

# Perry Mason Isn't Enough

## Finding the Truth in Our Most Complicated Cases

In a trial one of the last things a jury hears is an admonition from the Judge to let their verdict “speak the truth.” The phrase is intended to focus the jury on their task at hand: They must determine what the “objective” truth is regardless of whether it means a win or a loss for our clients or the defense.

The phrase also honors the adversarial system our courts embrace. The adversarial system is our preferred method of dispute resolution. The competing claims of the parties are presented by their legal representatives to a presumed impartial third party, usually the jury. The end result of the adversarial courtroom battle is usually a verdict by the neutral jury that “speaks the truth.”

Before a jury’s verdict can speak the truth, the truth must be disclosed. What happens if one side’s case is predicated on untruths or outright lies? Hopefully, the adversary will be able to expose the untruths or lies. Exposing the lies is very seldomly done in a “Perry Mason moment.” Rather, it is the result of very thorough preparation and often hundreds of hours of research by the lawyers.

Practically every civil jury trial requires testimony by expert witnesses. This includes medical doctors of every specialty, chiropractors, psychologists, engineers, accountants, economists, toxicologists, physicists, etc. Due to the way civil and criminal jury trials are portrayed on TV and in the movies, many jurors are surprised to find that it is exceedingly difficult, although not unheard of, to get an expert or for that matter, any witness, to admit that they lied or are lying when testifying. Defense experts often rationalize their prevarications by stating them as “opinions” that others may disagree with. Of course, they offer at least one opinion that differs with the injured party’s experts, more often than not, the injured party’s treating physicians and healthcare providers, for the sole purpose of creating an issue. If they did not disagree with at least one opinion offered by the injured party’s experts, their source of income from the insurance industry and product manufacturers would dry up. This phenomenon was well documented in the book “Doubt is Their Product” by David Michaels. In his book, Michaels argues that product defense consultants

have increasingly skewed the scientific literature and manufactured and magnified scientific uncertainty for the purpose of influencing decision makers including jurors and lawmakers to side with their clients who are often insurers, polluters and manufacturers of dangerous products.

Recently, I was reminded that even people who appear to be unimpeachable standup witnesses like the doctors in our communities lie on the witness stand when they can rationalize the lie. We must all continue our fight to expose these fabricators and share the fruits of our efforts with others who run up against them in other cases. The failure to expose the liars for what they are can be catastrophic. The following are a few examples of documented “lies” by defense experts.

In the context of a medical malpractice case, a highly qualified physician hired by the defendant and his insurance company gave the insurance company a blunt report which described serious mistakes made by the healthcare providers which, in turn, caused the permanent vegetative state of their patient. The patient was a relatively healthy young woman who went into a hospital to have a baby and ended up in a coma without any higher brain function.

The doctor who was a professor of medicine at an Ivy League school sent the insurer two reports. The first report for publication and for delivery to the victim’s lawyer stated unequivocally that he could find no evidence of negligence or malpractice. The second report sent only to the malpractice insurance company’s representative for his eyes only stated specifically it was going to be very difficult to defend the doctor and that there was no way he could defend certain conduct by the healthcare providers. That report opened with the following two sentences:

I have made no copies of this letter and I have written it for your eyes only. I would suggest that once you have read it it should be destroyed.”<sup>1</sup>

This report concluded with the following sentence:

“Again, let me emphasize that I do not have a copy of this letter and I frankly hope that you will destroy it after you read it.”



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In this case, the attorney for the young, comatose mother fortuitously discovered the report which contained the expert's "true" opinions and exposed him for the liar he was.

Unfortunately, it often takes years and in many instances, decades of extremely hard work to expose the defense experts' lies for what they are. We see this with litigation involving all types of products. An historical example of this is the asbestos litigation which ultimately disclosed that the industry knew its product was producing an incurable cancer, mesothelioma, back in the 1920s. More recently, the link between the use of Johnson & Johnson's baby powder and Shower to Shower products containing high levels of talcum powder and ovarian cancer has been exposed despite knowledge of that link for decades. Yet, if you "google" "Johnson & Johnson and talcum powder and its link to ovarian cancer," the result at the top of the list is a piece put out by Johnson & Johnson labeled "Facts About Talc." A reading of this material will leave you with the impression that the use of talcum powder on female genitalia does not increase the risk of ovarian cancer at all. Indeed, these materials make the use of talcum powder so inviting, you might want to run to the store and stock up on it in case there is a shortage.

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However, Johnson & Johnson intentionally fails to reference its own internal documents which, back in the 1980s, noted medical studies that implicated talc use in the vaginal area with the incidence of ovarian cancer. In the 1990s, its CEO received correspondence from the Cancer Prevention Coalition referencing scientific studies dating back to the 1960s which stated that the frequent use of talcum powder in the genital area poses a serious risk of ovarian cancer. The same letter also referenced a study performed by a leading ovarian cancer researcher from Harvard which found a threefold increase of ovarian cancer in women who used talc in the genital area daily. These documents were used as exhibits to expose the objective truth at the recent jury trials on the subject and Johnson & Johnson will hopefully have to pay the price for its knowing sale of a dangerous and defective product.

On this web page, Johnson & Johnson is trying

to create doubt. It is taking a page out of the tobacco industries' playbook. We all know of the decades of tobacco litigation that it took to finally prove that tobacco is addictive and carcinogenic. The industry had known that it was selling a highly addictive and dangerous product long before Surgeon General Dr. Luther Terry released a report sounding a nationwide alarm in 1964. In fact, the industry worked hard to find ways to more efficiently hook its customers. Despite internal research making this truth plain, the tobacco companies denied both the science and their role in encouraging greater use of even more addictive cigarettes.<sup>2</sup>

But, what if there are no whistle blowers, no documents, or no experts who will admit what happened? Consider medical malpractice claims where the defendant is a doctor who we are all indoctrinated to trust, respect and hold in high esteem. When it comes to medical errors, an increasingly common problem<sup>3</sup>, there may not be discoverable documents which prove the victim's case. Determining what happened in a surgery gone wrong is not the same things as identifying a dangerous product. Often, we must rely on individuals to give honest opinions on whether the doctor was negligent.

*Pro Publica* recently highlighted the confession of a South Dakota doctor who admitted he lied on the witness stand in a medical malpractice case. In an op-ed originally appearing in the *Yankton Community Observer*, Dr. Lars Aanning confessed to lying on the witness stand to protect a former colleague and business partner.

In this case, the victim alleged that the doctor was negligent in performing an operation and that the negligence was a cause of a stroke which left the patient permanently disabled. While testifying at the trial, Dr. Aanning denied any misgivings about his colleague's skill and experience. The problem, however, was that Dr. Aanning questioned his colleague's skill because his patients had suffered injuries during this and other procedures performed by him. The jury found in favor of the doctor.

Dr. Aanning described why he lied: He knew he was expected to support his colleague and he did. This goes well beyond the well-known phenomena which all lawyers who have prosecuted medical malpractice claims have experienced, namely, "the conspiracy of silence" where they cannot find a local doctor willing to criticize another local doctor. Here, Dr. Aanning supported his colleague even though his professional opinion was that he questioned his

colleague's skill. Dr. Aanning stated: "From that very moment, I knew I had lied - lied under oath - and violated all my pledges of professionalism that came with the Doctor of Medicine degree . . ." In an attempt to make amends, he now is an outspoken patient advocate who assists the medical malpractice attorney who represented the patient in the case in which he lied.

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Many patients are not informed that they are the victims of medical negligence. According to its research, *Pro Publica* has determined that many physicians do not have a favorable view of informing patients about medical mistakes. Further, healthcare workers are afraid to speak up when they believe that the care provided is subpar. They fear retaliation if they speak out about patient safety issues. Additional research shows that the medical community is often divided about disclosure of medical negligence. A 2010 survey of hospital risk managers and physicians revealed that risk managers are often at odds with physicians about how much to disclose.<sup>4</sup> Slightly less than half of the physicians felt that patients should be told when a medical error occurs.<sup>5</sup> In contrast, a majority of the risk managers felt that the error should be disclosed.<sup>6</sup> This result caught me by surprise: I thought the doctors would want to disclose medical errors to their patients but their desires were trumped by the risk managers. My pro-doctor indoctrination has just been exposed.

Wisconsin's personal injury trial lawyers confront all of the problems discussed above in prosecuting their client's claims to enforce safety rules that have been violated. Unfortunately, when we successfully do so, our opponent's well-funded, well-oiled and well-greased spin machines castigate us as greedy ambulance chasers. That machine rarely targets our clients because our client's causes are just. It is hard to demonize a quadriplegic, paraplegic or young comatose mother for trying to enforce the rules that would have prevented his or her injury. When it comes to uncovering dangerous products or improving patient safety, everyone benefits when the truth is revealed and the jury's verdict speaks it. Only those who cut corners and fail

to follow the applicable safety rules complain. Unfortunately, they often have the war chest needed to buy immunity or other protections from our politicians. 🗡️

#### ENDNOTES

- 1 Dr. Brett Gutsche, M.D., June 19, 1985 Letters to St. Paul Fire and Marine Ins. Co., originally compiled as part of AAJ, then ATLA, Smoking Gun documents collection.
- 2 Martin, Douglas, Merrell Williams Jr., Paralegal Who Bared Big Tobacco, Dies at 72, *New York Times*, Nov. 26, 2013; B 17.
- 3 <http://www.npr.org/sections/health-shots/2016/05/03/476636183/death-certificates-undercount-toll-of-medical-errors>
- 4 <https://www.documentcloud.org/documents/703679-risk-managers-physicians-and-disclosure-of.html#document/p2/a239408>
- 5 *Id.*
- 6 *See id.*



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