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Testimony for Sale: The Law and Ethics of Snitches and Experts

George C. Harris

I. INTRODUCTION

As a general rule, payments to witnesses in return for testimony are considered unethical and illegal. There are, however, two major exceptions to that general rule: 1) compensation (either immunity from prosecution, reduced charges, sentence reduction, or cash) by the government to cooperating witnesses in criminal prosecutions; and 2) fees to expert witnesses in civil and criminal cases.

Although these forms of payment for testimony are exceptions to the general rule, they are far from rare. They are each, in fact, pervasive in their separate realms, and are everyday occurrences in courtrooms across the country. According to U.S. Sentencing Commission studies, one of every five federal defendants receives a sentencing reduction for “substantial assistance” to the government, which is just one form of compensation that prosecutors can offer to cooperating witnesses.¹ Many more seek such reductions. As observed by one Assistant United States Attorney, “[i]t is a rare federal case that does not require the use of criminal witnesses—those who have pleaded guilty to an offense and are testifying under a plea agreement, or those who are testifying under a grant of immunity.”² A study of civil jury trials in California found that experts testified in eighty-six percent of the studied cases, at an average of 3.8 experts per case.³

1. Ian Weinstein, *Regulating the Market for Snitches*, 47 *BUFF. L. REV.* 563, 564, 580 n.58 (1999); see discussion *infra* at Part III.A.2; see also Mary Wisniewski Holden, *Questions Remain After 10 Years of Sentencing Guidelines*, *CHI. LAW.*, Dec. 1997 (stating that U.S. Attorneys’ offices in various districts granted substantial assistance departures in anywhere from 6.9 to 47.5 percent of cases, with a national average of 19.2 percent).

2. Ann C. Rowland, *Effective Use of Informants and Accomplice Witnesses*, 50 *S.C. L. REV.* 679, 697 (1999).

3. Samuel R. Gross, *Expert Evidence*, 1991 *WIS. L. REV.* 1113, 1118–20 (reporting a study based on 529 civil jury trials between 1985 and 1986). The use of experts may be increasing. See Michael D. Green, *Expert Witnesses and Sufficiency of Evidence in Toxic Substances Litigation: The Legacy of Agent Orange and Bendectin Litigation*, 86 *NW. U. L. REV.* 643, 669 n.123 (1992) (reporting increase of 1,540 percent in regularly testifying experts in Cook County, Illinois between 1974 and 1989); Samuel R. Gross & Kent D. Syverud, *Don’t Try: Civil Jury Verdicts in a System Geared to Settlement*, 44 *UCLA L. REV.* 1, 31–32 (1996) (reporting that mean number of experts in civil jury trials in California rose from 3.3 per case in 1985–86 to 4.1 per case in 1990–91).

The impact of compensated witnesses on civil and criminal trials is often significant and sometimes pivotal. Occasionally, it can result in dramatic miscarriages of justice. In their recently published book, *Actual Innocence*, Dwyer, Neufeld, and Scheck tell the story of Ron Williamson, who was convicted of murder but eventually freed by conclusively exonerating DNA evidence.⁴ Williamson spent twelve years in prison before being freed.⁵ At one point, he was on death row only five days from execution.⁶ The testimony of a “jailhouse snitch,” who claimed to have heard Williamson confess to the murder, was crucial to Williamson’s conviction.⁷ In return for her testimony, she received lenient treatment on a bad check charge despite two previous felonies.⁸ Of the sixty-four cases of DNA exoneration analyzed by Dwyer, Neufeld, and Scheck, “snitch” testimony was a factor in twenty-one percent of the wrongful convictions.⁹

Expert testimony also plays a prominent role in the cases of wrongful conviction described in *Actual Innocence*. According to the authors, “defective or fraudulent science” was a factor in more than one-third of the wrongful convictions.¹⁰ The incentives for shaped or slanted expert testimony in civil cases, where experts often receive substantial fees for helpful testimony, are certainly no less than in criminal prosecutions. One doctor, Houston hematologist Robert Lewy, examined more than 4,700 women with breast implants, most referred by lawyers, and found illness in ninety-three percent of them.¹¹ He set up a foundation called Breast Implant Research, Inc. and saw his income rise in one year from \$300,000 to \$2 million, primarily as a result of his expert services to breast implant plaintiffs.¹² Both a national panel of court-appointed independent experts and the Institute of Medicine of the National Academy of Sciences

4. JIM DWYER, ET AL, *ACTUAL INNOCENCE* 126–57 (2000).

5. *Id.*

6. *Id.* at 146.

7. *Id.* at 141–43.

8. *Id.* at 127; see, e.g., Abdon M. Pallasch, “Ford Heights Four” Case Now Turns on Prosecutors, Police, CHICAGO DAILY L. BULL., Apr. 24, 1999, at 3 (alleging that key eyewitness changed testimony and placed defendants at scene of crime after prosecutors agreed to reduce sentence to probation, resulting in four innocent people spending eighteen years in prison).

9. DWYER, *supra* note 4, at 156, app. 2; see discussion *infra* notes 356–64.

10. *Id.* at app. 2 (presenting statistics in a chart: “Factors Leading to Wrongful Convictions in 62 U.S. Cases”); see also Daniel Klaidman & Peter Annin, *Under the Microscope: The Once Legendary FBI Crime Lab is Swamped by Charges of Sloppiness*, NEWSWEEK, Feb. 10, 1997, at 32 (describing a report by inspector general for Justice Department that FBI experts have “not only mishandled evidence but, in some instances, misled courts”).

11. Gina Kolata & Barry Meier, *Doctors, Lawyers and Silicone: A Special Report, Implant Lawsuits Create A Medical Rush to Cash In*, N.Y. TIMES, Sept. 18, 1995, at A1; MARCIA ANGELL, SCIENCE ON TRIAL: THE CLASH OF MEDICAL EVIDENCE AND THE LAW IN THE BREAST IMPLANT CASE 149 (1996).

12. Kolata & Meier, *supra* note 11; ANGELL, *supra* note 11, at 147–49. A recent graduate from medical school who worked for Dr. Lewy on a temporary basis reported that she was told to examine patients at a rate of three or four an hour and that though she was paid \$50 an hour, Dr. Lewy would charge as much as \$6,000 for these examinations. Kolata & Meier, *supra* note 11. Breast implant experts like Lewy are reportedly paid up to \$500 per hour for trial testimony. 2 MEALEY’S LITIGATION REPORTS: BREAST IMPLANTS, No. 9 (Mar. 3, 1994), *Texas Jury Awards Three Women \$33 Million*.

subsequently concluded that there was no credible evidence that breast implants cause disease;¹³ not, however, before numerous plaintiffs had received multiple millions as a result of jury verdicts and settlements.¹⁴

Despite the obvious incentives for perjury and tailored testimony, our justice system accepts payments to witnesses in these two contexts as justifiable and necessary. Compensation, in the form of leniency or cash to induce testimony by prosecution witnesses in criminal cases, is generally considered a necessary evil, without which it would be impossible to obtain first-hand accounts of criminal activity and convict the most culpable defendants. Payments to experts are also considered necessary in order to obtain crucial scientific and technical assistance in a wide-range of civil and criminal cases. Lay juries regularly rely on the guidance of expert, often professional, witnesses to evaluate forensic crime evidence, assess and quantify personal or economic injuries, identify product defects, establish the standard of care in professional malpractice cases, explain the impacts on markets of anti-competitive practices, and illuminate numerous other issues upon which jury verdicts may turn. Generally, such professionals will not, of course, put in the required work to form an opinion and prepare for testimony without compensation.

Beyond the perceived necessity of such compensation, courts and commentators generally justify payments to witnesses in these two contexts on the assumption that the rigors of cross-examination and the context provided by cautionary jury instructions are adequate corrections for any distorting biases. Cooperation or immunity agreements and expert fee agreements, as well as communications with the compensated witness, are discoverable fodder for questioning by opposing counsel to establish bias. In criminal trials, jurors are typically warned by the court of the unreliability of compensated cooperating witness testimony. The dangers of perjured testimony are further constrained in criminal cases by the ethical duty of prosecutors to seek justice, not convictions.

Tolerance in these two areas for witnesses selected and paid by adverse parties is not without occasional, and continuing, dissent. Dissenting voices have not, however, deterred the universal acceptance of the two exceptions. A federal court of appeals panel recently held that the testimony of a cooperating witness was inadmissible because the government's promises of lenient treatment to the

13. Terrence Monmaney, *Panel Finds No Breast Implant Disease Risk*, L.A. TIMES, Dec. 2, 1998, at A1; Laurens Walker & John Monahan, *Scientific Authority: The Breast Implant Litigation and Beyond*, 86 VA. L. REV. 801, 810-13 (2000); see discussion *infra* pp. 58-61.

14. See ANGELL, *supra* note 11, at 69-89. See also *Texas Jury Awards Three Women \$33 Million*, *supra* note 12.

witness violated the federal bribery statute.¹⁵ That decision was, however, quickly reversed by the Tenth Circuit *en banc*, and has not been followed elsewhere.

The bias and distortions of truth-finding created by party retention and compensation of expert witnesses have been a subject of perpetual criticism and reform proposals since the nineteenth century.¹⁶ Judge Learned Hand, in a 1901 Harvard Law Review article, called for a court-appointed tribunal of neutral experts to conclusively advise juries on issues of scientific and specialized knowledge.¹⁷ Modern commentators continue to urge greater court involvement in the selection and retention of experts.¹⁸ Although rules of evidence now allow explicitly for court-appointed experts, such appointments are rare, and the typical selection and control of experts by adverse parties remains essentially unchanged from that criticized by Hand.

Is reliance on paid witnesses in these two contexts necessary, as suggested by its continued acceptance, despite criticism? Does it contribute to justice, or diminish it? Are cross-examination and cautionary jury instructions adequate safeguards against the dangers of perjured or tailored testimony? Are there workable additional measures that would further diminish those dangers? Are there alternatives to unilateral recruitment and preparation of paid witnesses? This article addresses these questions. It looks at government-compensated cooperators and adversary-paid experts together because of the common risks and procedural challenges that they pose.

Part II describes existing constraints on payments to witnesses in the rules of legal ethics and criminal statutes. Part III explores the history of the two exceptions to those constraints, including current practice and case law, and discovers a similar evolution in both areas. What began as a process controlled by the discretion of the courts has become largely controlled by adverse parties. Adversary control of both types of paid witness has remained durable despite criticism for more than a century.

Part IV analyzes and critiques the justifications for current practice. It concludes that the dangers of paid testimony for distortion of truth are unacceptably great when the selection and compensation of paid witnesses and the development of their testimony are unilaterally controlled by an advocate, even a “neutral” prosecutor, and that existing safeguards are inadequate because the sources of distortion remain largely hidden from the trier of fact.

Part V explores reforms in each area that would, as conditions to the admissibility of compensated witness testimony: 1) limit unilateral adversary control over the process of selecting, preparing and compensating witnesses; and

15. *United States v. Singleton*, 144 F.3d 1343, 1358 (10th Cir. 1998) [hereinafter *Singleton*].

16. See discussion *infra* Part III.B.3.

17. Learned Hand, *Historical and Practical Considerations Regarding Expert Testimony*, 15 HARV. L. REV. 40 (1901).

18. See discussion *infra* Part III.B.3.

2) make that process more fully discoverable and, therefore, more accessible to assessment by triers of fact. It attempts to avoid unworkable administrative burdens on courts by suggesting procedures that would be driven primarily by the initiatives of the parties, but would provide for more neutrality and transparency.

II. ETHICAL RULES AND CRIMINAL SANCTIONS REGARDING COMPENSATION TO WITNESSES

Ethical rules governing lawyers prohibit payments to witnesses, with exceptions for expenses, financial loss, and fees to expert witnesses. The ethical rules make no specific exception for benefits given to cooperating witnesses by the government in criminal cases. Criminal bribery statutes also prohibit compensation to witnesses, although courts are split on whether they require an intent that the witness testify falsely.

A. Ethical Rules

In 1908, the ABA adopted thirty-two Canons of Professional Ethics.¹⁹ Canon 39, which was added later and amended to its present form in 1937, addresses generally the lawyer's proper relationship with a witness. It counsels the lawyer to "scrupulously avoid any suggestion calculated to induce the witness to suppress or deviate from the truth, or in any degree to affect his free and untrammelled conduct when appearing at the trial or on the witness stand."²⁰

The 1908 Canons, with their general aspirational approach, were replaced in 1969 by the ABA *Model Code of Professional Responsibility*, which organized Disciplinary Rules and Ethical Considerations under nine very general canons. Disciplinary Rule ("DR") 7-109(C) provides:

A lawyer shall not pay, offer to pay, or acquiesce in the payment of compensation to a witness contingent upon the content of his testimony or the outcome of the case. But a lawyer may advance, guarantee, or acquiesce in the payment of:

- (1) Expenses reasonably incurred by a witness in attending or testifying.
- (2) Reasonable compensation to a witness for his loss of time in attending or testifying.

19. See PROFESSIONAL RESPONSIBILITY STANDARDS, RULES & STATUTES 494 (John S. Dzienkowski, ed., 1999-2000) (1999).

20. *Id.* at 507.

- (3) A reasonable fee for the professional services of an expert witness.²¹

Ethical Consideration (“EC”) 7–28 elaborates that “[w]itnesses should always testify truthfully and should be free from any financial inducements that might tempt them to do otherwise.”²²

The ABA Model Rules of Professional Conduct,²³ promulgated as successor to the Model Code in 1983,²⁴ acquiesce to substantive law in this area. Rule 3.4(b) provides only that: “A lawyer shall not falsify evidence, counsel or assist a witness to testify falsely, or offer an inducement to a witness that is prohibited by law.”²⁵ The Official Comment to Rule 3.4 elaborates, however, on the meaning of “prohibited by law” in terms similar to the Model Code:

With regard to paragraph (b), it is not improper to pay a witness’s expenses or to compensate an expert witness on terms permitted by law. 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 contingency fee.²⁶

While both the Model Code and the Model Rules make exceptions for fees paid to expert witnesses, neither make any exception for compensation by the government to cooperating witnesses in criminal cases, nor do the ABA Standards for Criminal Justice.²⁷ Standard 3–3.2(a), like Model Rule 3.4 and Model Code

21. MODEL CODE OF PROF. RESPONSIBILITY DR 7–109(C) (1983) (as amended and in effect as of 1983) [hereinafter MODEL CODE]. Canon 7 provides that: “A Lawyer Should Represent a Client Zealously Within the Bounds of the Law.” *Id.*

22. *Id.* Canon 7. EC 7–28 provides in full:

Witnesses should always testify truthfully and should be free from any financial inducements that might tempt them to do otherwise. A lawyer should not pay or agree to pay a non-expert witness an amount in excess of reimbursement for expenses and financial loss incident to his being a witness; however, a lawyer may pay or agree to pay an expert witness a reasonable fee for his services as an expert. But in no event should a lawyer pay or agree to pay a contingent fee to any witness. A lawyer should exercise reasonable diligence to see that his client and lay associates conform to these standards.

Id.

23. ANNOTATED MODEL RULES OF PROF. CONDUCT (1999) [hereinafter MODEL RULES].

24. Nearly forty jurisdictions have adopted the Model Rules, though most have done so with significant amendments; ten jurisdictions continue to follow the Model Code. COCHRAN & COLLETT, CASES AND MATERIALS ON THE RULES OF THE LEGAL PROFESSION 7 (1996). The largest jurisdiction, California, follows neither, but borrows liberally from both. California Rule 5–310(B) follows closely MODEL CODE DR 7–109(C).

25. MODEL RULE 3.4(b).

26. MODEL RULE 3.4, Comment, at ¶ [3].

27. The same is true of the *American Law Institute Restatement of the Law Governing Lawyers* [hereinafter *ALI Restatement*], which was approved by the ALI in 1998. *ALI Completes Restatement on Lawyers, Gives Final Approval to All Sections*, 14 Lawyer’s Manual on Professional Conduct (ABA/BNA) No. 8, at 211 (May 13, 1998). Section 117 of the ALI Restatement, entitled “Compensating

DR 7-109(C), makes exceptions for payment of expenses, but otherwise provides flatly that it is unprofessional conduct to “compensate a witness, other than an expert, for giving testimony” Indeed, the Commentary to Rule 3-3.1 (“Investigative function of prosecutor”), while allowing for the use of informants “engage[d] as a part of a supervised effort to obtain evidence,” appears to prohibit compensation in the form of lenient treatment in exchange for cooperation, at least where the cooperation is on a matter unrelated to the cooperator’s criminal exposure.²⁸ It provides that “[a] prosecutor may not grant ‘dispensation’ for criminal conduct because the actor is cooperating with the prosecutor in other areas of law enforcement.”²⁹

The ethical prohibition on compensation to non-expert witnesses proscribes both payments for telling the truth and attempts to induce false testimony. As noted above, the Comment to Model Rule 3.4 describes “[t]he common law rule in most jurisdictions” (which the Rule incorporates by way of the phrase “prohibited by law”) as making it “improper to pay an occurrence witness any fee for testifying”³⁰ As one commentator describes such prohibitions: “It is well established . . . that witnesses may not be paid a fee for telling the truth, for that is their duty in any event.”³¹

While Model Rule 3.4 purports to derive its ethical standard from the common law, courts have, in turn, relied on the ethical rules in condemning payments to witnesses for truthful testimony. *Golden Door Jewelry v. Lloyds*,³² in which the plaintiff sought to recover insurance proceeds in connection with the theft of over nine million dollars in gold from a warehouse, is illustrative.³³ The defendant insurer, Lloyds, undertook an investigation in cooperation with law

Witnesses,” provides similarly to the Model Code and the Model Rules:

A lawyer may not offer or pay to a witness any consideration:

- (1) in excess of the reasonable expenses of the witness incurred . . . in providing evidence, except that an expert witness may be offered and paid a non-contingent fee;
- (2) contingent on the content of the witness’s testimony or the outcome of the litigation; or
- (3) otherwise prohibited by law.

Id.

28. ABA STANDARDS OF CRIMINAL JUSTICE, RULE 3-3.1, COMMENT.

29. *Id.*

30. MODEL RULE 3.4, Comment ¶ [3].

31. GEOFFREY C. HAZARD, JR. & W. WILLIAM HODES, 1 THE LAW OF LAWYERING: A HANDBOOK ON THE MODEL RULES OF PROFESSIONAL CONDUCT § 3.4:301, at 632 (Supp. 1998).

The rule also bars lawyers from offering inducements to a witness that are ‘prohibited by law,’ which undoubtedly goes beyond bribery. Statutory and common law prohibitions exist in one form or another in every jurisdiction. It is well-established, for example, that witnesses may not be paid a fee for telling the truth, for that is their duty in any event.

Id.

32. 865 F. Supp. 1516 (S.D. Fla. 1994).

33. *Id.* at 1518.

enforcement officers to help solve the robbery and paid over \$750,000 to informants, witnesses, and intermediaries.³⁴ Of that sum, \$120,000 was paid to two fact witnesses for depositions in a civil action.³⁵ When opposing parties filed a motion for sanctions based on the payments, Lloyds defended on the grounds that it sought only truthful testimony, that the payments were made with the knowledge and cooperation of law enforcement agencies, and that the testimony and cooperation obtained by its payments resulted in the apprehension and conviction of those responsible for the theft.³⁶ A Special Master found that the payments were necessary to obtain the cooperation of the witnesses and that their testimony was “material and truthful,” and recommended against sanctions.³⁷

The district court rejected the Special Master’s recommendations and excluded testimony by any fact witnesses who had received compensation.³⁸ The court relied, in part, on Rule 4–3.4(b) of the Florida Rules of Professional Conduct, which is nearly identical to Model Rule 3.4(b) from which it was adopted.³⁹ The court pointed to the comment to the rule to conclude that “the rule applies to any payments to fact witness[es], without distinguishing between false and truthful testimony.”⁴⁰ The court also relied on the opinion of the Florida Supreme Court in a disciplinary proceeding,⁴¹ as well as on decisions from other jurisdictions,⁴² in holding that a lawyer is prohibited from “paying or offering to pay money or other rewards to witnesses in return for their testimony, be it truthful

34. *Id.* at 1519-21.

35. *Id.* at 1518, 1521.

36. *Id.* at 1522.

37. *Id.* at 1519.

The Special Master found:[T]he witnesses would not have come forward and offered the information and testimony unless they were paid, that Lloyds could not have otherwise obtained the cooperation and testimony of the witnesses, that the information and testimony given by the fact witnesses was material and truthful, and that [the opposing party] submitted no authority prohibiting the payment to witnesses to give *truthful* testimony.

Id.

38. *Id.* at 1526-27.

39. *Id.* at 1524.

40. *Golden Door Jewelry*, 865 F. Supp. at 1524. *See supra* note 29 & accompanying text for a discussion of the comment to the rule.

41. In *Florida Bar v. Jackson*, 490 So. 2d 935 (Fla. 1986), the Florida Supreme Court imposed a three-month suspension on a lawyer who had contacted another lawyer and requested that his clients be paid \$50,000 for testimony in an insurance claim case pending in New York. The court relied on MODEL CODE DR 1–102(A)(5), which provides that “[a] lawyer shall not engage in conduct that is prejudicial to the administration of justice.” *But see* Fla. Bar v. Cillo, 606 So. 2d 1161 (Fla. 1992) (finding that lawyer who made payments to witness to induce witness to sign true statements did not violate rules of professional responsibility).

42. The court relied on a 1912 New York case, *In re Robinson*, 136 N.Y.S. 548, 556 (1912), *aff’d* 209 N.E. 160 (N.Y. 1913), quoting it to the effect that: “*The payment of a sum of money to a witness to “tell the truth” is as clearly subversive of the proper administration of justice as to pay him to testify to what is not true.*” *Golden Door Jewelry*, 865 F. Supp. at 1526.

or not, because it violates the integrity of the justice system and undermines the proper administration of justice.”⁴³

The principle that compensation to a fact witness for truthful testimony is improper has also been applied in disciplinary cases. In a pair of 1977 cases, *In re Howard*⁴⁴ and *In re Kien*,⁴⁵ the Illinois Supreme Court suspended the defendant lawyers for two years and eighteen months, respectively, for making payments to law enforcement witnesses.⁴⁶ In each case, the court rejected the defense’ argument that the fifty dollar payments were made only to secure truthful testimony.⁴⁷

The Supreme Court of Virginia relied on Model Code DR 7–109(C) to reach a similar result in *Committee on Legal Ethics v. Sheatsley*.⁴⁸ The lawyer defendant, faced with a fact witness who refused to testify without being compensated, agreed to pay the witness \$3,250 immediately and \$3,250 on successful completion of the case.⁴⁹ There was no evidence that the testimony was false or that the lawyer believed it to be false, but the court found a violation of the ethical rules and issued a public reprimand.⁵⁰

B. Bribery Statutes

Compensation to fact witnesses may also violate criminal bribery statutes. The federal bribery statute, codified at 18 U.S.C. § 201 and entitled “Bribery of public officials and witnesses,” has two separate provisions that criminalize compensation to witnesses. The first, set forth in § 201(b)(3) and carrying a maximum prison sentence of fifteen years, requires a finding that the defendant

43. *Golden Door Jewelry*, 865 F. Supp. at 1526 (“Quite simply, a witness has the solemn and fundamental duty to tell the truth. He or she should not be paid a fee for doing so.”).

44. 372 N.E.2d 371 (Ill. 1977).

45. 372 N.E.2d 376 (Ill. 1977).

46. *In re Howard*, 372 N.E.2d 371, 372, 376; *In re Kien*, 372 N.E.2d 372, 376.

47. *In re Howard*, 372 N.E.2d at 375 (“This argument has numerous flaws. It incorrectly assumes that there can be a proper motive for influencing testimony—to assure truthful testimony. We flatly reject such contention. The damage that would immediately accrue to our system of justice, should it be acceptable to pay for truthful testimony, is manifest.”); *In re Kein*, 372 N.E.2d at 378 (“We do not find persuasive respondent’s argument that payment for truthful testimony is less harmful to our judicial system than is payment for false testimony or fabrication of evidence.”)

48. 452 S.E.2d 75 (W. Va. 1994).

49. *Id.* at 77.

50. *Id.* at 80.

“corruptly” gave or offered something of value “with intent to influence the testimony” of a witness.⁵¹

The second provision, set forth at § 201(c)(2) and carrying a maximum sentence of two years, criminalizes compensation to a witness without any further requirement that it be corrupt or made with the intent to influence a witness’ testimony:

Whoever directly or indirectly, gives, offers or promises anything of value to any person, for or because of the testimony under oath or affirmation given or to be given by such person as a witness upon a trial, hearing, or other proceeding, before any court . . . shall be fined under this title or imprisoned for not more than two years, or both.⁵²

On its face, the provision, therefore, prohibits compensation to a witness without regard to whether the witness’ testimony is false or whether there is any intent to influence the witness’ testimony.

Nonetheless, the federal district court, in *Golden Door Jewelry v. Lloyds*,⁵³ concluded that § 201(c)(2) requires “the giving something of value ‘for false testimony.’”⁵⁴ On that basis, the court held that the payments to witnesses in that case, although ethical violations justifying the exclusion of the witnesses’ testimony,⁵⁵ did not violate the federal bribery statute.

The court in *Golden Door Jewelry* relied on what it characterized as dicta⁵⁶ in an Eleventh Circuit opinion, *United States v. Moody*.⁵⁷ In *Moody*, the defendant argued that § 201(c)(2) is unconstitutionally overbroad and vague because it “does not expressly require a showing of evil intent on the bribe-giver’s

51. 18 U.S.C. § 201(b)(3) (1993) provides in full:

Whoever directly or indirectly, corruptly gives, offers or promises anything of value to any person, or offers or promises such person to give anything of value to any other person or entity, with intent to influence the testimony under oath or affirmation of such first-mentioned person as a witness upon a trial, hearing, or other proceeding, before any court, any committee of either House or both Houses of Congress, or any agency, commission, or officer authorized by the laws of the United States to hear evidence or take testimony, or with intent to influence such person to absent himself therefrom; . . . shall be fined under this title or not more than three times the monetary equivalent of the thing of value, whichever is greater, or imprisoned for not more than fifteen years, or both, and may be disqualified from holding any office of honor, trust, or profit under the United States.

Id.

52. 18 U.S.C. § 201(c)(2) (1993). This subsection is sometimes referred to as the “anti-gratuity statute.” See, e.g., *United States v. Dunlap*, 17 F. Supp. 1183, 1187 (D.Colo. 1998). It was enacted in 1962 as part of Public Law 87-849, which was intended “to strengthen the criminal laws relating to bribery, graft, and conflicts of interest . . .” S. REP. NO. 87-2213, at 1 (1962), reprinted in 1962 U.S.C.C.A.N. 3852, 3852.

53. 865 F. Supp. 1516 (S.D. Fla. 1994)..

54. *Id.* at 1524.

55. See discussion *supra* Part II., II.A.

56. *Golden Door Jewelry v. Lloyds*, 865 F. Supp. 1516, 1523 (S.D. Fla. 1994).

57. 977 F.2d 1420 (11th Cir. 1992).

part or even that the testimony of the witness be false.”⁵⁸ The defendant in *Moody* had, however, made payments to witnesses to induce false testimony.⁵⁹ The court, therefore, rejected the defendant’s argument as applied to his case without squarely facing the issue of whether the statute intended to condemn payments made to witnesses without an intent to induce false testimony.⁶⁰

Whatever the merits of the Eleventh Circuit’s treatment of the defendant’s constitutional challenge to § 201(c)(2) in *Moody, Golden Door Jewelry*’s conclusion that the statute requires “the giving [of] something of value ‘for false testimony’”⁶¹ cannot be reconciled with the plain language of the statute. To read that meaning into the phrase “for or because of the testimony,” looked at in isolation, strains the language. Put in the context of the entire statute, it would collapse the distinction between §§ 201(c)(2) and 201(b)(3) and render 201(c)(2) a nullity.

The Tenth Circuit panel, in *United States v. Singleton* (“*Singleton I*”),⁶² rejected the *Golden Door Jewelry* court’s reading of § 201(c)(2) in holding that the government’s offer of lenient treatment to a cooperating witness violated § 201(c)(2).⁶³ As pointed out by the *Singleton I* opinion, not even § 201(b)(3) has been interpreted to require the actual giving of false testimony. Therefore, it would be “anomalous to require under a gratuity provision both that testimony actually be given, and that it be false, when the bribery provisions require neither.”⁶⁴ As discussed within, the panel decision in *Singleton I* was vacated and its holding reversed *en banc*, on other grounds.⁶⁵ The *en banc* opinion did not address whether § 201(c)(2) requires an intent to induce false testimony.⁶⁶

Like 18 U.S.C. § 201(b)(3), and unlike § 201(c)(2), most state bribery statutes, as they pertain to witness tampering, require the intent, if not the “corrupt” intent,

58. *Id.* at 1424.

59. *Id.* at 1422.

60. *Id.* at 1424-25. The court rejected the defendant’s vagueness argument on the basis that “[g]iving something of value ‘for or because of’ a person’s testimony obviously proscribes a bribe for false testimony.” *Id.* at 1425. The court rejected *Moody*’s overbreadth argument on the same basis—the “conduct was clearly within the statute’s ‘legitimate sweep’”—in addition to the further finding that the defendant had “fail[ed] to demonstrate that applications that might go beyond constitutional limits are either real or substantial.” *Id.* at 1424. The facts of *Golden Door Jewelry*, however, demonstrate just such a real and substantial application. See *Golden Door Jewelry*, 865 F. Supp. at 1519-22.

61. 865 F. Supp. at 1524 (quoting *Moody*, 977 F.2d at 1425).

62. 144 F.3d 1343 (10th Cir. 1998); see also *supra* note 15 & accompanying text.

63. *Singleton I*, *supra* note 15, at 1358; see also *Shuttlesworth v. Housing Opportunities Made Equal*, 873 F. Supp. 1069, 1078 (S.D. Ohio 1994) (finding sufficient allegation of § 201(c)(2) as RICO predicate offense in civil action because, “although Plaintiff’s existing allegations arguably could be insufficient to suggest that Defendants sought to elicit false testimony against Plaintiff, under 18 U.S.C. § 201(c)(2), Defendants apparently could commit an offense even if they offered rental assistance only to secure truthful testimony against Plaintiff”). See Part III.A.3.b. for a further discussion of the *Singleton I* panel decision.

64. *Singleton I*, *supra* note 15, at 1358 (citing *United States v. Hernandez*, 731 F.2d 1147, 1149 (5th Cir. 1984) and *United States v. Johnson*, 621 F.2d 1073, 1076 (10th Cir. 1980)).

65. *United States v. Singleton*, 165 F.3d 1297 (10th Cir. 1999) [hereinafter *Singleton II*].

66. See generally *id.*

to influence the witness' testimony.⁶⁷ The Model Penal Code section pertaining to bribery of a witness goes further, requiring an intent that the witness testify falsely.⁶⁸

The courts of at least one state (Alabama), however, have interpreted the state's criminal prohibition against giving benefits to a witness with an "intent to corruptly influence testimony" to include payments given to a witness to tell the truth.⁶⁹ In a disbarment proceeding, *Ex Parte Montgomery*,⁷⁰ the defendant attorney argued that he had not committed bribery because the payment that he had made to the sheriff was "to induce the sheriff to perform a legal duty which he should have done without compensation," and that it was "not corrupt to pay a sheriff to perform a legal duty which he refused to do without compensation."⁷¹ The Alabama Supreme Court rejected that argument, and reasoned that, because it was "corrupt" for the sheriff to receive the payment, it was also corrupt to make the payment.⁷² The Court of Criminal Appeals of Alabama relied on *Ex Parte Montgomery*, and stated in dicta in a subsequent opinion that "if the appellant in the instant case offered to pay [the witness] to 'tell the truth,' with the intent to completely influence [the witness'] testimony, then the appellant would be guilty of the offense of bribery."⁷³

III. HISTORY AND CURRENT STATUS OF THE EXCEPTIONS TO THE RULE AGAINST COMPENSATED WITNESSES

Both exceptions to the rule against compensated witnesses had their origin in procedures controlled by the court in its discretion. As a matter of current practice, however, the selection, preparation, and compensation of compensated witnesses is largely within the unilateral control of an adverse party.

67. See, e.g., ALA. CODE § 13A-10-121(a)(1) (1975) ("intent to corruptly influence"); CAL. PENAL CODE § 137(a) (West 1999) ("understanding or agreement that the testimony of such witness . . . shall be thereby influenced"); KY. REV. STAT. ANN. § 524.020(a) (Michie 1970) ("intent to influence the testimony"); MINN. STAT. ANN. § 609.42(1)(4) (West 1964) ("understanding that the person's testimony be influenced thereby"); NEV. REV. STAT. § 199.240(1) (1957) ("agreement or understanding that [witness'] testimony shall be thereby influenced"); N.Y. PENAL LAW § 215.00(a) (McKinney 1916) ("agreement or understanding that the testimony of such witness will thereby be influenced").

68. MODEL PENAL CODE § 241.6(1)(a) (commentaries revised 1980) ("Tampering. A person commits an offense if, believing that an official proceeding or investigation is pending or about to be instituted, he attempts to induce or otherwise cause a witness or informant to testify or inform falsely."). Cf. Official Comment to Tex. Penal Code Ann. § 36.05(a)(1) (Vernon 2000) (language of statute—"intent to influence the witness . . . to testify falsely"—"excepts from liability under this subsection efforts to induce a witness or informant to tell the truth").

69. The Alabama statute provides that: "A person commits the crime of bribing a witness if he offers, confers or agrees to confer any thing of value upon a witness or a person he believes will be called as a witness in any official proceeding with intent to corruptly influence the testimony of that person." ALA. CODE § 13A-10-121(a)(1) (1975).

70. 12 So. 2d 314 (Ala. 1943).

71. *Id.* at 317.

72. *Id.* at 317-18.

73. *Maddox v. State*, 520 So. 2d 143, 147 (Ala. Crim. App. 1986).

A. *The Cooperating Witness Exception*

Current tolerance for compensation to witnesses cooperating with the government in criminal cases has its roots in the ancient doctrine of approvement and the subsequent practice of allowing a witness to turn “king’s evidence” or “state’s evidence.” While those practices were within the control of the court, modern prosecutors have virtually unlimited discretion to offer immunity, a plea to reduced charges, lenient sentencing, or even cash to a witness whose proffered testimony will be helpful in convicting another suspect. Despite no exceptions for this compensation in the ethical rules, the trend of modern federal case law is to allow the testimony of such witnesses even when offered pursuant to overtly contingent cooperation agreements. This trend was briefly interrupted by a 1998 panel decision in the Tenth Circuit, which held that cooperating testimony in return for lenient treatment violates the federal bribery statute and must be excluded. That decision was overruled by the court *en banc*, however, and has been rejected by every other circuit that has considered the issue. Some state case law, on the other hand, suggests more rigorous limits on contingent compensation to cooperating witnesses.

1. History

The first form of compensation to a cooperating witness in the Anglo-American legal system was probably the ancient practice of approvement. In response to an indictment in a capital case, a defendant could make an “appeal,” which consisted of confessing, but offering to prosecute for the same offense an alleged accomplice or accomplices.⁷⁴ A request to become an approver could be made anytime before the jury retired to deliberate.⁷⁵ The would-be approver was obligated to discover “the whole truth,” and “not only the particular offence [sic] for which he [was] indicted; but all treasons and felonies which he [knew] of.”⁷⁶ Whether or not the defendant should be accepted as an approver, was within the discretion of the court.⁷⁷ If successful at prosecuting an accomplice, the approver was pardoned.⁷⁸ If unsuccessful, the approver having confessed to a capital crime,

74. See 2 Sir Matthew Hale, *The History of Pleas of the Crown* 280 (Sollom Emlyn ed. 1736); BLACKSTONE’S COMMENTARIES BOOK 4 (Lewis ed. 1897).

75. HALE, *supra* note 74, at 228.

76. Rex v. Rudd, 98 Eng. Rep. 1114, 1116 (1775).

77. HALE, *supra* note 74 at 226; Rudd, 98 Eng. Rep. at 1116.

78. See, e.g., Rudd, 98 Eng. Rep. at 1116. In the early stages of the practice of approvement, trial was by combat. See HALE, *supra* note 74, at 233.

was executed.⁷⁹ The practice of approvement was abandoned by at least the 17th century as too conducive to perjury.⁸⁰

Approvement was replaced, however, by the practice of turning “king’s evidence,” or later, “state’s evidence.” If the court accepted the defendant’s request to turn king’s evidence, the defendant had “equitable title,” but not a “legal right” to a pardon, whether or not her testimony led to the conviction of another.⁸¹ Like the practice of approvement, discretion over whether to accept a defendant or target as king’s or state’s evidence initially resided entirely with the court.⁸² Over time, however, as practiced in the United States, discretion passed

79. See, e.g., *Rudd*, 98 Eng. Rep. at 1117. Even a variation in the approver’s repetition of the details of her accusation against an accomplice could lead by itself to rejection of the appeal and execution of the approver. HALE, *supra* note 74, at 229.

[T]he law [of approvement] is so nice, that if [the approver] vary in a single circumstance, the whole falls to the ground, and he is condemned to be hanged; if he fail in the colour of a horse, or in circumstances of time, so rigorous is the law, that he is condemned to be hanged; much more, if he fail in essentials.

Rudd, 98 Eng. Rep. at 1117.

80. HALE, *supra* note 74, at 226 (describing the practice of approvement as “long disused” and asserting that “more mischief hath come to good men by these kind of approvements by false accusations of desperate villains, than benefit to the public by the discovery and convicting of real offenders, gaolers for their own profits often constraining prisoners to appeal honest men . . .”). Sir Matthew Hale, the author of the cited treatise, lived from 1609 to 1676, though the treatise was first published in 1736. *Id.* at v–xxiii. One commentator, citing only the same treatise, asserts that the practice of approvement “fell into disuse around 1500 because conditioning the accomplice’s pardon upon conviction of the defendant was thought to be so conducive to perjury as to outweigh its value as an incentive to ‘squealing’.” Note, *Accomplice Testimony Under Conditional Promise of Immunity*, 52 COLUM. L. REV. 138, 139 (1952). The source of the date 1500 is unclear. See also *Rudd*, 98 Eng. Rep. at 1116 (“[A]pprovement . . . still remains a part of the common law, though, by long discontinuance, the practice of admitting persons to be approvers is now grown into disuse.”).

81. See *Rudd*, 98 Eng. Rep. at 1116.

There is besides a practice, which indeed does not give a legal right; and that is, where accomplices having made a full and fair confession of the whole truth, are in consequence thereof admitted evidence for the Crown, and that evidence is afterwards made use of to convict the other offenders. If in that case they act fairly and openly, and discover the whole truth, though they are not entitled of right to a pardon, yet the usage, the lenity, and the practice of the Court is, to stop the prosecution against them, and they have an equitable title to a recommendation for the King’s mercy.

Id.

[A]ccomplices, though admitted according to the usual phrase to be ‘king’s evidence,’ have no absolute claim or legal right to a pardon. But they have an equitable claim to pardon, if upon the trial a full and fair disclosure of the joint guilt of one of them and his associates is made.

Ex Parte Wells, 59 U.S. (8 How.) 307, 312–13 (U.S. 1855).

According to the law of approvement, if the jury do not give credit to the approver, and his accomplices are acquitted, the approver himself is executed; but where the king’s witness makes a fair and full discovery to the satisfaction of the judge, he is to be recommended to mercy, notwithstanding the jury would not convict the accomplices upon his evidence.

Commonwealth v. Knapp, 27 Mass. (10 Pick.) 477, 494 (1830).

To meet the needs of criminal law administration the practice of turning king’s evidence then evolved. This differs from approvement in that the accomplice witness is granted a right to pardon conditioned not upon the defendant’s conviction but upon the accomplice’s testifying fully and fairly.

Note, *Accomplice Testimony Under Conditional Promise of Immunity*, *supra* note 80, at 139.

82. See *Rudd*, 98 Eng. Rep. at 1117; *Rex v. Brunton*, 168 Eng. Rep. 894 (1821) (applying to court to turn “king’s evidence”).

to prosecutors to make offers of immunity in return for testimony.⁸³ As early as 1830, the Supreme Judicial Court of Massachusetts described the process of turning state's evidence as one controlled by the attorney general, not the court.⁸⁴ The United States Supreme Court, in an 1878 opinion, the *Whiskey Cases*,⁸⁵ contrasted the English practice, which required the approval of the court, with that of some states in which prosecutors exercised discretion over the acceptance of accomplice testimony.⁸⁶

Other states, however, continued to take the position that it was improper for the prosecutor to exercise discretion to allow accomplice testimony on a promise of lenity. The year before the U.S. Supreme Court's decision in the *Whiskey Cases*, the Wisconsin Supreme Court, in *Wight v. Rindskopf*,⁸⁷ rejected that practice as a "fraud upon the court":

So it is seen that courts jealously reserve to themselves, and cautiously exercise, the discretion to admit accomplices as witnesses, upon implied promise of pardon; and that a public prosecutor has no authority to make any such agreement with a defendant in an indictment. It is for the court alone to countenance the escape of an accomplice from punishment, for giving evidence against those indicted with him A public prosecutor may propose to an accomplice to become a witness for the prosecution; but an agreement to use him as a witness, upon any

83. See Albert W. Alschuler, *Plea Bargaining and Its History*, 79 COLUM. L. REV. 1, 15 (1979) ("[U]ntil the mid-nineteenth century [courts] forbade prosecutors from bargaining for testimony. They said that the power to grant leniency in exchange for information was 'by its nature a judicial power.'") (quoting *People v. Whipple*, 9 Cow. 707, 712 (N.Y.O.&T. 1827)).

84. *Knapp*, 27 Mass., at 493. In contrast to the practice in England, "[h]ere the attorney-general, of his own authority and upon his official responsibility, gives the pledge of the government that the state's witness shall not be prosecuted, if he makes and testifies to a full disclosure in all matters in his knowledge against his accomplices." *Id.*

85. 99 U.S. 594 (1878).

86. The Court explained:

[S]ufficient authority exists for saying that in the practice of the English court it is usual that a motion to the court is made for the purpose [of admitting accomplice testimony], and that the court, in view of all the circumstances, will admit or disallow the evidence as well best promote the ends of public justice.

Good reasons exist to suppose that the same course is pursued in the courts of some of the States, where the English practice seems to have been adopted without much modification.

Such offenders everywhere are competent witnesses if they see fit voluntarily to appear and testify; but the course of proceeding in the courts of many of the States is quite different from that just described, the rule being that the court will not advise the Attorney-General how he shall conduct a criminal prosecution. Consequently it is regarded as the province of the public prosecutor and not the court to determine whether or not an accomplice, who is willing to criminate himself and his associates in guilt, shall be called and examined for the State.

Id. at 603.

87. 43 Wisc. 344 (1877).

condition, without the sanction of the court, is a usurpation of authority, an abuse of official character and a fraud upon the court.⁸⁸

Yet, as outlined below, *Wight's* view of cooperation agreements did not prevail, and such agreements, negotiated by prosecutors with defendants or potential defendants, have become commonplace in modern criminal prosecutions.⁸⁹

2. Current Practice

In a modern prosecution involving more than one defendant or target, one or more defendants or targets will often reach cooperation agreements with the government in which they agree to testify against a co-defendant or target in exchange for lenient treatment. The lenient treatment may be a grant of immunity or non-prosecution agreement resulting in no charges being brought, the dismissal of pending charges, the acceptance of a plea to reduced charges, or advocacy of favorable treatment at sentencing.⁹⁰ In some instances, a cooperating witness may receive cash rewards for testimony helpful to the prosecution.⁹¹ For a criminal defendant or target facing a lengthy prison sentence, or even death, lenient treatment will likely be the more valued form of compensation.⁹² While some forms of lenient treatment may require court approval, the discretion to offer (or not offer) lenient treatment to a defendant or target in exchange for testimony is largely within the discretion of the prosecutor.

88. *Id.* at 350. The plaintiff in *Wight*, an attorney, sought to recover fees for negotiating a cooperation agreement with government counsel by which the government agreed not to prosecute the defendant in return for his testimony. *Id.* at 346. The court refused to enforce that aspect of the fee agreement as against public policy. *See id.* at 357. In support of a motion for rehearing, the plaintiff relied on a federal statute specifically authorizing revenue officers to make such agreements. *Id.* at 362-63. The Wisconsin Supreme Court denied the motion and rejected that argument with indignity:

Such contracts may be held lawful in the federal jurisdiction, though we hope not. But in this jurisdiction they must be held to ignore all sense of natural morality, to violate essential and fundamental principles of jurisprudence, to be against public policy and offensive to judicial integrity; tending to corrupt public morals and to promote obstruction of public justice.

Id. at 364.

89. *See* *United States v. Cervantes-Pacheco*, 826 F.2d 310, 315 (5th Cir. 1987) (“No practice is more ingrained in our criminal justice system.”); *United States v. Dailey*, 759 F.2d 192, 198 (1st Cir. 1985) (“So firmly established is the policy of allowing unsentenced accomplices to testify that we find one court, in rejecting the exclusion of such accomplice’s testimony, declaring, ‘We are not disposed to fashion a rule heretofore unknown in the jurisprudence of criminal prosecutions.’”) (quoting *United States v. Vida*, 370 F.2d 759, 767 (6th Cir. 1966)). *See also supra* note 1 and accompanying text.

90. *See* Bryan S. Gowdy, *Leniency Bribes: Justifying the Federal Practice of Offering Leniency for Testimony*, 60 LA. L. REV. 447, 462-67 (2000) (describing various forms of leniency under Department of Justice guidelines, including immunity agreements, charge agreements, sentence agreements, and fact stipulation agreements).

91. *See, e.g.,* *United States v. Wilson*, 904 F.2d 656, 658 (11th Cir. 1990) (In addition to immunity, cooperating witnesses expected monetary rewards of as much as \$11 million as reward for assistance in criminal tax prosecution.).

92. *See Singleton I, supra* note 15, at 1347 (arguing that “[t]he judicial process is tainted and justice cheapened when factual testimony is purchased, whether with leniency or money”). *But see* *United States v. Condon*, 170 F.3d 687, 689 (7th Cir. 1999) (disputing that an offer of leniency is a “thing of value” for purposes of the federal bribery statute). *Cf.* Evan Haglund, Note, *Impeaching the Underworld Informant*, 63 S. Cal. L. Rev. 1405, 1409 (1990) (“[L]aw enforcement agencies view a reduced jail sentence as greater inducement than the small amounts of money they can typically afford to pay.”).

The prelude to negotiation of a cooperation agreement is typically the prosecutor's attempt to convince the potential cooperator that she faces certain conviction and sentencing that can be mitigated only by cooperation.⁹³ Negotiations often begin with a proffer from counsel for the potential cooperator. The government may interview the potential cooperator under a "queen for a day" agreement in which the government agrees that statements made cannot be used against the potential cooperator, at least not in the government's case-in-chief, should the prosecution continue.

The *sine qua non* of such agreements is proffered testimony that will support the conviction of an accomplice or another suspect. While prosecutors generally attempt to make deals with defendants or targets that they believe are less culpable in order to secure testimony against those that are more culpable, the controlling principle in any negotiation is that the prosecutor will only give something to get something. Unless the proffering target has something to offer that will provide significant assistance in the prosecution of another target defendant, there will be no deal.⁹⁴

A cooperation agreement may be informal, but it usually is memorialized in a written agreement. Although some go further,⁹⁵ the government's performance under a cooperation agreement will typically be contingent only on "full cooperation," including "truthful" testimony. The government will almost always withhold performance until the cooperator testifies or the relevant prosecution or prosecutions are completed without trial. Whether the cooperator has given "truthful" testimony will be determined by the prosecutor. "Truthful" will be defined as consistent with the cooperator's proffer, and helpful in the conviction of another target. A cooperator whose testimony fails to meet that standard will be subject to prosecution for the subject crime and/or for perjury.

For a federal cooperator who is offered a plea to reduced charges, rather than immunity or a dismissal of pending charges, an important component of the consideration from the government will often be the prosecutor's agreement to

93. Rowland, *supra* note 2, at 680.

94. Department of Justice guidelines, for example, allow a government attorney, with supervisory approval, to "enter into a non-prosecution agreement in exchange for a person's cooperation when in [the prosecutor's] judgment, the person's timely cooperation appears to be necessary to the public interest and other means of obtaining the desired cooperation are unavailable or would not be effective." DEPARTMENT OF JUSTICE, UNITED STATE ATTORNEYS' MANUAL, at 9-27.600 (2000). They list the following "relevant considerations":

- (1) The importance of the investigation or prosecution to an effective program of law enforcement;
- (2) The value of the person's cooperation to the investigation or prosecution; and
- (3) The person's relative culpability in connection with the offense or offenses being investigated or prosecuted and his/her history with respect to criminal activity.

Id. at 9-27.620(A). Similarly, the first consideration that the federal prosecutor must weigh in determining the appropriateness of a plea agreement is "[t]he defendant's willingness to cooperate in the investigation or prosecution of others." *Id.* at 9-27.420.

95. See discussion of case law *infra*, at Part III.A.3.

request a reduction under the federal guidelines for “substantial assistance.”⁹⁶ The reduction for substantial assistance, which is available only on the motion of the prosecutor,⁹⁷ is a significant component of federal sentencing. It is the only provision in the guidelines that permits the court to impose a sentence outside the otherwise mandated range. According to statistics kept by the U.S. Sentencing Commission, in 1996 one of every five defendants won mitigation through providing “substantial assistance.”⁹⁸ It can be assumed, of course, that many more sought to ally themselves with the prosecution to obtain this mitigation. In sixty-four randomly selected narcotics conspiracies prosecuted in 1992, sixty-five percent of defendants offered assistance.⁹⁹ The “substantial assistance” reduction can have a significant impact on the sentence meted out to the cooperator. In the selected narcotics prosecutions, the average sentence reduction was five years.¹⁰⁰ Federal prosecutors may also enter into “fact stipulation agreements” that seek to reduce the cooperator’s sentence computation under the federal guidelines.¹⁰¹

3. Case Law: The General Trend in Federal Cases

Despite any explicit exception for such compensation in the ethical rules,¹⁰² and despite a recent court of appeals panel decision to the contrary,¹⁰³ it is well-established that prosecutors in federal criminal cases can offer lenient treatment and cash rewards to accomplices, informers, or other cooperating witnesses who testify for the government.¹⁰⁴ The trend in modern federal case law is to accept

96. Some commentators have argued that the federal sentencing guidelines, in general, and the substantial assistance departure, in particular, have accelerated the general trend to shift discretion over criminal sentencing from courts to prosecutors. *See generally* Cynthia K.Y. Lee, *From Gatekeeper to Concierge: Reigning in the Federal Prosecutor's Expanding Power Over Substantial Assistance Departures*, 50 RUTGERS L. REV. 199 (1997).

97. *See* 18 U.S.C. § 3553(e) (2000) (empowering district courts “[u]pon motion of the Government,” to impose sentence below statutory minimum for “substantial assistance in the investigation or prosecution of another person who committed an offense”); United States Sentencing Commission Guidelines § 5K1.1 (allowing district court to sentence below minimum if “substantial assistance” motion is filed); *Melendez v. United States*, 518 U.S. 120, 125-26 (1996) (“§3553(e) requires a Government motion requesting or authorizing the district court to ‘impose a sentence below a level established by statute as minimum sentence’ before the court may impose such a sentence.”); *Wade v. United States*, 504 U.S. 181 (1992) (holding that failing to file a substantial assistance motion is subject to limited review for constitutional violations).

98. Weinstein, *supra* note 1, at 564. *See also* Gowdy, *supra* note 90, at 461 (“Statistical evidence also supports the proposition that the § 5K1 departure is the most valuable bribe a prosecutor can offer an accomplice.”).

99. Weinstein, *supra* note 1, at 580 n.58.

100. *See id.* at 581.

101. Gowdy, *supra* note 90, at 466.

102. *See supra* Part II.A.

103. *See* discussion of *United States v. Singleton*, 144 F.3d 1343 (10th Cir. 1998) (*Singleton I*), *infra* at Part III.A.3.b.

104. *See, e.g.*, *United States v. Hoffa*, 385 U.S. 293 (1966) (upholding testimony of paid informant against Fourth, Fifth and Sixth Amendment challenges); *United States v. Dailey*, 759 F.2d 192, 198–200 (1st Cir. 1985); *cf. United States v. Bagley*, 473 U.S. 667 (1985) (remanding for determination of whether failure to disclose agreement to pay informers lump sums for information and testimony against designated target was prejudicial error without suggestion that agreement itself was objectionable).

even overtly contingent agreements for testimony.¹⁰⁵ The typical rationale is that the danger from resulting incentives for perjury or shaped testimony is adequately mitigated by disclosure, cross-examination, and cautionary jury instructions.¹⁰⁶

The development of case law in the Fifth and Eleventh Circuits illustrates the trend in federal law. In *Williamson v. United States*,¹⁰⁷ decided in 1962, the Fifth Circuit held that, at least without some compelling explanation or justification, an informer paid a contingent fee is not a competent witness.¹⁰⁸ Government agents in *Williamson* agreed to pay an informer, recently released from prison, ten dollars per day in expenses plus two-hundred dollars if he could “catch” a designated target, and an additional one-hundred dollars if he could “catch” another designated target.¹⁰⁹ The court held that the informer’s testimony was erroneously admitted and reversed the convictions.¹¹⁰

Twenty-four years later, the Fifth Circuit faced comparable facts in *United States v. Cervantes-Pacheco*.¹¹¹ In that case, an informer who worked for the government in more than thirty-five cases, provided information about a drug-smuggling conspiracy and a twenty-thousand-dollar cash advance that he was paid to pilot a plane as part of the conspiracy.¹¹² A DEA special agent instructed the informer to gather information on a designated principle in the alleged conspiracy with the understanding that the informer would be required to testify if the information led to an indictment.¹¹³ The informer’s “compensation from the government included a per diem, expenses, and a payment at the conclusion of the case based on the government’s evaluation of his overall performance.”¹¹⁴ The agent testified at the trial of the designated suspect that he had recommended payment of twenty thousand dollars to the informer—the same amount the informer received from the drug smuggling enterprise, but turned over to the agent.¹¹⁵ The district court allowed the informer’s testimony, but a Fifth Circuit panel reversed, holding that the contingent fee paid to the informer disqualified him as a witness.¹¹⁶

105. See Graham Hughes, *Agreements for Cooperation in Criminal Cases*, 45 VAND. L. REV. 1, 25 (1992) (“[S]uggestion of some older cases that an agreement with a witness should only demand full and truthful testimony and should in no way be contingent on the success of the prosecution seems to have crumbled.”).

106. See *id.* at 29-33.

107. 311 F.2d 441 (5th Cir. 1962), *overruled by* *United States v. Cervantes-Pacheco*, 826 F.2d 310 (5th Cir. 1987).

108. *Id.* at 444.

109. See *id.* at 442.

110. *Id.* at 445.

111. 800 F.2d 452 (5th Cir. 1986), *rev'd en banc* 826 F.2d 310 (5th Cir. 1987).

112. *Cervantes-Pacheco*, 826 F.2d at 311.

113. *Id.*

114. *Id.*

115. *Id.* at 312.

116. *United States v. Cervantes-Pacheco*, 800 F.2d 452, 460-61 (5th Cir. 1986) (reasoning that the search for truth should not include purchased truth).

Hearing the case *en banc*, the Fifth Circuit reversed the panel, affirmed the conviction, and explicitly overruled *Williamson*.¹¹⁷ The court noted that, in the intervening years, four circuits had rejected *Williamson*, “either expressly or in principle.”¹¹⁸ It also relied on the 1966 decision of the Supreme Court in *Hoffa v. United States*,¹¹⁹ which upheld against Fourth, Fifth, and Sixth amendment challenges a bribery conviction that was based in part on testimony of a paid informant.¹²⁰ However, there was no suggestion in *Hoffa* that the payments to the informer were made pursuant to a contingency agreement.¹²¹

In approving contingent payments to testifying informers, the Fifth Circuit reasoned that such payments were no more problematic than cooperation agreements or plea bargains that provide reduced sentences in return for testimony, a practice that the court took to be established beyond question:

No practice is more ingrained in our criminal justice system than the practice of the government calling a witness who is an accessory to the crime for which the defendant is charged and having that witness testify under a plea bargain that promises him a reduced sentence. It is difficult to imagine a greater motivation to lie than the inducement of a reduced sentence, but courts uniformly hold that such a witness may testify so long as the government’s bargain with him is fully ventilated so that the jury can evaluate his credibility. . . . It makes no sense to exclude the testimony of witnesses such as [the informer in this case] yet allow the testimony of informants . . . who are testifying with the expectation of receiving reduced sentences.¹²²

In rejecting its prior holding in *Williamson*, the Fifth Circuit in *Cervantes-Pacheco* articulated four procedural safeguards, the presence of which it deemed sufficient to protect against abuses resulting from the compensation of witnesses: 1) no indication that the government had deliberately used or encouraged the use of perjured testimony; 2) the complete and timely disclosure of the agreement; 3) adequate opportunity for cross-examination regarding the agreement; and 4) an adequate cautionary instruction regarding the credibility of accomplices.¹²³

117. 826 F.2d at 312.

118. *Id.* at 313. *But see* *United States v. Baresh*, 595 F. Supp. 1132 (S.D. Tex. 1984) (following *Williamson* and finding due process violation where plea bargain agreement was contingent on production of information and testimony resulting in indictment of specified targets).

119. 385 U.S. 293 (1966).

120. *See Cervantes-Pacheco*, 826 F.2d at 313-315 (citing *Hoffa v. United States*, 385 U.S. 293 (1966)).

121. In *Hoffa*, the government took the position that it had not “placed” the informer and that compensation paid to the informer and his wife was not the result of his services as an informer. *See Hoffa*, 385 U.S. at 295-98. That characterization of the facts was accepted by the trial court and the court of appeals. *Id.* at 298-99. Nonetheless, the Supreme Court decided the case on the premise that the witness had been a government informer throughout and that the government had compensated him for his services as an informer. *Id.* at 299.

122. *Cervantes-Pacheco*, 826 F.2d at 315.

123. *Id.* at 315-16.

One member of the Fifth Circuit, Judge Alvin Rubin, wrote separately in *Cervantes-Pacheco* to express his concern over the “perversion of the trial process” that he saw resulting from the court’s holding.¹²⁴ Judge Rubin pointed out that contingent payments to a witness violate the ABA’s Model Rules of Professional Conduct and Model Code of Professional Responsibility, and that, under the court’s holding, “[t]he prosecuting attorney is therefore permitted to adduce evidence in a criminal case despite the fact that it is gained by a breach of ethical standards.”¹²⁵ Judge Rubin nonetheless concurred in the *en banc* court’s decision based on the Supreme Court’s decision in *Hoffa* and the fact that “the decisions of every other circuit appear to sanction the use of such testimony . . .”¹²⁶

Three years after *Cervantes-Pacheco*, in a short opinion by Judge Rubin of the Eleventh Circuit, *United States v. Wilson*¹²⁷ affirmed a conviction in which the government’s “key witnesses at trial” received both immunity and contingent monetary rewards in exchange for their testimony.¹²⁸ The decision in *Wilson* is notable primarily for the size of the potential monetary awards offered to the cooperating witnesses.

The government charged the defendants in *Wilson* with tax fraud based on an alleged scheme to fabricate securities trades for the purpose of simulating trading losses.¹²⁹ The government relied at trial on the testimony of the broker who had created a false paper trail for the bogus trades, and on that of his then-wife.¹³⁰ The defendants contended that they were unaware that the transactions were bogus.¹³¹ The witnesses testified pursuant to immunity agreements that allowed them “not only to avoid prosecution but to avoid paying taxes on their earnings from their dealings” with the defendants.¹³² They also expected monetary awards from the government of approximately eleven million dollars based on IRS recovery of unpaid taxes as a result of the prosecution of their accomplices.¹³³ A letter from the chief of the IRS criminal investigation division noted that testimony at trial would be one of the factors taken into account in determining the amount of the reward, which would not be paid until the completion of the case.¹³⁴ Relying on

124. *Id.* at 316 (Rubin, J., concurring).

125. *Id.* (Rubin, J., concurring).

126. *Id.* (Rubin, J., concurring). In justifying his concurrence, Judge Rubin assumed that, as a matter of fairness, the court’s decision would mean that a defendant could “also employ experts and other witnesses to testify for a fee contingent on his acquittal.” *Id.* (Rubin, J., concurring). As discussed above in Part II.A. and Part IV.B.1., all courts considering this issue conclude that any payment by defense counsel to a witness, let alone one contingent on the outcome of the case, is improper and a violation of the ethical rules.

127. 904 F.2d 656 (11th Cir. 1990)

128. *Id.* at 658.

129. *Id.*

130. *Id.* at 657.

131. *Id.*

132. *Id.* at 660.

133. *Id.* at 658.

134. *Id.*

the presence of the four procedural safeguards articulated in *Cervantes-Pacheco*, the Eleventh Circuit held that no violation of due process resulted from the cooperation agreements in *Wilson*.¹³⁵

Decisional law in the other federal circuits is consistent with that in the Fifth and Eleventh Circuits. The First Circuit's decision in *United States v. Dailey*¹³⁶ is illustrative. In *Dailey*, two accomplice cooperators entered into agreements providing that, in return for full cooperation, including "complete and honest testimony at any and all proceedings,"¹³⁷ "the Government [would] recommend a specific term of imprisonment which does not exceed twenty (20) years and, depending principally upon the value to the Government of the defendant's cooperation, the Government, in its sole discretion, may recommend a sentence of ten (10) years"¹³⁸ A third accomplice, who faced sentences totaling five and one-half years of imprisonment on convictions in other cases, as well as the possibility of further prosecution, agreed to cooperate in exchange for a four-month stay of sentencing, the possibility of a further stay, and government support for reduction of sentencing "contingent upon the value or 'benefit' of his information to the government."¹³⁹

The district court held that the cooperation agreements with the witnesses were "so likely to induce perjurious testimony that to allow them to testify would be to violate defendant's due process rights."¹⁴⁰ Viewing the witness' sentencing as contingent on "'the success of the underlying prosecution' . . . the district court found that the plea agreements on their face impose a subjective pressure on the accomplices to testify as the government wants rather than truthfully and that the creation of such an inducement to lie necessitates excluding all their testimony."¹⁴¹

The First Circuit vacated the judgment.¹⁴² While acknowledging the contingent nature of the cooperation agreements, and expressing "concern and uneasiness . . . over the coercive potential" of the agreements, the First Circuit found that the "traditional safeguards"—disclosing the agreements to the jury, allowing cross-examination of the accomplices about the agreements and a cautionary instruction regarding the risks of the agreements—were sufficient to protect the due process rights of the defendant.¹⁴³ The court cautioned that "contingency agreements should be reserved for exceptional cases, such as this one, where the value and extent of the accomplice's knowledge is uncertain but very likely to be great."¹⁴⁴

135. *Id.* at 659–60.

136. 759 F.2d 192 (1st Cir. 1985).

137. *Id.* at 195.

138. *Id.* at 194.

139. *Id.* at 195–96.

140. *Id.* at 193.

141. *Id.* at 195.

142. *Id.* at 201.

143. *Id.* at 196, 200.

144. *Id.* at 201. The court further offered in dicta that "at present we can think of no instance in which the government would be justified in making a promised benefit contingent upon the return of an indictment or a guilty verdict." *Id.*

The district court decision in *Dailey* relied on the decision of an Eighth Circuit panel in *United States v. Waterman*.¹⁴⁵ The star prosecution witness in *Waterman*, who was “the ringleader of the fraudulent scheme” at issue, received a twelve-year sentence pursuant to a plea agreement in which he agreed to testify against others involved in the scheme.¹⁴⁶ After the witness testified in one successful prosecution of alleged accomplices, the government agreed to affirmatively recommend a two-year reduction of his sentence if his truthful testimony led to further indictments.¹⁴⁷ As a result of the witness’ grand jury and trial testimony against the defendant, Waterman, the government made the bargained-for recommendation.¹⁴⁸

Waterman challenged his conviction in a post-trial motion on the basis that the testimony of the cooperating witness violated his due process rights under the Fifth Amendment and his fair trial rights under the Sixth Amendment.¹⁴⁹ The district court, relying on disclosure of the agreement and the opportunity for cross-examination, denied the motion.¹⁵⁰ The Eighth Circuit panel that initially heard the appeal reversed, holding “that the government cannot consistent with due process offer favorable treatment to a prosecution witness contingent upon the success of the prosecution,” and finding that “[s]uch an agreement is nothing more than an invitation to perjury having no place in our constitutional system of justice.”¹⁵¹ On consideration by the court *en banc*, however, an equally divided court affirmed without opinion the judgment of the district court.¹⁵²

Two years later, in *United States v. Spector*,¹⁵³ another Eighth Circuit panel, eschewing reliance on *Waterman*, rejected the defendant’s due process claims based on comparable, although distinguishable, facts.¹⁵⁴ In *Spector*, the government gave the cooperating witness and his girlfriend use immunity and agreed not to prosecute other family members for past crimes, contingent on the value of the witness’ “information and cooperation as it relates to successfully solving and prosecuting crimes.”¹⁵⁵ The witness also “anticipated receipt of one thousand dollars if his testimony resulted in a conviction.”¹⁵⁶ Like the Eight

145. 732 F.2d 1527 (8th Cir. 1984) (*en banc*).

146. *Id.* at 1528.

147. *Id.* at 1530 (quoting *United States v. Waterman*, CR 81-0-47 (D.Neb. August 17, 1983) (memorandum opinion and order)).

148. *Id.*

149. *Id.* Waterman also argued “that the agreement violated the spirit, if not the letter, of 18 U.S.C. § 201 (1982), which proscribes bribery of witnesses; that it encouraged perjury to an extent which could not be rectified by cross-examination; and that it undermined the integrity of our judicial system.” *Id.*

150. *Id.*

151. *Id.* at 1531.

152. *Id.* at 1533.

153. 793 F.2d 932 (8th Cir. 1986).

154. *See id.* at 936-37.

155. *Id.* at 934 (quoting Appellant’s brief at Appendix 2).

156. *Id.* at 937 n.3 (citing *United States v. Valle-Ferrer*, 739 F.2d 545, 549 (11th Cir. 1984) (recognizing the proposition that the informant’s anticipated reward did not “render him incompetent to testify”)).

Circuit in *Spector* and the First Circuit in *Dailey*, other courts have declined to follow the *Waterman* panel.

B. *The Singleton Episode*

The 1998 Tenth Circuit panel decision in *United States v. Singleton* (“*Singleton I*”),¹⁵⁷ offered a short-lived exception to the trend of federal decisional law to approve of almost any form of government compensation to prosecution witnesses. Sending shock waves through the community of federal prosecutors, the *Singleton I* panel held that the government’s cooperation and plea agreement with an alleged accomplice violated the federal bribery statute.¹⁵⁸

The *Singleton I* panel decision was all the more shocking because of its totally unremarkable facts.¹⁵⁹ A co-conspirator in an alleged drug conspiracy entered into a cooperation agreement in which the government, in return for his “truthful” testimony, promised: 1) not to prosecute him for other drug violations currently under investigation; 2) to advise the sentencing court of the nature and extent of his cooperation; and 3) to advise his state parole board of his cooperation.¹⁶⁰ The defendant filed a motion to suppress the cooperator’s testimony on the basis that it violated 18 U.S.C. § 201(c)(2), the anti-gratuity portion of the federal bribery statute.¹⁶¹ The district court denied the motion, but the Tenth Circuit panel reversed and remanded for a new trial.¹⁶²

In construing the meaning of § 201(c)(2), the *Singleton I* panel relied on its “plain language”—“[w]hoever directly or indirectly, gives, offers or promises anything of value to any person, for or because of the testimony under oath”—to conclude that it applies to government prosecutors who promise witnesses lenient treatment in return for testimony.¹⁶³ In rejecting the “law enforcement justification”—that the government is privileged to engage in violations of the law as part of reasonable efforts to detect and prevent crime—the panel distinguished detection and prevention of crime from prosecution of crimes:

The government’s violation of § 201(c)(2) . . . is entirely unrelated to detecting crime. Once the exigencies of field enforcement are satisfied, we can find no policy by which prosecutors may be excused from statutes regulating testimony presented to the federal courts. Although there are difficulties inherent in proving certain types of crimes, violating § 201(c)(2) is not necessary to overcome those difficulties: compulsory process is lawful and available, and avoids the taint on truthfulness

157. 144 F.3d 1343 (10th Cir. 1998).

158. *Id.*

159. *Id.* at 1343-44.

160. *Id.* at 1344. There was also evidence that the government had agreed to file a motion for a “substantial assistance” reduction if in its discretion his cooperation warranted it, but because it was not clear that the government had made any “promise” in that regard, the Tenth Circuit panel did not rely on that aspect of the agreement in analyzing whether there had been a violation of the bribery statute. *Id.* at 1344, 1348.

161. *Id.* at 1343; see discussion of 18 U.S.C. § 201(c)(2), *supra* Part I.B.

162. *Id.* at 1361.

163. *Singleton I*, *supra* note 15, at 1344-51 (quoting 18 U.S.C. § 201(c)(2) (2000)).

which attends unlawful witness gratuities. The law enforcement justification has never altered the playing field on which crimes are proved.¹⁶⁴

The *Singleton I* panel also concluded that the government had violated Kansas Professional Rule 3.4(b), which is based on Model Rule 3.4(b).¹⁶⁵ It noted the comment to the Model Rule, adopted by the Kansas Supreme Court, which states that “[t]he common law rule in most jurisdictions is that it is improper to pay an occurrence witness any fee for testifying”¹⁶⁶

Nine days after the panel decision in *Singleton I*, the Tenth Circuit, acting on its own motion, issued an order vacating the panel decision and ordering rehearing *en banc*.¹⁶⁷ The *en banc* court (“*Singleton II*”), joined by all but the three members of the original panel, reversed the panel decision and held that 18 U.S.C. § 201(c)(2) does not apply to the United States or an Assistant United States Attorney (“AUSA”) functioning within the official scope of the office.¹⁶⁸ The majority decision for the court rested its holding on the conclusion that Congress did not intend “whoever” to encompass the United States or an AUSA who acts as its “alter ego.”¹⁶⁹ The court relied on its own version of the plain meaning of the statute’s language, but also on the “longstanding [common law] practice sanctioning the testimony of accomplices against their confederates in exchange for leniency,” which it concluded “created a vested sovereign prerogative in the government.”¹⁷⁰ It described this sovereign power as one that in the American system of criminal justice “can only be exercised by the United States through its prosecutor.”¹⁷¹

One concurring opinion in *Singleton II*, joined by one other member of the court, rejected the majority’s interpretation of the word “whoever,” but concurred on the basis that “§ 201(c)(2) operates in conjunction with other statutes to allow the government, upon proper disclosure and/or with court approval, to trade certain items of value for testimony.”¹⁷² The concurring opinion pointed to 18 U.S.C. § 3553(e) and 28 U.S.C. § 994(n), which allow government motions for “substantial assistance” reductions to cooperating defendants; 18 U.S.C. §§ 6001–6005, which provide for grants of immunity at the request of the prosecution

164. *Id.* at 1353.

165. *Id.* at 1358–59.

166. *Id.* at 1359.

167. *Id.* at 1361. Legislation was also quickly introduced in Congress to reverse the effect of the *Singleton I* panel decision. “The proposed Effective Prosecution and Public Safety Act of 1998 [would have] made it clear that the prosecutorial tactic of offering leniency to accomplices in exchange for their testimony is permissible.” Jessica A. Ballou, Note, *Above the Law?: Prosecutorial Tactics After United States v. Singleton*, 19 Q. L.R. 173, 207 (2000).

168. *Singleton II*, *supra* note 65, at 1298.

169. *Id.* at 1300.

170. *Id.* at 1301.

171. *Id.*

172. *Id.* at 1303.

to witnesses testifying in support of the prosecution; and 18 U.S.C. §§ 3521–3528, which allow the government to provide benefits for the protection of cooperating witnesses.¹⁷³

The dissenting judges countered the majority’s invocation of common law tradition with “the common law prohibition against paying fact witnesses, and the fundamental policy of ensuring a level playing field between the government and defendant in a criminal case.”¹⁷⁴ The dissent also sought to reconcile the other provisions of federal law that provide benefits to cooperating witnesses. It pointed out correctly that the government compelling a witness to testify against her wishes through a grant of immunity is quite different from a consensual cooperation agreement in which the witness agrees to testify in return for the government’s promise of lenient treatment.¹⁷⁵ It struggled more with the “substantial assistance” provisions of the Sentencing Guidelines, but construed them to place discretion with the court rather than the prosecutor:

[I]t appears that § 5K1.1 [of the Guidelines] creates a narrow exception to § 201(c)(2) by permitting a *court* to reward a defendant’s truthful testimony *after* it has been given. This narrow exception does not affect § 201(c)(2)’s prohibition against the prosecutor offering or promising leniency in advance to a defendant in exchange for his agreement to testify.¹⁷⁶

This interpretation ignores, however, the fact that the statute pertains only to substantial assistance to the government and gives the prosecutor sole discretion to move for a substantial assistance reduction.¹⁷⁷ The resulting practical reality is that a defendant, therefore, will give up her rights and provide substantial assistance only with some assurance that the government will honor that assistance with a motion for reduction at sentencing.

The panel decision in *Singleton I* spawned *Singleton* motions in federal prosecutions across the country for the exclusion of cooperating witness testimony. While a few district courts have followed *Singleton I* and granted those motions,¹⁷⁸

173. *Id.*

174. *Id.* at 1313. The court referred specifically to the comment to MODEL RULE 3.4 to the effect that “it is improper to pay an occurrence witness any fee for testifying.” *Id.* at 1313. *See* discussion of MODEL RULES, *supra* at Part II.A. Leaping over the practice of the intervening centuries, the dissent also quoted the comments of Sir Matthew Hale, recorded in the 17th century, which questioned the premise of cooperation agreements:

If a reward be promised to a person for giving his evidence before he gives it, this, if proved disables his testimony. And so for my own part I have always thought, that if a person have a promise of a pardon if he give evidence against one of his own confederates, this disables his testimony, if it be proved upon him.

Hale, *supra* note 74, at 280 and text accompanying.

175. *Singleton II*, *supra* note 65, at 1313.

176. *Id.*

177. *See supra* note 100 and accompanying text.

178. *See* United States v. Fraguela, 1998 WL 560352, at *2 (E.D. La. Aug. 27, 1998), *aff’d*, 216 F.3d 1079 (5th Cir. 2000) (finding that co-defendants’ testimony must be excluded); United States v. Lowery, 15 F. Supp. 2d 1348, 1359–60 (S.D. Fla. 1998), *cert. denied*, 120 S. Ct. 212 (1999) (concluding that 18 U.S.C. § 201(c) should apply to government plea bargaining, thus, excluding testimony).

all of the circuit courts that have considered the issue have, with various emphases in reasoning, sided with the *en banc* Tenth Circuit in *Singleton II*, and rejected the assertion that the government violates the federal bribery statute when it offers witnesses lenient treatment in return for testimony.¹⁷⁹ Given the government's heavy reliance on such testimony, of course, acceptance of the *Singleton I* holding would have placed in doubt a large number of past convictions and forced a radical change in the way that prosecutors approach building their cases.

1. State Cases

a. Substantive Restrictions on Cooperating Witness Testimony

Some state court cases suggest a more restrictive approach to the government's use of cooperating witnesses. A line of cases in California and Nevada is illustrative.

In *People v. Green*,¹⁸⁰ an accomplice witness testified against the defendant at the preliminary hearing, pursuant to an agreement reached during the course of the hearing, that charges against him would be dismissed if the defendant were bound over for trial.¹⁸¹ The witness changed his testimony at trial, but was presumably impeached with his preliminary hearing testimony, and the defendant was convicted. The court of appeal reversed the conviction on the basis that the use of the accomplice's testimony denied the defendant a fair trial.¹⁸² The court accepted the practice of "extend[ing] immunity to one jointly charged with crime, upon condition that he testify fully and fairly as to his knowledge of the facts out of which the charge arose."¹⁸³ However, the court found the bargain struck by the

179. See *United States v. Lara*, 181 F.3d 183, 197-98 (1st Cir. 1999), *cert. denied*, 120 S.Ct. 432 (1999); *United States v. Condon*, 171 F.3d 687, 690-691 (7th Cir. 1999), *cert. denied*, 526 U.S. 1126 (1999); *United States v. Lowery*, 166 F.3d 1119, 1122-24 (11th Cir. 1999), *cert. denied*, 120 S. Ct. 212 (1999); *United States v. Ramsey*, 165 F.3d 980, 987 (D.C. Cir. 1999), *cert. denied*, 120 S. Ct. 223 (1999); *United States v. Ware*, 161 F.3d 414, 418 (6th Cir. 1998), *cert. denied*, 526 U.S. 1045 (1999); *United States v. Haese*, 162 F.3d 359, 366-68 (5th Cir. 1998), *cert. denied*, 526 U.S. 1138 (1999).

180. 228 P.2d 867 (Cal. Ct. App. 1951).

181. *Id.* at 867-69. The accomplice, who was originally unwilling to testify, testified against the defendant at the preliminary hearing after conferring with the prosecutor during a recess. *Id.* In response to questioning on the record by the deputy district attorney with whom the bargain was made, the accomplice testified, in part, as follows regarding the bargain:

[Deputy] . . . Now except for this conversation here in court between you and I in which I have stated that I am going to dismiss this count, the Bergo count against you, if *Mr. Green is held to answer*, has anybody promised you any reward or immunity if you testified in this case? A. No, sir they haven't. [Deputy] And it is your understanding that you still—even if I get *Mr. Green held to answer in this case today*, there still is another case against you? A. I understand, sir.

Id. at 868 (emphasis in original).

182. *Id.* at 872.

183. *Id.* at 871-72.

deputy attorney with the accomplice unacceptable because it made the accomplice's immunity contingent on the magistrate's finding the testimony sufficient to bind the defendant over for trial.¹⁸⁴

Twenty-three years later, in *People v. Medina*,¹⁸⁵ another California court of appeal, relying in part on *Green*, reversed the murder convictions of two defendants because three accomplices testified pursuant to agreements by which they received immunity subject to the express condition that their testimony not change "materially or substantially" from recorded statements previously given to law enforcement officers.¹⁸⁶ The court held "that a defendant is denied a fair trial if the prosecution's case depends substantially upon accomplice testimony and the accomplice witness is placed, either by the prosecution or the court, under a strong compulsion to testify in a particular fashion."¹⁸⁷

The California court of appeal in *Medina* distinguished the earlier decision of the California Supreme Court in *People v. Lyons*, which rejected the argument that the use of accomplice testimony was improper merely because the accomplices were not yet sentenced at the time of their trial testimony.¹⁸⁸ Unlike the explicit condition in *Medina* that the accomplices' trial testimony be consistent with their prior statements, there was nothing in the agreements in *Lyons* "to indicate that the promises of leniency were conditioned on anything other than the accomplices testifying fully and fairly as to their knowledge of the facts out of which the charges arose."¹⁸⁹

This distinction would appear, however, to blink the reality of the typical cooperation agreement in which the government's performance remains contingent on the cooperator's testimony at trial. Whether the testimony is full and "truthful," as determined by the prosecutor, will surely depend on its consistency with the cooperator's prior statements to law enforcement officers or prosecutors. Indeed, those prior statements are the foundation upon which the cooperation agreement is premised. The agreement in *Medina* was unusual only in that it made explicit what is implicit in the typical agreement—in order to receive the bargained for leniency, the cooperating witness cannot change her story at trial.

Relying heavily on *Medina*, the Nevada Supreme Court, in *Franklin v. State*, reversed a conviction on the basis that a testifying accomplice was allowed to plead guilty to a lesser charge only after he testified at the preliminary hearing and trial.¹⁹⁰ The court reached that result despite the fact that "the full plea bargain was disclosed to the jury, emphasized on cross-examination, argued as an issue of

184. *Id.*

185. 41 Cal. App. 3d 438, 450 (1974).

186. *People v. Medina*, 41 Cal. App. 3d 438, 450 (1974).

187. *Id.* at 455.

188. 324 P.2d 556, 567 (1958).

189. *Id.* at 567.

190. 577 P.2d 860 (Nev. 1978). In the cooperation agreement, the prosecution "agreed [the accomplice] would be charged with second-degree murder only, receive credit for jail time served, and serve his remaining sentence outside Nevada, in a prison near his home." *Id.* at 861. The state performed its side of the bargain after the accomplice had testified at the trial of the defendant, who was convicted. *Id.* As a result of the agreement, the accomplice became eligible for parole after a total of five years of incarceration. *Id.*

accomplice credibility, and ultimately became the subject of jury instructions.”¹⁹¹ The agreement in *Franklin* was perhaps somewhat unusual in that not only the accomplice’s sentencing, but also his plea to reduced charges, were deferred until after his testimony. The court did not emphasize that fact, however, and it is not clear that the agreement was more coercive as a result. Indeed, unlike a testifying accomplice who has already pled guilty, the accomplice in *Franklin* remained free at the time of his testimony to contest his guilt and, presumably, to testify consistent with the innocence of both himself and the defendant.

The *Franklin* court articulated its holding as follows:

By bargaining for specific testimony to implicate a defendant, and withholding the benefits of the bargain until after the witness has performed, the prosecution becomes committed to a theory quite possibly inconsistent with the truth and the search for truth. We deem this contrary to public policy, to due process, and to any sense of justice.¹⁹²

The court’s premise—that the prosecution has “bargain[ed] for specific testimony to implicate a defendant, and withh[eld] the benefits of the bargain until after the witness has performed”—could apply to almost any modern cooperation agreement. No deal is reached unless the cooperating witness proffers testimony that implicates another defendant or target, and prosecutors will nearly always structure the agreement such that the benefits to the cooperator are withheld until after she has testified. Whether or not the cooperator has fulfilled her side of the bargain will inevitably be determined by the prosecutor based on whether, as was explicit in *Medina*, the cooperator’s testimony is consistent with her proffer or any prior statements.

b. Procedural Restrictions on Cooperating Witness Testimony

One state appellate court recently explored the use of procedural restrictions for the use of testimony by one kind of cooperating witness—the jailhouse informant, or “snitch.” In the course of reversing murder convictions based on erroneous exclusion of impeachment evidence, the Oklahoma Court of Criminal Appeals announced in a July 1999 opinion that, henceforth, testimony of jailhouse informants would be admitted only if the government made specified disclosures at least ten days before trial and could establish at a “reliability hearing” that “the informant’s testimony is more probably true than not.”¹⁹³ The court subsequently

191. *Id.* at 865 (Manoukian, J., dissenting).

192. *Id.* at 863.

193. *Oklahoma Prescribes Procedure to Ensure Reliability of Jailhouse Informer’s Testimony*, 68 U.S.L.W. 1084, 1085 (1999) (citing *Dodd v. State*, 1999 OK CR 29 (Okla. Crim. App. 1999) (hereinafter *Oklahoma Prescribes Procedure*)). The initial decision in *Dodd* was filed just three months after the April 1999 release by the Oklahoma courts of Ron Williamson, who was convicted based largely on the testimony

granted rehearing, however, and vacated its initial opinion.¹⁹⁴ In an opinion issued in January of 2000, the court reaffirmed the reversal of the conviction and the mandatory disclosures but withdrew the requirement of a “reliability hearing.”¹⁹⁵ The defendant in *Dodd* was convicted at trial and sentenced to death for a double murder.¹⁹⁶ The evidence was “wholly circumstantial,” and a “key witness” for the prosecution was a jailhouse informant who testified that the defendant had confessed to the murders.¹⁹⁷ The informant recanted his testimony after the preliminary hearing, but reasserted the truthfulness of his testimony at trial.¹⁹⁸ The defense sought to introduce two letters written by the informant regarding his recantations.¹⁹⁹ In one, he expressed his belief that he would still receive favorable treatment from the District Attorney’s office for his testimony in the *Dodd* case and another capital murder case despite his recantations.²⁰⁰ In the other, he discussed “his long history of testifying in first degree murder trials in Oklahoma County,” and stated that “he [was] no longer afraid . . . and no longer [has] to lie . . . for anyone in this world—especially the OK County D.A.’s Office,” and that the D.A.’s office would not get testimony “about a confession that you both asked & wanted from me . . . because as you very well know—there wasn’t one.”²⁰¹ The trial court sustained the state’s objection to admission of the letters on the grounds that they had not been properly produced in discovery.²⁰²

The Oklahoma Court of Criminal Appeals, in reversing the trial court’s evidentiary ruling and ordering a new trial, announced new disclosure requirements for the admission of jailhouse informant testimony:

At least ten days before trial, the state is required to disclose in discovery: (1) the complete criminal history of the informant; (2) any deal, promise, inducement, or benefit that the offering party has made or may make in the future to the informant . . . ; (3) the specific statements made by the defendant and the time, place, and manner of their disclosure; (4) all other cases in which the informant testified or offered statements against an individual but was not called, whether the statements were admitted in the case, and whether the informant received any deal, promise, inducement, or benefit in exchange for or subsequent to that testimony or statement; (5) whether at any time the informant recanted that

of a jailhouse informant and sentenced to death before being exonerated by DNA evidence. *See supra* notes 4-9 & accompanying text.

194. *Dodd v. Oklahoma*, No. F97-026, 1999 Okla. Crim. App. LEXIS 66, at *1 (Okla. Crim. App. October 6, 1999).

195. *Dodd v. Oklahoma*, 993 P.2d 778 (Okla. Crim. App. 2000).

196. *Id.* at 779.

197. *Id.* at 783.

198. *Id.* at 782.

199. *Id.*

200. *Id.*

201. *Id.*

202. *Id.*

testimony or statement, and if so, a transcript or copy of such recantation; and (6) any other information relevant to the informant's credibility.²⁰³

The court also specified a jury instruction to be given in all cases in which the court admits the testimony of a jailhouse informant.²⁰⁴

The initial decision of the court also mandated a pretrial "reliability hearing" before admission at trial of any jailhouse informant testimony, at which point the court would have heard the testimony of the informant and any other relevant witnesses, and considered as a prerequisite to admission "whether the moving party [had] established that the informant's testimony is more probably true than not."²⁰⁵ In making that determination, the court would have considered the following factors:

- 1) whether the informer has received or will receive anything in exchange for testifying;
- 2) whether the informer has testified or offered evidence in other cases and received any benefit thereby;
- 3) the specificity of the informer's testimony;
- 4) the manner in which the statement from the defendant was obtained by the informer;
- 5) the degree to which the statement can be independently corroborated;
- 6) whether the informer has changed his testimony in the instant case or any other one; and
- 7) the informer's criminal history.²⁰⁶

On rehearing, however, the court majority abandoned, without explanation, the requirement of the reliability hearing.²⁰⁷ One judge wrote a separate opinion, "specially concurring" in the decision of the majority, to indicate that he "would also mandate the reliability hearing prescribed in the original opinion in this matter."²⁰⁸ He compared such a hearing to hearings on the reliability of scientific expert testimony mandated by the U.S. Supreme Court's 1993 decision, *Daubert v. Merrell Dow Pharmaceuticals*:²⁰⁹ "As with the use of *Daubert* hearings to

203. *Id.* at 784. The specified disclosures are all probably required, in any event, by the federal constitution as interpreted by the U.S. Supreme Court. *See Brady v. Maryland*, 373 U.S. 83, 87 (1963) ("[T]he suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution.").

204. *Oklahoma Prescribes Procedure*, *supra* note 193, at 1085.

205. *Id.*

206. *Id.*

207. *Id.*

208. 993 P.2d at 785 (Strubhar, P.J., specially concurring).

209. 509 U.S. 579 (1993).

ensure the relevance and reliability of novel scientific expert testimony, this reliability hearing will allow the trial court to perform its gatekeeping function and filter out prejudicial jailhouse informant testimony that is more probably false than true.”²¹⁰

As a result of a celebrated wrongful conviction based on the testimony of a jailhouse informant and subsequent DNA exoneration, Canada has adopted similar procedural controls.²¹¹ A high-level screening committee of prosecutors must first confirm that the testimony can be corroborated.²¹² Similar to the aborted Oklahoma procedure set forth in the initial *Dodd* opinion, the prosecutor has the burden of showing the testimony’s reliability at a preliminary hearing.²¹³ In addition, “all deals with the informant must be written, and all conversations either videotaped or audiotaped.”²¹⁴

IV. CRITICISM AND PROPOSALS FOR REFORM

Our current system of compensation to cooperating witnesses has not escaped periodic criticism. Some commentators argue for limitations on the use of cooperating witness testimony, especially pursuant to overtly contingent agreements, and some propose procedural mechanisms to mitigate the danger of false testimony.

Yvette Beeman concluded in a 1987 Cornell Law Review Note that “courts should prohibit contingent accomplice plea agreements based upon defendants’ due process rights and courts’ supervisory powers to reject unreliable evidence.”²¹⁵ Presaging the *Singleton I* opinion, she argued that “[c]ontingent plea bargains are, in effect, bribes passing from the government to accomplices in return for specific testimony under oath.”²¹⁶

As demonstrated above, however, most cooperation agreements are functionally, if not explicitly, contingent. Graham Hughes made that point and posed the resulting policy issue this way in a 1991 article:

The prohibition of frank contingency agreements, therefore, may ultimately be little more than cosmetic. It seems impossible to give the government any protection at all [for its legitimate interest in using cooperation agreements] without giving it so much that the government elicits the testimony from

210. *Id.* (relying on *Daubert*, 509 U.S. 579; see discussion *infra*, at Part III.B.2.

211. DWYER, *supra* note 4, at 157.

212. *Id.*

213. *Id.*

214. *Id.*

215. Yvette A. Beeman, Note, *Accomplice Testimony Under Contingent Plea Agreements*, 72 CORNELL L. REV. 800, 800 (1987); see also Neil B. Eisenstadt, Note, *Let’s Make a Deal: A Look at United States v. Dailey and Prosecutor-Witness Cooperation Agreements*, 67 B. U. L. REV. 749 (1987) (arguing that the First Circuit’s decision in *United States v. Dailey* erred in allowing a “value” contingency cooperation agreement).

216. Beeman, *supra* note 215 at 826; see also Samuel A. Perroni & Mona J. McNutt, *Criminal Contingency Fee Agreements: How Fair Are They?*, 16 U. ARK. LITTLE ROCK L.J. 211, 220–22 (1994) (arguing that contingent cooperation agreements violate bribery statutes).

a cooperator under the strongest pressure. We are left with a stark choice between excluding this whole category of testimony and trusting the adversary system to weed out perjury.²¹⁷

Hughes would not throw out all cooperating witness testimony, but does observe the need for “guiding standards and supervision” for prosecutors, and suggests as some “administrative possibilities” the following: “rules requiring corroboration of accomplice testimony or special jury charges,” the “continued development of published internal standards for prosecutors,” and “an independent commission to advise and monitor prosecutors’ behavior.”²¹⁸

Evan Haglund, in a 1990 note in the *Southern California Law Review*, proposed that defendants be given an expanded opportunity to impeach “criminal informants” who receive money or immunity for their testimony.²¹⁹ He would permit cross-examination of criminal informants regarding all informant agreements they may have entered into and all charges dismissed as a result of informant agreements and would provide more liberally for introduction of extrinsic evidence by the defense, including to prove the defense of entrapment.²²⁰

J. Richard Johnston, in a four-page 1997 article, succinctly posed the question: “Paying the Witness: Why is it OK for the prosecution, but not the defense?”²²¹ He argued that the government’s use of cooperating witnesses violates the federal bribery statute, 18 U.S.C. § 201(c)(2).²²² That article directly inspired the defense motion accepted in *Singleton I*, but ultimately rejected in *Singleton II*.²²³

Ian Weinstein’s 1999 article, *Regulating the Market for Snitches*, argued that “[t]he excessive use of cooperation . . . damages the adversary system by putting too many defendants on the government’s team and making the defense lawyer little more than a passive observer of his or her client’s case.”²²⁴ He proposed “a numerical limit on the number of defendants who may be rewarded with sentence mitigation in order to impose a cost on prosecutors to encourage them to use fewer cooperators.”²²⁵ Federal prosecutors would be limited to making substantial

217. Hughes, *supra* note 105, at 39.

218. *Id.* at 68-69.

219. Haglund, *supra* note 92, at 1407; *see also* Justin M. Lungstrum, *United States v. Singleton: Bad Law Made in the Name of a Good Cause*, 47 U. KAN. L. REV. 749, 770-71 (1999) (proposing that government witness statements be provided prior to trial and that “substantial assistance” for federal sentencing reductions not include trial testimony).

220. Haglund, *supra* note 92, at 1440-41.

221. J. Richard Johnston, *Criminal Justice* (Winter 1997), at 21.

222. *Id.* at 24.

223. *See* Mark Hansen, *Shot down in Mid-Theory*, A.B.A. J. (May 1999), at 46.

224. Weinstein, *supra* note 1, at 564.

225. *Id.* at 568; *see also* Perroni & McNutt, *supra* note 216, at 231 (proposing that prosecutors “be allowed to offer any two concessions in exchange for cooperation and testimony, but no more”).

assistance motions in about 15 percent of cases in their district.²²⁶ Weinstein does not explain how this limit would be monitored or enforced.

A number of commentators have criticized the related practice of plea bargaining—leniency in sentencing in return for self-conviction.²²⁷ A plea bargain is often coupled with a cooperation agreement and is probably the most common form of compensation for testimony.²²⁸

A. *The Expert Witness Exception*

The history of the expert witness exception is parallel in significant ways to that of the cooperating witness exception. Like the use of cooperating witnesses by the prosecution in criminal cases, the use of expert witnesses in civil and criminal cases originated in procedures controlled by the court rather than the adverse parties. Calls for reform, beginning more than one-hundred years ago, have generally called for a return to greater court involvement in the selection and retention of experts. Selection and control of expert witnesses by adverse parties remains, however, the accepted and prevailing practice.

1. History

The use of expert witnesses had its origin in two ancient practices.²²⁹ The first was the use of the “special jury,” which was composed of people summoned by the court because they were especially qualified by background and knowledge to decide the matter at issue.²³⁰ Variations of the special jury were used as early as Roman times.²³¹ Special jurors in the English system provided facts and opinions as well as determining the matter. The distinction between jurors and witnesses did not become clear until the sixteenth century, or even later.²³² From early

226. Weinstein, *supra* note 1, at 630.

227. Alschuler, *supra* note 83 (demonstrating that the practice of plea bargaining is a recent historical phenomenon).

228. See Weinstein, *supra* note 1, at 567 (“[C]ooperation agreements may be seen as simply a subset of plea agreements. Cooperation agreements are a particularly attractive kind of plea agreement . . .”).

229. See Hand, *supra* note 17; Lloyd L. Rosenthal, *The Development of the Use of Expert Testimony*, 2 LAW & CONTEMP. PROBS. 403, 407 (1935).

[T]here were two methods of obtaining the requisite specialized knowledge. One was to impanel a jury of persons specially qualified to pass judgment in a particular case; this was really a jury of experts. The second was for the *court* to summon skilled persons to inform it about those matters beyond its knowledge.

Id.

230. Hand, *supra* note 17, at 40-41.

231. See Robert F. Taylor, *A Comparative Study of Expert Testimony in France and the United States: Philosophical Underpinnings, History, Practice, and Procedure*, 31 TEX. INTL. L. J. 181, 185 (1996).

232. See Rosenthal, *supra* note 229, at 406.

These early juries were not the juries we know today; rather they were bodies of neighbors, already acquainted with the facts or capable of discovering them easily, who partook of the character of witnesses as much as judges. . . . [The practice of adducing information by the sworn testimony of witnesses] was not general until the 16th century when the distinction between witnesses and jurors was becoming clear.

Id. at 409. “By the middle of the 17th century the office of juror has become clearly distinct from that of witness.” *Id.*

It is common learning to-day that originally and indeed for many years the jury had no witnesses

times, the court also had the power to summon experts to advise the court on factual matters.²³³ That advice was probably furnished only to the court, who would, in turn, instruct the jury if it saw fit.²³⁴

By the early seventeenth century, there were reported cases reflecting expert witness testimony in the modern sense, although without indication as to whether the expert was called by the parties or the court.²³⁵ By 1678, there was a report of a criminal case with experts presented on both sides,²³⁶ and by the late eighteenth century, there was evidence that the practice of presentation of experts by adverse parties in civil cases had been established.²³⁷

Precedent for the sanctioning of payments to expert witnesses is more obscure. The early reports do not indicate if, or by whom, experts were paid.²³⁸ That experts should be paid fees is not inevitable or unquestioned, however. As late as the early 1900s, there were still United States cases taking the position that it is improper for an expert to charge for testimony. In a 1907 Missouri Court of Appeals case, *Burnett v. Freeman*,²³⁹ a physician, who had previously testified as

present before them at all. They went about before or during the trial informing themselves as they might of the facts at issue. Not until the middle of the fifteenth century was even the practice of summoning witnesses well settled as incident to the trial, and it was still later that any compulsory process became available.

Hand, *supra* note 17, at 44.

233. Hand, *supra* note 17, at 42.

[I]f matters arise in our law which concern other sciences or faculties, we commonly apply for the aid of that science or faculty which it concerns. Which is an honorable and commendable thing in our law. For thereby it appears that we do not despise all other sciences but our own, but we approve of them, and encourage them as things worthy of commendation.

Buckley v. Rice, 175 Eng. Rep. 182, 192 (1554) (Saunders, J.).

234. Rosenthal, *supra* note 229, at 408.

235. In *Alsop v. Bowtrel*, 79 Eng. Rep. 464 (1620), physicians testified that a child born forty weeks and nine days after the death of a woman's husband could be his child. Hand, *supra* note 17, at 45. Hand describes *Alsop* as "the first case which I have found of real expert testimony,—by which I mean a case where the conclusions of skilled persons were submitted to the jury." *Id.* In *Alsop*, "the witnesses are not stated to have been called on either side; and from the meagre [sic] report we have, they seem to have satisfied the court in the first instance of the truth of their conclusion before the evidence went to the jury." *Id.* at 45-46.

236. In the case of *Rex v. Pembroke*, 7 Howell, State Trials 185 (1678), a murder case in which the cause of death was at issue,

[p]hysicians were called on either side who testified under the examination of the attorney for the prosecution, or of the prisoner, both as to what were the causes of certain observed upon an autopsy they had seen and as to the general proposition as to whether a man can die of wounds without fever.

Hand, *supra* note 17, at 46. Hand notes similar uses of expert testimony in other criminal cases from around the same time. *Id.* at 46-47. See also Rosenthal, *supra* note 229, at 409 (discussing *Rex v. Pembroke* and other criminal cases from the late 17th century involving expert testimony).

237. In *Folkes v. Chadd*, 99 Eng. Rep. 589 (1782), a civil nuisance action, "a new trial was granted, because of the exclusion of the testimony of engineers as to their opinion of the cause of the filling of a harbor, alleged to be caused by a sea wall. . . ." Hand, *supra* note 17, at 48. See Rosenthal, *supra* note 229, at 410 (discussing *Folkes v. Chadd* and asserting that "[b]y the 18th century the party system of experts had become firmly settled").

238. See Rosenthal, *supra* note 229, at 510-24.

239. 103 S.W. 121 (Mo. Ct. App. 1907).

an expert in a civil case, sued in *quantum meruit* to recover for his services as an expert witness.²⁴⁰ The trial court held for the physician, but the court of appeals reversed, holding that an agreement to pay an expert for testimony was invalid and against public policy.²⁴¹ The court in *Burnett* noted, with citations to decisions in other jurisdictions, that “[w]hether a physician could be allowed to charge for his services as a witness as an expert has been a question upon which the courts have entertained widely divergent views.”²⁴² It then acknowledged arguments for allowing compensation to experts, including the argument that

[i]f it were known that the free services (save ordinary witness fee) of the most eminent professional men of the country could be compelled at the instance of any litigant, might he not be required to devote a great part, or all, of his time in attendance upon courts or in giving his deposition.²⁴³

While conceding that an expert could not be compelled to make special examinations or engage in special preparation for testimony without compensation, the court nonetheless concluded that an expert called to give an opinion based on special expertise or knowledge should not be distinguished from any other witness with regard to compensation.²⁴⁴ In so holding, the court emphasized the concept of the expert as a neutral witness:

It should be remembered that the duty the expert owes to the state, as a performance of citizenship, rather than a rendering of service to an individual, pertains to an obligation to give the court the benefit of the knowledge he has in store at the time he is called upon.²⁴⁵

Burnet relied on an 1875 opinion of the Alabama Supreme Court, *Ex parte Dement*,²⁴⁶ which affirmed a finding of contempt against a physician called to testify as an expert in a criminal case who refused to do so on the grounds that he had not been compensated for his professional opinion.²⁴⁷ *Ex parte Dement*, like *Burnet*, articulated the ideal of the neutral expert:

[I]n truth, [the expert] is not really employed or retained by any person. And the evidence he is required to give should not be given with the intent to take the part of either contestant in the suit but with a strict

240. *Id.* at 123.

241. *Id.*

242. *Id.* at 121 (citing *Buchman v. State*, 59 Ind. 1 (1877), *Dills v. State*, 59 Ind. 15 (1877), *People v. Montgomery*, 13 Abb. Pr. (N.S. 207), *Ex parte Roelker*, 1 Sprague 276 (Mass. 1854), *Webb v. Page*, 1 Carr. & K. 23 (1843) (all affirming right to refuse to testify without payment) and *Ex parte Dement*, 53 Ala. 389 (1875), *Dixon v. People*, 48 N.E. 108 (Ill. 1897), *North C.S.R. Co. v. Zeiger*, 154 N.E. 1006 (Ill. 1898), *Bd. of Comm’rs v. Lee*, 3 Colo. App. 177 (1898), *Flinn v. Prairie County*, 29 S.W. 459 (Ark. 1895) (all taking the opposite view)).

243. *Id.* at 122.

244. *Id.* at 123.

245. *Id.*

246. 53 Ala. 389 (1875).

247. *Id.* at 398.

regard to the truth, in order to aid the court to pronounce a correct judgment.²⁴⁸

2. Current Practice

The view of *Burnett* and *Dement*, and the ideal of the neutral expert witness, did not prevail. It is now established beyond question in all jurisdictions that adverse parties can pay an expert a fee for providing testimony. As noted above, the ethical rules specifically so provide.²⁴⁹ The only express prohibition is that compensation cannot be contingent on the substance of the testimony or the outcome of the case.

As a practical matter, however, whether a party will retain an expert and whether an expert will receive what are sometimes very substantial fees for testimony, are contingent on the substance of the expert's projected testimony. Under the Federal Rules of Civil Procedure and the rules of most state jurisdictions, a party can obtain discovery regarding an expert who will not be called at trial only "upon a showing of exceptional circumstances . . ."²⁵⁰ The common practice is to engage an expert as a "consulting" expert only and not to identify the expert as a "testifying" expert until such time as it is clear that the expert will offer testimony helpful to the party's case. The expert knows that she will be retained for extensive work on the case and trial testimony only if she is able to reach a helpful opinion.²⁵¹

It is also common for a party to do extensive shopping for trial testimony—to interview and retain multiple experts as consultants in the process of searching for desired trial testimony. As a function of the work product doctrine (as well as professional ethics), retention of an expert will disqualify that expert from later testifying for the opposing party or even consulting with the opposing party.²⁵² As a result, whatever may have been the course of expert retention, and whatever the general consensus of experts in the field, a trial between parties of relatively equal resources will typically feature a fairly evenly divided contest between equal numbers of opposing experts advocating each side of the case.

Experts will often work closely with counsel to develop testimony that advocates one side of the case. While all the communications between counsel and

248. *Id.* at 393-94.

249. *See supra* Part II.A.

250. FED. R. CIV. P. 26(b)(4)(B).

251. Parties sometimes offer their own employees as expert witnesses. A recurring example is the government's use of its own forensic lab employees to present analysis of crime scene evidence. Private parties in civil cases may also, however, have occasion to call on their own personnel who have relevant expertise in engineering or accounting or any number of other disciplines. While these employee experts do not have the same financial inducements to provide helpful testimony, loyalty and perhaps career advancement will usually provide equivalent incentives. No less than independent experts, they are unlikely to approach the subject of their testimony for a neutral perspective.

252. *See* Steven Lubet, *Expert Witnesses: Ethics and Professionalism*, 12 GEO. J. LEGAL ETHICS 465, 475-77 (1999).

the expert are discoverable once the expert is designated as a testifying expert, experienced experts typically make little written record of such communications or of early versions of their opinions. In practice, therefore, discovery of counsel's role in the formation of expert opinions is usually superficial and not useful for impeachment.

Federal Rule of Evidence 706 authorizes the court to appoint expert witnesses of its own selection.²⁵³ Such appointments are, however, quite rare in practice.²⁵⁴ In most instances the court is reluctant to usurp what has become accepted as the parties' prerogative to appoint experts, and/or is not willing to allocate the time necessary to select and retain an expert, especially in a single case that may or may not ever reach trial.

Court selection of experts is most likely to occur when a judge has continuing responsibility for a group of cases presenting an issue of scientific uncertainty. Breast implant litigation provides two recent examples, each presenting a different model for the use of neutral experts.²⁵⁵ In May of 1996, Federal District Court Judge Sam C. Pointer, Jr., who presided for pretrial proceedings over more than twenty-thousand breast implant cases consolidated under the Multidistrict Litigation Act,²⁵⁶ relied on Federal Rule of Evidence 706 to appoint a national expert panel to investigate issues of causation central to those cases.²⁵⁷ He did so at the request of the National Plaintiffs' Steering Committee,²⁵⁸ with the input of attorneys from both sides.²⁵⁹ The panel issued its report in December of 1998 and concluded that "there was no credible evidence that the implants cause disease."²⁶⁰ The appointment of the panel and its report came after judgments and settlements in thousands of cases had resulted in multiple millions of dollars in payments by defendant manufacturers, although additional thousands of cases remained pending.²⁶¹ According to Judge Pointer's initial order, the testimony of the court-

253. FED. R. EVID. 706. Similar provisions are in force in most states. Joseph & Saltzburg, EVIDENCE IN AMERICA: THE FEDERAL RULES IN THE STATES §§ 55.2, 55.3 (Supp. 1994).

254. According to a 1988 survey of all active federal district court judges, eighty percent of the judges never appointed an expert, and eleven percent had done so only once. Joe S. Cecil & Thomas E. Willging, *Accepting Daubert's Invitation: Defining a Role for Court-Appointed Experts in Assessing Scientific Validity*, 43 EMORY L.J. 995, 1004-05 (1994). Out of hundreds of thousands of cases handled by the surveyed judges, only about 225 experts had been appointed. *Id.* A survey of use of experts in California civil cases during a one-year period found 1748 expert appearances in 529 cases but not a single use of a court-appointed expert. Gross, *supra* note 3, at 1191. California Evidence Code § 730 applies similarly to Federal Rule of Evidence 705 for court-appointed experts.

255. See generally Karen Butler Reisinger, Note, *Court-Appointed Expert Panels: A Comparison of Two Models*, 32 IND. L. REV. 225 (1998).

256. 28 U.S.C. § 1407 (2000).

257. *In re Silicone Gel Breast Implant Prods. Liab. Litig.*, Order 31 (N.D. Ala. 1996); 4 MEALEY'S LITIG. REPS.: BREASTIMPLANTS, JUNE 13, 1996, at F-1 [hereinafter Order 31]. The panel was charged with determining the extent to which "existing studies, research, and reported observations provide a reliable and reasonable scientific basis for one to conclude that silicone-gel breast implants cause or exacerbate" designated diseases and the extent to which its conclusions were subject to "legitimate and responsible disagreement" by experts expressing contrary opinions. *Id.*

258. Walker & Monahan, *supra* note 13, at 807.

259. Monmaney, *supra* note 13, at A1.

260. *Id.* Six months later a report of the Institute of Medicine of the National Academy of Sciences, made at the request of Congress, reached the same conclusion. See Walker & Monahan, *supra* note 13, at 812.

261. *Id.* at 803-17.

appointed experts will be available in any trial under the multidistrict litigation umbrella by way of video-taped depositions presided over by Judge Pointer.²⁶²

Another judge presiding over breast implant cases appointed a panel of experts to examine similar issues, but for a different procedural purpose. Federal district court judge Robert E. Jones, in cases remanded from Judge Pointer to the district of Oregon, relied on his inherent authority to appoint a panel of experts to aid the court in ruling on defendants' motions under Federal Rule of Evidence 702 and *Daubert v. Merrell Dow Pharmaceuticals, Inc.*²⁶³ to exclude testimony by plaintiffs' experts that silicone breast implants cause disease.²⁶⁴ The court characterized the expert panel as "technical advisors with the necessary expertise [in the relevant fields] to assist in evaluating the reliability and relevance of the scientific evidence."²⁶⁵ The panel of expert advisors heard the evidence of the parties, including the testimony of the experts engaged by the parties, and reported to the court.²⁶⁶ After the report was submitted, the court gave counsel for the parties an opportunity to question the expert advisors.²⁶⁷ Relying on the advice of the "neutral" experts, the court granted the motions in limine.²⁶⁸

3. Criticism and Proposals for Reform

The dangers and potential excesses resulting from adverse parties employing their own testifying experts have long been subjects of commentary and complaint. In a 1858 case holding that a court cannot be compelled to receive the evidence of experts as to how a patent ought to be construed, the U.S. Supreme Court offered the following commentary on such expert testimony:

Experience has shown that opposite opinions of persons professing to be experts may be obtained to any amount; and it often occurs that not only many days, but even weeks, are consumed in cross-examinations, to test the skill or knowledge of such witnesses and the correctness of their opinions, wasting the time and wearying the patience of both court and jury, and perplexing, instead of elucidating, the questions involved in the issue.²⁶⁹

262. Order 31, *supra* note 257, at F-1. The effect of the report of the national panel of experts on ongoing breast implant litigation is not yet clear. In one case, a federal district court judge disallowed consideration of the panel's report, and the jury awarded ten million dollars in compensatory damages. *See Walker & Monahan, supra* note 13, at 813.

263. 509 U.S. 579 (1993).

264. *Hall v. Baxter Healthcare Corp.*, 947 F. Supp. 1387, 1392-94 (D. Or. 1996).

265. *Id.* at 1392-93.

266. *Id.* at 1394.

267. *Id.*

268. *Id.* Because Judge Pointer had, in the mean time, "appointed a national panel of experts pursuant to FRE 706 to assist in a similar evaluation of the scientific evidence in the MDL," Judge Jones deferred the effective date of his decision "until the findings of the national Rule 706 panel are available." *Id.*

269. *Winas v. New York & E.R. Co.*, 62 U.S. (21 How.) 88, 101 (1858).

An 1877 English opinion commented similarly on the process and effect of party retention of experts:

[T]he mode in which expert evidence is obtained is such as not to give the fair result of scientific opinion to the Court. A man may go, and does sometimes, to half-a-dozen experts. . . . He takes their honest opinions, he finds three in his favor and three against him; he says to the three in his favor, “will you be kind enough to give evidence?” and he pays the three against him their fees and leaves them alone; the other side does the same. It may not be three out of six, it may be three out of fifty. I was told in one case . . . that they went to sixty-eight people before they found one. . . . I am sorry to say the result is that the Court does not get that assistance from the experts which, if they were unbiased and fairly chosen, it would have a right to expect.²⁷⁰

According to the California Supreme Court, commenting in 1906 in *In re Dolbeer's Estate*,²⁷¹

[the purpose of expert testimony presented by parties] is never to present the fair and accurate view, but the purpose always is to frame a question such that the answer will announce a predetermined result. This kind of expert testimony, given under such circumstances, even the testimony of able and disinterested witnesses . . . is in the eye of the law of steadily decreasing value.²⁷²

The same court, in 1931, noted the “many criticisms of the system of parties employing their own expert witnesses” and the loss of public confidence in such evidence.²⁷³ It quoted Wigmore to explain that loss of confidence:

The principal feature of the breakdown seems to be the distrust of the expert witness, as one whose testimony is shaped by his bias for the party calling him. That bias itself is due, partly to the special fee which has been paid or promised him, and partly to his prior consultation with the party and his self-committal to a particular view. His candid scientific opinion thus has no fair opportunity of expression, or even of formation, swerved as he is by this partisan committal.²⁷⁴

270. *Plimpton v. Spiller*, 6 Ch. D. 412, 415-18 n.2 (1877) (reprinting a motion in a action by Thorn, a licensee of Plimpton, against the Worthington Skating Rink).

271. 86 P. 695 (Cal. 1906).

272. *Id.* at 702.

273. *People v. Strong*, 300 P. 84, 85 (Cal. Ct. App. 1931).

274. *Id.* (quoting JOHN H. WIGMORE, A TREATISE ON THE SYSTEM OF EVIDENCE IN TRIALS AT COMMON LAW, § 563 (2d ed. 1923)); see also William L. Foster, *Expert Testimony—Prevalent Complaints and Proposed Remedies*, 11 HARV. L. REV. 169, 170-71 (1897) (quoting Professor Charles F. Hines, in the *Journal of the Franklin Institute*, Vol. 135, p. 409 (“It is often surprising to see with what facility and to what an extent their views can be made to correspond with the wishes or the interests of the parties who call them. They do not, indeed, wilfully misrepresent what they think, but their judgment becomes so warped by regarding the subject in one point of view that even when conscientiously disposed, they are incapable

These criticisms have been accompanied for at least a hundred years by calls for reform of the expert witness system. Most proposed reforms seek to neutralize experts through greater court involvement in their selection and presentation.

An 1897 Harvard Law Review article described then-current proposals.²⁷⁵ The article described the views of Professor John Ordronaux, who favored experts appointed by the court who would “be regarded as *amicus curiae*, whose opinion should be a conclusive judgment.”²⁷⁶ The expert, according to Ordronaux, “should be free from alliances with either party, and give his opinion only upon an *agreed* statement of facts.”²⁷⁷

The article also refers to unsuccessful efforts in the Massachusetts legislature over a period of twenty years to pass legislative reforms and similar unsuccessful attempts in other states.²⁷⁸ It describes the then-most-recent bill, designed by the Massachusetts Medico-Legal Society and the Boston Medico-Psychological Society, which provided for the court appointment of one or more experts in the absence of agreement by the parties on an expert.²⁷⁹ The compensation of experts would have “been fixed by the court and paid by the county,” with reimbursement to the county by the losing party.²⁸⁰

Learned Hand’s much-cited 1901 Harvard Law Review Article traced the historical origins of expert testimony and proceeded to its own criticisms and proposal for reform.²⁸¹ In Hand’s view, “[t]he serious objections [to expert testimony] are, first that the expert becomes a hired champion of one side; second, that he is the subject of examination and cross-examination and of contradiction by other experts.”²⁸² With regard to the first objection, he noted “the natural bias of one called in such matters to represent a single side and liberally paid to defend it.”²⁸³ Hand was even more concerned, however, with the second objection, and believed essentially that lay juries were not capable of making decisions based on contradictory expert testimony, which produces only confusion. Hand, therefore, proposed a neutral “advisory tribunal”—“a board of experts or a single expert, not called by either side” who would advise the jury with regard to specialized and scientific knowledge.²⁸⁴ Adverse parties would still be free to call experts, but the

of expressing a candid opinion. . . . They are selected on account of their ability to express a favorable opinion, which, there is great reason to believe, is in many instances the result alone of employment and the bias growing out of it.”)).

275. See generally Foster, *supra* note 274.

276. *Id.* at 181.

277. *Id.*

278. *Id.* at 182.

279. *Id.*

280. *Id.* at 183.

281. See Hand, *supra* note 17. Hand, later to become a federal judge on the Second Circuit Court of Appeals, was an attorney in Albany at the time of the publication of the article. See GERALD GUNTER, LEARNED HAND, at 59-61 (1994).

282. Hand, *supra* note 17, at 53.

283. *Id.*

284. See *id.* at 56.

advisory tribunal would conclusively decide the disputed matters.²⁸⁵ Five years after the publication of Hand's article, the California Supreme Court, without citation to Hand, offered a similar proposal in dicta in *In re Dolbeer's Estate*:

The remedy can only come when the state shall provide that the courts, and not the litigants, shall call a disinterested body or board of experts, who shall review the whole situation, and then give their opinion, with their reasons therefor, to the court and jury, regardless of the consequences to either litigant.²⁸⁶

As noted above, Wigmore, in his 1923 evidence treatise, was among the critics of the system of adversary retention and presentation of expert witnesses. Like Hand and other critics, he saw the need to unhinge expert testimony from partisan commitment to an adverse party. In language quoted by the California Supreme Court in 1935 in *People v. Strong*,²⁸⁷ he proposed that the court, rather than the parties, control the selection, retention, and compensation of expert witnesses.

The remedy therefore seems to lie in removing this partisan feature, i.e., by bringing [an expert witness] in court free from any committal to either party. Such a status for the expert would indeed not secure perfection. But it can be asserted that no measure can be effective which does not secure such a status for the expert witness. How can this be done? The essential features, in the abstract, are that the state, not the party, shall be the one to pay his fee, and that the court, not the party, shall be the one to select and summon him.²⁸⁸

Mid-twentieth century uniform law reform efforts continued to reflect the impulse to remove partisanship from the process of expert retention and presentation.²⁸⁹ The Uniform Expert Testimony Act, approved in 1937 by the Commissioners on Uniform State Laws, and adopted with minor changes in the American Law Institute Model Code of Evidence, expressly empowered the court in its discretion to appoint expert witnesses who could be called at trial by the court or a party and identified to the jury as court-appointed.²⁹⁰ Significantly,

285. See *id.* (noting that "the final statement of what was true would be from the assisting tribunal").

286. 86 P. 695, 702 (Cal. 1906); see discussion of *In re Dolbeer's Estate*, *supra* notes 271-72.

287. See discussion, *supra* note 273 and accompanying text.

288. *People v. Strong*, 300 P. 84, 85 (Cal. Ct. App. 1931) (quoting WIGMORE, *supra* note 274, at § 563 (2d ed. 1923)).

289. See Mason Ladd, *Expert Testimony*, 5 VAND. L. REV. 414, 430-31 (1952).

The tendency of present day thinking is in favor of eliminating, as far as possible, the adversary aspects of the use of experts and considering the scientific inquiry more in accord with the practices of the early law where persons with special knowledge got together to discuss the issue with each other and presented the results of their combined judgment.*Id.*

290. See HANDBOOK, NAT'L CONF. COMM'RS ON UNIF. STATE LAWS (1937), at 339-45; ALI MODEL CODE OF EVIDENCE (1942), at 34-36, 198-216; see also, Charles T. McCormick, *Some Observations Upon the Opinion Rule and Expert Testimony*, 23 TEXAS L. REV. 109, 132-33 (1945).

however, the Act did not preclude parties from calling their own experts or require the court to be involved in the process of expert selection and retention.²⁹¹

As noted above, Federal Rule of Evidence 706, adopted in 1972, similarly allows, but does not require, the use of court-appointed experts “on [the court’s] own motion or on the motion of any party.”²⁹² Rule 706 replaced, and was based, in part, on former Rule 28 of the Federal Rules of Criminal Procedure, which was adopted in 1946.²⁹³ The Advisory Committee Notes that accompanied the proposal of Rule 706 considered it merely a codification of the judge’s inherent power.²⁹⁴ The Notes referred to “[t]he practice of shopping for experts, the venality of some experts, and the reluctance of many reputable experts to involve themselves in litigation [as] . . . matters of deep concern.”²⁹⁵ Rule 706(c) gives the court discretion to “authorize disclosure to the jury of the fact that the court appointed the expert witness.”²⁹⁶ Similar provisions are in force in most states.²⁹⁷

Despite the long history of criticism and calls for reform, the typical process of retention and presentation of expert witnesses remains largely unchanged from that criticized in the nineteenth century and in the law reform efforts of the mid-twentieth century. Use of court-appointed experts remains the exception rather than the rule, especially in jury cases.²⁹⁸ Indeed, the commentary to the ABA Civil Trial Practice Standards takes the position that “[c]ourts should be reluctant to have court-appointed experts testify in jury trials.”²⁹⁹ It cautions that “[i]dentification of an expert with the court may artificially enhance that expert’s status and confer a false aura of authority and credibility.”³⁰⁰ Parties unquestionably continue to “shop” for experts favorable to their case. Indeed, under our present system counsel who failed to do sufficient shopping would be negligent in her duties to her client.

Proposals for reform continue, and increasingly focus on greater court involvement in the process of expert selection and retention.³⁰¹ In 1995, the Iowa

291. See McCormick, *supra* note 290, at 132-33.

292. FED. R. EVID. 706(a) (2000).

293. FED. R. EVID. 706 advisory committee note (1972); see *United States v. Collins*, 525 F.2d 213, 215 n.2 (1975) (“Rule 706(a) of the Federal Rules of Evidence has replaced former Rule 28 of the Federal Rules of Criminal Procedure.”).

294. FED. R. EVID. 706(a) (2000) (“The inherent power of a trial judge to appoint an expert of his own choosing is virtually unquestioned. . . . Hence the problem becomes largely one of detail.”).

295. FED. R. EVID. 706 advisory committee note (1972).

296. FED. R. EVID. 706(c) (2000).

297. See *supra* note 253.

298. See Reisinger, *supra* note 255, at 235-36.

299. ABA CIVIL TRIAL PRACTICE STANDARDS, at 31 (Feb. 1998).

300. *Id.*

301. A number of commentators have called for increased use of court-appointed experts. See, e.g., ANGELL, *supra* note 11, at 205 (“The most important reform we could make to raise scientific standards in the courtroom would be for judges to appoint expert witnesses, rather than to rely on witnesses hired by the opposing lawyers.”); Gross, *supra*, note 3; Nancy J. Burke, et. al., *Of Juries and Court-Appointed Experts*, 15 LAW & HUM. BEHAV. 451 (1991); Tabirih V. Lee, *Court-Appointed Experts and Judicial Reluctance: A Proposal to Amend Rule 706 of the Federal Rules of Evidence*, 6 YALE L. & POL’Y REV.

Law Review published a Model Expert Witness Act drafted by participants in a year-long seminar devoted to that project.³⁰² The Preamble to the Model Act reiterates the same problems of bias and confusion that troubled Hand nearly a century earlier.³⁰³ It describes the Model Act's general purpose as "chang[ing] the role of an expert witness from advocate to educator" and "transforming expert witnesses into court-appointed experts" with a neutral mission to "assist in the search for truth."³⁰⁴

The most significant changes in the status quo introduced by the proposed Model Act are contained in its Article 4, which concerns the "Issue Selection, and Appointment and Preparation of Testifying Experts."³⁰⁵ That article would transfer from the parties to the court significant control over the expert selection process. The parties would nominate testifying experts with whom they had had no case-specific communications.³⁰⁶ The court would then create a list of potential testifying experts comprised of those mutually nominated by the parties and any additions of its own.³⁰⁷ With the benefit of answers from the potential experts to written interrogatories submitted by the parties addressing the experts' opinions on relevant issues, the parties would alternately strike experts from the list to arrive at the actual testifying experts.³⁰⁸ The court would retain the power to appoint additional testifying experts.³⁰⁹ The parties would be prohibited from any direct communications with nominees or potential testifying experts about the case for which they had been nominated until after their designations as testifying experts.³¹⁰

As noted in the Preface to the proposed Model Act, Article 4 did not receive the support of a majority of the drafters.³¹¹ A "Minority Report" criticized the Article 4 scheme as administratively burdensome to the court, tending to exclude qualified expert witnesses, and financially burdensome to the parties.³¹² The Minority Report concluded generally that the proposed reform would unduly

480,484-85 (1988); Pamela Louise Johnston, *Court-Appointed Scientific Expert Witnesses: Unfettering Expertise*, 2 HIGH TECH. L.J. 249 (1988); Reisinger, *supra*, note 255; Beverly W. Lubit, Note, *The Time Has Come for Doing Science: A Call for the Rigorous application of Daubert Standards for the Admissibility of Expert Evidence in the Impending Silicone Breast Implant Litigation*, 42 N.Y.L. SCH. L. REV. 147 (1998).

302. Joanne A. Albers, et. al., *Toward a Model Expert Witness Act: An Examination of the Use of Expert Witnesses and a Proposal for Reform*, 80 IOWA L. REV. 1269 (1995).

303. *See id.* at 1276-77.

A major problem that arises when experts are used as advocates in the adversarial process is that conflicting pressures cause experts to slant their testimony which confuses the fact finder. . . . Since experts are readily available to testify to plausible or implausible opinions, the result is a courtroom battle between experts that over-emphasizes disagreements and deprives the fact finder of any helpful consensus in a specialized field.

Id.

304. *Id.* at 1276.

305. *Id.* at 1296.

306. *See id.* at 1297 (§ 4-102).

307. *See id.* at 1298 (§ 4-103).

308. *See id.* at 1299.

309. *See id.*

310. *Id.* at 1301 (§ 4-105).

311. *Id.* at 1274.

312. *Id.* at 1317-21.

handicap the truth-finding capacity of the adversary system by “remov[ing] control from the parties and plac[ing] it in the hands of the judge.”³¹³

Much recent commentary focuses on the court’s role as a gatekeeper for scientific expert testimony and advocates an increased court role in filtering such testimony and protecting juries from invalid or “junk” science.³¹⁴ The Supreme Court’s decision in *Daubert*³¹⁵ and *Daubert*’s lower court progeny, which have invigorated the federal court’s Federal Rule of Evidence 702 “gatekeeper” role,³¹⁶ can themselves be viewed as one response to the problems that arise from party control of expert testimony. As one commentator argues, “evidentiary changes embodied in [*Daubert*] and subsequent opinions can be understood as an attempt to assist jurors with expert evidence by reducing party control over expert testimony.”³¹⁷ In *Kumho Tire Co., Ltd. v. Carmichael*,³¹⁸ the Court held that *Daubert*’s gatekeeping obligations apply, not only to “scientific” testimony, but to all expert testimony.

B. Why Existing Procedural Controls Are Insufficient: Adversary Control Over Witness Selection, Preparation and Compensation

The inherent dangers of perjury and slanted testimony resulting from compensation to witnesses are obvious, and resulted in the general rule prohibiting compensation for testimony. Justifications for the two exceptions to that rule are premised on the necessity of compensation to procure essential testimony and the assumption that existing procedural controls are sufficient to correct for any resulting distortions of testimony. Existing controls are inadequate, however, because the sources of distortion remain largely hidden from triers of fact.

313. *Id.* at 1321.

314. See, e.g., David Faigman, *Mapping the Labyrinth of Scientific Evidence*, 46 HASTINGS L.J. 555, 556 (1995); Leslie A. Lunney, *Protecting Juries from Themselves: Restricting the Admission of Expert Testimony in Toxic Tort Cases*, 48 SMUL. REV. 103 (1994).

315. 509 U.S. 579 (1993); see also *supra* note 210 and accompanying text.

316. *Daubert* rejected the *Frye* “general acceptance” test, which allowed for admission of scientific expert testimony when based on principles “sufficiently established to have gained general acceptance in the particular field in which it belongs.” *Frye v. United States*, 293 F. 1013, 1014 (D.C. Cir. 1923). It replaced the *Frye* test with a “scientific validity” test, requiring the trial court judge to make “a preliminary assessment of whether the reasoning or methodology underlying the testimony is scientifically valid and of whether that reasoning or methodology properly can be applied to the facts in issue.” *Daubert*, 509 U.S. at 592-93. The court suggested four factors in making that assessment: 1) whether the expert’s theory or technique “can be (and has been) tested”; 2) whether the theory or technique “has been subjected to peer review and publication”; 3) “the known or potential rate of error” of a technique; and 4) *Frye*’s “general acceptance.” *Id.* at 593-94. Although one could conclude that *Daubert* lowered the admissibility standard, because “general acceptance” is no longer required, in practice “courts, especially federal courts, are less willing to admit marginal expert testimony than they were pre-*Daubert*.” Joseph Sanders, *Scientifically Complex Cases, Trial by Jury, and the Erosion of the Adversarial Process*, 48 DEPAUL L. REV. 355, 369 (1998).

317. Sanders, *supra* note 316, at 357.

318. 526 U.S. 137, 141 (1999).

1. Justifications

a. Necessity

The incentive of compensation in the form of lenient treatment or even cash rewards is generally considered necessary to induce cooperating witnesses, who would otherwise assert their Fifth Amendment rights against self-incrimination, and who are generally reluctant and sometimes fearful, to incriminate their associates in crime. Especially in cases involving accomplices and co-conspirators, many argue that the government must have the ability to secure the testimony of one co-conspirator against another in order to prosecute crime effectively.³¹⁹

The practice of paying expert witnesses in criminal and civil cases is also justified on the grounds that it is necessary. Despite currents to the contrary at the turn of the last century,³²⁰ it is currently generally accepted that technical, scientific, and other expert testimony is necessary to resolve many controversies central to civil and criminal litigation, and that experts cannot be compelled to devote the necessary time and attention to resolving those controversies and preparing to testify, unless they are compensated at customary professional rates.³²¹

b. Procedural Controls

While the incentives for perjury and slanted testimony inherent in compensating witnesses are universally acknowledged, the assumption is that those dangers are adequately controlled by existing procedural safeguards. Courts and commentators have concluded generally that juries can adequately judge witness credibility if the sources of bias are disclosed and aired in cross-examination.³²² In the case of cooperating witnesses, that means that the

319. See, e.g., Hughes, *supra* note 105, at 34:

Law enforcement's success has always depended heavily on criminals' willingness to cut each other's throats. Courts should not deny juries the opportunity to hear testimony that is very often decisive and true, nor should they deny society this most useful tool for convicting the guilty. A substantial number of valid convictions would be lost if these practices were forbidden.

Id. See also Gowdy, *supra* note 90, at 474-77.

320. See discussion *supra* Part III.B.3 and accompanying notes.

321. See, e.g., Buchman v. State, 59 Ind. 1, 13 (1877) ("But, if the professional services of a lawyer cannot be required in a civil or criminal case without compensation, how can the professional services of a physician be thus required? . . . When a physician testifies as an expert, by giving his opinion, he is performing a strictly professional service."); Foster, *supra* note 274, at 176; cf. Walker v. Squier, 139 F.2d 28, 29 (9th Cir. 1943) (rejecting claim that excessive payments to experts amounted to bribery and denied criminal defendant fair trial; "[u]ndesirable as the practice may be of paying experts at rates higher than paid other witnesses, its stigma has not yet so crystallized as to have its condemnation formulated in a rule of law").

322. See, e.g., United States v. Grimes, 438 F.2d 391, 395-96 (6th Cir. 1971) ("[W]e prefer the rule that would leave the entire matter to the jury to consider in weighing the credibility of the witness informant. . . . In our view this approach provides adequate safeguards for the criminal defendant against possible abuses since the witness must undergo the rigors of cross-examination."); accord United States v. Jones,

cooperation agreement is fully disclosed to defense counsel, the witness is subject to cross-examination regarding the agreement, and defense counsel can point out the source of bias in closing argument.³²³ In the case of paid experts, their fee agreement and communications with counsel and parties are discoverable, and may be explored in cross-examination.

Courts also routinely give cautionary instructions warning jurors to be skeptical about the testimony of cooperating witnesses, although failure to instruct will generally not result in a finding of reversible error.³²⁴ The pattern instruction authorized by the Eleventh Circuit is typical:

The testimony of some witnesses must be considered with more caution than the testimony of other witnesses. For example, a paid informer, or a witness who has been promised that he or she will not be charged or prosecuted, or a witness who hopes to gain more favorable treatment in his or her own case, may have a reason to make a false statement because the witness wants to strike a good bargain with the Government. So, while a witness of that kind may be entirely truthful when testifying, you should consider that testimony with more caution than the testimony of other witnesses.³²⁵

While instructions are also routinely given regarding expert testimony, they generally do not call attention to the fact that the witness may be receiving a fee for testimony or advise particular caution due to that fact. A pattern instruction approved by the Ninth Circuit for both civil and criminal cases is typical:

You have heard testimony from persons who, because of education or experience, are permitted to state opinions and the reasons for their opinions Opinion testimony should be judged just like any other testimony. You may accept it or reject it, and give it as much weight as you think it deserves, considering the witness' education and experience,

575 F.2d 81, 85-86 (6th Cir. 1978); *United States v. Dailey*, 759 F.2d at 200; *see also* Gowdy, *supra* note 90, at 472 ("So long as leniency bribes are fully documented and made available to defense counsel, the out-of-court dangers of leniency bribes can be corrected in the courtroom."); Beeman, *supra* note 215, at 808 ("[C]ourts have determined that mandatory disclosure of the terms of [cooperation] agreements and defense attorneys' cross-examinations sufficiently expose incentives to lie so that jurors can properly weigh witnesses' credibility.").

323. *See, e.g.*, *United States v. Cervantes-Pacheco*, 826 F.2d at 315-16 (articulating procedural safeguards for use of cooperating witness testimony).

324. *See* Gowdy, *supra* note 90, at 469; *see also* Hughes, *supra* note 105, at 33 ("Courts should instruct juries to consider how easily suspects with inside knowledge can fabricate testimony and the strong incentive for suspects to do so when their liberty may depend upon it.").

325. ELEVENTH CIRCUIT, PATTERN JURY INSTRUCTIONS, CRIMINAL (West 1997), at 45.

the reasons given for the opinion, and all the other evidence in the case.³²⁶

The concept of the neutral prosecutor is an additional factor that is sometimes invoked to justify the prosecutor's unique power to compensate fact witnesses. Unlike other adversaries, the prosecutor's primary duty is not to prevail in litigation, but to see that justice is done.³²⁷ Viewed from this neutral perspective, the power to compensate witnesses does not, some argue, have the same potential to corrupt the truth-finding process.³²⁸

c. Is Compensation to Witnesses Really Necessary?

One could argue that compensation to cooperating witnesses in criminal cases is simply not, contrary to accepted wisdom, necessary to effective prosecution of crime. The prosecutor always has the option of immunizing and, thereby, compelling the testimony of a witness who would otherwise rely on the Fifth Amendment.³²⁹ On the other hand, the policy of offering lenient treatment in exchange for testimony as a means of rewarding cooperation and facilitating criminal prosecutions has deep roots in our system of criminal justice, beginning with the ancient doctrine of approvement and the subsequent practice of turning "king's evidence" or "state's evidence."³³⁰ Given this long history, the facility, if not the necessity of retaining some inducement to cooperation, is difficult to dismiss. Hughes is likely correct in concluding that "[a] substantial number of valid convictions would be lost if [inducements to cooperating witnesses] were forbidden."³³¹

The argument against necessity is more difficult to make in the case of expert witnesses. Even the nineteenth and early twentieth century cases that took issue with an expert's right to be compensated for testimony acknowledged that an expert could not be compelled without payment to do special work on case-specific issues to prepare herself for testimony.³³² If unaffiliated experts could not be engaged to address the many scientific and technical issues raised by modern litigation, the resolution of those issues would be even more idiosyncratic than it is now. We could perhaps summon experts to court duty as we summon all

326. NINTH CIRCUIT MANUAL OF MODEL JURY INSTRUCTIONS, CIVIL (West 1997), at 39; NINTH CIRCUIT MANUAL OF MODEL JURY INSTRUCTIONS, CRIMINAL (West 1997), at 73.

327. See, e.g., *Singer v. United States*, 380 U.S. 24, 37 (1965) (quoting *Berger v. United States*, 295 U.S. 78, 88 (1935)) ("[T]he government attorney in a criminal prosecution is not an ordinary party to a controversy, but a 'servant of the law' with a twofold aim . . . that guilt shall not escape or innocence suffer.").

328. See, e.g., David A. Slansky, *Starr, Singleton, and the Prosecutor's Role*, 26 *FORDHAM URB. L.J.* 509 (1999).

329. See 18 U.S.C. § 6002 (2000); see also *Singleton I*, *supra* note 15, at 1353 ("[C]ompulsory process is lawful and available and avoids the taint on truthfulness which attends unlawful witness gratuities.").

330. Cf. Gerard V. Bradley, *Plea Bargaining and the Criminal Defendant's Obligation to Plead Guilty*, 40 *S. TEX. L. REV.* 65, 66 (1999) (arguing that "principles and norms which justify and shape punishment of criminals, not only allows, but requires favorable consideration of the pleading defendant.").

331. Hughes, *supra* note 105, at 34.

332. See *supra* notes 258-60 and accompanying text.

citizens to jury duty. This was, after all, the practice in ancient times.³³³ The required sacrifice of income on the part of this designated class of citizens, however, makes such a proposal probably unfeasible, even if constitutional.

2. The Inadequacy of Existing Procedural Controls

Accepting that both exceptions to the normal prohibition on payments to witnesses have great utility even if not necessary, the question is whether existing procedural safeguards are adequate to control the resulting inducements for perjury and slanted testimony. Reliance on those safeguards assumes that jurors (or judges in bench trials), with full disclosure of the sources of witness bias, can adequately judge witness credibility. Accepting that assumption, however, its premise—that the current controls provide full disclosure of the sources of witness bias—is flawed. The relied-on controls provide inadequate correction to distortions of the truth-finding process because significant sources of distortion—in particular, the processes by which compensated witnesses are selected and their testimony developed—remain largely hidden from the trier of fact. In addition, allowing adversary control of paid witnesses means that those witnesses have no opportunity for neutral formation of their testimony.

a. Cooperating Witnesses

The process by which witnesses are selected for compensation in criminal prosecutions is asymmetrical in two related and significant ways. First, the option to compensate a witness is available only to the prosecution and not to the defense. Second, prosecutors have no incentive to, and as a matter of practice do not, offer compensation in exchange for exculpatory testimony.

Former Fifth Circuit Judge Alvin Rubin, while reluctantly concurring in *Cervantes-Pacheco* despite his observation that compensation to cooperating witnesses contingent on the substance of their testimony is “a breach of ethical standards” and results in “perversion of the trial process,” assumed that the option to compensate witnesses would at least be equally available to the defense: “If the government may do so, the defendant presumably may also employ experts and other witnesses to testify for a fee contingent on his acquittal.”³³⁴ In fact, however, no case has so held. All courts considering the issue have held that any compensation, let alone contingent compensation, to defense witnesses is improper, even if for truthful testimony.³³⁵ Even if not ethically prohibited,

333. See *supra* Part III.B.1.

334. 826 F.2d at 316; see also *id.* (Goldberg, J., dissenting) (“Decency, security, and liberty alike demand that government officials shall be subjected to the same rules of conduct that are commands to the citizen.”) (citing *Olmstead v. United States*, 277 U.S. 438, 484 (1928)); see also discussion of *Cervantes-Pacheco*, *supra* notes 111-18 and accompanying text.

335. See *supra* notes 44-47 and accompanying text.

however, defense counsel would have no authority to provide the compensation most valued by accomplice witnesses. Only prosecutors currently have authority to offer or even advocate lenient treatment for witnesses.³³⁶

That authority is, in practice, never exercised to reward exculpatory testimony. Every defendant or target of an investigation knows that her only possibility of making a deal with the government for lenient treatment is a proffer of testimony helpful in convicting another defendant or target. Indeed, for a cooperating witness to obtain a downward departure from the federal sentencing guidelines, the government must state in its motion “that the defendant has provided substantial assistance in the investigation or prosecution of another person who has committed an offense.”³³⁷ In this sense, our present system is more similar to the ancient practice of approvement,³³⁸ which required the conviction of another defendant, than to the system of turning “king’s evidence” or “state’s evidence,” in which favorable treatment depended only on full and truthful disclosure. The proffers of would-be cooperating witnesses and the ultimate testimony of cooperating witnesses are necessarily skewed as a result.

The criminal justice process is not, of course, intended to be symmetrical. Most notably, the government must prove its case beyond a reasonable doubt. One might argue, therefore, that the government is entitled to this procedural advantage because of the burden of proof that it must shoulder. The government’s burden of proof is premised, however, on the principle that criminal justice should err on the side of the accused and that the accused should be deprived of life or liberty only in the clearest cases. Ad hoc justification of procedural advantages to the government on the grounds that it has the burden of proof would undermine this principle with the result of leveling a playing field that is constitutionally intended to be uneven.³³⁹ As demonstrated above, the government did not have the power to control compensation to cooperating witnesses at the time of the ratification of the Constitution.

Some might also argue that these asymmetries are justified because the government faces larger obstacles than does the defense in securing testimony. Those most likely to have relevant testimony—associates of the defendant and co-

336. The Third and Ninth Circuits have recognized a narrow prosecutorial misconduct exception to this general rule. *See, e.g.*, *United States v. Westerdahl*, 945 F.2d 1083, 1086-87 (9th Cir. 1991) (describing the requirements to show prosecutorial misconduct); *United States v. Lord*, 711 F.2d 887, 892 (9th Cir. 1983); *Gov’t of Virgin Islands v. Smith*, 615 F.2d 964, 968-69 (3rd Cir. 1980). In the Ninth Circuit, a criminal defendant can compel the government to grant immunity to a witness on a showing “that: (1) the testimony was relevant; and (2) the government distorted the judicial fact-finding process by denying immunity.” *United States v. Young*, 86 F.3d 944, 947 (9th Cir. 1996) (citing *Lord*, 711 F.2d at 892); *cf.* *United States v. Herman*, 589 F.2d 1191, 1204 (3rd Cir. 1978) (Defendant must show government decision not to provide immunity to defense witness was “made with the deliberate intention of distorting the judicial fact finding process.”). *But see, e.g.*, *United States v. Fricke*, 684 F.2d 1126, 1130 (5th Cir. 1982) (Defendant cannot “compel the government to grant use immunity to witnesses he desires to call.”). This may occur where the government relies heavily on cooperating witness testimony and refuses to immunize witnesses who would contradict that testimony. *Westerdahl*, 945 F.2d at 1087.

337. U.S. Sentencing Guidelines Manual, § 5K1.1 (1987).

338. *See* discussion *supra* Part II.A.

339. *Cf. Wardius v. Oregon*, 412 U.S. 470, 476 n.9 (1973) (“[T]he State’s inherent information-gathering advantages suggest that if there is to be any imbalance in discovery rights, it should work in the defendant’s favor.”).

conspirators—will be more reluctant, out of sympathy or fear, to come forward with inculpatory testimony. Defendants, it might be argued, do not need the inducement of compensation in order to secure exculpatory witnesses.³⁴⁰ The problem is, however, that the prosecution and defense are often competing for the truthful testimony of witnesses whose primary concern is their own exposure to prosecution. In the case of an alleged accomplice or co-conspirator, the potential witness' own interest in liberty or even life will often be at odds with that of the defendant. There will be a natural tendency to shift blame even without the promise of lenient treatment from the government.³⁴¹ Natural sympathies or even fears will seldom compete successfully with the government's enormous coercive power over witnesses who are defendants or potential defendants.³⁴²

For cooperating witnesses, the pressure to provide testimony sufficient to convict another defendant continues throughout the process of indictment and trial. Sentencing of a cooperating witness who has entered into a plea bargain, and the government's performance of its part of that bargain, are usually withheld until all desired cooperation is complete.³⁴³ While the agreement disclosed to the trier of fact will typically call only for "full cooperation" and "truthful" testimony, what is "truthful," and whether the witness is entitled to compensation, will be determined largely if not entirely by the prosecutor.³⁴⁴ "Truthful" will necessarily be defined as consistent with the proffer that inculpated another defendant and led to the cooperation agreement. Even in the case of a witness given immunity for testimony, charges may still be brought, or the witness may be prosecuted for perjury if she does not testify "truthfully" in accord with her prior proffer or statements.³⁴⁵

340. *But see* RUTH BRANDON & CHRISTIE DAVIES, *WRONGFUL IMPRISONMENT: MISTAKEN CONVICTIONS AND THEIR CONSEQUENCES* (1973), at 128 (discussing reluctance of exculpatory witnesses to come forward).

341. The government also has the option of offering cash. As noted by one commentator, "[i]nformants who receive monetary compensation may find that informing is safer and more lucrative than a life of crime." Haglund, *supra* note 92, at 1407.

342. *See* *Washington v. Texas*, 388 U.S. 14, 22–23 (1967).

Common sense would suggest that [an accused accomplice] often has a greater interest in lying in favor of the prosecution rather than against it, especially if he is still awaiting his own trial or sentencing. To think that criminals will lie to save their fellows but not to obtain favors from the prosecution for themselves is indeed to clothe the criminal class with more nobility than one might expect to find in the public at large.

Id.

343. *See, e.g.,* Rowland, *supra* note 2, at 686 ("Do not commit to a sentencing recommendation or to an agreement to move for a downward departure based upon substantial assistance under the sentencing guidelines, until the witness has fulfilled his agreement to cooperate fully.").

344. *See supra* note 97 and accompanying text. A motion for sentencing reduction based on "substantial assistance" can be made only by the government, while offers of immunity or non-prosecution are totally within the discretion of the prosecution. *See id.*

345. A cooperating witness will usually receive only "use" immunity not "transactional" immunity. Federal statutes provide only for use immunity. *See* 18 U.S.C. §6003(b) (2000). Use immunity only "prohibits the government from using the accomplice's immunized testimony, or any evidence derived thereof, in a subsequent prosecution." Gowdy, *supra* note 90, at 463. The government can still prosecute the immunized witness so long as it does not rely on the immunized testimony. *See* *Kastigar v. United*

In this sense, nearly every cooperation agreement is in reality “contingent.” Some agreements, for example, those allowed by federal courts in *United States v. Cervantes-Pacheco*³⁴⁶ or *United States v. Dailey*,³⁴⁷ may depend overtly on the resulting indictment or conviction of another defendant,³⁴⁸ and some, such as the agreement condemned by the California Supreme Court in *People v. Medina*,³⁴⁹ may depend overtly on testimony consistent with prior statements.³⁵⁰ Agreements that make lenient treatment contingent only on “full cooperation” and “truthful” testimony, as determined by the government, will have, however, little coercive power over the witness.³⁵¹ Indeed, the savvy prosecutor will prefer such an agreement, because it will be nearly, if not fully, as effective to compel inculpatory testimony, but will leave the witness free to testify, and the prosecutor free to argue, that the cooperation agreement calls only for “truthful” testimony.

The prosecutor’s control over the compensation of cooperating witnesses also results in unequal access to the witness for development of and preparation for trial testimony. Although a prosecutor cannot ethically prohibit a witness from meeting with defense counsel,³⁵² as a practical matter, a cooperating witness, whose fate depends on the prosecutor’s evaluation of her “full cooperation,” is under the control of the prosecution and is unavailable to defense counsel. The prosecutor will, therefore, have the exclusive opportunity to prepare the witness, counseling and shaping her direct testimony and alerting her to the anticipated snares of cross-examination. Because discovery depositions are rarely allowed in criminal cases,³⁵³ defense counsel, on the other hand, may hear crucial aspects of the witness’ testimony for the first time at trial. This is particularly true in federal prosecutions, which typically proceed through indictment by a grand jury, from whose proceedings defense counsel are excluded,³⁵⁴ without the benefit of a

States, 406 U.S. 441 (1972).

346. 826 F.2d 310 (5th Cir.1987).

347. 759 F.2d 192 (1st Cir. 1985) (holding that risk of perjury, although substantial, does not rise to the level of a due process violation).

348. See *supra* notes 111-15 and accompanying text; *supra* notes 136-43 and accompanying text.

349. 799 P.2d 1282 (Cal. 1990) (allowing the jury to draw an adverse inference from the defendant’s silence).

350. See *supra* notes 181-89 and accompanying text.

351. See *Accomplice Testimony Under Conditional Promise of Immunity*, *supra* note 80, at 140.

Yet but a slight and purely quantitative difference exists between [the pressure exerted by an overtly contingent agreement] and that exerted upon a witness promised immunity for testifying fully and fairly. In either case the accomplice doubtless feels that no immunity will be proffered unless the prosecuting attorney believes that his testimony will at least tend to incriminate the defendant.

Id.

352. See ABA STANDARDS FOR CRIMINAL JUSTICE (2nd ed. 1980), at Standard 3–3.1(c) (“A prosecutor should not discourage or obstruct communication between prospective witnesses and defense counsel. It is unprofessional conduct for the prosecutor to advise any person or cause any person to be advised to decline to give to the defense information which such person has the right to give.”).

353. FED. R. CRIM. P. 15 (allowing depositions only by order of the court when “due to exceptional circumstances of the case it is in the interest of justice that the testimony of a prospective witness of a party be taken and preserved for use at trial. . . .”).

354. See FED. R. CRIM. P. 6, 7.

preliminary hearing.³⁵⁵ Even though a witness' grand jury testimony will be available at or prior to trial, that testimony, because not subject to cross-examination, will provide limited discovery to defense counsel.³⁵⁶ Moreover, the prosecutor often simply chooses not to present the cooperating witness to the grand jury.

Cross-examination and cautionary jury instructions do not adequately correct for the distortions created by the government's power to compensate cooperating witnesses because they cannot effectively penetrate the process by which the government selects, prepares, and evaluates those witnesses.³⁵⁷ Under current rules, the processes by which prosecutors or law enforcement officers make decisions about what targets are most culpable and whose testimony is most useful, prepare cooperating witnesses for trial, and dole out immunity and plea bargains accordingly, are largely undiscoverable.³⁵⁸ Even that which is discoverable often remains resistant to realistic portrayal at trial.

The prosecutor's or law enforcement officer's selection of cooperating witnesses—the determination of what targets will receive immunity or be offered plea bargains—is often a crucial stage in the prosecution. The government may, for example, be confronted with inconsistent proffers from two or more targets, or a proffer from one target offering testimony against another target who maintains that she is innocent. A prosecutor's decision regarding whom to charge and to whom to offer cooperation may result in widely varying sentences, or even immunity for one suspected accomplice and substantial punishment for another. Yet, those decisions are often based on statements or proffers from would-be cooperators that are distorted by the knowledge that only significant assistance in proving the culpability of another target is likely to be rewarded with lenient treatment. Decisions regarding offers of leniency may depend as much on the skill and promptness of defense counsel in soliciting a deal as on a carefully considered assessment of relative culpability.

Dependence on accomplice testimony and use of cooperation agreements are most likely to occur, moreover, in just those cases where the extrinsic evidence is not sufficient, or only marginally sufficient to convict any suspected accomplice.³⁵⁹

355. Even where a preliminary hearing is held, the prosecution may proceed in many states through hearsay testimony of a law enforcement officer without exposing key witnesses to examination by defense counsel. *See, e.g.*, Cal. Penal Code § 872(b) (West 2000) (allowing hearsay testimony by law enforcement officer in support of finding of probable cause at preliminary hearing); *see also* Paul G. Cassell, *Balancing the Scales of Justice: The Case for and Effects of Utah's Victims' Rights Amendment*, 1994 UTAH L. REV. 1373, 1424 & n.263.

356. As a matter of federal statutory law, the prosecution is not required to disclose a witness' grand jury testimony until the witness testifies at trial. 18 U.S.C. § 3500(a) (1994). In order to avoid trial delays, however, federal prosecutors will typically make grand jury testimony available prior to trial.

357. Gowdy, *supra* note 90.

358. *See generally* Fed. R. Crim. P. 16 (providing limited discovery rights to the defense).

359. *U.S. v. Reid*, 19 F.Supp 2d 534, 537 (E.D. Va. 1998) (noting that "there are situations where those individuals [co-conspirators] may be the only credible witnesses of criminal activity and, without their testimony, the government would not be able to obtain convictions").

The same lack of evidence will make it difficult or impossible for the prosecutor to determine with any assurance which suspected accomplice or accomplices are telling the truth (or the closest approximation of the truth), and for the prosecutor to make the correct determination of their relative culpability.³⁶⁰ Particularly in the case of violent or high-profile crimes, these determinations will often be made under pressure to resolve the case by convicting someone.³⁶¹

The celebrated story of the wrongful conviction of Randall Dale Adams for the murder of a Dallas police officer, documented in the film, *THE THIN BLUE LINE*³⁶² and in Adams' own book, *ADAMS V. TEXAS*,³⁶³ vividly demonstrates this phenomenon.³⁶⁴ The state's key witness at trial was the actual murderer, David Harris, who testified under a grant of immunity. In choosing to make Harris a witness and Adams the defendant, prosecutors, under pressure to produce a conviction for the "cop killing," were apparently motivated, at least in part, by two factors: 1) Harris, unlike Adams, was a minor and not subject to the death penalty; and 2) by accepting Harris' story they had an eyewitness to the murder that Harris had, in fact, committed alone.³⁶⁵

Once the prosecutor's selection—who will be the defendant(s) and who will be the witness(es)—is made, the case will be developed and evidence will be evaluated and presented from the perspective of the selected theory of culpability.³⁶⁶ Cross-examination by effective defense counsel will bring out the cooperator's incentives to lie with sometimes substantial impact, especially where the witness can be made to appear equally or more culpable than the defendant.³⁶⁷ Cross-examination cannot, however, penetrate the selection process itself, which is the prosecutor's work product and likely undocumented except in a prosecution memorandum that views the evidence from the perspective of culpability determinations already made. While the cooperation agreement itself will be in evidence, the very ambiguity of its contingency will allow the witness to testify that she has been given no assurances and has simply agreed to tell the "truth." Paradoxically, the

360. United States Attorney General Robert Jackson, Address at the Second Annual Conference of United States Attorneys (Apr. 1, 1940) ("If the prosecutor is obliged to choose his cases, it follows that he can choose his defendants. Therein is the most dangerous power of the prosecutor: that he will pick the people he thinks should get, rather than pick cases that need to be prosecuted."), reprinted in ELLIOTT ABRAHMS, *UNDUE PROCESS: A STORY OF HOW POLITICAL DIFFERENCES ARE TURNED INTO CRIMES* and Robert D. Herman, *Mandatory Minimum Drug Sentences—Can They Be Any Less Draconian?* 16 T.M. COOLEY L. REV. 99, n.158 (1999).

361. See, e.g., DWYER, *supra* note 4, at xvi ("After a violent crime, both the damaged victim and society seek the equilibrium of prosecution, as relentlessly as ice will melt and boiled water will cool.")

362. (H.B.O. 1988).

363. RANDALL DALE ADAMS, ET AL., *ADAMS V. TEXAS* (1991).

364. See generally C. RONALD HUFF, ET AL., *CONVICTED BUT INNOCENT: WRONGFUL CONVICTION AND PUBLIC POLICY* (1996), at 33-46 ("Randall Dale Adams: Injustice in Dallas").

365. *Id.* at 37-38 ("If the prosecution blamed [Adams], it had a witness who said he was sitting in the passenger's seat at the time. If it chose Harris, it had no witness.") (quoting *Adams v. Texas* (1991)); see also Michael L. Radelet, et al., *Prisoners Released From Death Rows Since 1970 Because of Doubts About Their Guilt*, 13 T. M. COOLEY L. REV. 907, 923-24 (1996) (describing the *Adams* case).

366. See DWYER, *supra* note 4, at 237 ("[T]he psychological process of indicting and convicting a man is far more subtle than just pieces of evidence. . . . The prosecutor persuades himself of the suspect's guilt, and then observes facts and evidence only through that prism.")

367. See Gowdy, *supra* note 90. ("[T]he art of cross-examination permits a defendant, just like any other litigant, to expose an accomplice's bias and lack of credibility. . . .")

more the witness' fate depends on the success of the prosecution, the more resistant the witness will be to cross-examination. A witness whose future depends on currying the government's favor will formulate a consistent and credible story calculated to procure an agreement with the government, and will adhere religiously at trial to her prior statements.³⁶⁸

Nor can cross-examination effectively penetrate the witness preparation process.³⁶⁹ The prosecutor's preparation sessions with witnesses will be unrecorded and undiscoverable. While defense counsel will be able to elicit acknowledgment that the witness has met with the prosecution to prepare, a well-prepared witness' account of those sessions will be otherwise opaque: "The prosecutor asked me the same questions she asked me today and told me to tell the truth." While perhaps accurate as far as it goes, such accounts will allow the jury little insight into the significance and nuance of the prosecutor's effectively exclusive opportunity to prepare and rehearse with the witness for what is often the crucial testimony in an accomplice case.

Justifications for allowing compensation to witnesses cooperating with the government in criminal cases also rely on the concept of the "neutral" prosecutor. As ideally conceived, the prosecutor, unlike other adversaries, is not interested in obtaining convictions but only in seeing that justice is done.³⁷⁰ The prosecutor's selection of cooperating witnesses and development of their testimony is trustworthy, it is argued, because done impartially to serve justice.³⁷¹

There are several problems with reliance on the neutrality of the prosecutor in this context. First, while the prosecutor may be truly neutral at the charging stage,³⁷² as noted above, charging decisions may be made on limited and/or

368. See Beeman, *supra* note 215, at 821 ("The greater the witness's stake in the prosecution's success, the less an exhaustive cross-examination will reveal."); Eisenstadt, *supra* note 215, at 781 ("The most extensive and exhaustive cross-examination is likely to prove fruitless if the stake of the witnesses in the success of the prosecution is as intense as that in *Dailey*. . . .").

369. Lisa Renee Salmi, *Don't Walk the Fine Line: Ethical Considerations in Preparing Witnesses for Deposition and Trial*, 18 REV. LITIG. 135, 142-43 (1999) ("[C]ross-examination will not always uncover a witness preparation session or the extent to which the attorney has coached the witness.").

370. See *supra* note 326 and accompanying text; see also Bruce A. Green, *Why Should Prosecutors "Seek Justice"?*, 26 Fordham Urb. L.J. 607, 633-34 (1999).

[T]he duty [to seek justice] is said to be premised on prosecutor's extraordinary powers and their unique role as 'the representative not of an ordinary party to a controversy, but of a sovereign whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done.

Id. (citing *Berger v. United States*, 295 U.S. 78, 88 (1935)).

371. See Slansky, *supra* note 328.

372. But see H. RICHARD UVILLER, *THE TILTED PLAYING FIELD: IS CRIMINAL JUSTICE UNFAIR?* 61 (1999).

Prosecutors on the scene are rarely the neutral and detached counterpart of even the quasi-judicial figure who presides at the European investigation. . . . [P]rosecutors generally see themselves primarily as partisans, a mantle that is not easily shed when they are in the guise of investigator. As they see it, the job of investigation is mainly to choose an adversary wisely and, having chosen, to build strength for the government's case.

Id.

contradictory accounts and under the pressure to indict someone. Secondly, while the prosecutor (unlike defense counsel) is ethically bound not to rely on false inferences from the evidence,³⁷³ the prosecutor can be expected, for the most part, to function like any other adversary at the trial and trial preparation stages. She will select her evidence and prepare her witnesses to build the strongest possible case for the version of justice to which she has committed herself through choices at the charging stage. Some, especially in high-profile cases where the pressure for resolution through conviction of someone is greatest, will go farther. Dwyer, Neufeld & Scheck found that prosecutorial misconduct was a factor in twenty-six percent of the cases of wrongful conviction that they analyzed.³⁷⁴ As two British commentators observed:

The drive to get a conviction at all costs by police or prosecutor is a major factor causing wrongful imprisonment in America. . . . This is largely the result of continuous public pressure on the police and prosecutors to get convictions due to the very high rates of crime and especially violent crime in America.³⁷⁵

For the prosecutor who feels the pressure “to get a conviction at all costs,” shoring up a weak case by purchasing the testimony of a cooperating witness is a standard expenditure.

The concept of the neutral prosecutor may also undermine the effectiveness of the other controls relied on—cross-examination and cautionary instructions. While jurors in some venues may begin with a distrust of law enforcement authorities on which defense counsel can effectively build,³⁷⁶ jurors will more often assume that the prosecution has made the correct choices as to relative culpability and truthfulness and has charged those who ought to be charged.³⁷⁷

373. See, e.g., Harry I. Subin, *The Criminal Lawyer's "Different Mission": Reflections on the "Right" to Present a False Case*, 1 GEO. J. LEGAL ETHICS 125 (1987); John B. Mitchell, *Reasonable Doubts are Where You Find Them: A Response to Professor Subin's Position on the Criminal Lawyer's "Different Mission"*, 1 GEO. J. LEGAL ETHICS 339 (1987); Harry Subin, *Is This Lie Necessary? Further Reflections on the Right to Present a False Defense*, 1 GEO. J. LEGAL ETHICS 689 (1988).

374. DWYER, *supra* note 4, at app. 2; see also *Zahrey v. Coffey*, 221 F.3d 342 (2d Cir. 2000) (sustaining against claim of qualified prosecutorial immunity cause of action based on allegation that the Assistant United States Attorney fabricated testimony in investigative stage by pressuring and bribing cooperating witnesses to give false testimony through offers of lenient treatment).

375. BRANDON & DAVIES, *supra* note 340, at 244.

376. See, e.g., Richard Lempert, *Playing the "Culture Card": Trials in a Multicultural Democracy*, 5 CARDOZO J. INT'L & COMP. L. 113 (1997).

377. As one commentator describes this “white-hat factor.”

An axiom of deep gravity in the trial of criminal cases is that the prosecutors, and the victims they speak for, are the good guys; the defendant and his lawyers are the bad. Among jurors, exerting a pull you can almost feel, is a disposition brought into the jury box from real life, a disposition to identify with the victim, to regard law enforcement forces as the vindicators, and to suspect that all defendants are probably guilty (or else they wouldn't be there, would they?). . . . To the defense bar, this hostile predisposition is the root of the actual, legal presumption of guilt that all but eclipses the overt, legal presumption of innocence in every criminal trial.

UVILLER, *supra* note 372, at 113.

Because testimony by cooperating witnesses who are receiving lenient treatment for their testimony pervades our criminal justice system,³⁷⁸ and because the safeguards relied on to correct the resulting distortion of evidence presented to the trier of fact are inadequate, crucial decisions regarding culpability and truthfulness are, in effect, often made by prosecutors rather than jurors. One result is cynicism about our criminal justice process, particularly among those subject to it. There is widespread perception that the often widely-diverging results of the process for similarly situated targets of criminal investigations depend primarily on who made the best deal, that is, who was the biggest snitch.³⁷⁹

Compensation to cooperating witnesses may contribute, not only to unwarranted disparities in charging and sentencing of co-perpetrators, but to wrongful convictions of the innocent. A 1987 study published in the *Stanford Law Review* by Bedau and Radelet catalogued 350 cases of erroneous convictions in potentially capital cases and classified the causes of error in those cases.³⁸⁰ The leading cause, contributing to error in a third of those cases (117 cases total), was “[p]erjury by prosecution witness.”³⁸¹ The authors did not calculate how many of these cases involved witnesses receiving or seeking lenient treatment in exchange for their testimony, and their accounts do not always allow for that determination.³⁸² It can be determined from the appendix descriptions, however, that in at least thirty-five of the 350 cases, conviction was based on the testimony of a co-defendant, informant or jailhouse snitch.³⁸³

378. See *supra* notes 1-2 and accompanying text.

379. See Weinstein, *supra* note 1, at 617 (“[T]he overactive market in cooperation is a great source of dishonesty and evasion and a still uncertain amount of unwarranted disparities among individual defendants”).

380. See Hugo Adam Bedau & Michael L. Radelet, *Miscarriages of Justice in Potentially Capital Cases*, 40 STAN. L. REV. 21 (1987) [hereinafter *Miscarriages*]. But compare Stephen J. Markman & Paul G. Cassell, *Protecting the Innocent: A Response to the Bedau-Radelet Study*, 41 STAN. L. REV. 121, 126 (1988) (criticizing Bedau and Radelet’s determination of “innocence”) with Hugo Adam Bedau & Michael L. Radelet, *The Myth of Infallibility: A Reply to Markman and Cassell*, 41 STAN. L. REV. 161 (1988) (responding to Markman’s and Cassell’s criticism). In subsequent publications, Bedau and Radelet updated and supplemented their catalogue of erroneous convictions in potentially capital cases. See MICHAEL L. RADELET, ET AL., IN SPITE OF INNOCENCE: ERRONEOUS CONVICTIONS IN CAPITAL CASES (1992); Michael L. Radelet, William S. Lofquist & Hugo Adam Bedau, *Prisoners Released from Death Rows Since 1970 Because of Doubts About Their Guilt*, 13 COOLEY L. REV. 907 (1996). These publications do not, however, attempt to categorize the causes of error.

381. *Miscarriages*, *supra* note 380, at 57.

382. *Id.* at 57-64.

383. This statistic is based on the author’s own review of the Bedau & Radelet appendix descriptions. The three most recent cases that the authors categorize as involving perjury by prosecution witnesses are illustrative. In 1983, Anthony Brown was convicted of first-degree murder and sentenced to death in Florida based solely on the testimony of a co-defendant who was sentenced to life in prison for his role in the crime. *Miscarriages*, *supra* note 380, at 100. After the conviction was reversed on other grounds, the co-defendant admitted on re-trial that his incrimination of Brown at the first trial had been perjured, and Brown was acquitted. *Id.* at 101.

Neil Ferber was convicted of first-degree murder and sentenced to death in Pennsylvania in 1982. *Id.* at 113. The chief witness against Ferber was a former cellmate who claimed that Ferber had confessed to the crimes. *Id.* A polygraph test not revealed to the defense prior to trial indicated that the witness was lying.

Dwyer, Neufeld and Scheck's analysis of factors leading to wrongful convictions in sixty-two U.S. cases of DNA exoneration yields similar data.³⁸⁴ The authors found that testimony of "snitches or informants" was a factor in twenty-one percent of the cases analyzed.³⁸⁵ Huff, Rattner and Sagarin, who analyzed 205 cases of documented wrongful conviction, found that "perjury by witness" was the major single source of error in eleven percent of the cases.³⁸⁶ Based on review of several hundred additional recent cases, they report that "[t]he patterns are distressingly similar, with eyewitness error, police and prosecutorial overzealousness, and perjury interacting to produce system failure."³⁸⁷ It is also worth noting that Great Britain, which does not compensate cooperating witnesses in a comparable way, generally has fewer cases of wrongful conviction,³⁸⁸ and fewer instances of perjury.³⁸⁹

The proportion of the documented United States wrongful conviction cases involving perjured testimony by cooperating witnesses is striking, especially because many capital crimes and other crimes will not present an opportunity for accomplice testimony or otherwise provide a context that will lead to cooperating testimony. If perjured testimony by cooperating witnesses leads to wrongful convictions in a significant number of capital cases, as found in the Bedau and Radelet study, one can reasonably suspect that the same is true in non-capital cases. Because convictions in capital, or potentially capital cases, are subject to greater appellate and collateral scrutiny than convictions in non-capital cases, one could also reasonably suspect that the error correction rate will be lower in non-capital cases.³⁹⁰ Though the magnitude of the problem is difficult to determine, it seems safe to say that our current system, where the prosecution controls the selection, preparation and compensation of cooperating witnesses, poses a significant risk of wrongful conviction, especially when combined with other risk factors.

Id. A retrial was ordered at the urging of the district attorney, and charges were subsequently dropped. *Id.* In 1982 in New York, a state without the death penalty, Nathaniel Carter was convicted of second-degree murder and sentenced to twenty-five years to life. *Id.* at 103. The chief prosecution witness was the defendant's ex-wife, who had been given immunity for prosecution for murder prior to trial. *Id.* She later confessed to the murder, and Carter was released after serving twenty-eight months in prison. *Id.*

384. DWYER, *supra* note 4, at 246.

385. *Id.* at 246, 263 & App. 2; *see also* BRANDON & DAVIES, *supra* note 340, at 248 (discussing perjury as a significant factor in documented U.S. cases of wrongful conviction and observing that in many such cases "the key element is perjury by criminals seeking some advantage").

386. HUFF, ET AL., *supra* note 364, at 64, Tbl. 3.3.

387. *Id.* at 65.

388. *See* BRANDON & DAVIES, *supra* note 340, at 225 ("[I]t is evident that miscarriages of justice are much more frequent and far more drastic in their effects in America than in England.").

389. *Id.* at 233 ("Perjury as a cause of wrongful imprisonment is more widespread and more blatant in America than in England.").

390. *Cf.* HUFF, ET AL., *supra* note 364, at 144 (describing phenomenon of "ratification of error"—"the criminal justice system, starting with the police investigation of an alleged crime and culminating in the appellate courts, tends to ratify errors made at lower levels in the system").

b. Expert Witnesses

Compensation of expert witnesses in criminal and civil cases does not present the same asymmetries as does government compensation of prosecution witnesses in criminal cases. All parties are free to present the testimony of paid experts. Control of expert selection and compensation by adverse parties does, however, exert similar pressures on the formation and development of expert testimony that tend to distort that testimony. As in the case of cooperating witness testimony, cross-examination is inadequate to correct for those distortions because the selection of expert witnesses and the development of their testimony remain largely hidden from triers of fact.

Even more than in the case of a cooperating fact witness, who at least begins with actual observations (or the lack thereof), the development of expert testimony is contaminated by bias from its inception. An expert witness typically will know from the outset the opinion sought by the party that contacts her, and will understand that she will be retained, or at least retained as a testifying expert with substantial fees, only if she is able to reach helpful conclusions.³⁹¹ In practice, the development of expert testimony is often an exercise in collaboration between counsel and the expert, who together attempt to build a helpful analysis.

This is not to suggest that a conscientious and ethical expert will ever subscribe to opinions that she cannot support in good faith. The source of bias is more subtle and insidious. Because of the system of adversary retention of experts, an expert never has the opportunity to approach the object of testimony from a neutral perspective, or at least can do so only with an unusual degree of self-discipline. As one nineteenth-century observer articulated the problem, “[expert witnesses] do not, indeed, wilfully misrepresent what they think, but their judgment becomes so warped by regarding the subject in one point of view that even when conscientiously disposed, they are incapable of expressing a candid opinion.”³⁹² Wigmore expressed a similar view in the early twentieth century. Because of the expert’s “prior consultation with the party and his self-committal to a particular view,” Wigmore concluded, “[h]is scientific opinion . . . has no fair opportunity of expression or even formation.”³⁹³

As is true of cooperating witnesses, expert witness discovery and cross-examination are inadequate to correct for the distortions created by adverse party control because they do not penetrate the process of witness selection, opinion

391. Parties may sometimes retain their own employees as experts, and those experts will not have the same financial incentives to reach conclusions helpful to the party. *See supra* note 250 and accompanying text. They may, however, be equally motivated to reach a desired conclusion. Dwyer, Neufeld and Scheck found that “defective or fraudulent science” by government-employed experts was a factor in more than a third of the wrongful convictions that they analyzed. DWYER, *supra* note 4, at app. 2.

392. Foster, *supra* note 274, at 170-71.

393. WIGMORE, *supra* note 274, at § 563.

formation, and preparation. Jurors typically have no idea of the consensus of experts in the field because they hear at trial only from those selected by the adverse parties, and the selection process is undiscoverable.³⁹⁴ Counsel for a party may interview and reject ten experts before finding and presenting the one that supports her client's case. At trial, whatever the course of selection, the jury will typically be presented with a relatively equal division of dueling experts with no knowledge of how many experts were consulted or what views they held.³⁹⁵

Jurors will also be unaware of the role that counsel played in developing and shaping expert testimony. Although communications between counsel and testifying experts are discoverable, they will usually be oral and unrecorded. Experienced experts will avoid preliminary drafts or extensive note-taking. In response to questions regarding the opinion formation process and the role of counsel, a witness will typically describe the materials provided by counsel and counsel's request for her honest and unbiased opinion. While that response is likely accurate as far as it goes, it fails to capture the detail, sequence or nuance of opinion formation, or the significant role that counsel can play in shaping the process. Nor is this to suggest that counsel are necessarily engaged in unethical witness coaching. Asking the right questions and making pertinent suggestions from a particular perspective at crucial stages of the process of opinion formation can exert substantial influence over that process without crossing any current ethical boundaries.

Cooperating witness testimony, especially accomplice testimony, is often crucial and powerful in a criminal trial, despite the witness' demonstrable incentive for perjury, because the witness can give a first-hand account of the alleged crime. Expert witness testimony can be equally significant in many civil and criminal trials for the opposite reason. The credibility of the expert, who usually has no connection to the facts of the case and no apparent stake in its outcome, is boosted by the expert's aura of objectivity and neutrality. In addition, experts are allowed to rely on facts or data not otherwise admissible in evidence³⁹⁶ and are often given license to express opinions and conclusions regarding questions very close if not identical to those being decided by the jury. The

394. One pair of commentators has argued, by way of example, that if 999 of every 1000 experts in a given field hold one view of a question and one hold an alternate view, the two experts who appear in court will have been detached from the extremely skewed distribution of opinion from which they were drawn. The fact finder has no way of knowing this.

Michael J. Saks & Roselle L. Wissler, *Legal and Psychological Bases of Expert Testimony: Surveys of the Law and of Jurors*, 2 BEHAV. SCI. & L. 435, 439-40 (1984). Of course, if the disagreement were over basic theory or technique rather than application of accepted theory to the facts of a given case, the single expert's testimony would likely be excluded under the *Daubert* test as lacking scientific validity or under the *Frye* test as lacking "general acceptance." See *supra* notes 314-17 and accompanying text.

395. There is some empirical evidence that jury verdicts in cases turning on expert testimony, if not random, are often in error. See Bryan A. Liang, *Assessing Medical Malpractice Jury Verdicts: A Case Study of an Anesthesiology Department*, 7 CORNELL J. L. & PUB. POL'Y 121, 124-29 (1997) (reporting that neutral anesthesiologists in medical malpractice cases involving anesthesiologists defendant agreed with jury verdicts only fifty-eight percent of the time in one survey and only fifty-six percent of the time in another survey).

396. See FED. R. EVID. 703.

resulting power of adversary-controlled expert testimony makes its uncorrected biases a significant danger to the truth-finding process.

C. A Proposed Solution: Neutralizing the Compensated Witness

Accepting that exceptions to the normal prohibition on compensation to witnesses will and should continue in these two areas, the challenge is to allow for those exceptions in a framework that minimizes, wherever possible, the pressures that skew and distort the testimony of the compensated witnesses. Recognizing that those pressures result from adversary control of witness selection and compensation, most proposals for reform entail greater court involvement and initiative in the process. As demonstrated above, the selection and compensation of both cooperating and expert witnesses were historically the prerogative of the court rather than adverse parties.³⁹⁷

In the modern context in which judges typically carry crowded dockets with hundreds of cases, however, heavy reliance on court-initiated measures is problematic. Except in special circumstances, such as consolidated multi-district litigation or large class actions, a court rarely has sufficient time or incentive for the degree of pre-trial involvement necessary to take a substantial and informed role in the identification, selection or retention of compensated witnesses. The distorting effects of our current system of compensation could be adequately corrected, however, if there were a more open, bilateral, and, therefore, neutral process for determining whether and how witnesses are to be compensated, with full discovery of witness contacts and equal access to witness preparation. The following proposals attempt to create these sufficient conditions of neutrality and access. They are not intended as definitive, but as an exploration of concrete procedural steps that might fulfill these conditions. In the differing contexts presented by cooperating and expert witnesses, each proposal attempts to mitigate the distorting effects of party control over the selection, preparation, and compensation of paid witness by making full disclosure and open access conditions of the admissibility of their testimony.

1. A Proposal for Regulation of Cooperating Witness Testimony

Because of the incentives for perjured or slanted testimony and the inadequacy of existing safeguards, the testimony of cooperating witnesses in criminal cases should be allowed at trial only subject to additional requirements of neutrality and access: 1) all *ex parte* substantive discussions of compensated witness testimony should be not only discoverable, but recorded, and both parties should have fair opportunity for preparation with the witness; 2) admission of compensated cooperating witness testimony should be subject to the court's determination at a

397. See *supra* Part III.

reliability hearing that discovery obligations have been fulfilled and the testimony bears sufficient *prima facie* indicia of reliability; 3) any post-trial award of contingent compensation should be subject to court review at a noticed hearing; and 4) procedures should be established to provide opportunities for compensation to exculpatory as well as inculpatory cooperators. These requirements would pertain to any fact witness in a criminal prosecution who received any form of compensation for testimony, including immunity, an agreement not to prosecute, a plea to reduced charges (whether reduced before or after initial charging and whether before or after providing testimony) or sentencing leniency.

*a. Discovery Requirements*³⁹⁸

As a condition of the admissibility of compensated cooperating witness testimony, the government should be obligated to record and provide to defense counsel prior to trial any *ex parte* discussions with the cooperator regarding the cooperator's anticipated testimony, including any proffer sessions. The discussions could be video or audiotaped, or transcribed by a court reporter.³⁹⁹ Exceptions could be allowed for good faith failure to comply during the investigatory stage of a prosecution, but the government should bear the burden of showing that recording was not feasible due to the circumstances of the interview or the posture of the investigation and should offer a full written summary of the discussion.⁴⁰⁰ The requirement would not apply to undercover contacts or any discussions that did not reasonably contemplate that the interviewee would later provide testimony.

As a further condition of admissibility, the cooperating witness should be made available for complete interview by defense counsel prior to trial. Particularly in those cases where the government had a legitimate concern over the safety of the witness, access could be provided at a deposition or other jointly attended session.⁴⁰¹ In other cases, the witness could meet independently with defense counsel subject to reciprocal requirements for recording and discovery.

398. These discovery requirements could be incorporated into Federal Rule of Criminal Procedure 16 and equivalent state rules.

399. Commentators have proposed a similar recording requirement as a feasible prerequisite to the introduction of custodial confessions. See Paul G. Cassell, *Miranda's Social Costs: An Empirical Reassessment*, 90 NW. U. L. REV. 387, 486-92 (1996). The Alaska Supreme Court has held "that an unexcused failure to electronically record a custodial interrogation conducted in a place of detention violates a suspect's right to due process, under the Alaska Constitution, and that any statement thus obtained is generally inadmissible." *Stephan v. Alaska*, 711 P.2d 1156, 1158 (Alaska Ct. App. 1985). There is some evidence that Alaska's recording requirement has worked well. See Cassell, *supra* note 399, at 491-92.

400. As it is, federal investigators routinely prepare such summaries of witness contacts, referred to as "FBI 302s." In the absence of exigent circumstances, in order to offer compensation to a witness, these contacts would have to be recorded.

401. The limited discovery permitted in most criminal cases is sometimes justified as necessary to protect witnesses. Though 18 U.S.C. § 3500(a) does not require the government to provide witness statements until the time of trial, it is almost universal practice to deliver them prior to trial and sometimes substantially in advance of trial. It is hard to see how the additional measure of allowing for an interview or deposition by counsel at a session attended by the government would add to the existing danger to witnesses. In cases of particular risk, appropriate protective orders could be sought.

Although probably already required by the federal constitution under *Brady v. Maryland*,⁴⁰² discovery rules should also spell out required discovery regarding cooperating witnesses. Similar to the *Dodd* requirements for jailhouse informants,⁴⁰³ the government should be required to provide the following information regarding the credibility of any witness receiving compensation for cooperation: 1) the cooperation agreement and any communications regarding the negotiation of the agreement, including all information regarding anything of value (whether lenient charging or sentencing or cash or anything else of value) that the cooperator has received, will receive or may receive in exchange for testifying; 2) any information regarding the witness' cooperation in return for compensation in other cases, whether or not the cooperator was actually called as a witness in that case; 3) the cooperator's complete criminal history; and 4) any other information relevant to the cooperator's credibility.

b. Reliability Hearing

Because of the inherent unreliability of compensated witness testimony, the court should play a gatekeeping function with regard to compensated cooperating witnesses in criminal cases parallel to its *Daubert* gatekeeping role with regard to scientific expert testimony.⁴⁰⁴ A party offering the testimony of a compensated witness should have the burden of establishing at a Federal Rule of Evidence 104(a) reliability hearing that: 1) it has complied with the applicable discovery requirements; and 2) the circumstances of the witness' cooperation and the testimony offered provide sufficient *prima facie* indicia of reliability.

At this reliability hearing, the court would hear the testimony of the cooperating witness and other evidence offered by the parties relevant to the credibility of the witness. In making its determination on reliability, the court should consider: 1) the nature of compensation that the witness has received or may receive and any circumstances surrounding the cooperation agreement; 2) any cooperation and resulting benefits in other cases; 3) the cooperator's criminal history; 4) any physical evidence, unknown to the witness at the time of her initial proffer of testimony, that is consistent with or contradicts the cooperator's testimony in specific ways that could not have been anticipated by common sense surmise; 5) whether the cooperator has changed her testimony in the pending case or other cases; and 6) anything bearing on the credibility of the compensated witness' testimony. Changed testimony, a history of repeated cooperation for compensation, compensation out of proportion to the government's legitimate interest in the prosecution of the defendant, or overtly contingent compensation

402. 373 U.S. 83, 87 (1963) (holding that "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution").

403. See discussion *supra* Part III.A.3.c.2.

404. See discussion *supra* Part III.A.3.c.2., III.B.2

should create a presumption of insufficient reliability that the moving party would have to overcome.

This requirement would be similar to the aborted Oklahoma requirement for jailhouse informants set forth in the initial *Dodd* opinion,⁴⁰⁵ but with differences that would make it more manageable and feasible. Unlike the standard proposed in the initial *Dodd* opinion, the proponent of the witness would not have to demonstrate the truthfulness of the witness' testimony by a preponderance of evidence, but only that there are sufficient indicia of reliability to submit the testimony to the jury, subject to cross-examination, despite the incentives for perjury. Unlike the *Dodd* proposal, the court would not be obliged to hear all corroborating or contradictory evidence, which could include virtually the entire case and would make such hearings unfeasible. Moreover, the reliability of the cooperator's testimony should not be bootstrapped on the reliability of other evidence.⁴⁰⁶ However, the court should be allowed to consider, in its discretion, physical evidence unknown to the witness at the time of her initial statement or proffer that corroborates or contradicts her testimony in a specific way that could not have been anticipated by common sense surmise.

c. Evaluation of Entitlement to Compensation

A cooperator's entitlement to any contingent compensation to be awarded after trial testimony should be subject to court approval at a noticed hearing at which all interested parties could be heard. In most instances, the contingent compensation would be in the form of lenient treatment at a deferred sentencing hearing that already requires the court's approval.⁴⁰⁷ Notice of such hearing should be given to any defendants against whom the cooperator provided testimony, as well as any victims of the cooperator's crimes. The criteria for the court's approval of a proposed sentence reduction should include: 1) whether the cooperator provided complete and truthful testimony; and 2) whether the cooperator provided full cooperation to all parties in the preparation of the case.

d. Compensation for Exculpatory Testimony

In order to mitigate the pressure on a potential cooperator to inculcate others, compensation should also be available for substantial assistance that leads to the exculpation of others. Federal sentencing guidelines and other relevant statutes should be amended to include this form of assistance.

In addition, a witness should be allowed, without the sponsorship of the government, to apply to the court prior to trial for the status of "cooperating for compensation." Such application would be similar to the historical request to

405. See discussion *supra*, Part III.A.3.c.2.

406. Cf. *Idaho v. Wright*, 497 U.S. 805, 823 (1990) (rejecting use of corroborating evidence to demonstrate "particularized guarantees of trustworthiness" necessary for admission of hearsay testimony because it "would permit admission of a presumptively unreliable statement by bootstrapping on the trustworthiness of other evidence at trial").

407. See discussion *supra* Part III.A.2.

become “king’s” or “state’s evidence.”⁴⁰⁸ The applicant could be a charged defendant, a subject or target of an investigation, or anyone with perceived exposure in an identified investigation or prosecution. In the case of an applicant not yet charged with a crime, consideration of the application would be deferred until charges were filed, if ever. Applications could be made *ex parte* and under seal, then unsealed by the court at the time of actual consideration.

While the application would be made by the witness, the government would be free to support or oppose it, as would other targets or defendants, or anyone with an actual interest in the proceedings, including victims of the alleged crime. Prior to making the application, the would-be cooperating witness could consult with counsel for other defendants or targets, as well as with the government, and those parties would be free to encourage the witness to cooperate for compensation. Any substantive discussions regarding potential testimony would be, however, subject to recording and discovery requirements,⁴⁰⁹ which would apply to all compensated witnesses whether inculpatory or exculpatory.

The applying witness could seek immunity or dismissal of charges, the right to plead to a lesser charge, or a specified sentencing reduction. The parties, as well as the witness, would be free to propose and advocate an appropriate form and level of compensation. In the case of federal sentencing reductions for “substantial assistance,” this procedure and the resulting entitlement could be codified as a revision of section 5K1.1 of the sentencing guidelines, which now provides for reduction only on the motion of the government and only for “substantial assistance in the investigation or prosecution of another person who has committed an offense.”⁴¹⁰ The nature of the assistance would simply be redefined to include exculpatory as well as inculpatory disclosure, and the determination of compliance would be the subject of a potentially contested hearing rather than the unilateral prerogative of the prosecutor.

In ruling on an application to cooperate for compensation, the court would consider the witness’ relative culpability in the alleged crime and whether acceptance of the application would be in the interest of justice. In making those determinations the court could consider *in camera* as well as open submissions from the would-be cooperator, the government, defendants and other interested parties, including victims of the cooperator’s crimes. The court, in making its determination, would be bound to consider potential testimony that tended to exculpate other targets or defendants as well as inculpatory testimony.

If the application were accepted by the court, the witness would receive an entitlement to specified compensation subject to the fulfillment of two conditions: 1) complete and truthful testimony; and 2) full cooperation with both sides in the preparation of the case. Post-trial confirmation of the witness’ fulfillment of these

408. See discussion *supra* Part III.A.1.

409. See discussion *supra* Part V.A.1.

410. U.S. Sentencing Guidelines Manual § 5K1.1 (1998).

conditions would be required and could be supported or opposed by the government or a defendant or any party with an interest in the proceedings.

As with regard to all compensated cooperators, admission at trial of the testimony of a witness who had applied for and received cooperating status independent of government sponsorship would be subject to a reliability hearing. The government and defendants could support or oppose the admission of the cooperator's testimony at trial.

e. Discussion of the Proposal

This proposal would allow for current forms of cooperation but would mitigate the asymmetries between the prosecution and defense and make the process more open and neutral.⁴¹¹ It would make transparent the now opaque processes of selecting and preparing compensated cooperating witnesses.

Because cooperators could be rewarded for truthful exculpatory as well as inculpatory testimony, the current pressure for potential cooperators to falsely inculcate others would be reduced. The proposal would further even the playing field by allowing equal access to compensated witnesses prior to trial, and full discovery of the selection and preparation of those witnesses. Because all substantive communications with testifying cooperators would be recorded and discoverable, cross-examination at trial could penetrate the selection and preparation process to a degree not now possible.

One might argue that this proposal relies excessively on additional court involvement. But while it would require additional contested court hearings, it would not require the court to take a pro-active management role to which it is not suited. The required reliability hearings for all compensated witnesses, the pre-trial applications of independent would-be cooperators, and the post-trial confirmation of cooperators' entitlement to compensation would be based on motions with adversary presentation of evidence and argument of precisely the type that the courts are currently accustomed to hearing and deciding. While these proceedings might involve *in camera* reviews of proffered testimony and other evidence, such reviews are not unusual in the determination of pre-trial motions in a criminal case. Additionally, the court must already consider a cooperator's right to compensation in one or more hearings at the time of sentencing.

Admittedly, the most difficult new duty for the court would be ruling on independent applications for status as "cooperating for compensation." The court would be forced to consider some matters bearing on the administration of justice that are currently the province of the prosecutor's office. It would do so, however, with full briefing and advocacy from the prosecutor's office and would be primarily a check on the discretion of that office. It would ensure that the prosecutor was giving due weight to exculpatory as well as inculpatory assistance. Such motions would typically be made only when negotiations with the

411. Cf. AKHIL REED AMAR, *THE CONSTITUTION AND CRIMINAL PROCEDURE: FIRST PRINCIPLES* 133-36 (1997) (arguing, based on the principle of symmetry, that under Sixth Amendment compulsory process clause the defense, as well as prosecution, should have the power to compel witness testimony by granting immunity).

prosecutor's office had failed or where the witness had only exculpatory evidence to offer. One might complain that the proposed process creates too much uncertainty for the would-be cooperator and would, therefore, chill cooperation. Whereas a would-be cooperator can make a deal with the prosecutor under the current system, under this proposal she must face the uncertainty of contested proceedings. The current system is not, however, without its uncertainties for the cooperator. Sentencing is typically delayed until after the cooperator's testimony at one or more trials, and the cooperator's entitlement to the bargained-for lenient treatment is subject to the prosecutor's essentially unreviewable determination of the cooperator's compliance. To the degree that implementation of this proposal may chill to some degree the currently "overheated cooperation market,"⁴¹² that chilling might be salutary in any event.

On the other hand, one might be concerned that the proposal would encourage already-sentenced defendants to seek sentencing reductions in exchange for exculpatory assistance to defendants still facing trial on the theory that they had nothing to lose, and out of a desire to aid compatriots in crime. A prisoner who truly sought to aid the defense of another accused would, however, have a strong incentive not to seek any favorable treatment for that testimony, because receipt of compensation would make the witness' testimony subject to a reliability hearing and possible exclusion from trial. Moreover, the application for compensation would be subject to cross-examination which could be used to impeach the witness at trial, whether or not the application were accepted.

Could the government simply evade the new discovery requirements for compensated witnesses and the necessity of reliability hearings by engaging in informal charge bargaining, resulting in less, rather than more, scrutiny of the compensation afforded to the cooperating witness? Would prosecutors simply agree informally not to charge a would-be cooperator, or bring reduced charges only after satisfactory trial testimony?⁴¹³ Any procedural requirements are, of course, subject to attempts at evasion and disputes over compliance. The government's constitutional *Brady* obligation to disclose exculpatory evidence is, for example, a subject of constant defense motions and accusations of non-compliance.⁴¹⁴ Under this proposal, the government would be required in good faith to provide the requisite discovery with regard to any witness who received or might receive any form of favorable treatment in exchange for the witness' willingness to testify. The government's compliance would be subject to two

412. Weinstein, *supra* note 1, at 564 (arguing that "[t]he overheated cooperation market is creating serious problems in the federal criminal justice system").

413. As discussed above, an agreement that deferred reduced charging until after trial testimony was condemned by the Nevada Supreme Court in *Franklin v. State* as contrary to public policy and a denial of due process. 577 P.2d 860 (Nev. 1978), *overruled by* Sheriff, Humboldt County v. Acung, 819 P.2d 197 (Nev. 1991). See *supra* notes 190-92 and accompanying text.

414. See, e.g., *Kyles v. Whitley*, 514 U.S. 419 (1995); *Knox v. Johnson*, 224 F.3d 470, 482 (5th Cir. 2000); *McGregor v. Gibson*, 219 F.3d 1245, 1253 (10th Cir. 2000).

significant checks. First, it is unlikely that most cooperators would be willing to give up their Fifth Amendment rights and testify regarding their involvement in alleged crimes without some formal and enforceable assurance of benefit from the government. Second, the government's compliance would be subject to scrutiny by defense counsel whose suspicions would be aroused by the testimony of a witness about whom no disclosure was made. To the extent that the government could simply choose to avoid the new requirements by more often providing immunity to witnesses without any cooperation agreement, the proposal would successfully reduce the government's dangerous over-reliance on paid witness testimony.

Like any reform that creates additional procedural obligations and corresponding rights, this proposal would not come without the cost of increased administrative burden on the courts. To the degree that the proposal would make more cumbersome or uncertain the current system of rewarding cooperation, however, the resulting gains for fairness and justice would justify the cost. Process, if necessary and due, is the proper cost of justice. The present cooperation/plea bargaining system is a source of cynicism and perceived injustice.⁴¹⁵ By thrusting into the light of open court proceedings a process that is currently hidden from view in the recesses of the prosecutor's office, this proposal would address these legitimate concerns.

V. A PROPOSAL FOR REGULATION OF EXPERT WITNESS TESTIMONY

As is true of cooperating witness testimony, distortions in expert evidence result from unilateral adversary control over the selection and development of expert testimony that is hidden from the trier of fact. Proposals for reform have attempted to address these distortions by involving the court in expert selection.⁴¹⁶ But while current rules allow for court-appointed experts, such experts remain the exception rather than the rule. Expanded use of court-appointed experts, together with rigorous exercise of the court's *Daubert* gatekeeping role, will undoubtedly be necessary in cases of scientific uncertainty, and as a filter for the excesses of "junk science." Only some cases, however, will merit that level of court involvement. Without reliance on any greater court involvement in the selection or preparation of expert witnesses, the process could be made significantly more neutral in all cases simply by making it bilateral and subject to complete discovery.

A. *Discovery Requirements*⁴¹⁷

One of the major sources of distortion in expert evidence is the current ability of parties to work with potential testifying experts as consultants, identifying them as testifying experts only if and after they have reached satisfactory conclusions. Trial testimony by a paid expert witness should be allowed only if the expert is

415. See discussion *supra* Part III.A.4.

416. See discussion *supra* Part III.B.3.

417. These discovery requirements could be incorporated in Federal Rule of Civil Procedure 26, Federal Rule of Criminal Procedure 16 and state law equivalents.

identified to the opposing party prior to any case-specific discussion of the substance of the expert's opinions. Parties would be free to retain consulting experts and to conduct *ex parte* interviews of potential witnesses about their qualifications, areas of expertise, prior opinions and general approach to areas of controversy. They could not, however, seek to determine the expert's opinions on case-specific matters relevant to the litigation either directly or through intermediaries prior to identification. The actual development of the testifying expert's opinion would take place only after identification and on the basis of bilateral, equal access.

Once selected and identified, a party would relinquish control of an expert.⁴¹⁸ The expert would be equally accessible to both (or all) sides of the case and would be subject to being called by any party as a witness at trial. Experts would also be free to communicate with each other and attempt to reach a consensus. The initial selection of the expert by a party would be admissible as part of the expert's qualifications.

All communications with or among experts would be discoverable. Any written communication regarding the substance of the expert's formation of her opinion would be copied and distributed to all parties and other selected experts. All occasions for substantive oral discussions with experts would be noticed in advance to provide reasonable opportunity for participation by all parties, or recorded, either by audio or videotape, or transcription.

These discovery requirements would apply to all testifying experts, including those who are employees of a party and those who may also provide relevant factual testimony. In the case of the latter, however, counsel would be free to interview the witness as to factual matters so long as they avoided matters of expert opinion until after the witness had been identified as an expert.

B. Compensation

All parties would pay for their own consultation and preparation time with an expert witness at rates agreed to by the expert at the time of selection and identification by one party.⁴¹⁹ The trial time of the expert would be compensated by the party or parties that called her as a witness at trial. Appropriate limits could be set on the number of experts that could be identified or called at trial as a matter of pre-trial planning and orders.

418. In this sense, the proposed system would be similar to a common procedure for the selection of arbitrators in international disputes, by which each party selects arbitrators but the arbitrators once selected are neutral and out of the control of the selecting party, who is prohibited from engaging in *ex parte* communications.

419. The party that initially contacted the expert would, in effect, engage the expert for all parties at terms agreeable to the expert.

C. Consulting Experts

Parties would remain free to engage consulting experts to advise with regard to case analysis and litigation strategy, including the selection of testifying experts. Indeed, plaintiffs often must consult with an expert to fulfill their Federal Rule 11 or state law equivalent obligation to reasonably investigate the merits of a claim before filing.⁴²⁰ Furthermore, the filing requirements of some jurisdictions require that complaints against certain professionals be supported by certification of consultation with an expert.⁴²¹ Prosecutors similarly must often consult with forensic experts to evaluate crime evidence prior to bringing charges.

Such consultants could not, however, become testifying experts at trial unless the discovery requirements outlined above were met, including initial identification prior to case-specific discussion of the expert's opinions. When a party is required to consult with an expert prior to filing, the right to present the expert's testimony at trial could be preserved only by identification of the expert to the opposing party at that time. This pre-filing identification might be possible in some cases, although it will likely be impractical or undesirable in most. The work of a consulting expert could, however, be presented for consideration to a testifying expert once the testifying expert had been identified. Thus, for example, a prosecutor might consult with a forensic lab expert prior to filing an indictment and then, after indictment, turn that expert's work over to a testifying expert who was not involved in the initial testing once the second expert had been identified to defense counsel as a testifying expert.

D. Discussion of the Proposal

This proposal would open up and make bilateral the process by which expert opinions are developed and would eliminate the control by a single adverse party over an expert's compensation. The result would be a more truly neutral formation of opinions, and trial testimony that more accurately reflects the consensus of expert opinion in the field. Instead of engaging an expert as part of the advocacy team, parties would be forced to make their case to experts not under their control. Experts would not be pressured to come out one way on questions presented to them, because they could be called for trial testimony by either side. They would be more like neutral arbiters and less like advocates. Unlike prior proposals, this proposal has the advantage of not relying on court involvement in the selection and retention process in the majority of cases and not limiting the right of parties to present experts of their own selection.

One might argue that the proposal would unduly advantage repeat litigation players because of their existing relationships with previously retained experts.

420. FED. R. CIV. P. 11(b).

421. *See, e.g.*, CAL. CIV. PROC. CODE § 411.35(b)(1) (West Supp. 2000) (requiring that complaint against architect be accompanied by attorney's certification that "attorney has reviewed the facts of the case and has consulted with . . . at least one architect, professional engineer, or land surveyor and concluded on the basis of this review and consultation that there is reasonable and meritorious cause for the filing of this action").

One-time or less-experienced litigants, on the other hand, would be forced to shoot in the dark, making them less successful at choosing helpful witnesses. The first-time litigant would, however, have the option of consulting with experts in its selection of potential trial experts. Indeed, one could imagine that some consultants would specialize in advising with regard to such selections. Over time, by eliminating case-specific consultation prior to retention and *ex parte* development of expert testimony, the proposal should break down the affiliation of particular experts and litigants. No expert would work on any case with only one party.

Once this system were established, it would not be possible in the majority of cases for either party to rely on known expert bias. Most questions that are the subject of expert testimony are case-specific, and expert analysis is not predetermined by any identifiable professional orientation.⁴²² Opinions with regard to whether a doctor or other professional met the standard of care in the community, whether the quantum of lost wages or the economic damages suffered resulted from a breach of contract, whether product failure caused an accident, and the evaluation of forensic crime evidence and many other common subjects of expert testimony will be case-specific and predictable only based on the merits of the controversy. Because an expert's retention for trial testimony would no longer depend on satisfying the needs of the party who chose the expert, one could expect that experts, much like arbitrators or mediators, would increasingly maximize their retention by being truly neutral and not unreasonably wedded to the plaintiff's or defendant's side in areas of repeat litigation.⁴²³ By establishing a record of objectivity and neutrality, an expert would double her chances of identification and retention in any given case.

There will, of course, be a class of cases in which this is not true. Those will be primarily cases of scientific uncertainty, such as the breast implant cases and other cases involving disputed causation, in which some experts will have staked out a position on one side of the controversy. In that class of cases, any system that leaves the selection of experts in the hands of the parties will likely result in retention by both sides of experts with an existing bias on the question presented. Few parties will risk persuasion of an uncommitted expert if there are experts already committed to their side of the controversy. In such circumstances, a court

422. A study of civil cases in California in 1985-86 found that sixty percent of all experts were medical experts, primarily doctors. Samuel R. Gross & Kent D. Syverud, *Don't Try: Civil Jury Verdicts in a System Geared to Settlement*, 44 U.C.L.A. L. REV. 1, 31-32 n.46 (1996). Industrial and mechanical experts and engineers were the next most common category of experts. *Id.* Only three percent of experts were classified as "scientists." *Id.*

423. *Cf.* LEONARD L. RISKIN & JAMES E. WESTBROOK, DISPUTE RESOLUTION AND LAWYERS 298 (1987) ("An arbitrator who consistently fails to satisfy the parties' expectations becomes unacceptable and is not used in future cases."). Savvy counsel will want to avoid a witness who is perceived as a "hired gun" in any event. *See* SPECIAL COMM. A.B.A. SEC. LITIG., JURY COMPREHENSION IN COMPLEX CASES 40 (1989) (concluding that witness perceived by jury as hired gun can harm party's case).

must become involved in the selection of experts in order to approach a neutral or balanced assessment of the issue.⁴²⁴

It is in just this class of cases, however, that judges, like Judges Pointer and Jones in the breast implant litigation, will have an incentive to invest the necessary time and resources to make court appointments of neutral experts. Disputed questions on which experts have taken committed positions will necessarily be non-case-specific, general questions of scientific uncertainty that affect more than one, often large numbers of cases. Appointing a neutral panel of experts whose findings will be admissible in a large number of cases, as Judge Pointer did with regard to the multidistrict litigation breast implant cases, will result in a saving, rather than an expenditure of judicial resources.⁴²⁵

Areas of scientific dispute and uncertainty are likely to raise *Daubert* questions of admissibility—does the proffered expert testimony have sufficient scientific validity to meet the Rule 702 standard as interpreted by *Daubert*? Resolving those questions will require the judge to ascertain the consensus of opinion in the applicable field or fields and will often also be an occasion for reliance on neutral experts as technical advisors along the model followed by Judge Jones in the Oregon breast implant cases.⁴²⁶

Even in these cases of scientific uncertainty, however, where court involvement in the selection of experts may be necessary, this article's proposal for making the process of opinion formation and preparation bilateral remains helpful. The parties would at least have complete discovery with regard to that process, and the opportunity to be involved at the formation stage. Experts would also be able to communicate with each other and reach areas of consensus where possible. While not sufficient to provide neutral expert guidance in cases involving questions of scientific uncertainty, the proposal would result in a more complete and balanced presentation to the trier of fact of the selected experts' work in those cases, as well as other, more conventional cases.

A weakness of the proposal is that it would impose additional cost on some plaintiffs, including the government in some criminal cases, who would be forced to consult with an expert or experts prior to filing a complaint or indictment, and then identify different experts for trial testimony. This additional cost, however, should be limited in most instances. Preliminary consultation necessary to determine that a claim has merit generally does not require extensive work on the expert's part. The cost would also be mitigated by the testifying expert's ability to consider and build on the work of the consulting expert. In any event, the

424. Cf. ANGELL, *supra* note 11, at 28.

When a trial involves a matter of scientific fact, such as whether breast implants cause disease, the approach to answering the question is very different in court than it is in scientific research. In the courtroom, expert witnesses, chosen and paid by the adversaries, are invited to give their opinion. The opinions may include some reference to research, published or unpublished, but it doesn't have to. . . . In science, the evidence leads to the conclusion; in the courtroom, the expert's conclusion comes first and *becomes* the legal evidence.

Id.

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

426. *Id.*

majority of experts retained in civil and criminal cases are undoubtedly contacted and retained after litigation has begun.

The benefit of a more open and neutral development of expert opinion should justify this additional cost. In criminal prosecutions, the required second look of an expert not involved in initial testing whose work was subject to the questions and scrutiny of defense counsel would be a useful safeguard. As noted, Dwyer, Neufeld & Scheck found that “defective or fraudulent science” was a factor in more than a third of the cases of wrongful conviction that they analyzed,⁴²⁷ and a Justice Department Inspector General’s report recently found that FBI forensic experts have mishandled evidence and, in some instances, intentionally misled courts.⁴²⁸

One might also complain that the proposal takes decision-making authority out of the hands of jurors and gives it to the selected experts who would, in effect, decide expert issues through their consensus or preponderance.⁴²⁹ But that has, in fact, been the goal of most reform proposals, beginning with Learned Hand’s 1901 proposal of a court-appointed expert tribunal⁴³⁰—that resolution of scientific and technical issues affecting litigation should be determined by the consensus of knowledgeable people in the relevant field beginning from a neutral position rather than by jurors who, without any relevant training or background, must choose between equally divided sets of expert-advocates. Indeed, under Hand’s proposal, the tribunal of court-appointed experts would definitively determine scientific and technical issues.⁴³¹ This proposal would not go that far. It would leave identification and selection of experts under the control of the parties in most cases, and final decision-making power with the trier of fact. Juries could and should be instructed that they need not decide an issue according to the majority of expert testimony if they find the minority more persuasive. They would, however, have the benefit of more truly neutral guidance in making their decision.

VI. CONCLUSION

The potential for perjury or shaped testimony when witnesses are selected, prepared, and compensated by one party to litigation is self-evident and substantial. The ethical rules condemn such payments generally for this reason. We continue to tolerate, however, two major exceptions to the general rule—cooperating witnesses testifying for the government in criminal cases,⁴³² and

427. See *supra* note 4 and accompanying text.

428. See *supra* note 10 and accompanying text.

429. Cf., Ellen Relkin, *Some Implications of Daubert and Its Potential for Misuse: Misapplication to Environmental Tort Cases and Abuse of Rule 706(a) Court-Appointed Experts*, 15 CARDOZO L. REV. 2255, 2257 (1994) (arguing court-appointed experts will undermine jury party autonomy and jury process because conclusions will be determinative).

430. See *supra* note 17 and accompanying text.

431. See *supra* note 281 and accompanying text.

432. See discussion *supra* Part III.A.2.

expert witnesses in civil and criminal cases⁴³³—because of perceived necessity.⁴³⁴ The government needs to be able to enlist accomplice or other cooperating testimony in order to advance the goal of successfully prosecuting the most culpable offenders, and experts cannot be compelled to devote the necessary time and attention to resolving scientific and technical issues relevant to litigation, unless they are compensated for their time at market rates.

Accepting the necessity of these exceptions, however, all reasonable measures should be taken to guard against biased testimony and to preserve, to the degree possible, the neutrality of compensated witnesses. Our current system, by leaving the selection, preparation, and compensation of these witnesses within the unilateral control of adverse parties, fails to do so.⁴³⁵ Cross-examination and cautionary jury instructions are not adequate to correct for resulting distortions in the fact-finding process because the selection of these paid witnesses and the development of their testimony remain, under the current system, largely protected from discovery and hidden from the trier of fact.⁴³⁶

The proposals advanced by this article attempt to neutralize the pressures for bias and perjured testimony by making the selection, preparation and compensation of paid witnesses more bilateral, neutral and transparent.⁴³⁷ They do so through relatively simple, largely self-executing measures that would not require pro-active court management or extensive additional court supervision.⁴³⁸ With regard to cooperating witnesses, they would even the playing field between prosecution and defense and reduce the pressure for cooperating testimony to be skewed in favor of the prosecution.⁴³⁹ In the case of both cooperating witnesses and experts, they would eliminate unilateral adversary control and help to take the retention and preparation of compensated witnesses out of the back rooms of lawyers' offices and into the light of public process.⁴⁴⁰ While allowing for continued compensation to witnesses in these two contexts, procedures of the kind proposed here would help to curb the excesses of the current regime of testimony for sale.

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

434. See discussion *supra* Part IV.A.1.

435. See discussion *supra* Part IV.C

436. *Id.*

437. See discussion *supra* Part V.

438. *Id.*

439. See discussion *supra* Part V.A.5.

440. See discussion *supra* Part V.A.5 and V.B.4.