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The Role of Expert Witnesses in German and U.S. Civil Litigation

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THE ROLE OF EXPERT WITNESSES IN GERMAN AND U.S. CIVIL LITIGATION

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I. INTRODUCTION

The U.S. and German civil trial systems differ not only in many details but also regarding their fundamentals. The U.S. civil trial system seems to be basically a battle of the parties in which the lawyers are protagonists and warlords.[1] The judge has most often only a passive role. In contrast, in German civil litigation, the judge generally has a very active role. The judge controls the proceedings, examines the witnesses and is always the decision maker.[2] Other differences include the lack of pre-trial discovery in Germany and the important role of court experts in German civil litigation. Due to the active role of German judges, American lawyers partly describe the German civil procedure system as inquisitorial.[3]

This article focuses on the difference between the role of experts in German and U.S. civil litigation. In theory, expert witnesses seem to be only a small detail in the whole system. However, considering their

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1. *See* John H. Langbein, *The German Advantage in Civil Procedure*, 52 U. CHI. L. REV. 823, 823 (1985)("lawyer-dominated system") [hereafter cited as Langbein, *German Advantage*].

2. *Id.* at 828 ("The [German] judge serves as the examiner-in-chief").

3. *See* STEPHAN LANDSMAN, THE ADVERSARY SYSTEM 49 (1984) ("judge-centered inquisitorial process").

importance in German and U.S. civil trial practice,[4] the role of expert witnesses in both systems is worth analyzing. What is the role of an expert witness in German and U.S. civil litigation? On the one hand, the expert could serve to support the interests of the party employing her expertise. Although this does not necessarily preclude the expert from also supporting the truth-finding process, any conflict between supporting one party and supporting the truth-finding process may result in manipulated or false testimony.[5] On the other hand, the expert could (only) support the decision-maker in finding the truth, and, in this sense, could be considered an extension of the decision-maker. These are the possible roles or functions of expert witnesses. However, to make the issues discussed in this analysis easier to conceptualise, consider the following hypothetical case, which will be referred to throughout the paper:

Paul goes to a hospital for an appendectomy. Except for his appendix, Paul is healthy. After the surgery, Paul feels worse. He experiences pain in his legs and arms and gets strong headaches when he is awake for more than three hours; neither conditions are common after an appendectomy. As a result of the pain and headaches, Paul has another surgery which is successful and costs $20,000. Paul hires a lawyer, and files a lawsuit against the hospital. Discovery is conducted; settlement negotiations fail; trial preparation begins. The only issue at trial is causation, i.e., whether the first surgery (the appendectomy) caused the pain and the headaches. If the first surgery caused this pain, and consequently also the second surgery, Paul will win the case.

Paul and his lawyer come to the conclusion that an expert witness is needed to help them prove causation. Further assume two different scientific methods can be used to prove causation in this case. The use of Method 1 results in the conclusion that there is causation; the use of Method 2 results in the conclusion that there is no causation. Method 1 is the majority opinion of medical experts. However, some doctors and experts support Method 2.

The situation presented in the above hypothetical is common in Germany and probably also in the U.S.[6] In order to identify, compare and evaluate

4. *See* MCCORMICK ON EVIDENCE 58 (5th ed. 1999)("In the past two decades, the use of expert witnesses has skyrocketed").

5. "Manipulated" means in this context that the expert does not testify in the way she would if she is not hired by the party. This can begin with the choice of words and with the clearness of the testimony and can end with incomplete or even false testimony.

6. Another common example for different expert opinions besides causation issues is the valuation of companies and real estate.

the differences in German and U.S. civil litigation regarding expert witnesses, this article will describe how the hypothetical case would be tried in both jurisdictions. The analysis will first focus on expert testimony in U.S. civil litigation (part II), and then it will turn to the German law regarding expert witnesses in civil litigation (part III). The article will then compare the role of experts in both systems (part IV), and finally, a conclusion will be presented (part V).

II. EXPERT WITNESSES IN U.S. CIVIL LITIGATION

At least in theory, there are two ways of choosing expert witnesses in U.S. civil litigation: the expert is either hired by a party or appointed by the court.

1. EXPERTS HIRED BY THE PARTIES

a. The Selection of the Expert

In U.S. civil litigation a party may hire its own expert witness. The party has the choice which expert it hires. This so-called "expert shopping"[7] gives the party the opportunity to hire an expert who best supports the party's view.[8] The parties are not interested "in finding the best scientist, but the best witness".[9] Although the expert is hired by the party, he or she should be objective and neutral.[10] The party's lawyer will prepare the expert for testifying at trial.[11]

b. The Hypothetical Case

In the hypothetical case, Paul's (plaintiff) lawyer will hire an expert who adheres to Method 1, i.e., will likely conclude that the first surgery caused the pain which necessitated the second surgery.[12] The expert will

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7. *See* ADVISORY COMMITTEE'S NOTE on FRE 706.

8. *Compare* T. Dunkelberger & S. Curren, *Debating Court-Appointed Experts*, N.Y.L.J., Feb. 13, 2001 at S8, ("it is natural that the plaintiff will choose an expert from one polar end of the spectrum of scientific opinions, and the defense will choose an expert from the other"). *See also* William T. Pizzi, *Expert testimony in the US*, 145 NEW L. J. 82, 83 (1995).

9. MCCORMICK ON EVIDENCE, *supra* note 4, at 80; John B. Molinari, *The role of the expert witness*, 9 Forum 789, 791 (1973/1974).

10. Mortimer Nickerson, *The Expert Technical Witness on Trial*, 50 ABA J. 731, 732 (1964).

11. *Compare* Pizzi, *supra* note 8, at 83 ("trial lawyers have become more sophisticated at controlling experts and at preparing them for trial so that their testimony is shaded to achieve the maximum effect on the jury").

12. Of course there are also other important criterias which should be taken into account when hiring an expert such as personality, experience, expert qualifications, fees, credibility and

examine Paul and present her results to him and his lawyer. Paul's lawyer will then prepare the expert for testifying in court. She will advise the expert regarding the presentation of testimony and prepare her for cross-examination by the defendant's lawyer. Cross-examination is a critical point in the trial because Paul's expert must survive the cross-examiner's questions, which will attempt to discredit the expert's testimony and cast doubt upon her scientific conclusions. However, this is not the end. It is likely that the defendant will also hire an expert.[13] Of course, the defendant will select an expert who supports the defendant's view. Again, witness preparation, direct examination and cross-examination are conducted. Finally, the fact finder decides which expert is more convincing and, therefore, right; ergo, who wins the case.[14]

c. Assisting the Trier of Fact

Under the Federal Rule of Evidence (FRE) 702, the expert should assist the fact finder. Yet do the experts in the hypothetical case really help? Both experts offer plausible "stories;" each supports the story of one party with scientific knowledge. Therefore, although experts primarily support the parties who hire them, the scientific knowledge they present may also assist the fact finder in determining the truth. Since both sides to a dispute often rely on expert witness testimony, the fact finder is presented with two (or more) possible scientific explanations. In the end, the fact finder has to decide which "story," or testimony, is more plausible. Thus, the expert witness has two basic functions: (1) supporting a party's story[15] and (2) providing a possible scientific explanation for the issue.[16]

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persuasive effect. *See also* ROBERT ARON & JONATHAN L. ROSNER, HOW TO PREPARE WITNESSES FOR TRIAL § 15.05 (2nd Ed. 1998).

13. A survey of 529 civil trials in California in 1985 and 1986 revealed that in 86% of these cases experts testified. The average of experts per trial was 3.3. *See* Samuel R. Gross, *Expert Evidence*, 1991 WIS. L. REV. 1113, 1118-1120.

14. For the influence of expert testimony on the trier of fact *see* R. L. Tanton, *Jury Preconceptions and their Effect on Expert Scientific Testimony*, 24 JOURNAL OF FORENSIC SCIENCES 681, 689-690 (1979).

15. This does not necessarily mean that the expert is not objective.

16. But see Molinari, *supra* note 9, at 791 ("the function of the expert witness is to tell the jury the truth"). *But compare* J. H. Beuscher, *The Use of Experts by the Courts*, 54 HARV. L. REV. 1105, 1106 (1940/41) ("[the expert witness] frequently operates to confuse the judge or jury rather than to inform").

2. COURT-APPOINTED EXPERTS

According to FRE 706, the court may also appoint its own expert witness.[17] Courts use this power when a factual issue arises that would be better solved with the support of scientific knowledge and the partisan experts are not helpful due to their relationship to the parties.

a. The Selection of the Expert and Further Proceedings

The parties have no influence on the selection of a court-appointed expert.[18] However, even if the court appoints an expert, the parties may still hire their own expert witnesses.[19] The court has discretion over whether to disclose to the jury that the expert witness has been appointed by the court.[20] The court-appointed expert shall be available for pre-trial deposition,[21] but no rule governs whether the court expert should testify before or after the party-selected experts. Usually a judge would prefer to call the court expert after the testimony of partisan experts as this would allow the judge to question the court expert about discrepancies and weaknesses in the other experts' testimony. Even if not specifically informed, a jury will notice the different procedure used by the judge when examining the court expert, and as a result, the jury will be aware of the unique role of the court expert. This can result in a "special aura respectability"[22] for the court expert. Because this aura can influence the jury, judges apply FRE 706 far less frequently in jury trials than in non-jury trials.[23] After the examination by the judge, the parties have the opportunity to cross-examine the court expert under FRE 706 (a),[24] and according to FRE 706 (b), compensation for the court expert can be assessed by the court as it deems appropriate.

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17. Such an appointment is reviewable only for abuse of discretion. *See Students of Calif. Sch. for the Blind v. Honig*, 736 F.2d 538, 549 (9th Cir. 1984), *vacated on other grounds*, 471 U.S. 148, 105 S. Ct. 1820, 85 L.Ed. ed 114 (1985).

18. *Compare* Gross, *supra* 13, at 1190.

19. The court-appointed expert should not replace the experts which are hired by the parties but should complement them. *Id.* at 1190. *See also* FRE 706 (d).

20. *See* FRE 706 (c).

21. Gross, *supra* 13, at 1190.

22. *Compare* CHRISTOPHER B. MUELLER & LAIRD C. KIRKPATRICK, EVIDENCE UNDER THE RULES 719 (4th ed. 2000).

23. Joe S. Cecil & Thomas E. Willging, Court-Appointed Experts: Defining The Role Of Experts Appointed Under Federal Rule Of Evidence 706 48 (Federal Judicial Center 1992)(only 20% of trials in which court-appointed experts testify are jury trials).

24. *Compare* also Robert F. Taylor, *A Comparative Study of Expert Testimony in France and the United States: Philosophical Underspinnings, History, Practice, and Procedure*, 31 TEX. INT'L L.J. 182, 212 (1996) and Tahirih V. Lee, *Court-Appointed Experts and Judicial Reluctance: A Proposal to Amend Rule 706 of the Federal Rules of Evidence*, 6 YALE L. & POL'Y REV. 480, 494 (1988).

b. The Hypothetical Case

In the hypothetical case mentioned above, the court could appoint its own expert witness at the pre-trial stage.[25] In addition, the hospital and Paul can also hire their own expert witnesses. The expert witnesses would testify in favor of the party that hired them followed by the court expert. Suppose that the court-expert applies Method 1. It is up to the fact finder to determine which "story" is more plausible. In this scenario, it is likely that the fact finder will decide in favor of the plaintiff, finding that causation exists for two reasons. First, two experts testified in favor of the plaintiff, while only one testified in favor of the defendant. Second, the court-appointed expert, who is presumably neutral and independent, testified in favor of the plaintiff. Consequently, the fact-finder is more likely to believe that a verdict for the plaintiff is the correct decision. In practice, the trier of fact most often follows the view of the court expert.[26]

c. The Use of Court Experts in Practice

Court-appointed experts are rarely used in U.S. civil litigation.[27] A survey of federal judges[28] revealed that 81% had never appointed an expert under FRE 706, and only 8% had appointed a court expert more than one time.[29] The court does not often appoint its own expert because of the adversarial tradition and the problem of compensation, despite FRE 706 (b).[30] Moreover, many judges and lawyers may be unaware of the possibility to appoint a court expert.[31]

3. CRITICISM

Europeans[32] look skeptically at the way expert witnesses are used in U.S. civil litigation. In almost all cases the experts are partisans,[33] simply repeating their party's story and supporting it with scientific knowledge.

25. GLEN WEISSENBERGER, FEDERAL RULES OF EVIDENCE § 706.2 (3d ed. 1999).

26. The Federal Judicial Center found out that in 56 of 58 cases the jury followed the view of the court expert. See Cecil et al., *supra* note 23, at 52.

27. *See* MUELLER ET AL., *supra* note 22, at 720. ("Rule 706 is one of the least-used provisions in the Federal Rules"). *See also* Pizzi, *supra* note 8, at 82.

28. The judges were mainly involved in large civil cases where court experts could be useful.

29. *See* Pizzi, *supra* note 8, at 83.

30. *See* MUELLER ET AL., *supra* note 22, at 719-720.

31. *Compare* John Jerry Wiley, *The Doctor in Court: Impartial Medical Testimony*, 40 S. CAL. L. REV. 728, 734-735 (1967); Gross, *supra* note 13, at 1197.

32. Excluding Great Britain and Ireland which, like the U.S., are common law countries.

33. *See also* JEROME FRANK, COURTS ON TRIAL: MYTH AND REALITY IN AMERICAN JUSTICE 86 (1973) ("the partisan nature of trials tends to make partisans of the witnesses").

The fact finder hears only opinions favorable to the respective party. Although the experts should be independent and objective, it is not easy for a European lawyer to believe that they really are. The experts, at least financially, depend on the parties, and this may influence their objectivity. As a result, a European lawyer would doubt whether experts can really support the court in seeking the truth.[34]

However, the Europeans are not the only critics regarding this use of expert witnesses. Some authors in the U.S. demand that court experts be used more frequently. They complain that partisan experts are only the "saxophones"[35] of the parties. "The ready availability of a large stable of experts who, in return for a nice fee, seem eager to testify on one side or the other of a lawsuit is hardly a recent development."[36] There is a big concern about the objectivity of experts.[37] "Nobody likes to disappoint a patron; and beyond this psychological pressure is the financial inducement."[38]

In addition, it can be very difficult for a jury to determine which expert opinion is correct because the jurors lack the scientific knowledge needed to evaluate the experts' testimony.[39] Bazelon, a former chief judge said that even most judges are illiterate regarding technical issues.[40] In the end, "success may depend on the plausibility or self-confidence of the expert, rather than his professional competence."[41]

Even courts[42] and legislators[43] have doubts that partisan experts are independent and objective. The Advisory Committee proposed, and

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34. *Compare also* John H. Langbein, *Legal Institutions: Trashing the German Advantage*, 82 NW. U. L. REV. 763, 766 (1988) ("Testimony that is rehearsed and molded by adversaries is materially less trustworthy than testimony that is free of such influences").

35. Langbein, *German Advantage*, *supra* note 1, at 835.

36. Pizzi, *supra* note 8, at 82; *Compare also* John M. Sink, *The Unused Power of a Federal Judge to Call his own Expert Witness*, 29 S. CAL. L. REV. 29, 30 (1955/1956) ("hired courtroom lying").

37. Langbein, *supra* note 34, at 764 ("litigation-biased expert witnesses that American lawyers recruit and pay to bolster preordained results").

38. Langbein, *German, Advantage*, *supra* note 1, at 835.

39. Dunkelberger et al., *supra* note 8, at S8.

40. David L. Bazelon, *Coping with Technology through the Legal Process*, 62 CORNELL L. REV. 817, 817 (1976/1977).

41. John Basten, *The Court Expert in Civil Trials – A Comparative Appraisal*, 40 MODERN L. REV. 174, 174 (1977).

42. *Compare* Keegan v. Minneapolis and St LRR 76 Minn 90, 95 (1899) ("Experts are nowadays often the mere paid advocates or partisans of those who employ them, as much so as the attorneys who conduct the suit").

43. *See* ADVISORY COMMITTEE'S NOTE on FRE 706 ("The practice of shopping for experts, the venality of some experts, and the reluctance of many reputable experts to involve themselves in litigation, have been matters of deep concern."). *Compare also* Langbein, *supra* note 34, at 775 ("An expert hired to buttress a preordained position is engaged more in advocacy than in truth-seeking").

Congress enacted, FRE 706 in the hope that the common law rule[44] regarding court-appointed experts would be applied more frequently if written down in a statute. Under FRE 706, court experts should not replace party-experts, but only complement them. Additionally, by enacting FRE 706 the parties should be deterred from presenting their own expert who is capable of being discredited by a court expert.[45]

On rare occasions, even the courts believe that party-experts are not useful and therefore appoint their own expert. In particular, in sensitive areas like child custody cases, courts often prefer to appoint their own expert due to concerns about the child's welfare and because it would be difficult for a partisan expert to examine the opponent party.[46] Due to the sensitive issues involved, the opponent party is likely to be offended is examined by the other party's expert, and therefore, will not cooperate with a partisan expert.

4. PAST PROPOSALS ADDRESSING THE CONCERNS ABOUT THE OBSTRUCTION OF THE TRUTH SEEKING-PROCESS BY PARTY-EXPERTS

There have been several proposals to solve the concerns about the obstruction of the truth seeking process by partisan experts. One proposal was to establish a science court consisting of experts,[47] which would evaluate the different scientific arguments of the parties and their experts.[48] In contrast to an ordinary U.S. court, the science court would have a more active role. However, the establishment of such a court would increase the cost of the proceedings enormously because qualified experts from many different scientific fields would need to be hired permanently, which requires competitive salaries being offered. In addition, these experts would need a basic legal education. Therefore, this proposal could only be realized for big cases.[49] Even though most

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44. Case law already gave the trial judge the power to appoint a court expert before the Federal Rules of Evidence were codified in 1975. *See Scott v. Spanjer Bros. Inc.*, 298 F.2d 928, 930 (2d Cir. 1962).

45. *See* ADVISORY COMMITTEE'S NOTE on FRE 706; *see also Eastern Air Lines Inc. v. McDonnell Douglas Corp.*, 532 F.2d 957, 1000 (5th Cir. 1976) ("a great tranquilizing effect").

46. *See* for example *Boone v. Boone*, 150 F.2d 153, 157 (D.C. Cir. 1945); an experienced New York litigator, Robert A. Burstein, confirmed this also for nowadays. Compare also *Scott v. Spanjer Bros. Inc.*, 298 F.2d 928 (2nd Cir. 1962).

47. For the various approaches see James A. Martin, *The Proposed "Science Court"*, 75 MICH. L. REV. 1058, 1064-1069 (1977).

48. Arthur Kantrowitz, *The Science Court Experiment: Criticism and Responses*, 33 THE BULLETIN OF THE ATOMIC SCIENTISTS 44 (1977) ("the Science Court is intended to deal only with scientific questions of fact").

49. *See id.* at 43-50 for some problems which could arise.

civil cases in federal courts involve disputes totally more than $75,000, the cost of the proceedings would still be disproportional. Thus, for "everyday cases," it seems that a more extensive use of court-appointed experts (FRE 706) would be the easiest and cheapest solution.

Another approach, suggested by Judge Learned Hand,[50] was to establish special juries of experts. These juries would recommend decisions on scientific issues. Despite concerns regarding the constitutionality of such special juries,[51] this approach also seems to be very expensive because the "expert jury" would exist in addition to the judge and the jury.

Basten mentions the possibility of establishing "expert judges."[52] This could be realized either by hiring experts as judges for certain scientific fields or by giving the current judges the opportunity to obtain scientific knowledge in specific areas. Again, this approach would be very expensive, and the problem would not be completely solved due to the existence of numerous scientific areas, making it impossible to have an expert for each scientific issue that arises in trial.

In a recent case regarding silicone breast implants, the judge established a scientific panel to improve the truth-seeking process – after billions of dollars in damages were paid as a result of adversarial litigation.[53] The panel found no evidence that breast implants cause systematic diseases.[54] In this case, the adversarial approach failed because of the weaknesses of partisan expert testimony. The plaintiffs' expert claimed that he examined more than 4,700 women, which greatly increased the salary of the expert. Not surprisingly, the expert testified in favor of the plaintiffs. However, a medical student later testified that she received $50 per hour from the expert for examining 3 to 4 women per hour. Thus, the expert did not examine the women on his own even though he testified that he did.[55]

Finally, an approach has been suggested by the American Academy for the Advancement of Science (AAAS) which proposes a new system called the Court Appointed Scientific Experts (CASE). In this system, a committee would be established to help judges search for neutral experts

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50. Learned Hand, *Historical And Practical Considerations Regarding Expert Testimony*, 15 HARV. L. REV. 40, 56 (1901).

51. *Compare* Basten, *supra* note 41, at 188.

52. *Id.* at 190.

53. *Compare* Dunkelberger et al., *supra* note 8, at S8.

54. For details of the case see George C. Harris, *Testimony for Sale – The Law and Ethics of Snitches and Experts*, 28 PEPP. L. REV. 1, 2-3 (2000).

55. For more details *see id.* at 2-3.

on a case-by-case basis. This project is currently being evaluated by the Federal Judicial Center.[56] CASE could make it easier for the court to find an expert, thus solving one of the problems in applying FRE 706, i.e., finding an expert. However, the court would still need to decide whether or not to appoint its own expert, which appears to be a greater obstacle to overcome.

All past proposals to provide non-partisan experts have failed. Yet they are not even necessary for a court to obtain neutral expert testimony because legislation already provides the necessary medium with FRE 706. Consequently, the issue is not how the courts can obtain neutral expert testimony, but rather, why they do not appoint neutral experts under FRE 706.

5. DEFENSE OF PARTISAN EXPERTS

Although there is much criticism of the current situation, there is also a lot of concern that the establishment of non-partisan experts will undermine the U.S. adversarial system. The concerns are that a court expert compromises the impartiality of the judge, limits party control and destroys the parties' right to a jury decision.[57] It has been suggested that court experts would have too much power and become de facto fact finders – especially when more than one opinion exists on a scientific issue.[58] Deason argues that an expert is probably never completely neutral,[59] and even if Deason is incorrect, "[...] intelligent, objective scientists will still have disagreements over basic scientific issues."[60] If the strong influence of court experts on the outcome of a trial is believed, it would be dangerous to appoint a court expert because then the outcome of the case would only depend on which scientific opinion the specific court expert endorses.[61] Therefore, Dunkelberger & Curren suggest that "[...] the role of the court-appointed expert might be to act as an

56. *Id.* at S8.

57. *See, e.g.*, Stephen A. Saltzburg, *The Unnecessarily Expanding Role of the American Trial Judge*, 64 VA. L. REV. 1, 74-80 (1978). *Compare also* Gross, *supra* note 13, at 1193.

58. *Compare* Gross, *supra* note 13, at 1193-1194.

59. Ellen E. Deason, *Court-appointed expert witnesses: Scientific positivism meets bias and deference*, 77 OR. L. REV. 59, 99-121 (1998).

60. Dunkelberger et al., *supra* note 8, at S13.

61. *But see* MUELLER ET AL, *supra* note 22, at 719 ("The fear that a court-appointed expert will be viewed as the responsibility of one party or another is answered in part by language allowing any party actually to call the expert and entitling all to cross-examine").

'interpreter' for the jury, explaining the science involved in terms that the jury will understand while not advocating either side of the issue."[62]

The lack of non-partisan experts in U.S. civil litigation involves fundamental characteristics of U.S. civil litigation. In an adversarial system, where parties are the protagonists who investigate the facts, the court plays only a passive role. Although the function of the judge has changed over the last several years from that of a passive supervisor of the proceedings to a case manager,[63] courts still do not see fact-investigation as their proper role, and therefore, they do not apply FRE 706.

III. EXPERT WITNESSES IN GERMAN CIVIL LITIGATION

In contrast to U.S. civil litigation, expert witnesses in Germany are usually court experts, although the parties can also hire their own experts.

1. COURT EXPERTS IN GERMAN CIVIL LITIGATION

a. Experts versus Witnesses

The German Civil Procedure Code (ZPO) distinguishes between (lay) witnesses and court-experts. In German civil litigation, an expert is not a witness, but instead provides a separate form of evidence.[64] The German Code of Civil Procedure provides separate rules for court experts.[65] However, as far as the rules pertaining to court experts do not provide specific regulations, the rules about (lay) witnesses are partly applicable (ZPO § 402).

b. The Selection of the Expert

Under ZPO § 404, the court selects the expert.[66] Usually, the judge has prepared a list of experts from which one expert is chosen.[67] However,

62. Dunkelberger et al., *supra* note 8, at S13.

63. *See* Langbein, *German Advantage*, *supra* note 1, at 858.

64. ZOELLER, ZIVILPROZESSORDUNG § 402/1 (23nd ed. 2002); *see also* STEIN/JONAS-LEIPOLD, ZIVILPROZESSORDNUNG vor § 402/4 (21st ed. 1999); LEO ROSENBERG & KARL HEINZ SCHWAB & PETER GOTTWALD, ZIVILPROZESSRECHT 717-718 (15th ed. 1993); Langbein, *German Advantage*, *supra* note 1, at 835.

65. *See* ZPO §§ 402-414.

66. *See* ZOELLER, *supra* note 64, § 404/1. STEIN/JONAS-LEIPOLD, *supra* note 64, vor § 402/1. KLAUS MUELLER, DER SACHVERSTÄNDIGE IM GERICHTLICHEN VERFAHREN 83 (2nd ed. 1978).

the court's discretion is limited by ZPO § 404 (2) which gives priority to those experts who are officially designated for a specific field of expertise.[68] The court can also ask the parties to suggest an expert.[69] If the parties agree to the appointment of an expert, the court is bound and has to appoint that expert under ZPO § 404 (4). However, there is no possibility to review the court's appointment of an expert without appealing the final judgement, i.e. that entire case.[70]

If the court appoints an expert without the parties' consent, each party may seek to recuse the expert, but only for certain narrow reasons.[71] Regarding the reasons which justify recusing the court-appointed expert, ZPO § 406 (1) refers to ZPO §§ 42-45 which deal with the reasons for recusing a judge. Therefore, the standard for recusing an expert and recusing a judge is the same. A judge may be recused only when it appears that she is not neutral,[72] e.g. when the judge offends a party or is a friend or relative of one of the parties.[73] Similarly, a party can reject the appointment of a court expert for the same reasons she can reject a judge. If one party seeks to recuse the expert, the court decides whether to grant the party's request. If the court denies the request, the party can appeal under ZPO § 406 (5).

c. Further Proceedings

After appointing the expert, the court instructs the expert under ZPO § 404a, deciding which issues should be examined by the expert and regulating the extent to which the expert is allowed to contact the parties. In any case, the court expert has to be neutral and independent[74] – at least in regard to the parties. The court must disclose to the parties every order it gives to the expert.

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67. *Compare* KURT JESSNITZER & GÜNTER FRIELING, DER GERICHTLICHE SACHVERSTÄNDIGE 80 (10th ed. 1992). *See also* R. SCHLESINGER, H. BAADE, P. HERZOG, E. WISE, COMPARATIVE LAW 467 (6th ed. 1998).

68. *For details see* STEIN/JONAS-LEIPOLD, *supra* note 64, at § 404/15-16. *See also* Langbein, *German Advantage*, *supra* note 1, at 837-838.

69. *See* ZPO § 404 (3).

70. A. BAUMBACH, W. LAUTERBACH, J. ALBERS, P. HARTMANN, ZIVILPROZESSORDNUNG, § 404/7 (61th ed. 2003).

71. See ZPO § 406 (1).

72. STEIN/JONAS-LEIPOLD, *supra* note 64, at § 406/1.

73. *Compare* the list at BAUMBACH ET AL., *supra* note 70, at § 42/14-17.

74. JESSNITZER ET AL., *supra* note 67, at 109. *Compare* Langbein, *supra* note 34, at 775 ("neutral expertise is central to German civil procedure").

The general rule is that court-appointed experts testify orally in court;[75] in practice, many court experts submit a written opinion,[76] which is allowed if ordered by the court under ZPO § 411 (1). However, even if the court expert submits a written opinion pursuant to a court order, the court may still order the expert to appear at trial to explain her opinion.[77] At trial, the judge examines the expert. If the court is not convinced of the expert's view, it could appoint a new expert under ZPO § 412 (1). Afterwards, the lawyers of the parties have the opportunity to examine all experts who were also examined by the judge. Usually, only a few questions are asked, and in German civil litigation, the questioning of an expert by the lawyers can be described as a polite questioning in a non-confrontational atmosphere. Since leading questions are not allowed in German civil litigation, this examination is not comparable with the cross-examination in U.S. civil trials.[78] Another reason why the parties and their lawyers question the expert in such a deferential manner is obvious: the court appointed the expert and gave her orders during the proceedings. Attacking the expert would be equivalent to criticizing the judge's authority to select and question the expert – and in German civil courts, the judge is always the decision-maker. Therefore, also strategic reasons create the non-confrontational atmosphere between the parties and the court-expert.

d. Evaluation of the Expert Testimony by the Judge

Under ZPO § 286, the court has discretion as to whether or not it follows the view of the court-appointed expert.[79] In either case, the court has to explain why, in its opinion, the expert has the necessary scientific knowledge and why it follows her opinion or not.[80] The court cannot adhere to the expert's opinion if the opinion is not based on the particular facts of the current case at bar as well as the supporting scientific reasoning used.[81] However, the expert is not required to mention other scientific methods which lead to different results. As stated, the judge is the decision-maker, and under no circumstances should the judge transfer this decision-making power to the court-expert.[82] In practice, courts

75. *See* BAUMBACH ET AL., *supra* note 70, at § 411/1.
76. *Compare* ZOELLER, *supra* note 64, at § 411/1.
77. See ZPO § 411 (3).
78. *See* R. SCHLESINGER ET AL., *supra* note 67, at 457; ZOELLER, *supra* note 64, at § 397/7.
79. ZPO § 286; *see also* ZOELLER, *supra* note 64, at § 402/7a.
80. BAUMBACH ET AL., *supra* note 70, at § 286/50-53.
81. *Id.* at § 286/58.
82. ZOELLER, *supra* note 64, at § 404a/1.

usually[83] follow an expert's opinion because it is often not possible for the court to understand and control the reasoning of the expert due to the court's lack of scientific knowledge.[84]

e. The Hypothetical Case

In the hypothetical case, if Paul and the hospital are not able to settle, the court will appoint an expert based on ZPO § 144. The judge will likely choose the expert from a list which she prepared. This list includes the name of Emma who is a famous expert in the field of medical causation. Emma is famous because of her support of Method 2, about which she has published many articles. The fact that Emma supports Method 2 gives the plaintiff no reason to seek to recuse her, and the parties have no other reason to justify Emma's recusal as a court expert. The judge instructs Emma that she should examine Paul and determine if the first surgery caused the need for the second surgery. The judge discloses these orders to the parties, and except for Paul's examination, neither party has contact with the expert. After the examination, Emma writes her opinion, which applies Method 2. Emma writes her opinion thoroughly because she wants the judge to be satisfied with her work; otherwise the judge would remove Emma's name from the list and not appoint her in the future.[85] Because she applied Method 2, Emma concludes that the first surgery did not cause the second surgery. She considers also mentioning Method 1 in her written opinion; however, she decides not to do so because it is not necessary to justify her results. In addition, mentioning Method 1 could confuse the judge who would then have to decide which method should be applied. Emma thinks that she is expected to make this decision for the judge.

Emma submits her written opinion to the court. The court asks her to explain it orally at trial, which she does. The judge is not independently knowledgeable about causation in medical cases, and because of her heavy caseload, she has no time to study books about this issue. Therefore, the judge is very happy that Emma explains her expert opinion in a clear and understandable way. What Emma says makes sense to the judge, and the judge has no reason to ask Emma for other applicable methods. Just to make sure of the completeness of Emma's testimony she asks Emma if Method 2 is supported by other experts.

83. *See* Horst Sendler, *Richter und Sachverständige*, NJW 1986, 2907, 2909 (empirical studies showed that the court follows the opinion of the court expert in 95% of the cases).

84. *Compare* BAUMBACH ET AL., *supra* note 70, at vor § 402/2.

85. *See also* Langbein, *German Advantage*, *supra* note 1, at 838 ("the most important factor predisposing a judge to select an expert is favourable experience with that expert in an earlier case").

Emma answers that several experts and doctors support this method. The judge is satisfied and therefore stops questioning Emma. Paul's lawyer politely asks Emma about Method 1. Emma answers that Method 1 is supported by many experts, but Method 2 is the upcoming, modern method and cannot be called a minority opinion anymore. Paul's lawyer knows that it makes no sense to attack Emma because the judge appointed her. At the end of the trial the court decides in favor of the defendant based on Emma's testimony. Paul has to pay for Emma's expenses.[86]

Paul is very disappointed. Method 1 is a well-recognized method which is probably supported by the majority of experts. It was just bad luck for him that the judge appointed Emma and not someone else as the court expert in his case. Furthermore, he even has to pay for Emma's services even though she testified against him. Paul asks his lawyer what he can do. The lawyer answers that Paul can appeal *de novo*[87] the decision of the court. It would then be within the discretion of the Court of Appeal whether to follow the lower court's opinion, appoint a new court expert or examine Emma again.[88] However, Paul's lawyer also points out that this will result in additional costs, and if Paul loses the case on appeal, he will have to pay the court and hospital's reasonable legal expenses for both instances. Due to this risk Paul decides not to appeal the trial court's decision.

This result is probably not acceptable from an American lawyer's perspective. The outcome of the case only depends on which expert is appointed by the judge. The expert seems to decide the case for the judge, and the influence of the parties is limited.

2. EXPERTS HIRED BY THE PARTIES IN GERMAN CIVIL LITIGATION

a. Party-Selected Experts – Not Evidence

In German civil litigation the parties can also hire their own experts.[89] However, there are no rules in the German Civil Procedure Code dealing with these party-selected experts. The German courts have held that an

86. There is no contractual relationship between the parties and the court expert. *See* STEIN/JONAS-LEIPOLD, *supra* note 64, at vor § 402/41. But under ZPO § 91 the losing party has to pay the reasonable expenses of the winning party and also of the court, including the expenses for a court expert.

87. ROSENBERG ET AL., *supra* note 64, at 840-842.

88. *Compare* STEIN/JONAS-LEIPOLD, *supra* note 64, at vor § 402/27 and also at § 404/6.

89. *Id.* at vor § 402/56.

opinion of such an expert does not have the same value as the opinion of a court expert.[90] Courts usually doubt the reliability of partisan experts who are hired by the parties and have discussed the case with counsel.[91] Therefore, the opinion of a partisan expert is considered only as an assertion of a party[92] and is not evidence.[93] The party submits the expert's report to the court, but the party-expert is not examined at trial.

b. Parties v. Witnesses

In German civil litigation, parties may only testify at trial in certain narrow situations which are described in ZPO §§ 445-447. A party is not a witness.[94] Usually the plaintiff alleges facts in her pleadings. If the defendant denies these facts, the plaintiff has to offer testimony to prove these facts. There are five types of evidence in German civil litigation: witnesses, documents, court experts, the parties (in certain narrow situations), and judging by appearances. Except in rare cases where the party is allowed to testify, the party with the burden of proof must offer one of the other four types of evidence. This is a fundamental difference with U.S. civil litigation where the party can testify if she desires.

As previously mentioned, the German courts held that opinions of party-experts are not considered as evidence, but only as a party assertions. However, a partisan expert can discredit the court expert's opinion, and in such situations, the court can – although not required to and in practice, rarely does – appoint another court expert.[95] However, the court cannot base its final decision solely on the party-expert's opinion.[96] If the party-experts have differing opinions, the court is required to appoint its own expert.[97]

90. *Id.* at vor § 402/56. ROSENBERG ET AL., *supra* note 64, at 718. *See also* MÜLLER, *supra* note 66, at 40-41.

91. *Compare* Koetz, *Civil Litigation and the Public Interest*, 1 CIV. JUST. Q. 237, 241 (1982); Langbein, *German Advantage*, *supra* note 1, at 834; Langbein, *supra* note 34, at 767.

92. BGH NJW 1993, 2382, 2383.

93. *But see also* BGHZ 98, 32, 40 (holding that partisan expert opinion can be introduced into evidence if both parties agree).

94. *See* ROSENBERG ET AL., *supra* note 64, at 705. Langbein, *German Advantage*, *supra* note 1, at 834.

95. STEIN/JONAS-LEIPOLD, *supra* note 64, at vor 402/57.

96. BGH VersR 1981, 575, 576.

97. STEIN/JONAS-LEIPOLD, *supra* note 64, at vor 402/57; *see also* BGH NJW 1998, 2735.

c. The Hypothetical Case

What does this mean for the hypothetical case? Even if Paul and the hospital each hired an expert, the outcome would most likely be the same as before. The judge appoints its own expert, and bases the decision on the court expert's opinion.

d. The Significance of Party-Selected Experts

Although experts who are hired by the parties are not as commonplace as court experts in German civil litigation, party-experts are still used, particularly in cases involving the evaluation of damages or fault.[98] In recent years, the German Supreme Court (BGH) has raised the significance of partisan experts in trial by requiring the losing party to pay the reasonable expenses of the winning party's expert under ZPO § 91,[99] and by requiring the court to deal with the partisan expert's opinion.[100] The court cannot simply disregard the partisan expert's view anymore. It has to take a look at the partisan expert's opinion and has to explain in its reasoning why it does not follow the partisan expert's view.

3. CRITICISM

The German Civil Procedure Code distinguishes between court experts and witnesses. Party-selected experts cannot testify at all. This formal difference between court experts and witnesses on the one hand and the fact that the party can seek to recuse the court-appointed expert for the same reasons as judges shows the very specific and different role of court experts in German civil litigation. There is a close relationship between the court and the court expert.[101]

a. The Court Expert as *de facto* Decision Maker

In theory, the German system regarding experts seems to support the truth-seeking process more effectively. The court expert is independent from the parties and also objective. The German Civil Procedure Code tries to safeguard the parties' interests by giving them the right to seek to recuse the court expert. Additionally, the parties can ask follow-up

98. *Compare* JESSNITZER ET AL., *supra* note 67, at 15.

99. *Id.* at 172. As already mentioned in note 85 under ZPO § 91 the loosing party has to pay the reasonable expenses of the court and of the winning party.

100. BGH NJW 1996, 1597, 1598; NJW 1998, 2735; NJW-RR 1994, 219, 220-221.

101. *Compare* STEIN/JONAS-LEIPOLD, *supra* note 64, at § 406/1.

questions after the judge examines the expert. Finally, the parties can also hire their own experts, although these party-selected experts can not testify.

However, in practice the German way is not always perfect, as illustrated by the hypothetical case. Even if you consider the hypothetical an extreme case it shows that German court experts can cause problems in the truth-finding process. Too much depends on the court expert, and in many cases, it is not the judge but the court expert who decides the case. Although the court expert in Germany is not the judge,[102] she is at least an arm's-length adviser of the judge[103] who supports the court in finding the facts.[104] To some extent, the judge is no longer independent; because of her lack of scientific knowledge, the judge must trust the court expert.[105] Therefore, several German authors have criticized that the court expert is often the *de facto* decision-maker.[106]

b. The Problem of Multiple Scientific Opinions

Another problem arises in German civil litigation when different scientific opinions exist. Of course, a good court expert will mention all of them in her opinion. However, if the expert supports one opinion, it is obvious that she will not be neutral anymore with respect to the other existing opinions. Furthermore, the opportunities of the parties to "correct" this deficit are few due to the lack of an effective cross-examination. Even if a party hires her own expert who explains the other existing opinions, it is not certain that the judge will abandon her trust in the court expert she personally appointed. Usually, the judge will be convinced by an expert she has selected.[107] Even if the hypothetical case is an extreme case regarding the behaviour of Emma who only focused on Method 2 without mentioning Method 1 in detail, it is a possibility that poses a danger to the truth-seeking process. "Disagreements between opposing experts can be constructive in that they demonstrate the extremes of opinions within the scientific community, but are

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102. JESSNITZER ET AL., *supra* note 67, at 6.

103. BGH NJW 1998, 3355, 3356; *see also* STEIN/JONAS-LEIPOLD, *supra* note 64, at vor § 402/3; ROSENBERG ET AL., *supra* note 64, at 716; WILHELM KLOCKE, DER SACHVERSTÄNDIGE UND SEIN AUFTRAGGEBER 32 (2nd ed. 1987); *see also* Langbein, *German Advantage*, *supra* note 1, at 835 ("judges' aides").

104. STEIN/JONAS-LEIPOLD, *supra* note 64, at vor § 402/7 (neutral adviser of the judge).

105. *See* Dirk Olzen, *Das Verhaeltnis von Richtern und Sachverstaendigen im Zivilprozess unter besonderer Beruecksichtigung des Grundsatzes der freien Beweiswuerdigung*, 93 ZZP 66, 72-73 (1980).

106. STEIN/JONAS-LEIPOLD, *supra* note 64, at vor § 402/2 (in practice the court expert is the real judge which cannot be prevented but which is also very problematic).

107. Sendler, *supra* note 83, at 2909.

perplexing to the finders of fact."[108] On the other hand, in German civil litigation there are usually no disagreements between experts because most often there is only one.

IV. COMPARISON AND EVALUATION OF BOTH SYSTEMS REGARDING EXPERTS

As seen before, the role of expert witnesses in both trial systems is very different.

1. EVALUATION OF THE USE OF EXPERTS IN THE U.S.

In the U.S., experts are usually partisans of the parties who support the parties' claim with scientific knowledge. Because there is usually more than one expert, there is also more than one scientific opinion which is presented to the fact finder. Since the expert has a closer connection to the party who hired her than to the court, there is the danger that her objectivity will be compromised. The U.S. civil trial system seeks, among other purposes,[109] the truth.[110] The danger that experts are influenced can manipulate the truth-seeking process. However, the system provides safeguards such as cross-examination,[111] impeachment and the opportunity for the opponent to call her own expert witness. The basic idea of the U.S. civil trial system is that after all the information by the experts is provided, the fact finder will be able to determine the truth. Furthermore, in the U.S. civil trial system, the fact finder is also the decision-maker – even if the fact finder is not able to follow and understand the expert's opinion.[112]

2. EVALUATION OF THE USE OF EXPERTS IN GERMANY

In contrast, in the German civil trial system, most often only one expert testifies at trial, and she is usually appointed by the court. Like in the U.S., the expert provides her scientific opinion to the fact finder, but because of the lack of a real cross-examination and the weak influence of

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108. Dunkelberger et al., *supra* note 8, at S8.

109. E.g. dispute resolution.

110. *See* FRANK, *supra* note 33, at 80-102.

111. *But see* Pizzi, *supra* note 8, at 83 (1995) ("these protections have never seemed to work very well when it comes to experts [...] because the expert is much more at home in the area of his expertise than the lawyer"). *See also* Sink, *supra* note 36, at 196 ("Cross examination will not make him more objective").

112. *Compare* Beuscher, *supra* note 16.

party-selected experts, there are no effective opportunities to control and evaluate the expert's opinion. Of course, the court can appoint a second expert, but it will only do this when it doubts the first expert's opinion. This will usually not happen for two reasons. First, the judge does not have the scientific knowledge necessary to validate the expert's testimony. Second, the judge may be influenced by the fact that she has selected the expert and possibly even worked with the expert in prior cases. Consequently, the German court expert does not only provide information to the judge but also decides *de facto*, the factual issue.

3. COMPARISON OF BOTH APPROACHES

In both systems, experts should support the truth-seeking process. However, the German court expert also makes factual determinations regarding specific issues despite the fact that the expert is not the fact-finder. In the German system, the danger of a biased and partial expert is much less than in the U.S.; however, in Germany, the expert's influence is much greater due to the lack of control. The opportunity to appeal *de novo* appears to be the only mechanism to control the expert. Yet even an appeal *de novo* partially fails as an effective mechanism to control the expert, as the hypothetical case showed. A *de novo* appeal entails a financial risk that many may not be willing to take.

Both systems try to achieve truth-seeking, but each uses a different approach – the adversarial and the inquisitorial. Neither reach this aim completely. In the U.S., an appropriate outcome is sought by letting the parties control the presentation of evidence, and in Germany, this is the judge's role. We get more information in the former, but arguably less biased information in the latter. The danger in the U.S. system is that the party-selected expert could be influenced, while in Germany the court expert has too much power which makes her a *de facto* decision-maker.

4. CHANGES IN BOTH SYSTEMS

There are some developments in both systems which might result in change. In the U.S., the statutory basis for appointing court-experts already exists, FRE 706. In addition, the role of the U.S. judge has become more active, at least during the pre-trial phase. Additionally, there are scholars criticizing the present situation and even calling for more changes. Meanwhile in Germany, the Supreme Court raised the significance of partisan experts at trial. Are these only isolated developments or is it the beginning of a new approach for both systems regarding the role of expert witnesses?

With respect to the analysis above, it seems that there is such a new approach for both systems regarding the role of expert witnesses. However, this does not recognize the different roles of expert witnesses in U.S. and German civil litigation. These different roles are caused by the fundamental differences in both systems. Of course, both systems are fundamentally adversarial systems.[113] However, the role of the German judge is more active than that of the American.

5. THE ROLE OF THE JUDGE AS THE KEY DIFFERENCE

The key difference in both systems is the role of the judge. Therefore, any change in the role of experts causes a change in the role of the judge.

The American judge acts only as a referee and, therefore, better fulfils the idea of the adversarial system.[114] This approach is also supported by the so-called sporting theory of justice.[115] This theory states that in a society like the U.S., which is dominated by sport and competition, the state provides a trial system in the form of a legal gamble where the judge is only the referee. In recent decades, the judge has also become a managing judge[116] and is therefore more involved in the pre-trial phase. However, the role of the U.S. judge during the trial is still passive.

FRE 706 gives the U.S. judge the power to get more involved in the trial, at least regarding expert witnesses. In theory, the U.S. judge has the power to appoint court experts as often as German judges do,[117] but U.S. judges do not use this power due to their passive role.[118] You cannot expect that judges apply FRE 706 more frequently if you keep this passive role of the judge which is deeply rooted in in the U.S. adversary system. And you cannot change one small piece which is part of the whole system without changing the whole adversarial approach.[119] A change of the judge's function could also cause a change of the lawyer's

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113. Langbein, *supra* note 34, at 763.

114. *See* FLEMING JAMES & GEOFFREY C. HAZARD & JOHN LEUBSDORF, CIVIL PROCEDURE, § 1.2 (5th ed. 2001).

115. FRANK, *supra* note 33, at 91.

116. *For details see* Judith Resnik, *Managerial Judges*, 96 HARV. L. REV. 374 (1982); Robert F. Peckham, *The Federal Judge as a Case Manager: The New Role in Guiding a Case from Filing to Disposition*, 69 CAL. L. REV. 770 (1981).

117. *Compare* John C. Reitz, *Why we probably cannot adopt the German Advantage in Civil Procedure*, 75 IOWA L. REV. 987, 992 (1990) ("on paper our judges have some of the same power to dominate the making of the factual record").

118. *Id.* at 992 ("[Calling their own expert witnesses] is simply not in [the judges'] job description, as far as the legal culture is concerned").

119. *Id.* at 988.

role[120] to a more passive one. Additional problems would arise in a jury trial. By choosing the court expert the judge does in some way influence the jury's decision although she is not the decision-maker. Through the mannerism in which she questions the court expert, the judge can reveal what she thinks about the expert and can thereby influence the jury's decision.[121] If any, what should be the working relationship between the parties and the court-appointed expert?[122]

6. THE DIFFERENT LEGAL CULTURES

Any real attempt to bring the two systems into closer unity "would involve changing, not positive law, but deeply rooted cultural definitions."[123] Both systems are too different and therefore incompatible.[124] Attempts to change the status quo do not require new laws, but instead, a change in legal culture.[125] Such a sweeping change would require the support of the courts, the lawyers[126] and also the society. Despite several problems mentioned above, neither in Germany nor in the U.S. is there presently the necessary support for fundamental changes, and in some instances, reformist attempts are overtly opposed. For example, court decisions have been reversed by U.S. superior courts because a judge's behavior was considered too active.[127]

The developments mentioned above have occurred only in regard to expert witnesses; no one, in neither country, attacks the fundamentals of the domestic civil procedure system. The different roles of the expert witness is mainly attributable to fundamental differences between the two trial systems. However, it is not possible to change just one detail, one characteristic of a trial system, without affecting, or even attacking, its fundamentals. Both trial systems have problems regarding expert

120. *See* Gross, *supra* note 13, at 1200 ("The real explanation [for non-acceptance of court experts] is rooted in the nature of the role of the trial lawyer").

121. *Id.* at 996.

122. Pizzi, *supra* note 8, at 82.

123. Reitz, *supra* note 117, at 988.

124. *See also* Pizzi, *supra* note 8, at 83 ("The result is a [US] trial system that avoids neutral experts").

125. *See also* Reitz, *supra* note 117, at 992-993.

126. Probably the establishment of court experts will never get the support of U.S. trial lawyers because "they are beyond the control of lawyers". *See* Gross, *supra* note 13, at 1205.

127. *Compare* Mirjan Damaska, *Presentation of Evidence and Factfinding Precising*, 123 U. PA. L. REV. 1083, 1090-1091 (1975).

witnesses, and the developments mentioned above are an attempt to solve them – without changing the whole system.[128]

V. CONCLUSION

While the U.S. expert testimony system has its weaknesses, U.S. courts should not look to the German system as a model on which to base change, and vice versa. Each system has to respond to its weaknesses internally, without looking abroad. Because the systems are fundamentally different – adversarial versus inquisitorial - there is no basis for the blanket adoption of one set of rules by the other system. Instead of improving the system, such adoption would actually increase inconsistency. Furthermore, neither system is inherently better than the other.

In both systems, expert witnesses should support the truth-seeking process.[129] At least in theory, there are party-selected and court-appointed experts in both systems. However, each system's approach as to how the experts should support the fact finder in the truth-seeking process is very different. In Germany, the expert is usually appointed by the court and has considerable power and influence due to the lack of effective control over her decisions. These conditions lead to a situation where the expert becomes a *de facto* fact finder. In contrast, in the U.S., court experts are rare, but partisan experts abound. They merely provide information to the fact finder.

Despite the different approaches to support the fact finding process, neither U.S. nor German expert witnesses perfectly fulfill their purpose. The German approach avoids biased experts, but it lacks efficient mechanisms to restrict and control the substantial authority of the court expert. On the other hand, the U.S. approach offers several safeguards limiting the influence of experts, such as cross-examination and the opportunity for the opponent to call its own expert. Despite the criticism regarding the effectiveness of these mechanisms within the U.S. system, the parties are at least given the opportunity to be active in their own defense. In Germany the parties passively wait for the decision, and usually accept it without criticism. The main disadvantage of the U.S.

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128. *But see* Taylor, *supra* note 24, at 210-211 (1996) ("the procedural aspects of common law trials in the United States have been moving closer over the last century to the "inquisitorial" systems of civil law countries.").

129. *Id.* at 182-183 ("Both civil and common law institutions seek a trouble-free method of assisting the finder of fact in those areas where he or she encounters difficulties in making an informed finding.").

approach is that it tends to create biased, non-objective testimony. In addition, the U.S. system heavily relies on the strength of the party – or more precisely, on the skill of the lawyer – to attack the credibility and minimize the impact of opposing party's expert witness.

In my opinion, neither approach is better than the other: both have advantages and disadvantages. Additionally, because both approaches are the products of contrasting legal systems – adversarial v. inquisitorial – it is not possible to make qualitative comparisons independent from the legal system that is responsible for the difference in the first place. This may be best illustrated by FRE 706, a rule which gives U.S. courts the same power used daily by German courts, but due to the different legal culture, U.S. courts rarely use this power.[130] Therefore, it is not possible to evaluate the different approaches without evaluating the whole civil trial systems in both countries.

U.S. partisan expert testimony should not be abolished because it supports the truth-seeking process and the experts control each other. However, U.S. judges should be aware of the dangers of biased expert testimony, i.e. the obstruction of the truth-seeking process. In many cases such biased will already be disclosed by the opponent. But this does not always happen. Therefore, in order to protect the truth-seeking process judges must always be aware of the possibility given by FRE 706 and should use it where it seems to be appropriate to protect the truth-seeking process.

In certain varieties of cases, the court should always appoint its own expert, such as cases regarding child custody or when complicated scientific issues are involved. If the scientific issue is complicated partisan experts tend to confuse the trier of fact, and to prevent this, the court should appoint its own expert to balance the partisan testimony and to give reliable information to the jury. To assist judges in applying FRE 706, guidelines could be provided to the judges to give them an idea how proceedings under FRE 706 might like. CASE (see page 171 *infra*) could assist the courts in selecting experts.

In Germany, the Civil Procedure Code does not provide effective control over the court expert. The opportunity to appeal *de novo* is a possible control mechanism. But the most important rein on the court expert is the requirement that judges do not *de facto* delegate their role as decision-maker to the court expert. The judge appoints the court expert

130. *Compare also* Gross, *supra* note 13, at 1206 ("In short, court-appointed experts are not used in American trials because they are beyond the control of lawyers").

who is expected to deliver an expert opinion. The judge is under a duty to understand the reasoning of the expert and to questions her if things are unclear. Of course, she does not have the same level of scientific knowledge as the expert which limits the judge's control somewhat over the expert. However, judges can be trained in how to effectively question experts, and in any case, they should be aware that the opinion of the court expert represents only one possible explanation among several, perhaps even more logical It is the province and duty of the judge in Germany to determine the truth. The parties can assist the judge by pointing out inconsistencies in the court expert's opinion by the use of partisan experts. However, the establishment of a U.S.-style cross-examination is not possible because of the very different inquisitorial approach of the German Civil Procedure Code. A cross-examination as conducted in the U.S. would be inconsistent with the role of the judge, and the role of the lawyers, in German civil litigation.

Does the expert testimony in the U.S. and Germany fulfill its purpose? Certainly, it does, but not perfectly. In a sporting sense, it would be a tie between the U.S. and the German systems regarding expert testimony.