2204

FJC Staff Paper

Court-Appointed Experts

Federal Judicial Center

COURT-APPOINTED EXPERTS

Thomas E. Willging
Federal Judicial Center

1986

This paper is a product of a study undertaken in furtherance of the Center's statutory mission to conduct and stimulate research and development on matters of judicial administration. The analyses, conclusions, and points of view are those of the author. This work has been reviewed by Center staff, and publication signifies that it is regarded as responsible and valuable. It should be emphasized, however, that on matters of policy the Center speaks only through its Board.

Cite as T. Willging, Court-Appointed Experts (Federal Judicial Center 1986).

FJC-SP-86-1

TABLE OF CONTENTS

I. AUTHORITY TO APPOINT

There is no doubt that federal courts have the authority to appoint neutral expert witnesses. The sources of this power are twofold: the inherent power of federal courts to take actions necessary to perform their decision-making functions and the express authority set forth in rule 706 of the Federal Rules of Evidence. 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."[1] Federal courts also have express authority to appoint experts to perform functions permitted under rule 53 of the Federal Rules of Civil Procedure.[2]

Rule 706, the text of which is set out completely in note 3, gives the trial court broad discretion to appoint an expert witness and sets out a relatively clear set of procedures to govern the process of appointment, assignment of duties, reporting of findings, testimony, and compensation.[3] Practical questions--such as how to identify the need for a rule 706 expert,

---

1. Fed. R. Evid. advisory committee note; see also United States v. Green, 544 F.2d 138, 145 (3d Cir. 1976) ("the 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").

2. See, e.g., Hart v. Community School Bd., 383 F. Supp. 699, 762-67 (E.D.N.Y. 1974).

3. 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

how to shape pretrial procedures to reduce conflicts between experts for the parties, and how to reduce interference with the adversarial process--are not addressed by rule 706.

Ordinarily, the trial judge should consider the value of appointing a neutral expert when there is "extreme variation" among the parties' experts.[4] The trial court's discretion to appoint an expert witness, however, includes the power to refuse to appoint an expert despite extreme variations in the parties' expert testimony.[5] It is not an abuse of discretion for a trial court to refuse to appoint an expert under rule 706 when "additional experts

---

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 he consents to act. A witness so appointed shall be informed of his 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 the opportunity to participate. A witness so appointed shall advise the parties of his findings, if any; his deposition may be taken by any party; and he may be called to testify by the court or any party. He shall be subject to cross-examination by each party, including a party calling him as a 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.

4. Eastern Air Lines v. McDonnell Douglas Corp., 532 F.2d 957, 999 (5th Cir. 1976).

5. Georgia-Pacific Corp. v. United States, 640 F.2d 328, 333-35 (Ct. Cl. 1980).

would . . . add more divergence and opinion differences."[6]

Where a trial court has been unaware of its authority to appoint a neutral expert under rule 706 or its inherent powers 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.[7] 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."[8] The standard for review of a trial court's appointment of an expert under rule 706 is whether it constituted an abuse of discretion.[9] 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.[10]

Despite the relative clarity of the procedural rules, there are "remarkably few cases in which federal judges have appointed experts."[11] The

---

6. Id. at 334.

7. Fugitt v. Jones, 549 F.2d 1001, 1006 (5th Cir. 1977). In that case, the trial court had refused the request of a prisoner for the court to appoint a physician to assist her in the preparation of her case. The court refused the request "because the court could find 'no authority to support [the] granting of the requested relief.'" Id. Despite the fact that the plaintiff had not requested a court-appointed expert, the court of appeals reversed and remanded on other grounds and suggested that, on remand, the trial court decide whether to use its discretionary power to appoint an expert.

8. Eastern Air Lines v. McDonnell Douglas Corp., 532 F.2d at 1000.

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

10. Id.

11. 3 J. Weinstein & M. Berger, Weinstein's Evidence 706-11 (1985). Computer searches for references to rule 706 of the Federal Rules of Evidence show forty-five mentions of the rule and thirty-seven cases in which an appointment was made or discussed extensively. WESTLAW, 1985; LEXIS, 1985.

editors of the Manual for Complex Litigation Second conclude that "[e]ven in complex litigation," use of a court-appointed expert, special master, or magistrate "is the exception and not the rule."[12] Speculations as to the reasons for nonuse are that "[c]ounsel may view such referrals as infringing on their prerogatives, as encroaching on the right to a jury trial, or as imposing additional time and expense."[13] Moreover, judicial reluctance to use the appointment power may reflect the difficulty, if not the impossibility, of selecting "a truly neutral person."[14] Another reason for nonuse may be the difficulty of identifying the need for a court-appointed expert before trial. There are no reported empirical tests of these theories or, for that matter, of any theories relating to the nonuse of court-appointed experts. Further research is necessary to determine whether these are the reasons that judges have declined to use rule 706 more extensively or, indeed, whether they have even considered the question.

---

12. Manual for Complex Litigation Second § 21.5 (1985).

13. Id.

14. Id. See also 3 Weinstein & Berger, supra note 11, at 706-9 to -11. Judge Weinstein and Professor Berger elaborate on the reasons stated summarily by the editors of the Manual for Complex Litigation Second. They also restate the argument that any funding limits that a court may impose could result in a lackadaisical effort by an appointed expert. They rebut this argument by observing that the level of pay of the expert is within the control of the court. Id. at 706-11; see also the discussion at notes 47 to 54 infra.

II. PROCEDURES FOR APPOINTMENT OF EXPERTS

Form and Origin of Motion

The procedure specified in rule 706 is for the court to "enter an order to show cause why expert witnesses should not be appointed."[15] The order to show cause may be entered on the court's own motion or the motion of any party.[16]

Timing of Motion

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.[17] Identification of the need for a neutral expert

---

15. Fed. R. Evid. 706(a). For an example of a memorandum order to show cause, see United States v. Articles . . . Provimi, 425 F. Supp. 228, 231 (D.N.J. 1977), in which the court identified a specific expert and directed both parties "to show cause why an order appointing him should not be entered, and to submit proposed directions for his study and report" before a specific date. In cases in which the court does not have a specific nominee in mind, the court may elicit suggestions or direct the parties to consider agreement. See the discussion at notes 20 to 25 infra.

16. Fed. R. Evid. 706(a). For a case in which a party made the motion, see Lightfoot v. Walker, 486 F. Supp. 504, 506 (S.D. Ill. 1980).

17. 3 Weinstein & Berger, supra note 11, at 706-12; see also United States v. Weathers, 618 F.2d 663, 664 n.1 (10th Cir. 1980). One bar association committee recommended that rule 706 specify that the report of the expert be available at least thirty days before the trial date. While that may be useful as a general guide, Judge Weinstein states that "a strict timetable is undesirable." 3 Weinstein & Berger, supra note 11, at 706-16 n.14. Such

should begin at a pretrial conference held pursuant to rule 16 of the Federal Rules of Civil Procedure.[18] Specific procedures for such an identification are left to the creativity and imagination of the trial judge. Despite rule 706's call for early appointment of an expert, 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.[19]

Selection of Experts

The discretion of the trial court with respect to appointment of an expert extends to selection of a procedure for the appointment of the expert.[20] 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." Courts frequently seek nominations from the parties.[21] In some instances, courts have appointed panels of experts.[22]

---

a limit would inhibit the flexibility of using the expert to comment on the testimony of the parties' experts. The Manual for Complex Litigation, supra note 12, at § 21.5, recommends consideration of the use of a court-appointed expert, special master, or magistrate "[w]ell in advance of the final pretrial conference."

18. 3 Weinstein & Berger, supra note 11, at 706-12.

19. See, e.g., Leesona Corp. v. Varta Batteries, Inc., 522 F. Supp. 1304, 1311-12 (S.D.N.Y. 1981).

20. Gates v. United States, 707 F.2d at 1144.

21. Gates, 707 F.2d at 1144; 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. at 1311; Lightfoot v. Walker, 486 F. Supp. at 506; United States v. Ridling, 350 F. Supp. 90, 99 (E.D. Mich. 1972).

22. Rule 706 uses the plural term "expert witnesses" to indicate that more than one expert may be appointed in a case. See Gates, 707 F.2d at 1144; Fund for Animals, 550 F. Supp. at 1208; Lightfoot, 486 F. Supp. at 506.

Another approach is to direct the parties to seek agreement on an appointment and to exercise the court's discretion only if the parties are unable to agree.[23] One district court has adopted this approach by local rule, stating that "[i]f the parties agree in the selection of an expert or experts, only those agreed upon shall be appointed. Otherwise, the judge will make his own selection."[24] An advantage of this approach is that it gives the parties an incentive to agree; a disadvantage is that it binds the court to accept that agreement in all cases.

An alternative selection procedure suggested in the Manual for Complex Litigation Second is for the court to "call on professional organizations and academic groups to provide a list of qualified, willing and available persons."[25] The court could allow the parties a number of peremptory challenges to those listed, and the court could then select an expert from those remaining.

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

Assignment of Duties

Rule 706(a) limits the manner of communicating the duties of the expert to two options, both of which ensure that the parties will be aware of the

---

23. Hatuey Prods., Inc. v. U.S. Dep't of Agriculture, 509 F. Supp. 21, 23 (D.N.J. 1980).

24. U.S. District Court for the District of Kansas, Rule of Practice 22 (1985).

25. Manual for Complex Litigation, supra note 12, at § 21.51; see also C. McCormick, Evidence 43-44 (E. Cleary 3d ed. 1984) (recommends "establishing panels of impartial experts designated by groups in the appropriate fields, from which panel court-appointed experts would be selected").

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.[26] These options preclude assignment of duties through a conference without the presence of the parties. One court recommends that all communications with an expert be conducted in an on-the-record conference in chambers or in an on-the-record conference call.[27] As a corollary to restriction on ex parte communication between the court and an expert, ex parte communication between a party and the court's expert should also be prohibited.[28]

Using the conference option, one court indicated that the parties would be free to bring their own experts to participate in the conference.[29] A benefit of such a procedure may be the narrowing or elimination of factual differences among the experts.[30] Another means of eliciting the parties'

---

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

27. United States v. Green, 544 F.2d at 146 n.16; cf. Leesona Corp. v. Varta Batteries, Inc., 522 F. Supp. at 1312. A limited deviation from the implicit prohibition on ex parte communication between the court and the expert was permitted in Green. In that case, the court and a law clerk communicated to the expert about observations of the defendant's behavior in court. The fact of the telephone call was placed in the record, and defendant's counsel had an opportunity to cross-examine the expert. The Third Circuit affirmed the general rule that "the court should avoid ex parte communications with anyone associated with the trial, even its own appointed expert," but found no violation of due process and no "reversible error" in the circumstances of the case. Green, 544 F.2d at 146 n.16. The court cautioned, however, that "a proper way [to proceed] would be to utilize an on-the-record conference in chambers or an on-the-record conference call so that counsel for all parties may participate." Id.

28. See, e.g., Leesona, 522 F. Supp. at 1312 n.18; see also 3 Weinstein & Berger, supra note 11, at 706-15 n.14 ("Of course ex parte attempts to influence the expert are improper").

29. United States v. Articles . . . Provimi, 74 F.R.D. 126, 127 (D.N.J. 1977).

30. C. McCormick, supra note 25, at 44.

participation is to have them prepare a statement of the technical issues in the case for the court to include in written instructions to the expert.[31] A third option for communicating an expert's duties is for the court to delineate the issues in the context of an opinion on the applicable legal standards.[32]

In any event, an overlap between the designation of issues for the expert and other pretrial efforts to narrow the disputed issues is apparent. A court could use the need to instruct the expert as a means to elicit the opinions of the parties and their experts about the crucial issues.

Findings and Testimony

The court-appointed expert must advise the parties of any findings, submit to a deposition by any party, and be subject to cross-examination by any party if called by the court or a party to give testimony.[33] Findings may be presented in a written report, by deposition, in testimony in open court, or through some combination of the above.[34]

The right of a party to depose the court-appointed expert in a criminal

---

31. Leesona, 522 F. Supp. at 1311-12 & n.18.

32. See, e.g., Stickney v. List, 519 F. Supp. 617, 619 (D. Nev. 1981).

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

34. Leesona, 522 F. Supp. at 1312. One district court has used a procedure in which the parties waive their rights to disclosure of the expert's report and conclusions. SAS Institute, Inc. v. S&H Computer Systems, 605 F. Supp. 816 (M.D. Tenn. 1985). An apparent purpose of the waiver of a report is to allow the expert to report directly to the court and perhaps also assist the court in framing an opinion.

case "goes considerably further than any other rule or statute in authorizing depositions in a criminal case."[35]

Advising Jury of Court-Appointed Status

One of the controversial aspects of rule 706 is that it explicitly grants discretion to the trial judge to decide whether to disclose to the jury the fact that the expert was appointed by the court.[36] Commentators such as the Association of Trial Lawyers of America have opposed informing the jury on the grounds that its knowledge of the expert's appointment by the court will undermine the adversarial system and dominate the jury decision-making process.[37] One court concluded that a court-appointed expert "would most certainly create a strong, if not overwhelming, impression of 'impartiality' and 'objectivity' [which] could potentially transform a trial by jury into a trial by witness."[38] Appointments of experts, however, have rarely been challenged in litigation, and there is little case law on the issue.[39] One circuit court has, however, stated its explicit assumption that "scientific proof may in some instances assume a posture of mystic infallibility in the

---

35. 3 Weinstein & Berger, supra note 11, at 706-16.

36. Fed. R. Evid. 706(c) provides: "In the exercise of its discretion, the court may authorize disclosure to the jury of the fact that the court appointed the expert witness."

37. See, e.g., Bua, Experts--Some Comments Relating to Discovery and Testimony Under New Federal Rules of Evidence, 21 Trial Law. Guide 1 (1977); 3 Weinstein & Berger, supra note 11, at 706-6 to -12.

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

39. In one district court case, the plaintiff challenged the communication of the court-appointed designation to the jury. The trial court overruled plaintiff's motion to set aside the jury verdict and grant a new trial. The only stated reason was that there was no abuse of discretion because

eyes of a jury of laymen."[40] But the limited empirical evidence that is available does not support the full, dramatic thrust of that comment.[41] The trial court's discretion, of course, subsumes this problem because the "fact of the appointment need not be divulged to the jury if the court fears it would be overimpressed by the status of the witness."[42]

If the court-appointed status of the expert is not to be divulged, how will the testimony of the witness be communicated to the jury? If neither party chooses to call the expert, will the testimony be presented? If so, who will call the expert and conduct the direct examination? Rule 706 does not address these issues directly; apparently, the court has to create a procedure that will disguise the source of the testimony. Any such proce-

---

the expert's testimony related to a "disputed issue." Grothusen v. National R.R. Passenger Corp., 603 F. Supp. 486, 490 (E.D. Pa. 1984).

40. United States v. Addison, 498 F.2d 741, 744 (D.C. Cir. 1974).

41. Loftus, Impact of Expert Psychological Testimony on the Unreliability of Eyewitness Identification, 65 J. Applied Psychology 9 (1980). In an experimental setting, two sets of subjects were asked to read the facts in a criminal case that involved an eyewitness identification. One set was also given a summary of evidence presented by a psychologist on the pitfalls for eyewitnesses in making accurate identifications; the other set received no expert evidence. The percentage of guilty verdicts was reduced from 57.5 in the nonexpert experimental condition to 39 when the expert evidence was included, a statistically significant change. These results, however, also demonstrate that at least in this specific hypothetical situation, the expert's testimony did not so dominate the experimental jurors as to produce acquittals in all cases. The impact, while significant, was marginal.

In a second experiment involving the same case, Professor Loftus examined the impact of expert testimony on experimental jurors' deliberation time. She observed that "in the presence of expert testimony, the juries spent an average of 10.6 minutes [of a possible 30] discussing the subject of eyewitness testimony, whereas without the expert they spent an average of 6.8 minutes." Thus, a likely effect of expert testimony is to stimulate discussion of the subject of testimony. Id. at 13-14; see also G. Wells & E. Loftus, Eyewitness Testimony 280-82 (1984).

42. 3 Weinstein & Berger, supra note 11, at 706-11.

dure should simulate the normal practice of allowing each party to call its own witness and conduct direct examination. Rule 706 requires that the court-appointed expert "be subject to cross-examination by each party, including a party calling him as a witness,"[43] which implies that there will be occasions when a party calls the expert and conducts direct examination as well as cross-examination.

How should the court-appointed expert's testimony be sequenced in relation to the testimony of the parties' witnesses?[44] A presentation by the expert in either the beginning or the end of the trial can be expected to give greater influence to the expert's testimony than a presentation during the middle of the trial, perhaps after the close of the plaintiff's case.[45] The logic of the case, however, might suggest a different sequence, for example, after the testimony of the experts for both parties. The trial court has discretion to control the order of presentation of the evidence.[46] With little additional guidance from the rules or case law, courts will have to

---

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

44. The timing and sequence of the testimony may have serious effects on the jury's recollection of the evidence and may distort the normal primacy and recency benefits that accompany the opening and closing presentations during the trial. J. Thibault & L. Walker, Procedural Justice: A Psychological Analysis 54-66 (1975); see also I. Horowitz & T. Willging, The Psychology of Law 110-11 (1984).

45. In Leesona Corp. v. Varta Batteries, Inc., 522 F. Supp. at 1311 n.17, the court, in a bench trial of a patent infringement action, expressly instructed the court-appointed expert to attend the trial during the testimony of witnesses for the parties and to testify after completion of the parties' cases.

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

explore this question on a case-by-case basis until sufficient experience with various alternatives can be accumulated and reported. This is another question that calls for further research.

III. PROCEDURES FOR ALLOCATION AND PAYMENT OF COSTS

Who Pays?

Concerns about compensation may inhibit courts from using court-appointed experts.[47] Rule 706 sets forth a rubric that prescribes reasonably definite procedures while allowing the trial court some flexibility. Costs of court-appointed experts in criminal cases and cases involving government "taking" and awards of "just compensation" under the Fifth Amendment are payable from funds provided by law. Otherwise, "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."[48]

By its terms, rule 706 gives the district courts discretion to apportion costs in advance according to the dictates of the litigation. 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."[49] If one party is indigent and compelling circumstance indicate that the opposing party should advance the costs for an expert witness, the

---

47. 3 Weinstein & Berger, supra note 11, at 706-11 to -12.

48. Fed. R. Evid. 706(b) (emphasis added).

49. United States Marshals Serv. v. Means, 741 F.2d 1053, 1058 (8th Cir. 1984) (en banc); cf. Cagle v. Cox, 87 F.R.D. 467, 468, 471 (E.D. Va. 1980) (advance authorization for payment for experts is not permitted, but taxation of plaintiffs' expert witness fees as costs is allowed to improve access of indigents to court); Maldonado v. Parasole, 66 F.R.D. 388, 390 (E.D.N.Y. 1975) (indigency is a proper consideration in taxation of costs pursuant to Fed. R. Civ. P. 54(d)).

court has the authority to order the nonindigent party to advance the entire cost of the expert.[50] The court may also order the advance payment of a reasonable fee for a rule 706 expert and defer the final decision on assessment of costs until the outcome of the litigation is known.[51] Payments to court-appointed experts are taxable as costs.[52] Payment should be made in advance of the testimony to avoid the possibility of bias based on the superior ability of one party to pay the expert's fee.[53]

The United States "has no special or different status than any other party" with regard to liability for payment of a rule 706 expert in a civil case.[54] In a criminal case or a case involving just compensation for a

---

50. Means, 741 F.2d at 1058.

51. Rule 706 provides that "compensation shall be . . . charged in like manner as other costs." See the discussion at notes 58 to 59 infra; see also United States v. Articles . . . Provimi, 425 F. Supp. at 231 (assessing one-half of the costs of the expert's services, "with further decision on the expert's costs to abide the event"); Baker Industries v. Cerberus, Ltd., 570 F. Supp. 1237, 1248 (D.N.J. 1983) (assessment of 85 percent of costs against defendant and 15 percent against plaintiff who prevailed on almost all issues was approved).

52. 28 U.S.C. § 1920(6); cf. Hart v. Community School Bd., 383 F. Supp. at 767 (fee of an "expert master" appointed to assist with posttrial enforcement of a desegregation decree can be assessed against the defendant when the appointment is made).

53. 3 Weinstein & Berger, supra note 11, at 706-23 to -24 and cases cited therein. Disciplinary rule 7-109(c) of the Code of Professional Responsibility prohibits a contingent fee for expert witnesses on the grounds that it may influence the witness to favor the party best able to pay. The rule has been upheld against a challenge that it unconstitutionally limited access to the courts. Person v. New York City Bar Ass'n, 554 F.2d 534 (2d Cir.), cert. denied, 434 U.S. 924 (1977); see also Note, Contingent Fees for Expert Witnesses in Civil Litigation, 86 Yale L.J. 1680 (1977).

54. United States v. R.J. Reynolds Tobacco Co., 416 F. Supp. 313, 316 (D.N.J. 1976).

governmental taking of property, rule 706 provides that compensation "is payable from funds which may be provided by law."

Mechanism for Payment

In criminal and land condemnation cases in which the United States is a party, the comptroller general has ruled that the source of payment is the Department of Justice, not the Administrative Office of the United States Courts.[55] In the event of a dispute over payment, the district court may order the Department of Justice to make immediate payment pending resolution of the dispute.[56]

In civil cases other than condemnation cases, the court has discretion under rule 706(b) to order the parties to make payment "at such time as the court directs." This language clearly authorizes an order for advance payment to the expert. Such an order will prevent the possibility of a deferred payment's biasing an expert's testimony in favor of the party with the greatest ability to pay.[57] The rule also provides that the expert's "compensation . . . shall be charged in like manner as other costs."[58] This means

---

55. 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); see also 3 Weinstein & Berger, supra note 11, at 706-21.

56. In re Payment of Court-Appointed Expert Witness, 59 Comp. Gen. at 314 (court issued order for immediate payment after the Administrative Office and the Justice Department disagreed about payment); see also the discussion at note 51 supra.

57. See note 51 supra.

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

that "costs shall be allowed as of course to the prevailing party unless the court otherwise directs."[59]

Amount of Payment

Rule 706(b) states that court-appointed experts "are entitled to reasonable compensation in whatever sum the court may allow." This language puts to rest the issue of whether an expert witness is relegated to the relatively small per diem fees provided for nonexpert witnesses.[60] Courts have apportioned fees among the parties in various proportions, based on the outcome of the litigation.[61]

---

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

60. 3 Weinstein & Berger, supra note 11, at 706-22 (refers to "insignificant per diem fees provided for in 28 U.S.C. § 1821"). Those fees are thirty dollars per day plus travel expenses and a subsistence allowance if an overnight stay is required.

61. See, e.g., Baker Industries v. Cerberus, Ltd., 570 F. Supp. at 1248 (assessment of 85 percent of costs against defendant and 15 percent against plaintiff who prevailed on almost all issues was approved).

IV. FUNCTIONS OF COURT-APPOINTED EXPERTS

Trial court use of court-appointed experts spans the spectrum of pretrial, trial, and posttrial activity. What one would expect to be the traditional function of court-appointed experts--the presentation of evidence at trial--is not the dominant use, at least not as revealed in reported cases.[62] While rule 706 is limited by its terms to use of the court-appointed expert as a witness, the court's inherent power to appoint an expert or master and its power under Federal Rule of Civil Procedure 53 to appoint a special master have been held to support nontestimonial functions by court-appointed experts.[63] Experts have been appointed to assist the court in pretrial activities such as:

---

62. This is not to say that court-appointed experts do not present evidence. A partial explanation of this phenomenon may be that case reports frequently relate to pretrial appointment issues and do not indicate whether the expert testified at a trial or hearing. On the other hand, the paucity of challenges to identification of the expert as court appointed (see the discussion at note 39) suggests that presentation of evidence in a jury trial is rare. Perhaps, as has been suggested by some commentators, court appointment of an expert increases settlements and reduces the number of trials. M. Provine, Settlement Strategies for Federal District Judges (Federal Judicial Center, in press). Empirical studies of the uses of court-appointed experts would be useful to clarify this issue.

63. Reed v. Cleveland Bd. of Educ., 607 F.2d 737, 746 (6th Cir. 1979) (authority to appoint nontestimonial experts to assist in the remedial phase of a case derives from Fed. R. Civ. P. 53 or the inherent power of court, not Fed. R. Evid. 706); see also Hart v. Community School Bd., 383 F. Supp. at 762-67 (appointment of an "expert master" under Fed. R. Civ. P. 53 and Fed. R. Evid. 706); cf. Wheeler v. Shoemaker. 78 F.R.D. 218, 227 n.14 (D.R.I. 1978) ("court-appointed expert's function is solely to furnish impartial testimony and opinion respecting his particular area of expertise to assist the jury's evaluation of the partisan experts").

a. Investigating factual issues,[64]

b. Examining physical evidence,[65]

c. Examining the competence of parties or a witness to participate in a trial,[66]

d. Evaluating documentary evidence, preparing a written report, and testifying regarding a motion for preliminary injunction,[67]

e. Gathering evidence at the situs of an environmental dispute during the period of a temporary restraining order and prior to a hearing on a preliminary injunction,[68]

f. Administering a pretrial test,[69]

g. Inspecting an institution,[70]

---

64. Gates v. United States, 707 F.2d at 1144 (in swine flu case, panel of experts appointed to conduct physical examinations of plaintiff, to review literature submitted by the parties, and to review medical records); United States v. Articles . . . Provimi, 425 F. Supp. at 231 (expert appointed to study the "fact aspects" of the case, including manufacturing processes); United States v. R.J. Reynolds Tobacco Co., 416 F. Supp. at 316 ("gathering and analyzing the facts and data on which one or more opinions may be based").

65. See, e.g., Baker Industries v. Cerberus, Ltd., 570 F. Supp. at 1241 (examination of smoke detector for dangerousness); United States v. Articles . . . Provimi, 74 F.R.D. 126.

66. United States v. Faison, 564 F. Supp. 514 (D.N.J. 1983) (conflict between parties' experts about competence of witness to testify); United States v. Reding, 557 F. Supp. 88 (D. Nev. 1982) (physical competence after heart bypass operation); United States v. Green, 544 F.2d 138 (mental competence).

67. Syntex Opthalmics, Inc. v. Tsuetaki, 701 F.2d 677, 684 (7th Cir. 1983) (testimony of parties' experts unnecessary in light of complete record).

68. Fund for Animals, Inc. v. Florida Game & Fresh Water Fish Comm'n, 550 F. Supp. 1206 (appointed panel reported on issues such as presence of endangered species in area).

69. United States v. Ridling, 350 F. Supp. at 99 (polygraph examination of defendant in perjury prosecution).

70. Stickney v. List, 519 F. Supp. 617 (expert appointed to apply

h. Promoting settlement,[71] and

i. Evaluating a proposed settlement.[72]

Conditional appointment of an expert in the event that the parties are unable to reach agreement may encourage settlement.[73]

Not surprisingly, court-appointed experts are sometimes used to present testimony at trial.[74] Sometimes, an expert may be expressly instructed to

---

Eighth Amendment standards to prison provisions for shelter, sanitation, food, personal safety, clothing, and medical care); Dreske v. Wisconsin Dep't of Health & Social Servs., 486 F. Supp. 504, 506 (E.D. Wis. 1980) (panel of doctors appointed to conduct comprehensive health services survey at prison).

71. San Francisco NAACP v. San Francisco Unified School Dist., 576 F. Supp. 34 (N.D. Cal. 1983); see also T. Lambros, The Summary Jury Trial and Other Alternative Methods of Dispute Resolution, 103 F.R.D. 461, 466 (1984); Center for Public Resources, Corporate Dispute Management MH-39 to MH-41 (1982) (in Judge Robert Zampano's court (D. Conn.), expert businessmen in construction disputes brought a sense of marketplace reality to claims of parties' experts).

72. Ohio Pub. Interest Campaign v. Fisher Foods, Inc., 546 F. Supp. 1, 4, 11 (N.D. Ohio 1982) (expert played "key role in the lengthy, protracted and heated negotiations," testified that settlement is "fair, reasonable and adequate"); Williams v. City of New Orleans, 543 F. Supp. 662 (E.D. La. 1982) (evaluation of a consent decree in the face of objections from intervenors); Alaniz v. California Processors, Inc., 73 F.R.D. 269, 274 (N.D. Cal. 1976) (two experts reviewed all pleadings and documents and testified on adequacy of highly contested settlement); see also In re Armored Car Antitrust Litigation, 472 F. Supp. 1357, 1375 (N.D. Ga. 1979) (court-appointed expert on damages was unnecessary because "educated estimates" of parties were sufficient to evaluate proposed settlement).

73. American Export Lines v. J & J Distrib. Co., 452 F. Supp. 1160, 1165 (D.N.J. 1978) (appointment of expert on damages issues conditioned on failure of parties to settle within one month).

74. See, e.g., Grothusen v. National R.R. Passenger Corp., 603 F. Supp. at 490 (testimony on disputed issue of damages in Federal Employer's Liability Act (FELA) case); Camrex Contractors v. Reliance Marine Applicators, 579 F. Supp. 1420, 1429 (E.D.N.Y. 1984) (court "could have" appointed expert on commercial practices to clarify contract term); Eastern Air

evaluate conflicting claims and testimony of the parties' experts at trial.[75] In one bench trial, the court described the expert as "a second set of ears for the court and a teacher who . . . can explain the technical significance of the evidence presented."[76]

After trial or other determination of issues of liability, experts have been used to assess damages and render an accounting,[77] to resolve technical issues that remain regarding implementation of a settlement decree,[78] to aid the special master in implementation of a remedial decree to desegregate schools or to restore a prison to constitutional standards,[79] and to deal with

---

Lines v. McDonnell Douglas Corp., 532 F.2d at 1000 (appeals court suggested that "jury might benefit from the testimony of a neutral expert" in computing lost profits); Pennwalt Corp. v. Becton, Dickinson & Co., 434 F. Supp. 758, 761 n.8 (D.N.J. 1977) (athletic director testified that term "jock itch" was familiar term in the 1960s and 1970s).

75. Leesona Corp. v. Varta Batteries, Inc., 522 F. Supp. at 1311 n.17 (experts' duties included attending trial during testimony of parties' experts and testifying subsequent to completion of parties' cases).

76. Id. at 1312.

77. American Export Lines v. J & J Distrib. Co., 452 F. Supp. 1160 (appointment conditioned on failure of parties to settle damages issues).

78. In the Agent Orange litigation, Chief Judge Weinstein appointed an expert pursuant to rule 706 after the $180 million settlement was approved. The expert's function included consultation with "the court, parties, and others" to determine how members of the class and their families who have reproductive or genetic problems should be compensated. In re "Agent Orange" Product Liability Litigation, MDL No. 381, slip op. (E.D.N.Y. July 18, 1984).

79. Hart v. Community School Bd., 383 F. Supp. at 762-67; cf. United States v. American Tel. & Tel. Co., No. 74-1698 (D.D.C. June 29, 1978), reproduced in W. Brazil, G. Hazard & P. Rice, Managing Complex Litigation: A Practical Guide to the Use of Special Masters 173-74 (Am. Bar Found. 1983) (special masters "may employ other persons to assist them in connection with this Order").

issues of the competence of a death row inmate to waive legal rights.[80] In one case, the court combined the concept of a court-appointed expert with that of a special master under rule 53 of the Federal Rules of Civil Procedure and appointed an "expert master" to advise the court regarding various remedial plans to be formulated by the parties to resolve issues of desegregation of housing and schools.[81] In another desegregation case, the court announced its intention to appoint a panel of experts to "oversee desegregation" of the school system.[82]

In sum, courts have used their power to appoint experts in a wide variety of procedural contexts. These myriad uses are drawn together by the common thread of judicial necessity. Courts seem to be using experts to aid in the resolution of cases with complex technical issues. From this perspective, the question of whether the expert is used for testimonial or nontestimonial activities is functionally irrelevant. Given the inherent power of the courts to manage their dockets and appoint expert witnesses, doctrinal debates about the applicability of rule 706 to a particular appointment may be largely academic. Nevertheless, fundamental questions about the impact of

---

80. Smith v. Armontrout, 604 F. Supp. 840 (W.D. Mo. 1984).

81. Hart v. Community School Bd., 383 F. Supp. at 762-67. The court in Hart implied that the expert master would testify as a witness regarding his advice to the court and be subject to cross-examination. Id. at 766. Cf. Reed v. Cleveland Bd. of Educ., 607 F.2d at 746-47 (authority to appoint nontestimonial experts to assist in the remedial phase of a case derives from Fed. R. Civ. P. 53 or the inherent power of court, not from Fed. R. Evid. 706).

82. Keyes v. School Dist. No. 1, 540 F. Supp. 399, 404 (D. Colo. 1982).

court-appointed experts on the traditional adversary system remain. Practical issues relating to diagnosis of impending "battles of the experts" before they erupt deserve immediate research attention.

TABLE OF CASES