1993

Experts: Is the End Near for Their Use

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Recommended Citation

https://scholar.smu.edu/jalc/vol59/iss1/3
EXPERT WITNESSES have been around for centuries. One of the first recorded uses of an expert witness appears in the Talmud, the ancient documentation of Jewish law and tradition, compiled between 600 B.C. and 500 A.D. It seems a husband sought to divorce his wife. Unfortunately, no grounds existed. No matter. The resourceful man simply arranged a party at which he got his wife and all the guests drunk. He waited until his wife and a gentleman guest passed out. He then carried them to a couch and threw a clear, mucousy goo between them. He immediately called the neighbors in to witness the messy scene, exclaiming with outrage that his wife had committed adultery.

The wife, it turned out, was as resourceful as the husband. When she sobered up and found out about the trumped up charge, she did not just get mad, she got even. Her physician was brought forth. He identified the

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incriminating substance as egg-white, not seminal fluid. Although the Talmud does not so state, apparently the husband could not find an expert to testify otherwise. The case was closed. The wife prevailed. The expert witness was born.¹

Over the centuries, the use and importance of expert witnesses in resolving legal disputes has continually expanded, always — ostensibly — with the noble goal of helping the judge and jury to decide a case fairly and correctly. Yet today, many of us who practice aviation law have had enough. We question whether the judicial process has lost the ability to control the misuse and abuse of expert witnesses. We all have horror stories involving expert witnesses. Cases where too many experts have been used, where experts have been harassed by opposing counsel, and where experts have been qualified on the most mundane or off-the-wall issues, to name a few of the gripes. Are we fed up and not going to take it anymore? Is the end near for the use of experts? A historical perspective will help understand how we got to where we are today and how we might improve the future.

A. The Historical Development of the Expert Witness: Form over Substance Then

The law of Germanic tribes was the source of English primitive folk-law which appeared after 400 A.D.² Experts were not needed because primitive law employed a pseudo-science of its own, a mechanical device which was based on the wrath of God. Whereas today some experts believe they are god, back then God was the expert.

Litigation had two stages: an issue term and a trial term. During the issue term, the parties made allegations

following very formalistic rules. Once the issue was narrowed, the case proceeded to the trial term. No investigation of the facts was undertaken at trial. Rather, the parties were subjected to an arbitrary, mechanical test which was expected to reveal God's judgment.

Generally, the test was accomplished by way of oath, compurgation, or ordeal. If the test was by oath or compurgation, oath helpers assisted a party by bolstering his position and attesting to his truthfulness. The "scientific" principle was very simple: he who told a lie was certain to suffer God's wrath. Thus, there was great stake in telling the truth. The test by ordeal was more complicated and carried with it the potential for disaster. There were four forms of ordeal: (1) by cold water; (2) by hot water; (3) by hot iron; and (4) by the morsel. Before undergoing the ordeal, the party went through a solemn religious ceremony in which Heaven was invited to watch over the proceedings and to decide the issue. The theory of the ordeal was that a divine or supernatural power could make truth manifest if that power were properly sought.\(^3\) If the party put to the ordeal survived the torture, God was on his side, and that party prevailed, even if crippled for life.

Over time, as people saw the possibility of manipulating the ordeal by collusion, as well as through general intellectual advancement and the rise of more efficient methods at trial, public confidence in the ordeals waned. Ultimately, during the reign of Henry III, in the thirteenth century, the church was forbidden further involvement in the elaborate religious ceremonies upon which the ordeals depended. Trial by ordeal was abandoned in favor of a primitive form of jury trial.

The jury trial system was founded in the Frankish kings' courts which were used to decide revenue matters. The practice was extended to land ownership issues and later civil cases. Freemen of a particular locality made up the

\(^3\) John H. Wigmore, A Kaleidoscope of Justice 5 (1941).
jury panel. The manner of trial was inquisitorial, and the jury system came to depend on facts to decide litigation.

In its beginnings, the jury served as truth tellers: they stated what they knew to be the truth, not from evidence heard, but from personal knowledge and the reputation of the neighborhood. Facts were not provided by witnesses, but were based on the knowledge of the jurors themselves. The jurors, in a manner, were the experts. By the fourteenth century, the need for specialized knowledge in judicial proceedings began to be recognized. At that time, however, the expert was called to assist the judge, not the jury. One of the expert's roles was to aid in selecting jury members whose experience made them especially fit to know and understand the types of facts involved in the case.4 Over time, the jury ceased to be witnesses and became witness-triers. As the inquisitorial system gave way to the adversary system, knowledge about the controversy served to disqualify prospective jurors. By the sixteenth century, witnesses were called to prove facts, and experts were permitted to testify on behalf of a party. By the eighteenth century, use of the partisan expert witness was well established.5 And it has been all downhill since then.6

By 1902, the American legal community had begun to criticize the use of expert witnesses and the opinion rule upon which that use was founded. The esteemed Learned Hand was one of the critics. Hand commented that "criticism [of the rules regarding expert witnesses] comes with

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4 Learned Hand wrote of a 1555 case where an expert grammarian was required to assist the court in translating pleas into Latin. Learned Hand, Historical and Practical Considerations Regarding Expert Testimony, 15 HARV. L. REv. 40, 43 (1902). Hand further related a 1665 case involving an expert on witches. Dr. Brown testified to the fact that the accused were witches, elaborating his opinion by scientific explanation as to why they had fits. Id. at 46.

5 In 1782, expert testimony was endorsed in certain cases where "matters of science" were involved. Folkes v. Chadd, 3 Doug. 157 (1782).

6 In his oft-quoted article on the subject, Mason Ladd wrote: "With the rise of the adversary system in which witnesses were looked upon as being called by the parties and expected to represent their position in the case, it was not surprising that the use of scientific proof developed into testimonial battle of experts." Mason Ladd, Expert Testimony, 5 VAND. L. REV. 414 (1952).
great unanimity.” He opined that the rules of evidence regarding the manner in which expert witnesses could testify was an anomaly, which slipped through the cracks in the development of evidence rules.

He noted that rules developed that excluded witnesses from stating opinions or conclusions, but “the use of experts being established and convenient, remained unaffected when other opinion evidence disappeared.” The rise of expert testimony is no more than the gradual recognition of such testimony, amid the gradual definition of rules of evidence, as a permissible, because supposedly useful, archaism.”

In his opinion, however, the expert witness “presents serious practical difficulties.”

Hand went on to list his objections to the use of experts — remember, this is 1902: “[F]irst, that the expert becomes a hired champion of one side; second, that he is the subject of examination and cross-examination and of contradiction by other experts.” Hand suggested that the expert should be limited to relating only facts concerning “uniform physical rules, natural laws, or general principles, which the jury must apply to the facts.” He stated that when the expert is allowed to give an opinion or conclusion, “[t]he expert has taken the jury’s place if they believe him.” The expert’s role is to be witness, not adviser.

Hand noted that the jury is placed in an especially difficult situation when the experts themselves disagree. “[H]ow can the jury judge between two statements each founded upon an experience confessedly foreign in kind to their own? It is just because they [the jury] are incompetent for such a task that the expert is

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7 Hand, supra note 4, at 53.
8 Id. at 50.
9 Id.
10 Id.
11 Id.
12 Hand, supra note 4, at 53.
13 Id. at 50.
14 Id. at 52.
15 Id. at 53.
16 Id. at 54.
necessary at all. The author makes this forceful conclusion:

One thing is certain, [the jury] will do no better with the so-called testimony of experts than without, except where it is unanimous. If the jury must decide between such they are as badly off as if they had none to help. The present system in the vast majority of cases . . . is a practical closing of the doors of justice upon the use of specialized and scientific knowledge.  

Pretty strong stuff. But has the situation improved since the turn of the century when the learned Hand wrote? Some years after Hand addressed the issue, the respected dean of the Harvard Law School, Roscoe Pound wrote, "[u]nder the conditions of today, jury trial in civil cases is expensive, dilatory and wasteful of the time of the court and of the public."19 Dean Pound, interestingly, observed that the civil jury had "fallen into disuse in England, except for certain classes of wrongs where an emotional element is legitimately involved."20 Pound considered the great amount of discretion left in the hands of the trial judge to be a major cause for the abuses of our American jury trial system.21

By 1937, the Model Expert Testimony Act had been written. Before its measures would become law in 1975, however, in the Federal Rules of Evidence22 expert witness use rapidly and continuously expanded in direct proportion to scientific developments and the application of scientific methods of proof to ordinary issues. Then, as now, a broad range of witnesses who possessed varying degrees of expertise were permitted to state their opin-

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17 Hand, supra note 4, at 54.
18 Id. at 56. Hand cites the case of Alsop v. Bowtrell, Cro. Jac. 14 (1620), to illustrate that perhaps a more enlightened use of experts occurred centuries ago. He states that in Alsop the court first satisfied itself of the physicians' facts before it told the jury they could do the same. Id. "Truly we have not in all respects advanced in two hundred and eighty years." Id. at 56 n.1.
20 Id. at 67.
21 Id.
22 FED. R. EVID. 702-06.
ions. The weight given their testimony depended on the qualification process and the foundation testimony. The judge had broad discretion to determine an expert’s qualifications, and his decision was (as it is today) final, except in a case of clear abuse.

B. THE HYPOTHETICAL QUESTION AND IMPLEMENTATION OF EXPERT DISCOVERY UNDER FEDERAL RULE OF CIVIL PROCEDURE 26

For years, the use of the hypothetical question dominated expert testimony. When an expert was highly trained or educated in his field, but lacked personal observation, hypothetical questioning was the sole method for questioning the witness. Through use of the hypothetical question, the foundational facts necessary to present the expert testimony were generally established. Practical difficulties arose, however, in formulating the hypothetical. If any material fact was omitted or if any statement included in the question had not been established by the evidence, then the expert’s opinion, based on a faulty hypothetical, was itself inadmissible, or, if admitted, grounds for possible reversal. Obviously, in factually complicated cases, the question posed to an expert had the potential to become long, convoluted, and more likely to confuse the jury than help it. For example, in United States v. Sessin, a hypothetical question took half an hour to propound. An appeal was taken on the grounds "that a few of the multitudinous statements of the hypothesis lacked meticulous accuracy.”

In addition to jury confusion, reliance on the hypotheti-

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23 See John H. Wigmore, Evidence § 676 (3d ed. 1940).
24 Generally, a hypothetical question had to assume all facts disclosed by the evidence material to the theory of the case as viewed from the side propounding the question. Kale v. Douthitt, 274 F.2d 476 (4th Cir. 1960). A question which assumed any material fact not supported by the evidence was inadmissible. Id. A question which omitted any material fact essential to the formation of a rational opinion or conclusion had to permit reasonably accurate conclusions as distinguished from mere guess or conjecture. Id.
25 84 F.2d 667 (10th Cir. 1936).
26 Id. at 669.
cal question placed a heavy burden on the proponent of the expert evidence sought to be admitted. Furthermore, there was no procedural mechanism through which the opposing party could obtain pre-trial discovery in order to aid cross-examination of the expert. Until implementation of Rule 26 in 1970, the Federal Rules of Civil Procedure provided no method to obtain discovery of experts or the nature of the information upon which their testimony was based.

Prior to the current Federal Rule of Civil Procedure 26, a trial judge held strict control over a party’s pre-trial access to information concerning an opponent’s experts.27 The result was that discovery was denied in its entirety or limited to extremely narrow areas in most cases.28 There were many grounds for denying discovery, including attorney-client privilege,29 work product privilege,30 and “unfairness.”31 In addition to providing needed information for effective cross-examination, an added reason for pre-trial discovery was raised: “the need for pretrial discovery regarding expert witnesses is further evidenced by the ever-increasing dissatisfaction with the honesty and reliability of expert testimony . . . .”32

The implementation of Rule 26 provided for a uniform,
orderly scheme of liberal discovery and adopted the doctrine of “fairness” as its guide. Subdivision (b)(4)(A) of Rule 26 addresses trial preparation concerning experts. The Advisory Committee on Civil Rules, in its note accompanying the 1970 rule stated that the intent of the drafters in broadening discovery:

In cases [which present intricate and difficult issues as to which expert testimony is likely to be determinative], a prohibition against discovery of information held by expert witnesses produces in acute form the very evils that discovery has been created to prevent. Effective cross-examination of an expert witness requires advance preparation . . . . [T]he only substitute for discovery of experts’ valuation materials is “lengthy — and often fruitless — cross-examination during trial . . . . [E]ffective rebuttal requires advance knowledge of the line of testimony of the other side . . . .

By limiting discovery to experts who will testify at trial, the committee sought to balance the fear that one side would unduly benefit from the other’s better preparation. Under Rule 26, a party may discover facts known or opinions held by an opponent’s expert who is not expected to testify at trial only upon a showing of exceptional circumstances which make it impractical for the party seeking discovery to acquire the facts or opinion by other means.

Rule 26 sets forth a two-step process for discovery from

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53 Rule 26(b)(4)(A) states:

(i) A party may through interrogatories require any other party to identify each person whom the other party expects to call as an expert witness at trial, to state the subject matter on which the expert is expected to testify, and to state the substance of the facts and opinions to which the expert is expected to testify and a summary of the grounds for each opinion. (ii) Upon motion, the court may order further discovery by other means, subject to such restrictions as to scope and such provisions, pursuant to (b)(4)(C) of this rule, concerning fees and expenses as the court may deem appropriate.

54 Rule 26 applies equally, however, to complex and simple cases.

55 FEd. R. Civ. P. 26 Advisory Committee Notes.

56 Id.

expert witnesses. First, written interrogatories must be propounded to the party. The party is required, through the interrogatories, to identify its expert witnesses and to state the subject matter on which each expert is expected to testify, the substance of the facts and opinions to which the expert is expected to testify, and a summary of the grounds of each opinion. "Perhaps due to trial courts' disgust with evasive and dilatory discovery tactics, the case law reflects a trend toward requiring more detailed and complete answers to expert witness interrogatories." If a party seeks any other information from the expert for impeachment purposes, that information can only be obtained through deposition under the rule.

Second, when answers to expert witness interrogatories are complete, a party may obtain further discovery of an expert through depositions and document requests. According to the rule, however, further discovery may be made only upon motion and by order of the trial court. The intent of the rule is to avoid burdensome and unwarranted discovery which may occur if depositions are undertaken before interrogatories are completed. Although the rule has theoretical foundation, its application in practice has been difficult, especially to the party and its expert who are at the receiving end of discovery requests.

While providing pre-trial discovery of experts may encourage the opposing party to be certain that its expert is, in fact, qualified and has a valid opinion to offer, permitting broad discovery tends to provide the opportunity for abuse and harassment of the person on the receiving end

59 Id.
40 United States v. Harless Aviation, 1991 WL 326639 (S.D. Ga. 1991) (court ordered FAA to provide more complete answers to expert witness interrogatories where responses given did not provide sufficient information for counsel to conduct further discovery).
41 Bottorff, 130 F.R.D. at 97.
of the request. Obviously, discovery of an opponent’s expert is necessary for effective cross-examination. On the other hand, one of the main goals of cross-examination is to discredit an expert personally.\textsuperscript{44} Rule 26 provides an excellent mechanism to obtain the type of information which has nothing to do with the case and everything to do with harassing the expert.

It is not unusual for a party to seek information on an opponent’s expert regarding the expert’s: (1) financial interest in a case by asking about remuneration for services,\textsuperscript{45} (2) continuing employment relationship with the party on whose behalf the expert will testify,\textsuperscript{46} or (3) any record of the expert’s prior testimony for the same party or attorney.\textsuperscript{47} Moreover, the trend is to permit discovery directed towards establishing (1) the amount of prior compensation the expert has received from the party; (2) the percentage of total income the expert receives from expert testimony per year; and (3) prior testimony for litigants similarly situated to the party he currently represents.\textsuperscript{48}

Undeniably, a great deal of the discovery that is sought to discredit the expert personally would be unnecessary if the witness were confined to testimony concerning scientific facts that are outside the understanding of the jury. It is because the expert is permitted to state opinion, even on the ultimate issue of fact, that opposing counsel seeks damaging personal information to discredit the expert.

A pre-trial order entered in the case of \textit{In re Air Crash at Stapleton Int’l Airport, Denver, Colorado, on November 15, 1987},\textsuperscript{49} provides a good example of the issues which may arise when attempting to obtain discovery from expert witnesses. The matter presented concerned the plaintiffs’

\textsuperscript{44} \textit{James W. Jeans, Trial Advocacy} § 13.39 (1975).
\textsuperscript{45} \textit{Bottorff,} 130 F.R.D. at 97.
\textsuperscript{46} Sperberg v. Goodyear Tire & Rubber Co., 519 F.2d 708 (6th Cir. 1975).
\textsuperscript{47} See Sears v. Rutishauer, 466 N.E.2d 210 (Ill. 1984).
\textsuperscript{48} See Graham, \textit{supra} note 27, at 348-49.
\textsuperscript{49} 720 F. Supp. 1442 (D. Colo. 1988), rev’d in part on other grounds, 964 F.2d 1059 (10th Cir. 1992).
designated experts in aeronautical engineering, wing design and the effect of ice contamination on aircraft wings. In accord with previous orders by the court, defendants noticed two of the experts for deposition. The notices included requests for production of various documents in the experts’ possession.

At the depositions, plaintiffs objected to the following requests: all materials possessed by the experts relating to the case; all written records of communications between plaintiffs’ attorneys and the experts in the case; copies of all trial and deposition transcripts of other cases where the experts testified. In addition, plaintiffs’ counsel advised the experts to refuse to answer any questions on the issue of the experts’ own relationship and their relationship with the plaintiffs’ law firm. Plaintiffs’ argument in refusing to cooperate with this discovery was that the scope of expert discovery is limited to documents the expert relies on in preparing his testimony and opinion. Defendants argued that the attorney work product privilege protected certain records of the experts’ opinions. Defendants countered that they were entitled to discover the records and information requested for purposes of impeachment.

The trial court held that information sought relevant to an expert’s impeachment at trial is limited to materials possessed by the expert which are related to the case at hand.50 The court found that any materials an expert reviews in forming his opinion, even those he later disregards, are relevant for impeachment.51 “Specifically, the Rule does not limit discovery to documents which support an expert’s opinion. In forming an opinion, an expert ‘relied’ upon material he finds unpersuasive as well as material supporting his ultimate position.”52

As to the claim of attorney work product privilege, the court held that the privilege is superseded by the discov-

50 Id. at 1444.
51 Id.
52 Id.
erability of expert information.\textsuperscript{53} The court reasoned, "[a]n expert who was not an eye witness to the events about which he will testify obtains the majority of the material he considers through the attorneys who employ him."\textsuperscript{54} The court said that if the attorney work product privilege could be raised in such situations, it would be an "impenetrable shield" to prohibit obtaining impeachment information.\textsuperscript{55} According to this case, even if the documents requested contain an attorney’s mental impressions, those impressions are discoverable if they were reviewed by the expert before the expert opinion was formed.\textsuperscript{56}

The court in \textit{Air Crash at Stapleton} did rule that defendants’ sweeping request for all materials and prior testimony dealing in any way with the experts’ aeronautical experience was too burdensome and beyond the scope of Rule 26.\textsuperscript{57} The judge reasoned that permitting such unrelated litigation to enter into the case at hand was totally irrelevant and that defendants were not entitled to inquire into the relationships between the two experts or between the experts and the plaintiffs’ attorney.\textsuperscript{58}

In sum, due to the creative uses of Rule 26, it is sometimes difficult to remember that the rule was devised as a procedural mechanism intended to inject a pre-trial breath of fresh air into the use of expert witnesses, to do away with the need for the hypothetical question, and to simplify the trial process. The rule’s effect on litigation practice today has greatly increased the complexity of cases, compounded the use of experts, increased the cost of litigation, and, to say the least, raised the blood pres-

\textsuperscript{53} Id.
\textsuperscript{54} \textit{Air Crash at Stapleton}, 720 F. Supp. at 1444.
\textsuperscript{55} Id.
\textsuperscript{56} Id.
\textsuperscript{57} Id.
\textsuperscript{58} Id. at 1445; see County of Suffolk v. Long Island Lighting Co., 122 F.R.D. 120 (E.D.N.Y. 1988) (holding that memoranda between expert and attorney was discoverable as were all documents that expert wrote or looked at in forming his opinion, but diaries, notebooks and calendars were not discoverable).
sure of many attorneys and experts within the reach of its tentacles.

C. The Impact of Federal Rules of Evidence 702 through 706 on Expert Use

As Rule 26 increased the availability of discovery concerning experts, criticism mounted against use of the hypothetical question and other traditional foundational hoops through which counsel had to jump prior to putting on expert evidence. In a further effort to satisfy criticism of hypothetical question use, and in order to refine expert witness use at trial, Federal Rules of Evidence 702 through 705 were implemented in 1975. Specifically Rule 705 eliminates the need for hypothetical questions and allows an expert to “testify in terms of opinion or inference and give reasons therefor without prior disclosure of the underlying facts or data, unless the court requires otherwise.” Cross-examination thus has become the means to reveal such underlying facts. Rule 703 states that the underlying facts or data need not be admissible if evidence is “of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject . . . .” Rule 702 addresses the admissibility of expert testimony.

59 Criticism of the hypothetical question existed on all sides. As stated in CHARLES T. MCCORMICK, Evidence § 16 (1984):

The hypothetical question is an ingenious and logical device for enabling the jury to apply the expert’s scientific knowledge to the facts of the case. Nevertheless, it is a failure in practice and an obstruction to the administration of justice. If we require that it recite all relevant facts, it becomes intolerably wordy. If we allow, as most courts do, the interrogating counsel to select such of the material facts as he sees fit, we tempt him to shape a one-sided hypothesis. Those expert witnesses who have given their views seem to agree that this partisan slanting of the hypothesis is the fatal weakness of the practice.

60 FED. R. EVID. 702-05.
61 FED. R. EVID. 705.
62 FED. R. EVID. 703.
63 Federal Rule of Evidence 704 provides that expert testimony that touches on and expresses an opinion on an ultimate issue of fact is not objectionable if it is helpful to the trier of fact.
Before Federal Rule of Evidence 702 came into existence, *Frye v. United States* set forth the test of admissibility of scientific evidence. Under *Frye*, scientific evidence could not be admitted unless it was "sufficiently established to have gained general acceptance in the particular field in which it belongs." A party seeking to introduce expert testimony had to prove that the "community" of experts considered the scientific knowledge upon which the testimony was based to be reliable and valid. With the advent of the Federal Rules of Evidence on expert testimony, however, the *Frye* test was no longer the only game in town. The test became one of balancing the helpfulness of the expert testimony against any relevance or prejudice which it might cause the opposing party. In this sense, Rule 702 does little to define the parameters of a trial judge’s discretion in admitting all kinds of alleged expert testimony. The rule expands more than limits a trial judge’s discretion in admitting all types of experts and all types of evidence through experts.

Under Rule 702, expert testimony is admissible as long as the trial judge rules that it is likely to assist the trier of fact. This means that expert testimony is admissible even where the jury needs no help in understanding the issue the expert addresses. Under Rule 702, neither education, experience, nor formal training of any sort is necessary to qualify one as an expert. In fact, the term "expert" is actually a word of art; the more exact term is "skilled" or "experienced" witness. This is true because according to the rule, a person skilled or possessing specialized knowledge in a given area meets the definition of an expert. The trial judge, however, applies Rule 104(a)

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64 293 F. 1013 (D.C. Cir. 1923).
65 *Id.* at 1014.
66 See Mercado v. Ahmed, 756 F. Supp. 1097 (N.D. Ill. 1991), for an excellent discussion of application of the scientific concepts of reliability and validity to both the *Frye* test of admissibility and Rule 702.
67 Federal Rule of Evidence 403 provides a safeguard against abuse under Rule 702 by prohibiting the admission of irrelevant and unduly prejudicial evidence.
68 See Hammond v. International Harvester Co., 691 F.2d 646, 653 (3d Cir.
to decide if a witness has sufficient qualifications to be an expert. Discretion abounds, and an appellate court will generally defer to a trial judge's decision on the issue. Accordingly, in Schroeder v. Boeing Commercial Airplane Co., a plaintiff designated 18 experts in what should have been a simple slip and fall case.

The final words in Rule 702 permit an expert to testify in the form of an opinion "or otherwise." Such broad language, although merely a codification of existing common law, indicates that not only was Learned Hand's proposal that experts be limited to testifying to facts ignored by the committee which drafted the federal rules, but instead, the opposite is true. An expert is expected to give an opinion. He might also provide the jury with factual data or give background information in a technical area. Of course, opposing counsel then has the right to introduce an expert with a contrary opinion. The result is just as Hand posited: The jury is seldom helped at all, but is simply more confused. Their heads spinning, it is understandable that jurors might seek to evaluate the experts in a context they can understand. Thus, an expert's manner of speech, dress, and appearance may be much more determinative of his/her believability than any amount of research or knowledge the witness may possess.

In 1983, the Litigation Section of the American Bar Association produced a document which reviewed the rules on experts, yet it did not consider this state of affairs a problem. In Emerging Problems Under the Federal Rules of Evidence, the panel wrote, "[t]ogether with Rule 703, providing an expert may rely on certain data that might not be independently admissible, and Rule 705, which permits an expert to offer an opinion before providing supporting data, Article VII offers litigants opportunities to

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1982)(holding salesman of farm tractors qualified as expert on tractor design defects).


70 FED. R. EVID. 702.

71 AMERICAN BAR ASSOCIATION, LITIGATION SECTION (1903).
make expert testimony as helpful as possible.” Not to mention as confusing as possible.

Thus, it is up to the trial judge to apply discretion in qualifying one as an expert. In Haley v. Pan American World Airways the plaintiff, parents of an adult passenger killed in the Kenner, Louisiana plane crash on July 9, 1982, were awarded damages for their son’s pre-impact fear. All passengers and crew on the flight perished; thus, the plaintiffs presented evidence on this claim through the testimony of their expert witness, a psychiatrist who had treated survivors of aircraft accidents and was familiar with the physiological effects of stress. The expert explained the five levels of anxiety which culminate in panic, and then opined that most, if not all, the people on the flight were in an absolute state of pandemonium for at least four to six seconds between the time they realized they were going to crash (the expert said this occurred when the plane’s wing hit a tree) and the fatal impact.

On appeal, Pan Am contended that the trial judge abused his discretion in admitting the expert’s evidence on the issue of pre-impact pain and suffering. The Fifth Circuit disagreed and affirmed the trial court.

While recognizing that other courts have disallowed recovery for pre-impact fear in similar cases based on a lack of evidence, the court found that admission of the expert’s evidence, while arguably “irrelevant or within the ken of the

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72 Id. at 202-03.
73 In Mercado, 756 F. Supp. at 1100, the plaintiff sought to have an economist testify as an expert on “hedonic damages,” the monetary value of pleasure of life of an accident victim. In a well reasoned opinion, the trial judge reached beyond the Rules of Evidence and applied the Frye test. The judge analyzed the requirements of reliability and validity to determine whether such evidence was admissible by assessing the degree to which the discipline is characterized by reliability among practitioners and by validation of its theories. Id. at 1100-01. Stating that “[t]he risk to justice from pseudo-science is substantial,” the trial court held that there was “no basic agreement among economists as to what elements ought to go into the life valuation” and thus granted defendant’s motion to bar such expert testimony. Id. at 1102-03.
74 746 F.2d 311 (5th Cir. 1984).
75 Id. at 319.
layman-juror," was not an abuse of discretion.\textsuperscript{76} Thus, based on that evidence plus the defendant airline expert’s acknowledgment that the passengers were fighting for their lives when the plane’s wing hit the tree, the $15,000 damage award was affirmed.\textsuperscript{77}

In contrast, the same Fifth Circuit in the case of \textit{In re Air Crash Disaster at New Orleans, Louisiana,}\textsuperscript{78} undertook a more considered analysis in reviewing whether the trial judge had abused his broad discretion by admitting an expert economist’s opinion that the lost inheritance to three children whose parents perished in an air crash was $1,778,873. The economist had based his projections on analysis of the decedent father’s tax returns and other financial information. The Fifth Circuit recognized that deference should be given the trial judge’s decision to find the expert qualified and competent to assist the jury.\textsuperscript{79} On the other hand, the court stated:

Basic policy questions that affect the very nature of a trial lie behind decisions to receive expert testimony. Under the Federal Rules of Evidence, experts not only explain evidence, but are themselves sources of evidence. These two roles, though related, are quite distinct. In deciding whether explanation by an expert will assist the jury or judge, the superior position of the trial judge over the appellate judge is apparent. By comparison, in deciding whether evidence should be allowed from this source, the trial judge draws less upon the scene and the case immediately before him, and more upon the substantive law. To the extent that the decision to allow expert testimony as a source of evidence is significantly intertwined with the underlying substantive law, we will accord it less deference, and take a much closer look.\textsuperscript{80}

Having outlined its method of analysis, the court further elaborated that a trial judge must be wary of an ex-

\textsuperscript{76} Id. at 316 n.10.
\textsuperscript{77} Id. at 319.
\textsuperscript{78} 795 F.2d 1230 (5th Cir. 1986).
\textsuperscript{79} Id. at 1233.
\textsuperscript{80} Id.
pert who is proffered to the jury to speak on an ultimate issue because "the ultimate issue... can too easily become whatever an expert witness says it is." The court reprimanded trial judges who take the easy road and permit any and all expert testimony to come in "with the shorthand remark that the jury will give it 'the weight it deserves.'" The court recognized that "the signals of competence cannot be catalogued" and that the detection of qualified experts depends on the "good sense and instincts" of the trial judge. The court noted, for example, that many experts are academicians who supplement their income with consulting work. It pointed out that in some cases such witnesses are willing to state in court an opinion which would not be publishable in an academic or scientific journal because the theory does not stand up to peer review. The court stated that this was but one signal that the witness offered as an expert may not be qualified.

The Fifth Circuit, in sum, decried the "let it all in" philosophy and sent a message to trial judges: "It is time to take hold of expert testimony in federal trials." With that, the economist's testimony was dismissed as speculative, the award based on that evidence was reversed, and the case remanded for a new trial on that issue.

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81 Id.
82 Id.
83 Air Crash Disaster at New Orleans, 795 F.2d at 1234.
84 Id.
85 Id.
86 Id. The court also commented that, while the professional expert is commonplace and, standing alone, not grounds for disqualification, the presence of such a fact should be scrutinized. "[E]xperts whose opinions are available to the highest bidder have no place in a court of law." Id.; see Snyder v. Whittaker Corp., 839 F.2d 1085, 1089 (5th Cir. 1988).
87 Air Crash Disaster at New Orleans, 795 F.2d at 1234.
88 Id. at 1237. The plaintiff in Robertson v. McCloskey, 676 F. Supp. 351, 352 (D.D.C. 1988), proposed to introduce testimony of an expert in the "psychodynamics of memory and perception." In plain English, plaintiff's expert was to testify that people forget things over time. The trial judge found that the proposed testimony concerned "matters that are squarely within the comprehension of the average juror." Id. at 354. Moreover, the judge noted that if plaintiff's expert testimony were admitted, defendant would have the right to call his own
The case of Apostol v. U.S.,\textsuperscript{89} provides another example of Rule 702's limits. Apostol stands for the following proposition: "Once an expert not always an expert."\textsuperscript{90} In that case, plaintiff sought to have his air traffic control expert qualified merely by informing the court that the witness had testified in other cases as an expert. The trial court did not buy it. Pointing out that the witness had not controlled an airplane since 1953, some 25 years prior to the trial, the court did not accept plaintiff's "remarkable proposition that a court is bound to qualify as an expert someone who testified as an expert in other cases."\textsuperscript{91} The court, apparently having done its own research, noted that in a more recent case than that relied upon by plaintiff, the alleged expert had been "thoroughly discredited ... because of his lack of experience in air traffic controlling."\textsuperscript{92}

Examples abound of cases, however, where arguably prejudicial and irrelevant expert testimony was sought to be admitted under Rule 702. Consider, for example:

The "Attention K-Mart Shoppers" Expert: Plaintiff, who claimed injury when she apparently got caught up in a K Mart Blue Light Special stampede for Cabbage Patch dolls, attempted to introduce the testimony of an expert on K Mart's negligent merchandising techniques. The trial court determined that the jury did not need the help.\textsuperscript{93}

expert on the subject and the battle of the experts would be excruciatingly pro-
longed. \textit{Id.} at 354-55.

By way of contrast, in Scott v. Sears, Roebuck & Co., 789 F.2d 1052 (4th Cir. 1986), a human factors expert was found qualified and permitted to introduce statistical evidence that people wearing high heels tend to avoid walking over grates on sidewalks. (There are actually statistical studies on such behavior.) The appellate court found the admission of such evidence on a matter obviously within the common knowledge of jurors to be harmless error. \textit{Id.} at 1055. In the meantime, a party and her expert were successful in getting such evidence before a jury.

\textsuperscript{89} 838 F.2d 595 (1st Cir. 1988).

\textsuperscript{90} \textit{Id.} at 599 n.4.

\textsuperscript{91} \textit{Id.}

\textsuperscript{92} \textit{Id.}

The "Liar, Liar Pants on Fire" Expert: A somewhat new category of witness involves experts who seek to testify as to the truthfulness of other experts. Human lie detectors, if you will. While the reported cases deal mostly with criminal defendants, the strategy has also been tried in civil cases.

Do we really need an expert here? Testimony of experts was deemed necessary to enable a jury to understand the meaning of the "technical" terms "fair," "reasonable," and "non-discriminatory." The case of What do you mean by that? A securities expert testified as to the meaning of the term "best efforts" in a contract dispute.

The case of "We see, but can you make it more complicated?" Howard Cosell wrote a book about boxing. The World Boxing Council got miffed and charged him with libel. The Council sought to have an expert testify as to Cosell's state of mind when he wrote certain parts of his book. No one ever accused him of being a literary genius, but Cosell got upset when the Council sought to introduce the testimony of a linguistics expert to explain what Cosell meant in his book. Perhaps the Council considered Cosell, the writer, and his topic so profound that a jury could not understand either without the help of a linguist. The trial judge disagreed, to put it mildly. "[The expert's] testimony would waste the time of both the jury and the court . . . [i]t transforms a common sense issue into a technical one, and relies on virtually incomprehensible pseudo-sci-

94 See United States v. Sorondo, 845 F.2d 945 (11th Cir. 1988); United States v. Azure, 801 F.2d 336 (8th Cir. 1986).
95 See Carver v. Orange County, 444 So.2d 452 (Fla. 5th DCA 1983); cf. Schwab v. Tolley, 345 So.2d 747 (Fla. 4th DCA 1977)(trial court properly struck testimony of one expert who where he expressed an opinion as to what another expert would think); Ecker v. National Roofing of Miami, Inc., 201 So.2d 586 (Fla. 3d DCA 1967)(reversible error to permit defendant's expert to testify as to the professional reputation of the plaintiff's expert).
96 Nucor Corp. v. Nebraska Public Power Dist., 891 F.2d 1343, 1350 (8th Cir. 1989)(in customer's breach of contract claim against electric utility based on electric rate overcharges).
entific jargon.” The testimony was excluded.  

The “I swear, he's worth it,” way of proving damages: An economist was permitted to opine as to a stevedore's lost wages without having referred at all to the records and the facts of the case. The Fifth Circuit found admission of the testimony to be error and stated, “[The expert's] testimony on direct and cross examination was confusing at best and nothing . . . in the record clarifies how the economist reached his end result figures.” 

D. Federal Rule of Evidence 703

If Rule 702 has the potential to be more hindrance than help, consider Rule 703. This rule opens the door to the admission of hearsay evidence through an expert's testimony. Not only may an expert impinge on the jury's province and provide a major premise in a case in the form of an opinion or an inference on an issue which it is for the jury to decide, he can base his opinion on inadmissible evidence. What is to keep a party from doing this? Solely the trial judge and his or her broad reaching discretion. Admittedly this rule was put in place to counter the criticism of the hypothetical question. The question is: Does it do more harm than good?

Rule 703 does require that the facts or data upon which the expert bases his opinion be of the type “reasonably relied upon by experts in the particular field” of the witness's expertise. Nevertheless, the rule is silent as to whether the expert may tell the jury the factual basis of his opinion if the facts are not independently admissible into evidence. Thus, the bottom line is again the trial judge's discretion, tempered by Rule 403's general bar against the admission of unduly prejudicial evidence.

99 Randolph v. Laeisz, 896 F.2d 964, 967 (5th Cir. 1990).
100 Fed. R. Evid. 703. “The term 'reasonably' employed in Rule 703 implies a judicial determination of trustworthiness. If solely routine reliance was intended, either the term 'customarily'; or 'regularly' could have been selected.” Graham, supra note 27, at § 6651 n.13.
An example of the interplay of Rules 703 and 403 is found in Nachtsheim v. Beech Aircraft Corp.\textsuperscript{101} To prove its claim of product defect, plaintiff’s attorney attempted to introduce evidence of a previous airplane accident in St. Anne, Illinois involving one of defendant’s planes. Plaintiff claimed the St. Anne crash was substantially similar to the crash at issue. Applying Federal Evidence Rule 403, the trial judge excluded the testimony after balancing its probative value against its prejudicial effect.\textsuperscript{102} The judge found the facts of the two accidents were not sufficiently similar.\textsuperscript{103} Plaintiff then sought to introduce the same evidence through its expert witness, pursuant to Rule 703, claiming that its expert had relied on evidence of the St. Anne accident to form his opinion as to the cause of the accident at issue. The trial court excluded introduction of the evidence through this technique, again relying on Rule 403.\textsuperscript{104}

The opposite result occurred in the case of In re Aircrash in Bali, Indonesia on April 22, 1974,\textsuperscript{105} The trial judge had not allowed plaintiff’s expert to bring before the jury otherwise inadmissible evidence of the accident pilot’s training records which contained double and triple hearsay. The appellate court reversed, however, finding that defendant’s expert had opened the door to the admission of such evidence though its own expert’s testimony regarding the role of training records in the investigation of the accident, as well as his testimony that all of Pan Am’s pilots, including the pilot in question, were competent.\textsuperscript{106}

Similarly, in Rossi v. Mobil Oil Corp.,\textsuperscript{107} Rule 703 was the basis for allowing into evidence a retailer’s expert’s monthly financial statements from which damage estimates were derived, even though the statements were not

\textsuperscript{101} 847 F.2d 1261 (7th Cir. 1988).
\textsuperscript{102} Id. at 1267.
\textsuperscript{103} Id. at 1269.
\textsuperscript{104} Id. at 1267.
\textsuperscript{105} 684 F. 2d 1301 (9th Cir. 1982), cert. denied, 493 U.S. 917 (1989).
\textsuperscript{106} Id. at 1315.
compilations of regularly kept business records, but were specifically prepared for trial. The appellate court affirmed the trial judge's ruling that the otherwise inadmissible evidence could be brought in by an expert pursuant to Rule 703. Moreover, the court found this not to be unfair since the defendant was able to attack the testimony during the expert's cross-examination and in closing argument.

Finally, in *Shatkin v. McDonnell Douglas Corp.*, the Second Circuit affirmed a ruling which excluded an economics expert's testimony on future gifts a deceased son would have made to his mother. The court affirmed the trial judge who had based his decision on the interplay between Rules 703 and 403. The trial judge had concluded that the testimony "would seriously prejudice, mislead and confuse the jury." The appellate court affirmed the trial court by finding that under Rule 703, the trial judge correctly denied admission of the testimony which was based on unrealistic and contradictory assumptions of facts.

**FEDERAL RULE OF EVIDENCE 705**

Rule 705, also a response to criticism of the hypothetical question, addresses the disclosure of facts or data underlying expert opinion. Pursuant to the rules, once an expert is qualified, he can simply state his opinion without more. The responsibility of the opposing party, through cross-examination, is to bring out the information upon which the expert based his opinion. In other words, the cross examiner is the source through which an opposing party may get otherwise inadmissible hearsay evidence brought before the jury. It should be pointed

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106 *Id.* at 831.
109 *Id.*
110 727 F.2d 202, 203 (2d Cir. 1984).
111 *Id.* at 208.
112 *Id.* at 205.
113 *Id.* at 208.
114 *Fed. R. Evid.* 705.
out, however, that a safeguard to the misuse of experts is that the party offering the expert will usually provide a foundation for his expert’s testimony because testimony which consists of no more than a conclusory opinion will probably carry little weight with a jury.\textsuperscript{115}

Regardless, the elimination of reliance on the hypothetical question virtually lifted the burden of admitting expert evidence from its proponent, once the expert is qualified. The effect of Rule 705, as well as Rule 703, is to “place the full burden of exploration of facts and assumptions underlying the testimony of the expert witness squarely on the shoulders of opposing counsel’s cross-examination.”\textsuperscript{116}

\section*{E. Proposed Changes to Evidence Rule 702 and Procedural Rule 26}

A review of the development of expert witness use is instructive in order to put in perspective the role of the expert witness in our adversarial trial system. Today, Rule 26 of the Federal Rules of Civil Procedure and rules 702 through 705 of the Federal Rules of Evidence are clear guideposts from which to begin to analyze any strategy to improve the use of experts in the future. In fact, the Judicial Conference Advisory Committee on Civil Rules recently proposed various amendments both to the Federal Evidence and Civil Procedure Rules regarding experts. Specifically, revisions have been proposed to Fed.

\textsuperscript{115} Moreover, Rule 26(b)(4), providing for discovery of the expert witness, protects against undue surprise, thus allowing for more effective cross-examination. \textit{Fed. R. Evid. 26(b)(y)}. Such pre-trial discovery can also cut an opponent off at the pass in his attempt to get certain evidence before a jury through an expert. For example, in \textit{In re Air Crash Disaster at Detroit Metro. Airport on Aug. 16, 1987}, 130 F.R.D. 652, 653 (E.D. Mich. 1989), Northwest Airlines was prohibited from introducing a tower tape its expert relied on because the airline did not disclose the tape as required in a pre-trial order.\textsuperscript{116} Smith v. Ford Motor Co., 626 F.2d 784, 793 (10th Cir. 1980) (quoting Michael H. Graham, \textit{Discovery of Experts Under Rule 26(b)(4) of the Federal Rules of Civil Procedure: Part One, an Analytical Study}, U. ILL. L. REV. 895, 897 (1976)); see First of Am. Bank-Central v. United States, 639 F. Supp. 446, 461-62 (W.D.Mich. 1986)(cross-examination of wake turbulence expert and air traffic control expert proved neither was qualified to testify).

The committee acted upon the concern that expert testimony had gotten out of hand, thus dangerously and unnecessarily raising the costs of litigation without providing a justifiable benefit to the fact finder. The committee has proposed to revise Rule 26 with the aim of reducing the need for formal discovery requests to obtain information on experts to be used at trial. The Rule 26 changes also authorize depositions of experts without a court order (as is the practice in most courts). One goal of the amendments, however, is to reduce the need for depositions altogether by requiring the expert to affirmatively state both the details of his testimony and other information regarding the expert's relation to the case and the party he represents.

Specifically, the revised Rule 26(a)(2) would require that a party disclose any expert "retained or specially employed to provide expert testimony in the case" or any employee who regularly gives such testimony as part of his or her duties. The expert would then be required to submit a report to opposing counsel containing a complete statement of all opinions to be expressed and the basis for those opinions. The report must detail the data and other information considered by the witness in forming the opinion, as well as provide any exhibits to be used at trial. Moreover, the report must contain the qualifications of the witness, including a list of all publications he

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118 Id. at 156.
119 Id. at 87-106.
120 Id.
121 Id.
122 The committee notes point out that subdivision (a)(2) does not apply to treating physicians or nominal experts who are not specially retained to testify at trial.
has written within the last ten years; the compensation to be paid for the study and testimony; and a listing of any other cases in which the witness has testified as an expert at trial or by deposition within the preceding four years.\textsuperscript{123}

After submitting the report, the expert can be deposed, if necessary. The intent of the revision, however, is to require the report to be so specific that no deposition will be required.

Implementation of the Rule 26 revisions will surely streamline discovery of the technical and factual data upon which an expert bases his opinion. Nevertheless, the revisions do little to curb discovery abuses which occur when opposing counsel goes hunting for cross-examination information to discredit an expert personally. The advisability of limiting all expert discovery to that contained within the revised Rule 26 is questionable.

Recognizing that expert testimony is subject to misuse as a trial technique to wear down adversaries, the Committee on Rules of Practice and Procedure has also proposed to change Federal Evidence Rule 702.\textsuperscript{124} The goal is to limit expert witness use at trial.\textsuperscript{125} The revision provides that expert testimony is limited to information that is "reasonably reliable" and that will "substantially assist" the trier of fact.\textsuperscript{126} According to the committee, this revision should curb excessive use of expert testimony which lacks even marginal acceptance within the scientific community.\textsuperscript{127}

\textsuperscript{123} 137 F.R.D. at 89. No specific time limits for providing the expert report are set by the revised rule; however, the committee notes state that in most cases, the party with the burden of proof on an issue should disclose its expert testimony before other parties. Subsection (a)(2)(C) does require that disclosures be made at least 90 days before trial by the party with the burden of proof on the issue, and 30 days before trial by the party who contradicts the subject matter. Proposed Rule 26(c) states that timely supplementation of disclosures is required where there are changes to the expert opinion. 137 F.R.D. at 96.

\textsuperscript{124} 137 F.R.D. at 156.

\textsuperscript{125} \textit{Id.} (Committee Notes).

\textsuperscript{126} \textit{Id.}

\textsuperscript{127} \textit{Id.} at 157.
In its notes, the committee recognizes that, while the Federal Rules of Evidence were enacted in order to expand expert use to illuminate technical issues in dispute, the use of expert testimony has greatly increased and become subject to abuse. The committee notes point out that the Rule 702 change does not mandate a return to the Frye test which required general acceptance of the scientific premise on which the testimony was based before expert testimony would be admissible. However, the court is called upon to reject testimony that is based upon premises lacking any significant support and acceptance within the scientific community, or that otherwise would be only marginally helpful to the fact-finder.

E. THE LITTLE-USED EVIDENCE RULE 706: THE FUTURE OF EXPERT WITNESS USE?

While the proposed changes to the rule regarding expert witnesses provide positive steps toward eliminating expert witness abuse, there already exists a, until now, little used rule of evidence that may foretell the future for expert witness use. It is Federal Rule of Evidence 706 which permits the court to order the appointment of an expert on its own motion or that of any party. The witness may be agreed on by the parties or selected by the judge.

Upon the expert’s agreement to serve, the court, with the participation of the parties, sets forth in writing the

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128 Id. at 156.
129 Id. at 157.
130 Id. The second proposed change to Rule 702 simply complements the proposed amendments to Civil Rule 26 by providing that expert information not disclosed in advance of trial as required by Rule 26 cannot be used on direct examination without leave of court for good cause. Id.

Similarly, the committee proposed to change Federal Rule of Evidence 705 to avoid any possible conflict with the revised Rule 702 and Rule 26. 137 F.R.D. at 158. Rule 705 would continue to permit an expert to state his opinion in court without testifying to underlying facts or data. Nevertheless, the contents of the expert’s opinion would have to have been previously disclosed to opposing counsel in order for the testimony to be admissible. Id. (Committee Notes).

131 Fed. R. Evid. 706(a).
132 Id.
expert’s duties.\textsuperscript{133} It is then the expert’s role to advise the parties of his or her findings, if any.\textsuperscript{134} The parties may take the witness’ deposition, and any party or the court may call the witness to testify, subject to cross-examination.\textsuperscript{135} The court, in its discretion, may authorize disclosure to the jury of the fact that the court appointed the expert witness.\textsuperscript{136}

While Rule 706 was not implemented until 1975, the use of a court appointed expert is hardly new.\textsuperscript{137} It will be remembered that the expert witness was originally employed as a non-partisan aide to the court.\textsuperscript{138} Learned Hand advocated such experts in his seminal 1902 article.\textsuperscript{139} In his 1952 article on expert testimony, Mason Ladd cited the case of \textit{In re Dolbeer's Estate},\textsuperscript{140} where the court stated:

The remedy [to misuse of experts] can only come when the state shall provide that the courts, and not the litigants, shall call a disinterested body or board of experts, who shall review the whole situation and then give their opinion, with their reasons therefore, to the court and jury, regardless of the consequences to either litigant.\textsuperscript{141}

Regardless of its logical appeal, no organized plan for the use of impartial expert witnesses in civil cases was undertaken until 1956 when the Association of the Bar of

\begin{footnotesize}
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\item \textsuperscript{133} \textit{Id.}
\item \textsuperscript{134} \textit{Id.}
\item \textsuperscript{135} \textit{Id.} According to Rule 706, compensation of the expert witness is determined by the court and paid by the parties according to the court’s directions. \textit{FED. R. Evid. 706(a)}; \textit{see National Union Fire Ins. Co. of Pittsburgh, Pa. v. Risk Exchange, Inc., 1990 U.S. Dist. Lexis 16936 (S.D.N.Y. 1990)} (where cost of court appointed expert got out of control).
\item \textsuperscript{136} \textit{FED. R. Evid. 706(d)}.
\item \textsuperscript{137} Prior to the implementation of Rule 706, power to appoint an expert was found within the inherent authority of the court. Today, where an expert is not called as a witness, the authority to appoint the expert derives also from the court’s inherent authority, not from Rule 706. \textit{See Reed v. Cleveland Board of Education, 607 F.2d 737, 746 (6th Cir. 1979)}.
\item \textsuperscript{138} \textit{See supra note 4} and accompanying text (discussing the use of medical experts).
\item \textsuperscript{139} Hand, \textit{supra note 4}, at 56.
\item \textsuperscript{140} 86 P. 695, 702 (1906).
\item \textsuperscript{141} Ladd, \textit{supra note 6}, at 429 n.50.
\end{itemize}
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New York City issued its report and recommendations on the use of impartial medical testimony in medical malpractice lawsuits.\textsuperscript{142} As the committee notes to Rule 706 point out, attorneys are reluctant to seek the appointment of an impartial expert because of the fear that the expert acquires an aura of unmerited infallibility.\textsuperscript{143} Such fear is probably especially intense when the party opposing the expert fears the witness will fail to support that party’s theory of the case.\textsuperscript{144}

The Rules Committee recognizes that even though actual court appointment of an expert is rare, “[t]he availability of the procedure in itself decreases the need for resorting to it.”\textsuperscript{145} Rule 706, Notes of Advisory Committee on 1972 Proposed Rules. Eastern Air Lines, Inc. v. McDonnell Douglas Corp.\textsuperscript{146} illustrates this point. The dispute concerned damages for breach of contract to manufacture and deliver 99 jet airplanes. Eastern’s primary expert witness placed damages from delivery delays at $23,400,000. McDonnell’s expert opined that Eastern had actually saved at least $1,294,000 due to the late delivery. The discrepancy was a mere $22,106,000. A jury awarded Eastern some $25 million in damages.\textsuperscript{147}

The Fifth Circuit in reversing and remanding for a new trial, observed that estimating a major airline’s lost profits based on such facts as the case presented was a tremendously complicated project.\textsuperscript{148} The court pointed out that the trial judge had the discretion to call an expert witness of its own.\textsuperscript{149} The panel reasoned:

\textsuperscript{143} Fed. R. Evid. 706 Advisory Committee note.
\textsuperscript{144} See Gartner v. Hendrix, No. Civ. A-90-4980, 1991 WL 162121 (E.D. La. 1991)(noting that “nary a peep was heard” from any party regarding disenchantment with the court-appointed medical expert until after the doctor issued his report).
\textsuperscript{145} Fed. R. Evid. 706 Advisory Committee note.
\textsuperscript{146} 532 F.2d 957 (5th Cir. 1976).
\textsuperscript{147} Id. at 961.
\textsuperscript{148} Id. at 1000.
\textsuperscript{149} Id.
Because a court-appointed witness would be unconcerned with either promoting or attacking a particular estimate of Eastern's damages, he could provide an objective insight into the $24.5 million difference of opinion between the parties' experts. Indeed, the mere presence of a neutral expert may have, in Judge Prettyman's phrase, "a great tranquilizing effect" on the experts retained by Eastern and McDonnell.  

While Rule 706's provision for appointed experts is ideally suited for technically complex cases, it is not without critics. In fact, case law shows that some judges reject the whole concept of court-appointed experts as a direct attack on the adversarial system. In *Kian v. Mirro Aluminum Co.* the court, in a complicated breach of patent license case, denied the defendant's motion to appoint an impartial expert to inform the jury what the case was about. The judge found that the issues were within the grasp of the jury, and reasoned that the presence of the court-sponsored witness could create a strong, if not overwhelming, impression of impartiality and objectivity, which "could potentially transform the trial by jury into a trial by witness."  

Other judges appear to embrace the use of court-appointed experts. In *Repetitive Stress Injury Cases Pending in the U.S. Dist. Court for the Eastern Dist. of New York v. Northern Telecom, Inc.* the trial judge was faced with a number of suits for injuries to the wrist and hand (Carpal Tunnel Syndrome) allegedly caused by the routine use of computers, adding machines, supermarket checkout scanners and other mechanical and electrical devices. The court indicated that a court-appointed panel of experts, in mass

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150 Id. (citations omitted). In Ohio Public Interest Campaign v. Fisher Foods, Inc., 546 F. Supp. 1 (N.D. Ohio 1982), the court appointed an advisor to interpret data in a food retailer's price fixing case after the parties could not agree on the data and methodologies to use in calculating damages.


152 Id. at 356. The judge in *Kian* also denied the defendant's motion to strike plaintiff's demand for a jury trial. Id. at 355. Defendant had contended that the case was too complex for a jury to understand.

litigation cases, might contribute to an overall effort to "minimize litigation costs and to help achieve satisfactory resolution of individual cases when scientific information concerning injuries and causation and the legal theories of the cases are fully developed at an early state of the litigation." 154

The court stated that such appointed experts could be shared in order to eliminate redundant testimony and expenses.155 The court also advocated use of court-appointed panels of experts "both to advise the court on scientific matters and to develop protocols for design and use by employees that may help reduce the probability of future harm."156 The court concluded, "By involving experts and representatives of workers, producers and the medical profession who are significantly affected by the litigation, the judicial process can serve a proactive as well as a compensatory function."157

Appointment of impartial experts at an early stage in the litigation not only helps the judge and the parties more readily bring complex issues into focus, but it could avert the types of discovery harassment which are becoming more and more common with regard to experts. Furthermore, knowledge that an impartial expert would be involved in the case could deter frivolous lawsuits. The practice could also result in earlier resolution of litigation on summary judgment.

For example, in Hemstreet v. Burroughs Corp.,158 use of an impartial expert in a patent case led to a summary judgment. Plaintiff, the losing party, argued that granting summary judgment was improper because the court unfairly relied on the court-appointed expert to resolve several genuine issues of material fact. The court rejected the argument, pointing out that the expert was appointed

154 Id. at 587.
155 Id.
156 Id.
157 Id.
to "increase the court’s understanding of the technical matters presented." The expert was strictly instructed to confine his analysis to a review of the materials submitted by the parties. The court stated that the expert offered no independent findings, conclusions, or recommendations, and that the decision to grant summary judgment was based on the evidence submitted by the parties. The court concluded:

A busy trial court faced with complex technology may require independent education or analysis if it is to understand the technology before the trial. The parties nominated [the expert] and agreed that he is an independent expert. If a motion for summary judgment appears to have merit a court will need some education about the technology at an earlier stage of the proceedings but it will not need independent findings. That is this case. What was sought here was an independent explanation of the technology and assistance in understanding the positions of the parties’ experts.

Complex issues of science and technology play an ever increasing role in litigation. We truly live in the Information Age where data, statistics, facts of all kinds are at one’s fingertips due to media saturation and computer-based information systems. Product liability, patent, antitrust, trademark, securities, employment rights, contract, toxic tort and other contexts within which litigation occurs will only become more fact, science and technology intense. The adversarial system must evolve with the realities of our age if confidence is to be maintained in the outcome of litigation. Undeniably, the rules of procedure are shaped by social, political and economic factors. The medieval ordeals were halted when society advanced to a point where their methods of proof were no longer

159 Id. at 1.
160 Id.
161 Id. at 2.
163 See Richardson, supra, note 1, § 1.2 at 3.
perceived as reliable. Conceivably, Rule 706 provides the procedural mechanism to maintain confidence in the judicial system in this Information Age.

F. EXPERT WITNESSES: FORM OVER SUBSTANCE TODAY

Nevertheless, preliminary results of a recent study concerning the role of court-appointed experts which was undertaken by the Federal Judicial Center (FJC) shows that judges seldom employ Rule 706.164 Barriers to the appointment of experts are diverse, according to the judges polled by the FJC. One barrier noted is that parties rarely request a court appointed expert. A second barrier is the judge’s fear of an appearance of impropriety should ex parte communications between the judge and the expert occur.165 Judges also raised the practical problem of the expert’s compensation. The study found that many parties are reluctant to pay experts whom they did not retain and who offer testimony fatal to their case. Moreover, problems arise when an indigent party is unable to pay his share or when a party fails to pay his share to the expert, thus requiring the judge to follow additional procedures to enforce payment.

Practical problems aside, the principal reason both judges and attorneys look warily at Rule 706 is because of a court appointed expert’s potential to affect a case outcome.166 The FJC study found that the outcomes of cases which used a court-appointed expert were generally consistent with the expert’s advice.167 The authors point out, however, “since an inability to decide the case without an

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164 Joe S. Cecil & Thomas E. Willging, Defining a Role for Court-Appointed Experts, FJC Directions, August 1992.
165 Judges polled by the FJC expressed frustration that Rule 706 only addresses use of appointed experts as testifying witnesses. Several judges state that the rule should address use of appointed experts as technical advisors in pretrial proceedings. Id. at 13.
166 Kian, supra note 151.
167 The study found:
Of fifty-eight responses to this question [Do experts affect outcome?] . . . , only two indicated that the result was not consistent with the guidance given by the expert. Both of these cases involved
independent expert was a prerequisite to the appointment, it follows that the testimony of the appointed expert is likely to be persuasive.\textsuperscript{168}

Attorneys fear the expert will take the case out of their hands. On their part, judges appoint experts only in cases they deem otherwise unresolvable. Clearly, the issue of court-appointed experts goes to the heart of the adversarial system. In fact, the FJC study found, "A number of judges acknowledged that relying only on parties' experts...may hinder a reasoned solution to the conflict, but found such concerns to be outweighed by the importance of maintaining the adversarial system and the control exercised by the parties in the presentation of evidence."\textsuperscript{169}

Consider that statement again. The adversarial system and party control of proceedings are more important to these judges than a reasoned decision. Is this not form over substance? Have we come full circle? Centuries ago, trial by ordeal was abandoned when society lost confidence in the method's ability to provide a fair and honest solution to a dispute. The whole system was abandoned when trial by ordeal and oath came to be perceived as promoting form over substance, when it became apparent that the methods of trial were more important than the result. Are the partisan experts of today, sought out and paid for by a party to bolster that party's case, no different than the oath helpers of centuries ago? Perhaps the adversarial system's reliance on partisan expert witnesses to reveal the truth is a figurative and literal ordeal which has become obsolete.

Is the end near for the use of experts? Or is the end near for the use of partisan experts? Only time will tell. And as a review of the evolution of expert witness use shows, time, indeed, \textit{will} tell.

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bench trials in which the judge pursued a legal analysis that was independent of the technical issues.

\textit{Id.} at 14.

\textsuperscript{168} \textit{Id.} at 14.

\textsuperscript{169} \textit{Id.} at 8.