THE FEDERAL JUDICIAL CENTER
THURGOOD MARSHALL FEDERAL JUDICIARY BUILDING
ONE COLUMBUS CIRCLE, N.E.
WASHINGTON, DC 20002-8003

RESEARCH DIVISION
TEL.: 202-273-4070
FAX: 202-273-4021

January 27, 1997

Professor Daniel J. Capra
Fordham Law School
140 W. 62nd St.
New York, New York 10023

Dear Dan:

We promised to suggest issues that you may wish to keep in mind as you draft proposed amendments to FRE 706. Our suggestions grow out of interviews we conducted seven years ago with judges who had appointed such experts under authority of this rule. Our study is summarized in the enclosed law review article.[1] We have included additional reference material in endnotes.

Current practice under Rule 706 is an example of courts struggling to adapt existing authority to meet evolving needs. The existing rule anticipates that appointed experts will be present trial testimony in a manner similar to the parties' experts. In the past twenty-five years the role of court-appointed experts has expanded beyond this testimonial function. We found that only about half of the appointed experts in our study testified at a trial. Nontestimonial duties recognized by federal courts include educating the court about underlying science and technology issues,[2] aiding the court in screening expert testimony by commenting on the scientific validity of proffered expert testimony,[3] reviewing discovery documents and materials,[4] reviewing proposals for class action certification,[5] preparing reports regarding future claimants to guide a court in allocating the proceeds of a settlement fund,[6] preparing videotaped testimony on the state of scientific knowledge as part of a multi-district litigation pretrial process,[7] and even developing proposals for bring legal doctrines regarding protection of computer software into accord with current standards and practice of computer science.[8]

The strain that exists in adapting the existing rule to current needs also is indicated by the extent to which the authority of experts appointed under FRE 706 is supplemented by appointment as a special master under FRCivP 53.[9] Also, a number of current cases seem to favor of appointment of "technical advisors" under the courts inherent authority rather than its

codification in FRE 706.[10] The fundamental problem is confusion regarding the authority of the court to use this mix of overlapping procedures to engage in the activities listed above.

Before offering suggestions, we should mention that when we asked judges about the need for changes in Rule 706, most judges indicated that they were satisfied with the present form of the rule. This satisfaction likely was related to their satisfaction with the service provided by the expert (only two of the sixty-five judges expressed any reservations). We also suspect that the practice of some judges to supplement the authority of FRE 706 experts with the authority of FRCivP 53 special masters and the inherent common law authority of court to appoint experts and advisors, tended to disguise any shortcomings of the rule.

Also, most judges indicate that they view the use of a court-appointed experts to be an extraordinary procedure that should be reserved for the few cases where the dispute turns on evidence that is not readily comprehensible and where the traditional adversary process has failed to produce information for resolving a highly technical dispute. We offer these suggestions, not to replace the role of adversarial experts in common litigation,[11] but only to improve the use of appointed expert in that narrow spectrum of cases in which such information is required for a reasoned and principled resolution of the dispute.

Clarify Authority to Assess Costs to Compensate the Expert According to a Party's Ability to Pay. The judges' most common suggestion for changes in the rule was to clarify the court's authority to order compensation of the experts. Compensation of experts was often mentioned in our discussions with judges as an impediment to effective use of appointed experts under FRE 706. Such problems extend beyond the authority to compensate experts under the rule to the practical problem of enforcing payment terms. Concern about securing payment causes some judge to restrict appointment of experts to only those cases in which the parties consent.[12]

The problem of compensating appointed experts is most common in civil cases when one or both parties resists contributing to the costs of the experts. The current rule includes broad authority to permit courts to allocate costs as the court sees fit. Most judges require the parties to split the expert's fee, with the party prevailing at trial being reimbursed for its portion. When one party is indigent judges are reluctant to order the nonindigent party to advance the full cost of the expert, even though current case law indicates that a judge has discretion to allocate the fees among the parties as he or she finds appropriate, and to reconsider this allocation as part of the final award. This includes the authority to order one party to pay the entire costs.[13]

Clarify Expectation Regarding Ex Parte Communication between the Judge and Appointed Expert. FRE 706 does not explicitly address the issue of

whether the judge and the appointed expert may communicate *ex parte* during the course of the litigation. Conversations with judges indicated this is a particularly troubling issue.[14] Six judges mentioned the need for more guidance in the rule or advisory committee notes concerning appropriate forms of communication between the judge and the appointed expert. Case law and canons of judicial ethics discourage off-the-record contacts between a judge and an expert witness.[15] However, some judges have relied on the court's inherent authority to appoint an expert as a "technical advisor" to avoid constraints on such communication.[16]

Our interviews revealed considerable *ex parte* communication between judges and experts as well as some confusion concerning proper conduct. More than half of the judges indicated they communicated directly with the expert outside of the presence of the parties. About half of these judges limited their *ex parte* discussion to procedural aspects of the expert's service, including matters of availability. The remaining judges communicated with the court-appointed experts on at least some occasions to elicit technical advice outside the presence of the parties. In most of these situations the very purpose of the appointment was to provide the judge with one-to-one technical advice. (Many of these were patent cases.) We did not systematically ask about consent, but some judges indicated that the parties expressly consented to the *ex parte* communications. In all other cases it appeared from the context of the interviews that the parties were generally aware of the arrangements and either expressly consented or failed to object.

Consider noting in the rule the circumstances in which some form of *ex parte* communication will be permitted, and the safeguards that can be employed to minimize the opportunity that such communication can disadvantage a party. In *Reilly*,[17] the United States Court of Appeals for the First Circuit affirmed the inherent authority of the court to appoint a technical advisor and offered a number of suggestions for diminishing the concerns about *ex parte* communication. The court suggested that the expert should be instructed on the record and in the presence of the parties, or the duties of the expert should be recorded in a written order. And at the conclusion of his or her service, the technical advisor should file an affidavit attesting to his or her compliance with these instructions. The court noted with approval that some judges have gone further, making a record of discussions and disclosing the record to the parties. These safeguards may do little to comfort those who see any form of *ex parte* communication as an unforgivable intrusion into the adversarial system, but such safeguards will permit the parties to remain informed of the nature of the assistance and raise objections when the intended form of assistance encroaches on the duties of the judge. At the same time, information about the expert's advice will permit parties to challenge misplaced factual assumptions and debatable opinions.

Rule 706 also fails to address the question of whether *ex parte* communication should be permitted between the expert and the parties. We found that about half of the responding judges permitted direct, separate communication

between the expert and one or more parties. Often, the nature of the appointment and the role of the expert led naturally, if not inexorably, to that practice. The clearest example was the medical examination of a party by an expert to determine the extent of injuries. *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 or when the expert must assemble data from the parties. Such circumstances should be easy to anticipate and the order of appointment can specify the procedures and safeguards that will control such communications.

Clarify Authority to Limit Deposition and Cross-Examination of Appointed Expert. Currently the FRE 706 permits the appointed expert to be deposed and cross-examined without any indication of the need for limits on such inquiries. Judges in a number of cases have issued orders limiting such inquiries and have on occasion substituted informal hearings in court as a substitute for such procedures.[18] Those who have served as appointed experts have told us that they are concerned that absent court intervention, they will be set upon by attorneys for both sides without their own legal counsel to object to improper queries. Judge Pointer has recognized this concern in the multi-district litigation breast implant case and appointed a member of the Advisory Committee on Evidence Rules, John Kobayashi, to represent the national panel of experts during their depositions.[19] Some comment in the rule regarding the opportunity for limiting deposition and cross-examination, depending on the nature of the appointed expert's service, may be appropriate.

On the other hand, FRCivP 53 makes no explicit provision for the deposition of testimony of a special master. When the special master's report involves identifying expert evidence, one can imagine that the use of a special master procedure may be used to bypass the procedural safeguards in FRE 706.

Reconcile Overlap in Authority of Court-Appointed Expert, Special Master, and Technical Advisor. We saved the most ambitious task for last. As noted above, there is considerable overlap in the duties of FRCivP 53 special masters, FRE 706 court-appointed experts, and "technical advisors" appointed under the inherent authority of the courts. You may wish to work with the Advisory Committee on Civil Rules to try to sort out the overlap in authority for these two procedures. The Advisory Committee on Civil Rules has discussed amending Rule 53 and is aware of the overlap with court-appointed experts. Ed Cooper may have advice on how to proceed. (Even though FRE 706 experts can be appointed in criminal cases, separate statutory authority for such appointments may diminish the need for similar coordination with the Advisory Committee on Criminal Rules.)

These are the areas that our research indicate may benefit from attention in an amended rule. Please note that there are a number of other

problems with court-appointed experts: judges often fail to recognize the need for such assistance until the eve of trial; parties rarely participate in the identification of suitable experts, leaving judges to recruit experts through personal and professional contacts; and, judges and juries may give the advice of court-appointed experts more deference than it deserves. We believe that these issues are best addressed through pretrial procedures and expanding the opportunity to recruit experts from among scientific and professional societies. If you see opportunities to address such issues by amending the rule, please let us know and we will expand on our findings in these areas as well.

Please let us know if you want us to expand on any of these ideas or if we can be of further assistance.

Sincerely,

Joe S. Cecil

Thomas E. Willging

Enclosure

[1] Joe S. Cecil and Thomas E. Willging, Accepting Daubert's Invitation: Defining A Role for Court-Appointed Experts in Assessing Scientific Validity, 43 Emory L. J. 995 (1994).

[2] Unique Concepts, Inc. v. Brown, 659 F. Supp. 1008, 1011 (S.D.N.Y. 1987) (court-appointed expert for issues on patent construction, validity and infringement).

[3] Renaud v. Martin Marietta Corp., 972 F.2d 304, 308 n.8 (10th Cir. 1992) (court-appointed expert in geochemistry and hydrology assessed the narrow question of the scientific acceptability of using a single data point to estimate toxic exposure over several years). See also, 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 (1994) (Rule 706 experts will become more common following Daubert). This point may also be made in Margaret A. Berger, Procedural Paradigms for Applying the Daubert Test, 78 Minn. L. Rev. 1345 (1994).

[4] Kerasotes Mich. Theaters v. Nat'l Amusements, No. 85-CV-40448-FL (E.D. Mich. Feb. 2, 1989) (order appointing expert under Rule 706).

[5] Superior Beverage Co., Inc. v. Owens-Illinois, Inc., No. 83C512, Pretrial Order 87-1, 1987 WL9901 (N.D. Ill. Jan. 30, 1987) (expert "is to consider only whether the method of classwide proof proposed by plaintiffs presents . . . an economically and statistically valid alternative to individualized proof," explicitly prohibiting expert from drawing any conclusions regarding the ultimate issues in the case);

[6] In re Joint Eastern and Southern Districts Asbestos Litigation, 830 F.Supp. 686, (E. & S.D.N.Y., 1993).

[7] In re Silicone Gel Breast Implant Products Liability Litigation, MDL No. 926, Order No. 31 (May 30, 1997).

[8] Computer Assocs. Int'l, Inc. v. Altai, Inc., 982 F.2d 693, 713-14 (2d Cir. 1992).

[9] Students of Calif. School for the Blind v. Honig, 736 F.2d 538, 549 (9th Cir. 1984), *vacated on other grounds*, 471 U.S. 148 (1985); Hart v. Community Sch. Bd., 383 F. Supp. 699, 765-66 (E.D.N.Y. 1974), *aff'd*, 512 F.2d 37 (2d Cir. 1975). Another district court expressly granted a special master the power, subject to approval by the court, to "seek the assistance of court-appointed experts." Young v. Pierce, 640 F. Supp. 1476, 1478 (E.D. Tex. 1986), *vacated on other grounds*, 822 F.2d 1368 (5th Cir. 1987), *order reinstated*, 685 F. Supp. 984, 985-86 (E.D. Tex. 1988).

[10] Reilly v. U.S., 682 F.Supp. 150 (D.R.I.), *aff'd in part and remanded in part*, 863 F.2d 149, (1st Cir. 1988); Goetz v. Crosson 967 F.2d 29, 37 (2nd Cir. 1992) (VanGraafeiland, J., concurring and dissenting); Hall v. Baxter Healthcare Corp. ____ F.Supp. ____ (Civ. No. 92-182) (D. Or., 1996) (appointing technical experts to assess scientific reasoning and methodology underlying testimony of party's expert in breast implant litigation).

[11] For examples of suggestions that court-appointed experts should be preferred over parties' experts, see Samuel R. Gross, *Expert Evidence*, 1991

Wisc. L. Rev. 1113; Joanna A. Albers, et al., Toward a Model Expert Witness Act: An Examination of the Use of Expert Witnesses and a Proposal for Reform, 80 Iowa L. Rev. 1269 (1995).

[12] Cecil and Willging, supra note 1 at 1045-54 (discussion of issues that arise in compensating court-appointed experts).

[13] McKinney v. Anderson, 924 F.2d 1500, 1510-11 (9th Cir. 1991) (overruling magistrate's decision to deny appointment of an expert as unduly restrictive because "Rule 706 . . . allows the courts to assess the cost of the experts compensation as it deems appropriate").

[14] Id. at 1029-35 (discussion of *ex parte* communication with court-appointed experts).

[15] Canon 3A(4) of the Code of Conduct for United States Judges provides: "A judge should ... except as authorized by law, neither initiate nor consider *ex parte* communications on the merits, or procedures affecting the merits, of a pending or impending proceeding." See also, Edgar v. K.L., et al., 93 F.3d 256 (7th Cir. 1996) (judge's actions in meeting *ex parte* with panel of experts appointed by judge to investigate Illinois mental health institutions and programs to receive preview of panel's conclusions and to persuade judge that their methodology was sound was grounds for disqualification of judge); Cecil and Willging, supra note 1 at 1031.

[16] Reilly v. U.S., 682 F.Supp. 150 (D.R.I.), *aff'd in part and remanded in part,* 863 F.2d 149, (1st Cir. 1988).

[17] 863 F.2d 149, 159–61 (1st Cir. 1988).

[18] Hall v. Baxter Healthcare Corp. ____ F.Supp. ____, fnt. 8 (Civ. No. 92-182) (D. Ore, 1996); In re Joint Eastern and Southern Districts Asbestos Litigation, 151 F.R.D. 540 (E. & S.D.N.Y. 1993).

[19] In re Silicone Gel Breast Implant Products Liability Litigation, MDL No. 926, Order No. 31f (January 13, 1997).