

[FN8]. Ohio Revised Code § 2711.21.

[FN9]. See Order of January 5, 1987 attached as Appendix I.

[FN10]. See Appendix II-"Order of Intent to Appoint Court Expert".

[FN11]. See Appendix III-"Instruction to Court Appointed Expert Witnesses".

[FN12]. See Appendix IV.

[FN13]. By comparison, in one case where asbestosis was conceded by defendants and no court expert was retained, the plaintiff received a verdict for \$80,000.

[FN14]. See Footnote 13.

[FN15]. Herron v. Southern Pacific Co., 283 U.S. 91, 51 S.Ct. 383, 75 L.Ed. 857 (1931).

[FN16]. No opinion expressed regarding lung cancer.

END OF DOCUMENT

Westlaw

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Federal Rules Decisions  
October, 1991

\*35 THE USE OF COURT EXPERTS IN ASBESTOS LITIGATION [FNa]

Carl B. Rubin [FNaa]  
Laura Ringenbach [FNaaa]

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October, 1991\*35 THE USE OF COURT EXPERTS IN ASBESTOS LITIGATION [FN<sup>a</sup>]Carl B. Rubin [FN<sup>aa</sup>]  
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## I.

## INTRODUCTION

Of growing concern to the progress of litigation has been the proliferation of expert witnesses. Hardly a case is tried that does not have its share of experts on almost any subject imaginable. [FN<sup>1</sup>] It has been said that the greatest untapped source of wealth in the United States is the money available to anyone who qualifies as an expert. Aside from the added expense that experts cause, their use creates an advantage to the litigant who is well financed and an equivalent disadvantage to the one who is not.

Inevitably, the increased use of experts has created the "Expert-Advocate," who no longer is sought simply because of his technical knowledge, but rather for his courtroom presence and his ability to present a convincing position.

Anyone familiar with current litigation is also familiar with the "Battle of the Experts." Where each side has adequate financial resources, the jury will be treated to a procession of persons with impeccable credentials and persuasive testimony. The real problem confronting a jury is that these experts, all armed with such qualifications, will reach diametrically opposite viewpoints depending upon which side they testify for. All too often it is the charm, wit and appearance of such an expert that decides the outcome of the litigation.

\*36 Juries in the Southern District of Ohio will usually be composed of jurors with an average formal education of high school. The ability of an erudite expert with two or three college degrees to confuse such jurors is not even in question. Theoretically he will be counter-balanced by an expert for the other side possessing equivalent credentials. The avoidance of jury confusion is probably the most critical task facing a trial judge. An uncontrolled number of experts inevitably magnifies confusion. Arguably that problem can be minimized by limiting the number of experts permitted for each side. [FN<sup>2</sup>] Usually this technique meets with some resistance, particularly by the side that is better financed. It is not enough. Even two or three experts per side are capable of confusing any jury.

This is not to suggest that jurors are incapable of understanding scientific testimony. Studies beginning with the Chicago Jury Project reported in "The American Jury" by H. Kalven and H. Zeisel (1966) indicate quite the contrary. [FN3] The problem instead is how to minimize the inevitable confusion of contradictory partisan testimony.

There is a procedure for control in this area and it is contained in Rule 706 of the Federal Rules of Evidence. [FN4] A court may appoint its own expert. It is a customary technique on cross examination to inquire of an expert witness how frequently he has been retained by one side or another; how much he charges for his appearance and in some instances how much he made in previous years by acting as an expert witness. While this should not detract from the validity of his views it does imply that the expert's view are colored by his employment. The more partisan the retained experts appear to be, the more objective the Court's expert will seem.

\*37 There has been a reluctance to use this device because of the substantial impact the Court's expert may have. [FN5] But choosing between alternatives is nothing new. It is the very essence of the art of judging.

It is the basic thesis of this paper that this problem, like most others that occur in the courtroom, are controllable by the presiding Judge by the use of Rule 706. As a subthesis it is suggested that Rule 706 be used sparingly since it has the potential for affecting the litigation involved.

## II.

### THE ASBESTOS LITIGATION

This paper reports the results of using a court appointed expert in 65 asbestos bodily injury cases filed in the United States District Court for the Southern District of Ohio at Cincinnati. Part III will be concerned with the use of Court experts in 65 cases. Part IV will consider the results of the sixteen cases where the Court's expert testified.

Asbestos litigation in significant numbers began in the United States District Court at Cincinnati in 1986. The majority of suits filed arose from conditions in a plant originally owned by the Philip Carey Company and later sold to Celotex. The plant produced building material containing asbestos. Employees were exposed to asbestos in its unprocessed state. A group of cases concerned the General Electric Corporation Jet Engine facilities at Evandale, Ohio. At that plant the exposure was limited to processed asbestos in the walls and ceilings.

It should also be noted that the illnesses which were the subject of this litigation were the noncancerous variety of asbestosis and pleural plaque. Merely for the purpose of separation, the two conditions are described as follows:

Asbestosis is a term reserved for the interstitial fibrosis of the pulmonary parenchyma in which asbestos bodies or fibers may be demonstrated. [FN6]

Asbestosis is only caused by the inhalation of asbestos fibers. It is not curable and will result in permanent disability.

A second condition is known as "pleural plaque":

Pleural plaques are discrete, elevated, rounded lesions characteristically

occurring on the posterolateral aspect of the lower parietal pleural or diaphragm. Plaques are of two types-diffuse and nodular-and can vary in size and shape. [FN7]

Pleural plaque does not interfere with the lung function, nor does it predispose a person to early death or a functional impairment. It is, however, an abnormal condition and, arguably, compensable.

\*38 In 1986 and in 1987 the early asbestos cases began to come to the Court's attention, usually in settlement conferences. A pattern began to develop almost immediately. It became apparent that the plaintiffs had available a group of experts who always found asbestosis. They were countered by a group of defendant experts who rarely if ever found asbestosis. There should be no question regarding the competence of the experts involved. Without exception, they are all board certified, although one has been unable to obtain certification in the specialty of pulmonology. They are all experienced, knowledgeable and qualified.

Proceeding under Rule 706, the Court first inquired of the American Medical Association, The American Thoracic Society, The American Board of Internal Medicine and other national groups of the availability of specialists in pulmonology who would be willing to participate in this program. To be used as a Court's expert, a doctor was required to meet the following criteria: (1) board certification in the field of pulmonology, (2) no previous participation in an asbestos case by appearance either for a plaintiff or a defendant, and (3) no previous employment or retentions as a consultant for any of the defendant asbestos companies. Without much difficulty a list of experts was developed. While names were solicited from plaintiffs and defendants, it developed, predictably, that each side was submitting names of doctors who had previously testified favorably.

Initially an effort was made to create panels. In Ohio there is an arbitration procedure whereby medical malpractice cases may be submitted to a board, one member of which is named by the plaintiff, one by the defendant, and a chairman by the Court. [FN8]

The Court proposed such a panel to examine each plaintiff. One doctor would be selected by the plaintiff, one by the defendant and one by the Court. [FN9] It continues to be this Court's opinion that a report by such a panel would be useful in any asbestos case. Regrettably, however, counsel declined to participate. In the absence of such a panel the Court then began to name its expert for each case. With the assistance of Special Master Laura Ringenbach, and later Special Master Jill Fuchs, a procedure was developed whereby counsel were advised of the name of the expert proposed by the Court and given an opportunity to object. [FN10] Upon selection, the expert was instructed by the Court. [FN11]

Counsel were to submit to such expert all reports, x-rays, and other pertinent material. The expert rendered a written opinion and was thereupon available for deposition. In the event the case went to trial, the expert would testify at a convenient time. All expenses of the expert, the cost of his initial opinion, his time in deposition, if any, his travel expenses and a fee for testifying were paid equally by the plaintiff and the defendant.

### \*39 III.

#### THE USE OF COURT EXPERTS WHERE CASES SETTLED

Initially the Court developed a list of ten doctors who served as the Court's

experts. [FN12] None were selected from the Cincinnati area. Of the ten, five considered three or fewer cases, one reported on five and four dealt with ten or more. The differences were entirely the result of a doctor's availability.

Appendix IV details the separate conclusions of the experts as to asbestosis and pleural plaque. It is noteworthy that ten independent experts all found that the majority of plaintiffs examined did not have an asbestos related condition.

Appendix IV may have statistical value. It discloses that court appointed experts found that almost two thirds of all plaintiffs did not have an asbestos related condition. Of the 65 plaintiffs, 42 (64.62%) were found to be free of any condition giving rise to a cause of action.

The remaining 23 have been subdivided into a group diagnosed with asbestosis and one diagnosed with pleural plaque only. The distinction may be medically significant, but legally the distinction should be irrelevant on the subject of liability. Either asbestosis or pleural plaque caused by exposure to asbestos fiber should be compensable. The initial question directed to the court expert, however, was "does this plaintiff have Asbestosis?" That question was answered "no" over 80% (84.62%) of the time.

#### IV.

#### COURT EXPERT TESTIMONY

The Court's experts testified in sixteen cases tried between September, 1987, and September, 1990. In point of time, one case was tried in 1987, three in 1988, three in 1989, nine in 1990. In all appearances by the Court's expert, the same technique was used. The jury was instructed that the expert had been called by the Court and that his testimony was not to be given any additional credence from that fact alone. A copy of the jury instruction given in these cases is included herein as Appendix V. Ideally, the Court's expert would testify after the plaintiff had rested and before the defendant had begun. This was not possible in all cases. Where it was not practical for the Court's expert to testify in that fashion, his testimony was presented wherever convenient. The Court's expert was introduced, as all experts are introduced, by the Court with a reading of selected qualifications. He was then asked three questions:

1. What have you done to prepare yourself for testimony in this case?
2. Do you have an opinion to a reasonable degree of medical certainty as to whether or not Mr. \_\_\_\_\_ has an asbestos related disease?
3. What is that opinion?

\*40 Upon the giving of such opinion, the witness was then interrogated by counsel in such detail as counsel found appropriate and in whatever order counsel agreed.

While it is discretionary under Rule 706 for the Court to advise or not advise the jury that the witness has been selected by the Court, an alternate procedure proved impractical. In a situation where all experts appeared in person, the Court offered to interrogate each in the same fashion with the same three questions asked and without any identification that one was a court appointed expert. Unfortunately, frequently one or more experts would testify by videotape and thereby prevent the uniform introduction by the Court.

In the sixteen cases where court experts testified, they found asbestosis in two. Pleural plaque alone was found by them in five cases. As a result of those trials, juries returned eleven defendant verdicts and five plaintiff verdicts. The damage awards for the plaintiffs ranged from a low of \$10,000 to a high of \$140,000. In only one instance, where the Court's expert found neither asbestosis nor pleural plaque, was there a plaintiff's award. In that case he was awarded \$10,000. In two cases where the Court's expert found no asbestosis, but did find pleural plaque, there were awards of \$15,000 and \$22,000. In the remaining two cases where the Court's expert found both asbestosis and pleural plaque the damage awards ranged from a low of \$30,000 to a high of \$140,000. [FN13]

Cases tried involved three Court experts: Dr. Murray Gilman of Atlanta, Georgia; Dr. Eddy Bresnitz of Philadelphia, Pennsylvania; and Dr. Marc Schenker of Los Angeles, California. Dr. Gilman testified in seven cases, Dr. Bresnitz in six, and Dr. Schenker in three. Dr. Gilman found no case where the plaintiff had asbestosis alone, three cases where the plaintiff had pleural plaque alone, two cases where there was both asbestosis and pleural plaque and two cases where there was neither asbestosis nor pleural plaque. Where Dr. Gilman found both asbestosis and pleural plaque, the plaintiff won damage awards. Where he found no asbestosis but pleural plaque, there were two defense verdicts and one plaintiff's verdict in the amount of \$15,000. It was Dr. Gilman who testified in the one case where he found neither asbestosis nor pleural plaque that the plaintiff received a \$10,000 verdict.

Dr. Schenker testified in three cases and found neither asbestosis nor pleural plaque in any of the plaintiffs. In one instance he did testify that asbestosis was "possible but unlikely" and in none of the cases in which he testified did the plaintiff receive any monetary award.

Dr. Bresnitz testified in six cases, found pleural plaque alone in two and neither asbestosis nor pleural plaque in four. In no instance did the jury disagree with his findings where he found neither asbestosis nor pleural plaque, but in the two cases where he found no asbestosis but pleural plaque, the jury found for the defendant in one and for the plaintiff in the other and awarded \$22,000.

It should be pointed out that in all of the cases tried, the only defendant was Carey-Canada, Ltd., a subsidiary of the Celotex Company. \*41 Before or during trial all other defendants settled. Carey-Canada alone was responsible for any judgments. In four of the cases where there were judgments of \$10,000, \$15,000, \$22,000, and \$30,000, Carey-Canada paid nothing. The amount of settlement by other defendants exceeded the judgment awarded. From that defendant's viewpoint, the trial of sixteen asbestos cases was probably economically sound since only in two cases were they required to pay any damages. The largest verdict was returned in a case where the Court's expert found both asbestosis and pleural plaque and the second largest verdict was returned in the case where no court expert was retained. [FN14]

If sixteen cases is a statistically significant number, it would appear that the juries tended to follow the Court's experts. The Court's experts found no asbestosis in fourteen cases and there were defendant verdicts in eleven. The Court's experts found asbestosis in two cases and there were plaintiff verdicts in each. In three other cases where the Court's expert found no asbestosis there were plaintiff verdicts, but in the fairly nominal range of \$10,000- \$22,000.

Pleural plaque was found by the Court's expert in seven cases. It was not found in nine. In three cases where the Court's expert found pleural plaque, there was

still a verdict for the defendant. Where it was not found, the jury held for the defendant in eight of the nine cases. In the one case there was a plaintiff's verdict for \$10,000, although the Court's expert found no asbestosis either. In five cases where the Court's expert found pleural plaque, there were plaintiff verdicts ranging from a high of \$140,000 to a low of \$15,000.

In summary, the jury decided with the Court's expert in thirteen out of sixteen cases where asbestosis was involved for a percentage of 81.25. In cases where pleural plaque was involved, the juries decided with the Court's expert in twelve out of sixteen cases for a percentage of 75.00. Note that there is an overlap in the foregoing since only sixteen cases in toto are involved but two questions on each.

The conclusion is inescapable: A Court's expert will be a persuasive witness and will have a significant effect upon a jury.

V.

#### FUTURE USE

For the future, Rule 706 will be used wherever appropriate with the following safeguards:

One: Impartial experts must be selected. In medical matters the American Medical Association or its various specialty Boards are an appropriate starting point. No expert should ever be selected who has any prior connection with either side.

Two: Counsel should be given an opportunity to recommend or at least to comment on the court's proposed selection. All available information concerning the proposed expert should be given to counsel together with \*42 an opportunity to be heard either by written objections or by an appropriate court hearing.

Three: It must be emphasized to the expert from the beginning that his only function is to render an objective opinion. He is neither an advocate for, nor partisan of either side.

The use of court experts may also involve a question of judicial philosophy. Justice Oliver Wendell Holmes once described the trial judge's function in these words "In a trial by jury in a federal court, the judge is not a mere moderator but is the governor of the trial for the purpose of securing its proper conduct".

[FN15] Rule 706 may become essential to the function of the "governor".

#### APPENDIX I

In the United States District Court for the Southern District of Ohio Western  
Division

In Re: ASBESTOS LITIGATION

#### NOTICE OF PROPOSED ORDER

Essential to any determination of the litigation currently in this Court and referred to as the "Asbestos Cases" is the existence or nonexistence of the medical condition known as Asbestosis. This Notice is limited to those cases where the existence of Asbestosis is contested. It does not deal with any asbestos case asserting the existence of cancer as a result of exposure to asbestos fibers.

This common issue warrants a procedure for prompt disposition. There are currently in excess of 60 asbestos cases pending before the undersigned. They will require approximately one-half of the Court's trial time for 1987. Additional cases may require similar time commitments during 1988.

This problem has been discussed with representative counsel of both Plaintiffs and Defendants. Based upon the views stated by such counsel it is the Court's intention to proceed as follows:

1. All counsel will be solicited to suggest Board Certified Pulmonologists who might assist the Court.
2. The Court will make an independent inquiry of the University of Cincinnati College of Medicine and other appropriate agencies and will from all sources compile and publish a short list of qualified pulmonologists who may serve as Court Experts.
3. In any asbestos cases where the existence of Asbestosis is questioned, the parties will be directed to submit all pertinent information to a panel of three experts, one to be selected by the Plaintiff, one to be selected by the Defendants, and the third by the Court. The Court's choice will serve as Chairman. Such a panel may examine the Plaintiff, \*43 may inquire into his medical records and may conduct any other tests that appear to be appropriate.

Upon completion of its inquiry, the panel will advise the Court of its opinion in regard to the existence or nonexistence of Asbestosis. The parties will be encouraged to resolve their differences based upon such report. No party to the litigation will be required to accept such panel opinion as a basis for settlement. The right to a jury trial will not be affected.

4. Pursuant to the Rule 706 of the Federal Rules of Evidence the Court may call any panel member as its witness in the trial of the case. In such event counsel will be so advised at the final pretrial conference and given an opportunity to depose that witness.

This Court proposes to make this order effective February 1, 1987. A hearing will be held on Friday January 16, 1987 at 2:00 p.m., at which time any person wishing to do so may show cause why this Order should not be adopted.

IT IS SO ORDERED.

Carl B. Rubin

[FNa] Chief Judge

United States District Court

[FNa]. Judge Rubin served as Chief Judge in the Southern District of Ohio from Sept. 23, 1979 to March 15, 1990.



APPENDIX II

In the United States District Court for the Southern District of Ohio Western  
Division

IN RE: ASBESTOS LITIGATION  
This Order Applies to Case Nos.

ORDER OF INTENT TO APPOINT COURT EXPERT

Pursuant to Rule 706 of the Federal Rules of Evidence counsel in the above-entitled cases are hereby notified that the Court proposes to appoint as its expert:

Dr. \_\_\_\_\_

for the above-listed cases.

Counsel are directed to file any objections to such appointment within ten days of the date of this order.

IT IS SO ORDERED.

Carl B. Rubin

Chief Judge

United States District Court

\*44 APPENDIX III

In the United States District Court for the Southern District of Ohio Western  
Division

IN RE: ASBESTOS LITIGATION

INSTRUCTION TO COURT APPOINTED EXPERT WITNESSES

In accordance with Rule 706(a) of the Federal Rules of Evidence, the following instructions to each court-appointed expert witness serving on the Asbestosis Panel are hereby filed with the Clerk of this Court.

As the Court's appointed expert on the Asbestosis Panel, you will render an objective medical diagnosis of the presence or absence of such diseases as may be requested.

You will be assigned a case or cases that have been assigned a trial date. The plaintiff's and defendants' counsel will be instructed to provide you with all necessary and relevant medical data, including but not limited to records, x-rays, slides, tissue samples, and pulmonary test information for each plaintiff. You may request additional tests of plaintiff if, in your judgment, it is warranted. In addition, if you wish to consult with a pathologist or radiologist, the Special

Master will assist with any necessary arrangements.

The plaintiff's and defendants' counsel will each submit, in writing, the name, address and telephone number of the physician selected to act as that party's representative on the Asbestosis Panel. You may communicate with the other physician panelists or call for joint consultation.

A written report for each case summarizing your findings and opinions will be required. That report should be sent to the Special Master for distribution to lead counsel on that case.

Counsel for plaintiff and defendants may wish to depose you after you have submitted your written report. The deposition will take place in the city where you reside (unless you agree to another location) and at a mutually convenient date and time.

If the case you evaluated proceeds to trial, you must be available to testify as the Court's expert witness. All reasonable efforts will be made to minimize any inconvenience the scheduling may cause you and your patients.

Your bill for fees and expenses associated with the case evaluation, depositions, and/or trial testimony must be sent to the Special Master. The Court will arrange for prompt payment.

If at any time you have any questions concerning the procedure, please direct them to the Special Master.

IT IS SO ORDERED.

Carl B. Rubin

Chief Judge

United States District Court

\*45 APPENDIX IV

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COURT EXPERT FINDINGS				
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EXPERT	TOTAL	ASBESTOSIS	PLEURAL	NO ASBESTOS RELATED
	CASES		PLAQUE	CONDITION
			ONLY	
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Dr Marc	11	6777, 6779	6778	6773, 6776, 6827 6830,
Schenker		6833		7962 [FN*], 8279 [FN*]
				8240 [FN*]
-----				

Dr. Eddy	10		6795, 8013	6784, 8019 [FN*], 6792
Bresnitz			[FN*],	6787, 8012 [FN*], 8016
			81061 [FN*]	[FN*] 8010 [FN*]
-----				
Dr Brian	10	6814	6817, 6836	6804, 6808, 6812 6824,
Boehlecke			6841	6839, 6845
-----				
Dr Richard	5			6854, 6856, 7010 61197,
Matthay				61135
-----				
Dr Hans Weil	3	6232	6226	6229
-----				
Dr Robert Jones	3		6238	6235, 6241
-----				
Dr Charles	3			6250, 6351, 6356
Drage				
-----				
Dr Irwin Berlin	3	6510	6512	6518
-----				
Dr Murray	15	8027, 8037	8044 [FN*],	6726, 6727 [FN*], 6731
Gilman		8048	7820	6732, 6743, 6749 8030,
		[FN*],	[FN*]	8040 [FN*]
		8694 [FN*]	8450 [FN*]	
-----				
Dr Bernard Gee	2			6352, 6357
-----				
TOTAL	65	10	13	42
		15.38%	20.00%	64.62%

FN\* Tried to a Jury

APPENDIX V

JURY INSTRUCTION-5006.1

EXPERT WITNESS

You have heard testimony from persons who were described as experts.

A person who by knowledge, skill, experience, training or education has become expert in some field, may state an opinion on matters in that field and may also state reasons for that opinion.

Expert testimony should be considered by you like any other testimony. You may accept it or reject it, or give it as much weight as you think it deserves, considering the witness' education and experience, the reasons given for the opinion, and all the other evidence in the case.

**\*46** In this case you have heard from an expert witness appointed by the Court. You may not attach any significance to that fact in considering his testimony.

APPENDIX VI  
TRIAL RESULTS

CASE NUMBER	TRIAL DATE	DR.	ASBESTOSIS	PLEURAL PLAQUE	DECISION	DAMAGES
6727	9/87	G	No	No	Deft	0
7820	9/88	G	No	Yes	Deft	0
7962	11/88	S	No	No	Deft	0
8010	12/88	B	No	No	Deft	0
8450	6/89	G	No	Yes	Deft	0
8040	11/89	G	No	No	Pltf	\$10,000
8044	4/90	G	No	Yes	Pltf	\$15,000
8012	4/90	B	No	No	Deft	0
8013	5/90	B	No	Yes	Deft	0
8019	9/90	B	No	No	Deft	0
8016	6/90	B	No	No	Deft	0

81061	6/90	B	No	Yes	Pltf	\$22,000
8048	12/89	G	Yes	Yes	Pltf	\$140,000
8279	2/90	S	No	No	Deft	0
8240	2/90	S	No [FN*]	No	Deft	0
8694	3/90	G	Yes	Yes	Pltf	\$30,000

G-Dr. Murray Gilman

B-Dr. Eddy Bresnitz

S-Dr. Marc Schenker

FN\* 'Possible but unlikely'

#### APPENDIX VII

The following is a case by case listing of significant portions of the opinions by the court appointed expert. The parties are not identified and the number used is a portion of the filing number in the Southern District of Ohio.

##### A. Court's Expert Diagnosis of Asbestosis

6232

"Asbestosis of mild extent-evidence of chronic bronchitis, undoubtedly primarily associated with long term cigarette smoking."

\*47 6510

"Squamous cell carcinoma of lungs, asbestosis/fibrosis of the lung."

6777

"My opinion with a reasonable degree of medical certainty is that the findings in this case are consistent with asbestosis."

6779

"My opinion in this case with a reasonable degree of medical certainty is that the findings are sufficient to make a diagnosis of asbestosis."

6814

"Overall it is my opinion that Mr. \_\_\_\_\_ has asbestos induced pulmonary disease which is of a very mild degree in terms of its physiological impact."

6833

"It is my opinion with a reasonable degree of medical certainty that Mr. \_\_\_\_\_

has probable asbestosis."

8027

"Mr. \_\_\_\_\_ has a restrictive ventilating defect most likely secondary to a combination of diffuse pleural thickening and interstitial pneumonitis ... it is reasonable to attribute these abnormalities to asbestos related events."

8037

"Mr. \_\_\_\_\_ has a probable asbestos-related disease process. The clinical data suggests that early interstitial pneumonitis or asbestosis may be present."

8048

"The clinical and radiologic findings are consistent with asbestos-induced pleuroparenchymal changes. The demonstration of bilateral pleural thickening and calcified plaques is a classical asbestos-related problem."

8694

"In summary, the radiologic findings indicate that Mr. \_\_\_\_\_ asbestos exposure has produced a mild degree of interstitial fibrosis as well as a calcified pleural plaque."

#### B. Court's Expert Diagnosis of Pleural Plaque Only

6226

"There is ample evidence of the pleural affects of asbestos exposures, but no evidence of asbestosis."

6238

"Mr. \_\_\_\_\_ had calcified plaque of the parietal pleura caused probably by inhaled asbestos. There is no radiographic evidence of asbestosis."

6512

"Asbestos induces pleural calcification indicative of exposure but not disease, no evidence of asbestosis."

\*48 6778

"My opinion in this case with a reasonable degree of medical certainty is that Mr. \_\_\_\_\_ has pleural changes consistent with this asbestos exposure, however, he does not have adequate findings to make a diagnosis of asbestosis."

6795

"It is my opinion with a reasonable degree of medical certainty that Mr. \_\_\_\_\_ has asbestos induced bilateral pleural plaque/thickening. There is no evidence of parenchymal asbestosis or clinically significant pulmonary function impairment."

6817

"It is my opinion that Mr. \_\_\_\_\_ has no clinically significant interstitial fibrosis (asbestosis) at the present time ... he does have bilateral localized pleural thickening (plaques) which is attributable to his asbestos exposure."

6838

"It is my opinion with a reasonable degree of medical certainty that Mr. \_\_\_\_\_ has pleural plaques due to his prior asbestos exposure. He does not have evidence of interstitial fibrosis or asbestosis."

6841

"It is my opinion with a reasonable degree of medical certainty that Mr. \_\_\_\_\_ has a pleural plaque related to his prior asbestos exposure. He does not have evidence of asbestosis."

7820

"A diagnosis of asbestosis cannot be supported by the available medical records. The presence of pleural plaque on the postmortem pathology specimens demonstrates that an asbestos related pleural process was present."

8013

"It is my opinion with a reasonable degree of medical certainty that Mr. \_\_\_\_\_ has the following diagnosis: (1) pleural plaque/thickening ... asbestos was a significant contributing cause to the above diagnosis."

8044

"Mr. \_\_\_\_\_ has asbestos related lung disease in the form of calcified pleural plaque. There is no substantial evidence to indicate that pulmonary asbestosis is present."

8450

"The medical evidence clearly establishes that Mr. \_\_\_\_\_ has an asbestos-related disorder. The chest x-rays consistently demonstrate bilateral pleural plaque formation. A pulmonary parenchymal disorder such as asbestosis cannot be diagnosed based on the available data."

81061

"It is my opinion with a reasonable degree of medical certainty that Mr. \_\_\_\_\_ has the following diagnosis: (1) bilateral pleural plaques secondary to his past history of asbestos exposure. Although early \*49 asbestosis is a possibility, the lack of bibasilar end-inspiratory rales, the lack of a persistently abnormal diffusing capacity, the lack of interstitial opacities and the changes in PFT's associated with increasing weight, do not support that diagnosis currently."

#### C. Court's Experts Diagnosis of No Asbestos Related Condition

6229

"No asbestos related disease."

6235

"Mr. \_\_\_\_\_ did not have an asbestos related condition of lungs or pleura."

6241

"No evidence of asbestos-related health effects."

6250

"The x-ray reviewed revealed no evidence of asbestosis.... no evidence of restricted lung disease which should be characteristic of parenchymal asbestosis."

6351

"Record does not substantiate the diagnosis of either pleural or parenchymal pulmonary asbestosis."

6352

"There is no medical basis for believing there are any asbestosis effects on lung or pleural."

6356

"[N]o evidence of pleural or parenchymal asbestosis."

6357

"No interstitial lung disease and no pleural pulmonary abnormalities, therefore no asbestos related abnormalities."

8518

"No evidence for asbestosis i.e. no interstitial lung disease."

6726

"Review of the chest x-ray findings did not reveal signs of an increase of interstitial markings which could support a diagnosis of asbestosis even in the presence of normal pulmonary functions studies."

6727

"The accumulative findings do not indicate that asbestosis has occurred in this individual."

6731

"The pulmonary function data do not however provide objective data supportive of an interstitial disease process such as asbestosis.... the chest x-rays [d]emonstrate essentially clear lung fields without evidence of asbestosis or asbestos-related pleural abnormalities."

6732

"The cumulative data does not indicate that the claimant has an interstitial disease process consistent with asbestosis."

\*50 6743

"Chest x-rays ... do not reveal any evidence of an increase in interstitial markings ... in the absence of any increase in interstitial markings on x-rays a normal diffusing capacity and a normal vital capacity, it is highly unlikely that a diagnosis of asbestosis can be supported."

6749

"In the absence of significant pulmonary parenchymal changes on chest x-rays and a normal specific diffusing capacity, a diagnosis of an interstitial disease process is unlikely. As a result a diagnosis of asbestosis is not supported by the cumulative medical information."

6773

"... He does not at this time have sufficient findings for a diagnosis of asbestosis."

6776

"My opinion with a reasonable degree of medical certainty is that there is no evidence of asbestos related abnormalities in this case."

6784

"It is my opinion with a reasonable degree of medical certainty that Mr. \_\_\_\_\_ has no evidence of asbestos related disease and no evidence of respiratory impairment."

6787

"It is my opinion with a reasonable degree of medical certainty that there is no evidence of asbestos related disease at the present."



6792

"It is my opinion with a reasonable degree of medical certainty that Mr. \_\_\_\_\_ has no evidence of asbestos related pleural or parenchymal pulmonary disease."

6804

"It is my opinion that Mr. \_\_\_\_\_ does not have clinically significant interstitial fibrosis (asbestosis)."

6808

"It is my opinion that Mr. \_\_\_\_\_ has no evidence for clinically significant interstitial fibrosis (asbestosis)."

6812

"It is my medical opinion that Mr. \_\_\_\_\_ does not have significant interstitial fibrosis (asbestosis)."

6824

"It is my medical opinion that Mr. \_\_\_\_\_ does not have any clinically significant asbestos related lung disease."

6827

"Diagnosis of asbestos related conditions: None. Mr. \_\_\_\_\_ does not have criteria for a diagnosis of asbestosis ... the pleural changes on his chest x-ray may have been due to asbestos exposure but could also represent a post infectious or post surgical outcome. It's presence on only the left side suggests it may be related to a process other than his asbestosis exposure."

\*51 6830

"It is my opinion with a reasonable degree of medical certainty that Mr. \_\_\_\_\_ does not have any asbestosis related conditions."

6839

"It is my opinion with a reasonable degree of medical certainty that Mr. \_\_\_\_\_ does not have asbestosis."

6845

"Mr. \_\_\_\_\_ does not have evidence of asbestosis or pleural changes due to asbestos exposure."

6854

"There is no evidence that the patient is significantly impaired due to asbestosis at this time."

6856

"I find no evidence for significant impairment due to asbestos."

61135

"Patient has a significant history of asbestos exposure, but no evidence of significant impairment secondary to asbestosis."

61197 [FN16]

"No clinical evidence at this time that the patient is impaired by asbestos related pulmonary pleural alterations. Note, no opinion was expressed whether lung cancer was due in part to asbestos exposure.-1986 an upper lobectomy for

adenocarcinoma of the lung."

7010

"No evidence of parenchymal disease ... no evidence of asbestosis."

7962

"... it is not possible to state with a reasonable degree of medical certainty that asbestosis related lung disease was present ..."

8010

"It is my opinion with a reasonable degree of medical certainty that Mr. \_\_\_\_\_ has no evidence of asbestos related disease." (Testimony at trial December 20, 1988).

8012

"It is my opinion with a reasonable degree of medical certainty that Mr. \_\_\_\_\_ has no evidence of asbestos related disease."

8016

"It is my opinion with a reasonable degree of medical certainty that Mr. \_\_\_\_\_ has no evidence of asbestos related disease."

8019

"There is no definitive evidence of an asbestos related disease such as asbestosis."

8030

"Mr. \_\_\_\_\_ does not have sufficient objective evidence to support a diagnosis of an asbestos-related disease process."

\*52 8040

"The cumulative data which I had the opportunity to review was not supportive of an asbestosis related lung disorder ... interstitial ... asbestosis was not considered a likely possibility in the absence of supportive ... data."

8240

"... asbestosis is possible but unlikely in the absence of more definite x-ray changes. Similar cases would find asbestosis on pathologic specimens at the most 25% of the time."

8279

"In summary, there is no evidence to support a diagnosis of asbestosis in this case, but it is not possible to categorically exclude such a diagnosis in view of the basilar fibrosis on the chest x-rays and the possibility that asbestosis could have contributed to their presence."

The views expressed are those of the author and do not necessarily reflect the views of the publisher.

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[FNaa]. Judge, United States District Court, Southern District of Ohio.

[FNaaa]. Esquire, Special Master.

[FN1]. Rule 702 Federal Rules of Evidence. Testimony by Experts

"If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise."

[FN2]. In Re Bendectin Products Liability Litigation, 624 F.Supp. 1212, aff'd 857 F.2d 290 (6th Cir.1988), cert. denied, 488 U.S. 1006, 109 S.Ct. 788, 102 L.Ed.2d 779 (1989).

[FN3]. This subject is considered in a scholarly and well written article by Edward J. Imwinkelried, "The Standard for Admitting Scientific Evidence: A Critique from the Prospective of Juror Psychology" 28 Villanova Law Rev. 554 (1982-1983).

[FN4]. Rule 706 Federal Rules of Evidence. Court Appointed Experts

(a) Appointment. The court may on its own motion or on the motion of any party enter an order to show cause why expert witnesses should not be appointed, and may request the parties to submit nominations. The court may appoint any expert witnesses agreed upon by the parties, and may appoint expert witnesses of its own selection. An expert witness shall not be appointed by the court unless the witness consents to act. A witness so appointed shall be informed of the witness' duties by the court in writing, a copy of which shall be filed with the clerk, or at a conference in which the parties shall have opportunity to participate. A witness so appointed shall advise the parties of the witness' findings, if any; the witness' deposition may be taken by any party; and the witness may be called to testify by the court or any party. The witness shall be subject to cross-examination by each party, including a party calling the witness.

(b) Compensation. Expert witnesses so appointed are entitled to reasonable compensation in whatever sum the court may allow. The compensation thus fixed is payable from funds which may be provided by law in criminal cases and civil actions and proceedings involving just compensation under the fifth amendment. In other civil actions and proceedings the compensation shall be paid by the parties in such proportion and at such time as the court directs, and thereafter charged in like manner as other costs.

(c) Disclosure of appointment. In the exercise of its discretion, the court may authorize disclosure to the jury of the fact that the court appointed the expert witness.

(d) Parties' experts of own selection. Nothing in this rule limits the parties in calling expert witnesses of their own selection.

[FN5]. See Rule 706(c) supra.

[FN6]. Official Statement of the American Thoracic Society published in the American Review of Respiratory Disease, March 1986.

[FN7]. Supra.