

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

MARK BANFIELD, et al.,	:	
	:	
Petitioners,	:	
	:	
v.	:	
	:	
PEDRO CORTÉS,	:	Docket No. 442 M.D. 2006
	:	
Respondent.	:	

**[PROPOSED] ORDER GRANTING
RESPONDENT’S MOTION TO STRIKE INADMISSIBLE
ASSERTIONS IN DECLARATIONS OF PETITIONERS’ EXPERTS OR
IN LIMINE TO EXCLUDE ANTICIPATED INADMISSIBLE TESTIMONY BY
PETITIONERS’ EXPERTS AT PRELIMINARY INJUNCTION HEARING**

AND NOW this _____ day of _____, 2008, upon consideration of all papers filed in connection with Respondent’s Motion to Strike Inadmissible Assertions in Declarations of Petitioners’ Experts and in Limine to Exclude Anticipated Inadmissible Testimony by Petitioners’ Experts at Preliminary Injunction Hearing (“Motion”), it is HEREBY ORDERED that the Motion is GRANTED.

It is further ORDERED that:

1. The Declaration of Daniel P. Lopresti, Ph.D. (“Lopresti Declaration”) is STRICKEN in its entirety and Petitioners are precluded from offering at the Preliminary Injunction Hearing any evidence or testimony by Dr. Lopresti regarding the opinions stated therein.

2. Paragraph 17 of the Lopresti Declaration and paragraphs 30, 31, 32, 33, 35, 36, 37, 38 of the Certification of Douglas W. Jones, Ph.D. are STRICKEN. Petitioners are precluded from offering at the Preliminary Injunction Hearing any evidence or testimony by Dr. Lopresti or Dr. Jones regarding the events and incidents summarized and quoted in these paragraphs.

Quigley, Senior Judge

Strike paragraph 17 of the Lopresti Declaration and paragraphs 30, 31, 32, 33, 35, 36, 37, 38 of the Jones Declaration and preclude Petitioners from offering at the Preliminary Injunction Hearing any evidence or testimony by Dr. Jones and Dr. regarding the events and incidents summarized and quoted in these paragraphs.

Respectfully submitted,

HANGLEY ARONCHICK SEGAL & PUDLIN

Dated: February 6, 2008

By: _____

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First, the declarations are replete with examples of “hearsay in disguise,” primarily comprising paragraphs lifted directly (and selectively) from reports that are critical of Direct Recording Electronic (“DRE”) voting systems. Such wholesale adoption of out-of-court statements is not a proper basis for expert opinion under Pennsylvania law and deprives the Secretary of the ability to cross-examine the actual authors of the reports.

Second, Petitioners fail to make the required showing that Dr. Lopresti is an expert on electronic voting and electronic voting security, the subjects he addresses in his declaration. His assertions that he organized panels, reviewed writings, and expressed concerns about electronic voting to public officials demonstrate that, without more, Dr. Lopresti – like many of the Petitioners – has an interest in electronic voting; but this does not endow him with sufficient specialized knowledge to testify as an expert on this subject before this Court.

Accordingly, the Court should strike the offending portions of Dr. Jones’s declaration and preclude him from testifying regarding the statements in these paragraphs during the hearing on the Motion for Preliminary Injunction. In addition, the Court should strike Dr. Lopresti’s declaration in its entirety and preclude him from providing any testimony at the hearing.

II. RELEVANT FACTUAL BACKGROUND

In the Motion for Preliminary Injunction presently before the Court, Petitioners seek an order (a) “directing the Secretary to suspend the acquisition by purchase, lease or otherwise” of six DRE voting systems at issue in this case; and (b) “prohibiting the Secretary from using state funds to assist to assist county board of elections [sic] from acquiring, by purchase, lease or otherwise,” these DRE voting systems. (Motion for Preliminary Injunction (“Motion”) at Wherefore Clause.) The Motion does not contain any factual support or exhibits demonstrating the Petitioners’ right to relief. Instead, the only factual basis for the Motion comes by way of

two reports, by Petitioners’ proffered experts, which are attached to the Motion. (See Motion, Exhibit A (Certification of Douglas W. Jones, Ph.D. (“Jones Declaration”)); id., Exhibit B (Declaration of Daniel P. Lopresti, Ph.D. (“Lopresti Declaration”).)

A. Dr. Jones’s Efforts to Introduce as “Expert Opinion” Otherwise Inadmissible Conclusions of Voting Systems Reviews Commissioned by Election Officials in Ohio and California

A substantial portion of Dr. Jones’s criticism of DRE voting systems is based on what he asserts is his review of reports titled Project Everest: Evaluation and Validation of Election Related Equipment Report of Findings (“Project Everest Report”) and the Top-to-Bottom Review Reports (“TTBR Reports”), which election officials in Ohio and California, respectively, commissioned. (Jones Decl., ¶ 16.) At no point does Dr. Jones assert that he authored, was consulted, or conducted any of the underlying testing, or, indeed, played any role in connection with either of the reports. (See id., generally.) While Dr. Jones ignores those aspects of the reports that cast a negative light on his – and Petitioners’ – preferred optical scan voting systems, he incorporates directly into his opinion verbatim and extensive statements and conclusions that purport to support Petitioners’ assertions as to DRE systems. (See, e.g. id., ¶¶ 30, 33, 35, 37, 38 (quoting TTBR Reports); id., ¶¶ 31, 32, 36, 37.) Based solely on the passages that he has lifted from these reports, Dr. Jones concludes that based on his understanding of the Election Code, the DRE voting systems at issue lack “workmanship” and are not “suitably designed.” (Id., ¶¶ 29, 34.)¹

B. Lopresti Declaration

1. *Dr. Lopresti’s Background and Limited Knowledge and Experience Regarding Electronic Voting*

Dr. Lopresti, in lieu of a curriculum vita or a resume, provides a five-paragraph “Summary of Qualifications” in his Declaration regarding his fitness to provide expert testimony

¹ As such, Dr. Jones’ conclusions should be afforded no weight.

about electronic voting. (Lopresti Decl., ¶¶ 1-5.) This summary recites that Dr. Lopresti has, in pertinent part:

- “been examining issues concerning electronic voting” since 2006;
- “reviewed numerous scientific papers and other published documents” regarding electronic voting systems;
- “organized a panel discussion at Lehigh University” on one occasion to discuss electronic voting systems;
- supervised college students working on the security of electronic voting systems; and
- voiced concerns about electronic voting systems to government officials and attended a conference in August 2007 where this subject was discussed.

(Id. ¶ 3.) Missing from his declaration is a recitation of any of the following experience by Dr. Lopresti regarding electronic voting and electronic voting security: articles, books, or reports that he has authored, conference papers that he has given, expert testimony that he has given before any court, or commissions or review teams on which he has served concerning voting machine security. (Id. ¶¶ 1-5.)

2. *Dr. Lopresti’s Declaration as a Conduit to Present Findings From the Project Everest and TTBR Reports*

Although Dr. Lopresti had no involvement with the Everest and TTBR Reports, large swaths of his Declaration, like Dr. Jones’s Declaration, consist of wholesale adoptions of the portions of the Project Everest Report and TTBR Reports that are critical of DRE voting systems. (Id., at ¶¶ 17(b)-17(c).) In particular, Dr. Lopresti does not identify anywhere in his Declaration that these reports are of the type that he usually relies, and instead simply assumes

that these reports, and the conclusions they draw, are applicable to this issue and consideration of the standards required by the Election Code. (Id.)²

III. ARGUMENT

A. Petitioners Improperly Use Their Experts' Declarations as Vehicles to Present Inadmissible Material From Reports With Which Their Experts Were Not Involved

Under Pennsylvania law, when an expert relies on information that is not independently admitted in the record, the fact-finder may consider only the expert's opinion – but not the information in the extrajudicial source – in reaching its decision. See Beaumont v. ETL Servs., 761 A.2d 166, 171 (Pa. Super. Ct. 2000). Thus, “[c]ounsel may not bootstrap factual material into a case through opinion evidence, and such facts may not be argued to the jury as if they have been demonstrated.” Bernstein, Pennsylvania Rules of Evidence, Comment 5(a) to Pa. R.E 703 (Gann 2007 ed.)

Moreover an expert “may not act as a mere conduit or transmitter of the content of an extrajudicial source.” Woodard v. Chatterjee, 827 A.2d 433, 444 (Pa. Super. Ct. 2003) (citations and internal quotations omitted). Expert testimony that merely parrots extrajudicial information is, therefore, inadmissible. Id.; see also Carroll v. Avallone, 869 A.2d 522, 527 (Pa. Super. Ct. 2005) (stating that an expert may “not merely repeat another’s conclusions”), app. granted 897 A.2d 1183 (Pa. 2006). This Court has cautioned against permitting an expert to simply repeat as his or her own opinion, the conclusions by other experts because the “non-testifying expert is not

² Dr. Lopresti relies on one other hearsay report in his analysis of security. (See Lopresti Decl., ¶17(a) (referencing the “Hursti exploit”).) This is simply another example of one purported expert incorporating another purported expert into the Petitioners’ case.

on the witness stand and truly is unavailable for cross-examination.” Luzerne Cty. Flood Protection Auth. v. Reilly, 825 A.2d 779, 784 (Pa. Commw. Ct. 2003).

Here, Petitioners improperly use their experts’ declarations as conduits to present to the Court cherry-picked information. Petitioners’ experts do not provide any independent analysis of these statements; rather, they adopt them uncritically and present them as their own. This is not a proper expert opinion.

Petitioners’ attempts to bootstrap the Project Everest and TTBR Reports into this case through their experts are apparent from even a cursory scan of these declarations. For instance, the Jones Declaration is replete with verbatim excerpts from these reports, which at one point included eight out of nine paragraphs at the heart of his declaration. (See, e.g., Jones Decl. ¶¶ 30-33, 35-38) (quoting Project Everest and TTBR Reports).) This is not an instance where an expert points to a source in passing; rather, in many cases entire paragraphs of what is meant to pass as Dr. Jones’s opinion identifies the Project Everest or TTBR Reports, then is followed by direct quotes from those reports. (Id.) Dr. Jones’s unquestioned adoptions of the Project Everest and TTBR Reports are so manifest that, in extended passages of his Declaration, it is difficult, if not impossible, to determine where the statements from the reports end and where Dr. Jones’s independent analysis, if any, of the reports begins.

Dr. Lopresti’s Declaration is also infirm on the same grounds. In particular, Dr. Lopresti’s independent judgment regarding the security of DRE voting systems consists of little more than repeated citations and reference to the others’ reports, including the Project Everest and TTBR Reports. (See Lopresti Decl., at ¶¶ 17.)

The widespread incorporation of extrajudicial and otherwise inadmissible information by experts into their opinions, as Petitioners’ experts have done here, has been criticized as “hearsay

in disguise.” Woodard, 827 A.2d at 444 (stating expert opinion based on extrajudicial information is only appropriate where expert, in addition to consulting his own professional judgment and experience, consults “numerous sources”). Petitioners’ experts do not rely on “numerous sources” to form their opinion regarding the DRE voting systems at issue. As they themselves make clear, the basis for large parts of their opinion is exclusively based on the Project Everest and TTBR Reports.³

B. Petitioners Fail to Establish That Dr. Lopresti is Qualified to Offer Expert Testimony Regarding Electronic Voting

A party offering a witness as an expert has the burden of pointing to facts that, if credited, show that the witness qualifies as an expert. Kovalev v. Sowell, 839 A.2d 359, 364-365 (Pa. Super. Ct. 2003). To qualify as an expert the witness must possess “sufficient skill, knowledge, or experience” regarding an issue such that his testimony will aid the Court in its consideration of that issue. Id. at 363. “If the witness has neither experience nor education in the subject under investigation, he should be found not qualified.” Id. at 364 (citations and internal quotations omitted). In addition, although an expert may testify about a field related or similar to his field of expertise, he may not do so if his testimony will be speculative or if he lacks experience in the related field. Vanden-Brand v. Port Auth. of Allegheny County 936 A.2d 581, 585 (Pa. Commw. Ct. 2007) (finding that a doctor failed to establish overlap between internal medicine and neurosurgery).

Based on the credentials that Dr. Lopresti sets forth in his Declaration (which does not include a curriculum vita or resume), he is not qualified to render an opinion regarding “electronic voting” in general, and electronic voting security in particular. In short, Petitioners

³ As such, their conclusions based on the reports should be afforded no weight.

do not carry their burden to demonstrate any “specialized” training or experience that Dr. Lopresti may have in this field. At best his proffered qualifications show that Dr. Lopresti is someone who follows issues related to electronic voting. As he asserts, he has “been examining issues concerning electronic voting” since 2006, but does not identify how he has been examining them or which particular issues he has examined. (Lopresti Decl., ¶ 3.) The extent of his credentials include his review of “scientific papers and other published documents” – presumably published by others; panel discussions that he has organized; supervision of college students regarding electronic voting systems generally, concerns that he has raised to government officials, and conferences that he has attended, and his participation in connection with a grant concerning the processing of voting records (with no indication that the grant concerns security of DRE voting systems). (Id. ¶ 3.)

Not surprisingly, because Dr. Lopresti has been looking into electronic voting issues only since 2006, missing from his Declaration is any hint that he has explored this subject by, for instance, publishing articles, books, or reports, presenting conference papers, providing expert testimony on the issue, or serving on commissions or review teams like the ones in Ohio and California. (Id. ¶¶ 1-5.) Faced with Dr. Lopresti’s meager record of scholarly and specialized involvement regarding electronic voting and electronic voting security, the Court must find that he is not qualified to opine on this topic. See Kovalev v. Sowell, 839 A.2d at 364 (precluding witness from testifying as an expert because he failed to “further develop record” regarding his asserted “specialized skills, knowledge or experience” in the relevant field); Bielski v. Brabender, 50 Pa. D. & C.4th 531, 537 (Pa. Com. Pl. 2006) (concluding that witness was not qualified based on “witness' own admissions that she has never provided testimony as a qualified

expert in business valuations in any court of law, nor has she ever been previously retained as an expert in this area”).

The Court should therefore strike Dr. Lopresti’s Declaration in its entirety.⁴

IV. CONCLUSION

WHEREFORE, the Secretary respectfully requests, for the reasons stated above and in the Secretary’s accompanying Motion to Strike and In Limine, that this Court: (a) Strike the Lopresti Declaration in its entirety and preclude Petitioners from offering at the Preliminary Injunction Hearing, any evidence or testimony by Dr. Daniel regarding the opinions stated therein; and (b) Strike paragraph 17 of the Lopresti Declaration and paragraphs 30, 31, 32, 33, 35, 36, 37, 38 of the Jones Declaration and preclude Petitioners from offering at the Preliminary

⁴ In addition, Dr. Lopresti cannot render an opinion regarding electronic voting simply because he may have expertise in computer science, a related field. Just as the fact that “every doctor has a general knowledge of the human body” does not qualify them to opine on every topic regarding the body, the fact that Dr. Lopresti may be knowledgeable regarding computer science does give him specialized knowledge about electronic voting systems in particular. See Kovalev v. Sowell, 839 A.2d at 364 (internal quotations and citations omitted). Here, electronic voting is a specialized sub-field, which requires knowledge beyond simple computer science, to include, for instance, knowledge about how computers are used in practice by voters and election officials during elections. Id. (holding that doctor’s expertise in one field was insufficient to make him an expert in another, more specialized area).

Injunction Hearing any evidence or testimony by Dr. Jones and Dr. regarding the events and incidents summarized and quoted in these paragraphs.

Respectfully submitted,

HANGLEY ARONCHICK SEGAL & PUDLIN

Dated: February 6, 2008

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CERTIFICATE OF SERVICE

I, Alan C. Promer, hereby certify that on February 6, 2008, I caused true and correct copies of the foregoing Respondent's Motion to Strike Inadmissible Assertions in Declarations of Petitioners' Experts and in Limine to Exclude Anticipated Inadmissible Testimony by Petitioners' Experts at Preliminary Injunction Hearing, and accompanying memorandum of law, to be served by the method indicated below, on the following:

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