

**Court-Appointed
Experts:
Defining the Role of
Experts Appointed
Under Federal Rule of
Evidence 706**

Federal Judicial Center



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Court-Appointed Experts: Defining the Role of Experts Appointed Under Federal Rule of Evidence 706

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This publication is a product of a study undertaken in furtherance of the Center's statutory mission to conduct and stimulate research and development on matters of judicial administration. The analyses, conclusions, and points of view are those of the authors. On matters of policy, the Center speaks only through its Board.

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Purpose

This study grew out of an inquiry by a member of the Center's Board asking why judges so rarely appoint experts under Rule 706 of the Federal Rules of Evidence. In discussing with judges the reasons for infrequent appointments, we also learned of techniques and procedures that may aid judges when considering whether to appoint an expert or when managing an expert who has been appointed. These suggestions are collected in the final chapter of this report.

Chapter 1

Summary of Findings and Overview of Report

Primary Issue

Evidence involving complex issues of science and technology plays an increasing role in federal litigation.¹ Appointing an expert is often suggested as a means for the court to enhance its ability to deal with such issues, yet court-appointed experts are infrequently used.² We seek to answer the question "Why are court-appointed experts, as authorized by Federal Rule of Evidence 706, employed so infrequently?"

Methodology

We employed two distinct research methods. First, we sent a cover letter (Appendix A) and a one-page questionnaire (Appendix B) to each active federal district court judge asking the following questions: "Have you appointed an expert under the authority of Rule 706 of the Federal Rules of Evidence?"³ and "Are experts appointed under Rule 706 likely to be helpful in certain types of cases?" The questionnaire was intended to determine the extent to which the authority to appoint an expert under Rule 706 had been employed and the extent to which opportunities for such appointments exist.

Second, we asked those judges who had made such appointments to participate in a telephone interview concerning their experiences with court-appointed experts (Appendices C and D). We sought to identify uses of Rule 706 that judges have found appropriate,⁴ and, at the same

1. The Federal Courts Study Comm. Report, at 97 (April 2, 1990) ("Economic, statistical, technological, and natural and social scientific data are becoming increasingly important in both routine and complex litigation.").

2. See, e.g., *id.*; 3 Jack B. Weinstein & Margaret A. Berger, Weinstein's Evidence ¶ 13.06[01], at 13-34 (1992 & Supp. 1992) [hereinafter Weinstein's Evidence]; Enhancing the Availability of Reliable and Impartial Scientific and Technical Expertise to the Federal Courts: A Report to the Carnegie Commission on Science, Technology, and Government (AAAS/ABA National Conference of Lawyers and Scientists Task Force on Science and Technology in the Courts) (September 1991).

3. Judges who answered "yes" were asked about the number of appointments made.

4. This investigation is focused on the exercise of authority to appoint an expert under Rule 706. There are several other sources of authority that permit a

time, identify reasons for nonuse. The telephone interviews lasted approximately thirty minutes and addressed (1) the judges' reasons for appointing an expert; (2) the timing and circumstances of the appointment of an expert; (3) the interaction of an expert with the court and with parties; (4) the manner in which an appointment affects the outcome of litigation; and (5) suggestions for improvements in the rule and the process of appointing experts in general.⁵ We also contacted judges who had not appointed experts but who had indicated, when responding to the mailed questionnaire, strong feelings regarding such practices. We asked these judges how they responded to a number of the situations that the appointing judges had identified as being suitable for making an appointment (Appendix E). All judges were asked why so few experts are appointed.

Summary of Findings

In brief, we found that much of the uneasiness with court-appointed experts arises from the difficulty in accommodating such experts in a court

court to appoint an expert, each envisioning a somewhat different role for the expert. Rule 706 most directly addresses the role of the appointed expert as a testifying witness; the structure, language, and procedures of Rule 706 specifically contemplate the use of appointed experts to present evidence to the trier of fact. Underlying this authority is the broader inherent authority of the court to appoint experts who are necessary to enable the court to carry out its duties, including authority to appoint a technical advisor to consult with the court during the decision-making process. *See, e.g.,* *Reilly v. United States*, 863 F.2d 149 (1st Cir. 1988). In addition, there exists separate authority to appoint a special master under Fed. R. Civ. P. 53, and other statutory authority to provide expert assistance for indigent criminal defendants. 18 U.S.C. § 3006A(e) (1988). We found instances of experts appointed under authority of Rule 706 serving one or more of these functions apart from preparing to offer testimony. *See also* Tom Willging, *Court-Appointed Experts* 1-4, 18-23 (Federal Judicial Center 1986).

5. Before the telephone interviews, the judges were sent a list of the issues we wished to address along with a letter inviting their participation. Judges who had appointed more than one expert were asked to describe the circumstances of their most recent appointments. We spoke with seventy-three of the eighty-six judges who indicated that they had appointed experts. Of the seventy-three judges, five were not interviewed when they indicated that they relied primarily on other authority in making the appointments. Thus, the total number of completed interviews was sixty-eight. Not all judges answered all of the questions in the surveys and interviews, nor did we ask the same questions of all of those interviewed. Therefore, the numbers of judges answering specific questions varies throughout the report.

system that values, and generally anticipates, adversarial presentation of evidence. More specifically, we found the following:

- Judges view the appointment of an expert as an extraordinary activity that is appropriate only in rare instances in which the traditional adversarial process has failed to permit an informed assessment of the facts. We found no evidence of general disenchantment with the adversarial process by judges who had made such appointments.
- Parties rarely suggest appointing an expert and typically do not participate in the nomination of appointed experts.
- The opportunity to appoint an expert is often hindered by failure to recognize the need for such assistance until the eve of trial.
- Compensation of an expert often obstructs an appointment, especially when one of the parties is indigent.
- Judges report little difficulty in identifying persons to serve as court-appointed experts, largely because of the judges' willingness to use personal and professional relationships to aid the recruitment process.
- Ex parte communication between judges and appointed experts occurs frequently, usually with the consent of the parties.
- The testimony or report presented by an appointed expert exerts a strong influence on the outcome of litigation.

Overview of Report

In Chapters 2 through 5 of this report, we present the results of our mail survey and a discussion of our interviews with the judges about the origination, selection, pretrial and trial activity, and compensation of the appointed experts. In Chapter 6 we discuss alternative approaches to the problems, gleaned primarily from interviews with judges who had not used court-appointed experts. Finally, in Chapter 7 we discuss possible changes to Rule 706 and outline a pretrial procedure that facilitates the early identification of disputed issues arising from scientific and technical evidence, clarifies and narrows disputes, and eases appointment of an expert when an independent source of information is necessary for a principled resolution of a conflict.

Chapter 2

Use and Nonuse of Court-Appointed Experts

Use of Court-Appointed Experts

Many have mentioned that the use of court-appointed experts appears to be rare, an impression based on the infrequent references to such experts in published cases.⁶ To obtain an accurate assessment of the extent to which court-appointed experts have been employed, we sent a one-page questionnaire (Appendix B) to all active federal district court judges.⁷

As indicated in Table 1, eighty-six judges, or 20% of those responding to the survey, revealed that they had appointed an expert on one or more occasions.⁸ The figures indicate that, taken together, these judges made approximately 225 appointments, far more than suggested by the paucity of published opinions dealing with the exercise of this authority.⁹

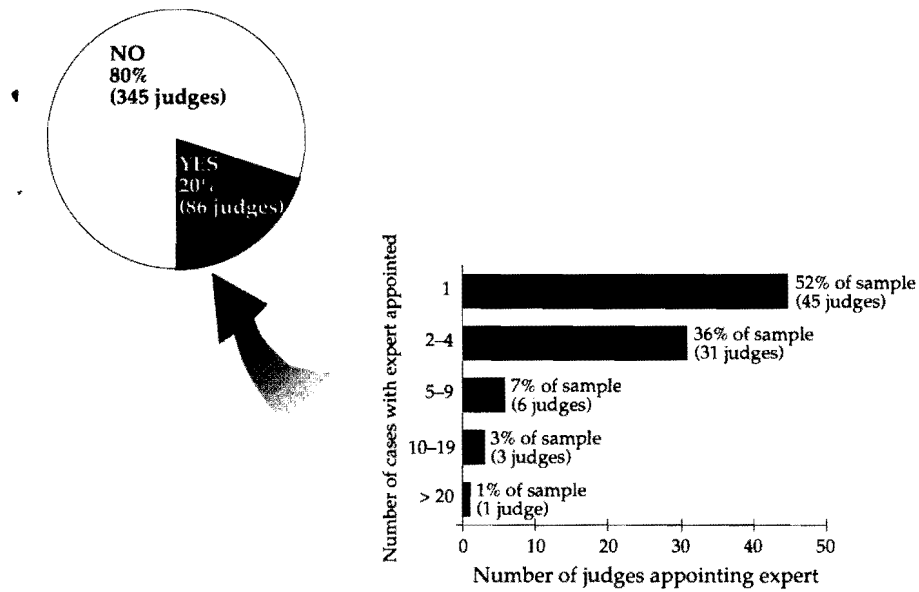
6. Weinstein's Evidence, *supra* note 2, at ¶ 706-13. The editors of the Manual for Complex Litigation note that "[e]ven in complex litigation" use of a court-appointed expert, special master, or magistrate judge "is the exception and not the rule." Manual for Complex Litigation, Second § 21.5 (1985).

7. Questionnaires were sent to 537 active federal district court judges; 431 judges responded (a response rate of 80%).

8. This figure includes some judges who made appointments under Rule 706 that could have taken place under alternative authority. For example, we learned in telephone interviews that nine of the experts appointed under Rule 706 functioned also as special masters, or examined parties to determine fitness to stand trial. Although these appointments could have been made under alternative authority, some judges made the appointment under Rule 706 to ensure that the appointed expert was available to testify and be cross-examined. When a judge indicated that an appointment was pursued under authority of Rule 706 the case was included in the study.

9. Determining an exact number of appointments was not possible, since the questionnaire asked judges to indicate the range of appointment activity in which they fell. By multiplying the midpoint of each range by the number of judges within that range, we estimate that there were 225 instances in which experts were appointed under authority of Rule 706. By comparison, computer searches for references to Rule 706 at the time of the initial mail survey (January 1988) showed only fifty-eight reported cases in which the rule was mentioned, including forty-seven reported cases in which an appointment was made or discussed extensively. Reported cases are likely to underestimate the degree of appointment activity since reported cases address only disputed issues. If an ap-

Table 1
Have you appointed an expert under Rule 706?



Of the eighty-six judges reporting appointment of an expert, just over half had appointed an expert on only one occasion. Only four judges appointed an expert in ten or more cases, a frequency that suggests a somewhat systematic use of appointed experts to deal with difficult scientific or technical issues. In fact, the one judge who had appointed an expert in more than twenty cases employs this mechanism as a standard part of a pretrial procedure in cases in which medical experts offer dia-

pointment was made in a case that settled, a published opinion that mentions the appointment is even less likely. *See* *Evolving Role of Statistical Assessments as Evidence in the Courts*, at 171 (Stephen E. Fienberg ed., 1988) ("One of the difficulties in trying to assess the potential value of the use of court-appointed experts is that their greatest value may occur prior to trial, especially if they are able to resolve conflicting analyses in reports by opposing statistical experts. But in such cases the likelihood of a pretrial settlement is high, and for such cases there are no published opinions or other easily accessible records.").

metrically opposed testimony concerning the existence of an asbestos-related injury.¹⁰

During the telephone interviews we asked the judges to describe the cases in which they had appointed experts under authority of Rule 706.¹¹ Three circumstances accounted for almost two-thirds of the appointments: medical experts appointed in personal injury cases, engineering experts appointed in patent and trade secret cases, and accounting experts appointed in commercial cases. The appointed expert usually served a different function in each type of case.

The expertise most commonly sought by the courts, required in twenty-four cases, was that of medical professionals concerning the nature and extent of injuries. In thirteen of these cases experts were appointed to help assess claims for injuries arising from improper medical care.¹² In eight other cases the appointed expert considered injuries arising from defective products, five of which were tort claims based on injuries caused by exposure to toxic chemical products.¹³

The services of the appointed medical experts varied with the type of personal injury case. In cases arising from claims of improper medical care, the parties' experts usually were in complete opposition and the appointed expert advised the court on the proper standards of medical care and treatment.¹⁴ During the product liability litigation the appointed medical expert addressed the cause and extent of injuries. In four of five tort cases about toxic products, the appointed expert addressed the likelihood that the product caused the injuries.

10. See Carl B. Rubin & Laura Ringenbach, *The Use of Court Experts in Asbestos Litigation*, 137 F.R.D. 35 (1991).

11. All judges who appointed experts were asked to describe the nature of the case and the issues addressed by the expert. Judges who made more than one appointment were asked to describe all the cases in which an expert had been appointed. When judges mentioned more than one case, the specific issues addressed by the expert were explored in detail only for the most recent case.

12. Most of these cases involved medical malpractice, but three cases involved claims against insurance companies for compensation for, or permission to undergo, medical treatment. For purposes of this study we combined these cases with malpractice cases since in each case the appointed expert was addressing the proper treatment under accepted medical standards. Medical experts were appointed in several cases that did not involve personal injuries. In three cases psychiatrists or psychologists were appointed to address the competency of a party to sue or to stand trial.

13. Two of the remaining product liability cases claimed injuries arising from swine flu inoculations.

14. An exception concerned an instance in which a medical expert was appointed to resolve a conflict over a diagnosis by reading an X ray.

In fifteen cases judges sought experts with skills in engineering.¹⁵ Twelve of these cases raised questions of patentability, patent infringement, or technical issues surrounding trade secret protection.¹⁶ Unlike the personal injury cases in which the expert was appointed to resolve a dispute among the parties' experts, in these cases the expert typically was appointed to interpret technical information for the judge. Almost all of these cases were bench trials, and the parties agreed to the appointment of an expert to enhance the court's ability to understand the technology underlying the dispute.

In twelve cases involving disputes over contracts or failed commercial enterprises, judges sought the assistance of accountants.¹⁷ Often these cases involved complex financial transactions, and the expert was appointed to assist the court in placing a value on a claim. In reaching such an assessment, the appointed expert often functioned like a special master, reviewing records and preparing a report that was submitted as evidence in the case.¹⁸ In several cases the judge asked the appointed expert not to place a value on a disputed claim, but to address acceptable standards of accounting that should be followed in making such a determination, or to educate the court regarding acceptable methods for making such a determination.

The remainder of the appointments were scattered across a variety of specialties and types of cases. In two cases economists were appointed to aid in class certification; in two cases handwriting experts were appointed to verify signatures on legal documents; two statisticians were appointed, one to aid in a case challenging the accuracy of the Census and one in a case challenging a congressional reapportionment plan; and

15. We include in this category experts who had knowledge of the development of computer hardware and software (accounts for six cases).

16. For example, in one case involving trade secrets two employees left a company and started a competing enterprise. Their former company claimed that they took and used proprietary software in their new company. Such cases are similar to patent cases in that in both types of cases the judge sought assistance in understanding the underlying technology. The three remaining cases involved disputes over construction in which the expert offered an independent assessment of whether a completed structure conformed to the contract.

17. We include in this category those appointed experts who were identified as accountants or described as providing accounting services. Some may have lacked formal training as accountants. We did not inquire about the credentials of the appointed experts.

18. Some judges expressed a preference for appointing an expert under Rule 706, as opposed to a special master under Fed. R. Civ. P. 53, so the accountant could testify in court and be cross-examined by the parties.

two attorneys were appointed, one to address the reasonableness of a request for attorneys' fees and one to address mixed questions of law and fact surrounding patentability. Other appointments included a real estate appraiser to aid in a condemnation proceeding, a geologist to advise the court on the likelihood of seismic activity in a construction area, a botanist to address plant growth in wetlands, a hydrologist to address water damage to property, a geneticist to examine the inherited properties of a strain of seed corn, a penologist to testify to prison conditions in a case charging overcrowding, a theologian to testify to the basis in religion of "secular humanism," and an agricultural economist to aid in a farm bankruptcy reorganization.¹⁹

Judicial Receptivity to Appointment of Experts

In response to a preliminary question in our telephone interviews, judges indicated that conflict over scientific or technical evidence is very common.²⁰ Yet, judges appoint experts in very few of the cases in which they are presented with conflicting expert testimony. The question arises, "Why are experts not appointed more often?"

The second question asked on the one-page questionnaire ("Are experts appointed under Rule 706 likely to be helpful in certain types of cases?") was intended to assess the extent to which judges consider appointment of an expert to be an acceptable alternative in at least some types of cases.

Few judges fail to see any value in appointment of experts by the court. Eighty-seven percent of the judges responding to the question indicated that court-appointed experts are likely to be helpful in at least

19. In eight cases the judge described an appointment but was unable to characterize the nature of the expertise that was rendered. Four of these cases involved challenges to prison conditions, in which the appointed expert (in one case, a panel of experts) assessed conditions in the prison and reported to the court.

20. We did not attempt to determine with precision the extent to which scientific or technical issues arise in federal district courts. However, as an initial part of a question intended to identify reasons for resistance to appointment of experts, judges who had appointed only one expert were asked if their most recent trial involved evidence that was scientific or technical in nature. Approximately three-fourths of the judges (twenty-nine of thirty-eight judges) indicated that such evidence was introduced. The extent and nature of expert testimony in federal court is being addressed by a project in progress at the Federal Judicial Center.

some circumstances (see *infra* Table 2).²¹ This openness to appointment of experts extended to judges who had never appointed an expert, 67% of whom indicated that such an appointment might be helpful.

Reasons for Appointing Experts

Judges who had made a single appointment were asked to describe their reasons for making the appointment. They were also asked in another portion of the interview what concerns led to their decision to appoint an expert. Our interviews revealed two distinct sets of judges who have used Rule 706. One group uses the rule primarily to advance the court's understanding of the merits of the litigation and to enhance the court's ability to reach a reasoned decision on the merits; a smaller group, apparently mostly multiple users, invokes the rule primarily to enhance settlement.

1. *To aid decision making.* As might be expected, experts are most often appointed to assist in understanding technical issues necessary to reach a decision.²² The desire for such assistance was attributed by the judges to a lack of knowledge in an essential area, a concern over the technical nature of an issue or issues, or a concern over the need to properly articulate the rationale for a decision. Many judges mentioned more than one of these concerns.

In explaining the reason for the appointments, judges often admitted their need to become better informed on an essential topic of the litigation. Typical comments were "I was aware of the limits of my knowledge of [biochemistry]," and "The experts took almost diametrically opposed positions in areas in which I knew next to nothing." In some contexts, the

21. Forty-nine of the 385 judges responding to the question indicated "no," or wrote a comment in the margin to that effect. Another forty-six judges did not respond to this second question. All but one of these judges had indicated that they had not appointed an expert. Many of these judges indicated that they did not have sufficient experience with court-appointed experts to know if such an appointment would be helpful. These findings are in accord with the results of other surveys on the willingness of judges to consider using court-appointed experts. See, e.g., *Judges' Opinions on Procedural Issues: A Survey of State and Federal Trial Judges Who Spend At Least Half Their Time on General Civil Cases*, 69 B.U. L. Rev. 731, 741 (1989) (see Table 3.6).

22. More than two-thirds of the forty-five judges who had made only one appointment reported that they made the appointment to obtain assistance in understanding technical issues necessary to reach a decision. We did not ask judges who appointed experts on more than one occasion about the reasons for their most recent appointment, focusing instead on the general characteristics of cases in which they appointed experts.

judge's need for technical expertise was coupled with a first-time exposure to a complex legal specialty area, such as patent law. One judge said, "This was my first patent trial and I did not understand the technical issues relating to computers and electronics. The combination of a confusing area of law and complex, technical issues led me to seek help." Similarly, another judge said,

I didn't know anything about computer software or the argot of the industry . . . I was in almost total ignorance and at an absolute loss as to what to do to speed up the educational process and keep the trial to a reasonable length.

The need for assistance in decision making often arose when the parties failed to present credible expert testimony, thereby failing to inform the trier of fact on essential issues. Judges' doubts regarding the credibility of testimony by the parties' experts were common. Usually an expert was appointed when the parties' experts offered directly conflicting testimony on topics that were beyond the comprehension of the court. Twenty-seven of the forty-five judges who appointed an expert on only one occasion described a situation in which both parties employed testifying experts. These judges often described a situation in which each party offered apparently competent expert testimony that was in direct opposition on virtually every issue to the other party's expert testimony. Such total disagreement in areas unfamiliar to the judge invited a general distrust of the experts.²³ This concern over the integrity of testimony of experts was echoed elsewhere in the survey. When judges were asked in a separate question what concerns led them to appoint an expert, in eighteen of thirty-six cases judges indicated that there was a failure by one or both parties to present credible expert testimony to aid in resolving a disputed issue. Appointment of an independent expert enabled access to testimony that was thought to be both impartial and necessary to understand the testimony of the parties' experts.

23. The extent of the judges' disillusionment with the role played by expert witnesses in such a circumstance was revealed by the suspicion with which the judges view such testimony. For example, in relating the reasons for appointing experts, judges remarked: "I discovered that experts in asbestos were so diverse in their opinions that they confused the jury"; "The main issue is whether the parties' experts are 'real' experts or simply 'hired guns'"; "I use an independent medical expert only when I smell a rat, based on my knowledge of the lawyers and doctors in the community"; "[T]he 'swearing contests' that take place between expert witnesses are a national disgrace, and the 706 procedure may offer an alternative to sitting there and listening to it."

For example, one judge recounted his experience in a class action dealing with issues of public safety surrounding the construction of a school for children with multiple handicaps. The proposed site was alleged to be on a seismic fault line. The case involved complex scientific evidence presented in an emotionally charged setting. "Outstanding experts in the field on both sides" clashed "in bitter opposition to each other." They "had become advocates." The judge realized that he could "apply the burden of proof and rule that plaintiffs had not met their burden," but that resolution did not seem fair because defendants had denied access to the type of testing that might be necessary to prove or disprove plaintiffs' claim. Also, the judge was reluctant to resolve an issue of public health and safety, especially the safety of children, without addressing the merits of the claim. He was uncomfortable with the burden of proof and decided after a bench trial to reopen the case to hear evidence from a court-appointed expert. The expert recommended specific tests, and the court ordered that the tests be conducted. The tests ruled out the alleged seismic danger; the judge then refused to enjoin the construction of the school on the site.

The second typical circumstance involved appointment of an expert when at least one of the parties failed to offer expert testimony, resulting in what the judge perceived to be an inadequate presentation of issues. This circumstance, reported by thirteen of the forty-five judges who had appointed an expert on one occasion, typically arose because of a party's inability to pay for expert testimony.²⁴ In many of these cases the judge had heard expert testimony by one party and could have resolved the dispute in favor of that party because of the failure of the opponent to present countervailing expert testimony in support of a critical issue. In discussing such cases the judges made clear their uneasiness in basing their decisions strictly on the adversarial presentations of the parties. Such a resolution would have failed to adequately resolve the disputed issue and may have complicated a fair and accurate resolution of similar issues in the future. These judges were sufficiently concerned about the nature of the proffered expert testimony to undertake the considerable effort necessary to obtain an independent assessment from an appointed expert, thereby obtaining a valid rationale for a decision.²⁵

24. See discussion of this issue *infra* note 150 and related text.

25. Even if there is no consensus on the scientific or technological issues, the expert may clarify the parties' arguments and provide information about the extent to which the testimony of the parties falls within the accepted principles, theories, and conclusions of persons learned in the field. See generally E. Donald Elliott, *Toward Incentive-Based Procedure: Three Approaches for Regulating Scientific Evidence*, 69 B.U. L. Rev. 487, 508 (1989) (suggesting that in cases with "substan-

Though circumstances differed in these cases, each reveals a judge's marked dissatisfaction with the parties' experts' presentation of information and the traditional means of resolving such conflicting testimony. In each circumstance an expert was appointed by the court when traditional adversarial presentation by parties failed to provide the court with information necessary to make a reasoned determination of disputed issues of fact.

2. *To aid settlement.* Some judges suggested that appointment of an expert may bring about settlement,²⁶ although enhancement of settlement prospects was rarely an articulated purpose of the appointment. Indeed, the judges we interviewed indicated that the prospect of settlement often argued against the appointment of an expert. In the words of a judge who had never made an appointment, judges might be reluctant to "get all dressed up with no place to go."²⁷

When the appointment of an expert was made to aid in deciding the case, often the appointment appeared to be postponed until it seemed certain that the case was unlikely to settle. In twenty of the forty-five cases described by the judges who had appointed an expert only once, the expert was appointed at some late stage when trial or evidentiary proceeding was imminent or had begun.²⁸ One judge indicated he would "exhaust other efforts to settle first" and "reserve appointment [of an expert] for a case that appears unseizable by other means." Along the same lines, another judge clearly separated the appointment of an expert from the settlement process:

My purpose is not to encourage settlement. It is to get better information for making a decision. If I thought a case might

tial doubt" regarding the scientific integrity of testimony by a party's expert, the court appoint a "peer review expert learned in the relevant fields to testify at trial concerning whether the principles, techniques, and conclusions by the experts for the parties would be generally accepted as valid by persons learned in the field").

26. See Eric D. Green & Charles R. Nesson, *Problems, Cases and Materials on Evidence*, at 700 (1983) (role of court-appointed expert in narrowing the disputed issues).

27. Our sample was somewhat unsuited for an examination of the extent to which concerns over settling a case influenced the judge's decision to appoint an expert. If a judge threatens such an appointment to settle a case and is successful, this instance would not be included in our sample unless the appointment was made. Our study was not designed to capture cases in which the threat alone was sufficient to bring about a settlement.

28. In such cases the expert almost always testified or issued a report. For further discussion of issues relating to testimonial use of experts in trials or hearings, see Chapter 4.

settle, I would not appoint an expert. I would send it to the magistrate [judge] for settlement discussion. If [the magistrate judge's] response indicated that an expert might aid settlement, I would consider [appointing one].

Even when the appointment was made prior to trial, fewer cases than we expected settled: only nine of the twenty-two such cases we examined settled before the expert prepared a report or offered advice.

We found other evidence to suggest that judges might resist appointing an expert if settlement were the expected outcome. Only seven of the forty-five one-time users of Rule 706 alluded to settlement in their responses to our open-ended question about concerns leading to the appointment. In three of those cases, the parties indicated a desire to settle and expressed the need for an independent assessment. In those three cases, the court seemed to be serving the limited role of selecting a neutral expert who would guide the parties toward settlement. The parties paid for the expert and were the primary beneficiaries of the appointment. In the other four cases, the court noted the parties needed an independent assessment, but settlement was not the articulated purpose. In two of those cases the court saw the appointment primarily as a way to increase understanding of voluminous documents and widely dispersed information, and aid either the parties or the court in resolving the dispute.

Judges who have appointed more than one expert are more likely to view settlement as a reason to make an appointment; a majority of those judges reported that when appointing an expert they had in mind enhancing the opportunity for settlement.²⁹ These judges sometimes appeared to appoint an expert in an effort to change parties' extreme evaluations of a case. In situations in which the experts for the parties are highly qualified, yet give disparate opinions (in the words of one judge "fixed on two equally good positions"), an appointment is intended to resolve the impasse and permit the parties to move on to discussion of other issues.

29. We asked those who had made multiple appointments, "How do the prospects for settlement of the case influence your decision to appoint an expert?" Of the nineteen judges who responded to the question, nine indicated that the possibility of settlement would favor their decisions to appoint experts and two indicated that the prospect of settlement was a secondary consideration supporting appointment. Four of the multiple users said that serious prospects for settlement would lead them to *not* appoint an expert and four more said that the prospects of settlement would have no effect on their decision.

Most one-time users also were asked whether they had ever threatened or proposed to appoint an expert under Rule 706 "as a means of improving the quality of the expert testimony or resolving the case." The majority (twenty-one of the thirty-six judges asked) said that they had not threatened to appoint an expert for those purposes.³⁰ Indeed, one judge who is active in encouraging settlement by other means has chosen not to use court-appointed experts as part of his approach to settlement; he raises appointment of an expert only when he intends to make an appointment, reserving the court-appointment process for improving the information available to the court.

On the other hand, about one-third of the one-time users indicated that they used the threat of appointment as a settlement device. One judge describes an "in terrorem" effect. He says that the threat is effective because the authority exists and the judge is known as one who will use it; he need not mention it each time. Another judge, who has never appointed a Rule 706 expert, reports that he has "a regular procedure for addressing problems with experts and focusing attention on whether a court-appointed expert is needed." His experience has been that "raising the issue has a salutary effect on the lawyers and they either settle the case or tone down the position of their expert." Another judge found that discussion of a Rule 706 appointment can be helpful when the parties' experts appear to agree on almost nothing. Then the judge can "huff and puff" and say he is considering appointment of an independent expert since the parties are so far apart." Such a discussion can be helpful in "narrowing the issues." Another judge described the process and effect this way:

I have threatened to use a court expert when I discover in the final pretrial conference that the parties' experts have taken diametrically opposite positions. In those cases, the parties have reviewed their position after I've pointed out the "all or nothing" character of their position and the risks involved. Generally, this changes their evaluation of their cases.

As with judicial involvement in settlement in general,³¹ there is no consensus on the use of court-appointed experts to aid in settlement. The time and expense involved in the process, however, raises the question of

30. Again, successful use of threats to appoint experts to improve expert testimony may mean that such a judge would not be included among our interviewees.

31. See generally D. Marie Provine, *Settlement Strategies for Federal Judges* (Federal Judicial Center 1986).

whether an appointment for the purpose of improving judicial decision making will be worthwhile if the parties are likely to settle.

Reasons for Failure to Appoint an Expert

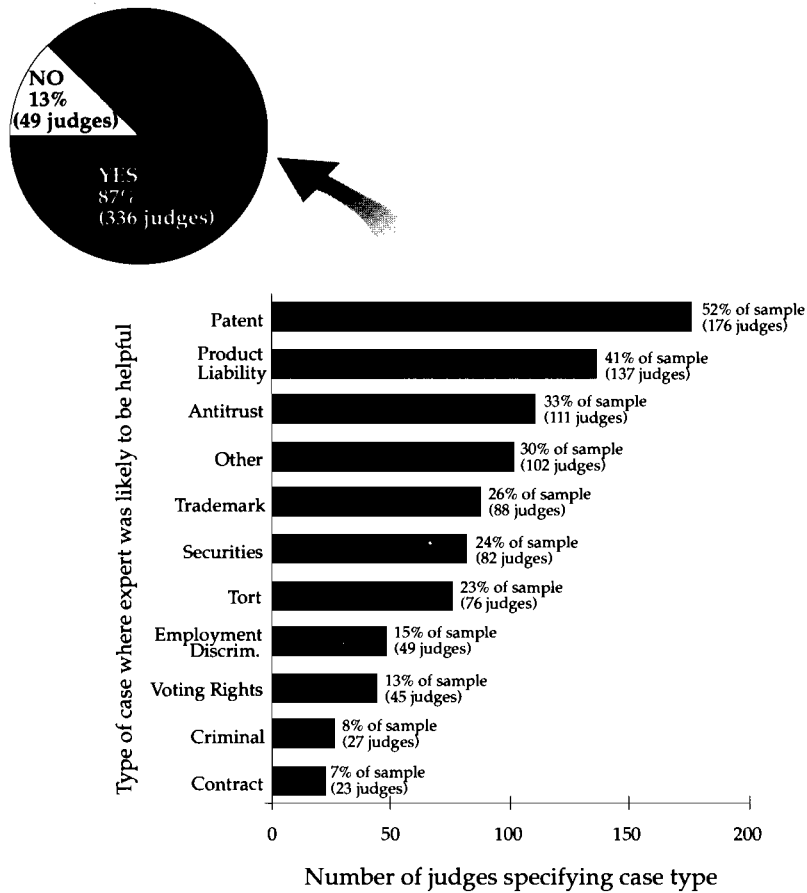
Almost all judges are willing to consider the appointment of an expert in at least some circumstances, so the infrequency of such appointments is not related to a strict opposition to the practice. Much of the remainder of this report is devoted to a detailed examination of impediments to effective use of court-appointed experts. The following discussion lists the six most common reasons mentioned by judges, in order of their frequency, for not appointing an expert. Often a combination of these reasons explains the absence of appointments in individual cases.

1. *Infrequency of cases requiring extraordinary assistance.* To better understand the reasons for the infrequent appointment of experts, we asked eighty-one judges why they thought the authority had been exercised so infrequently.³² Fifty judges indicated that they see the appointment of an expert as an extraordinary action. The importance of reserving appointment of experts for cases involving special needs was especially apparent in the responses of the judges who had made only a single appointment. Thirty-two of the forty-five judges who had appointed an expert on a single occasion indicated that they had not used the procedure more often because the unique circumstances in which they employed the expert had not arisen again. They simply had not found another suitable occasion in which to appoint an expert.

When we asked judges in the mail survey to indicate types of cases in which an appointed expert might be helpful, they usually indicated types of cases that are both rare and unusually demanding, implying that appointed experts should be reserved for cases with extraordinary needs. Table 2 indicates the types of cases, as identified by the judges, in which the appointment of an expert would be helpful. More than half of the judges mentioned patent cases. Cases involving questions of product liability and antitrust violations also were common candidates for such

32. Sixty-three judges who had appointed an expert on one or more occasions were asked why so few *other* judges had appointed an expert; eighteen judges who had not appointed an expert were simply asked why so few judges appoint 706 experts.

Table 2
Are Rule 706 experts helpful in particular types of cases?



Note: Of the 537 judges surveyed, there were 385 respondents to this question. Forty-six of the 431 who answered the first question did not answer this one (all of those judges had answered no to the first question).

In the "Other" category, the most common responses were "Depends on particular case" (twenty-seven judges) and "All cases" (nineteen judges).

assistance.³³ It follows that one reason appointments are rare is that the kinds of cases in which judges are likely to require such assistance are themselves rare.

Often appointments were made in response to a combination of unusual events, such as a failure by the parties to provide a basis for a reasoned resolution of a technical issue, combined with a perceived need by the court to protect poorly represented parties (such as minors or members of a certified class action). One judge, in a case alleging injuries to a family arising from toxic contamination of a water supply, appointed an expert when the plaintiff's attorney failed to retain an expert witness to establish the occurrence of injury to the children. The judge could have entered a summary judgment in favor of the defendant, and suggested he would have done so but for the presence of children. The failure of the plaintiff's attorney to present expert testimony and the presence of children combined to motivate the court to appoint an expert.

A number of judges mentioned the need for an appointed expert when the parties' experts are in complete disagreement, one judge remarking, "One needs a complete divergence in the views of the parties' experts in a technically complex field. Often experts differ, but not in a crazy way." Several of these judges questioned the belief that court-appointed experts were being used too infrequently. While acknowledging that such authority is useful, one judge remarked, "I don't know that [court-appointed experts have] been used too infrequently. It should remain a rare device that is suited for unusual circumstances."

2. *Respect for the adversarial system.* Respect for the adversarial system was cited as a reason for the infrequent appointment of experts by thirty-nine of the eighty-one judges, including thirteen of the eighteen judges who had not appointed an expert.³⁴ Many of those who had appointed experts professed commitment to the adversarial process and the ability of juries to assess difficult evidence, and indicated they would appoint an expert only where the adversarial process had failed. The extent of the esteem for the adversarial system among the judges responding was re-

33. In the twelve-month period from July 1, 1989, to June 30, 1990, a total of 9,263 civil cases were terminated during or after trial. Of these, there were ninety-six patent cases and one antitrust case. Product liability cases were not listed separately in the reference source. Administrative Office of the U.S. Courts, Annual Report of the Director, 1990, at 153-54, Table C-4.

34. Judges were permitted to offer more than one reason, and many of the judges who cited the unique circumstances in which such an appointment would be appropriate also stressed the importance of the judge not intruding on the adversarial system where it appears to be functioning.

vealed by several of the comments of judges who had appointed an expert on one or more occasions:

I believe in the adversary system. I was a litigator for thirty years. I don't feel comfortable taking over the case (like a small claims court, without lawyers). I don't know why I would be better equipped than the lawyers to find a top-flight person.

[T]he lawyers are pretty good about shooting holes in each others' experts. It's generally a credibility question and the jury can sort it out.

We're conditioned to respect the adversary process. If a lawyer fails to explain the basis for a case, that's his problem.

In general, it conflicts with my sense of the judicial role, which is to trust the adversaries to present information and arguments. I do not believe the judge should normally be an inquisitor.

A related reason for infrequent appointment of experts is deference by the judge to objections by the parties. Several judges alluded to such resistance, one stating, "The parties resist, saying that they have their own experts." Similarly, another judge said that generally "the plaintiffs or their attorneys do not want such an expert because it will reduce the value of their case. I don't appoint experts without consent of the parties." Judges who favored other alternatives over the use of court-appointed experts cited deference to the parties as an important consideration.³⁵

In addition to citing reasons of judicial philosophy for the reluctance to appoint an expert, a number of judges also mentioned practical problems that serve to impede appointments. Much of the remainder of the report is devoted to an analysis of these practical difficulties, but they also are listed here as an indication of the hurdles that must be overcome if an appointment is to be made.

3. *Difficulty identifying an expert suitable for appointment.* Judicial reluctance to appoint an expert also may reflect the difficulty, if not the impossibility, of selecting "a truly neutral person."³⁶ The difficulty in identifying a suitable neutral expert to serve the court was mentioned by fourteen judges. Some judges spoke of the difficulty in recruiting unbi-

35. See also Manual for Complex Litigation, Second § 21.5 (1985) ("Counsel may view such referrals as infringing on their prerogatives, as encroaching on the right to a jury trial, or as imposing additional time and expense.").

36. *Id.* See also Weinstein's Evidence, *supra* note 2, at ¶¶ 706-12 to -13. Judge Weinstein and Professor Berger elaborate on the reasons stated summarily by the editors of the Manual for Complex Litigation.

ased experts with the knowledge demanded in litigation. Some didn't know where to turn to initiate the process. And expressed repeatedly in the interviews was the distrust of expert testimony in general. Several judges doubted that such testimony would be truly neutral, even if the expert was invited to testify by the court. A few of the comments will reveal the depth of this concern:

It is hard to find an impartial expert. When both parties have experts testifying, the judge may feel that another expert opinion will only add to the confusion.

In circumstances that are simply a matter of professional opinion, adding another opinion is unlikely to be helpful.

To appoint an expert is to decide the case. Few experts are truly neutral and the expert will decide the case according to personal values. In most fields, there is no neutral.

It is difficult to find a neutral expert, and the judge is in no better position to judge the neutrality of the expert than the parties.

4. *Securing compensation for an expert.* Another practical problem, raised by fourteen judges, concerns the means of compensating an expert. Since the parties are usually assessed a fee for the services of a court-appointed expert, the judge must often order payment by the parties, and perhaps supervise the billing practices of the appointed expert.³⁷ Reliance on the parties for payment of fees was cited by several judges as the principal reason for restricting appointment of experts to cases in which the parties consent to an appointment. As one judge who had never appointed an expert stated, the lawyers find the process "hard to justify to their clients when the client is paying for expert testimony already," particularly when the court-appointed expert may "hurt the client's case, making the client even angrier."

5. *Lack of early recognition that appointment is needed.* Thirteen judges indicated that effective appointment of an expert requires the court's awareness of the need for such assistance early in the litigation. Since the parties rarely suggest that the court appoint an expert, judges sometimes realize that they need assistance on the eve of trial when there is not sufficient time to identify and appoint an expert. Several judges indicated that they had learned of the need for such assistance when it was too late. Other judges pointed to the crucial role played by the judge's pre-trial procedures in informing the judge of the existence of a dispute

37. Issues regarding payment of expenses incurred by the expert are discussed in Chapter 5.

among the parties' experts and permitting sufficient time to consider an appointment.³⁸

6. *Lack of awareness of the procedure.* Eleven judges attributed the low incidence of court-appointed experts to a lack of awareness of the opportunity and means to make such an appointment. Since the rule is rarely invoked, there is little information concerning this process. This lack of familiarity on the part of some judges has led to some distrust: one judge remarked, "My guess is that it could be a pain in the ass."

38. The need for an early awareness of a conflict among the experts was indicated by the following comments: "Generally, the one-sided views of experts are not helpful, but the problem of experts is usually not called to the judge's attention in time. . . . I've seen inadequate experts, but I usually find out too late to prepare for a court appointment. A judge needs to find out early"; "Busy judges, especially those who delegate pretrial management to [magistrate judges], don't see the problem until it's too late"; "Some judges are reluctant to intervene in the litigation, or are unable to intervene either because they do not have the time or have a case management system that permits an ability to intervene in a timely manner."

Chapter 3

Identification and Appointment of Experts

This chapter addresses the procedures used in the early stages of the appointment process: the timing of the appointment, the manner in which the appointment is initiated, and the means of selecting the expert.

Timing of the Appointment

One of the impediments to broader use of court-appointed experts mentioned earlier is the difficulty in identifying the need for an expert in time to make the appointment without delaying the trial.³⁹ Procedures specified in Rule 706 imply that the appointment process “will ordinarily be invoked considerably before trial” to allow time for hearings on the appointment, consent of the expert, notification of duties, research by the expert, and communication of the expert’s findings to the parties in sufficient time for the parties to conduct depositions of the expert and prepare for trial.⁴⁰ For example, one authority has suggested that identification of the need for a neutral expert should begin at a pretrial conference held pursuant to Federal Rule of Civil Procedure 16.⁴¹ However, specific procedures for identifying such a need are left to the trial judge.⁴²

Judges often indicated that they became aware that the traditional adversary process might be inadequate as they learned of conflicts in the evidence; eighteen of the forty-five one-time users identified direct conflicts in the evidence as one of the concerns that led to the appointment. In nine of those situations judges identified clear conflicts in the evidence at preliminary hearings, while reviewing affidavits, or during some other pretrial exercise. In the other nine instances judges antici-

39. See *supra* note 38 and related text.

40. Weinstein’s Evidence, *supra* note 2, at ¶ 706-14; see also *United States v. Weathers*, 618 F.2d 663, 664 n.1 (10th Cir.), *cert. denied*, 446 U.S. 956 (1980). The Manual for Complex Litigation, Second § 21.5 (1985) recommends consideration of the use of a court-appointed expert, special master, or magistrate judge “[w]ell in advance of the final pretrial conference.”

41. Weinstein’s Evidence, *supra* note 2, at ¶¶ 706-14 to -15.

42. For example, a court may want to time the neutral expert’s testimony and final report to allow that expert to hear and comment on the testimony of the parties’ experts. See, e.g., *Leesona Corp. v. Varta Batteries, Inc.*, 522 F. Supp. 1304, 1311-12 (S.D.N.Y. 1981).

pated that irresolvable conflicts would develop by gauging the emotional intensity of the parties' arguments, by using personal knowledge and skepticism about the quality of a proposed expert, or by reviewing summaries or previews of the evidence in pretrial conferences and otherwise.

Timing of the appointment was discussed regarding fifty-two cases.⁴³ A majority of the experts were appointed at an early point in the litigation, but a sizable minority were appointed on the eve of trial.⁴⁴ A few judges even appointed experts during or after bench trials. Often, judges who acted immediately before, during, or after trial indicated that an earlier appointment would have been helpful. Thirty-one of the judges reported that they appointed the expert early in the pretrial process, usually at the close of discovery, leaving time to recruit an expert and permit the expert to prepare a report.

Judges who had appointed more than one expert were especially likely to make an appointment early in the pretrial process: eighteen of the twenty-four judges interviewed who had appointed an expert on more than one occasion indicated that they made appointments early, usually soon after discovery. Several of these judges indicated that they employ a routine procedure that helps identify the need for an expert at an early stage in the litigation. Recall that judges who have appointed experts more than once are more likely to use the process to stimulate

43. Sixty-six judges were asked "At what point in the litigation did you appoint the 706 expert? Would it have been helpful to have appointed the 706 expert earlier in the litigation?" Because we did not anticipate the variety of nontrial or unusual trial circumstances in which an expert would be employed, instances described by fourteen of the judges did not lend themselves to fairly characterizing the timing of the appointment as "early" or "late." For example, two of the appointments were intended to determine the fitness of criminal defendants to stand trial and one appointment was made to address an issue that arose during sentencing a criminal defendant. In two cases the appointment was made to assist the judge in assessing a settlement agreement that would be supervised by the court. Other appointments were made to assist with questions involving class certification and a proposed reorganization in a bankruptcy case. These cases were excluded from the analysis because the need for an expert could not have been anticipated.

44. In discussing the timing of the appointment, the term *trial* is used in a broad sense to indicate the anticipated evidentiary hearing before the court in which the opinion of the appointed expert would be solicited. Usually this will be a formal trial before a judge or jury. Sometimes, however, the court invited the assistance of an expert to aid in resolving an issue to be addressed in a pretrial hearing. In this circumstance the timing of the appointment was examined with reference to the hearing rather than to the trial itself. For convenience, this pretrial hearing is referred to as a trial.

settlement, a purpose that one would expect to be correlated with early appointment.

Judges who appointed an expert on the eve of trial often reported considerable flexibility in scheduling the expert's participation. Twenty-one of the judges indicated that they appointed the expert either immediately before or during a bench trial; only one judge made such a late appointment in a jury trial.⁴⁵ On seven of the twenty-one occasions the appointment took place during the course of a bifurcated trial after liability was established, with expert assistance typically invited to inform deliberations regarding the amount of damages. Since the need for expert assistance was contingent on the ruling on liability, these appointments were made at the earliest practical point.

The remaining fourteen instances in which the expert was appointed immediately before or during the course of an ongoing trial offer examples of judges attempting to cope with unexpected difficulties. Often the expert was appointed when the parties were ineffective in addressing troublesome but crucial technical issues, either because the parties presented no testimony by expert witnesses or because the expert witnesses lacked credibility with the court. The judges chose to seek additional assistance rather than resolve the disputed issues on the basis of a record that they considered incomplete or inaccurate. In some of the fourteen cases, the technical issues involved questions of public safety, the protection of minors, or both. In two noteworthy cases, the court reopened the evidentiary proceedings after the close of the bench trial and initiated the appointment of an expert witness as a means of addressing technical issues that had proven intractable as the judge deliberated. In both cases the consequences of the decision extended far beyond the immediate parties to the litigation.

Asked if it would have been helpful to appoint the expert at an earlier point in the litigation, those who made an appointment shortly after discovery generally expressed satisfaction with the timing of the appointment. By contrast, most of those fourteen judges who appointed the expert immediately before or during the trial indicated that appointment earlier in the process would have been helpful. Often they noted the

45. In the single instance in which a late appointment was made in a case tried before a jury, a handwriting analyst was appointed to assess the contention of a criminal defendant that she had not signed checks that implicated her in a crime. Neither the prosecutor nor the defendant had provided an expert witness to address the accuracy of the attribution of the signature to the defendant. The expert appointed by the court was well known and accessible to the court, and the analysis was straightforward, suggesting that this was an unusually easy instance in which to invoke such assistance.

need to reschedule the proceeding to permit time to appoint and employ the expert. Another judge mentioned that an earlier appointment would have been helpful in recruiting more skilled experts, remarking, "Only one of the potential experts was available. With more time it may have been possible to choose among several experts."

The lateness of some appointments appears to have been the result of a lack of familiarity with the substance of the litigation. For example, one judge indicated that he was unfamiliar with patent cases and was not experienced enough to anticipate the problems that would arise. Several of the judges who had made more than one appointment indicated that their familiarity with the substantive nature of the litigation permitted them to anticipate the need for assistance and initiate the appointment process at an early stage in the proceedings. Erroneous expectations of a settlement also misled some judges into postponing the appointment of an expert until late in the proceedings. When asked if an earlier appointment would have been helpful, one judge remarked, "I don't think so. I don't think I could have been persuaded that it was necessary any earlier, that the case would not settle."

Finally, a number of judges who appointed experts just prior to or during trial pointed out the difficulty of anticipating some of the circumstances that resulted in the need for an expert witness. As noted above, a number of these instances resulted from a failure by the parties to present credible experts at the trial. When no expert testimony was to be presented, this fact often was noticed only at the final pretrial conference when the lists of testifying witnesses were submitted. In other instances in which the appointment stemmed from the lack of credibility of one or more of the witnesses, the judges pointed out that credibility could not have been judged before trial.

It is worth emphasizing that all but one of these instances in which an appointment was made immediately before or during trial involved a judge rather than a jury serving as the finder of fact. One judge remarked that a bench trial permits such flexibility because the judge can schedule the proceedings without having to accommodate the need for a continuous period of service by jurors. He noted that a late appointment did not make much difference in a bench trial, "but a jury trial would be different; I would have to move earlier." In fact, we wonder if one of the reasons for the paucity of court-appointed experts in jury trials is the necessity to identify the need for such assistance early in the proceeding. While a jury trial certainly presents other issues that make appointing an expert more difficult,⁴⁶ the prospect of interrupting a jury trial to place

46. See *infra* note 107 and related text.

into motion an appointment process that may take weeks or even months must inhibit the use of court-appointed experts.

In summary, it appears that experts usually were appointed long before their testimony would be needed, and many judges who made late appointments thought an earlier appointment would have been helpful. When an appointment was made on the eve of trial it typically was made in a situation that was difficult to anticipate and in which the evidentiary hearing could be interrupted or postponed. We are left asking what happens in similar situations in which the evidentiary hearing cannot easily be delayed, such as in cases in which a jury has been impaneled to hear the evidence. These may be instances in which the failure to anticipate the need for assistance has eliminated this procedure as a practical alternative, leaving the court and the jury to sort out the conflicting evidence without assistance.

Initiation of the Appointment of the Expert

Our interviews revealed that the initial suggestion to appoint an expert almost always comes from the judge, not the parties.⁴⁷ When asked who had initiated the appointment, almost all of the judges who responded (fifty-four of sixty-one judges) indicated that they had. In only seven instances did the initial suggestion come from the parties—twice from the plaintiff, twice from the defendant, and three times from both parties. In one instance the plaintiff's suggestion for appointment of a panel of experts⁴⁸ appeared to be part of a broader litigation strategy, since the plaintiff had recommended such appointments in related litigation in other districts.

A number of the judges who had been trial attorneys before becoming judges noted that they would not have suggested a court-appointed expert when they were attorneys. Having appointed experts as judges, however, they now approve of the procedure and would consider recommending its use to litigators. One judge remarked, "Lawyers are afraid of [the authority of the court to appoint an expert]. If I were in pri-

47. The judges were asked, "Did you suggest using a 706 expert or was this suggested by one of the parties? Did either or both parties oppose appointment of the 706 expert?"

48. Panels of experts also may be appointed by the court. Rule 706 uses the plural term *expert witnesses* to indicate that more than one expert may be appointed in a case. See *Gates v. United States*, 707 F.2d 1141, 1144 (10th Cir. 1983); *Fund for Animals, Inc. v. Florida Game and Fresh Water Fish Comm'n*, 550 F. Supp. 1206, 1208 (S.D. Fla. 1982); *Lightfoot v. Walker*, 486 F. Supp. 504, 506 (S.D. Ill. 1980); *In re Repetitive Stress Injury Cases Pending in the Eastern District of New York*, 142 F.R.D. 584 (E.D.N.Y. 1992).

vate practice I think I would use it. It is a powerful tool to come to a judge and say, 'Your Honor, I think any neutral expert we find will agree with our side.'" Nevertheless, the infrequency with which parties initiate an expert appointment suggests that it is generally left to the judge.

While the parties rarely suggested appointment of an expert, they also rarely objected to the judge's suggestion that an expert be appointed. In three-fourths of the cases (fifty-two of sixty-eight instances) the judge reported that neither party opposed the appointment. Of course, these figures may understate the actual degree of opposition and our strategy for identifying cases would have overlooked cases in which the judge deferred to parties opposed to the appointment.⁴⁹ Some of the comments from the judges indicated that while there may have been no formal opposition to the appointment, some parties expressed reservations. In only a few instances did there appear to be any enthusiasm by the parties for the process.⁵⁰

In sixteen instances there was formal opposition to the appointment of the expert, including several instances in which a party opposed the appointment in the form of a petition of mandamus seeking appellate review of the authority of the judge to make the appointment. In each instance the authority to make the appointment was upheld. Several concerns were expressed in opposition to the appointment, including the allocation of the expert's expenses among the parties, the scope of the issues addressed by the expert, and the expert's impartiality. These reports may underestimate the instances of parties opposing an appointment because judges may have been unaware or untold of such reservations.

49. Interviews with judges who considered and rejected the idea of appointing an expert revealed several instances in which judges acquiesced to party opposition of a proposed appointment. See note 161 and related text. See also Tahirih V. Lee, *Court-Appointed Experts and Judicial Reluctance: A Proposal to Amend Rule 706 of the Federal Rules of Evidence*, 6 *Yale L. & Pol'y Rev.* 480, 501 (1988) (suggesting that Rule 706 be amended to make clear that consent of the parties is not required to appoint an expert).

50. In a few instances the parties were eager to resolve an evidentiary dispute that was impeding settlement discussions and welcomed the suggestion of a court-appointed expert as a means of resolving this impasse. Judges who used such experts as technical advisors with the consent of the parties also reported that the parties welcomed the appointment.

Selection of the Appointed Expert

Identification and selection of a neutral expert by the court is a critical step in ensuring the fairness of the proceeding.⁵¹ Many judges anticipate difficulty in finding a neutral expert who will consent to an appointment.⁵² Judges were asked, "How was the expert selected? Did the parties nominate candidates? Did you identify candidates other than those nominated by the parties? Was it difficult to identify a neutral 706 expert?"

Only six of sixty-six judges reported difficulty finding a neutral expert willing to serve. Those six judges cited either difficulty in finding a skilled person who could be considered neutral (some had ties with the parties while others had previously taken positions on the technical issues that were the object of the dispute), or difficulty in finding a neutral expert who would consent to serve in the position.

Some judges may have encountered difficulty in finding a neutral expert and abandoned their efforts to appoint such a person, thereby eluding our investigation. Several judges who had not appointed experts mentioned that their attempts to make an appointment had been thwarted by an inability to find a suitable person to serve as an expert. For example, in one case involving a dispute about the value and authenticity of a product, the judge simply found no interest among potential experts. In another case the judge found that all of the experts in the field had ties to either government or industry, the parties to the dispute.

Perhaps one reason judges who made such appointments found little difficulty in identifying experts is that they often appointed experts with whom they were familiar. We found that it is far more common for judges to appoint experts that they have identified and recruited, often based on previous personal or professional relationships, than for judges to appoint experts nominated by the parties.⁵³

51. By "neutral" expert we mean an expert who can respond to the technical or scientific issue in a manner consistent with generally accepted knowledge in an area, without regard to the interests advanced by either party. This would rule out experts with significant ideological, financial, or professional interests in debatable normative issues related to the issue in dispute.

52. Rule 706(a) specifies that the court shall not appoint an expert who does not consent to serve.

53. Judges are afforded great discretion under Rule 706 in designating a procedure for appointing such an expert. *Gates v. United States*, 707 F.2d 1141, 1144 (10th Cir. 1983). Rule 706(a) provides that "[t]he court may appoint any expert witnesses agreed upon by the parties, and may appoint expert witnesses of its own selection."

In forty-one of the sixty-six appointments, the judge appointed an expert without suggestions by the parties. In twenty-nine of these cases, the judge used preexisting personal or professional contacts to identify an expert. The informality of the procedure used by many judges may be problematic. A number of judges relied on recommendations by friends; on a few occasions, judges asked friends to serve as experts.⁵⁴ Former magistrate judges and former law clerks also were appointed as experts. One judge relied on discussions with his wife, who was an experienced professional in the area of interest, for suggestions for likely candidates and appropriate rates of compensation.

In many of these cases (we didn't ask specifically, but comments by the judges suggested this to be the common practice) the parties had the opportunity to object to the appointment, and in some instances objections were entered and other experts were selected. However, the extent to which judges relied on their informal networks of friends and acquaintances raises concerns about the extent to which such networks can be relied on to provide skilled and neutral experts to inform the deliberations of the trier of fact. While such persons may be "disinterested" with regard to the issues of the specific case, there is little assurance that such acquaintances bring an unbiased, or even a well-informed, perspective to the disputed technical issues. Personal associations formed while practicing law may reflect a narrow spectrum of professional opinion that was suited to the interests of the judges' former clients and colleagues. Even if

54. The comments of one judge, in a case in which the parties submitted a list of suitable candidates, indicated the range of options that are considered when the judge must identify a suitable candidate: "I had a plan for identifying other candidates if the parties had not submitted a name. I either would have gone to one of the national [accounting] firms and plucked out their best or I would have picked among prior witnesses in my court. I also thought of my own accountant, decided that it would not be right to appoint him, and concluded that I would consult him for recommendations." Informal means of recruiting experts through the recommendations of friends and colleagues appears to be the norm. Such practices have been observed in criminal cases involving expert testimony (Michael J. Saks & Richard Van Duizend, *The Use of Scientific Evidence in Litigation* 16, 28 (1983)), in workers compensation claims (Peter S. Barth, *Workers Compensation Research Institute, Resolving Occupational Disease Claims: The Use of Medical Panels* (1985)), and under the German system which relies on experts appointed by the court (John H. Langbein, *The German Advantage in Civil Procedure*, 52 *U. Chi. L. Rev.* 823, 838-39 (1985)).

such an appointment results in the selection of a suitable expert, the parties may perceive such an expert as biased.⁵⁵

Judges did not always rely on friends and associates to suggest experts; in nine instances in which an appointment was made without suggestions by the parties, judges contacted nearby institutions for assistance in identifying suitable experts to serve the court.⁵⁶ These were almost all instances in which medical expertise was needed and the judges contacted nearby medical schools or associations for suggestions of candidates.⁵⁷ Such a procedure, while more burdensome and not foolproof,⁵⁸ is likely to be more effective than using informal contacts to identify skilled, neutral experts.

In eighteen instances the expert was selected from a list of experts provided by one or more of the parties.⁵⁹ Published cases commonly suggest that a court direct the parties to seek agreement on an appoint-

55. We should note that while our interview with judges raised the possible dangers of such appointments, we found no indication that such harms have resulted.

56. The selection procedure suggested in the Manual for Complex Litigation is for the court to "call on professional organizations and academic groups to provide a list of qualified, willing and available persons." Manual for Complex Litigation, Second § 21.51 (1985); *see also* Charles T. McCormick, Evidence 71 (John W. Strong ed.) (4th ed. 1992) (recommends "establishing panels of impartial experts designated by groups in the appropriate fields, from which panel court-appointed experts would be selected").

57. *E.g.*, "I wrote to the American Medical Association, the Board of Pulmonology, and the Board of Industrial Medicine. I asked them if they could identify experts in the detection of asbestos disease who were not aligned with either party in the litigation. They were all very helpful and also are upset about the misuse of experts in the courts. I compiled a list of about a dozen experts"; "Both sides agreed to my suggestion that I call Mt. Sinai Hospital and ask for their top person in the area of hip surgery."

58. Professional associations and academic groups also may have skewed approaches to a specific issue, perhaps giving subconscious, or even conscious, priority to the impact of a rule or ruling on their professional autonomy. Medical malpractice cases, for example, may test the ability of medical schools or professional associations to assist in identifying neutral experts.

59. The few reported cases dealing with selection of experts tend to emphasize nomination by the parties. *See, e.g.*, *Gates v. United States*, 707 F.2d 1141, 1144 (S.D. Fla. 1982); *Fund for Animals, Inc. v. Florida Game and Fresh Water Fish Comm'n*, 550 F. Supp. 1206, 1208 (S.D. Fla. 1982); *Leesona Corp. v. Varta Batteries, Inc.*, 522 F. Supp. 1304, 1311 (S.D.N.Y. 1981); *Lightfoot v. Walker*, 486 F. Supp. 504, 506 (S.D. Ill. 1980); *United States v. Ridling*, 350 F. Supp. 90, 99 (E.D. Mich. 1972).

ment and exercise its discretion only if the parties fail to agree.⁶⁰ One district court has adopted this approach by local rule, stating that “[i]f the parties agree in the selection of an expert or experts, only those agreed upon shall be appointed. Otherwise, the judge will make his own selection.”⁶¹ Sometimes the parties agreed on an expert with little or no involvement from the judge. Normally each party submitted a slate of experts that would be acceptable to them. Occasionally one or more names would appear on each list, making selection easy. Often the parties identified one or more suitable experts with little or no involvement by the judge. When the parties could not agree, the judge often chose the expert from the slates after listening to objections from each of the parties.

Soliciting nominations from the parties did not always relieve the judge of the responsibility of seeking other candidates. In five instances the parties advanced slates of candidates that were not acceptable to the judge. These judges were then left with the task of identifying a suitable expert; they contacted friends or institutions for suggestions for candidates.

In summary, the identification of a need for, and selection of, a court-appointed expert appears to be a process in which the parties infrequently play an active role. The judge typically identifies the need for assistance and raises the possibility of such an appointment, sometimes very late in the pretrial process. The judge is usually responsible for identifying suitable candidates and often relies on informal recommendations from friends and associates. Such unsystematic approaches to identifying needs and recruiting experts raise doubts about the extent to which the procedure provides the timely and neutral assistance warranted by the critical nature of the expert’s task.

60. *United States v. State of Mich.*, 680 F. Supp. 928, 957 (W.D. Mich. 1987); *Unique Concepts, Inc. v. Brown*, 659 F. Supp. 1008, 1011 (S.D.N.Y. 1987); *Hatuey Prod., Inc. v. United States Dep’t of Agric.*, 509 F. Supp. 21, 23 (D.N.J. 1980). See also Pamela L. Johnston, *Court-Appointed Scientific Expert Witnesses: Unfettering Expertise*, 2 *High Tech. L.J.* 249, 268 (Fall 1987) (suggesting that Rule 706 be amended to require parties to submit a list of proposed experts suitable for appointment by the court for each area of disputed scientific testimony).

61. U.S. District Court for the District of Kansas, Rule of Practice 211 (1988). See also Local Rule 5, § III of the Western District of Pennsylvania, permitting referral to an impartial medical expert, selected from a panel of experts designated by a local medical association, after consultation with the local bar association. We understand that this program is presently inactive.

Chapter 4

Communication with the Appointed Expert

Instruction of the Appointed Expert

Rule 706(a) specifies two options for instructing the expert in his or her duties, both of which ensure that the parties will be aware of the assignment. The court may communicate with the expert either in writing (filing a copy with the clerk) or at a conference in which the parties have an opportunity to participate.⁶² In practice, judges instructed experts by conference call (involving the judge, the expert, and the parties), informal conferences in chambers, formal hearings in open court, and letters and written orders, sometimes with accompanying documents and exhibits. In only two instances did judges instruct experts outside the presence of the parties.⁶³

Judges' instructions were used to meet multiple needs, including (1) establishing a record of the terms and conditions of the appointment, (2) defining the legal and technical issues in the case and identifying the technical issues the expert was to address, (3) clarifying the role of the expert in relation to the role of the judge, and (4) establishing procedures for assembling information, communicating with the parties, and report-

62. Fed. R. Evid. 706(a). The rule distinguishes communications regarding the appointment from informing the expert and the parties about the expert's duties. The appointment process may necessarily involve *ex parte* communication between the judge and a proposed expert. The rule envisions that a court may make "its own selection" and that the expert witness will then consent to the appointment. *Id.* The opportunity for an informal exchange of information about the qualifications of the expert and the needs of the court seems appropriate, if not essential, to aid the court and the expert in their respective decisions.

63. Direct instructions from the judge outside the presence of the parties occurred in an emergency situation (appointment of a doctor to review medical records on the day of trial) and in a nonadversarial situation in which the expert functioned like a special master in preparing a report to assist the judge in formulating the distribution of a settlement fund. For discussion of the application of rules regarding *ex parte* communications by the judge or the parties with the court-appointed experts, see *infra* notes 79–96 and related text.

ing findings and opinions. The following discussion summarizes how judges met those needs in the cases we encountered.⁶⁴

Regarding terms of payment, judges included the rate of payment,⁶⁵ any ceiling on the total amount of work and payment, the allocation of payment among the parties, the timing of installment payments, the amount of an initial payment, the court's role, if any, in reviewing the bills and serving as a conduit for payments, and reallocation of payments upon taxation of costs.

Judges also used the order of appointment to define the role of the court-appointed expert in relation to the judicial role, distinguishing between the expert's duty to provide technical expertise and the judge's duty to decide the case. One judge said,

I instructed [the expert] that his role was to help me and that he was not to decide the case. His main role was to interpret the language to me, give me background on computer technology, tell me how the various systems work.

Similarly, another judge said, "[I] emphasized that I did not want him to give his opinion on the substance of the dispute, but to explain and guide me through the testimony." Another defined the expert's role as that of "interpreter."⁶⁶

On the other hand, one judge seemed to want an opinion from the appointed expert on the ultimate issue.⁶⁷ He issued an order "instructing . . . [the expert] to answer the question in the case, whether the device in issue was an infringing device." Occasionally, as in this example, words may differ in their technical and legal meanings. When using legal terms-

64. For an example of an order appointing an expert, see *In re Swine Flu Immunization Products Liability Litig.*, 495 F. Supp. 1185 (1980) (comprehensive order appointing panel of experts to review swine flu cases, detailing the areas of inquiry, the duties of the panel, the content and timing of the reports, the deposition process, exchange of information by counsel, and the charges and method of claiming compensation).

65. Issues regarding compensation of experts are discussed in Chapter 5.

66. For an example of a broad grant of authority to a court-appointed experts that included the opportunity to suggest a modification of legal doctrine governing software copyright, see *Computer Assoc. Int'l v. Altai, Inc.*, 775 F. Supp. 544 (E.D.N.Y. 1991), *aff'd in relevant part*, 982 F.2d 693, 1992 U.S. App. LEXIS 33369 (2d Cir. 1992).

67. Fed. R. Evid. 704 removes the traditional objection to testimony on the "ultimate issue to be decided by the trier of fact." In discussing the inherent power of a court to obtain assistance from a technical advisor, the First Circuit stressed the point that such advisors "may not be allowed to usurp the judicial function." *Reilly v. United States*, 863 F.2d 149, 157 (1st Cir. 1988).

of-art, a judge may have a special need to define issues and roles clearly.⁶⁸

The form of the expert's report should also be defined. By detailing the formalities of reporting, the court may prevent unnecessary confusion regarding *ex parte* communication between the expert and the court.⁶⁹

In addition to defining the roles of the judge and expert, the court also must define the issues for the expert to consider. This may be as straightforward as directing a panel of physicians to determine a plaintiff's injuries, prognosis, and the treatment required.⁷⁰ In other cases, defining the technical issues for the expert may require an explanation of legal issues as well. For example, in a case dealing with conditions of confinement at a correctional facility, the court used the appointment of an expert to articulate the applicable legal standards.⁷¹

Defining the issues to be considered by the expert seems to serve multiple purposes. For the expert, a written definition will serve as an essential guide to the generally unfamiliar world of litigation and the role of the appointed expert. For the parties and counsel, the use of court-appointed experts is so rare that a clear definition of the issues and the process should enhance understanding and allay concerns. For the court itself, the process of defining the issues may help clarify the roles of the court and expert. In one of the few cases in which a party contested an appointment, the court asked the parties to propose instructions to the

68. For example, even in a technical area such as patent law, the apparent identity of technical and legal terms may be deceiving. In the case of *Pennwalt Corp. v. Durand-Wayland, Inc.*, 833 F.2d 931 (Fed. Cir. 1987), plaintiff urged that the "doctrine of equivalents" compelled a finding of infringement because the court-appointed expert had testified that "the internal operations . . . are functionally equivalent because they perform some of the same operations." *Id.* at 937. The court emphasized that the expert was "a technical, not a legal expert" and that, as such, he "was not expected to, and did not analyze infringement under a legal standard." *Id.* at 936. The court went on to find that the testimony on the facts relating to equivalency was not inconsistent with the court's conclusion that there was no legal equivalency.

69. See discussion at notes 85–86 and related text.

70. See, e.g., *In re Swine Flu*, 495 F. Supp. at 1186 (1980); see also *In re Asbestos Litigation* (S.D. Ohio filed April 29, 1987) ("render an objective medical diagnosis of the presence or absence of asbestosis or other asbestos-related diseases").

71. *Stickney v. List*, 519 F. Supp. 617 (D. Nev. 1981); see also *United States v. State of Mich.*, 680 F. Supp. 928, 983–84, 986–88 (W.D. Mich. 1988).

expert. After reviewing them, the court formulated its own instructions, addressing issues raised by the parties' proposals.⁷²

Instructions to experts have been, at times, open-ended. For example, in a complex antitrust case the court established a process for the expert to "formulate the technical issue(s) the expert thinks are appropriate and form opinions thereon."⁷³ If a judge wishes to have an expert examine the methodology of the parties' experts, this should be communicated in the order of appointment.⁷⁴

Finally, judges frequently use the order of appointment as a way to define the process of assembling information for the expert.⁷⁵ As noted above, one court channeled all of the information from the parties to the expert through the court. This process permitted easy assembly of a record of the basis for the expert's opinions. In other cases, the court established a way for the parties to convey information to the expert without the court's participation.

In several of the cases, the courts closely supervised the transfer of information to the expert by specifying the transcripts and portions of exhibits to be delivered to the expert, ruling on proposals from the parties, and providing for court review of additional requests from the expert.

72. *Students of the Cal. Sch. for the Blind v. Riles*, No. Civ.S.80-473-MLS (N.D. Cal. filed March 31, 1982). See also *Leesona Corp. v. Varta Batteries, Inc.*, 522 F. Supp. 1304, 1311-12 & n.18 (S.D.N.Y. 1981) (parties asked to prepare a statement of the technical issues for inclusion in written instructions to the expert).

73. *Kerasotes Mich. Theaters v. National Amusements*, No. 85-CV-40448-FL order appointing expert under Rule 706 (E.D. Mich. filed Feb. 2, 1989).

74. Elliott has proposed that Rule 706 process be used to appoint an expert to conduct a "peer review" of the scientific acceptability of the methods used by the parties' experts to reach their conclusions. E. Donald Elliott, *Toward Incentive-Based Procedure: Three Approaches for Regulating Scientific Evidence*, 69 B.U. L. Rev. 487 (1989). Under the proposal, a judge would make a determination of "whether there would be 'substantial doubt' among qualified scientists concerning the basis for an expert's testimony." *Id.* at 508. The purpose of the experts would be to assess the approaches of the parties' experts and not to present a view on the merits of the dispute. *Id.* at 510. Query whether the "substantial doubt" standard in the proposal alters the legal standard for judging the admissibility of the evidence or, if admitted, the legal standard for applying the burden of proof in a civil case.

75. In one reported case, the court invited the parties to bring their own experts to participate in the conference at which the judge instructed the court-appointed expert. *United States v. Articles . . . Provimi*, 74 F.R.D. 126, 127 (1977), supplementing 425 F. Supp. 514 (D.N.J. 1977). A joint meeting of the experts at that stage could initiate a process of assembling common information for all of the experts.

The court also permitted the expert to interview, on the record, all lay and expert witnesses, and to view the site of the dispute.⁷⁶

In another case, the court provided for the expert's participation in the discovery process.⁷⁷ The expert, a law professor with special expertise in antitrust law, was to consider all pleadings and writings of the parties and advise the court and the parties about "the discoverability of technical matters" and the "nature [of], . . . reason for, and terms of protective orders." The expert also was to advise the parties as to additional discovery that might be necessary to render an opinion on the technical issues. The expert was given explicit power to call meetings to resolve disputes about the formulation of the technical issues or about discovery. Disputes not resolved through this process would be brought to the court. In that case, the court extended the process of developing information through the final pretrial conference. After providing for a written report and deposition of the expert, the court ordered the parties to exchange written expert reports with each other and the court's expert. The court also ordered the parties' experts to submit to depositions that would include questioning by the court's expert. After hearing and cross-examining the parties' experts, the court's expert could revise her written report.

Judges found little need to clarify instructions. Those who found such a need reported using informal mechanisms, such as conference calls or communication through their law clerks, as well as more formal approaches, such as issuing supplemental orders or discussing issues at a pretrial conference. In the context of complex institutional reform litigation, with the court's expert also serving as a special master, one court reported the need for a series of conferences to obtain information that would permit more precise instructions as technical information unfolded. For the most part, however, concerns about the process of instructing an expert appear to be unfounded. Judges seem to have adapted flexibly to the need for continued instruction and to have involved the parties in the process.

Ex Parte Communication

Communication between the judge and the expert

Rule 706 does not explicitly address the issue of whether the judge and the appointed expert may communicate ex parte during the course of the

76. *Students of the Cal. Sch. for the Blind v. Riles*, No. Civ.S.80-473-MLS, at 6-7 (N.D. Cal. filed March 31, 1982).

77. *Kerasotes Mich. Theaters v. National Amusements*, No. 85-CV-40448-FL order appointing expert under Rule 706 (E.D. Mich. filed Feb. 2, 1989).

litigation. Case law and canons of judicial ethics discourage off-the-record contacts between a judge and an expert witness. Reacting to ex parte communication between the district court and an expert, one appeals court ruled that “if any experts are appointed to advise the district court on any further matters in this litigation, they shall prepare written reports, copies of which shall become part of the record and shall be made available to all parties or their attorneys.”⁷⁸ Another appellate tribunal recommended that all communications with an expert be conducted in either an on-the-record conference in chambers or an on-the-record conference call.⁷⁹ The norm, as stated in the Code of Conduct for United States Judges, is that a judge should not consider “ex parte or other communications on the merits . . . of a pending or impending proceeding.”⁸⁰ The scope of the term “ex parte” is not defined further. Whether this concept is applicable to court-appointed experts is unclear.

A broad prohibition of ex parte communications between a judge and a court-appointed expert would impede necessary communication when the expert is appointed to serve as a technical advisor to the court,⁸¹ a

78. *Bradley v. Miliken*, 620 F.2d 1143, 1158 (6th Cir.), *cert. denied*, 449 U.S. 870 (1980).

79. *United States v. Green*, 544 F.2d 138, 146 n.16 (3d Cir. 1976); *cf. Leeson Corp. v. Varta Batteries, Inc.*, 522 F. Supp. 1304, 1312 (S.D.N.Y. 1981). In *Green*, the court presumed that the general prohibition on ex parte communication between the court and a witness applied, and the court carved out a limited exception. The district judge and a law clerk had communicated with the expert over the phone about observations of the defendant’s behavior in court. The fact that they had talked was placed in the record, and defendant’s counsel had an opportunity to cross-examine the expert. The Third Circuit recited as a general rule that “the court should avoid ex parte communications with anyone associated with the trial, even its own appointed expert,” but found no violation of due process and no “reversible error” in the circumstances of the case. *Green*, 544 F.2d at 146 n.16. The court cautioned, however, that “a proper way [to proceed] would be to utilize an on-the-record conference in chambers or an on-the-record conference call so that counsel for all parties may participate.” *Id.*

80. Canon 3(A)(4) of the Code of Conduct for U.S. Judges provides that “[a] judge should accord to every person who is legally interested in a proceeding, or the person’s lawyer, full right to be heard according to law and, except as authorized by law, neither initiate nor consider ex parte or other communications on the merits or procedures affecting the merits of a pending or impending proceeding.” Judicial Conference of the United States, Code of Conduct for U.S. Judges I-9 (Rev. Sept. 1987).

81. For illustrations of the contexts in which such discussions took place and for a description of some safeguards short of prohibition, see discussion at note 88 and related text.

role analogous to that of a judicial clerk. In such cases either the parties consented to off-the-record discussions between the judge and the expert or the court relied on its broader inherent power to appoint the expert as a technical advisor. In either event, the very purpose of the appointment was to secure an expert who would “act as a sounding board for the judge—helping the jurist to educate himself in jargon and theory disclosed by the testimony and to think through the critical technical problems.”⁸² That educational function seems to contemplate ex parte communication, albeit with procedural safeguards.⁸³ In the analogous context of seeking “the advice of a disinterested expert on the law applicable to a proceeding before the judge,” the Code of Conduct for United States Judges permits the judge to obtain such advice and outlines a procedure for advising the parties about the consultation.⁸⁴

Our interviews revealed considerable ex parte communication between judges and experts as well as some confusion concerning the proper standard. More than half of the judges who responded to the question “Did you communicate directly with the expert outside of the presence of the parties?” answered in the affirmative.⁸⁵ About half of the judges limited their ex parte discussion to procedural aspects of the expert’s service—including matters of availability.⁸⁶ Often lengthy ex parte communications were required to recruit an expert. As one judge

82. *Reilly v. United States*, 863 F.2d 149, 158 (1st Cir. 1988). *See also* *Burton v. Campbell*, 793 F. Supp. 1329 (D.S.C. 1992).

83. *Reilly v. United States*, 863 F.2d 149, 158, 159–60 (1st Cir. 1988) (ground rules included advising parties if expert ranged into area not discussed in briefs; appellate court recommends inclusion of a comprehensive job description on the record and submission of an affidavit of the expert’s compliance with the ground rules at the end of the appointment).

84. The relevant portion of Canon 3(4), as an exception to the rule regarding ex parte communication recited in note 80 above, provides that a judge “may obtain the advice of a disinterested expert on the law applicable to a proceeding before the judge if the judge gives notice to the parties of the person consulted and the substance of the advice, and affords the parties a reasonable opportunity to respond.” *Judicial Conference of the United States, Code of Conduct for U.S. Judges I-9* (Rev. Sept. 1987). But the reader should note that at least one court has held that “the adversary system . . . precludes the court from receiving out-of-court advice on legal issues in a case.” *Reed v. Cleveland Bd. of Educ.*, 607 F.2d 737, 748 (6th Cir. 1979).

85. Two-thirds of the multiple users of the Rule 706 process reported ex parte communication with an expert in at least one case.

86. One judge limited discussion further: he advised the parties that he would meet with the expert for dinner the evening before trial, that they were welcome to attend, and that the case was not to be discussed.

said: "I communicated extensively with . . . [the prospective expert] in chambers prior to the appointment to convince him to accept it."

Some judges expressly structured the work of the court-appointed expert to prevent any danger of *ex parte* contact by, for example, instructing the expert to communicate only through formal reports. At least one judge, however, regretted limiting *ex parte* communication, saying that he "would not use an expert again unless I could discuss matters privately. [The court-appointed expert] . . . did not educate me on a one-to-one basis and that is what I needed."

The remaining judges communicated with the court-appointed experts on at least some occasions to elicit technical advice outside the presence of the parties. In most of these situations the very purpose of the appointment was to provide the judge with one-to-one technical advice. We did not systematically ask about consent, but some judges indicated that the parties expressly consented to the *ex parte* communications. In all other cases it appeared from the context of the interviews that the parties were generally aware of the arrangements and either expressly consented or failed to object. For example, one judge had the "prior, general permission of the parties" to communicate on a one-to-one basis with the expert. The parties expressly "agreed to waive their right to a report" from the expert and "to permit continuing dialogue during the trial and the preparation of my opinion." In addition to dialogue about technical issues in the case, the judge asked the expert to review a draft opinion for technical errors.

In one case the communication with the expert was a side-by-side review of documents claimed to be privileged. The parties selected the expert, participated in the process of instructing the expert, and did not oppose the procedure. The expert advised the judge of the business purpose, setting, and significance of each document. In another case, with the permission of the parties, the expert sat with the judge throughout a lengthy trial and discussed the evidence with him during breaks and at the end of the day. Neither the judge nor the expert disclosed the contents of these discussions to the parties.

Several judges devised procedures to subject their contact with a technical advisor to some of the checks and balances of the adversary system. For example, one judge communicated *ex parte* with the expert, but made a record of the discussions and disclosed the exact content to the parties. Another judge indicated that the parties' agreement to *ex parte* discussion was conditioned on his reporting the substance of such discussions to the parties. These procedures inform the parties of the content of the judge's information about a case and allow them an opportunity to clarify, rebut, or even reinforce the expert's statements. By notifying the parties of the substance of discussions and granting the

parties an opportunity to respond, judges comport with the spirit of the limited permission for ex parte communication with legal experts in the Code of Conduct for United States Judges.⁸⁷ Such procedures may also improve the efficiency of the litigation by focusing the attention of all participants on the same issues.

Communications between the parties and the expert

Rule 706 also fails to address the question of whether ex parte communication should be permitted between the expert and the parties.⁸⁸ Some judges apply the same rules to court-appointed experts that they would apply to themselves.⁸⁹ This would seem especially apt for cases in which the expert, as a technical advisor, is intimately involved in the decision-making process. Even in the absence of an explicit order, however, attorneys should be aware that "ex parte attempts to influence the expert are improper."⁹⁰

We found that about half of the judges who responded permitted direct, separate communication between the expert and one or more parties. Often, the nature of the appointment and the role of the expert led naturally, if not inexorably, to that practice. The clearest example was the medical examination of a party by an expert to determine the extent of

87. See discussion at *supra* note 69.

88. During the original consideration of the Federal Rules of Evidence, a committee from the American Bar Association suggested that a direct prohibition on ex parte communication by a party with a court-appointed expert should be added to Rule 706. While the suggested procedure was not adopted, Weinstein & Berger suggest that such a prohibition "may prove useful to the court and parties in using" the appointment procedure. Weinstein's Evidence, *supra* note 2, at ¶ 706-20, n.21.

89. See, e.g., *Leesona Corp. v. Varta Batteries, Inc.*, 522 F. Supp. 1304, 1312, n.18 (S.D.N.Y. 1981) (parties were not permitted to communicate directly with the court's expert; materials selected by the parties for the expert to use were transmitted through the court and entered in the court's docket); see also *Kerasotes Mich. Theaters v. National Amusements*, No. 85-CV-40448-FL, order appointing expert under Rule 706 (E.D. Mich. filed Feb. 2, 1989) (expert "shall be limited in the same manner as judicial officers as to ex parte communications" unless parties stipulate to alterations or move for the court to alter the restrictions).

90. Weinstein's Evidence, *supra* note 2, at ¶ 706-20, n.21. See also Model Code of Professional Responsibility DR 7-110 (1980) ("a lawyer shall not communicate . . . as to the merits of a cause with a judge or an official before whom the proceeding is pending . . ." [emphasis added]). Presumably, the expert is an "official" agent of the court. Cf. Model Rules of Professional Conduct Rule 3.5 (1983) ("A lawyer shall not (a) seek to influence a judge . . . by means prohibited by law; (b) communicate ex parte with . . . [a judge] except as permitted by law . . .").

injuries. Normally such examinations are conducted in private (i.e., technically *ex parte*) with a copy of the report furnished to the parties and the court.⁹¹ Adversarial participation would invade the privacy of the party and might compromise the expert's ability to obtain information on which to base a diagnosis.

Several judges would permit *ex parte* communication between parties and expert witnesses under special circumstances. Most of these instances concerned investigation of facts to support the expert's assessment. For example, in a case in which an appointed expert also served as a special master, the judge permitted the expert to clarify questions that he or she had posed by communicating directly with the parties. The judge instructed the expert to disclose fully to the parties all separate communications. In a more traditional 706 appointment, the expert was required to examine a list of secret ingredients in a product. The judge and parties carefully crafted a way for the defendant's agent to communicate the trade secrets so that only the secrets were disclosed to the expert and no discussion of other issues was permitted. In another case, the judge permitted the expert to meet separately with the parties as a part of the expert's assignment to formulate a proposed remedial decree. The judge reasoned that "because [the expert] was looking at alternative remedies, he needed to look behind the claims and identify the needs of the parties."⁹²

In several cases, *ex parte* communication between an expert and a single party appeared to have been unnecessarily closed. While there may have been a special need to exclude the opposing party in these cases, none was apparent. For example, in one institutional case the judge "permitted the expert to communicate directly with the officers at

91. Cf. Fed. R. Civ. P. 35, which provides for a physical examination of a party and production of a report. Presumably the party who calls for the examination is not entitled to be present during it. The plain language of Rule 35 does not confer such a right. In any event, the practice under Rule 35 could serve as a guide regarding physical or mental examinations under Rule 706. The ABA exempted medical examinations from their proposed restriction on *ex parte* communication between a party and a court-appointed expert. Weinstein's Evidence, *supra* note 2, at ¶ 706-20, n.21.

92. To the extent that the expert was exclusively serving as a mediator, this seems fair. If, however, the expert is also playing a role in the formulation of a decree, there would seem to be a need for procedures that would permit the parties to confront the "facts" gleaned from *ex parte* interviews. The same concerns that inhibit some trial judges from engaging in settlement discussions seem to apply. See generally D. Marie Provine, *Settlement Strategies for Federal Judges* 21-41 (Federal Judicial Center 1986).

the . . . [institution] with the idea of getting the fullest possible report of conditions." In another case, the judge permitted the expert to "interview the parties about entries in their books and records" and to seek "justification or explanation for various entries." In yet another case the judge stated that "the nature of the task, including the collection of billing records, required that the parties be able to meet with the expert to furnish information."

In each of these cases the ex parte contact seemed to be more a matter of convenience than necessity. Permitting the opposing party to participate might prevent due process challenges. Because expert communication with parties separately may, in effect, generate evidence outside of the adversarial system, due process may require that the adverse party be notified of the ex parte contact and be given an opportunity to be present at the meeting(s) or, at least, to respond to the substance of the communication. Absent precautions, a broad grant of investigative authority to an appointed expert may be susceptible to challenge on due process grounds. We did not uncover any such challenges relating to court-appointed experts, but several cases dealing with the powers of special masters may provide useful analogies.⁹³

Pretrial Reports and Depositions

Unless the parties agree otherwise, the court-appointed expert must advise the parties of any findings, submit to a deposition by any party, and respond to cross-examination of his or her testimony, if any, at trial.⁹⁴

93. See *Ruiz v. Estelle*, 679 F.2d 1115 (5th Cir. 1982). In that case, the court found the order of appointment of a special master to be "too sweeping" in that it permitted the special master to submit reports "based upon his own observations and investigations in the absence of a formal hearing before him." The court found that such a broad power—the equivalent of permitting ex parte communication to become part of the findings without adversarial testing—exceeded the traditional power given masters and "denies the parties due process." *Id.* at 1162–63. Cf. *Young v. Pierce*, 822 F.2d 1368, 1375 (5th Cir. 1987), *order on remand*, 685 F. Supp. 975, 982–83, 985 (E.D. Tex. 1988) (special master given authority to interview employees of government agency–defendant, subject to the rights of the parties to notice and the opportunity to be present at such interviews and to object to questions).

94. Fed. R. Evid. 706(a). See also *Unique Concepts Inc. v. Brown*, 659 F. Supp. 1008, 1011 (S.D.N.Y. 1987). Cf. *Reilly v. United States*, 863 F.2d 149, 159 (1st Cir. 1988) ("where an advisor was not an evidentiary source, there was neither a right to cross-question him as to the economics of the situation nor a purpose in doing so"). Weinstein and Berger observe that the right of a party to depose the court-appointed expert in a criminal case "goes considerably further than any other

Findings may be presented in a written report, by deposition, in testimony in open court, or through some combination of the above.⁹⁵

We found that, except when used as a technical advisor,⁹⁶ the expert invariably reports findings to the parties. In several cases the parties met informally with the expert to discuss his or her report. Generally, the findings are in the form of a written report furnished to the court and the parties. In two instances the expert reported orally to the parties, once by deposition, and once in a meeting in the judge's conference room. In the few cases where the expert was appointed immediately before or during trial, the expert reported by way of testimony at the trial or hearing. One judge reported the practice of using the report of the expert as the equivalent of direct testimony at the trial.⁹⁷

Three of the judges, all of whom had appointed experts more than once, asked the expert for a preliminary report, then permitted the expert to modify this report after reviewing the reports of the parties' experts. The use of a preliminary report "serve[s] to give [the judge] an independent report" and allows "an opportunity to take into account the reports of other experts." Formal depositions are relatively infrequent, occurring in about one case in four.

rule or statute in authorizing depositions in a criminal case." Weinstein's Evidence, *supra* note 2, at ¶ 706-21.

95. *Leesona Corp. v. Varta Batteries, Inc.*, 522 F. Supp. 1304, 1312 (S.D.N.Y. 1981). One district court has used a procedure in which the parties waive their rights to disclosure of the expert's report and conclusions. *SAS Inst., Inc. v. S&H Computer Sys.*, 605 F. Supp. 816 (M.D. Tenn. 1985). An apparent purpose of the waiver of a report was to allow the expert to report directly to the court and perhaps also assist the court in framing an opinion. Note, however, that the role of a technical advisor is to assist the court regarding factual issues, not legal conclusions. See *Pennwalt Corp. v. Durand-Wayland, Inc.*, 833 F.2d 931 (Fed. Cir. 1987), *cert. denied*, 485 U.S. 961 (1988) (court-appointed expert "was a technical, not a legal, expert. He was not expected to, and did not, analyze infringement under a legal standard."). See also *Reilly v. United States*, 863 F.2d at 157-59 (1st Cir. 1988) (technical advisor did not usurp judicial functions based on limits placed by the court and evidence of compliance with those limits).

96. As noted above in the discussion of *ex parte* communication between the judge and the expert (see discussion at *supra* notes 87-89), in several cases the expert reported directly to the judge without any report to the parties.

97. See discussion *infra* at note 118.

Presentation of Expert Opinion in Court

Frequency and nature of testimony

Although Rule 706 seems to anticipate that court-appointed experts will testify at trial,⁹⁸ our earlier review of reported decisions found that court-appointed experts can serve a range of nontestimonial functions during different stages of the litigation.⁹⁹ Although published opinions reveal instances of court-appointed experts presenting testimony at trial,¹⁰⁰ references to nontestimonial functions were more frequent.¹⁰¹

98. Rule 706 is captioned "Court Appointed Experts." The text of the rule, however, refers exclusively to "expert witnesses" or "witness" and is located in the Federal Rules of Evidence. *See Wheeler v. Shoemaker*, 78 F.R.D. 218, 227 n.14 (D.R.I. 1978) ("court-appointed expert's function is solely to furnish impartial testimony and opinion respecting his particular area of expertise to assist the jury's evaluation of the partisan experts").

99. Tom Willging, *Court-Appointed Experts 18-23* (Federal Judicial Center 1986).

100. *See, e.g., Phillips Oil Co. v. OKC Corp.*, 812 F.2d 265 (5th Cir.), *cert. denied*, 484 U.S. 851 (1987) (expert testimony was required to explain accounting interpretation of term in contract); *U.S. Fidelity & Guarantee Co. v. Williams*, 676 F. Supp. 123 (E.D. La. 1987) (in suit brought by marine insurer to recover amounts paid for damage to yacht, an expert was appointed to testify as to the generally accepted meaning of a particular provision in an insurance contract); *Grothusen v. National R.R. Passenger Corp.*, 603 F. Supp. 486, 490 (E.D. Pa. 1984) (testimony on disputed issue of damages in Federal Employer's Liability Act (FELA) case); *Camrex Contractors v. Reliance Marine Applicators*, 579 F. Supp. 1420, 1429 (E.D.N.Y. 1984) (court "could have" appointed expert on commercial practices to clarify contract term); *Eastern Airlines v. McDonnell Douglas Corp.*, 532 F.2d 957, 1000 (5th Cir. 1976) (appeals court suggested that "jury might benefit from the testimony of a neutral expert" in computing lost profits); *Pennwalt Corp. v. Becton, Dickinson & Co.*, 434 F. Supp. 758, 761 n.8 (D.N.J. 1977) (athletic director testified that *jock itch* was familiar term in the 1960s and 1970s).

101. *See Tom Willging, Court-Appointed Experts 18, 20-21* (Federal Judicial Center 1986). Authority to appoint a court-appointed expert in a nontestimonial capacity is found in the court's inherent power to appoint an expert or master and its power under Fed. R. Civ. P. 53 to appoint a special master. *See Reilly v. United States*, 863 F.2d 149, 154 (1st Cir. 1988) (court has inherent power to appoint an expert as an advisor and this power is not subject to Rule 706, unless the expert acts as a witness); *Reed v. Cleveland Bd. of Educ.*, 607 F.2d 737, 746 (6th Cir. 1979) (authority to appoint nontestimonial experts to assist in the remedial phase of a case derives from Fed. R. Civ. P. 53 or the inherent power of the court, not Fed. R. Evid. 706); *see also Hart v. Community Sch. Bd.*, 383 F. Supp. 699, 762-67 (E.D.N.Y. 1974) (appointment of an "expert master" under Fed. R. Civ. P. 53 and Fed. R. Evid. 706).

Our interviews revealed more testimonial use of experts than suggested by published opinions. Roughly half of the cases discussed by judges involved court-appointed experts' testimony presented in court, usually at a trial, less frequently at a pretrial evidentiary hearing. On the other hand, settlement was less frequent than commentary on Rule 706 led us to expect.¹⁰² These findings are consistent with our finding that most judges who use Rule 706 reserve the process for cases with difficult technical issues that are not likely to settle.¹⁰³

Relatively few (approximately one in five) of the testimonial uses of court-appointed experts occurred in jury trials. This supports our earlier finding that enhancement of judicial decision making is the primary concern leading to such appointments.¹⁰⁴

Advising jury of court-appointed status

One of the controversial aspects of Rule 706 is that it explicitly grants the trial judge discretion whether to inform the jury that the expert was appointed by the court.¹⁰⁵ Commentators such as the Association of Trial Lawyers of America have opposed informing the jury of the expert's status. Their rationale is that jury knowledge that the court appointed the expert will undermine the adversarial system and dominate the jury decision-making process.¹⁰⁶ One court concluded that a court-appointed expert "would most certainly create a strong, if not overwhelming, impression of 'impartiality' and 'objectivity' [which] could potentially transform a trial by jury into a trial by witness."¹⁰⁷

Reference to the court's role in appointments of an expert, however, has rarely been challenged in litigation, and there is little case law on the issue.¹⁰⁸ When faced with such a challenge, courts may be concerned that scientific proof will "assume a posture of mystic infallibility in the eyes

102. See discussion at *supra* notes 45–46.

103. See discussion at Chapter 2.

104. See discussion at Chapter 2.

105. Fed. R. Evid. 706(c).

106. See, e.g., Nicholas J. Bua, *Experts—Some Comments Relating to Discovery and Testimony Under New Federal Rules of Evidence*, 21 Trial Law. Guide 1 (1977); Weinstein's Evidence, *supra* note 2, at ¶ 706-26.

107. *Kian v. Mirro Aluminum Co.*, 88 F.R.D. 351, 356 (E.D. Mich. 1980).

108. In one district court case, the plaintiff challenged the disclosure of the court-appointed designation to the jury. The trial court overruled plaintiff's motion to set aside the jury verdict and grant a new trial. The only stated reason was that there was no abuse of discretion because the expert's testimony related to a "disputed issue." *Grothusen v. National R.R. Passenger Corp.*, 603 F. Supp. 486, 490 (E.D. Pa. 1984).

of a jury of laymen.”¹⁰⁹ If party experts can achieve such stature, the court’s imprimatur could transform an expert’s testimony into an impenetrable edict.¹¹⁰ The trial court retains discretion, however, to decline to place a judicial imprimatur on a witness if concerned that the jury will give undue weight to a court’s expert.¹¹¹

Only seven jury trials were identified from the interviews in which the court-appointed expert offered testimony in court.¹¹² In all but one of these cases, the judge or the party calling the witness informed the jury of the expert’s court-appointed status. In the only exception, it appears that neither party was sufficiently advantaged by the report to want to underscore its source. At the other extreme, one judge reported that the advantaged party called the expert “with great flourish,” had the order appointing the expert read to the jury, and asked a series of questions

109. *United States v. Addison*, 498 F.2d 741, 744 (D.C. Cir. 1974). Note that experimental social scientific research does not support the full, dramatic thrust of that argument. See, e.g., Nancy J. Brekke, *Expert Scientific Testimony in Rape Trials* 38–40 (1985) (unpublished Ph.D. dissertation, University of Minnesota) (effects of the presence of an expert for the prosecution on final verdicts are quite small, accounting for approximately 8% of the variance); Elizabeth F. Loftus, *Impact of Expert Psychological Testimony on the Unreliability of Eyewitness Identification*, 65 *J. Applied Psych.* 9 (1980) (inclusion of a summary of expert evidence regarding the pitfalls of eyewitness identification produced statistically significant reduction from 57% to 39% in guilty verdicts; these differences, however, are marginal and do not show domination of the jury by the experts); see also *infra* note 126.

110. See, e.g., *Weinstein’s Evidence*, *supra* note 2, at ¶ 706-26 and sources cited therein.

111. *Weinstein’s Evidence*, *supra* note 2, at ¶ 706-27. See also Tahirih V. Lee, *Court-Appointed Experts and Judicial Reluctance: A Proposal to Amend Rule 706 of the Federal Rules of Evidence*, 6 *Yale L. & Pol’y Rev.* 480, 500 (1988) (suggesting that Rule 706 be amended to include a duty of the court to caution the jury against excessive reliance on the testimony of the expert appointed by the court).

112. Aside from the presence of a technical issue of fact, the jury cases had few similarities. Two were product liability actions, one dealing with claims of asbestos-related disease and the other with a claim of enhanced risk of cancer from exposure to a product. Two of the cases were criminal proceedings, both using experts to respond to a defendant’s asserted need. One of the criminal cases involved use of a handwriting expert; the other involved use of a psychiatrist to test the competence of a prosecution witness. Two of the other civil cases included use of financial experts, one in a shareholder action, the other in a breach of contract case. The final case related to use of a polygraph expert to evaluate evidence that each side planned to use.

emphasizing neutrality, the source of the appointment, and the method of payment.

We found no consensus about whether courts should permit or prohibit the identification of an expert as appointed by the court. One judge declared that the jury "should know" because the fact that "one of the experts was not paid by a party" is "relevant to the assessment of credibility." Another found a benefit from disclosure in that "the knowledge that such a disclosure will be made is effective in bringing about settlement." One judge would vary the disclosure with the type of case, permitting disclosure of court sponsorship of a technical expert in a patent case, and not permitting it of an orthopedic expert in a personal injury case.

If the court-appointed status of the expert is not to be divulged, how will the testimony of the witness be communicated to the jury? If neither party chooses to call the expert, will the testimony be presented? If so, who will call the expert and conduct direct examination? Rule 706 does not address these issues directly; it requires only that the court-appointed expert "be subject to cross-examination by each party, including a party calling him as a witness."¹¹³ This implies that there will be occasions when a party calls the expert and conducts direct examination as well as cross-examination.

In two of the cases in our study, the judge disclosed the appointed status of the expert and issued a cautionary instruction that the fact of court appointment should not result in giving greater weight to that expert than to the parties' experts. One of the judges who reported using the cautionary instruction said, "[I am] not satisfied with the current procedure because I don't think the jury should be influenced by the act of the judge in appointing the expert."

Two judges who had used court-appointed experts on multiple occasions indicated that they would use in limine rulings to prevent the lawyers from calling attention to the court-appointed status of the witness. One recommended the following procedure to disguise the status: "I would allow the favored party to call the expert and allow the other party to cross-examine. I would instruct the lawyers not to mention the fact of appointment."

Our impression is that none of the judges doubt that the status of the expert is relevant to credibility. The question is whether a jury can weigh credibility without being unduly impressed by the neutral posture and apparent judicial imprimatur of the court's expert. As we discuss below, judges and juries both tended to reach conclusions that were consistent

113. Fed. R. Evid. 706(a).

with the advice of a court-appointed expert. Given that finding, concern about undue influence seems reasonable.

Sequencing the testimony of the court-appointed expert

How should the court-appointed expert's testimony be sequenced in relation to the testimony of the parties' witnesses? The timing and sequence of the testimony may have serious effects on the jury's recollection of the evidence and may distort the normal primacy and recency benefits that accompany the opening and closing presentations during the trial.¹¹⁴ A presentation by the expert in either the beginning or the end of the trial can be expected to have greater influence than a presentation during the middle of the trial (e.g., after the close of the plaintiff's case and before the defendant presents direct testimony). The logic of the case, however, might suggest a different sequence—for example, after the testimony of the experts for both parties.¹¹⁵ The trial court has discretion to control the order of presentation of the evidence.¹¹⁶ With little additional guidance from the rules or case law, courts have explored this question on a case-by-case basis.

The judge in one series of cases called an expert and asked three questions to elicit the expert's opinion.¹¹⁷ The party most disadvantaged by the expert's report was then allowed to cross-examine. In the other six cases in which a court expert testified at a jury trial, the judge more or less left the issue of presenting the expert to the parties. Indeed, in none of the six cases did the judge ask any questions of the expert. The absence of questions from the judge contrasted starkly with the practices of judges in bench trials: in almost all of the bench trials, the judge reported asking questions of the expert.

114. See John W. Thibault & Laurens Walker, *Procedural Justice: A Psychological Analysis* 54–66 (1975). See also Irwin A. Horowitz & Tom Willging, *The Psychology of Law* 110–11 (1984).

115. In *Leesona Corp. v. Varta Batteries, Inc.*, 522 F. Supp. 1304, 1311 n.17 (S.D.N.Y. 1981), the court, in a bench trial of a patent infringement action, expressly instructed the court-appointed expert to attend the trial during the testimony of witnesses for the parties and to testify after completion of the parties' cases.

116. Fed. R. Evid. 611(a).

117. The questions were "What did you do to prepare for this appearance?"; "Do you have an opinion as to whether or not plaintiff has an asbestos-related disease?"; and "What is that opinion?" See generally Carl B. Rubin & Laura Ringenbach, *The Use of Court Experts in Asbestos Litigation*, 137 F.R.D. 35 (1991). For another instance of experts appointed to aid the court in asbestos litigation, see *In re New York City Asbestos Litigation*, 1992 U.S. Dist. LEXIS 3721 (S.D.N.Y. 1992).

In two of the six cases described above, the judge reported that the party favored by the court-expert's report called the expert and conducted a direct examination. In all cases, the disadvantaged party cross-examined. In cases in which the judge directly called the expert, both parties had an opportunity to cross-examine. Although we didn't ask specifically, in no instance did we receive any indication that the cross-examination was abusive or even rigorous.¹¹⁸

Effect of the testimony of the appointed expert

Our interviews revealed that juries and judges alike tend to decide cases consistent with the advice and testimony of court-appointed experts. We asked, "Was the disputed issue resolved in a manner consistent with the advice or testimony of the 706 expert?" Of fifty-eight responses, only two indicated that the result was not consistent with the guidance given by the expert. Both of those cases involved bench trials in which the judge pursued a legal analysis that was independent of the technical issues. In one, the judge decided about an appropriate remedy but found it useful to have the expert's analysis of the strengths and weaknesses of an alternative proposal. In the other, the judge ruled that the plaintiff had not met its legal burden of proof.¹¹⁹ Two of the fifty-eight judges indicated that the expert did not give any advice, but simply had explained the technical issues and the testimony of the parties' experts. Three judges indicated that the information provided by the expert was used in conjunction with other information to shape a resolution of the issue.

In the remaining fifty-one cases, including seven jury trials, the outcome was consistent with the expert's advice or testimony.¹²⁰ Note that we asked only if the outcome was consistent with the advice of the appointed expert. Twenty-one of the judges who indicated outcomes consistent with the appointed experts' testimony also volunteered the information that the experts' opinions were not the exclusive, or even the most important, factor in determining the outcome of their cases. Seven of the twenty-one cases settled following the submission of the expert's

118. We asked "Was the expert cross-examined?" Fifteen judges (of the twenty judges reporting the activities of experts who had offered testimony at a trial or hearing) indicated explicitly that there had been cross-examination by one or both parties. None volunteered any suggestion that the expert was the least bit ruffled by the procedure.

119. In the latter case, the plaintiff argued on appeal that the court should have followed the expert's analysis. As noted *supra* at note 77, the court of appeals carefully distinguished between the technical and the legal issues.

120. For responses to a question about whether juries were overwhelmed by the testimony of a court-appointed expert, see discussion *infra* at notes 124-26.

report or testimony, and the judges believed that the resolution was consistent with the report of the appointed expert. In the remaining fourteen cases the judge indicated that the report or testimony of the appointed expert provided a context for understanding and evaluating other evidence presented by the parties.

In eleven of those fourteen cases the judge indicated that he or she followed the advice of the appointed expert, either generally or regarding one of several issues. For example, one appointed expert set forth a general plan for restructuring a business following a declaration of bankruptcy. The parties made additions and alterations to this plan which the judge then adopted. One appointed expert outlined the historical and legal backgrounds of the prohibitions on sex discrimination in athletics, which were then used in assessing the testimony of the parties' experts. In another case, the judge used an expert on institutional conditions while maintaining that the expert was "neutral and recited the conditions" without giving "a final opinion statement." At the same time, the expert gave the judge "ideas about solutions" that benefited all parties.

In three of the fourteen cases the judge had questioned one party's expert testimony, but the appointed expert confirmed that testimony. While the resolutions of the cases were consistent with the testimony of appointed experts, it is clear that the testimony of each appointed expert was one of several sources of information influential in resolving the case. In one of the three cases, the judge reported that the Rule 706 expert confirmed the testimony offered by the plaintiff's expert, removing the judge's doubts about the plaintiff's evidence and paving the way for a ruling that the plaintiff had met his or her burden of proof. In a sentencing matter, the judge "was able to use the expert's testimony to craft modifications of the sentence and recommendations for conditions of confinement." In another case, the expert confirmed the judge's impression about the abnormality of a defendant's record-keeping practices on a critical point.

In discussing their appointment of an expert, judges often expressed enormous personal and professional respect for the expert.¹²¹ In at least two cases, the expert was appointed primarily to serve as a technical advisor to the judge and not as a witness. In such cases the judge's

121. In one case the judge went so far as to say the expert was "probably the most wonderful man I ever met. . . . He was honest, self-effacing, dedicated, respected, and objective."

rapport with the expert implied a faith in the expert's credibility that could easily have led the judge to follow the advice of the expert.¹²²

One judge in a bench trial reported that he gave more credence to the 706 expert and to the parties' experts whom the 706 expert agreed with than to the opposing expert. Another judge reported that the appointed expert's testimony was "very influential" in a bench trial. Another judge "put more credence in the 706 expert because he was neutral." In yet another case, the judge reported mixed reliance on a 706 expert: "In some areas, his testimony dominated; in others, the parties' experts had superior knowledge. Some [of the parties' experts] were national experts who were quite knowledgeable." In only one instance did a judge indicate disagreement with the court's expert.

Our final question for this chapter was (if a jury trial) "Did the testimony of the court-appointed expert appear to overwhelm the expert testimony offered by the parties?" In a dozen jury cases,¹²³ it appears that the testimony of court-appointed experts dominated the proceedings. In general, the testimony of the court's expert affirmed the testimony of one of the parties' experts, thereby overcoming contrary evidence.

The most dramatic illustration of dominance by a court expert occurred in a case in which a large number of workers claimed damages due to working conditions. At the behest of the court, a physician examined all of the workers and reported findings for each plaintiff. The physician's court-appointed status was disclosed to the jury, and the judge reported that "the juries discounted the experts for each side." In fact, in each individual case, the jury followed the findings of the court-appointed expert, finding sometimes for the plaintiff and sometimes for the defendant.

In a series of asbestos cases, a judge indicated that the testimony of the expert must have overwhelmed the testimony of the opposing experts. Each of four jury verdicts agreed with the court expert that the plaintiff had not suffered an asbestos-related impairment.¹²⁴ In another case in-

122. We did not systematically ask judges in bench trials to assess the weight given to experts' testimony. We did, however, elicit some responses on this point in discussing the relationship between experts' testimony and the outcome of the litigation.

123. In addition to the seven cases elicited in our discussions with judges who had appointed an expert a single time, five additional cases were uncovered when we asked judges who were multiple users if they had ever presided at a jury trial at which a court-appointed expert testified.

124. In a subsequent publication this judge has reported that the jury agreed with the court-appointed expert concerning the presence or absence of asbestos-related disease in thirteen of sixteen cases. Carl B. Rubin & Laura Ringenbach, A

volved a question of sanity, the judge was "sure the testimony of the court-appointed expert was decisive for the jury." In another jury trial, the judge found the appointed expert to be a "brilliant" person who "overshadowed every other expert" and "was recognized as an authority by the experts of both parties." In one jury case, the court's expert was the only expert. In yet another case, the judge said that the jury "agreed with" the 706 expert, but the judge found the word "overwhelm" too strong to describe the jury reaction. In another case the judge said the expert's testimony "was the most credible and was therefore given more weight."

In three of the twelve jury cases judges did not find testimony of the court-appointed experts to dominate the jury's decision. In two, judges said that they were unsure of the influence of the court's expert on the jury. Finally, in one case the judge recalled that the jury "awarded an amount that reflected a compromise between the amount supported by the 706 expert and the amount supported by the expert of one of the parties."

We are wary of overstating the strength of these findings in light of the inability of social psychologists to demonstrate greater deference to appointed experts by jurors in controlled laboratory settings.¹²⁵ The Advisory Committee notes accompanying Rule 706 warn that "court-appointed experts acquire an aura of infallibility to which they are not entitled."¹²⁶ Our findings of consistency between appointed experts' testimony and the resolution of disputed issues seem to justify this concern.

When viewed in the light of the circumstances leading to an appointment, perhaps it should come as no surprise that the outcome of a case is greatly influenced by the testimony of an appointed expert. Since the absence of an impartial factual basis to decide the case was a prerequisite to the appointment, it follows that the testimony of the appointed expert is likely to be influential. The primary reasons for appointment of an expert were either a failure of the parties to offer credible expert testimony or an actual or anticipated conflict in the testimony of the parties' experts that defied resolution through traditional means. Regarding the failure of advocacy cases, we reported (in Chapter 2) that in eighteen of the thirty-six

Role for the Court's Expert in Asbestos Litigation, *The Use of Court Experts in Asbestos Litigation*, 137 F.R.D. 35, 41 (1991). *See also* discussion *supra* at note 117.

125. *See, e.g.*, Nancy J. Brekke et al., *Of Juries and Court-Appointed Experts: The Impact of Nonadversarial Versus Adversarial Expert Testimony*, 15 *Law & Hum. Behav.* 451 (1991) (jurors did not accord more weight to nonadversarial testimony presented by an expert appointed by the court when compared with adversarial testimony presented by the party).

126. Fed. R. Evid. 706 advisory committee's note.

cases involving judges who had used Rule 706 only once, the judges indicated that there was a failure by one or both parties to present credible expert testimony. In many of these cases there was no credible evidence at all on the technical issue. Given a void of evidence on a critical issue, the court-appointed expert's testimony would necessarily be influential.

Similarly, in cases with an unresolvable conflict among the parties' experts, the equipoise in the evidence prior to appointment renders the court-appointed expert likely to tip the scale to one side or another. Any other result would raise significant questions about whether there had been a need for an outside expert. These reasons tend to explain and qualify our findings. Nevertheless, the central finding is clear: judges who appointed an expert indicated that the final outcome on the disputed issue was almost always consistent with the testimony of the appointed expert.

Summary

In summary, the concerns of judges and commentators that court-appointed experts will exert a strong influence on the outcome of litigation seem to be well founded. Whether such influence is appropriate is a different question. In almost all cases, the jury was aware of the expert's court-appointed status and seemed influenced by the expert's apparent neutrality. Some judges think that it is important for the jury to know the status as an aid in assessing credibility. Some judges who presided over jury trials, however, expressed misgivings about permitting revelation of court-appointed status because it seemed to have led to automatic reliance on the expert by the jury. Potential controls, such as imposing in limine restrictions on lawyers and camouflaging the source of a witness, remain untested.

Judges were, of course, always aware of the experts' status. In their instructions to experts and in the course of work with them, judges frequently showed a conscious effort to maintain control of the legal and policy analysis and decision making, while limiting technical information and advice to a subsidiary, instrumental role. Nevertheless, our interviews reveal a high degree of consistency between the outcome of litigation and the testimony and advice of court-appointed experts.

Chapter 5

Compensation of Court-Appointed Experts

Payment of court-appointed experts presents an awkward problem for judges. Although judges appoint the experts, typically judges must turn to the parties for compensation. Furthermore, because an expert may serve long before the case is resolved, a means must be found to provide prompt payment while retaining the option of reallocating the expenses among the parties based on the resolution of the issues. Parties may resist compensating experts they did not retain and who offer testimony that is damaging to their interests. If the parties balk at payment the judge must either enforce payment by means of a formal order and a hearing, thereby disrupting the litigation and increasing the level of acrimony between the parties, or postpone payment, thereby leaving the expert uncompensated for an indefinite period.

Interviews with judges suggest that such practical problems in providing compensation can thwart the appointment of an expert. Judges expressed concerns regarding payment when describing how the experts were compensated¹²⁷ and at a number of other points in the interviews. When asked why more judges do not use court-appointed experts, many judges focused on the difficulties in providing compensation.¹²⁸ When asked what changes in the rule would make court-appointed experts more useful, the most common suggestion from judges was for clarification of the means of compensating the expert.¹²⁹ While appointment of an expert poses many practical problems, providing a mechanism ensuring the prompt compensation for appointed experts appears to be one of the more serious ones.

Rule 706, supplemented by statutory authority and case law, grants judges broad discretion in allocating the costs of appointed experts among the parties but allows little opportunity to turn elsewhere for compensation. The following sections address four different circumstances that affect the manner of compensation: special instances of land condemnation actions and criminal cases in which the rule permits the

127. We asked the judges who had appointed experts, "How was the amount of compensation determined? Who paid?"

128. See *supra* note 37.

129. This suggestion was mentioned by ten of the nineteen judges who suggested changes in the rule. See also Weinstein's Evidence, *supra* note 2, at ¶¶ 706-27 to -29.

expert to be compensated from public funds; matters involving general civil litigation (in which the court must rely on the parties for compensation); general civil litigation when one of the defendants is indigent; and occasions when the court wishes to employ a technical advisor as opposed to a testifying expert.

Statutory Basis for Compensation from Public Funds

In two circumstances—land condemnation cases and criminal cases—Rule 706 and related statutes authorize payment of the appointed expert from public funds. In land condemnation cases, all costs, including fees for an appointed expert to testify regarding compensation for the taking of property, are assessed against the government, not the property owner.¹³⁰ In the few instances we encountered in which an expert was appointed to assist in a condemnation proceeding, the fee was paid by the Department of Justice with little difficulty.

Obtaining payment for experts in criminal cases follows a similar process. Again, the rule and related statutes¹³¹ permit payment of the expert's fees from public funds. The Criminal Justice Act authorizes payment of experts' expenses when such assistance is needed for effective representation of indigent individuals in federal criminal proceedings.¹³² In criminal cases in which the United States is a party, the Comptroller General has ruled that the source of payment is to be the Department of

130. Fed. R. Evid. 706(b); Fed. R. Civ. P. 71A(l). According to the advisory committee notes accompanying Rule 706, "The special provision for Fifth Amendment Compensation cases is designed to guard against reducing constitutionally guaranteed just compensation by requiring the recipient to pay costs." It is not enough to merely have a case involving a taking under the Fifth Amendment wherein an expert is used in some capacity. In order for the costs of the expert to be covered by government funds, the expert must have been appointed in direct connection to the issue of the taking. See, e.g., *Sullivan v. Kenton County, KY*, 793 F.2d 1293 (6th Cir. 1986) (text in Westlaw), where the court disallowed costs for an expert because he had been appointed to resolve a boundary dispute between two private parties, not to help resolve the Fifth Amendment issue involved in the case.

131. See, e.g., Fed. R. Evid. 706(b); 18 U.S.C. § 3006A(e) (1988).

132. 18 U.S.C. § 3006A(e) (1988). In fiscal year 1987, \$1,421,332 was spent on psychiatrists and other experts under the provisions of the Criminal Justice Act. Memorandum to Chair and Members of the Judicial Conference Committee on Defender Services, Summary Report on Appointments and Payments Under the Criminal Justice Act for Fiscal Year 1988 (1988). See generally John F. Decker, *Expert Services in the Defense of Criminal Cases: The Constitutional and Statutory Rights of Indigents*, 51 U. Cin. L. Rev. 574 (1982).

Justice, not the Administrative Office of the U.S. Courts.¹³³ Four judges revealed that they had appointed experts to aid in assessing the physical or mental condition of a defendant; three of the judges indicated no difficulty in obtaining payment, while one indicated some initial reluctance by the Department of Justice followed by prompt payment.

Payment of Fees by Parties

In the most common litigation context, the court appoints an expert with the expectation that the expert will offer testimony at a trial or hearing or produce a pretrial report that will facilitate settlement. Except for criminal and land condemnation cases, under Rule 706(b) "the compensation . . . shall be paid by the parties in such proportion and at such time as the court directs, and thereafter charged in like manner as other costs."¹³⁴ The flexibility of the rule permits the court to rely on the parties to compensate the expert when service is rendered rather than waiting until the conclusion of the litigation. The court may order the advance payment of a reasonable fee¹³⁵ for a court-appointed expert and defer the final de-

133. *In re* Payment of Court-Appointed Expert Witness, 59 Comp. Gen. 313 (1980) (expert appraisal of property to be forfeited in a criminal case; same rule applies to land condemnation proceedings). In the event of a dispute over payment, the district court may order the Department of Justice to make immediate payment pending resolution of the dispute. *Id.* at 314 (court issued order for immediate payment after the Administrative Office and the Justice Department disagreed about payment).

134. Fed. R. Evid. 706(b). By statute, payments to court-appointed experts are taxable as costs to the losing party. 28 U.S.C. § 1920(6) (1988). *Cf.* *Miller v. Cudahy*, 656 F. Supp. 316 (D. Kan. 1987), *aff'd in part and rev'd in part*, 858 F.2d 1449 (10th Cir. 1988), *cert. denied*, 492 U.S. 926 (1989) (costs of what the district court had incorrectly characterized as a court-appointed expert could not be taxed, beyond the statutory allowance, to the party ordered by the court to use the expert); *Hart v. Community Sch. Bd.*, 383 F. Supp. 699, 767 (E.D.N.Y. 1974) (fee of special master appointed pursuant to Rule 53, Fed. R. Civ. P., to assist with post-trial enforcement of a desegregation decree can be assessed against the defendant when the appointment is made).

135. Rule 706(b) states that court-appointed experts "are entitled to reasonable compensation in whatever sum the court may allow." This language puts to rest the issue of whether a court-appointed expert witness is relegated to the relatively small per diem fees allowed for the parties' witnesses, expert or not. 28 U.S.C. § 1821 (1988). *See also* *Crawford Fitting Co. v. J.T. Gibbons, Inc.*, 482 U.S. 437 (1987), where the court, in dictum, stated that the statutory fee limit for the parties' witnesses does not apply to compensation for court-appointed expert witnesses.

cision on costs assessment until the outcome of the litigation is known.¹³⁶ Such an order is intended to limit the possibility of a deferred payment's biasing an expert's testimony in favor of (or against) the party with the greatest ability to pay.¹³⁷ The court may allocate the fees among the parties as it finds appropriate both as an interim measure and in the final award. One court has held that the "plain language of Rule 706(b) . . . permits a district court to order one party or both to advance fees and expenses for experts that it appoints."¹³⁸ In brief, the court has discretion to order a single party to pre-pay the full cost of the appointment.¹³⁹

136. Rule 706 provides that "compensation shall be . . . charged in like manner as other costs." *See also* *United States v. Articles . . . Provimi*, 425 F. Supp. 514 (D.N.J. 1977) (assessing one-half of the costs of the expert's services, "with further decision on the expert's costs to abide the event"). *Cf. Baker Indus. v. Cerberus, Ltd.*, 570 F. Supp. 1237, 1248 (D.N.J. 1983) (85% of costs were assessed against defendant and 15% against plaintiff who prevailed on almost all issues).

137. Disciplinary Rule 7-109(C) of the American Bar Association's Model Code of Professional Responsibility prohibits a contingent fee for expert witnesses, presumably on the grounds that it may influence the witness to favor the party best able to pay. The rule has been upheld against a challenge that it unconstitutionally limited access to the courts. *Person v. New York City Bar Ass'n*, 554 F.2d 534 (2d Cir.), *cert. denied*, 434 U.S. 924 (1977). Rule 3.4(b), comment 3 of the ABA Model Rules of Professional Conduct continues the same prohibition by interpreting such a fee to be an "inducement" to testify falsely. At least one jurisdiction has decided to permit contingent fees for expert witnesses as long as the fee is not a percentage of the recovery. *See also* District of Columbia Court of Appeals, Rules of Professional Conduct, Rule 3.4, cmt. 8 (1990) ("A fee for the service of a witness who will be proffered as an expert may be made contingent on the outcome of the litigation; provided, however, that the fee, while conditioned on recovery, shall not be a percentage of the recovery.").

Note that an appointment in a case with an indigent party in which the expert is to be compensated by the losing party, in effect, may make the expert's fee contingent on the success of the indigent party. The Manual for Complex Litigation suggests that judges should be wary of making such appointments under Rule 706. *Manual for Complex Litigation*, Second § 21.51 n.162 (1985) ("The judge should be wary of making an appointment under Fed. R. Evid. 706 if, in effect, the expert will be on a contingent fee basis."). *See also* Note, *Contingent Fees for Expert Witnesses in Civil Litigation*, 86 Yale L.J. 1680 (1977).

138. *United States Marshals Serv. v. Means*, 741 F.2d 1053, 1058 (8th Cir. 1984) (en banc); *see also Webster v. Sowders*, 846 F.2d 1032, 1039 (6th Cir. 1988) (allocation of Rule 706 costs, at least temporarily, to the party against whom a preliminary injunction is granted is permitted when the parties obtaining the relief were impecunious). *Cf. Cagle v. Cox*, 87 F.R.D. 467, 471 (E.D. Va. 1980) (advance authorization for payment for experts is not permitted, but taxation of plaintiffs' expert witness fees as costs is allowed to improve access of indigents to

At the conclusion of the litigation, Rule 706 also provides that the expert's "compensation . . . shall be charged in like manner as costs."¹⁴⁰ This means that "costs shall be allowed as of course to the prevailing party unless the court otherwise directs."¹⁴¹ Courts sometimes have apportioned fees among the parties, in some cases simply splitting the costs equally¹⁴² and in other cases basing the apportionment on the outcome of the litigation.¹⁴³ Of course, if the parties settle short of a resolution of the merits of the dispute, allocation of the expert's fees may be part of such a settlement agreement.

Most judges require the parties to split the expert's fee, with the party prevailing at trial being reimbursed for its portion. Often the parties arrive at this arrangement without judicial involvement. In other instances, especially those in which the parties are reluctant to endorse the court's appointment of an expert, the judge may issue an order that requires the parties to pay a fixed amount to cover the expert's fees. In several cases in which an appointed expert served for a lengthy period, the court required the parties to make periodic payments into an account from which the court then compensated the expert. Judicial participation in the payment process varied greatly. Some judges permitted the expert to bill the parties directly; other judges had the expert submit the bill directly to the judge with copies to the parties and required the parties to pay a proportional amount unless they objected to the bill.

Obtaining payment for the expert from the parties proved to be troublesome in several instances. As one judge noted, "It [is] a bitter pill for the disadvantaged party to have to pay for harmful testimony."¹⁴⁴

court); *Maldonado v. Parasole*, 66 F.R.D. 388, 390 (E.D.N.Y. 1975) (indigency is a proper consideration in taxation of costs pursuant to Fed. R. Civ. P. 54(d)).

139. *McKinney v. Anderson*, 924 F.2d 1500 (9th Cir. 1991).

140. Fed. R. Evid. 706(b).

141. Fed. R. Civ. P. 54(d).

142. *See United States v. Michigan*, 680 F. Supp. 928, 956-57 (W.D. Mich. 1987); *Unique Concepts Inc. v. Brown*, 659 F. Supp. 1008, 1011 (S.D.N.Y. 1987).

143. *See, e.g., Matter of Fleshman*, 82 B.R. at 996 (Bankr. W.D. Mo. 1987) (court stated that parties would have to pay for an appraiser's services "according to a ratio determined by comparing the final outcome to their initial contentions"); *cf. Baker Indus.*, 570 F. Supp. at 1248 (D.N.J. 1983) (assessment of 85% of special master costs against defendant and 15% against plaintiff who prevailed on almost all issues was approved).

144. Several judges mentioned that they suspected that the prospect of the losing party reimbursing the winning party for the additional amount of the expert's fee encouraged settlement, but this topic was not developed in the interviews.

Occasionally one of the parties would simply refuse to pay. Then the judge generally held a hearing and, when necessary, demanded that the payment be made. In several instances the court had to impose injunctive relief as a means of ensuring that the payment was made. In discussing these instances the judges repeatedly indicated their great uneasiness at the prospect of incurring the services of an expert and then being unable to pay for those services in a timely manner. Concerns about securing payment moved several judges to employ a court-appointed expert only with the consent of the parties.

Compensation of Appointed Experts When One Party Is Indigent

As a practical matter, the indigent status of one or more of the parties restricts the ability of a court to allocate the expense of the expert among the parties. The court has the authority to order the nonindigent party to advance the entire cost of the expert.¹⁴⁵ However, the judges indicated a great reluctance to employ such experts when the expense cannot be shared. We asked a number of the judges, including those who had not appointed experts, what they would do if one of the parties was indigent. Often they responded that they would proceed with the evidence at hand and decide the case to the best of their abilities, since forcing one party to bear the full expense of the court-appointed expert was a step they were unwilling to take.

We found six instances in which a judge appointed an expert when one or more of the parties were indigent. In each case, the indigent status of the party limited the extent to which the party could present expert testimony, limited the effectiveness of the adversarial examination of the opponent's contentions, and raised concerns that the judge sought to address by appointment of an expert. Three of these cases involved prisoners proceeding pro se and challenging the conditions of their incarceration. In each circumstance there was reason to believe that there was merit in the prisoner's complaint,¹⁴⁶ and the court appointed an expert

145. *United States Marshals Serv. v. Means*, 741 F.2d 1053, 1058 (8th Cir. 1984) (en banc); *McKinney v. Anderson*, 924 F.2d 1500 (9th Cir. 1991) (district court has discretion to appoint an expert witness in a case involving an indigent litigant and require the opposing party to compensate the witness).

146. In one case an inmate charged that he received inadequate care for a broken bone treated by a prison doctor. The state offered the doctor's testimony and the plaintiff offered no expert testimony. The court appointed an expert who confirmed that the medical care the prisoner received did not meet the standards of the profession. In a second case, prisoners claimed that inadequate facility staffing led to unsafe conditions. The court-appointed expert testified on the

with the expectation that the expert would be compensated by the state. Experts were appointed in two other cases, but in both cases alternative authority for appointing an expert and imposing costs on the defendants were utilized.¹⁴⁷

The most difficult circumstance identified concerned the appointment of an expert in a suit by an indigent family contending that exposure to toxic chemicals caused a number of physical injuries as well as emotional harm. The indigent status of the plaintiffs limited the amount of expert testimony they offered. The judge doubted the integrity of the defendants' expert testimony and appointed an expert to testify about whether the chemicals had carcinogenic properties. The judge indicated that the presence of children as plaintiffs in the case caused him to be especially reluctant to decide the case without additional expert testimony, since the children as well as the parents would be barred by an adverse judgment from raising future claims. In this case, much of the difficulty was avoided when the defendant agreed to pay the expense of the court-appointed expert.

conditions of incarceration and compared them to conditions in similar institutions. Although the judge made an effort to allocate the expense fairly among the parties, he expressed considerable doubt that the prisoners would pay and appeared willing to impose the entire expense on the state if this should be necessary. In a third case, an expert was appointed to aid the court in deciding a motion for contempt against a state based on violation of an earlier order to reduce prison overcrowding. Again, the expert testified on the conditions of incarceration. In each of these cases the fact that the defendant was the state and that some preliminary investigation revealed the complaint to be of merit appeared to weigh heavily in the court's decision to appoint the expert and impose the costs on the defendant. A preliminary inquiry would seem to be appropriate to avoid the concerns expressed in the Manual for Complex Litigation, *supra* note 137.

147. In one case, an indigent pro se party resisted attending a deposition, claiming an inability to participate due to a medical condition and presenting a letter from a personal physician. The deposing party objected and the court, at the deposing party's request, appointed an independent medical expert and assessed costs against the deposing party. The expert confirmed the validity of the excuse. Despite the fact that the appointment was made at the suggestion of the deposing party, that party then resisted payment for some time. In a second instance an indigent criminal defendant charged with fraud claimed that she did not sign certain checks that were introduced as evidence. Since the federal prosecutor did not plan to present expert testimony on this topic, the court appointed an expert in handwriting analysis and assessed the expense to the Department of Justice. This expense was then paid under the statutory authority to provide expert assistance for indigent defendants in a criminal proceeding trial under the Criminal Justice Act. 18 U.S.C. § 3006A(e) (1988).

These few instances suggest the difficulties that may be encountered when added expert assistance is required and one or more of the parties are indigent. Although Rule 706 supports the imposition of the expenses on the nonindigent party,¹⁴⁸ judges seem willing to impose one-sided expenses only when the indigent party's claim shows some merit, or when the nonindigent party has agreed to assume the cost of the expert. The difficulties in providing payment in such circumstances suggest that the few instances recounted above may be far overshadowed by instances in which no appointment was made because of an inability to find a means of fairly compensating an appointed expert.¹⁴⁹

Compensation of Technical Advisors

Finally, it also proves difficult to compensate an expert appointed as a "technical advisor" who may confer in private with the judge and who is not expected to offer testimony. Through our interviews we identified several instances in which a Rule 706 expert advised the court on the interpretation of evidence submitted by the parties rather than present evidence as a witness. Payment in these circumstances was simplified by the fact that the parties apparently consented to the appointment and agreed to share the cost of the expert. However, in a limited number of circumstances the Administrative Office of the U.S. Courts has been willing to assume the costs of such services. The Administrative Office has denied requests for such services where appointment of such an expert would be appropriate under Rule 706 of the Federal Rules of Evidence or under Rule 53 of the Federal Rules of Civil Procedure. Securing compensation for a court-appointed expert remains an impediment to the full utilization of Rule 706.

In *Reilly v. United States*,¹⁵⁰ the Court of Appeals for the First Circuit addressed the district court's use of a technical advisor and payment of the technical advisor's fees and expenses by the Administrative Office. Citing statutory authority that permits the judiciary to employ consultants and experts,¹⁵¹ the district judge petitioned the Director of the Administrative Office for permission to appoint and compensate a tech-

148. See *supra* note 136.

149. David Medine, *The Constitutional Right to Expert Assistance for Indigents in Civil Cases*, 41 *Hast. L.J.* 281, 298 (1990) ("court appointment of expert witnesses [under Fed. R. Evid 706] does not provide adequate assistance to indigent civil litigants").

150. 682 F. Supp. 150 (D.R.I.), *aff'd in part*, 863 F.2d 149 (1st Cir. 1988).

151. 5 U.S.C. § 3109 (1988) and 28 U.S.C. § 602(c) (1988).

nical advisor.¹⁵² The judge expressly disavowed appointment under authority of Rule 706 since he wished to employ the expert to advise him in chambers regarding interpretation of evidence presented at trial, and not to present additional evidence or testimony. Permission to appoint the technical expert was granted and the expert was compensated from the funds appropriated to the judiciary. We are aware of only one other instance in which the Administrative Office has agreed to pay the expenses of a technical advisor.¹⁵³ In both of these instances the payment was at the behest of a plaintiff who suffered childhood injuries. In one case, the proceedings were nonadversarial; in the other, the presentation on a highly technical issue was one-sided.¹⁵⁴ It seems that this form of payment is available only in very unusual circumstances in which the expert is to provide technical assistance to the judge rather than to present evidence to the court, and in which the Director of the Administrative Office has approved such an expenditure prior to the appointment.

152. *Reilly*, 682 F. Supp. at 152–55. The court also secured the permission of the Chief Judge of the First Circuit Court of Appeals and the Circuit Council. The court of appeals did not address which of these permissions would be necessary in order to appoint a technical expert. *Reilly*, 863 F.2d at 154 n.2.

153. Letter from L. Ralph Mecham, Director, Administrative Office of the United States Courts, to Gary J. Golkiewicz, Chief Special Master, United States Claims Court (October 10, 1989) (on file with author) (approving a request to hire an economic expert to assist a special master in a case brought under the National Vaccine Injury Compensation Program). No similar authority exists for appointment of a technical advisor to serve the court of appeals. See *E. I. du Pont de Nemours and Co. v. Collins*, 432 U.S. 46, 57 (1977).

154. In the words of the court of appeals, the case “involved esoterica: complex economic theories, convoluted by their nature, fraught with puzzlement in their application.” *Reilly v. United States*, 863 F.2d 149, 157 (1st Cir. 1988).

Chapter 6

Alternatives to Appointment of Experts

As we have seen, court-appointed experts are rarely used, being limited to unusual cases involving the convergence of several special circumstances. Before we offer suggestions for improving the use of court-appointed experts, it is useful to recognize some of the alternative approaches that judges consider, implicitly or explicitly, in deciding whether or not to take the unusual step of appointing an expert. We concluded in Chapter 2 that judges generally appoint experts only if the evidence is unusually dense and technical and is unlikely to be illuminated by the parties either because of a failure of advocacy or a direct conflict between credible experts.¹⁵⁵ The issue for this chapter is "How do judges who have never appointed experts deal with the special circumstances of conflicting or inadequate expert testimony relating to extraordinarily technical issues?"

To address this question, we interviewed by telephone twenty-one judges who, according to our survey, had never appointed an expert under Rule 706.¹⁵⁶ We asked them whether they had faced any of three circumstances that might lead to an appointment, namely (1) a suggestion from a party that an expert be appointed, (2) an awareness prior to trial that the parties' experts would take diametrically opposed positions on a complex technical issue, or (3) failure of one party, due to indigence

155. We also found that judges who appoint experts tend to support the adversarial system and carve out exceptions for court appointments only by obtaining the consent of the parties or by relying on the courts' traditional *parens patriae* to protect the interests of minors or wards of the state. Finally, we found that judges tend to appoint experts only when able to overcome practical problems in locating and compensating an expert.

156. For this portion of the study, we selected from judges who had written substantial comments on the survey form. Generally, we looked for a cross-section of judges whose comments indicated that they had considered appointing an expert as well as judges whose comments indicated principled objections to the concept. While we do not contend that the views expressed by judges who volunteered such comments are representative of all judges who have not appointed experts, we hope that by speaking with those judges we were able to obtain a better understanding of the range of concerns judges experience when confronting circumstances that would suggest the use of a court-appointed expert. We expected judges who volunteered comments on the survey to be more forthcoming in discussing why they chose not to appoint an expert.

or incompetence, to present opposing evidence on a complex technical issue.

The judges confirmed that parties rarely suggest appointment of an expert.¹⁵⁷ Parties may, however, suggest alternatives to court-appointed experts once the judge raises the possibility of an appointment. Similarly, while many judges reported experience with cases involving a failure of advocacy,¹⁵⁸ none would intervene in those situations to appoint an expert.¹⁵⁹

In cases in which judges considered but rejected the appointment of an expert, we were able to gain a glimpse of their approach to managing conflicting expert testimony. Their general comments suggest that these judges, like most of the judges who had appointed experts,¹⁶⁰ struggle to balance the goal of accurate, fair decision making with a system in which control of the presentation of information is generally vested in the adversaries. As one judge summarized the dilemma, "one has to balance the question of going outside the record [as developed by the parties] . . . with the ultimate interest of reaching the right result."

Just as judges who appointed experts typically had at least the parties' acquiescence,¹⁶¹ judges who rejected the idea appeared to give careful consideration to the parties' wishes. One judge remarked that when the issue of appointing an expert was raised, "the parties objected to the interference . . . in the presentation of their cases." Instead, the judge used less intrusive alternatives to aid the jury and minimize confusion. Similarly, when a judge raised the issue of a court-appointed expert in the context of a bench trial, the lawyers were "very reluctant and preferred a tutorial approach" by the parties' experts, and the judge acquiesced.

In addition to the above examples, a number of judges considered and rejected the idea of a court appointment because of an inability to over-

157. This concurs with the finding from our interviews with judges who had appointed experts: judges almost always suggested the appointment. *See* discussion at notes 47 and 48 and related text.

158. In our interviews with judges who had appointed experts, we found that in about one-third of the cases the actual or anticipated failure of the advocates to present evidence on a technical issue was a factor in the judges' decisions to appoint experts. *See* discussion at note 22 and related text.

159. One judge indicated that he would try to appoint a volunteer attorney in pro se cases and depend on the attorney to search for an expert willing to testify without compensation.

160. *See* discussion at note 49 and related text (relating to lack of party opposition to the appointment of an expert and the prevalence of consent).

161. *Id.*

come some of the practical difficulties noted earlier.¹⁶² Some judges encountered vigorous objections, often on the issue of cost, from the lawyers and parties. Other judges found it difficult to identify and secure the cooperation of a neutral expert. In these instances it is likely that an expert would have been appointed if a solution to these practical difficulties could have been found.

Judicial Screening of Experts' Testimony Before Trial

Several judges who had never appointed an expert reported having a standard procedure for addressing problems concerning expert testimony and questioned whether a court-appointed expert is ever needed. One judge has found that "raising the issue [at a Rule 16 conference] has a salutary effect on the lawyers and they either settle the case or tone down the position of their expert." This same judge indicates that, in his relatively small community, he will generally know the experts in a given field. Even if a party's expert is not known, the lawyers know that the judge will "examine the expert closely and try to detect any fraud." In addition, if an expert testifies to an absurd position, the judge sometimes indicates his disbelief to the lawyers and even instructs the jury that they can disregard all of the testimony of the expert if they do not find it credible.¹⁶³

Another judge has a standard pretrial order in patent cases in which she raises the issue of whether a court-appointed expert might be needed. The lead trial counsel are directed to meet at least ten days before a scheduling and planning conference to discuss, among other topics, whether "an impartial expert may be of material assistance in educating the court with respect to the technology involved in the case." If counsel agree, the order directs them to "reach agreement as soon as practicable upon an individual who is willing to serve." The judge has never found it necessary to make such an appointment.

Another judge believes that "court-appointed experts are a corruption of the jury system." He has created an elaborate set of procedures to manage evidence in cases with various levels of complexity. At the first level, he exercises his discretion to apply the *Frye* test¹⁶⁴ and Rule 702 of

162. See *supra* discussion of problems in Chapter 2.

163. For a summary of the authority of a federal judge to comment on the credibility of witnesses, see Fleming James & Geoffrey C. Hazard, *Civil Procedure* 289 (2d ed. 1977) and sources cited therein.

164. See *Frye v. United States*, 293 F.2d 1013, 1014 (D.C. Cir. 1923) (novel scientific principle or discovery must have "gained general acceptance in the particular field in which it belongs" before evidence will be admissible). The *Frye* test has undergone extensive reexamination in recent years and has been rejected,

the Federal Rules of Evidence¹⁶⁵ to assess the admissibility of proposed expert testimony. His standard is that an expert must both demonstrate expertise in a field with a body of knowledge that can be taught and replicated, and must have experience with the application of the principles in a setting that is relevant to the litigation. Thus, he might examine closely, and perhaps screen out, the opinions of either lab technicians, who may have little general knowledge, or theoreticians, who may have little experience in applying their knowledge to the problem at hand. At a final pretrial conference he will probe to see if there is any dispute about the expertise of the proposed experts. If there is, he will plan to have the parties conduct a preliminary examination of the proposed expert outside of the presence of the jury to determine whether the expert meets the *Frye* standards and those of Rule 702.

In a complex case, this judge will encourage the parties to depose each other's experts. If there are no depositions, answers to expert interrogatories must be detailed and comprehensive enough to articulate all the bases for the expert's testimony. If a basis for the expert's testimony is not included, that expert will be precluded from testifying about that source of his or her opinion.¹⁶⁶

In an extremely complex case, this judge has used an effective but costly procedure that, he cautions, should not be used routinely. His pretrial order said, in effect: "As to any fact that a party wants to prove, that party must make that fact the subject of a request for admissions. Only facts that are denied will be subject of trial." The result was to narrow the

modified, and criticized by an increasing number of courts. For an overview of the developments and arguments regarding the *Frye* test, see John D. Borders, Jr., *Fit to be Fryed: Frye v. United States and the Admissibility of Novel Scientific Evidence*, 77 Ky. L.J. 849, 858-75 (1989). The Supreme Court has agreed to review the role of the *Frye* test in relation to the Federal Rules of Evidence. See *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 951 F.2d 1128 (9th Cir. 1991), *cert. granted*, 113 S. Ct. 320 (1992).

165. Fed. R. Evid. 702 calls for a judgment about whether the "scientific, technical or other evidence will assist the trier of fact to understand the evidence or to determine a fact in issue."

166. By limiting the expert's testimony to the content and bases identified and described in the report, a court can put teeth in the directive that an expert's report be complete. In one district, the practice is that an expert's direct testimony is confined by the written report. Indeed, in a bench trial, the report is the only direct evidence permitted; the opposing party begins cross-examination immediately after admission of the expert's written report. One judge from that district indicated that this practice created an incentive to produce thorough reports and a disincentive for the parties to "hide the ball."

focus of the disputes among the experts and “to press the parties to find ways to present the facts clearly to the jury.”

Narrowing of Experts’ Conflicts: Bench Trials

In discussing techniques to cope with divergent expert testimony, judges generally differentiated between bench and jury trials. In this section we will discuss bench trials; in the next, jury trials.

In bench trials, many of the judges who did not use court-appointed experts expressed confidence in their ability to assess the credibility of experts and to decide cases after taking into account conflicting expert evidence. Others identified alternative approaches to obtaining the information necessary for a decision.

Almost all of the judges we interviewed acknowledged that they had presided over bench trials that involved a “battle of the experts” in presenting highly technical evidence.¹⁶⁷ In general, judges hear and evaluate conflicting expert testimony by employing their critical faculties much as they would in less difficult cases. A judge’s typical elaboration of a response described the normal course of decision making without the aid of a court-appointed expert or a technical advisor:

I listen to the experts for both sides and make my decision. I will often decide on the basis of credibility or on the content of the evidence presented. Sometimes the experts have different facts than I do and that the other expert may have. I have to evaluate that and come to a decision.

As with appointing an expert, addressing the problem of conflicting expert testimony begins with a diagnosis of the problem.¹⁶⁸ For example, in a complex contract case, the judge learned of an impending battle of the experts through pretrial conferences with the lawyers. In response, he got into the case more deeply and reasoned with the lawyers, urging them to stipulate as many facts and documents as possible, which they did. He explained:

I made them go through all the expense records and to pinpoint any disagreements. It turned out that most of their disagreement was on liability, not the amount of damages within a given category. My job . . . [became] primarily a de-

167. The exact question was “Have you ever had a case in which you learned before trial that the parties had experts prepared to testify to diametrically opposed, extreme positions in a highly technical subject area (i.e., ‘battle of the experts’)?” Of the sixteen judges who responded to the question, fifteen indicated that they had faced this type of situation.

168. See *supra* notes 41–42 and related text.

termination of liability. [At trial] I also got at the heart of many facts by interrupting and asking questions of witnesses.

Another judge reported that his general practice of holding conferences within ninety days of filing the complaint enables him to learn about expert disputes long before trial. For this reason that judge chooses not to refer pretrial conferences to a magistrate judge.¹⁶⁹

In another case the judge expressed his need for information about the issues in his ruling on a motion for summary judgment, saying simply, "I'm confused. There must be an issue of material fact." In the course of trying to address the issue raised by the judge, the parties and their experts narrowed the issues and were able to settle the case.

Appointment of a special master may be a viable alternative to appointment of an expert.¹⁷⁰ One judge chose this alternative on several occasions "to do work similar to that of a court-appointed expert." In a complex property dispute involving Native American tribes, the special master held hearings, wrote a report, and later testified at trial. In institutional litigation, the judge appointed a special master to examine the factual basis for the state's motion to dissolve an injunction. The special master's evaluation of the institution uncovered clear and continuing violations and the state abandoned the dissolution effort without a hearing. The judge found two major advantages in the use of a special master. First, the master can "conduct hearings and take testimony, leading to a written report to the court." Second, the judge appreciated having

169. On the other hand, routinely presiding at conferences in cases that do not go to trial may consume more time than is saved by the early detection of expert disputes. Qualitative factors, however, such as focusing on the legal issues, preventing fraud, or enhancing the relationship between settlement and the legal merits, may justify any increased investment of judicial resources at the pretrial stages. For a discussion of the decision about judicial intervention in the context of pretrial settlement activity, see D. Marie Provine, *Settlement Strategies for Federal District Judges 8-19* (Federal Judicial Center 1986). For a description of differing models for using magistrate judges, see Carroll Seron, *The Roles of Magistrates: Nine Case Studies* (Federal Judicial Center 1985).

170. Fed. R. Civ. P. 53 details the procedures that govern the appointment and powers of a special master. Rule 53(b) states that "reference to a master shall be the exception and not the rule." For further discussion of applications of Rule 53 in modern litigation contexts, see Wayne D. Brazil, *Special Masters in Complex Cases: Extending the Judiciary or Reshaping Adjudication?*, 53 U. Chi. L. Rev. 394 (1986); Francis A. McGovern, *Toward a Functional Approach for Managing Complex Litigation*, 53 U. Chi. L. Rev. 440 (1986).

"considerable case law defining the role of a special master" in contrast to having "very little [case law] about court-appointed experts."

A number of judges take advantage of the flexibility of a bench trial to ask questions of the experts. One judge deals with the battle of the experts "by asking a lot of questions of the expert. If I'm not satisfied, I ask more." That judge has "rarely seen a case in which the expert evidence ends up being balanced." The judge finds it effective to push the expert's concept to an extreme "to see how far the expert will go." The judge's theory is that "if they have no limits and will stretch their testimony beyond credulity, I use that information to judge credibility." This judge also asks about the expert's compensation. His theory is that "the more extreme the position, the higher the fee."¹⁷¹

Another technique that may help a judge or jury detect a "hired gun" expert is to allow the lawyers, in appropriate cases, to cross-examine experts based on opinions expressed in other cases. One judge reports that such cross-examination is becoming increasingly frequent as transcripts become available in computer-searchable formats. Another judge focuses on experts' assumptions, saying:

Parties' experts are not so bad if you know what they are doing. They generally start with the assumptions of their side of the litigation. Examining their assumptions is usually the key. An average cross-examiner can generally show the limits of the testimony and that the testimony would be different on different assumptions (e.g., economic projections on the assumption of disability versus ability to return to work, for a simple example). By challenging the premises, the lawyers . . . [develop] some basis for deciding which expert to follow.

Similarly, another judge finds that he is generally able to deal with conflicting expert testimony "by reading their reports carefully, rereading, and taking notes about the important points," which "usually serves to clarify the alleged differences." Along the same lines, another judge has found that "differences tend to be a matter of degree, not total disagreement." As an example, that judge referred to a products liability case in which one expert testified that a design change would have improved the product. The other expert testified that the product was safe

171. The combination of a high fee with an extreme position is the key for this judge. The amount of the fee, by itself, does not speak directly to the issue of credibility. A high fee could also reflect the prestige of the expert, the effort expended to conduct original research, or the competing demands for the expert's time.

as designed, without addressing the idea of the design change. This judge has "rarely had the nose-to-nose, head-to-head expert witness combat." Other judges expressed similar assessments of the "battle of the experts."

By calling the parties' attention to their need for special background information, some judges have stimulated the parties to make special efforts to educate the judge. In what the judge described as a "tutorial approach," the parties' experts used the first week of trial to present "the evidence I needed to understand the evidence" in a bench trial that lasted months. In another case the judge learned in a pretrial conference that the issues were technical and that, without any special effort from the judge, "the parties were aware of the need to educate me." During the trial, the parties "conducted experiments in the courtroom to demonstrate their process." When one side tried five times and failed each time, and the other presented a videotaped demonstration of its successful technique, the judge "didn't need an expert to help [him] decide which one worked."

Enhancing Jury Competence

Having identified an impending technical dispute in a jury case, a number of judges reported that they would take special measures to enhance the jury's ability to understand and resolve the technical issues.¹⁷² In a complex case, one judge narrows the focus of the disputes among the experts during pretrial. He reports that "once I learn what the disputed facts are, I begin to look at them like a lawyer/educator." He will "press the parties to find ways to present the facts clearly to the jury." For him, "the issue is 'How can I help the jurors understand?'"

Another judge elaborated on a similar approach. His standard practice in dealing with technical evidence in a jury case is to

- "talk to the lawyers about using graphics, blowups, overheads, and jury notebooks";

172. For a discussion of innovative techniques designed to enhance the competence of jurors, see William W. Schwarzer, *Reforming Jury Trials*, 1990 U. Chi. Legal F. 119; Leonard B. Sand & Steven Alan Reiss, *A Report on Seven Experiments Conducted by District Court Judges in the Second Circuit*, 60 N.Y.U. L. Rev. 423 (1985); Larry Heuer & Steven D. Penrod, *Increasing Jurors' Participation in Trials: A Field Experiment with Jury Notetaking and Question Asking*, 12 Law & Human Behav. 231 (1988); Larry Heuer & Steven D. Penrod, *Instructing Jurors: A Field Experiment with Written and Preliminary Instructions*, 13 Law & Human Behav. 409 (1989).

- “jump in” during expert testimony “if the lawyer and expert begin to use jargon” and ask for an explanation of any technical term;¹⁷³
- encourage the jurors to “write down any questions that they may have during the examination of a witness”—if a question has not been answered by the end of the testimony (which rarely happens), the judge “reads the written question, deals with any evidentiary objections, and presents the question to the witness”;
- use a special verdict procedure and form in a case with multiple issues—the form should be created, if possible, before trial so that the jurors can use it as a guide during trial; and
- “outline the case and the issues for the jury” before trial, giving each juror a copy of a “rough draft of the instructions.”

One judge permits the jury to ask questions, usually submitted in writing and screened by the judge. He has found the questions to have been “good and useful.” This judge started the practice with oral questions from the jury; he now uses written questions. An advantage of written questions is that they allow the judge and the parties to limit questions to legally relevant topics and confine responses to admissible evidence.

An equal number of the judges we interviewed defined their role as *laissez-faire*, permitting the parties to present their cases to the juries and allowing the juries to decide the issues without any special procedures. They said, in effect, “Let the lawyers present their cases,” “Let the experts testify,” and “Let the jury decide.” One said that he simply “instructed the jury to listen to the experts and make a judgment regarding the weight of their testimony.”

How do these judges assess the advantages and disadvantages of their various approaches in comparison to the use of court-appointed experts? Mostly, as expected, they assert the advantages of their alternatives to court-appointed experts and, implicitly or explicitly, the disadvantages of the appointment of experts. One judge, who advocates the judge and jury questioning the expert, says that his system is “less trouble” and that it avoids wasting efforts on cases that might settle. This judge also would “feel a sense of inadequacy about selecting the expert” because “using the parties’ experts to suggest other experts might not lead to someone impartial.” That same judge raises a thought-provoking point: the process of persuading the expert to participate in the case

173. He has found that “lawyers hate it, but jurors tell me that it helps.” He has also found that lawyers now anticipate that he will intervene and they tend to ask the foundation questions themselves.

might tend to make the judge “committed to the expert’s view” and make it “uncomfortable to reject ‘my’ expert’s position.” We have seen that judge and jury almost invariably reach outcomes that are consistent with the advice and testimony of a court-appointed expert.¹⁷⁴ While we cannot definitively test the “commitment” thesis, the results of the cases indicate that such a process is possible and, indeed, plausible. When the relationship is one of technical advisor to a judge, the tendency to follow the analysis of a selected advisor may be stronger than in the case of a court-appointed witness.

Many of the judges cited the primary advantage of their procedure as being the maintenance of the adversary system, by permitting control of the evidence by the parties and by permitting control over decision making by judge and jury. One judge summarized these concerns in noting that his *laissez-faire* set of procedures “maintains the adversary system and helps me avoid becoming an adversary.”

Underscoring the importance of maintaining party control of the presentation of evidence, one judge observed that the adversary system “permits the attorney to control [party] costs and control the presentation of information.” In a case in which the judge “delved deeply” into the issues and narrowed them, he concluded that a “major advantage” of the procedure was the reduction of costs to the litigants. His procedure “used the parties’ own resources as opposed to hiring an outsider.” The judge did not explicitly factor his own time into the equation.

Support for maintaining control over jury decision making was more equivocal. One judge underscored the dilemma that “leaving control of the case in the hands of the advocates” may mean that “the jury may not have the background [and information] to make a reasoned decision.” As we have seen, however, several judges would temper the adversary system by prodding the adversaries to present jargon-free information in a clear and direct format to aid jury decision making. Indeed, an advantage that one judge found in not using a court-appointed expert is that such testimony may confuse the jury when the parties have competent experts. An advocate of jury enhancement devices asserts that such devices “maintain the integrity of the jury system and empower the jury to understand and resolve technical issues.”

Pretrial Procedures as an Alternative to Court-Appointed Experts

The responses of judges who had never appointed an expert demonstrate that a wide range of techniques exists to enable a court to deal with com-

174. See discussion *supra* at notes 123–26.

plex scientific and technical evidence. However, it is misleading to suggest that such techniques will always prove to be an adequate alternative to appointment of an expert. Many of the judges who appointed experts did so after other means of resolving the conflict, including many of the techniques mentioned as alternatives, were found to be inadequate. We asked the one-time users of the 706 process "Did you attempt other means of resolving the conflict before appointing the 706 expert?" The responses were evenly split, with nineteen of thirty-eight responding judges on each side of the question. However, the nature of the responses suggests that alternative methods of dispute resolution are used prior to the appointment of an expert more commonly than these figures indicate.¹⁷⁵

The affirmative responses revealed an assortment of methods (many of which were also cited by judges who had not appointed an expert). It was common for judges to inquire about expert testimony as part of a standard pretrial process. Consistent with our finding that many judges appoint only after it becomes clear that the cases will not settle, seven of the judges reported employing settlement or mediation techniques to resolve the conflicts. Two of the seven cases involved use of an outside mediator; in one of the cases, the mediator became the 706 expert. In addition, three of the judges explored the use of stipulations to narrow the dispute. Two judges urged the parties to agree on a single expert. In sum, twelve of the nineteen affirmative responses involved pressing for a consensual resolution of the conflict.

Four of the judges reported activity directly related to deciding the merits of the dispute, testing the reality and depth of the conflicts of the experts. One judge did so by examining the testimony of the experts at a pretrial hearing to find a basis for decision; another examined the plaintiff's expert to test credibility; another examined affidavits of the experts; and another read the briefs and found the parties unalterably opposed. One judge simply "tried everything, including stipulations," but found that the poor quality of advocacy derailed the usual techniques.

From these responses, we surmise that judges who appoint experts also use their personal pretrial case management systems to respond to

175. Reading between the lines of some of the negative responses led us to believe that some of the judges interpreted our question to ask only about extraordinary means of resolving the conflict. Some judges who said that they did not take other means indicated that they did have pretrial conferences at which they explored the issues regarding conflicting expert testimony and the prospects of settlement with counsel. One of the negative responses involved a case in which the judge spent more than forty days in a bench trial before determining that an outside expert was necessary in order to reach a reasoned decision.

the needs of these cases. Their approaches to these problems in cases where experts were appointed were not unlike the approaches taken by judges who have not appointed experts. These judges considered appointment of an expert only when they discovered an irreconcilable conflict in testimony that was likely to prevent a reasoned decision on the merits and when they determined that the parties were unlikely to resolve the dispute amicably. The difference between judges who had appointed experts and those who had not appears to lie not in the initial procedures employed when a difficult conflict regarding scientific or technical evidence arose, but rather in the extent to which the judges were willing to invoke the extraordinary alternative of appointing an expert when these initial procedures failed to provide a basis for a reasoned solution to the conflict.

Chapter 7

Improving the Use of Court-Appointed Experts

This chapter presents the judges' overall assessments of the service provided by the court-appointed experts and their suggestions for improvements in Rule 706 and related procedures. A pretrial procedure is described that is intended to ease the consideration of scientific and technical evidence. The pretrial procedure is based on early identification of issues likely to require expert testimony, specification of disputed issues of science and technology, and screening of expected testimony of parties' experts. This procedure will diminish the difficulties that arise when a judge determines that appointment of an expert is appropriate.

Satisfaction with Appointed Experts and Suggestions for Improvements

The judges who appointed experts were almost unanimous in expressing their satisfaction with the expert: all but two of the sixty-five judges indicated that they were pleased with the services provided.¹⁷⁶ Whatever difficulties may have arisen as a result of the appointment, the judges indicated that the appointed experts provided a highly valued service.¹⁷⁷

176. The judges were asked, "Were you satisfied with the services provided by the 706 expert? Would you use a 706 expert again in the same circumstances?" (We did not have time to pose these questions to three of the sixty-eight judges interviewed.) The two judges who did not indicate that they were satisfied remain open to appointing an expert in the future. One judge indicated that he had little basis from which to form a judgment regarding the performance of the two experts he appointed; one expert was called on to do little before the case settled, and the other testified before a visiting judge. The other judge that did not express satisfaction with the process indicated some frustration that the interactions with the expert had been constrained by a need to avoid direct communication with the expert outside the presence of the parties. He noted, "I would use an expert again in the same circumstances, but I would do a few things differently. I would not use the expert unless I could discuss matters privately with the expert. He did not educate me on a one-to-one basis and that was what I needed."

177. Our question concerning satisfaction with the process elicited a great many testimonials to the experts who were appointed. For example: "He was outstanding. He was very interested in the intersection of law and medicine and his testimony showed an understanding of the role of an expert and the role of the judge. He studied the statute and knew what would be helpful to me as a judge"; "He gave me a very thoughtful assessment of the position of the two par-

When asked about the need for changes, most judges indicated that they were satisfied with the present form of the rule.¹⁷⁸ Those judges who suggested changes focused on problems that have been discussed earlier, especially problems related to compensation¹⁷⁹ and ex parte communication.¹⁸⁰ In general, the suggestions called for more guidance concerning the exercise of judicial discretion in these areas. These suggestions are reviewed in order of their frequency.

Ten judges repeated their concern over difficulties in compensating the appointed expert and recommended more explicit guidance concerning allocation of costs. The need for guidance is especially great where one of the parties is hard pressed to make an equal contribution. The difficulty of imposing costs on indigent parties caused four judges to suggest that a separate fund be established to permit compensation of experts in such cases.¹⁸¹ The present rule grants the judge authority to allocate compensation expenses under almost any plan that he or she regards as appropriate.¹⁸² Some clarification concerning the exercise of this authority may be beneficial. Recent cases in which the entire cost of the appointed expert was allocated to the nonindigent party may clarify some issues.¹⁸³ This issue also can be explored at workshops and judicial conferences by using hypothetical circumstances similar to those that have been most troubling (e.g., indigent party opposing expert testimony that lacks credibility; presence of minors as parties; disputed issues of

ties and of his reasons for agreeing with the one"; and, "Here, the individual was skillful and he was very aware that he was acting for the court. He bent over backwards to be fair to both sides." We attempted in the initial interviews to question the judges to determine the extent to which their satisfaction could be attributed to the procedure they employed or to the individual who served as the expert. Those who responded indicated that their satisfaction with the process was due to both the individual and the procedure.

178. Judges were asked what, if any, changes would make court-appointed experts more useful. Multiple users were asked specifically about changes to Rule 706. One-time users were asked about changes in general, but were encouraged in the interview to address changes in the rule.

179. *See supra* Chapter 5.

180. *See supra* notes 79–80 and related text.

181. One judge suggested that filing fees be raised by \$1 to help build a fund used to pay experts when the cost becomes uncollectible. *See also* notes 151–54 and related text (authority of Administrative Office to authorize payment to consultants and experts).

182. *See supra* note 134 and related text.

183. *See, e.g., McKinny v. Anderson*, 924 F.2d 1500 (9th Cir. 1991) (Rule 706 permits imposition of cost of appointed expert on nonindigent party where one party is unable to pay a portion of the cost).

public safety). In this way the judiciary might develop a consensus regarding the circumstances that justify unequal apportionment of costs for an appointed expert.

Six judges mentioned the need for more guidance concerning *ex parte* communication between the judge and the expert.¹⁸⁴ These judges mentioned their frustration in avoiding *ex parte* communication when the expert was appointed to educate the judge regarding unfamiliar issues. The present form of the rule does not explicitly address such use—it focuses instead on the testimonial function of such experts and reliance on cross-examination to guard against bias. These judges recommend that the rule (or perhaps the Advisory Committee notes) be amended to address the appropriate forms of interaction with an appointed technical advisor. Such a revision could define the extraordinary circumstances that justify *ex parte* communication.¹⁸⁵ The aim would be to balance the felt need of some judges for technical advisors with proper deference to adversarial principles. For example, an amendment to the rule or notes could describe the circumstances that would merit such assistance, the extent to which the parties should be given an opportunity to confront facts communicated to the judge, and the procedures used to guard against improper delegation of judicial authority. Such an amendment could also address circumstances under which *ex parte* communication between the judge and the appointed expert could be undertaken only with the consent of the parties.

Three judges were concerned with the difficulty in selecting a neutral, unbiased expert and commented on the need for greater access to candidates who are both independent and knowledgeable. One judge suggested that independent panels of experts be assembled to consider various topics of concern and report to the courts; another suggested establishing a pool of independent experts who would only serve when appointed by the courts; and one suggested that outside organizations should play a more active role in directing courts to competent, independent experts. The fact that judges often appoint experts with whom

184. *See supra* notes 79–80 and related text.

185. *Reilly v. United States*, 863 F.2d 149, 156 (1st Cir. 1988) (such appointments “should be reserved for truly extraordinary cases where the introduction of outside skills and expertise, not possessed by the judge, will hasten the just adjudication of a dispute without dislodging the delicate balance of the juristic role. . . . Appropriate instances, we suspect, will be hen’s-teeth rare. The modality is, if not a last, a near-to-last resort, to be engaged only where the trial court is faced with problems of unusual difficulty, sophistication, and complexity, involving something well beyond the regular questions of fact and law with which judges must routinely grapple.”).

they are acquainted, and that some judges reported difficulty finding experts,¹⁸⁶ suggests that judges may welcome opportunities to consider experts presenting a broader range of professional expertise and opinion.¹⁸⁷ Cooperation with organizations outside the judiciary may expand such opportunities.¹⁸⁸

Two judges recommended that Rule 706 attend more to the pretrial aspects of litigation. One of these judges suggested that Rule 706 should be framed within the Federal Rules of Civil Procedure rather than the Federal Rules of Evidence.¹⁸⁹ Placement of such authority in the Federal

186. *See supra* notes 52–54 and related text. Again, our study was not well suited to determine the extent to which the judges were thwarted in making an appointment by failing to identify a suitable candidate.

187. When judges who appointed an expert on more than one occasion were asked how their use of court-appointed experts changed with experience, those who reported changes often mentioned that they did a better job of appointing experts. Six of the ten judges reporting changes mentioned improvements in the process of appointing experts. Four of these judges mentioned that they exercised greater care in selecting an expert, encouraged greater party participation, and became more actively involved in recruiting a qualified person to serve as the appointed expert. The other two judges mentioned that they now begin the appointment process earlier in the litigation. Other changes included closer supervision of the appointed expert's work, greater control over *ex parte* communication between parties and the appointed expert, and greater sensitivity to the manner in which the court's sponsorship of the appointed expert was revealed to the jury. Thirteen of the twenty-three judges responding reported no change in their practices despite greater experience.

188. A recent special task force of the AAAS/ABA National Conference of Lawyers and Scientists, supported by the Carnegie Corporation, is exploring ways to increase the number of scientists and engineers who are willing to serve as appointed experts. *See generally* *Enhancing the Availability of Reliable and Impartial Scientific and Technical Expertise to the Federal Courts: A Report to the Carnegie Commission on Science, Technology, and Government (AAAS/ABA National Conference of Lawyers and Scientists Task Force on Science and Technology in the Courts)*, September 1991. As part of a proposed pilot project various scientific societies will serve as sources of expertise for judges who desire to make such an appointment. This project also is developing guidelines for experts assisting the courts, and exploring the possibility of assembling a panel of qualified experts to prepare authoritative statements on the state of the art in specific areas of science and technology. A greater willingness of qualified persons to serve as appointed experts, combined with clearer instruction for judges concerning recruitment of experts beyond the judge's immediate circle of acquaintances, should address this concern.

189. Only four of the sixty-five users we interviewed had appointed experts under Rule 706 during criminal proceedings. In criminal proceedings there is

Rules of Civil Procedure would be consistent with the rules' increasing attention to issues relating to expert evidence and pretrial procedures,¹⁹⁰ and would permit integration of the rule allowing for court-appointed experts with the authority for appointment of special masters¹⁹¹ and the use of technical advisors.¹⁹² Locating the authority to appoint an expert in the Federal Rules of Civil Procedure also would permit easy integration with proposed changes intended to ease the difficulties that arise with expert testimony.¹⁹³ Timing of appointment, ex parte communication, and compensation of the expert may all be considered part of a comprehensive pretrial procedure intended to facilitate early identification of litigation disputes which turn on evidence that is not readily comprehensible, and to permit the court to select from a range of options depending on the degree of assistance required.

A Pretrial Procedure to Aid in Understanding Complex Expert Testimony

Even within the structure of the present rules there is opportunity to tailor procedures to permit more focused consideration of scientific and technical evidence. This section presents a pretrial procedure that is intended to ease the consideration of difficult scientific and technical evidence.¹⁹⁴ This procedure is based on (1) early identification of issues likely to require expert testimony; (2) specification of disputed issues of science and technology; and (3) screening of expected testimony by par-

separate statutory authority enabling appointment of an expert. *See, e.g.*, 18 U.S.C. § 3006(e) (1988).

190. *See* proposed amendments to Fed. R. Civ. P. 16(c)(4) (permitting consideration of limitations or restrictions on the use of expert testimony at a pretrial conference) and Fed. R. Civ. P. 26(a)(2) (requiring disclosure without a discovery request of anticipated expert testimony, information supporting that testimony, and qualifications and experience of expert witness).

191. Fed. R. Civ. P. 53.

192. *Reilly v. United States*, 863 F.2d 149 (1st Cir. 1988).

193. *See infra* note 198.

194. For a similar proposal to facilitate consideration of expert evidence in toxic tort litigation, see Margaret A. Berger, *Procedural and Evidentiary Mechanisms for Dealing with Experts in Toxic Tort Litigation: A Critique and Proposal*, submitted to the Carnegie Commission on Science, Technology, and Government (November 1990). *See also* Paul C. Giannelli, *Scientific Evidence: A Proposed Amendment to Rule 702*, 115 F.R.D. 102 (1987) (proposing that the Federal Rules of Evidence be amended to bar expert testimony unless the proponent gives the adverse party advance written notice of the nature of the testimony).

ties' experts to ensure admissibility. This pretrial procedure need not culminate in the appointment of an expert—it includes several alternatives to such an appointment. If, however, the judge determines that appointment of an expert would be appropriate, the proposed procedure should aid such an appointment.

This proposed pretrial procedure is intended for cases that turn on evidence that is not readily comprehensible. Furthermore, the procedure will be most useful to judges who wish to inquire into the nature of expert testimony and identify likely difficulties arising from the presentation of scientific and technical evidence. It is intended to permit recognition of difficulties at an early point in the litigation and allow the judge to narrow disputed issues by encouraging the parties and experts to specify their assumptions and designate areas of agreement and disagreement. If questions of admissibility are raised, the proposed procedure would enable the judge to conduct in limine hearings to resolve such questions and to enter summary judgment where disputed issues are not supported by admissible evidence. In those extraordinary cases in which the court requires the assistance of an appointed expert, the proposed procedure will enable an appointment in time to avoid delay in the litigation and difficulties in securing the effective services of an expert. Description of the proposed procedure is divided into (1) those pretrial practices that function independently of appointment of an expert and (2) special practices suited for such an appointment.

Clarification of disputed issues arising from complex evidence

Early identification of disputed expert testimony. All but the simplest techniques for addressing problems arising from difficult expert testimony require early awareness of disputed scientific and technical issues. Even if a judge decides to invoke none of the pretrial procedures intended to address issues of expert testimony, knowledge of especially difficult disputed issues prior to trial will enable a more informed consideration of such issues when they are presented. If extraordinary procedures are to be invoked, awareness of looming difficulties may be critical if the full range of pretrial devices are to be considered. One of the major impediments to the appointment of experts, according to our survey, is that judges are often unaware of a trial's difficulty until it is too late to make an appointment.¹⁹⁵

Almost all judges make some inquiry into the nature of proffered expert testimony, if only to ensure that it will assist the trier of fact as required under Rule 702 of the Federal Rules of Evidence. But judges ap-

195. See *supra* note 38 and related discussion.

pear to vary greatly in the extent to which they inquire beyond this threshold. Some judges may, as part of a standard pretrial order, require disclosure of anticipated expert testimony.¹⁹⁶ Proposed amendments to Rule 26(a)(2) of the Federal Rules of Civil Procedure would require such disclosures, as well as disclosure of the information the expert used in reaching the opinion.¹⁹⁷ Encouragement for early inquiry regarding the nature of expert testimony also is found in recent proposed amendments to Rule 16(c) of the Federal Rules of Civil Procedure. These proposed amendments would encourage more explicit consideration of limits on expert testimony.¹⁹⁸ The Manual for Complex Litigation also encourages early identification of difficult or complex litigation, and early intervention by the judge to ensure the efficient conduct of the litigation.¹⁹⁹

Early awareness of disputed issues addressed by expert testimony is a common goal of many standard pretrial orders. Our interviews with

196. See, e.g., William W Schwarzer, Guidelines for Discovery, Motion Practice and Trial, 117 F.R.D. 273, 276 (1987) ("If the expert is expected to testify at trial, a written statement of his anticipated testimony should be given to opposing counsel in advance of the deposition."). See also Litigation Management Manual, 59-60 (Federal Judicial Center 1992).

197. Proposed amendment to Rule 26(a)(2) of the Federal Rules of Civil Procedure, published for comment in August 1991, by the Committee on Rules of Practice and Procedure, reads: "[E]ach party shall disclose to every other party any evidence which the party may present at trial under rules 702, 703, or 705 of the Federal Rules of Evidence. This disclosure shall be in the form of a written report prepared and signed by the witness which includes a complete statement of all opinions to be expressed and the basis and reasons therefor; the data or other information relied upon in forming such opinions; any exhibits to be used as a summary of or support for such opinions; the qualifications of the witness; and a listing of any other cases in which the witness has testified as an expert at trial or in deposition within the preceding four years."

198. Proposed amendments to Fed. R. Civ. P. 16(c)(4) suggest consideration at pretrial conferences of "limitations or restrictions on the use of testimony under Rule 702 of the Federal Rules of Evidence." The proposed amendment 16(c)(15) also suggests consideration of reasonable limitations on the number of witnesses presented, a restriction that is likely to curb expert testimony. Proposed amendment 26(a)(2) would require each party to disclose by means of a written report any expert testimony that the party may present at trial, and include a statement of the information relied on in arriving at the opinion. Proposed Amendments to the Federal Rules of Civil Procedures, Meeting of the Advisory Committee on Civil Rules, May 22-24, 1991. Dean Berger has suggested that Rule 16 be amended to call for a pretrial conference in particularly demanding cases after completion of expert discovery that would explicitly address issues of expert testimony.

199. Manual for Complex Litigation, Second § 20.1 (1985).

judges who appointed experts and those who did not revealed that many judges inquire into the nature of expert testimony as a routine matter.²⁰⁰

Attempts to narrow disputes. Again, Rule 16 of the Federal Rules of Civil Procedure encourages efforts to narrow disputes during pretrial, a mandate that can extend to disputes between parties' experts as well as the parties themselves. One subject appropriate for discussion at the pretrial conference is "the possibility of obtaining admissions of fact and of documents which will avoid unnecessary proof"²⁰¹ Efforts to narrow disputes among experts may be especially useful where identification of disputed issues suggests that the experts' testimony will be in direct and complete opposition. Interviews with judges revealed that early indications of complete and thorough disagreement between experts often foreshadowed greater difficulties at trial.

A variety of devices can be used to explore the differences among experts, determine the extent of their disagreement, and clarify issues that underlie the dispute. Identifying the differences in assumptions that drive the more general disagreements will permit the trier of fact to try to resolve these assumptive differences rather than attempt to sort through the consequences of such disagreements. Some judges approach this task by asking experts to stipulate to those issues on which they agree and disagree, much like the factual stipulations that parties are often asked to provide.²⁰² Or the parties may be asked to submit a joint report, setting forth areas of agreement and disagreement.²⁰³ Some judges present the parties with a list of issues that they should respond to in preparing such a report.²⁰⁴ With especially demanding expert testimony, some judges convene a joint conference with counsel and the key experts, and engage

200. See *supra* Chapters 2 and 6.

201. Fed. R. Civ. P. 16(c)(3).

202. Fed. R. Civ. P. 36(a).

203. Margaret A. Berger, *Procedural and Evidentiary Mechanisms for Dealing with Experts in Toxic Tort Litigation: A Critique and Proposal* 53, submitted to the Carnegie Commission on Science, Technology, and Government (November 1990). See also *Litigation Management Manual*, 60 (Federal Judicial Center 1992).

204. See, e.g., *The Evolving Role of Statistical Assessments as Evidence in the Courts*, at Appendix II: Recommended Standards on Disclosure of Procedures Used for Statistical Studies to Collect Data Submitted as Evidence in Legal Cases, in Appendix F: Recommendations on Pretrial Proceedings in Cases with Voluminous Data (Stephen E. Fienberg ed., 1988) (protocol for statistical experts prepared by the Special Committee on Empirical Data in Legal Decision Making of the Association of the Bar of the City of New York).

in a formal or informal colloquy concerning the differences between the experts.²⁰⁵

Screening of expert testimony. Identifying and narrowing disputed issues may lead to doubts concerning the admissibility of some of the proffered expert testimony. Questions may arise concerning the qualifications of those likely to be called as experts, or the accuracy of the information on which the experts base their testimony.²⁰⁶ In such cases the judge may wish to conduct a separate pretrial hearing to determine the admissibility of proposed expert testimony.²⁰⁷ Such a hearing may dispose of questionable testimony, thereby providing the parties with a better understanding of the evidence to be presented at trial.²⁰⁸ If the court finds that there is no admissible evidence to support essential ele-

205. Jack B. Weinstein, *Role of Expert Testimony and Novel Scientific Evidence in Proof of Causation*, Presentation at ABA Annual Meeting, Managing Mass Torts, San Francisco, Cal., August 9, 1987, at 22 (describing an occasional practice of swearing in all the experts, seating them at the table together with counsel and engaging them in recorded colloquy under court direction). Other techniques for clarifying and narrowing issues are found in the *Manual for Complex Litigation*, Second § 21.33 (1985).

206. The various ways that expert testimony can fall short of the standards of admissibility are discussed in Margaret A. Berger, *Procedural and Evidentiary Mechanisms for Dealing with Experts in Toxic Tort Litigation: A Critique and Proposal*, submitted to the Carnegie Commission on Science, Technology, and Government 11–34 (November 1990).

207. The screening of expert testimony to determine its admissibility is authorized by Rules 104, 702, and 703 of the Federal Rules of Evidence. *Compare* *Christophersen v. Allied-Signal Corp.*, 939 F.2d 1106 (5th Cir. 1991) (per curiam, en banc) (affirming summary judgment for defendants following exclusion of expert testimony found to be untrustworthy) *with In re Paoli R.R. Yard PCB Litig.*, 916 F.2d 829 (3d Cir. 1990) (reversing summary judgment for the defendant and remanding for clarification of basis of exclusion of testimony by plaintiffs' expert).

208. *See generally* Johnny K. Richardson, *Use of Motions In Limine in Civil Proceedings*, 45 Mo. L. Rev. 130 (1980); Stephen A. Saltzburg, *Tactics of the Motion In Limine*, 9 Litig. 17 (1983). The arguments for and against motions in limine are set forth in 21 Charles A. Wright & Kenneth W. Graham, *Federal Practice and Procedure* § 5037, at 193–96. *See also* Jack B. Weinstein, *Role of Expert Testimony and Novel Scientific Evidence in Proof of Causation*, Presentation at ABA Annual Meeting, Managing Mass Torts, San Francisco, Cal., August 9, 1987, at 21 (“Pretrial (in limine) rulings on conditions for admission of evidence are increasingly being utilized. They are useful because they give parties directions.”).

ments of a claim, the court may dispose of the action by summary judgment.²⁰⁹

Courts vary greatly in the extent to which they will inquire into the basis of expert testimony and exclude testimony that appears untrustworthy. Some have identified an emerging trend toward a close examination of the basis of expert testimony and the exclusion of testimony that is seen as too unreliable.²¹⁰ The widening gulf between those who would permit close scrutiny of the basis for experts' testimony²¹¹ and those who favor less demanding screening²¹² has created considerable uncertainty regarding the manner in which expert testimony is to be evaluated by the court.

Appointment of an Expert

When a pretrial procedure based on the above elements fails to reveal information necessary to permit a reasoned resolution of the disputed issues, a judge may wish to appoint an expert. Our interviews suggested that such cases will be infrequent and will be characterized by evidence that is particularly difficult to comprehend, credible experts who find little basis for agreement, and a profound failure of the adversarial system to provide the information necessary to sort through the conflicting claims and interpretations. Judges who had appointed experts emphasized the extraordinary nature of such a procedure and showed no willingness to abandon the adversarial process before it had failed to provide the information necessary to understand the issues and resolve the dispute.

Cases involving unrepresented or poorly represented parties, another unusual circumstance, may also merit appointment of an expert. When one or more of the parties are unable to or choose not to present expert testimony, a court may be uneasy resolving the issue on the basis of ex-

209. *Celotex Corp. v. Catrett*, 106 S. Ct. 2548 (1986); *In re "Agent Orange" Prod. Liab. Litig.*, 611 F. Supp. 1223 (E.D.N.Y. 1985), *aff'd on other grounds*, 818 F.2d 187 (2d Cir. 1987).

210. Michael D. Green, *Expert Witnesses and Sufficiency of Evidence in Toxic Substances Litigation: The Legacy of Agent Orange and Bendectin Litigation*, 86 Nw. U. L. Rev. 643 (1992); Edward Brunet, *The Use and Misuse of Expert Testimony in Summary Judgment*, 22 U.C. Davis L. Rev. 93 (1988).

211. This trend is noted primarily in product liability and toxic tort litigation. *See, e.g.*, *Brock v. Merrell Dow Pharmaceutical, Inc.*, 874 F.2d 307 (5th Cir.), *modified*, 884 F.2d 166 (5th Cir. 1989); *Christophersen v. Allied-Signal Corp.*, 939 F.2d 1106 (5th Cir. 1991) (*per curiam, en banc*); *Richardson v. Richardson-Merrill Inc.*, 857 F.2d 823 (D.C. Cir. 1988).

212. *See Wells v. Ortho Pharmaceutical Corp.*, 788 F.2d 741 (11th Cir. 1986); *Ferebee v. Chevron Chem. Co.*, 736 F.2d 1529 (D.C. Cir. 1984).

pert testimony provided by a single party. If the court doubts the credibility or competence of the testifying experts, it may have to choose between appointing an expert and proceeding without competent and credible testimony on a critical issue.

Several judges, in describing the issues that caused them to consider an appointment, mentioned the interests of minors or a public interest that was not adequately represented. In such cases the importance of reaching a correct resolution of disputed evidentiary issues may be especially great, and appointing an expert may be the most practical means of obtaining information. The pretrial procedure outlined above should ensure that every effort has been made to obtain the necessary information short of appointing an expert.

Where appointment of an expert appears to be the only means of obtaining necessary information, the proposed pretrial procedure also provides an early indication of the problem, permitting the appointment to be undertaken in a timely manner without disrupting or postponing the anticipated trial. The proposed procedure also will develop material that will aid in instruction of the appointed expert. While we do not advocate appointment of an expert to encourage settlement, early awareness by the parties that such an appointment is being considered will permit them to engage in settlement negotiations with an awareness of that prospect.

Appointing an expert increases the burden on the judge, increases the expense to the parties, and raises unique problems concerning the presentation of evidence. These added costs will be worth enduring only if the information provided by the expert is critical to the resolution of the disputed issues. The proposed pretrial procedure is intended to identify cases that can be resolved in an expeditious manner without appointing an expert, as well as cases that require such assistance.

Initiation of the appointment. The interviews suggest that the appointment process will have to be initiated by the judge; rarely do the parties raise this possibility on their own. Again, the proposed pretrial procedure is intended to inform the judge of the nature of the underlying evidentiary disputes so that the judge is less reliant on the parties to inform the court of such disputes. The court can initiate this process on its own by entering an order to show cause why an expert witness or witnesses should not be appointed.²¹³

In responding to the order, parties should address a number of issues that may prove troublesome as the appointment process proceeds. Parties should be asked to nominate candidates for the appointment and

213. Fed. R. Evid. 706(a).

give guidance concerning characteristics of suitable candidates. Those judges who encouraged both parties to create a list of candidates and permitted the parties to strike nominees from each other's list found this to be a useful method for increasing party involvement and developing a list of acceptable candidates.

Greater party involvement in identifying suitable candidates diminishes the judge's reliance on friends and colleagues for a recommendation. When parties fail to recommend a suitable candidate, the judge may find it difficult to identify a candidate who is both knowledgeable in the relevant specialities and disinterested with respect to the outcome of the litigation. Academic departments and professional organizations may be a source of such expertise.

Compensation of the expert also should be discussed with the parties during initial communications concerning the appointment. Unless the expert is to testify in a criminal case or a land condemnation case, the judge should inform the parties that they must compensate the appointed expert for his or her services.²¹⁴ Typically each party pays half of the expense, with the prevailing party being reimbursed by the losing party at the conclusion of the litigation. Raising this issue at the outset will indicate that the court seriously intends to pursue an appointment, and may help avoid subsequent objections to compensation. If difficulty in securing compensation is anticipated, the parties may be ordered to contribute a portion of the expected expense to an escrow account prior to the selection of the expert. Objections to payment should be less likely to impede the work of the expert once the appointment is made.

Finally, the court should make clear in its initial communications the anticipated procedure for interaction with the expert. The assistance sought by the court and the anticipated manner of interaction can be described. If *ex parte* communication between the court and the expert is expected, the court should outline the specific nature of such communications, the extent to which the parties will be informed of the content of such communications, and the parties' opportunities to respond. Each of these issues is discussed in greater detail below. This initial communication may be the best opportunity to raise such considerations, entertain objections, and inform the parties of the court's expectations of the practices to be followed regarding the appointed expert.

214. If the appointed expert is to serve as a technical advisor, the judge may wish to seek permission of the Administrative Office to compensate the expert as a consultant to the judiciary. Such compensation is likely to be approved only in highly unusual cases.

Communicating with the appointed expert. Conversations with judges revealed that communications with experts is one of the most troubling areas when dealing with court-appointed experts. Several judges mentioned the need for guidance regarding ex parte communications with experts. Complete avoidance of ex parte communication seems impractical in light of the judge's obligation to contact the expert, explain the general nature of the task, and determine the expert's willingness to undertake the assignment. While an initial letter inviting participation may be drafted with the assistance of the parties, there are likely to be telephone inquiries and other incidental communications (e.g., concerning time of hearing, details of compensation) in which full participation by the parties is unnecessary.

Once the expert has agreed to serve and seeks more specific information regarding the nature of the task, concerns over communications between the judge and experts outside the presence of the parties become more acute. Participation of the parties in the instruction of the expert offers an early opportunity to ease such concerns and ensure that the parties are fully aware of the services being sought of the expert. Since appointment of an expert is a rare event, the parties and the expert are likely to require clear guidance regarding the expectations of the court.

A common practice is to instruct the expert at a conference with the parties present, then formalize the instructions with a written order filed with the clerk. This practice permits easy interaction with the expert at the initial conference, ensures that the parties and the expert understand the nature of the task, and avoids misunderstanding and disagreements over the initial instructions. The instructions themselves can be based on the materials prepared by the parties as part of the pretrial process, which should set forth areas of disagreement and confusion. A written order also will help the expert focus his or her inquiry and will serve as a reminder of the limitations of the expert's role in relation to the judge's.

If an appointed expert has questions regarding his or her duties, the parties should be informed of the nature of the inquiry.²¹⁵ In most cases this should pose no difficulty. A written request for clarification from the expert and a written response by the court, with copies to all interested parties, will permit parties to remain informed of the proceedings and offer objections or clarifications to the response. If the judge and the expert expect to confer in person, several options are available. Representatives of the parties can be invited to attend the conference or,

215. There may be questions concerning non-substantive issues, such as the timing of a report or hearing, or conditions of compensation, that do not require the participation of the parties.

if this proves impractical, a record of the discussion can be forwarded to the parties. In any event, we believe that parties should be informed of communications between the expert and the judge, and be informed of the nature of those communications. This will permit a party to challenge the substance of the expert's advice or object to inquiries and information that exceed the expert's agreed-upon duties.

The "technical advisor" who provides a judge with instruction and advice outside the presence of the parties poses a more difficult problem.²¹⁶ While the need for such assistance should be diminished by the pretrial procedure outlined above, our interviews suggested that in a very few circumstances such an appointment may be essential for a reasoned resolution of a dispute.²¹⁷ The difficulty is in providing such assistance while preserving the effective participation of the parties in presenting and refuting evidence.

The First Circuit Court of Appeals affirmed the inherent authority of the court to appoint a technical advisor, and offered a number of suggestions for diminishing the concerns that arise when such an appointment is made.²¹⁸ Before making the appointment the court should inform the parties of its intention to appoint a technical advisor, identify the person to be appointed, and give the parties an opportunity to object to the appointee on the basis of bias or inexperience. The expert should be instructed on the record and in the presence of the parties, or the duties of the expert should be recorded in a written order. And at the conclusion of his or her service, the technical advisor should file an affidavit attesting to his or her compliance with these instructions. Some judges have gone further, making a record of discussions and disclosing the record to the parties. These safeguards may do little to comfort those who see in the technical expert an unforgivable intrusion into the adversarial system, but such safeguards will permit the parties to remain informed of the nature of the technical assistance and raise objections when the intended form of assistance encroaches on the duties of the judge. At the same time, information about the expert's advice will permit parties to challenge misplaced factual assumptions and debatable opinions.

Ex parte communication between the appointed expert and representatives of the parties poses a separate but more manageable set of prob-

216. Although such an appointment does not require the authority of Rule 706, several of the judges invoked this rule and obtained consent of the parties in retaining a technical advisor.

217. See *Reilly v. United States*, 863 F.2d 149, 156-57 (1st Cir. 1988); *Manual for Complex Litigation*, Second § 21.54 (1985).

218. *Reilly v. United States*, 863 F.2d 149, 159-61 (1st Cir. 1988).

lems.²¹⁹ Ex parte communication between experts and parties will rarely be necessary—the most common instance occurs during the physical examination of a party. The expert can notify the opposing party of the intended nature of the examination and then report the findings, giving the opposing party an opportunity to raise objections. Ex parte communication may also be necessary when an expert must learn a trade secret in order to advise the court regarding a motion for a protective order. The ex parte communication serves the same purpose as an in camera examination of claims of privilege and should be equally permissible.

In most other occasions ex parte communication seems unnecessary. Even in the instance where the expert must seek clarification of the position of a party, the opposing party can be notified and may participate by conference call. In such circumstances it is likely that many parties will consent to ex parte communication between the expert and the opposing party. When an expert is deposed, representatives of all parties can be invited to attend.

Testimony of appointed experts. We found that almost all appointed experts, other than those serving as technical advisors, presented a written report of their findings. In approximately half of the appointments experts concluded their service with the presentation of a report. In the remaining instances the appointed experts also presented their findings in court, either at trial or in a pretrial evidentiary hearing.

Presentation of expert testimony presents few problems where the judge acts as the finder of fact. In such a case the judge is obviously aware of the expert's court-appointed status and is sensitive to the role of the appointed expert and the duties of the judge. The judge and the parties will have reviewed the report prior to the proceeding,²²⁰ and testimony can be presented in a less formal manner. In at least one case the expert was permitted to adopt the report as his direct testimony after being sworn in.

When an appointed expert testifies before a jury, the court must decide how the appointed expert will be presented to the jury. The court may, in its discretion, decide whether to disclose to the jury that the expert was appointed by the court.²²¹ In six of the seven instances we

219. Some judges apply the same restrictions on parties' ex parte communications as they impose on themselves and their law clerks. When the appointed expert is serving as a technical advisor, such restrictions would be especially appropriate.

220. Formal depositions of appointed experts proved to be infrequent, although on occasion an appointed expert met informally with the parties to discuss the report.

221. Fed. R. Evid. 706(c).

discovered, the court advised the jury or permitted the parties to advise the jury that the expert was appointed by the court. Still, we found no consensus among the judges about whether the court's sponsorship of such an expert should be mentioned. Those who favor acknowledging the court's sponsorship note that the purpose of appointing an expert often is to provide a credible witness for the jury to rely on, and independence from the parties is an important indicator of credibility. Those opposed cite the influence of such testimony, and question whether it is necessary to so discredit the testimony of the parties' experts in order for the appointed expert to serve effectively.

We believe that in almost all cases the court's sponsorship of the expert should be explicitly acknowledged, along with whatever limiting instructions are thought to be appropriate regarding the weight to be given the expert's testimony relative to the testimony of the parties' experts. If experts are appointed where doubts about the credibility of the parties' experts persist and other efforts to provide a basis for a reasoned decision have failed, knowledge of the independence of the appointed expert will be relevant to achieving the goals of the appointment. There may be instances in which the appointed expert offers testimony that serves as background information for the jury, or serves as a context for the interpretation of the testimony by the parties' experts—in these cases the court's sponsorship is less relevant to the task of the jury. But in such cases acknowledging sponsorship should disadvantage neither party. In other cases, if the need for independent testimony is sufficiently great to appoint an expert, this same need argues that such an action should be explicitly acknowledged.

Conclusion

Appointment of an expert by the court represents a striking departure from the adversarial process of presenting information for the resolution of disputes. But such an appointment should not be regarded as a lack of faith in the adversarial system. We learned that judges who appointed experts appear to be as devoted to the adversarial system as those who made no such appointments. Most appointments were made after extensive efforts failed to find a means within the adversarial system to gain the information necessary for a reasoned resolution of the dispute. Appointment of an expert was rarely considered until the parties had been given an opportunity and failed to provide such information. We find it hard to fault judges for failing to stand by a procedure that had proved incapable of meeting the court's need for information; to insist, in such a circumstance, that the court limit its inquiry to inadequate presentations by the parties is a poor testament to the adversarial system and

the role of the courts in resolving disputes in a principled and thoughtful manner.

A better approach is to encourage the parties to present information that is responsive to the concerns of the court, inform the parties of the manner in which their presentations fall short, encourage the development of more useful testimony, and appoint an expert only when no other means is available for reaching a reasoned decision. The pretrial procedure outlined above is intended to encourage the development of such information, thereby strengthening the presentations of the parties and facilitating the appointment of an expert when such efforts have failed.

Appointment of an expert will undoubtedly remain a rare and extraordinary event, suited only to the most demanding cases. Regardless, Rule 706 remains an important alternative source of authority to deal with some of the most demanding evidentiary issues that arise in federal courts.

Appendix A

The Honorable _____

Dear Judge _____:

The Center has been asked to inquire into the reasons for the limited use of court-appointed experts under Rule 706 of the Federal Rules of Evidence. As a first step, we seek to determine how many judges have appointed an expert using the authority of Rule 706. Will you please let us know if you have exercised this authority by completing and returning the enclosed sheet.

Please note that we are *not* asking about instances in which you have appointed experts to serve as special masters, or appointed experts to assist in determinations of fitness to stand trial. We are inquiring only about the appointment of experts under the authority of Rule 706 to aid in the presentation of evidence.

This inquiry is for the limited purpose of determining the extent to which the authority of Rule 706 has been exercised. At some future date we may wish to seek advice from some of those who have experience with Rule 706, but in returning the card, you incur no obligation to participate further.

If you have questions or wish to speak with us about our request, please call Joe Cecil or Tom Willging (both at FTS 633-6341) or me. We greatly appreciate your assistance.

Sincerely,

William B. Eldridge
Director of Research

Enclosure

Appendix B

Response of the Honorable _____, of the _____.

1. Have you appointed an expert under the authority of Rule 706 of the Federal Rules of Evidence?

_____ No

_____ Yes

_____ 1 case.

_____ 2-5 cases.

_____ 5-10 cases.

_____ 10-20 cases.

_____ More than 20 cases.

2. Are experts, appointed under Rule 706, likely to be helpful in certain types of cases?

_____ No

_____ Yes

_____ Tort

_____ Product Liability Law

_____ Employment Discrimination

_____ Antitrust Law

_____ Securities Law

_____ Civil Rights Law

_____ Voting Rights Law

_____ Contract Law

_____ Patent Law

_____ Trademark Law

_____ Criminal Law

_____ Other (please specify) _____

Thank you for
your assistance.

Appendix C

Protocol for Telephone Interviews of Single Users of Rule 706

Judge _____ Date _____

General Observations:

A. Identification of the Dispute

1. What was the nature of the dispute that led to the appointment of the 706 expert?
2. How did you become aware of the need for a 706 expert?
3. What concerns led you to appoint a 706 expert (e.g., mitigate irresponsible testimony, increase the quality of expert testimony, offer the factfinder an independent explanation of the underlying procedure or standards, encourage settlement)?
- 4.* Did you attempt other means of resolving the conflict before appointing the 706 expert?

B. Appointment and Compensation

5. At what point in the pretrial process did you appoint the 706 expert (e.g., before discovery, after discovery, after finding of liability to assist in determining damages or remedies)?
6. Would it have been beneficial to have known about the need for a 706 expert earlier in the litigation?
- 7.* Did both parties employ testifying experts?
8. Did either or both parties oppose appointment of a 706 expert?
- 9.* Was the litigation generally contentious in areas other than expert testimony?
10. How was the expert selected? *Did the parties nominate candidates?
- 11.* Did you identify candidates other than those nominated by the parties?
- 12.* Was it difficult to identify a neutral 706 expert?
- 13.* How was the amount of compensation determined? Who paid?

C. Interaction with the 706 Expert

14. How was the expert instructed in his or her duties (e.g., by a written order, by a conference with the parties present)?
- 15.* Was there a need to clarify the instructions? (If yes) How was this done?
16. Did you communicate directly with the expert outside of the presence of the parties? Did you permit the expert to communicate directly with the parties? Separately or together?
17. Did the expert prepare a written report?
18. Was the 706 expert deposed?
19. Did the expert testify at trial or in a hearing? (If yes) Was the expert cross-examined? *Did you examine the expert?
20. (If expert testified at a jury trial) Did you disclose that the court appointed the 706 expert?
21. Was the disputed issue resolved in a manner consistent with the advice or testimony of the 706 expert?
22. Did the testimony of the court-appointed expert overwhelm the expert testimony offered by the parties?

D. Improvement in 706 Practice

23. Were you satisfied with the services provided by the 706 expert? Would you use a 706 expert again in the same circumstances? (Attempt to distinguish the contribution of the individual from the contribution of the procedure to the judge's evaluation.)
24. (If satisfied with 706 experience) Why haven't you used the procedure more often?
25. Why have so few other judges used 706 experts (e.g., lack of knowledge about the procedure for recognition and appointment, concern about interfering with the adversarial system, rarely have cases involving scientific or technical issues, testimony of parties' experts makes additional expert testimony unnecessary)?
26. What, if any, changes would make court-appointed experts more useful?

“May I ask you two more general questions not related to this specific case?”

27.* Have you threatened to appoint 706 experts as a means of improving the quality of the expert testimony or resolving the case?

28.* Did your most recent trial involve evidence that was scientific or technical in nature? (If yes) Did you consider appointment of an expert? Why not?

Concluding Observations and Notes:

* These questions were asked if time permitted.

Appendix D

Protocol for Telephone Interviews of Multiple Users of Rule 706

Judge _____ Date _____

General Observations:

1. Your response to our survey indicated that you had used a court-appointed expert in _____ cases. Will you briefly describe the cases and the nature of the disputes that led to the appointment of the 706 experts? Are there some common characteristics of these cases?
2. Your response to our survey indicated that you thought that court-appointed experts would be more helpful in cases such as [INSERT CASE TYPES]. Why are such cases particularly suitable?

Observations Concerning the Most Recent Appointment:

We have a number of questions about the specific procedures used to appoint an expert under Rule 706. For convenience, we wish to focus on the most recent instance in which you appointed an expert. Please identify or describe that case.

3. Did you follow a standard procedure for appointing an expert? Please describe. When in the course of the litigation did you appoint the 706 expert? Would it have been helpful to appoint the expert earlier in the litigation?
4. Did you suggest using a 706 expert, or did the suggestion come from one of the parties?
5. Did either or both parties oppose appointment of the 706 expert? Have there been other cases in which you proposed using a 706 expert and did not when the parties opposed it? (If yes) What was the nature of this opposition?
6. How did you select the expert? Did you permit the parties to nominate candidates? (If yes) Did you identify candidates other than those nominated by the parties?
7. Was it difficult to identify a neutral 706 expert?
8. How did you instruct the expert in his or her duties? Was there a need to clarify your instructions? (If yes) How was this done?
9. Did you permit the expert to communicate directly with you outside the presence of the parties? Did you permit the expert to communicate directly with the parties? (If yes) Separately or together?

10. Did the expert prepare a written report? Did the parties depose the expert?
11. Did the 706 expert testify at a trial or hearing? [USE THIS QUESTION TO GET INDICATION OF RATE OF SETTLEMENT] (If yes) Was this a jury trial? (If no) Would it have been a jury or bench trial?
12. (If 706 expert testified) Who called the expert? Was the expert cross-examined? Did you examine the expert?
13. (If a jury trial) Did you disclose to the jury that the court had appointed the 706 expert? (If no) How did you disguise that fact? Did the testimony of the court-appointed expert appear to overwhelm the expert testimony offered by the parties?
14. (If not a jury trial) Have you presided at a jury trial at which a court-appointed expert offered testimony? (If yes) Did you disclose to the jury that the court appointed the 706 expert? (If no) How did you disguise that fact? Did the testimony of the court-appointed expert appear to overwhelm the expert testimony offered by the parties?
15. Was the disputed issue resolved in a manner consistent with the advice or testimony of the 706 expert?
16. How was the amount of compensation determined? Who paid?

General Observations Relating to Improvements in Using Court-Appointed Experts:

17. How has your use of court-appointed experts changed as you have gained more experience? What problems have you encountered? Have you been satisfied with the services provided by the 706 experts?
18. Have you appointed an expert in cases in which one of the parties has not retained an expert?
19. How do the prospects for settlement of the case influence your decision to appoint an expert?
20. In your opinion, why have so few other judges used the authority to appoint 706 experts?
21. What, if any, changes to Rule 706 would make court-appointed experts more useful?

Concluding Observations and Notes Re Suitability as a Case Study:

Appendix E

Protocol for Telephone Interviews of Judges Who Have Not Used Rule 706

Judge _____ Date _____

1. Have you ever appointed an expert under Rule 706? (If yes, go to protocol for users. If no, continue with question 2.)
2. Have you ever had a case in which you considered appointing an expert, including any case in which one of the parties suggested that you appoint an expert? (If no, skip to 3.)
 - A. Describe the nature of the situation that led you to consider such an appointment. Was it a bench trial or a jury trial?
 - B. Did either or both parties oppose the appointment? On what grounds? Why did you choose not to appoint an expert in that case?
 - C. How did you learn of the problem? What steps did you take to deal with the problem (e.g., appoint a special master, attempt to narrow the disputed issues prior to trial)? Were these steps effective?
 - D. What advantages or disadvantages would the procedures that you used have in comparison to the Fed. R. Evid. procedures?
 - E. Were the parties satisfied with the steps taken? Was there an appeal on the issue?
3. Have you ever had a case in which you learned before trial that the parties had experts prepared to testify to diametrically opposed, extreme positions in a highly technical subject area (i.e., battle of the experts)? (If no, then go to 4.)
 - A. Describe the case and the nature of the dispute over technical evidence. Was it a bench trial or a jury trial?
 - B. How did you learn of the problem? What steps did you take to deal with the problem (e.g., appoint a special master, attempt to narrow the disputed issues prior to trial)? Were these steps effective?

- C. What advantages or disadvantages would the procedures that you used have in comparison to the Fed. R. Evid. procedures?
 - D. Were the parties satisfied with the steps taken? Was there an appeal on the issue?
4. Have you ever had a case in which one of the parties did not present competent opposing evidence, either due to indigence or poor legal representation (e.g., failure of advocacy)?
- A. Describe the case and the nature of the dispute? Was it a bench trial or a jury trial?
 - B. How did you learn of the problem? What steps did you take to deal with the problem (e.g., appoint a special master, attempt to narrow the disputed issues prior to trial)? Were these steps effective?
 - C. What advantages or disadvantages would the procedures that you used have in comparison to the Fed. R. Evid. procedures?
 - D. Were the parties satisfied with the steps taken? Was there an appeal on the issue?
5. In your response to our survey you indicated that appointment of an expert under Rule 706 might be helpful in [INSERT CASE TYPES]. What factors in those types of cases lead you to think that a court-appointed expert might be helpful?
6. (If not otherwise addressed) Why have so few judges used 706 experts?
7. What, if any, changes would make court-appointed experts more useful?

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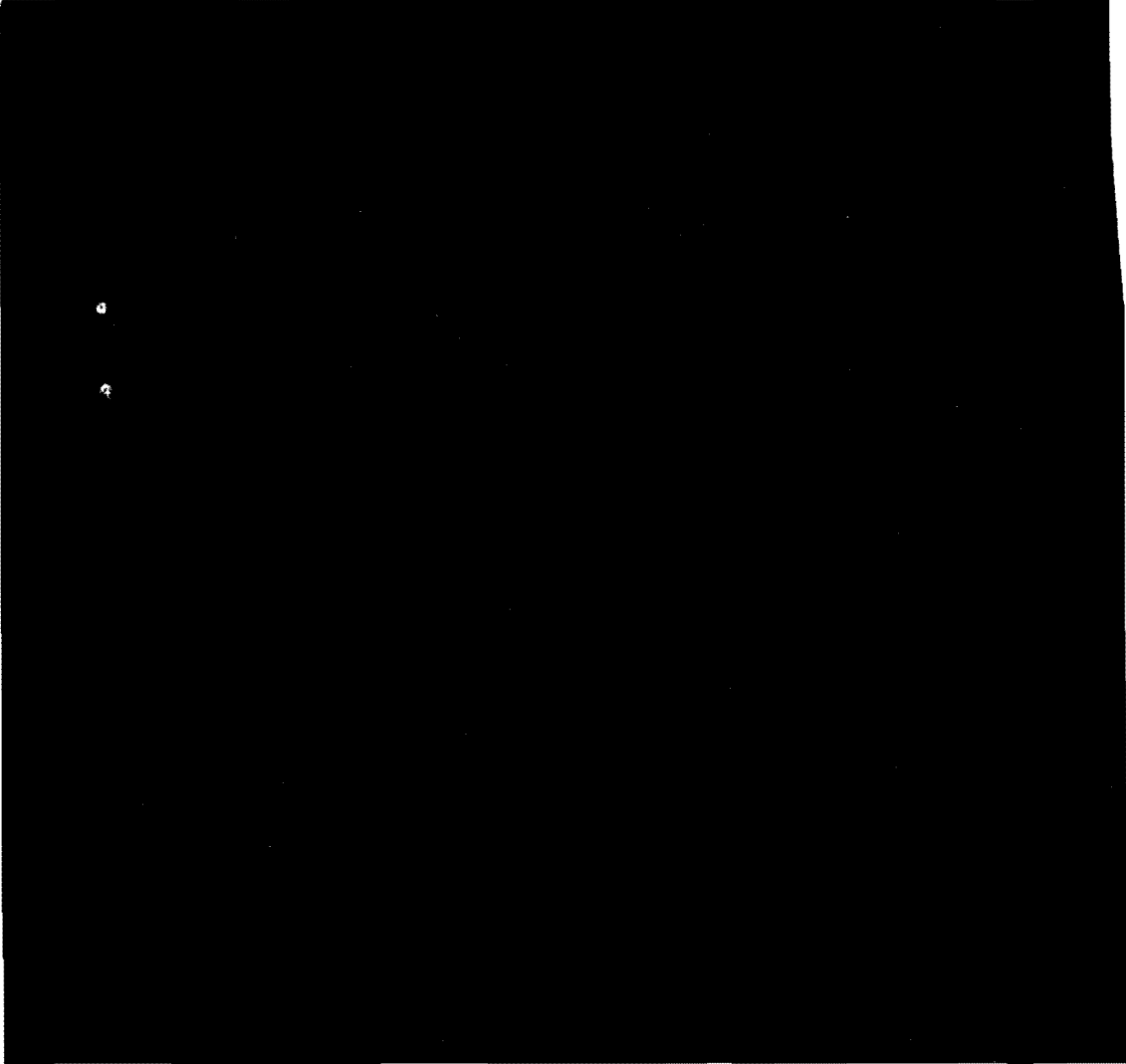
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