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Evidence

Can Adversarial Legal Culture Accept Neutral Expert Witnesses?

Distinguished Judge Richard A. Posner has long argued that high-stakes civil trials would function fairly and more efficiently if federal trial judges regularly appointed neutral expert witnesses.

Posner, who sits on the U.S. Court of Appeals for the Seventh Circuit, told Bloomberg BNA he often uses neutral experts when he volunteers to conduct trials in district courts for cases with ''significant technological aspects.''

But Posner is a clear exception. Neutral or non-partisan experts are rarely appointed by judges in the U.S., attorneys and others tracking the topic tell Bloomberg BNA.

The limited data that exists on court-appointed experts, though compiled years ago, bears out the scarcity of such appointments.

The most recent study of federal judges—a 2002 study by the Federal Judicial Center— noted that only 26 percent of judges had ever appointed an expert.

Similarly, a 2010 study of state judges in Arizona, Indiana, Michigan and Texas found that only 12 percent of judges appointed an expert at any time during the prior year.

Posner identified what he views as the leading cause.

Many judges view court-appointed neutral experts as ''inconsistent with the pure adversary system, in which all witnesses are lawyer-provided,'' he said.

But whether that's true is a matter of debate and Deborah Runkle, senior program associate at the American Association for the Advancement of Science, is trying to change the impression that it is.

Runkle manages the AAAS's project on Court Appointed Scientific Experts, which assist judges by identifying a number of ''highly qualified'' scientists, engineers, and healthcare professionals to serve as potential scientific experts.

Posner, Runkle and others list a host of good reasons for judges to appoint experts: getting judges up to speed on complex legal matters, trimming extraneous and sometimes costly and time-consuming technical issues from the litigation, and, in general, more independence, neutrality and balance.

But whether judges will start doing so, at least anytime soon, remains a big uncertainty.

Professor Samuel R. Gross of Michigan Law School in Ann Arbor, Mich., who teaches evidence, told Bloomberg BNA that for well over 100 years, people have been talking about how the ever expanding use of partisan experts is a crisis that should be addressed by using court appointed experts.

''And nothing changes. And then the cycle repeats,'' he said.

If the goal is non-partisan experts, it will take ''fundamental changes in how we manage and finance litigation,'' Gross said.

In this three-part series, Bloomberg BNA explores why court-appointed experts haven't become commonplace in civil litigation. It also examines the forces at work that may make that scenario unlikely but, at least on a limited basis perhaps, possible.

Part One of Three-Part Series

- Part One: Arguments for and against the use of court-appointed experts; why judges are so reluctant to appoint neutral experts.
- Part Two: Whether ''neutral'' experts actually exist; the types of cases most suited for appointed experts.
- Part Three: Controversial issues involving court-appointed experts, such as whether parties should have veto power over them, and how to cross-examine the judge's chosen expert (hint: gingerly).

Complicated History. Expert witnesses have played an important role in U.S. civil litigation for more than 150 years.

But almost from the start, there has been a split over whether justice is better served by deploying impartial ''objective'' expert witnesses who have no allegiance to any party.

Supporters of the adversarial system say each party should be allowed to spend its resources as it sees fit. This means selecting its own experts, and prosecuting the case in a manner designed to increase each party's chances of prevailing.

But others say party-retained experts are a corruptive force and no better than hired guns. These ''partisan'' experts slant their testimony to benefit paying clients, frustrating a judicial process that seeks to divine the truth.

Far less controversial than appointed experts are court-appointed ''special masters.'' These officials—often experts, but sometimes retired judges—assist judges in complex administrative or discovery proceedings.

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Looking abroad, Professor Richard D. Friedman, also with the Michigan Law School, said court-appointed experts are common in Europe, but views on the approach there are mixed.

''I noticed years ago in Europe considerable dissatisfaction with their system of court-appointed experts; there was a sense that to a large extent decision-making had been deferred to a scientific or technical establishment selected by the court,'' Friedman, an authority on evidence, told Bloomberg BNA.

Adversarial System Values Imbedded. Getting judges to boost the use of appointed experts is difficult because Posner and Runkle are challenging firmly established views, many legal authorities said.

''Trial lawyers deeply dislike court-appointed expert witnesses, and most judges—who are all ex-lawyers and often former trial lawyers—held that point of view as lawyers and do not change it later,'' Professor Gross said.

Plaintiffs' attorney Max Kennerly of Kennerly Loutey in Elkins Park, Pa., told Bloomberg BNA that one of the most common remarks that judges make to lawyers is, ''I'm not going to tell you how to try your case.''

Judges are ''rightly hesitant to insert themselves into the presentation of evidence, even if they are doing so with the best intentions,'' he said.

The adversarial system is ''robust and effective'' for a reason, Kennerly said.

''One side gets the experts that lean their way, the other side gets the experts that lean the other way, and the fact finders sort it out,'' he said.

Kennerly said court-appointed neutral experts raise an array of downsides.

''The court is necessarily introducing itself into the dispute; the parties will rarely be able to agree to an expert and the scope of their testimony; and the losing party will inevitably appeal the selection,'' he said.

Opponents of court-appointed experts also worry about the inordinate weight appointed experts receive from impressionable jurors.

Defense attorney Douglas G. Smith, with Kirkland & Ellis in Washington, said that court-appointed experts pose a ''danger of undue influence'' on juries.

These experts generally shouldn't be allowed to testify at trial, he said.

But Gross said that type of argument is a red herring.

Civil litigators are ''truly most concerned about loss of control. They have more control over their expert evidence than most other aspects of litigation, and successful litigators (no secret) are control freaks,'' he said.

Professor Edward J. Imwinkelried, of the UC Davis School of Law in Davis, Calif., agreed with Smith that valid concerns exist about a judge-appointed expert's perceived influence.

Imwinkelried, a leading authority on evidence law, told Bloomberg BNA that ''one of the major considerations shaping the American law of expert testimony has been that fear'' that if the jury learns that a particular witness is court-appointed, the jurors will be tempted to attach ''undue weight'' to that witness's testimony.

Smith, author of *Scientific Evidence, Litigation Practice Series* (Bloomberg BNA 2016), offered a solution.

When court-appointed experts are used it is ''important to put in place adequate procedural safeguards,'' he said, including the same ''stringent requirements of reliability and relevance that are applied to party experts.''

The Case for Neutral Experts. Kennerly, the plaintiffs' lawyer, said the most significant advantage in using neutral experts is the ''streamlining'' of a case.

''In many cases, an expert for one side can introduce unnecessary complexity and time into the case by raising objections to issues that really don't warrant a dispute,'' he said.

Runkle, of the AAAS, said court-appointed nonpartisan experts also offer ''independence.''

Additionally, just the appointment of a court expert can ''encourage settlement,' she said.

Professor David A. Sonenshein, of Temple University Beasley School of Law in Philadelphia, told Bloomberg BNA that the use of court-appointed experts also addresses long-standing policy concerns that party experts are unnecessarily ''adversarial and biased.''

Party-appointed experts are often chosen for their ''persuasive ability rather than the open-mindedness needed for real science,'' and ''inevitably suffer from confirmation bias,'' he said, referring to the tendency to seek information that validates existing precepts.

Sonenshein has authored 11 books on evidence, coauthored ''Principles of Evidence,'' (6th Ed. 2014) and teaches evidence to federal judges for the Federal Judicial Center.

Another authority on evidence, Professor Edward Cheng of the Vanderbilt Law School in Nashville, Tenn., -said that neutral experts offer another advantage over a typical adversarial witness: a different incentive structure.

Adversarial witnesses are more likely to favor their party's position for a whole host of reasons, said Cheng, co-author of ''Modern Scientific Evidence: The Law and Science of Expert Testimony'' (2015 ed.).

''They are obviously paid by the party, but even beyond that, the mere fact of being associated with a party and wanting to please them (or avoid conflict) make it more likely that the expert will agree with the party's position,'' he said.

''And given that parties can selectively retain experts—i.e., hire ten experts and only present the two most favorable findings—adversarial experts are more likely to present more extreme positions,'' Cheng said.

Cheng, whose research focuses on the ''interaction between law and statistics,'' says the neutral expert ''has none of these problems.''

They work for the court, and pleasing the court means being comprehensive and balanced, he said.

''Their position on the issue is also more likely to be representative (in a statistical sampling sense) of the overall population of experts in the field,'' Cheng said.

Lee Hollaar, a former professor at the University of Utah's School of Computers and a frequent expert witness in intellectual property cases, offered a practical advantage: Litigants may be more likely to respond positively to information requests from court-appointed experts than party-retained experts.

Litigants appreciate that the neutral expert may not have formed an opinion and will want to encourage that expert to come up with a ''favorable independent opinion,'' he told Bloomberg BNA.

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Judges Reluctant to Appoint Experts. For decades, judges have been allowed to appoint their own experts. But there has been no clear trend in favor of court-appointed experts.

Despite encouragement, judges have been reluctant to make appointments under Federal Rule of Evidence 706, Imwinkelried said.

And for good reason. Sonenshein said judges have ''legitimate fears'' in appointing experts.

''If only one expert is selected, that expert may represent only one school of thought where there are respectable opposing views,'' Sonenshein said.

For example, imagine choosing an economist from the University of Chicago, which trends conservative, to the exclusion of an expert from Harvard or MIT, which is viewed as liberal, he said.

''Judges fear putting the court's imprimatur on a single expert,'' Sonenshein said.

But Hollaar, the former Utah professor, offered another view.

Judges are rightly concerned that the expert might ''usurp their role in deciding the case or some of its elements when they hinge on technical issues,'' Hollaar said.

This can happen when the neutral expert is the only one that is going to testify on a technical aspect that can determine the outcome, and'' neither the judge nor the jury fully understand it,'' he said.

There is also the risk of juror confusion.

Hollaar said a jury might be confused if a court-appointed expert offers an opinion that differs from both of the parties' positions, and is questioned by both of the parties during a double cross examination.

Juries are more likely to understand when an expert tries to explain one side's theory and is tested by the other side during cross examination, he said.

Gross said he sees no disadvantage to the use of neutral experts provided parties can also call their own experts.

And more than one neutral expert can be appointed where the ''field is genuinely split,'' like doctors on the value of screening tests for prostate cancer, he said.

Practical Concerns Also Abound. Judges have practical concerns as well.

Posner, a former professor at the University of Chicago Law School, said judges also see this approach as creating more work for them.

A judge ''has to preside at the deposition of the neutral expert, since the neutral does not have the protection of any of the lawyers because he isn't employed by any of the parties,'' he said.

Gross, co-author of ''A Modern Approach to Evidence,'' (5th ed.) said judges know that party-appointed experts prepare very carefully for litigation.

But judges are in no position to step in and prepare experts themselves, he said.

''We have a system with very few judges per lawyer, so most of the work of investigating, preparing and conducting civil litigation goes on with no judicial participation,'' he said.

Judges may not even know where to find neutral experts who are highly versed in complex subjects, Cheng said.

Imwinkelried agreed. ''Judges believe that they don't have the time, background, or institutional mechanisms to find the right 'neutral' witness,'' he said.

Runkle, whose group assists judges in finding ''highly qualified'' scientific experts, said it can take several weeks to identify experts appropriate to the specific issues the court needs assistance on.

But it can get done.

What Will Future Bring? Kennerly, the plaintiffs' attorney, said we won't see an increase in the use of neutral experts unless there's a change in the culture of litigation.

Unless litigators and parties ''start agreeing on the use of 'neutral' experts, it's unlikely courts will start imposing 'neutral' experts on the litigation,'' he said.

But Imwinkelried, of UC Davis, was more hopeful.

He said conversations over the years with experts lead him to believe that a ''limited'' approach to appointment could work, and would be more attractive to a judge trying to find the ''best'' expert witnesses.

A limited appointment merely asks experts to do what they ordinarily do—teach, he said.

''While they're ordinarily lecturing to students, here in effect they would be lecturing to judges and jurors,'' he said.

Many of the ''most scrupulous experts I've met have expressed a dislike for the combative nature of litigation,'' Imwinkelried said.

If, instead, the experts were asked only to give the judge and jury a sense of the basics in the field, they can ''avoid getting down into the trenches with the opposing partisan experts,'' he said.

Experts who have a distaste for the adversary system may find such a limited appointment much more to their liking, Imwinkelried said.

In Part Two, Bloomberg BNA explores whether ''neutral'' experts actually exist, and examines the types of cases most suited for appointed experts.

BY BRUCE KAUFMAN

To contact the reporter on this story: Bruce Kaufman in Washington at bkaufman@bna.com

To contact the editor responsible for this story: Steven Patrick at spatrick@bna.com