a reasoned, well connected story with a clear statement of technical, scientific or highly convoluted facts.

V. DEEMANOR AND CREDIBILITY

A major consideration of trial attorneys in the presentation of evidence is the demeanor of the witness. The personal presence of the witness, his appearance, the manner in which he states his evidence, the directness of his approach, his personality as it were, may be considered by the jury in evaluating his credibility. Some will criticize the proposal herein on the ground that the written narrative statement will adversely affect the jury’s right to have the demeanor evidence of the witness.

In defense, it must first be pointed out that under the terms of the proposal the jury will see and hear a full, live cross-examination of the witness. Certainly, the demeanor of the witness under the pressure of a penetrating cross-examination is far more revealing than the demeanor of the same witness responding to questions of friendly counsel on direct.

The major credibility problem with expert witnesses stems from the desire of some experts and their counsel that the witness

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expert it is always lacking. The problem is greater where the fact witness is concerned. There, narrative spontaneity is very desirable. In the complex case, however, it is seldom realized as counsel carefully prepares the witness beforehand.

90. McCormick § 5 at 8.
91. 3A Wigmore § 946.
become an advocate for the cause. Code drafters have sought to reduce the advocacy of the expert by proposals for court appointed experts, coupled with proposals for the submission of written reports similar to the procedure suggested here. No foolproof method has been suggested. Nevertheless, it is submitted that the narrative form with the assistance of counsel may stimulate greater efforts by the expert, particularly in researching matters of detail and underlying fact. This will come about because of the threat of a more penetrating cross-examination which is inherent in the procedure. The expert may still be an advocate; at least, he will become a prepared advocate.

The proposal gives the court wide discretion in the matter of how the evidence shall be presented. If the judge is of the view that the demeanor of the witness is an important consideration, he may order that the witness give testimony in the ordinary course. Several alternatives to this are apparent. The proposal permits the court to have the witness read his direct to the jury, a method recently employed in matters where the credibility of the witnesses were matters of the highest national importance.

As an option of recent origin, and in the interest of saving time, the court could have the direct testimony delivered by video tape. This method has been approved in several recent cases. In Rubino v. G.D. Searle & Co., in addition to the usual transcript, a New York court permitted the defendant to make a video tape of the deposition of its former director of biological research. The court held that Section 3113(b) of the New York Civil Practice Law and Rules (hereinafter N.Y. CPLR) required only that the testimony be recorded. A stenographic transcript is not the only means of accomplishing the statutory objective. Although the court did not rule on the admissibility of the tape at trial, it suggested that if a proper foundation was laid, and if the terms

92. McCormick § 17 at 38; 2 Wigmore § 563, n. 2; Model Code, Introductory Note to Ch. V at 198.
93. See, e.g., Model Code, Rule 403; Proposed Federal Rules, Rule 706.
95. As in the Senate Watergate hearings. There is an obvious difference between a jury trial and a congressional hearing. However, in the context of the demeanor and credibility of a witness who reads his prepared narrative testimony to any fact-finding panel, the distinction vanishes.
97. See Miller, Videotaping the Oral Deposition, 18 Prac. Law. No. 2, 45, 56-57
In June, 1973, a Vermont court directed the use of video pretaped testimony in a criminal jury case. The court and counsel labored in advance of trial to tape all the testimony, edit out objectionable material, and prepare it for the viewing of the jury. Approval of the experiment was granted by the Vermont Supreme Court. Judge's and jurors' time was saved in the experiment, as counsel were able to tape the direct and cross outside of their presence. Even more recently, a California court held its first prerecorded video tape trial. The trial was held pursuant to a grant from the National Institute for Law Enforcement as part of an eight state project of the National Center on State Courts.

Though video tape will preserve demeanor evidence for the jury, courts and legislatures have permitted the introduction of evidence with demeanor necessarily excluded. This obtains whenever a pre-trial deposition or testimony at a former trial is permitted to be read to the jury in the absence of the witness. Such use of a deposition is widely permitted where the witness is dead or beyond a certain distance from the courthouse, or is unable to attend due to illness, age, imprisonment, or when the party offering the deposition is unable to procure the appearance of the witness, or in the interests of justice.

In addition to the foregoing, we readily admit all manner of out-of-court, demeanorless and cross examinationless evidence as various exceptions to the hearsay rule, and for non-hearsay purposes including impeachment of the credibility of the in-court witness. Moreover, we admit writings in evidence which cannot

(1972); see also Comment, Use of Videotape in the Courtroom and the Stationhouse, 20 De Paull L. Rev. 924, 943 (1971).

98. See text accompanying note 102 infra.
100. The jury found the defendant guilty. In connection with the video tape procedure, one may speculate whether it is easier for a jury to convict when the defendant is seen on tape but where his or her physical presence is lacking. It also seems appropriate to inquire whether the laboratory clean tape presentation causes a change in the ethos of the trial.
104. For instance, to prove the making of an oral contract or in cases of libel or
be tested by demeanor, but which we find ways of testing for factual credibility nevertheless. 105

In light of the foregoing, it is submitted that the proposal presented here gives the court ample room to preserve demeanor evidence where and to the degree it seems necessary on direct while guaranteeing it to the jury on cross-examination. 106 As can be seen, much of our present practice falls far short of this.

VI. LEADING QUESTIONS AND THE ROLE OF COUNSEL

When counsel actually assists in the promulgation of the witness’ direct testimony on the stand, some practitioners would object that the testimony is leading and should be stricken. There is probably not a more frivolous objection in our legal lexicon, and its use with most expert witnesses is an attempt to foist an untruth upon the jury. Surely, no lawyer worthy of his shingle would permit his witness to take the stand without careful preparation. In the case of the expert witness, it is not divulging a closely guarded secret to note that counsel has a large hand in the preparation of the testimony and indeed, if the presentation is written, as for use before an administrative agency, will likely do much of the writing himself.

This procedure is proper, but does permit counsel to insert his own ideas. As McCormick points out: 107

[T]he normal practice is for the careful lawyer to interview in advance all witnesses whom he expects to call for direct examination to prove his own case. This practice is entirely proper, but it does create a probability that the lawyer and the witness will have reached an entente which will make the witness especially susceptible to suggestions from the lawyer.

Not unlike the narrative form discussed earlier, the matter of leading questions is discretionary with the court 108 whose action

slander—the operative fact doctrine. See Morgan, A Suggested Classification of Utterances Admissible as Res Gestae, 31 YALE L.J. 229 (1922); MCCORMICK, § 249.

105. See McCormick § 245 at 582. We also take evidence of judicial notice and test it by affidavit and argument but not often by examination of witnesses.

106. Some practitioners will cavil at the procedure because they wish their expert to cut an impressive figure on direct before the jury. An impressive report and an implacable appearance on cross will do just as well. Counsel’s desires to impress the jury must, in any event, take second place to a clear presentation of the facts.


will be affirmed unless it amounts to the denial of a fair trial,\textsuperscript{109} or a miscarriage of justice.\textsuperscript{110} The frivolity of the objection is manifest, for the objectionable question can be made right simply by a rephrasing after the suspect suggestion has been planted.\textsuperscript{111} Indeed, the vast majority of what some lawyers mistakenly believe to be leading questions are perfectly proper.\textsuperscript{112} Thus, when the three most crucial problems with a witness arise, \textit{i.e.} when the witness’ recollection has been exhausted, or when the information cannot otherwise be obtained, or when directing his attention to further material evidence, leading questions on direct examination are the correct method of interrogation,\textsuperscript{113} the allowance of which will almost never be overturned on appeal.\textsuperscript{114}

In a sense, of course, every question is leading. Were it not so, the trial could not advance.\textsuperscript{115} These questions are not incompetent \textit{per se}\textsuperscript{116} and will always be permitted where justice so requires.\textsuperscript{117}

Long ago, jurists recognized the true quality of this objection. In \textit{Nicholls v. Dowding},\textsuperscript{118} quoted by Wigmore, Lord Chief Justice Ellenborough stated: “In general, no objections are more frivolous than those which are made to questions as leading ones.”\textsuperscript{119} Chief Judge Collier once remarked: “Objections to questions on the ground that they are leading are generally captious and not intended to subserve the ends of justice.”\textsuperscript{120}

\textsuperscript{109. Id.}
\textsuperscript{110. Usher v. Eckhardt, 176 Minn. 210, 222 N.W. 924 (1929).}
\textsuperscript{111. 3 Wigmore § 770 at 161; E. Morgan, \textit{Basic Problems of Evidence} 57 (1954); McCormick § 6 at 9 and cases cited in n. 11.}
\textsuperscript{112. So-called leading questions are permitted for preliminary matters, matters not in dispute, to suggest the topic but not the answer, children, ignorant or timid witnesses, language problems, and hostile witnesses. See, \textit{e.g.}, McCormick § 6 at 10; E. Morgan, \textit{Basic Problems of Evidence} 57 (1954); 3 Wigmore § 769-778.}
\textsuperscript{113. Id. \textit{See also} Advisory Committee Note to Rule 611(c), Proposed Federal Rules.}
\textsuperscript{114. 3 Wigmore § 770.}
\textsuperscript{116. State v. Johnson, 272 N.C. 239, 158 S.E.2d 95 (1967); Urbani v. Razza, 103 R.I. 445, 238 A.2d 383 (1968). \textit{See also} Mich. Comp. Laws Ann. § 766.24 (1968) which states: “Within the discretion of the court no question asked of a witness shall be deemed objectionable solely because it is leading.”}
\textsuperscript{118. 171 Eng. Rep. 408 (K.B. 1815).}
\textsuperscript{119. 3 Wigmore § 770 at 157 n. 1.}
\textsuperscript{120. Towns v. Alford, 2 Ala. 378, 381 (1841) quoted by Wigmore in § 770 at 157 n.1.}
The real danger to which the objection is addressed is that of improper collusion between counsel and the witness. The attempt to plant a false memory or false facts in the testimony is regarded by some as the only valid basis for the leading question objection. This is very serious business indeed and vastly transcends the more traditional emphasis on the merely suggestive.

In oral examinations much more than the bare question itself is often needed to determine if the danger is present. The verbal form of the question, the nature of the topic, the temper and bias of the witness, the tone, inflection and emphasis of the question are all important considerations in making a judgment.

The danger here boils down not to undue suggestability as some claim but rather to perjury. Seen in this light an objection to a question because it is leading will not serve either to prevent perjury or to uncover it. Whether suggestability or perjury or both are the concern, the only devices which will serve are an expanded opportunity for cross-examination and the imposition of traditional criminal penalties where necessary.

Written narrative testimony gives a far better opportunity for the preparation of incisive cross-examination than any other mode of direct presentation. If collusion between counsel and the witness has existed to place misinformation in the record, cross-examination following an extended period of study of the direct, and after a voir dire as to the statements made therein, is the best device we have to uncover it.

The problem comes down to one of legal ethics. Collusion

121. Appelton, Evidence 227 (1860); Chitty, 3 Practice of the Law 892 (1835); 3 Wigmore § 769 at 654, § 770 at 162.
122. Advisory Committee Note to Rule 611(o), Proposed Federal Rules; McCormick § 6; E. Morgan, Basic Problems of Evidence at 57 (1954).
124. E. Morgan, Basic Problems of Evidence at 57 (1954); McCormick § 6.
125. 3 Wigmore §§ 769, 770.
126. This is the case regardless of the form in which the evidence is presented.
127. Professor Morgan, in an aside, states that written testimony will not only destroy the leading question objection but will also hamper cross. E. Morgan, Basic Problems of Evidence 58 (1954). The first observation is obviously true, the second is gratuitous and just as patently false.
128. The direct participation of counsel will have a number of salutary effects. It will remove the fiction that lawyers do not prepare their witnesses prior to the trial. Counsel will be required to engage in greater and more careful preparation than generally is the case today and will have a greater responsibility for that which is presented in the courtroom. The employed expert will work more closely with counsel and will necessarily pay far greater attention to his task than is the practice currently. A primary cause of poor
as used here does not mean that counsel has written or edited or prepared his witness' testimony. We do that now. Rather, it is the deliberate attempt to falsify, to engage in felonious conduct, in the cause of the client. The procedure outlined here will go much further toward solving this problem than any we now have available in the courtroom.

VII. DISCOVERY

Where the witness is one who will testify as to complex facts, his testimony can be discovered prior to the trial through the use of ordinary discovery machinery. However, where the witness is a qualified expert many state and some federal courts have been loath to grant extensive pre-trial examination. The provisions of the proposal, which require that testimony be made available prior to the trial, may be resisted as transgressing procedures in those jurisdictions which do not ordinarily permit wide pre-trial discovery of experts. It must be noted at the outset, however, that the exchange of testimony contemplated here is not discovery at all. The exchange would take place after the expert has completed his tasks and formulated his testimony. It is the trial testimony itself that is exchanged. This phase of the proceedings must be considered a portion of the trial itself. Nevertheless, some will persist in labelling the exchange a discovery device. Even if that be accepted arguendo, public policy requires the implementation of the suggested procedure.

Objections to disclosure of expert reports are made generally on the grounds that such discovery invades the domain of the attorney's work-product, gives the opposing party an undue

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preparation of experts and lawyers is an economic one. Close cooperation and a substantial study of the subject matter at issue tend to raise fees beyond that which the client may wish to pay. The proposal may exacerbate this particular difficulty, but will insure that counsel and his witness will be better prepared if at higher cost.

129. Though some have counselled that under certain circumstances it may be that an attorney should go all the way for his client, the idea is repugnant to our system of jurisprudence. Moreover, it would glorify the same means and ends logic that tragically led a number of "loyal" attorneys of some prominence to their downfall in connection with Watergate.


advantage by allowing it to take a property right in the expert's testimony which has been purchased and paid for, and would permit invasion of the diligent preparation of the case. Similarly, some older decisions contended that discovery procedures did not apply to expert testimony and if they did at all, good cause had to be shown before discovery would be permitted. To allow discovery, it has been said, "would penalize the diligent and place a premium on laziness."

The proposal contemplates no "invasion" of the experts' domain or the lawyer's work-product. It merely advances required disclosure at trial to a slightly earlier period. The proposal puts a premium on clarity of direct presentation and on expanded opportunity for cross, both matters tending to advance the announced policy of mutuality of disclosure and to inhibit secrecy and undue game playing by counsel.

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135. United Airlines v. United States, 26 F.R.D. 213 (D. Del. 1960); Midland Steel Products Co. v. Clark Equipment Co., 7 F.R.D. 132 (W.D. Mich. 1945); U.S. v. Five Cases, 9 F.R.D. 81 (D. Conn. 1949); U.S. v. 6.82 Acres, 18 F.R.D. 195 (D. N.M. 1955). The requirement of good cause has been removed from Fed. R. Civ. P. 34 and a new requirement of a special showing has been added in Rule 26 as part of Rule 26(b)(4)(B) with regard to experts hired for litigation but not expected to testify. The proposal does not contemplate this type of expert.


139. Tiedman v. American Pigment Corp., 253 F.2d 803, 808 (4th Cir. 1958); South-
Written Direct Testimony

The Federal Rules of Civil Procedure clearly contemplates substantial discovery of expert testimony. Moreover, many courts rejected the objections to such discovery even before the 1971 changes in Rule 26. Discovery of expert testimony has been held to be within the sound discretion of the trial court. Exercising that discretion, the courts have rejected objections to disclosure based upon work product, alleged property rights and diligence of counsel.

Where the testimony of the adverse expert is to be offered at trial, some courts have held that it may be compelled earlier. Moreover, it has been recognized, albeit slowly, that the need for preparation of adequate cross-examination is in itself sufficient grounds for granting discovery.

140. Thus, Fed. R. Civ. P. 26(b)(4) now deals specifically with discovery of experts. Pursuant to its provisions, discovery may be obtained by interrogatory to identify experts the opposition expects to call at trial and obtain a statement as to subject matter, substance of the facts and opinions in that testimony, as well as a summary of the grounds for each opinion held, Rule 26(b)(4)(A)(i). Under Rule 26(b)(4)(A)(ii), the court upon motion may grant further discovery and under Rule 26(b)(4)(B) may extend discovery to experts not expected to be called as witnesses.

141. Goosman v. A. Duie Pyle, Inc., 320 F.2d 45 (4th Cir. 1963); Francisco v. Travelers Ins. Co., 363 F.2d 1018 (8th Cir. 1966); Benning v. Phelps, 249 F.2d 47 (2d Cir. 1957); Southern Ry. Co. v. Lanham, 403 F.2d 119 (5th Cir. 1968); Tiedman v. American Pigment Corp., 253 F.2d 803 (4th Cir. 1968); Bank of America Nat’l Trust & Savings Ass’n v. Hayden, 231 F.2d 595 (9th Cir. 1956).


143. Sachs v. Aluminum Co. of America, 167 F.2d 570 (6th Cir. 1948); United States v. Meyer, 398 F.2d 66 (9th Cir. 1968); Seven-Up Bottling Co. v. United States, 39 F.R.D. 1 (D. Colo. 1966); P. Lousell, Modern California Discovery, § 11.04 at 332 (1963).


145. Indeed, at least one court has held that in some circumstances, the adverse expert testimony can be compelled even where the proponent did not wish it offered at trial. Thomaston v. Ives, 239 A.2d 515 (Conn., 1968); noted in 73 Dickinson L. Rev. 675 (1968).


147. United States v. Meyer, 398 F.2d 66 (9th Cir. 1968); United States v. 23.76 Acres,
The barriers to discovery of expert testimony have been very slow to come down. This has been caused by a misplaced emphasis on the traditions of the adversary process and too little emphasis on the overall public policies involved in securing the speedy, just, and inexpensive resolution of disputes.

In United States v. 23.76 Acres of Land, Judge Winter rejected all the usual objections to discovery and concluded:

The basic purpose of discovery is to prevent confusion, and it does not appear to me how full discovery, even discovery of an opinion of ultimate value, if permitted, could possibly result in confusion. It is the rare lawsuit in which there are not at least two versions of a single transaction or occurrence. The purpose of discovery is to permit each party to learn of the other party's version. That the versions may conflict creates a question for the trier of the fact, but hardly creates a basis to refuse discovery.

It is to be noted . . . that one of the express uses of depositions is that of cross-examination, [Rule 32(a)(1)] and it needs no citation of authority to say that an expert is the most difficult witness to cross-examine, particularly if one is unaware until trial of the substance of his testimony.

CONCLUSION

Judge Winter's reasoning applies with equal force in support of the present proposal. Although the proposal does not seek to alter discovery rules because it is not technically a discovery device, it does seek to make the public policy behind them fully operative. Since we reject artificial objections to discovery and seek to disseminate the facts to all parties prior to trial, one can only speculate as to why we countenance artificial barriers to fact finding at the trial. That speculation in part centers on the attitude of the bar toward the trial process itself. So long as some lawyers treat trial practice as combat, the vice of obfuscation will seem to them to be a virtue. In this view, tactics rather than substance occupy counsel's energies, and the purpose of the

149. Id. at 596.
150. Id.
151. See Model Code, Comment to Rule 406 at 209.
trial—the just resolution of the particular dispute—is lost. To the vast majority of the trial bar, however, the true virtue is clarity of presentation coupled with skilled advocacy. The proposal advanced in these pages is intended to reduce obfuscation and the emphasis on tactical advantage so that through clarity and advocacy, the trier of the fact may have a better opportunity to reach a just result.