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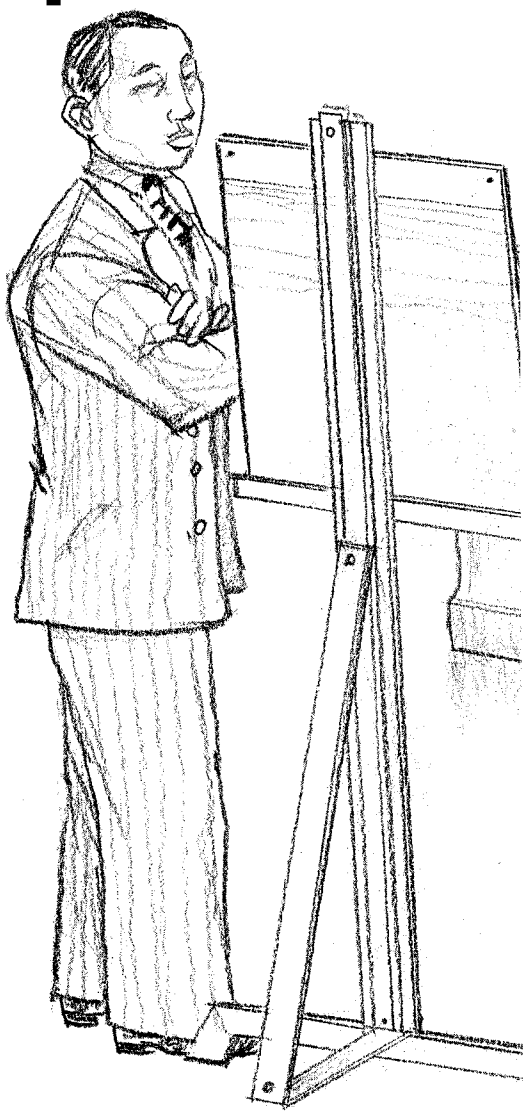
Are court-appointed experts the solution to the problems of expert testimony?

In Texas, court-appointed experts are frequently used in family law cases, providing a rare opportunity to examine how such a system works.

by Anthony Champagne, Danny Easterling, Daniel W. Shuman, Alan Tomkins, Elizabeth Whitaker



In contrast with the legal systems of many other countries, the use of privately-retained experts is the dominant method for presenting expert testimony in the U.S,[1] but the use of privately-retained rather than court-appointed experts has been the subject of intense criticism. Critics argue that privately-retained experts bias the information provided to courts because attorneys shop for experts who will present their point of view in the most favorable light, even though that point of view may not be the mainstream scientific one or appropriately reflect the consensus of technical or specialized knowledge.[2] Others argue that the use of retained experts permits non-mainstream perspectives to be brought

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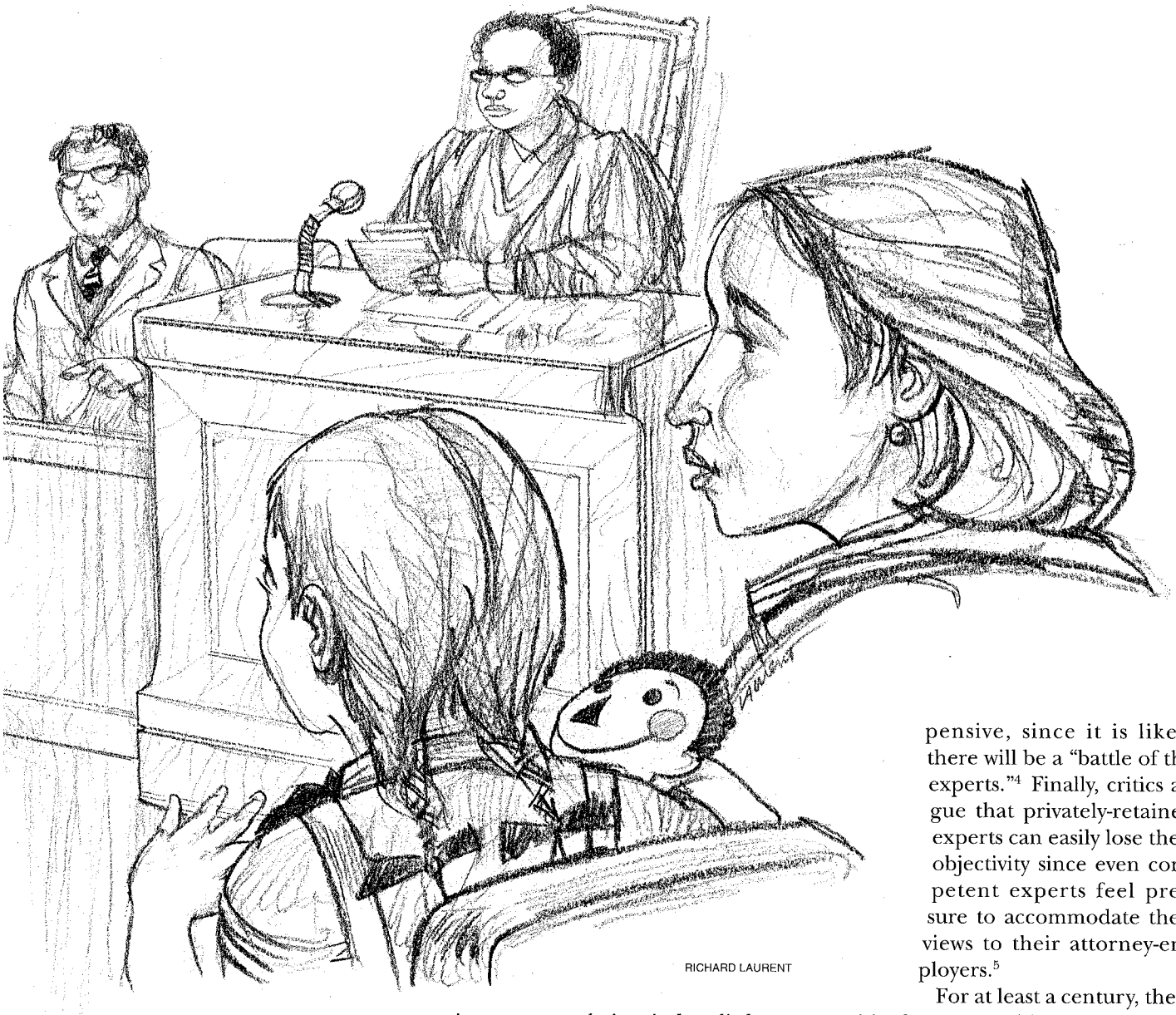
1. Di Lello, Note, *Fighting Fire with Firefighters: A Proposal for Expert Judges at the Trial Level,* 93 COLUM. L. REV. 473, 474 (1993). For an overview of expert testimony issues in a variety of legal contexts, *see* Faigman et al. eds., MODERN SCIENTIFIC EVIDENCE: THE LAW AND SCIENCE OF SCIENCE AND EXPERT TESTIMONY (1997); REFERENCE MANUAL ON SCIENTIFIC EVIDENCE (2d ed. Federal Judicial Center 2000). *See also* Erichson, *Mass Tort Litigation and Inquisitorial Justice,* 87 GEO. L.J. 1983 (1999). Erichson's article includes a useful comparison of expert evidence in the U.S. with the inquisitorial "legal systems of Germany, France, Italy, Brazil, Chile, South Korea, Egypt, and other civil law countries throughout continental Europe, Latin America and elsewhere" (citations omitted).

2. Monahan & Walker, *Social Science Research in Law: A New Paradigm,* 43 AM. PSYCHOLOGIST 465 (1988) ("[l]awyers sometimes cynically pick and choose among studies and experts until they find one with conclusions to their liking").

3. *See, e.g.,* Black et al., *Science and the Law in the Wake of* Daubert*: A New Search for Scientific Knowledge,* 72 TEX. L. REV. 715 (1994); Saks, *Expert Witnesses, Nonexpert Witnesses, and Nonwitness Experts,* 14 LAW & HUM. BEHAV. 291 (1990).

4. *See, e.g.,* Murphy, Note, *Experts, Liars, and Guns for Hire: A Different Perspective on the Qualifications of Technical Expert Witnesses,* 69 IND. L.J. 637 (1994).



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into court and gives judges little control over its introduction,[3] and that privately-retained experts can be expensive, since it is likely there will be a "battle of the experts."[4] Finally, critics argue that privately-retained experts can easily lose their objectivity since even competent experts feel pressure to accommodate their views to their attorney-employers.[5]

For at least a century, these critics have argued in favor of court-appointed experts.[6] Although there have been criticisms of these proposals, arguing that juries may be lulled into a false sense of security about court-appointed experts' competence and objectivity, proposals for the use of court-appointed experts abound. Yet the use of court-appointed experts has been the subject of little study.[7] Moreover, notwithstanding courts' express or inherent authority to appoint experts[8] and the enthusiasm expressed in favor of

5. *E.g.*, Albers *et al.*, *Toward a Model Expert Witness Act: An Examination of the Use of Expert Witnesses and a Proposal for Reform*, 80 IOWA L. REV. 1269, 1276 (1995) ("A major problem that arises when experts are used as advocates in the adversarial process is that conflicting pressures cause experts to slant their testimony. . . ").

6. *E.g.*, Washburn, *Testimony of Experts*, 1 AM. L. REV. 45, 61-62 (1866); Foster, *Expert Testimony — Prevalent Complaints and Proposed Remedies*, 11 HARV. L. REV. 169 (1897); Hand, *Historical and Practical Considerations Regarding Expert Testimony*, 15 HARV. L. REV. 40, 56 (1901); Friedman, *Expert Testimony, Its Abuse and Reform*, 19 YALE L.J. 247 (1910); Prettyman, *Needed: A New Trial Technique*, 34 A.B.A. J. 766, 769-70 (1948); For a recent overview, *see* Deason, *Court-Appointed Expert Witnesses: Scientific Positivism Meets Bias and Deference*, 77 OR. L. REV. 59, 64-74 (1998).

7. FED. R. EVID. 706 advisory committee's note (1972) ("experience indicates that actual appointment is a relatively infrequent occurrence"). *See generally* Cecil and Willging, *Court-Appointed Experts*, *in* REFERENCE MANUAL ON SCIENTIFIC EVIDENCE 525 (Federal Judicial Center, 1994). *See also* Cecil and Willging, *The Use of Court-Appointed Experts in Federal Courts*, 78 JUDICATURE 41 (1994).

8. *See, e.g.*, Carnegie Commission on Science, Technology, and Government, SCIENCE AND TECHNOLOGY IN JUDICIAL DECISION MAKING: CREATING OPPORTUNITIES AND MEETING CHALLENGES 37 (March, 1993) ("The present system authorizes the court to appoint experts to provide assistance, but courts have rarely availed themselves of this opportunity").

court-appointed experts, in most American civil and criminal settings the use of court-appointed experts is exceptional.[9]

However, one area of law—family law—makes use of court appointments even in non-exceptional circumstances,[10] although use varies across jurisdictions.[11] In Texas, court-appointed experts are frequently used in family law cases where there is a child custody dispute. In these cases, judges will appoint an expert, often a psychologist, to examine the parties. Of course, lawyers for both sides may examine the expert and also present privately-retained experts. However, unlike other areas of practice where the judge's power to appoint experts is unexercised, in Texas family law cases, at least in counties in which those experts exist, judges routinely appoint experts. Thus, these cases provide a rare opportunity to study the operation of a system that relies extensively on court-appointed experts and to assess the claims of its superiority to the use of retained experts.

Unlike other jurisdictions, family law cases can be heard by a jury in Texas. Thus, the family law practices described below are possibly germane primarily to Texas. Despite this unique situation, we believe the use of court-appointed experts in Texas *is* instructive regarding the potential usefulness of court appointments of experts in general.

Methodology

To explore how the court-appointment process operates and to examine various perspectives on its operation, we conducted focus groups with family district court judges, board certified family lawyers, and court-appointed experts from Dallas and Tarrant counties, Texas. We were concerned that a questionnaire would not provide information that was qualitatively as rich as the focus groups both because the number of experts and judges was small and because the number of contested custody cases that reach trial each year is also small. We anticipated that the focus groups would permit us to explore more extensively the participants' reactions to an operating, court-appointed expert system.

Dallas and Tarrant (Ft. Worth) counties are both large metropolitan centers in north Texas, although they are grounded in vastly different legal cultures. The smaller of the counties is Tarrant, which continues to maintain something of a small town culture. For the most part, the family lawyers, experts, and judges know one another. As a result, there is more of a spirit of cooperation and accommodation in Tarrant County than in Dallas County, where there is greater anonymity.

We invited board-certified family lawyers[12] in Dallas and Tarrant counties, psychologists who regularly served as court-appointed experts, and the judges and associate judges serving in the family district courts, to participate in our focus groups.[13] The focus groups, then, were comprised of self-selected participants.

The lawyers, judges, and experts from each county were interviewed in separate groups to prevent one occupational or geographic group from biasing the responses of another. We identified the experts by preliminary interviews of family district court judges to learn which ones are regularly court appointed. The Tarrant County focus groups included five board certified family lawyers, four experts, and four family district court and associate judges. The Dallas County focus groups included 12 board certified family lawyers, four experts, and eight family district judges and associate judges. Thus, our final sample of 37 was comprised of 17 lawyers, 8 experts, and 12 family district court judges and associate judges.

The experts

With no dissent, the experts enthusiastically supported the use of court-appointed experts in the family law arena. Indeed, although all of them were willing to be retained as non-testifying consulting experts, most were unwilling to work as privately-retained testifying experts. One of the reasons experts expressed for favoring court appointment over private retention is that court-appointed experts have access to both parents and children in a custody dispute, which retained experts rarely enjoy in Texas. The experts believed that without access to both sides they were unable to render satisfactory opinions and that testimony without access to both sides was ethically problematic. Indeed, at least in rendering an opinion about the best interests of a child, the American Psychological Association Child Custody Guidelines caution against a comparative assessment in the absence of access to all of the parties.[14] Relatedly, the experts had personal liability concerns, believing that they were exposed to liability if they were privately retained,

9. Cecil and Willging, COURT-APPOINTED EXPERTS: DEFINING THE ROLE OF EXPERTS APPOINTED UNDER FEDERAL RULE OF EVIDENCE 706 (Federal Judicial Center, 1993); Champagne, et al., *The Problem with Empirical Examination of the Use of Court-Appointed Experts: A Report of Non-findings*, 14 BEH. SCI. & LAW 361 (1996); *But see, e.g.*, Scott and Anderson, *Admissibility of Scientific Evidence: Proposed Implementation of the Guidelines of Daubert and Landrigan under the Newly Adopted New Jersey Rules of Evidence*, 20 RUTGERS COMPUTER & TECH. L.J. 1, 54-56 (1994): "Court-appointed experts have been used regularly in certain areas of the law in New Jersey. They have been used in matters such as worker's compensation, competency, attorney discipline, and paternity proceedings. Court-appointed experts have also been used for valuation of stock, in land condemnation proceedings, and for valuation of land in land swap deals. Independent experts are also used extensively in the family law context, in divorce, alimony, custody, and support cases, in addition to paternity situations." (citations omitted).

The use of court-appointed experts is regularly used throughout Europe and other inquisitorial-based legal jurisdictions throughout the world. *See, e.g.*, Langbein, *The German Advantage in Civil Procedure*, 52 U. CHI. L. REV. 823 (1985) (arguing Germany's tradition of making extensive use of court-appointed rather than party-retained experts shows the advantages of these practices).

10. *See, e.g.*, Scott and Anderson, *supra* n. 9, at 56.

11. *Compare* Note, Mcburney, *Bitter Battles: The Use of Psychological Evaluations in Child Custody Disputes in West Virginia*, 97 W. VA. L. REV. 773, 789 (1995) (only 9 of 14 family law masters interviewed in West Virginia had ever appointed an expert to conduct a custody evaluation) *with* Herman and Sullivan, *Court-Appointed Experts in Child Custody Cases*, N.Y.L.J., June 30, 1997, at 7 "Although a court is not required to appoint an independent psychological expert to investigate the background and psychological makeup of the litigants and their children in every case, such an appointment is generally required where there are serious issues of parental fitness," citing

but enjoyed immunity if they were court appointed.

The experts believed court appointment deprived the attorneys of control over them, resulting in greater professional independence. They believed that as privately-retained experts there was always an element of distrust toward them; they admitted that there were some experts whose testimony could be and was purchased by attorneys. As a court-appointed expert they perceived that there seemed to be less of a question of their integrity. And, they noted, if they were court appointed, attorneys had a sense that the judge had endorsed (or at least would listen seriously to) their views.

The experts suggested that the use of court-appointed experts did not invariably reduce the costs of a custody dispute as cases that proceeded to trial invariably involved both retained and appointed experts. In these cases the use of court-appointed experts increased the costs of experts. However, when the parents had limited resources, court-appointed experts often reduced the costs of litigation because the court-appointed expert's report served as a template for settlement negotiations. This was a significant advantage to parties who were unable to afford their own experts.

It is understandable why these experts preferred to serve as court-appointed rather than retained experts in family law cases. They believed that as court-appointed experts they were less likely to be subject to suit, enjoyed greater access to relevant information, and were unlikely to be treated as a hired gun. Indeed, some experts suggested that court appointment cast them in the role of decision makers as contrasted with the role of mere witnesses when they were retained. Some experts did suggest, however, that court appointment exacted greater responsibility because they were obliged to present the entire story in a balanced fashion, rather than just the point of view of one side.

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The lawyers

The lawyers offered a different assessment of the use of retained versus appointed experts in family law cases, expressing a marked preference for retained experts. The lawyers buttressed their preference with several observations.

The Dallas County lawyers were critical of the quality of court-appointed experts and maintained that the best experts were the ones the lawyers retained. They asserted that there were only a half dozen competent court-appointed experts. "Real experts," they argued, "work for lawyers." They believed that court-appointed experts could not succeed in private practice, or were inexperienced and just beginning a practice and consequently needed to rely on court appointments.

In addition to concerns about quality with the use of court-appointed experts, both Tarrant and Dallas county lawyers believed that they lose some control over a case with court-appointed experts who are independent and who have the approval of the judge. But it was not simply that a privately-retained arrangement, unlike court appointment, makes the expert beholden to the lawyer. Lawyers feared that they would be surprised at trial with a court-appointed expert because they had less chance to communicate with the expert prior to trial. In addition, they were less able to control the direction of the court-appointed expert's testimony and, unlike privately-retained experts, when the court-appointed expert was favorable to their side, they could not prepare the expert for the rigors of cross-examination.

Additionally, lawyers pointed out that privately-retained experts could help them with the case in other ways. As one lawyer put it, "When something is weak about the case, a retained expert can 'sniff it out.'" Since a court-appointed expert is not allied with a lawyer, (s)he cannot be relied on to suggest problems and avenues for exploration in a case to counsel.

Most, but not all of the lawyers we spoke with in Dallas and Tarrant counties, had some cases where money was no object, where there

Vernon Mc. v. Brenda N., 196 A.D.2d 823, 825 (2d Dept. 1993); *Giraldo v. Giraldo*, 85 A.D.2d 164, 171 (1st Dept. 1982), appeal dismissed, 56 N.Y.2d 804 (1982). The reason for the variation in practice probably reflects the differing notions regarding the usefulness of court-appointed evaluations in custody disputes.

12. The Texas Board of Legal Specialization offers certification, authorized by the Supreme Court of Texas, in 17 areas of law, including family law. Certification is not a requirement of practice but is intended to help the public learn about the experience and education of attorneys who are certified in a specialty.

13. Family district courts, which exist in urban areas including Dallas and Ft. Worth, are specialized courts empowered to hear "(1) adoptions; (2) birth records; (3) divorce and marriage annulment; (4) child welfare, custody, support and reciprocal support, dependency, neglect, and delinquency; (5) parent and child; and (6) husband and wife." Tex. Gov't Code §§ 24.601 (1999). Texas law permits a county to authorize a family district court judge to appoint an associate judge to hear "any aspect" of a suit over which the family court has jurisdiction, subject to the right of a party to object to an associate judge hearing a trial on the merits. Tex. Fam. Code §§ 201.005 (1999).

14. American Psychological Assn., *Guidelines for Child Custody Evaluations in Divorce Proceedings*, 49 Am. Psychologist 677 (1994).

were essentially unlimited funds available. But all the lawyers emphasized that high-dollar cases were rare and that, for the most part, lawyers had to operate within a budget. If, one lawyer suggested, there was $30,000 available for a case, a court-appointed expert could cut a large sum from the budget, perhaps $5,000. That left considerably less for hiring retained experts and for a sufficient fee for the lawyers. Still, the Ft. Worth lawyers, in particular, emphasized that perhaps 80 percent of their cases had major financial constraints, and for these cases, it might be possible for a court-appointed expert to work for as little as $2,500. In contrast, it was typical for retained experts to cost as much as $10,000 to $50,000. In fact, in some rare cases retained experts might cost $100,000.

Court-appointed experts, it seems, were the poor litigants' experts, even though poorer persons— the bottom 80 percent—might think that the cost of the court-appointed expert is not trivial. Still, the lawyers had a strong preference for privately-retained experts. As one lawyer put it, "Trying a custody case without an expert is like taking a knife to a gunfight." If there was to be a court-appointed expert, the lawyers thought that it was likely, if it was affordable, for there to also be at least one retained expert on each side.

The lawyers also believed that psychological testimony in custody cases was a highly subjective process. One lawyer described it as "soft science." Additionally, contested custody cases were overwhelmingly close cases that might easily go either way, even though they were also highly emotional cases where, unlike property disputes, there was little or no room for compromise. In these cases, "refined advocacy" was necessary and a court-appointed expert simply did not help to promote an adversarial outcome.

Because Texas judges are elected in partisan elections, we assumed that family district court judges would be especially sensitive to the concerns of family lawyers, if only to cultivate their support in election campaigns. If family lawyers were strongly opposed to the use of court-appointed experts, we assumed the judges would be responsive to their concerns and reduce or eliminate court appointments. Interestingly, however, the Ft. Worth lawyers did not believe that partisan election of judges had any effect on the use of appointed experts. The Dallas County lawyers felt even more strongly that family court judges in Dallas County would not respond to lawyer hostility to court appointment of experts. In their view, family lawyers were not the main constituency of judges. Rather, they argued that as Dallas has become increasingly Republican, Dallas County judges need only worry about receiving the Republican nomination and that nomination had no relationship to the views of family lawyers.

The judges

Not surprisingly, the judges responsible for appointing experts found little problem with court appointment. Judges claim they use court-appointed experts to minimize bias. They assume that since the experts are court appointed, they do not have a hidden agenda. And, claim the judges, if experts do show bias, they will not be reappointed. In Ft. Worth, the judges say that there are four or five experts who regularly tend to be used as court-appointed experts. In Dallas, of course, there are more. In both jurisdictions, the judges tend to believe that a court-appointed system encourages objectivity, which helps to achieve their goal of obtaining neutral information.

The Dallas judges saw an advantage in that court-appointed experts would get to interview all sides and thus they would tend to have a better sense of the custody situation. On the other hand, the Dallas judges did worry that court-appointed experts might get too much respect and might learn the biases of judges and try to please the judges too much. However, both the Dallas and Ft. Worth judges noted that cross-examination of court-appointed experts could sometimes be intense because a special effort had to be made to make apparent their bias to the court and to the jury.

Both the Dallas and Ft. Worth judges tried to obtain the cooperation of attorneys by allowing them to select the court-appointed expert. If the attorneys could not agree on an expert or if the judge was not satisfied with the expert, the judge would sometimes provide a list of possibilities from which the attorneys could choose. This method did not give attorneys control over the expert, but it offered them a role in the selection process. As the lawyers tended to be hostile to the idea of court appointment, this selection mechanism offered to reduce the opposition of the lawyers. Payment of the expert would then come from the marital estate, although the experts stressed that obtaining payment was sometimes a struggle and that the judges could not be depended on to assist the experts. Along with the experts and the attorneys, the judges noted that if the money was available, lawyers would also present privately-retained experts. However, most cases involved limited resources, so the court-appointed expert was likely the only expert.

A mixed picture

Although family law cases present a unique opportunity to examine the use of court-appointed experts in the American legal system, it is important to be cautious in generalizing from these cases to their use across the legal system. Family law cases have transformed the adversary system for many reasons, not the least of which is the concern that unabated adversarialness may be harmful to children. In addition, at least in the two counties studied, retained experts have not generally been permitted to examine both parents and children in custody/visitation disputes, which is a predicate for a competent comparative assessment. Thus, apart from generic critiques about the use of retained experts, these family law cases may present a special set of cir-

cumstances compelling the use of court-appointed experts not present in many other types of cases.

Court-appointed experts have been used rarely in the civil or criminal justice system in America, but in Texas they are commonly used in family law cases. Thus, while we intend to expand our examination of the use of court-appointed experts to other jurisdictions, Texas family law cases presented a unique opportunity for this pilot study. What emerges from our discussions with experts, lawyers, and judges who work in this highly emotional area in Dallas and Tarrant counties is a mixed picture.

Lawyers are concerned they lose control of the process when court-appointed experts are used. Their access to court-appointed experts is far less than their access to privately-retained experts. In addition, they are unable to prepare court-appointed experts for testimony or for cross-examination and they cannot use the court-appointed expert for guidance in directing their case.

Court-appointed experts are commonly used exclusively when the case is low budget, but if money is available, lawyers much prefer also hiring privately-retained experts. They fear that the court-appointed expert will receive too much respect from the judge or jury, although judges note that they have seen court-appointed experts rigorously attacked in cross-examination. Additionally, at least the Dallas lawyers believe that many of the court-appointed experts lack sufficient competence.

Although the lawyers bemoan the loss of control over the expert, the experts enjoy the independence they get from court appointment. Not beholden to lawyers, they perceive that they also are immune from civil lawsuits because of their testimony. Their comfort with the court-appointment system is very high.

Judges are primarily concerned that court appointment provides them with a neutral opinion by an expert in an intensely difficult and emotional area of law. For Texas's family court judges, who have been immersed in a legal culture that uses court appointment of experts, there appear to be no barriers to appointment and few downsides for doing so.

For judges, there appear to be no barriers to court appointment of experts and few downsides for doing so.

In short, the evaluations of court appointment of experts depends on one's role in the process. Nonetheless, several points emerge from our focus groups. These are the considerations of control, cost, and neutrality, which find their echo in the larger debate about the use of court-appointed experts.

Within the adversarial system, it is normally accepted that lawyers control the presentation of facts before the judge and jury, but that is lost with court-appointed experts. The experts are largely free of the lawyers' control and have, at the minimum, the aura of the judges' imprimatur in their testimony. Although they may be subject to harsh cross-examination, they are far more free agents than are privately-retained experts.

In low-budget custody cases, which are most of those in Dallas and Ft. Worth, limited resources may require that only the court-appointed expert is presented. Indeed, settlement may sometimes be encouraged where a court-appointed expert has reached a conclusion, having interviewed both parties. However, it is not necessarily the case that costs are reduced by the use of court-appointed experts. If money is available, privately-retained experts will be used, either in a testifying capacity, in a consulting capacity, or both.

Finally, when an expert is court appointed, there is at least an aura of neutrality about the expert. Court-appointed experts also interview both parents and thus will have more complete information on which to base a conclusion. It is a position that is much more appealing professionally for the expert witness. However, because there is little rigorous science underpinning most expert custody or visitation recommendations[15], the aura of neutrality and objectivity of court-appointed experts is troubling.

Despite complaints from the bar, the judges and experts we spoke to had a favorable impression of the use of court-appointed experts. But these impressions cannot substantiate the claim that the use of court-appointed experts is superior to the use of retained experts. Moreover, we do not know if the satisfaction expressed by judges and experts is generalizable to other judges and experts in Dallas and Ft. Worth, much less the rest of Texas. Even conceding that court appointment of experts in Texas family courts is working well, it is nonetheless unclear whether other case types will so easily permit the routine use of court-appointed experts. Nor is it clear whether it would be easy to establish elsewhere the kind of legal culture present in the Texas family court context that apparently appreciates the advantages of the regular use of court-appointed experts.

15. Krauss and Sales, *Legal Standards, Expertise, and Experts in the Resolution of Contested Child Custody Cases*, 6 PSYCHOL., PUB POL'Y & L. (2000) (forthcoming).