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## USING IMPARTIAL EXPERTS IN VALUATIONS: A FORUM-SPECIFIC APPROACH

Courts routinely must make valuations of property. In arriving at determinations of value, courts rely on expert testimony.<sup>1</sup> Unfortunately, because the parties to the case hire these experts, their opinions often diverge greatly, resulting in very little meaningful guidance for the court as to an accurate valuation. Consider the following:

In proceedings to determine compensation following the federal government's partial taking of plaintiff's timberland, plaintiff and defendant both presented expert testimony.<sup>2</sup> Plaintiff's expert posited that the condemned property was worth \$51 million, while the government's expert estimated the land to be worth only \$1.4 million.<sup>3</sup>

In litigation surrounding the value of a minority shareholder's stake in a closely held corporation,<sup>4</sup> petitioner's expert estimated the company to be worth \$20,700,000, while "respondent's expert valued the same business, as of the same day, at \$71,000—a difference of nearly thirty thousand percent!"<sup>5</sup>

In a tax dispute concerning the valuation of artwork which was the subject of a charitable contribution,<sup>6</sup> the taxpayer valued the painting at \$150,000, while the Commissioner of Internal Revenue valued it at a mere \$2,000, each party offering a battery of expert witnesses to buttress its argument.<sup>7</sup>

To cope with these divergences, courts often order a "splitting of the difference" between the two camps or discount one or both

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1. See Thomas D. Hall, Comment, *Valuing Closely Held Stock: Control Premiums and Minority Discounts*, 31 EMORY L.J. 139, 146 (1982) ("Valuation is an issue of fact that is largely the province of expert witnesses.").

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

3. *Id.* at 335.

4. *Taines v. Gene Barry One Hour Photo Process, Inc.*, 474 N.Y.S.2d 362 (Sup. Ct. 1983), *aff'd*, 486 N.Y.S.2d 699 (App. Div. 1985).

5. *Id.* at 365.

6. *Farber v. Commissioner*, 33 T.C.M. (CCH) 673 (1974), *aff'd*, 535 F.2d 1241 (2d Cir. 1975).

7. *Id.* at 673.

side's expert altogether. Neither of these results is satisfactory. Wide use of the split-difference solution creates an incentive for parties' experts to artificially inflate or deflate their appraisals,<sup>8</sup> whereas the wholesale disregard of one or both experts obviates entirely the purpose of expert testimony.

Rather than guide courts through an increasingly complex maze of technical terminology and financial calculation, expert witnesses in the valuation context often hinder the pursuit of a fair and accurate appraisal. Judge David Schwartz, then of the United States Court of Claims, characterized the problem as follows:

The trier must first judge the qualifications of the opposing experts, then try to understand their presentations, pass on their sincerity and credibility, and finally choose between opposing conclusions. Throughout, there is the uneasy doubt as to an appropriate discount for partisanship. Have the witnesses, both or one of them, anticipated a discount by the trier and hiked their opinions twice, once for discount and once for loyalty to their client, or only once, or even not at all?<sup>9</sup>

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8. The United States Tax Court, which handles numerous valuation claims, see *infra* note 194, stated its frustration with the split-difference methodology in *Buffalo Tool & Die Manufacturing Co. v. Commissioner*, 74 T.C. 441 (1980), and admitted its own ineffectiveness in coping with appraisals. The court urged the parties to seek resolution amongst themselves, rather than force the court to take the time and effort merely to reach the "Solomon-like adjustment" that the parties had planned and the court's lack of appraisal expertise practically demanded:

The existing record reeks of stubbornness rather than flexibility on the part of both parties. We are convinced that the valuation issue is capable of resolution by the parties themselves thereby saving the expenditure of time, effort, and money by the parties and the Court—a process not likely to produce a better result. Indeed each of the parties should keep in mind that, in the final analysis, the Court may find the evidence of valuation by one of the parties sufficiently more convincing than that of the other party, so that the final result will produce a significant financial defeat for one or the other, rather than the middle-of-the-road compromise which we suspect each of the parties expects the Court to reach. If the parties insist on our valuing any or all of the assets, we will. We do not intend to avoid our responsibilities but instead seek to administer them more efficiently.

*Id.* at 451-52.

9. David Schwartz, *Impact of the New Federal Rules of Evidence on the Court's Rules*, in PROCEEDINGS OF THE 1976 COURT OF CLAIMS JUDICIAL CONFERENCE 205,

This Note devises a method by which courts might defuse some of the more common problems associated with expert testimony in the valuation context. The first part of the Note discusses the many shortfalls of partisan expert testimony. The Note then highlights possible solutions to the difficulties posed by the prevalence of expert testimony, suggesting that the use of court-appointed experts is especially well suited to the valuation context, and discussing the common law and statutory authority of courts to appoint impartial experts. Next, the Note focuses on valuation issues in three specialty fora—the United States Tax Court, the United States Court of Federal Claims, and the Delaware Chancery Court—and argues that certain characteristics pertaining to these three fora make each uniquely suited to circumvent many of the practical and theoretical difficulties associated with the use of impartial experts. Finally, the Note sketches out a series of recommendations for these three fora by which each successfully might adopt the use of court-appointed experts in future valuation issues.

#### SHORTFALLS OF THE CURRENT SYSTEM

Partisan expert testimony is used in many contexts.<sup>10</sup> In a valuation action, however, divergence of expert opinion is perhaps the starkest, given that the object of offering expert opinion is to arrive at a single, critical, dollar figure. Regardless of context, however, the problems resulting from the use of partisan experts are the same. This part of the Note will outline the shortcomings of partisan expert testimony.

A judge or jury is an inept fact finder.<sup>11</sup> This lack of expertise creates an incentive for the parties to hire the best (or at

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214-15 (1977).

10. See, e.g., Phillip Areeda, Comment, *Always a Borrower: Law and Other Disciplines*, 1988 DUKE L.J. 1029, 1032-33 (“[C]ourts are besieged by experts testifying about whether a particular defendant is insane, has manufactured a ‘safe’ product, exercised common medical skill, discriminated in employment, priced below cost, worsened competition, or possessed a ‘monopoly.’”).

11. Hence the need arises for experts to present “scientific, technical, or other specialized knowledge [to] assist the trier of fact to understand the evidence or to determine a fact in issue.” FED. R. EVID. 702.

least the most) experts that money can buy. Two categories of problems arise: *justice-oriented* and *efficiency-oriented*.<sup>12</sup> Justice-oriented criticisms of the system relate to the parties' ability to use partisan experts to obfuscate issues or to give one side an unfair advantage. The efficiency-oriented problems relate to the huge cost of partisan experts in terms of time, money, and other resources, to the parties and to the already overburdened system of state and federal courts. These two categories are not discrete, as many efficiency-related problems have justice-oriented implications.<sup>13</sup>

### *Battles of the Experts*

The "battle of the experts," wherein two experts with diametrically opposed views opine on the issue at hand, leaves the court in little better position than when it started. An "evidentiary stalemate" results from conflicting testimony, with each expert's opinion counteracting that of the other. The court is left with no guidance whatsoever.<sup>14</sup>

Conflicting expert testimony might even put the court in a worse position. At least one federal judge has noted that battling experts create more potential for confusion than for enlightenment.<sup>15</sup> In its distrust of all experts, the court might disregard the valid testimony along with the invalid.<sup>16</sup> One commentator

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12. See 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, 502 (1988) (positing that the use of partisan expert testimony interferes with three goals of our adjudicative system—"truth-seeking, equal access, and efficiency").

13. The degree of interrelation is particularly high when the high cost of litigation works to deny a party access to the judicial system. See *infra* notes 21-24 and accompanying text (discussing deprivation of access to the courts).

14. Lee, *supra* note 12, at 488. On occasion, the court might prefer to be without the sort of guidance a partisan expert might offer. The trial judge in *Taines v. Gene Barry One Hour Photo Process, Inc.*, 474 N.Y.S.2d 362 (Sup. Ct. 1983), *aff'd*, 486 N.Y.S.2d 699 (App. Div. 1985), manifested his frustration with the partisan expert system, stating that "both experts' reasoning [is] fallacious and their conclusions preposterous, and I give no weight whatsoever to either of their ultimate conclusions as to the value of the business." *Id.* at 365.

15. Francis L. Van Dusen, *A United States District Judge's View of the Impartial Medical Expert System*, 32 F.R.D. 498, 501 (1962) (citing David W. Peck, *Impartial Medical Testimony*, 22 F.R.D. 21, 22 (1958)).

16. See John M. Sink, *The Unused Power of a Federal Judge to Call His Own*

argues that battles of experts inevitably result from partisan expert testimony, and that the litigation process creates a natural bias, resulting in courts having nothing but biased experts before them.<sup>17</sup>

### *Risk of Nonproduction*

A second shortcoming of partisan expert testimony is that the court's sole reliance on party experts to produce evidence might result in the nonproduction of certain evidence crucial to the court's decisionmaking process.<sup>18</sup> Highlighting this danger, Judge Tannenbaum of the U.S. Tax Court lamented in *Farber*<sup>19</sup> the vast amount of information not disclosed by the five experts put on the stand by the parties: "We can only conclude that the primary guideline for presentation of the case by both parties was that the less, rather than the more, the Court knew, the better."<sup>20</sup>

### *Deprivation of Access to Courts*

An emphasis on partisan experts favors the party with the greater resources, especially in technical or highly complex litigation, such as might surround a valuation issue. The wealthier party can hire not only *better* experts,<sup>21</sup> but also *more* ex-

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*Expert Witness*, 29 S. CAL. L. REV. 195, 199 (1956) ("[I]t is possible that perfectly good points in a party's argument may fail to win acceptance, because the judge or jury has become distrustful of all experts.").

17. *Id.* at 197 (arguing that the trial lawyer's object is to make an expert a member of his team and that the expert begins to identify his position and its success with his own reputation).

18. Lee, *supra* note 12, at 484 ("Sole reliance on the parties to produce expert guidance for the court and jury creates a risk of nonproduction of expert evidence."); see also *Johnson v. United States*, 333 U.S. 46, 54 (1947) (Frankfurter, J., dissenting) ("[T]he trial judge need not blindfold himself by failing to call an available vital witness simply because the parties, for reasons of trial tactics, chose to withhold his testimony.").

19. *Farber v. Commissioner*, 33 T.C.M. (CCH) 673 (1974), *aff'd*, 535 F.2d 1241 (2d Cir. 1975); see also *supra* notes 6-7 and accompanying text.

20. *Farber*, 33 T.C.M. (CCH) at 674-75. The parties presented no evidence as to the disputed painting's original purchase, the terms of its purchase, its insured value, or the fair market value of similar paintings from catalogues. Other pertinent evidence was also "cavalierly ignored." *Id.* at 674.

21. Those experts with the greatest prestige, reputation, name, or stage presence

perts.<sup>22</sup> In this manner, a disparity of resources can act to deprive a party opponent of access to the judicial system.<sup>23</sup> A party with especially limited resources might be unable to hire an expert altogether.<sup>24</sup>

### *Emphasis on Quantity of Experts*

Devotion of generous resources to the hiring of expert witnesses also can undermine the efficiency of the judicial process by emphasizing the quantity of witnesses.<sup>25</sup> For the party to whom cost is less important, it makes good sense to attempt to bury the party opponent with the sheer amount of expert testimony which one can marshal for his case.<sup>26</sup>

Although the presence of more experts favors the wealthy litigant with much riding on the outcome of his case, from the fact finders' standpoint the experts' participation means more testimony to hear and more reports to evaluate. Overuse of experts puts further demands on already strained judicial resources.<sup>27</sup> The hiring of additional experts might be intended not

will be the most sought after and, therefore, the most expensive. See Lee, *supra* note 12, at 482 ("Naturally, the most respected and accomplished experts will command the highest fees.").

22. See *infra* notes 25-28 and accompanying text (discussing quantity of experts).

23. See Albert W. Alschuler, *Mediation with a Mugger: The Shortage of Adjudicative Services and the Need for a Two-Tier Trial System in Civil Cases*, 99 HARV. L. REV. 1808, 1830-31 (1986) (discussing the incentives to overwhelm an opponent with greater resources); Lee, *supra* note 12, at 482-83.

24. Stephen A. Saltzburg, *The Unnecessarily Expanding Role of the American Trial Judge*, 64 VA. L. REV. 1, 75 (1978) ("[S]ome parties may be unable to procure the assistance of an expert, because either they cannot afford one or they cannot convince one to help.").

25. See Alschuler, *supra* note 23, at 1830.

26. Sink, *supra* note 16, at 199 ("[T]he expense and uncertainty are justified by the chance of a large verdict which will be none the less valuable because secured by partisan testimony."). Commentators' arguments resemble those made in the abuse of discovery context. One commentator even connects the two phenomena, stating that documents relating to expert testimony may "constitute a significant bulk of discovery avalanches." Lee, *supra* note 12, at 487.

27. See *Winans v. New York & E.R.R.*, 62 U.S. (21 How.) 88, 101 (1858) ("[I]t often occurs that not only many days, but even weeks, are consumed in cross-examinations, wasting the time and wearying the patience of both court and jury"); *Georgia-Pacific Corp. v. United States*, 640 F.2d 328, 334-35 (Ct. Cl. 1980) (denying request for the calling of a court-appointed expert because evidence would be cumulative).

simply to bury the opponent but also to bury the trier of fact, particularly where arcane economic evidence of the type relied upon in a valuation action is involved.<sup>28</sup>

### *Expert Shopping*

The partisan expert system has led to "expert shopping."<sup>29</sup> Not surprisingly, litigants seek out experts with opinions favorable to their case. As a result the court hears only those opinions that the parties want it to hear. More than one hundred years ago, an English court sitting in a patent case lamented the reality of expert shopping and outlined the shopping process as follows:

The mode in which expert evidence is obtained is such as not to give the fair result of scientific opinion to the court. A man may go, and does sometimes, to half-a-dozen experts. He takes their honest opinions, he finds three in his favor and three against him; he says to the three in his favor, Will you be kind enough to give evidence? and he pays the three against him their fees and leaves them alone; the other side does the same. It may not be three out of six, it may be three out of fifty. I was told in one case, where a person wanted a certain thing done, that they went to sixty-eight people before they found one. That is an extreme case no doubt, but it may be done, and therefore I have always the greatest possible distrust of scientific evidence of this kind, not only because it is universally contradictory, and the mode of its selection makes it necessarily contradictory, but because I know of the way in which it is obtained. I am sorry to say the result is that the Court does not get that assistance from the experts which, if they were unbiased and fairly chosen, it would have a right to expect.<sup>30</sup>

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28. Hays Gorey, Jr. & Henry A. Einhorn, *The Use and Misuse of Economic Evidence in Horizontal Price-Fixing Cases*, 12 J. CONTEMP L. 1, 1 (1986) (stating that economic evidence is sometimes "offered simply to confuse the jury by making the case unnecessarily complex or confusing") (footnote omitted).

29. FED. R. EVID. 706 advisory committee's note.

30. *Thorn v. Worthing Skating Rink Co.*, 6 Ch. D. 415n-416n (1876), quoted in Schwartz, *supra* note 9, at 213; Van Dusen, *supra* note 15, at 499.



### *Corrupt Experts*

Although most partisan experts "bought" by a party are true to their convictions and base their opinions on valid and generally accepted methodology, the "venality of some experts remains a risk."<sup>31</sup> Committed to the perpetuation of the partisan expert system, the trial lawyer would counter that cross-examination of expert witnesses should root out corrupt experts.<sup>32</sup> Not all trial lawyers are uniformly competent, however, and reliance on this systemic safeguard runs the risk that expert corruption will not be exposed.<sup>33</sup> Indeed, even the most competent attorney might have difficulty exposing a dishonest expert.<sup>34</sup>

### *Alienation of the Most Qualified Experts*

Because the practice of shopping for experts has at least created the perception of the "hired gun"<sup>35</sup> who will say anything for money, many reputable experts refuse to serve when called upon by a litigant.<sup>36</sup> Professor Wigmore stated that, as the use of

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31. FED. R. EVID. 706 advisory committee's note.

32. See generally ROBERT L. HABUSH, ART OF ADVOCACY—CROSS EXAMINATION OF NON-MEDICAL EXPERTS (1992) (discussing the various means to impeach expert witnesses).

33. See John Basten, *The Court Expert in Civil Trials—A Comparative Appraisal*, 40 MOD. L. REV. 174, 174 (1977) ("The corrupt expert may be a rare phenomenon, but will not necessarily be exposed by an inexpert cross-examination.").

34. See HABUSH, *supra* note 32, § 1.09[5] ("Everyone has faced an expert that they know is not being honest, but they lack the means or tools to expose the deceit.").

35. Professor John Langbein notes that trial lawyers often refer to experts as "saxophones," the idea being that "the lawyer plays the tune, manipulating the expert as though the expert were a musical instrument on which the lawyer sounds the desired notes." John H. Langbein, *The German Advantage in Civil Procedure*, 52 U. CHI. L. REV. 823, 835 (1985). Professor Samuel Gross less charitably avers that "lawyers and experts alike see expert witnesses—those members of other learned professions who will consort with lawyers—as whores." Samuel R. Gross, *Expert Evidence*, 1991 WIS. L. REV. 1113, 1115; see also *id.* at 1135 ("The contempt of lawyers and judges for experts is famous. They speak of maintaining 'stables' of experts, beasts to be chosen and harnessed at the will of their masters.").

36. In this regard, Professor Sink notes the irony that while the high cost of an expert witness may not inhibit a litigant, he may "still be unable to obtain the best qualified doctors to appear in his behalf . . . , owing to the reluctance which some of these men feel toward appearing in court." Sink, *supra* note 16, at 199 (citing Samuel R. Gerber, *Expert Medical Testimony and the Medical Expert*, in PHYSICIAN IN THE COURTROOM 73 (Oliver Schroeder, Jr., ed., 1954)).

expert testimony increased, "[p]rofessional men of honorable instincts and high scientific standards began to look upon the witness box as a golgotha, and to disclaim all respect for the law's methods of investigation."<sup>37</sup> Men and women of honorable instincts and high standards are, of course, precisely the people that the legal system contemplated having testify when the idea of allowing a "witness qualified as an expert" to "assist the trier of fact to understand the evidence or to determine a fact in issue" was devised.<sup>38</sup> If these experts refuse to serve out of fear for their reputation, the whole system quickly unravels.<sup>39</sup>

### *Danger of the Trier of Fact Being Misled*

The final, and probably most disturbing, flaw of the partisan expert system arises from the fact finder's lack of expertise. The judge or jury has few means, besides perhaps their own sense impressions, upon which to evaluate an expert's testimony. An expert's success might well depend more upon his demeanor and believability than upon the veracity of his opinions. In this regard, Judge Van Dusen stated that "the lawyers become more interested in retaining a good *testifier* than in retaining a good *doctor*."<sup>40</sup>

This phenomenon is exemplified in the bench trial of *Wells v. Ortho Pharmaceutical Corp.*,<sup>41</sup> a toxic tort case in which the judge found that a contraceptive manufactured by the defendant caused birth defects. The judge stated that he had "evaluated the rationality of each expert's testimony in light of all the evidence presented" and had "paid close attention to each expert's demeanor and tone."<sup>42</sup> He based his opinion on his finding that

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37. 2 WIGMORE, EVIDENCE § 563 (Chadbourn rev. 1979).

38. FED. R. EVID. 702.

39. Although individual experts may be alienated from the legal system because of the general lack of respect it accords the partisan expert, one commentator has stated that potential expert witnesses, and indeed whole professions "on which the judicial system is reliant," might also be "antagonized by adversary trial procedure." Basten, *supra* note 33, at 174.

40. Van Dusen, *supra* note 15, at 501 (emphasis added) (quoting David W. Peck, *Impartial Medical Testimony*, 22 F.R.D. 21, 22 (1958)).

41. 615 F. Supp. 262 (N.D. Ga. 1985), *aff'd*, 788 F.2d 741 (11th Cir.), *cert. denied*, 479 U.S. 950 (1986).

42. *Id.* at 267.

the testimony of plaintiff's experts was "competent" and "credible" whereas the testimony of defendant's experts "often indicated bias or inconsistency"<sup>43</sup>

Most observers agree, however, that although legally well reasoned, the *Wells* decision is scientifically wrong. Numerous articles in the national and medical press excoriated the *Wells* decision as against the weight of all scientific evidence<sup>44</sup> and "an intellectual embarrassment."<sup>45</sup> *Wells* continues to engender controversy, and proponents of expert evidence reform often use it as an example of justice gone awry<sup>46</sup> Even one of the plaintiff's experts, the author of a study investigating the relationship between spermicide use and birth defects, warned Judge Marvin Shoob, who presided in the case, "not to construe [the study] as proving a link between spermicides and birth defects."<sup>47</sup> In light of the verdict, the expert later remarked that Judge Shoob "either ignored or failed to understand" this crucial testimony<sup>48</sup>

### SOLUTIONS

Recognition of the shortcomings of partisan expert testimony is not new<sup>49</sup> In 1905, Judge Learned Hand wrote of the confu-

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43. *Id.*

44. James L. Mills & Duane Alexander, *Teratogens and "Litogens,"* 315 NEW ENG. J. MED. 1234, 1235 (1986) ("[T]he overwhelming body of evidence indicates that spermicides are not teratogenic."), *quoted in* Gross, *supra* note 35, at 1122.

45. *Federal Judges vs. Science*, N.Y. TIMES, Dec. 27, 1986, at A22 (unsigned editorial), *quoted in* Gross, *supra* note 35, at 1124.

46. See David E. Bernstein, *Junk Science in the Courtroom*, WALL ST. J., Mar. 24, 1993, at A15 (citing *Wells* as the "most prominent" of a "series of embarrassing decisions in cases involving scientific evidence").

47. *Id.*

48. *Id.*

49. Since at least the middle of the 19th century, commentators and courts have decried the use of partisan experts as a time-consuming and often counterproductive means of seeking justice. See, e.g., *Winans v. New York & E.R.R.*, 62 U.S. (21 How.) 88, 101 (1858) (stating that examination of experts is time-consuming, "often wasting the time and wearying the patience of both court and jury, and perplexing, instead of elucidating, the questions involved in the issue"); 2 WIGMORE, *supra* note 37, § 563 ("By any standard of efficiency, the orthodox method [of partisan expert testimony] registers itself as a failure, in cases where the slightest pressure is put upon it.").

sion caused a jury by conflicting expert opinions,<sup>50</sup> concluding that "[the jury] will do no better with the so-called testimony of experts than without, except where it is unanimous."<sup>51</sup> Over the years, various commentators have made proposals for reform of the partisan expert system. This section of the Note discusses proposed solutions, applies each to the problems posed by expert appraisals, and concludes that, of each of the solutions discussed, the use of court-appointed witnesses lends itself most readily to the valuation context.

The valuation claim of the type contemplated by this Note generally involves the resolution of only one issue: the appraisal itself. Although protracted litigation provides incentives for the court system to undertake the fashioning of a high cost, innovative procedure suited to individual circumstances,<sup>52</sup> this Note seeks a practical solution for the limited circumstances of the routine valuation action.

An effective remedy first must address efficiency and justice concerns.<sup>53</sup> To be practical, however, a solution also must be applied easily and with a minimum of preparation. Furthermore, a solution must be theoretically unassailable—providing the parties with grounds for appeal would be counterproductive for a scheme that seeks to save the judicial system time and effort. Finally, any successful solution must be flexible enough to be easily modified to fit a variety of circumstances.

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50. Learned Hand, *Historical and Practical Considerations Regarding Expert Testimony*, 15 HARV. L. REV. 40, 55 (1901). "What hope have the jury, or any other layman, of a rational decision between conflicting statements each based upon [a lifetime of technical] experience." *Id.* In his consideration of whether expert witnesses were used in the best possible manner, Hand set out to prove two things, "first, that logically the expert is an anomaly; second, that from the legal anomaly serious practical difficulties arise." *Id.* at 50.

51. *Id.* at 56.

52. See *infra* notes 54-118 and accompanying text (discussing judicial exclusion, advisory juries, special master, and government agency solutions to the expert problem).

53. See *supra* notes 12-13 and accompanying text.

*Exclusion of Partisan Expert Testimony*

One means of coping with the problem of partisan experts is to exclude their testimony altogether, thus conserving the resources of both the litigants and the court.

*Pretrial Exclusion*

Rule 16 of the Federal Rules of Civil Procedure enables trial courts to compel pretrial conferences of the parties and to schedule the trial process through pretrial orders.<sup>54</sup> Through use of this considerable discretion in the scheduling and management

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54. Rule 16 provides, in pertinent part:

(a) Pretrial Conferences; Objectives. In any action, the court may in its discretion direct the attorneys for the parties to appear before it for a conference or conferences before trial for such purposes as

- (1) expediting the disposition of the action;
- (2) establishing early and continuing control so that the case will not be protracted because of lack of management;
- (3) discouraging wasteful pretrial activities;
- (4) improving the quality of the trial through more thorough preparation, and;
- (5) facilitating settlement of the case.

(c) Subjects to Be Discussed at Pretrial Conferences. The participants at any conference under this rule may consider and take action with respect to

(1) the formulation and simplification of the issues, including the elimination of frivolous claims or defenses;

(4) the avoidance of unnecessary proof and of cumulative evidence;

(10) the need for adopting special procedures for managing potentially difficult or protracted actions that may involve complex issues, multiple parties, difficult legal questions, or unusual proof problems; and

(11) such other matters as may aid in the disposition of the action.

(e) Pretrial Orders. After any conference held pursuant to this rule, an order shall be entered reciting the action taken. This order shall control the subsequent course of the action unless modified by a subsequent order. The order following a final pretrial conference shall be modified only to prevent manifest injustice.

FED. R. CIV. P. 16.

The Note will use the Federal Rules of Evidence and the Federal Rules of Civil Procedure as a proxy for all American rules of court. Where relevant, state analogues to the Federal Rules will be addressed. *See, e.g., infra* note 134 (enumerating state analogues to Federal Rule of Evidence 706).

of trials, judges may limit the number of experts or the scope or subject matter of expert testimony<sup>55</sup>

*Exclusion Resulting in Summary Judgment*

Federal Judge Jack Weinstein used the grant of a party's motion in limine to exclude expert testimony and manage his unwieldy docket in the protracted "Agent Orange" litigation.<sup>56</sup> In this mass tort action, certain plaintiffs had opted out of the \$180 million class settlement to pursue individual claims. The defendant chemical manufacturer moved for summary judgment on the causation issue.<sup>57</sup> The plaintiffs responded with affidavits from medical experts stating that, in the experts' opinion, exposure to Agent Orange caused the plaintiffs' injuries.<sup>58</sup> A simple assertion by someone adjudged a medical expert is generally enough to survive an initial causation inquiry and send the case to trial.<sup>59</sup> Judge Weinstein, however, granted the defendant's motion in limine to exclude the expert's affidavits as lacking adequate foundation.<sup>60</sup> Because the plaintiffs could not produce evidence on the causation issue, Judge Weinstein granted defendant's motion for summary judgment.<sup>61</sup>

In *Viterbo v. Dow Chemical Co.*,<sup>62</sup> another mass tort action, a federal judge used the exclusion of plaintiff's expert to grant defendant's motion for summary judgment. In *Viterbo*, the judge ruled the expert's affidavit as to causation inadmissible on the

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55. Sink, *supra* note 16, at 199.

56. *In re "Agent Orange" Prod. Liab. Litig.*, 611 F. Supp. 1223 (E.D.N.Y. 1985), *aff'd*, 818 F.2d 187 (2d Cir. 1987), *cert. denied*, 487 U.S. 1234 (1988) [hereinafter *Agent Orange I*]; *In re "Agent Orange" Prod. Liab. Litig.*, 611 F. Supp. 1267 (E.D.N.Y. 1985), *aff'd*, 818 F.2d 187 (2d Cir. 1987), *cert. denied*, 487 U.S. 1234 (1988) [hereinafter *Agent Orange II*].

57. *Agent Orange I*, 611 F. Supp. at 1229-30.

58. *Id.*

59. E. Donald Elliott, *Toward Incentive-Based Procedure: Three Approaches for Regulating Scientific Evidence*, 69 B.U. L. REV. 487, 497 (1989).

60. *Agent Orange I*, 611 F. Supp. at 1253, 1255-56; *Agent Orange II*, 611 F. Supp. at 1281-83.

61. *Agent Orange I*, 611 F. Supp. at 262-64; *Agent Orange II*, 611 F. Supp. at 1284-85; *see also* Celotex Corp. v. Catrett, 477 U.S. 317, 322-23 (1986) (reiterating that the defendant is entitled to summary judgment when plaintiff is unable to produce evidence on an essential element of his claim).

62. 646 F. Supp. 1420 (E.D. Tex. 1986), *aff'd*, 826 F.2d 420 (5th Cir. 1987).

grounds that it was based on data which were not reliable, without probative force, and not objective because the expert sought employment from the plaintiff and not vice versa.<sup>63</sup>

### *Exclusion Using the Federal Rules of Evidence*

Since his *Agent Orange* decisions, Judge Weinstein has written that expert testimony can be excluded through creative use of three Federal Rules of Evidence.

First, there is Rule 703, which allows an expert to base his opinion on the type of evidence reasonably relied upon by experts in his field. In some cases, examination of the basis of an expert's opinion reveals that it is supported by no reliable evidence at all. In such cases exclusion of the expert's opinion under Rule 703 and a grant of summary judgment to the opposing party might be appropriate. In other cases, an expert's opinion is supported by *some* credible evidence, but further investigation reveals that there is other, much more persuasive evidence available which undermines the expert's opinion and which the expert is ignoring. In these cases, the court might exclude the expert's testimony either under Rule 702, as not being helpful to the trier of fact, or under Rule 403, as being likely to mislead the jury. Both the reasoning and the result are much the same, regardless of which rule is used.<sup>64</sup>

### *Exclusion of Novel Scientific Evidence*

The Supreme Court recently devised a test for the exclusion of novel scientific evidence similar to Judge Weinstein's, outlined above. As articulated last term in *Daubert v. Merrell Dow Pharmaceuticals*,<sup>65</sup> the new doctrine abrogates the seventy-year-old *Frye* rule<sup>66</sup> in favor of the less stringent standards of

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63. *Id.* at 1424-26.

64. Jack B. Weinstein, *Improving Expert Testimony*, 20 U. RICH. L. REV. 473, 493 (1986) (citations omitted).

65. 113 S. Ct. 2786 (1993).

66. The *Frye* rule provided that when expert testimony was "deduced from a well-recognized scientific principle or discovery, the thing from which the deduction [was] made must be sufficiently established to have gained general acceptance in the particular field in which it belongs." *Frye v. United States*, 293 F. 1013, 1014 (D.C. Cir.

Federal Rule of Evidence 702,<sup>67</sup> enacted in 1975, fifty years after *Frye*.<sup>68</sup> The Court stated that Federal Rule of Evidence 702 supersedes the previous common law<sup>69</sup> and that the "rigid 'general acceptance' requirement [is] at odds with the 'liberal thrust' of the Federal Rules."<sup>70</sup> Pursuant to Rule 702 and *Daubert*, a trial judge must inquire as to the relevance and reliability of novel scientific evidence,<sup>71</sup> determine whether the expert's testimony will aid the court in determining a fact in issue,<sup>72</sup> and decide whether the expert's "knowledge" was derived by application of the scientific method.<sup>73</sup>

The *Frye* and *Daubert* rules generally contemplate the exclusion of scientific evidence such as lie detector tests<sup>74</sup> or pharmacological studies of a drug's chemical structure.<sup>75</sup> However, the *Frye* rule and the new *Daubert* test also have been used to evaluate and exclude expert economic testimony, including testimony of the type made in valuation actions.<sup>76</sup>

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1923).

67. Rule 702 reads as follows:

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

FED. R. EVID. 702.

68. Marcia Coyle, *Supreme Court Eases Admissibility of Experts*, NAT'L L.J., July 12, 1993, at 12.

69. *Daubert*, 113 S. Ct. at 2794 (citing *Bourjaily v. United States*, 483 U.S. 171 (1987)).

70. *Id.* (citing *Beech Aircraft Corp. v. Rainey*, 488 U.S. 153, 169 (1988)).

71. *Id.* at 2795.

72. *Id.* at 2795-96.

73. *Id.* at 2795.

74. *Frye* concerned the use of a predecessor of the modern polygraph in the murder trial of appellant James A. Frye. *Frye*, 293 F. at 1013.

75. One of the issues in *Daubert* concerned the admissibility of a pharmacological study comparing the chemical structure of the drug Bendectin, alleged to have caused birth defects in plaintiff's children, with the chemical structure of other substances known to cause birth defects. *Daubert*, 113 S. Ct. at 2791.

76. See, e.g., *Frymire-Brinati v. KPMG Peat Marwick*, 2 F.3d 183, 187 (7th Cir. 1993) (holding that the trial judge "could not properly have admitted" the valuation testimony of plaintiff's expert, because the judge did not undertake an assessment of the expert's methodology before allowing him to testify); *Mercado v. Ahmed*, 756 F Supp. 1097, 1102-03 (N.D. Ill. 1991) (barring the use of testimony of an expert economist as to the monetary value of the "pleasure of life" on grounds that such science is not generally accepted in the economic community).



*Shortcomings of Exclusion*

Use of the exclusion remedies outlined above, however, raises several problems in the appraisal context. Most of the appraisal methods that a partisan expert uses in, for example, a stock valuation, will be well accepted in the professional community, making a *Frye*-type exclusion not relevant. The difference in interpretation will arise not because of the method used, but because of the *application* of the method by each expert.<sup>77</sup>

Exclusion of experts probably would not reduce the net expense of litigation. Although such an exclusion would result in fewer witnesses, more weight would be given to each, extending direct and cross-examination and thus countering any cost savings for parties who pay experts by the hour,<sup>78</sup> and for the courts, who have to hear and digest the additional testimony.<sup>79</sup>

In addition, because exclusion would work to limit only the number of experts, it does little to ameliorate justice-oriented

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77. See *infra* note 199 (discussing the economic analysis undertaken in *In re Shell Oil Appraisal* and the differing conclusions reached by experts using the same general methodology). The universe of generally accepted economic valuation methodology is finite. See, e.g., Rev. Rul. 59-60, 1959-1 C.B. 237 (governing the valuation of corporations). Regulatory rulings such as Revenue Ruling 59-60 list factors which may be considered, but give no guidance as to how those factors are to be applied. See Steven M. Loeb, *Valuation of Closely Held Business Interests*, in PREPARATION OF THE FEDERAL ESTATE TAX RETURN AND COMPUTER PROGRAMS FOR ESTATE PLANNING 569-601 (PLI Tax Law & Estate Planning Series No. 169, 1986) (outlining each of the predominant methods by which close corporations can be valued and the different applications of each); Michael F. Beausang, Jr., *Valuation: General and Real Estate*, Tax Mgmt. (BNA) No. 132-3d (1992) (reviewing the methods commonly used in the valuation of assets, including real estate, financial instruments, and personal property); Judith F. Todd & Candace L. Hemphill, *Valuation of Corporate Stock*, Tax Mgmt. (BNA) No. 831 (1992) (discussing the approach to valuation of Revenue Ruling 59-60 and the valuation process for interests in privately and publicly held corporations).

78. See Sink, *supra* note 16, at 199 (stating that experts are paid for time in court and thus extra time on the stand adds commensurately to party expense).

79. *Id.* Courts have suggested that parties gain little by the presentation of multiple experts. See *Cullers v. Commissioner*, 237 F.2d 611, 616 (8th Cir. 1956) (holding that the benefit of three separate appraisals is not lost by the similarity of the valuations therein, but that it is "not particularly surprising that [the three appraisers] came up with substantially similar valuations"). In addition, cumulative experts might undercut one another. See Jacob D. Fuchsberg, *Two Experts for Defendant Neutralize Each Other*, in JULIUS B. LEVINE, WINNING TRIAL ADVOCACY 81-82 (1989) (discussing "overtrial of a case by calling too many witnesses").

problems. The litigants still can confuse the fact finder with widely divergent partisan expert testimony

### *Appointment of a Special Fact Finder*

Federal Rule of Civil Procedure 39(c)<sup>80</sup> permits trial by an "advisory jury" in any action not triable of right by a jury, or by a binding jury with the consent of both parties. Given that the valuation issues addressed in this Note do not entitle the parties to a jury,<sup>81</sup> Rule 39(c) might provide a viable solution to the expert appraisal dilemma.<sup>82</sup>

Use of an advisory jury, however, would involve prohibitively high judicial expense. A judge would have to find and appoint a jury of advisors on his own, devising mechanisms by which they might be paid and excused, and by which new advisors might be appointed in the event of death or excusal. Rule 39(c) provides no guidance on these issues or on any of the myriad considerations which might come into play when a court sua sponte or upon motion of a party decides to appoint an advisory jury

The problems of appointment of a binding jury include the above practical concerns, plus any theoretical obstacles posed by the trial judge's abdication of responsibility. In addition, the

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80. The text of the rule provides as follows:

(c) Advisory Jury and Trial by Consent. In all actions not triable of right by a jury the court upon motion or of its own initiative may try any issue with an advisory jury or, except in actions against the United States when a statute of the United States provides for trial without a jury, the court, with the consent of both parties, may order a trial with a jury whose verdict has the same effect as if trial by jury had been a matter of right.

FED. R. CIV. P. 39(c).

81. See *infra* note 204 and accompanying text (discussing lack of jury right in the U.S. Tax Court, the U.S. Court of Federal Claims, and the Delaware Chancery Court).

82. Some jurisdictions allow for the appointment of special panels to undertake a valuation of property taken by the state pursuant to its condemnation power. See, e.g., VA. CODE ANN. §§ 25-46.19 to 25-46.29 (Michie Supp. 1992) (providing for the appointment of a panel of nine "condemnation commissioners" in takings actions); cf. FED. R. EVID. 706(b) (providing that the cost of a court-appointed expert will be paid by the government in "proceedings involving just compensation under the Fifth Amendment"); *infra* notes 132 and 283-85. Other jurisdictions allow for the appointment of disinterested appraisers in shareholder actions taken pursuant to statutory appraisal rights. See, e.g., MD. CORPS. & ASS'NS CODE ANN. § 3-210 (1993).

judge would have to convince both parties' lawyers to surrender control of their cases to a body of experts with years of experience in making appraisals and preconceived notions of how such appraisals should be made.

Although a Rule 39(c) special fact finder perhaps resolves some of the justice-oriented concerns, it seemingly only exacerbates the efficiency problems, at least from the point of view of the fact finder and court system.<sup>83</sup>

### *Appointment of Special Masters*

In addition to Rule 39(c) powers, courts have the power under Federal Rule of Civil Procedure 53 to appoint a special master.<sup>84</sup> Unlike Rule 39(c), Rule 53 specifies the duties and powers

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83. Cf. Note, *Practice and Potential of the Advisory Jury*, 100 HARV. L. REV. 1363 (1987) (identifying a "strong connection between advisory jury use and the goal of community participation in legal proceedings," and arguing for "expanded use of the advisory jury as one way to maintain the legitimacy of legal decisions in light of Realist and radical critiques of the legal system").

84. Rule 53 provides, in pertinent part:

(a) Appointment and Compensation. The court in which any action is pending may appoint a special master therein. As used in these rules, the word "master" includes a referee, an auditor, an examiner, and an assessor. The compensation to be allowed to a master shall be fixed by the court, and shall be charged upon such of the parties or paid out of any fund or subject matter of the action, which is in the custody and control of the court as the court may direct

(b) Reference. A reference to a master shall be the exception and not the rule. In actions to be tried by a jury, a reference shall be made only when the issues are complicated; in actions to be tried without a jury, save in matters of account and of difficult computation of damages, a reference shall be made only upon a showing that some exceptional condition requires it.

(c) Powers. The order of reference to the master may specify or limit the master's powers and may direct the master to report only upon particular issues or to do or perform particular acts or to receive and report evidence only and may fix the time and place for beginning and closing the hearings and for the filing of the master's report

(e) Report.

(1) Contents and Filing. The master shall prepare a report upon the matters submitted to the master by the order of reference and, if required to make findings of fact and conclusions of law, the master shall set them forth in the report. The master shall file the report with the clerk of the court and serve on all parties notice of the filing. In an

of masters,<sup>85</sup> as well as procedures for their compensation and appointment.<sup>86</sup> Federal Magistrate Judge Wayne Brazil has summarized federal courts' use of special masters: "[c]ourts appoint special masters as a means of addressing three overlapping categories of problems: judicial limitations, shortcomings of the traditional adjudicatory system, and shortcomings of parties and counsel."<sup>87</sup> Rule 53 makes clear that "the word 'master' includes a referee, an auditor, an examiner, and an assessor."<sup>88</sup> So described, the process of valuing disputed property would seem to be well within the role of a master, as contemplated by the Rules of Civil Procedure. In addition, Rule 53 masters address both the efficiency-oriented and the justice-oriented criti-

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action to be tried without a jury, unless otherwise directed by the order of reference, the master shall file with the report a transcript of the proceedings and of the evidence and the original exhibits. Unless otherwise directed by the order of reference, the master shall serve a copy of the report on each party.

(2) In Non-Jury Actions. In an action to be tried without a jury the court shall accept the master's findings of fact unless clearly erroneous. Within 10 days after being served with notice of the filing of the report any party may serve written objections thereto upon the other parties. Application to the court for action upon the report and upon objections thereto shall be by motion and upon notice as prescribed in Rule 6(d). The court after hearing may adopt the report or may modify it or may reject it in whole or in part or may receive further evidence or may recommit it with instructions.

(3) In Jury Actions. In an action to be tried by a jury the master shall not be directed to report the evidence. The master's findings upon the issues submitted to the master are admissible as evidence of the matters found and may be read to the jury, subject to the ruling of the court upon any objections in point of law which may be made to the report.

FED. R. CIV. P. 53.

85. FED. R. CIV. P. 53(a), 53(c), 53(e).

86. FED. R. CIV. P. 53(a), 53(b).

87. Wayne D. Brazil, *Special Masters in Complex Cases: Extending the Judiciary or Reshaping Adjudication?*, 53 U. CHI. L. REV. 394, 394 (1986). By judicial limitations, Judge Brazil refers to time constraints on the judiciary and judges' lack of expertise in certain "esoteric or technologically sophisticated areas." *Id.* at 394. The shortcomings that Judge Brazil mentions include the "ritualistic" formality and uncommunicativeness that can result from standard pleading and discovery. *Id.* at 395. These problems include lack of communication and distrust between the parties which can "cloud their judgment and inspire [] overkill tactics or opaque responses." *Id.*

88. FED. R. CIV. P. 53(a).

cisms of the partisan expert system by injecting into the adjudication a party with quasi-judicial power<sup>89</sup> and the time, resources, and knowledge to make informed input into the fact finding process.

The use of masters in a fact finding capacity is severely limited in practice. A court's use of a special master in a purely ministerial function is not controversial, given that such use involves no exercise of discretion or judgment and is intended simply as a timesaving device for the court.<sup>90</sup> When the master steps outside of these bounds, however, a basis for appeal is established. Appellate courts have been highly critical of lower courts' abuse of the master function,<sup>91</sup> and commentators have voiced concern about the increasingly adjudicatory roles (e.g., determination of damages, settlement, and discovery) that Rule 53 masters are filling.<sup>92</sup>

The use of special masters is not suited to all situations. In the past, masters have worked best in protracted litigation (e.g.,

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89. See, e.g., FED. R. CIV. P. 53(e)(2) ("In an action to be tried without a jury the court shall accept the master's findings of fact unless clearly erroneous.").

90. Brazil, *supra* note 87, at 395. ("In [accountings and calculations of damages using court-approved formulae] the work of masters is not controversial because it involves no significant exercise of judgment or discretion, no legal analysis, and no determinations of policy.").

91. See, e.g., *Prudential Ins. Co. v. United States Gypsum Co.*, 991 F.2d 1080, 1087 (3d Cir. 1993) (reversing a special master appointment on the grounds that the complexity of a case or the volume of work generated in a case cannot justify reference to a special master); *Madrigal Audio Labs., Inc. v. Cello Ltd.*, 799 F.2d 814, 818 n.1 (2d Cir. 1986) (excoriating the trial judge in a complex patent case for appointing a special master solely because of his unfamiliarity with patent law, and holding that it is a judge's obligation, "whenever faced with unfamiliar factual or legal issues to educate himself in those fields"); *Reed v. Cleveland Bd. of Educ.*, 607 F.2d 737, 746-48 (6th Cir. 1979) (disallowing the fees requested by an expert assistant to a special master on the grounds that the assistant was a constitutional law professor, and that "the adversary system as it has developed in this country precludes the court from receiving out-of-court advice on legal issues in a case").

92. See Linda Silberman, *Judicial Adjuncts Revisited: The Proliferation of Ad Hoc Procedure*, 137 U. PA. L. REV. 2131, 2172 (1989) (expressing "general concern about the abdication of the judicial function to outside actors" and citing particularly to *Mobil Oil Corp. v. Altech Industries, Inc.*, 117 F.R.D. 650 (C.D. Cal. 1987), in which "the court permitted a special master to preside over a jury trial with the consent of the parties"). Silberman states that, "[n]ot only is the use of a master expensive, but it also may delay the likelihood of focusing on the merits of the case," *id.* at 2174, and laments the fact that "important issues of policy and decision-making are subtly being transferred from the judge to judicial adjuncts." *Id.* at 2168.

mass tort actions).<sup>93</sup> Where the court can remove the danger of the master's exercising his own judgment by clearly defining the role of the master, devising rules and formulae for the master to follow,<sup>94</sup> and providing adequate avenues of appeal for the parties, the use of a master will be successful. As noted above, however, the average valuation action is not protracted. Therefore, none of the economies of scale that make a court's appointment of a master worthwhile are present in valuation cases. In addition, in a valuation action, a fact finder needs not administrative aid, but discretionary aid (e.g., guidance about appropriate valuation methodology).<sup>95</sup>

### *Appointment of Technical Advisors*

A more flexible alternative to the special master is the technical advisor, a common law judicial adjunct appointed periodically by courts as a guide through complex litigation. In *Reilly v. United States*,<sup>96</sup> the district judge in a bench trial appointed an economist to aid him in the determination of damages in a medical malpractice case involving the negligent delivery of a baby.<sup>97</sup> The child, Heather Reilly, was born with severe and irreparable brain damage "[a]s a result of the doctor's manifest negligence."<sup>98</sup> The court needed to calculate a damage award that accounted for the child's loss of earnings capacity, among other factors.<sup>99</sup> The court appointed an economist to serve *in camera* as a technical advisor.<sup>100</sup> The economist's role was " 'in the nature of a law clerk,' someone with whom the judge could engage in 'free-wheeling discussion' " outside the earshot of the

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93. See Brazil, *supra* note 87, at 398 ("Two notable efforts at case management took place in the asbestos cases in Ohio and the DDT cases in Alabama. In both settings, courts faced large numbers of claimants seeking relief from a small group of defendants for injuries having some sources and characteristics in common.").

94. *Id.* at 394.

95. See *supra* note 77 (discussing different valuation methods and the application of those methods).

96. 682 F. Supp. 150 (D.R.I.), *aff'd*, 863 F.2d 149 (1st Cir. 1988).

97. *Reilly*, 682 F. Supp. at 152.

98. *Reilly*, 863 F.2d at 153.

99. *Reilly*, 682 F. Supp. at 152.

100. *Id.*

parties.<sup>101</sup> The parties were excluded from the discussions between the judge and the advisor, were not provided advance notice of the expert's appointment or identity, and were denied an opportunity to cross-examine the expert to determine bias or inexperience and to test his theories and methodologies.<sup>102</sup>

In *Reilly*, the court relied at least in part on an earlier decision, *United States v. United Shoe Machinery Corp.*,<sup>103</sup> to establish its "inherent authority"<sup>104</sup> to appoint a technical advisor.<sup>105</sup> In *United Shoe*, a large and complex antitrust action, trial judge Charles Wyzanski appointed an economist to discuss the case with him without the parties present and to assist in "analyzing the facts of record and suggesting remedies."<sup>106</sup>

Numerous commentators have criticized the use of technical advisors. Some years after the *United Shoe* decision, Judge Wyzanski himself recanted, stating that he was mistaken not to have made the report of the court-appointed technical advisor available to the parties for comment.<sup>107</sup> With technical advisors parties are denied not only an opportunity to cross-examine the technical advisor,<sup>108</sup> but are not privy to the advisor's communications with the judge.<sup>109</sup>

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101. *Reilly*, 863 F.2d at 158 (citations omitted).

102. *Id.*

103. 110 F. Supp. 295 (D. Mass. 1953). "[O]ne court has provided an exemplary guide to the worth and vitality of [the appointment of technical advisors] to courts of law." *Reilly*, 682 F. Supp. at 161.

104. *Reilly*, 682 F. Supp. at 155.

105. The *Reilly* court relied more substantially on *In re Peterson*, 253 U.S. 300 (1920), to establish this proposition. *Reilly* 682 F. Supp. at 155, 161; see also *infra* note 135 (discussing *Peterson's* citation as authority for courts' appointment of impartial experts).

106. *Reilly*, 682 F. Supp. at 161.

107. See Carl Kaysen, *In Memoriam: Charles E. Wyzanski, Jr.*, 100 HARV. L. REV. 713, 715 (1987). Carl Kaysen was the economist who was appointed by Judge Wyzanski to serve as technical advisor.

108. *Reilly v. United States*, 863 F.2d 149 (1st Cir. 1988).

109. See Carl J. Schuck, *Techniques for Proof of Complicated Scientific and Economic Facts*, 40 F.R.D. 33, 35 (1967) ("[T]here is a serious question whether an economist whose personal philosophy is bound to affect his opinion—or anyone else for that matter—should be allowed to communicate with a trial judge regarding a case under trial in the absence of counsel.").

The *Reilly* decision was upheld on appeal.<sup>110</sup> Although approving of the trial judge's use of the technical advisor, the appellate court stated that such appointments "should be reserved for truly extraordinary cases where the introduction of outside skills and expertise will hasten the just adjudication of a dispute without dislodging the delicate balance of the juristic role."<sup>111</sup> It added that "[a]ppropriate instances [for appointment], we suspect, will be hen's teeth rare."<sup>112</sup>

Although arguably working to serve the interests of justice and efficiency,<sup>113</sup> the use of a technical advisor will not be an effective remedy for the partisan expert testimony dilemma until applicable to the everyday, not only "the truly extraordinary," valuation.

### *Rule 11 Sanctions as a Deterrent*

Increased imposition of Rule 11<sup>114</sup> sanctions for unwarranted or excessive use of experts can act as a deterrent to litigants making use of frivolous expert opinions.<sup>115</sup> Like judicial exclusion of experts, however, sanctions remedy efficiency-related problems but do not address justice concerns. Most courts are reluctant to use Rule 11 to sanction parties in the first place, and do so only in extraordinary circumstances.<sup>116</sup>

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110. *Reilly*, 863 F.2d at 174.

111. *Id.* at 156.

112. *Id.* at 156-57.

113. A trier of fact with the unchallenged opinion of a possibly biased or subcompetent expert may not be any closer to the truth than a trier of fact contending with partisan experts. In terms of efficiency, however, the technical advisor could be useful in sorting through the testimony and reports of the parties' experts.

114. Rule 11 of the Federal Rules of Civil Procedure provides that the court appropriately may sanction parties who file pleadings, motions or other papers frivolously, to cause unnecessary delay or increase in expense, or to harass opponent parties. FED. R. CIV. P. 11.

115. Weinstein, *supra* note 64, at 494. Judge Weinstein also suggests amending Rule 11 to allow courts to sanction directly the expert uttering a frivolous opinion. *Id.*

116. See SAUL M. KASSIN, AN EMPIRICAL STUDY OF RULE 11 SANCTIONS 36-37 (1985) (finding that of 260 federal district judges surveyed, 108 had not granted any sanctions under Rule 11 within the last 12 months and 71 of those had not received a single request to impose a sanction; an additional 48 judges had granted a Rule 11 sanction only once). Judge Weinstein acknowledges that judicial use of Rule 11 is rare. Weinstein, *supra* note 64, at 494 ("Generally, I am not in favor of such pu-



*Use of Governmental and Other Agencies*

Another potential solution to the partisan expert problem is use of governmental and independent agencies as sources of expertise.<sup>117</sup> Judge Weinstein cites the usefulness of such agencies in swine flu, toxic shock syndrome, asbestos, Agent Orange, and DES litigation.<sup>118</sup>

This solution, however, is unsuited to the valuation context, where few cases involve numerous plaintiffs or the serious public issues that would warrant or make cost-effective a specially commissioned study. The routine valuation action involves a discrete question of fact relating to the value of a unique piece of property.

## COURT-APPOINTED EXPERTS

Yet another option in dealing with the problems of partisan expert testimony is court appointment of an impartial expert witness. Such a witness would be subject to traditional rules of evidence and be treated like any other witness (i.e., subject to cross-examination and prohibited from communicating with the fact finder without the presence of counsel).

An impartial expert can address the justice and efficiency shortcomings of partisan experts as ably as any of the solutions enumerated above without suffering from many of the pitfalls. In serving the interests of justice, a court-appointed expert could remedy the fact finder's confusion by sorting through conflicting

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nitive measures"). But see GEORGENE M. VAIRO, RULE 11 SANCTIONS 1-20 to 1-23 (1993) (arguing that since Rule 11's amendment in 1983, it has been "overused," resulting in an "avalanche of 'satellite litigation'" and having a chilling effect on novel claims, in addition to other concerns). New amendments to Rule 11, effective December 1, 1993, seek to ameliorate these concerns, but some argue that the amendments render the rule "toothless." *Id.* at 1-23 to 1-24. The Rule 11 amendments, which in general work to make Rule 11 less onerous for attorneys filing frivolous pleadings through measures such as a 21-day safe harbor to withdraw challenged pleadings, make it less likely that courts will use the rule as a means of managing partisan expert testimony. See Constance M. Subadan, *Congress Weakened Rule 11 by Inaction*, NAT'L L.J., Jan. 31, 1994, at 15 ("[T]he changes to Rule 11 will break the civil litigation system's most effective tool for policing lawyer and litigant abuse.")

117. Weinstein, *supra* note 64, at 490-91.

118. *Id.* at 490.

expert testimony, thus lessening the incidence of evidentiary stalemate. The impartial expert could apprise the court of any important factors not being considered by the partisan experts, thereby ameliorating the risk of nonproduction of critical evidence. She could expose the venal partisan expert, if cross-examination failed to do so. She could inform the trier of fact of generally accepted professional methodology, thereby defusing some of the dangers of "expert shopping" and giving a perspective from which to view the testimony and reports of the partisan expert. Finally, an impartial expert could guide the trier of fact through partisan expert testimony, alerting it to invalid arguments and helping it to rely on objective criteria, rather than its own sense impressions. This solution also removes the incentive to unfairly or improperly influence the court with a compelling, but wrong, expert opinion.<sup>119</sup>

From an efficiency perspective, an impartial expert could remove the incentive for parties to devote excessive resources to the hiring of experts. Although an individual expert's credentials or the number of one party's experts might sway a judge or jury, an impartial expert would have independent bases on which to make his decision. Not only would litigation become less expensive for the parties, but fewer experts would lessen time demands on the judiciary, both at trial and in reviewing testimony and reports.

If the incentive to overwhelm with experts is removed, so is the unfair advantage garnered by the party with superior resources. Although the wealthier party still could hire the more expensive expert, the court-appointed's independent knowledge would temper that expert's influence. Even if the parties continued to present numerous experts, the impartial expert could help the fact finder to discard cumulative or peripheral testimony

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119. See FED. R. EVID. 706 advisory committee's note ("The ever-present possibility that the judge *may* appoint an expert in a given case must inevitably exert a sobering effect on the expert witness of a party and upon the person utilizing his services."); MANUAL FOR COMPLEX LITIGATION 2D § 21.51 (1986) [hereinafter MCL 2D] ("[C]ourt-appointed experts may have 'a great tranquilizing effect' on the other experts.").

The alienation from the expert testimony system which many professionals experience as a result of expert shopping also would be ameliorated.<sup>120</sup> The "hired gun" aspect of service would be eliminated when serving the court directly. As a court-appointed, a premium would be placed on credentials and impartiality, rather than on viewpoint or bias. As the incentive to mislead the court is reduced, professionals unwilling to serve previously as partisan experts might perceive less potential for reputational harm, thus raising the quality of partisan expert testimony.<sup>121</sup>

### *History of Court-Appointed Experts*

Court appointment of experts is not a new idea. Almost a century ago, Judge Learned Hand recommended "a board of experts or a single expert, not called by either side who shall advise the jury of the general propositions applicable to the case which lie within his province."<sup>122</sup> Professor Wigmore posited that the "remedy seems to lie in removing this partisan feature."<sup>123</sup> To remove the partisan feature, Wigmore considered special juries of experts and the calling of *only* official impartial experts, but rejected these proposals as undesirable interference with "the entrenched right of the parties to adduce such evidence as they think useful"<sup>124</sup> and as probably an unconstitutional abrogation of jury right.<sup>125</sup> He settled upon a compromise remedy which would authorize the judge to select an expert to testify in addition to those experts called by the parties.

The common law origins of impartial experts run deep. The first known references to court experts are from the fourteenth century, when, in an action for mayhem, surgeons were summoned to determine if a wound was fresh.<sup>126</sup> The use of impar-

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120. See Van Dusen, *supra* note 15, at 512.

121. See *infra* note 266 and accompanying text (discussing the experience of the New York Project with regard to the high quality of experts willing to serve and the notion that service might come to be seen as an honor or a civic duty).

122. Hand, *supra* note 50, at 56.

123. 2 WIGMORE, *supra* note 37, § 563, at 762.

124. *Id.* at 762-63.

125. *Id.* at 762 n.3.

126. Anonymous, Lib. Ass'n 28, pl. 5 (28 Edward III) (1345), cited in Hart v. Com-

tial experts to advise the trier of fact thus predates the use of witnesses altogether, which were not used until well into the fifteenth century<sup>127</sup>

In many civil law jurisdictions, most notably Continental Europe, this tradition persists.<sup>128</sup> Rather than using an adversarial system of civil procedure, the Continental system is predicated upon judges having responsibility for the examination of witnesses,<sup>129</sup> as well as the appropriation of expert opinion, where needed.<sup>130</sup> One author has suggested that this model would represent a vast improvement over the "incentives to distort evidence and the expense and complexity" which are present in the Anglo-American tradition.<sup>131</sup>

### *Judicial Authority to Appoint Experts*

Courts have both statutory and common law authority to appoint their own experts. Rule 706 of the Federal Rules of Evidence<sup>132</sup> allows courts to appoint impartial experts, sua

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munity Sch. Bd., 383 F Supp. 699, 763 (E.D.N.Y. 1974).

127. Hand, *supra* note 50, at 44 ("It is common learning to-day that originally and indeed for many years the jury had no witnesses present before them at all. Not until the middle of the fifteenth century was even the practice of summoning witnesses well settled as an incident to the trial.")

128. Langbein, *supra* note 35, at 828-29.

129. *Id.* at 828; see also JOHN THIBAUT & LAURENS WALKER, *PROCEDURAL JUSTICE: A PSYCHOLOGICAL ANALYSIS* 23-26 (1975); Judith Resnik, *Managerial Judges*, 96 HARV. L. REV. 374, 380-81 (1982) (characterizing the English and American systems of justice as *adversarial* and the West German and French systems of justice as *inquisitorial*).

130. Langbein, *supra* note 35, at 829.

131. *Id.* at 823.

132. Rule 706 reads as follows:

(a) Appointment. The court may on its own motion or on the motion of any party enter an order to show cause why expert witnesses should not be appointed, and may request the parties to submit nominations. The court may appoint any expert witnesses agreed upon by the parties, and may appoint expert witnesses of its own selection. An expert witness shall not be appointed by the court unless the witness consents to act. A witness so appointed shall be informed of the witness' duties by the court in writing, a copy of which shall be filed with the clerk, or at a conference in which the parties shall have opportunity to participate. A witness so appointed shall advise the parties of the witness' findings, if any; the witness' deposition may be taken by any party; and the witness may be called to testify by the court or any party. The witness shall be subject

sponte or on the motion of a party<sup>133</sup> Many states have analogous provisions in their evidence codes.<sup>134</sup> Even in those states which have not granted statutory authority to courts to call impartial experts, such authority probably exists at common law<sup>135</sup>

to cross-examination by each party, including a party calling the witness.

(b) Compensation. Expert witnesses so appointed are entitled to reasonable compensation in whatever sum the court may allow. The compensation thus fixed is payable from funds which may be provided by law in criminal cases and civil actions and proceedings involving just compensation under the fifth amendment. In other civil actions and proceedings the compensation shall be paid by the parties in such proportion and at such time as the court directs, and thereafter charged in like manner as other costs.

(c) Disclosure of appointment. In the exercise of its discretion, the court may authorize disclosure to the jury of the fact that the court appointed the expert witness.

(d) Parties' experts of own selection. Nothing in this rule limits the parties in calling expert witnesses of their own selection.

FED. R. EVID. 706.

133. FED. R. EVID. 706(a).

134. ALASKA R. EVID. 706 (1979); ARIZ. R. EVID. 706 (1977); ARK. STAT. § 28-1001, Rule 706 (1976); CAL. EVID. CODE §§ 730-733 (West 1966 & Supp. 1994); COLO. R. EVID. 706 (1979); LA. CODE OF EVID. art. 706 (1988); ME. R. EVID. 706 (1976); MICH. R. EVID. 706 (1978); MINN. R. EVID. 706 (1977); MISS. R. EVID. 706 (1985); NEB. REV. STAT. § 27-706, R. 706 (1975); N.M. STAT. § 20-4-706 (1973); N.D. R. EVID. 706 (1977); R.I. R. EVID. 706 (1987); S.D. CODIFIED LAWS ANN. §§ 19-15-9 to 19-15-19 (1979); VT. R. EVID. 706 (1982); WASH. R. EVID. 706 (1979); W. VA. R. EVID. 706 (1985); WIS. STAT. § 907.06 (1974); WYO. R. EVID. 706 (1978); UNIF. RULE OF EVIDENCE 706 (1974) (compiled in 2 WIGMORE, *supra* note 37, § 563).

135. "The inherent power of a trial judge to appoint an expert of his own choosing is virtually unquestioned." FED. R. EVID. 706 advisory committee's note. "No case has been discovered in which it was held that a court does not have the power and right to select an impartial expert witness." R.E. Barber, Annotation, *Trial Court's Appointment in Civil Case of Expert Witness*, 95 A.L.R.2d 391, 392 (1964).

In *Ex parte Peterson*, 253 U.S. 300 (1920), a court-appointed auditor was used to make a preliminary investigation of facts, hear witnesses, and examine the parties' accounts in connection with an alleged breach of a complex contract. The Court held that appointment of the auditor was within the lower court's "inherent power to provide [itself] with appropriate instruments required for the performance of [its] duties." *Id.* at 312. *Peterson* is frequently cited as authority for court-appointed experts. See, e.g., Sink, *supra* note 16, at 206; see also *In re Shell Oil Appraisal*, 607 A.2d 1213, 1222 (Del. 1992) (holding that even though there is no Rule 706 in the State of Delaware, the "spirit and purpose" of the Federal Rules of Evidence are within the power of Delaware courts).

*Pattern of Disuse of Rule 706 to Appoint Experts*

Despite the difficulties that the use of partisan expert testimony causes in the adjudication process, the long line of commentators espousing the use of court-appointed experts as the cure for these problems, and the clearly established power of courts to appoint experts of their own choosing, courts have been reluctant to use impartial experts.<sup>136</sup>

A recent empirical study of the use of Rule 706 experts surveyed 537 federal district judges.<sup>137</sup> The survey asked judges how often they had invoked the rule and appointed an impartial expert.<sup>138</sup> Of the 431 respondents, only twenty percent (eighty-six judges) stated that they had *ever* invoked the procedure at all, and more than half of those eighty-six judges had used an impartial expert only once.<sup>139</sup> The surveyors conducted telephone interviews with sixty-eight of the eighty-six judges who had appointed experts, and found that "experts were appointed when there was either a thorough disagreement among parties' experts over interpretation of technical evidence, or when the judge perceived an extraordinary need to protect minors or the public health."<sup>140</sup>

One reason that Rule 706 is desuetude is that judges and lawyers do not know that it exists.<sup>141</sup> At the very least, use of the rule to resolve problems resulting from conflicting expert testimony does not occur to the court or counsel in sufficient time to appoint an impartial expert. The unfamiliarity of the federal judiciary with Rule 706 is manifested by the fact that

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136. See 3 JACK WEINSTEIN & MARGARET BERGER, WEINSTEIN'S EVIDENCE 706-13 (1985) (noting that there are "remarkably few cases in which federal judges have appointed experts").

137. Joe S. Cecil & Thomas E. Willging, *Defining a Role for Court-Appointed Experts*, FED. JUD. CTR. DIRECTIONS #4, at 6, 9 (Aug. 1992).

138. *Id.* at 6.

139. *Id.* Forty-five judges had appointed an expert once, 31 judges between two and four times, six judges between five and nine times, three judges between 10 and 19 times, and one judge had appointed an impartial expert on more than 20 occasions. *Id.* at 7.

140. *Id.* at 7-8.

141. Gross, *supra* note 35, at 1197 (ascribing the non-use by the judiciary of a Los Angeles-area impartial expert testimony plan to "ignorance") (citing Note, *The Doctor in Court: Impartial Medical Testimony*, 40 S. CAL. L. REV. 728, 734-35 (1967)).

appellate courts have on several occasions seen fit to alert the lower court to this option on remand.<sup>142</sup>

### *Trial Lawyers' Objections to Court-Appointed Experts*

Judicial disuse of Rule 706 can also be explained by the antipathy which many trial lawyers feel for the impartial expert. One trial attorney called court-appointed experts "almost communistic" and exhorted his fellow members of the bar to "cling with liberty-loving, jealous, loyalty to our system."<sup>143</sup> Many courts might depend on the parties themselves to move for the appointment of an expert but, given trial lawyers' predisposition against impartial experts, such a motion is not likely to be forthcoming.<sup>144</sup>

The trial bar's objections to the use of impartial experts revolve in large part around the implications which that practice has for the adversarial system.<sup>145</sup> The court's appointment of its own expert witness injects the decisionmaker into the process, a factor antithetical to traditional Anglo-American notions of adversarial justice.

Trial lawyers see an impartial expert as infringing on their prerogatives.<sup>146</sup> The removal of even a modicum of control over witnesses to be heard will not sit well with the lawyer who sees himself as "the principal actor[] in the drama of a trial"<sup>147</sup> and who prides himself on his ability to do his job of controlling and influencing fact finders better than his peers.<sup>148</sup> Even though

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142. See, e.g., *Fugitt v. Jones*, 549 F.2d 1001, 1006 (5th Cir. 1977) (remanding to the trial court an action by a prisoner for damages for violation of her civil rights and noting "that Rule 706(a) of the Federal Rules of Evidence confers on a district court the discretionary power to appoint an expert witness"); *Eastern Air Lines, Inc. v. McDonnell Douglas Corp.*, 532 F.2d 957, 1000 (5th Cir. 1976) (remanding to the district court and stating "that the District Court has the discretion to call an expert witness on its own" and "that the jury might benefit from the testimony of a neutral expert in this case").

143. Howard K. Berry, *Impartial Medical Testimony*, 32 F.R.D. 481, 545 (1962).

144. Cecil & Willging, *supra* note 137, at 12.

145. See *supra* notes 128-31 and accompanying text.

146. MCL 2D, *supra* note 119, § 21.5.

147. FRANCIS L. WELLMAN, *DAY IN COURT, OR THE SUBTLE ARTS OF GREAT ADVOCATES* 6 (1910).

148. Trial lawyer Berry states, "[h]ow can an advocate, who has a passable pride in his advocacy, ever subscribe to this plan to stifle his art, and, in a way, subvert

trial lawyers may be hurt more by their opponent's experts than helped by their own, they don't want to cede control of the trial. According to Professor Gross, "They may not win, but they want to play"<sup>149</sup>

In addition, the trial bar might be opposed to impartial experts simply as a means of self-preservation. Trial lawyer Melvin Belli once stated, in typically self-deprecating fashion, that twenty-five percent of success in the courtroom is due to the lawyer, and that "the other seventy-five percent depends on the facts."<sup>150</sup> In other words, there is only so much value that a lawyer can add, and the appointment of an impartial expert whittles the trial lawyer's contribution down even further.

Trial lawyers' commitment to the adversary process is also perhaps explainable by the notion of *procedural justice*, a term coined by clinical psychologists John Thibaut and Laurens Walker in an effort to explain how participants in the legal system come to regard legal outcomes as just.<sup>151</sup> Thibaut and Walker argue that the judicial procedures most likely to be perceived as just are those that allow the maximum participation of the "disputants," and the least input from the "decision maker."<sup>152</sup> They state that the Anglo-American adversarial system, as compared, for instance, to an inquisitorial system, distributes more control to disputants, and thus provides a superior procedure for achieving results which disputants perceive as just.<sup>153</sup>

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his ethics?" Berry, *supra* note 143, at 544. Trial lawyers have long been known to have egos of legendary proportions. Ninety years ago, trial lawyer Francis Wellman explained that an effective advocate must have a "healthy frame capable of enduring the long-continued exertion of mind and body," WELLMAN, *supra* note 147, at 25, "a voice that 'reaches the real melody of a song,'" *id.* at 26, a "marked physical attraction or personal magnetism," *id.* at 28, as well as "[p]erception, keenness of observation, clearness and quickness of comprehension," *id.* at 33.

149. Gross, *supra* note 35, at 1200.

150. RICHARD H. LUCAS & K. BYRON MCCOY, *THE WINNING EDGE: EFFECTIVE COMMUNICATION AND PERSUASION TECHNIQUES FOR LAWYERS* xi (1993).

151. See E. ALLAN LIND & TOM R. TYLER, *THE SOCIAL PSYCHOLOGY OF PROCEDURAL JUSTICE* 5 (1988) ("[I]t was Thibaut and Walker who combined the study of process with an interest in the psychology of justice to initiate the study of procedural justice.").

152. THIBAUT & WALKER, *supra* note 129, at 1-2.

153. *Id.* at 118-24. "[T]he [adversary] procedure has been judged fairest and most trustworthy both by persons subject to litigation and by those observing the proceedings. Moreover, the adversary procedure produces greater satisfaction with the judg-



Trial lawyers also argue that impartial experts "acquire an aura of infallibility to which they are not entitled."<sup>154</sup> Trial lawyers believe that if a jury learns that an expert is a court-appointed it will accord the opinion of that expert undue deference, and "[e]ven when his appointment is not expressly disclosed, the absence of *apparent* bias will increase the appearance of objectivity, competence, and accuracy"<sup>155</sup> An empirical study of the use of impartial experts appears to confirm trial lawyers' worst fears—in fifty-eight cases in which experts were used, only two were decided contrary to the advice of the expert.<sup>156</sup>

A further difficulty for trial lawyers lies in the difficulty of cross-examining an impartial expert because he "is cloaked with the protection of the court's robe,"<sup>157</sup> thus making impeachment for bias or partisan motive nearly impossible. This danger is magnified by the possibility that an impartial witness might be co-opted by one of the parties during cross-examination and, through the skillful use of leading questions, mislead the jury.<sup>158</sup>

It is also argued in this regard that there is no such thing as an impartial expert.<sup>159</sup> Most professional people have preconceived notions and biases that influence the decisions they make in their professional capacity. For instance, there are often situ-

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ment, regardless of the outcome " *Id.* at 118. Compare Francis Wellman's bald statement that "[t]here are no methods for ascertaining truth that are superior to those in vogue in the English and American courts." WELLMAN, *supra* note 147, at 6.

154. FED. R. EVID. 706 advisory committee's note (citation omitted).

155. Theodore I. Botter, *The Court-Appointed Impartial Expert*, in USING EXPERTS IN CIVIL CASES 53, 62 (Melvin Kraft ed., 1982).

156. Cecil & Willging, *supra* note 137, at 14.

157. Botter, *supra* note 155, at 60. Judge Botter quotes a "skilled New York attorney" as asking, "[w]ill the law stand by and allow its anointed pillar of light to be overthrown by cross-examination?" *Id.* (citation omitted).

158. See Saltzburg, *supra* note 24, at 66 n.277.

159. See Diamond, *The Fallacy of the Impartial Expert*, 3 ARCHIVES OF CRIM. PSYCHODYNAMICS 221 (1959), cited in RICHARD O. LEMPERT & STEPHEN A. SALTZBURG, A MODERN APPROACH TO EVIDENCE 979-83 (1983) (arguing that court-appointed psychiatrists in criminal cases are inherently biased in that they are usually chosen from the same group of psychologists, are self-selecting, and because the district attorney has undue influence over the courts in psychiatrist selection); Berry, *supra* note 143, at 543 ("There just ain't no impartial [experts] because there ain't no impartial people!").

ations in technical professions in which there is more than one legitimate school of thought to which a professional might subscribe. In the case of a court-appointed expert, then, this poses a special threat, in that "the appointment may tend to predetermine the outcome of the case."<sup>160</sup>

Trial lawyers additionally argue that widespread use of court-appointed experts will effectively preclude many valid claims by making it impossible for plaintiffs to win certain actions. At the congressional hearings on the adoption of the Federal Rules of Evidence held in 1973, a representative of the Association of Trial Lawyers argued that adoption of Rule 706 would "literally obliterate" future medical malpractice claims.<sup>161</sup> Noting the reluctance of local doctors to testify against one another, he argued that court appointment of a local doctor would require the plaintiff to hire his expert from outside the community.<sup>162</sup> Meanwhile, the court-appointee in all likelihood would be a member of the community and biased toward the local doctor, as well as better known to the fact finder.<sup>163</sup>

Finally, the above objections implicate the Seventh Amendment right to a jury trial.<sup>164</sup> The opinion of the impartial expert may carry such weight with the jury that the expert's ap-

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160. MCL 2D, *supra* note 119, § 21.5.

161. *Rules of Evidence: Hearings Before the Special Subcommittee on Reform of Federal Criminal Laws of the House Comm. on the Judiciary*, 93d Cong., 1st Sess. 296-97, 308 (1973) (comments of James F. Schaeffer, Chairman of the ATLA's Committee on Federal Evidence and Procedure).

162. *Id.*

163. *Id.* The claims contemplated by this Note, however, are not of the medical malpractice variety, but rather are routine valuation actions in specialty courts such as the U.S. Tax Court and Delaware Court of Chancery. See *infra* notes 191-246 and accompanying text (discussing specialty fora and the valuation dilemma). Arguments such as those put forward by the ATLA would have less relevance in this context, in that there is no jury right in any of these specialty jurisdictions, the courts are national in nature, and the impartial experts testifying before these courts are likely to be drawn from all over the country.

164. The Seventh Amendment reads as follows:

In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

U.S. CONST. amend. VII.

pointment would be tantamount to the appointment of a special purpose fact finder.<sup>165</sup>

### *Judicial Reluctance to Appoint Experts*

In addition to the many valid objections of the trial bar, judges perceive several shortcomings with court-appointed experts that help to explain why courts are reluctant to use nonpartisan experts. These shortcomings revolve in large part around the complex and expensive procedures required to effectuate the appointment of an expert.

The appointment of a neutral expert is a time-consuming process, particularly for a judiciary whose resources are already strained.<sup>166</sup> The trial judge who wants to appoint *sua sponte* his own expert not only must undertake a complex appointment procedure,<sup>167</sup> but at trial has to contend with the testimony, expert report, and cross-examination by both parties of yet another witness. Thus one trial judge, in denying a party request for an impartial expert, held that "additional experts would not serve to elucidate, clarify, or enlighten , but instead would add more divergence and opinion differences in a cumulative manner."<sup>168</sup>

165. See MCL 2D, *supra* note 119, § 21.5; Elwood S. Levy, *Impartial Medical Testimony—Revisited*, 34 TEMPLE L.Q. 416, 425 (1961) ("[T]rial by jury becomes no more than an empty illusion "); Saltzburg, *supra* note 24, at 78.

166. If the judiciary lacks the wherewithal to administer the appointment of an impartial expert, an obvious solution is the devotion of additional resources, staff and judges to the judiciary. This costs money, however, and it also raises constitutional problems. "A substantial increase in the judiciary could make democratic control over judges even less effective than it is today." John C. Reitz, *Why We Probably Cannot Adopt the German Advantage in Civil Procedure*, 75 IOWA L. REV. 987, 998 (1990) (commenting on the German system, in which judges are required to take on many of the tasks which the American system assigns to the parties).

One commentator has characterized the claim of lack of resources as "sheer unwillingness to devote the time and money necessary for selecting experts and overseeing the taking of their testimony," which he describes as "a product of bureaucratic mentality—in a bureaucracy it is always safer to do nothing than to stick your neck out." Lee, *supra* note 12, at 499. But see *infra* notes 276-82 (describing the New York Project, which recounts the cost savings that can be realized through the appointment of expert witnesses).

167. See *infra* notes 249-60 and accompanying text (outlining the appointment process).

168. *Georgia-Pacific Corp. v. United States*, 640 F.2d 328, 334 (Ct. Cl. 1980). See

Compounding the difficulty of appointment is the likelihood that the judge, unless she is among the one in five who has appointed an expert before,<sup>169</sup> is unfamiliar with the process. Rule 706 gives the trial judge little or no guidance on how to deal with many practical considerations, "such as how to identify the need for a Rule 706 expert, how to shape pretrial procedures to reduce conflicts between experts for the parties, and how to reduce interference with the adversarial process"<sup>170</sup>

In addition to appointing an expert, a judge must devise some means of compensating the expert. Rule 706(b) allows for public funding of impartial experts in criminal cases and takings actions. In all other proceedings, compensation shall be paid "as the court directs."<sup>171</sup> Practically speaking, it is difficult to make a party pay for an expert who may well have testified in favor of its opponent.<sup>172</sup> For such a recalcitrant litigant, the judge would have to formally order payment and hold a show-cause hearing, which could result in considerable delay of payment to the court-appointee.<sup>173</sup> Many commentators have suggested that the fee of the impartial expert be taxed to the losing party as costs,<sup>174</sup> but this would require even further delay. The expert would have to wait until the trial judge's final decision for payment.<sup>175</sup> Judges have indicated that the uncertainty sur-

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*supra* note 2 and accompanying text (discussing the *Georgia-Pacific* case).

169. See *supra* notes 137-40 and accompanying text (discussing an empirical study of judicial use of Rule 706).

170. THOMAS WILLGING, COURT-APPOINTED EXPERTS 1-2 (1986).

171. FED. R. EVID. 706(b).

172. Cecil & Willging, *supra* note 137, at 11.

173. *Id.* Where the expert is discharged before the case is resolved, the order and hearing would have to interrupt the proceeding, or the payment would have to be yet further delayed. *Id.*

174. Lee, *supra* note 12, at 494 n.50 (citing Van Dusen, *supra* note 15, at 503, 505; Sink, *supra* note 16, at 210).

175. Delay in the court system has become notorious. For the impartial expert, who has in all likelihood been employed since the earliest pretrial hearing, this delay can mean a protracted period of time between when he renders his service and when he receives payment for that service. A recent study indicates that, on the average, only about 60% of civil cases filed in federal district court are terminated within one year. TERENCE DUNGWORTH & NICHOLAS M. PACE, STATISTICAL OVERVIEW OF CIVIL LITIGATION IN THE FEDERAL COURTS 46 (1990). In the U.S. Tax Court, it takes one year to get to trial and at least another year, often longer, *after the final briefs are filed*, to get an opinion issued. Claudia MacLachlan, *The Tax Bench: A Code Apart*,

rounding the administration of an impartial expert's compensation "can tip the balance against appointment."<sup>176</sup>

While lack of resources and unfamiliarity with the process work in part to explain why judges do not appoint experts, there is also a systemic bias against appointment. The American legal culture tends to view the judge as passive, as compared to the Continental tradition in which the judge is intimately involved in the proceedings from pleadings to final decision.<sup>177</sup> The appointment of an expert entails substantial involvement by the judge in the adjudicative process. Many judges committed to the adversary system are reluctant to take such a high level of involvement.<sup>178</sup> In addition, much of the judiciary is comprised of former trial lawyers who, as outlined above, are generally biased against the use of court-appointed experts.<sup>179</sup> For other judges, the resistance to court appointments is a matter of style. Many judges take an aloof attitude toward the trial process, viewing themselves as referees between the litigants during trial and relying on the evidentiary process and the competence of the parties in direct and cross-examination to elicit the relevant information.<sup>180</sup>

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NAT'L L.J., Sept. 27, 1993, at 1, 51.

176. Cecil & Willging, *supra* note 137, at 11.

177. Reitz, *supra* note 166, at 992; *see also supra* note 128 and accompanying text (describing civil law jurisdictions); Botter, *supra* note 155, at 78-79 ("[O]ur traditions of adversarial control and judicial restraint militate against judicial intervention.").

178. *See* Cecil & Willging, *supra* note 137, at 8 ("The non-appointing judges seemed to differ from the appointing ones primarily in the extent to which they were willing to stand by the adversarial system, even when it was failing to provide information necessary to resolve the dispute.").

179. Gross, *supra* note 35, at 1198 ("[M]ost judges are former trial lawyers and share some of the outlook of their past colleagues."). A survey of appointments to the federal judiciary by the Johnson, Nixon, Ford, Carter, and Reagan Administrations reveals that approximately 40% of the federal judiciary served as prosecutors prior to their appointment. This figure, of course, does not include those judges who litigated only in private practice or who represented the government in a civil capacity. Sheldon Goldman, *Federal Judicial Recruitment*, in *THE AMERICAN COURTS: A CRITICAL ASSESSMENT 195-98* (John B. Gates & Charles A. Johnson eds., 1991).

180. For discussions of managerial judging versus passive judging, *see* Saltzburg, *supra* note 24, at 7-10, and Resnik, *supra* note 129, at 417-24. Related to this discussion is the always controversial issue of what the proper role of a trial court should be—either seeker of truth or dispute resolution device. *See, e.g.*, Peter Huber, *A Comment on Toward Incentive-Based Procedure: Three Approaches for Regulating Scientific Evidence* by E. Donald Elliott, 69 B.U. L. REV. 513, 513 (1989) (quoting an

Judges also might be unwilling to appoint impartial experts because of an in-bred skepticism of technical expertise. Professor Gross has written, "[t]here is a strain in American case law of distrust, if not hostility, to scientific authority"<sup>181</sup> He cites as the worst example of this distrust *Barefoot v. Estelle*,<sup>182</sup> in which the Supreme Court disregarded warnings of the American Psychiatric Association as to the inaccuracy of psychiatric predictions of dangerousness in capital sentencing hearings.<sup>183</sup> Such a result does not seem unusual, given a judiciary imbued with the notion that, through the application of generic principles of law, a just resolution results regardless of the technical complexity of the issues.<sup>184</sup>

A final explanation of judicial reticence to appoint experts might be judicial fear of reversal on appeal. Rule 706's procedure is not widely used. It is settled that a court cannot be reversed for failure to appoint a Rule 706 expert, even upon the motion of one of the parties.<sup>185</sup> These two facts might lead a judge to con-

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unspecified "great Justice" as saying that "[i]t is sometimes more important that things be *settled* than that they be settled *right*"; cf. *Johnson v. United States*, 333 U.S. 46, 54 (1947) (Frankfurter J., dissenting) ("Federal judges are not referees at prize-fights but functionaries of justice. As such, they have a duty of initiative to see that the issues are determined within the scope of the pleadings") (citation omitted).

181. Gross, *supra* note 35, at 1123 n.36.

182. 463 U.S. 880 (1983).

183. Gross, *supra* note 35, at 1123 n.36.

184. For a generalist judge to engage in specialized and sophisticated scientific and economic analysis might be regarded as something of a "loser's game." That is, the risks of being wrong far outweigh the gain from being right, and it is a much safer proposition to decide such issues by recourse to general principles of law. See Areeda, *supra* note 10, at 1043 (stating that judges who engage in non-legal analysis may be regarded "condescendingly, for errors will sometimes occur in transmission").

185. See *Oklahoma Natural Gas v. Mahan & Rowsey, Inc.*, 786 F.2d 1004, 1007 (10th Cir.) ("[T]he district court was in no way obligated to appoint an expert in this case and its failure to do so cannot give rise to error."), *cert. denied*, 479 U.S. 853 (1986); *Fugitt v. Jones*, 549 F.2d 1001, 1006 (5th Cir. 1977) (holding that appointment is within the trial judge's discretion); *Georgia-Pacific Corp. v. United States*, 640 F.2d 328, 334 (Ct. Cl. 1980) ("[D]ivergence of opinions among the experts of the parties does not require that the court appoint experts to assist it in resolving such conflicts."); *Kian v. Mirro Aluminum Co.*, 88 F.R.D. 351, 356 (E.D. Mich. 1980) ("The matters raised herein are not amenable only to expertise, but are within the comprehension of laypersons. The presence of a court-sponsored witness would most certainly create a strong, if not overwhelming, impression of 'impartiality' and 'objectivity'").

clude that the probability of being reversed on appeal is high and that an expert appointment is more trouble than it is worth.

Any fear which a trial judge has of being overturned solely because of the appointment of an impartial expert, however, is unfounded. As the discretion to refuse to appoint an expert resides in the trial judge, so does the discretion to *choose* to appoint an expert.<sup>186</sup> Federal courts have the authority, both inherent and rule-given, to appoint impartial experts.<sup>187</sup> In addition, courts enjoy broad discretion as to this power of appointment.<sup>188</sup> Finally, appointments of neutral experts are reviewable only for abuse of that discretion.<sup>189</sup> The abuse of discretion standard is lenient. As an example of this leniency, the technical advisor appointments in *Reilly* and *United Shoe*, which permitted the court to engage in communication without the parties present and included no right of cross-examination, were upheld under similar standards.<sup>190</sup>

#### SPECIALTY FORA AND THE VALUATION DILEMMA

This Part of the Note will argue that the practical and theoretical difficulties which give rise to the disuse of impartial experts can be addressed by certain unique characteristics of three specialty jurisdictions: the United States Tax Court,<sup>191</sup> the

186. *Scott v. Spanjer Bros., Inc.*, 298 F.2d 928, 930 (2d Cir. 1962); *Dresser Indus. v. Ford Motor Co.*, 530 F. Supp. 303, 313 n.14 (1981); *Hart v. Community Sch. Bd.*, 383 F. Supp. 699, 762-64 (1974).

187. *Scott*, 298 F.2d at 930; *Dresser Indus.*, 530 F. Supp. at 313 n.14; *Hart*, 383 F. Supp. at 762-64.

188. *United States v. Michigan*, 680 F. Supp. 928, 987 (W.D. Mich. 1987); *see also Dresser Indus.*, 530 F. Supp. at 313 ("[I]t is within the Court's discretion to obtain an advisory opinion from the Patent Office where it will likely contribute to the avoidance of unnecessary duplication of effort, expense and delay.").

189. *Students of Cal. Sch. for the Blind v. Honig*, 736 F.2d 538, 549 (9th Cir. 1984), *vacated on other grounds*, 471 U.S. 148 (1985). The question of the expert's qualifications is also within the "sound discretion of the trial judge." *Id.*

190. *Reilly v. United States*, 863 F.2d 149, 157 (1st Cir. 1988) (holding that the district court acted within its discretion in the use of an expert); *see also supra* notes 96-106 and accompanying text.

191. The Tax Court's jurisdiction is defined by the following rules and statutes: Tax Court Rule 13 (deficiency jurisdiction); 26 U.S.C. §§ 6213-6214 (1988) (tax deficiency); *id.* § 7428 (qualified status of exempt organizations); *id.* § 7476 (qualification of retirement plans); *id.* § 7478 (tax exempt status of state and municipal bonds).

United States Court of Federal Claims,<sup>192</sup> and the Delaware Chancery Court.<sup>193</sup> Many high stakes valuation actions are tried in these three fora in connection with tax claims, takings actions, shareholder disputes, and similar claims.<sup>194</sup> While these courts are considered expert in their respective jurisdictions, each has lamented its frustration in deciding valuation issues based solely on the testimony of partisan experts. Judge Tannenbaum of the Tax Court, for instance, has spoken against the "Solomon-like adjustment" of the split difference.<sup>195</sup> Claims Court Judge David Schwartz spoke of his "uneasy doubt as to an appropriate discount for partisanship."<sup>196</sup>

Recently, Justice Walsh of the Delaware Supreme Court, in affirming the Chancery Court's valuation determination in a major shareholder appraisal, took "the occasion to comment upon a recurring theme in recent appraisal cases—the clash of

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192. See Strom Thurmond, *United States Claims Court Symposium: Introduction*, 40 CATH. U. L. REV. 513, 514 (1991) (stating that the court has nationwide jurisdiction over a broad range of nontort actions against the federal government, including contracts cases, tax disputes, takings actions, claims by Native Americans, suits by military and civil service personnel, patent infringement cases, and childhood vaccine compensation); *infra* note 230.

193. Delaware's Court of Chancery has "jurisdiction to hear and determine all matters and causes in equity," including equitable claims against corporations domiciled in Delaware. DEL. CODE ANN. tit. 10, § 341 (1974).

194. A survey of reported decisions for calendar year 1992, conducted for the purposes of this Note, indicates the following for each of the three specialty jurisdictions:

In 1992, the U.S. Tax Court reported 821 decisions, either in the official Tax Court Reporter or as unpublished "memorandum opinions." In 57 of these cases, representing 6.9% of total reported decisions, partisan expert testimony was heard with regard to a valuation issue.

In 1992, the U.S. Court of Federal Claims reported 277 decisions. In 16 of these cases, the court heard testimony from partisan experts, and in four of these cases, representing 1.4% of all cases reported, the expert testimony bore on a valuation issue. Of the four valuation claims, three were takings actions and the other was a Native American claim. These figures do not include those claims made pursuant to the Vaccine Compensation Amendments of 1987, 46 U.S.C. § 300aa-12(c), which are referred to a special master.

In 1992, the Delaware Chancery Court reported 190 decisions. Six of these decisions, representing 3.2% of reported cases, involved valuation determinations made with reference to partisan expert testimony. Only one of these cases was published in an official reporter.

195. See *supra* note 8 and accompanying text.

196. See *supra* note 9 and accompanying text.



contrary, and often antagonistic, expert opinions on value."<sup>197</sup> Justice Walsh continued:

The presentation of widely divergent views reflecting partisan positions in appraisal proceedings adds to the burden of the Court of Chancery's task of fixing value. Such extremes may result in the court's rejection of both opinions in favor of a middle position [I]f the court is limited to the biased presentation of the parties, it is often forced to pick and choose from a limited record without the benefit of objective analysis and opinion.<sup>198</sup>

Justice Walsh concluded by exhorting the Chancery Court to consider the use of *court-appointed experts* when making complex appraisal determinations.<sup>199</sup>

### *Authority of the Specialty Jurisdictions to Appoint Experts*

The Delaware Chancery Court,<sup>200</sup> the U.S. Tax Court,<sup>201</sup>

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197. *In re Appraisal of Shell Oil Co.*, 607 A.2d 1213, 1222 (Del. 1992); see also Anne C. Foster, *The Court's Own Expert Valuation Witness in Delaware*, P-H LAW AND BUSINESS INSIGHTS, Aug. 1992, at 30 (analyzing the *Shell Oil* decision and hypothesizing that its impact on future proceedings may be to encourage greater objectivity in expert analysis as a means of deterring a court from appointing its own experts).

198. *Shell Oil*, 607 A.2d at 1222.

199. *Id.* at 1223. *Shell Oil* concerned an appraisal action brought by minority shareholders following the cash-out merger of Royal Dutch Petroleum Company with its American subsidiary, Shell Oil. The Chancellor, in his attempt to value plaintiff shareholders' stock, heard from experts who opined that the shares were worth as little as \$43 and as much as \$143. *Id.* at 1216-17. The Chancery Court eventually valued plaintiffs' stock at \$71.20 per share. *Id.* at 1218.

The Chancellor found the most convincing testimony to be that of one of the plaintiffs' experts who valued the stock at \$89, to which the court then applied a 20% discount. He did not explain his choice of discount factor, but it seems worth noting in this regard that the \$71 figure basically "splits the difference" between \$43—defendant Shell's lowest estimate—and \$143—the high end of the plaintiffs' so-called present value of equity analysis. *Id.* at 1216-17.

The court also found compelling the analysis from one of defendant's experts valuing the stock at \$57.50. *Id.* at 1218. This is particularly interesting given that the split difference between \$57.50 and the plaintiffs' best estimate of \$89 is \$73.25, a scant two dollars richer than the Chancellor's own estimate.

200. The Chancery Court rules contain no parallel to Rule 706 of the Federal Rules of Evidence. *Id.* at 1222. The Delaware Supreme Court has stated that "even in the absence of a parallel federal rule, the spirit and purpose of the federal rules have always been within the inherent power of our courts." *Id.*

201. Tax Court Rule 143(a) provides that the Federal Rules of Evidence apply to

and the U.S. Court of Federal Claims<sup>202</sup> have the authority to appoint their own experts. None of these fora have as yet made use of this authority<sup>203</sup> While the judges sitting on these courts and the lawyers arguing before them no doubt take as dim a view of impartial experts as their brethren in the courts of general jurisdiction, there are certain characteristics of these three fora that make them especially well designed to cope with the theoretical and practical questions raised by the use of impartial experts.

### *Trial Lawyers' Objections to Court-Appointed Experts*

The numerous criticisms levelled at impartial experts by trial lawyers can largely be answered by the fact that there is no jury right in either the Claims Court, the Tax Court, or the Chancery Court.<sup>204</sup> Judges in each of the courts are highly specialized in their knowledge and abilities and have heard numerous valuation cases.<sup>205</sup> In this light, the trial lawyers' fear of abrogation of jury right<sup>206</sup> is entirely inapplicable, and the "aura of infal-

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U.S. Tax Court proceedings, to the extent that those Rules apply to trials without a jury in the United States District Court for the District of Columbia.

202. The Federal Rules of Evidence are applicable to the Court of Federal Claims. FED. R. EVID. 1101(a). *But see* Georgia-Pacific Corp. v. United States, 640 F.2d 328, 334 (Ct. Cl. 1980) (recognizing authority to appoint an impartial expert but declining to do so).

203. *See Shell Oil*, 607 A.2d at 1222 ("Apparently, no Delaware Court has ever appointed a neutral expert witness upon its own initiative."); *see also* Roger A. Pies & David J. Fischer, *Why Not Court Appointed Experts?*, TAX NOTES, July 18, 1988, at 306 (finding "no decided Tax Court case in which the Tax Court has exercised its authority and appointed its own expert"). *But see* Holland v. Commissioner, 835 F.2d 675 (6th Cir. 1987) (complaining that the Tax Court did not appoint a Rule 706 expert).

A computer search for references in the case law of each of these fora to Rule 706, impartial experts, or court-appointed experts confirms that in no reported decision has a judge in one of these three fora appointed his own expert.

204. The Tax Court and Court of Federal Claims are Article I courts, established by act of Congress, and thus the constitutional jury right does not apply. *See infra* note 231 and accompanying text. The Chancery Court is a court of equity, DEL. CODE ANN. tit. 10, § 341 (1974), and, as such, all cases are tried before chancellors only.

205. *See supra* note 194 (noting the number of valuation claims heard by special courts).

206. *See supra* notes 164-65 and accompanying text.

libility<sup>207</sup> and impeachment<sup>208</sup> concerns become considerably less pressing. While these dangers might be considered to be present in a bench trial, a judge is a more discriminating listener and would be aware of the limitations of the examination process. More importantly, in a bench trial the judge is obligated to state specifically all of his findings of fact and conclusions of law, whereas a jury can simply render a verdict without any explanation.<sup>209</sup>

The judges in the specialty jurisdictions are themselves specialists. Most of the judges in the Tax Court are former members of the tax bar, revenue agents, or staff members of congressional committees dealing with tax issues,<sup>210</sup> and Delaware's chancellors are similarly well recognized experts in the field of corporation law.<sup>211</sup> Judges of general jurisdiction, in contrast, have widely varied caseloads and expertise.

Procedural safeguards can address any inherent bias of impartial experts.<sup>212</sup> Rather than testifying as to the actual dollar value of property in issue, an impartial expert could simply serve as a guide for the court. She could critique the methodology of the partisan experts and prepare a report on the partisan experts' opinions which the court could use in reaching its own conclusion as to findings of fact.<sup>213</sup>

At common law, experts could not testify as to their opinion on an "ultimate issue" to be decided by the trier of fact.<sup>214</sup> The

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207. See *supra* notes 154-56 and accompanying text.

208. See *supra* notes 157-58 and accompanying text.

209. See, e.g., 26 U.S.C. § 7459(b) (1988) (requiring the Tax Court judge to specifically list findings of fact); FED. R. CIV. P. 52(a).

210. See Claudia MacLachlan, *The Players on the Tax Court Bench*, NAT'L L.J., Sept. 27, 1993, at 50 (finding that of the 19 judges on the U.S. Tax Court, all are tax specialists: eight have both government and private practice experience; six have only private practice experience; three were at the Internal Revenue Service; and two were congressional staffers).

211. See Roberta Romano, *Law as a Product: Some Pieces of the Incorporation Puzzle*, 1 J.L. ECON. & ORG. 225, 277 (1985) ("[T]he continuity in and small size of Delaware's chancery court, which hears corporation law cases, while facilitating the development of judicial expertise in the field, also makes Delaware decisions more predictable than those of other states"); see also *infra* note 236.

212. See *supra* notes 159-60 and accompanying text (discussing inherent bias).

213. See *infra* notes 250-60 and accompanying text (discussing appointment procedures and experts' duties).

214. See JOHN W. STRONG ET AL., MCCORMICK ON EVIDENCE §§ 12, 14 (4th ed.

Federal Rules reject this approach,<sup>215</sup> largely because it is too difficult to determine what an "ultimate issue" might be, and because the rule usually works to deprive the trier of fact of helpful information.<sup>216</sup> In the valuation context, there does not seem to be any such difficulty of definition—the ultimate issue is the dollar value of the property in issue.

Even if specialty courts using impartial experts in valuation cases do not choose to formally adopt an "ultimate issue" rule, parties can still object that the probative value of an impartial expert's dollar valuation is outweighed by the danger of potential prejudice to the fact finder.<sup>217</sup> The parties can insist that a prohibition on dollar valuations be included in the description of duties which the judge provides the partisan expert before trial.<sup>218</sup>

The arguments that impartial expert testimony threatens the adversarial system are harder to answer, given that court-appointed experts are by definition nonadversarial. In the context of expert testimony, it is in many respects the adversarial nature of partisan experts that causes the problems that this Note has described.

Professor Wigmore recognized many years ago that the removal of the partisan factor was necessary to rectify the problems of expert testimony.<sup>219</sup> Removing partisanship always will entail a loss to the adversarial process, but the appointment of court experts, as compared to other solutions to the partisan expert dilemma (notably technical advisors, special masters, and special juries), poses a lesser threat to the adversarial system. Rule 706 allows for party input into the choice of expert, party oversight of judge/expert communications, and party examination of the expert, thereby mitigating the appointment's threat to the adversarial system. As the Federal Judicial Center's *Manual for*

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1992).

215. FED. R. EVID. 704.

216. FED. R. EVID. 704 advisory committee's note.

217. FED. R. EVID. 403. There are also objections available under Rule 702 that the expert's testimony may not be helpful to the trier of fact.

218. See *infra* notes 250-60 and accompanying text (outlining the appointment process).

219. See *supra* note 123 and accompanying text.

*Complex Litigation* states, "[u]se of court-appointed experts is not a radical departure from the traditional adversary model for litigation."<sup>220</sup>

### *Judicial Reluctance to Appoint Experts*

Two of the reasons judges might be reticent to appoint impartial experts can be dispensed with immediately. First, as long as abuse of discretion cannot be persuasively argued, there is no reason to fear reversal.<sup>221</sup> Second, given the fact that the judges on the specialty courts are highly educated in the discrete areas of the law in which they specialize, it seems unlikely that they would suffer from the same distrust of scientific or technical authority as might a judge of general jurisdiction.<sup>222</sup>

Three other reasons for judicial disuse of the rule—ignorance, unfamiliarity with process, and lack of resources—can be addressed through the development of standard operating procedures for the appointment of impartial experts.

An easily implemented procedure used extensively, so as to spread fixed start-up and learning curve costs over a large enough caseload, could work to make the use of impartial experts more efficient than traditional (partisan expert only) litigation. Less deliberation and evaluation of nonpartisan testimony would be required of the court.<sup>223</sup> Widespread use of nonpartisan experts also might result in an increased incidence of pretrial settlement, or at least a tendency of partisan experts to tone down exaggeration of their client's claim,<sup>224</sup> thereby making

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220. MCL 2D, *supra* note 119, § 21.51

221. See *supra* notes 185-90 and accompanying text.

222. See *supra* notes 181-84 and accompanying text (discussing judges' distrust of expert technical authority).

223. The expert would be available to guide the court through the voluminous and conflicting testimony, rather than leaving the inexperienced fact finder to decipher the information itself. But see MCL 2D, *supra* note 119, § 21.51 ("Although court-appointed experts may facilitate settlements or concessions, the objective of such an appointment is a more understandable trial, not a shorter one.").

224. See *Eastern Air Lines, Inc. v. McDonnell Douglas Corp.* 532 F.2d 957, 1000 (5th Cir. 1976). "The mere presence of a neutral expert may have 'a great tranquilizing effect' on the experts retained by [the parties]." *Id.* (citing Judge E. Barrett Prettyman, *Proof of Scientific and Technical Facts*, 21 F.R.D. 466, 469 (1957)); see also *supra* note 119 and accompanying text.

the fact finder's job easier. Increased use of impartial experts would have a salutary effect on the justice-seeking functions the courts must perform, as well as enable the courts to become more efficient in their handling of valuation claims.<sup>225</sup> As this Note argues below, the Delaware Chancery Court, the U.S. Court of Federal Claims, and the U.S. Tax Court each have unique incentives, not shared by courts of general jurisdiction, to develop standard operating procedures.

A specialty judge might be more interested in the development of a procedure to handle valuation claims than would a general judge, who sees claims of all types and whose professional concerns are likely to be more diverse. This is the first step toward the appointment of experts pursuant to a standard procedure and the court's realization of the economies of scale possible with widespread utilization.

Each of the specialty courts tries enough valuation cases each year<sup>226</sup> that the fixed costs of the establishment and implementation of a standard procedure could be spread between numerous separate actions, making the development of a standard procedure more cost-effective than in a court of general jurisdiction.

Unlike a federal or state district court, the specialty courts are highly centralized. While judges on the Claims Court and the Tax Court will travel to accommodate petitioners in cities other than Washington, D.C., the permanent chambers of the respective courts are kept together.<sup>227</sup> This high degree of centralization would facilitate the implementation of any standard procedure, if only by word of mouth dissemination between the various chambers.

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225. See *supra* notes 214-18 and accompanying text (discussing how impartial experts can lead courts through complex factual determinations and ameliorate the truth problems posed by partisan experts).

226. See *supra* note 194 (discussing the number of valuation decisions rendered).

227. The Tax Court and the Claims Court are located in Washington, D.C. While the Chancery Court sits at three sites across Delaware: Wilmington, Dover and Georgetown, DEL. CODE ANN. tit. 10, § 301 (1974), the number of chancellors is sufficiently limited to achieve a comparable degree of centralization, *id.* § 307 (Supp. 1992) (providing for the appointment of only one Chancellor and four Vice-Chancellors).

Another potential incentive to adopt a procedure for the appointment of experts can loosely be termed "forum competition." Tax claims heard by the Tax Court, for instance, may be tried in either federal district court or the Court of Federal Claims. Similarly, the Court of Federal Claims has exclusive jurisdiction over claims for money against the federal government,<sup>228</sup> but this exclusive jurisdiction is constantly being modified and attrited by common law and statute.<sup>229</sup> Throughout their relatively brief histories, the very existence of the Claims Court and the Tax Court has been threatened on numerous occasions.<sup>230</sup> They exist because of their expertise in discrete areas of the law, but they were created by Congress, not Article III of the Constitution, and exist only at the whim of statute.<sup>231</sup> As specialty fora, each of these courts subsist in large part on their expertise to try special issues better than those courts with which they share jurisdiction. Litigants, when trying a claim within the specialty jurisdiction, generally can count on a more thorough and professional hearing than in a court of general jurisdiction. A feasible procedure for the appointment of expert witnesses would combat the problems associated with partisan expert testimony and augment the Tax Court's and Court of Federal Claims' respective statuses as innovative and professional fora.

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228. See 28 U.S.C. § 1491 (1988); see also *United States v. Jones*, 131 U.S. 1 (1888) (establishing that the jurisdiction of the Claims Court is to hear claims for money against the United States).

229. See JUDICIAL CONFERENCE OF THE UNITED STATES, REPORT OF FEDERAL COURTS STUDY COMMITTEE 69 (Apr. 2, 1990) (detailing a Federal Courts Study Committee proposal to vest near-exclusive jurisdiction for tax claims in the Tax Court); Richard H. Fallon, Jr., *Claims Court at the Crossroads*, 40 CATH. U. L. REV. 517 (1991) (discussing recent Supreme Court decisions which cut into Claims Court jurisdiction).

230. See David M. Cohen, *Claims for Money in the Claims Court*, 40 CATH. U. L. REV. 533 (1991) (describing the evolving jurisdiction of the Court of Federal Claims); Loren A. Smith, *Claims Court Symposium: Foreword*, 40 CATH. U. L. REV. 509 (1991) (summarizing the history of the Court of Federal Claims, originally without authority to render final judgments); see also *Dobson v. Commissioner*, 320 U.S. 489 (1943) (discussing the history of the Tax Court and establishing its legitimacy); MacLachlan, *supra* note 175, at 50 (stating that fewer cases are being tried in the Tax Court—in 1986, 84,007 cases were pending, and in 1993, about 40,000).

231. 26 U.S.C. § 7441 (1988) (establishing the Tax Court); 28 U.S.C. § 1491 (Supp. IV 1992) (establishing the Court of Federal Claims).

Forum competition is of a different nature in the Delaware Chancery Court. The State of Delaware is the domicile of more than half of America's 500 largest industrial firms.<sup>232</sup> This status represents the culmination of a long battle among the states to "steal" corporate chartering business, and the lucrative franchise tax revenues that accompany such business, from one another.<sup>233</sup> The State of Delaware has acted concertedly to attract corporate chartering business,<sup>234</sup> and the Delaware judiciary, because of its close ties to the legislature, has worked to effect this goal through its rulings.<sup>235</sup>

According to the "Interest Group Theory" of Delaware corporation law, the state's preeminence in the business of corporate chartering is the result of the state's reliable and professional judiciary and the predictability provided by its well-developed body of case law.<sup>236</sup> The interest group analysis is the latest in a line of explanations for Delaware's primacy in corporate chartering business<sup>237</sup> and, for the time being, it seems to be the most widely accepted.<sup>238</sup> If it is correct, a premium on innovation and predictability in the chartering competition would seem

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232. Lucian A. Bebchuk, *Federalism and the Corporation: The Desirable Limits on State Competition in Corporate Law*, 105 HARV. L. REV. 1435, 1443 (1992).

233. See William L. Cary, *Federalism and Corporate Law: Reflections upon Delaware*, 83 YALE L.J. 663, 663-65 (1974) (outlining the history of liberal corporate law); Roberta Romano, *The State Competition Debate in Corporate Law*, 8 CARDOZO L. REV. 709, 709 (1987) ("[S]tates compete to provide firms with corporate charters[] in order to obtain franchise tax revenues.").

234. Cary, *supra* note 233, at 668-69 (stating that franchise taxes accounted for one-quarter of Delaware's total tax revenue in 1974); see also Romano, *supra* note 211, at 241-42 (discussing the powerful franchise tax incentives "that goad [Delaware] to be responsive" to firms).

235. Cary, *supra* note 233, at 690-92.

236. Jonathan R. Macey & Geoffrey P. Miller, *Toward an Interest Group Theory of Delaware Corporate Law*, 65 TEX. L. REV. 469 (1987) (arguing that Delaware is an attractive state of incorporation because its judges are specialists in corporate law, thus enabling the state to offer a stable, predictable, and sophisticated body of common law as well as enabling it to assert credibly that the law will remain stable).

237. Another explanation is Professor Cary's "race to the bottom" theory. See Cary, *supra* note 233, at 684-86 (arguing that Delaware attracts corporate chartering business because its laws favor management at the expense of shareholders).

238. Douglas M. Branson, *Interdeterminacy: The Final Ingredient in an Interest Group Analysis of Corporate Law*, 43 VAND. L. REV. 85, 90 (1990).



to create an incentive for the establishment of procedures for the regular appointment of experts.

### *Cultural Bias Toward the Adversary System*

Although the unique characteristics and incentives of the specialty fora work to counteract most of the shortcomings of impartial expert testimony, the problem of the cultural bias of trial lawyers and the judiciary toward the adversary system persists. Given trial lawyers' disdain for impartial experts, and the fact that choice of forum is in most cases the province of the trial lawyer as advisor to the litigant, forum competition might actually provide a disincentive to the establishment of procedures for expert appointment. An argument also might be made that the party with the weak case will opt for the less expert forum.

Forum competition incentives, however, could play a role in alleviating the cultural preference for the adversary system. In the case of a shareholder appraisal action, the choice of forum is to a large extent determined by the defendant corporation's domicile. The people who make chartering decisions are not trial lawyers, but corporate lawyers<sup>239</sup> who, as counsel to boards of directors, are naturally conservative,<sup>240</sup> especially where litigation and contingent liabilities are concerned.<sup>241</sup> Thus corporate litigants in the Delaware Chancery Court might be willing to cede some control over the litigation, and the rare chance to win big in a valuation action, to the stability and predictability of court-appointed experts.<sup>242</sup>

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239. Romano, *supra* note 211, at 273.

240. For the corporate fiduciary, there is a systemic aversion to risk. Gains from risky activity are distributed pro rata among shareholders/owners, while the losses from risky activity are potentially borne by the fiduciary alone. *See, e.g.,* Bernard S. Black, *Shareholder Passivity Reexamined*, 89 MICH. L. REV. 520, 553-56 (1990) (discussing the incentives of institutional investors and their fiduciary role as deterring activism).

241. *See* Macey & Miller, *supra* note 236, at 484. Considerations other than fiduciary duty, such as lowering transaction costs and the cost of capital, also lead corporate directors and their lawyers toward conservatism. *See* Romano, *supra* note 211, at 251 ("[T]he additional expense of a Delaware domicile is analogous to an insurance premium that reduces the risks of future transactions by providing more certain outcomes.").

242. Romano, *supra* note 211, at 274 ("[S]tability and predictability are desired by

In the case of the Tax Court and Court of Federal Claims, the bias toward adversariness is mitigated by the fact that the respondent (or defendant) will always be the federal government. The law of averages dictates that in the long run the government, unlike the occasional litigant, will be unable to profit from the few decisional errors in its favor.<sup>243</sup>

Even some private practitioners have argued that the Tax Court should consider the appointment of impartial experts.<sup>244</sup> In certain types of valuation cases the Tax Court might be forced to disallow petitioner's requested relief rather than split the difference between the valuation testimony of petitioner's and respondent's experts.<sup>245</sup> The petitioner who has gone to "great lengths to enlighten the Tax Court" would prefer that the court make an educated judgment, rather than decide the case "without coming to grips with the expert testimony"<sup>246</sup>

### PROCEDURAL CONSIDERATIONS

The high cost and difficulty of appointment procedures is one of the primary impediments to courts appointing experts. As valuation actions are generally routine and short lived, a court has less incentive to take the time to seek out its own expert.<sup>247</sup> In order that the appointment of experts ceases to be "the exception and not the rule"<sup>248</sup> in valuation actions in the three specialty fora, standard operating procedures for appointment, use, and compensation must be established. One of the

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managers who need quick opinions on proposed activities.").

243. With hundreds of routine valuation claims being asserted on behalf of, and against, the government annually, the government's incentive to seek out an inexperienced fact finder and hope for an occasional decisional error is lessened by the fact that any lucky gain will be offset by future unlucky losses. See *supra* note 194 (discussing the large number of valuation cases in Claims Court and Tax Court).

244. Pies & Fischer, *supra* note 203, at 303.

245. *Id.* at 304. Pies and Fischer used an equipment leasing tax shelter as an example. In a case of that type, the residual value assigned the equipment leased is the heart of the matter: either it is high enough to qualify for the tax break or it is not. *Id.*

246. *Id.* at 305.

247. See FED. R. CIV. P. 16(c)(10) (indicating that "special procedures," presumably including a court-appointed expert, should be reserved for "managing potentially difficult or protracted actions").

248. MCL 2D, *supra* note 119, § 21.5, at 97.

premises of this Note is that the Tax Court, Claims Court, and Chancery Court are uniquely positioned because of their high degrees of centralization and expertise and the large number of valuation actions heard by each, to implement a standard operating procedure which would facilitate expert appointments.

### *The Appointment Process*

The appointment procedure, outlined in Rule 706(a), clearly anticipates that any appointment will be pretrial.<sup>249</sup> Early appointment enables the parties to have input into the appointment process, and helps the court to seek out the best-qualified expert available.<sup>250</sup>

The court must determine first that a neutral expert will be useful.<sup>251</sup> Thus the court must make a preliminary determination of the factual issues to be decided and how an expert might be helpful.<sup>252</sup> The court then must enter an order to show cause why an expert should not be appointed.<sup>253</sup> The court then may request nominations from the parties, and may appoint an expert agreed upon by the parties or appoint an expert of its own choosing.<sup>254</sup> Regardless of whether the court chooses its own expert or one agreed upon by the parties, hearings

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249. See WEINSTEIN & BERGER, *supra* note 136, at 706-14 (stating that Rule 706 "will ordinarily be invoked considerably before trial"); MCL 2D, *supra* note 119, § 21.5 ("Well in advance of the final pretrial conference, the court should consider submitting complicated factual disputes to an expert").

250. See Cecil & Willging, *supra* note 137, at 12 ("One judge mentioned that an earlier appointment would have been helpful in recruiting skilled experts, remarking, '[w]ith more time it may have been possible to choose among several experts.'").

251. See Botter, *supra* note 155, at 74 ("Judges do not investigate a case before trial. When the problem surfaces at trial it is probably too late for effective judicial action."). But see WEINSTEIN & BERGER, *supra* note 136, at 706-15 ("It is hard, because of the broad scope of discovery, to conceive of civil cases in which the need for a neutral expert would not become apparent until trial").

This discussion assumes that the court is appointing an expert *sua sponte*. Where one of the parties moves that an expert be appointed, the court need not identify the need.

252. See *Gates v. United States*, 707 F.2d 1141 (10th Cir. 1983) (directing parties to discuss appointment of an expert); *Scott v. Spanjer Bros., Inc.*, 298 F.2d 928 (2d Cir. 1962).

253. FED. R. EVID. 706(a).

254. *Id.*

should be held at which the parties have an opportunity to scrutinize the expert's credentials and make known any objections.<sup>255</sup> After the expert is selected and he consents to act, the court must draw up strict duties for the expert. The expert is informed of these duties either in writing or at a conference in which the litigants have an opportunity to participate.<sup>256</sup> The expert then must inform the parties of any findings,<sup>257</sup> and do so early enough to give the parties an opportunity to depose the expert and prepare for trial.<sup>258</sup> During the trial itself, the witness is subject to cross-examination by each party, including the party calling the witness.<sup>259</sup> The expert also may be called to testify by the court.<sup>260</sup>

### *Establishment of an Expert Witness Program*

Two primary obstacles remain to the development of a workable procedure for the appointment process and usage of experts: how experts might be chosen and how and when experts would be paid. One suggestion that could address both problems, as

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255. The *Manual for Complex Litigation* outlines the importance of the selection process as follows:

The most important factor when the court appoints experts is their selection. Only those whose fairness and expertise in the field cannot be genuinely questioned should be considered, and the court should select someone who can communicate effectively as a witness. Although the appointment is made by the court, every effort should be made to select a person acceptable to the litigants.

MCL 2D, *supra* note 119, § 21.51. See also FED. R. CIV. P. 16(c), which reads, in pertinent part,

The participants at any conference under this rule may consider and take action with respect to (10) the need for adopting special procedures for managing potentially difficult or protracted actions that may involve complex issues, multiple parties, difficult legal questions, or unusual proof problems

FED. R. CIV. P. 16(c). See also *infra* note 264 (positing that there is a small likelihood that the parties will be unable to decide upon a mutually agreeable impartial expert).

256. FED. R. EVID. 706(a).

257. *Id.*

258. WILLGING, *supra* note 170, at 5. One bar association has recommended that Rule 706 specify that the final report of the expert's findings be available to the parties at least 30 days before the trial date. *Id.* at 5 n.17.

259. FED. R. EVID. 706(a).

260. *Id.*

well as capitalize on the centralization and cost-spreading strengths of the three fora, is the establishment of an "Expert Witness Program" managed by the Clerk of the Court or a similar central office. The Expert Witness Program ("Program") could establish a clearinghouse of experts and provide a means to pay the impartial experts in a timely fashion.

In 1952, the Supreme Court of New York County developed a similar project to appoint impartial medical experts to cope with the problems resulting from the plethora of personal injury cases in that jurisdiction.<sup>261</sup> The Program contemplated herein uses the New York Medical Expert Testimony Project ("New York Project") as its model.

### *Development of an Expert Clearinghouse*

The Program could assemble a list of professionals in a number of different fields with valuation expertise.<sup>262</sup> Each judge could make use of the list when an expert was needed, thus spreading the costs of the list's compilation and maintenance between numerous actions. Procedurally, the court could hold a pretrial conference with the parties at which it would establish which experts were available to serve, run through the names of potential witnesses, and offer each party a number of peremptory challenges to the list.<sup>263</sup> The judge would appoint his own

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261. SPECIAL COMMITTEE OF THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK ON THE MEDICAL EXPERT TESTIMONY PROJECT, IMPARTIAL MEDICAL TESTIMONY (1956) [hereinafter IMPARTIAL MEDICAL TESTIMONY]. The problems the New York project was meant to address were court congestion and "battles of the experts." *Id.* at 6-10. The authors of the report estimated that "80 per cent of the cases in the trial courts of the country are personal injury cases, involving the taking of medical testimony." *Id.* at 3. The project was "aimed both at improving the quality of justice, providing more certainty for reaching right results, and at expediting the judicial process, thus reducing delay in the disposition of cases." *Id.* at 3. The project addressed the justice and efficiency concerns outlined in the first part of this Note. See *supra* notes 12-13 and accompanying text.

262. In the case of the Tax Court and Court of Federal Claims, lists of experts on real estate appraisal, artwork appraisal, and appraisal of the shares of a close corporation could be assembled. In the case of the Delaware Chancery Court, lists of equity analysts and other experts able to provide valuations of companies in certain industries (e.g., oil and gas, aerospace, financial, or manufacturing) could be assembled.

263. See MCL 2D, *supra* note 119, § 21.51.

expert or do without a court-appointee if the parties could not agree on an expert.<sup>264</sup>

Courts could look to local and national professional and academic societies as a source of experts.<sup>265</sup> Such societies not only provide many experts from whom to choose as well as facility of communication and solicitation, but also serve as prescreening devices for courts otherwise unfamiliar with expert credentials. The New York Project's experience in this regard is particularly encouraging. Its solicitation of local medical societies resulted in the testimony of experts of a particularly high quality—experts who had not, or would not, testify previously<sup>266</sup>

As an alternative to contacting professionals and academics through their membership in societies, the Program could also rely on experts who had served previously in a partisan capacity.<sup>267</sup> The establishment of a corps of experts might lead eventually to the perception by professionals and academics of service as a court-appointee as a civic responsibility, similar to jury duty or duty as a court-appointed attorney. Service could be encouraged as a means of fostering good will in the community or lending stature to the individual and the profession as a

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264. See WEINSTEIN & BERGER, *supra* note 136, at 706-16 to 706-17. Hopefully this situation would not arise very often. The *Manual for Complex Litigation* suggests that it should not be difficult to find an expert acceptable to the parties. "Concurrent nominations by the parties, a procedure recognized in Rule 706, will usually result in lists containing several names in common." MCL 2D, *supra* note 119, § 21.51.

265. See MCL 2D, *supra* note 119, § 21.51 ("The court may also call on professional organizations and academic groups to provide a list of qualified, willing, and available persons.").

266. See IMPARTIAL MEDICAL TESTIMONY, *supra* note 261, at 4 ("The physicians thus brought to the service of the court were not merely 'experts' . . . They were men in the highest ranks of their profession."). These high-quality experts might not have otherwise had occasion to impart their wisdom to the court. They might have found themselves alienated by the judicial system or might have viewed the process of expert testimony as beneath them. See *supra* notes 35-39 and accompanying text. In addition, they might have been excluded by the process of partisan expert shopping, see *supra* notes 29-30 and accompanying text, when they did not espouse a view favorable to either party.

267. The court also might seek out experts through legal advertisements. The *National Law Journal* publishes an annual *Directory of Appraisers*, in which experts advertise their ability to appraise a variety of assets ranging from machinery, real estate, and common stock, to stamps and rare books. *Directory of Appraisers*, NAT'L L.J., June 21, 1993, at S1-S12.

whole. Such service might even come to be seen as an honor, a badge of the high esteem in which a professional or academic is held by his peers and the courts, similar to the manner in which testimony before Congress or administrative agencies is now viewed.

### *Compensation of Court-Appointed Experts*

Not only could the Program establish a list of qualified experts, but it could serve as a solution to the complex compensation considerations which work to discourage judicial appointment of experts.<sup>268</sup> Pursuant to Rule 706, a judge normally has the discretion to apportion the costs of an impartial expert to the parties as he sees fit.<sup>269</sup> A court could make the losing party pay the cost of the impartial expert.<sup>270</sup> The court might assess the cost of the expert to both of the parties, either ratably or in some other sum.<sup>271</sup> These solutions, however, entail the experts' waiting to be paid for perhaps several years while the case is resolved.<sup>272</sup>

One means of circumventing this whole dilemma would be to remove the question from judges' consideration altogether, and allow the Program to administer compensation. The New York Project paid experts out of a fund established by grants from private foundations.<sup>273</sup> It was "agreed at the outset that no

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268. See *supra* notes 171-76 and accompanying text (discussing judicial reticence to appoint experts because of the difficulties in compensation).

269. FED. R. EVID. 706(b) ("[C]ompensation shall be paid by the parties in such proportion and at such time as the court directs.").

270. See MODEL CODE OF EVIDENCE, Rule 410 cmt. b (1942) ("[N]o doubt in the usual case the judge will provide that the expense of the experts will be taxed as costs and paid by the loser."); see also *supra* note 174 (listing commentators who recommend that expert fees be taxed as costs to the losing party).

271. See *Leesona Corp. v. Varta Batteries, Inc.*, 522 F Supp. 1304, 1312 n.21 (S.D.N.Y. 1981) (holding in a patent case that in the interests of justice, court-appointed expert fees be shared equally by the parties).

272. See *supra* note 175 and accompanying text.

273. IMPARTIAL MEDICAL TESTIMONY, *supra* note 261, at 4. The funding problem was solved "by the public-spirited generosity of the Alfred P Sloan Foundation and the Ford Motor Company Fund." *Id.* Alfred Sloan was the former President of General Motors Corporation. A cynic might take interest in noting that both of these philanthropic organizations were founded on the proceeds of the automobile industry, perhaps the single largest beneficiary of the New York Project's efforts to mitigate

party to a case should be permitted to pay such [expert witness] fees," apparently out of fear that such payment would bias the expert.<sup>274</sup> A similar fund could be established to pay valuation experts. Such a fund might be of a general nature, financed by public money or nominal court fees imposed on parties to litigation in the specialty fora.<sup>275</sup>

A fee fund would not only alleviate the burden of devising and enforcing a just and practical compensation scheme, but would remove a potential disincentive for experts to serve. The fund would ensure prompt payment of fees. The expert could be paid immediately upon his services being rendered if a fund were already established and available before trial, and thus the expert would not have to suffer the lost time value of his money.

While public funding for such a project might be controversial, the experience of the New York Project demonstrates that the net savings to the public of the establishment of an expert witness program could be enormous. The New York Project spent \$20,383.35 on expert witness fees over a two-year period.<sup>276</sup> During that two-year period, 238 cases were referred to experts,<sup>277</sup> 120 were settled<sup>278</sup> and only thirty-six went to trial.<sup>279</sup> At the time the Project was conducted, each day of trial in a New York court "[would have cost] the taxpayers, very conservatively, \$750."<sup>280</sup> Thus "[assuming], again very conservatively, that each [case] would have taken three trial days, we see

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the explosion of personal injury litigation.

274. *Id.*

275. The fund might also be specific to each action, financed by the litigants themselves through the posting of a bond or similar security prior to the appointment of an impartial expert. While there is some precedent for the posting of a bond in the context of a preliminary injunction, FED. R. CIV. P. 65(c), this seems to be an extraordinary requirement. To require such a bond in a routine valuation action would seem to unnecessarily restrict parties' access to the judicial system and place an artificial damper on litigation.

276. IMPARTIAL MEDICAL TESTIMONY, *supra* note 261, at 35. Incidental costs of the Project, such as the salary of the clerk in charge, were absorbed into the ordinary court budget and could not be specifically identified. *Id.*

277. *Id.* at 28.

278. *Id.* at 29.

279. *Id.* at 32. The remaining cases had not been disposed of as of the publication of the report, but further settlements were predicted. *Id.* at 30.

280. *Id.* at 35.



that savings will be effectuated of more than 10 times the total amount spent for the fees of impartial experts."<sup>281</sup> While settlements might have been reached in several of the 120 cases without appointment of an expert, "most of the cases referred to panel experts were conspicuously resistant to settlement because, in the referred cases, plaintiff and defendant differed markedly as to the extent of plaintiff's injuries."<sup>282</sup>

In takings actions, one sort of valuation action that this Note contemplates, public funding of impartial experts is mandated by Rule 706, which reads, "compensation is payable by law in civil actions and proceedings involving just compensation under the [F]ifth [A]mendment."<sup>283</sup> The Comptroller General has determined that in a condemnation proceeding, the Department of Justice must pay the fees of an impartial expert.<sup>284</sup> This provision is "designed to guard against reducing constitutionally guaranteed just compensation by requiring the recipient to pay costs."<sup>285</sup>

### CONCLUSION

Partisan expert testimony poses numerous problems in litigation. It adds to the expense of litigation for the parties and the court system and interferes with the justice system by obfuscating technical issues and effectively denying less wealthy litigants access to the judicial process. These problems are particularly stark in the context of the routine valuation action, in which the trier of fact is forced to choose between widely divergent dollar figures.

Of the numerous solutions to these problems that have been proposed over the years, the use of court-appointed experts stands out as the most effective as well as the most feasible.

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281. *Id.* This estimate was made "without speculating on the number of settlements that will be made in the 91 pending cases awaiting trial." *Id.*

282. *Id.* at 28.

283. FED. R. EVID. 706(b).

284. Decision of the Comptroller General B-139703 (Mar. 21, 1980), cited in WEINSTEIN & BERGER, *supra* note 136, at 706-27, 706 n.1.

285. FED. R. EVID. 706(b) advisory committee's note. An argument could be made that in the Tax and Claims Court, one of the parties is the government, and thus expert witness fees should be funded publicly to prevent any takings claims.

Courts have statutory and common law authority to appoint experts, but, the manifest deficiencies of expert testimony notwithstanding, they have been reticent to use this authority. For most judges, the idea of undertaking the convoluted process necessary to appoint an expert is too time-consuming and too unfamiliar. In addition, the implication that an impartial expert may unduly influence the fact finder makes appointment inappropriate in most instances.

Three specialty fora hear a great number of valuation actions. These three courts, the United States Tax Court, the United States Court of Federal Claims, and the Delaware Chancery Court, have certain characteristics, such as no right to jury trial, that work to counteract the shortfalls of impartial expert testimony. In addition, these courts have certain unique incentives to implement a standardized procedure for the appointment of experts, as well as a particularly good ability to spread the costs that the development of such a standard procedure would entail. Court appointed experts would function well in the context of valuation proceedings and present an opportunity for the courts to conserve judicial resources while reaching just decisions.

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