

Court Appointed Scientific Experts

Handbook for Judges

Version 4.0

Table of Contents

| | |
|---|----|
| Introduction..... | 5 |
| The American Association for the Advancement of Science (AAAS) | 5 |
| <i>Court Appointed Scientific Experts (CASE):</i> Background and History..... | 5 |
| Goals of <i>CASE</i> | 6 |
| Project Organization..... | 6 |
| Requesting Assistance from <i>CASE</i> | 7 |
| Recruitment and Screening of Experts..... | 8 |
| Scientific and Engineering Societies and Educational Organizations..... | 9 |
| Recruitment and Screening Panel..... | 9 |
| Conflicts of Interest..... | 9 |
| Confidentiality..... | 10 |
| Education of Experts and Judges..... | 11 |
| <i>CASE</i> 's Role Following the Expert's Appointment..... | 12 |
| Project Evaluation..... | 12 |
| Appendices | |

Copyright © February 6, 2002
American Association for the Advancement of Science
1200 New York Avenue, NW, Washington, DC 20005

INTRODUCTION

The American Association for the Advancement of Science (AAAS) has established *Court Appointed Scientific Experts (CASE)*, an innovative project to establish a cooperative effort between the scientific and engineering communities and the judiciary. The project will assist judges in identifying highly qualified, independent scientists, engineers, and health care professionals for appointment as court experts. While providing judges with a valuable resource within the scientific community itself, *CASE* also offers scientists an opportunity to perform an important public service.

THE AMERICAN ASSOCIATION FOR THE ADVANCEMENT OF SCIENCE

Founded in 1848, the American Association for the Advancement of Science is a non-profit, independent, multi-disciplinary scientific membership society, whose mission is to “advance science and serve society.” AAAS’s members are scientists, engineers, science educators, and policy makers, making it the largest general scientific society in the world. AAAS is also the world’s largest federation of scientific and engineering societies, with nearly 300 affiliate organizations, serving 10 million people. AAAS’s goals include furthering the work of scientists; facilitating cooperation among them; fostering scientific freedom and responsibility; improving the effectiveness of science in the promotion of human welfare; advancing education in science; and increasing public understanding and appreciation of the importance and promise of the methods of science in human progress.

AAAS is also world-renowned as the publisher of *Science*, the world’s leading peer-reviewed general scientific journal. Founded by Thomas Edison in 1880, *Science* has been the official journal of AAAS since 1900. As well as being one of the most frequently cited scientific journals in the world, *Science* has won numerous awards for its news coverage.

In 1974, AAAS established a formal program of activities at the science/law interface, and is the only scientific society to have a formal relationship with the legal community. The science/law program falls under the aegis of the National Conference of Lawyers and Scientists (NCLS), a joint standing committee of AAAS and the American Bar Association Science and Technology Law Section. Among its many activities, NCLS has a long-standing interest in finding ways to improve the quality and reliability of scientific evidence and testimony in the courts. It is this interest that motivated the initiation of *Court Appointed Scientific Experts*.

GOALS OF CASE

When addressing complex scientific and technological issues that increasingly come before them, many members of the judiciary often believe that experts retained by parties sometimes become advocates for the side that hired them, thereby calling into question the value of their testimony. Much of the scientific community echoes the concerns of judges regarding the resolution of scientific disputes. Additionally, many scientists

perceive service as an expert for a party in legal proceedings as incompatible with deeply held professional norms. Because legal and scientific goals and procedures differ in several respects, those scientists accustomed to presenting their opinions in traditional scientific arenas often are unwilling to serve as an expert retained by a party. The result is that the judiciary may be deprived of the very people best able to inform a judge or jury about the issues in dispute. We believe that *CASE* will provide scientists with an opportunity to render a valuable public service.

In order to address the concerns of judges regarding the objectivity and reliability of parties' experts, noted above, *CASE* responds to requests from judges by identifying highly qualified, independent scientists, engineers, and health care professionals to serve as court appointed experts in cases where the judge believes that a court appointed expert would facilitate the court's, parties' or jurors' understanding of scientific or technical issues.¹

REQUESTING ASSISTANCE FROM *CASE*

When a judge, or an individual calling on behalf of a judge, contacts us, staff will ask a few questions to determine whether the requested assistance appears to fall within the project scope.² These questions will ensure that we do not take up the court's time on requests that we cannot accept. For example, we will not accept cases if the expert sought is not a scientist, engineer or health care professional. If the request seems appropriate, staff then will ask for additional information

Upon the recommendation of AAAS counsel, staff asks that judges wishing to use our services be encouraged to issue an Order requesting that staff proceed in a "good faith effort" to identify an expert and that project staff consult with organizations or individuals outside the Association, as necessary to fulfill this request. While the possibility of untoward legal complications arising from the Association's leadership of this project is very remote, such an order may serve as added protection. Our assistance to the court is not contingent upon the issuing of such an order.

During the course of our search, it may be necessary for staff to have further conversations with the court. Additionally, we encourage the court to keep us informed of developments in the case that may affect our efforts, such as serious settlement discussions.

¹ In seeking "independent experts," *CASE* intends to provide judges with individuals disinterested in the outcome of the litigation at issue. In reality, very few experts are completely neutral regarding adherence to one scientific theory over another. The experts' overriding objective, therefore, is not to approach the scientific issues in the case without opinion, but to educate the judge and/or jury on the scientific issues while being disinterested in the case's outcome.

² If we receive a request from a party to litigation or a party's attorney, we will provide the caller with general, publicly available information only. Should the caller be interested in having an expert appointed, we will refer the party to the judge presiding over the litigation. Similarly, during the course of the litigation, absent judicial instruction, we will not communicate in any way with parties or their counsel regarding this matter.

Initially, the *CASE* project was supported by foundation grants and we were able to provide our services at no cost to the court. Because our grant funds ran out, we now charge a modest fee for our services. Additionally, the experts we recruit in response to a judge's request must be compensated for their service. The amount and scheduling of this compensation, as well as the source of the funds, are to be worked out between the court and the expert.

RECRUITMENT AND SCREENING OF EXPERTS

CASE project staff is not assembling a list or roster of scientists from which names will be pulled. Because each request is unique to the current litigation, we can best fulfill a judge's request by initiating a specific search in response to the court's needs. In addition to typical search methods, we are able to call on our many contacts in the scientific community to assist us in finding an appropriate expert. All discussions with such sources or with potential candidates for appointment are confidential.

CONFLICTS OF INTEREST

When we have identified scientists whose professional qualifications match the expertise that the court is seeking, staff will send those individuals a Potential Sources of Bias and Conflict of Interest Questionnaire.³ This questionnaire elicits information about employment or financial relationships between potential experts and members of their families and parties to the litigation. It also inquires into affiliations with interest groups or advocacy organizations whose views may be pertinent to the issues before the court

The names of individuals with obviously disqualifying conflicts, such as current or very recent employment by one of the parties, will not be forwarded to the court. Absent very obvious conflicts, staff will provide the court with the completed questionnaires of the potential experts whose names are forwarded. Please note that project staff makes no attempt to verify the information contained in the questionnaire. If the court has further questions regarding the matters addressed in this form, we encourage the court to contact the potential experts directly.⁴

For every request we receive from the court, we will attempt to forward two or three names for consideration. It is important for the court to be aware that situations that appear to be conflicts in a legal setting do not necessarily appear so to members of the scientific and technical communities. Once the court has appointed an expert, we will provide the expert with the *CASE* Handbook for Experts, which advises the expert to be

³ A copy of this questionnaire is attached as Appendix A.

⁴ In the course of its conflicts screening, *CASE* staff inquire into relationships with the parties named in the litigation only. If appropriate, the court may want to alert the experts to the identity of subsidiaries of the parties or other related entities, such as parent companies.

sensitive to conflicts that might arise during the course of his or her assignment.⁵ (For that reason, AAAS should be notified when an appointment is made.) Therefore, we urge the court to issue clear guidelines to experts it has appointed regarding permissible or advisable activities – or their opposite – during their service. We strongly urge the court to issue written instructions and encourage the experts to be in touch with the court if any questions arise in their minds about such activities. *CASE* staff will not advise experts regarding the propriety of specific activities, but will refer all such questions to the court.

CONFIDENTIALITY

Project staff has adopted a policy of confidentiality regarding our participation in this project. Staff members have signed a confidentiality agreement, and individuals from outside organizations who assist us in identifying an expert will be required to sign a similar form. We will not publicly discuss requests from judges until and unless an actual appointment is made. Further, all matters discussed between the court and staff will be kept strictly confidential. Similarly, we are very sensitive to the need to protect the privacy of scientists whom we consider as candidate experts. We will inform scientists who agree to have their names submitted to the courts that project staff will not disclose either the financial or employment information they provide to us, except to the judge. However, we also inform them that if their name is submitted to the court, parties to litigation will likely be allowed access to this information and will be free to question the expert about it during litigation proceedings.

EDUCATION OF EXPERTS AND JUDGES

Many of the individuals that *CASE* recommends to the court will have had little or no previous experience with judicial proceedings. For that reason, we have prepared a handbook to provide them with background information about the civil litigation process. The handbook covers a broad range of topics.

The handbook covers a broad range of topics that may be important for a scientist who has been appointed to serve the court, such as depositions, the nature of examination and cross-examination, and the purpose and scope of discovery. Nevertheless, the handbook is not intended to be a substitute for the court's "education" of its experts. It is important to note that experts appointed by the court, unlike parties' experts, will not have an attorney whom they can call on with

⁵ A copy of the Handbook for Experts is enclosed.

questions and concerns.⁶ We hope that the court will fill in some gaps by, for example, remembering that terminology familiar in the courtroom may seem like “jargon” to the expert, that instructions regarding matters such as the duties and expectations of the court be in writing, and that the court encourage the expert to call if clarification of assignment or of other issues is needed.⁷

CASE’S ROLE FOLLOWING THE EXPERT’S APPOINTMENT

Once the judge has appointed an expert, project staff will no longer have an active role in the litigation. To avoid the appearance of influencing the outcome of a particular case, staff will refer all questions about an expert’s assignment and other related activities to the court, unless otherwise instructed by the court. However, we are interested in the progress of judicial proceedings in which we have assisted the court. We hope that by observing the ways in which courts use the experts we recommend, we will learn more about this innovative effort to increase cooperation between the federal judiciary and the scientific and engineering communities. For that reason, we would appreciate receiving copies of documents relevant to the use of the expert and notices of hearings or other proceedings that are open to the public.

⁶ In some cases, particularly complex or lengthy litigation, the court may find it useful to appoint counsel to assist the expert.

⁷ In the *MDL-926* litigation, “Judge Pointer delivered oral instructions at a conference designed to orient the panel members... He discussed the panelists’ roles as expert witnesses, the procedures they should follow in seeking advice or information from nonparties, the ground rules about contacting representatives of other parties, and the procedures that would be involved in the discovery and trial depositions. This informal discussion was on the record, but later events suggest that some panel members may not have understood the issues and guidelines framed by Judge Pointer.” William Schwarzer and Joe Cecil, “Management of Expert Evidence,” *Reference Manual on Scientific Evidence, Second Edition*, at p.16. In fact, in a follow-up interview, “[o]ne expert commented that the oral instructions seemed fine at the time, but the panel later realized that all instructions should have been written and affirmed by all involved.” *Id.* at pp. 18-19. The experts in the *MDL-926* litigation found the following matters especially difficult: what constituted a conflict of interest during the course of their service; the discovery potential of notes, drafts, or other materials used in preparing their reports and testimony; and the rules and expectations governing their communications with colleagues about matters involved in the litigation.

Appendix A

Court Appointed Scientific Experts Advisory Committee

Appendix C

***Court Appointed Scientific Experts* Recruitment and Screening Panel**

Appendix D

Appendix A

POTENTIAL SOURCES OF BIAS AND CONFLICT OF INTEREST QUESTIONNAIRE FOR PROSPECTIVE EXPERTS

The case is _____. The plaintiff in the case is _____.
The defendant(s) is/are _____. The case is being heard by
_____, in the _____ District of _____. The legal issue(s) is/are

The attorneys for the parties are:

Plaintiff

Defendant:

The experts for the parties are:

Plaintiff

Defendant:

About Bias and Conflict of Interest

Before you begin this questionnaire, please review the introductory information provided on the following pages, as well as the list of plaintiffs and defendants listed above.

Do not skip any questions. If you need clarification of any of the items on the questionnaire, contact Deborah Runkle, Project Manager, for assistance. She can be reached at 202/326-6794 or drunkle@aaas.org.

When you have completed the questionnaire, sign and return it to:

Deborah Runkle
Program Manager
Court Appointed Scientific Experts
American Association for the Advancement of Science
1200 New York Avenue, NW
Washington, DC 20005
drunkle@aaas.org

If you have any changes or additions to the information reported on this form while you are being considered for service as an independent expert, please contact Deborah Runkle. If any changes or additions to this form occur while you are serving as an

independent expert, please report them to the judge you are assisting.

Once AAAS receives the completed questionnaire, the information contained in it will be kept confidential within the Association, and will be disseminated only to *CASE* staff. However, should your name be forwarded to the court, this questionnaire will be among the materials reviewed by the judge and the parties. The parties are typically free to use the information in preparing their case.

What Are Biases and Conflicts of Interest in the Legal Arena and Why Are They Important?

As you know, court appointed – or independent – experts are appointed by, and report to, the judge, rather than to either the plaintiff or the defendant. As an independent expert, you will receive written instructions from the judge regarding the role you will play in the litigation. (An instruction of this kind is referred to as a “charge.”) Because the parties involved in the litigation have a great deal at stake, it is very important that you be free from disqualifying financial conflicts of interest or significant bias regarding the issues and parties involved in the litigation. It is also important that you be free from the appearance of these kinds of biases or conflicts. The information asked for in this questionnaire is needed for the judge to determine whether you are indeed independent. It is important to provide as much information as possible in this questionnaire so that unanticipated conflicts do not arise when the judge and parties ask you questions at a later date. *CASE* staff will use this questionnaire to identify obvious conflicts. The judge presiding over the case will ultimately be responsible for choosing the expert, and will determine whether more subtle conflicts are disqualifying.

Bias in the legal setting has a meaning different from that used either in common usage or in a scientific field. Bias in the legal arena generally refers to substantive views you hold, whether or not they have been published or otherwise presented. Occasionally, the term might apply to the views of a professional society, advocacy group or even an individual with whom you are closely associated, either personally or professionally. An example of a potentially problematic form of bias is an independent expert who is asked for an opinion on a matter that he or she has taken a position on or is identified with. Some examples of this kind of bias are public statements (e.g., testimony, speeches, interviews, lectures), publication (e.g., articles, books), close identification or association with the positions or perspectives of a particular group, or through other personal or professional activities.

It should be stressed that “bias,” as the term is used here, is not pejorative. Moreover, bias of the sort discussed here is not automatically disqualifying. For example, a judge might well conclude that the fact that an expert has already formed an opinion about one of the questions presented in the litigation does not preclude appointing the expert.

Conflict of interest means any financial or other interest that could preclude an individual from offering independent and objective advice on an issue. An example of a conflict of interest is a court appointed expert who has a family member or close friend who is a

party to the litigation, or who is otherwise associated with the litigation (e.g., a family member who is an attorney involved in the litigation). If an expert is a senior officer of a professional society with a strong public position on the issue, that can also be thought of as a conflict of interest.

An illustrative example of direct economic benefit is an independent expert (or member of his or her immediate family) who has a significant financial investment or other close tie to a party. (Highly diversified mutual funds do not constitute a significant investment.) An example of indirect economic benefit would occur if the case for which the expert is being considered has the potential to affect the expert's career advancement.

The examples above are illustrative only, and an affirmative answer would not necessarily disqualify you from serving as a court appointed expert. It's important to remember that conflicts can affect – or appear to affect – an expert's opinion inadvertently. If you have any questions about the existence or appearance of bias or conflicts, please bring these matters to the attention of Deborah Runkle.

Instructions for Completing the Questionnaire

Please note that the following questions refer variously to “you,” “you or your immediate family,” or most broadly to “you, members of your immediate family or staff of your employer.”

Any reference to an “interested party” refers to:

- plaintiffs, defendants or the judge in the current litigation; or
- individuals or organizations that are otherwise substantially involved in the current litigation (e.g., law firms).

Please provide all relevant details for any questions answered in the affirmative. Also, please include any other factors that you believe could serve as a potential bias or conflict of interest that have not been covered in this questionnaire. An affirmative response to one or more questions does not automatically disqualify you from serving as an independent expert. Further explanations may, however, be requested.

Contact Information

Name: _____

Telephone/
Fax: _____

Email: _____

Title: _____

Employer: _____

Address: _____

1. Are you, family members, or close friends currently plaintiffs in this litigation [or employed by plaintiff], defendants [or employed by defendants], attorneys involved in this litigation, or otherwise interested parties in the pending litigation?

Yes No

2. Have you or any family members ever been employed by any of the parties, or provided services for compensation by any of the parties?

Yes No

3. If so, how long ago?

Within the past year 1-3 years ago More than 3 years ago

4. Period of employment or service:

Less than one year 1-3 years More than 3 years

5. Have you or any members of your immediate family ever been employed or otherwise paid by any organizations that have taken positions related to the core issues or policy implications of the litigation?

Yes No

6. Are you or members of your immediate family associated, on an unpaid basis,

with any organizations that have taken positions or interests related to the core issues or policy implications of the litigation? These relationships could include professional societies, trade associations, public interest or civic groups.

Yes No

7. Have you or members of your immediate family been contacted by any party or attorney regarding this litigation?

Yes No

8. Have you or members of your immediate family ever received any research funds, graduate support, or any other funds (awards, honoraria, speaking or consulting fees, etc.) from any interested party?

Yes No

9. Do you or members of your immediate family currently have investments in any of the interested parties' corporations in the form of stocks, bonds, etc.?

Yes No

10. Do you or members of your immediate family favor any of the parties in this litigation?

Yes No

11. Do you or members of your immediate family hold substantive views regarding the issue(s) in this litigation, whether or not these views have been made public?

Yes No

12. Have you ever served as an expert in litigation?

Yes No

13. If so, approximately how many times?

14. For whom did you work, i.e., plaintiff and/or defendant and/or independent expert for the court?

15. If you can recall, please provide the name(s) of the case(s), what issues the case(s) involved, and the nature of your testimony.

16. Have you, members of your immediate family, or your employer been employed by the attorneys in this litigation or provided services for compensation to these attorneys?

Yes No

17. Have you or members of your immediate family ever employed the attorneys in this litigation?

Yes No

18. Are you, members of your immediate family, or your employer associated with the parties' experts in this litigation or taken part in other litigation these experts have been involved in?

Yes No

19. Are there any factors not addressed above that could create an appearance of conflict or bias, should you be selected to serve in this case?

Yes No

20. Is there any reason not addressed by the above questions that you cannot give an independent opinion in this particular case?

Yes No

I have read the "General Statement Concerning Bias and Conflict of Interest" and the "Instructions for Completing the Questionnaire," and have answered the above questions in light of those statements completely and to the best of my ability.

SIGNATURE

DATE

Appendix E

Court Appointed Scientific Experts **Professional Standards Subcommittee**

Arthur Bryant, Esq.
Trial Lawyers for Public Justice

Ruth Greenstein, Esq.
Vice President, Administration & Finance
Institute for Defense Analyses

Susan Poulter, J.D., Ph.D.
S. J. Quinney College of Law
University of Utah

Honorable Barbara Jacobs Rothstein
Director, Federal Judicial Center

Dr. William A. Wulf
President
National Academy of Engineering

Honorable Rya Zobel
Judge
United States District Court
for the District of Massachusetts

Appendix F

Court Appointed Scientific Experts **Education Subcommittee**

Bert Black, Esq.
Diamond, McCarthy, Taylor & Finley, L.L.P.
Dallas, TX

JoAnn Bordeaux, Esq.
Deputy Director, Torts Branch
United States Department of Justice

Dr. David Eaton
University of Washington
Department of Environmental Health

Patrick Malone, Esq.
Stein, Mitchell & Mezines
Washington, DC

Dr. Richard Marshall
Association of Trial Lawyers of America

The Honorable William Schwarzer
Senior Judge
U.S. District Court for the Northern District of California