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## **The Duty to Preserve: *Victor Stanley* and Its Progeny**

By Carol Owen – June 30, 2011

Modern technology has blessed today's corporations with the ability to store vast amounts of detailed information at low cost. It has also cursed them with burdens of document retention and production that make one long for the days of carbon paper, shorthand dictation, and the IBM Selectric. Four years ago, amendments to the Federal Rules of Civil Procedure pertaining to electronically stored information (ESI) brought "litigation holds" out of obscurity and onto center stage for every corporate litigant. Those who fail to issue and implement a litigation hold of the proper scope at the proper time to the appropriate persons are likely to face, in the course of litigation, a motion for sanctions for spoliation of documents. Sanctions can be as severe as default judgment and imprisonment for contempt. Unfortunately, although corporate litigants are highly motivated, compliance may be difficult to attain, even for the most willing and able.

As one court noted, many corporations take actions that touch multiple jurisdictions, yet they "cannot look to any single standard to measure the appropriateness of their preservation activities, or their exposure or potential liability for failure to fulfill their preservation duties." *Victor Stanley, Inc. v. Creative Pipe, Inc.*, 269 F.R.D. 497, 523 (D. Md. 2010). Because such corporations cannot practicably adopt a different preservation policy for each federal circuit and state in which they operate, they must either adopt a uniform policy that complies with "the most demanding requirements of the toughest court to have spoken on the issue," *id.*, or live with an increased risk of sanctions for failing to do so.

Generally speaking, courts will impose sanctions where the party seeking discovery can prove that documents were destroyed or altered, a duty to preserve the documents had arisen at the time they were destroyed or altered, the nonpreserving party had a "culpable state of mind" at time of the destruction or alteration, the documents were relevant to claims or defenses at issue, and the party seeking the documents was prejudiced by the destruction or alteration. (Cases setting forth the specific test that applies in individual circuits are collected in a chart appended to the *Victor Stanley* opinion. *See id.* at 542–53.) While these elements may appear straightforward, they have proven challenging to apply in practice. The outcomes of spoliation motions have been unpredictable as to whether a sanction will be imposed and, if so, the nature and severity of the sanction that will result. This uncertainty stems from the lack of a settled understanding of issues such as the scope of a corporation's duty to preserve electronic documents, when this duty arises, the level of culpability that should lead to sanctions, and the nature of sanctions that should be imposed. *See generally id.* at 516.

Recent decisions have summarized the global concerns, analyzed the principles that govern them, and provided guidance as to the obligations of the corporate community. These decisions

are exerting a moderating influence on the e-discovery chaos of recent years, and they give institutional litigants some comfort that they will not suffer unreasonable penalties where they have made reasonable efforts to preserve relevant documents.

### ***Victor Stanley v. Creative Pipe***

The leading principles and the extent of potential sanctions are scrutinized in the landmark opinion in *Victor Stanley, Inc. v. Creative Pipe, Inc.*, an 89-page decision that not only provides a thorough analysis of the issues pertinent to the case but also collects and analyzes the leading federal cases in an accompanying chart. In *Victor Stanley*, the plaintiff brought claims of violations of copyrights and patents, as well as unfair competition.

Four years after the complaint was filed, the *Victor Stanley* court addressed the plaintiff's motion seeking sanctions against the defendant for intentional destruction of evidence and other litigation misconduct. The plaintiff alleged that, over the course of four years of discovery during which the president of the defendant company had actual knowledge of his duty to preserve relevant information, the defendants engaged in multiple acts of misconduct. The plaintiff identified eight discrete preservation failures, including failure to implement a litigation hold, deletion of ESI soon after the plaintiff filed suit, failure to preserve an external hard drive after the plaintiff demanded preservation of ESI, failure to preserve files and emails after the plaintiff demanded their preservation, deletion of ESI after the court issued its first preservation order, continued deletion of ESI and use of programs to remove files permanently after the court admonished the parties as to their duty to preserve evidence and issued a second preservation order, failure to preserve ESI after the company's server was replaced, and further use of programs to delete ESI permanently after the court issued numerous production orders. *Id.* at 501.

These, as well as other deletions that did not permanently destroy evidence, led the plaintiff to file multiple motions for sanctions. The fourth motion, decided in September 2010, resulted in filings and exhibits "exceeding the Manhattan telephone directory in its girth," *id.* at 500, as well as six days of evidentiary hearings held over a seven-month period. The defendants ultimately acknowledged that most of the plaintiff's allegations were true. As a result, the court entered a default judgment against them on the copyright infringement claim at the heart of the case. In addition, the court ruled that the company president "be imprisoned for a period not to exceed two years, unless and until he pays to Plaintiff the attorney's fees and costs that will be awarded to Plaintiff as the prevailing party." *Id.*

No opinion could make clearer than *Victor Stanley* what is at stake with regard to the preservation of all discoverable information, including ESI.

### **The Duty to Preserve and Breach of That Duty**

There is no inherent duty imposed on entities or persons to preserve documents; however, at the moment litigation is *reasonably anticipated*, a preservation duty emerges—whether the entity is the initiator or the target of the litigation. *Id.* at 521–22 (citing The Sedona Conference, *The*

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[Sedona Conference Commentary on Legal Holds: The Trigger and the Process](#) [PDF] 3 (public cmt. ed. Aug. 2007)). It is a fact-intensive inquiry, because the duty is not absolute; rather, the preservation efforts must merely be *reasonable under the circumstances* and *made in good faith*. *Id.* at 522. “Reasonableness” depends on what is proportional to the case and consistent with established standards. *Id.* (citing *Rimkus Consulting Grp., Inc. v. Cammarata*, 688 F. Supp. 2d 598, 613 (S.D. Tex. 2010)). See also *Jones v. Bremen High Sch. Dist.*, No. 08-C-3548, 2010 WL 2106640, at \*6–7 (N.D. Ill. May 25, 2010). “Proportionality” is evaluated with regard to what is at stake in the litigation and what costs and burdens are imposed by the preservation efforts. *Victor Stanley*, 269 F.R.D. at 523 (citing Paul W. Grimm, Michael D. Berman, Conor R. Crowley, Leslie Wharton, “Proportionality in the Post-Hoc Analysis of Pre-Litigation Preservation Decisions,” 37 *U. Balt. L. Rev.*, 388, 405). See also *Procter & Gamble Co. v. Haugen*, 427 F.3d 727, 739 n.8 (10th Cir. 2005) (ruling spoliation sanctions should not be imposed where burden or expense of proposed discovery outweighs its likely benefit). The resources available to a party can be a factor affecting whether sanctions will be imposed. As e-discovery has become an increasing focus for litigants and the courts deciding discovery disputes, the debate over defining the “contemporary standards” and when and how they should be imposed has been active, resulting in competing interpretations and outcomes. Whereas failure to issue a written litigation hold in a timely manner may constitute gross negligence in some cases, a written hold may not even be necessary in others. See *Orbit One Commc’ns, Inc. v. Numerex Corp.*, 271 F.R.D. 429 (S.D.N.Y. 2010).

While the relativistic nature of these inquiries is good news for institutional litigants, there remains cause for concern, as some authorities opine that “[t]he general duty to preserve may include *deleted data, data in slack spaces, backup tapes, legacy systems, and metadata.*” *Victor Stanley*, 269 F.R.D. at 524 (citing Grimm, 37 *U. Balt. L. Rev.* at 410) (emphasis added). For example, the court in *Treppel v. Biovail Corp.*, 233 F.R.D. 363, 372 n.4 (S.D.N.Y. 2006), found that “permitting the downgrading of data to a less accessible form—which systematically hinders future discovery by making the recovery of the information more costly and burdensome—is a violation of the preservation obligation.” See also *Orbit One*, 271 F.R.D. at 437 (quoting *Treppel v. Biovail Corp.*, 233 F.R.D. 363, 372 n.4 (S.D.N.Y. 2006)). Even courts that do not denominate downgrading as a violation of the preservation obligation appear prepared to remedy any prejudice that it causes, imposing costs of recovering inaccessible data on the party that converted the data to a less accessible format. *Id.* at 437. As anyone familiar with modern information technology knows, requirements such as maintaining legacy systems where software is no longer subject to an active contract between the litigant and the software company, where information technology staff are no longer familiar with servicing a system, or where a software company no longer exists are likely to impose a heavy burden, even on entities with tremendous resources. The threat that such a burden will be imposed in high-stakes cases diminishes the comfort that would otherwise come from knowing that a “reasonableness” or “proportionality” test will be applied.

Some circuits have an expansive understanding of what it means for a document to be “under the control” of a party to litigation. For example, in the Second and Fourth Circuits, documents are considered to be under a party’s control when that party “has the right, authority, or practical ability” to obtain them from a third party. *Victor Stanley*, 269 F.R.D. at 523 (quoting *Goodman v. Praxair Servs., Inc.*, 632 F. Supp. 2d 494, 515 (D. Md. 2009)) (emphasis added). Within the First, Fourth, and Sixth Circuits, courts have found a duty to notify the opposing parties of evidence in the hands of third parties. *Id.* (citing *Velez v. Marriott PR Mgmt., Inc.*, 590 F. Supp. 2d 235, 258 (D.P.R. 2008); *Silvestri v. Gen. Motors Corp.*, 271 F.3d 583, 590 (4th Cir. 2001); and *Jain v. Memphis Shelby Airport Auth.*, No. 08-2119-STA-dkv, 2010 WL 711328, at \*2 (W.D. Tenn. Feb. 25, 2010)). Courts in the Third, Fifth, and Ninth Circuits have declined to impose such a duty. *Id.* (citing *Bensel v. Allied Pilots Ass’n*, 263 F.R.D. 150, 152 (D.N.J. 2009); *Rimkus Consulting Grp., Inc. v. Cammarata*, 688 F. Supp. 2d 598, 615–16 (S.D. Tex. 2010); and *Melendres v. Arpaio*, No. CV-07-2513-PHX-GMS, 2010 WL 582189, at \*4 (D. Ariz. Feb. 12, 2010)).

With such a complex landscape of opinions, and with the knowledge that default judgment and imprisonment are potential sanctions, many observers have despaired of attaining predictability in the law without many more years of litigation or further revisions to the Federal Rules. There is one bedrock principle, however, that may provide some relief to corporate litigants: The duty to preserve evidence in most jurisdictions is owed to the *court*, not to other parties. The court’s inherent ability to sanction acts of spoliation springs from its duty to protect the integrity of the judicial process so that public confidence is not undermined. *See id.* at 526.

Public confidence requires belief that litigants obtain a just result based on a fair fact-finding process. Public confidence in a just result is not undermined in cases where irrelevant or duplicative documents were destroyed. Conversely, if critical documents were destroyed, were unavailable from any other source, and were not cumulative in their contents, then the fact-finding process is compromised, even if the spoliation resulted from an innocent mistake. For this reason, a court is likely to impose a severe sanction where key evidence has been lost, regardless of the good faith shown by the party in possession of the evidence. Such sanctions may be imposed even though they make “little logical sense” if one views the adverse inference as a punishment for wrongdoing rather than a prophylactic measure required to preserve the integrity of the court system in the view of the public.

This distinction is explained by the *Victor Stanley* court and exemplified in recent cases such as *Orbit One Communications, Inc. v. Numerex Corp.*, 271 F.R.D. 429 (S.D.N.Y. 2010). The *Orbit One* court discussed the Second Circuit rule that ordinary negligence constitutes a culpable state of mind for purposes of a spoliation inference. *See id.* at 438 (citing *Residential Funding Corp. v. DeGeorge Fin. Corp.*, 306 F.3d 99, 108 (2d Cir. 2002)). As *Orbit One* explained, this standard “protects the innocent litigant from the destruction of evidence by a spoliator who would otherwise assert an ‘empty head, pure heart’ defense.” *Id.* (quoting *Residential Funding*, 306 F.3d at 108 and citing for this same principle *Turner v. Hudson Transit Lines, Inc.*, 142, F.R.D.

68, 75 (S.D.N.Y. 1991) and *Pension Comm. of the Univ. of Montreal Pension Plan v. Banc of Am. Secs., LLC*, 685 F. Supp. 2d 456, 464 (S.D.N.Y. 2010)). Courts imposing this rule do so because “[i]t is cold comfort to a party whose potentially critical evidence has just been destroyed to be told that the spoliator did not act in bad faith.” *Id.* at 438.

What does all this mean for corporate litigants? Developing trends in judicial opinions should be discouraging to plaintiffs’ lawyers intent on using the spoliation motion as a weapon to inflate corporate costs and extort settlements. Frivolous sanctions motions based on spoliation of irrelevant and duplicative documents will be denied by courts properly crediting public policy principles, leaving, for the most part, only those motions that seek to rectify some actual harm. Until a settled policy is established, however, a fact-intensive analysis will continue to be required to defeat these motions and develop precedents that will curb abuse.

### **The Culpable State of Mind**

Once a court determines that documents were destroyed and that the destroying party was under a duty to preserve them, the court will examine that party’s culpability. As with duty, a culpability determination requires fact-intensive examination. Courts inquire as to whether the destruction was inadvertent or intentional, though they do so for varying reasons and with varying results.

It remains unsettled what level of bad faith is required before sanctions will be imposed, as well as what consequences will be imposed based on the culpability inquiry. Some courts require a showing of bad faith before any sanction will be imposed; others match the level of sanction to the perceived degree of bad faith; some do not require bad faith at all but require more than negligence; and others will impose sanctions upon a showing of “fault,” which encompasses bad faith, willfulness, and gross or ordinary negligence. *Victor Stanley*, 269 F.R.D. at 529. *See also Ashton v. Knight Transp., Inc.*, No. 3:09-CV-0759-B, 2011 WL 734282, \*26 (N.D. Tex. Feb. 22, 2011).

In sum, courts have grappled with the interplay among conduct, intent, and consequence, and they have reached incompatible results. Perhaps the spotlight now shining on frivolous e-discovery disputes and the overburdened dockets they have created will eventually lead to a settled and uniform understanding of how intent relates to consequence. For now, however, clients and counsel should be mindful that conflicting standards exist and should take precautions to avoid conduct that appears even careless.

### **Destroyed or Altered Documents and Resulting Prejudice**

The final considerations in a spoliation inquiry are whether the documents in question were “relevant” and whether their absence or alteration is prejudicial to the party seeking them. “Relevance” in the spoliation context means that a reasonable trier of fact could conclude that the lost evidence would have supported the claims or defenses of the party that sought it. *Victor Stanley*, 269 F.R.D. at 531 (citing *Thompson v. U.S. Dep’t of Hous. & Urban Dev.*, 219 F.R.D.

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93, 101 (D. Md. 2003) and *Goodman v. Praxair Servs., LLC*, 632 F. Supp. 2d 494, 509 (D. Md. 2009)).

In addition, for sanctions to issue, the party seeking them must have been prejudiced by the absence of the evidence that was destroyed or altered. *Id.* (citing *Pension Comm. of Univ. of Montreal Pension Plan v. Banc of Am. Sec.*, 685 F. Supp. 2d 456, 467 (S.D.N.Y. 2010) and *Consol. Aluminum Corp. v. Alcoa, Inc.*, 244 F.R.D. 335, 346 (M.D. La. 2006)). In general, “prejudice” in the spoliation context means that the party claiming spoliation is precluded from presenting evidence essential to its claim or defense. *Id.* (citing *Krumwiede v. Brighton Assocs., L.L.C.*, No. 05-C-3003, 2006 WL 1308629, at \*10 (N.D. Ill. May 8, 2006) and *Ashton*, 2011 WL 734282, at \*27). Some courts, however, hold that delayed production of evidence causes prejudice, creating a prejudice test that most spoliation respondents are certain to fail. *Id.* at 532 (citing *Jones v. Bremen High Sch. Dist.*, No. 08-C-3548, 2010 WL 2106640, at \*8–9 (N.D. Ill. May 25, 2010)). In addition, courts may apply a presumption that the spoliated evidence was essential, if the destroying party’s conduct was sufficiently culpable, such as where destruction or alteration was intentional. Other courts expand this concept to apply a presumption of prejudice to bad faith or grossly negligent conduct. *See, e.g., Sampson v. City of Cambridge*, 251 F.R.D. 172, 179 (D. Md. 2008). Again, the lack of uniformity among jurisdictions has frustrated responsible corporate citizens who are prepared to comply with the document preservation standards that apply to them but who cannot ascertain what those standards are.

**The State of the Law after *Victor Stanley***

*Victor Stanley* provides a comprehensive and useful survey of preservation and spoliation law as it stood in mid-2010. It summarizes the state of the law and provides guidance as to how our evolving adversary system can remain a source of public confidence in the face of technological developments that threaten to overwhelm corporate budgets and responsible corporate attorneys. *Victor Stanley*, however, has not gone without criticism. The *Orbit One* court disagreed that “the definition of what must be preserved should be guided by principles of ‘reasonableness and proportionality.’” 271 F.R.D. at 436 (citing *Victor Stanley*, 269 F.R.D. at 523, and *Rimkus Consulting Grp., Inc. v. Cammarata*, 688 F. Supp. 2d 598, 613 (S.D. Tex. 2010)). Rather, the court in *Orbit One* advised that “this standard may prove too amorphous to provide much comfort to a party deciding what files it may delete or backup tapes it may recycle.” *Id.* at 436. While acknowledging that reasonableness and proportionality are good guiding principles in general, the court cautioned that these principles are “highly elastic” and “cannot be assumed to create a safe harbor for a party that is obligated under a court-imposed preservation order.” *Id.* Accordingly, the court warned, parties are well-advised to “retain all relevant documents (but not multiple identical copies) in existence at the time the duty to preserve attaches” until a more precise definition emerges as to what must be preserved. *Id.* (quoting *Zubulake v. UBS Warburg LLC*, 220 F.R.D. 212, 218 (S.D.N.Y. 2003)).

Without doubt, the complexities presented by the interplay of developing technologies with long-standing procedural and evidentiary rules will continue to pose challenges to courts, lawyers, and

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litigants. The most important lesson to draw from *Victor Stanley* and its progeny is that proactive measures can ameliorate, if not eliminate, the most significant risk of sanctions posed by an uncertain present.

## Practice Guidance

Corporate citizens and their counsel must become familiar with how to craft, issue, and maintain an effective litigation hold in a cost-effective manner. Best practices on this include these tips.

**Adopt a written retention policy and inform all employees about it.** Explain what records are to be retained, by whom, and for how long. Include a catchall provision setting forth the decision-making process or principles for retention.

**Be sure electronic controls conform to this policy.** Work with your information technology (IT) professionals to be sure they understand the written retention policy and can implement litigation holds that comply with it.

**Know when to issue a hold.** Plan to issue the hold as soon as a dispute has been identified and described with particularity and as soon as an initial list of persons subject to the hold can be developed.

**Know to whom a hold should issue.** Immediately seek to identify those persons likely to have relevant information, including third parties, and deliver a written litigation hold as soon as one of the appropriate scope can be drafted.

**Establish a reporting procedure.** Establish a procedure for employees to report information they may have about a potential dispute.

**Understand the proper scope of a hold.** Clearly define the nature of the information to be preserved and the steps required to preserve it.

**Conduct a reasonable investigation when a dispute emerges.** Take steps to determine who has likely been involved in the situation and what they know.

**Review, revise, and re-circulate the hold as the dispute evolves.** Establish a system to review all litigation holds a company has in place, both periodically and upon key events such as the addition of a party or claim.

**Identify the “end” of the dispute.** Understand whether the dispute has “ended”—once a court decision becomes final, or in the case of a settlement, upon the effective date of the settlement agreement. Include in settlement agreements a provision stating that the litigation hold is lifted as of the effective date.

**Resume normal destruction procedures.** Inform hold recipients and IT personnel that they no longer need to retain documents and what duties they may have to destroy documents and to resume standard destruction procedures following the end of the hold.

### **Conclusion**

The *Victor Stanley* decision and opinions that have commented on its teachings are important milestones in the continuing quest for fairness in the e-discovery context. Without predictability and some modicum of uniformity in the way the Federal Rules of Civil Procedure are applied, corporations are destined to be frustrated in their attempts to determine their legal obligations and comply with them. E-discovery rules have put into the hands of scurrilous and aggressive counsel who sue corporations a powerful weapon that can be used effectively against even prudent and honest corporate litigants. Fortunately, the strong tradition of fairness and balance in American jurisprudence continues to serve as the foundation of our civil procedure, and there is no reason to fear that reasonable parameters will not emerge to govern the e-discovery landscape. The critical question is how quickly they will do so and how the bench and bar can advance that effort.

**Keywords:** litigation, trial evidence, duty to preserve, electronically stored information

[Carol Owen](#) is a partner at Waller, Lansden, Dortch & Davis, LLC, in Nashville, Tennessee.

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## **Is Rule Making a Cure for Preservation Headaches?**

By Richard Marcus – June 30, 2011

Almost everywhere you look, you see references to the preservation of electronically stored information. The Summer 2011 issue of the Trial Evidence Committee newsletter has an article by Carol Owen about the subject, called “The Duty to Preserve: *Victor Stanley* and Its Progeny.” A U.S. Senate report says that former senator John Ensign’s staff deleted incriminating emails. See Eric Lipton and Eric Lichtblau, “Senate Report Urges Reopening Ensign Case,” *N.Y. Times*, May 13, 2011, at A13. The roommate charged with criminal responsibility for the tragic suicide of a Rutgers student has also been charged with deleting a Twitter post about the events. See Lisa W. Foderaro, “Roommate Faces Hate-Crime Charges in Rutgers Spying-Suicide Case,” *N.Y. Times*, Apr. 21, 2011, at A19. The social website Friendster has stirred a controversy by proposing to erase early postings. See Jenna Wortham, “Social Site to Erase Early Posts,” *N.Y. Times*, Apr. 27, 2011, at B1.

These spoliation concerns can affect your cases. As Robert Shapiro noted in his article, “Conclusions Assumed,” in the Spring 2010 issue of *Litigation*, “Spoliation, in case you haven’t heard, is the newest battleground of contemporary litigation, now a continuing sideshow, if not the main event, in courtrooms across the country.” 36 *Litigation* 59, 59, Spring 2010.

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**Rule Changes Needed?**

Adopting new rules about spoliation, sanctions, or both could change things. Some say that's the only way things will change. Magistrate Judge James Francis noted that the present case law on the scope of the preservation duty may be amorphous. He added, however, that "[u]ntil a more precise definition is created by rule, a party is well-advised to 'retain all relevant documents (but not multiple copies) in existence at the time the duty to preserve attaches.'" *Orbit One Commc'ns, Inc. v. Numerex Corp.*, 271 F.R.D. 429, 436 (S.D.N.Y. 2010). A recent article coauthored by former Magistrate Judge Ronald Hedges says that case law is the only source of guidance "[u]ntil [the] next rules change." See Brad Harris & Ron Hedges, "Until Next Rules Change, 2010 Cases Set the Standard," *Nat'l L.J.*, Apr. 11, 2011, Electronic Discovery Special Report, at 1.

In May 2010, the Advisory Committee on Civil Rules of the U.S. Judicial Conference—the outfit that develops proposals to amend the Federal Rules of Civil Procedure—convened a major conference on civil litigation at Duke Law School. For two days, the conferees heard from panels of experts about many aspects of contemporary civil litigation. The conference was full of statements and counterstatements—exactly the sort of skillful advocacy you would expect of a group of American lawyers. (All the conference papers and proceedings are accessible thanks to the [Administrative Office of the U.S. Courts](#).)

Amid all the disputation at the Duke conference, the E-Discovery Panel, composed of leading lights in the field, spoke unanimously. The moderator was Greg Joseph of New York, former chair of the ABA's Section of Litigation. Members of the panel included U.S. District Judge Shira Scheindlin (S.D.N.Y.); Magistrate Judge John Facciola (D.D.C.); private practitioners John Barkett of Miami, Joseph Garrison of New Haven, and Dan Willoughby Jr. of Atlanta; and Thomas Allman of Cincinnati, a retired corporate general counsel. The panel unanimously recommended that the rules be amended to add a rule addressing preservation and proposed elements that such a rule might contain. Their three-page proposal, directed to the Advisory Committee on Civil Rules, is available through [the conference website](#).

**The Rule-Making Background**

The Advisory Committee has considerable experience dealing with e-discovery issues. Beginning in early 1997, lawyers urged the committee to design rule changes that specifically addressed the challenges of this new form of discovery. For a review of this history, see Richard Marcus, "Only Yesterday: Reflections on Rulemaking Responses to E-Discovery," 73 *Fordham L. Rev.* 1 (2004). From an early date, one of the things lawyers asked the committee to do was "tell us exactly how to deal with these problems." Dealing with new problems or technology understandably prompts a desire for specific directives that continues to this day.

The early problem was that although many lawyers were convinced there were serious problems, few were confident about what the solutions should be. The committee was also faced with a rapidly moving target as technology evolved; specific directives geared to current technology

might be meaningless in three years. And the careful statutory cycle for rule amendments means that none can come into effect until about three years of study are completed.

Given these considerations, the actual pace of rule change to deal with e-discovery was cautious and, some said, slow. Eventually, proposed rule changes were published for public comment in 2004 and, after revision, went into effect on December 1, 2006. For a review of these events, see Richard L. Marcus, “E-Discovery and Beyond: Toward *Brave New World* or *1984*?” 236 F.R.D. 598 (2006). These rule amendments did take some halting first steps toward addressing preservation and spoliation. Rule 26(f) was amended to direct the parties to discuss preservation along with other discovery issues at the outset of the case, and what is now Rule 37(e) was added, guarding against sanctions for loss of information due to the good-faith operation of an electronic information system, but the committee notes recognized that litigation holds should be used to avoid loss of information in some instances.

### **Ideas for Moving Beyond the 2006 Amendments**

The Duke panel’s proposal included a range of topics that could be included in a rule and deserve mention.

#### *Trigger*

The triggering event that causes an obligation to preserve to come into existence could be specified. A variety of suggested possible triggering events included service of a complaint or notice of a claim, actual notice of one, a statutory duty to preserve, or steps taken in anticipation of initiating litigation. Alternatively, a general trigger restating the common-law focus on reasonably foreseeable litigation could be written into a rule.

#### *Scope*

The panel recommended that a rule specify with as much precision as possible the scope of the duty to preserve, focusing on the subject matter, time frame, types of data, sources of data, form of preservation, and number of custodians of data to be covered. In addition, the rule could include how long information initially subject to a duty to preserve must be kept if no litigation eventuates.

#### *Sanctions*

The panel also urged that the rule specify different consequences for failure to preserve as required. The rule should specify different sanctions depending on culpability and the degree of harm to the victim’s case resulting from the failure to preserve.

### **Initial Consideration of These Issues**

In the year since the Duke conference, the Discovery Subcommittee of the Advisory Committee has put considerable effort into analyzing the issues raised by the Duke panel. This analysis has identified a variety of issues that devising rules along these lines might implicate. For one thing, there arguably could be debate about whether regulation of preservation of material is within the committee’s authority under the Rules Enabling Act. *See* 28 U.S.C. § 2072. A huge range of

preservation obligations exists in such legislation as the Sarbanes-Oxley Act, and those might be considered “substantive” and beyond the rule-making power.

Equally substantial considerations exist, however, about whether rule provisions could really provide the specifics some desire, even assuming unlimited rule-making power. The range of situations in which preservation issues can arise is extraordinarily broad. The variety of potential parties subject to such duties is very large. Specifics that apply to a large corporation or governmental agency, for example, might make no sense in a two-person operation. Trigger provisions that are suitable for sophisticated entities might be entirely inappropriate for prospective individual plaintiffs.

Technological change also could affect much that matters here. Nowadays many talk of “cloud computing,” although this form of digital activity is still at a nascent stage. But if many entities begin to store their information “in the cloud,” that would seem to raise serious questions about how readily they can ensure that the information will be preserved after a preservation duty has been triggered.

### **Current Possible Approaches**

Given these uncertainties, the Discovery Subcommittee has developed three general approaches and is evaluating them to try to determine which would be most promising. The first is to devise extremely detailed and specific directives on when a duty to preserve arises, what is required, and how long information subject to such a duty must be retained. The second is to address those matters much more generally, in a sense repeating the case law or common-law treatment of them. A third is, rather than attempt to develop any provisions directly regulating preservation, to instead make rules only for “back-end” sanctions issues. Such a sanctions rule could direct focus on the reasonableness of a potential litigant’s demands in relation to preservation, attempting to encourage reasonable demands and proportional retention efforts. The Discovery Subcommittee has developed very detailed sketches of such rule ideas. These detailed sketches can be found in the agenda book for the April 2011 meeting of the Advisory Committee on Civil Rules by following the rule-making links at <http://www.uscourts.gov>. The [agenda materials themselves](#) [PDF] can also be accessed.

There is much to discuss, and many questions to answer, about whether any of these three approaches holds real promise of offering solutions to the problems that lawyers have encountered. The tension between specifics and flexibility presents great challenges. Unless a rule is specific and concrete, it is likely not to provide the desired certainty about how prospective or actual litigants are to behave. But the more specific the rule is, the greater the risk that it will not suitably address the particulars of given situations in which the specific directive could lead to unwise results. And technological change may render specifics inapplicable.

Another problem is to develop a promising integration focusing on both culpability and the importance of the lost information. No matter how culpable a party’s behavior, it would seem that the most severe sanctions should not be imposed if the culpable behavior actually inflicted

no harm on the opposing party's case. Consider, for example, a spoliator who assiduously attempts to remove all files that might be harmful, violating court orders in the process. Suppose also that the contemnor bungled the effort, and no files were actually erased. That behavior might well result in a contempt citation, but deciding the case against the contemnor based solely on his bungled efforts would violate due process. *See Hovey v. Elliott*, 167 U.S. 409 (1897) (holding that the district court violated due process by entering judgment against a party for disobeying a court order that money be deposited into court).

On the other hand, it may be that the most severe of sanctions should be available in cases involving minimal culpability if the loss of information completely eviscerates an opposing party's ability to develop its case. A 2001 Fourth Circuit decision upholding dismissal of a personal injury suit illustrates that point. In that case, *Silvestri v. Gen. Motors Corp.*, 271 F.3d 583 (4th Cir. 2001), while the plaintiff was in the hospital recovering from injuries sustained in an accident while driving his landlady's car, his parents contacted a lawyer who had experts examine the vehicle. The experts concluded that the plaintiff's injuries were much worsened by a malfunction of the airbag deployment system and documented their conclusions with photos. But the plaintiff then discharged the lawyer and hired another, who later filed suit against the car manufacturer. By that time, the landlady had sold the car, and it had been reconditioned. The court held that the plaintiff's failure to ensure that his landlady's car remained unchanged justified dismissal of his suit. Given the litigation shackles under which the manufacturer had to operate, that result is understandable, but it is difficult to say that the plaintiff was very culpable.

### **The Future**

For the present, the study of these alternatives goes on. It may produce a rule amendment proposal in mid-2012. If so, that proposal would be published for public comment in August 2012. Those who are interested should be alert to this possible development. Should the public comment period support adoption of a rule change, the amendment could go into effect on December 1, 2014. So, relief is not imminent, but the process of gestation that could lead to some relief is well under way.

**Keywords:** litigation, trial evidence, preservation, electronically stored evidence

[Richard Marcus](#) holds the Horace O. Coil Chair in Litigation at the University of California Hastings College of the Law and is an associate reporter of the U.S. Judicial Conference's Advisory Committee on Civil Rules.

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## **The Duty to Disclose: Rule 37(c) and Self-Executing Sanctions**

By Lisa Stockholm – June 30, 2011

The adoption of Federal Rule of Civil Procedure 37(c)(1) in 1993 “gave teeth to a significantly broadened duty” to comply with discovery obligations. Chief among the sanctions provided by

Rule 37(c) for failure to timely disclose materials in discovery is the exclusion of the undisclosed information. The rule is said to be automatic, or self-executing, because a court may exclude undisclosed evidence even if no motion to compel has been brought. There is no meet-and-confer requirement prior to bringing a motion to exclude evidence under Rule 37(c). *See, e.g., Fulmore v. Home Depot, U.S.A., Inc.*, 423 F. Supp. 2d 861, 871–72 (S.D. Ind. 2006) (“The Advisory Committee Notes to both the 1993 and 2000 Amendments to Rule 37 make clear that Rule 37(c) operates independent of any motion required by Rule 37(a). Rule 37(c) simply does not require conferral.”). The rule applies not only at trial but also to any motion, such as a motion for summary judgment, or a hearing. It applies both to information not disclosed and to witnesses.

Moreover, courts have enforced the rule strictly, granting motions to exclude evidence even where the failure to disclose was inadvertent and not in bad faith and even where the sanction results in preclusion of an entire cause of action. Accordingly, litigants would be well advised to disclose all potential evidence and to supplement all required disclosures and discovery responses to avoid the possibility of having their evidence excluded. On the other hand, for litigants who have been prejudiced by their opponents’ failure to disclose, Rule 37(c) offers a remedy to offset the disadvantage of unfair surprise.

### **Rule 26 Required Disclosures**

Rule 37(c) sanctions apply to failures to disclose information required by Rule 26(a), as well as to failures to supplement discovery responses in accordance with Rule 26(e). The automatic exclusion sanction of material not disclosed pursuant to Rule 26(a) was added by the 1993 amendments to the rule. In 2000, a subsequent amendment made the same remedy available for material that should have been disclosed in discovery responses. Rule 26(a) lists mandatory disclosures that must be made even in the absence of a request from the opposing party. These disclosures include the identification of witnesses and documents that may be used to support the disclosing parties’ claims or defenses, computations of damages, and insurance agreements. Fed. R. Civ. P. 26(a)(1)(A). In addition, Rule 26(e) imposes a duty to supplement a Rule 26(a) initial disclosure or a response to an interrogatory “in a timely manner if the party learns that in some material respect the disclosure or response is incomplete or incorrect.” Fed. R. Civ. P. 26(e); *Colon-Millin v. Sears Roebuck De Puerto Rico, Inc.*, 455 F.3d 30, 37 (1st Cir. 2006) (“[A] party must supplement its answers to interrogatories if the party learns that the response is in some material respect incomplete or incorrect and the other party is unaware of the new or corrective information.”). Where a party is not required to make a disclosure, there is no duty to supplement.

The duty to supplement discovery responses is ongoing, and failure to supplement responses adequately can result in the exclusion of the untimely disclosed information. The required Rule 26(e) supplementation “should be made at appropriate intervals during the discovery period.” Fed. R. Civ. P. 26(e) advisory committee’s note to 1993 amendments. It is the responsibility of the party in possession of the information to supplement its responses, whether or not the

opposing party seeks additional disclosure. A “party may not free itself of the burden to fully comply” with the obligation to supplement by placing “a heretofore unrecognized duty of repeated requests for information on its adversary.” *Arthur v. Atkinson Freight Lines Corp.*, 164 F.R.D. 19, 20 (S.D.N.Y. 1995) (discussing duty to supplement under Rule 26(e)). The duty to supplement applies whether the corrective information is learned by the client or the attorney and extends not only to newly discovered evidence but also to information that was not originally provided even though it was available at the time of the initial disclosure or response. *Am. Friends of Yeshivat Ohr Yerushalayim, Inc. v. United States*, 2009 WL 1617773, at \*5 (E.D.N.Y. June 9, 2009). In addition, the duty to supplement continues even after the discovery period has closed. *See, e.g., McKinney v. Connecticut*, 2011 WL 166199, at \*2 (D. Conn. Jan. 19, 2011) (noting that the “fact that discovery has closed has no bearing on [the d]efendant’s duty to supplement under Rule 26(e)”). Thus, as discussed below, if newly discovered evidence is offered at trial or at summary judgment, a party may seek to exclude the evidence on the grounds that the proponent had a duty to supplement its discovery responses and that its failure to do so resulted in prejudice. *See, e.g., Net 2 Press, Inc. v. 58 Dix Ave. Corp.*, 266 F. Supp. 2d 146, 161 (D. Me. 2003) (“While supplementation of interrogatory answers may be allowed under some circumstances, it should not be allowed after the filing of dispositive motions and on the eve of trial.” “It makes no sense . . . to allow the plaintiff to avoid summary judgment by placing the necessary information in an affidavit submitted in opposition to the defendants’ motion for summary judgment.”).

### **Rule 37(c) Exclusionary Sanction**

Rule 37(c) enforces the disclosure requirements imparted by Rule 26. Rule 37(c) states, in relevant part:

If a party fails to provide information or identify a witness as required by Rule 26(a) or (e), the party is not allowed to use that information or witness to supply evidence on a motion, at a hearing, or at a trial, unless the failure was substantially justified or is harmless.”

Fed. R. Civ. P 37(c)(1); *see also Hoffman v. Constr. Protective Servs., Inc.*, 541 F.3d 1175, 1179 (9th Cir. 2008) (affirming district court’s order excluding undisclosed damages evidence); *Yeti by Molly, Ltd. v. Deckers Outdoor Corp.*, 259 F.3d 1101, 1106 (9th Cir. 2001); *Ortiz-Lopez v. Sociedad Española de Auxilio Mutuo*, 248 F.3d 29, 33 (1st Cir. 2001); *Wilson v. Bradlees of New England, Inc.*, 250 F.3d 10, 21 (1st Cir.2001) (“[T]he party facing sanctions for belated disclosure” has the obligation “to show that its failure to comply with the Rule was either justified or harmless and therefore deserving of some lesser sanction.”).

Thus, the rule contemplates the exclusion of later-discovered evidence not disclosed in the supplemental discovery responses required by Rule 26(e), as well as the initial disclosures contemplated by Rule 26(a)(1). *See Klonoski v. Mahlab*, 156 F.3d 255, 269 (1st Cir. 1998) (noting that prior to 1993 “adoption of Rule 37(c)(1), no rule specifically provided sanctions for the failure to supplement discovery”). The exclusionary sanction also applies to the disclosure of

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expert witnesses and pretrial disclosures. On its application to expert witnesses, see Rule 26(a)(2); *Daniel v. Coleman Co.*, 599 F.3d 1045, 1049 (9th Cir. 2010) (excluding expert report as untimely where delay was “neither justified nor harmless”); *Poulis-Minott v. Smith*, 388 F.3d 354, 358 (1st Cir. 2004) (“Rules 26(a) and 37(c)(1) seek to prevent the unfair tactical advantage that can be gained by failing to unveil an expert in a timely fashion, and thereby potentially deprive a plaintiff of the opportunity to depose the proposed expert, challenge his credentials, solicit expert opinions of his own, or conduct expert-related discovery.”) (internal quotations and citation omitted). On the application of the exclusionary sanction to pretrial disclosures, see Rule 26(a)(3); *Grajales-Romero v. Am. Airlines, Inc.*, 194 F.3d 288, 297 (1st Cir. 1999). A court may also order sanctions under Federal Rule of Civil Procedure 16(f) for failure to obey a pretrial order. Rule 16(f) is permissive and allows sanctions for, among other things, failure to abide by a court’s discovery orders directing disclosure or supplementation under Rule 26(e).

The sanction is intended to provide “a strong inducement for disclosure” of material that the disclosing party would expect to use as evidence, whether at trial, at a hearing, or on a motion. Fed. R. Civ. P. 37(c)(1) advisory committee’s notes to 1993 amendment; *see also Star Direct Telecom, Inc. v. Global Crossing Bandwidth, Inc.*, 272 F.R.D. 350, 359 (W.D.N.Y. 2011) (“If the Federal Rules of Civil Procedure are to be effective and meaningful, parties should not be permitted to conceal potential sources of responsive information in the hope that the opposing party does not discover their deliberate omission until the discovery deadline has expired.”). As discussed below, in addition to the exclusion of evidence, Rule 37(c)(1) allows a court to impose the full range of sanctions enumerated under Rule 37(b)(2) short of contempt and specifically authorizes the court to impose other penalties, including payment of reasonable expenses and attorney fees caused by the failure to disclose.

The Supreme Court has noted that Rule 37 sanctions must be applied diligently both to penalize those whose conduct may be deemed to warrant such a sanction and to deter those who might be tempted to engage in such conduct in the absence of a deterrent. *Roadway Express, Inc. v. Piper*, 447 U.S. 752, 764 (1980). Following the addition of the exclusionary remedy in Rule 37(c) in the 1993 amendments, courts have given broad effect to the rule. *See, e.g., Poulis-Minott*, 388 F.3d at 358 (1st Cir. 2004) (noting that the rule clearly contemplates stricter adherence to discovery requirements and harsher sanctions for failure to comply). Many courts, including the First and Seventh Circuits, have held that the sanction of exclusion is mandatory, unless the nondisclosing party can demonstrate substantial justification for the failure to disclose or can demonstrate that the failure was harmless. *See, e.g., id.* (holding that the exclusion of undisclosed evidence is a mandatory sanction); *Happel v. Walmart Stores, Inc.*, 602 F.3d 820 (7th Cir. 2010) (holding that the sanction for failure to comply with expert disclosures is automatic and mandatory exclusion unless the failure was substantially justified or harmless); *David v. Caterpillar, Inc.*, 324 F.3d 851 (7th Cir. 2003) (same). Other courts, including the Second Circuit, have reasoned that, while exclusion may be the primary sanction contemplated by the rule, a district court has discretion to impose other sanctions in lieu of exclusion. *Design Strategy, Inc. v. Davis*, 469 F.3d 284, 298 (2d Cir. 2006) (reasoning that mandatory exclusion was inconsistent with the wording of the rule,

which provides that “[i]n addition to *or in lieu of* this [preclusion] sanction, the court . . . may impose other appropriate sanctions”) (quoting Rule 37(c)(1)) (emphasis added).

### **Ninth Circuit Analysis of Rule 37(c) Sanctions**

The Ninth Circuit has thus far not followed the First and Seventh Circuits in explicitly holding that exclusion of undisclosed evidence is mandatory. However, the Ninth Circuit has consistently upheld district court decisions to exclude untimely disclosed evidence where the failure to disclose resulted in prejudice; the Ninth Circuit gives “particularly wide latitude to the district court’s discretion to issue sanctions under Rule 37(c)(1).” *Yeti by Molly, Ltd. v. Deckers Outdoor Corp.*, 259 F.3d 1101, 1106 (9th Cir. 2001). Further, the Ninth Circuit has held that the burden is on the party who failed to comply with its discovery obligations to demonstrate that it meets one of the two exceptions to mandatory sanctions. *Id.* at 1107 (“Implicit in Rule 37(c)(1) is that the burden is on the party facing sanctions to prove harmlessness.”). That is, the burden is on the proponent of the evidence to demonstrate that the failure to disclose was either substantially justified or harmless. Moreover, the Ninth Circuit has held that a district court is not required to make a finding of willfulness or bad faith to exclude the undisclosed evidence. *Hoffman v. Constr. Protective Servs., Inc.*, 541 F.3d 1175, 1179 (9th Cir. 2008) (noting that Rule 37 has been described as “a self-executing, automatic sanction to provide a strong inducement for disclosure of material”) (quoting *Yeti by Molly*, 259 F.3d at 1106). Finally, the Ninth Circuit has held that the sanction may be imposed “even when a litigant’s entire cause of action . . . [will be] precluded.” *Id.* (citation omitted); *see also Yeti by Molly*, 259 F.3d at 1106 (noting that the 1993 revisions to Rule 37 clearly contemplated “stricter adherence to discovery requirements, and harsher sanctions for breaches of this rule. . . .”); *Ortiz-Lopez v. Sociedad Española de Auxilio Mutuo*, 248 F.3d 29, 35 (1st Cir. 2001) (holding that although the exclusion of an expert would prevent the plaintiff from making out a case and was “a harsh sanction to be sure,” it was “nevertheless within the wide latitude of” Rule 37(c)(1)).

### **Substantially Justified or Harmless Nondisclosure**

The factors a court may consider in determining whether the nondisclosure is justified or harmless include prejudice or surprise to the party against whom the evidence is offered, the ability of the party to cure the prejudice, the likelihood of disruption to the trial, and bad faith or willfulness involved in not disclosing evidence at an earlier date. *Woodworker’s Supply, Inc. v. Principal Mut. Life Ins. Co.*, 170 F.3d 985, 993 (10th Cir. 1999); *see also David v. Caterpillar, Inc.*, 324 F.3d 851 (7th Cir. 2003) (same); *MicroStrategy, Inc. v. Bus. Objects, S.A.*, 429 F.3d 1344 (Fed. Cir. 2005) (applying five-factor test); *Macaulay v. Anas*, 321 F.3d 45, 51 (1st Cir. 2003) (factors to consider include “the history of the litigation, the proponent’s need for the challenged evidence, the justification (if any) for the late disclosure, and the opponent’s ability to overcome its adverse effects.”). *See also Gagnon v. Teledyne Princeton, Inc.*, 437 F.3d 188, 197 (1st Cir. 2006) (noting that the advisory committee notes to the 1993 amendments to Rule 37(c) “suggest a fairly limited concept of ‘harmless’”).

As noted above, a showing of bad faith is not required for preclusionary sanctions. However, courts have authorized terminating sanctions for failure to make required disclosures. Courts have relied on Rule 37(c)'s inclusion of allowable sanctions under Rule 37(b). Generally speaking, a court must make a finding of bad faith or willfulness prior to dismissing a case under Rule 37(b). *See, e.g., In re Connolly N. Am., LLC*, 376 B.R. 161, 182–94 (E.D. Mich. 2007) (dismissing with prejudice a case where a bankruptcy trustee failed to turn over 36 bankers' boxes of documents and failed to update discovery responses; finding the trustee was grossly negligent in his discovery duties). *See also Bass v. Jostens, Inc.*, 71 F.3d 237, 241 (6th Cir. 1995) (noting that the sanction of dismissal is available in appropriate cases because it "accomplishes the dual purpose of punishing the offending party and deterring similar litigants from such misconduct in the future") (citing *Nat'l Hockey League v. Metro. Hockey Club, Inc.*, 427 U.S. 639, 646 (1976)).

### Prejudice or Surprise

Concealing theories of liability of damages so that the opposing party has no opportunity to obtain discovery regarding the concealed theories is generally sufficient to demonstrate prejudice. For example, in *Oracle USA, Inc. v. SAP AG*, 264 F.R.D. 541 (N.D. Cal. 2009), the district court for the Northern District of California excluded all evidence of damages stemming from theories not asserted in discovery. The court noted that the plaintiffs had chosen to frame their case around a particular theory of damages and had not identified their newly articulated theories in connection with the required disclosures under Rule 26(a)(1)(A)(iii), nor did they supplement those disclosures for almost two years. The court also discussed the burden and expense associated with discovery in complex cases, noting that the defendants' expert would not have time to complete the required analysis within existing time constraints and that the costs of such analysis would be exorbitant:

Here, Plaintiffs seek to rely on the vague, very general damages allegations in their initial complaint to preserve their new, more extensive damages theories, even though they failed to disclose those theories in discovery for over two years, despite Defendants' efforts from the outset to flesh out Plaintiffs' sketchy damages allegations through appropriate discovery tools. To allow the belated disclosure of the new theories to trigger large new waves of expensive discovery and expert analysis at this late date based on vague allegations that Plaintiffs previously refused to elaborate on despite their ability to do so, would be simultaneously unfair to Defendants, very expensive and hugely time consuming, slowing down what is already very lengthy litigation. Such a result would run directly contrary to the mandate of Rule 1, achieving a dubious trifecta of unfair, glacially slow and exorbitantly expensive litigation.

*Id.* at 549; *see also Reyes Canada v. Rey Hernandez*, 233 F.R.D. 238, 242 (D.P.R. 2005) (excluding evidence where nondisclosure of evidence may not have been an intentional act because "the element of undue and unfair surprise remains"); *Pérez-Pérez v. Popular Leasing*

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*Rental, Inc.*, 993 F.2d 281, 286–88 (1st Cir. 1993) (holding that testimony of undisclosed medical expert that changed theory of the case constituted unfair surprise).

### Ability to Cure Prejudice

Although the ability to cure prejudice caused by untimely disclosure is one of the factors a court may consider in determining whether the nondisclosure was harmless, courts have excluded evidence even where it would be possible to reopen discovery so that, for example, depositions could be obtained from undisclosed witnesses or from previously disclosed witnesses regarding undisclosed documents. Courts have made this finding even where the trial date has not yet been set. *See, e.g., AVX Corp. v. Cabot Corp.*, 252 F.R.D. 70, 81 (D. Mass. 2008). In finding that reopening discovery would not eliminate the prejudice, courts frequently reason that the party to whom material was not disclosed has expended time and resources preparing its case, and should not be required to expend additional resources responding to late-disclosed materials. *See id.*; *see also Primus v. United States*, 389 F.3d 231, 236 (1st Cir. 2004). (“[W]e cannot fault the court for considering the time and expense involved in the government’s having prepared a dispositive motion”); *Santiago-Diaz v. Laboratorio Clinico y de Referencia del Este*, 456 F.3d 272, 277 (1st Cir. 2006) (noting that “the plaintiff’s foot-dragging in announcing her expert . . . deprived the defendants of the opportunity to depose him, . . . pursue countering evidence, or generally prepare their defenses”).

### Effect on Trial Schedule

In *Hoffman v. Construction Protective Services, Inc.*, 541 F.3d 1175 (9th Cir. 2008), the Ninth Circuit affirmed the district court’s exclusion of damages calculations, noting that untimely disclosure would require modification of the briefing schedule and possibly require reopening of discovery. “Such modifications to the court’s and the parties’ schedules supports a finding that the failure to disclose was not harmless.” *Id.* at 1180 (citing *Wong v. Regents of the Univ. of Cal.*, 410 F.3d 1052, 1062 (9th Cir. 2005)); *see also Gagnon*, 437 F.3d at 197–98 (noting that the “multiplicity of pertinent factors” includes an “assessment of what the late disclosure portends for the court’s docket”). District courts have weighed this factor in favor of excluding evidence, even where no trial date has been set. *See, e.g., Melczer v. Unum Life Ins. Co. of Am.*, 259 F.R.D. 433, 437 (D. Ariz. July 16, 2009) (noting that reopening discovery would result in increased expense and delay and that party “was entitled to assume that Rule 37(c)(1) means what it says and that the untimely disclosed documents would be excluded from evidence at trial”).

### Bad Faith

As noted previously, the Ninth Circuit has held that a district court need not make a finding of bad faith and may exclude evidence even when to do so would eliminate a litigant’s cause of action. However, it is likely within the district court’s discretion to consider both the degree of culpability of the nondisclosing party and the effect of the preclusion. For example, in *Network Appliance v. Bluearc Corp.*, 2005 WL 1513099, at \*3 (N.D. Cal. June 27, 2005), the district court for the Northern District of California declined to exclude undisclosed evidence, stating that “under certain circumstances, the imposition of preclusive sanctions may be tantamount to

dismissal of a plaintiff's claims or entry of default judgment against a defendant," and that "[u]nder those circumstances, mere negligent conduct is insufficient to impose the severe penalty of exclusionary sanctions, and a showing of bad faith is required."

### Other Remedies

Rule 37(c) provides for alternative sanctions in addition to or in lieu of the sanction of exclusion. One reason for alternative remedies is that preclusion of evidence is not an effective incentive to compel disclosure of information that would benefit the party to whom it was not disclosed. For example, a plaintiff might discover evidence that would tend to support the defendant's position; excluding such evidence would not punish the nondisclosing party or afford a remedy to the opposing party. Thus, in addition to or in lieu of the automatic preclusion of evidence, the district court, on motion and after affording an opportunity to be heard, may impose other appropriate sanctions.

In addition to requiring payment of reasonable expenses, including attorney fees, caused by the failure to disclose, these sanctions may include an order that facts be taken to be established under Rule 37(b)(2)(A); an order striking pleadings, staying further proceedings until the order is obeyed, dismissing the action or proceeding or any part thereof, or rendering a judgment by default against the disobedient party under Rule 37(b)(2)(C); or informing the jury of the failure to make the disclosure under Rule 37(c)(1). Dismissal is a severe sanction, and a court will impose it only in extreme circumstances. Dismissal may be "imposed only if the court concludes that a party's failure to cooperate in discovery is due to willfulness, bad faith, or fault." *Reg'l Refuse Sys., Inc. v. Inland Reclamation Co.*, 842 F.2d 150, 153-54 (6th Cir. 1988).

### Conclusion

Rule 37(c) was adopted with the intent that compliance with discovery rules be strictly enforced. The sanctions contemplated by the rule are intended not only to encourage compliance but also to penalize noncompliance and deter litigants who might be tempted to shirk their obligations in the future. Because there is no requirement that the parties meet and confer or that the disadvantaged party bring a motion to compel, a nondisclosing party may not have much notice of the other party's intent to exclude evidence. And, because undisclosed evidence may be excluded even where the failure to disclose was not willful or in bad faith, litigants must take seriously their duty to disclose all required information and to supplement their discovery responses, even in the absence of a renewed request from opposing counsel. Rule 37(c) ensures that failure to comply with discovery obligations can have profound, even game-changing consequences.

**Keywords:** litigation, trial evidence, self-executing sanctions, Rule 37(c)

[Lisa Stockholm](#) is with Shartsis Friese, LLP, in San Francisco, California.

## Federal Rule of Evidence 706: Court-Appointed Experts

By John P. McCahey and Jonathan M. Proman – June 30, 2011

Expert testimony is often central to the outcome of a trial. And a litigator is almost never surprised when the trial expert he or she retained—whether a scientific expert, business expert, or some other expert—reaches conclusions favorable to the litigator’s client. Nor is that same litigator particularly surprised when the equally well-credentialed expert retained by the other side reaches a conclusion polar opposite to that of his or her own expert. That litigator knows the trial will be a “battle of the experts” to sway the judge and jury.

The esoteric nature of much expert testimony, however, may make it difficult for that judge and jury to determine which of the two experts’ conclusions is entitled to greater weight. Federal Rule of Evidence 706 provides a means to slice through the fog of conflicting expert testimony and obtain unbiased testimony from a court-appointed expert. Although it has been infrequently invoked in the nearly 40 years since its enactment, Rule 706 may be utilized more often in the future as the issues that judges and juries are called upon to decide become increasingly more complex and the testimony of litigants’ experts become more partisan.

### Court-Appointed Experts and the Adversary System

The adversary system is at the core of American jurisprudence. Dating to the pre-Elizabethan era, its perceived virtue (albeit not free from debate) is that it is better suited than any alternative system to expose falsehoods and allow truth to emerge. It allows each party to control what witnesses and other evidence it will present to the fact finder in support of its claims or defenses or to rebut the testimony and other evidence presented by the other party. The fact finder, guided by the applicable burden of proof, is then in a position to weigh the evidence presented, assess the credibility of the witnesses heard, and reach an informed decision as to which of the two parties should prevail. In fulfilling its role, the fact finder calls upon his or her knowledge gained from everyday life.

The claims and defenses that the fact finder must decide at trial sometimes involve issues of a technical and specialized nature, and testimony from experts is essential to inform that decision. The fact finder, however, usually will not have any frame of reference to draw upon where the parties’ equally impressive experts reach opposite conclusions. In those instances, courts have warned that the adversary system is in danger of breaking down because of the fact finder’s unfamiliarity with the subjects being debated by the clashing experts, leaving the fact finder unable to distinguish between the conflicting opinions offered. *Indianapolis Colts, Inc. v. Metro. Balt. Football Club Ltd. P’ship*, 34 F.3d 410, 415 (7th Cir. 1994) (observing that “judicial constraints on tendentious expert testimony are inherently weak because judges (and even more so juries . . .) lack training or experience in the relevant fields of expert knowledge” and that Rule 706 provides a remedy to help fix “the system we [are resigned to]”). Judge Posner in *Indianapolis Colts* further observed that “[m]any experts are willing for a generous (and sometimes for a modest) fee to bend their science in the direction from which their fee is

coming.” *Id.* Rule 706 in those instances can serve to prevent the fact finder from being “at the mercy of the parties’ warring experts.” *In re High Fructose Corn Syrup Antitrust Litig.*, 295 F.3d 651, 665 (7th Cir. 2002) (citations omitted).

Rule 706’s drafters acknowledged the “deep concerns” that had arisen from the “practice of shopping for experts, the venality of some experts, and the reluctance of many reputable experts to involve themselves in litigation.” Fed. R. Evid. 706 advisory committee’s note. They also pointed to the fact that the “inherent power of a trial judge to appoint an expert of his own choosing is virtually unquestioned.” It was assumed (perhaps too optimistically) that the codification of that inherent power, by itself and without the need to appoint a neutral expert, would serve to deter retained experts and counsel from offering overreaching and unreliable testimony.

Still, Rule 706 was not without controversy when proposed, and Congress debated whether it tinkered too much with the adversary system. The key criticisms of Rule 706 when it was being considered were that no individual, including a court-appointed expert, is truly neutral, and the ideal of an unbiased expert is unrealistic; a court-appointed expert’s conclusions would prove to be determinative, because a fact finder would consider the court’s appointee more credible than the parties’ “hired guns”; and any deviation from the adversary system should be disfavored. *Id.* (“Though the contention is made that court appointed experts acquire an aura of infallibility to which they are not entitled . . . the trend is increasingly to provide for their use . . . [and] [t]he ever-present possibility that the judge may appoint an expert in a given case must inevitably exert a sobering effect on the expert witness of a party and upon the person utilizing his services.”).

Although these concerns were ultimately rejected by Congress, the text of Rule 706 reflects various efforts to allow the benefits of a court-appointed expert where warranted, while preserving the adversary system to the fullest extent possible. *Monolithic Power Sys. v. O2 Micro Int’l Ltd.*, 558 F.3d 1341, 1348 (Fed. Cir. 2009) (noting that Congress rejected policy arguments that a court-appointed expert would impair the adversary system by usurping the jury’s function and that court-appointed experts do not run afoul of the Seventh Amendment right to trial by jury); *In re High Fructose Corn Syrup*, 295 F.3d at 665 (7th Cir. 2002) (“The main objection to [appointing a Rule 706 expert is] that the judge cannot be confident that the expert whom he has picked is a genuine neutral.”); *Tangwall v. Robb*, 2003 U.S. Dist. LEXIS 27128, at \*11 (E.D. Mich. Dec. 23, 2003) (observing Federal Judicial Center report that “Rule 706 remains an important alternative source of authority to deal with some of the most demanding evidentiary issues that arise in federal courts”); *Wheeler v. Shoemaker*, 78 F.R.D. 218, 227 n.14 (D.R.I. 1978) (“Congress has provided that the court may appoint its own expert witness in jury trials . . . [and] that such non-partisan expert testimony would more assist jury deliberations than prejudice them.”).

### Cases That Merit a Court-Appointed Expert

Consistent with Rule 706’s attempt to balance the benefits of both a court-appointed expert and

the adversary system, courts do not entertain appointing an expert lightly. Instead, only truly complex cases warrant appointment of a court-appointed expert. *Ford v. Mercer Cnty. Corr. Ctr.*, 171 F. App'x 416, 420 (3d Cir. 2006) (“The most important factor in favor of appointing an expert is that the case involves a complex or esoteric subject beyond the trier-of-fact’s ability to adequately understand without expert assistance.”) (quoting 29 Charles Alan Wright & Victor James Gold, *Federal Practice and Procedure*, Evidence, § 6304 (1997)); *Quiet Tech. DC-8, Inc. v. Hurel-Dubois UK, Ltd.*, 326 F.3d 1333, 1348 (11th Cir. 2003) (“[A]ppointment [of a Rule 706 expert] is especially appropriate where the evidence or testimony at issue is scientifically or technically complex.”) (citation omitted); *Ledford v. Sullivan*, 105 F.3d 354, 358 (7th Cir. 1997) (“Generally, if scientific, technical, or other specialized knowledge will assist the trier-of-fact to understand the evidence or decide a fact in issue, a court will utilize expert witnesses.”); *Carranza v. Fraas*, 471 F. Supp. 2d 8, 9 (D.D.C. 2007) (“Court invocation of [Rule 706] typically occurs in exceptional cases in which the ordinary adversary process does not suffice. . . .”) (citation and internal quotations omitted); *Tangwall*, 2003 U.S. Dist. LEXIS 27128, at \*8 (“The determination to appoint an expert . . . is to be aided by such factors as the complexity of the matters to be determined and the fact-finder’s need for a neutral, expert view.”); *Pabon v. Goord*, 2001 U.S. Dist. LEXIS 10685, at \*3 (S.D.N.Y. July 27, 2001) (“The determination to appoint an expert . . . is to be informed by such factors as the complexity of the matters to be determined and the Court’s need for a neutral, expert view.”) (citation omitted); *Hunt v. R & B Falcon Drilling USA, Inc.*, 2000 U.S. Dist. LEXIS 18346, at \*2 (E.D. La. Dec. 12, 2000) (“Rule 706 should be reserved for exceptional cases in which the ordinary adversary process does not suffice.”) (citation omitted); *LeBlanc v. PNS Stores*, 1996 U.S. Dist. LEXIS 15909, at \*4 (E.D. La. Oct. 18, 1996) (“Rule 706 is . . . appropriate only in rare circumstances and cannot be utilized as an alternative to communication and the adversary process.”).

For example, Rule 706 expert witnesses have been appointed to assist a judge or jury in deciding a variety of issues, including those concerning surgical procedures, *Dull v. Ylst*, 1994 U.S. App. LEXIS 7821, at \*9–13 (9th Cir. Apr. 5, 1994) (medical expert was properly appointed by district court to assess whether oral surgery upon state prisoner was performed with deliberate medical indifference to support a 42 U.S.C. § 1983 claim); migration of contaminants in groundwater and air, *Abarca v. Franklin Cnty. Water Dist.*, 2011 U.S. Dist. LEXIS 1603, at \*17–20 (E.D. Cal. Jan. 5, 2011) (court retained experts to address migration in groundwater and air of contaminants from facility manufacturing pressure-treated wood); circuitry in laptop computers, *Monolithic Power Sys.*, 558 F.3d at 1343–44 (upholding jury verdict in a patent dispute involving circuitry controlling power from a laptop computer’s battery to the fluorescent lamps illuminating its screen); foreign law, *United States v. One Lucite Ball Containing Lunar Material*, 252 F. Supp. 2d 1367, 1372 (S.D. Fla. 2003) (appointing expert on Honduran law); and damage calculations, *Bd. of Educ. v. CNA Ins. Co.*, 113 F.R.D. 654, 655 (S.D.N.Y. 1987) (appointing Rule 706 expert to address amount of attorney fees and costs incurred during a litigation).

In appointing a Rule 706 expert, a court must be careful to ensure the jury always understands that it—not the court-appointed expert—remains the ultimate decision maker. *Hodge v. United*

*States*, 2009 U.S. Dist. LEXIS 78146, at \*14–15 (M.D. Pa. Aug. 31, 2009) (stating that “the policy behind [Fed. R. Evid. 706] is to promote the jury’s factfinding ability”; not to supplant the jury) (citations omitted).

Some courts have held that Rule 706 does not apply to a technical advisor appointed by the court who neither testifies at trial nor otherwise serves as an independent source of evidence for the fact finder. *Fed. Trade Comm’n v. Enforma Nat’l Prods., Inc.*, 362 F.3d 1204, 1213 (9th Cir. 2004) (“Technical advisors, acting as such, are not subject to the provisions of Rule 706, which govern court-appointed expert witnesses. A court-appointed expert is a witness subject to Rule 706 if the expert is called to testify or if the court relies on the expert as an independent source of evidence.” (citation omitted)); *TechSearch, L.L.C. v. Intel Corp.*, 286 F.3d 1360, 1380 (Fed. Cir.), *cert. denied*, 537 U.S. 995 (2002) (trial court did not err in refusing to allow depositions of technical advisor to the court because Rule 706 does not apply to such advisors).

### **Determining Whether a Court-Appointed Expert Is Needed**

Either the court, sua sponte, or counsel for any of the parties may move for the appointment of a Rule 706 expert by filing an order to show cause as to why such an expert should not be appointed. *Cheese v. United States*, 290 F. App’x 827, 830 (6th Cir. 2008) (“[A]ppointment of [an] expert witnesses [may be] by the court on its own motion or motions of the parties.”); *Steele v. Shah*, 1996 U.S. App. LEXIS 23301, at \*16 (11th Cir. July 17, 1996) (“[Rule 706] provides the court with discretionary power to appoint an expert witness . . . on the court’s own motion or the motion of a party.”); *Voth v. Maass*, 1994 U.S. App. LEXIS 19459, at \*6–7 (9th Cir. July 18, 1994) (“[T]he court may appoint an expert witness on its own or a party’s motion.”); *United States v. Bonds*, 12 F.3d 540, 567 (6th Cir. 1993) (“Federal Rule of Evidence 706 permits the court on its own to appoint an expert witness.”). Rule 706 does not provide any standard to be applied in considering such a motion. Rather, the decision whether to grant or deny the motion in a particular case is left to the trial court’s sound discretion and reviewed on appeal under an abuse of discretion standard. *Patel v. United States*, 2010 U.S. App. LEXIS 21539, at \*8 (10th Cir. Oct. 19 2010) (the decision to appoint an expert witness may be overturned “only for abuse of discretion”); *German v. Broward Cnty. Sheriff’s Office*, 315 F. App’x 773, 778 (11th Cir. 2009) (“We review a district court’s denial of a motion for appointment of an expert witness for an abuse of discretion.”) (citation omitted). Case law reveals that appellate courts rarely, if ever, take exception to a trial court’s exercise of discretion under Rule 706.

In practice, the appointment of a Rule 706 expert is rare. *McCracken v. Ford Motor Co.*, 392 F. App’x 1, 4 (3d Cir. 2010) (to avoid interfering with the adversary system, appointment of an expert seldom occurs) (citation omitted); *Monolithic Power Sys. v. O2 Micro Int’l Ltd.*, 558 F.3d 1341, 1346 (Fed. Cir. 2009) (“[D]istrict courts rarely make Rule 706 appointments. . . .”) (citation omitted); *Okla. Natural Gas Co. v. Mahan & Rowsey, Inc.*, 786 F.2d 1004, 1007 (10th Cir. 1986) (“The fact that the parties’ experts have a divergence of opinion does not require the district court to appoint experts to aid in resolving such conflicts.”); *Mavity v. Fraas*, 456 F. Supp. 2d 29, 34 n.4 (D.D.C. 2006) (“[A]ppointment of an expert [is] an extraordinary activity

that is appropriate only in rare instances.”) (citations and internal quotations omitted); *Tangwall v. Robb*, 2003 U.S. Dist. LEXIS 27128, at \*9 (E.D. Mich. Dec. 23, 2003) (“The enlistment of court-appointed expert assistance under Rule 706 is not commonplace.”); *In re Joint E. & S. Dists. Asbestos Litig.*, 830 F. Supp. 686, 693 (E.D.N.Y. 1993) (“Rule 706 should be reserved for exceptional cases in which the ordinary adversary process does not suffice. . . .”). Such experts are appointed only when deemed essential to a judge or jury as fact finder. Similarly, counsel are often hesitant to suggest a court-appointed expert because litigants tend to prefer experts who they know support their position over a court-appointed “wild card.” The stage in litigation when a Rule 706 expert may be appointed is within the trial court’s discretion, although practical considerations, such as allowing sufficient time to permit discovery of the appointed expert’s conclusions, should be considered. *In re Gainey Corp.*, 400 B.R. 576, 578 (W.D. Mich. 2008) (“A court should appoint an expert early in the litigation before it is too late.”).

### **Court-Appointed Expert’s Selection**

Counsel may be involved in most aspects of the expert-selection process once the court decides it will make an appointment under Rule 706. For example, counsel may separately suggest experts to be considered, *Leesona Corp. v. Varta Batteries, Inc.*, 522 F. Supp. 1304, 1310–11 (S.D.N.Y. 1981) (expert nominated by all parties was appointed by the court to serve as a Rule 706 expert), or may even reach agreement on an appropriate expert to be chosen. *In re High Fructose Corn Syrup Antitrust Litig.*, 295 F.3d 651, 665 (7th Cir. 2002) (stating that parties may agree on an expert to help remove concern that the expert chosen may not be neutral) (citations omitted); *In re Mcghan Med. Corp.*, 2000 U.S. App. LEXIS 26715, at \*1 (Fed. Cir. 2000) (appointing expert suggested by all parties).

Ultimately, however, Rule 706 vests exclusive authority with the court to control the expert-selection process. *Carranza v. Fraas*, 471 F. Supp. 2d 8, 11 (D.D.C. 2007) (“Rule 706 allows the court to appoint an expert witness to assist the court, not to assist a party.”). Any input from counsel as to the expert to be selected is merely advisory, and the court is not obligated to seek such input at all. The expert to be selected under Rule 706 lies solely within the court’s prerogative. *Daubert v. Merrell Dow Pharms.*, 509 U.S. 579, 595 (1993) (“Rule 706 allows the court in its discretion to procure the assistance of an expert of its own choosing.”); *Young v. City of Augusta ex rel. DeVaney*, 59 F.3d 1160, 1169 (11th Cir. 1995) (explaining a court may “appoint an expert witness selected by the parties or of its own choosing”); *Krause v. Whitley*, 1993 U.S. App. LEXIS 2693, at \*6–7 (9th Cir. 1993) (Rule 706 “allows the district court to appoint a neutral expert on its own motion, whether or not the expert is agreed upon by the parties”); *G.K. Las Vegas Ltd. P’ship v. Simon Prop. Grp.*, 671 F. Supp. 2d 1203, 1208 (D. Nev. 2009) (“A court may appoint an agreed-upon expert, or appoint its own . . . .”); *United States v. Galbreth*, 908 F. Supp. 877, 880 (D.N.M. 1995) (“Rule 706 . . . permits the court at its discretion to procure the assistance of an expert of its own choosing. . . .”).

### **Court-Appointed Expert’s Mandate**

Rule 706 does not define the scope of a court-appointed expert’s mandate beyond that of a

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“witness.” Instead, the court prescribes the expert’s mandate on a case-by-case basis. Fed. R. Evid. 706(a) (The court-appointed expert witness “shall be informed of the witness’ duties by the court in writing . . . or at a conference in which the parties shall have opportunity to participate.”). For example, a Rule 706 expert may be asked to review an entire case record, and then prepare a formal report as evidence to be considered in deciding a motion. *Dull v. Ylst*, 1994 U.S. App. LEXIS 7821, at \*9–13 (9th Cir. Apr. 5, 1994) (expert appointed to review an “entire medical record” on which the court granted summary judgment to the defendants). Alternatively, a court-appointed expert may be asked only to address discrete questions prepared by the court, counsel, or both. See *Abarca v. Franklin Cnty. Water Dist.*, 2011 U.S. Dist. LEXIS 1603, at \*20 (E.D. Cal. Jan. 5, 2011) (expert report consisted of responses to questions drafted jointly by the court and counsel). A Rule 706 expert may serve multiple functions, such as also acting as a special master to suggest a resolution of the parties’ competing positions. *Bd. of Educ. v. CNA Ins. Co.*, 113 F.R.D. 654, 654–55 (S.D.N.Y. 1987) (appointing expert to serve “as a Special Master, pursuant to [F. R. Civ. P. Rule 53](#), and concurrently as a court-appointed expert pursuant to [Fed. R. Evid. Rule 706](#)”).

In all events, however, no matter how broad or narrow the mandate, the parties are entitled to disclosure of a Rule 706 expert’s conclusions. *In re Joint E. & S. Dists. Asbestos Litig.*, 151 F.R.D. 540, 544 (S.D.N.Y. 1993) (“Rule 706 provides for the disclosure of an expert’s findings. . . .”). That disclosure will not necessarily include formal expert reports. The appropriate manner for the disclosure of the expert’s conclusions to the court and the parties is determined by the court case by case, and neither Rule 706 nor case law provides formal criteria that must be followed. If directed by the court, the expert’s conclusions may be reported at a hearing or through informal discussions with the parties. *Id.* (“Rule 706 expert witnesses report[] to the court in a variety of ways including reports, hearings and informal discussion with the parties.”) (citation omitted). Rule 706 thus provides the court with the flexibility to meet the specific needs of a particular case (and perhaps reduce the expenses associated with a court-appointed expert). See *Dull v. Ylst*, 1994 U.S. App. LEXIS 7821, at \*9–13 (9th Cir. Apr. 5, 1994) (expert’s findings contained in report made part of the record); *United States v. One Lucite Ball Containing Lunar Material*, 252 F. Supp. 2d 1367, 1372 (S.D. Fla. 2003) (a mere letter was sufficient to comprise the expert’s preliminary report); *Leesona Corp. v. Varta Batteries, Inc.*, 522 F. Supp. 1304, 1312 (S.D.N.Y. 1981) (although expert prepared a written preliminary report, it was sufficient that his final report was provided only in the form of testimony at trial).

Formal depositions also are a permissible way for the parties to understand, or to vet, a court-appointed expert’s findings. Rule 706 expressly provides all parties with the right to depose a court-appointed expert before trial. *Reid v. Albemarle Corp.*, 207 F. Supp. 2d 499, 507 (M.D. La. 2001) (“FRE 706 . . . indicate[s] that a witness appointed by the court to testify before the jury may be deposed by any party and shall be subject to cross examination.”); *Gartner v. Hendrix*, 1991 U.S. Dist. LEXIS 11516, at \*8 (E.D. La. Aug. 8, 1991) (parties enjoy the right to depose court-appointed experts).

The court-appointed expert may be called by any party to testify at trial and is subject to the same cross-examination as any other expert. *North Finn v. Cook*, 1998 U.S. App. LEXIS 32603, at \*7 (10th Cir. 1998) (“[Rule 706] entitles the parties to cross-examine court-appointed experts.”); *Holland v. Comm’r*, 835 F.2d 675, 676 (6th Cir. 1987) (Rule 706 experts are subject to cross-examination by the parties.). The court, sua sponte, also may call the court-appointed expert to testify at trial. *Aiello v. McCaughtry*, 1996 U.S. App. LEXIS 18737, at \*10 (7th Cir. 1996) (the court may “call its own . . . expert witnesses”). The parties are free to discredit the court-appointed expert’s conclusions and—in an effort to maintain the adversary system—as noted above, instructions to the jury that it ultimately decides the case, not the court-appointed expert, are proper. *DeAngelis v. A. Tarricone, Inc.*, 151 F.R.D. 245, 247 (S.D.N.Y. 1993) (explaining that the jury is to be made aware that “even an impartial expert can be wrong, and that the impartial expert must be subjected to the same evaluation of credibility as any other witness”).

Consistent with its intent to preserve the adversary system, Rule 706 expressly permits the parties to call their own expert witnesses notwithstanding the testimony (or anticipated testimony) of the court-appointed expert. *McKinney v. Anderson*, 1988 U.S. Dist. LEXIS 18596, at \*3 (D. Nev. Sept. 2, 1988) (“[T]he parties may . . . call their own expert witnesses.”); *United States v. Int’l Bus. Machs. Corp.*, 406 F. Supp. 178, 180 (S.D.N.Y. 1975) (“Nothing in this rule . . . limits the parties in calling expert witnesses of their own selection.”) (quoting Fed. R. Evid. 706(d)).

### **Court-Appointed Expert’s Fees**

The parties generally are responsible for the court-appointed expert’s fees and expenses, with the amount to be determined by the court. *Ledford v. Sullivan*, 105 F.3d 354, 360–61 (7th Cir. 1997) (“A number of circuits have recognized that Rule 706(b) grants a district court the discretion to apportion all the costs of an expert to one side.”) (citations omitted); *McGinnis v. Tenn. Gas Pipeline Co.*, 1994 U.S. App. LEXIS 12781, at \*11–12 (6th Cir. 1994) (Rule 706 “gives a trial court broad discretion to appoint an expert in a civil case and to apportion costs as necessary”). An exception to the parties-pay-the-bill rule exists for certain criminal cases and eminent domain cases under the Fifth Amendment, in which government funds pay the expert’s fee. Fed. R. Evid. 706(b); *Young v. City of Augusta ex rel. DeVaney*, 59 F.3d 1160, 1170 n.18 (11th Cir. 1995) (“In just compensation cases and in prosecutions involving indigent criminal defendants, expert witness fees may be paid with funds provided by law.”).

Payment of those fees in some cases may carry a potential social justice aspect: There is authority for the position that, where one party is indigent, the court has discretion to order the payment of expert fees exclusively by the able-to-pay party. *Davis v. United States*, 266 F. App’x 148, 150 (3d Cir. 2008) (explaining that a judge may “excus[e] indigent parties from paying their share of the costs [under Rule 706]”) (citations omitted); *Steele v. Shah*, 1996 U.S. App. LEXIS 23301, at \*16–17 (11Cir. 1996) (indicating Rule 706 can be used to level the playing field where an indigent party cannot afford to retain an expert) (citation omitted); *Pabon*

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*v. Goord*, 2001 U.S. Dist. LEXIS 10685, at \*3 (S.D.N.Y. July 27, 2001) (“[When] an expert is appointed [under Fed. R. Evid. 706], his or her compensation is to be paid by the parties; however, where . . . one of the parties is indigent, in compelling circumstances the Court may assess the entire cost of the expert’s compensation to the other party.”) (citations omitted). The fees of a Rule 706 expert may be payable in advance. *U.S. Marshals Serv. v. Means*, 741 F.2d 1053, 1058 (8th Cir. 1984) (“The plain language of Rule 706(b) thus permits a district court to order one party or both to advance fees and expenses for experts that it appoints.”); *Boatright v. Larned State Hosp.*, 2007 U.S. Dist. LEXIS 31734, at \*4 (D. Kan. Apr. 27, 2007) (“[T]he court may require the payment of expert fees in advance.”).

No matter who pays for the expert, however, the expert remains neutral. Ex parte communications between counsel and a Rule 706 expert that are not authorized by the court, for example, are impermissible. *DeAngelis*, 151 F.R.D. at 247 (“[I]n order to preserve their impartiality the experts must be contacted solely through the court.”).

**Advising the Jury That an Expert Is Court-Appointed**

Perhaps the greatest concern harbored by both court and counsel when a Rule 706 expert testifies at trial is that the jury will consider that expert’s opinion to be determinative of the case. The court may seek to minimize that danger by instructing the jury that the opinion of the court-appointed expert carries no more weight than those of the parties’ experts and that they must apply the same level of scrutiny and skepticism to all of the expert opinions offered at trial. *Monolithic Power Sys. v. O2 Micro Int’l Ltd.*, 558 F.3d 1341, 1347–48 (Fed. Cir. 2009) (jury instructed to afford no more weight to a Rule 706–appointed expert’s testimony than to that of a party-appointed expert); *DeAngelis*, 151 F.R.D. at 247 (explaining that the jury is to be made aware that “even an impartial expert can be wrong, and that the impartial expert must be subjected to the same evaluation of credibility as any other witness”); *Leesona Corp. v. Varta Batteries, Inc.*, 522 F. Supp. 1304, 1312 (S.D.N.Y. 1981) (indicating a court-appointed expert’s opinion should not be conclusive of a dispute).

If, in a particular case, it is perceived that such a limiting instruction will not suffice to protect against the jury blindly accepting the court-appointed expert’s conclusions, the court is free to withhold completely from the jury that an expert witness was appointed by the court. Fed. R. Evid. 706(c) (“In the exercise of its discretion, the court may authorize disclosure to the jury of the fact that the court appointed the expert witness.”). Conversely, a court is free to advise the jury that an expert has been appointed by the court, especially where the court deems it important for the jury to know which of the experts testifying are “hired guns” and which are not. *In re High Fructose Corn Syrup Antitrust Litig.*, 295 F.3d 651, 665 (7th Cir. 2002) (“The judge and jurors may not understand the neutral expert perfectly but at least they will know that he has no axe to grind, and so, to a degree anyway, they will be able to take his testimony on faith.”).

**Conclusion**

Complex litigation increasingly involves highly technical subject matter that a layperson, whether judge or jury, lacks the ability to scrutinize effectively. For this reason, use of Rule 706

court-appointed experts, or the threat thereof, may be increasingly useful to help keep expert “hired guns” honest or, at the least, more restrained in their opinions. Rule 706 experts increasingly may be the tool needed to help ensure that the adversary system allows the truth to emerge where a fact finder must assess esoteric evidence and testimony of which it otherwise has no firsthand knowledge or experience to guide its decision.

**Keywords:** litigation, trial evidence, Rule 706, court-appointed experts

[John P. McCahey](#) is a partner and [Jonathan M. Proman](#) is an associate at Hahn & Hessen, LLP, in New York.

## NEWS & DEVELOPMENTS

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### Eleventh Circuit Examines Admission of Lay Testimony

On June 14, 2011, the Eleventh Circuit held that an attorney could provide lay testimony regarding fraudulent transactions based on his own personal knowledge pursuant to Rule 701. *United States v. Graham*, \_\_\_ F.3d \_\_\_ (11th Cir.2011).

At the trial for mortgage fraud, a real-estate attorney, Key, who had participated in some of the transactions purported to be the basis for the fraud was permitted to testify not only about the transactions themselves, but also about whether the transactions were fraudulent. Rejecting arguments that the testimony in question should have been excluded because it was expert testimony that did not meet Rule 702 criteria, the Eleventh Circuit stated:

We have held that a witness who has particularized knowledge by virtue of his position in a certain company can give an opinion about the manner in which that company conducts its business, even if the witness is not qualified as an expert under Fed. R. Evid. 702. *See Tampa Bay Shipbuilding & Repair Co. v. Cedar Shipping Co.* [PDF], 320 F.3d 1213, 1223 (11th Cir. 2003) (“Tampa Bay’s witnesses testified based upon their particularized knowledge garnered from years of experience within the field.”). Key provided some testimony about the kind of conduct he engaged in or personally witnessed during fraudulent mortgage transactions, and he testified about his personal knowledge concerning the conduct of other participants in the mortgage fraud scheme. He did so based on his own experience.

**Keywords:** litigation, trial evidence, lay testimony, Eleventh Circuit

— *Amy Cashore Mariani, partner, Fitzhugh & Mariani, LLC, Boston, Massachusetts*

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## Learned Treatises Require Expert's Testimony

Do you need an expert's testimony for the admission of learned treatises? In a case recently decided by the Eastern District of Virginia, the answer was yes.

In *Hogge v. Stephens*, 2011 WL 2161100 (E.D.Va 2011), the plaintiff attempted to submit portions of medical articles in opposition to the defendants' motion for summary judgment. The court found that these documents were inadmissible hearsay, even though the information may have constituted learned treatises under Fed. R. Evid. 803(18), because they had not been authenticated by way of expert testimony. Thus, if you want to throw the book at the opposition, you'd better bring your expert.

**Keywords:** litigation, trial evidence, learned treatises, expert testimony

— *Amy Cashore Mariani, partner, Fitzhugh & Mariani, LLC, Boston, Massachusetts*

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ABA Section of Litigation Trial Evidence Committee

<http://apps.americanbar.org/litigation/committees/trialevidence/home.html>