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RULE 706: COURT APPOINTED EXPERTS

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 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.¹

Rule 706(a) of the Federal Rules of Evidence furnishes a trial court judge with the authority to appoint expert witnesses at the

1. FED. R. EVID. 706.

request of any of the parties or at the court's own discretion.² The trial judge may solicit nominations of experts from the parties, or the judge may select an expert of the court's choice.³ However, the expert witness is under no duty to comply with the court's request to appear.⁴ All of the parties have the right to depose the court appointed witness, and the expert can be called to testify at trial by any of the parties or by the court.⁵ If the proceeding is one that requires just compensation under the Fifth Amendment,⁶ the expert witness will be compensated from an established fund.⁷ In other circumstances, the court will determine how the compensation will be paid.⁸

Even though the use of Rule 706 is "a relatively infrequent occurrence."⁹ it was devised to solve many of the problems normally associated with the use of expert witnesses. It addresses the problem of the litigant who is either unable to afford or to find a suitable witness.¹⁰ The rule also encourages the parties to hire the most qualified person, rather than an expert who will only be favorable to the side who paid his fees.¹¹ An impartial witness is also an aid to the trier of fact who lacks the "experience, intuition or common sense" to weigh and evaluate

2. *Id.* See generally MICHAEL H. GRAHAM, FEDERAL PRACTICE & PROCEDURE, EVIDENCE § 6682, at 361 (1992).

3. *Id.*

4. *Id.*

5. *Id.*

6. U.S. CONST. amend. V. Amendment V states in pertinent part: "nor shall private property be taken for public use, without just compensation." *Id.*

7. FED. R. EVID. 706(b). See GRAHAM, *supra* note 2, at 361.

8. GRAHAM, *supra* note 2, at 362.

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

10. GRAHAM, *supra* note 2, § 6681, at 355. See *McKinney v. Anderson*, 924 F.2d 1500, 1511 (9th Cir. 1990) (holding that a prison inmate who could not afford an expert witness was entitled to court-appointed expert.), *rev'd on other grounds*, 502 U.S. 903 (1991) (mem.).

11. GRAHAM, *supra* note 2, § 6681, at 355. See *Contini v. Hyundai Motor Co.*, 149 F.R.D. 41, 41 (S.D.N.Y. 1993) (stating that the use or failure to use a court appointed expert witness in a products liability case who would "not have a strong pre-commitment to either side may have a significant impact on the structure of the trial").

scientific testimony.¹² The Advisory Committee, wanting to force the settlement of weak cases and, generally, increase the caliber of expert witnesses, believed that having one impartial expert would encourage trial counsel to find better quality experts so that their witness was not made to look less credible by a court appointed authority.¹³ The adoption of Rule 706 would also prevent “[t]he practice of shopping for experts, the venality of some experts, and the reluctance of many reputable experts to involve themselves in litigation.”¹⁴

The holding of the Second Circuit Court of Appeals in *Scott v. Spanjer Bros., Inc.*,¹⁵ made prior to the enactment of the Federal Rules of Evidence, stated that appointing an impartial medical expert is “an equitable and forward-looking technique for promoting the fair trial of a lawsuit.”¹⁶ The Court held that it is

12. GRAHAM, *supra* note 2, § 6681, at 355. See *Unique Concepts, Inc. v. Brown*, 659 F. Supp. 1008, 1011 (S.D.N.Y. 1987) (insisting, in a non-jury trial for patent infringement, on a court-appointed expert to prepare a report for the court prior to trial “regarding issues of patent construction, validity and alleged infringement”); *Board of Educ., Yonkers City Sch. Dist. v. CNA Ins. Co.*, 113 F.R.D. 654, 655 (S.D.N.Y. 1987) (holding that after granting a motion for summary judgment for the City of Yonkers in a breach of contract action concerning liability insurance in a desegregation case, the judge could appoint an expert who would be able to go through volumes of testimony and evaluate the complex issues involved in determining attorney fees, which are “too intricate for an otherwise unaided jury”).

13. GLEN WEISSEBERGER, *WEISSEBERGER'S FEDERAL EVIDENCE* § 706.1, at 378-79 (2d ed. 1995).

14. FED. R. EVID. 706 advisory committee's note. See *DeAngelis v. A. Tarricone, Inc.*, 151 F.R.D. 245, 247 (S.D.N.Y. 1993) (directing the parties to submit names of impartial experts to the court so that the court could “make the selections, utilizing the experts agreed upon by the parties, or relying on its own sources . . .”); *U.S. v. Helmsley*, 733 F. Supp. 600, 603 (S.D.N.Y. 1989) (appointing an out of state physician due to the concern over the ability to get an impartial physician because of Helmsley's “well-known and sizable charitable contributions to medical institutions in the New York area”).

15. 298 F.2d 928 (2d Cir. 1962).

16. *Id.* at 930-31. The judge appointed a physician as an expert witness in a personal injury action involving a mother and her two children who were hit by defendant's truck. *Id.* at 929-30. In overruling an objection that the witness was biased based on his experience as a “plaintiff's doctor,” the court held that

the judge's duty to appoint an unbiased expert to aid the court as well as the jury, to filter out the issues in a normally biased presentation.¹⁷

Rule 706 applies to both civil and criminal cases.¹⁸ In order to allow adequate time to implement the rule, preparation usually begins during the pretrial conference.¹⁹ Pretrial activities include: "a hearing on the order to show cause;" the judge exercising his option to allow the parties to agree on a neutral expert or select from a list of nominations by the parties; the offering of appointment to the expert and, then, allowing him an opportunity to accept; providing the witness with either an oral or written description of his duties; and obtaining the results of the expert's findings and allowing time for both parties to depose him.²⁰

Section (b) of 706, dealing with compensation, states in part that "[e]xpert witnesses so appointed are entitled to reasonable compensation in whatever sum the court may allow."²¹ In *Crawford Fitting Co. v. J.T. Gibbons, Inc.*,²² the Supreme Court

the appellants had ample opportunity to question him on the issue of bias. *Id.* at 931.

17. *Id.* at 931. See *In re Joint E. and S. Dist. Asbestos Litig.*, 982 F.2d 721, 750 (2d Cir. 1992) (holding that the trial court acted within its authority, in a class action suit involving payments relating to asbestos injuries, when the judge appointed an expert to assist on matters in which the court would have an ongoing interest), *modified by* 993 F.2d 7 (2d Cir. 1993).

18. JACK B. WEINSTEIN & MARGARET A. BERGER, WEINSTEIN'S EVIDENCE ¶ 706 [02], at 14 (1993).

19. WEINSTEIN & BERGER, *supra* note 18, ¶ 706[02] at 14-15. See *Scott*, 298 F.2d at 931 (holding that the selection of the witness after the pre-trial conference did not constitute prejudicial error if it was for the purpose of preventing manifest injustice).

20. See WEINSTEIN & BERGER, *supra* note 18, ¶ 706[02], at 14.

21. FED. R. EVID. 706.

22. 482 U.S. 437 (1987). In *Crawford*, the prevailing party in an antitrust litigation sought reimbursement from their adversary for the sum of over \$220,000, which included expert witness costs. *Id.* at 438-39. The Court held when a winning party seeks to be reimbursed for fees which were paid to its own expert witnesses, the party may not recover more than \$30 per day pursuant to 28 U.S.C. § 1821(b). *Id.* at 439. The Court held, however, that "[t]here is no provision that sets a limit on the compensation for court-appointed expert witnesses in the way that § 1821(b) sets a limit for litigants' witnesses." *Id.* at 442.

held that a court-appointed expert witness may charge more than thirty dollars a day, which is the fee allowed for a litigant's witness.²³ In *U.S. v. May*,²⁴ the court suggested guidelines for determining the fees: "the nature, the extent and the value of such services, taking into account all relevant factors . . . [including] time necessarily spent, thoroughness of the services, importance of the matter, and the assistance provided to a final disposition of the issues referred."²⁵

The court's discretion in determining who will pay for the expert can vary according to "the nature of the case, why the need for a court-appointed expert arose, the status of the parties, and the decision and its consequences."²⁶ Usually the judge finds that the loser will pay for the expert.²⁷ *McKinney v. Anderson*²⁸ demonstrates the importance of judicial discretion in determining who pays the expert's fees. A lower court ruled on a prisoner's civil right's suit by stating that, according to Federal Rule of Evidence 706(b),²⁹ both litigants must be able to share the expense for the expert and, therefore, since one party was indigent and since there were no funds allotted for this type of

23. *Id.*

24. 67 F.3d 706 (8th Cir. 1995) Defendant feigned incompetency to avoid criminal charges on income tax evasion. *Id.* at 707. Without court approval or "careful scrutiny" of the doctors' charges, the government paid the doctors' fees. *Id.* at 708. In remanding the case for further evaluation, the court of appeals suggested various ways to determine the compensation. *Id.*

25. *Id.* The Court stated that since the federal judiciary has not specified how a court-appointed expert's compensation should be determined, relevant standards including the Bankruptcy Code and Federal Rule of Civil Procedure 53 should be used for guidance. *Id.*

26. WEINSTEIN & BERGER, *supra* note 2, ¶ 706[03], at 28.

27. *Id.* See *May*, 67 F.3d at 707 (deciding that expert's fees are part of the costs of prosecution and, therefore, must be paid for by the defendant in the case).

28. 924 F.2d. 1500 (9th Cir. 1991), *rev'd on other grounds*, 502 U.S. 903 (1991) (mem.).

29. FED. R. EVID. 706(b). Section (b) provides in pertinent part: "Expert witnesses . . . are entitled to reasonable compensation . . . payable from funds which may be provided by law." In other actions "the compensation shall be paid by the parties."

case, there could be no court-appointed witness.³⁰ The Ninth Circuit Court of Appeals interpreted the phrase “such proportion as the court directs” as meaning that one party can be apportioned with the total fee.³¹ As a result of the flexible interpretation in *McKinney*, an expert witness can be appointed in a case involving an indigent party, even if “the district court apportion[s] all the costs to one side.”³²

New York has yet to codify the common law doctrine encompassing the trial court judge’s discretion to appoint expert witnesses in a court proceeding.³³ Currently, New York employs the common law along with a host of statutes, which address specific areas of the law.³⁴ In *Kessler v. Kessler*,³⁵ a case which dealt with the issue of child custody in a separation proceeding, the New York Court of Appeals reached a decision

30. *McKinney*, 924 F.2d at 1511.

31. *Id.*

32. *Id.*

33. See THE NEW YORK STATE LAW REVISION COMMISSION, A CODE OF EVIDENCE FOR THE STATE OF NEW YORK § 706 (1991) (discussing appointment, disclosure of appointment and allowance for parties to select their own witness).

34. See generally N.Y. COUNTY LAW § 722-c (*McKinney* 1991) (authorizing the court to provide an expert for a defendant who is financially unable to afford one); N.Y. JUD. LAW § 35(3) (*McKinney* 1991) (appointing no more than two psychiatrists to determine whether the defendant should be committed to a state institution); N.Y. CIV. PRAC. L. & R. 3036(2) (*McKinney* 1991). This section states that:

In any action brought pursuant to the simplified procedure for court determination of disputes in which the court shall be of the opinion that evidence by an impartial expert would be of material aid . . . [the court] may direct that such evidence be obtained. The fee and expenses of such expert shall be paid by the parties as, in its discretion, the court may direct.

Id.

35. 10 N.Y.2d 445, 180 N.E.2d 402, 225 N.Y.S.2d 1 (1962). In a custody hearing, the parties agreed to an evaluation by a court-appointed family counselor, but not to the use of psychiatrists and psychologists. *Id.* at 449, 180 N.E.2d at 403, 225 N.Y.S.2d at 3. It was held that the court erred in making its decision by relying on the reports of the psychiatrists and psychologists called on by the counselor in forming her report. *Id.* at 458, 180 N.E.2d at 408-09, 225 N.Y.S.2d at 11.

which typified New York's view regarding the appointment of expert witnesses by a trial court judge. The court held that it is within the trial court's discretion to appoint expert witnesses and have these witnesses testify at trial, as well as be subjected to cross-examination by all of the parties.³⁶

Various statutes govern compensation for court appointed expert witnesses in New York;³⁷ however, courts may employ judicial discretion in assigning fees outside of the confines of the statutes. In the case *In re Machuca*,³⁸ the court held that where extraordinary circumstances were present, an expert could be paid an amount greater than the fee provided by statute.³⁹ The court stated that even in an ordinary case it was difficult to obtain medical witnesses that would agree to work within the state's fee allowance.⁴⁰ The court urged the legislature to either raise the fee scale or allow the court to regulate the amount based on the facts of each case.⁴¹

In the case *In re Director of the Assigned Counsel Plan*,⁴² the New York Court of Appeals stated that it was clear and

36. *Id.* at 452, 180 N.E.2d at 405, 225 N.Y.S.2d at 6.

37. *See generally* N.Y. COUNTY LAW § 722-c (McKinney 1991) (authorizing the court to determine compensation, but only in extraordinary circumstances may it exceed three hundred dollars); N.Y. JUD. LAW § 35(3) (McKinney 1983) (directing the court to compensate psychiatrists, psychologists, or physicians with a sum not to exceed two hundred dollars for one, or three hundred for two or more, except in extraordinary circumstances).

38. 113 Misc. 2d 1044, 451 N.Y.S.2d 338 (Sup. Ct., Suffolk County 1982). After hearing testimony from both sides on a hearing to release petitioner from a state institution after he was acquitted on grounds of "mental disease or defect," the judge determined that two neutral psychiatrists should be appointed. *Id.* at 1044-45, 451 N.Y.S.2d at 339. The court held that due to petitioner's violent acts and "given the complex medical questions" regarding his condition, extraordinary circumstances would warrant fees in excess of the statutory limit. *Id.* at 1048, 451 N.Y.S.2d at 341.

39. *Id.* at 1048, 451 N.Y.S.2d at 341.

40. *Id.* at 1047, 451 N.Y.S.2d at 341.

41. *Id.* at 1049, 451 N.Y.S.2d at 341.

42. 159 Misc.2d 109, 603 N.Y.S.2d 676 (Sup. Ct. N.Y. County 1993). *aff'd*, 207 A.D.2d 307, 615 N.Y.S.2d 406 (1st Dep't 1994), *leave to appeal granted*, 85 N.Y.2d 806, 650 N.E.2d 1325, 627 N.Y.S.2d 323 (1995). After

unambiguous that judicial discretion should be applied to determine the extraordinary measures that are needed to exceed the statutory guidelines of three hundred dollars for the expert testifying in a case involving an indigent party.⁴³ The court held that when determining reasonable compensation, several factors should be considered: “1) the level of skill, training, experience, talent and expertise . . . 2) the nature, extent and quality of the necessary services provided, and 3) the complexity of the issues involved which were the subject of the expert services.”⁴⁴

In cases where fees are not governed by statute, judicial discretion is applied to determine who pays the expert and how much he receives. In *Lehman v. Lehman*,⁴⁵ a child custody and visitation case, the Court of Appeals affirmed the decision to lower the compensation for a psychiatrist from \$11,650 to \$5000.⁴⁶ The decision was based on the fact that the expert lost his neutrality and became a “dedicated partisan of the mother.”⁴⁷ The holding stated that when a court-appointed expert has “abandoned his role as a neutral scientific arm of the court . . . he forfeits all entitlement to a fee.”⁴⁸

Rule 706 and New York’s evidentiary law regarding the court’s appointment of expert witnesses are very similar. Both agree that the trial court judge has broad discretion when deciding whether

approving vouchers for a court-appointed social worker, the Director of the Assigned Counsel Plan of the City of New York returned them to the judge for reconsideration of the amounts. *Id.* at 110, 603 N.Y.S.2d at 677. After review, the judge found that the social worker’s impeccable credentials and the “highly professional, skilled, efficient and dedicated manner” in which he worked warranted the fees he charged. *Id.* at 124-25, 603 N.Y.S.2d at 686-87.

43. *Id.* at 111, 603 N.Y.S.2d at 678.

44. *Id.* at 124, 603 N.Y.S.2d at 686.

45. 70 N.Y.2d 674, 512 N.E.2d 308, 518 N.Y.S.2d 787 (1987).

46. *Id.* at 675, 512 N.E.2d at 308, 518 N.Y.S.2d at 787.

47. *Id.*

48. *Id.* (stating that the expert’s fee was not entirely forfeited because the Appellate Division did not abuse its discretion in awarding the fees). *See also* *Zirinsky v. Zirinsky*, 138 A.D.2d 43, 48, 529 N.Y.S.2d 298, 301 (1st Dep’t 1988) (holding that in a divorce case where an expert appraiser was appointed to evaluate marital property, payment may depend on the spouse’s conduct, regardless of which spouse is better able to pay).

an expert should be appointed, and determining the parties' rights with regard to examining that expert.⁴⁹ The only significant difference is that Rule 706 does not discuss an expert's compensation other than that it shall be reasonable,⁵⁰ while New York has no standard policy on the expert's fees because the policy differs depending upon the area of law in which the expert is testifying.⁵¹

49. See FED. R. EVID. 706(a); *Kessler v. Kessler*, 10 N.Y.2d 445, 452, 180 N.E.2d 402, 405, 225 N.Y.S.2d 1, 6 (1962).

50. FED. R. EVID. 706(b).

51. See THE NEW YORK STATE LAW REVISION COMMISSION, A CODE OF EVIDENCE FOR THE STATE OF NEW YORK § 706 (1991) (discussing appointment, disclosure of appointment and allowance for parties to select their own witness).