Trial Evidence
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Federal Rule of Evidence 706: Court-Appointed Experts

By John P. McCahey and Jonathan M. Proman – June 30, 2011

Expert testimony is often central to the outcome of a trial. And a litigator is almost never surprised when the trial expert he or she retained—whether a scientific expert, business expert, or some other expert—reaches conclusions favorable to the litigator's client. Nor is that same litigator particularly surprised when the equally well-credentialed expert retained by the other side reaches a conclusion polar opposite to that of his or her own expert. That litigator knows the trial will be a "battle of the experts" to sway the judge and jury.

The esoteric nature of much expert testimony, however, may make it difficult for that judge and jury to determine which of the two experts' conclusions is entitled to greater weight. Federal Rule of Evidence 706 provides a means to slice through the fog of conflicting expert testimony and obtain unbiased testimony from a court-appointed expert. Although it has been infrequently invoked in the nearly 40 years since its enactment, Rule 706 may be utilized more often in the future as the issues that judges and juries are called upon to decide become increasingly more complex and the testimony of litigants' experts become more partisan.

Court-Appointed Experts and the Adversary System

The adversary system is at the core of American jurisprudence. Dating to the pre-Elizabethan era, its perceived virtue (albeit not free from debate) is that it is better suited than any alternative system to expose falsehoods and allow truth to emerge. It allows each party to control what witnesses and other evidence it will present to the fact finder in support of its claims or defenses or to rebut the testimony and other evidence presented by the other party. The fact finder, guided by the applicable burden of proof, is then in a position to weigh the evidence presented, assess the credibility of the witnesses heard, and reach an informed decision as to which of the two parties should prevail. In fulfilling its role, the fact finder calls upon his or her knowledge gained from everyday life.

The claims and defenses that the fact finder must decide at trial sometimes involve issues of a technical and specialized nature, and testimony from experts is essential to inform that decision. The fact finder, however, usually will not have any frame of reference to draw upon where the parties' equally impressive experts reach opposite conclusions. In those instances, courts have warned that the adversary system is in danger of breaking down because of the fact finder's unfamiliarity with the subjects being debated by the clashing experts, leaving the fact finder unable to distinguish between the conflicting opinions offered. *Indianapolis Colts, Inc. v. Metro. Balt. Football Club Ltd. P'ship*, 34 F.3d 410, 415 (7th Cir. 1994) (observing that "judicial constraints on tendentious expert testimony are inherently weak because judges (and even more so juries . . .) lack training or experience in the relevant fields of expert knowledge" and that Rule 706 provides a remedy to help fix "the system we [are resigned to]"). Judge Posner in *Indianapolis Colts* further observed that "[m]any experts are willing for a generous (and sometimes for a modest) fee to bend their science in the direction from which their fee is

coming." *Id.* Rule 706 in those instances can serve to prevent the fact finder from being "at the mercy of the parties' warring experts." *In re High Fructose Corn Syrup Antitrust Litig.*, 295 F.3d 651, 665 (7th Cir. 2002) (citations omitted).

Rule 706's drafters acknowledged the "deep concerns" that had arisen from the "practice of shopping for experts, the venality of some experts, and the reluctance of many reputable experts to involve themselves in litigation." Fed. R. Evid. 706 advisory committee's note. They also pointed to the fact that the "inherent power of a trial judge to appoint an expert of his own choosing is virtually unquestioned." It was assumed (perhaps too optimistically) that the codification of that inherent power, by itself and without the need to appoint a neutral expert, would serve to deter retained experts and counsel from offering overreaching and unreliable testimony.

Still, Rule 706 was not without controversy when proposed, and Congress debated whether it tinkered too much with the adversary system. The key criticisms of Rule 706 when it was being considered were that no individual, including a court-appointed expert, is truly neutral, and the ideal of an unbiased expert is unrealistic; a court-appointed expert's conclusions would prove to be determinative, because a fact finder would consider the court's appointee more credible than the parties' "hired guns"; and any deviation from the adversary system should be disfavored. *Id.* ("Though the contention is made that court appointed experts acquire an aura of infallibility to which they are not entitled . . . the trend is increasingly to provide for their use . . . [and] [t]he 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.").

Although these concerns were ultimately rejected by Congress, the text of Rule 706 reflects various efforts to allow the benefits of a court-appointed expert where warranted, while preserving the adversary system to the fullest extent possible. *Monolithic Power Sys. v. O2 Micro Int'l Ltd.*, 558 F.3d 1341, 1348 (Fed. Cir. 2009) (noting that Congress rejected policy arguments that a court-appointed expert would impair the adversary system by usurping the jury's function and that court-appointed experts do not run afoul of the Seventh Amendment right to trial by jury); *In re High Fructose Corn Syrup*, 295 F.3d at 665 (7th Cir. 2002) ("The main objection to [appointing a Rule 706 expert is] that the judge cannot be confident that the expert whom he has picked is a genuine neutral."); *Tangwall v. Robb*, 2003 U.S. Dist. LEXIS 27128, at *11 (E.D. Mich. Dec. 23, 2003) (observing Federal Judicial Center report that "Rule 706 remains an important alternative source of authority to deal with some of the most demanding evidentiary issues that arise in federal courts"); *Wheeler v. Shoemaker*, 78 F.R.D. 218, 227 n.14 (D.R.I. 1978) ("Congress has provided that the court may appoint its own expert witness in jury trials . . . [and] that such non-partisan expert testimony would more assist jury deliberations than prejudice them.").

Cases That Merit a Court-Appointed Expert

Consistent with Rule 706's attempt to balance the benefits of both a court-appointed expert and

the adversary system, courts do not entertain appointing an expert lightly. Instead, only truly complex cases warrant appointment of a court-appointed expert. *Ford v. Mercer Cnty. Corr. Ctr.*, 171 F. App'x 416, 420 (3d Cir. 2006) ("The most important factor in favor of appointing an expert is that the case involves a complex or esoteric subject beyond the trier-of-fact's ability to adequately understand without expert assistance.") (quoting 29 Charles Alan Wright & Victor James Gold, *Federal Practice and Procedure*, Evidence, § 6304 (1997)); *Quiet Tech. DC-8, Inc. v. Hurel-Dubois UK, Ltd.*, 326 F.3d 1333, 1348 (11th Cir. 2003) ("[A]ppointment [of a Rule 706 expert] is especially appropriate where the evidence or testimony at issue is scientifically or technically complex.") (citation omitted); *Ledford v. Sullivan*, 105 F.3d 354, 358 (7th Cir. 1997) ("Generally, if scientific, technical, or other specialized knowledge will assist the trier-of-fact to understand the evidence or decide a fact in issue, a court will utilize expert witnesses."); *Carranza v. Fraas*, 471 F. Supp. 2d 8, 9 (D.D.C. 2007) ("Court invocation of [Rule 706] typically occurs in exceptional cases in which the ordinary adversary process does not suffice. . . .") (citation and internal quotations omitted); *Tangwall*, 2003 U.S. Dist. LEXIS 27128, at *8 ("The determination to appoint an expert . . . is to be aided by such factors as the complexity of the matters to be determined and the fact-finder's need for a neutral, expert view."); *Pabon v. Goord*, 2001 U.S. Dist. LEXIS 10685, at *3 (S.D.N.Y. July 27, 2001) ("The determination to appoint an expert . . . is to be informed by such factors as the complexity of the matters to be determined and the Court's need for a neutral, expert view.") (citation omitted); *Hunt v. R & B Falcon Drilling USA, Inc.*, 2000 U.S. Dist. LEXIS 18346, at *2 (E.D. La. Dec. 12, 2000) ("Rule 706 should be reserved for exceptional cases in which the ordinary adversary process does not suffice.") (citation omitted); *LeBlanc v. PNS Stores*, 1996 U.S. Dist. LEXIS 15909, at *4 (E.D. La. Oct. 18, 1996) ("Rule 706 is . . . appropriate only in rare circumstances and cannot be utilized as an alternative to communication and the adversary process.").

For example, Rule 706 expert witnesses have been appointed to assist a judge or jury in deciding a variety of issues, including those concerning surgical procedures, *Dull v. Ylst*, 1994 U.S. App. LEXIS 7821, at *9–13 (9th Cir. Apr. 5, 1994) (medical expert was properly appointed by district court to assess whether oral surgery upon state prisoner was performed with deliberate medical indifference to support a 42 U.S.C. § 1983 claim); migration of contaminants in groundwater and air, *Abarca v. Franklin Cnty. Water Dist.*, 2011 U.S. Dist. LEXIS 1603, at *17–20 (E.D. Cal. Jan. 5, 2011) (court retained experts to address migration in groundwater and air of contaminants from facility manufacturing pressure-treated wood); circuitry in laptop computers, *Monolithic Power Sys.*, 558 F.3d at 1343–44 (upholding jury verdict in a patent dispute involving circuitry controlling power from a laptop computer's battery to the fluorescent lamps illuminating its screen); foreign law, *United States v. One Lucite Ball Containing Lunar Material*, 252 F. Supp. 2d 1367, 1372 (S.D. Fla. 2003) (appointing expert on Honduran law); and damage calculations, *Bd. of Educ. v. CNA Ins. Co.*, 113 F.R.D. 654, 655 (S.D.N.Y. 1987) (appointing Rule 706 expert to address amount of attorney fees and costs incurred during a litigation).

In appointing a Rule 706 expert, a court must be careful to ensure the jury always understands that it—not the court-appointed expert—remains the ultimate decision maker. *Hodge v. United*

States, 2009 U.S. Dist. LEXIS 78146, at *14–15 (M.D. Pa. Aug. 31, 2009) (stating that "the policy behind [Fed. R. Evid. 706] is to promote the jury's factfinding ability"; not to supplant the jury) (citations omitted).

Some courts have held that Rule 706 does not apply to a technical advisor appointed by the court who neither testifies at trial nor otherwise serves as an independent source of evidence for the fact finder. *Fed. Trade Comm'n v. Enforma Nat'l Prods., Inc.*, 362 F.3d 1204, 1213 (9th Cir. 2004) ("Technical advisors, acting as such, are not subject to the provisions of Rule 706, which govern court-appointed expert witnesses. A court-appointed expert is a witness subject to Rule 706 if the expert is called to testify or if the court relies on the expert as an independent source of evidence." (citation omitted)); *TechSearch, L.L.C. v. Intel Corp.*, 286 F.3d 1360, 1380 (Fed. Cir.), *cert. denied*, 537 U.S. 995 (2002) (trial court did not err in refusing to allow depositions of technical advisor to the court because Rule 706 does not apply to such advisors).

Determining Whether a Court-Appointed Expert Is Needed

Either the court, sua sponte, or counsel for any of the parties may move for the appointment of a Rule 706 expert by filing an order to show cause as to why such an expert should not be appointed. *Cheese v. United States*, 290 F. App'x 827, 830 (6th Cir. 2008) ("[A]ppointment of [an] expert witnesses [may be] by the court on its own motion or motions of the parties."); *Steele v. Shah*, 1996 U.S. App. LEXIS 23301, at *16 (11th Cir. July 17, 1996) ("[Rule 706] provides the court with discretionary power to appoint an expert witness . . . on the court's own motion or the motion of a party."); *Voth v. Maass*, 1994 U.S. App. LEXIS 19459, at *6–7 (9th Cir. July 18, 1994) ("[T]he court may appoint an expert witness on its own or a party's motion."); *United States v. Bonds*, 12 F.3d 540, 567 (6th Cir. 1993) ("Federal Rule of Evidence 706 permits the court on its own to appoint an expert witness."). Rule 706 does not provide any standard to be applied in considering such a motion. Rather, the decision whether to grant or deny the motion in a particular case is left to the trial court's sound discretion and reviewed on appeal under an abuse of discretion standard. *Patel v. United States*, 2010 U.S. App. LEXIS 21539, at *8 (10th Cir. Oct. 19 2010) (the decision to appoint an expert witness may be overturned "only for abuse of discretion"); *German v. Broward Cnty. Sheriff's Office*, 315 F. App'x 773, 778 (11th Cir. 2009) ("We review a district court's denial of a motion for appointment of an expert witness for an abuse of discretion.") (citation omitted). Case law reveals that appellate courts rarely, if ever, take exception to a trial court's exercise of discretion under Rule 706.

In practice, the appointment of a Rule 706 expert is rare. *McCracken v. Ford Motor Co.*, 392 F. App'x 1, 4 (3d Cir. 2010) (to avoid interfering with the adversary system, appointment of an expert seldom occurs) (citation omitted); *Monolithic Power Sys. v. O2 Micro Int'l Ltd.*, 558 F.3d 1341, 1346 (Fed. Cir. 2009) ("[D]istrict courts rarely make Rule 706 appointments. . . .") (citation omitted); *Okla. Natural Gas Co. v. Mahan & Rowsey, Inc.*, 786 F.2d 1004, 1007 (10th Cir. 1986) ("The fact that the parties' experts have a divergence of opinion does not require the district court to appoint experts to aid in resolving such conflicts."); *Mavity v. Fraas*, 456 F. Supp. 2d 29, 34 n.4 (D.D.C. 2006) ("[A]ppointment of an expert [is] an extraordinary activity

that is appropriate only in rare instances.") (citations and internal quotations omitted); *Tangwall v. Robb*, 2003 U.S. Dist. LEXIS 27128, at *9 (E.D. Mich. Dec. 23, 2003) ("The enlistment of court-appointed expert assistance under Rule 706 is not commonplace."); *In re Joint E. & S. Dists. Asbestos Litig.*, 830 F. Supp. 686, 693 (E.D.N.Y. 1993) ("Rule 706 should be reserved for exceptional cases in which the ordinary adversary process does not suffice. . . ."). Such experts are appointed only when deemed essential to a judge or jury as fact finder. Similarly, counsel are often hesitant to suggest a court-appointed expert because litigants tend to prefer experts who they know support their position over a court-appointed "wild card." The stage in litigation when a Rule 706 expert may be appointed is within the trial court's discretion, although practical considerations, such as allowing sufficient time to permit discovery of the appointed expert's conclusions, should be considered. *In re Gainey Corp.*, 400 B.R. 576, 578 (W.D. Mich. 2008) ("A court should appoint an expert early in the litigation before it is too late.").

Court-Appointed Expert's Selection

Counsel may be involved in most aspects of the expert-selection process once the court decides it will make an appointment under Rule 706. For example, counsel may separately suggest experts to be considered, *Leesona Corp. v. Varta Batteries, Inc.*, 522 F. Supp. 1304, 1310–11 (S.D.N.Y. 1981) (expert nominated by all parties was appointed by the court to serve as a Rule 706 expert), or may even reach agreement on an appropriate expert to be chosen. *In re High Fructose Corn Syrup Antitrust Litig.*, 295 F.3d 651, 665 (7th Cir. 2002) (stating that parties may agree on an expert to help remove concern that the expert chosen may not be neutral) (citations omitted); *In re McGhan Med. Corp.*, 2000 U.S. App. LEXIS 26715, at *1 (Fed. Cir. 2000) (appointing expert suggested by all parties).

Ultimately, however, Rule 706 vests exclusive authority with the court to control the expert-selection process. *Carranza v. Fraas*, 471 F. Supp. 2d 8, 11 (D.D.C. 2007) ("Rule 706 allows the court to appoint an expert witness to assist the court, not to assist a party."). Any input from counsel as to the expert to be selected is merely advisory, and the court is not obligated to seek such input at all. The expert to be selected under Rule 706 lies solely within the court's prerogative. *Daubert v. Merrell Dow Pharms.*, 509 U.S. 579, 595 (1993) ("Rule 706 allows the court in its discretion to procure the assistance of an expert of its own choosing."); *Young v. City of Augusta ex rel. DeVaney*, 59 F.3d 1160, 1169 (11th Cir. 1995) (explaining a court may "appoint an expert witness selected by the parties or of its own choosing"); *Krause v. Whitley*, 1993 U.S. App. LEXIS 2693, at *6–7 (9th Cir. 1993) (Rule 706 "allows the district court to appoint a neutral expert on its own motion, whether or not the expert is agreed upon by the parties"); *G.K. Las Vegas Ltd. P'ship v. Simon Prop. Grp.*, 671 F. Supp. 2d 1203, 1208 (D. Nev. 2009) ("A court may appoint an agreed-upon expert, or appoint its own . . . ."); *United States v. Galbreth*, 908 F. Supp. 877, 880 (D.N.M. 1995) ("Rule 706 . . . permits the court at its discretion to procure the assistance of an expert of its own choosing. . . .").

Court-Appointed Expert's Mandate

Rule 706 does not define the scope of a court-appointed expert's mandate beyond that of a

"witness." Instead, the court prescribes the expert's mandate on a case-by-case basis. Fed. R. Evid. 706(a) (The court-appointed expert witness "shall be informed of the witness' duties by the court in writing . . . or at a conference in which the parties shall have opportunity to participate."). For example, a Rule 706 expert may be asked to review an entire case record, and then prepare a formal report as evidence to be considered in deciding a motion. *Dull v. Ylst*, 1994 U.S. App. LEXIS 7821, at *9–13 (9th Cir. Apr. 5, 1994) (expert appointed to review an "entire medical record" on which the court granted summary judgment to the defendants). Alternatively, a court-appointed expert may be asked only to address discrete questions prepared by the court, counsel, or both. *See Abarca v. Franklin Cnty. Water Dist.*, 2011 U.S. Dist. LEXIS 1603, at *20 (E.D. Cal. Jan. 5, 2011) (expert report consisted of responses to questions drafted jointly by the court and counsel). A Rule 706 expert may serve multiple functions, such as also acting as a special master to suggest a resolution of the parties' competing positions. *Bd. of Educ. v. CNA Ins. Co.*, 113 F.R.D. 654, 654–55 (S.D.N.Y. 1987) (appointing expert to serve "as a Special Master, pursuant to F. R. Civ. P. Rule 53, and concurrently as a court-appointed expert pursuant to Fed. R. Evid. Rule 706").

In all events, however, no matter how broad or narrow the mandate, the parties are entitled to disclosure of a Rule 706 expert's conclusions. *In re Joint E. & S. Dists. Asbestos Litig.*, 151 F.R.D. 540, 544 (S.D.N.Y. 1993) ("Rule 706 provides for the disclosure of an expert's findings. . . ."). That disclosure will not necessarily include formal expert reports. The appropriate manner for the disclosure of the expert's conclusions to the court and the parties is determined by the court case by case, and neither Rule 706 nor case law provides formal criteria that must be followed. If directed by the court, the expert's conclusions may be reported at a hearing or through informal discussions with the parties. *Id.* ("Rule 706 expert witnesses report[] to the court in a variety of ways including reports, hearings and informal discussion with the parties.") (citation omitted). Rule 706 thus provides the court with the flexibility to meet the specific needs of a particular case (and perhaps reduce the expenses associated with a court-appointed expert). *See Dull v. Ylst*, 1994 U.S. App. LEXIS 7821, at *9–13 (9th Cir. Apr. 5, 1994) (expert's findings contained in report made part of the record); *United States v. One Lucite Ball Containing Lunar Material*, 252 F. Supp. 2d 1367, 1372 (S.D. Fla. 2003) (a mere letter was sufficient to comprise the expert's preliminary report); *Leesona Corp. v. Varta Batteries, Inc.*, 522 F. Supp. 1304, 1312 (S.D.N.Y. 1981) (although expert prepared a written preliminary report, it was sufficient that his final report was provided only in the form of testimony at trial).

Formal depositions also are a permissible way for the parties to understand, or to vet, a court-appointed expert's findings. Rule 706 expressly provides all parties with the right to depose a court-appointed expert before trial. *Reid v. Albemarle Corp.*, 207 F. Supp. 2d 499, 507 (M.D. La. 2001) ("FRE 706 . . . indicate[s] that a witness appointed by the court to testify before the jury may be deposed by any party and shall be subject to cross examination."); *Gartner v. Hendrix*, 1991 U.S. Dist. LEXIS 11516, at *8 (E.D. La. Aug. 8, 1991) (parties enjoy the right to depose court-appointed experts).

The court-appointed expert may be called by any party to testify at trial and is subject to the same cross-examination as any other expert. *North Finn v. Cook*, 1998 U.S. App. LEXIS 32603, at *7 (10th Cir. 1998) ("[Rule 706] entitles the parties to cross-examine court-appointed experts."); *Holland v. Comm'r*, 835 F.2d 675, 676 (6th Cir. 1987) (Rule 706 experts are subject to cross-examination by the parties.). The court, sua sponte, also may call the court-appointed expert to testify at trial. *Aiello v. McCaughtry*, 1996 U.S. App. LEXIS 18737, at *10 (7th Cir. 1996) (the court may "call its own . . . expert witnesses"). The parties are free to discredit the court-appointed expert's conclusions and—in an effort to maintain the adversary system—as noted above, instructions to the jury that it ultimately decides the case, not the court-appointed expert, are proper. *DeAngelis v. A. Tarricone, Inc.*, 151 F.R.D. 245, 247 (S.D.N.Y. 1993) (explaining that the jury is to be made aware that "even an impartial expert can be wrong, and that the impartial expert must be subjected to the same evaluation of credibility as any other witness").

Consistent with its intent to preserve the adversary system, Rule 706 expressly permits the parties to call their own expert witnesses notwithstanding the testimony (or anticipated testimony) of the court-appointed expert. *McKinney v. Anderson*, 1988 U.S. Dist. LEXIS 18596, at *3 (D. Nev. Sept. 2, 1988) ("[T]he parties may . . . call their own expert witnesses."); *United States v. Int'l Bus. Machs. Corp.*, 406 F. Supp. 178, 180 (S.D.N.Y. 1975) ("Nothing in this rule . . . limits the parties in calling expert witnesses of their own selection.") (quoting Fed. R. Evid. 706(d)).

Court-Appointed Expert's Fees

The parties generally are responsible for the court-appointed expert's fees and expenses, with the amount to be determined by the court. *Ledford v. Sullivan*, 105 F.3d 354, 360–61 (7th Cir. 1997) ("A number of circuits have recognized that Rule 706(b) grants a district court the discretion to apportion all the costs of an expert to one side.") (citations omitted); *McGinnis v. Tenn. Gas Pipeline Co.*, 1994 U.S. App. LEXIS 12781, at *11–12 (6th Cir. 1994) (Rule 706 "gives a trial court broad discretion to appoint an expert in a civil case and to apportion costs as necessary"). An exception to the parties-pay-the-bill rule exists for certain criminal cases and eminent domain cases under the Fifth Amendment, in which government funds pay the expert's fee. Fed. R. Evid. 706(b); *Young v. City of Augusta ex rel. DeVaney*, 59 F.3d 1160, 1170 n.18 (11th Cir. 1995) ("In just compensation cases and in prosecutions involving indigent criminal defendants, expert witness fees may be paid with funds provided by law.").

Payment of those fees in some cases may carry a potential social justice aspect: There is authority for the position that, where one party is indigent, the court has discretion to order the payment of expert fees exclusively by the able-to-pay party. *Davis v. United States*, 266 F. App'x 148, 150 (3d Cir. 2008) (explaining that a judge may "excus[e] indigent parties from paying their share of the costs [under Rule 706]") (citations omitted); *Steele v. Shah*, 1996 U.S. App. LEXIS 23301, at *16–17 (11Cir. 1996) (indicating Rule 706 can be used to level the playing field where an indigent party cannot afford to retain an expert) (citation omitted); *Pabon*

v. Goord, 2001 U.S. Dist. LEXIS 10685, at *3 (S.D.N.Y. July 27, 2001) ("[When] an expert is appointed [under Fed. R. Evid. 706], his or her compensation is to be paid by the parties; however, where . . . one of the parties is indigent, in compelling circumstances the Court may assess the entire cost of the expert's compensation to the other party.") (citations omitted). The fees of a Rule 706 expert may be payable in advance. *U.S. Marshals Serv. v. Means*, 741 F.2d 1053, 1058 (8th Cir. 1984) ("The plain language of Rule 706(b) thus permits a district court to order one party or both to advance fees and expenses for experts that it appoints."); *Boatright v. Larned State Hosp.*, 2007 U.S. Dist. LEXIS 31734, at *4 (D. Kan. Apr. 27, 2007) ("[T]he court may require the payment of expert fees in advance.").

No matter who pays for the expert, however, the expert remains neutral. Ex parte communications between counsel and a Rule 706 expert that are not authorized by the court, for example, are impermissible. *DeAngelis*, 151 F.R.D. at 247 ("[I]n order to preserve their impartiality the experts must be contacted solely through the court.").

Advising the Jury That an Expert Is Court-Appointed

Perhaps the greatest concern harbored by both court and counsel when a Rule 706 expert testifies at trial is that the jury will consider that expert's opinion to be determinative of the case. The court may seek to minimize that danger by instructing the jury that the opinion of the court-appointed expert carries no more weight than those of the parties' experts and that they must apply the same level of scrutiny and skepticism to all of the expert opinions offered at trial. *Monolithic Power Sys. v. O2 Micro Int'l Ltd.*, 558 F.3d 1341, 1347–48 (Fed. Cir. 2009) (jury instructed to afford no more weight to a Rule 706–appointed expert's testimony than to that of a party-appointed expert); *DeAngelis*, 151 F.R.D. at 247 (explaining that the jury is to be made aware that "even an impartial expert can be wrong, and that the impartial expert must be subjected to the same evaluation of credibility as any other witness"); *Leesona Corp. v. Varta Batteries, Inc.*, 522 F. Supp. 1304, 1312 (S.D.N.Y. 1981) (indicating a court-appointed expert's opinion should not be conclusive of a dispute).

If, in a particular case, it is perceived that such a limiting instruction will not suffice to protect against the jury blindly accepting the court-appointed expert's conclusions, the court is free to withhold completely from the jury that an expert witness was appointed by the court. Fed. R. Evid. 706(c) ("In the exercise of its discretion, the court may authorize disclosure to the jury of the fact that the court appointed the expert witness."). Conversely, a court is free to advise the jury that an expert has been appointed by the court, especially where the court deems it important for the jury to know which of the experts testifying are "hired guns" and which are not. *In re High Fructose Corn Syrup Antitrust Litig.*, 295 F.3d 651, 665 (7th Cir. 2002) ("The judge and jurors may not understand the neutral expert perfectly but at least they will know that he has no axe to grind, and so, to a degree anyway, they will be able to take his testimony on faith.").

Conclusion

Complex litigation increasingly involves highly technical subject matter that a layperson, whether judge or jury, lacks the ability to scrutinize effectively. For this reason, use of Rule 706

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court-appointed experts, or the threat thereof, may be increasingly useful to help keep expert "hired guns" honest or, at the least, more restrained in their opinions. Rule 706 experts increasingly may be the tool needed to help ensure that the adversary system allows the truth to emerge where a fact finder must assess esoteric evidence and testimony of which it otherwise has no firsthand knowledge or experience to guide its decision.

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