

Court-Appointed Experts and Judicial Reluctance: A Proposal to Amend Rule 706 of the Federal Rules of Evidence

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The trial of Robert E. Chambers, Jr., for the murder of eighteen-year-old Jennifer Levin in Central Park in 1986, drew national attention to a deficiency in our system of expert testimony. The testimonies of the key experts on both sides conflicted on a central factual question. The jury was confronted with an evidentiary stalemate.¹

Evidence cancelling out evidence is merely one of the increasingly visible problems with partisan expert testimony. At the same time, expert testimony has become increasingly valuable in several categories of litigation. It is desirable, then, that the problems associated with expert testimony be solved not by decreasing its use but by deemphasizing or supplementing its partisan aspects. This Current Topic argues that increased reliance on court-appointed experts is a useful means of remedying the shortcomings of the current system.

Presently, judges are reluctant to appoint experts. A notable obstacle to the use of court-appointed experts is a reasonable concern for the risks of judicial influence on jury deliberation. Other reasons for reluctance include fears of interfering with the traditional functions of adversarial counsel, fears of creating an inference of a lack of judicial objectivity that may increase the risk of reversal on appeal, and unwillingness to devote the time and money necessary for selecting experts and overseeing the taking of their testimony. This reluctance necessitates a revision of the system of expert proof-taking to address these concerns.

1. Dr. Werner Spitz, a witness for the prosecution, testified that circumstantial evidence indicated that the victim had been beaten and then strangled with her blouse by someone who was facing her. This scenario would provide strong support for a finding of intent. Dr. Ronald Kornblum, a defense witness, testified that this circumstantial evidence could be explained by the victim's falling to the ground, followed by someone else applying an arm chokehold from the back. This scenario would be consistent with negligent homicide or other lesser offenses that lacked intent. Johnson, *In the Courtroom, Expertise Is Always a Matter of Opinion*, N.Y. Times, Mar. 20, 1988, at E8.

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Rule 706 of the Federal Rules of Evidence (FRE)² is the most obvious object of reform. Rule 706 codifies the common law right of courts to appoint experts to testify. It is a response to the view that the most significant drawback to expert testimony is its current predominantly partisan presentation.³ As Rule 706 now stands, it merely leaves available the judge's common law option to call his or her own experts. Article VII of FRE does not contain any incentives to appoint experts. Incentives, however, are necessary to combat the natural reluctance of judges to appoint experts. Thus, Rule 706 is not an adequate response to concerns about the risks of partisanship posed by the current scheme for obtaining expert testimony.

The proposal in this Current Topic recognizes that the first obstacle to judicial appointment of experts, fear of unduly influencing the jury, is a legitimately-felt one. Legitimate here means in line with the pursuit of truth, equal access, and efficiency in the adjudication system. This first concern can, however, be anticipated and addressed in the reform of Rule 706. The remaining reasons for reluctance to appoint experts are less legitimate. They are bases for judicial evasion of appointing experts which should be countered because they persist even when court appointment of experts promotes truth-finding and efficiency. Successful revision of Rule 706 should address both legitimate and illegitimate reasons for reluctance.

2. The complete text of Rule 706 states:

(a) Appointment. The court may on its own motion or on the motion of any party enter an order to show cause why expert witnesses should not be appointed, and may request the parties to submit nominations. The court may appoint any expert witnesses agreed upon by the parties, and may appoint witnesses of its own selection. An expert witness shall not be appointed by the court unless the witness consents to act. A witness so appointed shall be informed of the witness' duties by the court in writing, a copy of which shall be filed with the clerk, or at a conference in which the parties shall have opportunity to participate. A witness so appointed shall advise the parties of the witness' findings, if any; the witness' deposition may be taken by any party; and the witness may be called to testify by the court or any party. The witness shall be subject to cross-examination by each party, including a party calling the witness.

(b) Compensation. Expert witnesses so appointed are entitled to reasonable compensation in whatever sum the court may allow. The compensation thus fixed is payable from funds which may be provided by law in criminal cases and civil actions and proceedings involving just compensation under the fifth amendment. In other civil actions and proceedings 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.

(c) Disclosure of Appointment. In the exercise of its discretion, the court may authorize disclosure to the jury of the fact that the court appointed the expert witness.

(d) Parties' Experts Of Own Selection. Nothing in this rule limits the parties in calling expert witnesses of their own selection. Fed. R. Evid. 706

3. Fed. R. Evid. 706 advisory committee's note (West 1987).

tance to appoint experts. Rule 706 thus needs the addition of procedures designed to minimize the aura of enhanced credibility that judicial appointment may lend an expert witness. At the same time, revisions should include incentives to overcome the invalid fears and the tendency toward status quo that inhibit court-appointed expert testimony when it is a useful supplement to partisan expert testimony.

I. Deficiencies of Partisan Expert Testimony

The deficiencies of partisan expert testimony divide into two categories. This division underscores the need for timely revision of Rule 706 and the present scheme of expert appointment. The first category includes deficiencies that critics have observed and on which they have commented for decades. These deficiencies continue to trouble our system of expert testimony because little has been done to rectify them. The second category includes deficiencies that have recently begun to erode the utility of our system of expert testimony because they manifest themselves in types of litigation that are occurring with increasing frequency. Despite the seriousness of these newer deficiencies, legal scholars have not identified them. Both types of deficiencies call for revision of Rule 706.

A. Longstanding Problems

Discussion of certain problematic aspects of partisan expert testimony is not new. Shortcomings noted by lawyers and scholars for several decades have tended to fall into one of four categories.

First, some critics point out that if courts rely exclusively on the parties to produce experts any inequitable distribution of party resources creates an unfair advantage for the side that has the most money to hire experts. In criminal cases the defendant is generally at a disadvantage.⁴ Naturally, the most respected and accomplished experts will command the highest fees. Therefore, the litigants with

4. See Alschuler, *Mediation With a Mugger: The Shortage of Adjudicative Services and the Need For A Two-Tier Trial System*, 99 Harv. L. Rev. 1808, 1830 (1986). For statistics on defense lawyers' failure to procure expert witnesses, see H. Kalven & H. Zeisel, *The American Jury* 139 (1966); *People v. Chapter*, 13 Crim. L. Rptr. (BNA) 2479 (Cal. Super. 1973). See generally Decker, *Expert Services in the Defense of Criminal Cases: The Constitutional and Statutory Rights of Indigents*, 51 U. Cin. L. Rev. 574 (1982); Kwall, *The Use of Expert Services by Privately Retained Criminal Defense Attorneys*, 13 Loy. U. Chi. L.J. 1, 22 (1981).

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greater wealth than their adversaries will be more likely to obtain persuasive expert testimony, other factors being equal.

A second criticism is of the rise of the "professional" expert. These are individuals who so frequently offer their services to testify at trials that they earn a significant portion of their income from testifying.⁵ By 1987, two related predicaments in the hiring of partisan experts had become widespread enough to merit the attention of the Advisory Committee to the drafters of FRE. The Committee lamented "the practice of shopping for experts" and "the venality of some experts."⁶ Several commentators have noted a resulting lowered reputation of experts, which has in turn discouraged many of the most qualified experts from agreeing to serve as partisan expert witnesses.⁷

A third traditional criticism is the lack of objectivity of partisan experts. Experts hired by parties tend to function as "hired guns."⁸ They may either overtly conform their testimony to the needs of the side that hired them in order to earn a high fee, or they may unconsciously develop a bias favoring their employer's position as a result of a natural team-spirit mentality.⁹

5. See, e.g., "Exploding Bottles-flying caps[:] expert with 20 years worldwide experience . . . 100% success to date." Trial, Feb. 1985, at 92 (advertisement by expert witness for hire); Expert Witnesses: Booming Business for the Specialists, N.Y. Times, July 5, 1987, at A1 (notes examples of ads for experts offering to testify on "bicycle mishaps, battery or bottle explosions, hot-air balloon accidents, radiation incidents", and notes emergence of clearinghouses, companies, and thousands of individuals publicizing their availability for providing expert testimony and consultation); Ryan, Making the Plaintiff's Expert Yours, 24 For The Defense 12, 20 (Nov. 1982); Postel, Income From Testifying in Other Cases, Chicago Daily L. Bull., Apr. 23, 1987, at 1 (expert questioned on cross-examination about aggregate income earned from frequently serving as expert witness).

6. Fed. R. Evid. 706 advisory committee's note, *supra* note 3, at 306.1. See also Sink, The Unused Power of a Federal Judge to Call His Own Expert Witness, 29 S. Cal. L. Rev. 195, 197 (1956) (author notes persistence of "extensive shopping for experts").

7. Van Dusen, A United States District Judge's View of the Impartial Medical Expert System, 32 F.R.D. 498, 509 (1963) (a state statute providing for court-appointed medical experts "has the . . . advantage of attracting to the aid of the jury highly qualified medical experts who otherwise would be unwilling to participate in a legal proceeding in a position of partisan employment"); Diamond, The Fallacy of the Impartial Expert, 3 Archives of Crim. Psychodynamics 221 (1959), *cited in* R. Lempert & S. Saltzburg, A Modern Approach to Evidence 979, 983 (1982) ("dynamically oriented psychotherapists with liberal, enlightened, and non-moralistic attitudes towards mental illness and criminal behavior, shamefully avoid their social responsibility to participate in the administration of justice").

8. See Special Issue: The Ethics of Expert Testimony, 10 Law & Human Behav. 1 (1986).

9. See Chambers, Experts Need to Put Their House in Order, 10 Nat'l L.J., Apr. 18, 1988, at 13 (calling professional experts "hired guns"); Van Dusen, *supra* note 7, at 500 (noting common problem of experts selling out to the highest bidder); Johnson, *supra* note 1; Sink, *supra* note 6, at 209. The problem of the professional expert has plagued our proof-taking system for at least a century, as the following early criticisms of the

Inefficiency has been a fourth noticeable deficiency of reliance on partisan expert testimony. State experiments with systems of court-appointed medical experts in the 1950s and 1960s elicited comment on the waste of time and party resources when parties engage in a "battle of the experts."¹⁰ Many participants considered these programs to have enhanced the effectiveness with which malpractice cases were adjudicated because they cut down on frivolous and irrelevant expert testimony and on expert testimony attempting to rebut frivolous and irrelevant expert claims.¹¹ Professor Weinstein has stressed the inefficiency of exclusive use of partisan experts in contrast to a system of court-appointed experts.¹²

B. *Emerging Dysfunctions*

In addition to the longstanding, well-recognized deficiencies of partisan expert testimony, several emerging shortcomings of expert testimony are rendering it an even more problematic mode of proof-taking. The following examination of three of these areas demonstrates how they undermine the truth-finding, equal access, and efficiency goals of adjudication to the point where the deficiencies represent dysfunctions in the system.

1. *Burden of production.* Sole reliance on the parties to produce expert guidance for the court and jury creates a risk of nonproduction of expert evidence. By common law, our adversarial system has placed the sole burden to produce evidence on the litigants.¹³

problem illustrate. Hand, *Historical and Practical Considerations Regarding Expert Testimony*, 15 *Harv. L. Rev.* 40, 53-56 (1901); Prettyman, *Needed, A New Trial Technique*, 34 *A.B.A. J.* 766 (1948); Elliott & Spellman, *Medical Testimony in Personal Injury Cases*, 2 *Law & Contemp. Prob.* 466, 473 (1935). This century's greatest scholars of evidence have criticized the tendency of partisan experts to conform their testimony to the needs of their clients. *E.g.*, 2 *Wigmore, Evidence* § 563, at 646 (3d ed. 1940); Morgan, *Suggested Remedy for Obstruction to Expert Testimony by Rules of Evidence*, 10 *U. Chi. L. Rev.* 285, 292 (1943); McCormick, *Evidence* 35 (1954).

10. *See, e.g.*, Van Dusen, *supra* note 7, at 500-01.

11. *See, e.g.*, Botein, *Impartial Medical Testimony*, 328 *Annals* 75 (1960); McNally, *Impartial Medical Testimony Plan—Its Operation and Results*, 445 *Ins. L.J.* 95 (1960); Niles, *Impartial Medical Testimony*, 45 *Ill. B.J.* 282 (1957); Peck, *A Successful New Plan: Impartial Medical Testimony*, 42 *A.B.A. J.* 931 (1956); Peck, *Impartial Medical Testimony, A Way To Better and Quicker Justice*, 22 *F.R.D.* 21 (1958); Weinrott, *The Case for Impartial Medical Testimony*, 21 *The Shingle* 81 (1958). Under these programs, state and federal district court judges organized local panels of medical experts from whom judges could select to investigate individually medical malpractice insurance suits. The experts' powers varied, but generally they could conduct pre-trial hearings aiming to reach settlement between claimants and insurance companies.

12. 3 Weinstein & Berger, *Weinstein's Evidence* 706-11 (1981).

13. *See generally* R. Lempert & S. Saltzburg, *A Modern Approach to Evidence* 792-93 (1982); 8 Wright & Miller, *Federal Practice and Procedure* §§ 2001-2300 (1970).

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The system assumes that opposing counsel, each working to serve his client's interests, will produce all the relevant evidence needed to reconstruct the facts. FRE does not explicitly state that the litigants are solely responsible for producing evidence. FRE Rule 301, the only rule concerned with the burden of production, simply attempts to sort out *which* party should bear the onus of producing sufficient evidence on which to base a case decision.¹⁴

Rule 301 is a shaky basis for compelling the production of expert evidence. Conceivably, the rule is an attempt to create a tool for the judge to compel responses from parties, as it is an explanation-seeker. But the attempt is confused and half-hearted.¹⁵ Even more problematic, the language of Rule 301 creates the potential for judicial encroachment on the jury's fact-finding function. The rule leaves the judge as arbiter of whether the burden of production has been discharged. This judicial power infringes on the jury's prerogative to discredit evidence used at trial because the judge may make a presumption disappear using evidence that the jury might wholly discredit.¹⁶ Thus, FRE offers no devices with which the court can compel the parties to produce evidence.

The risk of nonproduction of expert evidence becomes serious in matters in which courts are dependent on expert guidance for deciding material facts. Four types of litigation are increasingly prone to dependence on experts for deciding material facts.¹⁷ First, criminal cases increasingly rely on forensic expertise to determine the factual bases of intent and on psychological expertise to determine the factual bases of insanity.¹⁸ Second, courts in toxic tort cases are

14. Rule 301 defines the legal effect of evidentiary presumptions in civil actions. It states that "a presumption imposes . . . the burden of going forward with evidence to rebut or meet the presumption, but does not shift to such party the burden of proof in the sense of the risk of nonpersuasion, which remains throughout the trial upon the party on whom it was originally cast."

15. The language of Rule 301 is vague on the question of burden of production because the rule relates to the broader burden of proof. The rule leaves unclear whether or not a presumption imposing the burden of production carries with it the risk of losing by directed verdict if the burden is not discharged. Also unclarified is the appropriate standard for determining whether the burden is discharged. It is theoretically possible that any evidence, no matter how unconvincing, will discharge the burden of production and shift the presumption. See E. Green & C. Nesson, *Problems, Cases and Materials on Evidence* 809-10 (1983).

16. E. Green & C. Nesson, *supra* note 15, at 811.

17. A material fact is "a fact to which the legal system attaches some consequence." Zuckerman, *Law, Fact or Justice?*, 66 B.U.L. Rev. 487, 490 (1986). Material facts are also referred to as ultimate facts, operative facts, and dispositive facts. *Id.*

18. See, e.g., *Bethea v. United States*, 365 A.2d 64, 82 (D.C. 1976), *cert. denied*, 433 U.S. 911 (1977) ("the witnesses should be free to testify directly in an unrestricted manner concerning all relevant matters to which their competence extends, including their conclusions as to the existence of a mental impairment and its relationship to the condemned behavior."); *People v. Drew*, 583 P.2d 1318 (Cal. 1978). See generally *Bonnie &*

increasingly willing to give a more dispositive role to the testimony of medical experts.¹⁹ Third, complex litigation and corporate and patent cases involving large treble damages awards²⁰ require determinations of increasingly complex fact situations.²¹ Differences of millions and even billions of dollars in a given punitive damages award depend on fact situations involving sophisticated economic modeling. Fourth, in child placement cases, professional expertise is increasingly deemed essential to determining whether or not the "best interests" standard has been met.²²

The Chambers case offers an example of the kind of void that results from a failure of both parties to produce evidence highly relevant to a material fact. To help the jury determine the existence of intent to murder the victim, one of the parties' medical experts testified that the blood vessels in the eyes of the victim had burst, indicating extreme force applied to her neck during strangulation. After this testimony, the jury asked the judge if an expert could testify as to the length of the stranglehold that was necessary to burst the blood vessels. The jury considered that fact relevant to its determination of intent. The prosecution and defense then informed the judge that neither counsel had asked its experts this question during deposition, nor had either counsel asked experts to look into the matter. The parties did not volunteer to direct their experts to investigate the problem. Instead of appointing an expert on behalf of the court to investigate and then testify about the relationship between physical force and the burst blood vessels, the judge simply informed the jury that no expert opinion would be produced on the matter.²³ This kind of evidentiary void, created by the failure of

Slobogin, *The Role of Mental Health Professionals in the Criminal Process: The Case for Informed Speculation*, 66 Va. L. Rev. 427 (1980).

19. See, e.g., *Jackson v. Johns-Manville Sales Corp.*, 781 F.2d 394, 413-15 (5th Cir.) (en banc), cert. denied, 106 S. Ct. 3339 (1986) (award given for future risk of cancer when demonstrated by experts to be more than 50%). See generally *California Medical Association Scientific Board Task Force on Clinical Ecology, Clinical Ecology—A Critical Appraisal*, 144 W.J. Med. 239 (1986); *Immune System Theories on Trial*, 234 Science 1490 (1986).

20. E.g., *Polaroid Corp. v. Eastman Kodak Co.* 789 F.2d 1556 (Fed. Cir.), cert. denied, 107 S.Ct. 178 (1986) (damages award pending; interest on damages alone projected from \$1 to \$3 billion).

21. See *Study To Investigate Use of Scientific Evidence*, 7 Nat'l Center for State Cts. Rep. 1 (Aug. 1980).

22. See *infra* text accompanying notes 41-45.

23. *Johnson, Levin's Injuries Are Described By a Physician*, N.Y. Times, Feb. 10, 1988, at B4 (expert testified that "pinpoint hemorrhages" around victim's eyes were evidence of compression of neck); *Johnson, Chambers's Lawyer Challenges Pathologist About Pressure on Neck*, N.Y. Times, Feb. 12, 1988, at B2; *Johnson, Expert Disputes Theory of Levin's Death*, N.Y. Times, Mar. 8, 1988, at B2 (expert testified victim's eyes were not bulging, a classic symptom of extended strangulation); *Johnson, End of the Case is 'Imminent,' Judge Tells Chambers Jurors*, N.Y. Times, Mar. 10, 1988, at B3

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either party to produce a certain piece of expert testimony, strikes at the heart of the truth-finding goal of our adjudication system.

2. *Abuses of discovery.* In our age of the mega-sized law firm, it is increasingly likely that a party represented by such a firm will have the ability to marshal enough legal resources to intimidate an opponent during the discovery phase of litigation.²⁴ Although judges sometimes penalize those who commit egregious abuses of discovery,²⁵ production of millions of pages of discovery documents often goes unchecked.²⁶ This problem undermines the goal of equality of access to justice because the party with fewer resources than its opponent is left with less time and money to pursue its own arguments, as its counsel is absorbed in responding to its opponent's interrogatories.

The problem becomes serious when documents relating to expert opinion constitute a significant bulk of discovery avalanches. This can be true particularly in complex litigation cases.²⁷ The phenomenon is dysfunctional in two ways. First, the efficiency goal of our adjudication system is undermined when the motivation to produce experts is quantity rather than quality. Second, the justice goal of our system is eroded when party resources influence the ability of litigants to meet the challenges of their adversaries.

(experts dispute cause of "discolored right eye" of victim and "small hemorrhages found around the eyelids"); Chambers Jury Deliberates for a Fifth Day, N.Y. Times, Mar. 22, 1988, at B9 ("jurors asked the court for a stipulation from the trial testimony about the minimum and maximum amount of time that would have been required to cause the pinpoint hemorrhages found in the lids of Jennifer Levin's eyes"); interview with Professor Steven Duke, Yale Law School (Mar. 22, 1988).

24. See Note, Discovery Abuse Under the Federal Rules: Causes and Cures, 92 Yale L.J. 352 (1982).

25. See, e.g., *Sig M. Glukstad, Inc. v. Lineas Aereas Nacional—Chile*, 656 F.2d 976 (5th Cir. 1981) (dismissal of plaintiff's action); *Smith v. Ford Motor Co.*, 626 F.2d 784 (10th Cir. 1980), cert. denied, 450 U.S. 918 (1981) (reversible error to permit doctor to testify on matter as to which discovery was obstructed); *Carroll v. Abbott Laboratories*, 122 Cal. App. 3d 971, 176 Cal. Rptr. 271 (1981), superseded by 654 P.2d 775 (Cal. 1982) (reversible error to refuse to dismiss for flagrant noncompliance by plaintiff's attorney). An interview with Judge Jose Cabranes, District of Connecticut (Mar. 20, 1986) confirmed the persistence of discovery abuses as a tactic for stalling litigation and intimidating opponents.

26. See, e.g., *Polaroid Corp. v. Eastman Kodak Co.* 789 F.2d 1556 (each party produced four to five million pages of discovery documents); *Soobzokov v. CBS*, 642 F.2d 28 (2d Cir. 1981); *International Business Machines Corp. v. United States*, 493 F.2d 112 (2d Cir. 1973).

27. E.g., *In Re Japanese Electronic Products Antitrust Litigation*, 631 F.2d 1069 (3d Cir. 1980) (multiparty lawsuit requiring jury to sort out opinions—dozens of experts discussing the facts using complicated economic modeling to explain alternative fact situations). For confirmation of the increasing dependency on experts of fact-finding in complex litigation, see Study To Investigate Use of Scientific Evidence, *supra* note 21.

3. *Evidentiary stalemate.* Because the parties to a law suit tend to shop around for the experts and theories most supportive of their arguments, it is not uncommon for one expert to contradict another expert at trial.²⁸ When the contradiction concerns evidence forming the basis of a material fact, the resulting evidentiary stalemate creates a need for some guidance for the jury attempting to weigh the conflicting experts' opinions.

Again, the Chambers case provides an illustration. Attorneys for the accused and for the victim both produced forensic experts to testify about whether or not the markings on Levin's neck were signs of intentional gripping from the front to strangle—as the prosecution alleged—or signs of accidental grabbing from behind “in a frantic effort to stop her from squeezing his testicles during a sexual act”—as the defendant had testified. The prosecution's expert asserted that the marks showed a face-to-face encounter. The expert for the defense claimed the marks were produced from a flailing grasp from behind.²⁹

Such evidentiary stalemates can occur in both criminal and civil cases. The effect on the resolution of the case is similar to that of the above-discussed failure of partisans to produce evidence highly probative of material facts—an evidentiary void is created. Evidentiary stalemates become dysfunctional in a truth-seeking adjudication system when the missing expert testimony is crucial to determining a material fact. It follows, then, that the problem arises most frequently in the types of litigation becoming increasingly dependent on expert testimony.

II. *The Increasing Value of Expert Testimony and the Need for Court-Appointed Experts in Four Types of Litigation*

Just as partisan expert testimony becomes more problematic, expertise from disciplines outside the law is becoming more valuable to litigation. The recent rise in value of expert testimony as a mode of proof-taking has become particularly apparent in criminal cases where the determination of intent turns on forensic and psychological evidentiary findings, in toxic tort litigation, in complex litigation cases, and in child placement cases. As shown below, in each of these four types of litigation, court-appointed experts are a viable supplement to partisan experts for satisfying the growing dependency of courts on non-legal expertise.

28. See Johnson, *supra* note 1; Sink, *supra* note 6, at 197.

29. Johnson, *supra* note 1.

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A. Criminal Cases

The Chambers case mentioned above is a recent example of how murder cases rely on professional forensic examiners to produce evidence relevant to the issue of intent. Since intent is a material fact in murder cases, the evidence produced to guide the jury in its determination is crucial to the outcome of the case. Moreover, psychiatric expert testimony has assumed an increasingly important role in determining insanity of criminal defendants. Until 1954, the common test of insanity was whether the defendant knew the difference between right and wrong and whether he could resist impulses.³⁰ It was a moralistic evaluation, one suited to a jury unaided by scientific expertise. In 1954, *Durham v. United States*³¹ created the rule, largely in effect today, which gives experts more freedom to express their views to the jury. As a result, it is more possible for psychiatric experts to render opinions on mental diseases and defects in terms which may approach or even amount to the determination of the legal conclusion of insanity.³²

The explosion in the use of polygraphs (lie detectors) in police departments and government agencies shows nascent signs of a parallel growth in the courtroom.³³ The reliability of polygraphs as aids to reconstructing facts remains questionable,³⁴ yet it is a form of non-legal expertise intruding on the traditional function of the jury as evaluator of the credibility of courtroom witnesses.

B. Toxic Torts

Reliance on expert testimony is also significant in cases in other areas of the law where material facts tend to turn on expert testimony. Tort cases involving medical or chemical disasters increas-

30. This century-old common law rule is called "The M'Naghten Rule." For discussions of how this rule accommodated expert testimony, see A. Goldstein, *The Insanity Defense* 53-58 (1967); Livermore & Meehl, *The Virtues of M'Naghten*, 51 *Minn. L. Rev.* 789 (1967).

31. 214 F.2d 862 (D.C. Cir. 1954).

32. For cases attempting to curb this expansion of expert determination into the sphere of the fact finder, see, e.g., *McDonald v. United States*, 312 F.2d 847, 850-51 (D.C. Cir. 1962); *United States v. Brawner*, 471 F.2d 969 (D.C. Cir. 1972).

33. Some trial courts have recently admitted expert testimony based on polygraph results. See, e.g., *United States v. Zeiger*, 350 F. Supp. 685 (D.D.C.), *rev'd*, 475 F.2d 1280 (D.C. Cir. 1972). For an indication of the surprisingly widespread open-mindedness of courts on the question of the accuracy of polygraphs as memory refreshers and confession inducers, see *Commonwealth v. Vitello*, 381 N.E.2d 582 (Mass. 1978) (summary of recent cases involving polygraph results).

34. See Office of Technology Assessment, U.S. Congress, *Scientific Validity of Polygraph Testing: A Research Review and Evaluation* (1983); P. Ekman, *Telling Lies* 209-18 (1985).

ingly call for determinations of causation, negligence, and contributory negligence, requiring medical testimony.³⁵

Problems of "hired-gun experts" plague this type of litigation, perhaps because the potential damages awards are exceptionally high. Recently, for example, a medical scholar allegedly gave false information in his testimony on behalf of the maker of the Dalkon Shield in exchange for \$277,000 in fees.³⁶

C. *Complex Litigation*

In the last decade or two, courts trying complex litigation cases have increasingly relied on expert testimony.³⁷ The parties produce these experts. In multiparty litigation, the number of expert witnesses can be staggering, making it difficult for the jury to keep track of them. Furthermore, calculating damages in patent infringement cases and resolving questions of misleading financial projections made by corporate disclosure statements in securities cases may draw on complicated economic modeling to reconstruct financial worlds.³⁸ When assessing the guilt and blame of corporations, courts must look at the probable ramifications in financial and consumer markets of past actions of the corporation.

Regulating the number of experts called in these trials would be a drastic step for a judge because it involves interfering with the kind

35. J. Weinstein, *Role of Expert Testimony and Novel Scientific Evidence in Proof of Causation*, Address Before the ABA Annual Meeting, at 12 (Aug. 9, 1987) (recent observation of the dispositive authority given to scientific opinion in tort suits). *See, e.g.*, Spill's Legal Odyssey, *N.Y. Times*, Oct. 24, 1987, at 10; Handler, *Social Dilemmas, Judicial (Ir)resolutions*, 119 *N.J. L.J.*, Mar. 19, 1987, at 5 ("stunning advances in human knowledge, science and technology" have forced courts in toxic tort cases to assume more responsibility for guiding the evaluation of expert evidence, particularly on issues relating to causation).

36. *Professor is Charged With Lying For Maker of Birth Control Device*, *N.Y. Times*, Mar. 4, 1988, at 1.

37. Recently, there has been a prevalence of pessimistic scholarly opinion on the ability of both judges and juries to evaluate massive amounts of expert testimony. Such commentaries highlight the significance given to expert testimony in complex cases. *See, e.g.*, Strawn & Munsterman, *Helping Juries Handle Complex Cases*, 88 *Case & Com.*, Mar./Apr. 1983, at 45; Jasanoff & Nelkin, *Science, Technology, and the Limits of Judicial Competence*, 22 *Jurimetrics J.* 266 (1982); Dombroff, *Courts Ill-Equipped to Assess Scientific Issues*, 7 *Legal Times*, Jan. 7, 1985, at 14. The numerous proposals for reform to improve courts' ability to evaluate evidence introduced by non-legal experts again suggest a high frequency of expert testimony in complex cases. *See, e.g.*, Chayes, *The Role of the Judge in Public Law Litigation*, 89 *Harv. L. Rev.* 1281 (1976); Levi, *The Business of the Courts: A Summary and A Sense of Perspective*, 70 *F.R.D.* 212 (1976); Hazard & Rice, *Judicial Management of the Pretrial Process in Massive Litigation: Special Masters as Case Managers*, 1982 *Am. B. Found. Res. J.* 375; Resnik, *Managerial Judges*, 96 *Harv. L. Rev.* 374 (1982).

38. *See Polaroid Corp. v. Eastman Kodak Co.*, 789 F.2d 1556.

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of case each party can present.³⁹ Alternatively, without infringing on the parties' right to fashion their own cases, the judge can help the jury sort out the strands of expert opinion by appointing one or more experts to comment on the partisan expert testimony. Scholars have advocated a variety of proposals to unravel the complexity of expert input necessary to these cases. None emphasizes increased use of court-appointed experts as a solution.⁴⁰ All recommend reforms that would change our trial system in more fundamental—and potentially hazardous—ways. To date, none has been adopted.

D. Child Placement Cases

Over the last ten years, child placement cases have come to routinely involve experts from the professions of child psychology, education, and social work.⁴¹ Their involvement is partly the result of the revolutionizing impact of the “Best Interests of the Child” trilogy on judges and child advocates in child placement cases.⁴²

39. Judge Weinstein handled the expert witnesses in the Agent Orange case in this manner. Professor Schuck criticizes this action mainly for its invasion of the domain of the expert: “[i]t inescapably amounts to a judicial second-guessing of scientists’ substantive judgments.” P. Schuck, *Agent Orange on Trial* 239 (1986). It seems, however, that Weinstein did not make a scientific evaluation. Rather, he made a legal evaluation about the legal effect of scientific testimony. On a summary judgment motion, Weinstein excluded the plaintiffs’ experts on causation by invoking Rules 703 and 403, claiming that the possibility that the testimony would “mislead and confuse” a jury outweighed its probative value. *Id.* at 238. The effect of this exclusion was that Judge Weinstein prevented one of the parties from presenting its case. The movement beyond the traditional parameters of a judge’s authority seems to have been principally a movement, not across the boundary between science and law, but across the boundary separating the roles of judge and litigants.

40. *E.g.*, Alschuler, *supra* note 4, at 1846-54 (judges should more closely supervise discovery and other pretrial activities guided by safeguards that ensure judicial impartiality); Green, *Expanded Use of the Mini-Trial, Private Judging, Neutral-Expert Fact-Finding, Patent Arbitration and Industry Self-Regulation, in Corporate Dispute Management* 333, 342 (1982) (use of “‘discovery masters’ to assist the court in complex cases with troublesome discovery disputes”); another proposal attempts to accommodate the growing need for and use of social science frameworks “for deciding factual issues crucial to the resolution” of cases. Walker & Monahan, *Social Frameworks: A New Use Of Social Science in Law*, 73 Va. L. Rev. 559 (1987) (courts should obtain information from social sciences useful for determination of “factual issues crucial to the resolution of . . . specific case[s],” *id.*, “through written briefs and independent investigation . . .” *Id.* at 589; “it is . . . the responsibility of the court rather than the jury to evaluate the research which comprises the social framework.” *Id.* at 594).

41. *See* Ellis, *Evaluating the Expert: Judicial Expectations of Expert Opinion Evidence in Child Placement Adjudications*, 5 Cardozo L. Rev. 587 (1984).

42. J. Goldstein, A. Freud, & J. Solnit, *Beyond the Best Interests of the Child* (new ed. with epilogue, 1979) [hereinafter *Beyond the Best Interests*]; J. Goldstein, A. Freud, & J. Solnit, *Before the Best Interests of the Child* (1979) [hereinafter *Before the Best Interests*]; J. Goldstein, J. Solnit, A. Freud, & M. Goldstein, *In the Best Interests of the Child* (1986) [hereinafter *In the Best Interests*]. For a convincing discussion of the tril-

These books recommend strict limitation of the judicial function to legal matters and heavy input by child care professionals on non-legal matters affecting the placement of the child.⁴³ In addition, judges in child placement cases are particularly receptive to expert opinions because the trial judge has unusually wide discretion and almost no legal guidelines.⁴⁴

Normally, the court directly or indirectly appoints experts in these cases. Social workers at the court's family relations department interview all the family members involved. Upon their recommendation of a full psychiatric evaluation of a family member, the court will issue a court order appointing a psychiatrist. Usually the court selects an expert agreed upon by the parties. When parties cannot agree, the court selects. In some states, Connecticut for example, judges appoint an advocate for the child and the advocate then chooses the experts. Partly because these cases do not always involve two clearly demarcated adversaries, even experts hired by the litigants' attorneys tend to become part of a team to which all expert members contribute their opinions on matters within the areas of their expertise. The ultimate function of the team is to advise the judge.⁴⁵

E. Advantages of Court-Appointed Experts as Supplement to Partisan Experts

Because the role of the expert bears ever more heavily upon the outcome of these four types of cases, the deficiencies of partisan expert testimony—expert biases, failure to produce adequate expert testimony, inequities in party resources, and evidentiary stalemates—pose significant threats to the truth-finding and justice goals of our system of adjudication. Increased use of non-partisan experts

ogy's influence in child placement decision making, see Davis, "There is a Book Out . . .": An Analysis of Judicial Absorption of Legislative Facts, 100 Harv. L. Rev. 1539, 1546, 1569 (1987) (Beyond the Best Interests was cited in 193 court cases. In most adoption cases after Beyond the Best Interests was published, expert evidence is frequently given both supporting and contradicting the "psychological parent theory" espoused in Beyond the Best Interests).

43. See *In The Best Interests*, *supra* note 42, at 48-49, 58, 68, 159 n.6, 164 n.11, 172-73 n.35, 177-78 n.10, 186 n.22, 190 n.24; *Beyond The Best Interests*, *supra* note 42, at 86-96; *Before The Best Interests*, *supra* note 42, at 122, 226 n.8, 228-31 & n.13.

44. Note, *Lawyering for the Child: Principles of Representation in Custody and Visitation Disputes Arising from Divorce*, 87 Yale L.J. 1126, 1135-36 (1978).

45. Wald, *Book Review, The Kindness of Strangers*, 97 Yale L.J. (forthcoming issue 7) (1988); interview with Miriam Berkman, Supervising Attorney, Jerome N. Frank Legal Services Organization, Yale Law School (Feb. 8, 1988).

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would decrease the problems inherent in expert testimony without detracting from its value.

Non-partisan experts are less susceptible to pressures to tailor their testimony to support a particular legal outcome than are partisan experts whose fees are paid by parties interested in the legal outcome. Ascertaining when there is a failure of production, an abuse of a party's financial advantage, or an evidentiary stalemate will, of course, be difficult in some situations. But it is not an insurmountable difficulty. Much of the difficulty stems from judges' lack of familiarity with the scientific theories in question. A judge is not likely to be an expert in the field in which the expert is testifying. A judge is supposed to be a legal expert, however, and determining the adequacy of expert testimony for the purpose of arriving at a legal resolution is a job with which we expect judges to be familiar and at which they should be competent. Evaluations of legal issues may be complicated, but we have vested in our judges the authority and responsibility to make these evaluations. Also, a judge and jury are better situated than are parties' attorneys to notice when the testimony of one party's expert cancels out the testimony of another and leaves an information gap that needs to be filled. The judge is in a better position than is the jury to do something about filling such gaps. The judge is the only player in a stymied litigation able to select and produce an expert who can offer a new view not provided by the parties' experts or provide enough additional support for one of the views provided by the partisan experts to break the stalemate.

Reaching a decision to appoint an expert is the first stage of the appointment process. The court most likely will be able to obtain all its cues from either a thorough reading of the briefs before trial or from close observation of expert testimony as the trial progresses.

Once a court decides to appoint an expert to remedy any of the situations outlined above, the appointment process would be roughly the same for all of them. The court would marshal its resources to investigate the general area of expertise that is posing a problem to the present litigation. It then will determine which expert or experts are most appropriate for appointment. Local psychologists or social workers should be adequate for most criminal insanity defenses, while nationally prominent leaders in a field may be required for large-scale, complex litigation. Naturally, the court would save time if it could rely on pre-assembled lists of experts

approved and available for specified types of issues,⁴⁶ though caution would be advised for maintaining a professional distance between these experts and the court.⁴⁷ The court may also wish to select experts based on submissions of written evaluations of the problem.

Once the court selects the expert, it is within the court's authority to call the expert to testify at trial and to initiate questioning of the expert by the judge.⁴⁸ Of course, to avoid confrontation clause problems, counsel for both or all parties would be entitled to question and cross-examine the expert.

Costs would be assigned according to the broad specifications of Section 706(b), which leaves to the judge's discretion the determination of an equitable apportionment of the costs between the parties. The only requirement is that the court underwrite the costs in fifth amendment compensation cases.⁴⁹ It may be sensible in many civil disputes to assign the costs of hiring the expert to the losing party.⁵⁰

III. Judges' Reluctance to Appoint Experts and the Need to Amend Rule 706

Court-appointed experts will not be used in most cases where they are needed if FRE Rule 706 is not amended. Even with Rule

46. See generally Wick & Kightlinger, *Impartial Medical Testimony Under the Federal Civil Rules: A Tale of Three Doctors*, 34 *Ins. Couns. J.* 115, 118 (1967) (description of five individual federal district courts that experimented with a system drawing on local medical advisory boards for court-appointed experts in insurance cases and established local rules giving the court power to initiate the process).

47. For a proposal that would not work in most of the situations outlined in this Current Topic, see Levy, *Impartial Medical Testimony—Revisited*, 34 *Temp. L.Q.* 416, 423 (1961) ("doctors are assigned under a rotating system which introduces an element of chance into the situation"). This Current Topic targets four very different types of litigation for increased use of court-appointed experts. In order for courts to select their experts at random in these four types of suits, a rotating panel would have to be established for each area of litigation. This would be difficult for complex litigation and toxic torts because the types of expertise required vary greatly from lawsuit to lawsuit. Also, because of the higher financial stakes and more refined areas of specialty involved, panels for complex litigation and toxic torts would have to draw from a national base, while most criminal and child placement cases using psychiatrists and doctors could use a local pool of experts. The cost of hiring from national panels would be considerable.

48. For recognition of the courts' power to initiate the calling of expert witnesses at trial, see 9 Wigmore, *Evidence* § 2484 (3d ed. 1940). For previous proposals and arguments that courts have the authority to call and question their own witnesses pursuant to local rules, see Van Dusen, *supra* note 7, at 503, 516-20.

49. See Fed. R. Evid. 706(b), *supra* note 2, and advisory committee's note, *supra* note 3.

50. For refined variations of this suggestion, see Van Dusen, *supra* note 7, at 503, 505; Sink, *supra* note 6, at 210.

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706 in place, judges rarely appoint experts.⁵¹ The reasons for their reluctance are not clearly documented. No studies have investigated judicial behavior when confronted with the possibility of appointing experts.⁵² Thus, the following are common sense, theoretical explanations.

A. *Undue Judicial Influence*

One obstacle to the use of court-appointed experts is judges' reasonable concern with the risks of judicial influence on jury deliberation.⁵³ Judges and scholars have referred to this problem with varying degrees of emphasis on the danger it poses for use of court-appointed experts. Those who raise this concern as an insurmountable obstacle to the use of court-appointed witnesses exaggerate its importance, claiming that it poses a threat to the seventh amendment guarantee of a jury trial.⁵⁴ This argument rests on the assumption that juries will be unduly persuaded by a court-appointed expert and unduly unaffected by the opinions of experts hired by the parties.⁵⁵ There is no conclusive, empirical evidence that juries are necessarily misled into giving court-appointed expert testimony

51. See E. Green & C. Nesson, *supra* note 15, at 699.

52. Louis Harris and Associates conducted a poll on "Judicial Attitudes Toward Issues in Civil Procedure" from October to December 1987. The poll surveyed the attitudes of federal and state judges toward proposed changes increasing the "use of expert witnesses in addition to adversary witnesses who are independent of the parties to the trial." Louis Harris and Associates, Inc., Study No. 874017, 52-53 (Apr. 1988) (survey conducted for Aetna Life & Casualty). An overwhelming majority of both federal (76%) and state (70%) judges replied that they favor increased use of non-adversarial experts. *Id.* The survey is useful to this proposal because a preponderance of judicial support for an attempt to increase the use of court-appointed experts underscores the feasibility of such a reform attempt. The survey does not, however, gauge judicial attitudes when specifically faced with the possibility or the necessity of appointing expert witnesses. Thus, the survey does not aid this proposal in assessing the sources of judicial reluctance to appoint experts.

Two limited surveys in the 1960s attempted to gauge judges' and lawyers' attitudes toward medical experts appointed by courts as a part of the local experiments with systems of rotating expert panels for medical malpractice cases. One surveyed 300 judges, lawyers and doctors in Nebraska in 1965, most of whom favored the use of such experts. See Myers, "The Battle of the Experts": A New Approach to an Old Problem in Medical Testimony, 44 Neb. L. Rev. 539, 540 (1965). The other surveyed 99 judges nationwide in 1966, and most disapproved of the use of such experts. See Wick & Kightlinger, *supra* note 46, at 120. Neither survey examined the behavior of judges when faced with an opportunity to appoint experts or of appellate courts reviewing cases involving court-appointed experts, nor is either survey recent enough to be of use to this proposal.

53. See Chambers, *supra* note 9 ("some judges also are reluctant to allow expert testimony for fear it will overwhelm the jury and make the expert, in effect, the ultimate factfinder").

54. See, e.g., Saltzburg, The Unnecessarily Expanding Role of the American Trial Judge, 64 Va. L. Rev. 1, 78 (1978); Levy, *supra* note 47, at 424.

55. For an example of this assumption by a critic of court-appointed experts, see, e.g., Saltzburg, *supra* note 54, at 77-78.

undue weight in their consideration of evidence. Admittedly, there is always a risk of juries being prejudiced by any kind of evidence. FRE 403⁵⁶ supersedes Rule 706, however, serving to minimize at all times the possibility of prejudicial information and of undue influence from both lay and expert testimony and from both real and demonstrative evidence.⁵⁷ In addition, most case law on the subject supports the right of courts to appoint witnesses over any possible threat that right poses to a defendant's right to a jury trial.⁵⁸ A final and most powerful argument that Rule 706 poses no threat to the seventh amendment is that judges are not empowered to delegate any aspect of the jury's fact-finding function to an expert. For all these reasons, court-appointed experts do not now pose a troublesome threat to the seventh amendment.

B. Interference With Adversarial Counsel

Another reason for judges' reluctance to appoint experts is the fear of interfering with the traditional functions of adversarial counsel. Reflections of this fear in scholarly writings often take the form of a discussion of the "active" versus the "passive" judge.⁵⁹ Such discussions often confuse "active" with interfering and "passive" with indifferent, instead of clearly defining these words so as to free them of some of the baggage associated with the adversarial myth. Disinterested need not mean indifferent and uninvolved.⁶⁰ This notion is based on a clinging to the myth that our legal system is "adversarial," and the more purely adversarial the better. Legal historians agree that the Anglo-American trial system has, since the late nineteenth century, been moving closer to the so-called "inquisitorial" systems of countries on the European Continent.⁶¹ For ex-

56. "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." Fed. R. Evid. 403.

57. For a discussion of the distinction between real and demonstrative evidence, see R. Lempert & S. Saltzburg, *supra* note 7, at 988-91.

58. For caselaw support, see Wick & Kightlinger, *supra* note 46, at 130-31. For confirmation that the "inherent power of a trial judge to appoint an expert of his own choosing is virtually unquestioned," see advisory committee's note, *supra* note 3, at 106. See also Sink, *supra* note 6; Van Dusen, *supra* note 7, at 514-15; 9 Wigmore, Evidence § 2484 (3rd ed. 1940).

59. See Saltzburg, *supra* note 54, at 74-81.

60. Sink, *supra* note 6, at 214.

61. See Merryman, On the Convergence (and Divergence) of the Civil Law and the Common Law, 17 Stan. J. Int'l Stud. 357 (1981). See also Langbein, The German Advantage in Civil Procedure, 52 U. Chi. L. Rev. 823, 840 (1986) ("In the use of expertise German civil procedure strikes an adroit balance between nonadversarial and adversarial values"; European litigants may engage their own experts). A decade ago, a Brit-

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ample, the practices of plea bargaining and bench trials are non-jury-trial devices representing aberrations of the adversarial quality of our legal system.⁶² They are litigation shortcuts which enhance the discretion and power of the judge and abort due process safeguards in order to avoid the high costs of jury trials. Similarly, the use of court-appointed experts may be viewed as a deviation from the adversarial nature of a trial employed in order to further the truth-seeking goal of the system.

C. Problems of Judicial Objectivity

A third fear is that of creating an inference of a lack of judicial objectivity. Of course, judges should always vigilantly maintain their objectivity. As will become clear upon distinguishing concerns about the appearance of objectivity from concerns about actually being objective, this fear is both exaggerated and misplaced with regard to court-appointed experts. First, this concern exaggerates the threat to the appearance of judicial objectivity posed by court-appointed experts. If two opposing litigants produce conflicting expert testimony, perhaps because the two experts fall on opposite ends of a spectrum of accepted scientific theory, the testimony of the court-appointed expert will often support one party's expert to the detriment of the other. The fact that the testimony does not come out half-way between them is not itself proof that the judge is biased. Legal bias is to be avoided, but scientific bias—the favoring of one scientific theory over another—is possible, even inevitable at times, in order for the judge to remain impartial. Also, in some cases there is a viable midpoint on the spectrum between the parties' experts or a third separate theory that the court-appointed expert may use as a basis for his or her testimony. The expert can be useful simply by putting partisan expert views into perspective. Even if the court's expert must conclude that he is unable to make any findings based on the current state of scientific expertise in his field, this conclusion of itself has an affirmative value for the trier of

ish scholar noted the need for increased court appointment of experts in Britain. See Basten, *The Court Expert in Civil Trials*, 40 *Mod. L. Rev.* 174 (1977).

62. See Langbein, *Mixed Court and Jury Court: Could the Continental Alternative Fill the American Need?*, 1981 *Am. B. Found. Res. J.* 195, 197.

fact.⁶³ But in these latter cases, the appearance of the judge's objectivity is in no danger.⁶⁴

Likewise, judges' fear of actually losing their impartiality by appointing experts is misplaced. It is based on a confused understanding of the definition of impartiality. Of concern to some critics is the fact that there is no such thing as "impartial" expert testimony because no science is exact and there will always be a difference of opinion among experts within a given field.⁶⁵ The point, however, is that court-appointed experts be neutral in a legal sense, not in a scientific sense. In fact, non-partisan experts are freer from pressure toward legal bias than are partisan experts because the people paying the non-partisan experts' fees have no personal interest in the outcome of the case. All the judge needs to do is avoid pressuring the appointed experts to testify a certain way and avoid deliberately appointing a witness for the purpose of influencing the jury.

The specter of appellate level review may explain the widespread reluctance of judges to risk creating an inference of a lack of objectivity by appointing experts. There is no empirical evidence that trial court decisions tend to be overturned on appeal because of, or even incidental to, the appointment of experts. In the absence of systematic, statistical information we must turn to an individual case. Judges might take comfort in the events of the "Agent Orange" case as a famous example of judicial participation in the production of expert testimony. Although Judge Weinstein's exclusion of some partisan expert testifiers in that case represents a somewhat

63. See Van Dusen, *supra* note 7, at 511 n.15.

Courts have unwittingly been swayed by partisan testimony of people fraudulently masquerading as experts. Such situations warn of the dangers to truth-seeking of uninformed and uninformed judges. One remedy is a court-appointed expert to testify on the validity of the partisan expert's expertise as a "field" under FRE 703 (the "Frye" rule). As an example of this problem, one expert witness falsely claimed that an expertise in dog-sniffing techniques existed as a device for identifying suspects and was used successfully to convict defendants in several cases. In two of the cases, defendants did not call their own experts to contradict this expert. *United States v. Gates*, 680 F.2d 1117 (6th Cir. 1982); *Epperly v. Commonwealth*, 294 S.E.2d 882 (Va. 1982). In another case, defendant called an opposing expert to contradict this same expert, but the court was persuaded by this expert and defendant was convicted. *State v. Roscoe*, No. 90-345, slip op. (Ariz. Dec. 28, 1984).

64. For a discussion of the tangential and virtually groundless obstacle to courts appointing experts, that of the risk of the expert's partiality, see Diamond, *supra* note 7 (court-appointed experts tend to devote less time to the job and take job less seriously than do parties' experts; author offers his "editorial opinion" that court-appointed experts are biased in favor of the prosecution, but offers no support for this notion). For a practitioner-oriented article that touches on the problem of impartiality in expert testimony, see Thorner, *Effective Use of Independent Medical Exams*, 24 *For the Defense* 21 (Jan. 1982).

65. See, e.g., Levy, *supra* note 47, at 419.

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drastic affront to the adversarial nature of our legal system, his decision was not overturned on appeal.⁶⁶

D. Lack of Judicial Resources

A fourth basis for judicial reluctance to appoint experts is sheer unwillingness to devote the time and money necessary for selecting experts and overseeing the taking of their testimony. Appointing experts requires a thorough understanding of the case and research into the relevant fields of expertise. A shortcoming of an adversarial system of litigation is the tendency of judges not to follow closely the briefs or the proceedings of a case. The duty of noninvolvement becomes for judges an excuse for not doing their homework and for allocating their time to other judicial tasks that appear more pressing.⁶⁷ This unwillingness might also be described as a product of bureaucratic mentality—in a bureaucracy it is always safer to do nothing than to stick your neck out. This brand of passivity in all its manifestations stands in the way of the truth-seeking goal of our adjudication system. Effective reform of Rule 706 should include disincentives to this tendency.

IV. Proposal for Reform of Rule 706

Since FRE Rule 706 is the sole codification of the common law power of courts to appoint experts, it is the most obvious object of reform in the attempt to modify judicial behavior in the appointing of experts. Rule 706 is the surest place from which to send the appropriate signals to the judiciary.

Rule 706 codifies the common law right of courts to appoint experts to testify. It is a response to the view that the most significant drawback to expert testimony is its current, predominantly partisan

66. See P. Schuck, *supra* note 39. An older case is more on point—an appellate court did not overturn a trial court's decision challenged on the ground that it had exceeded its powers by calling a handwriting expert. *Kamahalo v. Coelho*, 24 Haw. 689, 694-95 (1919).

67. See Langbein, *The German Advantage*, *supra* note 61, at 841 (discussing "simple inertia" as one explanation for judges' behavior). The author's interviews have suggested laziness as a possible reason for judicial unwillingness to undertake the responsibility and extra research necessary to appoint experts for the court. Interview with Professor Stephen Duke, Yale Law School (Mar. 22, 1988); interview with Dan Saulewicz, free lance reporter and former consultant to "20/20," Yale Law School (Apr. 1, 1988). See also *Discretion and Justice* Leff, *N.Y. Times*, Sept. 2, 1982, at A26 (mentions "lazy" and "slow" judges in New York's judicial system); Haberman, *Koch Judges Judges and They Return the Favor*, *N.Y. Times*, Nov. 23, 1980, at E6 (Koch criticizes New York judges for being too passive in criminal cases; suggests "judges confuse insularity with independence").

presentation.⁶⁸ As Rule 706 now stands, it merely leaves available the judge's common law option to call his or her own experts. Article VII of FRE does not contain any incentives to appoint experts. Incentives are necessary to combat the natural reluctance of judges to appoint experts. Rule 706 is therefore not an adequate response to the concerns about the risks of partisanship posed by the current scheme of court reliance on parties to obtain expert testimony in court. Because increased use of non-partisan experts would decrease the problems inherent in expert testimony without detracting from its value, Rule 706 should be amended to make court appointment of experts a more attractive alternative to deferring to the discretion of adversaries.

In order to recognize the legitimacy of the fear of unduly influencing the jury, a requirement for a jury instruction should be incorporated into Rule 706 in the form of an addition to Section 706(c). The new provision should come at the end of the existing language, and should read: "Upon disclosure that it appointed the expert witness, the court has a duty to instruct the jury that the jury is to make the final decision on issues of fact and is not bound to accept as true the testimony of the expert solely because the court selected him or her, but rather, the jury is to judge the testimony according to the same standard as the testimony of the other expert witnesses." This revision is designed to minimize the aura of extra credibility that judicial appointment may lend an expert witness.

In order to combat the tendency toward safe and easy inactivity inhibiting the court appointment of experts even when it is a useful supplement to partisan expert testimony, a new provision should be added to Rule 706 in the form of a Section 706(e). The new provision should read as follows: "(e). When Not Discretionary. Courts have an affirmative duty to appoint their own witnesses when the fact-finding process will otherwise be severely impaired. Such situations include those in which partisan expertise fails to produce highly relevant evidence; in which partisan expertise conflicts on a material fact, leaving a lack of guidance for the jury determination; or in which the production of partisan expert testimony is abused." This revision is not to be interpreted to mean that courts should always appoint expert witnesses. Rather, it is meant to call judges' attention to the need to appoint experts in cases where partisan expertise fails. To this end, an advisory committee note should follow this new section of the rule: "Failure by the court to identify situa-

68. Fed. R. Evid. 706 advisory committee's note, *supra* note 3.

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tions in which an expert witness should be appointed will be grounds for appellate review and assignment of reversible error.”

Admittedly it is difficult for a judge to decide which expert to call. The judge could get parties to agree on an expert. The danger here, however, is that in the judge’s attempt to appear impartial, the choice may be a conciliatory witness, one whose views are not clearly defined or rigorous. While a pacifying personality is fine for selecting an arbitrator to achieve a compromise between two disputants, it is not a good indicium of an expert highly respected in his field. Therefore, an alteration of the Rule 706(a) appointment clause is in order. It should be changed from “The court may appoint any expert witnesses agreed upon by the parties, and may appoint expert witnesses of its own selection” to “The court may appoint expert witnesses of its own selection, with or without the consent of the parties, and with or without the assistance of the parties. The Court may initiate the appointment, calling, and questioning of the expert.” This language reinforces the point that the judge’s authority to decide when and whom to appoint is independent from the parties’ prerogative to do so. The language clarifies the judge’s affirmative duty to appoint experts in some situations even over the objection of the parties. Moreover, the language also clarifies that the aim of calling court-appointed experts is not solely to effect a settlement between the parties, but also to facilitate truth-finding in situations in which the judge deems the parties have failed to do so.⁶⁹

69. Thus, Rule 706, amended pursuant to this proposal, reads as follows:
706(a) Appointment. The court may on its own motion or on the motion of any party enter an order to show cause why expert witnesses should not be appointed, and may request the parties to submit nominations. The court may appoint expert witnesses of its own selection, with or without the consent of the parties, and with or without the assistance of the parties. The court may initiate the appointment, calling, and questioning of the expert. An expert witness shall not be appointed by the court unless the witness consents to act. A witness so appointed shall be informed of the witness’ duties by the court in writing, a copy of which shall be filed with the clerk, or at a conference in which the parties shall have opportunity to participate. A witness so appointed shall advise the parties of the witness’ findings, if any; the witness’ deposition may be taken by any party; and the witness may be called to testify by the court or any party. The witness shall be subject to cross-examination by each party, including a party calling the witness.

(b) Compensation. Expert witnesses so appointed are entitled to reasonable compensation in whatever sum the court may allow. The compensation thus fixed is payable from funds which may be provided by law in criminal cases and civil actions and proceedings involving just compensation under the fifth amendment. In other civil actions and proceedings the compensation shall be paid by the parties in such

V. Conclusion

This Current Topic proposal aids the truth-seeking, equal access, and efficiency goals of our adjudication system by helping to correct the dysfunctions currently emerging in our system's virtually sole reliance on partisan expert testimony. Proposed Section 706(e) alleviates the most serious risks of nonproduction of evidence and evidentiary stalemate which undermine the truth-seeking function in cases where a legal decision turns on expert testimony. The amendment of Section 706(a), by disabusing judges of the notion that they must reconcile parties' demands when appointing experts, helps identify court-appointed witnesses as a tool for enhancing efficiency, even when this conflicts with the parties' desires. The court-appointed expert's functions include serving as a sanction against parties who hire excessive numbers of experts or produce excessive expert-generated documentation during discovery. By alerting courts to an affirmative duty to recognize situations in which their own experts can alleviate abuse of evidence production by the parties, Section 706(e) combats problems of the lack of equal access posed by the dysfunctions of discovery abuse and the inability of some parties to afford to obtain adequate expert testimony. Section 706(a) promotes efficiency because it notifies courts that appointing experts may be a tool for handling cases without striving for settlement.

The revision of Section 706(c) suggested in this Current Topic introduces ways of alleviating the legitimate concern of judges that they not unduly influence the jury. Section 706(c) requires a jury instruction that cautions against treating the court-appointed testi-

proportion and at such time as the court directs, and thereafter charged in like manner as other costs.

(c) *Disclosure of Appointment.* In the exercise of its discretion, the court may authorize disclosure to the jury of the fact that the court appointed the expert witness. Upon disclosure that it appointed the expert witness, the court has a duty to instruct the jury that the jury is to make the final decision on issues of fact and is not bound to accept as true the testimony of the expert solely because the court selected him or her, but rather, the jury is to judge the testimony according to the same standard as the testimony of the other expert witnesses.

(d) *Parties' experts of own selection.* Nothing in this rule limits the parties in calling expert witnesses of their own selection.

(e) *When Not Discretionary.* Courts have an affirmative duty to appoint their own witnesses when the fact-finding process will otherwise be severely impaired. Such situations include those in which partisan expertise fails to produce highly relevant evidence; in which partisan expertise conflicts on a material fact, leaving a lack of guidance for the jury determination; or in which the production of partisan expert testimony is abused.

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mony as necessarily more accurate than that produced by the parties.

In addition, all three provisions of this proposal aim to leave little leeway for accommodating the unreasonable bases for judicial reluctance to appoint experts. Section 706(a) refuses to accept the contention that contradiction of the parties' wishes about the court appointing experts is undue interference with the adversarial process. Nowhere, however, does this proposal encourage the extra interference that is brought by judicial revision of the parties' cases. Section 706(e), by stressing the affirmative duty to appoint when situations call for it, refuses to accommodate judges' tendency toward inactivity. Section 706(a)'s attention to the appearance of objectivity shows that courts may appoint experts without being perceived as losing objectivity. Creating an affirmative duty in Section 706(e) goes further and signals that in some situations failing to appoint experts will arouse suspicion about the court's indifference. Thus, an amended Rule 706 can recognize that judicial indifference joins judicial partiality as a violation of the judicial role.

