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Expert Evidence

Do ‘Neutral’ Expert Witnesses Exist?

Is there such a thing as a “neutral” expert witness?

“Unquestionably yes,” Judge Richard A. Posner of the U.S. Court of Appeals for the Seventh Circuit told Bloomberg BNA.

Posner is a long-time champion for boosting court appointment of neutral expert witnesses. And he tries to practice what he preaches.

“I conduct trials as a volunteer in the district court, though I’m an appellate judge, and if the case has significant technological aspects I ask the lawyers to have their experts get together and nominate a few neutrals, whom I then interview and choose one,” he said.

“With both sides’ experts agreeing on a neutral, one can be confident he or she is indeed neutral,” Posner said.

But others aren’t so sure.

Plaintiffs’ attorney Max Kennerly of Kennerly Loutey in Elkins Park, Pa., told Bloomberg BNA there is “no such thing” as a neutral expert.

“To me, saying there are ‘neutral’ experts is like saying there are constitutional law scholars who don’t have views on the right to abortion or the right to own firearms,” he said.

“How could anyone work in a field long enough to become an expert and not have their own opinions about the subject matter?” Kennerly asked.

Defense attorney Douglas G. Smith, with Kirkland & Ellis in Washington, told Bloomberg BNA that like any expert witness, experts appointed by the courts may have their own “biases or preconceived notions” about the subject matter of a case.

As such, when they are used it’s important to put in place procedural safeguards to try to eliminate or reduce the effect of any biases they may have, he said.

In this three-part series, Bloomberg BNA explores why court-appointed experts haven’t become commonplace in civil litigation, and the forces at work that make that scenario unlikely.

In Part One, we looked at the argument for and against the use of court-appointed experts, and delved into why judges are so reluctant to appoint neutral experts. Here, in Part Two, we ask whether “neutral” experts actually exist, and explore the types of cases most suited for appointed experts. In Part 3, we’ll dig deep into controversial issues involving court-appointed experts, such as whether parties should have veto power

Part Two 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).

over appointed experts and how to cross-examine the judge’s chosen expert.

Do ‘Neutral’ Experts Exist? It can be relatively easy to find an expert who is “clearly independent” from the parties, Professor Edward J. Imwinkelried, of the UC Davis School of Law in Davis, Calif., told Bloomberg BNA.

However, it can be “very difficult to find an expert who has not as yet formed an opinion about the merits of the scientific issue before the court,” he said.

“I’ve worked with experts for over 40 years,” he said. And like jurors, lawyers, and judges, “they’re human; and biases are part of the human condition,” he said.

But court appointment of an expert can, at least, remove the concern that “being paid by one of the parties has affected an expert’s testimony,” Professor Richard D. Friedman of the Michigan Law School in Ann Arbor, Mich., told Bloomberg BNA.

Even so, every expert “comes to a case with his or her own preconceptions, and there is no guarantee that a single court-appointed expert will be giving the best opinion,” he said.

However, Professor Samuel R. Gross of Michigan Law School took issue when asked if “neutral” experts exist.

He said the question itself was “misleading” and “sets up a straw man which allows opponents to claim there are no neutral experts.”

Deborah Runkle, for one, says she never uses the term “neutral.”

Runkle is senior program associate at the American Association for the Advancement of Science, and manages the AAAS’s project on court-appointed scientific experts, which assists judges in finding scientific experts.

The term neutral “sort of implies a blank slate, and each expert comes to the case with a background that contributes to their thinking,” Runkle said.

“I do, however, believe that an expert can be independent or impartial, without a preference for one party over another,” she said.

What Cases Work Best? Asked if certain types of cases are better candidates than others for court-appointed experts, Posner didn’t see distinctions in subject matter.

“The question should be: Will the jurors understand the party experts?”

“If there is significant doubt that they will, a neutral expert should be appointed,” Posner said. “The area of law involved is not important.”

But Kennerly, the plaintiffs’ attorney, said court-appointed experts are most useful in areas where the subject matter is so “dense and technical” that it would be difficult for the court to really understand the dispute without some sort of solid framework.

One good example would be patent infringement litigation, he said.

“As litigators, we get to spend hours and hours with our clients and our experts having conversations that help us get a solid grasp on the subject matter. Judges don’t get that opportunity,” he said.

In patent infringement litigation, it’s not uncommon for the parties to spend hours at a hearing just teaching the court about how the technology works, because, unlike the lawyers, the court hasn’t had an opportunity before that to learn about the technology, Kennerly said.

Lee Hollaar, a former professor at the University of Utah’s School of Computers, told Bloomberg BNA that he has worked as a court-appointed special master in intellectual property cases.

Court-appointed experts work particularly well for software-based cases (copyright, patent, antitrust and tort), where the expert is “more of an interpreter of the software source code for the court and jury rather than providing an opinion,” he said.

In practice, court-appointed experts have been used mostly in federal cases and generally in cases that do not go to trial, Gross said.

“This means that trial testimony, the hardest thing to accomplish with experts who are not prepared by partisan attorneys, is avoided,” Gross said.

In other cases, they are appointed in the process of settling highly complex cases.

Imwinkelried said many of the appointments have occurred in large, class-actions. “There the magnitude of the stakes can warrant this special step; and since the judge gets to spend more time on such cases, it is more feasible to search for and find the right expert,” he said.

In the product liability context, Smith said a multidistrict court appointed experts to assist the court in reviewing the scientific evidence regarding whether breast implants cause disease.

“The experts concluded that the evidence offered by plaintiffs’ experts was not particularly reliable and in doing so had an impact on the litigation,” he said.

Poor Candidates for Appointment of Experts. Are there certain types of cases that are poor candidates for the use of court appointed experts?

Not necessarily, Runkle said.

But there are certain types of cases where it is “just not possible to find an expert who can satisfy the definition of impartiality,” she said.

This arises when all knowledgeable individuals in a given area are employed by an industry that would favor either the plaintiff or defendant, she said.

“In general, cases where there is no academic discipline matching what the judges need are not suitable for court appointed experts,” she said.

Smith, the defense attorney, said there are no litigation subjects where courts have been more or less likely to use court-appointed experts.

“However, due to the costs and other potential downsides of appointing such experts, they have generally only been used in particularly complex cases,” he said.

But there is an additional factor in play that’s more important than the type of case, Imwinkelried said.

“That consideration is the extent of the judge’s unfamiliarity with the subject-matter,” he said.

“The more ignorant the judge feels, the more strongly he or she will be inclined to seek expert, neutral guidance,” he said.

Imwinkelried, who has written about judges and experts for 40 years, noted that judges often appoint experts to “essentially duplicate” the analysis by the opposing, partisan experts.

“The judge needn’t do that,” he said, noting that Federal Rule of Evidence 706(b) says the judge can specify the expert’s duties.

Instead, judges should consider appointing experts for the “limited purpose of giving the judge and jury a primer on the rudiments in the relevant discipline,” he said.

Additionally, if a judge has the benefit of a neutral expert’s presentation on widely accepted propositions in the field and the most highly regarded research studies, the judge will be in a much better position to decide whether a party’s proffered expert is “extrapolating too far,” he said.

Seeking Expertise in Complex Proceedings. Hollaar said technical experts like him aren’t only used as testifying witnesses.

More commonly, they are retained to assist courts in complex proceedings.

Hollaar said he was appointed as what’s known as a “special master” to help a judge with patent claim construction.

“I was able to better focus the issues and suggest a resolution for many of them. The parties could then concentrate on my recommendations in objections to the judge so they could concentrate on the important issues,” he said.

Hollaar has also been appointed as a special master in software copyright cases, to help determine whether there was a colorable claim of infringement by reviewing the parties’ computer programs.

“Finally, a judge might employ a technical expert as an advisor to the court, charged with determining an issue such as a discovery dispute and reporting to the court based on his/her technical knowledge,” he said.

Or even as a sounding board for the court, “much like a law clerk but for the technical rather than legal issues,” he said.

Kennerly noted that in product liability suits involving medications and medical devices, courts sometimes schedule off-the-record “science day” presentations where the parties can fill the court in on the overall scientific picture, “so that the court has some framework

to build upon when it comes time to resolve disputes,” he said.

Using Neutral Experts to Streamline Discovery. Using court-appointed neutral experts can be a highly effective way to ensure the “just, speedy and inexpensive” resolution of complicated discovery matters, Kevin F. Brady, of counsel to Redgrave LLP in Washington, told Bloomberg BNA.

But the “universe of persons with all those skills is small,” said Brady, who specializes in complex litigation.

Brady said court-appointed eDiscovery neutrals help parties maneuver through discovery, manage privileged information and adjudicate disputes at the “interface of law and technology.”

These experts can also help ensure that parties don’t inadvertently engage in sanctionable conduct through an eDiscovery misstep, he said.

At least one court, the Western District of Pennsylvania, has established a panel of eDiscovery special masters, and dispute-resolution services have sought to train and identify neutrals with eDiscovery skills, he said.

“The reality, however, is that most courts have yet to utilize qualified eDiscovery neutrals to reap their potential value and importance in facilitating timely, proportional and fair discovery in cases of all types and sizes,” Brady said.

In Part 3, we dig deep into controversial issues involving court-appointed experts, such as whether parties should have veto power over appointed experts and how to cross-examine the judge’s chosen expert.

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