

Braverman

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# The New York

## Expert Witness Holds Key to Trials

By LESLEY OELSNER

ITEM: A girl, 18, trips in the crack between the concrete blocks on a roller skating rink at Jones Beach. She breaks her leg.

ITEM: The president of Panama is shot; his vice president becomes president. The new ruler is charged with murder.

ITEM: A 34-year old Long Island man brings home a bottle of champagne to celebrate Mother's Day with his wife. He takes off the wire wrapped around the neck of the bottle, and the plastic cork pops out and hits his eye, severely damaging his vision.

In each of these cases, a lawsuit is begun. And in each case, as in countless suits tried every day in courts across the country, the outcome depends largely upon the testimony of an expert witness—a witness, summoned by the plaintiff or defendant, who is entitled because of particular knowledge or skill or experience to give his opinion of the facts in the case.

The expert seen most often by the public is the physician—Dr. Milton Helpert, chief medical examiner for New York City, for instance, or Dr. Joseph Spellman, the Philadelphia medical examiner who testified last week in the hearing on the petition for the autopsy of Mary Jo Kopechne, the 28-year-old secretary who was drowned when a car driven by Senator Edward M. Kennedy plunged off a bridge.

### Allergy Settlement

In lesser known cases, too, a physician is often a crucial witness. Recently, in Supreme Court in Brooklyn, for instance, the testimony of an eminent woman allergist helped persuade a hospital to settle, for \$100,000, a malpractice case brought by the wife of a medical student who died after receiving an injection of a drug for hay fever.

But there are also expert

witnesses on ballistics, on X-rays, on aircraft components, on trees, on road construction, on the operation of elevators. There are also experts who testify on the number of guards who should be assigned to staircases in school buildings.

"You name a subject and we'll give you an expert," Ronald Goldfarb, a Manhattan trial attorney in personal injury cases, said the other day, "and if we don't have one already, we'll find one."

In the 14 years he has practiced, he has used hundreds of experts, for, as he said, "without an expert you often don't have a case."

### Crucial Testimony

Without such witnesses, countless cases could not be won. And thousands of other cases would not even be brought. For under the United States legal system, where an injured party must initiate his own civil suit, and where, to recover, he must prove that the defendant was responsible for his injury, expert testimony is a necessity. It is also crucial in a highly developed technology that has methods of production often incomprehensible to the general public.

In the case of the popping plastic cork, for instance, in order to recover from the manufacturer, the lawyer had to prove that the eye was damaged and that it was damaged by the cork.

He also had to prove that because of faulty manufacture of the bottle, the cork popped out too soon—and that the manufacturer should have constructed the bottle, or the cork, in some other way.

"I made a series of measurements of the bottle," said Isaac Stuart, the engineer who testified as a witness in this case, "and my measurements showed the bottle was not good."

He measured, he said, the neck of the bottle and the width of the glass. He also

studied the effects on the bottle of various temperatures, and determined that the bottle and cork were so constructed that there was not enough friction to keep the cork tightly in the bottle.

### Career Witnesses

Though some expert witnesses participate in litigation only occasionally, and though a few of them testify reluctantly, many others have built entire careers as consultants to attorneys.

A few experts, such as the economist, Leon Keyserling, who spends about 30 or 40 per cent of his time either in consultation or in testimony before administrative agencies as an expert on rates of return in regulated industry, have names familiar to the general public.

Most, though, like Isaac Stuart, are known only in legal circles, where they are celebrities.

They are called or solicited by attorneys who have read their books or their articles, who have found their names in medical directories, who have heard them speak, who have watched them testify in other cases.

Thus when the girl fell on the skating rink at Jones

Beach, her attorney telephoned an engineer whom he had once heard lecture on sidewalk construction; the expert testified in court on the improper construction of the rink's surface.

The experts are paid well for their time. And the more expert they are, the more they get. A medical general practitioner might get only \$100 for a morning in court, but a specialist, or a chief of surgery, might get \$500.

#### Opinion for a Price

Because two opposing expert opinions are often offered to the same jury, the practice of soliciting expert testimony has been criticized. As long ago as 1891, a New York Court of Appeals judge wrote: "... the fact has become very plain that in any case where opinion evidence is admissible, the particular

kind of an opinion desired by any party to the controversy can be readily procured by paying the market price therefor."

One doctor—who, like other medical experts, asked that his name not be used—put it this way: "You get surprised at what people say in court—you never hear them say that in the medical societies or in the classroom."

The problem of reliability is particularly glaring, critics say, in testimony by physicians. "Some insurance companies have stables of doctors to say anything they want," one New York trial attorney said. One problem, he explained, is that most doctors, as well as lawyers, do not want to testify against members of their profession.

One solution, suggested by the American Law Institute in a model code published in

1942, and favored by many lawyers, is to allow the judge to call experts of his own.

California enacted a statute in 1965 that gave judges this authority, but in New York, judges generally bring in only doctors or psychiatrists, and only in cases involving confinement in an institution of an alleged narcotics addict or a mentally defective person.

Other lawyers, though, say the system should not be changed. They explain that it is inherent in America's adversary process, where argument between the two parties supposedly produces the truth. They say, too, that a less-than-honest witness can be discredited on cross

examination.

"You get him on cross, and you ask him how often he comes to court as an expert," Mr. Goldfarb explained. "You ask him what he gets paid each time, and whether he testifies only for defendants."

#### 'Coloring' Testimony

Expert witnesses complain that sometimes attorneys try to pressure them into giving a certain opinion, or, as one said, "to color your testimony." Other attorneys want experts to serve a role that Dr. Helpern called "window dressing."

And often, they say, lawyers make them look foolish or dishonest. "If a lawyer doesn't know his subject," said Sheldon Braverman, an expert on firearms who has his own ballistics laboratory in Coxsackie, N. Y., "it makes you look like you're weaseling, when it's merely that the questions are stupid."

These incidents occur despite the fact that experts, like all witnesses who testify voluntarily, are carefully rehearsed by the lawyer before the trial begins.

#### Helped Acquit a President

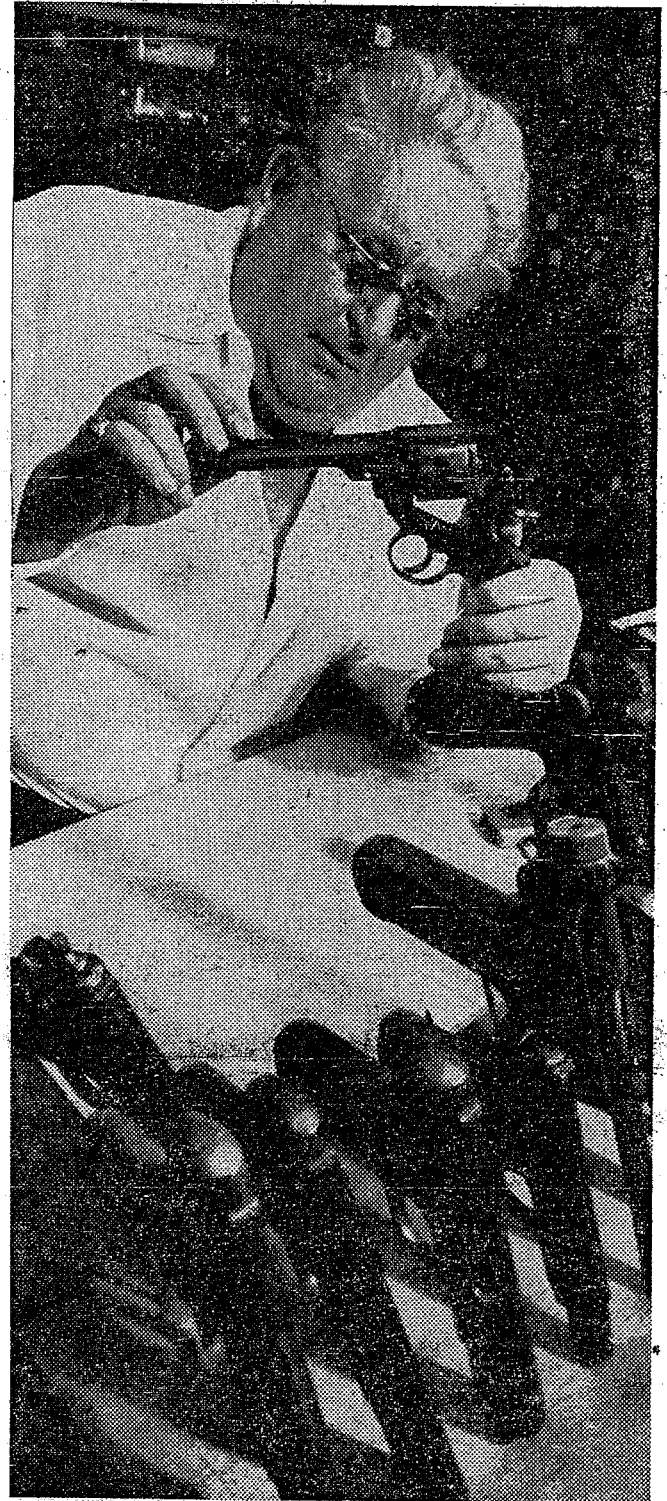
Mr. Braverman, three-fourths of whose time is spent as an expert consultant to attorneys, is the witness whose testimony resulted in the acquittal of the president of Panama.

In that case in 1959, Mr. Braverman demonstrated that a bullet found in the body of one of the four men killed with the assassinated president could not have come from the gun owned by the defendant.

Against Mr. Braverman's complaint about inept questioning, and Dr. Helpern's complaint about "window dressing," are the psychic satisfactions of an expert's work.

"There's a certain degree of excitement," said Isaac Stuart, who spends 90 per cent of his time testifying for, or consulting with, attorneys.

"You realize that sitting at the counsel table opposite you is an attorney who has his own expert, and there is the problem of convincing the jury which of the two experts has the better opinion. This is how you show your mettle."



The New York Times (by Carl T. Gossett Jr.)

Sheldon Braverman, an expert on firearms, examining a revolver in his ballistics laboratory in Coxsackie, N.Y.