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Pro Bono Publico: The Growing Need for Expert Aid

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PRO BONO PUBLICO: THE GROWING NEED FOR EXPERT AID

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I. INTRODUCTION

The importance of providing counsel for indigent parties, both defendants and plaintiffs, is widely recognized in the legal community. The Model Rules of Professional Conduct set out a clear expectation of volunteer service by attorneys, asserting that "[e]very lawyer has a professional responsibility to provide legal services to those unable to pay."[1] The Supreme Court declared in

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1. MODEL RULES OF PROF'L CONDUCT R. 6.1 (2008).

Gideon v. Wainwright[2] that "lawyers in criminal courts are necessities, not luxuries."[3] And Congress introduced the Legal Services Corporation Act by declaring that "there is a need to provide equal access to the system of justice in our Nation for individuals who seek redress of grievances; . . . providing legal assistance to those who face an economic barrier to adequate legal counsel will serve best the ends of justice . . . ."[4]

Despite these laudable goals, there remains a substantial barrier to the justice system that has been inadequately addressed by the legal community.[5] With the rise of scientific knowledge applicable to legal questions,[6] there is a growing reliance on detailed and technical facts in both civil and criminal cases.[7] Expert witnesses' development and analysis of those facts are crucial,[8] whether for issues of mental competence;[9] psychological syndromes in domestic violence, rape, and child abuse cases;[10] causes or extent of injury in

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2. 372 U.S. 335 (1963).

3. *Id.* at 344.

4. 42 U.S.C. § 2996(1), (3) (2000).

5. It is important to note that the availability of counsel for low income parties is itself still a substantial barrier to justice, as strikingly documented by the American Bar Association's report on the status of legal aid in the United States. STANDING COMM. ON LEGAL AID & INDIGENT DEFENDANTS, AM. BAR ASS'N, *GIDEON'S* BROKEN PROMISE: AMERICA'S CONTINUING QUEST FOR EQUAL JUSTICE 38 (2004) [hereinafter *GIDEON'S* BROKEN PROMISE], *available at* http://www.abanet.org/legalservices/sclaid/defender/brokenpromise/fullreport.pdf ("Forty years after *Gideon v. Wainwright*, indigent defense in the United States remains in a state of crisis, resulting in a system that lacks fundamental fairness and places poor persons at constant risk of wrongful conviction.").

6. *See, e.g.*, Thomas J. Moyer & Stephen P. Anway, *Biotechnology and the Bar: A Response to the Growing Divide Between Science and the Legal Environment*, 22 BERKELEY TECH. L.J. 671, 673 (2007) ("During the past two decades, our nation has experienced an explosive growth of scientific and technological knowledge. That knowledge has given rise to an increasing number of legal disputes involving science- and technology-related issues.").

7. *See, e.g.*, Mirjan Damaška, *Epistemology and Legal Regulation of Proof*, 2 LAW, PROBABILITY & RISK 117, 126 (2003) ("[A]n ever increasing number of facts of importance to the legal process is established by the operation of sophisticated technical instruments, and by the use of experts as interpreters of their 'silent testimony'.").

8. *See, e.g.*, KNOWLEDGE & INFO. SERVS. OFFICE OF THE NAT'L CTR. FOR STATE COURTS, 2003 REPORT ON TRENDS IN THE STATE COURTS 95 (2003), *available at* http://www.ncsonline.org/WC/Publications/KIS_CtFutu_Trends03_Pub.pdf ("Judges have begun to work more closely with scientists to ensure that rulings are based on sound science.").

9. *See, e.g.*, I. Bruce Frumkin, *Mental Retardation: A Primer to Cope with Expert Testimony*, NAT'L LEGAL AID & DEFENDER ASS'N CORNERSTONE, Fall 2003, at 6, 6, *available at* http://www.nlada.org/DMS/Documents/1075737923.69/Final%20Full.pdf ("Often, a comprehensive assessment of a client's intellectual functioning is needed to litigate [the issue of mental capacity].").

10. *See, e.g.*, Paul C. Giannelli, Ake v. Oklahoma: *The Right to Expert Assistance in a Post-*Daubert, *Post-DNA World*, 89 CORNELL L. REV. 1305, 1320–22 (2004) ("Beginning in the 1980s, the use of social science research has had a significant impact on criminal litigation. Prominent examples . . . include battered woman syndrome, rape trauma syndrome, child sexual abuse

tort cases;[11] forensic evidence and techniques;[12] medical malpractice;[13] product design;[14] industry standards;[15] or a party's knowledge or intent.[16] The successful prosecution of a case often rests largely on the ability of a party's experts to convey technical information to the court, as well as the attorney's ability to substantively cross-examine opposing experts.[17] Increasingly, experts are necessities in legal cases, and low income individuals without access to quality expert testimony are at a strong disadvantage. The 221 individuals who, as of 2008, have been exonerated post-conviction using DNA evidence[18] provide compelling supporting evidence of this need. Initial studies of these individuals'

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accommodation syndrome (CSAAS), child interviewing techniques, Munchausen syndrome by Proxy, and neonaticide syndrome-postpartum psychosis."); Kathryn M. Davis, Note, *Rape, Resurrection, and the Quest for Truth: The Law and Science of Rape Trauma Syndrome in Constitutional Balance with the Rights of the Accused*, 49 HASTINGS L.J. 1511, 1520–38 (1998) (discussing the prosecution's and the accused's use of expert testimony on rape trauma syndrome in a range of cases).

11. *See, e.g.*, MOLLY TREADWAY JOHNSON ET AL., FED. JUDICIAL CTR., EXPERT TESTIMONY IN FEDERAL CIVIL TRIALS: A PRELIMINARY ANALYSIS 4 (2000), *available at* http://www.fjc.gov (follow "Publications and video" hyperlink; then follow "Browse by Subject" hyperlink; then follow "Expert Witnesses" hyperlink; then follow "Expert Testimony in Federal Civil Trials: A Preliminary Analysis" hyperlink) ("Judges reported that the most frequent issues addressed [by expert witnesses] were the existence, nature, or extent of injury or damages (68% of the trials) and the cause of injury or damage (64%).").

12. Giannelli, *supra* note 10, at 1314–16 ("Few defense attorneys can deal with [new DNA technologies] . . . without expert assistance.").

13. *See, e.g.*, Thomas W. Metzloff, *The Unrealized Potential of Malpractice Arbitration*, 31 WAKE FOREST L. REV. 203, 209 (1996) ("Experts play a crucial role in malpractice litigation: in virtually every case, the opposing parties must have experts to testify as to the applicable standard of care. In addition, medical experts often testify about causation issues.").

14. *See, e.g.*, JOHNSON, *supra note* 11 (stating that litigators used expert testimony regarding product design in 25% of reported trials); *see also* David G. Owen, *A Decade of Daubert*, 80 DENV. U. L. REV. 345, 350 (2002) (arguing that "experts are crucial to both the prosecution and defense of a products liability case" and providing examples of the complicated issues that experts address in these types of cases).

15. *Id.* (finding that expert witnesses testified on the issue of industry standards in 30% of reported trials).

16. *Id.* (finding that expert witnesses testified on the issue of a party's knowledge or intent in 16% of reported trials).

17. *See, e.g.*, Patricia C. Bobb, *Making and Breaking the Expert Witness: Direct and Cross Examination*, *in* 2 AM. ASS'N FOR JUST. ANN. CONVENTION REFERENCE MATERIALS 1209, 1209 (2007) ("Effective expert testimony can make the difference between winning or losing a lawsuit. . . . The challenge presented in preparing for direct and cross of experts is in determining how to convey specialized and technical information to the jury in an understandable, compelling way.").

18. The Innocence Project, Facts on Post-Conviction DNA Exonerations, http://www.innocenceproject.org/Content/351.php (last visited Jan. 28, 2009); *see also* Brandon L. Garrett, *Judging Innocence*, 108 COLUM. L. REV. 55, 59 (2008) (noting that as of April 23, 2007, two hundred convicted criminals in the United States had been exonerated using post-conviction DNA evidence).

original trials have revealed that a majority involved "improper testimony" by the prosecutions' forensic experts, including "exaggeration of the probative significance of the evidence" and erroneous scientific conclusions.[19] Not surprisingly, of the sixty-one trials initially studied, only two defendants had a forensic expert.[20] Many of these defendants spent years in jail before being vindicated by DNA analysis;[21] expert assistance might have been able to prevent these injustices.

This Essay urges that indigent parties lack the expert resources they need. Policymakers, judges, and attorneys should consider more seriously the importance of experts in both criminal and civil trials and should design and implement a system for expanding quality expert services, especially for indigent parties who cannot afford such services. Although a limited number of indigent parties currently receive expert support, the quality and the availability of this support is insufficient.[22] This inequality in the provision of expert support also increases the risk of error in decision making, as unbiased and knowledgeable expert witness testimony can improve the accuracy of the legal process.[23]

To address these problems, this Essay argues for the development of an "expert aid" program—a system of pro bono expert assistance that both increases the availability of expert assistance and improves the quality of that assistance. First, this Essay suggests that experts, with the help of bar associations, should form their own associations at both the national and the state level, similar to the existing national and state bars. These associations should provide ethical standards, standards to encourage volunteer service, and basic qualification requirements to improve the accuracy and the legitimacy of expert testimony, as well as the availability of low cost expert assistance. Scattered organizations of experts currently exist, but most involve only one area of expertise and do not formally encourage volunteer service. Second, this Essay argues that the legal bar should better train attorneys to take advantage of expert assistance and to use it effectively. To do this, this Essay recommends the American Bar Association add more standards on expert assistance to the Model Rules of Professional Conduct by modifying the comments to the rules and perhaps the rules themselves. These modifications should encourage

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19. Garrett, *supra* note 18, at 82 n.99.

20. *Id.* at 82 n.99, 86 n.113.

21. *See* The Innocence Project, *supra* note 18 ("The average length of time served by exonerees is 12 years. The total number of years served is approximately 2,724.").

22. *See infra* Part III.

23. *See, e.g.*, Ellen E. Deason, *Court-Appointed Expert Witnesses: Scientific Positivism Meets Bias and Deference*, 77 OR. L. REV. 59, 83 (1998) ("[Expert witnesses] can help improve the quality of many types of decisions by helping the judge or jury better understand technical or scientific issues.").

lawyers to consider the need for expert assistance in each case and to make reasonable efforts to retain expert support if it is deemed beneficial. Along these lines, this Essay encourages the national and the state bars and similar organizations to increase education on expert assistance, which would better train lawyers to locate quality expert witnesses and effectively harness expert assistance. This education should target attorneys who provide services to low income clients whether through firm-based pro bono programs or legal aid and public defenders' offices. Third and finally, this Essay explores methods to provide funding for expert assistance without further compromising legal aid and public defender budgets, which are already stretched thin.

This Essay begins by discussing the importance of experts and pointing to recent cases and scientific developments that highlight the need for expert assistance. Part III summarizes current sources of expert support for low income parties including courts' appointment of experts, legislative mandates for expert aid, legal aid offices' hiring of expert witnesses, individual experts' voluntary services, and individual attorneys' recruitment and retention of expert witnesses. This Part also discusses the deficiencies of the current system, arguing that although there is a rudimentary foundation of expert assistance, the current system is inadequate. Part IV fleshes out the proposed centralized system of expert aid at the core of this Essay's proposal, drawing on existing institutional strengths. Within this part, the Essay argues that experts should form an "Expert Witness Association" with an ethical code including pro bono obligations, principles encouraging attorneys to recruit and to effectively use experts, and standards calling for the consideration of expert aid when funding low income legal services. While courts, legislatures, legal aid and public defender associations, individual attorneys, and experts will continue to be essential players in ensuring access to experts, a system of expert aid will create a centralized resource of information and services for these entities as they strive to improve the fairness and the quality of legal representation.

II. THE IMPORTANCE OF EXPERT SUPPORT FOR INDIGENT PARTIES

Scientific evidence relevant to the legal process has advanced at a rapid pace.[24] At the same time, the influence of experts who produce and analyze this

24. *See, e.g.*, United States v. Weikert, 504 F.3d 1, 12–13 (1st Cir. 2007) ("[S]cientific advances might make it possible to deduce information beyond identity from . . . DNA . . . ."); Harvey v. Horan, 285 F.3d 298, 301 (4th Cir. 2002) (discussing how prosecutors and defendants can benefit from scientific advances but recognizing the "trade-offs" involved for courts in terms of permissible evidence and costs); Idaho Farm Bureau Fed'n v. Babbitt, 58 F.3d 1392, 1404 (9th Cir. 1995) ("After a gap of nearly six years, the public may have new or different information . . . particularly given rapid advances in scientific knowledge."); Clemmons v. Bohannon, 918 F.2d 858, 865 (10th Cir. 1990), *vacated*, 956 F.2d 1523, 1525 (10th Cir. 1992) ("[A]s scientific

evidence in civil and criminal trials is increasingly apparent.[25] Jurors listen to expert testimony, and it impacts their decisions.[26] A poll of 800 jurors conducted by the *National Law Journal* and LexisNexis in the 1990s showed that 82% of jurors who heard expert testimony believed that experts influenced the verdict in civil trials, and 95% of jurors who heard expert testimony in criminal trials thought that the expert was "very believable" or "somewhat believable."[27]

In civil cases, advances in scientific knowledge have created new types of claims requiring expert testimony. In toxic tort disputes, for example, parties often struggle to establish causation of diseases with long latency periods such as cancer or asbestosis, and experts are necessary to testify regarding the early and ongoing toxic effects of a substance.[28] As states develop alternative remedies to address these difficulties, such as allowing damages for the costs of monitoring a disease in lieu of identifying injuries that surface long after exposure, experts are needed to testify about short term effects, such as the costs of the screening necessary for prevention and early detection of a disease.[29] Even under traditional tort litigation, discoveries of new diseases or complications caused by products require expert advice. In breast implant litigation, for example, one judge appointed four expert advisors in epidemiology, rheumatology, immunology/toxicology, and polymer chemistry in light of the "complicated scientific and medical issues involved."[30] And in many areas of tort and environmental law, there is little public information available, beyond broad theoretical understandings, regarding the toxicity of chemicals, the presence of pollutants in air or groundwater, or the pesticide levels on land,[31] making it essential that an expert marshal any existing data and

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awareness of potential harms evolves, some risks previously thought innocuous may rise to constitutional significance, while other risks, previously thought unacceptable, may no longer require judicial intervention."); Grady v. Frito–Lay, Inc., 839 A.2d 1038, 1045 (Pa. 2003) (noting that complex scientific advances necessitate the use of expert witnesses in litigation).

25. *See, e.g.*, Joan M. Cheever & Joanne Naiman, *The View from the Jury Box*, NAT'L L.J., Feb. 22, 1993, at S4 ("By large majorities, jurors in both civil and criminal cases said the experts whose testimony they heard were both credible and influential in the outcome.").

26. *See id.*

27. *Id.*

28. *See, e.g.*, Patricia E. Lin, Note, *Opening the Gates to Scientific Evidence in Toxic Exposure Cases: Medical Monitoring and* Daubert, 17 REV. LITIG. 551, 553–54 (1998) ("Because such injuries are not immediately apparent, because symptoms may not be unique to the disease, because the diseases already occur at background levels in the population, because the diseases remain latent for a long time, and because there is great opportunity for other sources of injury to arise, proving causation of a toxic tort injury is a challenging prospect.").

29. *See id.* at 554, 559.

30. Hall v. Baxter Healthcare Corp., 947 F. Supp. 1387, 1392–93 (D. Or. 1996).

31. *See, e.g.*, Wendy E. Wagner, *Commons Ignorance: The Failure of Environmental Law to Produce Needed Information on Health and the Environment*, 53 DUKE L.J. 1619, 1629–30

provide a coherent scientific explanation despite the holes in the knowledge.[32] Furthermore, in the medical field, the rise of new experimental treatment procedures raises a host of expert questions beyond medical malpractice,[33] where expert testimony is typically required by statute.[34] Many insurance companies, for example, have added "experimental exclusions" to plan contracts, omitting from coverage therapies "considered experimental or 'investigational.'"[35] Courts face substantial technical and scientific issues in determining whether a procedure falls within a clause's definitional boundaries, forcing them to "rely heavily on parties' experts."[36]

In criminal law, new technologies for surveillance and investigation, such as enhanced photographs, electronic media, or audio techniques, are constantly emerging and frequently used, requiring diligent attention to the reliability of these techniques.[37] A recent Texas incident demonstrates the rising use of

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(2004) ("Air is monitored for eight general pollutants, but the remaining 189 toxic air pollutants are rarely monitored . . . . Land is rarely sampled, even when it is routinely covered with pesticides . . . . As of 1984, *no* toxicity testing existed for more than 38,000, or eighty percent, of all toxic substances used in commerce. As of 1998, at least one third of the toxic chemicals produced in the highest volumes failed to satisfy minimal testing standards . . . .").

32. *See, e.g.*, Roy Alan Cohen & Jodi F. Mindnich, *Expert Testimony and the Presentation of Scientific Evidence in Toxic Tort and Environmental Hazardous Substance Litigation*, 21 SETON HALL L. REV. 1009, 1010–11 (1991) ("The presentation of scientific evidence and the use of expert witness testimony is crucial to the litigation of complex toxic tort and environmental cases. . . . Expert witnesses serve as interpreters and translate specialized knowledge into knowledge of common understanding . . . .").

33. *See, e.g.*, Joesph B. Clamon, *Does My Health Insurance Cover It? Using Evidence-Based Medicine and Binding Arbitration Techniques to Determine What Therapies Fall Under Experimental Exclusion Clauses in Health Insurance Contracts*, 54 DRAKE L. REV. 473, 488–90 (2006) (citing Jessica L. Basso, *"Experimental" Chemotherapy Treatment for Advance Stage Breast Cancer: Judicial Interpretation of Insurance Policy Coverage*, 1 DEPAUL J. HEALTH CARE L. 105, 114 (1996)) (discussing how judges must rely on expert witnesses to determine whether some treatments, such as certain medical treatments in breast implant litigation, are excluded by insurance policies that do not cover experimental procedures).

34. *See, e.g.*, Catherine T. Struve, *Doctors, the Adversary System, and Procedural Reform in Medical Liability Litigation*, 72 FORDHAM L. REV. 943, 990–91 (2004) (discussing how twenty states require panels of scientific experts for medical malpractice cases); Dace A. Caldwell, Comment, *Civil Procedure: Medical Malpractice Gets Eerie: The* Erie *Implications of a Heightened Pleading Burden in Oklahoma*, 57 OKLA. L. REV. 977, 988–98 (2004) (discussing statutes from Georgia, Florida, New Jersey, Colorado, and Illinois that require plaintiffs to attach expert affidavits to medical malpractice pleadings).

35. Clamon, *supra* note 33, at 481 (quoting Patricia C. Kuszler, *Financing Clinical Research and Experimental Therapies: Payment Due, but from Whom?*, 3 DEPAUL J. HEALTH CARE L. 441, 466 (2000)).

36. *See id.* at 489–90 (citing David M. Eddy, Commentary, *The Use of Evidence and Cost Effectiveness by the Courts: How Can It Help Improve Health Care?*, 26 J. HEALTH POL. POL'Y & L. 387, 392–93 (2001)).

37. *See, e.g.*, Burke v. Town of Walpole, 405 F.3d 66, 73, 82–83 (1st Cir. 2005) (discussing the validity and the probative value of a forensic odontologist's comparison of a teeth mold with

technology in law enforcement—here, a camcorder recording from a police officer's car—and the necessity of experts to analyze the data generated by that technology.[38] Authorities arrested David Lozano in Austin and charged him with attempted capital murder and aggravated assault.[39] Lozano was in his apartment and had allegedly received a threatening phone call from his wife's ex-boyfriend. According to Lozano's version of events, he heard a knock on his door about five minutes after the call and "cocked his gun loudly" to scare off the intruder.[40] The knock was from a police officer, not from the ex-boyfriend, and it was unclear from the record whether the officer had announced his presence. The officer heard Lozano cock his gun from behind the door. According to Lozano, he opened the door, and the officer shot at him first, firing two bullets. Lozano allegedly shot back into the dark, not knowing who was there. The officer, in contrast, testified in an affidavit that Lozano fired first, and the officer fired back once, although the officer later stated that he fired back with two shots. Months after the charge, an expert hired by Lozano discovered that the officer's account was not consistent with the audio portion of the video recording from the officer's car. The District Attorney's office requested a continuance and indicated that it would "[m]ost likely dismiss the charges."[41] Authorities released Lozano on May 2, 2008, after he spent approximately thirteen months in jail,[42] although he was later re-indicted on a lesser charge.[43]

In addition to basic advances in surveillance and investigative technologies, DNA science[44] and other emerging forensic techniques have revolutionized both the prosecution and the defense of cases.[45] These new methods provide

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photographs of bite marks on a victim and his use of enhanced photographs for more detailed analysis).

38. *See* Miguel Liscano, *Charge in Police Shootout Likely to be Dropped, Prosecutor Says,* AUSTIN AM. STATESMAN, May 17, 2008, *available at* http://www.austinpolice.com/localnews-aas.htm#dropped.

39. *Id.*

40. *Id.*

41. *Id.*

42. *Id.*

43. *See* Miguel Liscano, *New Charge in Police Shootout,* AUSTIN AM. STATESMAN, July 23, 2008, at B1 (archived article on file with author).

44. *See, e.g.*, United States v. Kriesel, 508 F.3d 941, 947–48 (9th Cir. 2007) ("'[U]nlike fingerprints, DNA stores and reveals massive amounts of personal, private data about [an] individual, and the advance of science promises to make stored DNA only more revealing over time.'" (quoting United States v. Kincade, 379 F.3d 813, 842 n.3 (9th Cir. 2004) (en banc) (Gould, J., concurring))).

45. *See, e.g.*, Moyer & Anway, *supra* note 6, at 682 (arguing that modern forensic technologies have been embraced by American courts and have facilitated convictions and exonerations that "previously would have been impossible.").

opportunities for enhancing the accuracy and the fairness of the legal process,[46] but they also make cases more complex.[47] The information can be overwhelming to counsel, judges, and juries without expert assistance in interpreting and understanding its scientific implications.[48] As a state supreme court justice has observed, "[i]ncreases in the complexity of technology, particularly in areas of biotechnology such as DNA forensics, genetic engineering, and genetic privacy" have created great complications for judges, forcing them to deal with large volumes of proffered scientific evidence.[49] Indeed, the quantity of DNA data to be analyzed is itself staggering, even absent consideration of the new techniques available for analysis of that data.[50] In June 2006, the FBI's Combined DNA Index System (CODIS) contained "more than 3.3 million convicted offender profiles and more than 142,000 profiles from crime scenes."[51] Prosecutors are actively using this information.[52] CODIS has produced 62,059 "matches" in investigations,[53] and prosecutors offer DNA evidence, whether from CODIS or other lab results, in approximately two-thirds of plea bargains and trials.[54] Prosecutors also have the resources necessary to hire experts to assist them in analyzing and conveying the information produced by DNA lab results and other forensic investigations, and they often have access to experts employed by the state.[55] In 1994, prosecutors already used expert witnesses in 83% of felony trials in state courts.[56]

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46. *See id.* at 687 ("[T]he reliability of DNA technology for identification purposes is well settled.").

47. *See id.* at 673 (discussing how scientific evidence has become more complex and has created evidentiary questions that are difficult for state and federal courts to answer).

48. *See id.* ("State and federal courts have . . . been forced to react [to scientific advancements], . . . without the requisite scientific training or education to make an informed decision regarding whether scientific evidence is a cutting-edge breakthrough or what has been called 'junk science.'").

49. *Id.*

50. *See* W. MARK DALE ET AL., SEARCH, THE NAT'L CONSORTIUM FOR JUSTICE INFO. & STATISTICS, DNA FORENSICS: EXPANDING USES AND INFORMATION SHARING 1 (2006), *available at* http://www.ojp.usdoj.gov/bjs/pub/pdf/dnaf.pdf (citing Fed. Bureau of Investigation, U.S. Dep't of Justice, The FBI's Combined DNA Index System Program: CODIS 1 [hereinafter, CODIS Brochure], *available at* http://www.fbi.gov/hq/lab/pdf/codisbrochure2.pdf).

51. *Id.*

52. *See id.*

53. CODIS Brochure, *supra* note 50.

54. Rita A. Fry, Gideon *at Forty: The Promise Comes with a Price Tag*, NAT'L LEGAL AID & DEFENDER ASS'N CORNERSTONE, Winter 2002/2003, at 2, 2, *available at* http://www.nlada.org/DMS/Documents/1066921880.77/Vol.%2024%2C%20No.%204%20Winter%202002-2003%20final.pdf.

55. *See infra* text accompanying note 288 (discussing how Mississippi funds full-time investigators for the District Attorney's office).

56. CAROL J. DEFRANCES ET AL., U.S. DEP'T OF JUSTICE, PROSECUTORS IN STATE COURTS, 1994, at 4 tbl.4 (1996), *available at* http://www.ojp.usdoj.gov/bjs/pub/pdf/pisc94.pdf.

Criminal defendants, in contrast, are often unable to hire experts to interpret forensic data or to rebut the prosecution's expert. In many states, public defenders' offices fund expert services[57] but commonly lack adequate resources to acquire the expert assistance needed to analyze the data derived from constantly advancing technology.[58] The inadequacy of expert services for criminal defendants is not only important because of its impact on the individual—it also has implications for the accuracy of case outcomes. As one scholar has observed, "[J]udges have been reluctant to hold the government's experts—forensic scientists and technicians—to the same kinds of standards they routinely require of expert witnesses appearing on behalf of civil claimants."[59] Further, without a defense expert's rebuttal of the government's experts, errors may go unnoticed.[60] And while some indigent parties receive limited reimbursement for expert services from the state or another party at the order of a court, as discussed in Part III, the reimbursement may not be sufficient to retain quality expert testimony.[61]

Capital cases most acutely speak to the rising importance of experts in criminal law, as expert assistance now substantially impacts whether a criminal defendant receives life in prison or a death sentence.[62] Following the Supreme Court's decision in *Atkins v. Virginia*,[63] a mentally retarded defendant may not

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57. *See* CAROL J. DEFRANCES & MARIKA F.X. LITRAS, U.S. DEP'T OF JUSTICE, INDIGENT DEFENSE SERVICES IN LARGE COUNTIES, 1999, at 4 (2000), *available at* http://www.ojp.usdoj.gov/bjs/pub/pdf/idslc99.pdf ("Eighty percent or more of the public defender programs indicated their expenditures included funding for expert, investigator, interpreter, and transcript services.").

58. *See id.* at 1 ("Indigent criminal defense providers in the 100 most populous counties received an estimated 4.2 million cases in 1999. Public defenders handled about 82% of these . . . ."); Fry, *supra* note 54 ("Indigent defense needs increased funding to keep pace with the prosecution's use of technical evidence.").

59. Gary Edmond, *Supersizing* Daubert *Science for Litigation and Its Implications for Legal Practice and Scientific Research*, 52 VILL. L. REV. 857, 906 n.165 (2007) (discussing Kumho Tire Co. v. Carmichael, 526 U.S. 137, 153 (1999)) ("In many cases, plaintiffs' experts in civil cases are much better qualified to testify than the technical experts routinely appearing on behalf of the state in criminal matters. For example, the Carmichaels' expert, prevented by the Supreme Court from testifying about tire wear and damage, had worked for Michelin America for ten years and possessed a Masters Degree in Engineering from Georgia Institute of Technology.").

60. *See, e.g.*, Lee Richards Goebes, Note, *The Equality Principle Revisited: The Relationship of* Daubert v. Merrell Dow Pharmaceuticals *to* Ake v. Oklahoma, 15 CAP. DEF. J. 1, 16 (2002) ("If the adversarial system is to function properly, the defendant must have access to an expert to assist her in rebutting the government's case.").

61. *See* Fry, *supra* note 54.

62. *See, e.g.*, Frumkin, *supra* note 9 (discussing Atkins v. Virginia, 536 U.S. 304 (2002)) ("An individual's intellectual functioning has always been a potential issue in both criminal and civil litigation. Yet because of *Atkins*, the accurate determination of a diagnosis of mental retardation becomes—in death penalty cases—a life or death matter.").

63. 536 U.S. at 304.

be put to death.[64] Under *Atkins*, the states must individually define mental retardation,[65] and many states have subsequently adopted definitions of mental retardation that involve an IQ score cut-off.[66] IQ scores "are considered to have a five-point measurement error,"[67] and retaining an expert to testify in a capital case about IQ measurement technique and its limitations is crucial, as is expert testimony on the other factors that states typically use to define mental retardation, such as "limitations in . . . applicable adaptive skill areas" and similar observations of basic human functions.[68] Scholars have warned that, in determining whether a defendant is mentally retarded, one cannot ignore the "need for clinical judgment by experienced diagnosticians."[69]

Whether for interpreting the location and timing of gunshots in an audio recording[70] or for identifying the connection between a chemical and a cancer tumor,[71] expert evidence is an integral aspect of the legal system. The following Part explores the current avenues of indigents' access to this assistance and the deficiencies within the system.

III. CURRENT RESOURCES FOR FREE OR LOW COST EXPERT AID

Although this Essay argues that the current system of expert assistance for low income parties is inadequate, there are several established resources that provide a foundation on which to build. Criminal defendants in a limited range

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64. *Id.* at 321 ("Construing and applying the Eighth Amendment in the light of our 'evolving standards of decency,' we therefore conclude that [the death penalty] is excessive and that the Constitution 'places a substantive restriction on the State's power to take the life' of a mentally retarded offender." (quoting Ford v. Wainwright, 477 U.S. 399, 405–06 (1986))).

65. *Id.* at 317 ("'[W]e leave to the State[s] the task of developing appropriate ways to enforce the constitutional restriction upon [their] execution of sentences.'" (quoting *Ford*, 477 U.S. at 416–17) (alterations in original)).

66. *See, e.g.*, Aimee Logan, Note, *Who Says So? Defining Cruel and Unusual Punishment by Science, Sentiment, and Consensus*, 35 HASTINGS CONST. L.Q. 195, 210 (2008) ("[T]hree requirements are common amongst [states] who have [adopted a definition of mental retardation]: sub-average intellectual functioning, impaired adaptive behavior, and age of onset. . . . Most of the states have used IQ scores as an indication of general intellectual function. . . . [M]any states set bright line IQ scores" (citing Woodsen v. North Carolina, 428 U.S. 280, 304 (1976))).

67. *In re* Hawthorne, 105 P.3d 552, 557–58 (Cal. 2005) (citing AM. PSYCHIATRIC ASS'N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 41 (4th ed., text rev. 2000)).

68. *In re* Holladay, 331 F.3d 1169, 1174 n.3 (11th Cir. 2003) (internal quotation marks omitted) (quoting *Atkins*, 536 U.S. at 308 n.3); *see also* Green v. Johnson, 515 F.3d 290, 301–02 (4th Cir. 2008) (discussing how the magistrate judge used the American Association on Mental Retardation's standard for determining a defendant's adaptive behavior skills).

69. James W. Ellis, *Mental Retardation and the Death Penalty: A Guide to State Legislative Issues* 7 (2002), http://www.aamr.org/Reading_Room/pdf/state_legislatures_guide.pdf.

70. *See* Liscano, *supra* note 38.

71. *See* Lin, *supra* note 28.

of cases have a constitutional right to an expert.[72] Many states require that low income felony defendants receive low or no cost expert aid.[73] Federal courts also occasionally appoint experts at their discretion in civil or criminal cases where an expert would benefit the case,[74] although this is a relatively rare measure, and they may direct one party to bear all of the costs or each to pay proportionately.[75] There are also resources beyond those created by rule or statute, as this Part discusses. But despite this basic foundation of aid, there is a large void in expert services for indigent parties. The Bureau of Justice Assistance has concluded that one of the "three main financial barriers to effective access to the trial court" is "third-party expenses," such as "deposition costs and expert witness fees."[76]

This Part provides a brief overview of the available options for expert assistance and the deficiencies of these options, beginning with court appointments and then discussing legislative mandates and volunteer resources. Part III.A discusses court-initiated appointment of experts arising from constitutional law and from courts' discretionary powers. Part III.B discusses legislative mandates that require courts to appoint experts or to order compensation for experts that serve indigent parties. Part III.C describes initiatives arising at smaller institutional levels, discussing legal aid and public defenders' alliances with expert witnesses. Part III.D describes individual efforts by experts and associations of experts to provide pro bono services, and Part III.E concludes with a discussion of attorneys' role in leveraging expert support.

A. Constitutional and Rule-Based Directives in Court

1. The Constitutional Right to Expert Aid

A court is constitutionally required to appoint an expert for a criminal defendant at the expense of the state only in limited circumstances. The Sixth Amendment was an early avenue by which counsel for indigent defendants attempted to obtain expert assistance, but the Sixth Amendment is now rarely used in this context.[77] In *Washington v. Texas*,[78] the Supreme Court held that the

72. *See infra* text accompanying note 96.

73. *See infra* note 282.

74. FED. R. EVID. 706(a).

75. *Id.* 706(b); *see infra* text accompanying notes 218–221 (discussing how only 20% of federal judges reported having appointed an expert and the reasons for their reluctance to appoint).

76. NAT'L CTR. FOR STATE COURTS, U.S. DEP'T OF JUSTICE, TRIAL COURT PERFORMANCE STANDARDS WITH COMMENTARY 9 (1997), http://www.ncjrs.org/pdffiles1/161570.pdf.

77. *See* U.S. CONST. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right . . . to have compulsory process for obtaining witnesses in his favor . . . .").

right to compulsory process[79] applies in state proceedings.[80] This holding, combined with the Court's observation in *United States v. Nixon*[81] that "[t]he need to develop all relevant facts in the adversary system is both fundamental and comprehensive" and applies both to the prosecution and the defense,[82] implied that an indigent defendant could potentially subpoena expert testimony for issues far beyond sanity. Indeed, in *Flores v. Estelle*,[83] the Fifth Circuit applied the Compulsory Process Clause to the subpoena of a witness.[84] Flores was convicted of murder based on the testimony of one eyewitness.[85] Flores' attorney argued that the eyewitness was too drunk to have effectively identified the murderer and introduced evidence suggesting that the victim may have also been drunk when he died.[86] The defense attorney subpoenaed the director of a criminal investigation laboratory "to produce blood toxicology" of the decedent and the eyewitness.[87] The defense asked the director for his expert opinion on whether the victim was intoxicated, but the director refused on the grounds that the defense had not retained him as an expert witness.[88] The trial court denied the motion to compel the director to answer.[89] The Fifth Circuit found compulsory process error and remanded the case for an evidentiary hearing to determine whether the error was "without injury."[90] However, decisions subsequent to *Washington* have narrowed its reach. The Court in *United States v. Valenzuela-Bernal*[91] held that proof of a due process or compulsory process violation requires "some showing that the evidence lost would be both material and favorable to the defense."[92] This is not an easy burden, as "materiality in this context means outcome determinative, a stringent standard."[93]

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78. 388 U.S. 14 (1967).

79. *Id.* at 19 (describing the right as "[t]he right to offer the testimony of witnesses, and to compel their attendance").

80. *Id.*

81. 418 U.S. 683 (1974).

82. *Id.* at 709.

83. 492 F.2d 711 (5th Cir. 1974).

84. *Id.* at 712–13; *see* Giannelli, *supra* note 10, at 1349 & n.285 (discussing *Flores* and how "prior to [*Ake v. Oklahoma*, 470 U.S. 68 (1985)], a number of courts had based the right to expert assistance on the compulsory process guarantee").

85. *Flores*, 492 F.2d at 712.

86. *Id.*

87. *Id.*

88. *Id.*

89. *Id.*

90. *Id.* at 712–13.

91. 458 U.S. 858 (1982).

92. *Id.* at 873.

93. Giannelli, *supra* note 10, at 1350.

A clearer right to expert assistance lies in the Fourteenth Amendment.[94] In *Ake v. Oklahoma*,[95] the Supreme Court held that due process requires a state to provide a criminal defendant with an expert "[w]hen the defendant is able to make an *ex parte* threshold showing to the trial court that his sanity is likely to be a significant factor in his defense."[96] Although *Ake*'s due process right to expert assistance is relatively clear, as compared to arguments for expert assistance under the Sixth Amendment, the breadth of *Ake*'s protection has not been fully defined. In *Caldwell v. Mississippi*,[97] where a defendant requested appointment of experts other than psychiatrists including a "criminal investigator, a fingerprint expert, and a ballistics expert," the Supreme Court did not decide whether the *Ake* right extends beyond a psychiatric expert.[98] Soon thereafter, Justice Marshall argued in a dissent in *Johnson v. Oklahoma*[99] that the *Ake* right should apply to "nonpsychiatric expert assistance" and discussed the "pressing need" to resolve the question, but it remains undecided.[100]

Despite the lingering questions surrounding *Ake*'s reach, some circuits have identified more expansive rights in *Ake*. "The Eighth Circuit has not limited the right to expert assistance to questions of sanity"[101] and, following *Ake*, required the appointment of an expert for a competence question for mitigation purposes where "a capital defendant['s] mental condition is seriously in issue."[102] The Fifth Circuit, despite having a relatively strict procedural requirement for demonstrating the need for expert assistance, has also found a right to non-psychiatric experts under *Ake*. The court requires that "[a]n indigent defendant requesting non-psychiatric experts must demonstrate something more than a mere possibility of assistance from a requested expert"[103] and provides non-

94. *See* U.S. CONST. amend. XIV, § 1.

95. 470 U.S. 68 (1985).

96. *Id.* at 82–83.

97. 472 U.S. 320 (1985).

98. *Id.* at 325 n.1.

99. 484 U.S. 878 (1987).

100. *Id.* at 880–81 (Marshall, J., dissenting from denial of certiorari).

101. Starr v. Lockhart, 23 F.3d 1280, 1288 n.4 (8th Cir. 1994) (citing Little v. Armontrout, 835 F.2d 1240, 1243 (8th Cir. 1987) (en banc)).

102. *Id.* at 1288.

103. Yohey v. Collins, 985 F.2d 222, 227 (5th Cir. 1993) (citing Moore v. Kemp, 809 F.2d 702, 712 (11th Cir. 1987)). In *Moore*, the Eleventh Circuit assumed, "*for sake of argument*, that the due process clause could require the government, both state and federal, to provide nonpsychiatric expert assistance to an indigent defendant upon a sufficient showing of need." 809 F.2d at 711–12 (emphasis added). Since *Moore*, the Eleventh Circuit has not held that *Ake* applies in the non-psychiatric context. *See, e.g.*, United States v. Brown, 441 F.3d 1330, 1365 (11th Cir. 2006) (citing Conklin v. Schofield, 366 F.3d 1191, 1206 (11th Cir. 2004)) (refusing to determine whether *Ake* extends to non-psychiatric experts).

psychiatric experts "only if the evidence is both critical to the conviction and subject to varying expert opinion."[104]

Several state courts have also applied *Ake* outside of the psychiatric context. In *Rodriguez v. State*,[105] a Texas court of appeals, after discussing *Ake* and subsequent decisions, recognized that "indigents are entitled in certain instances to an appointed expert to assist their defense in examining physical evidence."[106] Texas charged Rodriguez with murder and injury of an infant.[107] The cause of death was disputed at trial,[108] and Rodriguez petitioned the district court for appointment of a defense medical expert, which the court denied.[109] The treating physician and four other doctors for the state testified, and a jury convicted the defendant.[110] On appeal, the court rejected the state's argument that *Ake* "should be limited to insanity cases" and that the presence of an "independent medical expert" at trial prevented harm to Rodriguez,[111] observing that subsequent cases had expanded *Ake* and that appointment of an independent expert was insufficient.[112] The appellate court held that an expert was necessary in the case to "examine the physical evidence and medical records and to help defense counsel prepare his cross examination of the other experts."[113] Relying "in significant part on the Fourteenth Amendment's due process guarantee of fundamental fairness," it held that "justice cannot be equal where, simply as a result of his poverty, a defendant is denied the opportunity to participate meaningfully in a judicial proceeding in which his liberty is at stake."[114] The court reversed and remanded for a new trial.[115]

In Georgia, the supreme court reversed a case where the trial court refused an indigent defendant's request for compensation for a forensic dental expert.[116] The court held that the evidence that would be examined by the expert was "critical," as according to the defendant, it was "the one single item of evidence

104. *Yohey*, 985 F.2d at 227 (internal quotation marks omitted) (quoting Scott v. Louisiana, 934 F.2d 631, 633 (5th Cir. 1991)).

105. 906 S.W.2d 70 (Tex. App. 1995).

106. *Id.* at 74 (citing Gideon v. Wainwright, 372 U.S. 335, 344 (1963); McBride v. State, 838 S.W.2d 248, 251–52 (Tex. Crim. App. 1992) (en banc)).

107. *Id.* at 71.

108. *Id.* at 72.

109. *Id.* at 71.

110. *Id.* at 71–72.

111. *Id.* at 74–75.

112. *Id.*

113. *Id.* at 76.

114. *Id.* at 75 (quoting Ake v. Oklahoma, 470 U.S. 68, 76 (1985)).

115. *Id.* at 76.

116. Thornton v. State, 339 S.E.2d 240, 241 (Ga. 1986).

linking [him] to the murder."[117] The court qualified its holding, however, warning,

> The ruling of this case cannot serve as a basis for wide-ranging demands on behalf of indigent defendants for scientific investigative funds. This case is, assuredly, far from the normal . . . . Further, the record establishes that the possible scientific proof to be offered by the state is highly unusual in nature . . . .[118]

In *Bright v. State*,[119] the Georgia Supreme Court also found reversible error where a trial court failed to appoint or to grant funds for experts, including a psychiatrist and a toxicologist, to determine the defendant's diminished capacity during the sentencing phase of the trial.[120] And in Florida, a court of appeals in *Cade v. State*[121] held that Florida's statutes for compensation of experts for indigent criminal defendants,[122] combined with principles of constitutional law in *Ake* and subsequent cases,[123] required appointment of an expert to analyze DNA evidence.[124] In *Cade*, the circuit court convicted an indigent defendant of robbery, sexual battery, and other offenses, largely based on testimony of the state's DNA expert that the DNA of the semen found on the victim's clothing matched the defendant's DNA.[125] The appellate court observed that this testimony was "crucial to the state's case" and that the defendant had repeatedly requested appointment of a DNA expert.[126] It further concluded that "scientific evidence received from an expert is impressive to a jury, and we perceive that the use of DNA matching to prove identity is especially persuasive."[127] It accordingly reversed and remanded for a new trial, finding reversible error.[128]

Though some courts have read *Ake*'s right to expert assistance as applying beyond the psychiatric context or at least beyond the issue of insanity, others

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117. *Id.* at 240–41.
118. *Id.* at 241.
119. 455 S.E.2d 37 (Ga. 1995).
120. *Id.* at 50–51.
121. 658 So. 2d 550 (Fla. Dist. Ct. App. 1995).
122. *Id.* at 552–53 (citing FLA. STAT. ANN. § 27.54(3) (1991) (current version at FLA. STAT. ANN. § 29.006 (West Supp. 2008)); FLA. STAT. ANN. § 914.06 (1991) (repealed 2004) (current version at FLA. STAT. ANN. § 92.231(3) (West Supp. 2008))).
123. *Id.* at 553–54.
124. *Id.* at 555.
125. *Id.* at 552–53.
126. *Id.* at 552.
127. *Id.* at 554 (citing Ake v. Oklahoma, 470 U.S. 68, 81 n.7 (1985)).
128. *Id.* at 555.

have found relatively narrow protections in *Ake*.[129] These courts have placed a high burden of proof on a showing of expert necessity; have declined to extend *Ake* to non-psychiatric expert assistance; and in some cases, have granted psychiatric assistance strictly for questions of insanity.[130]

In *Caldwell v. Mississippi*,[131] for example, the Supreme Court held that "undeveloped assertions that the requested assistance would be beneficial" are inadequate to demonstrate the need for an expert under "federal constitutional law."[132] And in *Terry v. Rees*,[133] where an indigent defendant in state court was denied expert assistance to determine the cause of death,[134] the Sixth Circuit held that habeas relief under *Ake* is only available to a defendant who was denied expert assistance where the defendant "could establish that the [expert] was necessary to his defense and that the expert might have affected the determination of the victim's cause of death."[135] This holding mirrored a Fourth Circuit decision with identical facts.[136] The Eighth Circuit has formulated a similar standard, requiring expert appointment under *Ake* only where the defendant can show "a reasonable probability that an expert would aid in his defense, and that denial of expert assistance would result in an unfair trial."[137] The Eleventh Circuit has also held that, once a defendant shows that *Ake* applies, the defendant must prove on appeal that "(1) he made a timely request for the expert assistance, (2) it was unreasonable for the trial court to deny the request, and (3) the denial rendered the trial 'fundamentally unfair.'"[138] And the Fifth Circuit has determined that a defendant entitled to a psychiatrist under *Ake* is not entitled to an independent defense psychiatrist:[139] the court may appoint a neutral psychiatrist "whose opinion and testimony is available to both sides."[140]

In addition to setting a high bar for a showing of necessity, several circuits have rejected arguments that *Ake* applies to issues requiring expert assistance

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129. *See, e.g.*, David A. Harris, *The Constitution and Truth Seeking: A New Theory on Expert Services for Indigent Defendants*, 83 J. CRIM. L. & CRIMINOLOGY 469, 484 (1992) ("Many lower court interpretations of *Ake* attempt to limit its reach by looking at its facts narrowly.").

130. *See id.* at 484 n.115, 486 & n.121 (discussing the narrow application of *Ake* by various state courts).

131. 472 U.S. 320 (1985).

132. *Id.* at 323 n.1.

133. 985 F.2d 283 (6th Cir. 1993).

134. *Id.* at 283.

135. *Id.* at 284–85 (citing Williams v. Martin, 618 F.2d 1021, 1027 (4th Cir. 1980)).

136. *Id.* at 285.

137. Little v. Armontrout, 835 F.2d 1240, 1244 (8th Cir. 1987) (citing Moore v. Kemp, 809 F.2d 702, 712 (11th Cir. 1987)).

138. United States v. Brown, 441 F.3d 1330, 1365 (11th Cir. 2006) (quoting Conklin v. Schofield, 366 F.3d 1191, 1206 (11th Cir. 2004)).

139. Granviel v. Lynaugh, 881 F.2d 185, 191 (5th Cir. 1989).

140. *Id.*

beyond the psychiatric context. The Eleventh Circuit has "not extended *Ake* to non-psychiatric experts,"[141] assuming only for the sake of argument that it may apply in the non-psychiatric setting.[142] The Ninth Circuit has suggested the same when reviewing appeals under the Antiterrorism and Effective Death Penalty Act, holding that *Ake* is inapplicable where a petitioner did not raise sanity or diminished capacity issues at trial and rejecting a petitioner's claim that *Ake* guarantees indigents an expert to "assist in all aspects involving the mental condition of the defendant."[143]

Some circuits have also narrowed the class of defendants who are entitled to psychiatric assistance, affirming a right to an *Ake* expert only where it is likely that the defendant is insane. The Fifth and Eleventh Circuits, for example, have held that where a psychiatric commission or lunacy commission has evaluated a defendant's sanity, the defendant is not entitled to a defense expert who will testify at trial regarding competency.[144] The Fourth Circuit noted that "*Ake* . . . says nothing about determining 'competency' to stand trial or waive counsel; it deals only with a defendant's 'sanity' at 'the time of the offense'"[145] and suggested that no *Ake* right attaches to the issue of competency to waive the right to counsel.[146] And even where a defendant may have a right to an expert under *Ake*, a defendant who fails to request an expert at trial will not succeed in an *Ake* claim on appeal.[147]

Finally, *Ake*'s applicability has weakened since the Supreme Court's decision in *Medina v. California*,[148] which rejected the use of the *Mathews v.*

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141. *Brown*, 441 F.3d at 1365 (citing *Conklin*, 366 F.3d at 1206).

142. *Id.*

143. Menendez v. Terhune, 422 F.3d 1012, 1026 (9th Cir. 2005).

144. *See* Glass v. Blackburn, 791 F.2d 1165, 1169 (5th Cir. 1986) ("The psychiatric evaluation actually provided Glass [through a sanity commission] satisfied *Ake*."); Magwood v. Smith, 791 F.2d 1438, 1440, 1443 (11th Cir. 1986) ("We find, however, that Magwood was provided sufficient psychiatric assistance to satisfy the requirements of *Ake*. . . . The three members of the state lunacy commission concluded that Magwood was insane at the time of their examination and probably was insane at the time of the crime."). For a detailed summary of these cases, see David A. Harris, Ake *Revisited: Expert Psychiatric Witnesses Remain Beyond Reach for the Indigent*, 68 N.C. L. REV. 763, 775 n.89 (1990).

145. O'Dell v. Netherland, 95 F.3d 1214, 1244 n.24 (4th Cir. 1996) (quoting Ake v. Oklahoma, 470 U.S. 68, 83 (1984)).

146. *See id.* ("[Petitioner] claims that his competency was never appropriately determined . . . . [But] he misreads *Ake* to establish a general due process right to psychiatric assistance where none exists.").

147. *See, e.g.*, *Brown*, 441 F.3d at 1365 ("[Petitioner] would have to show that . . . he made a timely request for the expert assistance . . . ." (citing Conklin v. Schofield, 366 F.3d 1191, 1206 (11th Cir. 2004))).

148. 505 U.S. 437 (1992).

Elridge[149] balancing test in due process analyses of criminal proceedings;[150] *Ake* relied on the *Mathews* test in requiring expert assistance for certain insanity questions.[151] As a result, Professor Paul C. Giannelli argues that "*Medina* severed *Ake* from its moorings, leaving it a virtual orphan."[152] *Medina* may not have had such a severe result, as it reconciled its rejection of *Mathews* in the criminal context with *Ake*'s holding, observing that "[t]he holding in *Ake* can be understood as an expansion of earlier due process cases holding that an indigent criminal defendant is entitled to the minimum assistance necessary to assure him 'a fair opportunity to present his defense.'"[153] The due process right to an expert thus extends to a very limited set of indigent defendants, often leaving unanswered the need for experts in trials involving issues beyond sanity.

While *Ake* guarantees expert assistance for an indigent defendant where sanity will be a significant factor, *Ake* may extend to parties in a very narrow range of civil cases, namely, commitment proceedings. In *Goetz v. Crosson*,[154] a class of indigent individuals who were subject to involuntary commitment proceedings argued that *Ake* gave them a right to expert psychiatric assistance.[155] The Second Circuit held that "while *Ake* is relevant, it does not control our decision in light of other Supreme Court precedent clearly indicating that constitutional protections granted criminal defendants are not automatically extended to civil commitment proceedings."[156] The court concluded that "the due process clause does not require a state to provide an indigent patient with a consulting psychiatrist in every commitment or retention proceeding,"[157] but

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149. 424 U.S. 319 (1976). *Mathews* established a three-part test for procedural due process claims that balanced:

> First the private interest that [would] be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

Id. at 335.

150. *Medina*, 505 U.S. at 445–46 (citing Patterson v. New York, 432 U.S. 197, 201–02 (1977)) (holding that due process questions in criminal cases should be resolved under the approach taken in *Patterson*, as opposed to the *Mathews* balancing test). Under *Patterson*, a state's "procedures under which its laws are carried out" are not "subject to proscription under the Due Process Clause unless it offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental." 432 U.S. at 201–02 (internal quotation marks omitted) (citing Speiser v. Randall, 357 U.S. 513, 523 (1958); Leland v. Oregon, 343 U.S. 790, 798 (1952); Snyder v. Massachusetts, 291 U.S. 97, 105 (1934)).

151. Ake v. Oklahoma, 470 U.S. 68, 77 (1984).

152. Giannelli, *supra* note 10, at 1364.

153. *Medina*, 505 U.S. at 444–45 (quoting *Ake*, 470 U.S. at 76).

154. 967 F.2d 29 (2d Cir. 1992).

155. *Id.* at 33.

156. *Id.*

157. *Id.* at 34.

that "[w]here the trier believes that an accurate assessment of the subject's psychiatric condition cannot be reliably made without the aid of an independent psychiatrist, and the subject is financially unable to procure such testimony, a cognizable due process concern may arise."[158] This narrow extension of *Ake* is unlikely to give many civil parties a constitutional right to expert assistance.

No matter what remains of the law addressing the need for experts in criminal and potentially some civil cases, whether based in *Ake*'s due process rationale or in *Washington*'s compulsory process right, its principles are outdated. The relevant Supreme Court decisions, decided before the advent of many scientific innovations used in courts today, do not fully address the importance of experts in interpreting, explaining, and analyzing these innovations. As Professor Erin Murphy asserts, "The law has simply not kept pace with advances in forensic science."[159]

2. *Courts' Discretionary Appointment of Experts*

While courts, under limited circumstances, must appoint an expert for an indigent party at the state's expense on constitutional grounds, they may also discretionarily appoint an expert in a wider range of criminal and civil cases.[160] Rule 706 of the Federal Rules of Evidence provides that "[t]he 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 that the appointed experts are "entitled to reasonable compensation in whatever sum the court may allow."[161] Rule 614 of the Federal Rules of Evidence also provides that "[t]he court may, on its own motion or at the suggestion of a party, call witnesses, and all parties are entitled to cross-examine witnesses thus called."[162] As discussed further below, Rule 706 is the grounds for discretionary court appointment in the majority of cases; Rule 614 rarely arises in the expert context.

Dovetailing with the Rules of Evidence are statutes detailing how court-appointed experts may be paid. For instance, 28 U.S.C. § 1920 allows a "judge or clerk of any court of the United States" to tax as the costs of a case "[c]ompensation of court appointed experts," thus requiring one or both parties

158. *Id.* at 36.

159. Erin Murphy, *The New Forensics: Criminal Justice, False Certainty, and the Second Generation of Scientific Evidence*, 95 CAL. L. REV. 721, 743 (2007) ("The Supreme Court last addressed the constitutional requirements for expert assistance to indigents in 1985, in *Ake v. Oklahoma*, in which the Court recognized only the barest entitlement to expert advice" (citing Ake v. Oklahoma, 470 U.S. 68 (1985)).

160. *See* FED. R. EVID. 706(a).

161. FED. R. EVID. 706(a)–(b).

162. FED. R. EVID. 614(a).

to pay the experts' fees at the conclusion of trial.[163] More generally, Rule 54(d) of the Federal Rules of Civil Procedure allows courts to shift costs other than attorney's fees to the prevailing party.[164] But under both § 1920 and Rule 54, individual parties who hire witnesses must typically give them some amount of advance payment.[165] If a court will not appoint an expert and an indigent must hire his own, he may be unable to afford the up front costs.[166]

Scholars at one point envisioned that courts could waive up front expert witness fees for indigent parties under 28 U.S.C. § 1915, which permits courts to authorize proceedings *in forma pauperis*.[167] Although the language of the statute does not preclude up front waiver of expert fees, courts rarely, if ever, use the statute for that purpose.[168] The legislative history of § 1915 suggests that Congress may have intended that the statute apply solely to direct court fees,[169] and several circuits have followed this interpretation. The Third Circuit, for example, held that "Congress has authorized the courts to waive prepayment of such items as filing fees and transcripts if a party qualifies to proceed in forma pauperis" under § 1915, but not expert witness fees in civil suits.[170] Similarly, the Fifth Circuit held that "[t]he plain language of section 1915 does not provide for the appointment of expert witnesses to aid an indigent litigant."[171] The Eighth Circuit agreed, holding,

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163. 28 U.S.C. § 1920(6) (2000).

164. FED. R. CIV. P. 54(d).

165. *See, e.g.*, Kenneth R. Levine, Note, In Forma Pauperis *Litigants: Witness Fees and Expenses in Civil Actions*, 53 FORDHAM L. REV. 1461, 1476 (1985) ("[Under Rule 45], witnesses are required to attend the trial only if the fees for one day's attendance and mileage are tendered with the subpoena."); *see also* FED. R. CIV. P. 45(b)(1) ("Serving a subpoena requires delivering a copy to the named person and, if the subpoena requires that person's attendance, tendering the fees for 1 day's attendance and the mileage allowed by law.").

166. *See* Levine, *supra* note 165 ("Often, the most difficult expense for an indigent to meet is the prepayments that must be made to the indigent's witnesses.").

167. *See* 28 U.S.C. § 1915(a)(1) (2000) ("[A]ny court of the United States may authorize the commencement, prosecution or defense of any suit, action or proceeding, civil or criminal, or appeal therein, without prepayment of fees or security therefor, by a person who submits an affidavit that includes a statement of all assets such prisoner possesses that the person is unable to pay such fees or give security therefor."). *See generally* Levine, *supra* note 165, at 1466 n.24 (citing cases that consider whether § 1915 authorizes courts to prepay witness fees for indigent parties).

168. *See* Levine, *supra* note 165, at 1467 ("Courts have nearly unanimously held that the term 'fees and costs' [in § 1915] does not encompass witness fees and expenses.").

169. *See id.* at 1469 (citing H.R. REP. NO. 1079 (1892)) (discussing how the House Committee on the Judiciary, in a 1892 report, intended the statute only to allow indigent parties "'entrance' to the courts").

170. Boring v. Kozakiewicz, 833 F.2d 468, 474 (3d Cir. 1987).

171. Pedraza v. Jones, 71 F.3d 194, 196 (5th Cir. 1995).

> While the plain language of section 1915 expressly provides for service of process for an indigent's witnesses, it nowhere mentions payment of fees and expenses for such witnesses. . . . We cannot, in the absence of any clear statement to the contrary, infer congressional intent to have section 1915 cover witness fees and expenses.[172]

At least one circuit has suggested that § 1915 could cover witness fees, but not in a holding. The Sixth Circuit stated in a footnote,

> We think that it is within the sound discretion of the district court to order the payment of witness fees as well as other normal costs, out of government funds under Section 1915 where the court has made an initial determination that the litigant is without funds in its grant of in forma pauperis status.[173]

It later classified this language as dicta.[174]

The legislation and rules granting judicial discretion to shift or to eliminate expert expenses under Federal Rule of Evidence 706 and to call witnesses under Rule 614, as well as fee-shifting provisions for expert assistance, give parties—civil litigants in particular—broader opportunities for low- or no-cost expert assistance than does the limited constitutional right to an expert. And some courts have taken advantage of these opportunities.[175] In a survey on the use of experts in federal cases by the Federal Judicial Center, six judges out of the 431 who responded reported that they appointed an expert where an indigent party was involved.[176] Some judges expressed unease at deciding a case where only one party offered expert testimony, thus skewing the evidence strongly in that party's favor.[177] These judges appointed an expert under Rule 706 to improve the fairness of the process.[178] Another judge appointed an expert under Rule 706 where an indigent family, including several juvenile plaintiffs, claimed injury

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172. U.S. Marshals Serv. v. Means, 741 F.2d 1053, 1056 (8th Cir. 1984).

173. Morrow v. Igleburger, 584 F.2d 767, 772 n.7 (6th Cir. 1978).

174. Johnson v. Hubbard, 698 F.2d 286, 290 n.4 (6th Cir. 1983) ("The footnote statement [in *Morrow*] . . . was only dicta, since no finding of indigence had been made.").

175. *See* Joe S. Cecil & Thomas E. Willging, Fed. Judicial Ctr., *Court-Appointed Experts*, *in* REFERENCE MANUAL ON SCIENTIFIC EVIDENCE 535 & fig.1 (1994) (indicating that, as of 1994, 20% of the judges who participated in a survey sent to all active judges had appointed an expert witness).

176. *Id.* at 535 & n.30, 560. A total of eighty-six of the responding judges reported use of a court-appointed expert, but only six reported the use of such an expert for an indigent party. *Id.*

177. *Id.* at 538–39.

178. *Id.* at 539.

caused by a contaminated water supply; the judge expressed particular concern over the presence of children in the case.[179]

Prior to the survey, a smattering of cases showed that judges have historically applied rules for discretionary appointment of experts to assist indigent parties in limited circumstances, or have at least affirmed their ability to do so while declining to appoint an expert. In *Cagle v. Cox*,[180] a judge used his equitable discretion under 28 U.S.C. § 1920 and Rule 54 to tax expert fees as costs to the state where the indigent parties—prisoners alleging overcrowding, physical violence, and other inhumane practices in a correctional center—applied to the court for an expert, and the court explained the importance of expert testimony.[181] The court also found that the expert witness was necessary and the expense "reasonable and not excessive."[182] In *Sanders v. Lewis County Jail*,[183] the district court recognized that Rule 706 allowed it to "appoint an expert witness where the plaintiff is indigent and an expert is needed to understand complex, technical or esoteric subject matter"[184] and held that "[w]here one of the parties is indigent, the court may apportion all of the cost to one side."[185] But the court found that an expert opinion was not necessary given the facts of the case.[186] Similarly, the court in *Daker v. Wetherington*[187] held that the discretion of courts to appoint an expert witness and to assign the costs to one party under Rule 706 "is broad" but found an expert unnecessary where the question was relatively uncomplicated.[188]

Appellate courts have affirmed appointments of experts under Rule 706 and, in some cases, reversed trial courts' refusal to appoint. In *McKinney v. Anderson*,[189] a Ninth Circuit case, a prisoner brought an Eighth Amendment claim against prison officials alleging harm from second-hand smoke in the prison.[190] McKinney was unable to find an expert who would provide testimony for no fee, and the magistrate judge held that he could appoint an expert under Rule 706 only if both parties would pay for the expert.[191] Because McKinney

179. *Id.* at 542–43.
180. 87 F.R.D. 467 (E.D. Va. 1980).
181. *Id.* at 471–72.
182. *Id.*
183. No. C07-5001FDB/KLS, 2007 WL 1430273 (W.D. Wash. May 14, 2007).
184. *Id.* at *1 (citing 29 CHARLES ALAN WRIGHT & VICTOR JAMES GOLD, FEDERAL PRACTICE AND PROCEDURE § 6304 (1997)).
185. *Id.* (citing McKinney v. Anderson, 924 F.2d 1500, 1511 (9th Cir. 1991), *vacated and remanded on other grounds*, Helling v. McKinney, 502 U.S. 903 (1991)).
186. *Id.*
187. No. 1:01-CV-3257-RWS, 2006 WL 648765 (N.D. Ga. Mar. 15, 2006).
188. *Id.* at *4–5.
189. 924 F.2d 1500 (9th Cir. 1990).
190. *Id.* at 1509.
191. *Id.* at 1511.

brought his case *in forma pauperis*, the magistrate determined that McKinney "would be unable to pay his proportion of the fees."[192] The magistrate accordingly refused to appoint an expert.[193] The Ninth Circuit held that Rule 706, which provides that expert compensation in a civil case 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,"[194] permits the court to shift all costs to one party—the non-indigent party in *McKinney*, for example—and that the magistrate read the rule too restrictively in refusing to appoint an expert.[195] The court concluded that "[c]onsidering the complexity of the scientific evidence in the present case, we recommend that, on remand, the district court consider appointing an expert witness or witnesses who can provide the court with scientific information on the health effects" of second-hand smoke and the concentrations of smoke in the prison.[196]

The Eighth Circuit also has held that "[t]he plain language of Rule 706(b) . . . permits a district court to order *one party* or both to advance fees and expenses for experts that it appoints."[197] The court has further relied on Rule 614 as a basis for taxing expert costs, finding that Rules 614 and 706, read in light of cost-shifting statutes, "confer upon the district court discretionary power" to order the government to advance expert fees and expenses for indigent parties, which will later be taxed as costs.[198] Similarly, the Sixth Circuit in *Webster v. Sowders*[199] held that Rule 706 allows a court to appoint an expert for an indigent and to charge all expert costs to one side, stating, "A District Court has authority to apportion costs under this rule, including excusing impecunious parties from their share."[200] The court partially affirmed the district court's order that the state of Kentucky pay for expert costs where indigent prisoners sued the state for exposure to asbestos at a prison worksite, although it held that the court "should have made findings of fact and conclusions of law to justify its continuing employment" of the expert.[201]

The Eleventh Circuit reversed a case where, among other errors, the district court refused to appoint a psychiatric expert for a potentially indigent inmate and "gave no explanation for the refusal to appoint" the expert.[202] The inmate

192. *Id.*
193. *Id.*
194. *Id.* at 1510–11 (quoting FED. R. EVID. 706(b)).
195. *Id.* at 1511.
196. *Id.*
197. U.S. Marshals Serv. v. Means, 741 F.2d 1053, 1058 (8th Cir. 1984) (emphasis added).
198. *Id.* at 1057.
199. 846 F.2d 1032 (6th Cir. 1988).
200. *Id.* at 1038.
201. *Id.* at 1039.
202. Steele v. Shah, 87 F.3d 1266, 1270 (11th Cir. 1996).

sued a psychiatrist from a Florida state prison after the psychiatrist discontinued his "prescribed psychotropic medication."[203] The appellate court held that "[t]he case is one that by its nature warrants consideration of the possible need [for an expert] in order to insure a just resolution of the claim."[204] The court of appeals was particularly concerned with the inmate's claim that he was indigent and found that "this could provide further reason to appoint an expert to avoid a wholly one-sided presentation of opinions on the issue."[205]

A motion for the court to discretionarily appoint an expert is a more realistic method of obtaining expert assistance than is an *Ake* claim, as a court's discretion is broader than the constitutional right to an expert. But courts often deny motions for discretionary court-initiated appointment of an expert, in large part because Rule 706 exists for the benefit of the court, not for the individual parties before the court.[206] If a court deems expert testimony generally unhelpful, it need not appoint an expert under the Rule.[207] Cases like *Students of California School for the Blind v. Honig*[208] highlight this court-centric focus; in *Honig*, the Ninth Circuit observed, "Under Rule 706, the court is free to appoint an expert of its own choosing without the consent of either party."[209] Some courts have been more emphatic in rejecting any notion that Rule 706 exists for the benefit of the parties, holding that "[l]itigant assistance is not the purpose of Rule 706."[210] And the Fifth Circuit has found Rule 706 inapplicable where a party not only failed to show that he "attempted to procure an expert," but he also "requested an appointment only for his own benefit."[211] In many circumstances, the interests of the court and the indigent party in obtaining expert assistance to benefit the case will overlap, but in some cases, the court may be unaware of the flaws in one expert's testimony or in evidence relied upon by one side. In such cases, the indigent party, with the help of an expert, could develop questions to effectively draw out flaws on cross-examination of

203. *Id.* at 1267.

204. *Id.* at 1271.

205. *Id.*

206. *See, e.g.*, Daker v. Wetherington, No. 1:01-CV-3257 RWS, 2006 WL 648765, at *5 (N.D. Ga. Mar. 15, 2006) ("Litigant assistance is not the purpose of Rule 706.").

207. *See id.* ("[T]he question before the Court is not an especially complicated one. . . . [T]he Court declines [defendant's] request . . . to appoint an expert witness to assist him.").

208. 736 F.2d 538 (9th Cir. 1984), *vacated*, 471 U.S. 148 (1985).

209. *Id.* at 549.

210. *Daker*, 2006 WL 648765 at *5.

211. Pedraza v. Jones, 71 F.3d 194, 197 n.5 (5th Cir. 1995).

the opposing party's expert.[212] If the court is unaware of this benefit it will not appoint an expert,[213] to the detriment of both the court and the indigent party.

Even where judges find that an expert would assist the decision making process, they are understandably wary of exercising this option.[214] Litigation expenses are already high, and shifting additional costs to one party is often an unpopular decision.[215] Judges have admitted that despite the option to appoint an expert, the requirement that the expert be compensated "often obstructs an appointment, especially when one of the parties is indigent;"[216] there is "a great reluctance to employ . . . experts [under Rule 706] when the expense cannot be shared" because one party is indigent.[217] According to the Federal Judicial Center's survey results,[218] "[o]f the eighty-six judges reporting appointment of an expert, just over half had appointed an expert on only one occasion. Only four judges appointed an expert in ten or more cases."[219] Although one of the two "principal reasons" for deciding not to appoint an expert was the "infrequency of cases requiring . . . [expert] assistance," judges also reported a reluctance "to intrude into the adversarial process."[220] Furthermore, judges stated that they had trouble "identifying suitable experts" and "compensating appointed experts."[221] That said, in 2006, one author concluded that the "earlier reluctance of the federal courts to appoint their own expert witnesses is beginning to wane,"[222] at least for some types of courts.

Further, appellate courts have narrowed the scope of Rule 706. They generally review district courts' decisions to appoint or not appoint an expert under Rule 706 only for an abuse of discretion[223] and "have hesitated to find

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212. *See, e.g.*, Rodriguez v. State, 906 S.W.2d 70, 74 (Tex. App. 1995) (discussing the beneficial role an expert witness can play in developing a case).

213. *See, e.g.*, *Pedraza*, 71 F.3d at 197 n.5 ("Pedraza made no showing that he attempted to procure an expert, never submitted medical or psychological records regarding his mental condition, never requested the appointment of an expert pursuant to Rule 706, and requested an appointment only for his own benefit. Under these circumstances, Rule 706 is not applicable.").

214. *See* Cecil & Willging, *supra* note 175, at 557 ("Interviews with judges suggest that . . . problems in providing compensation can thwart the appointment of an expert.").

215. *See id.* ("Parties may resist compensating experts they did not retain and who offer testimony damaging to their interests.").

216. *Id.* at 530.

217. *Id.* at 560.

218. *See supra* text accompanying notes 175–79. The survey was "sent to 537 active federal district court judges; 431 judges responded." Cecil & Willging, *supra* note 175, at 535 n.30.

219. Cecil & Willging *supra* note 175, at 536.

220. *Id.* at 540.

221. *Id.*

222. Stan Bernstein et al., *The Empowerment of Bankruptcy Courts in Addressing Financial Expert Testimony*, 80 AM. BANKR. L.J. 377, 413 (2006).

223. *See, e.g.*, Gaviria v. Reynolds, 476 F.3d 940, 945 (D.C. Cir. 2007) ("Because [Rule 706] speaks in permissive terms and requires an individualized case-specific determination, other

any affirmative obligation to exercise the Rule 706 power."[224] The Eighth Circuit has held that under Rules 706 and 614(a) of the Federal Rules of Evidence, a court may require the government to advance the witness fees of a civil defendant, to be taxed later as costs, but "only under compelling circumstances."[225] The court of appeals found such compelling circumstances where the United States charged approximately forty indigent individuals of the Lakota Nation with illegally occupying "Yellow Thunder Camp" in Black Hills National Forest.[226] The United States initially paid for some pretrial witnesses' fees and expenses, but "midtrial refused to pay for the Yellow Thunder Camp's trial witnesses, and in so doing sought victory by default."[227] Such "compelling circumstances"[228] are unlikely to arise in many cases. The Seventh Circuit has also followed *Means*, similarly holding that a court's discretion to call witnesses under Rules 614 and 706(b) "is generally reserved for compelling circumstances."[229]

Courts are understandably hesitant to find an affirmative individual right to expert assistance in a rule that gives them discretion to appoint the expert only for their own benefit.[230] Their cost-shifting concerns are also persuasive.[231] But this leaves many indigent parties without recourse when expert testimony could support their claims.

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circuits review such denials for abuse of discretion. We join these circuits."); Walker v. Am. Home Shield Long Term Disability Plan, 180 F.3d 1065, 1070–71 (9th Cir. 1999) ("The district court did not abuse its discretion [under Rule 706] in appointing an independent medical expert . . . ."); Ledford v. Sullivan, 105 F.3d 354, 359 (7th Cir.1997) (noting that the Seventh Circuit applies an abuse of discretion standard, as do the Ninth and Eleventh Circuits); Gates v. United States, 707 F.2d 1141, 1144 (10th Cir. 1983) (reviewing for an abuse of discretion the district court's appointment of an expert panel under Rule 706).

224. *Gaviria*, 476 F.3d at 945.

225. U.S. Marshals Serv. v. Means, 741 F.2d 1053, 1059 (8th Cir. 1984).

226. *Id.* at 1055.

227. *Id.* at 1059.

228. *Id.*

229. Aiello v. McCaughtry, No. 94-1935, 1996 WL 420456, at *3 (7th Cir. July 25, 1996) (citing *Means*, 741 F.2d at 1059).

230. *See* Cecil & Willging, *supra* note 175, at 557 ("Judges expressed concerns regarding payment when describing how the experts were compensated . . . .").

231. *See id.*

B. *Legislative Mandates for Experts at the State and Federal Levels*

1. *Federal Criminal Justice Act*

Some expert assistance at the state and federal level arises from the legislative, rather than the judicial, process. The federal Criminal Justice Act[232] requires district courts to "place in operation . . . a plan for furnishing representation" for indigent defendants in a variety of cases involving criminal charges, mental condition, loss of liberty, or juvenile delinquency.[233] The representation to be provided includes "investigative, expert, and other services necessary for adequate representation."[234] Under the Act, if a defendant "is financially unable to obtain investigative, expert, or other services necessary for adequate representation," the court may, upon ex parte request by counsel, authorize the services if they are "necessary."[235] Compensation for these services is limited to $1,600, unless the court approves a higher amount.[236] Counsel may obtain up to $500 in expert or investigative services without prior authorization from the court.[237]

Appellate courts have relied on a combination of the Criminal Justice Act and *Ake* in holding that district courts have wrongfully denied an indigent defendant psychiatric expert assistance. In *United States v. Chase*,[238] for example, the Ninth Circuit held that the district court abused its discretion in denying an indigent defendant's motion to hire an expert where "[t]he district court explicitly relied on the government's expert testimony" in determining the quantity of methamphetamine produced by the defendant.[239] The court of appeals, rooting its findings in the Criminal Justice Act and *Ake*, concluded that "the only disputed issue was the quantity of methamphetamine produced"[240] and discussed how a defense expert could have offered an opinion "as to the best available method for estimating drug quantity;"[241] "produced his or her own 'investigation, interpretation, and testimony;'"[242] and "made the cross-examination of [the government's expert] more effective."[243] In the Tenth

232. Criminal Justice Act, Pub. L. 88-455, 78 Stat. 552 (1964) (codified at 18 U.S.C. § 3006A (2000)).
233. 18 U.S.C. § 3006A(a).
234. *Id.*
235. *Id.* § 3006A(e)(1).
236. *Id.* § 3006A(e)(3) (Supp. 2006).
237. *Id.* § 3006A(e)(2).
238. 499 F.3d 1061 (9th Cir. 2007).
239. *Id.* at 1068.
240. *Id.* at 1066.
241. *Id.*
242. *Id.* (quoting Ake v. Oklahoma, 470 U.S. 68, 80 (1985)).
243. *Id.*

Circuit, where "an indigent defendant is entitled to a psychiatric expert . . . upon 'a clear showing to the trial judge that his mental condition will be a significant factor at trial,'"[244] the defendant in *United States v. Crews*[245] argued that he was incompetent to stand trial.[246] He requested an expert, but the court denied the motion.[247] On appeal, he argued that the district court erred in failing to appoint a psychiatrist under the Criminal Justice Act.[248] The appellate court agreed and reversed the conviction, although it cited *Ake* and its own precedent relying on *Ake*, as opposed to the language of the Act, for its reasoning.[249]

2. *State Laws*

State statutes have requirements for court-ordered compensation of experts for indigent defendants that are similar to the federal Criminal Justice Act.[250] Alabama, for example, as part of its Code requiring court appointment of attorneys for indigent defendants, provides, "Counsel shall also be entitled to be reimbursed for any expenses reasonably incurred in the defense of his or her client to be approved in advance by the trial court."[251] In Arizona, where an indigent charged with a felony offense applies and shows that he is financially unable to obtain expert services, a court "shall . . . appoint investigators and expert witnesses as are reasonably necessary to adequately present a defense at trial and at any subsequent proceeding."[252] Minnesota allows counsel representing indigent defendants to "file an ex parte application requesting investigative, expert, or other services necessary to an adequate defense in the case."[253] The court may only compensate for expert expenses up to $1,000, unless a larger amount is certified by the court.[254] New Hampshire similarly provides that appointed counsel may, for an indigent defendant, apply for "expert or other services necessary to an adequate defense in his case."[255] Compensation is limited to $300 "unless the court determines that the nature or

244. *United States v. Crews*, 781 F.2d 826, 834 n.5 (10th Cir. 1986) (quoting United States v. Sloan, 776 F.2d 926, 929 (10th Cir. 1985)).

245. 781 F.2d at 826.

246. *Id.* at 832.

247. *Id.* at 833.

248. *Id.*

249. *Id.* at 833–34 (citing *Sloan*, 776 F.2d at 927–29).

250. *See, e.g.*, Harris, *supra* note 129, at 490 n.133 (describing state statutes, as of 1992, that allowed courts to order reimbursement for expert services).

251. ALA. CODE § 15-12-21(d) (LexisNexis Supp. 2007).

252. ARIZ. REV. STAT. § 13-4013(B) (LexisNexis Supp. 2007).

253. MINN. STAT. ANN. § 611.21(a) (West 2004).

254. *Id.* § 611.21(b).

255. N.H. REV. STAT. ANN. § 604-A:6 (LexisNexis 2003).

quantity of such services reasonably merits greater compensation."[256] New Mexico's Indigent Defense Act promises "the necessary services and facilities of representation, including investigation and other preparation" to needy persons detained or under formal charge for a serious crime, with no express monetary limit.[257] The Texas Code of Criminal Procedure provides that the state shall reimburse appointed counsel of an indigent criminal defendant for "reasonable and necessary expenses, including expenses for investigation and for mental health and other experts."[258] The Texas Code also permits the state to reimburse directly private investigators and expert witnesses "designated by appointed counsel and approved by the court."[259] The Code does not set a monetary limit.[260] West Virginia provides up to $1,500 for reimbursement of public defenders for travel, transcripts, investigative services, and expert witnesses, as well as a court-approved amount of reimbursement for public defenders' felony cases involving life imprisonment.[261]

Federal legislation on expert assistance in civil cases is sparse, as there is no civil counterpart to the Criminal Justice Act.[262] Indigent civil litigants at the federal level must typically rely on courts' discretion to appoint experts under the Federal Rules of Civil Procedure and the Federal Rules of Evidence.[263] Some states, however, provide limited compensation for experts in civil cases and in cases involving commitment to mental institutions. Massachusetts provides payment for reasonable expert witness fees if a party is found to be indigent.[264] Such payments are made from the Indigent Persons Fund.[265] The

256. *Id.*

257. N.M. STAT. ANN. § 31-16-3(A) (LexisNexis 2004).

258. TEX. CODE CRIM. PROC. ANN. art. 26.05(d) (Vernon Supp. 2008).

259. *Id.* art. 26.05(h).

260. *See id.*

261. W. VA. CODE ANN. § 29-21-13a(e) (LexisNexis 2004).

262. *See* discussion *supra* Part III.A.2 (analyzing courts' discretionary appointment of experts pursuant to the Federal Rules of Civil Procedure and the Federal Rules of Evidence).

263. *Id.*

264. MASS. GEN. LAWS ANN. ch. 261, § 27B (West 2004) ("Upon or after commencing or answering to any civil, criminal or juvenile proceeding or appeal in any court . . . any party may file with the clerk an affidavit of indigency and request for waiver, substitution or payment by the commonwealth of fees and costs . . . ."); *see also id.* § 27A ("[Extra fees and costs means] the fees and costs, in addition to those a party is normally required to pay in order to prosecute or defend his case, which result when a party employs or responds to a procedure not necessarily required in the particular type of proceeding in which he is involved. They shall include, but not necessarily be limited to, the cost of transcribing a deposition, expert assistance and appeal bonds and appeal bond premiums."); *id.* § 27C(4) ("If the court makes a finding of indigency, . . . it shall not deny any request with respect to *extra fees and costs* if it finds the document, service or object is reasonably necessary to assure the applicant as effective a prosecution, defense or appeal as he would have if he were financially able to pay.") (emphasis added).

party must file a motion with a judge for prior written approval of expert witness costs,[266] and counsel may appeal a judge's denial of funds.[267] Parties requesting money from the Indigent Persons Fund must show that they are indigent and that the expert services are "reasonably necessary to assure the applicant as effective a prosecution, defense or appeal as he would have if he were financially able to pay."[268]

For a narrow category of civil cases—mental commitment proceedings—many states guarantee expert assistance to indigent parties. Arkansas, for example, has a fund for each county in the state to pay for expert costs incurred in defending indigent persons in involuntary commitment proceedings for mental health, drug and alcohol, and incompetency.[269] In Washington state, any indigent person who "is subjected" to commitment examination as a sexually violent predator is guaranteed, upon request, an expert or a professional examination.[270] Florida has a similar statute,[271] and Pennsylvania has found a due process right to expert assistance for indigents in sexual predator hearings.[272] In Ohio, indigent defendants at a sexual offender classification hearing are entitled to an expert only if the "services are reasonably necessary to determine whether the offender is likely to engage in the future in one or more sexually oriented offenses."[273] Ohio also provides "independent expert evaluation" at the public's expense for indigent individuals in commitment proceedings that determine sanity.[274]

From this scattered array of state and federal provisions for indigent expert assistance emerges a basic yet incomplete foundation of rights. Low income parties who turn to statutes in search of expert assistance are likely to find little help.[275] Federal criminal defendants may receive expert aid under the Criminal

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265. Comm. for Pub. Counsel Servs., Assigned Counsel Manual: Policies and Procedures § 6-2 (2006), *available at* http://www.publiccounsel.net/private_counsel_manual/private_counsel_manual_pdf/chapters/manual_chapter_6.pdf.

266. ch. 261, § 27C(2)–(3).

267. *Id.* § 27D.

268. *Id.* § 27C(4).

269. ARK. CODE ANN. § 14-20-102 (West 1998).

270. WASH. REV. CODE. ANN. § 71.09.050(2) (West 2008).

271. FLA. STAT. ANN. § 394.918(1) (West 2003) (granting the court discretion, at the request of a person committed to a mental institution, to appoint a qualified professional to conduct an examination of the individual).

272. Commonwealth v. Curnutte, 871 A.2d 839, 843–44 (Pa. Super. Ct. 2005).

273. State v. Eppinger, 743 N.E.2d 881, 886 (Ohio 2001).

274. OHIO REV. CODE ANN. § 2945.371(B) (LexisNexis 2006).

275. *See, e.g.*, Comment, *Nonpsychiatric Expert Assistance and the Requisite Showing of Need: A Catch-22 in the Post-*Ake *Criminal Justice System*, 37 EMORY L.J. 995, 997 (1998) (noting that federal and state statutes provide insufficient support to indigent parties who need expert witnesses).

Justice Act.[276] But the standard of review for a district court's decision not to appoint an expert is a deferential abuse of discretion,[277] and indigent defendants may have trouble mustering adequate resources to prove the need for an expert under the Act.[278] At the state level, compensation for felony defendants' expert expenses may be inadequate, as exemplified by the meager $300 allowed in New Hampshire.[279] While some states offer more generous funding—$1,500 in West Virginia, for instance[280]—the $1,500 includes *all* expenses of the public defender; if a case is expensive to defend, there will be few, if any, funds available for experts.[281] And many states do not provide for any reimbursement of fees for experts who assist indigent parties.[282] In Michigan, for example, where courts individually appoint criminal defense attorneys, the fees awarded to the attorneys do not cover expert costs.[283]

Court-appointed attorneys are frequently underpaid and are unlikely to sacrifice a portion of their small fee to compensate an expert.[284] As a case in point, most counties in Mississippi rely on part-time contractors to represent

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276. *See* 18 U.S.C. § 3006A(e)(1) (2006).

277. *See, e.g.*, United States v. Chase, 499 F.3d 1061, 1066 (9th Cir. 2007) ("The decision to grant or deny a request for services under the Criminal Justice Act will be overturned on appeal where the district court has committed an abuse of discretion." (citing United States v. Smith, 893 F.2d 1573, 1580 (9th Cir. 1990)).

278. *See, e.g.*, SARAH GERAGHTY & MIRIAM GOHARA, NAACP, ASSEMBLY LINE JUSTICE: MISSISSIPPI'S INDIGENT DEFENSE CRISIS 11 (2003), *available at* http://www.abanet.org/legalservices/downloads/sclaid/indigentdefense/ms-assemblylinejustice.pdf (describing public defenders' uphill battle to obtain funds for their clients through case-by-case petitions).

279. N.H. REV. STAT. ANN. § 604-A:6 (LexisNexis 2003).

280. W. VA. CODE ANN. § 29-21-13a(e) (LexisNexis 2004).

281. *See id.*

282. *See* State v. Brown, 134 P.3d 753, 759 & n.1 (N.M. 2006) ("[T]he majority of state courts . . . have concluded that under the U.S. Constitution and their respective state statutes, indigent defendants represented by *pro bono* or retained counsel are entitled to state funding for various defense costs, including expert witness fees.").

283. ELIZABETH ARNOVITS & TIMOTHY ZELLER, MICH. COUNCIL ON CRIME & DELINQUENCY, MODEL PLAN FOR PUBLIC DEFENSE SERVICES IN MICHIGAN 4–5 (2002), *available at* http://www.abanet.org/legalservices/downloads/sclaid/indigentdefense/mi-modelplan.pdf.

284. *See, e.g.*, *id.* at 5 ("In some areas fees have been cut by 10 percent and are at 1970 levels."). These "inexcusabl[y] low rates of compensation" have in part caused "more than 33 percent of all assigned defense counsel [to] ask to be removed from the rosters each year." *Id.*; *see also* Editorial, *Michigan Justice is Threatened by Underfunding*, MICH. LAW. WKLY., Mar. 5, 2007, *available at* http://www.nacdl.org/public.nsf/DefenseUpdates/Michigan022 (commenting on the problem in Michigan of the inadequate amount of resources allocated to appointed attorneys). *But see* Dawn Childress & Anne Boomer, *Supreme Court Improves State's Indigent Defense System*, MICH. B.J., Sept. 2006, at 22, 22, *available at* http://www.michbar.org/journal/pdf/pdf4article1050.pdf (arguing that Michigan's indigent defense system has improved since 2002).

indigent criminal defendants.[285] Each lawyer representing an indigent defendant must individually petition the court for expert funds, and, according to the NAACP, elected judges may be reluctant to spend taxpayer dollars on such services.[286] This means that many attorneys in non-death penalty cases face the difficult choice of foregoing an expert or investigator, or using their personal funds to hire one.[287] The NAACP also points to the impact of inadequate expert assistance on the fairness and equality of the judicial system: while many indigent criminal defendants are unlikely to receive expert aid, the state funds full time investigators for the district attorney and pays all of the state crime lab's budget.[288]

On the civil side, individuals in commitment proceedings are typically guaranteed expert services, but few other civil parties have access to expert services absent a court's discretionary appointment of an expert to assist the case.

C. Legal Aid and Public Defenders' Alliances with Experts

Some avenues for indigent expert assistance are available outside of the legal and legislative processes. Legal aid and public defenders' organizations have developed their own systems for obtaining expert aid, although some receive compensation for expert services from legislative mandates[289] or expert fees ordered by the court.[290] The National Legal Aid and Defender Association encourages legal aid offices to forge alliances with experts for their clients' cases.[291] The Association's criminal defense service guidelines suggest that "[t]he contract should provide for employment of secretaries, social work staff, mental health professionals, forensic experts and support staff to perform tasks not requiring legal credentials or experience and tasks for which support staff and forensic experts possess special skills."[292] The American Bar Association has set a more ambitious benchmark for public defenders. Standard 8 of the *Ten Principles of a Public Defense Delivery System*, adopted by the ABA House of

285. GERAGHTY & GOHARA, *supra* note 278, at 6.

286. *Id.* at 11.

287. *Id.* at 6 ("In many counties, hiring an investigator or a psychiatrist in a non-death penalty case is only possible if the lawyer pays for it out of his or her own pocket.").

288. *Id.* at 11.

289. *See* discussion *supra* Part III.B.2.

290. *See, e.g.*, U.S. Marshals Serv. v. Means, 741 F.2d 1053, 1058 (8th Cir. 1984) (holding that a district court can require a party to advance fees for experts).

291. DEFENDER ASS'N & DEFENDER COMM., NAT'L LEGAL AID & DEFENDER ASS'N, GUIDELINES FOR NEGOTIATING AND AWARDING GOVERNMENTAL CONTRACTS FOR CRIMINAL DEFENSE SERVICES III-8 (1984), *available at* http://www.nlada.org/Defender/Defender_Standards/Negotiating_And_Awarding_ID_Contracts.

292. *Id.*

Delegates, establishes a goal of "parity between defense counsel and the prosecution with respect to resources," meaning that "[t]here should be parity of workload, salaries, and other resources (such as benefits, technology, facilities, legal research, support staff, paralegals, investigators, and access to forensic services and experts)."[293] Yet as of 1999, the most recent date for which Bureau of Justice statistics are available, eighty-one of the one hundred largest counties in the country spent $1.1 billion on indigent criminal defense, while the county prosecutors' offices had estimated budgets of $1.9 billion.[294]

While few legal aid or public defenders' offices have the budgets to realistically achieve the goals of equalized workload and resources for the prosecution and defense,[295] some offices have taken creative approaches to obtain expert support. In 1993, for example, an appointed public defender representing a felony defendant made a "Motion for Relief to Provide Constitutionally Mandated Protection and Resources."[296] The trial court found that the public defender was "handling 70 active felony cases" at the time of his appointment to the case and that "[i]n a routine case [the defender] receive[d] no investigative support at all. There [were] no funds for expert witnesses."[297] It held that the defender was unable to provide effective assistance of counsel due to the limited resources available to him and that Louisiana's indigent defense statute was unconstitutional.[298] The court ordered that the defender's case load be reduced and the public defender's office receive additional funds.[299] The state appealed, and the Louisiana Supreme Court affirmed, holding that "because of the excessive caseloads and the insufficient support with which their attorneys must work, indigent defendants . . . are generally not provided with the effective assistance of counsel the constitution requires."[300]

To cope with inadequate budgets, some legal aid organizations have joined coalitions of expert witnesses, forging long-term connections with experts who will help their clients. The Montana Coalition Against Domestic and Sexual Violence, for example, has organized a "pool of experienced advocates trained

293. STANDING COMM. ON LEGAL AID & INDIGENT DEFENDANTS, ET AL., AM. BAR ASS'N, THE TEN PRINCIPLES OF A PUBLIC DEFENSE DELIVERY SYSTEM 107 (2002), *available at* http://www.abanet.org/legalservices/downloads/sclaid/10principles.pdf.

294. DEFRANCES & LITRAS, *supra* note 57, at 3.

295. *See, e.g.*, State v. Peart, 621 So. 2d 780, 789 (La. 1993) (discussing the inadequacies of the indigent defense programs in Louisiana created by wide variations in funding); GERAGHTY & GOHARA, *supra* note 278, at 6 ("Lawyers for the poor lack funds to conduct the most basic investigation, to conduct legal research, or to hire experts.").

296. *Peart*, 621 So. 2d at 784.

297. *Id.*

298. *Id.*

299. *Id.* at 784–85.

300. *Id.* at 790.

in courtroom procedure."[301] These expert witnesses receive special training to help them establish their credentials as experts and testify free of charge for attorneys who do pro bono work in family law cases.[302] Montana Legal Services has contracted with the Coalition; through a partnership, it provides a "technical assistance attorney" for the Coalition's members.[303]

Despite creative strategies for obtaining expert assistance, many public defenders' offices have insufficient funds for their caseload and the experts needed for those cases. A study, again from Louisiana, provides a compelling example.[304] The authors focused on the Calcasieu Parish Public Defender Office in southwest Louisiana, which has the formidable task of representing approximately 90% of all individuals accused of felonies in the parish.[305] They tracked each individual in the parish who was charged with a felony in March 1997, March 1999, and March 2001; studied a random sample of these individuals' case files; and read jail visitation records.[306] The authors also compared the performance of public defenders' representation with that of local private criminal defenders:[307] the Calcasieu Public Defender Office had two investigators[308] and an average budget of only $110 per case,[309] with a total annual budget of $1.2 million.[310] In contrast, the Calcasieu Parish District Attorney's Office had fourteen investigators and an annual budget of $3.7 million, "as well as access to forensic testing, expert witnesses, and the investigative resources of local law enforcement agencies."[311] The District Attorney's office used the Southwest Regional Criminalistics Laboratory at no cost and spent $200,000 annually on experts.[312] The authors found only two instances in three years where the Calcasieu Public Defender Office used experts in a case.[313] Although the public defender office spent approximately $250,000 annually on professional services, the bulk of these costs went toward

301. *Organization Offers Expert Witnesses*, MONT. LAW., Mar. 2004, at 23, 23.

302. *Id.*

303. Mont. Coal. Against Domestic & Sexual Violence, Montana Legal Services DV Unit, http://www.mcadsv.com/PP-MLSA.html (last visited Jan. 28, 2009).

304. *See* MICHAEL M. KURTH & DARYL V. BURCKEL, DEFENDING THE INDIGENT IN SOUTHWEST LOUISIANA (2003), *available at* http://www.lacdl.org (follow "Public Reports" hyperlink; then follow "Calcasieu Parish Indigent Defense Report" hyperlink).

305. *Id.* at 3.

306. *Id.*

307. *Id.*

308. *Id.* at 15.

309. *Id.* at 21.

310. *Id.* at 22.

311. *Id.*

312. *Id.* at 24.

313. *Id.*

hiring contract attorneys, who were necessary when the attorneys within the office were conflicted out of cases.[314]

While legal aid and public defenders' organizations can obtain expert assistance by forming alliances with social service organizations or requesting assistance through the court, the inherent limitations of public funding as well as high case loads demanding most of these organizations' legal resources may understandably force expert assistance to the back burner. In states and counties where scarce funds must be channeled to the basic costs of legal representation, indigent parties represented by a public defender or legal aid attorney are unlikely to have expert help.

D. Individual Experts' Voluntary Services

Indigent parties who are unable to obtain an expert through a court appointment or a legal aid or public defenders' office may be able to identify individual experts who are willing to testify at no cost or a reduced rate.[315] The difficulty, of course, lies in finding those experts.[316] In some cases, individual experts involved in social work may volunteer their time.[317] Domestic violence advocates, for example, might testify on behalf of a victim in a family violence case.[318] For a wide range of legal questions, an expert with a personal commitment to an issue may volunteer on a case-by-case basis.[319] In 2007, for example, a municipal court in Ohio imposed a three-day suspended sentence on a public defender and fined him $100.[320] The defender had been appointed to represent an individual in a misdemeanor assault case involving several witnesses; he was appointed on the same day that the trial was to occur and was unprepared.[321] He refused to go to trial.[322] At the public defender's contempt

314. *Id.*

315. *See, e.g.*, Melissa L. Breger, *Introducing the Construct of the Jury into Family Violence Proceedings and Family Court Jurisprudence*, 13 MICH. J. GENDER & L. 1, 36 n.187 (2006) (recognizing that experts who work with indigent people may be willing to testify for a reduced fee).

316. *See, e.g.*, David Medine, *The Constitutional Right to Expert Assistance for Indigents in Civil Cases*, 41 HASTINGS L.J. 281, 339 (1990) ("Because most expert witnesses do not belong to professional societies that encourage pro bono service, it can be extremely difficult to find volunteer experts.").

317. *See* Breger, *supra* note 315.

318. *Id.*

319. *See id.*

320. Jack King, *NACDL News*, CHAMPION, Sept.–Oct. 2007, at 8, 8.

321. *Id.*

322. *Id.*

hearing, the president of the National Association of Criminal Defense Lawyers provided expert testimony on legal ethics at no cost.[323]

There are some associations of experts but few, if any, have formal provisions encouraging their members to provide pro bono services.[324] The American Psychological Association has some of the most comprehensive ethical standards with principles that, construed liberally, may cover indigent support.[325] The APA's Ethical Principles of Psychologists and Code of Conduct states, for example, "[p]sychologists recognize that fairness and justice entitle all persons to access to and benefit from the contributions of psychology and to equal quality in the processes, procedures, and services being conducted by psychologists."[326] Nothing in this language points specifically to pro bono expert testimony, however.[327] The California-based Forensic Expert Witness Association has a code of ethics requiring that members "utilize standards and controls to provide services in a professional and scientific manner" and endowing the association with disciplinary powers to remedy violations of the code.[328] There is no language recommending volunteer services.[329] Physicians and other individuals that belong to the American Medical Association operate under enforceable ethics codes and guidelines,[330] but again, none explicitly refer to pro bono expert assistance.[331] Some support for pro bono testimony may be found in the AMA's ethical opinions,[332] as well as other medical associations' codes.[333] The AMA has set forth general standards for testifying physicians in

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323. *Id.*

324. AM. PSYCHOLOGISTS ASS'N, ETHICAL PRINCIPLES OF PSYCHOLOGISTS AND CODE OF CONDUCT (2002) [hereinafter APA ETHICAL CODE], *available at* http://www.apa.org/ethics/code2002.pdf.

325. *See* Justin P. Murphy, Note, *Expert Witnesses at Trial: Where are the Ethics?*, 14 GEO. J. LEGAL ETHICS 217, 232 (2000) (discussing the APA's *Ethical Principles of Psychologists and Code of Conduct* and how they "offer the most comprehensive regulations of any professional organization and specifically devote an entire section to forensic activities").

326. APA ETHICAL CODE, *supra* note 324, at 3.

327. *See id.*

328. FORENSIC EXPERT WITNESS ASS'N, CODE OF ETHICS, *available at* http://forensic.org/About/ethics.asp.

329. *See id.*

330. COUNCIL ON ETHICAL & JUDICIAL AFFAIRS, AM. MEDICAL ASS'N, CODE OF MEDICAL ETHICS OF THE AMERICAN MEDICAL ASSOCIATION (2006–2007 ed.).

331. *See id.*

332. *Id.* at 286–87.

333. *See, e.g.*, Donald C. Watson Jr. et al., *Are Thoracic Surgeons Ethically Obligated to Serve as Expert Witnesses for the Plaintiff?*, 78 ANNALS THORACIC SURGERY 1137, 1139 (2004) ("The [American College of Surgeons] and the Society of Thoracic Surgeons (STS) have described qualifications and standards of behavior for expert witnesses. Qualifications include the following: possess a valid current and unrestricted license to practice, have board/specialty certification, practice in a specialty appropriate to the case, possess familiarity with the standards of care at the

the opinions of the Council on Ethical and Judicial Affairs.[334] One Council report on medical testimony stated, "As citizens and as professionals with specialized knowledge and experience, physicians have an obligation to assist in the administration of justice."[335] A low income individual seeking expert services may be able to contact a member of these types of associations and, if nothing else, receive leads on how to contact individual experts who might provide free services. But the fact that many experts do not belong to an association, and the associations' failure to formally encourage volunteer services, may limit the effectiveness of indigent clients in securing assistance.

Another potential source of expert support arises where states convene panels of neutral experts to assist courts pretrial: these experts' research and analysis may collaterally provide free benefits to an indigent party in the case.[336] In medical tort cases, for example, pretrial medical screening panels discuss the merits of malpractice claims and make recommendations as to liability and damages.[337] Expert findings from the panel may be useful to a plaintiff, as some states allow panel members to later testify at trial.[338] An indigent party may be able to persuade the expert, who has already invested numerous hours into research for the panel, to provide an hour or two of free testimony. But only twenty states provide for screening panels.[339] Furthermore, there is no guarantee that the information generated by the panel will provide sufficient data for the party at trial,[340] especially for rebutting the opposing side's experts.

Associations and individual expert witnesses may provide some support for a low income client seeking expert assistance, but the barriers to locating these individuals and the lack of centralized expert witness organizations that offer low cost options make the existing system insufficient for indigent clients' needs.[341] Often, volunteer expert witnesses are simply not forthcoming.[342]

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time and place of the case, have continuing medical education relevant to the specialty and the case, and have the ability to document time spent and fees.") (internal citations omitted).

334. *See* Murphy, *supra* note 325, at 231 (citing COUNCIL ON ETHICAL & JUDICIAL AFFAIRS, AM. MEDICAL ASS'N, CODE OF MEDICAL ETHICS OF THE AMERICAN MEDICAL ASSOCIATION 1 (1994 ed.)).

335. COUNCIL ON ETHICAL & JUDICIAL AFFAIRS, AM. MEDICAL ASS'N, CEJA REPORT 12-A-04: MEDICAL TESTIMONY 6 (2004), *available at* http://www.ama-assn.org/ama1/pub/upload/mm/369/12a04.pdf.

336. *See* Struve, *supra* note 34.

337. *See id.*

338. *Id.*

339. *Id.* at 990.

340. *See id.* at 995.

341. *See* Medine, *supra* note 316.

Unlike the legal profession, where attorneys must belong to a state bar and are expected, but not required, to provide pro bono legal services,[343] many expert witnesses are not members of an organized group with goals for volunteer service.[344] And although advocates working in social service organizations or other individuals may volunteer their services, the advocate may not in all cases qualify as an expert.[345] Without a more organized system, these services provide only a partial remedy to indigent parties.

E. Attorneys' Recruitment and Retention of Quality Expert Services

In some cases, individual expert services may be available—whether from a court's appointment of an expert,[346] a social service organization or professional association with members willing to provide pro bono testimony,[347] or a state-commissioned panel[348]—but these services are often underutilized. This problem finds its source partly in disorganized individual expert services and partly in attorneys' failure to recognize the importance of these services or to find ways to obtain them.[349] Without counsel providing the crucial link between a client and an expert witness, the system of expert support fails. Attorneys are essential in helping clients locate and retain expert services. Attorneys must also effectively use an expert's services—preparing questions that will draw out the relevant opinions on direct examination, harnessing the expert's knowledge in preparing for cross-examination of the opposing party's witnesses, and obtaining reports and other supporting documents from the expert.

Several state cases highlight the importance of counsel in helping indigent defendants obtain a court-appointed expert witness or compensation for a witness's services. In Georgia, the state supreme court convicted an indigent defendant of rape and malice murder.[350] The prosecution presented evidence of

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342. *See, e.g.*, John M. West, Note, *Expert Services and the Indigent Criminal Defendant: The Constitutional Mandate of* Ake v. Oklahoma, 84 MICH. L. REV. 1326, 1327 n.12 (1986) (discussing the unwillingness of expert witnesses to donate their time to indigent defendants).

343. MODEL RULES OF PROF'L CONDUCT R. 6.1 (2008) ("Every lawyer has a professional responsibility to provide legal services to those unable to pay. A lawyer should aspire to render at least (50) hours of pro bono publico legal services per year.").

344. *See* Medine, *supra* note 316.

345. *See* Breger, *supra* note 315.

346. FED. R. EVID. 706.

347. *See, e.g.*, Breger, *supra* note 315 ("[E]xpert witnesses . . . could include domestic violence advocates or shelter counselors who may even testify for low cost . . . .").

348. *See* Struve, *supra* note 34.

349. *See* GERAGHTY & GOHARA, *supra* note 278, at 11–12 (discussing cases where the defense attorneys for indigent parties failed to utilize expert witnesses).

350. Roseboro v. State, 365 S.E.2d 115 (Ga. 1988).

a handgun in defendant's apartment, human hairs, and bloodied clothing.[351] The defendant made a "motion for funds to hire expert witnesses," which the trial court denied.[352] The supreme court affirmed, observing that defendant's counsel had raised in the motion only "the bare assertion that [defendant's] counsel needed an expert witness to assist in preparing properly a defense, and that such an expert was necessary to assure a fair trial."[353] Counsel's motion failed to explain "why certain evidence is critical, what type of scientific testimony is needed, what that expert proposes to do regarding the evidence, and the anticipated costs for services."[354] In other words, defense counsel did not provide reasons for why he needed an expert.

A similar problem arose in *Cade v. State*.[355] A Florida court of appeals reversed a trial court's denial of compensation for a defense expert on DNA evidence, observing that "DNA evidence was central to the state's case and the remaining evidence against defendant was not overwhelming."[356] The court noted, however, that "there was little substance to counsel's request" for expert assistance and chided defendant's counsel for failing to provide additional information.[357] The court explained, "Counsel should be able to articulate a basis for requiring an expert beyond telling the judge that the subject is 'complicated.' This would seem to be especially true of forensic sciences commonly involved in criminal cases . . . ."[358]

In other circumstances, where an attorney fails independently to obtain an expert witness for a client, the deficiencies in representation may be so great as to rise to the level of ineffective assistance of counsel. In *Taylor v. State*,[359] for example, the Court of Criminal Appeals of Tennessee held that a capital defendant's attorneys provided ineffective assistance of counsel where they failed to elicit sufficient expert testimony on the issue of defendant's competence to stand trial.[360] A psychiatrist, who was a contractor for the state, had treated the defendant for approximately four years with antipsychotic medication, had recommended that defendant "receive an extensive mental evaluation," and had taken notes on his observations of the defendant.[361] Yet the defendant's attorneys never interviewed the psychiatrist, nor did they request a

351. *Id.* at 115–16.
352. *Id.* at 116.
353. *Id.* at 116–17.
354. *Id.* at 117.
355. 658 So. 2d 550 (Fla. Dist. Ct. App. 1995).
356. *Id.* at 554–55.
357. *Id.* at 555.
358. *Id.*
359. No. 01C01-9709-CC-00384, 1999 WL 512149 (Tenn. Crim. App. July 21, 1999).
360. *Id.* at *22.
361. *Id.* at *21.

competency hearing.[362] On the State's appeal from a county court's grant of post-conviction relief,[363] the court of appeals concluded that the "record supports the conclusion that the petitioner received the ineffective assistance of counsel,"[364] finding that the defendant's attorneys failed to "fully seek exploration of the mental competency at trial despite the evidence which showed a background replete with mental problems" and failed to put forth evidence "concerning his background, medications, and social history."[365]

In 2007, the Ninth Circuit reversed a death sentence on habeas review, partially due to ineffective assistance of counsel where an attorney failed to obtain readily available expert witness testimony.[366] The county court's psychologist had interviewed petitioner and "drafted a report in which he concluded that [the petitioner] suffered from antisocial personality disorder," yet the petitioner's attorney failed to contact the psychologist or to seek out another psychologist to interview the petitioner.[367]

Ineffective assistance of counsel, arising from attorneys' failure to obtain adequate expert testimony, does not occur only in capital cases. In South Carolina in 2008, a mother, Regina McKnight, was charged with homicide by child abuse after she gave birth to a stillborn baby.[368] The inflamed umbilical cord contained a cocaine by-product.[369] At the first trial, which ended in a mistrial, one of the State's expert witnesses testified that, in his opinion, McKnight's cocaine use was the sole cause of the inflammation that caused the fetus to die.[370] McKnight's attorney, a county public defender, called two expert witnesses.[371] The first testified that the only cause of death was the inflammation of the umbilical cord, but he could not determine the cause of the inflammation.[372] He further stated that the only conclusion he could draw from the presence of cocaine by-products in the fetus was that McKnight used cocaine, and that syphilis, as opposed to cocaine use, could have caused the inflammation.[373] He rebutted some of the State's expert testimony on cocaine's effects on the fetus and testified that several recent studies show that cocaine injures a fetus to the same extent as nicotine use, poor nutrition, and other

362. *Id.* at *21–22.
363. *Id.* at *1.
364. *Id.* at *22.
365. *Id.* at *17.
366. Lambright v. Schriro, 490 F.3d 1103, 1106 (9th Cir. 2007).
367. *Id.* at 1107.
368. McKnight v. State, 378 S.C. 33, 39, 661 S.E.2d 354, 356–57 (2008).
369. *Id.* at 39, 378 S.E.2d at 356.
370. *Id.* at 39, 41, 378 S.E.2d at 357–58.
371. *Id.*
372. *Id.* at 41, 378 S.E.2d at 358.
373. *Id.*

prenatal deficiencies.[374] The second expert called by McKnight's attorney testified that the cause of death was "'undetermined,'" but concluded that there were no natural causes of death and that "she could not rule out cocaine as a cause of death."[375] The State zeroed in on this expert's testimony in its arguments to the jury, arguing that McKnight's own expert concluded that the only cause of death was cocaine.[376]

At the second trial, McKnight's attorney failed to call the expert witness who had rebutted some of the State's studies.[377] Instead, she called only the second expert witness again—the witness whose testimony the State had relied on during the closing argument as supporting its theory—and failed to ask her about a study that was favorable to McKnight, which the expert had mentioned in the first trial.[378] This expert witness once again testified that she could identify no natural causes of death.[379] The jury convicted McKnight after the State again cited this expert's testimony in its closing argument, declaring that the doctor "'really helped us out in figuring out the cause of death in this particular case' by eliminating all other relevant causes of death."[380] At the first trial, McKnight's other expert had testified that there might be other causes of death.[381] But defense counsel failed to bring in this expert for the second trial, and she admitted that, due to a high case load, she had not had the time to seek out another expert who could rebut the studies cited by the State's experts.[382] McKnight's counsel also failed to cross-examine the State's expert witnesses on cocaine's contribution to the fetus's death.[383] On appeal from the denial of her petition for post-conviction relief, McKnight argued that "counsel was ineffective in calling an expert witness whose testimony undermined the defense and in failing to call an expert witness whose testimony supported the defense."[384] The court agreed, finding that "it was unreasonable for counsel to produce a single expert witness at the second trial whose testimony had clearly benefitted the State's case in the first trial, and that her reasons for doing so do not qualify as a valid trial strategy."[385]

McKnight v. State vividly demonstrates how improving expert services requires not only efforts toward obtaining expert support for clients but also

374. *Id.* at 41 & n.2, 378 S.E.2d at 358 & n.2.
375. *Id.* at 42, 378 S.E.2d at 358.
376. *Id.*
377. *Id.* at 41–42, 378 S.E.2d at 358.
378. *Id.*
379. *Id.* at 43, 378 S.E.2d at 358.
380. *Id.* at 43, 378 S.E.2d at 359.
381. *Id.* at 41, 378 S.E.2d at 358.
382. *Id.* at 42–44, 378 S.E.2d at 358–59.
383. *Id.* at 43, 378 S.E.2d at 359.
384. *Id.*
385. *Id.* at 43–44, 378 S.E.2d at 359.

ensuring that the attorney is adequately trained in eliciting effective and accurate expert testimony. More importantly, it shows that there is no single answer to the expert assistance problem, as it is inherently intertwined with the current deficiencies in legal representation for indigent parties. Between McKnight's two trials, the public defender representing McKnight testified that "she tried a death penalty case in addition to working on about two hundred other cases assigned to the public defender's office."[386] When attorneys for indigent parties are overworked and underpaid, obtaining expert testimony and effectively eliciting that testimony becomes an additional and sometimes unmanageable burden on both the financial resources of a public defenders' office and on the attorney's time.[387] Any proposed system of expert aid must account for these broader systemic deficiencies in its design and implementation.

IV. EXPERT AID: CENTRALIZED MEMBERSHIP, EDUCATION, AND OPTIONS FOR SERVICES

Given the difficulties that indigent parties now face in obtaining expert assistance, this Essay argues for a new centralized system of expert aid that provides a comprehensive set of options to an indigent party seeking expert support. The major deficiencies currently lie in limited funding,[388] limitations in courts' constitutional and legislative mandates and their willingness to exercise discretionary appointment powers,[389] an unorganized system of expert providers that offers few pro bono services,[390] and inadequate training and resources for attorneys whose indigent clients require expert services.[391] This Essay argues for a system that starts from the bottom up, encouraging the providers

386. *Id.* at 44 n.4, 378 S.E.2d at 359 n.4.

387. *See generally id.* at 44, 46, 378 S.E.2d at 359–60 (holding that an overworked public defender provided ineffective assistance of counsel when she failed to obtain expert testimony favorable to her client); ARNOVITS & ZELLER, *supra* note 283, at 3 ("Low fees and high case loads discourage attorneys from spending the time necessary to investigate the guilt . . . of the accused."); Gary Goodpaster, *The Adversary System, Advocacy, and Effective Assistance of Counsel in Criminal Cases*, 14 N.Y.U. REV. L. & SOC. CHANGE 59, 65 (1986) (explaining that poorly funded attorneys and public defenders may lack financial resources to provide a competent defense); Harris, *supra* note 129, at 490 n.133 ("[S]ome states cast the burden of paying for expert services on their already underfunded public defenders by forcing them to divert the money from other needs in their budgets.").

388. *See supra* pp. 523–24 (discussing inadequacies of state and federal funding to indigent defense programs).

389. *See supra* Part III.A–B.

390. *See supra* Part III.D.

391. *See supra* Part III.E.

themselves, as well as the individual attorneys and groups of attorneys who use these services, to make the system more accessible.

Other authors have suggested alternative solutions to the deficiencies in expert services for indigents. Professor David A. Harris focuses on the standards that courts should apply in determining whether to appoint an expert,[392] arguing for a "truth seeking theory" wherein the court would ask whether "the issue to which the requested resource pertains [is] in dispute"[393] and whether "the information that could be brought to trial as a result of granting the defendant's request for expert services [would be] helpful to the factfinder's decision."[394] Professor David Medine argues for a constitutional right to expert assistance "in civil cases when expert testimony or consultation is critical to a successful outcome."[395] And Professor Paul C. Giannelli briefly suggests that there could be a "public defender organization responsible for contracting all defense experts" but is quick to note the funding problem associated with this option.[396] These proposals hint at the need for centralized expert support, but they have several practical limitations. Many courts are already overwhelmed with crowded calendars and their own technological challenges, as parties spar over the admissibility of evidence and the bounds of discovery in a world with rapidly increasing quantities and types of information.[397] And this Essay has highlighted some of the many challenges, such as substantially limited resources and high caseloads, currently facing public defenders.[398]

By focusing on involving experts, rather than just courts or attorneys, in reforming the system, the expert aid proposed in this Essay attempts to avoid some of the funding problems currently facing courts, legislatures, and organizations that provide legal aid to indigent parties. Part V.A encourages expert witnesses to form cross-disciplinary associations with the help of the national and state bars. Part V.B maintains that attorneys must improve their knowledge of and connection with expert services, suggesting modifications to the Model Rules of Professional Conduct and stronger educational programs to

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392. *See* Harris, *supra* note 129, at 473 (citing U.S. CONST. amend. VI).

393. *Id.* at 491.

394. *Id.* at 491–92.

395. Medine, *supra* note 316, at 303.

396. Giannelli, *supra* note 10, at 1416.

397. Mark A. Berman & Hal N. Beerman, Am. Law Inst. & Am. Bar Ass'n, *The Use of Special Masters in Electronic Discovery Disputes*, *in* THE ART AND SCIENCE OF SERVING AS A SPECIAL MASTER IN FEDERAL AND STATE COURTS (2007) (discussing cases where courts appointed a special master to deal with large quantities of electronic information and destroyed electronic data).

398. *See supra* note 387 and accompanying text.

help meet this goal. Part V.C provides an overview of funding possibilities in cases where pro bono expert services are unavailable.

A. *Formation of an Expert Association with Provisions for Volunteer Services*

The first step in improving the availability of expert witnesses to low income clients is creating a centralized resource of expert providers—a national and state-based "Expert Witness Association." The American Bar Association and individual state bars provide a good model, although an association of experts will not necessarily require such a high level of organization. Because of their expertise in organizing and professionalizing legal services, the national and state bars would ideally spearhead the formation of the Expert Witness Association, helping to develop its initial organizational rules, ethics code, and qualifications for membership. The bars would not need to be involved in the continued management of the association but would be crucial at the beginning stages.

The Expert Witness Association should, like the legal bar, have modest membership dues to fund the association's administration and activities, including pro bono services.[399] Ideally, the association would also require members to obtain basic expert witness certification. This certification would require that members meet minimum qualifications, including knowledge of how to provide accurate and unbiased scientific and technical discovery, familiarity with the components of the *Daubert* test,[400] and an understanding of ethical requirements for working with clients and testifying before the court. The association should also develop a "Code of Ethics for Expert Witnesses," including standards for competence as well as honesty, integrity, and scientific rigor. A key component of the code would be a provision similar to Rule 6.1 of the American Bar Association's Model Rules of Professional Conduct.[401] Like

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399. *See* American Bar Association, ABA Member Rate, https://www.abanet.org/ome/front/form/dues/abarate.html (last visited Jan. 28, 2009).

400. *See* Daubert v. Merrell Dow Pharm., Inc., 509 U.S. 579 (1993).

401. Rule 6.1 of the Model Rules of Professional Conduct provides as follows:

> Every lawyer has a professional responsibility to provide legal services to those unable to pay. A lawyer should aspire to render at least (50) hours of pro bono publico legal services per year. In fulfilling this responsibility, the lawyer should:
>
> (a) provide a substantial majority of the (50) hours of legal services without fee or expectation of fee to:
>
> (1) persons of limited means or
>
> (2) charitable, religious, civic, community, governmental and educational organizations in matters that are designed primarily to address the needs of persons of limited means; and
>
> (b) provide any additional services through:

Rule 6.1, the experts' ethics code's pro bono provision should set forth an expectation that each member provide a minimum number of hours of pro bono expert testimony each year.[402] Additionally, such a provision should encourage experts providing pro bono services to take on the most meritorious indigent cases.[403] Also similar to the Rules of Professional Conduct, the pro bono portion of the ethics code should encourage experts to give financial support to organizations that offer pro bono expert assistance.[404]

Forming an expert association at the national and state level will require a substantial amount of effort on the part of experts, unlike the other recommendations in this Essay that suggest minor modifications to existing programs.[405] Although this is a demanding task, there are currently groups of experts, as well as numerous expert referral services, that connect many of the individuals active in the expert community and could help form a larger expert association. Nationally, many professional associations maintain up-to-date directories of expert witnesses and expert witness locating services.[406] Organizations such as Expert Witness Network,[407] ExpertPages,[408] and other online directories[409] provide numerous profiles of experts, typically divided by area of expertise as well as state. As discussed in Part III.D, there are also

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> (1) delivery of legal services at no fee or substantially reduced fee to individuals, groups or organizations seeking to secure or protect civil rights, civil liberties or public rights, or charitable, religious, civic, community, governmental and educational organizations in matters in furtherance of their organizational purposes, where the payment of standard legal fees would significantly deplete the organization's economic resources or would be otherwise inappropriate;
> (2) delivery of legal services at a substantially reduced fee to persons of limited means; or
> (3) participation in activities for improving the law, the legal system or the legal profession. In addition, a lawyer should voluntarily contribute financial support to organizations that provide legal services to persons of limited means.

MODEL RULES OF PROF'L CONDUCT R. 6.1 (2008).

402. *See id.*

403. *See id.*

404. *See id.*

405. *See infra* Part IV.B.

406. The International Association of Professional Security Consultants, for example, provides a database of expert witnesses on a variety of topics, from campus security to bomb threats and from shoplifting to workplace violence. International Association of Professional Security Consultants, http://iapsc.org/referral/search.asp (last visited Jan. 28, 2009).

407. Expert Witness Network, http://www.witness.net/ (last visited Jan. 28, 2009).

408. Expert Pages, http://expertpages.com/index.htm (last visited Jan. 28, 2009).

409. AML Experts, Anti-Money Laundering and Bank Secrecy Act Consultants, http://amlexperts.com/expertwitness/ (last visited Jan. 28, 2009); ExpertLaw, Expert Witness Directory, http://www.expertlaw.com/experts/ (last visited Jan. 28, 2009); JurisPro, Expert Witness Directory, http://www.jurispro.com/ (last visited Jan. 28, 2009).

professional associations, like the American Medical Association and American Psychological Association, with members that provide expert services and are linked to large networks of experts.[410]

Much of the expert community is already connected, either through existing associations or directories. The challenge lies in bringing them together across disciplines—medical, psychological, forensic, or otherwise—and in developing a basic system of membership, certification, and ethics standards. If formed, this association would also benefit from the creation of a nationwide, nonprofit directory of its members, with options for accessibility by potential low income clients, including a hotline for clients without computer access.

A national or state-based association of experts would increase clients' access to expert advice in a wide range of areas and, with pro bono provisions, would not exclude the poor. The association could also improve the quality of expert testimony, not only by requiring basic certification, but also by providing ongoing educational programs. Finally, it could form alliances with the legal bar to improve attorney–expert connections by providing joint workshops on science and the law, locating and retaining expert services, and developing effective strategies for providing pro bono expert assistance.

B. Attorney Involvement: Obtaining and Effectively Using Expert Witnesses

Lawyers are as important as expert witnesses in giving indigent parties access to expert aid. Lawyers must recognize the types of cases and questions that require expert assistance and must learn how to effectively draw out scientific facts at trial to assist both their clients and the court. Lawyers cannot be omniscient, but a basic level of scientific and technical understanding is important, as is the need to research the type of expert support necessary for each individual case, if such support is needed. As the National Center for State Courts emphasizes, "Because deep-level expertise will be impossible across a range of subjects and disciplines, closer cooperation between the judicial and scientific communities will be [increasingly] needed."[411]

This section suggests two distinct remedies for improving attorneys' skills in locating and using expert witnesses, particularly for indigent clients. First, it suggests that the Model Rules of Professional Conduct should be revised to include stronger language directing attorneys to consider the need for expert witnesses. Second, it argues for expanded educational opportunities for

410. *See supra* text accompanying notes 324–35.

411. KNOWLEDGE & INFO. SERVS. OFFICE, NAT'L CTR. FOR STATE COURTS, FUTURE TRENDS IN STATE COURTS 2004 at 47 (2004), *available at* http://www.ncsconline.org/WC/Publications/KIS_CtFuTu_Trends04.pdf.

attorneys: informing them of the need for expert testimony in certain cases, providing basic scientific and technical knowledge helpful in the questioning of experts, and teaching methods for obtaining pro bono expert assistance for indigent clients.

1. Revising the Comments to the Model Rules of Professional Conduct

The first step in improving attorneys' use of expert testimony should be to emphasize that the use of expert assistance is an important component of attorney competence. The Model Rules already contain language stating that lawyers should consider the use of expert services.[412] Comment 4 to Rule 2.1 states,

> Matters that go beyond strictly legal questions may also be in the domain of another profession. Family matters can involve problems within the professional competence of psychiatry, clinical psychology or social work; business matters can involve problems within the competence of the accounting profession or of financial specialists. Where consultation with a professional in another field is itself something a competent lawyer would recommend, the lawyer should make such a recommendation. At the same time, a lawyer's advice at its best often consists of recommending a course of action in the face of conflicting recommendations of experts.[413]

This standard encourages attorneys to consult with an expert in certain situations. But language could be added to this and other comments to the Model Rules to strengthen this basic principle. The drafters could add a standard to the Rule 2.1 comments that more clearly requires attorneys to "consider the need for expert scientific and technical assistance in a case, and to advise his or her client of this need if one exists." They could also revise the comments following Model Rule 1.1, "Competence," to include a clause such as, "If a case requires scientific or technical skill beyond the lawyer's realm of knowledge, the lawyer shall retain a competent expert with knowledge and analytical skills necessary to the representation of the client."

Finally, to encourage lawyers to obtain expert assistance in pro bono cases, following the provisions of Model Rule 6.1 stating that a lawyer should "provide a substantial majority of the (50) hours of legal services without fee or expectation of fee to: (1) persons of limited means . . . and (b) provide any

412. MODEL RULES OF PROF'L CONDUCT R. 2.1 cmt. 4 (2008).
413. *Id.*

additional services through: (1) delivery of legal services at no fee or substantially reduced fee to individuals, groups or organizations seeking to secure or protect civil rights,"[414] the comments to the Rule could contain a clause stating, "In providing pro bono services, the lawyer should work with pro bono providers of expert services where such services are needed."

These revisions to the Model Rules are not essential; as revisions are not lightly made, there are other ways to encourage attorneys to effectively use expert services. But additional standards in the comments to the Model Rules might be the strongest reminder that expert services are increasingly an essential component of competent representation of clients.

2. *Bolstering Educational Programs for Attorneys*

Whether or not the drafters revise the Model Rules to include stronger language on expert assistance, national and state bar associations and other organizations that train attorneys in effective lawyering should place more focus on training attorneys in the identification and effective use of expert witnesses. Many of these programs already exist, and a basic expansion or revision of their curricula would be sufficient to provide the base of educational support envisioned in this Essay.

The American Bar Association has an Expert Witnesses Committee that works to "provide continuing education to litigators . . . including retaining experts, preparing expert reports, preparing expert testimony, and examining expert witnesses in depositions and at trial."[415] The committee also aims to "explore best practices" on expert witness testimony and to help attorneys network with expert witnesses.[416]

Another useful tool for judges, which could be expanded or emulated in a similar model for attorneys, is the Advanced Science and Technology Adjudication Resource Center (ASTAR).[417] The program is funded in part by Congress's Science, State, Justice, Commerce, and Related Agencies Appropriations Act, 2006,[418] which directs funds toward "[j]ustice [i]nformation [s]haring [t]echnology" within the Department of Justice.[419] Thirty-nine

414. MODEL RULES OF PROF'L CONDUCT R. 6.1 (2008).

415. American Bar Association, Expert Witnesses Committee, http://www.abanet.org/litigation/committees/expertwitnesses/home.html (last visited Jan. 28, 2009).

416. *See id.*

417. *See* ASTAR Homepage, http://einshac.org (last visited Jan. 28, 2009).

418. Act of Nov. 22, 2005, Pub. L. No. 109-108, 119 Stat. 2290.

419. *Id.*; ASTAR, Congressionally Mandated National Resource Judge Program, http://einshac.org/judgeProgram.htm (last visited Jan. 28, 2009) [hereinafter ASTAR, Congressionally Mandated Program].

jurisdictions currently participate in ASTAR,[420] which aims to "identify, recruit, train and deploy science and technology resource judges"[421]—judges who "preside in complex cases featuring novel scientific evidence and issues"[422] and "provide . . . information to . . . colleagues" and law schools regarding science and technology in the law.[423] Science advisors in "boot-camps" and the National Judges' Science School provide judges with 120 hours of training in "court-related science and technology evidence and issues."[424] While the program already encourages judges to share their knowledge of expert issues with other attorneys,[425] a version of the program, modified for attorneys, could provide excellent educational opportunities on the effective use of scientific data and of experts who analyze that data.

The Internet is also an important tool for education about expert services and evidence requiring expert analysis. The National Legal Aid and Defender Association (NLADA), for example, has developed an electronic "Forensics Library,"[426] which it describes as a "versatile information clearinghouse on topics such as DNA testing, fingerprinting, toxicology, handwriting analysis, hair and fiber analysis, and autopsies."[427] Practitioners with experience in dealing with forensic science can upload their briefs, reports, and other documents to the library.[428] With slight revision, the NLADA could modify or expand this system to allow attorneys to post their comments about the availability of expert witnesses in various regions and fields of expertise, the most effective methods of obtaining court funds for expert support, and techniques in selecting expert witnesses who qualify under *Daubert*.[429]

Bolstered with additional classes geared toward public defenders, legal aid providers, and other attorneys who represent indigent defendants, the existing educational programs on use of expert witnesses and understanding expert

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420. ASTAR, Science in Your Courtroom, http://einshac.org/scienceInCourtroom.htm (last visited Jan. 28, 2009).

421. ASTAR, ASTAR's Mission & Leadership, http://einshac.org/astarMission.htm (last visited Jan. 28, 2009).

422. ASTAR, Science in Your Courtroom, *supra* note 420.

423. *Id.*

424. ASTAR, Congressionally Mandated Program, *supra* note 419.

425. *See* ASTAR, Science in Your Courtroom, *supra* note 420.

426. NLADA: Defender Legal Services, Forensic Science Resources, http://www.nlada.org/Defender/forensics/for_lib (last visited Jan. 28, 2009).

427. *The Forensics Library: NLADA's New On-Line Scientific Evidence Resource for Defenders*, NAT'L LEGAL AID & DEFENDER ASS'N CORNERSTONE, Winter 2002/2003, at 14, 14, *available at* http://www.nlada.org (follow "Communication Resources" hyperlink; then follow "Publications" hyperlink; then follow "*Cornerstone*" hyperlink; then follow "*Cornerstone* Archive" hyperlink; then follow "Cornerstone, Winter 2002–2003 (Volume 24, No. 4)" hyperlink).

428. NLADA: Defender Legal Services, Forensic Science Resources, *supra* note 426.

429. *See* Daubert v. Merrell Dow Pharm., Inc., 509 U.S. 579 (1993).

techniques, such as DNA data and forensic techniques, should form a key component of the expert aid system. These classes should train attorneys in locating expert witnesses who provide low cost aid and should encourage attorneys to communicate about their most successful methods for finding and working with these experts. An online network, associated with the classes, could provide an ongoing forum for sharing this type of information.

The educational component of expert aid will perhaps be the least costly piece of the proposed solution, as several strong programs are already in place that provide the information essential for connecting attorneys and experts, as well as training attorneys in the basic knowledge needed to effectively use witnesses to benefit their clients' cases.

C. Funding Options

An organized association of expert witnesses with basic provisions for pro bono services and programs to train attorneys in using these services will provide indigent parties with expanded opportunities for representation. But voluntary pro bono expert service will not be sufficient, as the lack of adequate volunteer legal services amply demonstrates.[430] Although attorneys and firms provide a strong base of pro bono legal assistance, many indigent parties would lack representation without the help of legal aid or public defenders' offices and court-appointed attorneys. Additional funding may be necessary for courts and organizations that provide legal aid to indigent defendants in order to strengthen their ability to appoint or hire expert witnesses. Ideally, this funding could even establish a centralized public defender and legal aid office with the sole responsibility of contracting for indigent expert services, as suggested by Professor Giannelli.[431]

As this Essay has discussed, however, in many states where courts individually appoint criminal defense attorneys for indigent parties, the attorneys are underpaid and the fees do not cover expert costs.[432] The same applies to legal aid offices with budgets that are already stretched thin[433]—

430. *See, e.g.*, LEGAL SERVS. CORP., DOCUMENTING THE JUSTICE GAP IN AMERICA: THE CURRENT UNMET CIVIL LEGAL NEEDS OF LOW-INCOME AMERICANS 15 (2005), *available at* http://www.lsc.gov/press/documents/LSC%20Justice%20Gap_FINAL_1001.pdf ("While there is only one legal aid lawyer . . . per 6,861 low income people in the country, there is one lawyer providing personal civil legal services for every 525 people in the general population.").

431. *See* Giannelli, *supra* note 10, at 1416.

432. *See supra* text accompanying notes 284–88.

433. Alan W. Houseman, *The Future of Civil Legal Aid: A National Perspective*, 10 D.C. L. REV. 35, 43 (2007).

allocating scarce funds to expert witnesses is a low priority.[434] Obtaining more funds from state or federal legislatures is unlikely.[435] A first step, however, is recognizing the need for expert assistance in calculating fee structures for individually-appointed attorneys and setting budgets for legal aid programs.[436] When Congress allocates funds to legal aid or when states make provisions for public defenders' budgets, they should at minimum consider the need for expert services and the fact that compensation for expert witnesses often competes directly with payment of legal aid and public defense attorneys. The American Bar Association has recognized this conflict.[437] Guideline III-13(a) of *Guidelines for Negotiating and Awarding Governmental Contracts for Criminal Defense Services* provides, "The contract should avoid creating conflicts of interest between Contractor or individual defense attorney and clients. . . . expenses for investigations, expert witnesses, transcripts and other necessary services for the defense should not decrease the Contractor's income or compensation to attorneys or other personnel."[438]

When the decisionmakers who fund organizations for indigent parties recognize the competing demands for legal and expert resources, they may be more willing to create a separate funding mechanism for expert aid. The public to some extent believes that providing expert witnesses for indigent parties is important,[439] suggesting that it may not be impossible for legislatures to shift some funds toward expert services. In a national survey of 1,500 individuals in 2001, 43% indicated a belief that "resources to hire expert witnesses" "[s]hould be guaranteed," and 40% believed that resources for expert witnesses were "[i]mportant, but should not be guaranteed."[440]

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434. *See, e.g.*, James P. George, *Access to Justice, Costs, and Legal Aid*, 54 AM. J. COMP. L. 293, 313 (2006) (citing *Washington Update*, LEGAL SERVICES NOW, Apr. 2005, at 2, 2) (explaining that the federal government cut funds to legal aid programs by 5% from 2005 to 2006).

435. *See* George, *supra* note 434.

436. COMM. ON STANDARDS OF JUDICIAL ADMIN., AM. BAR ASS'N, STANDARDS RELATING TO COURT ORGANIZATION 108 (1990) ("The capacity of the court system to perform its functions is determined by the financial resources available to it. Sufficient funds are required to . . . purchase services, such as those of physicians and psychologists, expert witnesses and examiners . . . and other specialized services that are uneconomical for the court system to provide through its own personnel.").

437. *See* GIDEON'S BROKEN PROMISE, *supra* note 5, at 9 (discussing inadequate compensation for defense attorneys who serve indigent defendants).

438. NAT'L LEGAL AID & DEFENDER ASS'N, GUIDELINES FOR NEGOTIATING AND AWARDING GOVERNMENTAL CONTRACTS FOR CRIMINAL DEFENSE SERVICES Guideline III–13(a) (1984), *available at* http://www.nlada.org/Defender/Defender_Standards/Negotiating_And_Awarding_ID_Contracts.

439. *See* OPEN SOC'Y INST. & NAT'L LEGAL AID & DEFENDER ASS'N, DEVELOPING A NATIONAL MESSAGE FOR INDIGENT DEFENSE: ANALYSIS OF NATIONAL SURVEY 41–42 (2001).

440. *Id.* at 2, 42.

Relying on legislative funding for expert aid may be unrealistic, however, and there are alternate funding mechanisms that may be more practical. One such method is obtaining expert assistance through specialized state programs focused on victim needs.[441] Under Oregon's Child Abuse Multidisciplinary Intervention program,[442] many counties have used funds to provide expert witness testimony in abuse cases.[443] More attorney alliances with existing social services organizations, which often have individuals with expert knowledge, should be encouraged.

At the individual level, funding the costs of legal representation by contingency fees relieves up-front financial burdens for indigent parties. The same could be true for expert witnesses, but allowing the use of contingency fees for expert assistance could seriously interfere with experts' impartiality and their ethical responsibility to provide sound, unbiased information.[444] In the United States, "The common law rule in most jurisdictions is that it is improper to pay an occurrence witness any fee for testifying and that it is improper to pay an expert witness a contingent fee."[445] Other jurisdictions have exhibited a similar wariness of this funding method, further confirming its risky implications. In England, for example, the Judicial Committee of the Academy of Experts expressly discourages the use of contingency fees for expert witnesses, asserting that "any form of contingency fee arrangement for Expert Witnesses is incompatible with the Expert's duty of independence and impartiality."[446] If contingency fees could somehow be provided to experts without influencing their testimony, this would be a legitimate option, but the negative ethical implications of this approach may be too severe for it to be viable.

Recent court decisions allowing experts to testify without providing an expert report, as is typically required by Federal Rule of Civil Procedure

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441. *See, e.g.*, OR. REV. STAT. ANN. §§ 418.746, 418.783 (West 2007) (establishing the Child Abuse Multidisciplinary Intervention Program and a separate fund for use by county teams and entities to assist those teams in supporting the victims of child abuse, in responding to allegations of child abuse within each county, and in prosecuting child abuse cases).

442. *Id.* § 418.746; *see also* Oregon Department of Justice, Child Abuse Multidisciplinary Intervention (CAMI), http://www.doj.state.or.us/crimev/cami.shtml (last visited Jan. 28, 2009) ("The [CAMI] Account is the sole source of state funding for a multidisciplinary approach to the assessment, investigation, and prosecution of child abuse cases.").

443. In 2002, twelve counties indicated that they would use the funds for expert witnesses. OREGON DEP'T OF JUSTICE, VICTIMS OF CRIME ACT, VICTIM ASSISTANCE GRANT PROGRAM, 2002 OREGON STATE WIDE ASSISTANCE REPORT, *available at* http://www.ojp.usdoj.gov/ovc/fund/sbsmap/ovcpfor1.htm.

444. MODEL RULES OF PROF'L CONDUCT R. 3.4 cmt. 3 (2008).

445. *Id.*

446. ACAD. OF EXPERTS JUDICIAL COMM'N, GUIDANCE NOTE ON CONTINGENCY FEES (1998), *available at* http://www.academy-experts.org/contingency.htm.

26(a)(2)(B),[447] provide a better means of reducing costs for individual parties who retain expert witnesses. Although this carries with it the danger of decreasing the quality of testimony or limiting the other side's ability to rebut the testimony, it is worth considering in some circumstances. In *Fielden v. CSX Transportation, Inc.*,[448] a railroad worker diagnosed with carpal tunnel syndrome brought a civil action against his employer, arguing that by assigning him to operate a "plate jack machine," CSX caused him to experience "severe, permanent and lasting injury to both hands and arms."[449] Fielden listed two of his treating physicians as experts in response to an interrogatory requesting that he disclose all persons who would produce documents, as required by Rule 26.[450] One of the treating physicians provided a letter of support, but neither prepared an expert report.[451] The district court considered Fielden's physicians to be experts under Rule 26 and excluded their testimony because they had not provided reports.[452] The court granted summary judgment to the defendants, holding that there was no expert testimony on the causation issue and thus no genuine issue of material fact as to causation.[453] The Sixth Circuit reversed,[454] observing, "Rule 26(a)(2)(B) by its terms provides that a party needs to file an expert report from a treating physician only if that physician was 'retained or specially employed to provide expert testimony.'"[455] Because the doctors in Fielden's case had formed their opinions on causation when treating Fielden, the court held they were not "specially employed to provide expert testimony" and were not required to prepare a report.[456] The court observed that "[d]etermining causation may . . . be an integral part of 'treating' a patient."[457] This decision squares with the Federal Rules Advisory Committee's Notes, which provide, "A treating physician . . . can be deposed or called to testify at trial without any requirement for a written report."[458]

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447. Rule 26(a)(2)(B) provides, among other things,

> Unless otherwise stipulated or ordered by the court, this disclosure must be accompanied by a written report—prepared and signed by the witness—if the witness is one retained or specially employed to provide expert testimony in the case or one whose duties as the party's employee regularly involve giving expert testimony.

FED. R. CIV. P. 26(a)(2)(B).

448. 482 F.3d 866 (6th Cir. 2007).

449. *Id.* at 867–68.

450. *Id.* at 868.

451. *Id.* at 868–69.

452. *Id.* at 869.

453. *Id.*

454. *Id.*

455. *Id.* (quoting FED. R. CIV. P. 26(a)(2)(B)).

456. *Id.*

457. *Id.* at 870.

458. FED. R. CIV. P. 26 advisory committee's note to 1993 amendment.

In *Watson v. United States*,[459] the Tenth Circuit held that even an expert who claims he is not an expert when testifying, provided he has the necessary qualifications and meets the *Daubert* standards, may give expert testimony and need not prepare a report.[460] In *Watson*, the guardian of an incapacitated former federal prisoner sued the United States under the Federal Tort Claims Act[461] for negligent response after her son's skull was fractured in a prison fight and, following his surgery and his return to prison, he developed an intracerebral hematoma.[462] The government retained the clinical director of the United States Department of Justice's Bureau of Prisons' Federal Transfer Center as an expert witness, but in a pretrial deposition, he stated that he did not consider himself to be an expert witness, and he did not prepare an expert report.[463] The district court allowed him to testify, and Watson appealed, arguing that the district court's admission of the expert testimony was an abuse of discretion and that Rule 26 requires an expert to prepare an expert report before testifying.[464] The Tenth Circuit affirmed, finding that the expert was qualified[465] and holding that he was not required to prepare a report because he was not "'retained or specially employed to provide expert testimony.'"[466] The government is of course not an indigent party, but the holdings of *Fielden* and *Watson* are likely to benefit low income parties by allowing them to retain certain experts, such as treating physicians or experts with general knowledge in a central issue of the case, without requiring the experts to prepare expensive written reports.

In order for a centralized system of expert aid to be successful, funding will need to occur on multiple levels, from the federal and state legislative provisions for legal aid and public defenders' budgets to alliances between social services organizations and groups that provide legal assistance to indigent parties. Some immediate solutions for mitigating funding shortages require attorneys to rely on creative techniques for reducing expert witness costs, such as retaining a witness who is not required to produce a costly report. Although funding is a substantial challenge within the expert aid proposal, pro bono expert services combined with programs that train lawyers in obtaining expert aid for indigent clients would be a significant step toward improving the quality and availability of expert services for indigent parties.

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459. 485 F.3d 1100 (10th Cir. 2007).
460. *Id.* at 1105–07.
461. Federal Tort Claims Act, 28 U.S.C. § 1346(b) (2000).
462. *Watson*, 485 F.3d at 1102–1104.
463. *Id.* at 1105 & n.2.
464. *Id.* at 1105.
465. *Id.* at 1106–07.
466. *Id.* at 1107 (quoting FED. R. CIV. P. 26(a)(2)(B) advisory committee's note to 1993 amendment).

V. CONCLUSION

Without an expert witness, indigent parties are increasingly at a strong disadvantage within the legal system. With the growing reliance on DNA testing and other advanced technologies in criminal prosecutions, it is critical that defendants have expert witnesses competent to evaluate and, when appropriate, rebut the prosecution's evidence. The use of scientific evidence has also increased on the civil side, where plaintiffs frequently need expert witnesses to prove causation or establish the standard of care. With this rise in complex evidence, courts, in addition to criminal and civil parties, benefit from expert witnesses because experts assist in the truthseeking functions of the judicial process and improve the fairness and equality of judicial proceedings. Even so, the current avenues for expert witness services to indigent parties are inadequate.

The system of expert aid proposed in this Essay, connecting expert witnesses through a centralized association and encouraging more connections between attorneys and experts, will improve indigent parties' ability to pursue and defend claims. The formation of an Expert Witness Association with an ethical code and basic certification standards would benefit the legal system by improving the quality of expert testimony, and low income parties would have more access to expert help. Encouraging attorneys to focus on the need for an expert witness in cases that require complex scientific data would also increase client access to experts and enhance the accuracy of the decision making process. Finally, focusing on locating new methods of funding and ways to reduce the cost of expert services is an essential component of the expert aid system, as funds used to pay attorneys for their representation of indigent parties should not be compromised to pay for expert services. Although "*Gideon*'s promise"[467] remains unfulfilled, improved access to expert aid would be one more crucial step toward that goal.

467. *See GIDEON'S* BROKEN PROMISE, *supra* note 5.