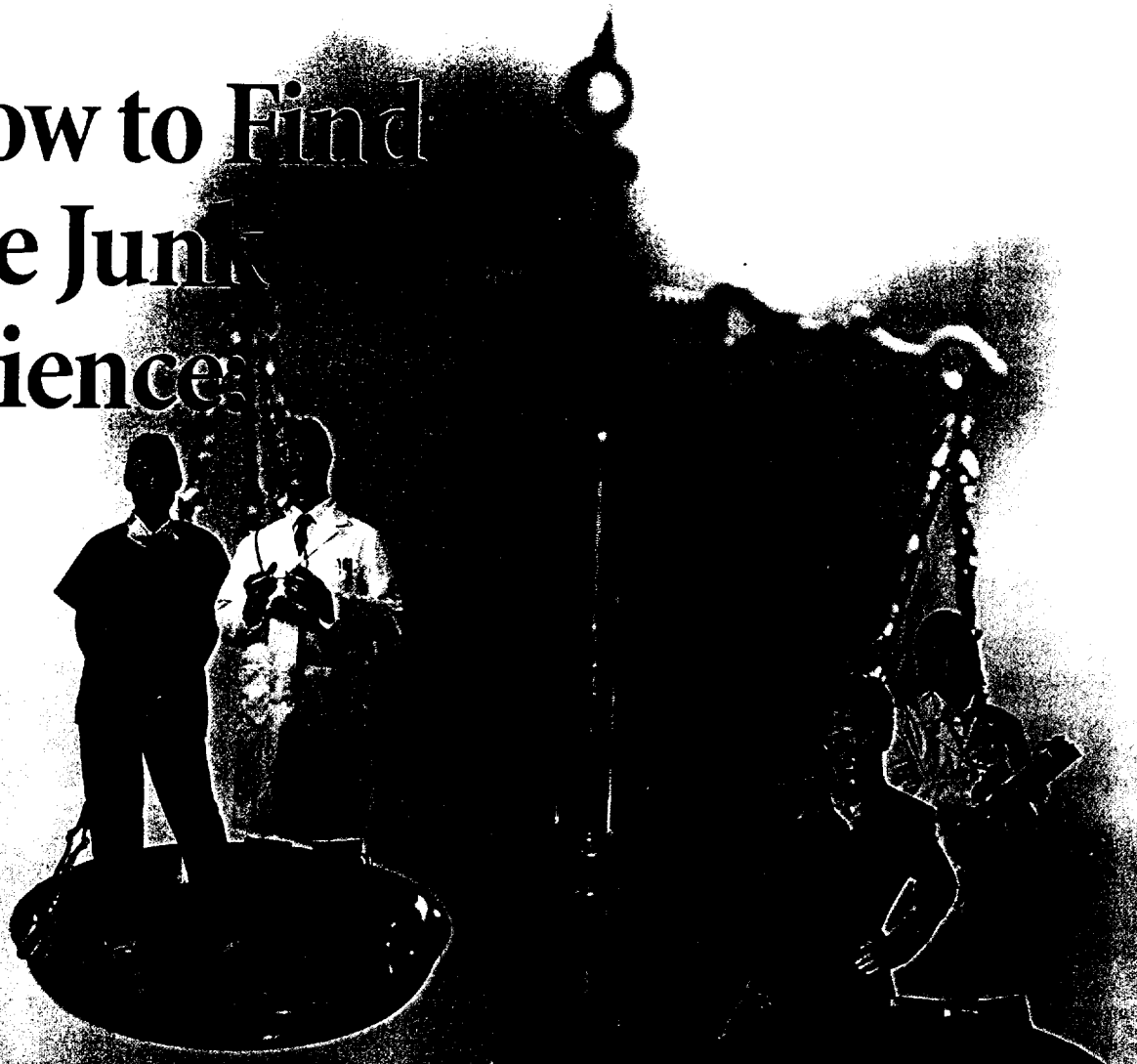
# How to Find the Junk Science:



## Are Rule 706 Panels the Answer?

*Kumho Tire Co. v. Carmichael*, 119 S.Ct. 1167 [illegible] Court of the United States [illegible] major debate about the scope of its holding in *Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579 (1993). It is now clear [illegible] courts and in those states that follow [illegible] admissibility of scientific and technical [illegible] dependent upon meet[illegible] criteria. The question of whether the *Daubert* criteria [illegible] generally pursue[illegible] wanted [illegible]

by Bruce R. Parker and Mary A. Wells

*Kumho Tire*'s effect promises to be significant. Many types of litigation, not previously thought to involve *Daubert* issues (such as contractual disputes), are subject to *Daubert* challenges. *See* Sampson, "*Daubert* Challenges to Economic Experts," March 1999 *For The Defense* 30.

As lawyers begin re-examining their cases to determine which contain *Daubert* issues in light of *Kumho Tire*, a number of suggestions are already being offered by commentators on how to maximize the benefits offered by *Kumho Tire*. One suggestion is that parties should move, under Rule 706 of the Federal Rules of Evidence, for the court to appoint experts to address *Daubert* challenges. Because Rule 706 offers a procedural mechanism for providing trial testimony, it is not immediately apparent why practitioners and commentators would feel that involving experts under Rule 706 would help increase the chances of excluding junk science. The answer probably lies in the coincidental timing of the *Kumho Tire* decision and the publicity generated by the report issued by the Rule 706 "National Science Panel" in the multidistrict silicone breast implant litigation in the federal court in Alabama. Because the National Science Panel concluded that the available science did not demonstrate or substantiate the claim that implants cause autoimmune disease, many have concluded that it is a good example of how Rule 706 can be used effectively to challenge junk science. Using the breast implant litigation as a case study, this paper explores the wisdom of using Rule 706 as a mechanism to increase the odds of successfully challenging junk science.

Despite the good result for the defendants obtained from the Rule 706 National Science Panel, this paper concludes that Rule 706 is not, generally, a procedural tool that should be used to help a court resolve *Daubert* challenges. The circumstances that present reasonable factual scenarios for seeking a Rule 706 panel are described. For the reasons discussed in this paper, such circumstances infrequently occur.

## Scope of Rule 706

Rule 706(a) of the Federal Rules of Evidence sets forth the procedural mechanism for the appointment of experts by the court. The rule provides that a court may appoint experts either on its own motion or the motion of any party. Discretion is given to the court to select its own experts or those agreed upon by the parties. Under the rule, it is mandatory for experts to "advise" the parties of those findings. The rule is silent, however, regarding the form in which the experts are to advise the parties of their findings. Depositions of the experts are permitted under Rule 706(a), and the rule entitles the court or any of the parties to call the expert to testify at trial.

Expert witnesses appointed by the court are entitled to "reasonable compensation" under Rule 706(b). In civil actions, compensation for the court-appointed experts, "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." Like other costs, the costs incurred as a result of compensating a Rule 706 expert "shall be allowed as of course to the prevailing party unless the court otherwise directs." Fed.R.Civ.Proc. 54(d). Courts typically will allocate a Rule 706 expert's fees among the parties during the course of the litigation, and at the close of the litigation will order the losing party to reimburse the prevailing party for some or all of the fees paid by the prevailing party to the expert. See, *e.g.*, *Webster v. Sowders*, 846 F.2d 1032, 1039 (6th Cir. 1988) (permitting allocation of Rule 706 costs, at least temporarily, to the party against whom a preliminary injunction was granted); *Baker Industries v. Cerberus, Ltd.*, 570 F.Supp. 1237, 1248 (D.N.J. 1983) (85 percent of costs associated with Rule 706 experts were assessed against the defendant and 15 percent against the plaintiff who prevailed on almost all issues), *aff'd*, 764 F.2d 204 (3d Cir. 1985). *See also*, Model Code of Evidence, Rule 410, Comment (1947) (basis of current Rule 706) ("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.").

Finally, and importantly, Rule 706(c) provides that the court has discretion whether to authorize disclosure to the jury of the fact that the court appointed the expert. This clause, for reasons described below, is a key provision that minimizes the utility of Rule 706.

Despite its arguable benefits, Rule 706 has been used only infrequently. Since its enactment in 1975, barely 100 reported opinions address the use of Rule 706 experts. In the vast majority of these cases, the court-appointed expert has been used to assist the court and the parties in understanding the complexities of disciplines other than medicine and the sciences. See, *e.g.*, *North Finn v. Cook*, 1998 Westlaw 906443 (full opinion), 166 F.3d 1221 (10th Cir. 1998) (accounting); *United States v. Walls*, 70 F.3d 1323 (D.C.Cir. 1995) (drug trade jargon), *cert. denied*, 517 U.S. 1147 (1996); *North Carolina Fisheries Association, Inc. v. Daley*, 27 F.Supp.2d 650 (E.D.Va. 1998) (economics); *Reynolds v. Alabama Department of Transportation*, 996 F.Supp. 1156 (M.D.Ala. 1998) (mathematics). Apart from the breast implant litigation experience described below, a Rule 706 panel has never been used for the express purpose of addressing a *Daubert* challenge.

## The Rule 104 Option

Rule 706 is not the only procedural mecha-

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nism by which a court can obtain the benefit of expert testimony to assist it in resolving *Daubert* challenges to junk science. Rule 104 of the Federal Rules of Evidence also offers a mechanism that, in many respects, is better than Rule 706.

Rule 104 gives the court the authority to conduct pre-trial evidentiary hearings to determine the admissibility of challenged testimony. At such hearings, the court has inherent authority to retain experts to assist it in understanding factual issues that underlie the dispute. "This inherent power of a trial judge to appoint an expert of his own choosing is virtually unquestioned." Advisory Committee Notes to Federal Rule of Evidence 706. "The inherent power of a trial judge to appoint an expert of his own choosing is clear." *United States v. Green*, 544 F.2d 138, 145 (3d Cir. 1976), *cert. denied*, 430 U.S. 910 (1977). "Appellate courts no longer question the inherent power of a trial court to appoint an expert under proper circumstances...." *Scott v. Spanjer Bros., Inc.*, 298 F.2d 928, 930 (2d Cir. 1962).

There are significant differences between experts retained under Rule 104 and those retained under Rule 706. Most importantly, experts retained under Rule 104 are truly the court's consultants. Such experts do not normally give depositions or trial testimony, but rather are limited to providing opinions and explanations of complex factual issues to the trial judge. The fact that there is no rule which gives the parties the right to question informally or depose such experts does not mean that the court lacks the authority to provide access to the experts.

A good example of the use of Rule 104 as a vehicle for a court to retain experts to assist it in resolving *Daubert* challenges occurred in one of the breast implant lawsuits. In *Hall v. Baxter Healthcare Corp.*, 947 F.Supp. 1387 (D.Or. 1996), Judge Robert Jones, upon reviewing the defendant manufacturers' *Daubert* motions, decided in July 1996 that the issues raised by the defendants' motions were sufficiently meritorious to justify an evidentiary hearing. To assist him in understanding the scientific testimony that would be offered at the hearing, Judge Jones appointed an epidemiologist, rheumatologist, immunologist, and a chemist to serve as an advisory scientific panel.

After completing the selection of his panel in August 1996, Judge Jones held evidentiary hearings over four days. During the hearings, the parties were not permitted to object or to explore in cross-examination the degree to which the expert witnesses were allegedly biased as evidenced by fees generated from the litigation or personal animosities. The hearings were intended to be focused solely on a discussion of the scientific methodology that was used by the plaintiffs' experts in arriving at their opinion that silicone breast implants caused an atypical form of autoimmune disease.

**Rule 706 is not, generally, a procedural tool that should be used to help a court resolve *Daubert* challenges.**

Following the hearing, the attorneys were given an opportunity to prepare videotaped closing statements. After viewing the tapes, panel members submitted their individual reports in September. The parties then reconvened and were permitted to question the panel members on their reports. Judge Jones issued his ruling on December 18, 1996, concluding in large part based upon the findings of the panel, that the plaintiffs' experts' methodologies were scientifically unreliable as were their conclusions that were based on those methodologies. The judge ruled, on a motion *in limine*, that the plaintiffs would not be permitted to introduce expert testimony of a causal relationship between silicone breast implants and an atypical form of autoimmune disease.

Despite the success enjoyed by the defendants in *Hall v. Baxter* with respect to the use of an expert science panel retained by a court pursuant to its inherent powers under Rule 104, Judge Jones was not required to give the parties the opportunity to question the members of the panel on their findings and reports. Under the Rule, Judge Jones was not even obligated to give the litigants copies of the reports prepared by the experts. The lack of such procedural safeguards poses a risk to counsel who may be considering whether to suggest to a court that it retain experts pursuant to Rule 104. In contrast, such procedural safeguards are explicitly provided for in Rule 706. However, Rule 706 is not a panacea for the procedural shortcomings of Rule 104.

## Should Rule 706 Experts be Appointed?

In deciding whether appointment of Rule 706 experts will increase the odds of having expert testimony based on junk science excluded, the first issue that trial counsel needs to address is whether the disputed scientific issue is legitimately one that falls within *Daubert*, or whether the evidence is such that experts can legitimately offer opposing conclusions on disputed issues. If the case is not one that raises compelling issues under *Daubert*, then deciding whether to move under Rule 706 for retention of experts involves factors that have more to do with the need of securing trial testimony from experts who will be perceived as independent. As explained above, the primary difference between experts retained under Rule 104 and those retained under Rule 706 is that, under Rule 706, experts are retained by the court for the purpose of providing trial testimony. Therefore, if the issue is the merit of a *Daubert* challenge, little purpose is served in having an expert panel offer trial testimony that is focused on whether the challenged expert testimony meets *Daubert*'s criteria of scientific reliability. Such testimony is often so technical that its ultimate benefit to a jury, should the *Daubert* motion be denied, is questionable.

There is, however, nothing in Rule 706 that prevents a party from seeking to have the court retain experts to assist in resolving a *Daubert* dispute and in deciding the ultimate causation issue. The balance of this paper assumes that either the court on its own motion or on motion of the parties has retained experts under Rule 706 to assist it in resolving *Daubert* issues.

## Selecting a Panel of Experts

Once the order has been issued that experts will be retained under Rule 706 for purposes of providing opinion testimony on a *Daubert* challenge, trial counsel must focus

on the procedural mechanism for selecting the panel. Among the many issues that need to be considered is how the panel is to be selected. For example, are the litigants entitled to peremptory strikes of proposed experts? Should the court create exclusionary appointment criteria such as prior retention in similar litigation or prior retention by either party in unrelated litigation? Should the court create a committee to select the panel without input or involvement by the parties?

Most, if not all, of the questions in the preceding paragraph arose in the breast implant litigation. The procedural history of the selection of the National Science Panel in the breast implant litigation provides an interesting and valuable lesson to litigants of what they may face if they open Pandora's box and ask for a Rule 706 expert panel.

At approximately the same time that Judge Jones had begun to suggest the creation of a Rule 706 panel, similar thoughts were being expressed by Senior Judge Jack Weinstein and Judge Harold Baer, Jr., federal judges for the Eastern and Southern Districts of New York, respectively. To create their panel, Judges Weinstein and Baer retained Professor Margaret Berger and Drs. Joel Cohen and Alan Wolf to serve on a Selection Committee.

Our attention now shifts to the United States District Court for the Northern District of Alabama, where Judge Sam Pointer presided over multidistrict litigation on silicone breast implants. Presumably uncomfortable with the idea of having Judges Weinstein and Baer preside over a *Daubert* hearing with a Rule 706 panel, the National Plaintiffs' Steering Committee (PSC) in the MDL moved, on April 16, 1996, for an order compelling the creation of a "National Science Panel." The PSC proposed that it supersede the panels proposed by Judges Jones and Weinstein. The defendants objected to the PSC's motion principally on jurisdictional grounds.

Pursuant to a show cause order issued on May 30, 1996, Judge Pointer conditionally ordered the creation of a Selection Panel. The panel was to include the three people previously appointed by Judge Weinstein and three physicians chosen by the court. The Selection Panel was instructed that it:

> not solicit, or receive, suggestions from the parties regarding the names of potential nominees for appointment to the Science Panel, but may receive general suggestions from the parties respecting criteria, qualifications, and possible areas affecting bias or conflicts.

Order No. 31, at 2-3 [*In re: Silicone Gel Breast Implant Products Liability Litigation* (MDL-926) Master File No. CV-92-P-100000-S]. The panel was charged with selecting one to three well-qualified experts in the areas of epidemiology, immunology, rheumatology, and toxicology. In addition, the Order encouraged the Selection Panel to recommend a person "with special expertise in the interrelationship between the forensic sciences and legal processes" who would serve as the Chair of the Science Panel. *Id.* at 3. Funding for the experts was to be divided: one-half would be paid by the plaintiffs as a charge against the common benefit fund established by the court, and one-half would be paid by the defendants.

On June 16, 1996, Judge Pointer denied the defendants' objections and issued an order creating a National Science Panel. On August 23, the court accepted the Selection Panel's recommendation to retain Drs. Barbara Hulka (epidemiology), Peter Tugwell (rheumatology), and Betty Diamond (immunology); a few weeks later, Dr. Nancy Kerkvliet (toxicology) was added to the panel. [The full text of the orders issued in the breast implant MDL litigation can be found by first going to the MDL home page at: HTTP:\\www.fjc.gov\BREIMLIT\mdl926.htm]

## Questions for the Panel

Before deciding whether to move for experts under Rule 706, counsel should first formulate the questions that the panel will be charged with answering. Unless the issues are well defined in advance, the possible outcome cannot be predicted, and the value of court-appointed experts cannot be reasonably evaluated. Once the panel is selected, counsel should move for an order charging the panel with the precise questions that it is to answer. What the parties believe they may be getting with a Rule 706 panel and what they end up with may begin to diverge at this point. Again, the experience in the breast implant litigation is instructive. What began as an attempt by Judges Jones and Weinstein to create a panel of experts that would address *Daubert* issues is very different from what Judge Pointer ultimately ordered the panel to consider.

On October 31, 1996, Judge Pointer issued MDL Order No. 31E. This order required the panel to answer two questions:

1) Does the existing science provide a "reliable and reasonable scientific basis" from which an expert could conclude that silicone implants caused or exacerbated several enumerated conditions?
2) To what extent could the panel's opinions in response to (1) be subject to "legitimate and responsible disagreement" among qualified experts?

Order No. 31E, at 1. These questions, although relevant to the litigation, did not necessarily require the panel to opine on whether the methodologies used to develop the data relied upon by plaintiffs' experts were scientifically reliable. A favorable report, although helpful in defending the cases, might not be helpful in resolving the *Daubert* challenges to the plaintiffs' evidence.

## Legal Counsel for the Panel?

Rule 706 is silent with respect to whether the court has the authority to retain counsel for the panel. Counsel contemplating whether to recommend a Rule 706 panel need to consider the additional expense if the court elects to retain counsel for the panel. Depending upon the scope of the representation, the costs can be substantial.

As previously discussed, MDL Order No. 31 contemplated the selection of an individual skilled in "forensic sciences and legal processes" who would serve as the chair of the panel. The defendants objected to the selection of such an individual on a panel that was charged with answering scientific questions. Ultimately, Judge Pointer decided not to make a selection; instead, on January 13, 1997, he retained counsel for the panel.

One benefit of having counsel for the panel is that it insulates the panel from direct communication from both the court and parties. Rule 706 is silent with respect to the permissibility of *ex parte* communications by the litigants and panel members. If the goal of seeking a Rule 706 panel is to develop independent testimony, it is strongly recommended that the party making the

*Daubert* challenge seek an order excluding all direct communications between the litigants and the panel members.

## Educating the Panel

Once the experts are selected and instructed on the issues, the next step is to educate them on the scientific literature relevant to the litigation. In all probability, if the panel members truly are neutral in the litigation, they probably have had little exposure to the relevant peer-reviewed literature. Among the questions that need to be addressed by counsel are the following:

- Are there to be limitations on the amount of technical literature provided to the panel?
- With or without express limitations, what factors need to be weighed in selecting the literature for the panel?
- Will the panel be encouraged or prohibited from going outside the literature database given to them by the parties?
- Will an evidentiary hearing at which the parties present expert testimony to the panel be requested and, if so, what will be the procedural parameters of the hearing?

In circumstances in which there are multiple defendants, seeking a Rule 706 panel of experts is simply not feasible unless there is a high degree of cooperation among the defendants. The need for cooperation was demonstrated in the creation of the literature database in the breast implant experience. All of the submissions were made on behalf of either all plaintiffs or all defendants. The panel was not informed about which side submitted particular studies. The plaintiffs and the defendants were each instructed by the court to provide the panel with the top 40 articles in each of the four scientific disciplines. After the parties exchanged their initial list, each side was permitted to submit an additional list of one hundred articles. By the time the "educational phase" was completed, both parties had submitted a third list of supplemental literature.

There are a number of factors to consider in determining the type and volume of literature that should be given to Rule 706 experts. Highly qualified experts do not have an abundance of free time in which to review dozens, not to mention hundreds, of technical articles. The risk that parties run in providing a large amount of literature to the panel is that the selection process delays the panel and increases its cost. It is incumbent upon counsel to develop a system that prioritizes the different pieces of literature that may be given to the panel. Without such an organization scheme, the experts will use their own methods in deciding which of the articles they will read. This may be problematic because, unlike counsel and their experts, the panel will probably not be familiar with the literature. Consequently, their selections may not encompass important papers and/or they may become distracted by collateral issues.

## Briefing the Scientific Issues

In an effort to narrow the issues and to facilitate the digestion of a massive body of literature, both sides in the breast implant litigation agreed to submit scientific briefs on issues relevant to the scope of the Rule 706 panel's charges as outlined by the court. When faced with this task, counsel are advised not to forget the nature of the audience reading the brief. A brief that is too adversarial is not consistent with the task of finding objective truth that the panel has been given; it may be rejected by the panel as too argumentative and unscientific. Conversely, an uncritical discussion of the literature is also not advisable because such a document may be used by the plaintiffs to cross-examine your experts at trial. Striking the correct balance requires considerable effort and knowledge of the technical issues. Most importantly, the analyses must be correct. Overreaching or overinterpreting data will almost assuredly damage credibility, just as misciting legal authorities damages credibility with a court. Unlike judges, who expect advocacy, "neutral" experts do not want, expect, or appreciate excessive advocacy.

## The Evidentiary Hearing

Once the scientific briefs are completed, the stage is set for an evidentiary hearing. At this point, numerous litigation tactical options need to be considered, including:

- Should an evidentiary hearing be requested?
- Should the parties ask for a limitation of the number of experts that will be permitted or the time in which the parties will be permitted to conduct direct and cross-examinations?
- Should there be modifications of the typical question-and-answer format given the nature of the hearing, which differs from the typical jury proceeding?
- What tone should be adopted in the cross-examination, and are there "jury friendly" issues, such as litigation bias, that ought not be pursued in cross-examination before the panel of experts?
- When there are multiple defendants, how do the parties decide who will represent the defendants in cross-examining each of the witnesses?
- Will the expert witnesses who make presentations to the panel be placed under oath?

The evidentiary hearing before the National Science Panel in the breast implant litigation was held in July 1997, approximately one year after the panel had been selected. Participating in the evidentiary hearing was professionally challenging given the restrictions established by Judge Pointer. These included limiting the parties to six hours (for direct and cross) to address issues that had taken several hundred pages of briefing to explain. Judge Pointer was adamant that the hearing be principally a scientific discourse among the experts. Consequently, he permitted the parties to abandon the question-and-answer format for direct examinations in favor of a narrative discussion by the experts. Objections were not permitted and counsel were advised by the court that their cross-examinations were to be "friendly." The expert witnesses chosen by the parties to present "testimony" to the panel were not put under oath.

Although inquiries into litigation bias were not expressly prohibited on cross-examination, as they had been with Judge Jones in *Hall v. Baxter Healthcare*, the time limitations and, more importantly, a sense of what the panel wanted to hear, led defense counsel to virtually eliminate the bias issue from their cross-examinations. Scientific bias and failure to follow the scientific method in the plaintiffs' experts' studies were the main issues discussed by defendants in cross-examinations.

Demonstrative exhibits are very important in an evidentiary hearing before a Rule 706 panel of experts. The task of summarizing a substantial amount of scientific evidence

and presenting it in a cogent and persuasive manner in a relatively short period of time is difficult. Computers can be used extensively both to create exhibits and to show the text of important studies discussed in cross-examination. Static exhibits summarizing the relevant literature in discrete areas can be presented and given to panel members for their use in deliberations. Analyses and reports prepared by many of the testifying experts can also be given to the panel.

A risk that parties run with conducting an evidentiary hearing is that the panel may decide after it has heard from the parties' experts that there are additional experts it needs to hear in order to reach its decision. This happened with the breast implant National Science Panel.

Shortly after the evidentiary hearing was completed, the panel announced that it would conduct its own hearing. In November 1997, it met in Washington, D.C. and heard from several invited witnesses. Attorneys were not permitted to cross-examine the experts. Counsel were given the option of submitting questions to the panel, but it was under no obligation to present the questions to the witnesses.

## Panel Report

After all of the briefing and hearings are completed, the panel is left to complete its analysis. In the breast implant litigation in Judge Pointer's courtroom, the panel submitted its report in November 1998, 27 months after the panel members had been selected. Although the panel had been given authorization after renewed motions by the defendants in early 1998 to expand its charge to address *Daubert*-related issues, its report ultimately largely addressed the two issues that were the subject of MDL Order No. 31E (October 31, 1996). Each of the panel members submitted a report and all contributed to the preparation of the executive summary. The panel report concluded that the weight of the scientific evidence did not support the plaintiffs' claim of an association between silicone breast implants and either defined (classic) or atypical connective tissue diseases. With respect to the second question in MDL Order No. 31E (see *supra*), the panel concluded that "the large majority of scientists in our respective disciplines would find merit in our reviews and analyses. Nevertheless, as in every field of endeavor, a few individuals may find disagreements with our statements." How this statement is interpreted by transfer courts adjudicating *Daubert* challenges in future trials remains to be seen.

## Discovery

Rule 706(a) provides that any party may take the deposition of the court's experts; it does not contain special provisions for production of documents or the submission of interrogatories to the witness. Provisions for written discovery should be addressed early in the process, so that the experts can anticipate the need to produce documents on request.

**The lack of procedural safeguards poses a risk to counsel who may be considering whether to suggest to a court that it retain experts pursuant to Rule 104.**

There may be resistance to producing documents or answering interrogatories if the Rule 706 experts believe that their material is confidential or privileged. Problems of this nature can be avoided if clear instructions are given by the court to the experts in advance of their work, so that there are no misunderstandings later, when the court orders that documents be produced.

Rule 706(a) does not distinguish between discovery depositions and trial preservation depositions. Practical problems arise concerning the conduct of depositions in multistate litigation. Will the witnesses be subjected to multiple depositions in multiple cases? How can the court control the depositions so as to complete them in a reasonable length of time, while protecting the rights of all parties to examine completely?

In the MDL breast implant litigation, the Alabama federal court solved these problems by allowing discovery depositions to be followed by trial preservation depositions. The court directed that the Plaintiffs' Steering Committee and the defendants each designate one primary and one secondary examiner for each witness deposed. Then time limitations were set—three hours per side per witness for the discovery deposition. These depositions were not cross-noticed in pending federal cases, because the remand orders provided that depositions taken in the MDL could be used in any remanded cases. Nor were the discovery depositions cross-noticed in the state court cases, in an effort to permit better control of the proceedings.

Preparation of the witnesses for the deposition raises numerous problems. Traditional means are not available; the parties cannot prepare the witness and the court should not prepare them. When counsel is appointed for the experts, that lawyer can prepare the witnesses, yet the preparation may not be complete because counsel may lack a full understanding of the esoteric technical or scientific issues.

The court has a substantial interest in assuring that the Rule 706 experts can prepare fully so that they are better able to answer questions presented and communicate clearly the substance of their opinions. The entire process can be undermined if the testimony is muddled because of clever cross-examination. In the breast implant litigation, the court ordered that the parties submit cross-examination topics to the witnesses in advance and with sufficient specificity; this would allow each expert to prepare complete answers. The plaintiffs strongly objected to this requirement, arguing that they had the right to use aggressive cross-examination techniques, and that surprise and impeachment were tools which would be blunted by advance notice to the witnesses. They argued that the submission of topics would prejudice their ability to cross-examine, and would deny them a fair trial.

The plaintiffs' final presentation of topics was general in nature, yet few questions went unanswered for want of preparation by the witness. Submission of detailed questions by the defense provided a means to communicate with the witnesses about lines of questioning designed to fully develop their opinions.

Judge Pointer presided over the deposi-

tions, which were attended by many lawyers and all of the panelists. The court first contemplated a group deposition of all of the panelists. Such a procedure presents obvious problems in using the testimony for any purpose other than gathering information in the deposition itself. In the end, the witnesses were examined individually, but the court permitted the testifying witness to defer to another panel member who might have more specialized knowledge to respond to a particular question. Objections were raised, primarily to the form of the question, and were resolved by the court as they were made.

### Trial Testimony

The presentation of trial testimony from a court-appointed expert may vary widely, depending on the type of litigation involved. If it is a one-plaintiff case, and the expert is within the court's territorial jurisdiction, the witness will most likely appear live at trial. If the testimony is part of consolidated or multidistrict litigation, the expert may not be within subpoena range, and/or may be unwilling to testify at several different trials. Videotaped preservation of trial testimony can be a good solution to the need to use the testimony in several trials. All issues conceivably relevant in a trial conducted by the transferor court upon remand from the MDL (hereafter referred to as a "remand court") can be examined, and later editing can eliminate matters which may be relevant to some but not all cases.

In the breast implant litigation, trial testimony was taken on videotape, in Judge Pointer's courtroom in Birmingham. No time limitations were imposed, but each witness was generally scheduled for two days of examination. The length of the examinations ranged from seven to 24 hours, and the court curtailed questioning of one witness, after the examination by plaintiffs had consumed over 10 hours.

Rule 706(a) provides that both parties may cross-examine the witness; it makes no provision for direct examination. This omission poses few problems when the Rule 706 expert is retained for one case, where the party calling the expert presumably conducts the direct examination. The situation is unclear, however, in the mass tort context. In this type of litigation, the trial testimony of the Rule 706 expert is generally not given live at each trial but rather is preserved on videotape and made available to remand courts and litigants to be played at trial.

The question of who conducts the direct examination on the videotape can be vexing. At one time in the breast implant litigation, the court considered conducting the direct examination, but after counsel was appointed for the panel, the task of presentation of the direct exam fell to those lawyers.

**Before deciding whether to move for experts under Rule 706, counsel should first formulate the questions that the panel will be charged with answering.**

The scope of the direct examination is an important issue, which may be beyond the control of the parties. Likewise, the order of cross-examination deserves careful consideration. If the witness' testimony is generally favorable, it may be best to immediately cross-examine after the direct, so that issues needing further development can be fleshed out in a positive way, prior to attempts by the opposition to discredit the testimony.

Exhibit lists and demonstrative exhibits can be exchanged by the witness and the parties prior to the testimony being taken. Topics for the examination can be identified in advance, so that the witnesses can fully prepare.

Objections present another problem that deserves careful consideration. Should the judge rule on all possible objections and would such "trial" rulings bind remand courts? Can the presiding judge properly deal with the wide variety of relevancy objections which may be appropriate in different trials? Can the judge deal with foundational objections which may be dependent on evidence from other witnesses, not presented within the Rule 706 proceedings? Judge Pointer decided to leave all substantive objections to the remand courts, and rule on form objections when presented. All objections but those going to form were reserved for presentation to the remand courts. This procedure recognizes that the MDL court could not foresee all of the circumstances which might make an objection valid, yet it leaves a tremendous job for the remand courts.

Careful consideration should be given to all of the circumstances in which the testimony may be used. If the testimony is necessary in litigation that is separate from the case wherein the court-appointed expert is retained, all other affected parties must have notice of the proceeding and the opportunity to appear and cross-examine the witnesses (except in limited circumstances beyond the scope of this article). The depositions of the National Science Panel were cross-noticed in all state court cases. The notice of depositions attached a copy of Judge Pointer's Order 31K (March 10, 1999), which contained the procedures for the trial depositions. That order provided that the testimony shall be taken by designated attorneys for the plaintiffs and defendants, and that if other lawyers wanted to question the witnesses, they should present questions to the designated examiners for consideration. The court would not permit redundant questioning from other lawyers if they appeared to examine. To the authors' knowledge, no state court plaintiffs' attorney requested that additional questions be asked by the Plaintiffs' Steering Committee, but one lawyer appeared for his individual clients. At the conclusion of the questioning by the designated PSC lawyer, this lawyer was given an opportunity to question one of the witnesses.

### Recording the Proceedings

The videotaping procedures require more attention than in the usual case. The quality of the tape is more important if many copies will be required. Presentation of exhibits is problematic, requiring two cameras so that one can capture the testimony and one film the exhibits as they are presented. Counsel may consider adding cameras to film the judge and the examining lawyers, so that the presentation resembles *Court TV*. However, in the MDL, these suggestions were rejected because of cost, technical complications, and debate about the

benefits of a *Court TV*–style presentation.

Editing the videotapes presents a tedious task at a time when the trial lawyers and the witnesses' counsel are ready to move on to other concerns. Still, the correcting of the transcript and editing of the videotape to eliminate colloquy, unnecessary activity or comments, pauses, and disturbances is a important task which cannot be left to staff. Indeed, the editing process creates the final product, the only product which will be available for use at trials. Cooperation among all of the participants and helpful instructions to the video technicians are necessary to get the task completed.

## Using the Testimony

Deposition or trial preservation testimony of Rule 706 experts can be used for any purpose permissible under the Rules of Civil Procedure and the Rules of Evidence. In cases where the Rule 706 experts discuss methodological approaches to reaching opinions on causation, their testimony may be useful for *Daubert* hearings in unrelated litigation. When challenging the reliability of expert testimony, Rule 104 allows parties to use inadmissible evidence. Thus, discovery depositions or trial preservation depositions of Rule 706 experts can be used in support of *Daubert* motions in any litigation where similar issues arise. Testimony of Rule 706 experts may be particularly persuasive to courts dealing with similar issues in unrelated litigation because of their independence.

In the breast implant litigation, the substance of the experts' testimony went to the ultimate issue of causation. In developing that testimony, the experts were questioned extensively about the methodology that must be used to formulate scientifically based opinions on causation. The experts talked at length about the scientific method for determining cause of disease, the principles of epidemiology, the Bradford-Hill criteria, the limitations of differential diagnosis, animal studies, and *in vitro* studies. These are matters that are raised in many product and toxic tort lawsuits.

The testimony of Rule 706 experts may also be used as affirmative evidence at trial provided the opposition had the opportunity to cross-examine the witness when the testimony was taken. If counsel elects to use the testimony of Rule 706 experts, they need to be designated in the same manner as witnesses retained by the parties. Normally this will require compliance with the provisions of Rule 26 of the Federal Rules of Civil Procedure.

In all but the exceptional case, the court should inform the jury that the experts have been appointed by the court. In the breast implant litigation, it would have been very difficult to keep that fact from the jury, considering that the judge was present to rule on objections, numerous references were made to the court's charge to the experts, and the experts asked the court for guidance at times. Although a remand court has the discretion to withhold such information, it would be a disservice to the Rule 706 process and the judicial system if a remand court chose not to tell the jury that the experts were appointed by the court.

There has not been a case tried using the testimony from the National Science Panel. It is, therefore, too early to know the impact such testimony may have on jurors. The belief among those involved with the process is that Rule 706 expert testimony will be a tremendous help to jurors attempting to resolve the "battle of experts" that is played out in each case. Because of the difficulties discussed above in preparing the Rule 706 experts for trial, it is unlikely that a defendant will opt to defend the generic issues by relying solely upon their testimony. Preferably, retained experts will be permitted to comment and collaborate upon the panel's expert testimony. A trend among judges trying complex and protracted cases is to limit parties to one expert on each issue. Only time will tell if trial counsel, if forced to choose between court-appointed experts and counsel's own experts, will opt for the testimony of the former. This may prove to be a severe limitation on the effectiveness of the Rule 706 expert testimony.

## Lessons Learned and Recommendations

One lesson learned from the breast implant experience is that the Rule 706 process can be very expensive and slow. For example, although the Rule 104 process in *Hall v. Baxter Healthcare* and the Rule 706 process in the MDL began at approximately the same time, Judge Jones had already completed his hearing in *Hall* before the MDL Selection Panel had even made its recommendations to Judge Pointer. In addition, more than two years elapsed from the time Judge Jones issued his order excluding the plaintiffs' experts' testimony to the time the National Science Panel submitted its report to Judge Pointer in November 1998. Thus, using the Rule 104 approach, the implant defendants were able to get a favorable published decision from the Oregon federal court in a fraction of the time and at a fraction of the cost that they incurred in the Rule 706 process.

Another lesson learned is that there are no guarantees that the questions that counsel anticipate will be resolved by the panel will be included in the panel's actual charge. For example, although the Rule 706 science panel concept was first advanced by Judges Jones and Weinstein as a means by which to address *Daubert* issues, Judge Pointer's approach was to use the panel to address the ultimate issue of causation. Depending on the circumstances, this may be more or less than what is wanted.

If the science is well developed and supports the defendants, little benefit is gained by asking the court to appoint a panel of experts. Under such circumstances, the benefit of a panel decision that supports the defense is dependent upon the jury believing that the panel's opinion has greater weight because the panel members are independent. However, depending on how the testimony of the experts is developed, it may support *Daubert* challenges to the plaintiffs' experts. This kind of testimony will be hard for a court to disregard. If the *Daubert* challenges are successful, summary judgment should be available.

Allowing the court to decide whether to tell the jury about the independent nature of the panel is a procedural weakness in Rule 706. The Rule gives the court the discretion whether to inform the jury that the experts were retained by the court. If a court elects not to instruct the jury that it retained the experts, a favorable opinion by Rule 706 experts may be received and perceived by the jury as nothing more than an opinion by "paid" experts hired to testify. Conversely, the risk of a Rule 706 expert developing a

continued on page 64

use the computer system to monitor its customers' medication profiles for adverse drug interactions. It held that the decedent's wife could maintain a negligence action against the pharmacy for its failure to notice the computer indication that the prescribed drug should not be taken at the same time as drugs that had been prescribed previously.

## Conclusion

Generally, courts across the country have held that a decedent's act of committing suicide after an overdose of a prescription drug is an independent, intervening act that breaks the chain of legal causation. Older court decisions, with a few exceptions, do not appear to draw a distinction between the overdose situation and where the pharmacist's customer committed suicide as a result of a drug-induced psychological condition. These cases found that death by self-destruction was not an act that would be reasonably expected as a result of the pharmacist's conduct. The courts tended to recognize that suicide is a highly extraordinary event, and accordingly was not foreseeable and therefore constituted a superseding or intervening cause.

However, in the more recent cases where the pharmacist's customer's suicide has resulted from a drug-induced psychological or mental state, the courts have tended to admit evidence which would allow the plaintiff to demonstrate that the drug-induced mental state or condition was reasonably foreseeable. In these circumstances, the plaintiff's suicide would not be deemed to be an intervening cause. FD

**Junk Science, from page 47**

damaging opinion and the judge telling the jury that the expert was an "independent" expert hired by the court highlights the risks of court-appointed experts.

One situation in which using Rule 706 experts may be advantageous is when a defendant cannot afford the cost of experts testifying in repetitive litigation. In such cases, developing "independent" expert testimony that can be used in other lawsuits may well be worth the risks inherent in the process.

Independent of the expert's testimony, a Rule 706 expert report may have significant evidentiary value. Good arguments can be advanced that the Rule 706 report is a public report as defined by Rule 803(8) of the Federal Rules of Evidence and hence admissible. See *Ellis v. International Playtex, Inc.*, 745 F.2d 292 (4th Cir. 1984). If not admissible, the report should satisfy the requirements of a learned treatise, in which event its contents can be effectively placed before the jury by either a defense expert or by using it in cross-examining plaintiffs' experts. Federal Rule of Evidence 803(18).

Another lesson learned is the importance of timing. If a Rule 706 panel is requested at a point when the science is poorly developed, an adverse decision by the panel may have long-term devastating effects in the litigation. Litigants cannot assume that a panel will be kept "on retainer" by a court to evaluate the science as it develops. Therefore, a Rule 706 panel approach is probably not advisable when the science is not well developed or when the existing science, despite its poor quality, is adverse to the defense.

## Conclusion

Court-appointed experts can often provide an invaluable service to courts that are struggling to understand complex scientific disciplines that are the subject of a *Daubert* challenge. In those cases in which counsel feel that a court would benefit from court-appointed experts, the better procedure in the majority of cases is to have the experts retained pursuant to Rule 104 of the Federal Rules of Evidence rather than Rule 706. Resort to court-appointed experts should be limited to those cases in which the principal need of the party is to have expert testimony that is generic and expected to be used repeatedly. Having the court retain Rule 706 experts for the purpose of informing the court on *Daubert* issues is not worth the danger of having the experts reach contrary conclusions and having the court or plaintiffs use the experts in subsequent trials on key liability or damage issues. FD

**Fear of Future Injury, from page 39**

sue diseases, related signs and symptoms, and immune system dysfunction." "Silicone Breast Implants in Relation to Connective Tissue Diseases and Immunologic Dysfunction: A Report by a National Science Panel to the Honorable Sam C. Pointer, Jr., Coordinating Judge for the Federal Breast Implant Multi-District Litigation," November 17, 1998, p. 1 ("Federal Breast Implant Panel Report").

The Federal Breast Implant Panel concluded that: (1) the preponderance of data from animal studies indicates that "silicone implants do not alter incidence or severity of autoimmune disease... there is no evidence that silicone breast implants precipitate novel immune responses or induce systemic inflammation"; (2) in studies where different immunologic response markers and appropriate comparisons were used, "neither immune system activation nor autoreactivity could be reproducibly demonstrated in women with silicone breast implants"; (3) "no association was evident between breast implants and any of the individual connective tissue diseases, all definite connective tissue diseases combined, or the other autoimmune/rheumatic conditions" (with the possible exception of Sjögrens syndrome); and (4) no distinctive rheumatological complaints relating to silicone breast implants could be identified. Federal Breast Implant Panel Report, pp. 4-7.

These conclusions contradict the allegations of women who currently claim they have already developed autoimmune and connective tissue diseases from their breast implants. In addition, the Panel's conclusions would make it very difficult for a plaintiff to recover for fear of developing any of the studied diseases or injuries. One would conclude that the alleged fear is not reasonable since, according to the Panel, there is little likelihood that the plaintiff will become ill with these diseases in the future.

## Conclusion

Claims for fear of future injury in drug and medical device cases are likely to occur with greater frequency. However, the same kind of careful preparation necessary to attack plaintiffs' primary causation and damage claims can be utilized successfully to defeat such claims. FD