

NOTES

COURT-APPOINTED EXPERT PANELS: A COMPARISON OF TWO MODELS

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INTRODUCTION

Science and the law make uneasy partners. Expert testimony at trial in toxic tort and product liability cases is unavoidable and increasingly complex.¹ This creates two sources of difficulty for a federal trial judge: (1) how to manage the potential venality and questionable science presented by some experts selected by the parties;² and (2) how to understand the scientific issues well enough to make admissibility decisions under the judge's role as "gatekeeper" of expert testimony.³

To address either issue, courts sometimes turn to court-appointed experts pursuant to Federal Rule of Evidence 706 ("Rule 706").⁴ In the first instance, a neutral expert appointed by the court may provide a reference point for a jury trying to determine the scientific truth based on biased testimony from party experts.⁵ Without the neutral expert, it is feared, juries cannot make just and

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1. See JOE S. CECIL & THOMAS E. WILLGING, COURT-APPOINTED EXPERTS: DEFINING THE ROLE OF EXPERTS APPOINTED UNDER FEDERAL RULE OF EVIDENCE 706, at 3 (1993), *microformed on Sup. Docs. No. JU 13.2:C 83/4* (U.S. Gov't Printing Office) [hereinafter CECIL & WILLGING STUDY].

2. See *id.* at 13; see also FED. R. EVID. 706 advisory committee's note.

3. See *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 597 (1993) (stating the role of the judge in determining the admissibility of scientific evidence is a "gatekeeper"). The Court in *Daubert* held Federal Rule of Evidence 702 ("Rule 702") sets the standard for admission of scientific testimony by an expert. *Id.* at 587. Rule 702 states: "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.

4. See CECIL & WILLGING STUDY, *supra* note 1, at 3-5. In contrast to Rule 702, which guides a judge in qualifying expert witnesses, Rule 706 allows a judge to appoint an expert witness to testify at trial. FED. R. EVID. 706.

5. See *Developments in the Law—Confronting the New Challenges of Scientific Evidence*, 108 HARV. L. REV. 1583, 1589 (1995) [hereinafter *Developments in the Law*].

consistent determinations.⁶ In the second instance, a court-appointed expert may assist the judge in determining whether the methodology behind a proffered opinion is based on scientifically valid principles.⁷ Judges know the law but need help wading through the scientific principles involved in complex litigation such as toxic torts. A court-appointed expert could help teach the court enough for sound decision-making during the admissibility phase of the pretrial process.⁸

Some complex issues, however, need more than one expert. For example, causation in toxic torts is a particularly difficult area.⁹ There can be three types of problems: (1) whether the substance has the capacity to cause the disease suffered by the plaintiff;¹⁰ (2) whether the particular plaintiff contracted the disease because of exposure to the agent and not for another reason existing in the general population;¹¹ and (3) whether the particular defendant being sued produced the agent causing the plaintiff's disease.¹² Determination of the capacity of a substance to cause the disease suffered by the plaintiffs (sometimes called "general causation")¹³ often involves complex interaction of scientific disciplines including toxicology, epidemiology, and other branches of medicine.¹⁴ To understand this interaction, more than one expert must help the jury or the judge make an appropriate assessment of the science involved.

Court-appointed expert panels raise uncertainty for litigants that they will receive fair treatment from juries. Aspects of the adversarial system such as party autonomy and impartial decision-making¹⁵ are compromised when court-appointed expert panels testify at trial. Parties want to control the presentation of the testimony to a jury to ensure fairness.¹⁶ Juries, as impartial decision-makers, bring social conscience into the litigation process.¹⁷ Courts have been

6. See *id.* at 1585-86, 1589 (discussing the errors in decision-making by juries without accurate evidence and suggesting court-appointed experts could alleviate this problem).

7. See CECIL & WILLING STUDY, *supra* note 1, at 12.

8. See, e.g., Bert Black et al., *Science and the Law in the Wake of Daubert: A New Search for Scientific Knowledge*, 72 TEX. L. REV. 715, 795-96 (1994) (suggesting court-appointed experts as a method for applying the *Daubert* test); Joe S. Cecil & Thomas E. Willging, *Accepting Daubert's Invitation: Defining a Role for Court-Appointed Experts in Assessing Scientific Validity*, 43 EMORY L.J. 995 (1994) (advocating increased use of court-appointed experts).

9. See Jean Macchiaroli Eggen, *Toxic Torts, Causation, and Scientific Evidence After Daubert*, 55 U. PITT. L. REV. 889, 890 (1994).

10. See *id.*

11. See *id.*

12. See *id.* at 903.

13. See *id.* at 896.

14. See *id.* at 896-98.

15. See Patrick E. Longan, *Civil Trial Reform and the Appearance of Fairness*, 79 MARQ. L. REV. 295, 300 (1995) (setting out party autonomy and impartial decision-making as key aspects of the adversarial system).

16. See *id.* at 300-02.

17. See Allan Kanner, *The Evolving Jurisprudence of Toxic Torts: The Prognosis for Corporations*, 12 CARDOZO L. REV. 1265, 1279-80 (1991) (discussing the importance of the jury

reluctant in the past to appoint expert panels to testify at trial out of respect for the adversarial system.¹⁸ However, the judge's increased managerial role and his role as gatekeeper of expert testimony likely will increase the need for court-appointed expert panels in toxic tort cases.¹⁹ Two recent appointments of expert panels provide models for the judiciary in addressing this need.²⁰

Specifically, in May 1996, U.S. District Chief Judge Sam C. Pointer, Jr. appointed a national expert panel, pursuant to Rule 706, to investigate the causation data in the combined federal cases regarding silicone gel breast implants.²¹ Requested by the National Plaintiff's Steering Committee,²² Judge Pointer's order provides for an expert panel to review scientific data relevant to the issues in the breast implant litigation, particularly general causation.²³ The panel will serve as experts for any trial under the multidistrict litigation umbrella.²⁴ However, following an initial "discovery-type," casual deposition taken by the parties, an individual expert's testimony is limited to a video-taped deposition presided over by Judge Pointer.²⁵ Parties will participate in the videotaped deposition by cross-examining each expert about his findings.²⁶

in "doing justice" in toxic tort cases because it brings morals and values into the analysis that a scientific expert would not).

18. See CECIL & WILLGING STUDY, *supra* note 1, at 20. Most panels appointed to date either assisted the court in understanding the issues or assisted the court in determining appropriate reorganization plans. Compare, e.g., *Pierce v. Murphy*, 984 F.2d 196 (7th Cir. 1993) (court-appointed expert panel recommended new procedures for children services department to reach settlement agreement); *Reed v. Cleveland Bd. of Educ.*, 607 F.2d 737 (6th Cir. 1979) (panel of court-appointed experts assisted special master in evaluating a desegregation plan for Cleveland and Ohio); *Lightfoot v. Walker*, 486 F. Supp. 504 (S.D. Ill. 1980) (panel of experts appointed by the court to evaluate prison system medical care), with *In re Swine Flu Immunization Prods. Liab. Litig.*, 495 F. Supp. 1185 (W.D. Okla. 1980) (panel of experts appointed to testify in Swine Flu suits). See also THOMAS E. WILLGING, COURT-APPOINTED EXPERTS, 18 & n.62 (1986).

19. See Cecil & Willging, *supra* note 8, at 995-96; Stephan Landsman, *Of Witches, Madmen, and Products Liability: An Historical Survey of the Use of Expert Testimony*, 13 BEHAV. SCI. & L. 131, 154-55 (1995).

20. *In re Silicone Gel Breast Implant Prods. Liab. Litig.*, Order 31 (N.D. Ala. 1996), 4 MEALEY'S LITIG. REP.: BREAST IMPLANTS, June 13, 1996, at F-1 [hereinafter Order 31]; *Hall v. Baxter Healthcare Corp.*, 947 F. Supp. 1387, 1392 (D. Or. 1996).

21. Order 31, *supra* note 20, at F-1.

22. *Id.* The National Plaintiff's Steering Committee is a group of individuals appointed by the court to coordinate litigation efforts on behalf of all plaintiffs participating in the multidistrict litigation.

23. *Id.* at F-4. Judge Pointer made subsequent modifications to his original order. See MEALEY'S LITIG. REPS.: BREAST IMPLANTS, May 1996-Nov. 1996. The most significant of the modifications further defined the parameters for the working of the National Science Panel. See *infra* notes 205-07, 211 and accompanying text.

24. Order 31, *supra* note 20, at F-1.

25. *Id.* at F-5.

26. *Id.*

By contrast, in December 1996, U.S. District Judge Robert E. Jones filed an opinion and order describing a Federal Rule of Evidence 104(a) ("Rule 104(a)") admissibility hearing²⁷ in which he employed four court-appointed experts to act as his advisors.²⁸ Judge Jones appointed the experts using the inherent power of the court.²⁹ The parties' experts presented their evidence and answered questions from the court, the panel of appointed advisors, and the parties themselves.³⁰ Each advisor submitted a report, and the parties raised questions about the reports before Judge Jones issued his ruling.³¹

The processes of appointing experts pursuant to Rule 706 and under the inherent authority of the court raise questions of party autonomy and fairness that judges need to consider before following either model. This Note ascertains which court-appointed panel model is more appropriate for the adversarial system. Part I reviews the history of court-appointed experts in our system. Part II discusses modern justifications for and opposition to court-appointed experts. Part III focuses on expert panels appointed by the court: reviewing arguments for their use during and before trial; looking in detail at the two models provided by judges in the breast implant litigation; and comparing the models in the context of the adversarial process. This Note recommends that judges looking to utilize court-appointed expert panels use a preliminary hearing model because it represents the best balance of scientific certainty, party autonomy, and impartial decision-making.

I. HISTORY OF COURT-APPOINTED EXPERTS

Noted partisanship on the part of doctors testifying at trial during the 1850s prompted calls for reform of expert testimony.³² Proposals for reform continued through the early 1900s.³³ Judges responded to proposals by appointing their own experts using the inherent authority of the court.³⁴ These early court-

27. *Hall v. Baxter Healthcare Corp.*, 947 F. Supp. 1387, 1392 (D. Or. 1996). *See also* FED. R. EVID. 104(a).

Preliminary questions concerning the qualification of a person to be a witness, the existence of privilege, or the admissibility of evidence shall be determined by the court, subject to the provisions of subdivision (b). In making its determination, [the court] is not bound by the rules of evidence except with respect to privileges.

Id.

28. *Hall*, 947 F. Supp. at 1392-93.

29. *Id.* at 1392.

30. *Id.* at 1393.

31. *Id.* at 1394.

32. *See* Landsman, *supra* note 19, at 144-47.

33. *See id.* at 151 (citing Learned Hand, *Historical and Practical Considerations Regarding Expert Testimony*, 15 HARV. L. REV. 40 (1901); Roscoe Pound, *Mechanical Jurisprudence*, 8 COLUM. L. REV. 605 (1908)).

34. *See, e.g., Ex parte Peterson*, 253 U.S. 300, 312 (1920) (discussing the history of court-appointed advisors).

appointed experts generally had the special skills necessary to assist the judge in narrowing issues, interpreting complex financial data or auditing volumes of data.³⁵ Experts utilized in this manner preserved the litigants' Seventh Amendment³⁶ right to a trial by jury because their appointment only made the judicial process more efficient by simplifying issues without making ultimate fact determinations.³⁷ In addition, some experts could participate in preliminary hearings to assist the judge in sorting evidence for presentation at trial.³⁸ A judge might also enter an expert's report into evidence, provided the parties had an opportunity to call rebuttal witnesses.³⁹ Courts likened court-appointed experts to special masters, used at the time only in suits in equity.⁴⁰ The early cases laid out broad authority for the trial judge to appoint and utilize an expert to make preliminary findings, however, left the "ultimate determination of issues of fact"⁴¹ for the jury.

Courts continued utilizing the inherent power of the court to appoint various specialists to assist the judge before or during trial.⁴² However, one judge in 1962 expressed concern over the potential for abuse of the inherent power.⁴³ In particular, he wanted to protect the parties from the surprise appointment of an expert and he wanted to ensure the expert chosen had no hidden bias.⁴⁴ Even with this judge's expressed concern and the enactment of the Federal Rules of Evidence in 1975,⁴⁵ courts still enjoyed broad discretion to appoint advisors or experts.⁴⁶ For example, the appellate court in *Reilly v. United States*⁴⁷ found the

35. *See id.* at 313.

36. U.S. CONST. amend. VII. The Seventh Amendment states:

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.

Id.

37. *See Ex parte Peterson*, 253 U.S. at 309-10.

38. *See id.* at 310.

39. *See id.* at 311.

40. *See id.* at 312-14.

41. *Id.* at 310.

42. *See Danville Tobacco Ass'n v. Bryant-Buckner Assocs., Inc.*, 333 F.2d 202 (4th Cir. 1964); *Scott v. Spanjer Bros., Inc.*, 298 F.2d 928 (2d Cir. 1962). *See also Cecil & Willging*, *supra* note 8, at 1001-04 (discussing recent uses of experts appointed to assist the judge at trial and pretrial).

43. *Scott*, 298 F.2d at 932 (Hincks, J., dissenting in part).

44. *Id.*

45. The enactment of the Federal Rules of Evidence in 1975 included express authority for the court to appoint experts. *See* FED. R. EVID. 706.

46. *See, e.g., Reilly v. United States*, 863 F.2d 149, 157 (1st Cir. 1988) (holding the district court properly invoked the court's inherent power to hire a technical advisor to assist the judge in making estimates of damage award in a medical malpractice case).

47. 863 F.2d 149 (1st Cir. 1988).

district court's appointment of a technical advisor proper even though the judge gave no notice to the parties.⁴⁸ However, that court was quick to point out the impropriety of such action if the expert had been appointed by the court to *testify* at trial.⁴⁹ The *Reilly* court attributed this finding to the difference between technical advisors and experts who will testify at trial.⁵⁰ Technical advisors, appointed with the inherent power of the court, present no evidence at trial.⁵¹ By contrast, an expert appointed by the judge under Rule 706 presents evidence at trial and is subject to deposition and cross-examination by the parties.⁵² The *Reilly* court apparently decided that a court's discretion to appoint expert advisors is broader than that under Rule 706. A closer look at Rule 706 will highlight some procedural safeguards that restrict a judge's inherent power⁵³ and outline some other purposes fostered by the Rule.

Federal Rule of Evidence 706 gives the court authority, upon its own motion or the motion of a party, to appoint an expert witness.⁵⁴ To an extent, this rule

48. *Id.* at 155-56.

49. *Id.* at 156.

50. *Id.* at 155-56.

51. *Id.* at 156.

52. *Id.* at 155-56. *See also* FED. R. EVID. 706(a).

53. *See Reilly*, 863 F.2d at 156 (stating Rule 706 establishes a procedural framework for court-appointed expert witnesses); 3 J. WEINSTEIN & M. BERGER, WEINSTEIN'S EVIDENCE ¶ 706[02] at 706-15 (1988) ("The provisions of subdivision (a) of Rule 706 operate as restrictions on the judge's common law power to appoint experts.") [hereinafter WEINSTEIN'S EVIDENCE].

54. FED. R. EVID. 706(a). Federal Rule of Evidence 706 states:

- (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 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

codified the practice federal courts already followed.⁵⁵ Similar to development of the court-appointed expert process at common law, agreement of the parties on the appointment is recommended, not required.⁵⁶ In addition, the Rule provides no limit on the ability of the parties to call experts on their own.⁵⁷

Rule 706 departs from the common law in significant ways, however. Unlike the traditional practice which allowed the judge to exercise broad discretion in choosing and utilizing a court-appointed expert, Rule 706 imposes procedural checks on the court's inherent power.⁵⁸ These checks include: (1) the expert himself must agree to testify;⁵⁹ (2) the expert witness must inform the parties of his findings;⁶⁰ (3) the parties must be provided an opportunity to both depose and cross-examine the expert witness;⁶¹ (4) the court must delineate the duties of the expert in written form, filing a copy of the document with the court's clerk for access by all parties;⁶² and (5) the court's appointment decision is reviewed on appeal with an abuse of discretion standard.⁶³ The advisory committee's notes suggest Congress codified the inherent power of the federal court,⁶⁴ however, addition of the "safeguards" in Rule 706 reflect an intent to minimize the negative effects of court-appointed experts on the adversarial process. Each safeguard appears to protect the parties' interests in controlling and contributing to the fact-finding process while granting the court access to an impartial expert. Rule 706 also effectively addresses concerns about notification of appointment to the parties by encouraging their participation in the appointment process. The parties' involvement in selection of an expert and the parties' ability to depose and cross-examine the expert address concern about uncovering potential bias of the appointed expert.

Adding procedural safeguards was not the only reason for adopting Rule 706. Abuse of the judicial system by the use of partisan experts⁶⁵ and the need for

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.

Id.

55. See FED. R. EVID. 706 advisory committee's note ("The inherent power of a trial judge to appoint an expert of his own choosing is virtually unquestioned. . . . Hence the problem becomes largely one of detail.").

56. FED. R. EVID. 706(a); see also WILLGING, *supra* note 18, at 6-7.

57. FED. R. EVID. 706(d).

58. See *supra* note 56.

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

60. *Id.*

61. *Id.*; see also, WEINSTEIN'S EVIDENCE, *supra* note 53, at 706-15.

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

63. WILLGING, *supra* note 18, at 3 (citing *Gates v. United States*, 707 F.2d 1141, 1144 (10th Cir. 1983)).

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

65. See FED. R. EVID. 706 advisory committee's note.

more effective management of the federal court docket⁶⁶ also motivated codification of the common law. Three specific concerns emerged. Availability of experts was the first issue.⁶⁷ Experts avoided involvement with litigation because they distrusted the adversarial process to represent their views in an objective fashion or to expose the scientific truth.⁶⁸ A process allowing for neutral expert testimony alleviated this concern. Rule 706 permits such testimony.

Enactment of Rule 706 also attempted to discourage the practices of "shopping for experts" and venality.⁶⁹ Shopping for experts is a partisan practice whereby parties select an expert based on the conformity of the expert's opinion to that party's theory of the case. This practice, according to commentators, helps obscure the truth rather than reveal it for resolution by the jury.⁷⁰ Enactment of the Rule also sought to decrease "junk science" in the courtroom.⁷¹ "Junk science" is a term developed to describe the type of expert testimony relied upon by some plaintiffs which is purported to lack credible scientific foundation.⁷² According to the advisory committee, in addressing these problems, Rule 706 overtly threatens the appointment of a neutral expert by the

66. See Landsman, *supra* note 19, at 154 (discussing the increased pressure on federal courts to manage litigation because of the rising number of cases being brought in federal court).

67. See FED. R. EVID. 706 advisory committee's note.

68. See Landsman, *supra* note 19, at 144-46.

69. See FED. R. EVID. 706 advisory committee's note. A venal expert is one whose opinion tends to change based, in part, on his fee, or, based on the position of the party that hired him. See *Developments in the Law, supra* note 5, at 1586; see also BLACK'S LAW DICTIONARY 1555 (6th ed. 1990) (defining venal: "[P]ertaining to something that is bought; capable of being bought; offered for sale; mercenary. Used usually in an evil sense, such purchase or sale being regarded as corrupt and illegal.").

70. See E. Donald Elliott, *Toward Incentive-Based Procedure: Three Approaches for Regulating Scientific Evidence*, 69 B.U. L. REV. 487, 493 (1989) (commenting "an expert's testimony can be used to obfuscate what would otherwise be a simple case"); Landsman, *supra* note 19, at 148-51 (discussing the effect of expert venality on fact-finding and tracing the development of expert shopping from the mid-nineteenth century to the present). See generally Samuel R. Gross, *Expert Evidence*, 1991 WIS. L. REV. 1113 (outlining the problems with partisan expert testimony and suggesting reforms using court-appointed experts); John H. Langbein, *The German Advantage in Civil Procedure*, 52 U. CHI. L. REV. 823, 833 (1985) (contrasting the German fact-finding process with the American adversarial fact-finding process and recommending the adoption of a system in the United States where the judge plays a more managerial role in the fact-finding process).

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

72. See PETER W. HUBER, GALILEO'S REVENGE: JUNK SCIENCE IN THE COURTROOM 2 (1991); Ellen Relkin, *Some Implications of Daubert and Its Potential for Misuse: Misapplication to Environmental Tort Cases and Abuse of Rule 706(a) Court-Appointed Experts*, 15 CARDOZO L. REV. 2255, 2255 n.3 (1994).

court.⁷³ In theory, it was proposed, "the availability of the procedure in itself decreases the need for resorting to it. 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."⁷⁴ In addition, parties usually end up paying for court-appointed experts,⁷⁵ increasing their overall costs. This aspect of the rule supports a theory that parties would rather address venality and unreliable science issues themselves, rather than paying for another expert.⁷⁶

By enacting Rule 706, its developers sought mainly to improve the quality of testimony by party experts, not necessarily to encourage the use of appointed experts at trial. Implied in this theory is a balance of the need for experts to help resolve complex issues of science or technology and the virtues of party autonomy inherent in the adversarial system.⁷⁷ Actual appointment of experts was meant to be rare.⁷⁸

II. MODERN DAY COURT-APPOINTED EXPERTS

A. *Justifications*

All commentators seem to agree that the need for and the use of scientific testimony in product liability litigation is likely to increase as products become more complex and science advances more rapidly.⁷⁹ This trend coupled with continued concern about "junk science"⁸⁰ and venal experts supports modern day advocacy for increasing the use of court-appointed experts.⁸¹ Further, the

73. See FED. R. EVID. 706 advisory committee's note. See also Pamela Louise Johnston, Comment, *Court-Appointed Scientific Expert Witnesses: Unfettering Expertise*, 2 HIGH TECH. L.J. 249, 261 (1987) (suggesting the advisory committee intended that judges use the threat of appointment inherent in the rule, not the mechanism itself); Michael J. Saks, *The Phantom of the Courthouse*, 35 JURIMETRICS J. 233, 234 (1995) (reviewing CECIL & WILLGING STUDY, *supra* note 1).

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

75. See FED. R. EVID. 706(b) (requiring parties pay for a court-appointed expert).

76. See the interesting discussion on a lawyer's responsibility to select an appropriate expert in Dick Thornburgh, *Junk Science—The Lawyer's Ethical Responsibilities*, 25 FORDHAM URB. L.J. 449 (1988).

77. See Saks, *supra* note 73, at 234.

78. See *id.*

79. See CECIL & WILLGING STUDY *supra* note 1, at 3 (citing JUDICIAL CONFERENCE OF THE U.S., REPORT OF THE FEDERAL COURTS STUDY COMMITTEE 97 (1990)).

80. See *supra* notes 71-72 and accompanying text.

81. See *Developments in the Law, supra* note 5, at 1589; 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, 484-85 (1988); Beverly W. Lubit, Note, *The Time Has Come for Doing Science: A Call for the Rigorous Application of Daubert Standards for the Admissibility of Expert Evidence in the Impending Silicone Breast Implant Litigation*, 42 N.Y.L. SCH. L. REV. 147

Supreme Court's decision in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*,⁸² making the judge a gatekeeper for expert testimony, provides additional fodder for advocates.⁸³

Partisan experts, commentators argue, often fail to clarify issues for the jury because the expert may tailor testimony to meet the needs of the client rather than make a full disclosure.⁸⁴ Adversarial experts also tend to polarize the parties' theories of the case⁸⁵ and may create a conflict for resolution by a jury where in actuality little conflict exists.⁸⁶ In contrast, a neutral expert is loyal to the court's interest in finding the truth.⁸⁷ The reason is simple: Neutral experts are "less susceptible to pressures to tailor their testimony to support a particular legal outcome than are partisan experts whose fees are paid by parties interested in the legal outcome."⁸⁸ Since the use of a court-appointed expert under Rule 706 is not intended to replace party experts,⁸⁹ but merely to enhance the information available to the trier of fact, the neutral expert may fill in gaps of knowledge necessary for resolution of the parties' dispute.⁹⁰ Hence, advocates of court-appointed experts encourage sacrificing some party autonomy for more accurate results.

A second modern justification for Rule 706 court-appointed experts is encouraging the parties to settle before trial.⁹¹ A court-appointed expert working with the parties and their corresponding experts before trial, may clarify issues on which the party experts agree and disagree.⁹² This reduces polarization⁹³ and forces the lawyers to re-evaluate continually their positions.⁹⁴ If the court-appointed expert clarifies issues for the parties, allowing them to resolve the case without a trial, the parties save money and the federal case load is reduced. If the

(1998).

82. 509 U.S. 579, 597 (1993) (discussing the gatekeeping role of the judge in allowing expert testimony).

83. See Black et al., *supra* note 8, at 793-94; Cecil & Willging, *supra* note 8, at 995-96; Lubit, *supra* note 81, at 147.

84. See Gross, *supra* note 70, at 1188; *Developments in the Law*, *supra* note 5, at 1589-91.

85. See Gross, *supra* note 70, at 1181.

86. See *id.* at 1184.

87. See Langbein, *supra* note 70, at 847; Lee, *supra* note 81, at 492-93.

88. Lee, *supra* note 81, at 493. See also Gross, *supra* note 70, at 1188 (commenting: "If witnesses are chosen and compensated by the court, and responsible to it, these pitfalls are avoided.").

89. See FED. R. EVID. 706(d).

90. See Lee, *supra* note 81, at 493.

91. See CECIL & WILLGING STUDY, *supra* note 1, at 15; WEINSTEIN'S EVIDENCE, *supra* note 53, at 706-09.

92. See CECIL & WILLGING STUDY, *supra* note 1, at 16.

93. See *supra* note 86 and accompanying text.

94. See CECIL & WILLGING STUDY, *supra* note 1, at 16. See also Langbein, *supra* note 70, at 832-38 (discussing the fact-finding process in the German system that encourages settlement through the use of expert witnesses).

court-appointed expert simply narrows issues for trial, the trial process itself becomes more efficient. The growing federal case load adds weight to this argument since slim judicial resources force federal courts to look for ways to increase efficiency.⁹⁵

Advocates of Rule 706 argue that court-appointed experts could assist the judge in determining the reliability and fit of an expert's testimony in his gatekeeping role under Federal Rule of Evidence 702 ("Rule 702").⁹⁶ In *Daubert*⁹⁷ the Supreme Court articulated the requirement under Rule 702 of "a preliminary assessment of whether the reasoning or methodology underlying the testimony [of an expert witness] is scientifically valid and of whether that reasoning or methodology properly can be applied to the facts in issue."⁹⁸ This "gatekeeping role"⁹⁹ of the judge puts him in the difficult position of having to assess the scientific validity of a scientist's assumptions, methodology, and data. Without the necessary scientific skills, a judge thrust into this role may need an appointed expert to help him make sound decisions on admissibility.¹⁰⁰

B. Opposition to Court-Appointed Experts

If court-appointed experts were a panacea, judges would likely use the Rule 706 process more often, particularly in toxic tort and product liability cases. This is far from reality. Of 431 federal district judges polled for a 1993 study, only twenty percent had appointed an expert under Rule 706;¹⁰¹ only ten percent had used the process more than once.¹⁰² Some of the reasons cited for the rare appointment of Rule 706 experts include the infrequency of the need for

95. See RICHARD A. POSNER, *THE FEDERAL COURTS: CRISIS AND REFORM* 317-18 (1985). See generally THOMAS E. BAKER, *RATIONING JUSTICE ON APPEAL: THE PROBLEMS OF THE U.S. COURTS OF APPEALS* (1994).

96. See *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 597 (1993). Federal Rule of Evidence 702 provides for the use of expert testimony if it "will assist the trier of fact to understand the evidence or to determine a fact in issue." FED. R. EVID. 702. See also Black et al., *supra* note 8, at 790-96; CECIL & WILLGING STUDY, *supra* note 1, at 12; Margaret G. Farrell, *Daubert v. Merrell Dow Pharmaceuticals, Inc.: Epistemology and Legal Process*, 15 *CARDOZO L. REV.* 2183, 2202 (1994).

97. 509 U.S. 579 (1993).

98. *Id.* at 592-93.

99. *Id.* at 597.

100. See Cecil & Willging, *supra* note 8, at 995-96 (noting the Supreme Court itself recognized the possibility judges would need experts to assist them in their gatekeeping capacity); see also Black et al., *supra* note 8, at 790-96 (expressing faith in judges to make correct admissibility decisions with help from court-appointed advisors, experts or special masters); Lubit, *supra* note 81, at 148-50 (suggesting judges employ more court-appointed experts to "independently evaluate" scientific evidence).

101. See CECIL & WILLGING STUDY, *supra* note 1, at 7.

102. See *id.* at 8.

appointed experts,¹⁰³ particularly in light of judicial respect for the adversarial system,¹⁰⁴ and the failure to recognize the need for such an expert until the eve of trial when delay is costly.¹⁰⁵

Scholars offer additional reasons for caution in using appointed experts under Rule 706. One argues "by designating [an expert] witness as court-appointed and 'impartial' the court has in effect cloaked him with a robe of infallibility."¹⁰⁶ The concern is undue persuasion. A designation of impartiality may elevate the appointed expert's status, persuading the jury to the expert's viewpoint regardless of the validity of the parties' position on the same issue. Opponents of appointed experts argue that the opportunity to cross-examine the appointed witness cannot safeguard against a jury's perception that the court-appointed expert is infallible.¹⁰⁷

Closely related to this concern is the additional weight a jury may give to the court-appointed expert's testimony. When the court announces the expert is "neutral" a jury likely will believe that opinion. The problem is twofold. First, a "neutral" expert may not always be right.¹⁰⁸ Second, a "neutral" expert may be biased by the school of thought under which he trained.¹⁰⁹ If a jury follows the "neutral" opinion, the court-appointed expert has interfered with the deliberative process of the jury.¹¹⁰

Data regarding the impact of a court-appointed expert on a jury is mixed. Little empirical data exists on the subject,¹¹¹ and what little there is points to a finding that jurors do not accord nonadversarial experts more weight.¹¹² The actual experience of federal judges, however, indicates real juries do seem to follow court-appointed expert opinions. For example, in a study of court-appointed experts in a series of asbestos litigation, the court-appointed expert witnesses had a noticeable effect on jury outcomes.¹¹³ A court-appointed expert testified in each of sixteen asbestos injury cases tried in the Southern District of

103. See *id.* at 18.

104. See *id.* at 20.

105. See *id.* at 22.

106. Elwood S. Levy, *Impartial Medical Testimony—Revisited*, 34 TEMP. L.Q. 416, 424 (1961). See also Carl B. Rubin & Laura Ringenbach, *The Use of Court Experts in Asbestos Litigation*, 137 F.R.D. 35, 41 (1991), discussed *infra* notes 114-20.

107. See Levy, *supra* note 106, at 427.

108. See *id.* at 420.

109. See *id.* at 421; Relkin, *supra* note 72, at 2257.

110. See Levy, *supra* note 106, at 424; Relkin, *supra* note 72, at 2257; see also *Kian v. Mirro Aluminum Co.*, 88 F.R.D. 351, 356 (E.D. Mich. 1980). But see Gross, *supra* note 70, at 1194, 1197 (arguing neutrality of the court-appointed expert *should* influence the jury).

111. See Black et al., *supra* note 8, at 787 n.456; Gross, *supra* note 70, at 1183 n.215.

112. See Nancy J. Brekke et al., *Of Juries and Court-Appointed Experts: The Impact of Nonadversarial versus Adversarial Expert Testimony*, 15 LAW & HUM. BEHAV. 451, 451 (1991) (reporting that "jurors did not accord more weight to nonadversarial expert testimony").

113. See Rubin & Ringenbach, *supra* note 106, at 41.

Ohio.¹¹⁴ Since some of the experts needed to testify by videotaped depositions, practicality forced the judge to advise the jury of an expert's court appointment in each of the trials.¹¹⁵ Juries hearing the cases received instructions to "not attach any significance to that fact in considering [the appointed expert's] testimony."¹¹⁶ In cases involving asbestosis, "the jury decided with the [c]ourt's expert in thirteen out of sixteen cases."¹¹⁷ In case involving pleural plaque, "the juries decided with the [c]ourt's expert in twelve out of sixteen cases."¹¹⁸ The judge in the cases, Judge Carl B. Rubin, and his assistant, Special Master Laura Ringenbach, concluded: "A court's expert will be a persuasive witness and will have a significant effect upon a jury."¹¹⁹ Other judges polled about similar experiences agree with this conclusion.¹²⁰

Litigants on both sides of the table dislike Rule 706 court-appointed experts because the process interferes with party autonomy.¹²¹ In essence, lawyers argue against court-appointed experts because lawyers lose the ability to control development of expert witness testimony because coaching of the court-appointed expert is not allowed.¹²² Discomfort with court-managed expert testimony under Rule 706 is not surprising, however, given the liberal procedural rules that govern most aspects of federal litigation. Some commentators suggest the greater managerial role of the federal judge in settlement proceedings and other pre-trial processes in recent years may encourage the use of court-appointed experts.¹²³ However, this trend only would reduce party autonomy further.

For litigants, another disadvantage of court-appointed experts is higher litigation costs. The parties pay for a court-appointed expert's time¹²⁴ and must make additional preparations¹²⁵ to accommodate the extra witness. More experts

114. *See id.* at 39. The original number of plaintiffs was sixty-five; however, forty-two "were found to be free of any condition giving rise to a cause of action." *Id.*

115. *See id.* at 40.

116. *Id.* at 46.

117. *Id.* at 41.

118. *Id.* "[T]here is overlap in the foregoing [cases] since only sixteen cases in toto [were] involved but [with] two questions [in] each." *Id.*

119. *Id.*

120. *See* CECIL & WILLGING STUDY, *supra* note 1, at 52-56.

121. *See* WILLGING, *supra* note 18, at 22-23; *see also* Gross, *supra* note 70, at 1193.

122. *See* Gross, *supra* note 70, at 1200.

123. *See* Landsman, *supra* note 19, at 154-55; Langbein, *supra* note 70, at 858-66 (theorizing the continued rise in managerial aspects of a federal judge's role will increase the use of court-appointed experts; however, safeguards against abuse of judicial power must develop concurrently).

124. *See* FED. R. EVID. 706(b) (providing for compensation of court-appointed experts).

125. Extra preparation could include researching the background of the court-appointed expert to prepare cross-examination, deposing the court-appointed expert, or further physical or psychological examination of a party. *See* Relkin, *supra* note 72, at 2266-267 (identifying additional physical examinations of a party as one extra cost in product liability cases where the health of a party or causation is at issue). *See generally* CECIL & WILLGING STUDY, *supra* note 1, at 57-65.

at trial increases court costs as well. Thus, any use of court-appointed experts adds to an individual party's costs.

Finally, judges sometimes forego the Rule 706 appointment process because identifying an expert with appropriate qualifications and neutrality is difficult and time consuming.¹²⁶ Although no systematic method for procuring names of potentially suitable experts exists, several options have been proposed including centralized expert resource centers,¹²⁷ government agency expert review panels,¹²⁸ and professional association referrals.¹²⁹ Scientists themselves encourage the participation of professional associations in providing neutral experts.¹³⁰ Given that some scientists dislike the litigation process because some lawyers encourage venality,¹³¹ and that the Federal Judicial Center encourages judges to utilize professional associations to help find neutral experts,¹³² interaction through associations is likely to develop first. Any formalized collaborative effort likely will develop slowly.

III. COURT-APPOINTED EXPERT PANELS

A single court-appointed expert witness may have minimal negative effect on the outcome of an individual case.¹³³ However, in toxic tort and some product liability cases, finding a single expert who could address every scientific issue in the case is a daunting (if not impossible) task.¹³⁴ The complexity of cases such as toxic torts, and concern over venal experts and "junk science" experts offered by some parties,¹³⁵ led scholars to conclude that court-appointed expert panels under Federal Rule of Evidence 706 offer viable solutions. Suggestions to use court-appointed expert panels sometimes include overhauls of the judicial

126. See CECIL & WILLGING STUDY, *supra* note 1, at 21-22.

127. See CARNEGIE COMM'N ON SCIENCE, TECH., AND GOV'T, SCIENCE AND TECHNOLOGY IN JUDICIAL DECISION MAKING: CREATING OPPORTUNITIES AND MEETING CHALLENGES 17 (1993) [hereinafter CARNEGIE COMM'N REPORT].

128. See Lawrence S. Pinsky, Comment, *The Use of Scientific Peer Review and Colloquia to Assist Judges in the Admissibility Gatekeeping Mandated by Daubert*, 34 HOUS. L. REV. 527, 529 (1997).

129. See Gross, *supra* note 70, at 1214-15.

130. See, e.g., MARCIA ANGELL, M.D., SCIENCE ON TRIAL: THE CLASH OF MEDICAL EVIDENCE AND THE LAW IN THE BREAST IMPLANT CASE 205-07 (1996); James T. Rosenbaum, *Lessons From Litigation Over Silicone Breast Implants: A Call for Activism By Scientists*, 276 SCI. 1524 (1997).

131. See Gross, *supra* note 70, at 1115.

132. See MANUAL FOR COMPLEX LITIGATION SECOND § 21.51 (1985).

133. See *supra* notes 111-20 and accompanying text.

134. See MARGARET A. BERGER, PROCEDURAL AND EVIDENTIARY MECHANISMS FOR DEALING WITH EXPERTS IN TOXIC TORT LITIGATION: A CRITIQUE AND PROPOSAL 40-41 (Carnegie Commission on Science, Technology, and Government 1991). See generally CECIL & WILLGING STUDY, *supra* note 1, at 31-34.

135. See, e.g., ANGELL, *supra* note 130, at 207; Gross, *supra* note 70, at 1220.

system¹³⁶ or eradication of the jury altogether in complex cases.¹³⁷ Some scholars argue that changing the system in which the expert panels operate effectively eliminates the conflicts a court-appointed panel would have with the adversarial system and the jury process. Thus, party autonomy within the jury process is sacrificed on the altar of scientific certainty. Such sacrifice is unnecessary. Existing procedural rules, the integrity of the judiciary, and modern managerial techniques can effectively utilize the knowledge of court-appointed expert panels preserving both the adversarial process and the right to a jury trial.¹³⁸ The remainder of this Note explores briefly the use of court-appointed expert panels as witnesses and as advisors, then compares two current expert panel models.

A. Using Court-Appointed Expert Panels

Some proponents of the increased use of Rule 706 court-appointed experts argue that juries may not understand the complexity of scientific issues. Proponents argue that a panel of court-appointed experts should make findings of fact.¹³⁹ Few empirical studies address the adequacy of juries in making decisions based on the probabilistic proof offered by many scientists in complex

136. See, e.g., Gross, *supra* note 70, at 1221-29 (proposing procedural changes with incentives for judges and lawyers to use court-appointed experts in every case); Langbein, *supra* note 70, at 825 (advocating more judicial control over the fact-finding process similar to the German approach); Pinsky, *supra* note 128, at 529 (suggesting a centralized panel of experts provide colloquia review of data offered by party experts).

137. See, e.g., *In re United States Fin. Secs. Litig.*, 609 F.2d 411, 429-32 (9th Cir. 1979); Ora Fred Harris, Jr., *Complex Product Design Litigation: A Need for More Capable Fact-Finders*, 79 KY. L.J. 477, 508 (1991) (determining an expert jury is the most feasible method to eliminate the confusion of complex product design cases while furthering efficiency and equity); William V. Luneburg & Mark A. Nordenberg, *Specially Qualified Juries and Expert Nonjury Tribunals: Alternatives for Coping with the Complexities of Modern Civil Litigation*, 67 VA. L. REV. 887, 950-51 (1981) (advocating the use of an administrative body for complex civil litigation similar to other Congressionally created agency tribunals); *Developments in the Law*, *supra* note 5, at 1605 (concluding alternative methods of dispute resolution best handle complex or scientific issues).

138. The absolute right to a jury trial in civil cases is disputed in the literature; however, this paper assumes that in tort litigation, regardless of complexity, litigants retain the Seventh Amendment right to a jury trial. See *Ex parte Peterson*, 253 U.S. 300, 309-10 (1920) (stating the need under the Seventh Amendment to ensure the jury function is not usurped by court-appointed experts); Luneburg & Nordenberg, *supra* note 137, at 1004 (concluding after analyzing the Supreme Court's opinion in *Atlas Roofing Co. v. Occupational Safety & Health Review Comm'n*, 430 U.S. 442 (1977), that state common law claims would not fit the *Atlas* criteria for exclusion from the Seventh Amendment right to a jury trial).

139. See, e.g., Harris, *supra* note 137, at 508 (advocating the use of an expert jury); Luneburg & Nordenberg, *supra*, note 137, at 950-51 (advocating the use of an administrative body for complex civil litigation similar to other Congressionally created agency tribunals); Pinsky, *supra* note 128, at 529 (suggesting "external scientific peer review of proffered evidence" and/or using "colloquium style preliminary hearings" to educate the judge in making admissibility decisions).

toxic tort cases.¹⁴⁰ However, results of some cases and studies support the increased use of appointed expert panels to render scientifically oriented fact determinations.¹⁴¹ In the adversarial system, the best use of expert panels would not replace the jury. An expert panel is best used to assist the judge in evaluating the foundation of scientific testimony. Such an idea is not far-fetched, particularly in light of recent applications of expert panels in the silicone breast implant cases.¹⁴² The key to any use of court-appointed expert panels is the proper balance of justice, fairness, efficiency and adherence to the traditional values of the adversarial system.

1. *Court-Appointed Panels at Trial.*—Introducing a Rule 706 expert panel to testify at trial¹⁴³ may cause excessive interference with the adversarial system. Concern stems from two difficulties: parties usually control presentation of evidence to the jury,¹⁴⁴ and juries usually deliberate evidence not weighted by a court-appointed panel of experts.¹⁴⁵

Procedural issues of how to present the panel experts' testimony perhaps loom largest. First, Rule 706 suggests either the court or one of the parties may call an appointed witness to testify.¹⁴⁶ If the panel expert's testimony is favorable to a particular party, it makes sense for that party to call the expert witness, allowing the other party to cross-examine. The panel testimony then integrates into a party's presentation of evidence. That party's position is weighted not

140. See Black et al., *supra* note 8, at 787 n.456; Gross, *supra* note 70, at 1183 n.215.

141. Professor Samuel R. Gross provides a clear example of a court reaching a non-scientific resolution in a case based on partisan expert testimony. Tried to a judge, the court found a spermicide caused birth defects without scientifically credible evidence. Gross, *supra* note 70, at 1121-24 (discussing *Wells v. Ortho Pharmaceutical Corp.*, 615 F. Supp. 262 (N.D. Ga. 1985), *aff'd as to liability, modified as to damages* 788 F.2d 741 (11th Cir. 1986)). Professor Gross asserts juries likely would be no better than judges in similar circumstances. *Id.* at 1180. See also Jane Goodman, *Jurors' Comprehension and Assessment of Probabilistic Evidence*, 16 AM. J. TRIAL ADVOC. 361, 375 (1992) (concluding jurors "failed to make adequately refined distinctions between probabilities" in a mock study of jury reaction to probabilistic evidence).

142. See *Hall v. Baxter Healthcare Corp.*, 947 F. Supp. 1387 (D. Or. 1996); Order 31, *supra* note 20, at F-1.

143. Rule 706 itself suggests experts appointed with this authority will testify at trial stating, "the witness may be called to testify by the court or any party." FED. R. EVID. 706(a). Some courts use Rule 706 to appoint experts even if the experts will not testify at trial. See WILLGING, *supra* note 18, at 18-23 (describing the various uses for court-appointed experts).

144. See Gross, *supra* note 70, at 1193 (discussing main arguments against court-appointed experts); see also Langbein, *supra* note 70, at 840-42 (discussing the use of court-appointed experts in the American system and the adversarial approach to presenting testimony); Longan, *supra* note 15, at 300-01 (suggesting the key elements of the adversarial process are party autonomy and impartial juries).

145. See Relkin, *supra* note 72, at 2257.

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

only by the testimony of its own experts¹⁴⁷ but by the court-appointed panel as well. A party faced with such opposition may feel compelled to even the score by providing additional experts. Thus, this scenario encourages proliferation of marginally useful testimony and works against the purpose of Rule 706 to control venal experts.

When neither party wants to call the panel experts and the court must, timing of the testimony becomes an issue. When in the trial process is presentation of the panel testimony least prejudicial? One commentator suggests the most neutral timing is between presentation of the two parties' cases.¹⁴⁸ Whatever timing the judge selects is likely to influence the jury in some manner because of a fact inherent to a panel of experts—there is more than one expert. Both parties will attempt to discredit the appointed experts' testimony. As a result, a jury will likely conclude something is different about that set of witnesses. The panel testimony in such a situation may unduly influence the deliberations of the jury¹⁴⁹ regardless of the judge's decision to divulge the panel's court-appointed status.¹⁵⁰

In addition, assuming the court has each panel expert testify separately, too many experts testifying at trial may confuse the jury. Statistical data or probabilistic proof of complex concepts is difficult for juries to handle.¹⁵¹ More information from additional experts may compound confusion. Some data suggest jurors exhibit a propensity to not listen well with one court-appointed expert.¹⁵² The likelihood of jurors tuning out testimony of successive court-appointed panel members seems high. Neither litigants nor the judge want a confused jury, ignoring all of the relevant scientific testimony because too much is presented.¹⁵³

147. Rule 706 states, "Nothing in this rule limits the parties in calling expert witnesses of their own selection." FED. R. EVID. 706(d). Expert witness testimony is limited by other rules of evidence including Rules 702, 703, 705, 401, 402, and 403. *See generally* FED. R. EVID.

148. WILLGING, *supra* note 18, at 12.

149. *See* Longan, *supra* note 15, at 300-01 (discussing the importance of an impartial decision-maker on the appearance of fairness in judicial administration). *See also* Rubin & Ringenbach, *supra* note 106, at 41.

150. Scholars disagree over the propriety of divulging the court-appointed status of any expert. *Compare* Brekke et al., *supra* note 112, at 470 (advising against informing juries of experts' court-appointed status) *with* Gross, *supra* note 70, at 1194, 1197 (implying an expert's court-appointed status should be divulged in order to increase his influence with the jury).

151. *See* Goodman, *supra* note 141, at 375; Harris, *supra* note 137, at 491 (suggesting that juries are unable to comprehend technology involved with products liability design defects).

152. Brekke et al., *supra* note 112, at 470. Brekke's mock jury study reports, "recognition recall of the expert testimony was significantly higher in adversarial conditions than in nonadversarial conditions." *Id.* Therefore, even if court-appointed experts present more impartial and accurate testimony than party experts, the jury may not notice because they seemingly pay less attention to the court-appointed experts. *Id.*

153. The appellate process may be a safeguard for confusion because of too much expert testimony. In one case, the appellate court held a trial court did not abuse its discretion to appoint

Improving the integrity of scientific evidence presented in complex toxic tort cases is important. Party autonomy and impartial fact finding likely will suffer if court-appointed panels present findings in addition to party testimony. An expert panel appointed by the judge for pretrial hearings is likely a better solution to problems of questionable science and venal experts within the adversarial system.

2. *Court-Appointed Panels Before Trial.*—No doubt concerns expressed by commentators, judges, and rulemakers about expert venality and experts offering “junk science” is justified.¹⁵⁴ These arguments reflect skepticism about a jury’s ability to wade through the “junk” and glean the truth.¹⁵⁵ In cases such as toxic torts, it makes sense to use a pretrial process that ensures the efficacy of scientific testimony and minimizes the “junk.” Courts can achieve a high level of efficacy using expert panels in conjunction with the judge’s *Daubert*¹⁵⁶ gatekeeping role. In fact, many commentators recognize the value of court-appointed experts in the *Daubert* process.¹⁵⁷ Few, however, recommend that a judge utilize his inherent authority to appoint an advisory panel.¹⁵⁸

A court reduces the opportunity for “junk science” to invade the courtroom by undertaking a panel inquiry at an early juncture,¹⁵⁹ respecting party autonomy in the process. Judge Robert E. Jones in Oregon effectively utilized a process similar to the one briefly described here.¹⁶⁰ First, the judge called for a pretrial admissibility hearing as part of his managerial role under Federal Rule of Civil

an expert under Rule 706 when “additional experts would . . . add more divergence and opinion differences.” *Georgia-Pacific Corp. v. United States*, 640 F.2d 328, 334 (Ct. Cl. 1980).

154. If this were not the case, no one would write about it and Rule 706 would not exist. Venality is a concern because it tends to polarize parties, increase costs and adversely effect jury decision-making. See Gross, *supra* note 70, at 1129-36; Lee, *supra* note 81, at 482-83. “Junk science” is of concern in toxic torts because of issues related to causation which can involve complex scientific data sets. See Eggen, *supra* note 9, at 893.

155. See, e.g., *Developments in the Law*, *supra* note 5, at 1586-87 (arguing partisan expert testimony on complex and scientific issues makes fact finding extremely difficult); Harris, *supra* note 137, at 491 (arguing some complex cases fall outside a lay person’s understanding which effects his or her ability to sort out complex facts from partisan experts). Some commentators blame lawyers for this phenomenon. Elliott, *supra* note 70, at 492-93; Gross, *supra* note 70, at 1129-30.

156. *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579 (1993)

157. See, e.g., Black et al., *supra* note 8, at 793-96; Cecil & Willging, *supra* note 8, at 995-97; Gross, *supra* note 70, at 1187-88; Lee, *supra* note 81, at 480; Lubit, *supra* note 81, at 147.

158. See Black et al., *supra* note 8, at 796. One commentator suggests the differences between appointed experts under the inherent authority and under Rule 706 differ only in the function they serve. WILLGING, *supra* note 18, at 22.

159. Federal Rule of Evidence 706 was implemented partly to evade “junk science.” FED. R. EVID. 706 advisory committee’s note. See also *supra* note 74 and accompanying text.

160. *Hall v. Baxter Healthcare Corp.*, 947 F. Supp. 1387, 1392-94 (D. Or. 1996).

Procedure 16.¹⁶¹ Using the court's inherent power, the judge appointed an expert panel.¹⁶² The parties' experts presented testimony, in a direct and cross-examination format for the panel and the judge.¹⁶³ Panel experts submitted findings on specific questions posed by the judge, and parties challenged the panel experts' findings.¹⁶⁴ Next, applying the standard of Rule 702¹⁶⁵ and the corresponding Supreme Court guidelines in *Daubert*¹⁶⁶ (including Federal Rule of Evidence 104(a)),¹⁶⁷ the judge ruled on whether the underlying methodology of a particular party expert was admissible, unreliable, invalid, or irrelevant.¹⁶⁸

In a process like the one Judge Jones employed, if proffered expert testimony is determined admissible, the judge has ensured the evidence will assist the jurors in making factual determinations.¹⁶⁹ Most importantly, the parties retain control over presenting the evidence to a jury. Neither the jury's knowledge of the panel's existence nor the possibility of the panel being outcome determinative become an issue at trial. Thus, two elements that help maintain the integrity of the adversarial process remain intact: Party autonomy and impartial decision-makers.¹⁷⁰

Some commentators suggest using a panel procedure similar to the one discussed here.¹⁷¹ However, they advocate using a centralized clearinghouse and

161. This rule sets out lists of subjects for consideration during pretrial conferences. FED. R. CIV. P. 16(c). These include disposition of pending motions, the need for adopting special procedures for handling complex issues, and any other matters effectuating a just, speedy and inexpensive disposition of the action. *Id.* A judge might order an admissibility hearing under any of these provisions, or upon motion in limine by one of the parties. *See, e.g., Hall*, 947 F. Supp. at 1391. *See also* FED. R. CIV. P. 26(a)(2) (providing for disclosure of the identity and potential content of expert witnesses' testimony to the other parties with management by the court).

162. *Hall*, 947 F. Supp. at 1392. *See also* *Scott v. Spanjer Bros., Inc.*, 298 F.2d 928, 930 (2d Cir. 1962) (using a similar process).

163. *Hall*, 947 F. Supp. at 1392-93.

164. *Id.* at 1393-94.

165. Federal Rule of Evidence 702 states: "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 (emphasis added).

166. In *Daubert*, the Court set out a two step analysis for admissibility of scientific evidence under Rule 702. "[T]he reasoning or methodology underlying the testimony [must be] scientifically valid and . . . [the] reasoning or methodology [must] be appli[cable] to the facts in issue." *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 592-93 (1993).

167. Federal Rule of Evidence 104(a) provides for the trial judge to make preliminary findings concerning the admissibility of evidence, without being bound by the Rules of Evidence in making the ruling. FED. R. EVID. 104(a).

168. *Daubert*, 509 U.S. at 590-92.

169. *See* FED. R. EVID. 702.

170. *See* Longan, *supra*, note 15, at 300.

171. *See* CARNEGIE COMM'N REPORT, *supra* note 127, at 16; Pinsky, *supra* note 128, at 553.

group of experts for appointment by courts.¹⁷² This seems time-consuming and expensive. It is certainly more costly than judges appointing panels when necessary, with direct help from universities or scientific associations,¹⁷³ and requiring payment by the parties.¹⁷⁴

Appointed expert panels in *Daubert*-style hearings that preserve presentation of expert testimony by the parties at trial is the best way to ensure party autonomy and jury integrity while efficiently resolving toxic tort disputes. Two examples clarify this point.

B. Court-Appointed Expert Panels in Practice

In litigation over silicone gel breast implants, the issue of whether silicone causes systemic disease has prompted much debate.¹⁷⁵ Systemic disease causation is debated partly because existing epidemiologic data show no link to silicone, while plaintiffs' experts argue a new disease is occurring which current epidemiologic studies fail to consider.¹⁷⁶ This presents a classic example of science and the law as uneasy partners. Science in the breast implant cases may be underdeveloped,¹⁷⁷ yet litigants expect an efficient resolution of their legal

172. See CARNEGIE COMM'N REPORT, *supra* note 127, at 17-18 (recommending the creation of federal and state resource centers, scientific community resource centers, a judicial scientific and technology clearinghouse, and a non-governmental/non-judiciary Science and Justice Council for studying and exploring solutions to the science/law interface issues); Pinsky, *supra* note 128, at 563-64 (suggesting a central group to receive requests from judges and facilitate distribution of questionnaires and assignments to scientists in various government agencies to act as court-appointed experts; government funding of research projects would hinge on cooperation of the individual scientists in the program).

173. See Rosenbaum, *supra* note 130, at 1524 (listing the National Institute of Health, universities, the American Association for the Advancement of Science and the National Academy of Sciences as existing resources for providing scientific guidance). *But see* Pinsky, *supra* note 128, at 545-48 (discussing the various scientific groups willing to help judges appoint experts and ultimately rejecting them in favor of centralizing the program in a more structured fashion).

174. Payment by the parties is suggested in Rule 706. FED. R. EVID. 706(b).

175. Compare Marcia Angell, *Do Breast Implants Cause Systemic Disease? Science in the Courtroom*, 330 NEW ENG. J. MED. 1748 (1994) (arguing rational epidemiological studies show no connection between silicone and connective-tissue disease), with Gary Solomon et al., *Breast Implants and Connective-Tissue Diseases*, 331 NEW ENG. J. MED. 1231 (1994) (arguing existing epidemiological studies fail to account for the new type of connective-tissue disorder caused by silicone).

176. See Lubit, *supra* note 81, at 151-54 (discussing the early evidence that silicone may cause connective-tissue disorder); Jack W. Snyder, *Silicone Breast Implants: Can Emerging Medical, Legal, and Scientific Concepts Be Reconciled?*, 18 J. LEGAL MED. 133, 137-138 (1997) (discussing, generally, the alleged risks associated with silicone).

177. See *In re Breast Implant Cases*, 942 F. Supp. 958, 961 (E. and S.D.N.Y. 1996). Judges in this case suggest summary judgment on causation of systemic disease is improper at this time "since scientists are still developing relevant information." *Id.*

dispute.¹⁷⁸ Two judges have confronted this dichotomy by appointing a panel of experts.¹⁷⁹ One judge chose to use court-appointed experts under Rule 706.¹⁸⁰ The other judge exercised his inherent authority to appoint a panel of independent advisors to assist him in ruling on the admission of expert evidence offered by the plaintiff.¹⁸¹ Although the circumstances of the cases differ slightly,¹⁸² the use of expert panels on the same issue highlights the advantages and disadvantages of court-appointed experts.

1. *National Panel Model.*—Toxic tort litigation differs from traditional product liability in substantial ways. Usually there is a combination of the following factors: a large number of exposed plaintiffs;¹⁸³ a “long latency period between time of exposure and manifestation of the disease;”¹⁸⁴ a disease which “mimic[s] diseases found in background levels in the general population;”¹⁸⁵ and scientific uncertainty of the effects of toxic exposure on people.¹⁸⁶ Litigation of this complexity, for a single toxic substance and in multiple federal districts, may lead to consolidation of pretrial proceedings.¹⁸⁷ Employment of 28 U.S.C. § 1407¹⁸⁸ allows for centralization of the pretrial phase of civil actions under a single judge¹⁸⁹ for convenience and efficiency reasons.¹⁹⁰ This judicial management technique is called “multidistrict” litigation.¹⁹¹

A panel of judges from various districts administer the multidistrict litigation

178. See *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 597 (1993).

179. See *Hall v. Baxter Healthcare Corp.*, 947 F. Supp. 1387 (D. Or. 1996) (using an appointed panel of experts under the court’s inherent authority to assist the judge in making admissibility determinations of expert evidence under Rule 702); Order 31, *supra* note 20, at F-1 (forming a national panel of experts to evaluate plaintiff’s evidence on the causal relationship between silicone and systemic disease).

180. Chief Judge Sam C. Pointer, Jr. of the Northern District of Alabama. Order 31, *supra* note 20, at F-1.

181. Judge Robert E. Jones, District Judge in Oregon. *Hall*, 947 F. Supp at 1392.

182. Judge Pointer is the transferee judge for silicone breast implant litigation under an order from the Judicial Panel on Multidistrict Litigation. *In re Silicone Gel Breast Implants Prods. Liab. Litig.*, MDL No. 926, 793 F. Supp. 1098, 1101 (J.P.M.L. 1992). Judge Jones was assigned his breast implant case on remand from Judge Pointer. *Hall*, 947 F. Supp. at 1392.

183. See Deborah R. Hensler & Mark A. Peterson, *Understanding Mass Personal Injury Litigation: A Socio-Legal Analysis*, 59 BROOK. L. REV. 961, 965 (1993).

184. Eggen, *supra* note 9, at 890.

185. *Id.*

186. See *id.* at 896; see also Ann Taylor, Comment, *Public Health Funds: The Next Step in the Evolution of Tort Law*, 21 B.C. ENVTL. AFF. L. REV. 753, 758 (1994).

187. See 15 CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE: JURISDICTION AND RELATED MATTERS § 3861, at 499-500 (2d ed. 1986).

188. 28 U.S.C. § 1407 (1994).

189. *Id.*

190. See 15 WRIGHT ET AL., *supra* note 187, § 3861, at 499-500.

191. *Id.* at 499.

process.¹⁹² The panel “determine[s] whether transfer is appropriate in a particular case and what district should be denominated the transferee forum.”¹⁹³ Criteria for pretrial consolidation include: the existence of one or more common questions of fact; the convenience of consolidated proceedings for the parties and witnesses; and the promotion of just and efficient conduct.¹⁹⁴ Authority of the transferee judge under § 1407 is limited to proceedings before trial.¹⁹⁵ This puts all discovery motions, motions to amend pleadings, motions to dismiss for lack of jurisdiction or lack of venue, motions to proceed as a class action, and motions for summary judgment occurring during the coordinated pretrial proceedings within the transferee court’s power.¹⁹⁶ Upon consent of the parties or by stipulation, the transferee judge may retain a case or cases for trial.¹⁹⁷ In the circumstances of the silicone gel breast implant cases, the Judicial Panel for Multidistrict Litigation (“JPML”) received overwhelming support for consolidation and appointed Chief Judge Sam C. Pointer of the Northern District of Alabama to handle the pretrial proceedings.¹⁹⁸ Judge Pointer is handling pretrial proceedings for over 21,000 cases from 92 federal districts in the consolidated proceedings.¹⁹⁹

In May 1996,²⁰⁰ upon request by the National Plaintiff’s Steering Committee of the Silicone Gel Breast Implant Products Liability Litigation²⁰¹ (“Consolidated

192. See *id.* at 500.

193. *Id.*

194. See 28 U.S.C. § 1407(a) (1994). The remainder of the statute sets out procedural aspects of the consolidation process and sets limitations on the authority of the Judicial Panel for Multidistrict Litigation (“JPML”). *Id.* § 1407(b)-(h).

195. See 15 WRIGHT ET AL., *supra* note 187, § 3866, at 606.

196. *Id.* at 606-18. Arguably, the transferee judge may rule on motions for summary judgment when discovery is complete without remanding the cases as § 1407 suggests. See *id.* at 618. This makes sense from a judicial economy standpoint given the case overload in the federal courts. See Comment, *The Experience of Transferee Courts Under the Multidistrict Litigation Act*, 39 U. CHI. L. REV. 588, 602 (1972) for more on this issue.

197. See 15 WRIGHT ET AL., *supra* note 187, § 3866, at 618-19.

198. *In re Silicone Gel Breast Implants Prods. Liab. Litig.*, MDL No. 926, 793 F. Supp. 1098, 1099-1100 (J.P.M.L. 1992). Selection of the transferee forum and judge was the most contentious issue of the transfer process and the JPML decided against using any forum suggested by the parties to preserve the perception of fair and just proceedings. *Id.* at 1100-01. The JPML selected Judge Pointer because of his experience with multidistrict litigation as a past member of the Panel, his participation as a transferee judge in prior litigation, and his familiarity with procedural rules. *Id.* at 1101.

199. Order 31, *supra* note 20, at F-1 n.2. On May 30, 1996, when Judge Pointer issued the order, over 300 cases had already been remanded for trial to 45 district courts. *Id.*

200. A subsequent order issued in October 1996 further delineated the task for the expert panel. See *In re Silicone Gel Breast Implant Prods. Liab. Litig.*, Order 31E (N.D. Ala. 1996), 5 MEALEY’S LITIG. REP.: BREAST IMPLANTS, Nov. 7, 1996, at C-1 [hereinafter Order 31E].

201. The litigation referred to here and throughout this section is the action transferred to Judge Pointer by the JPML in *In re Silicone Gel Breast Implants Prods. Liab. Litig.*, MDL No. 926,

Implant Litigation”), Judge Pointer issued an order calling for the development of a National Science Panel (“National Panel”) under Rule 706.²⁰² National Panel members include an expert from each of four scientific disciplines (epidemiology, immunology, rheumatology, and toxicology)²⁰³ and a panel chairman with expertise in “the interrelationship between forensic sciences and legal procedures and processes.”²⁰⁴ The panel’s primary function is the assessment of “[t]o what extent, if any—and with what limitations and caveats—do existing studies, research and reported observations provide a reliable and reasonable scientific basis for one to conclude that silicone-gel breast implants cause or exacerbate”²⁰⁵ certain diseases. Diseases for study include “‘classic’ connective tissue diseases, . . . ‘atypical’ presentations of connective tissue diseases or symptoms[, and] immune system dysfunctions.”²⁰⁶ Each panel member must also assess to what extent opinions contrary to his own “would likely be viewed by others in the field as representing legitimate and responsible disagreement within [his] profession.”²⁰⁷ Judge Pointer gave the experts control over whether to decline review of certain research because of insufficiency or ongoing studies.²⁰⁸

Judge Pointer scheduled a series of hearings for plaintiffs’ and defense’s experts to present findings on the causation issue.²⁰⁹ Attorneys for each party could not ask questions; however, the judge or the appointed panel experts could interrupt presentations as necessary.²¹⁰ After reviewing the available data and consulting with the other experts on the panel, if necessary, each court-appointed expert will submit a written report of his findings particular to his area of expertise.²¹¹ Judge Pointer retained control over issuing panel member reports

793 F. Supp. 1098 (J.P.M.L. 1992).

202. Order 31, *supra* note 20, at F-1.

203. *Id.* at F-4.

204. *Id.*

205. Order 31E, *supra* note 200, at C-1.

206. *Id.*

207. *Id.*

208. Order 31, *supra* note 20, at F-5.

209. See *MDL Update: Pointer’s Scientific Panel to Convene*, 5 No. 8 MED. LEGAL ASPECTS BREAST IMPLANTS 1, 6-7 (July 1997).

210. See *id.* Two presentation hearings were held in 1997: one in July, the other in November. 6 No. 2 MEALEY’S LITIG. REP.: BREAST IMPLANTS 15 (Nov. 20, 1997). *Id.* Judge Pointer may schedule an additional hearing. *Id.* However, one reporter suggests the panel will conclude and submit findings in fall 1998. Carole K. Cones, *Galileo’s Example Recalled: Sound Science is Finally Prevailing in Silicone Breast Implant Controversy*, LAS VEGAS REV.-J., Sept. 27, 1998, at 1D.

211. Order 31, *supra* note 20, at F-4 to F-5. Further specific guidelines for “consultation among [the experts,] procedures for the panel to present questions to the parties and/or to hear presentations from the parties at a future point,” and procedures for panelists to obtain further information from specific report authors were decided during a conference with the experts and the parties. Order 31E, *supra* note 200, at C-1.

to the parties by requesting that preliminary findings be submitted to him directly for determination of whether an expert's findings "have sufficient probative value to justify"²¹² a formal report for the parties.²¹³

Following the deposition requirements in Rule 706,²¹⁴ Judge Pointer's order sets out opportunities for the parties to conduct "'discovery-type' non-videotaped deposition[s] of [an] expert" once the expert has submitted a report.²¹⁵ The judge suggests the parties make this process informal,²¹⁶ most likely because of the more formal aspects of Judge Pointer's plan for trial testimony. According to Rule 706, either party may call a court-appointed expert as a witness, and both parties may cross-examine.²¹⁷ Because Judge Pointer plans to make the panel experts' testimony available for use by any trial court on remand,²¹⁸ "trial testimony . . . will be perpetuated by means of a videotaped deposition at which [the c]ourt . . . will preside. It is further anticipated that [the c]ourt . . . may conduct the initial direct examination of such expert, with the plaintiffs and defendants then being allowed to cross-examine the expert."²¹⁹ Other than the informal deposition by the parties for preparation discussed above,²²⁰ this is the only testimony each court-appointed expert will give.²²¹ Further, any judge on remand may edit the deposition as necessary to conform with his own ruling on disclosure of the experts' court-appointed status to a jury.²²²

Judge Pointer's order, establishing the National Panel, exhibits attention to the consistency and efficiency goals of the multidistrict litigation process and awareness of the party autonomy considerations of Rule 706. Consistency is served by creating a single panel to address the complicated scientific issues involved in systemic disease causation rather than each trial court appointing its own panel.²²³ In addition, allowing for testimony of National Panel members by videotape only ensures consistency in presentation of the expert's opinions in

212. Order 31, *supra* note 20, at F-5.

213. *Id.*

214. "[T]he witness' deposition may be taken by any party." FED. R. EVID. 706(a).

215. Order 31, *supra* note 20, at F-5.

216. *Id.*

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

218. Order 31, *supra* note 20, at F-6.

219. *Id.* at F-5.

220. *See supra* notes 215-16 and accompanying text.

221. Order 31, *supra* note 20, at F-6.

222. *Id.* Subsection (c) of Rule 706 allows the trial court to use its discretion in authorizing disclosure of the court-appointed expert's status to the jury. FED. R. EVID. 706(c). Judge Pointer allowed for each judge on remand to decide if the panel experts' testimony will be used in a *Daubert* hearing or for trial purposes. Order 31, *supra* note 20, at F-6 & n.6.

223. *See* Order 31, *supra* note 20, at F-1. Judge Pointer refers to the National Plaintiff's Steering Committee's argument in favor of appointing a national panel, "in the interest of avoiding potentially redundant or even conflicting results in potential testimony arising from multiple Rule 706 appointments by different courts, it would be preferable to have a single set of nationally-appointed experts." *Id.*

those courts choosing to use them on remand. Even if the trial judge on remand decides to use the National Panel member's testimony only for *Daubert* hearings,²²⁴ all judges will make rulings from the same data, thereby eliminating any differences in rulings that may occur because of inequities of resources between the parties.²²⁵ The use of a single panel promotes efficiency because each judge on remand need not appoint his own panel. The National Panel's appointment has delayed some cases already remanded.²²⁶ Judge Pointer, however, left to the judge before whom the case is pending any decision to delay trial proceedings.²²⁷

This National Panel model also considers the procedural safeguards built into Rule 706.²²⁸ First, it recognizes the need for adversaries to participate in the development of the panel's objectives and to develop each expert's testimony. The model gives the parties an opportunity to participate in a conference delineating the Panel members' responsibilities and charter.²²⁹ The parties will receive each expert's findings in writing and can informally depose the expert in preparation for the formal videotaped testimony.²³⁰ Cross-examination of the expert witnesses by each of the parties will occur during the formal deposition phase of the hearings.²³¹ Finally, the process envisioned by this model gives the parties, and trial judges on remand, flexibility in determining the best use of the experts' testimony²³² (if at all) for presentation at trial or in conjunction with a Rule 702 and Rule 104(a) *Daubert* admissibility hearing.

The National Panel model is carefully crafted to comply with Rule 706 safeguards and other evidence safeguards.²³³ However, difficulties may arise on

224. See *supra* note 218 and accompanying text.

225. Inequities of resources is an argument used for promoting the use of court-appointed experts, particularly in criminal cases where one party may be indigent. See *Lee, supra* note 81, at 482. The Administrative Office of the United States Courts, the Federal Judicial Center, the National Plaintiff's Steering Committee, and the national defendants will pay for the National Science Panel. See Order 31, *supra* note 20, at F-6; Terence Monmaney, *Scientists Take New Role in Implants Case*, L.A. TIMES, Sept. 15, 1997, at A1. Costs for the individual litigants during trial on remand may also be reduced, since additional depositions or testimony by a Panel expert is restricted by Judge Pointer's order. Order 31, *supra* note 20, at F-5.

226. *Hall v. Baxter Healthcare Corp.*, 947 F. Supp. 1387, 1394-95 (delaying the effective date of the opinion until the National Science Panel had reported).

227. See Order 31, *supra* note 20, at F-6.

228. See *supra* notes 58-63 and accompanying text.

229. Order 31, *supra* note 20, at F-4; see also FED. R. EVID. 706(a).

230. Order 31, *supra* note 20, at F-5.

231. *Id.*

232. *Id.* at F-6.

233. If the panel were required to reach consensus and testify as a group, the probative value of the testimony may outweigh its unfair prejudice to the party not favored. See FED. R. EVID. 403 ("Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.")

remand of individual cases when judges or parties decide to use the National Panel testimony at trial. The manner in which each expert is to give videotaped testimony presents questions about undue weight of the testimony. Although the advisability of telling the jury the status of court-appointed experts is disputed,²³⁴ the method of deposition may bias jurors toward the court's experts. The initial order infers the court will directly examine each expert during his or her deposition,²³⁵ and each party will then cross-examine.²³⁶ Judges on remand may experience difficulty in explaining the participation of another judge²³⁷ and lawyers who are not participants in the case.²³⁸ In fact, the status of the individuals as part of the "National Panel" is likely to give the experts' findings an air of omniscience, artificially weighting the findings. Some opponents of court-appointed experts fear such an uneven result from one such expert;²³⁹ multiple experts may compound the problem. Each remand judge may decide to withhold the experts' status from the jury for this reason. In turn, depending on the nature of the questions asked by the court at deposition and the corresponding cross-examination, jurors may question why the panel experts' testimony seems different. In the asbestos series of cases,²⁴⁰ where a single court-appointed expert testified by videotape, the decision to withhold the expert's status in an attempt to keep all experts on equal footing with uniform introductions "proved impractical."²⁴¹ The question really is whether editing of the videotaped depositions would counter-balance the weight of the appointed panel testimony such that the parties felt their own expert testimony would receive fair treatment. Using the court-appointed panel findings for *Daubert* hearing purposes only would alleviate this concern.

The potential for efficiency and cost savings in pretrial proceedings with a National Panel seem relatively straightforward.²⁴² Some silicone breast implant cases, however, will not proceed with this model until the National Panel

(emphasis added).

234. See *supra* note 151.

235. Order 31, *supra* note 20, at F-5.

236. *Id.*

237. The rules of evidence provide for questioning by the judge; however, in the case of the depositions contemplated here, another judge will do the questioning. See FED. R. EVID. 614. Also, former testimony is admissible under Federal Rule of Evidence 804(b)(1), a hearsay exception as long as the declarant is unavailable. FED. R. EVID. 804(a). The National Panel Model participants will not be available to each litigant for additional questioning according to the original order. Order 31, *supra* note 20, at F-5.

238. The initial order seems to contemplate a representative from each of the plaintiff and defendant groups to question the experts. Order 31, *supra* note 20, at F-3.

239. See Levy, *supra* note 106, at 424; Relkin, *supra* note 72, at 2265.

240. See *supra* notes 113-19 and accompanying text.

241. Ruben & Ringenbach, *supra* note 106, at 40.

242. See *supra* notes 223-27 and accompanying text.

presents results.²⁴³ For example, experts from both parties in *In re Breast Implant Cases*²⁴⁴ had presented testimony in a *Daubert* hearing²⁴⁵ and the two presiding judges determined plaintiff failed to make a "prima facie case"²⁴⁶ on causation of systemic disease by silicone. Instead of finding for the defendant on summary judgment, the court states,

The national Rule 706 committee has, however, not yet reported. It is possible that further information will in time support plaintiffs' general systemic claims sufficiently to permit a jury trial. A grant of summary judgement and dismissal of plaintiffs' cases now would be unfair since scientists are still developing relevant information.²⁴⁷

The court in *Hall v. Baxter Healthcare, Corp.*²⁴⁸ made a similar decision to wait for the National Panel results to issue a final ruling.²⁴⁹ In addition, that court held an extensive *Daubert* hearing utilizing a court-appointed expert panel for which the parties paid.²⁵⁰ The judge in *Hall* found plaintiff's evidence on systemic disease causation lacking, also.²⁵¹ Thus, plaintiffs in these two cases receive a reprieve and both sides bear a burden of continuing costs because litigation may continue.

Defendants may question the efficiency, cost effectiveness and fairness of such a system, particularly after a *Daubert* hearing where both parties were allowed to present expert testimony before a panel²⁵² and the judge ruled in defendant's favor.²⁵³ This points to an interesting question arising from the *Daubert* mandate: on which side should the burden of incomplete proof lie? The Supreme Court provided an answer in *Daubert* stating that "a gatekeeping role for the judge, no matter how flexible, inevitably on occasion will prevent the jury from learning of authentic insights and innovations."²⁵⁴ Thus, the balance in a particular case is struck in favor of resolving disputes efficiently and finally

243. See *In re New York State Silicone Gel Breast Implant Liab.*, 656 N.Y.S.2d 97, 99 (N.Y. Sup. Ct. 1997) (determining severance of "the plaintiffs' claims for local injuries from the plaintiffs' claims for systemic disease" was proper and that "[t]he court should wait to hear the systemic injury claims until the work of the federal 706 panel is completed"); *In re Breast Implant Cases*, 942 F. Supp. 958, 961 (E. and S.D.N.Y. 1996); *Hall v. Baxter Healthcare Corp.*, 947 F. Supp. 1387, 1394 (D. Or. 1996).

244. 942 F. Supp. at 958.

245. See *id.* at 959.

246. *Id.* at 961.

247. *Id.*

248. 947 F. Supp. at 1387.

249. *Id.* at 1394.

250. *Id.* at 1392, 1393 & n.9.

251. *Id.* at 1414-15.

252. See *id.* at 1392-93.

253. See *id.* at 1414.

254. *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 597 (1993).

rather than waiting for scientific certainty.²⁵⁵ A court-appointed panel utilized early in the litigation process, such as during an admissibility hearing, would strike a better balance of party autonomy, efficiency and fairness.

2. *Daubert Panel Model*.—In contrast to Judge Pointer's appointment of an expert panel to testify at trial, Oregon Federal Judge Robert E. Jones in *Hall v. Baxter Healthcare Corp.*²⁵⁶ appointed a panel of experts to assist him in making preliminary findings in a Rule 104(a) hearing.²⁵⁷ Defendants in the case made "motions in limine to exclude testimony by plaintiffs' experts concerning any causal link between silicone breast implants and the alleged systemic disease."²⁵⁸ In order to make an effective ruling on this issue in his role as "gatekeeper," Judge Jones used his inherent power to appoint a panel of independent advisors, one each in the fields of epidemiology, rheumatology, immunology/toxicology, and polymer chemistry.²⁵⁹ Thus, Judge Jones addressed a similar issue with a similar panel, but using a different procedure.

Specifically, the *Daubert* Panel model has the following characteristics. Each party submitted materials that their respective experts would rely upon along with transcripts of testimony the expert may have given at similar trials.²⁶⁰ All parties to the litigation participated fully in a Rule 104(a) hearing, where experts on both sides gave testimony and took questions from counsel on both sides, the court, and the expert panel members.²⁶¹ Upon completion of the testimony, each party gave a videotaped summation for use by the judge and the expert advisors.²⁶² Judge Jones developed a questionnaire for the experts with input from the parties.²⁶³ Each panel expert submitted a written report answering the proffered questions and any other pertinent questions submitted by counsel that the expert felt appropriate to educate Judge Jones.²⁶⁴ Parties were then given the opportunity to challenge each *Daubert* Panel expert's findings.²⁶⁵

Although technically not a panel appointed under Rule 706, the *Daubert* Panel model seems to incorporate some of the procedural safeguards of Rule

255. See *id.*; see also Black et al., *supra* note 8, at 750 (commenting, "the Court also seems to acknowledge that trial judges will often exclude evidence even though exclusion might limit the search for truth").

256. 947 F. Supp. at 1387.

257. *Id.* at 1391; see also *Daubert*, 509 U.S. at 592-93 ("Faced with a proffer of expert scientific testimony, then, the trial judge must determine at the outset, pursuant to Rule 104(a), whether the reasoning or methodology underlying the [proposed expert's] testimony is scientifically valid and . . . can be applied to the facts in issue." (footnote omitted)); FED. R. EVID. 104(a).

258. *Hall*, 947 F. Supp. at 1391.

259. *Id.* at 1392-93.

260. *Id.*

261. *Id.*

262. *Id.* at 1393.

263. *Id.* at 1393-94.

264. *Id.* at 1394.

265. *Id.*

706.²⁶⁶ First, the parties submitted relevant documents for review by the panel²⁶⁷ and participated in developing the questionnaire presented to the expert panel members to guide their report writing.²⁶⁸ In fact, experts received copies of all pertinent written questions from the parties.²⁶⁹ This appears to satisfy the requirement of participation by the parties in advising the experts of their duties as required by Rule 706(a).²⁷⁰ Each party evidently reviewed a report by each appointed expert because each questioned the experts about their findings in the presence of the judge.²⁷¹ This could, in effect, suffice for a “cross-examination.”

A minimal opportunity to challenge the court-appointed panel experts’ findings may prove insignificant for purposes of a *Daubert* hearing. The safeguards embodied in Rule 706 exist to minimize the appointment of non-neutral experts by a judge²⁷² and ensure notification of the appointment to the parties early in the litigation.²⁷³ Cross-examination of the court-appointed expert panel members may bring out hidden bias.²⁷⁴ The panel here, however, is being used for admissibility purposes to help the judge determine the integrity of an expert’s methodology. Disagreement by the panel members on the validity of the methodology should alert the judge and the parties to potential bias within the panel. In addition, the *Daubert* Panel model allows the parties to question the experts’ reports,²⁷⁵ providing them an opportunity to raise the issue of bias for the judge’s consideration. Further, appointment of the panel comes early in the litigation process, protecting the parties from surprise. Once the judge becomes aware that the parties intend to offer expert testimony, her “gatekeeping” responsibilities²⁷⁶ and her managerial role as set out in the Federal Rules of Civil Procedure,²⁷⁷ require the judge to seek information pertaining to the integrity of the expert’s testimony. In addition, the parties themselves become aware of the other party’s intent to use experts during the discovery process²⁷⁸ and should have responsibility for bringing questionable expert opinions to the judge’s attention.²⁷⁹

266. See *supra* notes 61-66 and accompanying text.

267. *Hall*, 947 F. Supp. at 1392-93.

268. *Id.* at 1393.

269. Only one question, specific to an individual plaintiff, was omitted. *Id.* at 1394 & n.15.

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

271. *Hall*, 947 F. Supp. at 1394.

272. See *Scott v. Spanjer Bros., Inc.*, 298 F.2d 928, 932 (2d Cir. 1962) (Hincks, J., dissenting in part).

273. See *id.*

274. See *Gross*, *supra* note 70, at 1168 (discussing the purposes of cross-examination of expert witnesses).

275. See *Hall*, 947 F. Supp. at 1394.

276. See *Daubert v. Merrell Dow Pharm., Inc.*, U.S. 579, 597 (1993); see also *supra* note 3.

277. See FED. R. CIV. P. 26.

278. See *id.*

279. This type of responsibility makes sense in light of the control given to parties over the discovery process by the Federal Rules of Civil Procedure. FED. R. CIV. P. 26(f).

Some may argue that the *Daubert* Panel model mimics a trial of experts to a jury of their peers, undermining the jury process because the appointed panel's point of view is outcome determinative.²⁸⁰ However, for the purpose of "gatekeeping" expert evidence as mandated by *Daubert*, the judge must make a ruling of law—the reliability and fit of expert testimony. With the *Daubert* Panel model, party autonomy and adversarial aspects of litigation such as party presentation of evidence and cross-examination of potential witnesses remain intact throughout the process.²⁸¹ The *Daubert* Panel model might actually restore skeptics' faith in the adversarial process because it is dependent on the presentation of the parties. The plaintiff's bar, in particular, may find their concerns about the opinion of one court-appointed expert being outcome determinative²⁸² put to rest with the *Daubert* Panel model. First, each expert on the panel, in effect, acts as a check on the others. The parties also act as a check on the potential bias of the experts since they participate in the process to a great degree. In addition, keeping party presentation of the evidence and the opportunity to cross-examine party experts as part of the model preserves faith in the judicial system.²⁸³

The *Daubert* Panel model has other advantages. In Rule 104(a) hearings, the rules of evidence do not apply.²⁸⁴ This enhances the interaction between the parties' experts, the court-appointed panel, and the judge.²⁸⁵ In turn, the interaction strengthens the appearance of fairness in the *Daubert* ruling process²⁸⁶ and allows for more education of the judge on critical areas of concern.²⁸⁷

Additionally, assume the *Daubert* Panel findings and the subsequent ruling in the *Hall* case found a sufficient foundation for the plaintiff's experts' evidence, and the case goes to trial. The traditional autonomy of the parties in

280. See, e.g., Relkin, *supra* note 72, at 2257 (arguing court-appointed experts in a *Daubert* setting will undermine party autonomy and the jury process because the appointed expert point of view will be outcome determinative). However, one commentator advocates using a peer review approach to admitting scientific evidence, citing Judge Jones' *Daubert* Panel with approval. See Pinsky, *supra* note 128, at 553.

281. See *supra* notes 270-71 and accompanying text.

282. See Relkin, *supra* note 72, at 2257. Defendant's counsel express concerns also. See Gross, *supra* note 70, at 1199; see also Order 31, *supra* note 20, at F2 & n.3 (reporting that defendants objected to formation of National Panel for reasons the judge found unclear).

283. See Longan, *supra* note 15, at 301.

284. FED. R. EVID. 104(a).

285. See *Hall v. Baxter Healthcare Corp.*, 947 F. Supp. 1387, 1993 n.11 (D. Or. 1996). Judge Jones states the relaxed Rule 104(a) standard "was remarkably effective, both in permitting the parties to focus on presenting their evidence and in expediting the proceeding." *Id.*

286. See Longan, *supra* note 15, at 301.

287. See, e.g., Lubit, *supra* note 81, at 148-50 (suggesting judges "empanel[] qualified and neutral experts to independently evaluate[] scientific evidence" in a *Daubert* capacity); Pinsky, *supra* note 128, at 571-72 (suggesting judges hold a peer review colloquia session with outside experts to better educate themselves on the scientific issues relevant to making an expert testimony admissibility ruling).

presenting their cases to the jury is preserved because the parties' expert evidence passed the Rule 702 requirement. There is less "junk science" and a primary justification for court-appointed experts testifying at trial no longer exists. This, perhaps, is the type of balance the Supreme Court expected from its ruling in *Daubert*: a respect for the autonomy of the parties in presenting evidence to the jury, balanced by integrity of the scientific information the jury hears to minimize its confusion. The adversarial process is maintained with restored trust in the judicial process because of more consistent jury verdicts.

C. Comparing Models

A major goal of our legal system is administering justice efficiently.²⁸⁸ Our legal system favors the adversarial process because of its appearance of fairness to the parties and because of the importance of party autonomy in our culture.²⁸⁹ Our system values truth as well.²⁹⁰ When the truth turns on scientific questions, these two sets of values seem to clash.²⁹¹ The models discussed here balance party autonomy and scientific certainty in slightly different ways.

In each model, parties participate in educating the panel members on the scientific points of view. Parties' experts present evidence and answer questions of the panel members in a hearing format, to clarify the foundation for their opinions.²⁹² This process of educating the panel members serves to educate the judge on the scientific issues, since he is also an active player in the process.²⁹³ Participation by the parties encourages them to present the clearest evidence of their case and focuses attention on the key issues in dispute. Moreover, complete disclosure of expert testimony early in the litigation enhances the appearance of fairness in the judicial process.

Both models also require the court-appointed experts to summarize their findings individually, based on questions submitted by the judge. Parties participate in developing the questions for the panel experts.²⁹⁴ Panel members may discuss or question each other under each model; however, the actual

288. See Richard A. Posner, *An Economic Approach to Legal Procedure and Judicial Administration*, 2 J. LEGAL STUD. 399, 399-400 (1973).

289. See Longan, *supra* note 15, at 300. Longan lays out the elements of perceived fairness as "the existence of an impartial decision maker and party autonomy with respect to the presentation of the case." *Id.* (citing Lon L. Fuller, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353 (1978); William W. Schwarzer, *The Federal Rules, the Adversary Process, and Discovery Reform*, 50 U. PITT. L. REV. 703, 706-712 (1989)).

290. See Gross, *supra* note 70, at 1114 (outlining the types of witnesses leading to distortions in truth).

291. *Id.*

292. See *supra* notes 209, 260-62 and accompanying text.

293. See *Hall v. Baxter Healthcare Corp.*, 947 F. Supp. 1387, 1393 (D. Or. 1996); and see Order 31E, *supra* note 200, at C-1.

294. See *supra* notes 211, 261-63 and accompanying text.

procedure for doing so is slightly different.²⁹⁵ In addition, each party questions the panel experts about their findings.²⁹⁶

At this point the models diverge. The National Panel model prepares testimony of panel experts for use at trial. Following the procedural safeguards of Rule 706,²⁹⁷ testimony of each National Panel expert is taken at a deposition-type hearing with the judge presiding and the parties cross-examining each expert.²⁹⁸ Videotaped depositions of the panel experts provide the trial judge with either a basis for a pre-trial admissibility hearing or with court-appointed expert witnesses for use at trial at the judge's discretion.²⁹⁹

In contrast, the *Daubert* Panel model serves to educate the judge. The judge participates fully in questioning the party experts during a Rule 104(a) hearing.³⁰⁰ Parties cross-examine each other's experts³⁰¹ and provide summation of their arguments for review by the panel experts.³⁰² Neither party cross-examines the court-appointed experts.³⁰³ Each may, however, challenge the written findings of the experts in the presence of the judge.³⁰⁴

The most fundamental difference between the two models is whether the parties are given the opportunity to cross-examine the court-appointed experts. In the National Panel model, the parties cross-examine the court-appointed experts.³⁰⁵ In the *Daubert* Panel model, the parties challenge the expert findings in the presence of the judge.³⁰⁶ Cross-examination is a tool for gleaning additional facts,³⁰⁷ attacking credibility,³⁰⁸ safeguarding reliability,³⁰⁹ and achieving fairness.³¹⁰ Similarly, a party's control over the presentation of its case is a fundamental element of the adversarial system.³¹¹

In the National Panel model, cross-examination of the court-appointed panel

295. Compare *Hall*, 947 F. Supp. at 1393, with Order 31E, *supra* note 200, at C-2.

296. See *supra* notes 215-17, 261 and accompanying text.

297. See *supra* notes 58-63 and accompanying text.

298. See *supra* notes 215-16 and accompanying text.

299. See *supra* notes 218-22 and accompanying text.

300. See *Hall*, 947 F. Supp. at 1393.

301. *Id.*

302. *Id.*

303. *Id.*

304. *Id.* at 1394.

305. See Order 31, *supra* note 20, at F-6.

306. See *Hall*, 947 F. Supp. at 1394.

307. See KENNETH S. BROUN, ET AL., MCCORMICK ON EVIDENCE § 31, at 41 (John William Strong, ed., student abr. 4th ed. 1992).

308. See *id.*

309. See *id.*

310. See *id.* at 42; see also *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 596 (1993) (stating that vigorous cross-examination is one of the "appropriate means of attacking shaky but admissible evidence").

311. See Longan, *supra* note 15, at 301 (discussing the importance of presenting one's own case to litigants).

points out inherent bias in the experts' opinions, and perhaps, affects the experts' credibility with the jury. However, the panel testimony at trial usurps the parties' control over the presentation of their cases and may step too far into the jury box. Carefully preserved in the National Panel model is the individuality of each expert's opinion because each testifies independently.³¹² If jury members perceive consistency in the panel members' testimony and know their court-appointed status, the jury is likely to follow the perceived consensus of the group.³¹³ Even apparent consensus of the experts in a panel implies deliberation which is the function of the jury. The parties' perception of fairness in the process will suffer as a result.³¹⁴ The National Panel model has positive advantages in the multidistrict litigation context.³¹⁵ However, presenting panel expert testimony at trial strays too far from traditional notions of party autonomy and the right to a jury trial.

A court-appointed panel model allowing the parties to present their cases, such as the *Daubert* Panel model, is likely the best choice to preserve autonomy of the parties. First, it preserves the parties' control over presentation of their cases at trial. This model allows for full disclosure of the party experts' testimony for the court-appointed panel and the judge. Thus, the parties themselves participate in supplementing the judge's knowledge of the technical issues in the case. Additionally, judges may make better assessments of the party experts' credibility since judges hear both the direct and cross-examination of the party experts and the additional questions by the expert panel. Armed with the opinions of the court-appointed panel, the parties' comments on the appointed experts' findings, and the judge's own assessment of the credibility of the party experts, the judge is well equipped to carry out his responsibilities as "gatekeeper" of scientific testimony. Once the integrity of the evidence is decided, the parties retain complete control over presentation of evidence to a jury.

The *Daubert* Panel model also encourages parties to prepare well before trial to present the foundation elements of the science they plan to use in their cases. The process of presenting expert testimony and responding to questions by the expert panel, the judge and opposing counsel, prepares the parties for making coherent, simple and sound presentations of their scientific evidence at trial. In addition, this pretrial process clarifies points of contention between the parties,

312. See Order 31, *supra* note 20, at F-4, F-5; see also Order 31E, *supra* note 200, at C-2 (referring to guidelines for court-appointed experts if they need assistance from other experts).

313. See *supra* notes 148-50 and accompanying text.

314. See Relkin, *supra* note 72, at 2269.

315. This Note attempts to analyze the two models for application by an individual judge faced with an expert evidence challenge. The combined model, briefly discussed here, is likely the best approach for multidistrict litigation purposes because it provides the greatest flexibility for trial judges on remand while serving the efficiency goals of 28 U.S.C. § 1407 (1994). If the transferee judge makes a ruling on summary judgment by one of the parties based on insufficiency of a party's expert evidence, the combination procedure would also preserve testimony for use at trial in case of reversal on appeal. Further analysis of this issue is beyond the scope of this paper.

and potentially, furthers settlement negotiations or shortens the trial process. The *Daubert* Panel model improves the integrity of scientific testimony at trial while preserving party autonomy.

An alternative model emerges from both the National Panel model and the *Daubert* Panel model. Such an alternative would include an opportunity for cross-examination of both the panel experts (the National Panel model), and the party experts (the *Daubert* Panel model). Preserving party autonomy on both fronts guarantees party autonomy even if the court-appointed panel testified at trial through videotaped depositions. In the case of a judge faced with a group of toxic tort cases within his own jurisdiction, cross-examination of the panel experts is unnecessary. In the *Daubert* Panel model, the judge considers the parties' assessments of the panel experts' reports before making a ruling. In addition, other safeguards exist to compensate for not cross-examining the expert panel. These include the focus of admissibility hearings on scientific methodology, not conclusions,³¹⁶ and the relaxed evidentiary guidelines of Rule 104(a).³¹⁷ Also, party control over the discovery process³¹⁸ performs a function similar to cross-examination because such control encourages the parties to bring panel expert bias and credibility issues to the judge's attention early in the process.

Judges looking for a solution to expert venality and questionable science should consider using the *Daubert* Panel model as a solution. Using a panel of experts to assist the judge in his "gatekeeping" role balances the party autonomy, efficiency and fairness goals of our judicial system most effectively.

CONCLUSION

Expert panels will become an important part of toxic tort and product liability litigation in the Twenty-first Century. Judges faced with a decision to impanel court-appointed experts should consider party autonomy, efficiency and fairness concerns underlying the use of such bodies during the trial process.

Use of court-appointed expert panels in pretrial admissibility hearings allows for the best of both worlds: good science and true adversarial presentation of the issues. In addition, it provides an incentive to the parties to be prepared for challenges to their scientific method well before trial. Benefits also include productivity increases in the pretrial settlement process, narrowing of issues before trial, and improving the quality of expert testimony during trial. Using court-appointed panels to testify at trial is unnecessary with these benefits of the *Daubert* Panel model. Court-appointed expert panels used to assist the judge in evaluating the foundation of scientific testimony offered by the parties is the best way to improve the quality of testimony presented in toxic tort and product liability actions.

316. See *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 592-93 (1993).

317. FED. R. EVID. 104(a) provides that the court "is not bound by the rules of evidence except those with respect to privileges."

318. See FED. R. CIV. P. 26(f).