Court-Appointed Experts

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Contents

I. Introduction

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.[2] The Supreme Court has urged judges to "be mindful" of this authority in assessing a proffer of expert testimony.[3] Yet court-appointed experts are infrequently used. This paper summarizes the findings of a study intended to answer the question "Why are court-appointed experts, as authorized by Federal Rule of Evidence 706, employed so infrequently?"[4] 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 and when managing an expert who has been appointed. These suggested techniques are collected in section VII.

A. Methodology

We gathered information for this report through a mail survey and telephone interviews. First, we sent to each active federal district court judge a cover letter and a one-page questionnaire asking the following questions: "Have you appointed an expert under the authority of Rule 706 of the Federal Rules of Evidence?"[5] 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

1. The Federal Courts Study Comm., Report of the Federal Courts Study Committee 97 (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.*; Jack B. Weinstein & Margaret A. Berger, Weinstein's Evidence Manual: A Guide to the United States Rules Based on Weinstein's Evidence ¶ 13.06[01] (1993); 3 Jack B. Weinstein & Margaret A. Berger, Weinstein's Evidence: Commentary on Rules of Evidence for the United States Courts and State Courts ¶ 706[01] (1993) [hereinafter Weinstein's Evidence]. *See also* AAAS-ABA Nat'l Conference of Lawyers & Scientists Task Force on Science & Technology in the Courts, 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 (1991); Carnegie Comm'n on Science, Technology, & Gov't, Science and Technology in Judicial Decision Making: Creating Opportunities and Meeting Challenges 37 (1993).

3. Daubert v. Merrell Dow Pharmaceuticals, Inc., 113 S. Ct. 2786, 2797–98 (1993).

4. For a more detailed report of this study, see Joe S. Cecil & Thomas E. Willging, Court-Appointed Experts: Defining the Role of Experts Appointed Under Federal Rule of Evidence 706 (Federal Judicial Center 1993).

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

and the extent to which opportunities for Rule 706 appointments exist. Second, we asked those judges who had made Rule 706 appointments to participate in a telephone interview concerning their experiences with court-appointed experts. We sought to identify uses of Rule 706 that judges have found appropriate and, at the same time, identify reasons for nonuse.[6]

In brief, we found that much of the uneasiness with court-appointed experts arises from the difficulty in accommodating such experts in a court 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 court-appointed experts occurs frequently, usually with the consent of the parties.
- The testimony or report presented by a court-appointed expert exerts a strong influence on the outcome of litigation.

B. Overview

Section II offers a brief summary of the authority of the court to appoint an expert, either under Rule 706 of the Federal Rules of Evidence or under the inherent authority of the court. In subsequent sections we present the results of our mail survey and discuss our interviews with the judges about the origination, selection, pretrial and trial activity, and compensation of the appointed experts. Finally, in section VII we outline suggestions to facilitate the early identification of disputed issues arising from scientific and technical evidence, to clarify and narrow disputes, and to ease appointment of an expert when an independent source of information is necessary for a principled resolution of a conflict.

6. 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. This information is detailed in Cecil & Willging, *supra* note 4, at 67–78.

II. Authority to Appoint an Expert

Two principal sources of authority permit a court to appoint an expert, each source envisioning a somewhat different role for the expert. Rule 706 of the Federal Rules of Evidence 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. Supplementing this authority is the broader inherent authority of the court to appoint experts who are necessary to permit the court to carry out its duties, including authority to appoint a technical advisor to consult with the court during the decision-making process. The narrower testimonial focus and procedural confines of Rule 706 do not envision such a role.[7] The authority to appoint a special master under Rule 53 of the Federal Rules of Civil Procedure is addressed elsewhere in this manual.[8] We found instances in which experts appointed under Rule 706 engaged in fact finding much like a special master, yet were also prepared to offer testimony.[9]

A. Federal Rule of Evidence 706

Federal Rule of Evidence 706 specifies a set of procedures governing the appointment, assignment of duties, reporting of findings, testimony, and compensation of experts (for text of Rule 706, see the Appendix). Other questions—such as how to identify the need for a Rule 706 expert, how to shape pretrial procedures to reduce conflicts between the parties' experts, how to compensate experts, and how to reduce interference with the adversarial process—are not addressed by the rule but are discussed in later sections of this paper.

The trial court has broad discretion in deciding whether to appoint a Rule 706 expert. Although it has been suggested that "extreme variation" among the parties' experts is a circumstance suggesting that such an appointment may be

7. Reilly v. United States, 863 F.2d 149, 155–56 (1st Cir. 1988) ("Rule 706 . . . was not intended to subsume the judiciary's inherent power to appoint technical advisors.").

8. *See* Margaret G. Farrell, Special Masters § III, in this manual.

9. At least one district court has held that a single appointee may serve as both a special master and as a court-appointed expert in the same case. Hart v. Community Sch. Bd., 383 F. Supp. 699, 765–66 (E.D.N.Y. 1974), *aff'd*, 512 F.2d 37 (2d Cir. 1975). Another district court expressly granted a special master the power, subject to approval by the court, to "seek the assistance of court-appointed experts." Young v. Pierce, 640 F. Supp. 1476, 1478 (E.D. Tex. 1986), *vacated on other grounds*, 822 F.2d 1368 (5th Cir. 1987), *order reinstated*, 685 F. Supp. 984, 985–86 (E.D. Tex. 1988).

beneficial,[10] the trial court retains discretion to refuse to appoint an expert despite such a circumstance.[11] Such experts should be appointed when they are likely to clarify issues under consideration; it is not an abuse of discretion for a trial court to refuse to appoint an expert under Rule 706 when "additional experts would . . . add more divergence and opinion differences."[12]

Appellate courts on occasion have reminded judges of this authority. Where a trial court has been unaware of its authority to appoint a neutral expert under Rule 706 or its inherent power to do so, a reviewing court may order the trial court to exercise its discretion and decide whether appointment of a neutral expert is justified in the circumstances of the case.[13] Indeed, in a case in which the experts' testimony is especially disparate on an issue of valuation, a trial court should consider the value of "a court-appointed witness [who] would be unconcerned with either promoting or attacking a particular estimate of . . . [plaintiff's] damages."[14] The standard for review of a trial court's appointment of an expert under Rule 706 is whether the appointment constituted an abuse of discretion.[15] One factor to consider in such a review is whether the expert selected by the court had any bias toward one party or one side of an issue.[16]

Two cases demonstrate the range of functions that may be performed by court-appointed experts. *Computer Associates International, Inc. v. Altai, Inc.*[17] offers an example of an expansive role by an appointed expert in difficult technical litigation concerning alleged infringement of a software copyright. The question before the court was how to separate the idea underlying a computer program from its expression, since only the latter is protected by copyright. The parties agreed to the court's appointment of a computer science professor from the Massachusetts Institute of Technology to aid the judge in a nonjury trial in understanding the technical issues of the case. In analyzing and interpreting the facts for the court, the appointed expert also pointed out deficiencies in the legal doctrines and suggested alternative standards that would bring the copyright law protecting computer software into conformity with current practices in computer science. The district court adopted this proposal and assessed the allegedly copied program under this new standard. On appeal one party sought to over-

10. Eastern Air Lines, Inc. v. McDonnell Douglas Corp., 532 F.2d 957, 999 (5th Cir. 1976). In Reilly v. United States, 863 F.2d at 156–57, the court identified "some cognizable judicial need for specialized skills" as a justifiable reason for utilizing an expert as a technical advisor. *See also* Computer Assocs. Int'l, Inc. v. Altai, Inc., 982 F.2d 693, 713 (2d Cir. 1992) (complicated nature of computer software programming justifies assessment by court-appointed expert if similarities arise to the level of a wrongful appropriation of copyrighted work).

11. Oklahoma Natural Gas Co. v. Mahan & Rowsey, Inc., 786 F.2d 1004, 1007 (10th Cir.), *cert. denied*, 479 U.S. 853 (1986); Georgia-Pacific Corp. v. United States, 640 F.2d 328, 333–35 (Ct. Cl. 1980).

12. *Georgia-Pacific*, 640 F.2d at 334.

13. Fugitt v. Jones, 549 F.2d 1001, 1006 (5th Cir. 1977).

14. Eastern Air Lines, Inc. v. McDonnell Douglas Corp., 532 F.2d 957, 1000 (5th Cir. 1976).

15. Gates v. United States, 707 F.2d 1141, 1144 (10th Cir. 1983).

16. *Id.*

17. 775 F. Supp. 544, 549, 559–60 (E.D.N.Y. 1991), *aff'd,* Nos. 91-7893, 91-7935, 1992 U.S. App. LEXIS 14305 (2d Cir. June 22, 1992), *vacated in part on other grounds,* 982 F.2d 693 (2d Cir. 1992).

turn the standard, contending that the district court had erred by relying too heavily on the court-appointed expert's opinions. The court of appeals noted that the technical nature of assessments of computer software justified a more expansive role for expert assistance and that the appointed expert's opinion "was instrumental in dismantling the intricacies of computer science so that the court could formulate and apply an appropriate rule of law."[18] Since, in the final analysis, the district court judge exercised judicial authority in reviewing these findings, the court of appeals found the assistance provided by the expert to be appropriate.

In contrast to this expansive role, the court in *Renaud v. Martin Marietta Corp.*[19] relied on the appointed expert for the more limited purpose of assessing the acceptability within the scientific community of the methodology used by the plaintiffs to measure exposure to a toxic chemical. Residents of a community brought a toxic tort action against a nearby manufacturer; the residents alleged injuries caused by contaminated drinking water. The defendants challenged the admissibility of expert testimony by the plaintiffs concerning the level of exposure to the chemical. Estimates of exposure over an eleven-year period were based on an extrapolation from a single measure of contamination in one place and one time two years after the last alleged exposure. The court appointed an expert in geochemistry and hydrology to assess not the general question of causation, but the narrow question of the scientific acceptability of using a single data point to estimate exposure over such a period. In her report to the court, the appointed expert wrote, "'[i]t is unsound scientific practice to select one concentration measured at a single location and point in time and apply it to describe continuous releases of contaminants over an 11-year period.'"[20] On this basis the court refused to admit the evidence of exposure and, in the absence of other evidence, granted the defendants' motion for summary judgment. On appeal the plaintiffs challenged the authority of the expert to render such an assessment. The court noted such duties are well within the scope of the authority of an appointed expert.[21] The use of appointed experts to comment on the acceptability of scientific methods that underlie expert opinions may expand as courts assess the scientific validity of expert testimony under the standards estab-

18. Computer Assocs. Int'l, Inc. v. Altai, Inc., 982 F.2d 693, 713–14 (2d Cir. 1992).

19. 749 F. Supp. 1545, 1552–53 (D. Colo. 1990), *aff'd*, 972 F.2d 304 (10th Cir. 1992).

20. 749 F. Supp. at 1553. *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 "substantial 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").

21. Renaud v. Martin Marietta Corp., 972 F.2d 304, 308 n.8 (10th Cir. 1992). The court of appeals also rejected the plaintiffs' argument that they were wrongly denied the right to depose the appointed expert, noting that the appointed experts were "more technical advisors to the Court than expert witnesses as contemplated by Fed. R. Evid. 706, and accordingly depositions and cross-examination were inappropriate."

lished by the Supreme Court's decision in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*[22]

B. Inherent Authority to Appoint a Technical Advisor

The court's authority under Rule 706 to appoint an expert to offer testimony represents a specific application of its broader inherent authority to invite expert assistance in a broad range of duties necessary to decide a case. The most striking exercise of this broader authority involves appointing an expert as a technical advisor to confer in chambers with the judge regarding the evidence, as opposed to offering testimony in open court and being subject to cross-examination. Although few cases deal with the inherent power of a court to appoint a technical advisor, the power to appoint remains virtually undisputed,[23] tracing a clear line from the 1920 decision of the Supreme Court in *Ex parte Peterson*[24] to the recent decision of the U.S. Court of Appeals for the First Circuit in *Reilly v. United States*.[25] Generally, a district court has discretion to appoint a technical advisor, but it is expected that such appointments will be "hen's teeth rare," a "last" or "near-to-last resort."[26] General factors that might justify an appointment are "problems of unusual difficulty, sophistication, and complexity, involving something well beyond the regular questions of fact and law with which judges must routinely grapple."[27] The role of the technical advisor, as the name implies, is to give advice to the judge, not to give evidence and not to decide the case.[28] Compensation of a technical advisor can be especially awkward; this issue is discussed at length in section VI, *infra.*

22. 113 S. Ct. 2786 (1993). For a discussion of admissibility of expert testimony after *Daubert,* see Margaret A. Berger, Evidentiary Framework, in this manual.

23. In the words of the Advisory Committee on the Rules of Evidence, "[t]he inherent power of a trial judge to appoint an expert of his own choosing is virtually unquestioned." Fed. R. Evid. 706 advisory committee's note; *see also* United States v. Green, 544 F.2d 138, 145 (3d Cir. 1976), *cert. denied sub nom.* Tefsa v. United States, 430 U.S. 910 (1977) ("[T]he inherent power of a trial judge to appoint an expert of his own choosing is clear."); Scott v. Spanjer Bros., 298 F.2d 928, 930 (2d Cir. 1962) ("Appellate courts no longer question the inherent power of a trial court to appoint an expert under proper circumstances . . . .").

24. 253 U.S. 300, 312 (1920) (In approving the appointment of an auditor to segregate the claims that were in dispute and to express an opinion on the disputed items, the Court found that "[c]ourts have (at least in the absence of legislation to the contrary) inherent power to provide themselves with appropriate instruments required for the performance of their duties.").

25. 863 F.2d 149, 154 & n.4 (1st Cir. 1988) (In a case involving appointment by the district court of an economist to assist the court in calculating damages to an infant resulting from medical malpractice, the United States (defendant) conceded that "a district court has inherent authority to appoint an expert as a technical advisor." The circuit court agreed that "such power inheres generally in a district court."); *see also* Bullard Co. v. General Elec. Co., 348 F.2d 985, 990 (4th Cir. 1965) ("Of course, the District Court has the right on an intricate subject of suit, as here [a patent infringement case], to engage an advisor to attend the trial and assist the court in its comprehension of the case."); Friends of the Earth v. Carey, 535 F.2d 165, 173 & n.13 (2d Cir. 1976) (District judge has "power to obtain such expert advice and assistance as may be necessary to guide him" and "to assist him in the performance of his duties."), *vacated on other grounds*, 552 F.2d 25 (2d Cir.), *cert. denied*, 434 U.S. 902 (1977).

26. Reilly v. United States, 863 F.2d 149, 157 (1st Cir. 1988).

27. *Id.*

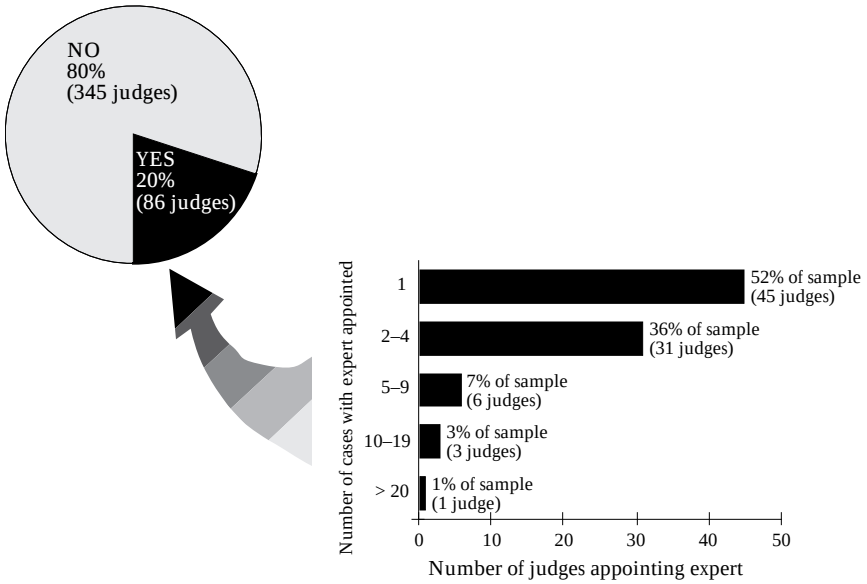
28. *Id*. ("Advisors . . . are not witnesses and may not contribute evidence. Similarly, they are not judges, so they may not be allowed to usurp the judicial function.").

III. Use and Nonuse of Court-Appointed Experts

A. 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.[29] To obtain an accurate assessment of the extent to which court-ap pointed experts have been employed, we sent a one-page questionnaire to all active federal district court judges.[30]

Figure 1
Have You Appointed an Expert Under Rule 706?



As indicated in Figure 1, eighty-six judges, or 20% of those responding to the survey, revealed that they had appointed an expert on one or more occasions.

29. Weinstein's Evidence, *supra* note 2, ¶ 706[01], at 706–13.

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

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.

During the telephone interviews, we asked the judges to describe the cases in which they had appointed experts under authority of Rule 706. 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. 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.

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. 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.

In fifteen cases judges sought experts with skills in engineering.[31] Twelve of these cases raised questions of patentability, patent infringement, or technical issues surrounding trade secret protection. 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.[32] 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.[33] In several cases the judge

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

32. 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.

33. 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.

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.

B. Satisfaction with Appointed Experts

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. 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 who 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.

C. Receptivity to Appointment of Experts

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 some circumstances (see *infra* Figure 2). 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.

D. 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.[34] 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 judge's need for technical expertise was coupled with a first-time exposure to a complex legal specialty area, such as patent law.

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. 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. 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.

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.[35] 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

34. 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.

35. *See* discussion of this issue *infra* notes 99–102 and related text.

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.

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, 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."

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.[36] 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.

As with judicial involvement in settlement in general,[37] 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 whether an appointment for the purpose of improving judicial decision making will be worthwhile if the parties are likely to settle.

36. 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.

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

E. Reasons for Failure to Appoint an Expert

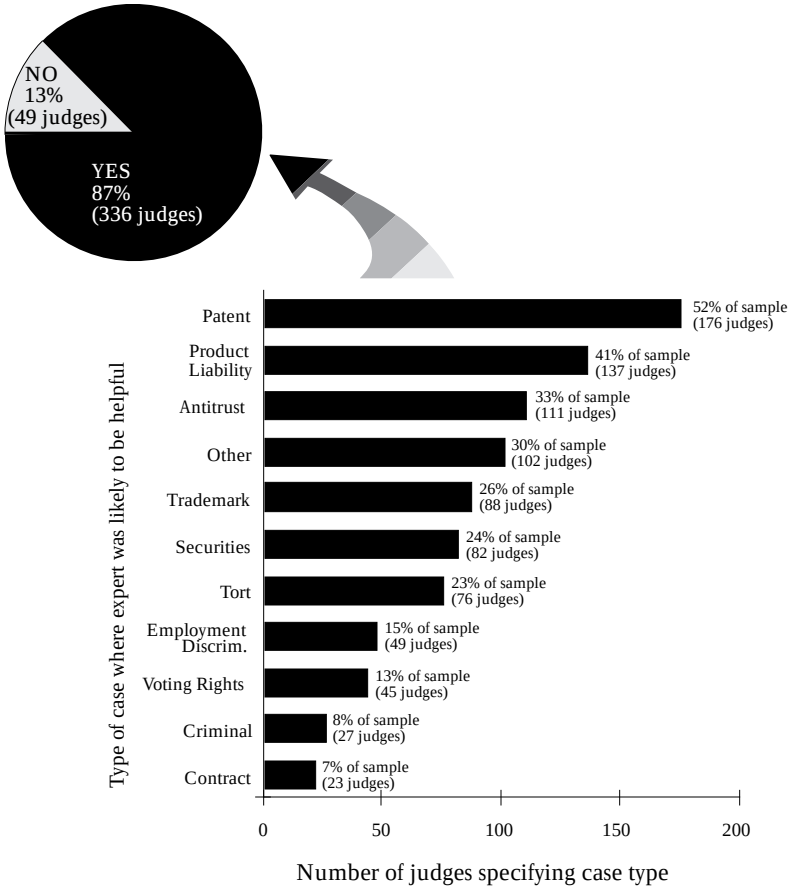
Almost all judges are willing to consider the appointment of an expert in at least some circumstances, so the infrequency of such appointments is not related to a strict opposition to the practice. Our investigation revealed problems in identifying suitable experts, communicating effectively with such appointed experts, and compensating appointed experts. Many of these practical problems can be overcome and are discussed in detail in the following sections. But the two principal reasons for failure to appoint an expert are the infrequency of cases requiring such assistance and the reluctance of judges to intrude into the adversarial process. These two issues set a limit on the opportunities to use such appointed experts, a limit that will not be overcome by improvements in procedures.

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. 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. Figure 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 assistance. 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.

Figure 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).

Appointments were often 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.[38]

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.[39] Many of those who had appointed experts professed commitment to the adversarial process and the ability of juries to assess difficult evidence, and they indicated that they would appoint an expert only where the adversarial process had failed.

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.[40]

38. *See* discussion *infra* § VI.C.

39. 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.

40. *See also* Manual for Complex Litigation, Third, § 21.51 ("Although the appointment is made by the court, every effort should be made to select a person acceptable to the litigants; in fact, the parties should first be asked to submit a list of proposed experts and may be able, with the assistance of their own expert, to agree on one or more candidates.") (forthcoming 1995) [hereinafter MCL 3d].

IV. Identification and Appointment of Experts

A. 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.[41] 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 don't realize that they need assistance until 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.

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.[42] 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.[43] However, specific procedures for identifying such a need are left to the trial judge.[44]

Timing of the appointment was discussed regarding fifty-two cases. 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.[45] A few judges even appointed experts

41. The role of timing of the appointment is discussed in greater detail in Cecil & Willging, *supra* note 4, at 26–29.

42. Weinstein's Evidence, *supra* note 2, ¶ 706[02], 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).

43. Weinstein's Evidence, *supra* note 2, ¶ 706[02], at 706–14 to –15.

44. 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).

45. 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

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.

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 judges who appointed the expert immediately before or during the trial indicated that appointment earlier in the process would have been helpful.[46] Often they noted the 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."

B. Initiation of the Appointment

Our interviews revealed that the initial suggestion to appoint an expert almost always comes from the judge, not the parties. 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 experts[47] appeared to be part of a broader litigation strategy, since the plaintiff had recommended such appointments in related litigation in other districts.

C. 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.[48] When we asked why experts are ap-

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.

46. It is worth noting 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.

47. 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 & 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), *later proceeding*, 619 F. Supp. 1481 (S.D. Ill. 1985), *aff'd* 797 F.2d 505 (7th Cir. 1986); *In re* Repetitive Stress Injury Cases Pending in the U.S. Dist. Court., 142 F.R.D. 584 (E.D.N.Y. 1992), *vacated on other grounds sub nom.* Debruyne v. National Semiconductor Corp. (*In re* Repetitive Stress Injury Litig.), 11 F.3d 368 (2d Cir. 1993).

48. 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

pointed infrequently, 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 unbiased 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.

Those judges who actually appointed experts did not seem to encounter such difficulty. Only six of sixty-six judges reported difficulty finding a neutral expert willing to serve.[49] 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.

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.[50]

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 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 such an appointment results in the selection of a suitable expert, the parties may perceive such an expert as biased.[51]

party. This would rule out experts with significant ideological, financial, or professional interests in debatable normative issues related to the issue in dispute. *Cf. In re* Philadelphia Mortgage Trust, 930 F.2d 306, 309 (3d Cir. 1991) (comparing "neutral" court-appointed expert with accountants appointed to assist a trustee in bankruptcy).

49. Some judges may have encountered difficulty in finding a neutral expert and abandoned their efforts to appoint such a person, thereby eluding our investigation.

50. 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."

51. 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.

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.[52] These were almost all instances in which medical expertise was needed and the judges contacted nearby medical schools or associations for suggestions of candidates. Such a procedure, while more burdensome and not foolproof,[53] 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.[54] Published cases commonly suggest that a court direct the parties to seek agreement on an appointment and for the court to exercise its discretion only if the parties fail to agree.[55] 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.

In summary, the identification of a need for and the 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 central importance of the expert's task.

52. The selection procedure suggested in the *Manual for Complex Litigation*, Third, is for the court to "call on professional organizations and academic groups to provide a list of qualified and available persons . . . ." MCL 3d, *supra* note 40, § 21.51; *see also* 1 McCormick on Evidence § 17, at 71 (John William 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 . . .").

53. 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.

54. 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 (10th Cir. 1983); Fund for Animals, Inc. v. Florida Game & 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), *later proceeding*, 619 F. Supp. 1481 (S.D. Ill. 1985), *aff'd*, 797 F.2d 505 (7th Cir. 1986); United States v. Ridling, 350 F. Supp. 90, 99 (E.D. Mich. 1972).

55. United States v. Michigan, 680 F. Supp. 928, 957 (W.D. Mich. 1987); Unique Concepts, Inc. v. Brown, 659 F. Supp. 1008, 1011 (S.D.N.Y. 1987), *later proceeding*, 735 F. Supp. 145 (S.D.N.Y. 1990), *aff'd*, 939 F.2d 1558 (Fed. Cir. 1991); Hatuey Prods. v. United States Dep't of Agric., 509 F. Supp. 21, 23 (D.N.J. 1980). *See also* Pamela Louise Johnston, *Court-Appointed Scientific Expert Witnesses: Unfettering Expertise*, 2 High Tech. L.J. 249, 267–68 (1988) (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).

V. Communication with the Appointed Expert

A. Instruction of the Appointed Expert

Rule 706(a) of the Federal Rules of Evidence specifies two options for instructing the expert in his or her duties—both options 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. 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.[56]

Judges' instructions were used to meet multiple needs, including (1) establishing a record of the terms and conditions of the appointment, including the terms of payment; (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 reporting findings and opinions. The following discussion summarizes how judges met those needs in the cases we encountered.[57]

Regarding terms of payment, judges included in the order of appointment the rate of payment,[58] 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.

56. 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.

57. For an example of an order appointing an expert, see *In re* Swine Flu Immunization Prods. Liab. Litig., 495 F. Supp. 1185 (E.D. Okla. 1980) (comprehensive order appointing panel of medical 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).

58. Issues regarding compensation of experts are discussed in § VI, *infra*.

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.

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.[59]

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.[60] 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.[61]

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, 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 expert. After reviewing them, the court formulated its own instructions, addressing issues raised by the parties' proposals.[62]

Finally, judges frequently use the order of appointment as a way to define the process of assembling information for the expert.[63] 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.

59. *See* discussion *infra* notes 64–71 and related text.

60. *See, e.g., In re* Swine Flu Immunization Prods. Liab. Litig., 495 F. Supp. 1185, 1186 (E.D. Okla 1980); *see also In re* Asbestos Litig. (S.D. Ohio Apr. 29, 1987) (order issuing instructions to court-appointed expert witnesses—"render an objective medical diagnosis of the presence or absence of asbestosis or other asbestos-related diseases").

61. Stickney v. List, 519 F. Supp. 617, 619 (D. Nev. 1981); *see also* United States v. Michigan, 680 F. Supp. 928, 983–84, 986–88 (W.D. Mich. 1987).

62. Students of the Cal. Sch. for the Blind v. Riles, Civ. No. S-80-473-MLS (E.D. Cal. Mar. 31, 1982) (order appointing expert witness). *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).

63. 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 (D.N.J. 1977) (supplementing 425 F. Supp. 228 (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.

B. Ex Parte Communication

1. Communication between the judge and the appointed 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 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."[64] 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.[65] 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."[66] 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,[67] a 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."[68] That educational function seems to contemplate ex parte communication, albeit with procedural safeguards.[69]

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

65. United States v. Green, 544 F.2d 138, 146 n.16 (3d Cir. 1976), *cert. denied sub nom.* Tefsa v. United States, 430 U.S. 910 (1977); *cf. Leesona Corp.*, 522 F. Supp. at 1312 & n.18.

66. Canon 3(A)(4) of the Code of Conduct for United States 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 communications on the merits, or procedures affecting the merits, of a pending or impending proceeding.

Judicial Conference of the U.S., *Code of Conduct for United States Judges, in* 2 Guide to Judiciary Policies and Procedures, Canon 3(A)(4), at I-9 (rev. Nov. 1993).

67. 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 71 *infra* and related text.

68. Reilly v. United States, 863 F.2d 149, 158 (1st Cir. 1988).

69. *Id.* at 158, 159–60 (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).

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 "yes."[70] About half of those judges limited their ex parte discussion to procedural aspects of the expert's service—including matters of availability. Lengthy ex parte communications were often required to recruit an expert. As one judge said: "I communicated extensively with . . . [the prospective expert] in chambers prior to the appointment to convince him to accept it."

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.

Several judges devised procedures to subject their contact with a technical advisor to some of the checks and balances of the adversary system.[71] For example, one judge communicated ex parte with the expert, but made a record of the discussions and disclosed the exact contents 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.

2. 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.[72] Some judges apply the same rules to court-appointed experts that they would apply to themselves.[73] 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

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

71. *See, e.g.*, Jackson v. Fort Stanton Hosp. & Training Sch., 757 F. Supp. 1231, 1234 (D.N.M. 1990) (judge kept a record of the discussions with the appointed expert and made these available to the parties), *rev'd in part*, 964 F.2d 980 (10th Cir. 1992).

72. 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, ¶ 706[02], at 706–20 n.21.

73. *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).

absence of an explicit order, however, attorneys should be aware that "ex parte attempts to influence the expert are improper."[74]

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 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.[75] 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.

C. 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.[76] Findings may be presented in a written report, by deposition, in testimony in open court, or through some combination of the above.[77]

We found that, except when used as a technical advisor,[78] 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. We were told of two instances in which 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

74. Weinstein's Evidence, *supra* note 2, ¶ 706[02], at 706–20 n.21. *See also* Model Code of Professional Responsibility DR 7-110(B), at 39 (1982) ("a lawyer shall not communicate . . . as to the merits of the 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 . . .").

75. *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, ¶ 706[02], at 706–20 n.21.

76. Fed. R. Evid. 706(a). *See also* Unique Concepts, Inc. v. Brown, 659 F. Supp. 1008, 1011 (S.D.N.Y. 1987), *later proceeding*, 735 F. Supp. 145 (S.D.N.Y. 1990), *aff'd*, 939 F.2d 1558 (Fed. Cir. 1991). *Cf.* Reilly v. United States, 863 F.2d 149, 159 (1st Cir. 1988) ("If . . . the 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 rule or statute in authorizing depositions in a criminal case." Weinstein's Evidence, *supra* note 2, ¶ 706[02], at 706–21.

77. Leesona Corp. v. Varta Batteries, Inc., 522 F. Supp. 1304, 1312 (S.D.N.Y. 1981).

78. As noted above in the discussion of ex parte communication between the judge and the expert (*see* discussion *supra* notes 67–71 and related text), in several cases the expert reported directly to the judge without any report to the parties.

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.

Three 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.[79]

D. Presentation of Expert Opinion in Court

1. Frequency and nature of testimony

Although Rule 706 seems to anticipate that court-appointed experts will testify at trial, our earlier review of reported decisions found that court-appointed experts can serve a range of nontestimonial functions during different stages of the litigation.[80]

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. Relatively few (approximately one in five) of the testimonial uses of court-appointed experts occurred in jury trials.

2. 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.[81] Some commentators have opposed informing the jury of the expert's status, fearing that knowledge that the court appointed the expert will undermine the adversarial system and dominate the jury decision-making process.[82] The trial court retains discretion, however, to decline to place a judicial impri-

79. *See* Renaud v. Martin Marietta Corp., 972 F.2d 304, 308 n.8 (10th Cir. 1992) (depositions and cross-examination found to be inappropriate where expert appointed under authority of Rule 706 in fact functioned as a technical advisor).

80. Although published opinions reveal instances of court-appointed experts presenting testimony at trial, references to nontestimonial functions were more frequent. Thomas E. Willging, Court-Appointed Experts 18–23 (Federal Judicial Center 1986).

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

82. *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, ¶ 706[02], at 706–26.

matur on a witness if concerned that the jury will give undue weight to a court-appointed expert's testimony.[83]

Only seven jury trials were identified from the interviews in which the court-appointed expert offered testimony in court. 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 emphasizing neutrality, the source of the appointment, and the method of payment.

3. 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. 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. 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 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

83. Weinstein's Evidence, *supra* note 2, ¶ 706[02], 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).

a context for understanding and evaluating other evidence presented by the parties.[84]

If the case involved testimony by an appointed expert at a jury trial, we asked, "Did the testimony of the court-appointed expert appear to overwhelm the expert testimony offered by the parties?" In a dozen jury cases,[85] 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.

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 section II *supra*) that in eighteen of the thirty-six 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.

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 impos-

84. A more detailed analysis of these cases appears in Cecil & Willging, *supra* note 4, at 52–56.

85. 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.

ing limited 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.

VI. Compensation of Court-Appointed Experts

Payment of court-appointed experts presents an awkward problem for judges. Although judges appoint the experts, judges usually 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 problems in providing compensation can thwart the appointment of an expert. Judges expressed concerns regarding payment when describing how the experts were compensated and at a number of other points in the interviews. When asked why more judges do not use court-appointed experts, fourteen judges focused on the difficulties in providing compensation. 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." 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.[86] 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 subsections address four different circumstances that affect the manner of com-

86. This suggestion was mentioned by ten of the nineteen judges who suggested changes in the rule. *See also* Weinstein's Evidence, *supra* note 2, ¶ 706[03], at 706–27 to –29.

pensation: special instances of land condemnation actions and criminal cases in which the rule permits the 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.

A. 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.[87] 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 statutes[88] permit payment of the experts' 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.[89] 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 Justice, not the Administrative Office of the U.S. Courts.[90] Four judges revealed that they had appointed experts to aid in assessing the physical or mental condition of a defendant; three of these judges indicated no difficulty in obtaining payment, while one indicated some initial reluctance by the Department of Justice followed by prompt payment.

B. 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."[91] The flexibility of the rule permits the

87. Fed. R. Evid. 706(b); Fed. R. Civ. P. 71A(*l*) advisory committee's note.

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

89. 18 U.S.C. § 3006A(e) (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).

90. *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).

91. 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, 338–39 (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 incor-

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 fee[92] for a court-appointed expert and defer the final decision on costs assessment until the outcome of the litigation is known.[93] 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."[94] In brief, the court has discretion to order a single party to prepay the full cost of the appointment.[95]

Rule 706(b) also provides that, at the conclusion of the litigation, the expert's "compensation shall be . . . charged in like manner as other costs." This means that "costs . . . shall be allowed as of course to the prevailing party unless the court otherwise directs."[96] Courts sometimes have apportioned fees among the parties, in some cases simply splitting the costs equally[97] and in other cases basing the apportionment on the outcome of the litigation.[98] 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

rectly 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).

92. Rule 706(b) states that court-appointed experts "are entitled to reasonable compensation in whatever sum the court may allow."

93. *See* United States v. Articles . . . Provimi, 425 F. Supp. 228, 231 (D.N.J. 1977) (assessing "one-half of the cost of the expert's services . . . with further decision on the expert's cost to abide the event"), *supplemental op.*, 74 F.R.D. 126 (D.N.J. 1977). *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), *aff'd*, 764 F.2d 204 (3d Cir. 1985).

94. United States Marshals Serv. v. Means, 741 F.2d 1053, 1058 (8th Cir. 1984) (en banc), *cert. denied*, 492 U.S. 910 (1989); *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).

95. McKinney v. Anderson, 924 F.2d 1500, 1510 (9th Cir. 1991), *vacated on other grounds sub nom.* Helling v. McKinney, 112 S. Ct. 291 (1991).

96. Fed. R. Civ. P. 54(d)(1).

97. *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), *later proceeding*, 735 F. Supp. 145 (S.D.N.Y. 1990), *aff'd*, 939 F.2d 1558 (Fed. Cir. 1991).

98. *See, e.g.*, *In re* Fleshman, 82 B.R. 994, 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 finding on value to their initial contention"); *cf.* Baker Indus. v. Cerberus, Ltd., 570 F. Supp. 1237, 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), *aff'd*, 764 F.2d 204 (3d Cir. 1985).

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." 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.

C. 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.[99] 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,[100] and the court appointed

99. United States Marshals Serv. v. Means, 741 F.2d 1053, 1058 (8th Cir. 1984) (en banc), *cert. denied*, 492 U.S. 910 (1989).

100. 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.

an expert with the expectation that the expert would be compensated by the state.

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.

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,[101] 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.[102]

D. 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.

101. *See supra* note 95 and related text.

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

In *Reilly v. United States*,[103] the U.S. 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,[104] the district judge petitioned the Director of the Administrative Office for permission to appoint and compensate a technical advisor.[105] The judge expressly disavowed appointment under authority of Rule 706 because he wanted 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.[106] In both cases 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.[107] 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.

103. 682 F. Supp. 150 (D. R.I.), *aff'd in part and rev'd in part*, 863 F.2d 149 (1st Cir. 1988).

104. 5 U.S.C. § 3109 (1988 & Supp. 1993) and 28 U.S.C. § 602(c) (1988).

105. *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.

106. Letter from L. Ralph Mecham, Director, Administrative Office of the U.S. Courts, to Gary J. Golkiewicz, Chief Special Master, U.S. Claims Court (Oct. 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 & Co. v. Collins, 432 U.S. 46, 57 (1977).

107. 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*, 863 F.2d at 157.

VII. Procedures for the Effective Use of Court-Appointed Experts

Effective use of court-appointed experts must be grounded in a pretrial procedure that enables a judge to consider the possibility of an appointment in a timely manner and to anticipate problems in expert testimony.[108] Such a pretrial process is discussed in the paper on case management of this manual and is summarized here to provide a context for suggested improvements in the use of court-appointed experts.

The pretrial procedure described in the paper on case management will be useful in a wide variety of cases involving expert testimony—this procedure need not culminate in the appointment of an expert by the court. 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 suggested 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 additional procedures specified in this section will enable an appointment early enough to avoid delay in the litigation and difficulties in securing the effective services of an expert.

A. Clarification of Disputed Issues Arising from Complex Evidence

1. 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. 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.[109] Even if a judge decides to invoke none of the extraordinary procedures intended to address problems with expert testimony (e.g.,

108. Such a pretrial procedure is described in William W Schwarzer, Management of Expert Evidence § II, in this manual. *See also* Margaret A. Berger, Procedural and Evidentiary Mechanisms for Dealing with Experts in Toxic Tort Litigation: A Critique and Proposal (1991); and Cecil & Willging, *supra* note 4, chap. 7.

109. *See* discussion *supra* notes 41–46 and related text.

appointment of an expert or special master), knowledge of especially difficult disputed issues prior to trial will enable a more informed consideration of such issues and related motions when they arise. 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.

Recent amendments to Rule 26(a)(2) of the Federal Rules of Civil Procedure increase the information to be disclosed by experts that are to testify at trial, thereby easing early identification of disputed issues. Not less than ninety days before the trial, each party must disclose written reports prepared by the testifying witnesses that include, among other things, "a complete statement of all opinions to be expressed and the basis and reasons therefor; [and] the data or other information considered by the witness in forming the opinions."[110] Failure to make such disclosures will bar testimony by the expert at trial.[111] 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.[112]

2. Attempts to narrow disputes

Rule 16 of the Federal Rules of Civil Procedure encourages efforts to narrow disputes between parties before trial, a mandate that can extend to disputes between parties' experts. 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 . . . ."[113] 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 focus on the assumptions 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.[114] Or the parties may be asked to submit a joint report, setting forth areas of agreement and disagreement. Some judges present the parties with a list of issues that they should respond to in preparing such a report. The reference guides in this manual, when supplemented by the parties, should offer an effec-

110. Fed. R. Civ. P. 26(a)(2)(B).
111. Fed. R. Civ. P. 37(c)(1).
112. MCL 3d, *supra* note 40, § 20.1.
113. Fed. R. Civ. P. 16(c)(3).
114. Fed. R. Civ. P. 36(a).

tive means for structuring consideration of such issues in these particular areas of science. When faced with especially demanding expert testimony, some judges convene a joint conference with counsel and the key experts and engage in a formal or informal colloquy concerning the experts' differences.[115]

3. 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 validity of the information on which the experts base their testimony.[116] As part of the "gatekeeping" role recognized by the Supreme Court in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*,[117] the judge may wish to conduct a separate pretrial hearing to determine the admissibility of proposed expert testimony. Such a hearing may dispose of questionable testimony, thereby providing the parties with a better understanding of the evidence to be presented at trial. If the court finds that there is no admissible evidence to support essential elements of a claim, the court may dispose of the action by summary judgment.[118]

B. 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 consider appointing an expert. Our interviews suggested that such cases will be infrequent and will be characterized by (1) evidence that is particularly difficult to comprehend, (2) credible experts who find little basis for agreement, and (3) 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 may also merit appointment of an expert, although such cases are rare. 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 expert testimony provided by a sin-

115. Jack B. Weinstein, Role of Expert Testimony and Novel Scientific Evidence in Proof of Causation, Address at ABA Annual Meeting, Panel Discussion on Managing Mass Torts 22 (Aug. 9, 1987) (on file with authors) (describing an occasional practice of swearing in all the experts, seating them at a table with counsel, and engaging them in recorded colloquy under court direction). Other techniques for clarifying and narrowing issues are found in MCL 3d, *supra* note 40, § 21.33.

116. These issues are addressed in Margaret A. Berger, Evidentiary Framework §§ I, III, in this manual.

117. 113 S. Ct. 2786, 2795 & n.7 (1993).

118. Celotex Corp. v. Catrett, 477 U.S. 317 (1986); *In re* "Agent Orange" Prod. Liab. Litig., 611 F. Supp. 1223, 1239 (E.D.N.Y. 1985), *aff'd on other grounds*, 818 F.2d 187 (2d Cir. 1987), *cert. denied sub nom.* Lombardi v. Dow Chem. Co., 487 U.S. 1234 (1988).

gle 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 and described in greater detail elsewhere in this manual 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, an effective 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. An effective pretrial procedure will identify cases that can be resolved in an expeditious manner without appointing an expert, as well as cases that require such assistance.

1. Initiation of the appointment

Our interviews suggest that the appointment process will have to be initiated by the judge; rarely do the parties raise the idea of the court appointing an expert. Again, an effective 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 possibility of appointing an expert may be raised at pretrial conferences.[119] The court can initiate the appointment process on its own by entering an order to show cause why an expert witness or witnesses should not be appointed.[120]

119. Although Rule 16 does not specifically address court-appointed experts as a topic to be considered at a pretrial conference, the rule does recognize that it may be necessary to inquire into "the need for adopting special procedures for managing potentially difficult or protracted actions that may involve complex issues, multiple parties, difficult legal questions, or unusual proof problems." Fed. R. Civ. P. 16(c)(12).

120. Fed. R. Evid. 706(a). *See also In re* Joint E. & S. Dists. Asbestos Litig., 830 F. Supp. 686, 694 (E.D.N.Y. 1993) (parties are entitled to be notified of the court's intention to use an appointed expert and be given an opportunity to review the expert's qualifications and work in advance).

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 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 recommendations. 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 specialties 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. 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 court should describe the assistance sought and the anticipated manner of interaction. 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.

2. 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.[121] 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, 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 should 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.[122] While the need for such assistance should be diminished by the pretrial procedure out-

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

122. 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.

lined above, our interviews suggested that in a very few circumstances such an appointment may be essential for a reasoned resolution of a dispute.[123] The difficulty is in providing such assistance while preserving the effective participation of the parties in presenting and refuting evidence.

The U.S. Court of Appeals for the First Circuit 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.[124] 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 manageable set of problems.[125] 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.

123. *See* Reilly v. United States, 863 F.2d 149, 156–57 (1st Cir. 1988); MCL 3d, *supra* note 40, § 21.54.

124. *Reilly*, 863 F.2d at 159–61.

125. 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.

3. 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, and testimony can be presented in a less formal manner.[126] 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. The court may, in its discretion, decide whether to disclose to the jury that the expert was appointed by the court.[127] In six of the seven instances we 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.

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

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

VIII. 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. An effective pretrial procedure will enable 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

Federal Rule of Evidence Rule 706. Court Appointed Experts

(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 expert 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.