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Expert Evidence in the Republic of Korea and Under the U.S. Federal Rules of Evidence: A Comparative Study

ERIC ILHYUNG LEE*

I. INTRODUCTION

In 1987, Bristol-Myers Corporation (Bristol-Meyers) petitioned the U.S. Trade Representative for assistance in protecting its patent rights in the Republic of Korea (Korea).¹ Bristol-Myers alleged that Korea's discriminatory enforcement of its intellectual

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I thank Professor Eun-Jung Park of Ewha Women's University, College of Law, Seoul, Korea for her invaluable assistance on research of Korean law and Sung-A Lee for providing English translations of Korean text. This Article has also benefited from the usual insights of William Carl Smith of Philadelphia. I extend a special note of gratitude to the former judges of the Seoul District Court identified in this Article who graciously gave their time for interviews and follow-up questions.

This Article is dedicated to In Soo Rhimm (1933-1996), past Chairman of the Hollym Group.

1. Section 301 of the Trade Act of 1974 permits such petitions. See 19 U.S.C. § 2411 (1994). The legislative purposes of the Act are, inter alia, "to foster the economic growth of and full employment in the United States and to strengthen economic relations between the United States and foreign countries through open and nondiscriminatory world trade," "to provide adequate procedures to safeguard [U.S.] industry and labor against unfair or injurious import competition, and to assist industries, firm, [sic] workers, and communities to adjust to changes in international trade flows." *Id.* § 2102(1), (4).

For a discussion of the practical effect of section 301 on U.S. businesses operating in foreign countries, see David I. Wilson, *A Trade Policy Goal for the 1990s: Improving the Adequacy and Effectiveness of Intellectual Property Protection in Foreign Countries*, 1 *TRANSNAT'L LAW*. 421, 423-36 (1988). For a report on the circumstances surrounding Bristol-Myers' petition, see *Industry Groups Press White House to Renew Section 301 Case Against Korea*, *INSIDE U.S. TRADE*, Nov. 27, 1987, at 1, 2 [hereinafter *Industry Groups*].

property laws failed to protect the company's interests in Korea.² According to Bristol-Myers, U.S.-based firms involved in patent infringement actions were subjected to a Korean bias against foreign expert testimony.³ In addition, Korean judges reportedly required litigants to conduct their experiments in Korea in order to be admissible as evidence.⁴

As it relates to Korean evidentiary requirements, the Bristol-Myers episode may reflect judicial territorialism.⁵ It may represent one jurisdiction's insistence that foreign litigants conform with its established rules and practices. Whatever its proper characterization, the Bristol-Myers episode exemplifies the distinctions between Korean and U.S. evidentiary rules. Given the stark differences in the origins of their legal systems, it is not surprising that these countries' evidentiary rules are also different. An independent sovereign for less than sixty years, Korea,⁶ like Germany, em-

2. See Wilson, *supra* note 1, at 429.

3. See *id.*

4. See *id.*; *Industry Groups*, *supra* note 1, at 2.

5. See *Industry Groups*, *supra* note 1, at 2. "Bristol-Myers [eventually] withdrew its petition to the [U.S. Trade Representative] after receiving assurances from South Korean officials that the South Korean company (the defendant in the pending Bristol-Myers case) would begin settlement discussions. The settlement negotiations ultimately broke down." Wilson, *supra* note 1, at 430 (footnote omitted).

6. Korea occupies the peninsula in East Asia between the Yellow Sea and the Sea of Japan. See THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 999 (3d ed. 1992). The Yellow Sea and the Sea of Japan are known to Koreans as the "West Sea" and "East Sea," respectively. See MINJUNG ESSENCE KOREAN-ENGLISH DICTIONARY 559, 1107 (1993). Korea is currently divided into two sovereignties: the Republic of Korea, commonly known as South Korea, and the Democratic People's Republic of Korea, commonly known as North Korea. See ANDREW C. NAHM, INTRODUCTION TO KOREAN HISTORY AND CULTURE 234, 238 (1993). A heavily armed demilitarized zone (DMZ) divides the two Koreas—a result of the armistice that concluded the Korean War in 1953. See *id.* at 252. Relations between the political leaders of North and South Korea over the years have been tense, but hopes for reconciliation and talk of unification continue.

Communist rule under Il-Sung Kim governed North Korea, sometimes referred to as the "Hermit Kingdom," from the conclusion of the Korean War until his death in 1994. See *id.* at 258-61. Kim's son, Jong-Il Kim, has reportedly assumed leadership, but Western observers continue to question the extent of his control and power. See Nicholas D. Kristof, *Kim Jong-Il Seems Firmly in Charge*: *NYT*, KOREA HERALD, Nov. 22, 1996, at 2; *Kim Jong-Il Ill, Lacks Support of NK Military*: *German Source*, KOREA TIMES, Nov. 23, 1996, at 2. For an insightful exposé on the two Kims, see Michael Shapiro, *Annals of Authoritarianism: Kim's Ransom*, NEW YORKER, Jan. 31, 1994, at 32. Information about the legal system in North Korea is not readily available.

ploys a civil law system.⁷ In contrast, the United States has a common law system, which has operated under a single constitution for over two centuries.

This Article discusses Korea's rules of expert evidence and compares them with the U.S. Federal Rules of Evidence. Part II introduces the basic characteristics of the Korean legal system. It also describes Korea's modern judiciary, as well as Korea's rules of civil procedure and evidence. Part III focuses on the Korean rules governing expert evidence. A plain reading of these rules shows that the Korean approach to expert evidence differs from its U.S. counterpart. For example, the U.S. Federal Rules of Evidence contain several evidentiary principles that are not found in Korean jurisprudence, thereby leaving more issues to Korean judges' discretion. Part IV discusses the Korean equivalents to the provisions in the U.S. Federal Rules of Evidence pertaining to expert evidence. It also explains how Korean courts address matters that have no textual equivalents in the Korean rules. This comparative analysis provides both an introduction to the rules of expert evidence in a foreign jurisdiction and an unconventional method for examining the bases of U.S. rules and practices. Finally, Part V advocates consideration of the Korean approach to expert evidence in reforming the much-criticized use of expert testimony in U.S. courts.

II. THE KOREAN LEGAL SYSTEM⁸

A. Civil Law System

For many years,⁹ neighboring nations' imperialistic designs

This Article focuses only on South Korea's legal principles.

7. See discussion *infra* Part II.A.

8. There is a limited number of materials in the English language on the study of Korean law. See, e.g., DAE-KYU YOON, *LAW AND POLITICAL AUTHORITY IN SOUTH KOREA* at vii (IFES Korean Studies Series No. 2, 1990). With increasing interest, the number of relevant works is steadily growing. For helpful introductions to the subject, see PYONG-CHOON HAHM, *KOREAN JURISPRUDENCE, POLITICS AND CULTURE* (1986); *INTRODUCTION TO THE LAW AND LEGAL SYSTEM IN KOREA* (Sang Hyun Song ed., 1983) [hereinafter *INTRODUCTION TO THE LAW*]; *KOREAN LAW IN THE GLOBAL ECONOMY* (Sang Hyun Song ed., 1996). These works also include recommended bibliographies.

9. For an introduction to Korea's social and political history, see generally NAHM, *supra* note 6.

victimized Korea.¹⁰ During the early part of the twentieth century, Japan claimed Korea as its protectorate and sent military forces and administrative officials to operate Korea as a Japanese province.¹¹ During this period, Japan crafted Korea's legal system to serve its own colonialist interests.¹² In effect, Japanese rulers implemented and incorporated a civil law approach.¹³

In 1945, at the end of World War II, Korea claimed its independence as a sovereign nation within days of Japan's surrender to the Allies.¹⁴ The new Korean republic ultimately retained many aspects of the legal system left by Japan.¹⁵ Thus, several Korean legal institutions, including law schools, the judiciary, and court practices, resembled those established during Japanese colonial rule.¹⁶ To date, many law professors and practicing lawyers in Korea continue to be "heavily influenced by a Japanized European approach to law and legal scholarship."¹⁷

Currently, the Korean legal system is very similar to the civil legal systems in many European countries and unlike the Anglo-American common law system in the United States.¹⁸ One key distinction between the Korean civil law system and the U.S. common law system relates to their respective sources of law. "As a result of the reception of the Civil Law System through Japan,"¹⁹ the law in Korea "arises from codes, not court decisions."²⁰

10. See JOSEPH C. GOULDEN, *KOREA: THE UNTOLD STORY OF THE WAR* 3 (1982) ("Korea was—and is—one of those nations with the misfortune to lie at a crossroads of world power politics, repeatedly stomped over, brutalized, and occupied by stronger neighbors. In Korea's instance, the perpetual antagonists were China, Japan, and Russia.").

11. See *id.* at 8; KOREAN OVERSEAS INFO. SERV., *A HANDBOOK OF KOREA* 93 (9th ed. 1993) [hereinafter *HANDBOOK OF KOREA*].

12. See HAHM, *supra* note 8, at 144; David I. Steinberg, *Law, Development and Korean Society*, *KOREANA Q.*, Fall 1971, at 43, reprinted in *INTRODUCTION TO THE LAW*, *supra* note 8, at 47, 52; YOON, *supra* note 8, at 23-24.

13. See *INTRODUCTION TO THE LAW*, *supra* note 8, at 14.

14. See HAHM, *supra* note 8, at 144.

15. See *id.* at 52-53; YOON, *supra* note 8, at 109.

16. See *INTRODUCTION TO THE LAW*, *supra* note 8, at 14.

17. *Id.*

18. See *id.* at 528.

19. *Id.* at 17.

20. *Id.* at 14.

[A] court is bound primarily by codes and statutes; a judicial decision is nothing but a product of interpretation of codes and statutes; and the judicial decisions per se have no binding effect as precedents for subsequent decisions. A judicial decision is not a theory that states abstract doctrines of law; it is a resolution of a specific and individual dispute.²¹

There are, however, de jure and de facto exceptions to this rule. By statute, a higher court's decision with respect to findings of fact and law binds the lower court to which the judgment is remanded.²² Further, the established opinions of the higher courts generally exert significant influence on subsequent court decisions.²³ Lower court judges are mindful of Korean Supreme Court rulings,²⁴ and desire to limit instances of reversal.²⁵ Nevertheless, "[t]he doctrine of stare decisis does not [apply] in Korea as a matter of theory,"²⁶ and judicial precedents do not necessarily bind Korean judges.²⁷

Although this Article does not attempt an exhaustive discussion of the civil and common law systems, it is important to note that there are significant differences in the way the two systems conduct ordinary adjudication. One commentator distinguished

21. *Id.* at 17.

22. See COURT ORGANIZATION ACT art. 8, translated in 2 CURRENT LAWS OF THE REPUBLIC OF KOREA 301, 301-1 to 301-2 (Korea Legislation Research Inst. ed., 1992) ("Any decision made in a judgment of a higher court shall bind the lower instance with respect to the case."); INTRODUCTION TO THE LAW, *supra* note 8, at 1023 ("An inferior court is bound by the interpretation of law rendered by the Supreme Court when a judgment of the lower court is reversed upon appeal and the case is remanded.").

Citations to Korean statutes in this Article are to the unofficial English translations, which are included in the six-volume *Current Laws of the Republic of Korea*, edited and published by the Korea Legislation Research Institute. Translations of some Korean phrases and legal terms are inexact and imprecise and do not always capture the special nuances.

23. See INTRODUCTION TO THE LAW, *supra* note 8, at 1023.

24. See *id.* at 18. For a description of the Korean judiciary, see discussion *infra* Part II.B.

25. "[T]here seems to be little doubt for any observer of judicial life about the enormous importance for inferior judges of the previous sentences of the Supreme Court. . . . Hence, [there is] strong encouragement (especially among career-minded judges) to comply with the interpretive guidelines set by the Supreme Court." INTRODUCTION TO THE LAW, *supra* note 8, at 274.

26. *Id.* at 18; see YOON, *supra* note 8, at 65.

27. See INTRODUCTION TO THE LAW, *supra* note 8, at 18.

these two processes by describing the Common Law procedure as "the day in Court system" and the Civil Law system as the "dental clinic form of trial."²⁸ Common law judges are described as "depositories of the Law," and civil law judges are considered the "mouth of the Law."²⁹ These analogies reflect the widely divergent configurations of the judges' roles in the two systems.³⁰

One commentator has described civil law judges as "passive" participants in the adjudication process.³¹ A civil law judge is generally passive in most situations and may take an active stand only in a few situations: (1) the judge may declare himself or herself jurisdictionally incompetent—a decision that a superior court may review and overturn; (2) during the proof-taking period, the judge may refuse to accept or validate some of the proofs presented—a decision that is also appealable to a superior court; and (3) during the final phase of the process and prior to issuing his or her orders, the judge may order additional proof.³²

Despite the comparative characterization of civil law judges, the commentator also recognizes that these judges can actively participate in the taking of evidence.³³ In practice, Korean rules give judges broad authority to ascertain facts.³⁴ Where the rules are silent regarding specific issues that arise in ordinary adjudication, the court retains great discretion and latitude.

Scholars commenting on societal attitudes toward law and dispute resolution emphasize the Korean cultural distaste for litigation.³⁵ One particular Korean commentator notes:

Koreans have abhorred the black-and-white designation of one party to a dispute as right and his opponent as wrong. Assigning all blame to one for the sake of rendering a judgment has

28. *Id.* at 276.

29. *Id.* at 270.

30. *See id.* "[I]n basic contrast with his Common Law counterpart, the Civil Law judge is but a 'kind of expert clerk,' a distinguished bureaucrat, but a bureaucrat nonetheless. This configuration of the judge as a civil servant at the service of the Public Administration entails a number of decisive consequences." *Id.* at 271.

31. *See id.* at 275.

32. *See id.* at 275-76.

33. *See id.*

34. *See infra* text accompanying notes 88-89.

35. *See* HAHM, *supra* note 8, at 95-96.

been repugnant to the fundamental valuation of harmony, because such a judgment has retarded swift restoration of broken harmony. . . . [I]f discord could not be avoided, society demanded the quickest restoration of broken concord. For this purpose mediation has been preferred to adjudication because it does not require the fixing of blame. Parties themselves formulate the solution by mutual agreement, thus obviating the need for an external sanction. Since mediation is possible only when both sides are willing to compromise, each side has to give a little and to be satisfied with less than complete victory.³⁶

Korean society may indeed be less litigious than U.S. society.³⁷ Trial court dockets indicate, however, that litigation in Korea has sharply increased in recent years.³⁸ Korean judges complain of overwork and limited resources.³⁹ The increase in litigation may be attributed to rapid commercial growth, industrialization, and economic development in Korean society.⁴⁰ Without any available empirical studies, however, these factors are merely speculative.

36. *Id.* (footnotes omitted).

37. Korea has far fewer lawyers per capita than the United States. One study reporting the number of legal professionals, defined as judges, prosecutors, and attorneys, in selected countries showed that there was one legal professional per 19,000 people in Korea, compared with one per 454 in the United States. See YOON, *supra* note 8, at 128 tbl. 3. Unlike in the United States, where individual state bar associations regulate the number of applicants who may pass the bar examination, in Korea, the national government assumes this responsibility. See Chang Soo Yang, *The Judiciary in Contemporary Society: Korea*, 25 CASE W. RES. J. INT'L L. 303, 304 (1993); YOON, *supra* note 8, at 118. In recent years, the pass rate for the Korean bar examination has been between two to three percent. See Yang, *supra*, at 304. Not surprisingly, the legal profession tends to be more respected in Korea than in the United States. See generally INTRODUCTION TO THE LAW, *supra* note 8, at 278-80; YOON, *supra* note 8, at 117, 126-33.

38. See Yang, *supra* note 37, at 309-10 & nn.15-16. Professor Yang notes:

Heavy caseloads create obstacles to the systematic improvement of legal services. Normal litigation cases which impose the heaviest burdens on judges have increased more than 100 percent. Consequently, the court is short of judges. This might prevent the court from guaranteeing the citizen's right to trial because of chronic trial date tardiness.

Id. at 309-10 (footnotes omitted).

39. See Interview with Meong-Ho Jeon, Seoul District Court Judge, 1993-1995 (July 3, 1996) [hereinafter Jeon Interview I].

40. *But cf.* INTRODUCTION TO THE LAW, *supra* note 8, at 68-69 ("The spectacular economic growth rates of Korea and the attraction of significant foreign investment have not been possible without the internationalization of law . . .").

B. Korean Judiciary⁴¹

In contrast to the federalist system of government in the United States, Korea employs a parliamentary system.⁴² Thus, unlike the dual state and federal court systems in the United States, Korea has a single judiciary. The Korean Constitution states that "judicial power shall be vested in courts composed of judges."⁴³ It further provides for the basic structure of the judiciary: "The courts shall be composed of the Supreme Court, which is the highest court of the State, and other courts at specified levels."⁴⁴ Through the Court Organization Act,⁴⁵ Korea's National

41. For a discussion of the history of Korean judicial review, see YOON, *supra* note 8, at 150-99.

42. For a description of the differences between the federal and parliamentary systems, see generally GARY K. BERTSCH ET AL., *COMPARING POLITICAL SYSTEMS: POWER AND POLICY IN THREE WORLDS* 111-24 (1978).

The Korean Constitution provides that the nation "shall be a democratic republic." KOREA CONST. art. 1(1), *translated in* 1 CURRENT LAWS OF THE REPUBLIC OF KOREA 3, 3 (Korea Legislation Research Inst. ed., 1992). It also provides for three branches of government similar to the U.S. government. The legislature is presently a unicameral body. *See id.* art. 40, *translated in* 1 CURRENT LAWS OF THE REPUBLIC OF KOREA 3, 8 (Korea Legislation Research Inst. ed., 1992) ("The legislative power shall be vested in the National Assembly."). "Executive power [is] vested in the Executive Branch headed by the President." *Id.* art. 66(4), *translated in* 1 CURRENT LAWS OF THE REPUBLIC OF KOREA 3, 12 (Korea Legislation Research Inst. ed., 1992). The President is "elected by universal, equal, direct and secret ballot by the people." *Id.* art. 67(1), *translated in* 1 CURRENT LAWS OF THE REPUBLIC OF KOREA 3, 12 (Korea Legislation Research Inst. ed., 1992). Finally, "[j]udicial power [is] vested in courts composed of judges." *Id.* art. 101(1), *translated in* 1 CURRENT LAWS OF THE REPUBLIC OF KOREA 3, 17 (Korea Legislation Research Inst. ed., 1992).

Thus, the parliamentary system in Korea is similar to the systems in some democratic nations in Western Europe. The democratic processes in Korea, however, are still undergoing changes. For example, in June 1995, governors and city officials were directly elected. *See* Steven Brull, *After Spurt of Growth, Time for "Awkward Stage"*, INT'L HERALD TRIB., Sept. 26, 1995, available in LEXIS, News Library, Iht File; *South Korea's Ruling Party Heads for Large Losses in Elections*, DEUTSCHE PRESSE-AGENTUR, June 28, 1995, available in LEXIS, News Library, Dpa File.

43. KOREA CONST. art. 101(1), *translated in* 1 CURRENT LAWS OF THE REPUBLIC OF KOREA 3, 17 (Korea Legislation Research Inst. ed., 1992).

44. *Id.* art. 101(2), *translated in* 1 CURRENT LAWS OF THE REPUBLIC OF KOREA 3, 17 (Korea Legislation Research Inst. ed., 1992). This provision of Korea's Constitution is similar in content and purpose to Article III, Section I of the U.S. Constitution, which reads: "The judicial Power of the United States, shall be vested in one Supreme Court, and such inferior Courts as the Congress may from time to time ordain and establish." U.S. CONST. art. III, § 1.

Assembly established a judicial structure similar to the U.S. federal and state court systems.

Thus, Korea's judiciary consists of one supreme court,⁴⁶ trial courts,⁴⁷ and intermediate appellate courts.⁴⁸ In addition, Korea's

45. See COURT ORGANIZATION ACT art. 4(1), *translated in 2 CURRENT LAWS OF THE REPUBLIC OF KOREA* 301, 301 to 301-1 (Korea Legislation Research Inst. ed., 1992).

46. The Korean Supreme Court is comprised of 13 Justices and one Chief Justice. See *id.* art. 4(2), *translated in 2 CURRENT LAWS OF THE REPUBLIC OF KOREA* 301, 301 to 301-1 (Korea Legislation Research Inst. ed., 1992). The President, with the consent of the National Assembly, appoints the Chief Justice. See KOREA CONST. art. 104(1), *translated in 1 CURRENT LAWS OF THE REPUBLIC OF KOREA* 3, 18 (Korea Legislation Research Inst. ed., 1992). The President, on recommendation from the Chief Justice and with the consent of the National Assembly, appoints the remaining 13 Justices. See *id.* art. 104(2), *translated in 1 CURRENT LAWS OF THE REPUBLIC OF KOREA* 3, 18 (Korea Legislation Research Inst. ed., 1992). All Supreme Court Justices, except for the Chief Justice, serve renewable six-year terms. See *id.* art. 105(1)-(2), *translated in 1 CURRENT LAWS OF THE REPUBLIC OF KOREA* 3, 18 (Korea Legislation Research Inst. ed., 1992). The Chief Justice's six-year term is not renewable. See *id.* art. 105(1), *translated in 1 CURRENT LAWS OF THE REPUBLIC OF KOREA* 3, 18 (Korea Legislation Research Inst. ed., 1992).

The Supreme Court is the court of last resort for the following cases:

1. Case of a final appeal against a judgment of the high court, appellate court, or patent court;
2. Case of a reappeal against a decision or decree of the final appeal court, high court, appellate court or patent court; and
3. Cases coming under the jurisdiction of the Supreme Court under other laws.

COURT ORGANIZATION ACT art. 14, *translated in 2 CURRENT LAWS OF THE REPUBLIC OF KOREA* 301, 301-3 (Korea Legislation Research Inst. ed., 1992).

47. Korea's district courts are trial courts with general, original jurisdiction over most civil actions. See COURT ORGANIZATION ACT arts. 32, 34, *translated in 2 CURRENT LAWS OF THE REPUBLIC OF KOREA* 301, 301-7 to 301-8 (Korea Legislation Research Inst. ed., 1992). Depending on the complexity of the proceedings, either a single judge or a panel of three judges, referred to as a collegiate court, conducts the proceedings. See *id.* arts. 7(5), 32, 34, *translated in 2 CURRENT LAWS OF THE REPUBLIC OF KOREA* 301, 301-1, 301-7 to 301-8 (Korea Legislation Research Inst. ed., 1992). The Court Organization Act also provides for specialized Patent, Family, and Administrative Courts. See *id.* art. 3(1), *translated in 2 CURRENT LAWS OF THE REPUBLIC OF KOREA* 301, 301 (Korea Legislation Research Inst. ed., 1992).

A collegiate court has original jurisdiction over the following cases: (1) "Cases that the collegiate court itself decides to judge in the collegiate court"; (2) Civil actions prescribed by the Supreme Court; (3) Most cases where the permitted punishment includes capital punishment, life imprisonment, or imprisonment for more than one year; (4) Cases of complicity; (5) Cases where district court judges are disqualified or recused; and (6) "Cases coming under the competence of the collegiate court of the district court under other laws." *Id.* art. 32(1), *translated in 2 CURRENT LAWS OF THE REPUBLIC OF KOREA* 301, 301-7 to 301-8 (Korea Legislation Research Inst. ed., 1992). A collegiate court has appellate jurisdiction over the following cases: (1) "A case of appeal against a judgment of a single judge of the district court," and (2) "A case of appeal against a deci-

Constitution provides for the Constitutional Court, a separate tribunal with prescribed jurisdiction over certain constitutional issues and specified cases.⁴⁹

sion or decree of a single judge of the district court." *Id.* art. 32(2), translated in 2 CURRENT LAWS OF THE REPUBLIC OF KOREA 301, 301-8 (Korea Legislation Research Inst. ed., 1992).

Decisions by a single district court judge are appealable to the collegiate court. *See id.* Decisions by the original trial court may be appealed. *See* CODE OF CIV. PROC. art. 360(1), translated in 2 CURRENT LAWS OF THE REPUBLIC OF KOREA 753, 753-50 (Korea Legislation Research Inst. ed., 1992).

48. The High Court, the intermediate appellate court, has jurisdiction over the following cases:

1. Cases of appeal against a judgment made in the first instance by a collegiate court of the district court, the family court, or administrative court;
2. Cases of appeal against an a judgment, decision or decree made in the first instance by a collegiate court of [the] district court, family court, or administrative court; and
3. Cases coming under the jurisdiction of the high court under other laws.

COURT ORGANIZATION ACT art. 28, translated in 2 CURRENT LAWS OF THE REPUBLIC OF KOREA 301, 301-6 (Korea Legislation Research Inst. ed., 1992). Cases that may, by statute, be further appealed are submitted to the Supreme Court. *See id.* art. 14(3), translated in 2 CURRENT LAWS OF THE REPUBLIC OF KOREA 301, 301-3 (Korea Legislation Research Inst. ed., 1992).

49. *See* KOREA CONST. art. 111(1), translated in 1 CURRENT LAWS OF THE REPUBLIC OF KOREA 3, 19 (Korea Legislation Research Inst. ed., 1992). For a discussion of the origins of the Constitutional Court, see YOON, *supra* note 8, at 156. For a helpful piece on the workings of the Constitutional Court, see James M. West & Dae-Kyu Yoon, *The Constitutional Court of the Republic of Korea: Transforming the Jurisprudence of the Vortex?*, 40 AM. J. COMP. L. 73 (1990).

Article 111(1) of the Korean Constitution provides:

The Constitutional Court shall adjudicate the following matters:

1. The unconstitutionality of a law upon the request of the courts;
2. Impeachment;
3. Dissolution of a political party;
4. Disputes about the jurisdictions between State agencies, between State agencies and local governments and between local governments; and
5. Petitions relating to the Constitution as prescribed by law.

KOREA CONST. art. 111(1), translated in 1 CURRENT LAWS OF THE REPUBLIC OF KOREA 3, 19 (Korea Legislation Research Inst. ed., 1992). The Constitutional Court's prescribed areas of review are repeated in the CONSTITUTIONAL COURT ACT art. 2, translated in 2 CURRENT LAWS OF THE REPUBLIC OF KOREA 91, 91 (Korea Legislation Research Inst. ed., 1992).

Nine judges serve on the Constitutional Court. *See* CONSTITUTIONAL COURT ACT art. 3, translated in 2 CURRENT LAWS OF THE REPUBLIC OF KOREA 91, 91 (Korea Legislation Research Inst. ed., 1992). In form, the President must appoint all nine judges; in practice, however, the President has the power to select only three judges. *See id.* art. 6(1)-(2), translated in 2 CURRENT LAWS OF THE REPUBLIC OF KOREA 91, 91-1 (Korea Legislation Research Inst. ed., 1992). The National Assembly and the Chief Justice of the

It is, of course, difficult to describe the "personality" or "character" of any judicial system beyond global characterizations, regardless of the jurisdiction. Due to its relatively brief period of operation, the Korean judiciary is difficult to describe, even in general terms. One commentator writes:

[There is] a feeling among students of the power process, as well as among the legal profession, that the judicial process in Korea has not yet reached that stage of development where it can be considered sufficiently "mature." It is often observed that, having had less than two decades of self-government and a large portion of that wasted by war, the Korean judiciary has not yet been able to emerge with its own developed personality.⁵⁰

If war and post-war restoration have delayed the emergence of a judicial personality in the first two decades of Korea, the turbulence and turmoil in Korean politics during the subsequent three decades have further impeded its development. Indeed, in the past thirty years, the country has experienced one presidential assassi-

Supreme Court each select three judges, whom the President subsequently "appoints." *See id.*, translated in 2 CURRENT LAWS OF THE REPUBLIC OF KOREA 91, 91-1 (Korea Legislation Research Inst. ed., 1992). With the consent of the National Assembly, the President chooses the Constitutional Court president from the nine judges. *See id.* art 12(1)-(2), translated in 2 CURRENT LAWS OF THE REPUBLIC OF KOREA 91, 91-1 (Korea Legislation Research Inst. ed., 1992).

Constitutional Court judges serve renewable six-year terms. *See id.* art. 7(1), translated in 2 CURRENT LAWS OF THE REPUBLIC OF KOREA 91, 91-1 (Korea Legislation Research Inst. ed., 1992). They must retire at the age of 65, except for the president of the Constitutional Court, who retires at age 70. *See id.* art. 7(2), translated in 2 CURRENT LAWS OF THE REPUBLIC OF KOREA 91, 91-1 (Korea Legislation Research Inst. ed., 1992).

Korean law students often compare the roles of the Supreme Court and the Constitutional Court. Many ask which of the two is the "superior court." Korea's Constitution, which was most recently amended in October 1987, pronounces that "the Supreme Court . . . is the highest court of the State." KOREA CONST. art. 101(2), translated in 1 CURRENT LAWS OF THE REPUBLIC OF KOREA 3, 17 (Korea Legislation Research Inst. ed., 1992). The National Assembly re-affirmed this point in the Court Organization Act, which declares that "[t]he Supreme Court shall be the highest court." COURT ORGANIZATION ACT art. 11, translated in 2 CURRENT LAWS OF THE REPUBLIC OF KOREA 301, 301-3 (Korea Legislation Research Inst. ed., 1992). Despite the proclamations, Korea's Constitution, presumably the supreme law of the land, explicitly provides for the Constitutional Court, which is the only and final arbiter of matters of a constitutional nature. KOREA CONST. arts. 111-113, translated in 1 CURRENT LAWS OF THE REPUBLIC OF KOREA 3, 19-20 (Korea Legislation Research Inst. ed., 1992). Thus, questions about which court is the higher court and which is more highly regarded evade simple answers.

50. HAHM, *supra* note 8, at 112.

nation, a military coup, twelve years of rule by military-backed presidents,⁵¹ and continuing public unrest, marked most noticeably

51. After a coup in 1961, Army General Chung-Hee Park held nearly two decades of unchallenged power. See HANDBOOK OF KOREA, *supra* note 11, at 116-17. His assassination in October 1979 triggered months of political unrest. See *id.* at 117. Prime Minister Kyu-Hah Choi served as interim president, as dictated by Korea's Constitution. See *id.* Army Major General Doo-Hwan Chun led a military coup in December 1979, dealt swiftly with resisting military leaders and political officials, suspended the National Assembly, ordered a revision of Korea's Constitution, and ultimately emerged as Korea's self-proclaimed President. See *id.* at 117-18. Chun and fellow General Tae-Woo Roh allegedly masterminded the brutal crackdown on pro-democracy demonstrators in the infamous May 18, 1980 incident in the southwestern city of Kwangju, which resulted in the deaths of over 200 civilians. See *Background on S. Korea Trial*, UPI, Aug. 25, 1996, available in LEXIS, News Library, UPI File; *Chronology of S. Korea's Bloody 1980 Civil Uprising*, Reuters North American Wire, Nov. 25, 1995, available in LEXIS, News Library, Reuna File. Chun's military coup and the "Kwangju Massacre" are indelibly marked in Korea's history. See HANDBOOK OF KOREA, *supra* note 11, at 117-18.

Chun served as president until 1987. See *id.* at 118. His successor, Roh, won a presidential election over opposition party leaders, Dae-Joong Kim and Young-Sam Kim. See *id.* at 118-19. At the conclusion of Roh's five-year term in 1992, Young-Sam Kim won the presidential election. See *id.* at 119. Young-Sam Kim is often described as Korea's first civilian president in 37 years. See *id.*

After Young-Sam Kim assumed office, opposition leaders demanded the prosecution of Chun and Roh for their roles in the coup and the crackdown in Kwangju. See generally *Background on S. Korea Trial, supra*; *Chronology of S. Korea's Bloody 1980 Civil Uprising, supra*. In December 1995, prosecutors revealed that both Roh and Chun amassed millions of dollars in secret slush funds. See Sung-Chul Kang, *Chun Sentenced to Death*, KOREA HERALD, Aug. 27, 1996, at 1; Hak-Lim Shin, *Chun Gets Death, Roh 22 1/2 Years*, KOREA TIMES, Aug. 27, 1996, at 1. These funds consisted largely, if not wholly, of bribes collected from chairmen of business conglomerates. See Kang, *supra*. Both Chun and Roh were subsequently arrested and indicted for not only bribery but also mutiny, treason, and insurrection based on the "Kwangju Massacre." See Shin, *supra*. Business leaders were accused of giving bribes, and military leaders who took part in the Kwangju incident were also charged. See *id.* In August 1996, at the conclusion of what was described as Korea's "trial of the century," Chun received the death penalty and Roh received a sentence of 22½ years in prison; both also received fines. See Kang, *supra*; Shin, *supra*; Russell Watson & Jeffrey Bartholet, *Getting Back at Dictators*, NEWSWEEK, Sept. 9, 1996, at 51.

On appeal, the Seoul High Court upheld the convictions of Chun and Roh and almost all of the other defendants, but the Court commuted Chun's death sentence to life imprisonment and reduced Roh's imprisonment term from 22½ years to 17 years. See *Chun's Death Commuted to Life in Prison*, KOREA TIMES, Dec. 17, 1996, at 1; *Chun's Death Sentence Commuted*, KOREA HERALD, Dec. 17, 1996, at 1. The appellate court assessed fines of 263 billion won (about U.S.\$330 million) and 226 billion won (about U.S.\$280 million) to Chun and Roh, respectively—the same amounts that Chun and Roh had amassed illegally. See *Chun's Death Commuted to Life in Prison, supra*. The Seoul High Court judges reportedly justified their decisions to reduce Chun's sentence in light of his contribution to the country's economic development during his presidency and the peace-

by occasional violent student demonstrations.⁵²

Any discussion of the Korean judiciary and judicial review must take into account Korea's political history. As in every country, law and politics in Korea are inextricably intertwined.⁵³ The relationship between them is particularly poignant in Korea because military-backed dictators ruled the country for most of its history.⁵⁴ One observer describes the Korean situation as one of "politics above law."⁵⁵ "A characteristic feature of law in Korea is that it tends to be diminished primarily for the purpose of achieving a political goal, rather than for upholding the rule-of-law."⁵⁶ "[L]acking a tradition of judicial independence, . . . Korea needs to

ful transfer of power in 1987. See *id.*

Although Chun and Roh chose not to appeal further to the Korean Supreme Court, the prosecution asked the Supreme Court to examine the High Court's sentences for Chun, Roh, and many of the other defendants. *Chun, Roh Give Up Supreme Court Appeals*, KOREA HERALD, Dec. 24, 1996, at 3.

52. Student protests have long been a part of the Korean political landscape. Student-led demonstrations preceded the downfall of Korea's first president, Syng-Myun Rhee, in 1960. See HANDBOOK OF KOREA, *supra* note 11, at 115. Widespread demonstrations, many of them violent, protested the authority and policies of the Chun administration.

Hanchongnyon, a radical student group demanding reunification with North Korea and governance under the policy of *juche*, or self-rule, orchestrated the latest round of demonstrations. See *Students, Police Continue Face-Off*, KOREA HERALD, Aug. 19, 1996, at 1. In August 1996, coinciding with the 51st anniversary of Korea's liberation from Japanese rule, the student group held pro-unification rallies that were outlawed and reportedly planned a symbolic march to Panmunjom, the peace village near the DMZ. See *id.*; *Police, Students Clash Again, Hundreds Injured*, KOREA HERALD, Aug. 16, 1996, at 1. Students faced off against heavily armed police and military troops. See *Police, Students Clash Again, Hundreds Injured, supra*; *Students, Police Continue Face-Off, supra*; see also *Police Raid Ends Yonsei Protest*, KOREA HERALD, Aug. 21, 1996, at 1; *President Vows to Root Out Pro-North Student Elements*, KOREA HERALD, Aug. 22, 1996, at 1; *Special Task Force Set to Hunt Down Core Hanchongnyon Members*, KOREA TIMES, Aug. 23, 1996, at 1; *462 Students Formally Charged*, KOREA HERALD, Aug. 23, 1996, at 1.

53. "[L]aw and politics stand in an antinomic relationship: law is created by politics, but it has to be freed from politics if it is to function as intended." YOON, *supra* note 8, at 71 (citing JUDITH N. SHKLAR, LEGALISM 146, 148 (1964)).

54. Civilians served as Presidents from the founding of Korea in 1945 until 1960. Army General Park led a coup in 1961 and ruled with military-backed power until his assassination in October 1979. See HANDBOOK OF KOREA, *supra* note 11, at 116-17. Two months later, Army General Chun led a coup and served as President until 1987. See *id.* at 117-18. Chun's classmate from the Korea Military Academy and fellow General, Roh, won the presidential election in 1987 and served as President until 1992. See *id.* at 118-19.

55. YOON, *supra* note 8, at 70.

56. *Id.*

establish a legislature capable of restraining the executive from encroachment."⁵⁷

Korea's Constitution mandates that judges "shall rule independently according to their conscience and in conformity with the Constitution and law."⁵⁸ No one seriously believes, however, that the Korean judiciary has been truly autonomous from politics or free from the influence of ruling regimes. A commentator observes:

Judges themselves question the independence of the court. A survey conducted by [the] Seoul Lawyer's Association in March 1980 showed that sixty-seven percent of judges believed independence of the court was not fairly achieved. Eighty-three percent also responded that sometimes interpretation and application of law did not match their conscience and notion of justice. Moreover, eighty-five percent criticized the Supreme Court's effort to insure independence as insufficient.⁵⁹

The same commentator acknowledges, however, that the "[r]ecent democratic development has altered this situation to some degree."⁶⁰ The judiciary appears to be quietly staking out a more assertive presence among the three branches of government.⁶¹

C. Rules of Korean and U.S. Litigation

One observer of the Korean legal scene offers this concise, although oversimplified, summary of the Korean adjudication process:

[Korea's] procedural system has been described as a clockwork system aimed at achieving the greatest possible uniformity, automatism and predictability, as well as the maximum possible protection of the parties' interests. The result is a complex, at times tortuous, process in which three main phases may be distinguished: introductory, proof-taking and decision-making.⁶²

The introductory stage of an adjudication in Korean courts is

57. Dan Fenno Henderson, *Foreword to YOON*, *supra* note 8, at v.

58. KOREA CONST. art. 103, *translated in* 1 CURRENT LAWS OF THE REPUBLIC OF KOREA 3, 18 (Korea Legislation Research Inst. ed., 1992).

59. Yang, *supra* note 37, at 312-13.

60. *Id.* at 313.

61. See West & Yoon, *supra* note 49, at 115.

62. INTRODUCTION TO THE LAW, *supra* note 8, at 276.

not dramatically different from the pleading stage in the U.S. setting. The service and filing of a complaint initiate the case.⁶³ The complaint states "the legal and factual grounds upon which the prayer for relief is based and describes the evidence that the plaintiff wishes to be considered."⁶⁴ The answer sets forth the "defendant's denials, defenses, set-offs, counterclaims and evidence."⁶⁵

There is no clear demarcation between the introductory and proof-taking stage in Korean courts.⁶⁶ "Evidence is taken during the proof-taking stage at various hearings, separated by periods of weeks or months."⁶⁷ The decision stage follows, beginning with a public hearing where litigants may submit their briefs and present their oral arguments to the court.⁶⁸ Thereafter, the court renders its judgment.⁶⁹

The Code of Civil Procedure,⁷⁰ which the National Assembly enacted in 1960 and has periodically amended, governs practice and procedure in Korean courts. It works as an omnibus statute of procedure and contains the rules of civil procedure, evidence, and appellate procedure.⁷¹ It also contains Korean equivalents to many of the rules in the U.S. Federal Rules of Civil Procedure⁷²

63. *See id.*

64. *Id.*

65. *Id.*

66. *See id.*

67. *Id.*

68. *See id.* Additionally, Professor Song makes the following observation about the courtroom advocate in Korea:

The introduction of the cross examination is of special importance. Trial lawyers in Korea have yet to learn the examination skills more fully. Lacking experience, many Korean lawyers are clumsy amateurs in the examination of witnesses. Their questions are in many instances, apt to be inept and time-consuming. Even now some lawyers simply read aloud the written topics and ask a witness to answer yes or no. The grossly leading question is very common. Cross examination though frequently used, is often a mere repetition of the direct examination or is unduly argumentative.

Id. at 1026-27.

69. *See id.*

70. CODE OF CIV. PROC., translated in 2 CURRENT LAWS OF THE REPUBLIC OF KOREA 753 (Korea Legislation Research Inst. ed., 1992).

71. *See* CODE OF CIV. PROC. bk. II (Proceedings in First Instance), bk. III (Appeal), translated in 2 CURRENT LAWS OF THE REPUBLIC OF KOREA 753, 753-32 to 753-57 (Korea Legislation Research Inst. ed., 1992).

72. Structurally, the U.S. Federal Rules of Civil Procedure are divided into eleven

relating to matters such as commencement of action,⁷³ service of process,⁷⁴ pleadings and motions,⁷⁵ parties,⁷⁶ trials,⁷⁷ and judgment.⁷⁸ The Code of Civil Procedure does not, however, provide for equivalents to depositions and discovery proceedings⁷⁹ or jury trials provided under the federal rules.⁸⁰ The lack of jury trials and pre-trial discovery in Korea represents a radical departure from litigation practice in the United States. They are also significant factors that affect the subject matter of this Article—expert evidence in Korea.⁸¹

Because Korea does not employ a jury system, the task of fact-finding is left to the judge.⁸² A common observation among comparative commentators is that “[t]he administration of justice

sections with roman numeral headings and consecutively numbered rules under each heading. The Korean Code of Civil Procedure is divided into twelve Books, which are further divided into Chapters, with individual rules in consecutively numbered articles.

73. See CODE OF CIV. PROC. bk. II (Proceedings in First Instance), *translated in 2 CURRENT LAWS OF THE REPUBLIC OF KOREA 753, 753-32 to 753-50* (Korea Legislation Research Inst. ed., 1992).

74. See *id.* bk. I, ch. IV, § 3 (Service), *translated in 2 CURRENT LAWS OF THE REPUBLIC OF KOREA 753, 753-23 to 753-26* (Korea Legislation Research Inst. ed., 1992).

75. See *id.* bk. I, ch. IV, § 1 (Pleadings), bk. II, ch. II (Pleadings and Preparation Thereof), *translated in 2 CURRENT LAWS OF THE REPUBLIC OF KOREA 753, 753-17 to 753-22, 753-36 to 753-37* (Korea Legislation Research Inst. ed., 1992).

76. See *id.* bk. I, ch. II (Parties), *translated in 2 CURRENT LAWS OF THE REPUBLIC OF KOREA 753, 753-6 to 753-12* (Korea Legislation Research Inst. ed., 1992).

77. See *id.* bk. I, ch. IV (Litigation Proceedings), *translated in 2 CURRENT LAWS OF THE REPUBLIC OF KOREA 753, 753-17 to 753-32* (Korea Legislation Research Inst. ed., 1992).

78. See *id.* bk. I, ch. IV, § 4 (Judgment), *translated in 2 CURRENT LAWS OF THE REPUBLIC OF KOREA 753, 753-26 to 753-30* (Korea Legislation Research Inst. ed., 1992).

79. U.S. Federal Rules of Civil Procedure 26 through 37 govern depositions and discovery in U.S. federal courts. FED. R. CIV. P. 26-37.

80. Thus, there are no Korean equivalents for the following U.S. Federal Rules of Civil Procedure: Rule 38 (Jury Trial of Right), 39(a) (Trial by Jury), 47 (Selection of Jurors), 48 (Number of Jurors—Participation in Verdict), and 51 (Instruction to Jury: Objection).

81. Evidentiary, not discovery, rules govern the production of documents and the examination of witnesses. Expert witnesses in Korea are not subject to deposition before trial. See CODE OF CIV. PROC. bk. II, Ch. III, §§ 2, 4, *translated in 2 CURRENT LAWS OF THE REPUBLIC OF KOREA 753, 753-39 to 753-42, 753-44 to 753-46* (Korea Legislation Research Instituted ed., 1992). They are court-appointed, and cross-examination is allowed only with court approval. See Interview with Byung-Chol Yoon, Seoul District Court Judge, 1990-1992 (July 6, 1996) [hereinafter Yoon Interview]. See also *infra* text accompanying notes 139-142.

82. See INTRODUCTION TO THE LAW, *supra* note 8, at 528, 1026.

in Korea is 'judge-oriented' rather than 'lawyer-oriented.'⁸³ With the search for truth as the court's primary goal, judges take an active role in interviewing interested parties and potential witnesses.⁸⁴ In Korea, as in other civil law jurisdictions, the determination of truth is neither left to chance nor intended to be a residue of the adversarial process.

D. Korean Rules of Evidence

A chapter of the Code of Civil Procedure contains the Korean rules of evidence,⁸⁵ which are consolidated into seven sections: General Rules, Examination of Witness, Expert Testimony, Documentary Evidence, Inspection, Examination of Parties, and Preservation of Evidence.⁸⁶ These rules, either explicitly or implicitly, give trial judges broad discretion on matters of proof. For example, explicit rules grant the court independent powers to gather evidence;⁸⁷ the absence of provisions on issues such as relevance and hearsay, however, render judges responsible for resolving such matters.

If a Korean court is not satisfied with the evidence that the parties offer, the Code of Civil Procedure empowers it to "conduct investigation of evidence upon its own authority."⁸⁸ Clearly, the U.S. Federal Rules of Evidence do not provide such broad authority. In practice, the Korean rules allow the court to summon witnesses not called by either party.⁸⁹ In addition, the Code of Civil Procedure authorizes the court to "undertake investigation of evi-

83. *See id.* at 528.

84. By rule and practice, the court has broad power and discretion to investigate and ascertain facts toward adjudication of the claims. *See infra* text accompanying notes 88-91.

85. *See* CODE OF CIV. PROC. bk. II, ch. III (Evidence), *translated in* 2 CURRENT LAWS OF THE REPUBLIC OF KOREA 753, 753-37 to 753-48 (Korea Legislation Research Inst. ed., 1992).

86. *See id.*, *translated in* 2 CURRENT LAWS OF THE REPUBLIC OF KOREA 753, 753-37 to 753-48 (Korea Legislation Research Inst. ed., 1992).

87. *See id.* art. 265, *translated in* 2 CURRENT LAWS OF THE REPUBLIC OF KOREA 753, 753-38 (Korea Legislation Research Inst. ed., 1992).

88. *Id.*, *translated in* 2 CURRENT LAWS OF THE REPUBLIC OF KOREA 753, 753-38 (Korea Legislation Research Inst. ed., 1992).

89. *See* Jeon Interview I, *supra* note 39.

dence out of court."⁹⁰ The rules further elaborate that another judge or a public or a private organization may conduct that examination.⁹¹

For individuals accustomed to the provisions in the U.S. Federal Rules of Evidence that address specific evidentiary issues, the Code of Civil Procedure's absence of guidelines on relevance and hearsay is striking. Contrasting the Korean rules with the U.S. Federal Rules of Evidence is instructive here. The U.S. Federal Rules of Evidence define relevance⁹² and dictate that only relevant evidence is admissible.⁹³ Relevant evidence may nevertheless be excluded if its probative value is outweighed by such factors as unfair prejudice, cumulative evidence, and delay.⁹⁴ The Korean rules do not have equivalent provisions. According to several former Seoul District Court judges, Korean courts resolve relevance issues in a manner quite similar to their U.S. federal counterparts.⁹⁵ Unlike the U.S. federal courts, which apply explicit

90. CODE OF CIV. PROC. art. 269(1), *translated in 2 CURRENT LAWS OF THE REPUBLIC OF KOREA* 753, 753-38 (Korea Legislation Research Inst. ed., 1992). There are, however, limitations on the court's authority to investigate evidence outside the court. Although the rules do not explicitly so state, if the court intends to examine evidence out of court, it must give notice to the parties, who have the right to be present at any investigative activity. Thus, in both the United States and Korea, the district court's unaccompanied visit to an out of court location to confirm the accuracy of a witness' testimony probably would not be allowed. For a discussion of this limitation on U.S. trial judges, see *City of Columbus v. Carter*, 49 N.E.2d 186 (Ohio Ct. App. 1943).

91. See CODE OF CIV. PROC. art. 269(2), *translated in 2 CURRENT LAWS OF THE REPUBLIC OF KOREA* 753, 753-38 (Korea Legislation Research Inst. ed., 1992).

92. See FED. R. EVID. 401 ("Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.").

93. See FED. R. EVID. 402 ("All relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, by Act of Congress, by these rules, or by other rules prescribed by the Supreme Court pursuant to statutory authority. Evidence which is not relevant is not admissible.").

94. See FED. R. EVID. 403 ("Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.").

95. See Jeon Interview I, *supra* note 39; Interview with Hyun-Chul Lee, Seoul District Court Judge, 1994-1995 (July 1996) [hereinafter Lee Interview]; Interview with Jung-Keol Suh, Seoul District Court Judge, 1991-1993 (July 20, 1996) [hereinafter Suh Interview I]; Yoon Interview, *supra* note 81.

rules, Korean courts simply use established practices.⁹⁶

There is little discussion of relevance in Korean legal commentary. One of the few articles covering this subject purports to compare the Korean and U.S. approaches to relevance.⁹⁷ The article defines relevance as "the probability to be able to infer the existence of the fact as important evidence"⁹⁸ and points out somewhat tautologically that "not all evidence can be . . . material to the judgment and . . . relevant evidence shall only be adopted as the evidence."⁹⁹ The article points out that Korean law does not provide a specific standard for determining relevance; rather, this determination rests on the judge's experience and common sense.¹⁰⁰

The Code of Civil Procedure also fails to address hearsay, which the Federal Rules of Evidence discuss extensively.¹⁰¹ Thus, in Korea, all decisions relating to hearsay are left to the judge's discretion.

The lack of judicial discussion and scholarly commentary on relevance and hearsay issues are largely a result of Korea's civil law system wherein judges act as the sole triers of fact. As both

96. See Jeon Interview I, *supra* note 39; Lee Interview, *supra* note 95; Suh Interview I, *supra* note 95; Yoon Interview, *supra* note 81.

Generally, decisions on probative value rest with the judge. See John Y. Lee, *Fair Trial Standards and Korean Criminal Law and Procedures*, 6 KOREAN J. COMP. L. 13 (1978).

97. Kwang-II Choo, *Jeung-guh-eue Gwal-lyun-sung Geh-suhl*, 26 BUB JUN 97 (1977), translated in *The Introduction of Relevance Between Evidences* (1977) (unpublished manuscript, on file with the *Loyola of Los Angeles International and Comparative Law Journal*).

98. *Id.* at 99, translated in *The Introduction of Relevance Between Evidences* 1 (1977) (unpublished manuscript, on file with the *Loyola of Los Angeles International and Comparative Law Journal*).

99. *Id.*, translated in *The Introduction of Relevance Between Evidences* 1 (1977) (unpublished manuscript, on file with the *Loyola of Los Angeles International and Comparative Law Journal*).

100. See *id.*, translated in *The Introduction of Relevance Between Evidences* 1 (1977) (unpublished manuscript, on file with the *Loyola of Los Angeles International and Comparative Law Journal*).

101. See FED. R. EVID. 801-806. The headings of these rules are: Rule 801 (Definitions), Rule 802 (Hearsay Rule), Rule 803 (Hearsay Exceptions; Availability of Declarant Immaterial), Rule 804 (Hearsay Exceptions; Declarant Unavailable), Rule 805 (Hearsay Within Hearsay), and Rule 806 (Attacking and Supporting Credibility of Declarant). See *id.*

the arbiter and trier of fact, the court often entertains admissibility and sufficiency questions simultaneously, and the lines drawn between the issues are blurred. As a result, evidentiary rulings do not have the import in Korean adjudication as they do in U.S. courts. During a trial, Korean judges need not make prompt rulings on admissibility, and often do not in practice.¹⁰² Routinely, judges do not even discuss evidentiary rulings until judgments are announced. Often, discussions of the sufficiency of evidence overtake admissibility questions.¹⁰³

III. EXPERT EVIDENCE IN KOREA¹⁰⁴

The articles in the Code of Civil Procedure that address evidentiary matters contain the rules governing expert evidence in Korean courts. The corresponding provisions in the U.S. Federal Rules of Evidence address issues such as qualification of the expert witness and the scope, form, and basis of expert testimony.¹⁰⁵ In contrast, the Korean rules address more procedural matters. Thus, the Code of Civil Procedure provisions focus on matters such as the method of appointment of an expert witness,¹⁰⁶ the procedure for challenging the appointment of a witness,¹⁰⁷ court requests for written testimony,¹⁰⁸ and court requests for expert testimony from an organization rather than an individual.¹⁰⁹

The most striking difference between the Korean and U.S. rules on expert evidence is the method for selecting and appoint-

102. See Yoon Interview, *supra* note 81.

103. See *id.*

104. This Article focuses on expert evidence in the civil action setting in Korea. The basic parameters of the presentation of expert evidence in civil and criminal actions in the jurisdiction are quite similar. Provisions for expert evidence in criminal actions are included in the PENAL PROC. CODE arts. 169 to 179-2, *translated in* 2 CURRENT LAWS OF THE REPUBLIC OF KOREA 815, 815-25 to 815-27 (Korea Legislation Research Inst. ed., 1992).

105. See FED. R. EVID. 702-705.

106. See CODE OF CIV. PROC. art. 308, *translated in* 2 CURRENT LAWS OF THE REPUBLIC OF KOREA 753, 753-43 (Korea Legislation Research Inst. ed., 1992).

107. See *id.* art. 310, *translated in* 2 CURRENT LAWS OF THE REPUBLIC OF KOREA 753, 753-43 (Korea Legislation Research Inst. ed., 1992).

108. See *id.* art. 312, *translated in* 2 CURRENT LAWS OF THE REPUBLIC OF KOREA 753, 753-43 (Korea Legislation Research Inst. ed., 1992).

109. See *id.* art. 314, *translated in* 2 CURRENT LAWS OF THE REPUBLIC OF KOREA 753, 753-43 (Korea Legislation Research Inst. ed., 1992).

ing expert witnesses. While the U.S. Federal Rules of Evidence allow the parties to retain their own expert witnesses,¹¹⁰ the Korean Code of Civil Procedure specifically provides that only the court may appoint these witnesses.¹¹¹ This single difference greatly impacts the manner in which each jurisdiction gathers and presents expert evidence. It also results in two starkly contrasting systems.

A. Expert Witnesses in Korea

Article 308 of the Korean Code of Civil Procedure provides: "An expert witness shall be appointed by the court of suit, a commissioned judge or an entrusted judge."¹¹² Article 306 states that "[a]ny person who is possessed of erudition and/or experience necessary for giving expert testimony" may qualify as an expert witness.¹¹³ Together, these two rules indicate the court's reverence for the expert witness. The expert witness in Korea is normally regarded either as an individual with advanced scholarship in a particular field or discipline or as one holding an occupation requiring a certifiable or licensed skill. As one former Seoul District Court judge explained, the court-appointed expert witness is seen as someone who can lend special or critical analysis.¹¹⁴ In brief, individuals qualified to be court-appointed expert witnesses

110. See FED. R. EVID. 706(d) ("Nothing in this rule limits the parties in calling expert witnesses of their own selection.").

111. See CODE OF CIV. PROC. art. 308, translated in 2 CURRENT LAWS OF THE REPUBLIC OF KOREA 753, 753-43 (Korea Legislation Research Inst. ed., 1992). In practice, parties may submit nominees for the court-appointed expert witness. See Jeon Interview I, *supra* note 39; Suh Interview I, *supra* note 95; Yoon Interview, *supra* note 81. Parties may also retain witnesses to give expert testimony, but the court considers parties' witnesses to be regular witnesses, not "court-appointed experts." See *infra* note 148.

112. CODE OF CIV. PROC. art. 308, translated in 2 CURRENT LAWS OF THE REPUBLIC OF KOREA 753, 753-43 (Korea Legislation Research Inst. ed., 1992).

113. *Id.* art. 306(1), translated in 2 CURRENT LAWS OF THE REPUBLIC OF KOREA 753, 753-42 to 753-43 (Korea Legislation Research Inst. ed., 1992). Article 313, which governs examination of the expert witness, repeats the reference to "facts of which [the expert witness] has come to knowledge by erudition or experience." *Id.* art. 313, translated in 2 CURRENT LAWS OF THE REPUBLIC OF KOREA 753, 753-43 (Korea Legislation Research Inst. ed., 1992). The equivalent provision in the U.S. Federal Rules of Evidence is Rule 702. See *infra* text accompanying note 151.

114. See Jeon Interview I, *supra* note 39.

are viewed as either "men of letters"¹¹⁵ or specialized professionals who can serve as court assistants.¹¹⁶

The text of the Korean rules appears to require testimony from individuals who are qualified to give expert opinions.¹¹⁷ This mandatory testimony requirement is absent in the U.S. Federal Rules of Evidence. Article 306(1) of the Korean Code of Civil Procedure, entitled "Obligation to Give Expert Testimony," provides that a person qualified to give expert testimony "shall bear the obligation to give such testimony."¹¹⁸ In theory, this provision

115. The phrasing is not intended to be chauvinistic or sexist. Although empirical statistics are not available, interviews with former judges who served for a combined 10 years in Korean district courts indicate that they rarely saw or appointed women as expert witnesses. See Interview with Meong-Ho Jeon, Seoul District Court Judge, 1993-1995 (Oct. 14, 1996); Interview with Jung-Keol Suh, Seoul District Court Judge, 1991-1993 (Oct. 17, 1996); Interview with Jee-Soo Rhee, Suwon District Court Judge, 1988-1990, Seoul District Family Court Judge, 1990-1993; Cheongju District Court Judge, 1993-1994 (Oct. 15, 1996) [hereinafter Rhee Interview]. Of the five former judges interviewed for this Article, Rhee is the lone woman.

The reality is that Korea always has been, and continues to be, a male-dominated society. To many, the provision in Korea's Constitution that "[a]ll citizens shall be equal before the law, and there shall be no discrimination in political, economic, social or cultural life on account of sex" rings hollow. KOREA CONST. art. 11(1), translated in 1 CURRENT LAWS OF THE REPUBLIC OF KOREA 3, 4 (Korea Legislation Research Inst. ed., 1992). For a discussion of the cultural origins of gender roles and attitudes in Korea, see DIANE YU, WINDS OF CHANGE (1995). See also Nicholas D. Kristof, *Seoul Journal: In Sexist South Korea, the Girls Even the Score*, N.Y. TIMES, July 13, 1996, at 4 ("South Korea remains overwhelmingly a man's world. Aside from Islamic countries, it has fewer female politicians and business executives and prominent figures than almost any other nation in the world. Only 1.9 percent of civil servants are women.").

116. Similarly, the expert witness in Germany is often described as a "consultant" to the court. See Samuel R. Gross, *Expert Evidence*, WIS. L. REV. 1113, 1209 (1991) (citing M. CAPPELLETTI & J.M. PERILLO, CIVIL PROCEDURE IN ITALY (1965); John H. Langbein, *The German Advantage in Civil Procedure*, 52 U. CHI. L. REV. 823, 835-41 (1985); Morris Ploscowe, *The Expert Witness in Criminal Cases in France, Germany and Italy*, 2 LAW & CONTEMP. PROBS. 504 (1935)).

117. CODE OF CIV. PROC. art. 306, translated in 2 CURRENT LAWS OF THE REPUBLIC OF KOREA 753, 753-42 to 753-43 (Korea Legislation Research Inst. ed., 1992).

118. *Id.* art. 306(1), translated in 2 CURRENT LAWS OF THE REPUBLIC OF KOREA 753, 753-42 to 753-43 (Korea Legislation Research Inst. ed., 1992) (emphasis added). Article 275 of the Code of Civil Procedure also sets forth a general "[d]uty to be [a] witness" for non-expert witnesses. *Id.* art. 275, translated in 2 CURRENT LAWS OF THE REPUBLIC OF KOREA 753, 753-39 (Korea Legislation Research Inst. ed., 1992). Article 275(1) states: "Except as otherwise provided, the court may examine any person as a witness." *Id.* art. 275(1), translated in 2 CURRENT LAWS OF THE REPUBLIC OF KOREA 753, 753-39 (Korea Legislation Research Inst. ed., 1992). Except for certain public officials, a witness may refuse to testify only on grounds of self-incrimination, privilege, or trade secret. See *id.*

reflects the view that individuals with special talents and abilities to aid the judicial process should come forward and assist the courts. The court may ensure compliance by imposing fines on individuals who fail to testify.¹¹⁹ The rule appears to be merely precatory, however, because courts rarely seek testimony from an individual who is unwilling to testify. In practice, the Korean courts neither enforce the mandatory component of Article 303 nor demand testimony from an unwilling or uncooperative expert.¹²⁰ Thus, in reality, similar to U.S. Federal Rule of Evidence 706,¹²¹ expert testimony in Korea is given voluntarily.

B. Operation of the Korean Rules

The Korean approach to expert evidence under the Code of Civil Procedure can best be understood by examining how the rules apply in a typical case involving an expert witness. After the filing of the initial pleadings, either party may petition the court

arts. 276-278, 285-286, *translated in* 2 CURRENT LAWS OF THE REPUBLIC OF KOREA 753, 753-39 to 753-41 (Korea Legislation Research Inst. ed., 1992). A witness may refuse to testify on the ground of self-incrimination concerning "such matters as may cause prosecution or conviction or as may bring disgrace to himself" or to certain persons with whom he has association or relation. *Id.* art. 285, *translated in* 2 CURRENT LAWS OF THE REPUBLIC OF KOREA 753, 753-40 (Korea Legislation Research Inst. ed., 1992).

Thus, the Code of Civil Procedure provides what has been described as a "maxim" in common law jurisprudence—an individual has a duty to give evidence when able. Interestingly, this duty is not codified in the United States Code or the Federal Rules of Evidence. It is, however, mentioned in the case law. *See Davis Enters. v. United States Evtl. Protection Agency*, 877 F.2d 1181 (3d Cir. 1989) (holding that an EPA employee may not be compelled to give deposition testimony as requested by a litigant). Judge Joseph F. Weis, Jr. dissented in *Davis Enterprises*:

Professor Wigmore was emphatic in his support for the obligation. He wrote that society has the right to the testimony because the demand comes from "the community as a whole—from justice as an institution and from law and order as indispensable elements of civilized life." The particular cause before the court may be "petty and personal, but the results that hang upon it are universal The pettiness and personality of the individual trial disappear when we reflect that our duty to bear testimony runs not to the parties in that present cause, but the community at large and forever."

Id. at 1190 (citations omitted) (Weis, J., dissenting); *see also Branzburg v. Hayes*, 408 U.S. 665, 688-89 & n.26 (1972).

119. *See* CODE OF CIV. PROC. art. 282, *translated in* 2 CURRENT LAWS OF THE REPUBLIC OF KOREA 753, 753-40 (Korea Legislation Research Inst. ed., 1992).

120. *See* Suh Interview I, *supra* note 95.

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

for the appointment of an expert witness.¹²² Alternatively, the court itself may deem that the case warrants an expert's analysis.¹²³ The court may either request the parties to nominate expert witnesses and choose one from that list,¹²⁴ or it may select another individual altogether.¹²⁵ In cases involving frequently adjudicated subject matters, the court may choose from a list of expert witnesses who have testified in previous actions without resorting to the parties.¹²⁶ Thus, the court may maintain a list of real estate appraisers for disputes over land value,¹²⁷ physicians for personal injury actions, or university academic departments equipped to perform scientific experiments for suits requiring academic or technical analysis.¹²⁸ The individuals on these lists are not considered members of "panels" or "boards" of certified expert witnesses as proposed by U.S. commentators to enhance the standing of expert witnesses.¹²⁹ A ranking district court judge directs court personnel to maintain these lists, thus making the process informal and convenient for judges.¹³⁰

Article 309 of the Korean Code of Civil Procedure permits a party to challenge the court's appointment of an expert witness.¹³¹ The grounds for a challenge are somewhat vague: "In cases where

122. See Jeon Interview I, *supra* note 39; Suh Interview I, *supra* note 95; Yoon Interview, *supra* note 81.

123. See Jeon Interview I, *supra* note 39; Suh Interview I, *supra* note 95; Yoon Interview, *supra* note 81.

124. See Jeon Interview I, *supra* note 39; Suh Interview I, *supra* note 95; Yoon Interview, *supra* note 81.

125. See Jeon Interview I, *supra* note 39; Suh Interview I, *supra* note 95; Yoon Interview, *supra* note 81.

126. See Jeon Interview I, *supra* note 39; Suh Interview I, *supra* note 95; Yoon Interview, *supra* note 81.

127. In some districts, names of appraisers are stored in computer-generated lists from which witnesses may be randomly selected. See Rhee Interview, *supra* note 115.

128. In addition to individual professionals, the court may request expert testimony, usually in the form of a report, from "a public office, school or any other organization possessed of adequate equipment." CODE OF CIV. PROC. art. 314(1), *translated in 2 CURRENT LAWS OF THE REPUBLIC OF KOREA 753, 753-43* (Korea Legislation Research Inst. ed., 1992). In practice, the court requests reports from, for example, a hospital, research laboratory, or professional organization. See Suh Interview I, *supra* note 95.

129. See *infra* text accompanying note 238.

130. See Suh Interview I, *supra* note 95.

131. See CODE OF CIV. PROC. art. 309, *translated in 2 CURRENT LAWS OF THE REPUBLIC OF KOREA 753, 753-43* (Korea Legislation Research Inst. ed., 1992).

there are such circumstances as preventing an expert witness from giving expert testimony faithfully, the parties may challenge him."¹³² Litigants often challenge expert witnesses based on bias or interest.¹³³ Interestingly, the Korean rules allow a party to immediately appeal the court's denial of the party's objection to the appointment of the expert witness.¹³⁴ This availability of an immediate appeal may indicate an expert witness' special role under Korean law and the need for a prompt opportunity to correct an unwarranted appointment. Conversely, when a court sustains an objection to the appointment of an expert witness, the non-objecting party may not immediately appeal this decision.¹³⁵

After appointing an expert, the court summons the court-appointed witness to take a special oath.¹³⁶ The court then assigns the expert witness his or her task, which varies from case to case. The assigned task depends largely upon the individual judge, or if the action is before a collegiate court, its ranking judge. The court may either: (1) request the witness only to clarify or confirm certain facts; (2) instruct the expert to give his or her opinion on what may be the ultimate issue of an action; or (3) ask the witness to do both.¹³⁷

132. CODE OF CIV. PROC. art. 309, *translated in 2 CURRENT LAWS OF THE REPUBLIC OF KOREA 753, 753-43* (Korea Legislation Research Inst. ed., 1992).

133. See Suh Interview I, *supra* note 95.

134. See CODE OF CIV. PROC. art. 310(1), *translated in 2 CURRENT LAWS OF THE REPUBLIC OF KOREA 753, 753-43* (Korea Legislation Research Inst. ed., 1992). In contrast, the court's denial of a party's motion to disqualify an expert witness is clearly not immediately appealable in U.S. federal courts.

135. See CODE OF CIV. PROC. art. 310(3), *translated in 2 CURRENT LAWS OF THE REPUBLIC OF KOREA 753, 753-43* (Korea Legislation Research Inst. ed., 1992).

136. Expert witnesses take the following oath: "I swear that I will give my opinion faithfully in accordance with my conscience and will be subject to the penalty of false expert testimony in case of any falsehood in my opinion." *Id.* art. 311, *translated in 2 CURRENT LAWS OF THE REPUBLIC OF KOREA 753, 753-43* (Korea Legislation Research Inst. ed., 1992). This oath differs from the oath for all other witnesses, which reads: "I swear that I will conscientiously speak the truth without concealing or adding anything and will be subject to the penalty of perjury in case of false statement." *Id.* art. 292(2), *translated in 2 CURRENT LAWS OF THE REPUBLIC OF KOREA 753, 753-41* (Korea Legislation Research Inst. ed., 1992).

137. See Suh Interview I, *supra* note 95. For example, in a negligence action arising out of an automobile accident, the court may ask the expert witness to ascertain the speed of each car, the weather conditions, or the lighting conditions. The court may also ask the expert to give an opinion as to whether the crash occurred in Mr. Kim's lane or Mr.

The court decides whether the witness may attend trial proceedings or review the evidence presented. Because the Korean Code of Civil Procedure does not provide for general pre-trial discovery, an expert witness is not subject to depositions or any other discovery requests. An expert witness submits a written report to the court, which the court then distributes to the parties. The report states the witness' position and special qualifications, summarizes the task given, states the materials reviewed, and sets forth analyses and conclusions.¹³⁸

After receiving the report, either party, as well as the court, may request in-court examination of the expert witness.¹³⁹ Examination, however, is only by leave of court.¹⁴⁰ The scope of the examination is often limited to the contents of the expert's written report, including the analyses and conclusions.¹⁴¹ The court has great discretion in shaping the examination, but either party may object to questions by the other litigant.¹⁴²

Former district court judges insist that the court is not obliged to accept or adopt the expert witness' conclusions.¹⁴³ Judges are free to reject any part of the witness' report.¹⁴⁴ Thus, although the court-appointed expert witness is seen as the court's assistant and presumed to give impartial testimony, his or her conclusions and testimony do not carry an "aura of infallibility."¹⁴⁵

Although the court appoints only one expert witness per issue, the parties may retain "experts" to testify in their fields of expertise without the title of "court-appointed expert witness."¹⁴⁶ If there is contradictory "expert" evidence, the party-retained wit-

Chang's lane.

138. See Jeon Interview I, *supra* note 39; Yoon Interview, *supra* note 81.

139. The rules of examination of non-expert witnesses apply to expert witnesses. See CODE OF CIV. PROC. art. 305, translated in 2 CURRENT LAWS OF THE REPUBLIC OF KOREA 753, 753-42 (Korea Legislation Research Inst. ed., 1992) ("The provisions of Section 2 [Examination of Witness] shall apply *mutatis mutandis* to expert testimony, except in case of provisions of Article 283 [Taking in Custody of Non-appearing Witness].").

140. See Yoon Interview, *supra* note 81.

141. See Jeon Interview I, *supra* note 39; Lee Interview, *supra* note 95.

142. See Jeon Interview I, *supra* note 39; Lee Interview, *supra* note 95.

143. See Suh Interview I, *supra* note 95; Yoon Interview, *supra* note 81.

144. See Suh Interview I, *supra* note 95; Yoon Interview, *supra* note 81.

145. For a discussion of the "infallibility" of expert evidence in the U.S. setting, see Gross, *supra* note 116, at 1179-81.

146. See Jeon Interview I, *supra* note 39; Suh Interview I, *supra* note 95.

ness is presumptively partial, biased, and less objective.¹⁴⁷ Thus, many litigants do not retain such witnesses. In certain cases, however, especially those involving complex facts or disputed issues on which the community of experts is divided, parties may choose to offer the testimony of partisan experts.¹⁴⁸ Occasionally, the court may question the conclusions of its court-appointed expert witness and seek the opinion of another expert, or alternatively, adopt the testimony of a party-retained expert.¹⁴⁹

IV. KOREAN COUNTERPARTS TO THE U.S. FEDERAL RULES OF EVIDENCE PROVISIONS GOVERNING EXPERT TESTIMONY

A. Federal Rule of Evidence 702

Rule 702 provides for: (1) the general subject matter of expert testimony, (2) the qualification of the expert witness, (3) the threshold standard to permit a party to offer such testimony, and (4) the form in which the expert may give testimony.¹⁵⁰ Rule 702's

147. See Jeon Interview I, *supra* note 39; Suh Interview I, *supra* note 95.

148. See Jeon Interview I, *supra* note 39; Suh Interview I, *supra* note 95; Yoon Interview, *supra* note 81. The prosecution arising out of the collapse of the Sungsoo Bridge illustrates this situation. During morning rush hour on October 21, 1994, a portion of the Sungsoo Bridge, one of fifteen bridges connecting the northern and southern parts of Seoul, collapsed onto the waters of the Han River. As a result of the accident, 32 people died and many more sustained serious injuries. The public was outraged. See Andrew Pollack, *A Crisis of Faith: Is the New Korea Jerry-Built?*, N.Y. TIMES, Nov. 18, 1994, at A4. In response, the Prime Minister accepted moral responsibility and offered his resignation to the President of Korea.

The Supreme Public Prosecutors Office brought criminal charges of negligent homicide against, among others, officials of the Dong-Ah Company, which designed and constructed the bridge. The court appointed a professor of civil engineering at Suwon University as its expert witness.

Both sides also retained faculty members from two respected universities in Seoul as experts. Faculty members from Seoul National University testified for the prosecution; their counterparts from Hanyang University appeared for the defense. The prosecution's witnesses testified that the collapse of the bridge was due primarily to faulty construction and design. The defense's witnesses testified that inadequate work in the repair and maintenance of the bridge was the primary cause of the collapse. The court-appointed expert witness' findings and conclusions were closer to the testimony of the defense witnesses. See Suh Interview I, *supra* note 95.

149. In this and other respects, the Korean system of selecting and using expert witnesses is similar to the system in Germany. See Langbein, *supra* note 116, at 837-40.

150. Rule 702 provides, with the corresponding provisions in the text above indicated: If [1] scientific, technical, or other specialized knowledge [3] will assist the trier

Korean counterpart is Article 306(1) of the Korean Code of Civil Procedure, which states that “[a]ny person who is possessed of erudition and/or experience necessary for giving expert testimony shall bear the obligation to give such testimony.”¹⁵¹ The plain text of Rule 702’s Korean counterpart appears to address only two of the four issues dealt with in Rule 702: the matter of qualification of the expert witness and perhaps more obliquely, the general subject of expert testimony.¹⁵² In practice, however, several aspects of Rule 702 have similar application in Korea.

Rule 702 allows expert testimony in the subject areas of scientific, technical, and the all-inclusive “other specialized knowledge.”¹⁵³ Commentators have noted that areas of knowledge on which expert testimony will be accepted are broad.¹⁵⁴ Unlike the U.S. Federal Rules of Evidence, the Korean Code of Civil Procedure does not describe the specific subject areas in which there may be expert testimony. In practice, the areas for expert testimony are equally broad, subject to the limitation that the expert testify only on areas in which he or she has obtained advanced education or certifiable skill.¹⁵⁵

of fact to understand the evidence or to determine a fact in issue, [2] a witness qualified as an expert by knowledge, skill, experience, training, or education, [4] may testify thereto in the form of an opinion or otherwise.

FED. R. EVID. 702.

151. CODE OF CIV. PROC. art. 306(1), *translated in* 2 CURRENT LAWS OF THE REPUBLIC OF KOREA 753, 753-42 to 753-43 (Korea Legislation Research Inst. ed., 1992).

152. The Code of Civil Procedure seemingly includes an obligation to give expert testimony. *See id.* art. 306, *translated in* 2 CURRENT LAWS OF THE REPUBLIC OF KOREA 753, 753-42 to 753-43 (Korea Legislation Research Inst. ed., 1992). The U.S. Federal Rules of Evidence clearly state, however, that “[a]n expert witness shall not be appointed by the court unless the witness consents to act.” FED. R. EVID. 706(a).

153. FED. R. EVID. 702; *see id.* advisory committee’s note (“The rule is broadly phrased. The fields of knowledge which may be drawn upon are not limited merely to the ‘scientific’ and technical’ but extend to all ‘specialized’ knowledge.”).

The proper standard for the admission of novel scientific evidence in U.S. federal courts is set forth in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993). In *Daubert*, the Supreme Court specifically rejected the test from *Frye v. United States*, 293 F. 1013, 1014 (D.C. Cir. 1923), which stated that “expert opinion based on a scientific technique is inadmissible unless the technique is ‘generally accepted’ as reliable in the relevant scientific community.” *Daubert*, 509 U.S. at 584. Instead, the Supreme Court held that the Federal Rules of Evidence supersede the *Frye* test. *See id.* at 587.

154. L. Timothy Perrin, *Expert Witness Testimony: Back to the Future*, 29 U. RICH. L. REV. 1389, 1395 (1995).

155. *See supra* text accompanying notes 150-153.

Rule 702 requires that expert witnesses be qualified by "knowledge, skill, experience, training or education."¹⁵⁶ Thus, it allows physicians, physicists, and architects, as well as "the large group sometimes called 'skilled' witnesses, such as bankers or landowners testifying to land values," to give expert testimony.¹⁵⁷ The Korean counterpart to this qualification requirement is Article 306(1), which states that one "possessed of erudition and/or experience necessary for giving expert testimony" qualifies as an expert.¹⁵⁸ Although the two rules seem similar, they differ somewhat in application. Under Rule 702, doctors and doctorates, as well as carpenters and car mechanics, could qualify as expert witnesses. Under Korean practice, however, it is unlikely that the latter two, regardless of their experience or degree of specialized knowledge, would be appointed as expert witnesses.¹⁵⁹ Only individuals with advanced education in a particular field or professionals with special occupational licenses or certification qualify as expert witnesses in Korea.¹⁶⁰ Thus, Korean standards appear to presume that court-appointed expert witnesses hold white-collar positions.

Rule 702 requires that the testimony "assist the trier of fact to understand the evidence or to determine a fact in issue."¹⁶¹ Commentators note that the subject testimony need only be "helpful" to the trier of fact to be admissible under Rule 702.¹⁶² Or as John Henry Wigmore posits, "[o]n *this subject* can a jury receive from

156. FED. R. EVID. 702.

157. *Id.* advisory committee's note.

158. CODE OF CIV. PROC. art. 306(1), *translated in* 2 CURRENT LAWS OF THE REPUBLIC OF KOREA 753, 753-42 to 753-43 (Korea Legislation Research Inst. ed., 1992).

159. In Korea, such witnesses could give testimony similar to expert witnesses in U.S. federal courts, but as regular witnesses and without the title of "court-appointed expert witness."

160. *See supra* text accompanying notes 150-153.

161. FED. R. EVID. 702.

162. *See* Michael C. McCarthy, Note, "Helpful" or "Reasonably Reliable"? *Analyzing the Expert Witness's Methodology Under Federal Rules of Evidence 702 and 703*, 77 CORNELL L. REV. 350, 355 (1992) (citing 3 DAVID W. LOUISELL & CHRISTOPHER B. MUELLER, FEDERAL EVIDENCE § 380, at 633 (1979)); Perrin, *supra* note 154, at 1398. The liberalizing rule eliminates the higher standard that the subject of the expert testimony either (1) lie outside common knowledge, *see* McCarthy, *supra*, at 355, or (2) be "beyond the ken of the ordinary lay person," Faust F. Rossi, *Modern Evidence and the Expert Witness*, LITIGATION, Fall 1985, at 18, 19.

this person appreciable help?"¹⁶³ Many regard Rule 702 to be more lenient than some state courts' standards. For example, New York requires that expert evidence be "of *material aid* to the just determination of the action."¹⁶⁴ In contrast, Korea's Article 306(1) is silent as to the standard of helpfulness; the matter is left to the court's discretion.

Most U.S. commentators agree that it is fairly easy to meet the standards for the qualification of expert witnesses under Rule 702.¹⁶⁵ Comparatively, the standards for appointing an expert witness in Korea appear to be appreciably higher. This difference is likely due to the Korean witness' role as a neutral assistant and the expectation that he or she hold a certain profession and deliver testimony of a skilled or analytical nature.

Finally, Rule 702 provides that an expert witness, unlike an ordinary witness, may testify "in the form of an opinion."¹⁶⁶ Although not explicitly stated in the Korean Code of Civil Procedure, an expert witness may give an opinion or testimony in any form that the court requests.¹⁶⁷

163. 7 JOHN HENRY WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 1923, at 29 (James H. Chadbourn ed., rev. ed. 1978).

164. N.Y. C.P.L.R. 3036(2) (McKinney 1991) (emphasis added); see Irving Younger, *A Practical Approach to the Use of Expert Testimony*, 31 CLEV. ST. L. REV. 1, 3 (1982) ("[Rule 702] opens the door quite wide to the receipt of expert testimony.").

165. See FAUST F. ROSSI, EXPERT WITNESSES 27 (1991) ("[D]oubts about whether an expert's testimony will be useful generally should be resolved in favor of admissibility" (quoting 3 J. WEINSTEIN & M. BERGER, WEINSTEIN'S EVIDENCE ¶ 702[02], at 702-30 (1988))); Perrin, *supra* note 154, at 1395 ("Rule 702 is generous in its definition of an expert."); Younger, *supra* note 164, at 3. One judge explained his approach to an expert witness' qualification on a given subject:

My rule of thumb test for whether or not a witness is qualified as an expert is simple. I hear the witness explain his experience, and if there is an objection to the qualifications I would explain to the jury that under the Federal Rules of Evidence an expert is any person who knows more about what he is talking about than I do.

Expert Testimony, 11 TOURO L. REV. 107, 143 (1994) (comments by Hon. George C. Pratt).

With respect to the qualification of technical expert witnesses, see Christopher P. Murphy, Note, *Experts, Liars, and Guns for Hire: A Different Perspective on the Qualification of Technical Expert Witnesses*, 69 IND. L.J. 637 (1994).

166. FED. R. EVID. 702.

167. See Suh Interview I, *supra* note 95; Yoon Interview, *supra* note 81.

B. Federal Rule of Evidence 703

Rule 703 provides that the basis of an expert's testimony does not need to be admissible evidence, so long as it is material that is "reasonably relied upon by the experts."¹⁶⁸ Generally, under common law, an expert's testimony could be based only on admissible evidence and personal knowledge.¹⁶⁹ The expert witness could not rely on documents that amounted to hearsay.¹⁷⁰ One legal scholar believes that Rule 703's broadening of the bases of an expert witness' testimony is well-justified:

One rationale is efficiency. Often an expert relies on records . . . that would themselves be admissible but only after the expenditure of money and time in producing and examining authenticating witnesses. Another rationale is trustworthiness. Rule 703 is justified because the expert is qualified to assess the reliability of these nonevidence sources, she may therefore be trusted to rely only on trustworthy materials, and she is present in court to explain the nature, extent, and reasons for this reliance.¹⁷¹

The Advisory Committee explains that the change was "to bring the judicial practice into line with the practice of the experts themselves when not in court."¹⁷² Thus, under current practice, Rule 703 allows an expert witness to rely on three sources: (1) first-hand observation; (2) presentation at trial; and (3) presentation of outside data to the expert, so long as other experts in the field reasonably rely on such data.¹⁷³

Rule 703 has inspired a great deal of commentary.¹⁷⁴ In con-

168. FED. R. EVID. 703 states in full:

The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by the experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence.

169. See ROSSI, *supra* note 165, at 44.

170. See *id.* at 45-46.

171. *Id.* at 46.

172. FED. R. EVID. 703 advisory committee's note; see McCarthy, *supra* note 162, at 355-56.

173. See FED. R. EVID. 703 advisory committee's note.

174. See, e.g., ROSSI, *supra* note 165, at 43-98; Ronald L. Carlson, *Collision Course in Expert Testimony: Limitations on Affirmative Introduction of Underlying Data*, 36 U. FLA. L. REV. 234 (1984); McCarthy, *supra* note 162, at 355-58; Stanley Pierce et al., *Ex-*

trast, Korean law is generally not as well-developed or sophisticated on the subject of expert evidence in both judicial thought and academic discussion.¹⁷⁵ The Code of Civil Procedure is silent as to whether an expert witness may rely on inadmissible evidence, and there has been little, if any, academic discussion on this subject. Nevertheless, it seems that Korean practice is identical to U.S. practice under the Federal Rules of Evidence. Expert witnesses may rely on data not admitted into evidence.¹⁷⁶ Practitioners in Korea appear to follow Rule 703's "reasonably relied upon" requirement, although jurists prefer to describe it as a matter of "common sense."¹⁷⁷

C. Federal Rule of Evidence 704

Except in criminal actions, Rule 704 provides that testimony "embrac[ing] an ultimate issue to be decided by the trier of fact" may be admissible.¹⁷⁸ Because the jury is free to disregard the evidence presented, Rule 704 rejects the notion that an expert testifying on an ultimate issue usurps the jury function.¹⁷⁹ The old rule, which precluded testimony on the ultimate issue of an action, has been described as "unduly restrictive, difficult [to apply], and generally served only to deprive the trier of fact of useful informa-

pert Testimony in Technically Complex Litigation, 7 COOLEY L. REV. 429, 433-38 (1990); Paul R. Rice, *Inadmissible Evidence as a Basis for Expert Opinion Testimony: A Response to Professor Carlson*, 40 VAND. L. REV. 583 (1987); Rossi, *supra* note 162, at 21-23.

175. See INTRODUCTION TO THE LAW, *supra* note 8, at 17 ("In nearly all branches of law, Korea has a smaller body of case law than does the United States and most West European countries, because litigation is a comparatively rare phenomenon in Korea.").

176. See Jeon Interview I, *supra* note 39; Suh Interview I, *supra* note 95; Yoon Interview, *supra* note 81.

177. See Jeon Interview I, *supra* note 39; Yoon Interview, *supra* note 81.

178. FED. R. EVID. 704 provides in full:

(a) Except as provided in subdivision (b), testimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact.

(b) No expert witness testifying with respect to the mental state or condition of a defendant in a criminal case may state an opinion or inference as to whether the defendant did or did not have the mental state or condition constituting an element of the crime charged or of a defense thereto. Such ultimate issues are matters for the trier of fact alone.

179. See *id.* advisory committee's note. Wigmore has dismissed the notion of jury usurpation as "empty rhetoric." 7 WIGMORE, *supra* note 163, § 1920, at 18; see Daniel J. Steinbock et al., *Expert Testimony on Proximate Cause*, 41 VAND. L. REV. 261, 267 (1988).

tion.”¹⁸⁰

A Korean court may, in its discretion, request an expert witness to give an opinion on the ultimate issue in an action. Like a U.S. jury, a Korean court is free to reject expert testimony and may render a decision contrary to the expert’s opinion.¹⁸¹ One former judge points out that this can occur with some frequency.¹⁸²

D. Federal Rule of Evidence 705

Rule 705 provides that “[t]he expert may testify in terms of opinion or inference and give reasons therefor without first testifying to the underlying facts or data, unless the court requires otherwise.”¹⁸³ A legal scholar has noted that Rule 705 permits qualified witnesses to state only that they have formed their conclusions and then to state their conclusions, without stating anything further.¹⁸⁴ The rule also allows witnesses to limit their testimony to responses to hypothetical questions.¹⁸⁵ To account for this scenario and to be fair to the opposing party, Rule 705 also provides that “[t]he expert may in any event be required to disclose the underlying facts or data on cross-examination.”¹⁸⁶ The opposing party’s lawyer must decide whether to conduct cross-examination based on the results of the expert witness’ deposition and other discovery proceedings.¹⁸⁷

Rule 705 has no textual equivalents in Korea. In Korean practice, expert witnesses usually submit their written reports to the court and the parties. Their reports contain a brief curriculum vitae, a summary of the court-assigned task, work done pursuant to the task, findings, and conclusions.¹⁸⁸ A report without such information would be considered incomplete.¹⁸⁹ A report that states only the witness’ appointment and conclusion, without mentioning

180. FED. R. EVID. 704 advisory committee’s note.

181. See Suh Interview I, *supra* note 95; Yoon Interview, *supra* note 81.

182. See Yoon Interview, *supra* note 81.

183. FED. R. EVID. 705.

184. See ROSSI, *supra* note 165, at 115-16.

185. See *id.* at 116.

186. FED. R. EVID. 705.

187. See ROSSI, *supra* note 165, at 116.

188. See Jeon Interview I, *supra* note 39.

189. See *id.*

the basis of his or her testimony, is unheard of and will likely raise a question of the witness' competence.¹⁹⁰ Indeed, the absence or inadequacy of underlying facts or data is often the basis for a party's request to examine the expert witness in court.¹⁹¹ Thus, the expert must discuss the basis of his or her conclusions in the report because, unlike U.S. federal court practice, an expert witness in Korea is not subject to pre-trial deposition testimony.¹⁹² Often, the only record of the witnesses' work is the written report.¹⁹³

E. Federal Rule of Evidence 706

Rule 706 governs court-appointed experts.¹⁹⁴ Rule 706(a) provides for the selection of court-appointed expert witnesses and sets forth their duties and responsibilities.¹⁹⁵ This provision also specifies that the court may select expert witnesses from among submitted nominations or from its own candidates.¹⁹⁶ The court must notify the expert witnesses about their duties and inform the parties about the experts' findings.¹⁹⁷ The parties may depose, examine, and cross-examine the experts.¹⁹⁸ Rule 706(b) provides that expert witnesses shall receive "reasonable compensation" as

190. *See id.*

191. *See* Suh Interview I, *supra* note 95.

192. *See id.*; Yoon Interview, *supra* note 81.

193. *See* Suh Interview I, *supra* note 95; Yoon Interview, *supra* note 81.

194. For a helpful guide on the practical aspects of Rule 706, see JOE S. CECIL & THOMAS E. WILLGING, FEDERAL JUDICIAL CTR., COURT-APPOINTED EXPERTS: DEFINING THE ROLE OF EXPERTS APPOINTED UNDER FEDERAL RULE OF EVIDENCE 706 (1993).

195. FED. R. EVID. 706(a) provides:

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

196. *See id.*

197. *See id.*

198. No individual can be compelled, however, to be an expert witness. *See id.*

directed by the court.¹⁹⁹

With a few notable exceptions, the selection of expert witnesses in Korea and the assignment of their duties and responsibilities are virtually identical to those described under Rule 706(a) and (b). Parties may submit nominations for the court-appointed expert witnesses, and the court may select a witness from among the nominees or from its own candidates. In cases involving frequently litigated subject areas, the court may refer to a list of appointed experts.²⁰⁰ The court informs the witnesses of their duties and notifies the parties of the same.²⁰¹ The witnesses perform their assigned duties, conduct their activities, and submit their findings. Although not explicitly stated in the Code of Civil Procedure, witnesses are compensated for their services.²⁰²

There are two key differences between Korean practice and U.S. practice under subsections (a) and (b) of Rule 706. First, the Korean expert witness is not subject to deposition because such discovery is not permissible. Second, unless otherwise directed by the court, the witness is not required to provide in-court testimony. Unlike U.S. federal practice, litigants in Korea do not have a right of examination of expert witnesses.

Whereas many of the provisions in Rule 706 (a) and (b) correspond closely with Korean practice, the contents of Rule 706 (c) and (d) have no Korean counterparts. Rule 706(c) permits the court to disclose to the jury that the expert witness is court-

199. FED. R. EVID. 706(b) provides:

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

200. See *supra* text accompanying notes 125-130.

201. See Jeon Interview I, *supra* note 39; Suh Interview I, *supra* note 95; Yoon Interview, *supra* note 81.

202. Ultimately, the compensation of a court-appointed expert witness is included in the costs of the action, which the non-prevailing party generally bears. See CODE OF CIV. PROC. art. 89, translated in 2 CURRENT LAWS OF THE REPUBLIC OF KOREA 753, 753-12 (Korea Legislation Research Inst. ed., 1992) ("The costs of a suit shall be borne by the defeated party.").

appointed.²⁰³ Rule 706(d) explicitly states that it does not prohibit the parties from calling their own expert witnesses.²⁰⁴ In Korea, only the court can confer the title "expert witness."²⁰⁵ The parties may retain witnesses to testify in the same subject areas as court-appointed expert witnesses; however, these witnesses may testify only as *regular* witnesses.²⁰⁶

Thus, deleting subsections (c) and (d) of Rule 706 and slightly revising subsection (a) would provide for a system similar to the Korean practice.

V. TOWARD REFORM OF THE USE OF EXPERT EVIDENCE IN THE U.S. COURTS

A large portion of the commentary on U.S. expert evidence criticizes the current system of selecting and using expert witnesses.²⁰⁷ Ideally, expert evidence should be used to "assist the trier of fact"²⁰⁸ toward a fair determination of the facts and fair adjudication of the disputed claims. Many observers ask, however, whether the U.S. federal system is conducive to realizing this objective. Others ask more pointedly if the system under the current rules "undermine[s] the truth-finding, equal access, and efficiency goals of adjudication."²⁰⁹ One commentator protests that expert testimony is the weak link in the adversarial fact-finding system and is, "in fact, a disgrace."²¹⁰

Another commentator points out that many of the current system's flaws stem from the traditional common law reliance on

203. FED. R. EVID. 706(c) states: "In the exercise of its discretion, the court may authorize disclosure to the jury of the fact that the court appointed the expert witness."

204. FED. R. EVID. 706(d) states: "Nothing in this rule limits the parties in calling expert witnesses of their own selection."

205. See *supra* text accompanying note 148.

206. See *supra* text accompanying note 148.

207. See Gross, *supra* note 116; Tahirih 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. 480 (1988); Perrin, *supra* note 154, at 1389; *The Use and Misuse of Expert Evidence in the Courts*, JUDICATURE, Sept.-Oct. 1993, at 68, 69 (edited transcript of panel discussion at American Judicature Society's mid-year meeting, Mar. 6, 1993) (introduction by Kathleen Sampson); Murphy, *supra* note 165, at 637.

208. FED. R. EVID. 702.

209. Lee, *supra* note 207, at 484.

210. Gross, *supra* note 116, at 1116.

the parties to produce expert guidance for the trier of fact.²¹¹ As a result, this system encourages parties to “shop” for experts who will provide favorable testimony²¹² and favors litigants who can afford to hire the best experts.²¹³ The system also does not address situations where expert testimony fails to cover issues for which the trier of fact expects to rely on expert witnesses.²¹⁴ Further, the current system allows, perhaps even encourages, expert witnesses to give diametrically opposed testimony on key issues,²¹⁵ thus transforming the trial into a battle of the experts and ultimately leaving the trier of fact without any guidance in resolving the issues.²¹⁶

The U.S. system imposes significant costs on litigants for witness preparation, which drives up litigation costs and requires resources to be diverted from other pursuits, thereby further contributing to judicial inefficiency.²¹⁷ The U.S. system also allows

211. See Lee, *supra* note 207, at 484-85. Others echo this point. See, e.g., Perrin, *supra* note 154, at 1393, 1415.

212. See Lee, *supra* note 207, at 483.

213. See *id.* at 482. “Litigants with greater wealth than their adversaries will be more likely to obtain persuasive expert testimony.” *Id.* at 482-83. See Richard A. Epstein, *A New Regime for Expert Witnesses*, 26 VAL. U. L. REV. 757, 759 (1992).

214. See Lee, *supra* note 207, at 485-87. “The risk of non-production of expert evidence becomes serious in matters in which courts are dependent on expert guidance for deciding material facts.” *Id.* at 485.

215. See Epstein, *supra* note 213, at 258; Lee, *supra* note 207, at 488; *The Use and Misuse of Expert Evidence*, *supra* note 207, at 69. Indeed, a blizzard of expert testimony may address virtually all issues except those that the trier of fact considers relevant to the resolution of the dispute. For an example of such an “evidentiary void” in the presentation of expert testimony, Lee highlights the murder trial of Robert E. Chambers in 1988:

To help the jury determine the existence of intent to murder the victim, one of the parties’ medical experts testified that the blood vessels in the eyes of the victim had burst, indicating extreme force applied to her neck during strangulation. After this testimony, the jury asked the judge if an expert could testify as to the length of the stranglehold that was necessary to burst the blood vessels. The jury considered that fact relevant to its determination of intent. The prosecution and defense then informed the judge that neither counsel had asked its experts this question during deposition, nor had either counsel asked experts to look into the matter. . . . [T]he judge simply informed the jury that no expert opinion would be produced on the matter.

Lee, *supra* note 207, at 486 (footnote and citation omitted).

216. See *id.*

217. See Epstein, *supra* note 213, at 759; Perrin, *supra* note 154, at 1417-18; Lee, *supra* note 207, at 484. Professor Michael Tigar reports a case in which he was involved where a party spent \$5 million to prepare an expert who was deposed for twenty-three days. See *The Use and Misuse of Expert Evidence*, *supra* note 207, at 70.

expert witnesses to give partisan rather than objective testimony.²¹⁸ Typically, U.S. expert witnesses are not accountable for their work in court proceedings.²¹⁹ Some expert witnesses admit that they have given testimony that they would not have submitted for peer review.²²⁰

Generally, U.S. expert witnesses are a beleaguered lot.²²¹ The criticism against them has been pointed and unrelenting: "Experts, it is said, are seen as mercenaries, prostitutes or hired guns, witnesses devoid of principle who sell their opinions to the highest bidder."²²² Experts shade and overstate the certainty of their opinions, use unreliable methodologies or rely on unproven theories, serve as conduits of inadmissible evidence, and occasionally lie to serve their clients.²²³

One commentator, who previously served as an expert witness, relates his experience in less than judicious terms:

At the American trial bar, those of us who serve as expert witnesses are known as "saxophones." . . . The idea is that the lawyer plays the tune, manipulating the expert as though the expert were a musical instrument on which the lawyer sounds the desired notes. . . . I have experienced the subtle pressure to join the team—to shade one's views, to conceal doubt, to overstate nuances, to downplay weak aspects of the case that one has been hired to bolster. Nobody likes to disappoint a patron; and beyond this psychological pressure is the financial inducement. Money changes hands upon the rendering of expertise,

218. See Lee, *supra* note 207, at 483 ("They may either overtly conform their testimony to the need of the side that hired them in order to earn a higher fee, or they may unconscionably develop a bias favoring their employers' position as a result of a natural team-spirit mentality."); Perrin, *supra* note 154, at 1415.

219. See McCarthy, *supra* note 162, at 352.

220. See *id.*

221. An oft-quoted quip against expert witnesses is attributed to an attorney's closing statement to the jury: "Gentlemen of the jury, there are three kinds of liars,—the common liar, the d—d liar, and the scientific expert." Murphy, *supra* note 165, at 637 & n.1. More than a hundred years later, the criticism has not subsided. See, e.g., Gross, *supra* note 116, at 1135 ("The contempt of lawyers and judges for experts is famous. They regularly describe expert witnesses as prostitutes, people who live by selling services that should not be for sale. They speak of maintaining 'stables' of experts, beasts to be . . . harnessed at the will of their masters.").

222. Perrin, *supra* note 154, at 1389.

223. See *id.* at 1418-20.

but the expert can run his meter only so long as his patron litigator likes the tune.²²⁴

Reports of “professional” expert witnesses and individuals who noisily offer their services do not improve the image of expert witnesses.²²⁵ All things considered, many experts deserve the criticism that they receive.

Some observers wonder why expert witnesses, of all the participants in the adjudication process, receive the most stinging criticism.²²⁶ “[N]ot even criminal defendants get bad mouthed quite as much as experts do.”²²⁷ Despite such harsh criticism, expert witnesses are merely creatures of the lawyers who vilify them²²⁸ and of the judges who only passively maintain control over their work and influence.²²⁹

For as long as there have been expert witnesses in U.S. courts, there have been calls for reform of the process of gathering and presenting expert evidence.²³⁰ Some proposed measures are purportedly designed to address systemic flaws; others are aimed at specific features of the system. In effect, all reform proposals seek to gain some control over a process that has gone awry.

The most frequently proposed reform is the use of neutral, court-appointed expert witnesses.²³¹ In addition, there have been proposals to amend the substantive rules of evidence concerning the presentation of expert testimony.²³² Some commentators em-

224. Langbein, *supra* note 116, at 835.

225. See Lee, *supra* note 207, at 483.

226. See Gross, *supra* note 116, at 1114, 1135; *The Use and Misuse of Expert Evidence*, *supra* note 207, at 76. Professor Gross ponders: “[I]sn’t it remarkable—isn’t it, in fact, shocking—that casual observers and even interested partisans are treated by the legal profession with at least reasonable respect, but trained and experienced doctors, engineers and scientists are castigated?” Gross, *supra* note 116, at 1114.

227. *The Use and Misuse of Expert Evidence*, *supra* note 207, at 76.

228. See Gross, *supra* note 116, at 1115.

229. See Lee, *supra* note 207, at 480.

230. See Perrin, *supra* note 154, at 1440. For a sampling of the proposed reforms, see Epstein, *supra* note 213; Gross, *supra* note 207; Jack B. Weinstein, *Improving Expert Testimony*, 20 U. RICH. L. REV. 473 (1986); Lee, *supra* note 207.

231. See *infra* text accompanying notes 246-262.

232. For the text of proposed revisions to Rule 702 submitted in 1991, see Advisory Committee on Civil Rules of the Judicial Conference of the United States, Proposed Amendments to the Federal Rules of Civil Procedure and the Federal Rules of Evidence

phasize the need for the accountability of expert witnesses through, inter alia, peer review.²³³ In one state, court rules limit the number of expert witnesses and the length of their depositions.²³⁴ One commentator's proposed reform includes "a call to lawyers to take the higher ground by ending the misuse and abuse of experts."²³⁵

There has been some experimentation with expert witness panels²³⁶ and discussion of rule changes,²³⁷ but reforms have been slow, and the system appears reluctant to change. Others question whether the proposals would do more harm than good.²³⁸ As a result, the system continues on with all its flaws and remains a much criticized part of the litigation process in the United States.

The frequent calls for reform of the present use of expert testimony highlight the utility of a comparative study of the rules and practices relating to expert evidence in the jurisdictions of Korea and the United States. First, comparing the differences between the Korean and U.S. systems provides a tool for better understanding the rationale behind the rules of each jurisdiction. In addition, studying another jurisdiction's methods allows for consideration of other reform options, because one judicial system can draw from the experiences of another. Indeed, some of the reforms proposed

702[1] (1991), reprinted in Jack B. Weinstein, *Rule 702 of the Federal Rules of Evidence Is Sound; It Should Not Be Amended*, 138 F.R.D. 631, 636 (1991).

233. See Gross, *supra* note 116, at 1213-15.

234. See *The Use and Misuse of Expert Evidence*, *supra* note 207, at 70. Such rules were adopted in Arizona. Justice Thomas A. Zlaket of the Arizona Supreme Court explained: "[U]nder the rules that went into effect in Arizona July 1, 1992, each side is allowed one expert; one expert per issue, per side, period. Each deposition is limited to four hours. That's all. If you can't take a deposition in four hours, you ought to find another line of work." *Id.*

235. Perrin, *supra* note 154, at 1394. This commentator explains that "[s]hort of radically changing the adversary system, the only way to reform the use of experts is for lawyers to fundamentally change their ways." *Id.* at 1442.

236. See Gross, *supra* note 116, at 1192-93.

237. See, e.g., Jack B. Weinstein, *Rule 702 of the Federal Rules of Evidence Is Sound; It Should Not Be Amended*, 138 F.R.D. 631, 636 (1991); Lee, *supra* note 207.

238. Weinstein, *supra* note 237, at 491-92 ("When all else fails—when neither improved pretrial procedures nor strengthened ethical codes succeed in terminating litigation in which one party's position is grounded solely on specious expert testimony—it may be the task of the judge to do what the adversarial process and professional ethics have failed to do. This is strong medicine. It impinges on our constitutional notion of the right to a jury trial. And . . . I share the concern with placing more power and discretion in the 'unlearned' court.").

for the U.S. system regarding the use of expert evidence already exist in Korean courts.

A. Proposals for Reform

Professor Samuel Gross is the author of perhaps the single most comprehensive and concise work on the subject of expert evidence in U.S. courts.²³⁹ He discusses the need for fundamental reforms in the expert evidence process and the relative merits of different proposals. Professor Gross acknowledges that some of the proposed measures require major changes in adversarial procedures. If implemented, these proposals would “challenge the basic premises of our adversarial method.”²⁴⁰ Nevertheless, serious attempts to reform the current system require consideration of all options. Specifically, Professor Gross’ proposals include: (1) using neutral court-appointed experts, either exclusively or in addition to those retained by the parties;²⁴¹ (2) eliminating juries;²⁴² and (3) presenting expert testimony primarily by written reports.²⁴³

1. Court-Appointed Experts

The idea of employing a panel of qualified experts has been discussed for almost a century. From such a panel of experts, the court would appoint a witness to assist the trier of fact on disputed issues.²⁴⁴ The “most appealing solution to the problem of partisan expert evidence is still the oldest: use court-appointed experts.”²⁴⁵

239. See Gross, *supra* note 116. Critical in Professor Gross’ discussion is his view that expert evidence is inherently different from other evidence, and thus should be treated differently. He argues: “[E]xpert information is categorically different from other types of information that we use in litigation, and...the function of experts are fundamentally different from those of other people who provide information in court.” *Id.* at 1208.

240. *Id.* at 1210.

241. See *id.* at 1220-30.

242. See *id.* at 1218-19.

243. See *id.* at 1215-18. The professor’s other proposals, which would require only minor changes in the procedural rules, include: (1) “chang[ing] the conventional sequence of presentation of testimony so that the expert evidence on any issue would all be presented at one time,” *id.* at 1211; and (2) generally increasing the accountability of expert witnesses, see *id.* at 1213-15; see also Weinstein, *supra* note 237, at 485-86.

244. See Gross, *supra* note 116, at 1188-89.

245. *Id.* at 1220.

The advantages of using a neutral court-appointed expert are obvious. Expert testimony would no longer be a product of the parties. Instead, the court would select its own expert, thereby avoiding much of the current system's partisanship. Court-appointed experts can address gaps that partisan experts' testimony often creates.²⁴⁶ Court-appointed experts are also "less susceptible to pressures to tailor their testimony to support a particular legal outcome than are partisan experts whose fees are paid."²⁴⁷

Although courts may appoint expert witnesses,²⁴⁸ as authorized by Rule 706(a) of the Federal Rules of Evidence,²⁴⁹ they rarely exercise this power.²⁵⁰ Commentators have long criticized the unused power of federal judges to call their own expert witnesses.²⁵¹ Nevertheless, the power to appoint such experts still goes largely unused.

Some observers reason that no expert witness can be truly neutral, and thus, no expert witness can give truly neutral testimony.²⁵² Others argue that the current system is insufficiently

246. See Lee, *supra* note 207, at 492.

247. *Id.* at 492.

248. See FED. R. EVID. 706 advisory committee's note.

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

250. See Gross, *supra* note 116, at 1190. Professor Gross cites two studies conducted by the Federal Judicial Center:

The first study included a survey of all published federal opinions through 1985; it found only forty-five references to Rule 706, and only thirty-seven cases "in which an appointment was made or discussed extensively." The second study was a survey of 79% (417/526) of all active federal district court judges. Eighty-one percent of the judges said that they had never appointed an expert witness under rule 706, and only 8% said that they had done so more than once.

Id. at 1191 (footnotes and citations omitted).

251. See John M. Sink, *The Unused Power of a Federal Judge to Call His Own Expert Witness*, 29 S. CAL. L. REV. 195 (1956).

[I]t would seem that if the federal judiciary understands that it need not be indifferent in order to remain disinterested, their inherent power to appoint expert witnesses in civil actions offers great potential benefit to the orderly administration of justice. There is no reason to fear the exercise of that power or to doubt that it can be employed within the bounds of the proper and established scope of the judiciary. Its exercise can hardly help but fulfill its reason for existing—facilitate the functioning of the court.

Id. at 214.

252. See Gross, *supra* note 116, at 1193; 1 MCCORMICK ON EVIDENCE § 17, at 72 (John William Strong ed., 4th ed. 1992). Gross responds that this argument is "unpersuasive." Gross, *supra* note 116, at 1194.

structured to encourage or facilitate the use of expert witnesses.²⁵³ Further, many judges and lawyers oppose the use of court-appointed expert witnesses.²⁵⁴

Judicial reluctance arises from concerns with potentially interfering with or influencing jury deliberation. Judges fear interfering with the traditional functions of adversarial counsel or creating a risk of reversal on appeal.²⁵⁵ There is also an “unwillingness to devote the time and money necessary for selecting experts and overseeing the taking of testimony.”²⁵⁶

Practitioners oppose the use of court-appointed experts because they would then lose control over experts.²⁵⁷ Court-appointed experts detract from the trial lawyer’s packaged presentation in seeking answers from witnesses during direct and cross-examinations and in shaping witnesses’ testimony.²⁵⁸ Professor Gross contends “[i]n short, court-appointed experts are not used in [U.S.] trials because they are beyond the control of lawyers. As a result, they threaten the prerogatives of the trial attorneys, and they are likely to be inadequately prepared for testimony and uncomfortably unpredictable.”²⁵⁹ Regardless of the cause, Professor Gross notes that the use of expert witnesses in litigation has “failed repeatedly.”²⁶⁰

2. Written Testimony

The usual practice of presenting expert evidence as oral testimony may be “one of the main difficulties” of expert evidence.

253. See Gross, *supra* note 116, at 1191; Lee, *supra* note 207, at 481.

254. See Gross, *supra* note 116, at 1197-99, 1203-04; Lee, *supra* note 207, at 480, 495-99.

255. See Lee, *supra* note 207, at 480; Gross, *supra* note 116, at 1193.

256. Lee, *supra* note 207, at 480; see *id.* at 495-96. Lee is rather critical of the failure on the part of the bench:

The duty of noninvolvement becomes for judges an excuse for not doing their homework and for allocating their time to other judicial tasks that appear more pressing. This unwillingness might also be described as a product of bureaucratic mentality—in a bureaucracy it is always safe to do nothing than to stick your neck out.

Id. at 499 (footnote and citation omitted).

257. See Gross, *supra* note 116, at 1205.

258. See *id.* at 1201.

259. *Id.* at 1205.

260. *Id.* at 1117.

Professor Gross explains that “[t]his format [oral expert testimony] multiplies the cost of the process, maximizes the need for adversarial preparation and the distortions it generates, creates a market for expert witnesses with testimonial experience and persuasive demeanor, introduces numerous opportunities for manipulation, and scares off many useful experts.”²⁶¹

The oral presentation of expert evidence also “limits the possibilities for reform.”²⁶² Professor Gross insists that moving toward the regular use of neutral experts or creating “an external mechanism for reviewing expert evidence” would be greatly facilitated if “instead of undergoing the ordeal of direct and cross-examination in depositions and at trial, experts expressed their opinions in written reports.”²⁶³ He suggests a system where experts must submit written reports before trial, and where the court permits the opposing lawyers and experts to question experts’ reports.²⁶⁴ Another version of this proposal would make oral testimony optional.²⁶⁵

Professor Gross acknowledges two major difficulties in using written reports. First, these reports are hearsay and would not be admissible under any exceptions to the hearsay rule.²⁶⁶ Second, written reports deprive parties of the opportunity to cross-examine the experts, which is “the major method of testing the value of all evidence.”²⁶⁷ Gross suggests that new legislation would have to be enacted to create an admissibility exception for expert witnesses’ written reports.²⁶⁸ Gross also recognizes that the implementation of his proposal would eliminate cross-examination of expert witnesses altogether.²⁶⁹

3. Elimination of Juries

Professor Gross states that “[t]he institution of trial by jury is

261. *Id.* at 1215.

262. *Id.*

263. *Id.*

264. *See id.*

265. *See id.* at 1217.

266. *See id.* at 1216.

267. *Id.*

268. *See id.*

269. *See id.*

a serious obstacle to reform in the use of expert evidence."²⁷⁰ He notes that "the difficulty is that the rigid procedural requirements of jury trials inhibit innovation" and that the problem could theoretically be eliminated.²⁷¹ One option is to submit expert issues to judges instead of juries.²⁷² Precluding juries from considering expert evidence or eliminating juries altogether are extreme steps.²⁷³ There is a constitutional right to trial by jury,²⁷⁴ and an amendment to address issues relating to expert evidence is unlikely to occur soon.

The use of neutral experts who submit written reports to a judicial officer without a jury is already implemented in some administrative proceedings.²⁷⁵ Professor Gross acknowledges that although the use of court-appointed experts has "failed repeatedly in formal litigation," it works "reasonably well" in some administrative proceedings, such as workers' compensation cases.²⁷⁶ Gross attributes the success to the following factors: "First, there are no juries. All claims are decided by administrative law judges. . . . Second [the proceedings are less formal] Third, and most important, neutral experts in workers' compensation cases do not, as a rule, *testify*; they write reports."²⁷⁷

B. The Korean Model

In brief, the reform of the U.S. system regarding expert evidence could benefit from a study of another jurisdiction's practice involving expert evidence. Because the Korean judiciary has already adopted some of the reforms proposed for the U.S. system,

270. *Id.* at 1218.

271. *Id.*

272. *See id.* at 1219.

273. *See id.* at 1210.

274. U.S. CONST. amend. VII ("In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by jury, shall be otherwise re-examine in any Court of the United States, than according to the rules of the common law.").

275. *See Gross, supra* note 116, at 1205.

276. *Id.* at 1117; *see id.* at 1205-07.

277. *Id.* at 1206. Although it is difficult to assess whether court proceedings in Korea are more or less formal than those in the States, proceedings in the civil law system are similar to some American administrative proceedings in that there are no juries, the expert testimony is presented in writing, and testimony is given at the court's discretion.

there is a practical utility in examining the Korean model.

As previously stated, the use of expert evidence in Korea differs significantly from its use in U.S. federal courts. Without a jury system, the Korean court ascertains the facts and has broad discretion to shape expert testimony. The process is not left to the parties. The court appoints an expert, thus excluding others. The court considers this appointed expert as its assistant. Although the court-appointed expert witness is not granted an "aura of infallibility," as the court may reject his or her findings and conclusions, the testimony of a court-appointed witness is generally regarded more highly than the testimony of a party-retained witness who is presumed to be biased and partial. This system reduces instances of experts clashing on issues and enhances the standing of expert witnesses. Finally, expert testimony is largely presented in writing, usually in a report setting forth the expert's findings, analysis, and conclusions. Any examination of the witness is subject to the discretion of the court.

This Article does not propose converting the entire U.S. common law system to the Korean civil law system. Admittedly, the implementation of many of the proposed reforms may have that effect. After considering all options, including a review of another jurisdiction's handling of expert evidence, this Article instead proposes a genuine attempt toward reforming a beleaguered institution. A constitutional amendment eliminating the jury system solely to reform expert evidence is drastic. The use of written reports is less radical but nonetheless requires new legislation and eliminates a key aspect of the U.S. adjudication process. The only feasible remaining option is the increased use of court-appointed experts. Commentaries have already proposed revising the current rules to specify areas in which expert evidence could or should be used and have addressed the concerns of judicial interference or influence.²⁷⁸ Regardless of whether new rules will be promulgated

278. See Lee, *supra* note 207, at 499-501. Lee proposes an addition to the current Rule 706(c) that would address judicial interference and influence, and a new Rule 706(e), which would specify situations in which the court appointment of expert witnesses is mandatory. Thus, Lee's revised rules would read as follows:

Rule 706. Court Appointed Experts

....
(c) Disclosure of Appointment. In the exercise of its discretion, the court may authorize disclosure to the jury of the fact that the court appointed the ex-

to increase the use of court-appointed experts, there is no reason to avoid their use in actions without juries. Experimenting with the use of court-appointed experts in bench trials should provide revealing results. In any event, continued refusal to experiment will leave a much criticized system intact.

VI. CONCLUSION

The legal systems of the Republic of Korea and the United States reflect their separate histories as imperial colonies. Korea's civil law system is a modified version of the system that Japan established during the first half of the twentieth century. Similarly, the U.S. legal system, formalized under a constitution that is in its third century, has its roots in English common law. The Korean and U.S. legal systems have both similarities and differences. For example, although the adjudication process in both jurisdictions is adversarial, the two systems differ in their methods of collecting and presenting evidence. In Korea, the court, as both trier of fact and arbiter, ascertains the relevant facts. In the United States, the parties are responsible for gathering and presenting evidence through discovery and examination of witnesses.

The substance of the expert witness' testimony in Korea is quite similar to its U.S. counterpart. There are, however, noticeable differences in the form of collection and presentation of expert evidence. Because a Korean court is authorized to investigate the facts, it may appoint expert witnesses of its own choosing. The judge further shapes the expert's contribution to the adjudication of the case.

The Korean system seeks to use expert evidence to assist the

pert witness. Upon disclosure that it appointed the expert witness, the court has a duty to instruct the jury that the jury is to make the final decision on issues of fact and is not bound to accept as true the testimony of the expert solely because the court selected him or her, but rather, the jury is to judge the testimony according to the same standard as the testimony of the other expert witnesses.

....

(e) When Not Discretionary. Courts have an affirmative duty to appoint their own expert witnesses when the fact-finding process will otherwise be severely impaired. Such situations include those in which partisan expertise fails to produce highly relevant evidence; in which partisan expertise conflicts on a material fact, leaving a lack of guidance for the jury determination; or in which the production of partisan expert testimony is abused.

trier of fact. The system appears free from the sharp criticisms made about expert witnesses in the United States. Perhaps the much maligned U.S. system could benefit from a study of the Korean system.