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Impartial Expert Testimony Under the Federal Rules of Evidence: A French Perspective

I. Introduction

With the proposed adoption of the Rules of Evidence for U.S. Courts,¹ the continental institution of court appointed expert witnesses² may be introduced on a national scale in American civil litigation.³ This would represent a departure from the traditional common law system of expert testimony, which has come under heavy attack by commentators of the legal and medical professions.⁴ The criticism has focused on the expert's partisan nature, which many have found to be an unacceptable aspect of the adversary process as it now exists in the United States, where experts are more than likely to be "... merely expert advocates."⁵

Federal Rule of Evidence 706 is designed to minimize the abuses of expert advocacy by establishing a procedure by which the court may order the appointment of a neutral expert, either on motion of a party or on the judge's own motion. The Rule makes the expert's fee taxable as costs, and in addition

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¹The Federal Rules of Evidence were adopted by the Supreme Court on November 20, 1972 and were scheduled to go into effect on July 15, 1973. However, in view of the controversial nature of some of the Rules, Congress reacted in March, 1973 by passing P.L. 93-12, which provides that the Rules "... shall have no force or effect except to the extent, and with such amendments, as they may be expressly approved by Act of Congress," 41 U.S.L.W. 2542. Thus the chances of enactment of the Federal Rules of Evidence in their present form are uncertain.

²FED. R. EV. 706.

³In federal criminal trials court appointed experts have been in use since 1946, FED. R. CRIM. P.

⁴See, e.g., articles cited in 2 WIGMORE, A TREATISE ON THE ANGLO-AMERICAN SYSTEM OF EVIDENCE IN TRIALS ON COMMON LAW, sec. 563 n. 2 (3rd ed. 1940) (hereinafter cited as WIGMORE). See also ASS'N OF THE BAR OF THE CITY OF NEW YORK, IMPARTIAL MEDICAL TESTIMONY (1956); Elliott and Spellman, *Medical Testimony in Personal Injury Cases*, 2 LAW & CONTEMP. PROB. 466 (1935); Griffin, *Impartial Medical Testimony: A Trial Lawyer in Favor*, 34 TEMP. L.Q. 402 (1961); Levy, *Impartial Medical Testimony—Revisited*, 34 TEMP. L.Q. 416 (1961); Morgan, *Suggested Remedy for Obstruction to Expert Testimony by Rules of Evidence*, 10 U. CHI. L. REV. 285 (1943); Peck, *Impartial Medical Testimony*, 22 F.R.D. 21; Prettyman, *Needed, A New Trial Technique*, 34 A.B.A.J. 766 (1948); Van Dusen, *The Impartial Medical Expert System: The Judicial Point of View*, 34 TEMP. L.Q. 386 (1961).

⁵Introductory Note, MODEL CODE OF EVIDENCE, 198 (1942) (hereinafter cited as MODEL CODE). The partisan expert was termed an "intellectual prostitute" in Friedman, *Expert Testimony, Its Abuses and Reformation*, 19 YALE L.J. 247 (1910), quoted in Bomar, *The Compensation of Expert Witnesses*, 2 LAW & CONTEMP. PROB. 510, 520 n.76 (1935).

preserves the parties' right to call experts of their own choice as partisan witnesses.

But the creation of this new method of proof—in itself a necessary and commendable reform—automatically brings with it other problems concerning both the “official” nature of court appointed experts, *e.g.*, over-credibility,⁶ delegation of duties within the province of judge or jury,⁷ disqualification,⁸ etc., and the procedure required to make the Rule operate justly and efficiently, *e.g.*, selection of the expert,⁹ opportunity for the parties to observe his investigations,¹⁰ undue delay by the expert,¹¹ notice of his findings of fact and opinion,¹² etc. In its present form, Federal Rule of Evidence 706 leaves many of these questions unanswered.

France, on the other hand, has a highly developed system of court appointed expert witnesses.

In contrast to the novelty of this institution in America,¹³ the use of impartial experts in France dates back to the Roman era.¹⁴ The framework of the modern French expert procedure, called *expertise*, was first established by Louis XIV, *le Roi Soleil*, in the Ordinance of 1667,¹⁵ and is incorporated in the Napoléonic Code de Procédure Civile of 1806 (art. 302-323).¹⁶ These provisions, still in effect, have been progressively refined—they were completely revised in

⁶See pp. 36-39 *infra*.

⁷See pp. 21-24 *infra*.

⁸See pp. 30-31 *infra*.

⁹See pp. 26-28 *infra*.

¹⁰See pp. 34-55 *infra*.

¹¹See pp. 39-40 *infra*.

¹²See pp. 35-37 *infra*.

¹³Prior to Federal Rule of Evidence 706 impartial experts were used in federal criminal trials, *see* note 3 *supra*, and in civil actions in certain federal and state courts, *see* pp. 11-12 *infra*.

¹⁴For example, surveyors (*agrimensores*) were consulted in boundary disputes, 3 CODEX JUSTINIANUS, tit. 39, sec. 3, cited in ENGELMANN, A HISTORY OF CONTINENTAL CIVIL PROCEDURE, 362, n. 1 (Millar transl. 1927) (hereinafter cited as ENGELMANN-MILLAR). After a long hiatus during the Dark Ages, the Roman procedure resurfaced in France in the Middle Ages with the introduction of Romano-canonical law, *id.* 417. Expert testimony [*expérience (sic)*] is listed as a method of proof in fourteenth century France, JEAN BOUTEILLER, SOMME RURAL, tit. 40, at 613 (ed. Charondas le Caron 1603), cited in ENGELMANN-MILLAR 678. As the monarchy's power was growing, the more civilized Romano-canonical procedure began to replace the feudal methods of proof-taking, *id.* 664. The latter fell in the category of proof by Judgment of God, such as ordeal (*ordalie*) by fire and water, judicial combat, duel, and proof by the cross (where the adversaries held their arms extended, and the first to lower them lost), 6 GLASSON, HISTOIRE DU DROIT ET DES INSTITUTIONS DE LA FRANCE 565 (1887).

¹⁵Title XXI. The Ordinance of 1667 was the first national codification of civil procedure in France, ENGELMANN-MILLAR 719.

¹⁶The *Code de Procédure Civile* was drafted by lawyers and judges who had become famous in pre-revolutionary days. Their Code understandably reflected the conservative views of its draftsmen—they more or less copied it from the Ordinance of 1667, and it has been unfavorably compared to the more innovative Code Civil of 1804, 1 GLASSON & TISSIER, TRAITÉ THÉORIQUE ET PRATIQUE D'ORGANIZATION JUDICIAIRE, DE COMPÉTENCE ET DE PROCÉDURE CIVILE 61-66 (3rd ed. 1925) (hereinafter cited as GLASSON & TISSIER); P. HERZOG & M. WESER, CIVIL PROCEDURE IN FRANCE 48 (H. Smit ed. 1967) (hereinafter cited as HERZOG); R. MOREL, TRAITÉ ÉLÉMENTAIRE DE PROCÉDURE CIVILE 11 (2nd ed. 1949) (hereinafter cited as MOREL).

1944¹⁷—and provide an excellent opportunity for the reformers of American expert procedure to learn from the French experience.

It is appropriate at the outset to trace the evolution of the various proposals to reform American expert testimony, the predecessors of Federal Rule 706. Thence, one must proceed to describe briefly the French *expertise*, the 1944 reform, and the procedural setting of French civil litigation. The main body of this Article consists of an analysis of Federal Rule 706, comparing it with its predecessors on the one hand, and with the French *expertise* on the other hand. It concludes with a synthesis, of how, by avoiding or adopting certain aspects of the French system, Federal Rule 706 might possibly be made to serve the interests of justice more effectively.

II. American Reform Proposals: A Background To Federal Rule of Evidence 706

A. *Prior Codifications*

The new Federal Rules of Evidence are not the first modern codification of impartial expert procedure in civil trials—there is a significant history of comprehensive reform proposals in this area. The first was the Uniform Expert Testimony Act,¹⁸ adopted by the Commissioners on Uniform State Laws in 1937. Wigmore called it: “. . . the final solution, assuming that the Act is generally adopted. . . .”¹⁹ Unfortunately, this was assuming too much, since South Dakota was the only state to adopt the Uniform Act.²⁰ But it did provide the initial impetus for the subsequent codifications.²¹

The American Law Institute originally considered writing a Restatement of the Law of Evidence, but abandoned the idea because “. . . the Rules themselves are so defective that instead of being the means of developing truth, they operate to suppress it. . . . A bad rule of law is not cured by

¹⁷Law of July 15, 1944, Concerning Experts, (1944) J. O. 1903, (1944) D.A.L. 82, see p. 16, *infra*.

¹⁸HANDBOOK OF THE NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS 339 (1937), and 9A UNIFORM LAWS ANNOTATED 536 (1965); (hereinafter referred to as UNIFORM ACT). It was approved by the American Bar Association's Committee on the Improvement of the Law of Evidence in 1937, 2 WIGMORE, sec. 563 at 656, and was redesignated Model Expert Testimony Act in 1943, 9A U.L.A. 536 (1965).

¹⁹2 WIGMORE, sec. 563 at 650.

²⁰S.D.C.L. ch. 19 sec. 6 (1967) adopted by Supreme Court Rule, Order no. 5, 1942, effective Jan. 1, 1943, 9A U.L.A. 536 (1965). It is sometimes believed that Vermont had adopted the Uniform Act, see e.g. *Scott v. Spanjer Bros., Inc.*, 298 F.2d 928, 933 (2nd Cir. 1962) (Hincks, J., dissenting). The Vermont statute does not concern neutral expert testimony at all, but rather eliminates the need for hypothetical questions, 12 V.S.A., sec. 1643 (1958). Moreover, this statute was not even similar to the corresponding provision in the Uniform Act, *General Statutory Notes*, 9A U.L.A. 537 (1965).

²¹The Advisory Committee Notes to Rule 28 of the Federal Rules of Criminal Procedure state that the Rule was based, in part, on the Uniform Act.

clarification."²² Instead of a Restatement, the A.L.I. decided to write a Model Code of Evidence, and work was started in 1939. Model Code Rules 403 to 410 provide for impartial, court appointed experts, paralleling, with minor variations, the corresponding provisions of the Uniform Act. The Code was adopted by the Institute in 1942;²³ but two years later the State Bar of California refused to recommend it for enactment, considering it too revolutionary.²⁴ The Model Code thus far has not been adopted by any state.

In 1949 the A.L.I. referred its Model Code to the National Conference of Commissioners on Uniform State Laws for use "... as the basis for the preparation of a uniform code of evidence."²⁵ The Conference, perhaps with the reaction of the California Bar to the Model Code in mind, decided that "... its departures from traditional and generally prevailing common law and statutory rules of evidence are too far-reaching and drastic for present day acceptance. . . ."²⁶ As a result, they opted to modify the Code in the interests of acceptability and uniformity.²⁷

The Uniform Rules also differ from their predecessor in their exclusion of procedural detail resulting in greater brevity—there are only 72 Uniform Rules as opposed to 116 in the Model Code—and purity in their codification of the law of evidence. An exception to this policy exists in Rules 59 to 61, concerning court appointed experts and their compensation: "But because of the urgent necessity . . . of correcting abuses in the use of expert testimony, the rules have been incorporated here to call attention to the desirability of getting them included in the procedural law. . . ."²⁸

Indeed, a mere codification of the power of a federal judge to call expert witnesses *ex mero motu* would add nothing to the law, since that power already exists.²⁹ But rather what is needed is a set of procedural rules to dispel the confusion and to end the lack of uniformity concerning the appointment of such experts. The essential conservatism of the Uniform Rules, however, fails to

²²W. Lewis, *Introduction to MODEL CODE OF EVIDENCE* at VIII (1942) (hereinafter cited as MODEL CODE).

²³19 PROCEEDINGS OF THE AMERICAN LAW INSTITUTE 257 (1942).

²⁴"A study of the Code must convince anyone that it was designed not to offer any improvement to the existing statutes . . . but to entirely revolutionize our present rules of evidence. . . ." *Report of the Committee on Administration of Justice on Model Code of Evidence*, 19 J. STATE BAR OF CAL. 262 (1944), cited in Chadbourn, *The "Uniform Rules" and the California Law of Evidence*, 2 U.C.L.A. L. Rev. 1, 3-4 (1954).

²⁵HANDBOOK OF THE NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS 161 (1953), cited in Chadbourn, *supra* note 24, at 5.

²⁶*Id.*

²⁷*Id.* The Model Code might be considered as more radical than the Uniform Act because, for example, Model Code Rule 410 requires that an impecunious party's share of the expert's fees be paid by the adverse party or by the state in certain civil actions. *Contra*, UNIFORM RULE OF EVIDENCE 60 (1953) (hereinafter cited as UNIFORM RULES).

²⁸UNIFORM RULES, Rule 59, Comment, 9A U.L.A. 632 (1965).

²⁹Whether this flows from a federal judge's inherent powers, or from the Federal Rules of Civil Procedure is discussed at note 75, *infra*.

follow through to provide the necessary degree of procedural certainty, as evidenced by the Comment to Rule 59: "The rather elaborate procedural provisions of Model Code Rules 405 and 408 are omitted. . . ." ³⁰

The Conference approved the Uniform Rules in 1953;³¹ the only jurisdictions to adopt Rules 59 to 61, concerning court appointed experts, were the Virgin Islands in 1957³² and the Panama Canal Zone, in 1963.³³ California enacted parts of Rules 60 and 61 in a 1965 revision of that state's pre-existing statute on impartial experts;³⁴ and the Judicial Conference used the same rules as a model, to some extent, in drafting the new Federal Rules.³⁵

Federal Rule of Criminal Procedure 28, adopted in 1948, is the most obvious source of inspiration for Federal Rule of Evidence 706, which repeats the Criminal Rule almost verbatim. The only material differences are found in Rule 28(b), concerning interpreters, in Rule 706(b), concerning compensation in civil cases,³⁶ and in Rule 706(c), concerning disclosure to the jury of an impartial expert's appointment. Impartial expert testimony has been rarely used under Federal Rule of Criminal Procedure 28;³⁷ consequently the courts have furnished little by way of judicial interpretation of the Rule's language. There are several reasons for the courts' reluctance to invoke Rule 28. First, an indigent criminal defendant may obtain an expert of his own selection, whose fees are paid by the government, under both Federal Rule of Criminal Procedure 17(b), and the Criminal Justice Act of 1964;³⁸ it is understandable that the defendant would prefer not to take the risk that a court appointed expert would testify unfavorably.³⁹ Moreover, expert testimony on the matters which arise most often in criminal trials is readily available from

³⁰9A U.L.A. 631 (1965).

³¹*Ibid.*, at 589.

³²*Id.*; 5 V.I.C. secs. 914-1916 (1967).

³³9A U.L.A. 589 (1965); 5 C.Z.C. secs. 2934-2936 (1963).

³⁴6 CALIFORNIA LAW REVISION COMMISSION REPORTS 946-950 (1964); CAL. EV. CODE, sec. 730-733 (West 1966).

³⁵FED. R. EV. 706, Advisory Committee's Note (Prelim. Draft, 1969, 46 F.R.D. 161, 322).

³⁶Rule 706(b) provides for payment of the expert's fee as costs by the parties in civil suits, and for payment by the government in criminal trials, the latter in accordance with Federal Rule of Criminal Procedure 28(a). The Federal Rules of Evidence will apply generally to criminal proceedings, F.R.E.V. 1101(b), and Criminal Rule 28(a) will be deleted if and when the Federal Rules of Evidence go into effect, 2 WRIGHT, FEDERAL PRACTICE AND PROCEDURE §451 (Supp. 1972).

³⁷8 MOORE'S FEDERAL PRACTICE—CIPES, CRIMINAL RULES, at 28-3 (2d ed. 1972) (hereinafter cited as MOORE'S FEDERAL PRACTICE). At the time of the Criminal Rules' enactment, Judge George Z. Medalie stated that Rule 28 "... won't be used often because I think the average trial judge begins to feel that things develop well enough if each side calls a witness." N.Y.U. INSTITUTE, FEDERAL RULES OF CRIMINAL PROCEDURE 200 (1946). There are, however, two decisions in which the court dealt with the question under Federal Rule of Evidence 28(a) at which stage in the proceedings a neutral expert could be appointed; U.S. v. Cancellieri, 5 F.R.D. 313, 314 (E.D. N.Y. 1946); and U.S. v. Allied Stevedoring Corp., 138 F. Supp. 555, 557 n. 4 (S.D. N.Y. 1956).

³⁸18 U.S.C. Section 3006A(e).

³⁹8 MOORE'S FEDERAL PRACTICE at 28-5.

"... laboratory experts of the Federal Bureau of Investigation, whose approach to such matters is entirely objective and impartial."⁴⁰

B. Other Proposals and Precedent

1. MAGRUDER COMMITTEE REPORT

In 1953 the Judicial Conference of the United States considered a report concerning impartial experts submitted by the Magruder Committee.⁴¹ The scope of the report was limited to the question of whether to recommend legislation to provide for the compensation of experts in civil trials from public funds—the Committee's response was unfavorable. The final proposal was merely a system by which an *inter-partes* neutral expert could be appointed by stipulation of the parties.⁴²

2. SPECIAL JURY OF EXPERTS

Wigmore has suggested the special jury as an alternate method of removing the partisan feature from expert testimony.⁴³ This was probably the original common law fashion of resolving issues of fact beyond the ordinary competence of laymen:⁴⁴ Learned Hand traced the use of the expert jury as far back as the fourteenth century; and as recently as the nineteenth century.⁴⁵ A special jury is composed solely of experts: for example, in *Regina v. Anne Wycherley*⁴⁶ a jury *de ventre inspiciendo*—consisting of matrons—was called upon to decide whether the defendant was pregnant.

The modern use of the special jury in the U.S. seems to be precluded by constitutional considerations: our trial institutions have evolved to distinguish between juror and witness, making the special jury alien to the Seventh Amendment guarantee of the right to trial by jury.⁴⁷ However, from 1875 until

⁴⁰Holtzoff, *Codification of Federal Criminal procedure*, 4 F.R.D. 275, 283 (1945).

⁴¹REPORT OF THE JUDICIAL CONFERENCE OF THE UNITED STATES 23 (1953), cited in FED. R. EV. 706, Advisory Committee's Note (Prelim. Draft, 1969, 46 F.R.D. 161, 322), and in Sink, *The Unused Power of a Federal Judge To Call His Own Expert Witness*, 29 S. CAL. L. REV. 195, 203 (1956).

⁴²*Id.* For other proposals relating to neutral expert testimony, but with a narrower focus on trials involving unusually complex issues, see PRETTYMAN REPORT, 13 F.R.D. 62, 79 (1951); Yankwich, "Short Cuts" in Long Cases, 13 F.R.D. 41, 56-58 (1953); HANDBOOK OF RECOMMENDED PROCEDURE FOR THE TRIAL OF PROTRACTED CASES, 25 F.R.D. 351 (1960); L. WHINERY, THE ROLE OF THE COURT EXPERT IN PATENT LITIGATION, STUDY OF THE SUBCOMM. ON PATENTS, TRADEMARKS AND COPYRIGHTS OF THE SENATE COMM. ON THE JUDICIARY, STUDY NO. 8, 85th Cong., 1st Sess. (1958) (hereinafter cited as WHINERY); and PALFREY, THE PROOF OF SCIENTIFIC AND TECHNICAL FACTS IN THE COURTS: IMPARTIAL TESTIMONY (1957) (Armstrong Project Report).

⁴³2 WIGMORE, sec. 563 at 647-648.

⁴⁴Rosenthal, *The Development of the Use of Expert Testimony*, 2 LAW & CONTEMP. PROB. 403, 407 (1935).

⁴⁵L. Hand, *Historical and Practical Considerations Regarding Expert Testimony*, 15 HARV. L. REV. 40, 41 (1901).

⁴⁶8 C. & P. 262 (1838).

⁴⁷The special jury is "... a relic of the usage of an undeveloped age which had not so far

1948 a federal statute provided for advisory juries composed of not less than five nor more than twelve expert jurors in equity patent cases.⁴⁸

It can also be argued that under Rules 39(c) and 48 of the Federal Rules of Civil Procedure it is still technically possible to try a case by the majority verdict of a jury composed of any number less than twelve experts. Rule 39(c) permits the parties to agree on an advisory jury, but only in actions not triable by right of jury; Rule 48 provides for majority verdicts and juries of less than twelve by stipulation of parties.⁴⁹ On the contrary, Judge Smith believes that a Rule 39(c) jury cannot consist of experts, but must be selected from a general panel.⁵⁰ Whether or not the special jury is constitutional, it does not appear to be a feasible alternative to the present system of partisan experts.

3. THE INHERENT POWER OF A FEDERAL JUDGE TO APPOINT EXPERTS

Another alternative, at least in the federal courts, is the use of the judge's inherent power to call expert witnesses and masters.⁵¹ Authority for the existence of this power can be found in *Ex parte Peterson*,⁵² in which the Supreme Court upheld the trial court's appointment of an auditor to examine account books, hear testimony, and submit a report to the jury. In the words of Justice Brandeis, ". . . the court possesses the inherent power to supply itself with this instrument for the administration of justice when deemed by it essential."⁵³ But does the holding in *Peterson* mean that a federal judge has the power to appoint an expert, or rather to appoint a master?

One writer cites the case for the former proposition, *i.e.*, that a federal judge has the power to appoint expert witnesses,⁵⁴ while a second writer cites it as an example of the use of a master.⁵⁵ Although the case might stand for both propositions, the latter interpretation is more accurate, since the auditor in *Peterson* was in fact a master, synonymous with "referee" as found in the opinion.⁵⁶

differentiated witness from jury as rigidly to confine each to its function." L. Hand, *supra* note 45, at 50.

⁴⁸Act of February 16, 1875, ch. 77, sec. 2, 18 Stat. 316, as amended, act of March 3, 1911, ch. 231, sec. 291, 36 Stat. 1167 (repealed 1948), cited in WHINERY 17, n. 92.

⁴⁹WHINERY 18-19.

⁵⁰*Proceedings of the Seminar on Protracted Cases for U.S. Circuit and District Judges*, 21 F.R.D. 395, 468 (1958).

⁵¹Power to appoint masters is codified in Federal Rule of Civil Procedure 53. A "standing" master may be appointed by a majority of district court judges for general reference, and a "special" master may be appointed by the presiding judge to act in a single action, FED. R. CIV. P. 53(a).

⁵²253 U.S. 300, 40 Sup. Ct. 543, 64 L. Ed. 919 (1920).

⁵³253 U.S. 300, 312.

⁵⁴Sink, *supra* note 41.

⁵⁵Kaufman, *Masters in the Federal Courts: Rule 53*, 58 COL. L. REV. 452 (1958); accord, 95 A.L.R.2d 392 (1964).

⁵⁶253 U.S. 300, 309, 313. Rule 53(a) of the Federal Rules of Civil Procedure says: ". . . the work 'master' includes . . . an auditor. . . ."

But impartial experts and masters are similar in many respects: both are appointed by the court in actions at law as well as in equity, and their fees are set by the court.⁵⁷ Furthermore, although a master, unlike an expert, is not a witness, masters often perform certain expert functions: for example, the auditor's job in *Peterson* was: "... to assist the judge by defining the issues and ... to convey to the jury, in the form of a written report, his expert opinion of the disputed facts."⁵⁸ On account of their similarity, some confusion exists about the relative roles of master and expert in a civil trial. It is therefore necessary to distinguish between the master, on the one hand, and the court appointed expert, on the other. There are four significant differences:⁵⁹ first, the powers and duties of a master, in preparing his report, include the power to conduct a hearing, to require the production of evidence, rule on its admissibility, to put witnesses and parties on oath, to examine them himself, and to make a record of the evidence just as in a non-jury trial.⁶⁰

The extent of the powers of an impartial expert, on the contrary, is less clearly defined by Federal Rule of Evidence 706, than are the powers of a master by Federal Rule of Civil Procedure 53. Rule 706 merely provides: "A witness so appointed shall be informed of his duties by the judge in writing . . . ," and contemplates that the expert make certain "findings." It is generally considered that an expert's powers are considerably narrower than those of a master,⁶¹ and therefore Rule 706, by leaving his powers totally to the discretion of the trial judge, creates a large potential for abuse in impartial expert procedure, and lessens the chances of recognizing error on appeal.

Secondly, the expert testifies as a witness, subject to cross-examination,⁶² whereas the master merely submits a written report which is read to the judge⁶³

⁵⁷FED. R. EV. 706, and FED. R. CIV. P. 53(a). Although there is no longer any formal distinction between law and equity in the federal courts since the establishment of the Federal Rules of Civil Procedure in 1939, Rule 53(a) contemplates the use of masters in both jury and non-jury trials. Even prior to 1939, however, a master could be appointed in an action at law tried by a jury, e.g., *Ex Parte Peterson*, 253 U.S. 300, in which Justice Brandeis stated at 314: "... no reason exists why a compulsory reference to an auditor to ... make tentative findings may not be made at law ... as freely as compulsory references to special masters are made in equity."

⁵⁸*Sink*, *supra* note 41, at 207.

⁵⁹It should also be noted that until the enactment of the Federal Rules of Evidence in 1973 there was no statutory recognition of court appointed experts in federal courts; whereas the procedure for reference to masters was codified a century and a half earlier in Rule XXIX of the Federal Equity Rules of 1822, 20 U.S. (7 Wheat.) xii, cited in Kaufman, *supra* note 55, at 454 n. 12. For the state and territorial legislation on experts prior to the Federal Rules of Evidence, see pp. 3, 5, *supra*, and p. 11 *infra*.

⁶⁰FED. R. CIV. P. 53(a).

⁶¹*See, e.g.*, the comparison between experts and masters in Kaufman, *supra* note 55, at 460 n. 43.

⁶²FED. R. EV. 706(a). This rule does not require or even suggest the possibility that an expert make a written report, but does require him to submit to oral examination: "... 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."

⁶³FED. R. CIV. P. 53(e)(2).

or, in a jury trial, is read to the jury.⁶⁴ Thus the master's report, and the testimony contained therein, having been received out of the court,⁶⁵ constitute an exception to a basic principle of American Civil procedure, as expressed in Federal Rule of Civil Procedure 43(a):⁶⁶ "In all trials the testimony of witnesses shall be taken orally in open court, unless otherwise provided by those rules."

The relative weight allotted to findings by the master and expert is a third point of difference. In non-jury actions the master's report is conclusive, in the absence of clear error,⁶⁷ and in jury actions it constitutes prima facie evidence of truth of the findings asserted therein.⁶⁸ The credibility of an impartial expert's testimony, on the other hand, is a question for the trier of fact.⁶⁹

Finally, the reference to a master differs from expert testimony in that the former is restricted to the complex case, *e.g.*, anti-trust, patent, or admiralty,⁷⁰ by Federal Rule of Civil Procedure 53(b).⁷¹ Federal Rule of Evidence 706 contains no such limitation, thus rendering neutral expert testimony available on a much broader scale, and thereby increasing the need for a well-defined set of rules applicable to the new impartial expert procedure.

In any event, cases can be found in which a federal judge has appointed, on his own motion an impartial expert who clearly did not come within the category of master. In *Scott v. Spanjer Bros., Inc.*,⁷² for example, the Second Circuit upheld the trial judge's appointment of a medical expert to examine the plaintiff in a personal injury action. The Court held that a trial court has the inherent power to appoint an expert⁷³—relying, curiously enough, on *Ex parte Peterson*.⁷⁴ Some federal and state courts have established impartial medical

⁶⁴*Id.*, 53 (e)(3).

⁶⁵A master is not subject to questioning by the parties, *United States v. Cline*, 388 F.2d 294, 296 (4th Cir. 1968), *vacating* 225 F. Supp. 488 (W.D.N.C. 1964), and *Danville Tobacco Assoc. v. Bryant-Buckner Associates, Inc.*, 333 F.2d 202, 208 (4th Cir. 1964), modified, 250 F. Supp. 357 (W.D. Va. 1966), *affid.* 372 F.2d 634 (4th Cir. 1967), *cert. denied*, 387 U.S. 907 (1967). This is also true as to French experts, *see* text accompanying note 97 *infra*.

⁶⁶*See Kaufman, supra* note 55, at 461. Perhaps this is why the use of masters has been so strictly limited, *see* note 71, *infra*.

⁶⁷FED. R. CIV. P. 53(e)(2).

⁶⁸*Ibid.*, 53(e)(3).

⁶⁹*See, e.g., Scott v. Spanjer Bros., Inc.*, 298 F.2d 928, 932, 95 A.L.R.2d 383 (2nd Cir. 1962). The belief that the jury in effect remains the arbiter of fact when presented with expert testimony has been disputed: *e.g.*: ". . . [T]he expert has taken the jury's place if they believe him." The expert's opinion ". . . furnishes to them general propositions which it is ordinarily their function, and theirs only, to furnish to the conclusion which constitutes the verdict." L. Hand, *supra* note 45, at 52.

⁷⁰*See WHINERY* at 8-17; and Note, *Reference of the Big Case Under Federal Rule 53(b)*, 65 YALE L. J. 1057 (1956). Under this procedure, the master himself must have expert knowledge on the subject of the litigation—hence the confusion in differentiating between master and expert.

⁷¹"A reference to a master shall be the exception and not the rule." FED. R. CIV. P. 53(b). The Supreme Court referred to the use of masters as ". . . an inroad upon the right to trial by jury." *Dairy Queen v. Wood*, 369 U.S. 469, 478, n. 18 (1961). *See also WRIGHT, FEDERAL COURTS* 436 (1970); 2B BARON & HOLTZOFF, sec. 1161 (Wright ed. 1960).

⁷²298 F.2d 928 (2nd Cir. 1962).

⁷³*Id.* at 930.

⁷⁴253 U.S. 300, 40 Sup. Ct. 543, 64 L. Ed. 919 (1920). *See* p. 8, *supra*.

expert procedures by local rule.⁷⁵ This experimentation by the federal courts, although sometimes leading to bad results, as discussed below, has served a valuable function as forerunner⁷⁶ to the impartial expert provision in the new Federal Rules of Evidence.

4. STATE STATUTES

The last group of precedents for new Federal Rule 706 to be discussed herein are the various state statutes providing for neutral expert testimony. The vast majority concern the insanity plea in criminal cases, but a few deal with civil actions. The jurisdictions having enacted the Uniform Act or Rules have already been listed.⁷⁷ Two other jurisdictions have original legislation in point: Illinois adopted a system of impartial medical experts in 1961 based on Local Rule 20 of the Federal District Court of the Northern District of Illinois;⁷⁸ and California has had a comprehensive scheme for impartial experts since 1925,⁷⁹ having thus developed some case law which is possibly relevant to new Federal Rule 706.⁸⁰

III. French Expert Procedure in Civil Trials

A. Introduction

It is impossible to make a perceptive study of any single aspect of a foreign civil procedure in a complete vacuum. Holmes, reviewing a judgment interpreting the law of Puerto Rico, observed: "When we contemplate such a system from the outside it seems like a wall of stone, every part even with all the others, except so far as our own local education may lead us to see subordinations to which we are accustomed. But to one brought up within it, varying emphasis, tacit assumptions, unwritten practices, a thousand influences gained only from life, may give to the different parts wholly new

⁷⁵For descriptions of these rules and their validity, see Van Dusen, *supra* note 4; and Wick & Knightlinger, *Impartial Medical Testimony Under the Federal Civil Rules: a Tale of Three Doctors*, 34 INS. COUNS. J. 115 (1967). Whether the rule-making power in federal courts stems from any inherent power of the trial judge or from Rules 35 (medical examination of a party) and 83 (power to establish district court rules) of the Federal Rules of Civil Procedure, is an unanswered question. After enactment of the new Federal Rules of Evidence, the local rules on expert testimony will become invalid to the extent they are inconsistent with Rule 706, FED. R. CIV. P. 83.

The best known of the local plans is the New York Medical Expert Testimony Project. It was originally promulgated by the justices of the Supreme Court of New York County and operated on an experimental basis from 1952 to 1954. During that period empirical data and comments by judges were collected for each case, and published in REPORT BY SPECIAL COMMITTEE ON THE ASS'N OF THE BAR OF THE CITY OF NEW YORK: IMPARTIAL MEDICAL TESTIMONY (1956). The plan is still in effect in New York County. For commentaries on the New York plan, see Peck, *supra* note 4 and McNally, *Impartial Medical Testimony Plan*, 27 INS. LAW J. 95 (1960).

⁷⁶Justice Brennan referred to this function of local district court rules—in another context—in his dissent in *Miner v. Atlass*, 363 U.S. 641, 652, 662 (1960).

⁷⁷See pp. 3 and 5, *supra*.

⁷⁸S.H.A. ch. 110A, sec. 215(d) (1968).

⁷⁹CAL. EV. CODE secs. 730-733 (West 1966) (formerly C.C.P. sec. 1871, Stats. 1925 ch. 156, p. 305, sec. 1).

⁸⁰See note 199, *infra*. For a collection of California cases see 95 A.L.R.2d 390 ff. (1964).

values that logic and grammar never could have got from the books."⁸¹

Therefore, before embarking upon a comparative analysis of the substantive provisions of Federal Rule of Evidence 706 in conjunction with the French *expertise*, it is first necessary to describe the latter in its proper context. But since we cannot, as outsiders, hope to attain as profound an understanding of the French system as that suggested by Holmes, the following description is limited to a brief outline of the *expertise*, its legislative history and how it fits into the general pattern of French litigation, as compared with American trial institutions.

B. Conduct of a Trial Involving Expert Testimony

In France a civil action before a court of first instance (*tribunal de grande instance*)⁸² begins when the defendant is served with the complaint (*ajournement*).⁸³ The plaintiff's lawyer⁸⁴ files a copy with the court clerk, who

⁸¹Diaz v. Gonzalez, 261 U.S. 102, 106 (1923), cited in Kaplan, *Civil Procedure—Reflections on the Comparison of Systems*, 9 BUFF. L. REV. 409, 415 n. 2 (1960). In Diaz the Supreme Court affirmed the judgment of the Supreme Court of Puerto Rico, which had been reversed by a Federal Court of Appeals. Holmes reached this conclusion by emphasizing the greater weight to be given to the Puerto Rican court's interpretation of its own civil law system.

⁸²This discussion is limited to procedure in civil courts, as distinguished from the administrative, commercial, and labor tribunals.

⁸³The complaint contains a brief statement of facts and prayer for relief. In France service is effected by the *huissier de justice*, an official roughly equivalent to a sheriff, at least in this capacity. See, e.g., HERZOG 92-97. Formal service, i.e., upon the party himself, is required for *ajournements*, C. PRO. CIV. art. 58 (Decree no. 65-1006); HERZOG 367-368. Once an action has begun summons (*avenir*) and pleadings (*conclusions*) are served by the *huissier* informally, i.e., from one attorney directly to the other. This process is called *acte d'avoue a avoue* or *signification a avoue*, C. PRO. CIV. art. 78, and new art. 78 (Decree No. 65-872).

⁸⁴In France there exists no equivalent of the American private attorney. Instead, until the recent reform, his functions were fragmented among no less than five distinct legal professions: *notaire*, *conseiller juridique*, *agree*, *avocat* and *avoue*. Since the two former do not play a role in litigation, they will not be discussed here. The *avoue*, like the British solicitor, was primarily concerned with the preparation of pleadings, motions and briefs. *Avocats*, on the other hand, had direct contact with clients, negotiated with the opposing side, and argued before the court. *Agrees* performed the same functions as the *avocats*, but only before the commercial courts. *Avoues* were government officials, *officiers ministériels*, appointed by the Minister of Justice: they enjoyed a limited monopoly in their jurisdiction, and their fees were strictly regulated by statute. *Avocats* had no monopoly, could set their own fees, and were generally regulated by their local bar association (*barreau*). See generally HERZOG 66-109; SCHLESINGER, *COMPARATIVE LAW: CASES—TEXT—MATERIALS* 271-282 (3rd ed. 1970) (hereinafter cited as SCHLESINGER); Lepaulle, *Law Practice in France*, 50 COLUM. L. REV. 945 (1950). All the above was true until December 31, 1971, when the Assemblée Nationale passed a sweeping reform of the legal professions: *avoue*, *avocat*, and *agree* were merged into one new profession, called *avocat*, Law no. 71-1130 of December 31, 1971, effective as of September, 1972, (1972) J.O. 131, (1972) D.S.L. 38, (1972) Rep. Commaille 149. The members of the new profession are now permitted to conduct all phases of litigation before civil and commercial tribunals and courts of appeal. The *avoues*, who have lost their valuable monopoly, are to receive compensation, *id. tit. I ch. V*. The *avocats*, the group having the most to gain by reason of their enlarged role, are perhaps the least satisfied with the reform. Traditionally, *avocats* have operated as solo practitioners, or, at most, in tandem with one or two others: their small offices are simply not in a position to accommodate the additional clerks and secretaries needed to perform what was formerly the *avoue's* piece of the action. The highly individualistic *avocats* believe, therefore, that they will be forced to abandon their independence by forming American style law firms. Moreover, the *avocats* fear that the next step by the government will be to regulate their fees

dockets the case with one of the three-judge panels of the court, and one judge is delegated to supervise the case.⁸⁵ Counsel then exchange pleadings (*conclusions*) relating to procedural matters, such as sufficiency of the claim for relief or lack of jurisdiction.⁸⁶ At this point the case is deemed to be formally commenced (*mise en état initiale*).

During the next stage of the action concerning the merits, a rigid procedural separation arises between proof-taking and oral argument before the court. All proof is gathered under the supervision of the judge delegate in incidental proceedings, which alternate with the formal hearings, or conferences, before all three judges, one of whom is the judge delegate. These proceedings consist of the four means of proof-taking used in French civil procedure: the report of an expert (*expertise*),⁸⁷ testimony of witnesses (*enquête*),⁸⁸ examination of parties (*comparution*),⁸⁹ and judicial inspection or view (*descente sur les lieux*).⁹⁰

Counsel may move the court to take proof on an issue at any stage in the trial. If a party applies for the appointment of an expert, the judge delegate first hears oral argument on the question, then makes an interlocutory order (*ordonnance*)⁹¹ appointing an expert and setting out the precise issues to be

in the same manner as *avoués'* fees had been fixed previously, thus further reducing their independence. Parenthetically, it should be mentioned that in the past anyone could practice as a *conseiller juridique*, regardless of education or nationality: this has enabled the branch offices of certain large American law firms to thrive in Paris, despite widespread discontent on the part of their French counterparts, who would normally have the clients in the absence of their American competitors. The law of December 31, 1971, lays down for the first time educational and professional regulations for *conseillers*, *id.* tit. II. Foreign law firms (*groupements*) which were practicing as *conseillers* in France before July 1, 1971, are not subject to regulation. But if reciprocity is not granted to French firms by December 31, 1976, the American firms' privilege to practice in France may be terminated, *id.* art. 64. See Brown, *The Foreign Lawyer in France*, 59 A.B.A.J. 365 (1973).

⁸⁵C. PRO. CIV. art. 77. According to this provision, the president of the tribunal appoints a judge delegate (*juge chargé de suivre la procédure*) in each new case. The notion of designating a subordinate official to hear witnesses and take proof which is then to be transmitted to the full tribunal in written form is a legacy from the Romano-canonistic procedure, ENGLEMAN-MILLAR 457-8; SCHLESINGER 305 n. 6. In 1965 the judge delegate was re-named *juge des mises en état*, and was given expanded powers of supervision over the conduct of the litigation; Decree no. 65-872 of October 13, 1965, (1965) J.O. 9076, *as corrected*, (1965) J.O. 9235, (1965) D.S.L. 318; J.D. Bredin, *Commentaire*, (1966) D. Chron. 195; HERZOG 365-375. The new law is not yet in effect in all courts, *id.* 366. The *juge des mises en état* is appointed for the period of a year by the president of the tribunal, and the clerk assigns new cases to him.

⁸⁶This exchange formerly took place at a preliminary hearing (*audience de liaison de l'instance*), held either before the three-judge tribunal or the judge delegate, CORNU & FOYER, PROCEDURE CIVILE 525 (1958) (hereinafter cited as CORNU & FOYER). The Decree of October 13, 1965, *supra* note 81, abolished the preliminary hearing: counsel now serve each other with the pleadings and file a copy with the court, C. PRO. CIV. art. 81-2 (Decree no. 67-1072); HERZOG 372.

⁸⁷C. PRO. CIV. art. 302-323.

⁸⁸*Ibid.*, art. 252-280. Counsel do not examine or cross-examine witnesses—all is done by the judge delegate, who prepares a resume of all testimony, which is not recorded verbatim.

⁸⁹*Ibid.*, art. 324-336.

⁹⁰*Ibid.*, art. 295-301.

⁹¹Rulings by the judge delegate which do not effectively put an end to the case are non-appealable until a final decision on the merits, C. PROC. CIV. art. 81. When the full tribunal makes such an

examined.⁹² Note that the taking of evidence is ordered at the discretion of the court rather than as a matter of right, and may be initiated by motion of the parties or the court.⁹³

Once the expert's report has been completed and taxed,⁹⁴ it is deposited with the court clerk.⁹⁵ This formally marks the end of the expert's duties unless the full court deems it necessary to call the expert to the formal hearing to explain his report more fully.⁹⁶ At the hearing the expert may be questioned by the judges, but is not subject to cross-examination by the parties' counsel.⁹⁷ In practice such an appearance by an expert at the request of the tribunal is very exceptional;⁹⁸ thus the written character of the expert's report is dominant. All proof-taking having been completed, the judge delegate now puts the case at issue (*mise en état*).⁹⁹ Counsel for plaintiff sees that his adversary is served with a copy of the report and a summons to the formal hearing,¹⁰⁰ at which the value of the report may be argued. In practice, the lawyers usually exchange briefs on the subject:¹⁰¹ they may attack the report for procedural and substantive irregularities.¹⁰²

At the formal hearing (*audience des plaidoiries*) before the full three-judge tribunal the lawyers present their oral argument.¹⁰³ The case may be decided

order, termed *jugement*, it is immediately appealable, *id.* art. 451. See also SCHLESINGER, 306 n. 11; HERZOG 373.

⁹²C. PRO. CIV. art. 302, *infra* note 115.

⁹³E.g., *ibid.*, art. 252, 81; Pugh, *Cross-Observations of the Administration of Civil Justice in the United States and France*, 19 U. MIAMI L. REV. 345, 361 (1965).

⁹⁴C. GEN. IMP. art. 809.

⁹⁵C. PRO. CIV. art. 319.

⁹⁶MOREL 406. In *Soc. d'exploitation des eaux et thermes d'Enghien-les-Bains v. Soc. des films Eclair*, (1920) S.I. 254 (Cass. reg.), the Paris court of appeals required an expert to appear before it to explain the report he had written for the trial court. A more recent writer, however, states that French courts do not have the power to call an expert to testify orally, Catala, *Les Suites de l'Expertise*, 78, in *L'EXPERTISE DANS LES PRINCIPAUX SYSTEMES JURIDIQUES D'EUROPE* (1969). It is notable that Belgium, which had formerly followed the French Code in not having impartial experts testify, has revised its Code and now expressly gives the judge the power to call an expert to testify, CODE JUDICIAIRE BELGE art. 987, Law of October 10, 1967.

⁹⁷See text accompanying note 130, *infra*.

⁹⁸HERZOG 354.

⁹⁹C. PRO. CIV. art. 81-7 (added by Décret no. 65-872). The order closing the expertise and putting the case at issue is called *ordonnance de clôture*, *id.*

¹⁰⁰*Ibid.*, art. 321. Service is by means of *acte d'avoue a avoue*, see note 83, *supra*.

¹⁰¹NOUVEAU REPERTOIRE DE DROIT (hereinafter cited as NOUVEAU REPERTOIRE), *Expertise*, no. 70 (2e ed. Dalloz 1963).

¹⁰²For example, it could be argued that the report is of questionable value because of inconsistency with textbooks, HERZOG 354.

¹⁰³The hearing begins with the reading of the parties' final pleadings. The reporting judge (*juge rapporteur*)—generally the same as the judge delegate—presents an oral report, briefly stating the history, issues, and evidence involved, without giving an opinion on the merits. C PRO. CIV. art. 82 (Décret no. 58-1289); CUCHE & VINCENT, *PRECIS DE PROCEDURE CIVILE* 75 (3e ed. 1963) (hereinafter cited as CUCHE & VINCENT) (Mise a jour 1966). See Pugh, *supra* note 93, at 365.

Prior to 1965 the lawyers did not have to submit their written briefs (*dossiers de plaidoirie*) until the close of the hearing. Thus the reporting judge could not rely on the briefs in preparing his report, nor could the judges gain adequate familiarity with the issues and arguments so as to be able

immediately, or the court may merely announce the date on which judgment will be rendered.¹⁰⁴ The judgment is not necessarily final: if the court deems it necessary, it will remand the case to the judge delegate for further proof-taking, after which there will be another hearing before the full bench.

The 1965 reform¹⁰⁵ was designed to minimize the inefficient merry-go-round of successive rounds of *audience* and incidental proceedings: the judge delegate's control over the conduct of the action during the intervals between hearings was expanded, so that it could be disposed of in one session before the three-judge tribunal.¹⁰⁶ Unfortunately, the hoped-for speed-up in litigation did not materialize on account of hostility of judges and lawyers toward the judge delegate's increased responsibilities.¹⁰⁷ As a result, the episodic nature of a French trial means that proof may be taken in any order, and the case may come before the full court several times before a final disposition on the merits. However many hearings and proof-taking sessions may have been necessary, let us assume that at last our expert's report has been completed and judgment entered.

C. Legislative History of the Expertise: *the Law of July 15, 1944*

The policy behind the French *expertise* can better be understood by reviewing its legislative history, which can be applied by analogy to refine Federal Rule 706. The Law of July 15, 1944¹⁰⁸ effected the first major reform of French expert procedure since its initial codification in 1667: the *expertise*, designed in the technological simplicity of an earlier age, had become obsolete and impractical in the twentieth century. The frequency of the use of expert testimony had increased enormously, and so it became apparent that the old procedure was badly in need of an overhaul: judges were too often delegating their functions to experts, and the cost and delay occasioned by the necessity of having three experts in a single case were intolerable.

To remedy the situation, the articles on expert testimony were extensively revised. Perhaps the most significant change was the specific mention of the judge delegate, which had been created by the decree-law of October 30, 1935¹⁰⁹

to pose meaningful questions to the lawyers at the hearing. Decret no. 65-872 reversed this situation by requiring the submission of briefs well in advance of the hearing, CUCHE & VINCENT 74 (Mise a jour 1966), HERZOG 373. The rendition of the oral report constitutes the tentative putting at issue (*mise en etat effective*) of the case, CUCHE & VINCENT 374.

¹⁰⁴See HERZOG 286.

¹⁰⁵See note 85, *supra*.

¹⁰⁶Prime Minister's Report, accompanying Decree of October 13, 1965, *supra* note 85; HERZOG 375.

¹⁰⁷The Decree of October 13, 1965, which created the *juge des mises en etat*, has received criticism for not going far enough in increasing the judge delegate's powers, Y. Lobin, *Quelques reflexions sur le decret du 13 octobre 1965 relatif a la mise en etat des causes* (1966) D. Chron. 15.

¹⁰⁸*Supra*, note 17.

¹⁰⁹C. PROC. CIV. art. 80-82. The judge delegate, originally called *juge charge de suivre la*

in order to accelerate trial procedure, but which had not realized its full potential.¹¹⁰ Articles 302 to 323 of the Code de Procédure Civile strictly define the functions of the judge delegate in regard to the *expertise*.

Formerly three experts were appointed unless the parties stipulated that they desired only one.¹¹¹ The 1944 new Law expressly provided that the court shall appoint one expert unless the court, in its discretion, deems it necessary to appoint three.¹¹² By reversing the old policy, the reform reduced the expenses of the *expertise* by two-thirds.

The expert's duties were clarified by the 1944 new Law in three ways. First, Article 304 aims at a more precise definition of the expert's mission in the court's order: the report may cover only the issues which are expressly designated in the order. If a new issue appears later, the judge delegate may postpone the date on which the report is due.¹¹³ Second, Article 303 limits the expert's ability to hear witnesses and take testimony, but provides an alternative by application to the judge delegate.¹¹⁴ Third, to curtail the practice of delegating judicial functions to experts, the scope of the *expertise* is expressly limited to technical issues only.¹¹⁵

Finally, the Law of July 15, 1944 refined some minor procedural aspects of the *expertise*. For example, the old swearing in of the expert by a judge is done away with—in fact, the cumbersome process had been regularly avoided by stipulation.¹¹⁶ Now the court clerk mails to the expert a written oath attached to the notice of appointment, to be signed and returned within three days.¹¹⁷ All experts must sign, signifying their impartial role as a sort of officer of the court.¹¹⁸

D. Basic Differences with American Trial Institutions

Thus far we have examined the functions of the French expert and judge delegate, and how the *expertise* fits into the framework of civil litigation. To complete this brief introduction to the *expertise*, it is now appropriate to take a look at some of the salient differences between French and American trial institutions. Specifically, these differences stem from the roles of court, counsel and jury: the net effect is that in the United States the trial has a strongly adversary nature, whereas in France the opposite is true, *i.e.*, the trial takes on

procedure, was renamed *juge des mises en état*, *supra*, note 107.

¹¹⁰Hebraud, *Commentaire, loi du 15 juillet, 1944*, (1945) D.L. 49.

¹¹¹*Id.* at 51.

¹¹²C. PRO. CIV. art. 305.

¹¹³*Id.* art. 320.

¹¹⁴The expert may request the judge delegate to conduct an *enquête* in order to take sworn testimony to be used in the report. *See* note 183, *infra*.

¹¹⁵C. PRO. CIV. art. 302; CUCHE & VINCENT 606; Hebraud, *supra* note 110, at 50.

¹¹⁶2 GLASSON & TISSIER 861.

¹¹⁷C. PRO. CIV. art. 307-308.

¹¹⁸Hebraud, *supra* note 110, at 52-53.

a more inquisitorial character, although it would be an exaggeration to say that no adversary features are present.

First, there is no jury in French civil trials—the court is composed of three judges.¹¹⁹ Unlike their American counterparts, French judges are professionals, having chosen a civil service career upon graduation from law school.¹²⁰ It is to three professional judges that the French expert's report is directed: by virtue of their life-time training and experience, three French judges are arguably in a better position than one American judge (or twelve lay jurors) to make a coldly objective analysis of an "official" expert's report.

Other advantages of the French set-up are the absence of gruesome dramatics by counsel to impress a lay jury, overly protective exclusionary rules of evidence,¹²¹ and the need for a compressed, one-shot trial (in order to avoid detaining the jury). The major disadvantage of the French three judge tribunal is the fact that only one member, the judge delegate, will have participated in proof-taking¹²² and the other two will have only second-hand knowledge of the facts through the file (*dossier*)¹²³ and the expert's written report.

Although this process is unquestionably more efficient and less costly than an American trial, it also eliminates the element of courtroom demeanor: this is serious if one considers it more important not *what* a witness says, but *how* he says it.

Second, the fact gathering function differs between the two countries: in the United States the task of producing the evidence falls squarely on the parties (and hence on their lawyers);¹²⁴ in France, while the parties certainly bear the greater part of the responsibility of adducing the proof (indeed, their own self-interest so requires), the court assumes an auxiliary role in clarifying the issues and developing the evidence.¹²⁵

Although the Code de Procédure Civile contains no explicit injunction to the court,¹²⁶ such a duty is implied by all the provisions on proof-taking, which can

¹¹⁹CUCHE & VINCENT 104. If one judge is lacking, to complete the three judge requirement a senior member of the bar will be called upon to take his place, *id.* 104 n. 3.

¹²⁰After graduation from law school, future members of the judiciary undergo three years of specialized training at the relatively new Centre National d'Etudes Judiciaires. For a description of legal education in France see HERZOG 68-73; SCHLESINGER 94-105.

¹²¹For example, the hearsay rule does not exist in France. See HERZOG 340; SCHLESINGER 309; Hammelman, *Hearsay Evidence—A Comparison*, 67 L. Q. Rev. (1951).

¹²²See text accompanying note 103, *supra*.

¹²³Rapid familiarization with testimony is possible on account of the efficient manner in which it is recorded. Instead of a verbatim transcript, the judge delegate dictates a summary of the testimony to the clerk. HERZOG 339; Pugh, *supra* note 93, at 362.

¹²⁴9 WIGMORE sec. 2483, 2484. But Wigmore argues that judges should take a greater share of the responsibility in adducing the proof, *id.* For an argument to the contrary see Sink, *supra* note 41, at 212.

¹²⁵See, e.g., CUCHE & VINCENT 331-333.

¹²⁶The German Code of Civil Procedure (*Zivilprozessordnung*) contains such an affirmative injunction, directing the court to help the parties develop the evidence, ZPO sec. 139, cited in Kaplan, von Mehren & Schaefer, *Phases of German Civil Procedure I*, 71 HARV. L. REV. 1193, 1224 (1958).

be applied only at the discretion of the court or judge delegate, and which may be triggered expressly at the motion of the court as well as of the parties.¹²⁷ Moreover, in France the process of receiving evidence occurs entirely out of court, be it through an expert, a judge delegate, or even a bailiff,¹²⁸ whereas in America the normal pattern of proof-taking is by means of live testimony in open court.¹²⁹

Third, French trials are literally inquisitorial. In America it is the lawyers who examine and cross-examine witnesses, whereas in France the same task belongs exclusively to the judge delegate—indeed, direct interrogation of witnesses by parties of counsel is punishable by expulsion from the *enquête* proceeding plus a fine.¹³⁰ Questions on matters not already covered by the judge must be routed through him.¹³¹ The French judge's inquisitorial and auxiliary functions account for the correspondingly lesser importance of lawyers in the French system, and the relatively inexpensive legal fees.¹³²

Lastly, the American expert as created by Federal Rule 706 and the French expert have in common the features of impartiality and appointment by the court. Nevertheless, the Rule 706 expert is essentially a witness, while the French expert is not. In this respect the latter bears a greater resemblance to the American master, since both communicate to the trier of fact via written report rather than oral testimony. This basic difference should be constantly kept in mind throughout the comparative analysis which follows.

IV. A Comparison of Federal Rule of Evidence 706 with the French Expertise

A. When Expert Testimony May Be Ordered

1. LIMITED TO TECHNICAL QUESTIONS

In the United States experts may only be called to testify concerning issues beyond the ken of ordinary laymen.¹³³ This rule is incorporated in Federal Rule of Evidence 702, which operates as a condition precedent to the introduction of any expert testimony, whether the expert is appointed by the court or by the parties. In this respect Rule 702 follows the Model Code¹³⁴ and Uniform

¹²⁷C. PRO. CIV. art. 252, 264, 295, 302, and 324.

¹²⁸For example, when the court needed to know a fact (the religion of a person connected with the trial), the bailiff was dispatched to find this out, *Fray v. Juenet* (1954), D. Somm. 48 (Cour d'appel, Lyon, trial court decision unreported).

¹²⁹See text accompanying note 66, *supra*.

¹³⁰C. PRO. CIV. art. 265.

¹³¹*Id.*

¹³²See HERZOG 78, 87, 88; SCHLESINGER 275 ff.

¹³³Ladd, *Expert Testimony*, 5 VAND. L. REV. 414, 418 (1952).

¹³⁴MODEL CODE, rule 402.

Rules¹³⁵ rather than the Uniform Act,¹³⁶ which leaves the propriety of expert testimony to the discretion of the judge.

The French Law of July 15, 1944,¹³⁷ limiting the *expertise* strictly to questions beyond the technical competence of the court, was a legislative attempt to overrule the customary delegation of judicial functions to experts.¹³⁸ Other questions of fact within the technical competence of the judge must be the subject of an inquest (*enquête*).¹³⁹ In an inquest the court collects the facts by hearing witnesses and forms its own opinion thereupon: in an *expertise* the expert gathers the facts, interviews witnesses informally, forms an opinion, and submits it to the court. Thus courts are tempted to prefer an *expertise* to an inquest: it is faster, more efficient and, above all, easier to have all the work done by an expert, even though an inquest may be more appropriate and a more rigorous search for the truth.

Nevertheless, recent cases indicate that French judges have been loath to give up their old habits, and the Court of Cassation¹⁴⁰ has refused to enforce the technical issue limitation, indulging the use of semantics to qualify virtually anything as technical within the meaning of Article 306. For example, in *Société Teuchetet et Tansini*,¹⁴¹ an action by an employee to collect his pay at an alleged overtime rate, an expert was given the task of determining whether the employee had actually done the work for which he was seeking compensation. On appeal, the Court upheld this broad delegation of fact-finding duties to the expert, although the issue involved was not of a technical nature. In *Société Le Siège de France v. Zamora*,¹⁴² an expert accountant was requested to examine an employer's allegations that an employee accountant had made certain bookkeeping errors. In furtherance of this task, the expert interviewed all relevant witnesses and gave an opinion on the employee's general performance. Thus, it appears that the expert was asked to interpret general questions of fact which would more properly have been resolved by courtroom testimony than by expert opinion, and yet the Court of Cassation sustained the expert's mission.

Some limitations have been imposed by the Court on the scope of the

¹³⁵UNIFORM RULE, 56(2).

¹³⁶UNIFORM ACT, sec. 1.

¹³⁷(1944) J.O. 1903, (1944) D.A.L. 82.

¹³⁸See text accompanying note 115, *supra*.

¹³⁹NOUVEAU RÉPERTOIRE, *Expertise* no. 3.

¹⁴⁰The Court of Cassation (*Cour de Cassation* or *Cour Supreme*) is the highest French court in civil matters. See HERZOG 158 ff.

¹⁴¹(1970) J.C.P. IV 159 (Cass. Soc. req.).

¹⁴²(1956) Bull. Civ. IV no. 910. There are many examples of this type of judicial delegation of power, e.g.: in a landlord-tenant dispute an expert determined the correct amount of rent, *Veuve Mathieu v. Société La Réunion Immobilière des Champs-Élysées*, (1959) Bull. Civ. IV no. 1099 (Cass. soc.); an expert determined who held the title to a piece of land, *Doumenjou v. Epoux Berdot*, (1939) D.H. 422 (Cass. req.); an expert conducted an inquiry whether a tenant had committed an abuse of possession (*abus de jouissance*), *Taki Meziane v. Hattab bey Akli*, (1954) D.J. 591 (Cass. soc.).

expertise. In *Dame veuve Barthe v. Barreau*,¹⁴³ a landmark case, the practice of the Toulouse court of appeals of delegating judicial functions to experts was declared to violate public policy (*ordre publique*). Plaintiff, the widow Barthe, held a remainder interest in some furniture sold by defendant Barreau. An action for rescission was brought. The trial court appointed an attorney as expert, with the title of judge-arbitrator (*commissaire-arbitre*),¹⁴⁴ to evaluate the furniture, determine the relationship between plaintiff and defendant, report on the facts and defendant's motives for selling, hear the parties, and attempt to conciliate them. Although the Court of Cassation refused to allow such a broad *expertise*, subsequent case law¹⁴⁵ indicates that the validity of the delegation may depend on the phrasing of the expert's mission and title, rather than on the true extent of his duties.¹⁴⁶

The French practice demonstrates that an overly broad *expertise* can have the effect of speeding up litigation by eliminating the need for ordinary testimony. In the United States the crowded state of the dockets could constitute a powerful motivation for judges to expedite trials by having the neutral expert conduct his own out of court investigation of matters which ought to be resolved by courtroom testimony of ordinary witnesses, although this type of abuse would be less likely than in France for three reasons. First, the constitutional guarantee of trial by jury could arguably be violated by over-delegation of the fact finding function to an expert.¹⁴⁷ Second, while all proof-taking in France is at the court's discretion, American parties have a basic right to adduce evidence, subject only to the rules of evidence: "All evidence shall be admitted which is admissible . . . under the rules of evidence. . . ."¹⁴⁸ Third, Federal Rule 706 preserves the right of the parties to call their own expert witnesses.

But a court might attempt to prevent a party from presenting lay witnesses on the grounds that this would be cumulative testimony,¹⁴⁹ in a case in which a court appointed expert has already testified on the same question of fact. Although this is an extreme example, it may nevertheless be prudent to write into the Federal Rules of Evidence a provision expressly limiting the scope of a court appointed expert's duties to technical matters, and forbidding the courts

¹⁴³(1935) D.P.I. 94 (Cass. civ., note P. Mimin). Mimin hails this decision as the enunciation of a fundamental principle of public policy by the Court.

¹⁴⁴The title *commissaire-arbitre* suggests a hybrid of judge delegate (with power to conduct an inquest), arbitrator (with a duty to reconcile the parties), and expert (with a duty to evaluate the furniture).

¹⁴⁵See, e.g., notes 141, 142, *supra*.

¹⁴⁶Indeed, one commentator was skeptical about the prospects of the 1944 revision of Article 306 at the very outset, Hebraud, *supra* note 110, at 50.

¹⁴⁷Cf. *Ex parte Peterson*, 253 U.S. 300, 307 (1920), by analogy to the powers of a master appointed in an action tried to a jury. Justice Brandeis emphasized that: "The order expressly declared that the auditor should not finally determine any of the issues in this action . . .," *id.*

¹⁴⁸FED. R. CIV. PRO. 43(a).

¹⁴⁹See generally 6 WIGMORE sec. 1907, 1908.

to avail themselves of neutral expert testimony to avoid hearing witnesses offered by the parties.

B. Who May Be An Expert

1. PARTIES' EXPERTS OF OWN SELECTION

Federal Rule of Evidence 706(d) provides for both court appointed experts and experts hired by the parties. French case law also recognizes the ability of litigants to make use of partisan experts, in addition to the impartial *expertise*: a party may submit the written report of an expert of his choosing.¹⁵⁰ Both systems recognize that private experts serve the essential function of watchdog over the competence and integrity of the neutral expert. There is nevertheless a fundamental difference in attitude toward private experts: in France the principal use of such an expert is exceptional, usually to expose error in the court appointee's previously completed report,¹⁵¹ whereas the Advisory Committee's note to Federal Rule 706 considers impartial expert testimony only as a potential deterrent, to be used in rare cases when a partisan expert's testimony is abusive or exaggerated.¹⁵²

In France the *expertise* effectively holds down the cost of litigation in most cases, simply by imposing one neutral expert's fee instead of that of two partisan experts.¹⁵³ Nevertheless, the possibility remains of having three experts in one given case:¹⁵⁴ if this were to occur regularly in the United States under Rule 706, our already high litigation expenses would be increased.

In France a means of avoiding this extra expense and cutting down on our costs at the same time is for the parties to stipulate in advance that they will accept the neutral expert's decision as binding.¹⁵⁵ Once a sufficient degree of

¹⁵⁰The procedure for partisan expert's reports is called *expertise officieuse*. See, e.g., HERZOG 317 n. 407.

¹⁵¹See, e.g., J. VOULET, *LA PRATIQUE DES EXPERTISES JUDICIAIRES* at A5 (4e ed. 1971) (hereinafter cited as VOULET).

¹⁵²"While experience indicates that actual appointment is a relatively infrequent occurrence, the assumption may be made that the availability of the procedure in itself decreases the need for resorting to it. The ever-present possibility that the judge *may* appoint an expert in a given case must inevitably exert a sobering effect on the expert witness of a party and upon the person utilizing his services." F.R. Ev. 706, Advisory Committee's Note (1969).

¹⁵³Expert's fees are relatively lower in France than in the United States. As recently as 1967, for example, an ordinary medical expert's fee for performing an *expertise* in France was about \$100, HERZOG 538.

¹⁵⁴There could be three experts, for example, if the court appointed one and each party hired one.

¹⁵⁵This is known as a friendly *expertise* (*expertise amiable*). See, e.g., *Souques v. La Diffusion Industrielle et Automobile*, (1942) J.C.P. II 1815 (Cass. civ.) (noted M. Becqu ), in which the Court severely reprimanded the court of appeals for having modified the expert's findings and thus having interfered with the parties' freedom of contract under Article 1134 of the Code Civile. The friendly expertise is encountered most often: 1) in insurance contracts, where in case of disagreement the insured's damages are to be set by an expert, and 2) in leases, where an expert is designated to evaluate the lessee's improvements, VOULET at A2.

confidence in impartial experts is established in the United States, perhaps the litigants will be willing to stipulate to accept the expert's findings, or merely to refrain from hiring their own experts.

2. CHOICE OF IMPARTIAL EXPERTS

Federal Rule of Evidence 706 differs from the prior American codifications as to the judge's power of selection of the neutral expert: Model Code Rule 403, Uniform Rule 59, and Uniform Act Section 2 require the court to appoint an expert agreed to by the parties, whereas Federal Rule of Evidence 706(a) gives the judge absolute discretion in selecting an expert, the agreement of the parties notwithstanding.

In this respect the French Code is now similar to the new Federal Rule, the 1944 reform having vested the power of selection in the judge.¹⁵⁶ Before 1944 if the parties did not like the court appointees, experts mutually agreed upon by the parties could be substituted within three days.¹⁵⁷ This rule was changed in the realization that it was time-consuming and inefficient for the court to order the experts' appointment, which could be subsequently undone by the parties, incidentally adding three days' delay to the trial.¹⁵⁸

The difference between the Model and Uniform proposals on the one hand, and Federal Rule 706, on the other hand, unconsciously parallels that between the former and present French Code provisions.¹⁵⁹ For the same reasons as cited in connection with the 1944 reform,¹⁶⁰ the French Code and Federal Rule 706(a) contain the most practical solution.

3. SEMI-OFFICIAL COURT LISTS OF EXPERTS

Neither Federal Rule of Evidence 706 nor the prior American codifications mention a procedure for finding reliable professionals to serve as neutral experts. As a practical matter such a procedure is necessary. Presumably this will be regulated by local rules under Federal Rule of Civil Procedure 83.

A uniform method of selection, however, should be included in Federal Rule 706, in light of the experience under Federal Rule of Criminal Procedure 28—it appears that a practice has arisen in certain District Courts under which impartial experts are nearly always chosen from an informal list of experts maintained by the local U.S. Attorney. In order to remain on the list, the expert

¹⁵⁶C. PRO. CIV. art. 306. The California statute similarly vests the power of selection in the court, CAL. EV. CODE Sec. 730 (West 1966).

¹⁵⁷2 GLASSON & TISSIER 854.

¹⁵⁸Hebraud, *supra* note 110, at 55. Another reason for the change was to dispel the lingering belief that an expert was in fact an agent of the parties, rather than an officer of the court. At any rate, it was thought that the court would probably appoint an expert known to be acceptable to the parties in most cases, *id.*

¹⁵⁹The Advisory Committee's Note eschews any discussion of the reasons behind the Rule's variation from its predecessors.

¹⁶⁰See text accompanying note 158 *supra*.

may feel obliged to favor the government.¹⁶¹ One possible method is that used by the New York Medical Expert Testimony Project, whereby panels of neutral experts are chosen by a joint committee of the New York Academy of Medicine and the New York County Medical Society.¹⁶²

In France each court of appeals compiles a list of experts annually for use in all courts within its jurisdiction.¹⁶³ Persons wishing to be included on the list submit their names and qualifications to a special office of the court called the *service du contrôle des experts*, and the decisions are made by a committee of judges.¹⁶⁴ These lists are not exclusive, since the courts are free to choose any qualified person as an expert.¹⁶⁵ In addition, there exist associations of experts, organized on both a professional and regional level and which are consulted in connection with the preparation of court lists.¹⁶⁶ But these organizations cannot nominate their own members as impartial experts.¹⁶⁷

It is apparent that in any system of court appointed experts a panel or semi-official list of experts is inevitable, if only for reasons of convenience. There is, nevertheless, an important distinction between the New York Project, where the panel is chosen directly by the professional organization, and the French method of direct selection by the court. The disadvantage of the New York system is the closed, guild-like character of its exclusive panel, perhaps preventing otherwise better qualified individuals who do not happen to be in favor with the professional organization from serving as experts.

The disadvantages of the French system, on the other hand, are that the courts are not as well qualified as a professional organization to evaluate an expert's qualifications, and are therefore more open to political influence.¹⁶⁸ In the balance, the New York method may be superior by virtue of its greater degree of interprofessional cooperation and its greater degree of immunity from improper influences. Federal Rule of Evidence 706 should address itself to this issue, and preferably follow the New York example, assuming that professional organizations will voluntarily compile lists of prospective neutral experts, who will receive reasonable compensation for their efforts.

¹⁶¹8 MOORE'S FEDERAL PRACTICE at 28-5.

¹⁶²SPECIAL COMMITTEE OF THE CITY OF NEW YORK BAR ASS'N ON THE MEDICAL EXPERT TESTIMONY PROJECT, *supra* note 75, at 4. The opposite approach is taken in Local Rule 23(b) of the U.S. District Court for the Western District of Missouri, which provides: "The court shall examine and qualify a panel of competent psychiatrists." Query on what grounds the court deems itself competent to judge the psychiatrists' qualifications?

¹⁶³Law of June 29, 1971, (1971) J.O. 6300, (1971) J.C.P. III. No. 38030.

¹⁶⁴See HERZOG 351.

¹⁶⁵By implication from Code de Procédure Civile Art. 306. See CUCHE & VINCENT 607.

¹⁶⁶One such organization is the Confédération Nationale des Experts agricoles et fonciers, VOULET at C 7-8.

¹⁶⁷*Ibid.*, at C 7.

¹⁶⁸Continental official or semi-official experts generally have been criticized for incompetence, SCHLESINGER 321; 2 WIGMORE sec. 563 at 648; Plowscoe, *The Expert Witness in Criminal Cases in France, Germany, and Italy*, 2 LAW & CONTEMP. PROB. 504, 508 (1935).

C. Procedure

1. WHETHER A NEUTRAL EXPERT SHOULD BE APPOINTED

The appointment of a neutral expert may cause extra expense and delay, and even affect the outcome of the trial, for example when one party lacks funds to hire his own expert. Under the Federal Rules of Evidence and the French system the appointment of a neutral expert may be elicited by motion of the parties or the judge.¹⁶⁹ Rule 706(a) permits the judge in his discretion to enter a show cause order: a dissenting party would then have to appear before the court in a summary hearing to show cause why an expert should not be appointed.¹⁷⁰

Under the French Code,¹⁷¹ on the other hand, this question is decided by the judge delegate at a summary hearing, which is mandatory in view of the important effects this interlocutory decision can have on the entire trial.¹⁷² Perhaps the structure of the French judiciary—three judge tribunals, with summary proceedings conducted before a single judge delegate—means that a mandatory hearing of this nature is possible only in France. In the United States, the possibility of a hearing on the issue of whether to appoint an impartial expert is best left to the discretion of the trial judge, who is subject to more stringent limitations on his time, unlike his French counterparts. Federal Rule 706(a) correctly recognizes this limitation, and accordingly makes the hearing discretionary.

2. DISQUALIFICATION OF EXPERTS

Neither Federal Rule 706(a) nor the French Code provides for notice to the parties of an expert's identity in advance of his appointment, for this would be inconsistent with the court's power of selection of the expert. Once an expert has been selected, however, only the French system allows a party to move for his disqualification (*récusation*): this may be done within twenty days of the expert's appointment.¹⁷³ Federal Rule 706(a) is silent on this point.

Nor is there any existing American law on the subject of disqualification of impartial experts, although 18 U.S.C. Section 201(d) would probably apply, prescribing criminal penalties for the bribing of witnesses in federal courts. Cross-examination and impeachment, rather than outright disqualification, are the proper means for exposing interest or bias of a partisan expert witness: his

¹⁶⁹See notes 93, 127, *supra*.

¹⁷⁰*Cf.* Ex parte Wood, 9 Wheat. (U.S.) 603, 606-607, 6 L. Ed. 171, 172 (1824). This case makes it clear that a show cause order contemplates a hearing, hence Rule 706(a) omits to mention the word "hearing" as redundant, in contrast to Uniform Rule 59.

¹⁷¹C. PRO. CIV. art. 81-2 (as added by the Law of Oct. 13, 1965, *supra* note 85). This hearing is before the judge delegate, *id.*; HERZOG 373; p. 13 *supra*.

¹⁷²See NOTE 91, *supra*.

¹⁷³C. PRO. CIV. art. 309. The period was extended from three to the present twenty days in 1944, Law of July 15, 1944, (1944) J.O. 1903, (1944) D.A.L. 82. One of the reasons for the extension of this period was to make up for the removal of the parties' power to nominate impartial experts, Hebraud, *supra* note 110, at 53.

testimony is still admissible, but its relative weight may be weakened in the eyes of the trier of fact.¹⁷⁴ Although this method could certainly be used to deal with a biased or interested court appointed expert, his testimony would then become worthless. Therefore it would make more sense to cure the defect at the outset if one party has information which could reasonably lead to the expert's disqualification.

The French system protects the litigants against the danger of having a prejudiced or unqualified expert, yet prevents undue disruption of the case by establishing a firm deadline for bringing objections. Federal Rule 706 should adopt such a procedure, or perhaps, like Model Code Rule 403(a)(ii), allow the parties to "... submit objections to proposed appointments ..." for determination at the time of the initial hearing on the issue of whether neutral expert testimony should be ordered. This latter proposal would also require the court to give reasonable notice to the parties of the proposed expert's name in advance of the hearing, as in Uniform Act Section 2.¹⁷⁵

3. INITIAL MEETING OF THE PARTIES WITH THE EXPERT

Federal Rule 706(a) provides that an impartial expert witness "... shall be informed of his duties by the judge in writing ... or at a conference in which the parties shall have an opportunity to participate."¹⁷⁶ The Rule is ambiguous for lack of a standard for choosing between the two alternatives. In France an expert is notified of his mission by a letter sent by the court clerk.¹⁷⁷ The *expertise* is then formally opened at an initial meeting of the expert with the parties and the judge delegate, if the latter chooses to attend.¹⁷⁸ One of the primary functions of the meeting is to allow the expert to clarify the extent of his duties: if the parties disagree with the expert, he may proceed unless he is uncertain himself, in which case he instructs the parties to move for an interpretation by the court.¹⁷⁹ The parties may also confer with the expert on the conduct of his proposed operations, and may submit memoranda of their contentions.¹⁸⁰

An initial meeting of the expert with the parties is desirable because the expert avoids having to rely solely on secondary information by way of the judge.

¹⁷⁴*See, e.g.*, *Dayton Power & Light Co. v. Public Utilities Comm.*, 292 U.S. 290, 299-303, 78 L. Ed. 1267, 54 S. Ct. 647 (1933).

¹⁷⁵*See* *Scott v. Spanjer Bros., Inc.*, 298 F.2d. 928, 933 (2nd Cir. 1962) (Hincks, J., dissenting). In this case the trial judge's failure to give adequate notice to the parties of the expert's identity worked an injustice on the defendant. The Court of Appeals refused to reverse because this did not constitute an abuse of discretion.

¹⁷⁶This provision was derived from Federal Rule of Criminal Procedure 28, which was amended in 1966 to permit the court "... to inform the witness ... in writing since it often constitutes an unnecessary inconvenience and expense to require the witness to appear in court for such purpose," F. R. CRIM. PRO. 28(a), Advisory Committee Note (1966).

¹⁷⁷C. PRO. CIV. art. 307.

¹⁷⁸C. PRO. CIV. art. 315.

¹⁷⁹VOULET at D2.

¹⁸⁰C. PRO. CIV. art. 317.

Of the earlier American reform proposals, only Uniform Rule 59 makes an initial meeting necessary: "... the judge shall determine the duties of the witness and inform him thereof at a conference in which the parties shall have an opportunity to participate." The unrealistic and time-consuming requirement that the judge be present should be eliminated from Federal Rule 706, however, and the judge be given the option of attending, as in Code de Procédure Civile Article 315. The parties should also have the opportunity of presenting memoranda to the expert in order to help clarify the technical issues.

4. SUPERVISION OF EXPERTS BY THE COURT

Model Code Rule 405 and Uniform Act Section 5 give detailed instructions as to notice, orders for the submission of evidence to experts, and determination by the court of the scope and manner of inspection as to which a dispute has arisen. Federal Rule of Evidence 706, like Uniform Rule 59, omits the elaborate procedural provisions of the Model Code and Uniform Act, leaving the supervision of the expert's inspection to the implied powers of the judge.

This lack of a well defined procedure is ambiguous, and conflicts with the purposes of the Federal Rules of Evidence, as stated in the Preliminary Report: "Rules of court used to regulate the admissibility of evidence . . . have many of the advantages displayed by other rules of court governing procedure. The principles, precedents, and procedures can be organized, clarified, simplified, and abbreviated. These are things that cannot be accomplished through decisions of the courts. . . ."¹⁸¹ Yet it is precisely the mechanism of precedent which will have to fill in the gaps in the procedure of neutral expert testimony left by Federal Rule 706.

In France supervision of the *expertise* falls within the judge delegate's functions,¹⁸² which are fully set out in the Code de Procédure Civile.¹⁸³ As we

¹⁸¹COMM. ON RULES OF PRACTICE AND PROCEDURE OF THE JUDICIAL CONF. OF THE UNITED STATES, RULES OF EVIDENCE 52-53 (Prelim. Report 1962). A similar inconsistency exists between the purposes of Uniform Rule 59 and its omission of procedural detail, *see pp. 4-5 supra*.

¹⁸²C. PRO. CIV. art. 315.

¹⁸³C. PRO. CIV. art. 80-82. An expert has the power to interview witnesses informally, *i.e.*, not under oath, and may rely on such testimony in his final report, CUCHE & VINCENT 610. If, however, the testimony is particularly important to the expert's conclusions, the above procedure is inadequate on account of the evidentiary value of unsworn testimony, which may be considered by the court only as the basis for inferences, HERZOG 352; Bordier v. Cons. Eon-Voisin, (1954) D.J. 612 (Cass. civ. 1er). In this case the expert may request the judge delegate to hold a separate inquest (*enquête*) to hear the testimony upon which the expert's report will be based, C. PRO. CIV. art. 303. The expert need not attend this inquest, Janvier et autres v. Creste et Chantepie, (1959) D. Jur. 291 (Trib. grande inst. Laval). *aff'd.*, (1960) D. Jur. 252 (Cour d'appel, Angers), cited in CUCHE & VINCENT 610 n. 2.

Furthermore, if the expert does not accept his mission or is disqualified, the judge delegate must replace him without further procedural formalities, C. PRO. CIV. art. 316. This codifies the former practice whereby the court automatically granted the judge delegate a power of replacement at the same time as it rendered the order directing an *expertise*, Hebraud, *supra* note 110, at 54; 2 GLASSON & TISSIER 873.

saw above in connection with the Law of July 15, 1944,¹⁸⁴ the judge delegate was expressly given the option of attending the expert's operations and the expert was required to keep the judge informed.¹⁸⁵

The detailed procedure of the Model Code and Uniform Act coincides with the theory of the French Code, and the 1944 reform underlines the importance of an established procedure for the supervision of neutral experts. The Model Code and Uniform Act provisions are more suitable to American courts, however, on account of the absence of an equivalent of the French judge delegate. Should the Federal Rule 706 neutral expert gain a broader use than that contemplated by the Rule's draftsmen, who believed that "... the availability of the procedure in itself decreases the need for resorting to it,"¹⁸⁶ then inclusion of greater procedural guidance for the court in the everyday application of Rule 706 is certainly called for. In view of the stated purposes of the Federal Rules of Evidence and the unsatisfactory value of precedent in evolving court rules in the altogether novel area of impartial expert testimony, Rule 706 should follow the provisions of the Model Code and Uniform Act.

5. SUPERVISION OF EXPERTS BY THE PARTIES

While Federal Rule 706 avoids this question entirely, two of its predecessors, Model Code Rule 405(2) and Uniform Act Section 5, provide that both parties be given notice of and opportunity to attend the expert's inspections. French case law gives the parties similar rights: the expert must give advance notice of all his activities to the parties, who have the right to attend and watch over them. Lack of notice to a party constitutes grounds for nullification of the entire *expertise*.¹⁸⁷ However, an expert does not need to convoke the parties when the private or technical nature of his work so requires, such as a psychiatric¹⁸⁸ or medical¹⁸⁹ examination of a party. Thus in France the general rule is that the parties and their attorneys may attend the expert's operations, subject to the above mentioned exceptions.

In *Scott v. Spanjer Bros., Inc.*¹⁹⁰ both parties were allowed to be represented

¹⁸⁴ (1944) J.O. 1903, (1944) D.A.L. 82.

¹⁸⁵ C. Pro. Civ. art. 315.

¹⁸⁶ See text accompanying note 152, *supra*.

¹⁸⁷ *Société Française de Transports Gondrand v. Pech*, (1960) J.C.P. II sec. 11, 421 (Cass. Civ. 2e). A party who has not been formally summoned to the opening meeting, but has actual notice, is deemed to have waived any objections if he does not attend, *see, e.g.*, 2 GLASSON & TISSIER 862 n. 1. Parties and their representatives may be present at all investigations held by the expert but, of course, they may waive this right by simply not attending, NOUVEAU RÉPERTOIRE, *Expertise*, No. 51.

¹⁸⁸ *See, e.g.*, *Béraud v. Procureur général de Bordeaux*, (1911) S. Jur. I 13 (Cass. Civ.).

¹⁸⁹ *See, e.g.*, *Leclercq v. Nicolas*, (1959) Gaz. Pal. II 20 (Cour d'appel, Paris). *See also* *Dame Bouillaguet v. Couturoux*, (1960) Gaz. Pal. II 160 (Cass. Civ. 2e), audit of account books; *Cie. française de gaz et autres v. Bonneau et consorts*, (1881) D.P. I 19 (Cass. Civ.), chemical analysis.

¹⁹⁰ 298 F.2d 928, 931 (2nd Cir. 1962).

at the physical examination of the plaintiff by an impartial expert, but we do not know whether the parties were accorded this as a matter of right. Federal Rule of Civil Procedure 35 on its face applies to all physical and mental examinations, whether conducted by a neutral or partisan expert. Under existing case law, the plaintiff cannot have his own lawyer present during a medical examination by the defendant's doctor,¹⁹¹ possibly on the theory that this type of examination is not an adversary proceeding and the presence of attorneys may prove disruptive. This rationale seems to be equally applicable to medical examinations by impartial experts under Federal Rule 706. On the other hand, there is a strong policy reason for permitting the parties to observe the neutral expert's operations—to assure the parties of the correctness and impartiality of the expert's work. An acceptable compromise would be for Federal Rule 706 to recognize the parties' right to advance notice of and opportunity to attend the expert's operations, except where the latter involve medical or highly technical matters. This right may, of course, be waived.

6. VERBAL TESTIMONY OR WRITTEN REPORT: NOTICE AND CROSS-EXAMINATION

Federal Rule 706(a) contemplates a verbal report by the expert, either by deposition or by testimony in court, whereas Model Code Rule 405(1)(c) and Uniform Act Section 6 permit the judge to order a written report in addition to oral testimony. The duty to prepare some kind of written report can, however, be inferred from the requirement in Federal Rule 706(a) that an impartial expert advise the parties of his findings.¹⁹² The Rule goes on to state that the expert is subject to cross-examination by the parties.

The French Code, on the other hand, provides only for the submission of a written report; the expert is never subject to cross-examination by the parties, and only on rare occasions, if ever, is he subject to questioning by the judges.¹⁹³ The moving party¹⁹⁴ causes a copy of the expert's report to be served on his adversary,¹⁹⁵ enabling him to argue the merits of the expert's findings at the formal hearing.

The French written report is certainly less costly than having the expert

¹⁹¹*Dziwanski v. Ocean Carriers Corp.*, 26 F.R.D. 595 (D.C. Md. 1960). See also state court decisions collected in 64 A.L.R.2d 501 (1959).

¹⁹²For a discussion of the separate problem of discovery of a partisan expert's findings see Freidenthal, *Discovery and Use of an Adverse Party's Expert Information*, 14 STAN. L. REV. 455 (1962).

¹⁹³*Supra*, note 97.

¹⁹⁴C. PRO. CIV. art. 315. The Code itself employs the somewhat ambiguous term "*avoué le plus diligent*" to designate the party's lawyer who has the burden of summoning the other party. The author has interpreted this to mean the lawyer of the party having the greatest interest in seeing that the *expertise* is carried out as expeditiously as possible: presumably this is the lawyer of the party who requested the *expertise*.

¹⁹⁵C. PRO. CIV. art. 321.

appear in court,¹⁹⁶ but his immunity from cross-examination is unacceptable by American standards: cross-examination is the single most reliable device for ferreting out the bases of the expert's opinion and his possible biases, thus aiding the trier of fact to determine the degree of credibility to be accorded to the neutral expert's testimony.

Otherwise, as in the French system, the court may tend to give credibility to the impartial expert merely on the basis of his semi-official status.¹⁹⁷ The only useful function of the written report should be to furnish the parties with adequate notice of the expert's conclusions in order to facilitate cross-examination of the expert, and even to help the parties to decide whether or not they will need to call a partisan expert to buttress their arguments.

The inclusion of the requirements of cross-examination and notice in Federal Rule 706 is superior to the French system of written reports in all but one way—the substantial expense of having an expert appear in court. Perhaps Federal Rule 706 should provide for experts' written reports automatically to be served on the parties, who could then make an informed decision whether or not to stipulate to accept the neutral expert's written report without the necessity for cross-examination in court.

D. Judgment

1. PROBATIVE FORCE OF IMPARTIAL EXPERT'S FINDINGS AND OPINION

In an American trial, the weight of an expert's findings and opinion are questions to be resolved by the trier of fact. When two partisan experts violently contradict each other, their credibility suffers in the eyes of the judge or jury. With the introduction of a neutral expert, the question arises as to the weight to be accorded to his testimony *vis-à-vis* that of the parties' own experts.

Four different solutions have been offered: a) Illinois Supreme Court Rule 215(d)¹⁹⁸ favors withholding all information concerning an expert's impartial status in order to avoid over-credibility. The rule relies on the chilling effect on partisan experts of the knowledge that the trial and appellate courts would be advised of the impartial expert's status and opinion;¹⁹⁹ b) Federal Rule 706(c), Uniform Rule 61, and California Evidence Code Section 722(a) authorize the judge, in his discretion, to disclose to the jury that an expert was appointed by

¹⁹⁶See note 153, *supra*.

¹⁹⁷Indeed, one commentator has written concerning impartial experts under Federal Rule of Criminal Procedure 28(a): "It may well be wondered what weight the jury will give to an expert summoned by a party when there is another expert testifying in the case who bears 'the accolade flowing from a judicial appointment,'" 2 WRIGHT, FEDERAL PRACTICE AND PROCEDURE sec. 453 (1969), citing *Scott v. Spanjer Bros., Inc.*, 298 F. 2d 928, 933 (2d Cir. 1962) (Hincks, J., dissenting).

¹⁹⁸S. H. A. ch. 110 A sec. 215(d) (1968).

¹⁹⁹*Id.*, Jenner & Tone, *Historical and Practice Notes*.

the court,²⁰⁰ presumably on the theory that this disclosure will be necessary only to counterbalance egregious exaggerations by partisan experts, and this determination is best left to the judge's discretion; c) Model Code Rule 407 and Uniform Act Section 8 require that the jury be informed of an expert's neutral status—automatically according a greater weight to such testimony in the eyes of the jury; d) Uniform Act Section 10, Uniform Rule 60, and California Evidence Code Section 722(b) provide that the amount of a partisan expert's fee shall be disclosed if requested upon cross-examination, with the predictable effect that the jury will consider such a fee as tantamount to a bribe, thus thoroughly discrediting a partisan expert's testimony, and incidentally greatly increasing the weight accorded by the jury to the impartial expert. Thus the various approaches run the gamut from non-disclosure to revelation of a partisan expert's fee.

A French neutral expert's report consists of observations and opinion. The former carry a presumption of correctness,²⁰¹ while the latter is a question for the free evaluation (*conviction intime*) of the judges.²⁰² The court appointed expert's report, as fully admissible evidence, carries more weight than a private expert's report, which may only be used as the basis for inferences.²⁰³ The effect of this has been that litigants have been discouraged from hiring their own experts, who otherwise would have exercised the necessary function of watchdog over the neutral expert. Hence it is not surprising that French courts have accorded excessive credibility to the reports of court appointed experts.²⁰⁴

Lack of special evidentiary weight for the testimony of impartial experts and the availability of cross-examination under Federal Rule 706 lessen the dangers of over-credibility present in the French system. In contrast to some of the other American codifications, Federal Rule 706 properly leaves disclosure of an appointee's "official" status up to the trial judge's discretion: the fear of being discredited by the neutral expert in the eyes of the jury will tend to discourage wild exaggerations by private experts. Rule 706 also wisely refrains from requiring disclosure of a partisan expert's fee, which goes too far in the direction of harming his credibility, thereby enhancing that of the court appointee.

E. Undue Delay Caused by Impartial Experts

Federal Rule 706(a) provides that an impartial expert " . . . may be called to

²⁰⁰*Contra*, *People v. Tomalty*, 14 Cal. App. 224, 234, 111 Pac. 513, 517 (1910), upholding the power of the trial judge, in the exercise of discretion, to preclude inquiry as to the amount paid to an expert. *See* cases collected in 33 A.L.R. 2d 1170.

²⁰¹NOUVEAU RÉPERTOIRE, *Expertise*, No. 70. The evidentiary value of a French expert's report is similar to that of an American master's report, *see* notes 67-69 *supra*.

²⁰²C. PRO. CIV. art. 323. A notable exception to the principle of free evaluation is the *expertise amiable*, where the expert's findings are binding upon the court as well as upon the parties, *supra* note 155.

²⁰³HERZOG 317 n. 407.

²⁰⁴HERZOG 354; MOREL 402.

testify by the judge or any party.” But what if such an expert, having received a subpoena, is unable to testify properly because of a lack of preparation? May he be replaced or punished? If so, in what manner? Although the contempt of court sanction and the inherent powers of the court would come into play in such a situation, perhaps the contempt power is too crude a weapon, in light of the French experience as outlined below.

The French approach is relevant here, although the situation is not completely similar because a French expert tenders a written report instead of testifying orally as in the United States. Before the 1944 reform, a dilatory French expert could be ordered to deliver his report within three days or face imprisonment (*contrainte par corps*).²⁰⁵ In recognition of the dubious quality of an expert’s work performed under such circumstances, Article 320 of the Code was changed to give the judge delegate discretion to grant extensions of the original period of time (*délai*) specified for preparation of the expert’s report, or to replace the expert and hold the latter liable for the costs involved in naming a replacement.²⁰⁶

Perhaps the admittedly unlikely situation of delay occasioned by an unprepared expert and the necessity of replacing him could more effectively be dealt with by an express provision in Federal Rule of Evidence 706 itself. As an alternative to use of the contempt power, the judge could invoke the alternate procedure of replacing the expert, who would then become liable for the costs involved.

V. Conclusions

In summary, it is possible to refine certain features of Federal Rule of Evidence 706 in light of the French experience, with particular emphasis on the improvements brought about by the 1944 reform. Some of the ways in which Rule 706 can benefit from a comparative study of the advantages and disadvantages of the French *expertise* are the following:

- 1) Rule 706 should expressly limit the activities of impartial experts to technical matters, and admonish the courts not to use the testimony of such experts in order to avoid hearing ordinary witnesses;
- 2) Rule 706 lacks a method by which a pool of specialists can be established from which courts can appoint neutral experts. Professional organizations—not an office of the court itself, as in France—should prepare lists of qualified experts willing to serve as court appointees;

²⁰⁵Herbraud, *supra* note 110, at 51.

²⁰⁶*Id.* In addition, the expert is liable to the parties for actual damages (*dommages-inférêts*) on account of the resulting delay: the theory of recovery is that the litigants are third party beneficiaries of the agreement between the court and the expert that the latter will complete his report within the period of time specified by the court. Nevertheless, it is difficult to understand how the parties may prove damages, since the delay may be merely inconvenient.

- 3) Rule 706 should include a procedure for the disqualification of an expert within a definite period after his appointment. In the alternative, the Rule should give the parties notice of a proposed expert's name in advance of the initial hearing, at which time the parties may object to the appointment of a particular expert;
- 4) The expert should be notified of his duties by mail rather than orally by the judge. Then, at the outset of the expert's investigations, Rule 706 should provide for a meeting at which the parties may consult with the expert;
- 5) Rule 706 should contain instructions to the court concerning orders for the submission of evidence to experts and determination of the scope and manner of an inspection as to which a dispute has arisen;
- 6) Reasonable notice of the proposed inspections of the expert should be given to the parties in order to give them an opportunity to be represented at such inspections;
- 7) In order that the litigants might have timely notice of a neutral expert's findings and opinion, Rule 706 ought to require him to file a written report to be served on the parties;
- 8) Rule 706 ought to codify the manner in which impartial experts may be dismissed and replaced.