How To Handle Experts Like An Expert In Antitrust Trials

By **David Cross and Rob Manoso** (April 26, 2023)

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Expert testimony is a central feature of most antitrust trials. It often involves challenging technical issues that are not easily digested by judges and juries, such as econometric analysis.

A growing trend in the federal courts is for judges to host an "economics day," when each side presents testimony from their respective economists and potentially other witnesses about the economic issues in the case.

The presentations are supposed to be essentially neutral explanations of the economic issues and corresponding facts each side anticipates the court will need to understand and address during the course of the case.

A panel of federal judges at the American Bar Association's annual spring meeting of the antitrust section recently emphasized the value of this sort of presentation to aid judges in tackling dense, complicated issues and reaching the right decisions in complex antitrust matters.

Another growing trend is expert "hot tubs," where experts appear before the court together, answer questions from the judge about their respective analyses and opinions and respond directly to one another in a live, dynamic, back-and-forth dialogue controlled by the court. These are not intended to be neutral presentations like with an economics day, but rather an opportunity for the court to understand and evaluate the experts' respective analyses and opinions in ruling on motions concerning their testimony. The lawyers often play little, if any, role in these proceedings.

These recent trends highlight an increasing focus on experts by the courts in antitrust cases and the critical importance of effective, impactful expert testimony.

A strong expert examination — direct or cross — can sway judges and jurors and force favorable settlements. But poor examinations can lose judges and jurors in a morass of technical jargon, dense concepts and muddled testimony.

It's been said that an expert is someone who knows some of the worst mistakes that can be made in a particular field and how to avoid them. Lawyers likewise need to know how to avoid the mistakes that can turn an expert into a liability rather than an asset. This begins with engaging the right expert and laying the groundwork in discovery for expert examinations at trial.

Hire the Right Expert: Follow the Six C's

Sometimes an expert might seem like the right fit until suddenly they're not, and it's too late to switch.

The smartest, most experienced and best-credentialed expert isn't necessarily the right choice. Experts — especially economists and technical witnesses — must be able to explain complex concepts in a way that judges and jurors can easily understand.

We emphasize what we call the six C's of expert selection: credibility, composure, clarity, charisma, confidence and creativity.

Perhaps nothing matters more in court than credibility. One of the keys to expert credibility is independence. Experts should be more like stone than clay.

An expert who pushes back and emphasizes the weaknesses of proposed arguments will be much more valuable than one who simply defers to counsel. A reliable expert brings creativity to their work, but within the limits of accepted principles and professional standards for their field.

It may seem that a malleable expert is beneficial because they'll offer the opinions you want from them. But this is wrong. Such an expert is likely to be seen by jurors as a hired gun rather than someone they can rely on to help them reach the right verdict on the facts.

A credible expert determines and conducts their own analyses with their own team, gathers available information they need and arrives at their own conclusions. This lesson was learned in a recent antitrust case of ours when testimony from an opposing expert was excluded based in part on important data his client very belatedly produced after he submitted his reports; that data undermined his opinions.

When asked why he didn't identify that data himself during his work, the expert testified that he was never given an opportunity to ask his client what data they had that might be relevant for his work. Rather, he was given a narrow assignment, and he dutifully executed that specific assignment, which apparently excluded some of the most important documents and data in the case.

Experts should be free to explore with their clients or counsel what information might be relevant and available for their analyses. An expert willing to accept blinders for their work is unlikely to be perceived as credible by jurists and jurors, and rightly so.

Robust background research on experts is especially important for assessing credibility, both when hiring them and when cross-examining them. Even highly experienced, highly credentialed experts can yield surprises if not properly vetted.

As the court observed in an antitrust class action we worked on several years ago, the plaintiffs' economic expert failed to exercise sound judgment when he evidently invested heavily in a fund that had purchased claims of putative members of the proposed class for which he was testifying. After we uncovered the investment in discovery, the court found that his conduct seriously undermined his credibility.

A key takeaway from that situation was the need to conduct one's own background research on experts and not just rely on the expert's own disclosures to assess their fitness, impartiality and potential conflicts.

And periodically updating that background information during the engagement also is important given new circumstances can develop creating credibility or reliability concerns.

Maintaining composure is also critical for an expert's credibility. Many experts suffer from what we call Dr. Jekyll and Mr. Hyde syndrome. They're affable, chatty and cooperative on direct examination but become terse, evasive and even hostile on cross. This can signal to the jury that the expert is there to help the party that hired them rather than offer an independent assessment of the facts.

Charisma can be powerful for persuading jurors of particular positions, but it shouldn't disappear on cross-examination. When testifying, the substance and manner of an expert's answer to a question shouldn't depend on who is asking the question.

Questions that can be answered succinctly with yes or no, but instead elicit a self-serving narrative can raise a red flag about the expert's credibility. This holds for clarity too.

An expert who answers simple, direct questions with jargon or word salads in initial interviews as a candidate for retention is unlikely to become a model of clarity on the stand or even in a written report.

Litigants sometimes try to bolster an expert's credibility by retaining a second expert to offer similar opinions. This may provide some additional protection against an adverse Daubert ruling,[1] but ultimately the reliability of expert testimony turns on the quality of the experts, not the quantity.

And overlapping experts can hurt their respective credibility, if not well managed, by leading to inconsistent testimony. Having separate experts address distinct issues, such as one economist on liability and another on damages, can provide some Daubert protection since your case isn't then dependent on a single expert.

Unfortunately, even the best experts can fall prey to Daubert or other adverse decisions that strike or limit their testimony at trial. When that happens, it's imperative that both the expert and counsel are fully aligned on the effect of any such limitations for the expert's testimony and carefully adhere to those limits.

We saw this important lesson play out in a recent antitrust class action trial where much of the plaintiffs' economic expert's direct examination testimony was stricken for violating the court's order on the scope of permissible testimony.

When the judge asked the expert whether he'd relied on something he wasn't permitted to rely on, a red flag went up as the expert began to answer with a narrative. The judge appropriately pressed him for a simple yes or no and the devastating yes finally came. The jury was ordered to disregard the testimony.

Counsel should discuss with the expert any rulings limiting their testimony to avoid inadvertent missteps when testifying. And if there is any ambiguity with a ruling, seek clarification. It is better to seek permission than forgiveness in such situations given the repercussions for failing to comply.

Confidence is critical for an effective expert given what can be an intimidating environment in litigation. But experts can alienate jurors if they come across as arrogant or condescending. A healthy dose of humility — combined with a bit of charisma — can produce testimony that's interesting and impactful.

Overconfidence also can be a problem when it leads an expert to underprepare and overly rely on their team. Unfortunately, this problem can arise with some highly sought-after experts. Reputation is no substitute for preparation. Hungry and hardworking can be far more valuable traits than pedigree and notoriety.

Lay the Groundwork in Discovery for Trial Examinations

Every effective trial examination begins in discovery. This is true for both direct and cross-examinations. Laying the groundwork for those during discovery is critical. And yet, too often this is done poorly, especially with experts.

There are two fundamental objectives with expert depositions: One, explore and understand the substance and scope of their opinions and the underlying facts; and two, set up your cross-examination for trial.

Many lawyers devote far too little time to the latter or ignore it entirely. And too much time is squandered through common mistakes.

For example, many lawyers are enamored with hypotheticals in expert depositions — but to what end?

A hypothetical by definition is not reality and thus not what matters to judges and juries. They're also easy for experts to neutralize because they're virtually always incomplete in some material way that allows the expert to escape what might seem like a helpful admission. "What if" questions generally are better left for Marvel movies than expert examinations.

Arguing with experts is similarly unhelpful, especially at trial. At best, jurors are likely to see it as a draw and, as with a runner in baseball, a tie goes to the witness. More likely jurors are to see it as obnoxious, unhelpful bickering. So, time spent arguing in depositions means a lost opportunity for useful cross-examination.

Additionally, there's no democracy among cross-examination points — some are much more important than others, especially to jurors.

An issue that might turn heads at an antitrust economics conference might leave jurors' heads in their hands, no matter how important it might be to those steeped in the field. A succinct cross-examination that undermines the opposing expert's key arguments is much more likely to leave a lasting impression than a cross that tries to attack an expert's direct testimony point by point.

The reality is that effective cross-examinations typically come down to just a few key points that readily resonate with the jury, especially those that effectively undermine the witness's credibility. Identifying those few points and establishing them at trial with short, clear questions begins in the expert's deposition.

Pin the expert down on key points with crisp admissions, including what they didn't do, didn't consider, aren't opining on and don't know. Effective cross-examination of an opposing expert can do more than just damage the expert — it can turn the expert into a key affirmative witness.

Generally, each cross-examination question of an expert at trial already should have a clear, concrete answer in the record that the expert cannot escape if impeached.

Asking cross-questions of experts at trial without compelling impeachment material at hand begs for unhelpful testimony. It's like a character in a horror movie who ventures down a dark hallway and opens the door at the end only to find a monster awaiting them. Don't be that character in a courtroom.

Direct examinations of experts also benefit from groundwork in discovery that too often goes overlooked.

Having your expert approach their deposition with merely a "do no harm" mentality misses a valuable opportunity to develop testimony that can help defend the expert against a Daubert attack and neutralize impeachment attempts at trial with prior consistent testimony.

Even the best-written expert reports or declarations, especially addressing complex economic or technical issues, can be long and dense — and they're generally not admissible at trial.

Affirmatively helpful deposition testimony from your own expert — and your fact witnesses for that matter — on at least the few key points that matter most can prove very valuable. This can be developed on cross-examination with appropriate witness preparation beforehand or on a brief redirect at the end of the deposition.

In short, the approach of saying as little as possible can be a strategic loss in a deposition.

Demonstratives can be especially important for expert testimony in antitrust cases, which commonly involve complex economic issues. But just as lawyers are not professional graphic designers, neither are most experts.

Hire someone who can ensure complicated, esoteric issues — such as regression analysis — are reduced to graphics that the jurors can readily understand. Demonstratives with a lot of text tend to be a distraction rather than a value-add. The jury's focus should be on what the expert has to say, and any demonstrative should serve only to illustrate the testimony rather than repeat it.

Additionally, it's important to think through carefully how any demonstrative can be turned against an expert on the stand. One important way to protect against that is to ensure that any demonstrative is fair and complete for the purpose for which it's offered.

Omitting anything material, especially if it's perceived as unhelpful to the expert, can generate a crippling blow to the expert's credibility. This is true for expert testimony generally.

Preparing your expert to deal with bad facts is far better than shielding them from those facts. And owning bad facts on direct can help preserve an expert's credibility and neutralize otherwise damaging points, as opposed to jurors hearing about them for the first time on cross.

Courts often exclude opinions that cherry-pick facts, improperly rely on the testimony of other experts[2] or fail to account for economic realities.[3] Even if admitted, such testimony can lose jurors for the same reasons.

Experts can make or break an antitrust case at trial. They can have an outsized influence on how jurors perceive not only the issues and the facts, but also the lawyers and their clients who sponsored the experts.

A key question in the minds of jurors throughout a trial is whom to believe, especially involving issues they have little to no familiarity with, such as complicated economic issues.

In helping them answer that question in your favor, you need not destroy the opposing expert. You generally just need to show that they cannot take that expert's testimony at face value, without the other side doing the same to your expert. Following the six C's and building the necessary record in discovery for impactful examinations at trial will go a long way toward achieving that objective.

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[1] Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579 (1993).

[2] Kentucky Speedway, LLC v. National Association of Stock Car Auto Racing, Inc. (NASCAR), 588 F.3d 908 (6th Cir. 2009), (affirming exclusion of opinions regarding anticompetitive effects where expert relied on previously excluded expert's market definition analysis).

[3] In re Wholesale Grocery Products Antitrust Litig., 946 F.3d 955, 1003 (8th Cir. 2019) (citing Concord Boat Corp. v. Brunswick Corp., 207 F.3d 1039, 1057 (8th Cir. 2000)).