Buying Justice: The Cost of Expert Witnesses in Jurisdictions Across the World

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Introduction

Perhaps nothing is more instrumental in a trial in the United States than a smoking gun. Smoking guns come in many forms such as damning evidence, the impeachment of a witness, and a damning cross-examination, but one smoking gun that may surpass them all is an expert witness with outstanding credentials. A neurosurgeon who received his bachelor's degree in biology from Brown, attended Harvard Medical School, and completed his residency at John Hopkins Hospital may be the smoking gun for a defendant's or a plaintiff's case. But why? Simply because the opposition cannot afford an expert with the same credentials.

Here in the United States, this is a generally accepted principle with few limitations. The United States has a unique approach to expert witnesses and witnesses in general. But perhaps it is not the United States that harbors a unique approach to expert witnesses, but rather the jurisdictions that take an alternative approach? Either way, there are major differences in how common law and civil law jurisdictions regulate the testimony of a nonfactual witness.

This article is not written to condemn, recommend, or support a single judicial system and their approach to expert witnesses. This article is written to develop and explore the differences in how three different jurisdictions – the United States, Germany, and Colombia –approach Expert witnesses. Common law or civil law, no justice system is perfect. There are differences, and those differences require alternative approaches, both procedurally and substantively.

The United States Approach to Expert Witnesses

A. The Federal Rules of Evidence

To understand the context of an expert witness in the United States judicial system, one must first understand the limitations of a non-expert witness. Opinion testimony by a lay witness is outlined in Rule 701 of the Federal Rules of Civil Procedure. This rule only permits the testimony of a lay witness if: 1) it was based on the witness's perception, 2) if it is needed in understanding a fact in issue, and 3) if it was not based on specialized knowledge.[1]

Judge Learned Hand once stated:

> The truth is, as Mr. Wigmore has observed at length, that the exclusion of opinion evidence has been carried beyond reason in this country, and that it would be a large advance if courts were to admit it with freedom. The line between opinion and fact is at best only one of degree, and ought to depend solely upon practical considerations, as, for example, the saving of time and the mentality of the witness.[2]

Consequently, a lay witness is only permitted to testify in the form of the opinion if it is not based on specialized knowledge and the opinion helps to clarify pertinent facts. The line drawn between an expert witness and a lay witness is gray at best. As Judge Learned Hand put it, testimony in the form of an opinion has been constricted.[3] Because lay witnesses are limited in such a fashion, expert witnesses have been relied upon more and more and are also paid for not only time spent testifying, but also time spent in preparation thereof. Parties are now forced to hire experts if they want to have any shot at being successful in litigation. Expert witnesses increase litigation costs and require more judicial oversight as courts are tasked with the duty of determining the credibility and admissibility of the party's experts.

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[1] FED. R. EVID. 701.
[2] Central R. Co. v. Monahan, 11 F.2d 212, 214 (2d Cir. 1926).
[3] *Id*.

Although a party may already have a witness that is qualified to testify in a specific area, they may not be allowed to. An example of this can be seen in *Asplundh Mfg. Div. v. Benton Harbor Eng.*[4] This case involved a wrongful death action brought against the manufacturer of truck lifts[5]. The plaintiffs called a witness who had been the fleet maintenance supervisor for the city[6]. He had used the lifts for more than ten years and testified that he believed the malfunction was due to a fracture in the boom assembly and attributed the accident to the design of the rod.[7]

The appellate court held that his position as maintenance supervisor was inapplicable and did not shed light on his ability to testify on the matter[8]. On appeal, the appellate court overruled the lower court's decision to allow the manager to testify as an expert and remanded the case for a new trial. [9]

It is possible for an individual to be knowledgeable enough to repair and maintain equipment, yet not knowledgeable enough to testify as to the defect of the very equipment that he specialized in maintaining.

So, who is an expert if an individual who is called to testify regarding equipment that he has maintained for ten years is not? According to Federal Rules of Evidence 702, an expert is "[a] witness who is qualified as an expert by knowledge, skill, experience, training, or education."[10] Courts are given broad discretion in determining who is qualified as an expert.[11]If a party is seeking to qualify a witness as an expert, that same party has the burden of proving that the witness they

[4] Aspludh Mfg. Div. v. Benton Harbor Eng'g., 57 F.3d 1190, 1195-96 (3d Cir. 1995).
[5] *See generally Id*.
[6] *Id*. at 1192-93.
[7] *Id.* at 1193-94.
[8] *Id*. at 1205.
[9] *Id.* at 1207.
[10] FED. R. EVID. 702.
[11]Dreyer v. Ryder Auto. Carrier Group, Inc., 367 F. Supp. 2d 413 (2d Cir. 2005*)*.

intend to use has the requisite "knowledge, skill, experience, training, or education."[12] However, a witness who may otherwise possess the necessary credentials to testify as an expert may subsequently be disqualified to testify if he or she fails to investigate in a manner necessary to give a reliable opinion.[13] Thus, simply holding qualifying credentials does not in and of itself qualify a witness as an expert.[14]

Courts have allowed police officers to testify as experts.[15] Courts have also allowed police officers to testify concurrently as a fact witness and as an expert witness.[16] Contrary to the requirements for other expert witnesses, police officers, although skilled, are not generally required to hold any formal education beyond a high school diploma. Therefore, their skills, knowledge, and expertise, are quite often the product of only field training and on the job experience. A double standard can be seen. A court held that a maintenance manager whose skills were derived from the position that he held was not qualified to testify as an expert[17]; yet it will allow a police officer to testify as an expert whose experience is derived in the same fashion.[18]

B. The Impact of Expert Witnesses in The United States

In any jurisdiction, an expert witness has the possibility of influencing the outcome of the litigation. Questions might be asked such as: how often are experts used? How much do they cost? Do juries believe them? Where are experts selected from?[19]

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[12] *Id.* At 425.
[13] *Id.* At 425
[14] *Id.*
[15] United States v. Harris, 192 F.3d 580, 589 (1999).
[16] *Id.*
[17] *Supra* note 4.
[18] *See Generally*, *Supra* note 15.
[19] *Id.*

A 1991 study done by Anthony Champagne, Daniel Shuman, and Elizabeth Whitaker, shows just how often expert witnesses are used.[20] Their study involved ninety random civil trials, in which fifty-seven of those trials' experts were used.[21] In forty of those civil trials involving experts, twenty-one of them had at least one expert witness for either side.[22] Furthermore, the nineteen remaining cases had at least one expert on each side, and eleven of the cases had one or two experts per side.[23] Arguably, the desire and use of expert witnesses has grown since the late twentieth century, yet a study from the early nineties shows the use of expert witnesses in the United States was essential even three decades ago.[24]

This regular use of experts has created a quasi-profession where experts are becoming experts in being experts.[25] This is causing the "business of being an expert" to explode.[26] Obscure fields of expertise have been enticed to join the already practicing professors, doctors, engineers, accountants, veterinarians, and other professionals to join the expert witness industry.[27] This demand for expertise is creating companies that specialize solely in finding parties expert witnesses that can testify in accordance with their needs.[28] According to Louis B. Potter, the former executive director of Defense Research Institute of Chicago, "almost anybody

[20] Anthony Champagne, Daniel Shuman & Elizabeth Whitaker, *An Empirical Examination of the Use of Expert Witnesses in American Courts*, 31 Jurimetrics J. 375, 391 (1991).
[21] *Id.* at 380.
[22] This study was conducted in Dallas County District Court over a three-month period. During that time there were 90 civil trials and 57 of those trials involved experts. Case files could only be obtained in 40 of those 57 cases involving experts. *Id.* at 380-381.
[23] *Id.*
[24] PHILIP F. ZEIDMAN, *THE RISE OF THE EXPERT WITNESS*, FRANCHISE TIMES (2015), http://www.franchisetimes.com/January-2016/The-rise-of-the-expert-witness/.
[25] Michael Graham, *Expert Witness Testimony and the Federal Rules of Evidence: Insuring Adequate Assurance of Trustworthiness*, 1986 U. Ill L. Rev. 43, 90 (1986).
[26] ARTHUR W. WILKINSON, *EXPERT WITNESSES: BOOMING BUSINESS FOR THE SPECIALISTS*, NEW YORK TIMES, 1 (1987), http://www.nytimes.com/1987/07/05/us/expert-witnesses-booming-business-for-the-specialists.html?pagewanted=all.
[27] *Id.*
[28] *Id.* at 3.

can become an expert."[29] Although Mr. Potter's statement may be an exaggeration, there are some truths to it. Courts trust that experts are who they claim, and the judiciary is required to exercise control due to the flexible rules.[30]

Experts whose credentials may seem to support the request of the party may be more of an expert in testifying than in the actual field they claim.[31] Some professional fields shun the idea of testifying. Scholars believe that social scientists should not be allowed to testify due to the lack of hard evidence that can be testified to.[32] This creates a divide between experts and professionals in their field. Those who testify continue to do so because of the lack of qualified professionals willing to testify.[33]

The business of being an expert is quite lucrative. Thirty years ago, the average expert fee was $258 an hour, and since then fees have grown tremendously.[34] Hourly fees differ greatly between experts. His or her education, expertise, and experience determine the rate charged. An expert's desire not to testify may stem from a personal belief that his or her profession is one that should not give expert opinion, or a general discomfort in the courtroom and a desire not to be cross-examined by an aggressive attorney.[35]

The price paid for witnesses varies greatly depending on the profession. For example, in the late 1980's, a general veterinarian might have charged $65 an hour for her services, while a veterinarian that specialized in equine care may have charged $300 an hour for the same thing.[36] This early correlation in specialization costs continues to be seen today, but the current hourly rate

[29] *Id*. at 2.
[30] *Id*.
[31] Champagne et al., *supra* note 20 at 381.
[32] *Id*. at 382.
[33] *Id*.
[34] *Id.*
[35] *Id*.
[36] *Id*. at 383.

for experts has drastically increased.[37] In 2017, Orthopedic Surgeons were charging $570/hour for review, $903/hour for depositions, and $977/hour for trial testimony.[38] On average, nurses are charging $204/hour for review, $273/hour for deposition, and $315/hour for trial testimony.[39] Law Enforcement experts on average are charging $210/hour for review, $258/hour for depositions, and $266/hour for trial testimony.[40] The Expert Institute compiled data from more than 20,000 cases and discovered that the average hourly rate for case review was $372/hour, $475/hour for deposition, and $507/hour for trial testimony.[41]

The price that litigants pay to expert witnesses can lead to multiple expectations throughout litigation. A lawyer who knows that his opposition is using the testimony of an expert can either attempt to disqualify the testimony of that expert or find an expert that can come to the opposite conclusion of his opponent's expert. This leads to lawyers extensively coaching their expert.[42]

A forensic scientist once said, "You work for who pays you."[43] This implies that testimony can be altered, or at least spun, according to the one who is cutting the check. Lawyers understand that experts are working for them, which leads to preferential treatment and biased testimony.

> [E]vidence reveals the variation in the degree that lawyers will push experts to draw favorable conclusions. Forty-five percent of the experts stated that lawyers commonly coach experts about how their testimony should be presented. Fifty-six percent said that lawyers frequently urge experts to be less tentative in their testimony, and 12% stated that lawyers frequently try to get experts to testify to issues for which there is no accepted scientific basis. Twenty-two percent of the expert witnesses concluded that to be retained by lawyers it is crucial to be responsive to suggestions from the lawyer.[44]

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[37] *Most Requested Medical Expert Witness Fees*, THE EXPERT INST. (2017), https://www.theexpertinstitute.com/expert-witness-fees/
[38] *Id*.
[39] *Id.*
[40] *Id*.
[41] *Id.*
[42] *Supra*, note 16, at 385.
[43] *Id*.
[44] *Id*.

Although lawyers play a big part in how testimony is shaped, this does not mean that expert witnesses do not partake in the influencing of testimony as well. Experts often ask and want to know the position that their attorney wants them to take.

> Many lawyer responses also suggest that experts are receptive to encouragement in their testimony. Eighty-six percent of the lawyers consider the adamancy of the expert's support for the lawyer's position as being either important or very important as a consideration in employing the expert. Forty-six percent of the lawyers do not assume that the experts they hire will be truly impartial. Seventy-seven percent think experts are willing to be coached about how their testimony should be presented. And 45 % of the lawyers admitted that, if an expert seems willing to be biased in favor of the lawyer's position, the lawyer is inclined to employ the expert in future similar cases.[45]

The undoubted influence that is inherent in some expert witnesses can be seen in a recent scandal with the Federal Bureau of Investigation (FBI).[46] The Justice Department and the FBI admitted that their forensic unit was giving flawed testimony in criminal trials for over two decades.[47] Twenty-six out of twenty-eight FBI examiners "overstated" forensic data.[48] The testimony helped prosecutors achieve more than a ninety percent conviction rate in 268 trials.[49] Thirty-two of the trials in which the flawed testimony was given involved the defendants receiving the death penalty. [50] Fourteen of the thirty-two defendants have been executed or have died in prison.[51]

Situations such as these have stirred up some debate regarding expert witnesses and their ethical duties. However, agencies such as the FBI or a prosecutor's office are not solely

[45] *Id*. at 385.
[46] Spencer Hsu, *FBI Admits Flaws in Hair Analysis over Decades*, THE WASHINGTON POST, Apr. 18, 2015.
[47] *Id*.
[48] *Id*.
[49] *Id*.
[50] *Id*.
[51] *Id*.

responsible for influencing expert witnesses. The influence of other experts, and cross-contamination can also cause a biased snowball effect.[52]

> Although some types of evidence are often presented in court as independent, most often this claim is overstated. Each affects (and potentially contaminates) one another. Hence, expert testimony about one type of evidence is not independent of other (unrelated and different) types of evidence. For example, a forensic examiner may be exposed to other forensic evidence in the case or what the investigating detective thinks, or a suspect confessing to a crime may be aware of evidence placing the suspect at the crime scene.[53]

Opportunities for undue influence may intrude through the testimony of an expert. If the factfinder is not informed that the testimony is not independent but rather influenced by another source, then the factfinder may be misled.[54]

> For example, if the fingerprint examiner knew that the suspect was also identified by DNA evidence and that affected the conclusion that the fingerprints found at the crime scene matched those of the suspect, when presenting the conclusions that the fingerprints match the examiner (mis)presents the conclusion as if it was solely based on the fingerprints evidence. This is misleading and misrepresents what the conclusions are really based on. Furthermore, by using the DNA evidence (in this example, but it can be a variety of other effects, such as being influenced by a suspect's confession), this evidence is double counted: first —implicitly— as part of the fingerprint evidence, and then again when the DNA expert testifies.[55]

This shows that expert witnesses have multiple avenues of influence, whether it may be financial incentives, aggressive attorneys, work quotas, or even other witnesses. Surprisingly, recent changes to the rules provide even more protection between the communication between a

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[52] Itiel Dror, Jules Epstein, Bridget McCormack, *Cognitive Bias and Its Impact on Expert Witnesses and the Court*, Vol. 54 No. 4, THE JUDGES' J., 8, 10 (2015).
[53] *Id.* See, for example, the case of *Regina v. Jamie Deakin*, [2012] EWCA (Crim) 2637, where the Court of Appeal notes that "a matter of particular concern, in this court's view, is that Police Constable Gorringe had actually told Detective Constable Churton shortly prior to his examining the CCTV to see if he could recognize the appellant… This was highly suggestive and should never have happened… very real possibility of unconscious influence." (Paragraph 25). In another case, Dwayne Jackson confessed to a crime he did not commit after he was erroneously identified in DNA testing by Las Vegas forensic examiners, L. Mower & D. McMurdo, "Las Vegas police reveal DNA error put wrong man in prison" L. V. REV. J. (2011).
[54] *Supre* note 52.
[55] *Supra* note 52.

lawyer and her expert by protecting communication between the lawyer and his or her expert witness. [56] This allows attorneys to communicate more freely between their experts without their opponent having access to the materials or conversations that may have once been discoverable.[57]

The lack of consistency in expert witnesses has caused some tension between courts and those who qualify as experts.[58] Because expert witnesses are relied upon so often, they can also be found testifying regarding matters that do not risk someone's liberty but rather someone's property. Experts are often used in cases that involve financial estimations and matters such as divorce, probate, estate tax, and partnership dissolution.[59] A perfect example of this can be seen when a court stated:

> As it turns out, I find both experts' reasoning fallacious and their conclusions preposterous, and I give no weight whatsoever to either of their ultimate conclusions as to the value of the business. The petitioner's expert valued the business, as of August 27, 1981, as $ 20,700,000. The respondent's expert valued the same business, as of the same day, at $ 71,000 -- a difference of nearly thirty thousand percent![60]

How is it possible to have two so called "experts" whose estimated value of a business is $20,629,000 apart? This frustrates the judicial body and compromises the integrity of the courts. In the instance above, the experts not only frustrated the court, they burdened the court with the duties of an expert.[61] Because the experts' conclusions were so "fallacious" and "preposterous," the court was forced to find the value of the business independent of the experts.[62] Once again

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[56] Scott Stein & Julie Sneed, *Ethical Hurdles, Snares, and Pitfalls in Prepping and Using Experts*, A.B.A. (2013).
[57] *Id*. at 1–2.
[58] *Id.*
[59] Taines v. Gene Barry One Hour Photo Process, 474 N.Y.S.2d 362, 365 (1983).
[60] *Id*. at 365.
[61] *Id*.
[62] *Id*.

the experts were influenced by an extraneous source, the party that payed them, thus tainting their ability to be fair and impartial. [63]

The Civil Law Approach

A. Germany's Rules of Evidence

Germany's rules regulating expert witnesses are much more complex than those of the United States. There is a general rule that outlines the selection process, then many sub-rules that apply once the expert witness has been appointed.[64] The rule outlining the selection process reads:

> (1) The court hearing the case shall select the experts to be involved and shall determine their number. It may limit itself to appointing a single expert. It may appoint other experts to take the stead of the expert first appointed.
> (2) Should experts have been publicly appointed for certain types of reports, other persons shall be selected only if particular circumstances so require.
> (3) The court may ask the parties to the dispute to designate persons who are suited to be examined as experts.
> (4) Should the parties to the dispute agree on certain persons to be appointed as experts, the court is to comply with what they have agreed; however, the court may limit the selection made by the parties to a certain number.[65]

The importance of this rule is the involvement of the court in the selection process of expert witnesses. The court is responsible for selecting the experts and determining the number of experts needed in the case. Although the court is responsible for selecting the expert witness, the losing party is responsible for paying the reasonable expenses of the litigation, as well as the fees for the court appointed expert.[66]

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[63] *Id.* at 366.
[64] Spencer Hsu, *supra* note 53.
[65] BUNDESGESETZBLATT [BGBL][Federal Law Gazette], at 1781 (2007) (Last amended by Article 1 of the Act dated Oct. 10, 2013 BGBL at 3786) (Ger.).
[66] ZIVILPROZESSORDNUNG [ZPO] [CIVIL PROCEDURE CODE], § 402/1 (23nd ed. 2002) (Ger.) English version available at: https://www.gesetze-im-internet.de/englisch_zpo/englisch_zpo.html.

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Although the court generally appoints experts, this does not mean that parties involved in the dispute have no control over the experts that testify.[67] Parties are allowed to stipulate to experts, and if so, the court is to adhere to the agreement.[68] However, experts that are selected and hired by the parties do not hold the same weight as a court appointed expert.[69] Courts are wary of accepting partisan experts; therefore, these expert opinions are only viewed as an argument and not evidence.[70] The general purpose of a partisan expert is to discredit the court's appointed expert. If the court deems it necessary, the court can appoint another court expert, but that rarely happens.[71] Partisan experts are used with caution, as the losing party is responsible for their fees.[72] Regardless, the court always has the last say.[73]

The involvement of the court in expert witness testimony does not stop at the selection process and the court continues to have oversight of the expert after the selection process.[74] Germany's code outlines the duties as follows:

> (1) The court is to direct the expert in terms of his activities and may issue instructions as concerns their nature and scope.
> (2) Insofar as the special aspects of the case require, the court is to hear the expert prior to wording the question regarding which evidence is to be taken; it is to familiarize the expert with his tasks; and is to explain to the expert the task it has allocated to him should he so request.
> (3) Where the facts of a case are at issue, the court shall determine the facts on which the expert is to base his report.
> (4) To the extent required, the court shall determine the scope in which the expert shall be authorized to elucidate the question regarding which evidence is to be taken, and it shall

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[67] *Id.*
[68] Sven Timmerbeil, *The Role of Expert Witnesses in German and U.S. Civil Litigation*, 9 ANN. SURV. OF INT'L & COMP. L. 1 (2003).
[69] *Id*. at 178.
[70] Timmerbeil, *supra* note *68;* BGH NJW 1993, 2382, 2383; *See also* BGHZ 98, 32, 40 (held that partisan expert opinion can be introduced into evidence if both parties agree).
[71] Timmerbeil, *supra* note 68, at 178.
[72] ZIVILPROZESSORDNUNG [ZPO] [CIVIL PROCEDURE CODE], § 91 (the losing party is responsible for reasonable fees to the court and the winning party.).
[73] Timmerbeil, *supra* note 68, at 175.
[74] ZIVILPROZESSORDNUNG [ZPO] [CIVIL PROCEDURE CODE] § 404(a).*Id.*

> also determine whether or not he may contact the parties, and at which point he is to permit them to participate in his investigations.
> (5) Any instructions given to the expert shall be communicated to the parties. If a separate hearing is held at which the expert is familiarized with his tasks, the parties are to be allowed to attend.[75]

The court acts as a director to the expert and decides which issues the expert is responsible for evaluating.[76] The court takes away the power of the attorneys in the case to influence the expert's area of analysis and outcome.[77] However, this does not mean that the parties are blind to the work of the expert.[78] The court is responsible for disclosing the orders that it has given to the experts.[79] In addition to disclosure, the parties are entitled to reject an expert.[80]However, the parties must challenge the expert based on the same method one must use to challenge a judge, which requires a party to petition to the very court that appointed the expert, and demonstrate why the expert should be disqualified.[81] This makes challenging an expert tedious and difficult.[82] A judge may also take the challenge personally, as it is possible that the court appointed the very expert that is being challenged.[83]

Because the judge has so much discretion as it pertains to the expert witness, the court may also decide in what manner the expert testifies.[84] "If it is ordered that the report be submitted in writing, the court shall set a period of time for the expert to transmit his signed report."[85] Accordingly, the general rule that the court-appointed expert can testify in trial may be overridden

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[75] *Id.*
[76] Timmerbeil, *supra* note 68, at 174.
[77] *Id.* at 167.
[78] *Id*. at 174.
[79] *Id.*
[80] *Id.*
[81] ZIVILPROZESSORDNUNG [ZPO] [CIVIL PROCEDURE CODE], § 406.
[82] Timmerbeil, *supra* note 68, at 174.
[83] *Id.* at 175.
[84] *Id*.
[85] ZIVILPROZESSORDNUNG [ZPO] [CIVIL PROCEDURE CODE], § 411.

by the judge's discretion.[86] Consequently, many courts require that the expert submit a written opinion.[87] The court still has the ability to call the expert who submitted the report to appear at trial to explain the contents and opinion therein.[88]

The way in which the cross-examination is conducted in Germany differs greatly from how it is conducted in the United States.[89] Leading questions are not allowed, which creates a more relaxed and conversational setting between the lawyer and the expert.[90] Generally, only a few questions are asked, and the lawyers are not aggressive towards the expert.[91] The expert is not only selected by the court, but is also instructed as to the material that is to be testified to. This explains the non-confrontational approach to questioning experts in the German court system.[92] Therefore, criticizing the expert is the equivalent of criticizing the court and its decisions.[93]

B. Expert Witness in Colombia's Judicial System

Similar to Germany and many other civil law countries, Colombia has a very distinct and codified approach to expert witnesses. Although codified, Colombia, unlike Germany, gives more leniency to the parties who are requesting the expert. Although judicial oversight does exist regarding experts and their testimony, Colombia has created rules that allow the governance of experts to be held with little intervention from the court. Even so, the Colombian code liberally regulates the process regarding experts by creating steps and procedures that parties must follow.

[86] Timmerbeil, *supra* note 68, at 175.
[87] *Id.*
[88] *Id.*
[89] *Id.*
[90] *Id.*
[91] *Id.*
[92] Timmerbeil, *supra* note 68, at 175.
[93] *Id.*

Like the United States, Colombian experts are only allowed to testify in the form of an opinion.[94] The Colombian code states that "[Opinions] must be clear, precise, exhaustive and detailed; it will explain the examinations, methods, experiments and investigations carried out, as well as the technical, scientific or artistic foundations of its conclusions."[95] This is just the first overall requirement outlining expert's duties. The opinion must be signed and, as a minimum, contain:

1. The identity of the person who rendered the opinion and who participated in its preparation.
2. The address, telephone number, identification number and other data that facilitate the location of the expert.
3. The profession, trade, art or special activity exercised by the person who rendered the opinion and who participated in its preparation. The appropriate documents that enable it for its exercise must be attached, the academic titles and the documents that certify the respective professional, technical or artistic experience.
4. The list of publications, related to the matter of expertise, that the expert has made in the last ten (10) years, if any.
5. The list of cases in which he has been designated as an expert or in which he has participated in the preparation of an expert opinion in the last four (4) years. Said list shall include the court or office where it was presented, the name of the parties, the representatives of the parties and the matter on which the opinion was based.
6. If it has been designated in previous or ongoing proceedings by the same party or by the same attorney of the party, indicating the purpose of the opinion.
7. If it is incurred in the causes contained in article 50, as pertinent.
8. Declare whether the examinations, methods, experiments and investigations carried out are different from those that have been used in expert reports rendered in previous processes that deal with the same matters. If it is different, you must explain the justification for the variation.

[94] Gen. Code Process, Law 1564, Art. 226 (2012), http://www.alcaldiabogota.gov.co/sisjur/normas/Norma1.jsp?i=48425.
[95] *Id.*

9. Declare whether the examinations, methods, experiments and investigations carried out are different from those used in the regular exercise of their profession or trade. If it is different, you must explain the justification for the variation.
10. Relate and attach the documents and information used to prepare the opinion.[96]

These ten requirements are an example of how Colombian Courts use a codified statute to regulate and enforce the use of expert witnesses. The party is required to disclose as much information about their expert as possible.[97] This creates a transparent process that reveals any possible biases and gives the opponent an opportunity to examine the validity of the opinions and research of the expert.

Unlike the United States, Colombia requires experts to be impartial and objective.[98] The expert must disclose not only what is beneficial to her party, but also what is detrimental.[99] This prohibits the expert from testifying only to what favors the party she is testifying on behalf of. Like Germany, experts appointed by the court or a party may be challenged before their reports are submitted.[100] A challenge of an expert is the same process that a party uses to challenge a judge.[101] Parties are also allowed to challenge the expert's report, not just the expert himself.[102] To challenge an expert's report, the party must either provide another report by an expert that outlines the flaws or inaccuracies therein, or hold a hearing in which the court and parties may question the expert regarding his report.[103]

C. Corruption in Colombia

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[96] *Id.*
[97] *Id.*
[98] *Id.* at Art. 235.
[99] *Id.*
[100] William Araque & David Ricardo Araque, *Colombia*, LATIN LAWYER: LITIGATION (2017), http://latinlawyer.com/jurisdiction/1003058/colombia.
[101] *Id.*
[102] *Id.*
[103] *Id.*

As strong as Colombia's rules outlining expert witnesses may seem, their Judiciary has struggled with corruption and outside influence.[104] Colombia's national director of anti-corruption, Luis Gustavo Moreno Rivera, was charged in July of this year (2018) with conspiracy to launder money.[105] Moreno attempted to receive a bribe from a politician to disclose information regarding witnesses who were testifying against him in a Colombian court.[106]

Regardless of how well rules may be drafted, if they are not implemented properly then they have no value. The lack of enforcement and denial of justice in Colombia defeats some of the possible effectiveness of their rules.

> In June of 1996, the Superior Council of the Judiciary reported that between 97 and 98% of all crimes go unpunished, and that 74% of crimes go unpunished …. Other state authorities provide similar statistics. According to information issued by the National Police, 90% of all crimes go unpunished. According to the 1996 report of the Commission for the Rationalization of Public Spending and Finances, the level of impunity in all cases has reached 99.5%. That organization asserts that only one of every 100 crimes reached the trial stage of criminal proceedings....[107]

The end of the twentieth century bred distrust between Colombians and their judiciary, causing the people to feel they could not rely on their judicial system to solve issues and seek justice.[108] The corruption of witnesses and police tactics further polluted the judicial integrity.[109] In attempt to hide heinous acts by the Colombian Military and Police, government officials began torturing witnesses to elicit false testimony or prevent them from testifying.[110] This led to a lack of cooperation with witnesses. Witnesses were offered security and identity protection from the

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[104] *DOJ Hits Colombia's Anti-Corruption Chief with Bribery Charge: U.S. v. Moreno Rivera*, 31 No. 11 Westlaw J. White-Collar Crime 4, July 21, 2017, 2017 WL 3120639, at *1.
[105] *Id.*
[106] *Id.*
[107] Javier Giraldo, SOCIAL JUSTICE, Vol. 26, No. 4 (78), *Shadows of State Terrorism: Impunity In Latin America* (Winter 1999), pp. 31.
[108] *Id.*
[109] *Id.*
[110] *Id.* at 52.

courts, but the violent culture, lack of uncertainty, and distrust still dissuaded witnesses from testifying.[111]

Government officials, corrupt politicians, and wealthy criminals were not the only ones influencing important witnesses; the Colombian media also played a part.[112] The media was using their power to manipulate and intimidate witnesses into contradicting their previous statements.[113] The media would not publish public statements that did not fit their agenda and continued to silence protestors that were advocating for judicial and political reform.[114]

The pressure from external forces that led to witness intimidation still continues. Corruption is still present in Colombia's judiciary and political forum.[115] When citizens cannot trust their government to act on their behalf without intrusion and outside influence, they are wary to bring their problems to institutions run by those same officials. According to the 2010/2011 Global Corruption Barometer:

> [Fifty-six percent] of respondents [Colombian citizens] perceived that the level of corruption in Colombia in the previous three years had increased. The institutions identified as the most corrupt in this study were the political parties and the parliament, with an average score of 4.2, on a 1 (not at all corrupt) to 5 (extremely corrupt) scale. Other institutions with scores over 3.0 were the police and public officials (4.0), the judiciary (3.8) and the military (3.4). While 46% of respondents evaluated the government actions against corruption as ineffective, 35% considered them effective.[116]

Consequently, bribery has become part of how the Colombian judiciary functions.[117] In 2010, 17% of respondents that had contact with either a Colombian judiciary or agency paid a

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[111] *Id.*
[112] *Id.* at 39-41.
[113] *Id.*
[114] *Id.*
[115] Hernán Gutiérrez PhD, *Colombia: Overview of corruption and anti-corruption*, TRANSPARENCY INT'L, 2013, at 1.
[116] *Id.* at 2.
[117] *Id.* at 3.

bribe, and 38% of the bribes that were paid were for services that the individuals were entitled to.[118] This shows that Colombian courts are still prone to corruption and bribery. Consequently, the rules outlining expert witnesses and their testimony can quite easily be circumvented by bribing the court.

Comparisons and Contrasts

D. Advantages and Disadvantages

Each country brings a unique approach to the regulation of expert witnesses; this section discusses the benefits and setbacks therein. The non-adversarial approach of the German courts protects the experts from pressured, biased testimony. In regard to the United States' adversarial system, Marvin Frankel stated, "it is the rare case in which either side yearns to have the witnesses, or anyone, give *the whole truth.*"[119] The German Code of Civil Procedure attempts to help German courts eradicate the partisan, adversarial approach.[120] The German system is built around trust and transparency. A single witness selected by the court, can be used by both parties because the pressure of influence is relieved.[121] However, challenges to the judicially selected experts may be made by either party.[122]

The role that German courts play in litigation is much different than the judiciary's role in the United States. The German court takes an active role in litigation by gathering and deciphering evidence, and German lawyers play a role more similar to a judge in the United States.[123] After a complaint is filed, the judge determines what is necessary to proceed, whether that be calling lay

[118] *Id.*
[119] Marvin E. Frankel, *The Search for Truth: An Umpireal View*, 123 U. PA. L. REV. 1031, 1038 (1975).
[120] John H. Langbein, *The German Advantage in Civil Procedure*, U. CHI. L. REV. Vol. 52, No. 4 (Autumn, 1985).
[121] *Id.* at 827, 829.
[122] *Id.*
[123] Langbein, *supra* note 121, at 827-28.

witnesses, experts, or scheduling hearings with the parties.[124] German lawyers take a more passive approach and watch the actions and inactions of the court to ensure that the proceedings are being conducted as they should.[125]

The lack of juries and lack of a court that act as the sole fact finder, alters the process of what we in the United States consider a "trial." A German trial is not a single event; it is a series of as many events or hearings that the court deems necessary to sort the evidence and return a verdict.[126]

> The very concepts of 'plaintiff's case' and 'defendant's case' are unknown. In [the German] system those concepts function as traffic rules for the partisan presentation of evidence to a passive and ignorant trier. By contrast, in German procedure the court ranges over the entire case, constantly looking for the jugular-for the issue of law or fact that might dispose of the case.[127]

Although this system requires heavy judicial oversight, it also has the power to eradicate frivolous and meritless claims.[128]

For economic and efficiency reasons, German courts prefer that an expert submit a written report of his findings.[129] This speeds up the litigation process and allows both parties and the court to review and critique the report.[130] This method also promotes amicability; if a lawyer disrespects an expert, it is often seen as disrespecting the court because the expert is often appointed by the court, and has therefore become a quasi-court official.[131]

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[124] *Id.* at 827.
[125] *Id.* at 826.
[126] ROLF BENDER, THE STUTTGART MODEL, 433 (M. Cappelletti & J. Weisner eds., 1979).
[127] Langbein, *supra* note 121, at 830.
[128] *Id.*
[129] Timmerbeil, *supra* note 69, at 175.
[130] Langbein, *supra* note 121, at 839.
[131] *Id.* at 840.

Unlike Germany, the United States is a common law system, and this aspect alone requires a different judicial approach to the role a court plays in litigation. Courts in the United States operate under case-law which gives more leniency and power to the courts, while German and Colombian courts are dominated not by case law, but by statute. Giving civil law courts the ability to make law and control the outcome via judicial oversight, particularly regarding expert witnesses, would be an excessive grant of power. Beyond that, culture and tradition also play a significant role.

> Attorneys in the United States are generally motivated to search for all evidence favorable to their clients, either because they are paid on an hourly basis and, therefore, earn more the longer they search, or because they are working on the basis of a contingent fee, in which case reasonable search efforts are an appropriate investment.[132]

Similarly, attorneys in the United States also have an ethical duty to zealously represent their clients. The United States' tradition of legal independence, capitalism, and overall distrust of government has created a legal system that thrives on private counsel and that counsel's ability to go above and beyond in an attempt to vindicate his or her client. The mere thought of more government control and oversight in the United States' judicial system is enough in and of itself to deter many United States citizens from supporting any judicial reform.

In contrast, the heavy judicial oversight that German courts bear is what the Colombian courts attempted to alleviate without compromising the integrity of the expert witness. The codified rules governing Colombia's expert witnesses attempts to strike a balance between oversight, transparency, and integrity without significantly burdening the courts. Colombia's

[132]John C. Reitz, *Why We Probably Cannot Adopt the German Advantage in Civil Procedure*, 75 IOWA L. REV. 987, 995 (1990).

codified approach and move from judicial oversight may be the product of the nation's shift from a purely inquisitorial system that required extreme judicial oversight and minimal attorney intervention, to an accusatory system that began to shift roles.[133] This shift is the product of a desire for greater efficiency and more cost-effective procedures, along with internal and external pressures.[134] No longer are Colombian judges burdened with the heavy load of litigation oversight. Likewise, Colombian attorneys are given more freedoms and responsibilities, similar to those in the United States.

On paper, Colombia's approach strikes a balance. It regulates conduct between the attorneys and experts, it promotes transparency, and it attempts to unearth biases. It does all of this with little to no judicial oversight. Unlike the United States, the rules governing experts are intricate, thorough, and leave no room for interpretation. On the other hand, unlike courts in Germany, Colombian courts are not daunted with the rigorous task of monitoring each expert. The capability of Colombia's rules governing expert witnesses will start to show if the country and its judiciary continue to progress and establish integrity throughout their institutions. However, because there is still significant corruption, it is difficult to determine the true effectiveness of Colombia's codified approach at this time.

Conclusion

[133] Andrés Torres, *From Inquisitorial to Accusatory: Colombia and Guatemala's Legal Transition,* L. AND JUST. IN THE AMERICAS WORKING PAPER SERIES 4, 6 (2007).
[134] *Id.* at 3.

While rules of evidence and procedure may be constantly changing as issues and litigation increases in complexity, one thing isn't: the desire and need for expert witnesses. Both civil and common law jurisdictions are tasked with the duty of admitting experts, yet trying to regulate them at the same time. Culture, traditions, and general procedure make it nearly impossible to institute a legitimate and universal regulation on experts.

Each approach has its benefits whether it may be transparency, economic, efficiency, reliability, independence, impartiality, or equity. The United States has traded transparency and reliability for efficiency and independence; Germany has traded efficiency and independence for reliability and impartiality; Colombia has traded impartiality and equity for transparency and efficiency. Although the line of benefits is blurred and gray, each judicial system's approach sacrifices some things for the sake of others. Common law or civil law, each system is unique, and each system requires a custom approach.