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IN THE UNITED STATES BANKRUPTCY COURT FOR THE DISTRICT OF NEW JERSEY

In re:	Chapter 11
	Case No. 21-30589
LTL MANAGEMENT LLC,	Honorable Michael B. Kaplan
Debtor.	**Hearing date: No hearing**

MAUNE RAICHLE HARTLEY FRENCH & MUDD, LLC'S[1] SUPPLEMENTAL RESPONSE TO THE COURT PROPOSING KENNETH R. FEINBERG AS RULE 706 EXPERT

In response to the court's invitation on July 28th, MRHFM filed its Response to Mr. Feinberg's appointment as a Rule 706 expert yesterday afternoon. *See* Dkt. 2847. Neither the Debtor nor the TCC filed a response yesterday. Today, at 4:45pm, the TCC filed a letter and Proposed Order for this court's consideration regarding Mr. Feinberg's appointment, approved by the TCC, the Debtor, the FCR, and the U.S. Trustee. Given that there will not be a hearing on this matter and that the court is to issue its ruling tomorrow morning, Thursday, August 11, out of necessity MRHFM files this short Supplemental Response to the terms in the Proposed Order.

[1] "MRHFM" represents sixty-one (61) current mesothelioma victims with pending lawsuits against Johnson & Johnson, as well as seventeen (17) additional victims who would have filed suit against the Company but for the injunction and stay that has been entered since October.

Johnson & Johnson's primary objective in carrying out this abomination is to *quietly, discreetly, confidentially* sweep its—'we intentionally sold cancer-causing Baby Powder to millions of mothers and babies for 50 years'—secret under the rug with as little ***transparency*** as possible. Johnson & Johnson can issue press releases, find malleable witnesses to vouch for the legitimacy of its useless stooge, and present carefully crafted PowerPoint slides in this bankruptcy proceeding. But, in courts of law across the country, juries and trial judges who saw ***all*** the evidence—not the sanitized and controlled script the Company presents here—consistently and repeatedly found that Johnson & Johnson's recklessness with asbestos is killing people.

With due respect to the TCC and to the U.S. Trustee, MRHFM strenuously objects to paragraph 4 of the proposed Order: "Confidentiality and Non-Confidential Information." Dkt. 2851-1, pg. 6. Under the proposed terms, not only are parties *permitted* to have "confidential *ex parte* communications" with Mr. Feinberg (para. 4(a)) but "parties may designate information, facts or data in the submissions [to Mr. Feinberg] as 'confidential' under the Protective Order and subject to the disclosure restrictions thereunder." *Id.*, para. 4(c).

Mr. Feinberg is a ***court-appointed testifying expert***, not a mediator. While privilege or confidentiality may attach to portions of a party's communications with a party's *own* expert, no privilege or confidentially can or should attach to communications between a party and a court-appointed testifying expert. In ordering estimation the court recognized:

> [A]ll parties in interest are entitled to have this information [estimated liabilities] before being asked to accept or reject a plan. **I believe that the need for transparency and to preserve the integrity of the bankruptcy process and the system** requires a reasonable effort to estimate the debtor's aggregate liability for both present and future claims for both ovarian and meso diseases.

Tr. 7/28/2022, pg. 4 (emphasis added).

The Manville related cases the court referenced on July 28th provided for a discovery process involving a panel of Rule 706 experts which was much more transparent than the Proposed

Order here. *See In re Joint E. & S. Dists. Asbestos Lit.*, 151 F.R.D. 540 (S.D.N.Y. & E.D.N.Y 1993). The confidentiality terms in the Proposed Order are ***directly*** contrary to the views expressed in Wright & Miller's Federal Practice and Procedure:

Proposed Order

4. Confidentiality and Non-Confidential Information:

   a. Parties may have confidential *ex parte* communications with the Court-Appointed Expert. Except as otherwise specifically provided herein, the content of any confidential communications shall not be disclosed to any other party, shall not be subject to discovery in this or any other proceeding, and shall not be memorialized in a written record or transcript.

Federal Practice and Procedure (Wright & Miller)

> After the court informs the expert of his duties and the expert commences work, the court and the parties should remain available to answer the expert's questions or refine instructions where necessary. As a safeguard against bias, these communications also should be conducted in a manner open to all the parties.[22] **This means that *ex parte* communications between the judge and the expert or between a party and the expert are discouraged.**[23] Such communications may pose ethical issues for the judge or attorney involved.[24] In fact, *ex parte* communications between the judge and the expert may justify disqualification of the judge.[25] **Similarly, *ex parte* communications between one party and the expert may justify rejecting the expert's analysis as unreliable.[26] Further, such communications may compromise the impartiality of the witness or at least call that impartiality into question**. On the other hand, there may be situations where *ex parte* communications with appointed experts are both unavoidable and harmless.[27]

See Wright & Miller, 29 Fed. Prac. & Proc. Evid. § 6305 (2d ed.) (emphasis added).[2]

One of the fundamental flaws in this proceeding—Johnson & Johnson's constant demand for *secrecy*—will be massively compounded if a court-appointed testifying expert, upon whose

[2] Given the late hour and for the court's convenience, this entire Wright & Miller section and the case citations corresponding to the footnotes above are attached as Exhibit 1.

opinions the court intends to rely, forms his opinions in connection with confidential, unsworn, and non-evidentiary whispers from the parties and their lawyers. Whispers that cannot be revealed and tested in deposition or on cross-examination.

In paragraph 4(b) of the proposed Order, "facts or data" that Mr. Feinberg "considers or relies upon in forming his opinions" are discoverable. How does one differentiate between "communications" with Mr. Feinberg, which ***are*** confidential, from "facts" that he "considers" in forming his opinions, which are ***not*** confidential? And why does the court want to go down this rat hole in having to rule on the multiple and predictable discovery disputes on this issue? The Proposed Order will further shroud this proceed in secrecy when transparency is the objective and lead to endless and completely preventable discovery battles.

Following the Proposed Order will result in unsworn, unverifiable, and secret communications being "washed" through the expert and then appearing in pseudo-evidentiary form in Mr. Feinberg's report. Any parties objecting or seeking discovery will be prevented from uncovering reality because J&J will claim facts which are bad for the Company are actually confidential "communications", and Company talking-points shared in *ex parte* communications will masquerade as "facts" in Mr. Feinberg's report, at worst, or improperly influence his opinions at best.

It's obviously one thing to maintain confidentiality during mediation, a role Mr. Feinberg often plays, including in *Cyprus* and *Imerys*. That is ***not*** his role in this case. It would be objectively improper for any of the parties to have *ex parte* communications with this court about estimation. What is the difference when it comes to Mr. Feinberg? There is none.

What does Johnson & Johnson have to hide? What is J&J going to tell Mr. Feinberg in a confidential "communication" that will vary from the "data" it provides him? And how will the

parties be able to differentiate between the two? MRHFM has nothing to tell Kenneth Feinberg that needs hiding or protecting. The ***fact*** that J&J's talc had asbestos in it for decades is overwhelming and found in the Johnson & Johnson's own documents, Company witness testimony, internal testing, and a myriad of other non-confidential sources. Evidence that has already been before juries across the country. Is J&J's "new science" confidential?

What super-secret information does Johnson & Johnson want to shield from this court and the parties but still "communicate" to the court-appointed expert? MRHFM will gladly provide Mr. Feinberg with whatever he thinks he needs to reach his opinion; but, *if* he requests information that actually *is* confidential, MRHFM will withhold it entirely and make that clear to all parties…rather than "communicate" it to Mr. Feinberg anyway and still keep it hidden.

Here's MRHFM's proposal: Anything said or sent to Kenneth Feinberg by any party is discoverable by every other party. Simple. Transparent. Correct.

Respectfully submitted:

MAUNE RAICHLE HARTLEY
FRENCH & MUDD, LLC

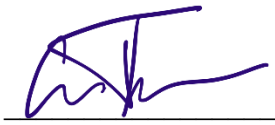

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Exhibit 1

29 Fed. Prac. & Proc. Evid. § 6305 (2d ed.)

Federal Practice and Procedure (Wright & Miller) | April 2022 Update

Federal Rules of Evidence

Chapter 8. Opinions and Expert Testimony
Victor J. Gold

Rule 706. Court-Appointed Expert Witnesses

§ 6305 Procedural Issues

Primary Authority

Fed. R. Evid. 706

Court appointment of an expert witness under Rule 706 raises several procedural issues. First, when should the court consider appointing an expert witness?[1] Second, how is the issue of court appointment raised and decided?[2] Third, assuming the court appoints an expert, how do the court and the parties communicate with the expert and what should be communicated?[3] Fourth, how do the court and the parties learn of the expert's findings?[4] Fifth, how is the expert's testimony presented at trial?[5] Sixth, what are the rules concerning compensation of the expert witness?[6] Finally, should the court disclose to the jury the fact that the court appointed the expert witness?[7]

Where at all possible, the decision to appoint an expert under Rule 706 should be made before trial.[8] The various procedures contemplated by the rule, from a hearing on the order to show cause why an expert should not be appointed to the taking of expert's deposition, can take considerable time.[9] The trial may be delayed if a court waits until trial has commenced to begin this process. Where the appointment is not made until trial, the effectiveness[10] and fairness[11] of these procedures also may become issues. Accordingly, a court should confront the question of exercising Rule 706 powers as soon as it becomes apparent that a case involves complex technical issues. However, the need to appoint an expert often is not apparent to the court until trial has commenced. In such a case, the court may still have discretion to appoint an expert if it can reasonably accommodate the trial schedule with the procedures described in the rule. But where it is simply too late to effectively and fairly implement these procedures, appointment of an expert under Rule 706 may be an abuse of discretion.[12]

The question whether the court should appoint an expert witness must be resolved at a hearing on an order to show cause why such a witness should not be appointed.[13] Rule 706 makes it clear that such an order may be made in response to a motion by any party or the court itself. Where a court declines to appoint an expert in response to a party's request to do so, the court should state on the record its reasons for the ruling.[14] Once the court has decided to appoint an expert, the next question becomes who to appoint. Rule 706 does not specify the procedure for resolving this question, except to state that the parties may submit nominations.[15] Some courts conclude that the trial judge must give the parties advance notice and an opportunity to be heard

before selecting an expert.[16] Since Rule 706 contemplates the appointment of a neutral expert, the court should at least make an effort to identify candidates acceptable to all parties.[17] But Rule 706 plainly leaves the court ample discretion to fashion procedures for selecting experts.[18] The principal limitation on this discretion is the expert's willingness to become a witness. This is because the rule precludes appointment unless the expert consents.[19]

Assuming the court appoints an expert, the next procedural question is how do the court and the parties communicate with the expert and what should be communicated. Rule 706 provides that the court must inform the expert of the expert's duties either in writing, a copy of which must be filed with the clerk, or at a conference at which the parties may participate.[20] The openness of these procedures ensures that the parties have the opportunity to object where the court's instructions to the expert may interject bias into what should be an impartial examination of the facts. In anticipation of this communication with the expert, and to promote this goal of impartiality, the court may confer with counsel for the purpose of obtaining agreement concerning the expert's duties.[21] After the court informs the expert of his duties and the expert commences work, the court and the parties should remain available to answer the expert's questions or refine instructions where necessary. As a safeguard against bias, these communications also should be conducted in a manner open to all the parties.[22] This means that ex parte communications between the judge and the expert or between a party and the expert are discouraged.[23] Such communications may pose ethical issues for the judge or attorney involved.[24] In fact, ex parte communications between the judge and the expert may justify disqualification of the judge.[25] Similarly, ex parte communications between one party and the expert may justify rejecting the expert's analysis as unreliable.[26] Further, such communications may compromise the impartiality of the witness or at least call that impartiality into question. On the other hand, there may be situations where ex parte communications with appointed experts are both unavoidable and harmless.[27]

Once the court-appointed expert has completed his work the question then becomes how do the parties learn of the expert's findings. Rule 706 provides that the witness must advise the parties of the witness' findings and may be deposed.[28] The expert may provide notice of findings through a written report, a conference with the parties, a court hearing at which the expert testifies, a deposition, or some combination of these.[29] The goal is to provide the parties with sufficient notice to permit them to deal with those findings at trial or at a hearing on a motion for summary judgment.[30] Thus, so long as this goal is attained, the trial court has discretion to structure the manner in which the expert's findings are disclosed.[31] Where the expert is appointed merely to advise the court and not to testify, the parties have no right under Rule 706 to depose the expert or otherwise learn of his findings since that provision applies only to expert witnesses.[32] Subdivision (a) provides that the expert may be called as a witness by the court or any party.

Rule 706 describes in simple terms how court-appointed expert testimony will be presented at trial. Subdivision (b) provides that the expert may be called as a witness by the court or any party. This means that a party does not need to secure the approval of the court in order to call a court-appointed expert to testify.[33] Once the witness has been called, the rule further provides that each party, including the party calling the witness, may cross-examine.[34] This normally means that all parties may use leading questions when examining the expert.[35]

More complicated are questions concerning compensation of court-appointed experts. Rule 706(c) provides that court-appointed experts are entitled to reasonable compensation in whatever sum the court may allow. As this standard clearly suggests, the courts have broad discretion to set compensation.[36] The difficulty rests not in arriving at a dollar amount but in determining the source of funding. The appropriate source depends on the type of case involved.

In criminal cases and civil condemnation actions, compensation is payable from funds that are “provided by law.” This means that the expert's fees are paid out of public funds. In a criminal proceeding, the Criminal Justice Act authorizes payment of an

expert's fees where this is necessary for effective representation of an accused.[37] In addition, the Comptroller General has ruled that the Justice Department is the appropriate source of funds to pay court-appointed experts in both criminal prosecutions and civil condemnation actions.[38]

In other civil cases, Rule 706(c) provides that compensation of court-appointed experts shall be paid by the parties "in the proportion and at the time that the court directs—and the compensation is then charged like other costs." Judicial discretion over the time of payment means that the court has power to make the parties pay the expert's fees as the expert renders services, rather than making the expert wait until the case is concluded. Discretion over the allocation of fees means that, before final judgment, the court may split responsibility for fees as the court sees fit.[39] Thus, while the court commonly will order the parties to contribute equal shares, the court may apportion fees differently and may even impose the fee burden entirely on one side.[40] Once the case is concluded, the rule provides that expert's fees are taxable as costs to the losing party.[41] However, the courts have read this provision as giving the trial judge discretion to allocate fees between the parties even after final judgment, regardless of who has prevailed.[42] Accordingly, where one of the parties is indigent and the need for a court-appointed expert is clear, the courts may assess all expert fees against the party with the ability to pay, regardless of who prevails.[43]

The final question of procedure raised by Rule 706 is whether the court should disclose to the jury the fact that an expert who has testified was appointed by the court. Subdivision (d) provides that the court has the discretion to make such a disclosure. This was the most controversial aspect of Rule 706 during the rulemaking and legislative processes that led to its enactment. Opponents of disclosure argued that the opinion of a court's expert would be decisive in any case in which it was offered because such an expert acquires from the court the mantle of both authority and impartiality. They also asserted that this aura of impartiality is misleading because no expert is unbiased.[44] The drafters rejected these objections on the grounds that discretion to disclose the court appointed status of an expert "seems to be essential if the use of court appointed experts is to be fully effective."[45]

There is every reason to believe that the opponents of the discretion to disclose were correct in assuming that, once the court-appointed status of an expert is disclosed, the jury may give decisive weight to his testimony.[46] But the drafters were also correct in concluding that disclosure may be essential. A basic purpose of appointing an expert is to provide the trier of fact with a neutral viewpoint when the parties' experts are in conflict.[47] The testimony of a court's expert normally helps to resolve such a conflict only if the jury understands that the testimony comes from someone with no partisan affiliation.[48] Accordingly, where a court-appointed expert testifies, the trial judge commonly discloses the appointment to the jury.[49] On the other hand, subdivision (d) does not compel such a disclosure. Thus, a court may decline to reveal the status of a court appointed expert where the danger that the jury may give too much credit to his testimony outweighs the value of making such a disclosure.[50]

§§ 6306-6320 are reserved for supplementary material.

Footnotes

1 **When**
See below at notes 8 through 12.

2 **How decided**
See below at notes 13 through 19.

3 **Communications**
See below at notes 20 through 27.

4 **Findings**

See below at notes 28 through 32.

5 **Testimony**
See below at note 34 & 35.

6 **Compensation**
See below at notes 36 through 43.

7 **Disclosure**
See below at notes 44 through 50.

8 **Before trial**
See Cecil and Willging, Court-Appointed Experts, Federal Judicial Center Reference Manual on Scientific Evidence, p. 566 (1994) ("The possibility of appointing an expert may be raised at pretrial conferences.").

9 **Considerable time**
See Cecil and Willging, Court-Appointed Experts, Federal Judicial Center Reference Manual on Scientific Evidence, p. 542 (1994) ("Procedures specified in Rule 706 imply that the appointment process 'will ordinarily be invoked considerably before trial' to allow time for hearings on the appointment, consent of the expert, notification of duties, research by the expert, and communication of the expert's findings to the parties in sufficient time for the parties to conduct depositions of the expert and prepare for trial.").

10 **Effectiveness**
See Cecil and Willging, Court-Appointed Experts, Federal Judicial Center Reference Manual on Scientific Evidence, p. 542 (1994) ("One of the impediments to broader use of court-appointed experts mentioned earlier is the difficulty in identifying the need for an expert in time to make the appointment without delaying the trial. Thirteen judges [responding to survey on Rule 706] indicated that effective appointment of an expert requires the court's awareness of the need for such assistance early in the litigation.").

11 **Fairness**
See Scott v. Spanjer Bros., Inc., 298 F.2d 928, 932–934 (2d Cir. 1962) (Hincks, J., dissenting) (in negligence action to recover for injuries suffered by infant, trial judge appointed physician at outset of trial to examine the plaintiff and testify without any prior report to the parties; "Here the notice on the very eve of trial was far less than reasonable: it was so short that an expert on whom the parties apparently could have agreed could not be obtained in time—an obstacle which could have been avoided by but a few days' notice. * * * Here, appellants' counsel was not advised of what the expert would say until he actually testified. This was after counsel had completed his cross-examination of [plaintiff's] mother on whose version of [plaintiff's] 'history' the expert's testimony was solely based. And of course at that stage it was too late to consult and perhaps call other psychiatrists. * * * Surely a party needs protection from surprise caused by a judge as much as that caused by his adversary.").

12 **Too late**
See U.S. v. Weathers, 618 F.2d 663, 664 (10th Cir. 1980) (where presentation of evidence was completed and case submitted, court committed harmless error in ordering, sua sponte, further examination and report by independent expert, "[T]here is serious doubt whether the procedure employed by the trial court in seeking additional expert testimony comported with the requirements of Fed.R.Evid. 706, which was designed in part to lessen the risk that the adversary system would be encroached upon by a judge's assumed inquisitorial power.").

13 **Show cause**
See, e.g., U.S. v. Articles. . . Provimi, 74 F.R.D. 126 (D.N.J. 1977) (issuing order to appoint expert witness after parties made submissions in response to order to show cause why an independent expert should not be appointed).

14 **State on record**
Steele v. Shah, 87 F.3d 1266, 1270 (11th Cir. 1996) (in civil rights action brought by prisoner against prison psychiatrist who had discontinued prisoner's psychotropic medication, trial court erred in denying prisoner's

motion to appoint expert without giving reasons for that denial; since appropriate standard of psychiatric care was at issue, prisoner was entitled to a reasoned ruling on his motion).

15 **Nominations**

For a discussion of the court's power to appoint expert witnesses, see § 6304 at notes 20 and 21.

16 **Notice and opportunity**

See, e.g., DeAngelis v. A. Tarricone, Inc., 151 F.R.D. 245, 246–247 (S.D. N.Y. 1993) (parties should be given advance notice and an opportunity to participate in selection of the expert and in the definition of the expert's duties; "The parties are directed to consult concerning the identity of a reasonable number of knowledgeable impartial experts who could examine all written evidence and also examine the plaintiff in a neutral and nonabrasive manner. In connection with such consultation, each party shall inform the others of any prior connection with any proposed expert which may be recommended. Separate or joint submissions by the parties concerning the experts to be utilized and any proposed guidelines beyond those set forth in this memorandum order shall be submitted within 45 days of the date of this memorandum order. The court will then make the selections, utilizing experts agreed upon by the parties, or relying on its own sources, and will also issue any further guidelines which may be necessary * * *.").

17 **Neutral experts**

Cecil and Willging, Court-Appointed Experts, Federal Judicial Center Reference Manual on Scientific Evidence, p. 542 (1994) (describing results of survey of federal court judges concerning use of Rule 706 powers; "In eighteen instances the expert was selected from a list of experts provided by one or more of the parties. Published cases commonly suggest that a court direct the parties to seek agreement on an appointment and for the court to exercise its discretion only if the parties fail to agree. Sometimes the parties agreed on an expert with little or no involvement from the judge. Normally each party submitted a slate of experts that would be acceptable to them. Occasionally one or more names would appear on each list, making selection easy. Often the parties identified one or more suitable experts with little or no involvement by the judge. When the parties could not agree, the judge often chose the expert from the slates after listening to objections from each of the parties.").

18 **Discretion**

See, e.g., In re Joint Eastern and Southern Districts Asbestos Litigation, 151 F.R.D. 540, 542 (E.D. N.Y. 1993) (trial court appointed law professor to aid the court in selecting panel of knowledgeable and neutral experts).

19 **Consents**

Of course, an expert subpoenaed by a party can be compelled to testify without his consent. See Kaufman v. Edelstein, 539 F.2d 811, 818 (2d Cir. 1976) ("Article VII of the Rules deals with 'Opinions and Expert Evidence' and contains six rules, 701 to 706. Although the framers of the rules must have been well aware of the frequently made contention that experts enjoy some kind of privilege, neither this chapter nor the proposed rules on privilege which the framers proposed but Congress rejected contain any suggestion that an expert enjoys either an absolute or a qualified privilege against being called by a party against his will. The only reference to the need of consent by an expert is in Rule 706(a), dealing with court appointed experts. * * * The situation of the court appointed expert who is expected to delve deeply into the problem and arrive at an informed and unbiased opinion differs utterly from that of an expert called by a party to state what facts he may know and what opinion he may have formed without being asked to make any further investigation. If any inference is to be drawn from the Federal Rules of Evidence, it is thus against the claim of privilege by an expert, not for it."); U.S. v. International Business Machines Corp., 406 F. Supp. 178, 180 (S.D. N.Y. 1975) ("subdivision (d) of Rule 706 * * * suggests that the requirement of consent in subdivision (a) does not extend to a party's attempt to subpoena an unwilling expert").

20 **Writing or conference**

Cecil and Willging, Court-Appointed Experts, Federal Judicial Center Reference Manual on Scientific Evidence, p. 568 (1994) (describing results of survey of federal court judges concerning use of Rule 706 powers; "A common practice is to instruct the expert at a conference with the parties present, then formalize

the instructions with a written order filed with the clerk. This practice permits easy interaction with the expert at the initial conference, ensures that the parties and the expert understand the nature of the task, and avoids misunderstanding and disagreements over the initial instructions. The instructions themselves can be based on the materials prepared by the parties as part of the pretrial process, which should set forth areas of disagreement and confusion. A written order also will help the expert focus his or her inquiry and will serve as a reminder of the limitations of the expert's role in relation to the judge's.").

21 **Agreement**

U.S. v. Articles. . . Provimi, 74 F.R.D. 126, 127 (D.N.J. 1977) (before appointed expert can provide assistance, "the court must have the perceptive and constructive support of both parties in order to settle the directions to be given to the expert, so that his aid will be efficient and at the least feasible cost and expense").

22 **Safeguard**

See, e.g., Leesona Corp. v. Varta Batteries, Inc., 522 F. Supp. 1304, 1312 (S.D. N.Y. 1981) (parties were not permitted to directly communicate with court appointed expert; "All communication with the court expert was done through the Court, and copies of all materials sent by the Court to Dr. Cairns were docketed by the clerk and placed in the court file."). See also Cecil and Willging, Court-Appointed Experts, Federal Judicial Center Reference Manual on Scientific Evidence, p. 568 (1994) ("If an appointed expert has questions regarding his or her duties, the parties should be informed of the nature of the inquiry. In most cases this should pose no difficulty. A written request for clarification from the expert and a written response by the court, with copies to all interested parties, will permit parties to remain informed of the proceedings and offer objections or clarifications to the response. If the judge and the expert expect to confer in person, several options are available. Representatives of the parties can be invited to attend the conference or, if this proves impractical, a record of the discussion can be forwarded to the parties. In any event, we believe that parties should be informed of communications between the expert and the judge and should be informed of the nature of those communications. This will permit a party to challenge the substance of the expert's advice or object to inquiries and information that exceed the expert's agreed-upon duties.").

23 **Discouraged**

U.S. v. Green, 544 F.2d 138, 146 (3d Cir. 1976) ("[T]he court should avoid ex parte communications with anyone associated with the trial, even its own appointed expert. [W]hen the necessity arises for the court to talk with an expert appointed pursuant to 18 U.S.C. § 4244, a proper way would be to utilize an on-the-record conference in chambers or an on-the-record conference call so that counsel for all parties may participate."); Leesona Corp. v. Varta Batteries, Inc., 522 F. Supp. 1304, 1312 (S.D. N.Y. 1981) ("[T]he parties were not permitted to communicate directly with [the court appointed expert]. All communication with the court expert was done through the Court, and copies of all materials sent by the Court to [the court appointed expert] were docketed by the clerk and placed in the court file.").

24 **Ethical issues**

See Canon 3(A)(4) of the Code of Conduct for United States Judges ("[a] judge should * * * neither initiate nor consider ex parte communications on the merits, or procedures affecting the merits, of a pending or impending proceeding"); Model Code of Professional Responsibility DR 7-110(B), at 39 (1982) ("a lawyer shall not communicate * * * as to the merits of the cause with a judge or an official before whom the proceeding is pending").

25 **Disqualification**

Edgar v. K.L., 93 F.3d 256, 258–262 (7th Cir. 1996) (judge's actions in meeting ex parte with panel of experts appointed by judge to receive preview of panel's conclusions and to persuade judge that their methodology was sound was grounds for judge's disqualification under 28 U.S.C.A. § 455(b); allowing off the record briefing on issues and prohibiting opposing counsel from discovering what was said in meetings resulted in unauthorized private investigation by judge, raised concerns about judge's impartiality, and was inconsistent with procedure called for by Rule 706).

26 **Unreliable**

G.K. Las Vegas Ltd. Partnership v. Simon Property Group, Inc., 671 F. Supp. 2d 1203, 1215 (D. Nev. 2009) (defendants' ex parte meetings with independent forensic examiners, and their delivery of legal documents to examiners as well as answering various questions examiners posed to defendants' counsel, without consulting with plaintiff, so compromised examiners' role as independent expert in action arising out of breakup of real estate partnership that court could not rely on examiners' analysis; defendants treated examiners as their own personal expert without giving due respect to direction of court in spoliation hearing and forensic examinations order, court ordered that defendants work cooperatively with plaintiffs in good faith and defendants violated order).

27 **Unavoidable**

Cecil and Willging, Court-Appointed Experts, Federal Judicial Center Reference Manual on Scientific Evidence, p. 568 (1994) ("Ex parte communication between experts and parties will rarely be necessary —the most common instance occurs during the physical examination of a party. The expert can notify the opposing party of the intended nature of the examination and then report the findings, giving the opposing party an opportunity to raise objections. Ex parte communication may also be necessary when an expert must learn a trade secret in order to advise the court regarding a motion for a protective order. The ex parte communication serves the same purpose as an in camera examination of claims of privilege and should be equally permissible.").

28 **Deposed**

The right to depose court appointed experts in a criminal case did not exist before Rule 706. See former Criminal Rule 28, discussed in § 451. Rule 28 was the predecessor of Rule 706 and had no provision concerning deposing court appointed experts.

However, at least one court has held that the right to depose court-appointed experts is not absolute and may be withheld where the findings of the experts are otherwise revealed. See In re Joint Eastern and Southern Districts Asbestos Litigation, 151 F.R.D. 540, 542–545 (E.D. N.Y. 1993), described in note 29 below.

29 **Combination**

See, e.g., Computer Associates Intern., Inc. v. Altai, Inc., 982 F.2d 693, 712–713 (2d Cir. 1992) (court expert submitted comprehensive written report); DeAngelis v. A. Tarricone, Inc., 151 F.R.D. 245, 247 (S.D. N.Y. 1993) (trial court orders court experts to submit written report); In re Joint Eastern and Southern Districts Asbestos Litigation, 151 F.R.D. 540, 542–545 (E.D. N.Y. 1993) (notice of deposition for court-appointed experts properly was quashed where experts prepared written report, meetings were held with counsel to answer questions, the report was revised, and a hearing was held at which experts testified subject to cross-examination; "All parties are entitled to receive the fullest practicable disclosure from the 706 Panel. Nevertheless, courts and parties recognize that cooperative discovery devices, such as those used in the instant case are sometimes the most efficient method for conducting discovery in complex cases. The pre-hearing and hearing procedures provide for extensive exchange of information informally and then for the sworn testimony (orally or in writing) of the 706 Panel and full opportunity for cross-examination at a hearing presided over by the courts. Conflating the depositions within the framework of the hearing can reduce unnecessary and expensive discovery. It can encourage the most useful contribution of all experts. Protecting court-appointed experts from unnecessary and harassing depositions can encourage many of the best experts, who have tended to eschew court proceedings because of their burdensome nature, to come forward and accept Rule 706 appointments. * * * Deposing the 706 Panel members by one attorney representing a small minority of plaintiffs in a hostile manner would be excessively burdensome and expensive. The 706 Panel members are not represented by counsel. Deposing Professors Cohen, Stallard and Manton would be likely to constitute the kind of harassment which might discourage highly qualified academic researchers in the future from accepting appointment as expert witnesses under Rule 706."); Leesona Corp. v. Varta Batteries, Inc., 522 F. Supp. 1304, 1312 (S.D. N.Y. 1981) (while court expert submitted preliminary report of findings and was deposed, he did not prepare revised report but disclosed his final findings during testimony at trial).

30 **Notice**

See, e.g., In re Joint Eastern and Southern Districts Asbestos Litigation, 830 F. Supp. 686, 694 (E.D. N.Y. 1993) ("Before the courts can take action based upon the report of Dr. Manton and the other Rule 706 experts,

the parties must be afforded the opportunity to evaluate the report and test its validity. * * * Approximately one month will be provided during which the parties will be permitted to study and evaluate the Rule 706 report. Members of the Rule 706 panel will themselves continue to critique Dr. Manton's initial report and he may supplement and revise it. Revisions of the Rule 706 report shall be furnished promptly to the courts and made immediately available to the parties by the Trust. After the one-month evaluation period has concluded, the courts will hold a hearing. The authors of the Rule 706 report will be asked to present their report in the form of sworn testimony. They may be cross-examined. The parties may present their own testimony and exhibits relevant to the question of estimating numbers and volume of future asbestos claims.").

31 **Discretion**

See, e.g., Cecil and Willging, Court-Appointed Experts, Federal Judicial Center Reference Manual on Scientific Evidence, pp. 551–552 (1994) (describing results of survey of federal-court judges concerning use of Rule 706 powers; "We found that, except when used as a technical advisor, the expert invariably reports findings to the parties. In several cases the parties met informally with the expert to discuss his or her report. Generally, the findings are in the form of a written report furnished to the court and the parties. We were told of two instances in which the expert reported orally to the parties, once by deposition, and once in a meeting in the judge's conference room. In the few cases where the expert was appointed immediately before or during trial, the expert reported by way of testimony at the trial or hearing. * * * Three judges, all of whom had appointed experts more than once, asked the expert for a preliminary report, then permitted the expert to modify this report after reviewing the reports of the parties' experts. * * * Formal depositions are relatively infrequent, occurring in about one case in four.").

32 **No right**

See Hemstreet v. Burroughs Corp., 666 F. Supp. 1096, 1123–1124 (N.D. Ill. 1987), adhered to on reconsideration, 1987 WL 13994 (N.D. Ill. 1987), order rev'd, 861 F.2d 728 (Fed. Cir. 1988) and rev'd, 861 F.2d 728 (Fed. Cir. 1988). See also § 6303 at note 3.

33 **Approval**

Nemir v. Mitsubishi Motors Corp., 381 F.3d 540, 556 (6th Cir. 2004).

34 **Cross-examine**

But the right to cross-examine may be waived. See Gilbane Bldg. Co. v. Federal Reserve Bank of Richmond, Charlotte Branch, 80 F.3d 895, 906 (4th Cir. 1996) (in action alleging breach of construction contract where special master was appointed to judge performance under the contract and special master appointed expert to assist, defendant was not denied right to cross-examine expert under Rule 706(a) where it never asked to cross-examine expert during special master's hearings).

35 **Leading questions**

See Rule 611(c), discussed in § 6168.

36 **Broad discretion**

See generally Crawford Fitting Co. v. J. T. Gibbons, Inc., 482 U.S. 437, 441–44, 107 S. Ct. 2494, 2497–2498, 96 L. Ed. 2d 385 (1987) (while federal courts may not assess as costs the fees of expert witnesses in excess of the statutory witness fee of $30 per diem, "[t]here is no provision that sets a limit on the compensation for court-appointed expert witnesses").

37 **Criminal Justice Act**

18 U.S.C. § 3006A(e), 1988.

38 **Comptroller General**

Matter of: Payment of Court-Appointed Expert Witness—Criminal Proceeding, 59 Comp.Gen. 313, 315–316 (1980) ("The language in Rule 706(b) for compensation in criminal cases is the same as that for land condemnation cases; that is, the rule provides that compensation 'is payable from funds which may be provided by law.' * * * We are persuaded that in criminal and condemnation cases, where the rule precludes

assigning any of the cost of court-appointed expert witnesses to the private litigant or defendant, these costs should be borne by Justice.").

39 **Before judgment**

See, e.g., U.S. Marshals Service v. Means, 741 F.2d 1053, 1058 (8th Cir. 1984) ("The plain language of Rule 706(b) thus permits a district court to order one party or both to advance fees and expenses for experts that it appoints."); U.S. v. Articles. . . Provimi, 425 F. Supp. 228, 231 (D.N.J. 1977) ("The court also intends to assess one-half of the cost of the expert's services in conducting the study and preparing the report, and for any testimony which either or both parties, or the court, may wish to have after review of the report, with further decision on the expert's cost to abide the event."), opinion supplemented, 74 F.R.D. 126 (D.N.J. 1977).

40 **One side**

See, e.g., Claiborne v. Blauser, 928 F.3d 794, n. 7 (9th Cir. 2019) (in an appropriate case, Rule 706(a) permits a trial court to apportion to one side all the cost of an appointed expert, as where one of the parties is indigent), opinion amended and superseded on other grounds on denial of reh'g, 934 F.3d 885 (9th Cir. 2019) and withdrawn from bound volume; Ledford v. Sullivan, 105 F.3d 354, 361 (7th Cir. 1997); McKinney v. Anderson, 924 F.2d 1500, 1510 (9th Cir. 1991) (trial court's magistrate erred in refusing to appoint expert witness on ground one of the parties was indigent and magistrate incorrectly assumed that fees must be split between the parties; "We believe that the phrase 'such proportion as the court directs,' in an appropriate case, permits the district court to apportion all the cost to one side. Otherwise, we are faced with an inflexible rule that would prevent the district court from appointing an expert witness whenever one of the parties in an action is indigent, even when the expert would significantly help the court."), cert. granted, judgment vacated on other grounds, 502 U.S. 903, 112 S. Ct. 291, 116 L. Ed. 2d 236 (1991) and judgment reinstated, 959 F.2d 853 (9th Cir. 1992).

41 **Costs**

See 28 U.S.C. § 1920(6) ("A judge or clerk of any court of the United States may tax as costs the following * * * [c]ompensation of court appointed experts."). See also Civil Rule 54(d), discussed in § 2678.

42 **Who prevailed**

See, e.g., Board of Educ., Yonkers City School Dist. v. CNA Ins. Co., 113 F.R.D. 654, 655 (S.D. N.Y. 1987) ("The special master/expert shall be compensated from time to time as directed by the Court, and at the conclusion of the trial, such compensation to be paid by the parties in equal proportion, subject to reallocation by the Court as justice may require."); Leesona Corp. v. Varta Batteries, Inc., 522 F. Supp. 1304, 1312 (S.D. N.Y. 1981) ("Although the Court is of the view that all of the costs incident to the retaining of a court expert may be assessed as a taxable cost * * * the Court has determined not to include Dr. Cairns' compensation in the taxable costs authorized by 28 U.S.C. § 1920. The taxation of costs is a matter committed to the district court's discretion. * * * In this Court's view, considering the nature of the case and the reason a Rule 706 court expert was appointed, the appointing court may in the interest of justice apportion the cost of the expert in the manner it finds appropriate under the circumstances, regardless of the ultimate victor in the lawsuit.").

43 **Indigent**

See, e.g., Aiello v. Town of Brookhaven, 149 F. Supp. 2d 11, 13 (E.D. N.Y. 2001) (quoting treatise); McKinney v. Anderson, 924 F.2d 1500, 1510 (9th Cir. 1991) (described in note 34 above), cert. granted, judgment vacated on other grounds, 502 U.S. 903, 112 S. Ct. 291, 116 L. Ed. 2d 236 (1991) and judgment reinstated, 959 F.2d 853 (9th Cir. 1992); Webster v. Sowders, 846 F.2d 1032, 1038 (6th Cir. 1988) (in toxic-tort litigation posing complex scientific issues, trial court had power to appoint expert witness even where plaintiff was indigent and could not pay fees; "A District Court has authority to apportion costs under [Rule 706(b)], including excusing impecunious parties from their share."); U.S. Marshals Service v. Means, 741 F.2d 1053, 1058 (8th Cir. 1984) ("No doubt in the usual case the judge will provide that the expense of the experts shall be taxed as costs and paid by the loser. He may require the parties to contribute proportionate shares of the fee in advance. He may think it wise to excuse an impecunious party from paying his proportionate share.").

But many courts are reluctant to appoint an expert where one of the parties is indigent and has no hope of paying any share of the fees. See Cecil and Willging, Court-Appointed Experts, Federal Judicial Center Reference Manual on Scientific Evidence, pp. 560–561 (1994) (describing results of survey of federal-court judges concerning use of Rule 706 powers; "The court has the authority to order the nonindigent party to advance the entire cost of the expert. However, the judges indicated a great reluctance to employ such experts when the expense cannot be shared. * * * Although Rule 706 supports the imposition of the expenses on the nonindigent party, judges seem willing to impose one-sided expenses only when the indigent party's claim shows some merit, or when the nonindigent party has agreed to assume the cost of the expert.").

44 **Not impartial**
See § 6301 at notes 4 through 6.

45 **Effective**
Advisory Committee's Note, Rule 706(c).

46 **Decisive weight**
Cecil and Willging, Court-Appointed Experts, Federal Judicial Center Reference Manual on Scientific Evidence, pp. 553–554 (1994) (describing results of survey of federal-court judges concerning use of Rule 706 powers; "Our interviews revealed that juries and judges alike tend to decide cases consistent with the advice and testimony of court-appointed experts. We asked, 'Was the disputed issue resolved in a manner consistent with the advice or testimony of the 706 expert?' Of fifty-eight responses, only two indicated that the result was not consistent with the guidance given by the expert. * * * [I]t should come as no surprise that the outcome of a case is greatly influenced by the testimony of an appointed expert. Since the absence of an impartial factual basis to decide the case was a prerequisite to the appointment, it follows that the testimony of the appointed expert is likely to be influential. * * * [T]he concerns of judges and commentators that court-appointed experts will exert a strong influence on the outcome of litigation seem to be well founded. Whether such influence is appropriate is a different question.").

47 **Basic purpose**
Cecil and Willging, Court-Appointed Experts, Federal Judicial Center Reference Manual on Scientific Evidence, p. 554 (1994) ("Since the absence of an impartial factual basis to decide the case was a prerequisite to the appointment, it follows that the testimony of the appointed expert is likely to be influential. The primary reasons for appointment of an expert were either a failure of the parties to offer credible expert testimony or an actual or anticipated conflict in the testimony of the parties' experts that defied resolution through traditional means. * * * Given a void of evidence on a critical issue, the court-appointed expert's testimony would necessarily be influential. * * * Similarly, in cases with an unresolvable conflict among the parties' experts, the equipoise in the evidence prior to appointment renders the court-appointed expert likely to tip the scale to one side or another.").

48 **Affiliation**
Cecil and Willging, Court-Appointed Experts, Federal Judicial Center Reference Manual on Scientific Evidence, p. 570 (1994) ("We believe that in almost all cases the court's sponsorship of the expert should be explicitly acknowledged, along with whatever limiting instructions are thought to be appropriate regarding the weight to be given the expert's testimony relative to the testimony of the parties' experts. If experts are appointed where doubts about the credibility of the parties' experts persist and other efforts to provide a basis for a reasoned decision have failed, knowledge of the independence of the appointed expert will be relevant to achieving the goals of the appointment.").

49 **Commonly discloses**
Cecil and Willging, Court-Appointed Experts, Federal Judicial Center Reference Manual on Scientific Evidence, p. 553 (1994) ("Only seven jury trials were identified from the interviews in which the court-appointed expert offered testimony in court. In all but one of these cases, the judge or the party calling the witness informed the jury of the expert's court-appointed status.").

50 **Outweighs**

See generally DeAngelis v. A. Tarricone, Inc., 151 F.R.D. 245, 247 (S.D. N.Y. 1993) ("[Rule] 706 indicates that, like many other facts which may come to light in a trial, the source of appointment of an expert can be placed in proper perspective by awareness of the factfinder that even an impartial expert can be wrong, and that the impartial expert must be subjected to the same evaluation of credibility as any other witness. Rule 706(c) does provide that a court in its discretion may disclose to a jury that an expert witness was court appointed. See generally Fed.R.Evid. 403 (balancing of relevancy and any potential erroneous use of evidence generally).").

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