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RULE 706: AN UNDERUTILIZED TOOL TO BE USED WHEN  
PARTISAN EXPERTS BECOME “HIRED GUNS”

JUDGE BRADFORD H. CHARLES\*

**D**URING the past fifteen years as a trial judge, I have begun to carefully look at the faces of jurors when the inevitable “How much are you paid?” question is asked of an expert. The expressions I routinely observe range from shock to disgust. I have seen jurors glance at one another and roll their eyes. I have observed many jurors shake their heads in disbelief. I can almost hear these citizens thinking: “He is nothing but a hired gun.” While I know that experts play an important role in educating jurors about matters that are beyond common understanding, I have increasingly observed that cases are won because of the quality of lay-factual witnesses and not the eloquence of the partisan experts.

Perhaps because my anecdotal observations have been shared by others, the cadence of criticism regarding America’s utilization of partisan experts has begun to approach snare-drum intensity. In this commentary, I will endeavor to chronicle some of the criticism that is being leveled at our current system of adversarial expert testimony. I will then identify an alternative that is finding increasing support among academicians and judges—the appointment of independent experts by the court.

I. AMERICA’S SYSTEM OF PARTISAN EXPERTS

The American judicial system is based upon the precept that truth can best be determined within an adversarial system. Proponents of the partisan expert system argue, with some justification, that truth can be discerned when a jury is presented with two opposing viewpoints that can each be tested through the crucible of cross-examination. Yet, many now believe that our adversarial paradigm does not translate well to scientific analysis and may be detrimental to a court’s fundamental truth-gathering purpose in a science-dependent dispute.

Outside the United States, most of the world’s expert witnesses are selected by judges and are intended to be neutral and independent. For example, in Japan,

[e]xperts are called by, and asked to assist, the judge in making his or her determinations in the case, when necessary. . . . If the

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court decides an expert is needed, it selects the expert and provides him or her with the necessary case materials to help decide the contested expert issue.<sup>1</sup>

Similarly, in Germany,

[a]fter both parties make claims in the pleadings stage of the case, the judge must determine whether an expert will be necessary to decide a contested issue. If so, the judge will appoint an expert to assist him or her in the determination of the contested issue. To determine who to select, the judge may request the parties to nominate an expert, but more often will select the expert himself or herself.<sup>2</sup>

Even in England, the incubator for American common law, a process has been created to promote independent court-appointed experts: “In certain cases, the court may request that a single expert address an issue rather than each party address it separately. The selection of the expert may be done by the parties or, if they cannot agree, by the judge based on a list provided by the parties.”<sup>3</sup> Generally, European legal scholars view the American system of partisan experts with curiosity and thinly veiled disdain.<sup>4</sup>

In the world of American legal academia, the partisan expert process has long been the subject of criticism. In 1901, Judge Learned Hand observed that expert bias in favor of the party paying compensation could result in outcomes that are not scientifically supportable.<sup>5</sup> Twenty years later, famous legal scholar John Henry Wigmore noted:

But the practice [of using expert witnesses] under the present method has for years exhibited shortcomings which are lamentable.

.....

The principle feature of the breakdown seems to be the *distrust* of the expert witness, as one whose testimony is shaped by his *bias for the party calling him*. That bias itself is due, partly to the special fee which has been paid or promised him, and partly to his prior consultation with the party and his self-committal to a particular view. His candid scientific opinion thus has had no

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1. Andrew W. Jurs, *Balancing Legal Process with Scientific Expertise: Expert Witness Methodology in Five Nations and Suggestions for Reform of Post-Daubert U.S. Reliability Determinations*, 95 MARQ. L. REV. 1329, 1396 (2012) (footnote omitted).

2. *Id.* at 1387 (footnotes omitted).

3. *Id.* at 1380 (footnote omitted).

4. *See id.*; *see also* Oscar G. Chase, *American “Exceptionalism” and Comparative Procedure*, 50 AM. J. COMP. L. 277 (2002); Adam Liptak, *In U.S., Expert Witnesses Are Partisan*, N.Y. TIMES, Aug. 11, 2008, [http://www.nytimes.com/2008/08/12/us/12experts.html?pagewanted=all&\\_r=0](http://www.nytimes.com/2008/08/12/us/12experts.html?pagewanted=all&_r=0) [<http://perma.cc/HL9Y-6HU9>].

5. *See generally* Learned Hand, *Historical and Practical Considerations Regarding Expert Testimony*, 15 HARV. L. REV. 40 (1901).

fair opportunity of expression, or even formation, swerved as he is by this partisan committal.<sup>6</sup>

More recent criticism is even more pointed. A commentator from the University of Georgia College of Law described expert witnesses as “mercenaries, prostitutes, or hired guns . . . whose opinions are sold to the highest bidder.”<sup>7</sup> Professor Joseph Sanders of the University of Houston Law Center observed:

It is the legal system’s commitment to adversarialism in the form of party control of expert witnesses that creates substantial pressures on experts to adopt a more party-oriented point of view.

. . . .

Party control over the selection of experts produces bias not only by pushing experts to a more one-sided view than the individual expert might express if placed in a different role; it produces bias in the selection process itself. Witnesses are chosen because they prefer a point of view, and the very choice of experts clouds the degree of consensus that may surround a topic.<sup>8</sup>

Even harsher were the words of Professor Jeffrey L. Harrison of the University of Florida Levin College of Law:

Unlike virtually any other business, expert witnesses are not typically held accountable in either tort or contract law for their commercial activities. This means that many are inclined to deliver what the market demands—partisan, biased, or plainly dishonest testimony—without concern for the costs this testimony may impose on others. This immunity from the internalization of the social cost of their testimony is hard to reconcile with any moral or economic standard.<sup>9</sup>

The language outlined above mirrors what many other legal commentators have written.<sup>10</sup>

6. 1 JOHN HENRY WIGMORE, *A TREATISE ON THE ANGLO-AMERICAN SYSTEM OF EVIDENCE IN TRIALS AT COMMON LAW* § 563 (2d ed. 1923).

7. Yunwei Jiang, *Reconsidering the Medical Expert Witness System* 3 (Jan. 1, 2006) (unpublished LL.M thesis, University of Georgia School of Law) (on file with Digital Commons @ Georgia Law).

8. Joseph Sanders, *Science, Law, and the Expert Witness*, 72 *LAW & CONTEMP. PROBS.*, Winter 2009, at 63, 74, 76–77.

9. Jeffrey L. Harrison, *Reconceptualizing the Expert Witness: Social Costs, Current Controls and Proposed Responses*, 18 *YALE J. ON REG.* 253, 253 (2001).

10. See, e.g., David E. Bernstein, *Expert Witnesses, Adversarial Bias, and the (Partial) Failure of the Daubert Revolution*, 93 *IOWA L. REV.* 451 (2008); Edward K. Cheng, *Same Old, Same Old: Scientific Evidence Past and Present*, 104 *MICH. L. REV.* 1387 (2006); Michael H. Graham, *Impeaching the Professional Expert Witness by a Showing of Financial Interest*, 53 *IND. L.J.* 35 (1977); Susan Haack, *Irreconcilable Differences? The Troubled Marriage of Science and Law*, 72 *LAW & CONTEMP. PROBS.*, Winter 2009, at 1; Jennifer L. Mnookin, *Expert Evidence, Partisanship, and Epistemic Competence*, 73 *BROOK. L. REV.* 1009 (2008); David M. Paciocco, *Unplugging Jukebox Testimony in an*

Expert witnesses themselves have begun to complain about pressure from lawyers and unethical dilemmas faced by expert witnesses in a partisan system.<sup>11</sup> In a particularly poignant letter of confession, former expert witness Steven Moss wrote an op-ed entitled *Opinion for Sale: Confessions of an Expert Witness* in which he stated:

Every day, in courtrooms across the country, economists, statisticians, engineers, doctors, and psychologists raise their right hand and swear to tell the truth. Expert witnesses are used in all types of cases . . . .

. . . .

As my experience . . . taught me, experts, who are hired and paid by one side in a case, get compensated for saying what the lawyers want to hear. The lawyers invite potential witnesses to their offices for interviews and pepper them with questions, but the question they care most about is “Can you prove my case?”

With such a big paycheck on the line, it’s easy to find yourself looking for ways to answer “yes.” The expert’s thought process goes something like this: In most cases, both sides have experts, so it’s perfectly ethical for me to focus on demonstrating that my client is right and that the opposition is wrong. After all, the opposing side will have an expert to do the same, and everything will balance out.

Once you start thinking this way, it’s easy for an expert, his training in the scientific method of inquiry notwithstanding, to drift further and further away from analytic neutrality. No one is lying, exactly, but this isn’t a search for truth.

. . . .

A [few years ago], I [realized] that I was increasingly arguing—in the courtroom and on the tube—on behalf of interests that I didn’t care about or flatly opposed . . . .

But what troubled me even more was the recognition that the system wasn’t as fair and balanced as I had led myself to believe. While it’s true that there’s more than one side to every argument, more often than not only one has the financial resources to get its story heard. Not everyone has access to a top-

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*Adversarial System: Strategies for Changing the Tune on Partial Experts*, 34 QUEEN’S L.J. 565 (2009); Jack B. Weinstein, *Improving Expert Testimony*, 20 U. RICH. L. REV. 473, 482 (1986) (“An expert can be found to testify to the truth of almost any factual theory, no matter how frivolous . . . .”).

11. See Thomas G. Gutheil, Michael Lamport Commons & Patrice Marie Miller, *Withholding, Seducing, and Threatening: A Pilot Study of Further Attorney Pressures on Expert Witnesses*, 29 J. AM. ACAD. PSYCHIATRY & L. 336 (2001); Michael J. Saks, *Accuracy v. Advocacy: Expert Testimony Before the Bench*, 90 TECH. REV., Aug.–Sept. 1987, at 42, 43–49; John B. Molloy, *The Difficulties of Being an Expert Witness*, NEWSL. 7(5) (H.K. Int’l Sch.), May 1998, available at <http://www.hkis.org.hk/ufiles/ar04.pdf> [<http://perma.cc/627G-SKDX>].

shelf expert at \$600 an hour. The winner is too often the side wealthy enough to purchase the highest-caliber experts. The pretense that I was just a necessary cog in the adversarial process became increasingly hard to believe.<sup>12</sup>

Concerns about America's partisan expert system have not escaped the attention of mainstream media, either. In 2008, the *New York Times* published an article entitled *In U.S., Expert Witnesses Are Partisan*.<sup>13</sup> The *Times* quoted famed trial lawyer Melvin Belli as stating, "If I got myself an impartial witness . . . I'd think I was wasting my money."<sup>14</sup> The *Times* also quoted University of Michigan Law Professor Samuel R. Gross:

To put it bluntly, in many professions, service as an expert witness is not considered honest work . . . . The contempt of lawyers and judges for experts is famous. They regularly describe expert witnesses as prostitutes.<sup>15</sup>

Judges have also leveled criticism at the traditional method of presenting adversarial expert evidence. In a 2002 report predicated upon a survey of all active federal district court judges, the Federal Judicial Center reported that the biggest problem with expert testimony is that "[e]xperts abandon objectivity and become advocates for the side that hired them."<sup>16</sup> In a case almost dripping with sarcasm, a Maryland appellate court stated:

In recent years the courts in Maryland and elsewhere have experienced the phenomenon of the "professional expert" whose opinions are oftentimes shaded in favor of the party who pays his or her fee. With the existence of locator services, a resourceful attorney can contact an expert to testify on nearly any subject that

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12. Steven Moss, *Opinion for Sale: Confessions of an Expert Witness*, LEGAL AFF. (Mar.–Apr. 2003), [http://www.legalaffairs.org/issues/March-April-2003/review\\_marapr03\\_moss.msp](http://www.legalaffairs.org/issues/March-April-2003/review_marapr03_moss.msp) [<http://perma.cc/RS9Y-EDM4>].

13. See Liptak, *supra* note 4.

14. See *id.* (internal quotation marks omitted).

15. *Id.* (internal quotation marks omitted). Similarly, the *Los Angeles Times* rhetorically asked in an article about kidnapping: "Do expert witnesses provide reliable testimony to help jurors decide a criminal case? Or are they paid advocates obligated to provide favorable testimony for the party footing the bill?" See Associated Press, *Sex Slave Case Judge Hits Value of Expert Witnesses*, L.A. TIMES, Jan. 12, 1986, [http://articles.latimes.com/1986-01-12/local/me-27263\\_1\\_expert-witnesses](http://articles.latimes.com/1986-01-12/local/me-27263_1_expert-witnesses) [<http://perma.cc/GKE4-RSUQ>] (questioning the value of expert witnesses); see also Ellen O'Brien, *Rent an Opinion: The Expert Witness 'Industry'*, PHILA. INQUIRER (May 11, 1986), [http://articles.philly.com/1986-05-11/news/26047406\\_1\\_expert-rainy-night-legal-system](http://articles.philly.com/1986-05-11/news/26047406_1_expert-rainy-night-legal-system) [<http://perma.cc/2XSP-RU47>].

16. See Carol Krafka, Meghan A. Dunn, Molly Treadway Johnson, Joe S. Cecil & Dean Miletich, *Judge and Attorney Experiences, Practices, and Concerns Regarding Expert Testimony in Federal Civil Trials*, 8 PSYCHOL. PUB. POL'Y & L. 309, 328 (2002). This rating was generated by asking the respondent to use a scale of 1 (very infrequent) to 5 (very frequent) to denote the frequency with which they encountered a particular problem. See *id.* at 314.

calls for the opinion of an expert. Seemingly, an “expert” can be found to testify to virtually anything. In Maryland, as in most other parts of the country, if an attorney needs an expert medical witness to state that the plaintiff suffered a whiplash injury caused by a rear-end collision, call Dr. A; if the defense needs a medical expert to dispute that fact, call Dr. B.<sup>17</sup>

In some cases, courts have begun to reject the testimony of experts who are deemed to be little more than cheerleaders for their clients’ position.<sup>18</sup>

To be intellectually fair, any evaluation of expert testimony must acknowledge that many experts are honest and adhere to the rigors of scientific inquiry. For as many times as an expert will skew his or her testimony in favor of the party who is paying the bills, there are undoubtedly other occasions where potential experts will quietly tell a client, “I cannot, with intellectual integrity, support what you are suggesting.” It is impossible to quantify the number of potential civil cases that simply evaporate because the plaintiff’s lawyer cannot support a theory with credible expert testimony. For each of these potential disputes that never become actual cases, the contemplated defendant never has to hire counsel or expend any cost of defense.

Acknowledging that there are advantages to a partisan system of expert testimony still does not cure the problem created by the perception of partiality. An increasingly cynical public is exposed, on a daily basis, to partisan political parties and even allegedly partisan news outlets. When these members of the public are called upon to serve as jurors, they will invariably view even the most intellectually rigorous of experts through a prism that focuses upon the source of that expert’s compensation—and the amount of the compensation paid to experts is staggering.

In America, expert witness services now represent a billion dollar industry. In fact, three expert witness firms are now publicly traded on Wall Street.<sup>19</sup> Employing a survey of over 1,000 expert witnesses in over 300 fields of expertise, SEAK, Inc. published the national guide to expert witnesses’ fees and billing procedures in 2004.<sup>20</sup> In that guide, SEAK re-

17. *Wrobleski v. de Lara*, 708 A.2d 1086, 1091–92 (Md. Ct. Spec. App. 1998) (footnote omitted) (citation omitted).

18. *See, e.g., In re Bextra & Celebrex Mktg. Sales Practices & Prod. Liab. Litig.*, 524 F. Supp. 2d 1166 (N.D. Cal. 2007); *Pop v. Yarborough*, 354 F. Supp. 2d 1132, 1140–41 (C.D. Cal. 2004); *Johnston v. United States*, 597 F. Supp. 374 (D. Kan. 1984). *But see Donahoe v. Arpaio*, Nos. CV 10–02756–PHX–NVW, CV11–009 02–PHX–NVW, 2013 WL 5604349, at \*10 (D. Ariz. Oct. 11, 2013) (declaring that when jury is factfinder, “general rule” is that “bias is not a permissible reason for the exclusion of expert testimony” (internal quotation marks omitted)).

19. *See Steven Feola & Richard A. Alcorn, Expert Witness Advocacy: Changing Its Culture*, ARIZ. ATT’Y, Mar. 2009, at 24, 24, *available at* [https://www.myazbar.com/AZAttorney/PDF\\_Articles/0309expert.pdf](https://www.myazbar.com/AZAttorney/PDF_Articles/0309expert.pdf) [<https://perma.cc/VA59-427L>].

20. ALEX BABITSKY, STEVEN BABITSKY & JAMES J. MANGRAVITI, JR., SEAK, INC., NATIONAL GUIDE TO EXPERT WITNESS FEES AND BILLING PROCEDURES (2004).

ported that almost all experts charge for their time “portal-to-portal.”<sup>21</sup> The average rate charged by experts for in-court testimony was reported as \$385 per hour, and the average preparation time charged by experts was \$254 per hour.<sup>22</sup> Moreover, most experts imposed a minimum daily charge for time spent in court or in a deposition.<sup>23</sup> Even in relatively small Lebanon County, Pennsylvania, we routinely encounter expert witnesses who are paid \$5,000 per day. When one recognizes that this daily compensation can represent up to one-quarter of many jurors’ *annual* income, it becomes easy to recognize why jurors view experts with skepticism and even cynicism.

## II. AN ALTERNATIVE APPROACH

The law provides an alternative to the use of partisan experts. Both the Federal Rules of Evidence and the Pennsylvania Rules of Evidence contain a Rule 706 that authorizes court-appointment of independent expert witnesses.<sup>24</sup> Federal Rule of Evidence 706 states:

On a party’s motion or on its own, the court may order the parties to show cause why expert witnesses should not be appointed and may ask the parties to submit nominations. The court may appoint any expert that the parties agree on and any of its own choosing. But the court may only appoint someone who consents to act.<sup>25</sup>

Federal Rule of Evidence 706 outlines the role that must be played by a court-appointed expert, authorizes the court to disclose the expert’s court-appointed nature, and states “this rule does not limit a party in calling its own experts.”<sup>26</sup> Pennsylvania Rule of Evidence 706 is similar and provides:

Where the court has appointed an expert witness, the witness appointed must advise the parties of the witness’s findings, if any. The witness may be called to testify by the court or any party. The witness shall be subject to cross-examination by any party, including a party calling the witness. In civil cases, the witness’s deposition may be taken by any party.<sup>27</sup>

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21. *Id.* at 7. SEAK reported that 86% of experts charge for all time spent between the time they leave their office and return to it. *Id.*

22. *Id.* at 4.

23. *Id.* at 4–5.

24. Because FED. R. EVID. 706 and PA. R. EVID. 706 share the same number and are substantially similar in their focus, both will hereafter be collectively referenced as Rule 706.

25. FED. R. EVID. 706.

26. *Id.*

27. PA. R. EVID. 706.



Both of the above rules are the logical extension of a long-standing common law precept that authorizes judges to question witnesses.<sup>28</sup> This common law authority was summarized by one widely-respected commentary as follows:

The [judicial] system is a means to the end of disclosing truth and administering justice. In order to achieve that same end, the judge may exercise various powers to intervene to supplement the parties' evidence.

More specifically, the judge has the powers to call and question witnesses. Under the case law and Federal Rule of Evidence 614(b), the judge has discretion to examine any witness to clarify testimony or to bring out needed facts omitted by the parties. The trial judge is not a mere umpire or passive moderator. Some appellate courts have even gone to the length of stating that the trial judge may have a "duty" to question witnesses.<sup>29</sup>

Most American judges do not independently appoint experts, largely due to a self-perceived fear of interfering with the adversarial process.<sup>30</sup> However, this is changing. An ever-expanding body of case law is evolving under Rule 706. In *Gorton v. Todd*,<sup>31</sup> the Federal Court for the Eastern District of California determined that Rule 706 could be invoked when a judge weighs the following factors:

- (1) Whether expert testimony is necessary or significantly useful for the trier of fact to comprehend a material issue in a case.
- (2) Whether the moving party has produced some evidence, admissible or otherwise, that demonstrates a serious dispute that could be resolved or understood through expert testimony.
- (3) Whether certain circumstances or conditions of a party limit the effectiveness of the adversary process to result in accurate factfinding.

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28. See, e.g., *Commonwealth v. Lanza*, 323 A.2d 178, 179–80 (Pa. Super. Ct. 1974) (holding that defendant's right to fair and impartial trial were not prejudiced by judge's direct questioning of witnesses).

29. See 1 MCCORMICK ON EVIDENCE § 8, at 37–39 (Kenneth S. Broun ed., 7th ed. 2013) (footnotes omitted); see also *United States v. Catalan-Roman*, 585 F.3d 453, 471 (1st Cir. 2009) (noting that trial judge is not "mere umpire," but rather "governor" of trial with right to participate actively); *Stevenson v. D.C. Metro. Police*, 248 F.3d 1187, 1190 (D.C. Cir. 2001) ("[T]he precepts of fair trial and judicial objectivity do not require a judge to be inert." (internal quotation marks omitted)); *United States v. Rodriguez-Rodriguez*, 685 F. Supp. 2d 293, 297 (D.P.R. 2010) (stating that judge is not "bloodless automaton" (internal quotation marks omitted)).

30. See Andrew W. Jurs, *Questions from the Bench and Independent Experts: A Study of the Practices of State Court Judges*, 74 U. PITT. L. REV. 47 (2012). In this article, Professor Jurs conducted a survey that revealed that 77% of state trial judges have yet to appoint an independent expert due to "concerns about interference with adversarial norms." See *id.* at 78.

31. 793 F. Supp. 2d 1171 (E.D. Cal. 2011).

(4) Whether the legal basis of plaintiff's claim entitles him to special consideration by the courts.<sup>32</sup>

Essentially, the court in *Gorton* declared that Rule 706 could be helpful when the amount in controversy is significant and when circumstances arise that would inhibit the fact-finder's ability to discern truth based exclusively upon the parties' partisan experts.<sup>33</sup>

Well-known Judge Richard Posner and United States Supreme Court Justice Steven Breyer have both written in support of court-appointed neutral experts. In a decision he authored in 1994, Judge Posner recommended "asking each party's hired expert to designate a third, a neutral expert who would be appointed by the court to conduct the necessary studies."<sup>34</sup> More recently, Judge Posner authored an opinion in which he specifically proposed that the district court appoint a neutral expert:

Turning to the technical statistical evidence . . . we recommend that the district judge use the power that Rule 706 of the Federal Rules of Evidence expressly confers upon him to appoint his own expert witness, rather than leave himself and the jury completely at the mercy of the parties' warring experts. The main objection to this procedure and the main reason for its infrequency are that the judge cannot be confident that the expert whom he has picked is a genuine neutral. The objection can be obviated by directing the party-designated experts to agree upon a neutral expert whom the judge will then appoint as the court's expert. The neutral expert will testify (as can, of course, the party-designated experts) and the judge and jury can repose a degree of confidence in his testimony that it could not repose in that of a party's witness. The judge and jurors may not understand the neutral expert perfectly but at least they will know that he has no axe to grind, and so, to a degree anyway, they will be able to take his testimony on faith.<sup>35</sup>

While less direct than Judge Posner, Justice Breyer noted several concerns that occur "when law and science intersect."<sup>36</sup> Citing an amicus brief filed by the prestigious New England Journal of Medicine, Justice Breyer observed:

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32. *Id.* at 1185.

33. *Id.* at 1171.

34. *Indianapolis Colts, Inc. v. Metro. Balt. Football Club Ltd.*, 34 F.3d 410, 415 (7th Cir. 1994), *abrogation recognized by Advanced Tactical Ordinance Sys., LLC v. Real Action Paintball, Inc.*, 751 F.3d 796 (7th Cir. 2014).

35. *In re High Fructose Corn Syrup Antitrust Litig.*, 295 F.3d 651, 665 (7th Cir. 2002) (citations omitted).

36. *See Gen. Elec. Co. v. Joiner*, 522 U.S. 136, 148 (1997) (Breyer, J., concurring).

[A] judge could better fulfill this gatekeeper function if he or she had help from scientists. Judges should be strongly encouraged to make greater use of their inherent authority . . . to appoint experts . . . Reputable experts could be recommended to courts by established scientific organizations, such as the National Academy of Sciences or the American Association for the Advancement of Science.<sup>37</sup>

For this author, the case that highlighted the need for a neutral, independent expert was a divorce dispute that focused upon the valuation of the husband's dental practice.<sup>38</sup> Both parties presented partisan experts. Using very different but equally suspect methodologies, the husband's expert valued the dental practice at \$276,300.00, while the wife's expert opined a value of \$614,500.00.<sup>39</sup> To put this difference in perspective, if the wife's valuation represented a superstar baseball player with a batting average of .350, then the husband's valuation would represent a player with a batting average of only .158.<sup>40</sup> Simply stated, neither player—and neither valuation—could be considered in the same league.

In a written opinion dated December 2, 2009, the jurist wrote:

We cannot in good conscience adopt either of the valuations proffered by [the parties' partisan experts]. Given the stakes involved—in excess of a third of a million dollars in valuation difference—and given our desire to render a decision based upon reality and not perspective, we will reject both business valuations proffered by both parties.<sup>41</sup>

Citing Rule 706, we gave the following reasons for our decision to appoint a neutral independent expert:

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37. *Id.* (alterations in original) (internal quotation marks omitted). After quoting this passage from the New England Journal of Medicine's brief, Justice Breyer added the following:

Given this kind of offer of cooperative effort, from the scientific to the legal community, and given the various Rules-authorized methods for facilitating the courts' task, it seems to me that *Daubert's* gatekeeping requirement will not prove inordinately difficult to implement; and that it will help secure the basic objectives of the Federal Rules of Evidence; which are, to repeat, the ascertainment of truth and the just determination of proceedings.

*Id.*; see also JACK B. WEINSTEIN, *INDIVIDUAL JUSTICE IN MASS TORT LITIGATION* 116 (1995) (explaining court should sometimes “go beyond the experts proffered by the parties,” and “utilize its powers to appoint independent experts under Rule 706 of the Federal Rules of Evidence”).

38. *Davis v. Davis*, No. 2006–20176 (Pa. D. & C. Dec. 2, 2009).

39. See *id.*

40. The algebraic formula used for this calculation is as follows:

If  $61,400,000 = .350x$ , then  $x = 1,754,285$ , then

$276,300 = .158x$ .

41. *Davis*, No. 2006–20176, at 17–18.

(1) We have rejected the valuation opinions rendered by both the experts who testified before the Special Master. Both expert opinions are flawed to such a degree that it would be patently unfair for us to adopt either.

(2) Although we have the authority to formulate a compromise value of our own that does not match the opinion of either expert, we candidly admit that we lack the expertise to do so.

(3) Had both experts used an identical valuation methodology, it might have been possible for us to compute a compromise valuation by substituting our own component data for any non-credible data used by experts. Unfortunately, the two experts who testified in this case used completely different valuation models. We lack the training and expertise to choose between those models.

(4) Although we doubt that the true value of HUSBAND's business is as high as [wife's expert] estimates or as low as [husband's expert] calculates, it is possible that a credible analysis based upon generally accepted accounting principles could yield a result similar to the opinions of one of the current experts. For us to simply use a figure that "splits the difference" would be to engage in blatant speculation. We prefer not to do so.

(5) In many cases, a significant obstacle to using court-appointed experts is the cost involved. In this case, that is an obstacle easily hurdled. These parties possess assets in excess of \$3,000,000. The difference in competing valuations alone exceeds one-third of a million dollars. Given the assets of the parties and the stakes involved, we do not perceive that cost should be a factor that would prevent Court-appointment of an expert.<sup>42</sup>

### III. POTENTIAL BENEFITS OF INVOKING RULE 706

From the admittedly less-than-comprehensive vantage point of this small county trial judge, the appointment of independent experts under Rule 706 can be beneficial in numerous respects:

(1) Cost reduction—Expert witnesses are expensive. In a partisan expert case, both parties hire separate experts and each separately pays for the advice and analysis that the expert provides. If the parties could agree to a court-appointed expert, they would divide the cost, thereby lowering each side's expert expenses by up to 50%.

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42. *Id.* at 20–21. After reaching the above conclusions, this Jurist ordered both parties to provide the names of three possible neutral experts. One name appeared on both lists, and we appointed him to conduct an evaluation. The number he generated was between the two extremes proffered by the partisan experts, but was much closer to the valuation number that the husband advocated.

(2) Unvarnished expression of opinion—Utilization of a court-appointed expert eliminates the “hired gun” perception. The only allegiance of a court-appointed expert is to the truth, and fact-finders will quickly recognize and appreciate this fact.

(3) Avoiding speculation—When two partisan experts provide disparate opinions, it will invariably become tempting for a fact-finder to “split the difference” between the parties’ two extremes. But this may not always reflect the truth. Moreover, the “split the difference” approach would inevitably encourage both parties to proffer even more extreme and unsupportable opinions so that the so-called “middle ground” is closer to the result the party wishes to achieve. The *Davis* case chronicled above is a perfect example of how an independent expert can help avoid speculation. The neutral expert appointed by the court in *Davis* rendered an opinion that was between the extremes of the two parties, but was nevertheless significantly closer to the opinion of the husband’s expert than it was to that of the wife’s expert. Had we speculated that “splitting the difference” would be fair, we actually would have valued the husband’s dental practice at an unrealistically high figure. Instead, the independent expert allowed us to fairly and accurately divide the parties’ marital estate.

(4) Foundational education—An independent expert can be helpful to educate a fact-finder on foundational scientific principles about which the parties themselves may not actively disagree. For example, an independent expert could “brief” the jury regarding underlying principles even before adversarial testimony begins. In such a process, the jury would have a basic understanding of the scientific foundation upon which the parties’ adversarial testimony could be constructed. Moreover, every court must recognize that understanding is a predicate to acceptance, and jurors have a tendency to afford credibility to the expert who initially educates them to the point of understanding. Appointing an independent expert to educate the jurors precludes the risk that a juror will place undue weight on the first expert who can provide an understandable explanation of what may be undisputed scientific principles.

(5) Debunking junk science—In their role as gatekeepers of evidence, judges are required to determine whether a scientific theory is reliable enough to be admitted in evidence. In federal courts, these questions are submitted via a so-called *Daubert* challenge.<sup>43</sup> In Pennsylvania, on the other hand, these types of challenges are submitted via what is commonly referred to as a *Frye*

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43. See *Daubert v. Merrell Dow Pharm.*, 509 U.S. 579 (1993); see also, e.g., *Oddi v. Ford Motor Co.*, 234 F.3d 136 (3d Cir. 2000) (denying expert testimony under *Daubert* standard).

motion.<sup>44</sup> Either way, the judge is asked to define whether a witness's theory is scientifically legitimate or merely "junk." When these very difficult questions are presented, judges can employ Rule 706 to appoint an expert who can assist in distinguishing science from hopeful conjecture. As stated by Professor Howard M. Erichson, "courts often use their own scientific experts not to testify to a jury, but rather to advise the court on such matters as the admissibility of other scientific evidence."<sup>45</sup>

(6) Promoting settlement—The appointment of an independent expert can be helpful in promoting an amicable resolution to a dispute. Judge Masterson of the United States District Court for the Eastern District of Pennsylvania put it this way:

We might also note that in the last two and a half years this Court has appointed impartial medical experts in approximately a dozen cases where there were sharp disputes between regularly appearing medical experts for plaintiffs and defendants. In every one of these cases, after the impartial medical expert had made his study and reported to counsel and the Court, the case was settled amicably by the parties. This is probably one of the most effective and desirable functions performed by an impartial medical expert.<sup>46</sup>

(7) Synthesizing scientifically contested issues—Issues sometimes arise where there may be "two schools of thought" within the scientific community. Through a *Frye-Daubert* motion or otherwise, the parties will invariably present experts who have a vested interest in one "school of thought" or the other. Each expert will refer to peer-reviewed studies that support their school of thought without crediting any contrary research. In this type of situation, an independent court-appointed expert can be tasked with the responsibility of conducting a comprehensive survey of available research in order to provide the court or the finder of fact with an untainted summary of all available information.

(8) Keeping the parties' experts honest—If or when the expert witness community comes to realize that courts will employ Rule 706, experts for hire will quickly come to the realization that their work will be subject to scrutiny by court-appointed, neutral experts who will be cloaked with the aura of independence. Experts will quickly learn that extremely partisan viewpoints will be

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44. *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923); see also, e.g., *Grady v. Frito-Lay, Inc.*, 839 A.2d 1038 (Pa. 2003) (rejecting expert testimony under *Frye* standard).

45. Howard M. Erichson, *Mass Tort Litigation and Inquisitorial Justice*, 87 GEO. L.J. 1983, 1994 (1999).

46. *Nebinski v. Am. Trading & Prod. Corp.*, 309 F. Supp. 936, 938 (E.D. Pa. 1970).

easier to criticize than those that may be more mainstream. By itself, the specter of an independent expert appointed under Rule 706 could help promote intellectual honesty among experts who otherwise might be tempted to push the envelope of scientific legitimacy.

#### IV. CONCLUSION

In many ways, the current practice of employing partisan experts is broken. In terms of costs, it is not working for litigants. In terms of affording unvarnished, unbiased opinion evidence from which the truth of a dispute can be discerned, it is not working for judges or juries. Indeed, one could provide a compelling argument that from a societal cost-benefit standpoint, our partisan expert process is not working for America.<sup>47</sup> Yet it persists as the primary paradigm for expert testimony in our courts. Why is this so?

The primary criticism of our current system—that partisan experts are biased in favor of the party hiring them—explains why it will be so difficult to shift to another paradigm. Utilizing a system of court-appointed experts requires the parties' counsel to cede control over the process to someone else—and any good attorney will recognize that ceding control creates a risk that the resulting work product could be damaging or even deadly to their client's chances in court. Because of this reality, it is unlikely that lawyers will step forward to change the existing system. Indeed, it is possible that the organized bar would actively oppose any move designed to shift control over expert testimony from counsel to courts.

No one can or should declare the death of America's partisan expert system. In some form, adversarial expert testimony will likely continue to have a place in American jurisprudence. However, every case where an expert overreaches as a result of partisan perspective further wounds the credibility of our current system and brings us closer to the day where courts—or perhaps even legislatures—will mandate a new expert witness paradigm.

The time has arrived for both judges and litigants to employ Rule 706 to supplement or supplant testimony presented by partisan experts. To the extent that litigation can be considered a quest for the truth, neutral, independent experts can facilitate this quest better than ones who are hired and paid by parties who are looking to advocate a particular point of view. No longer should jurors be seen shaking their heads or rolling their eyes in disgust when confronted with “hired guns.” Rather, fact-finders should be assisted in their quest for justice by independent experts who owe allegiance to nothing other than scientific truth.

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47. See Harrison, *supra* note 9.