CHAPTER VII

THE ROLE OF EXPERTS IN ANTITRUST CLASS CERTIFICATION

A survey of district court judges found that expert witnesses are widely relied upon by both plaintiffs and defendants, with nearly 80 percent of civil trials involving some form of expert testimony.[1] An antitrust case being litigated today may involve not only complex issues of economics requiring such testimony, but also biology, chemistry, or engineering, depending on the industry and contour of the substantive allegations. The role of these experts can vary from consulting expert to testifying expert.

The same survey found that the most common issues addressed by expert witnesses relate to injury and damages (e.g., in terms of existence, cause, nature, extent, and amount) and that economists are the most frequently used expert witnesses.[2] Commentators believe that the frequent use of economists as expert witnesses may be driven in part by the Supreme Court's decision in *Daubert v. Merrell Dow Pharmaceuticals*,[3] which emphasized that expert witness testimony must be reliable and assigned the trial judge a gatekeeping role over experts.[4] In addition to the expert consulting and testimony on liability and damages, the antitrust class action will require expert evidence and more commonly expert testimony at a hearing regarding whether a class may be certified.

Daubert and its progeny have tightened standards for the admissibility of expert testimony, but at the same time highlighted the importance of expert discovery. Thus, for counsel to derive the most benefit from expert testimony, witnesses need latitude to become

---

1. Carol Krafka, *Judge and Attorney Experiences, Practices, and Concerns Regarding Expert Testimony in Federal Civil Trials*, 8 PSYCH. PUB. POL. AND L. 309, 318-19 (2002).
2. *Id.*
3. 509 U.S. 579 (1993).
4. *See* Michael J. Mandel, *Going for the Gold: Economists as Expert Witnesses*, 13 J. ECON. PERSP. 113, 116 (1999).

educated about these standards in order to avoid fundamental criticisms related to testimony reliability or discovery obligations.

Although the specific evidence techniques and methodologies that may be applicable are themselves the subject of treatises and beyond the purpose and scope of this handbook,[5] this chapter serves as an initial source and provides an outline and introduction to these topics. They include the evidentiary rules and procedures that apply to expert witnesses, the distinction and role of testifying and consulting experts, and guidelines for identifying an expert.

A. Rules Governing Expert Witnesses

The use and admissibility of expert testimony is governed by Rule 702, which provides that:

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.[6]

---

5. Brian P. Brinig, The Art of Testifying, in LITIGATION SERVICES HANDBOOK: THE ROLE OF THE ACCOUNTANT AS EXPERT, 8-1, 8-2-8-3 (Roman L. Weil et al. eds., 2d ed. 1995). *See generally* DAVID L. FAIGMAN ET AL., MODERN SCIENTIFIC EVIDENCE: THE LAW AND SCIENCE OF EXPERT TESTIMONY (2006); KENNETH S. COHEN, EXPERT WITNESSING AND SCIENTIFIC TESTIMONY: SURVIVING IN THE COURTROOM (2007).

6. The principles of *Daubert* and Rule 702 have not been uniformly adopted by the states. Twenty-five states have affirmatively adopted the *Daubert* or similar test for use in their courts (or had previously developed a similar test). Fifteen states and the District of Columbia adhere to the "general acceptance" standard articulated by *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923). Six states have not rejected *Frye* completely, but apply the *Daubert* factors, while four states have developed their own tests. *See* Alice B. Lustre, Annotation, *Post-Daubert Standards for Admissibility of Scientific and Other Expert Evidence in State Courts,* 90 A.L.R. 5th 453 (2009).

A core principle of Rule 702 is its focus on the steps undertaken by the experts to arrive at their conclusions,[7] not the reasonableness of their conclusions. New and innovative methods to reach an opinion can be appropriate if they are grounded in sound scientific principles. Rule 702, as interpreted in *Kumho Tire Co. v. Carmichael*,[8] also allows for the application of such factors to non-scientific expert testimony (*e.g.*, in social science subjects such as economics).[9]

Although the drafting committee did not anticipate that Rule 702 would lead to automatic or regular challenges to experts, *Daubert* challenges have become more and more routine in cases involving expert testimony.[10] Indeed, many scheduling orders include time for *Daubert* motions and hearings even before expert reports have been submitted. It is important to note, however, that *Daubert* challenges may be subject to

---

7. *See* Daubert v. Merrell Dow Pharms., 509 U.S. 579, 595 (1993) ("The focus, of course, must be solely on principles and methodology, not on the conclusions that they generate.").
8. 526 U.S. 137 (1999).
9. In *General Electric v. Joiner*, 522 U.S. 136 (1997), the Supreme Court also clarified the gatekeeper role of the trial judge, finding that the determination of admissibility of expert testimony is within the trial judge's discretion and review by a higher court should occur only for abuse of this discretion. More recently, in *In re Hydrogen Peroxide Antitrust Litig.*, 552 F.3d 305 (3d Cir. 2008), the Third Circuit held that some level of *Daubert* review is proper at the class certification stage to ensure that courts do not reach the class certification decision based upon unreliable expert testimony. Future application of this precedent will reveal how the courts interpret the standard set forth in *In re Hydrogen Peroxide*. *Id.* at 323. For more extensive discussions of the *Kumho* decision and subsequent cases, see Mark P. Denbeaux & D. Michael Risinger, *Kumho Tire and Expert Reliability: How the Question You Ask Gives the Answer You Get*, 34 SETON HALL L. REV. 15 (2003) and Richard W. Hoyt & Robert J. Aalberts, *Implications of the Kumho Tire Case for Appraisal Expert Witnesses*, 69 APPRAISAL J. 11 (2001).
10. *See* David L. Hanselman Jr. & Jennifer Smulin Diver, *Opposing Class Certification with a One-Two Punch: A Daubert Motion Plus a Brief Opposing Certification May Work*, NAT'L L.J., Apr. 20, 2009, at S1 (noting that *Daubert* motions have become more commonplace, even at the class certification stage).

abuse. These challenges may be used as a tactic to delay, to get a "dry run" at cross-examination, or simply to harass the witness.[11]

B. The Testifying Expert's Role

As discussed earlier, Rule 702 of the Federal Rules of Evidence requires that the expert testimony "assist the trier of fact." In an antitrust class action, an expert's assignment may relate to class certification at an early stage in the litigation and later expand to issues of liability or damages at a later stage. For example, in a typical case involving direct and indirect classes, different econometric models may be involved with respect to each class. Moreover, in multiple defendant cases, there may be experts retained by a joint defense group regarding common issues and experts retained by individual defendants to address issues unique to those individual defendants.

With respect to antitrust class actions, the experts will be directed in the first instance to the class certification requirements set out in Rules 23(a) and 23(b) of the Federal Rules of Civil Procedure, specifically the requirements that common methods of proof outweigh individual issues and whether named plaintiffs' claims are typical of those of putative class members.

Thus, in a typical case of direct or indirect purchasers, an economist could assess whether the evidence and allegations support a finding that each member of the putative class would have been impacted by the alleged antitrust violation, or whether the overcharge pass through is fundamentally similar or different across putative class members. In this role, the economist may gather relevant information about the industry, review documents and even transaction-level data produced in discovery by plaintiffs and defendants (and, increasingly, third parties in the distribution chain), perform independent research, confer with other testifying or consulting experts, such as industry practitioners, or perform statistical analyses.

These approaches may help the expert economist analyze whether members of a putative class are homogeneous members with different levels of the same attributes or were impacted in fundamentally different ways (or, potentially, not at all) by the defendant's alleged illegal

---

11. Thomas G. Gutheil & Harold J. Bursztajn, *Attorney Abuses of Daubert Hearings: Junk Science, Junk Law, or Just Plain Obstruction?*, 33 J. AM. ACAD. PSYCHIATRY L. 150 (2005).

actions.[12] Following class certification, the economic expert may also play a role using approaches and information similar to those described to assess class certification, such as defining a relevant market, identifying and weighing procompetitive and anticompetitive effects of the challenged conduct, and assessing impact and damages.

C. Identifying the Right Expert

1. Contents of the curriculum vitae

Outstanding qualifications are not enough to guarantee admissibility of the expert's testimony, as the *Daubert* criteria reiterated in Rule 702 apply to the work performed rather than the expert's past experience. Both academics and non-academics can serve effectively as witnesses. Degrees and awards, publications, specialized knowledge relevant to the case, and an ability to offer an objective opinion are other factors that may be important. However, if the inherent quality of the work is questionable, an expert's marginal qualifications may increase the likelihood that the testimony will be excluded.[13]

2. Ability to Communicate

Given that an expert witness must be helpful to the trier of fact, communication, teaching skills, presence, and demeanor may ultimately be just as important as academic credentials in expert selection.[14] In antitrust class actions, communication skills can be especially important because the analysis and methodology will be unfamiliar (and perhaps boring) for the jury and even the judge. It is important to keep in mind that it can be especially difficult to convey statistical information.[15] Consequently, attorneys who anticipate that statistical testimony will be

---

12. For a practical example of this approach, see Dennis J. Aigner, *Statistical Sampling and Analysis*, *in* THE ROLE OF THE ACADEMIC ECONOMIST IN LITIGATION SUPPORT 229, 236 (Daniel J. Slottje ed., 1999).
13. *See* Elcock v. Kmart Corp. 233 F.3d 734, 749 (3d Cir. 2000).
14. Richard A. Posner, The Law and Economics of the Economic Expert Witness, 13 J. ECON. PERSP. 91, 95-96 (1999) ("If a witness cannot communicate in a way that the court understands, the testimony is unlikely to be persuasive. This is a particularly important consideration in jury trials, because jurors give less weight to credentials than to clarity.").
15. J. ALEXANDER TANFORD, THE TRIAL PROCESS: LAW, TACTICS AND ETHICS 372 (3d ed. 2002).

an integral part of their legal strategy are well advised to search for an expert who can explain statistical methodology and results in a manner that is as interesting and compelling as possible.

3. Quantitative Skills

Many important issues in litigation hinge on quantitative evidence, and experts skilled in developing such evidence can provide crucial insights, both in the context of their own affirmative testing and in their critique of the work of opposing experts. Developing strong quantitative evidence, however, can be complex and time consuming, and requires attention to the details of the data, as well as knowledge of theory, mathematical models, and statistics.[16]

Because data are rarely perfectly suited to answering the question at hand, experts must be willing to invest the time to fully understand all the strengths and weaknesses of the data. Understanding the attributes of the data often goes hand in hand with understanding the institutional details of the industry. While an expert can direct others to perform specific mathematical and statistical calculations using the data, the expert must be willing and able to defend every decision that is made with respect to the data analysis.

D. Sequence of Events to Select a Testifying Expert

In choosing an expert for a particular case, counsel should be forward-looking and consider whether the legal strategy requires separate experts for the class certification stage and the merits stage of the litigation (e.g., if the positions taken in each stage are potentially different). Counsel should also consider selecting an industry expert in addition to an economic expert. An industry expert may be better informed about the specifics of the industry at issue, but may lack a range of tools necessary to quantify key relationships relevant to the case. The economic expert may be in a better position to draw upon theoretical and empirical methods for quantifying the analysis, but may lack practical insights into the relevant industry. In some cases, both an industry expert and an economic expert may be helpful.

---

16. For a review of empirical "best practices" derived from experience at the Federal Trade Commission, see David Scheffman and Mary Coleman, *FTC Perspectives on the Use of Econometric Analyses in Antitrust Cases*, http://www.ftc.gov/be/ftcperspectivesoneconometrics.pdf.

For example, a case pertaining to a regulated industry (such as health care or telecommunications) might require an industry expert for assessing liability and an economic expert for quantifying impact and/or damages. In cases involving multiple expert witnesses, counsel should take care to avoid possible contradictory statements among their own experts. Once a potential expert is identified, it is important to explore potential conflicts of interest with the particular expert. This can be even more difficult in cases involving multiple defendants, each of which may have other ongoing litigation involving experts. Counsel should review all of the expert's publications, working papers, speeches, personal web pages, course web pages, and trial testimonies, including disqualifications, motions to disqualify or critical remarks by judges.

When contacting a potential expert, after reviewing potential conflicts of interest with the parties, counsel should explain the anticipated assignment and gain an understanding of how the expert might approach the problem. This interview process will also provide counsel a sense of the information and data that would be necessary for the expert to complete the assignment, and facilitate discovery. This interview will also help determine whether prior positions taken by the expert may be in conflict or antagonistic to expected position in the current matter.

This initial contact is also helpful to assess the expert's ability to explain complex economic concepts. If counsel does not understand the expert's description of past research and relevant findings, it is unlikely that a judge or jury will be any more enlightened when the expert testifies to the findings relevant to the case at hand. It is often helpful for counsel to interview multiple potential testifying experts prior to committing to retaining one for the case. This allows counsel to compare both the proposed analytical approaches as well as testimonial abilities of multiple experts to determine which one provides the best fit for the case and the clients.

E. Consulting Experts

In addition to the testifying expert, parties in large antitrust class actions often will retain one or more consulting experts who will not be subject to discovery by the other side if they do not testify. The consulting expert's function is different than the testifying expert. The involvement of consulting experts in complex class action litigations can be beneficial to both the testifying expert and counsel. The consulting expert can help counsel evaluate the case, suggest areas for further

investigation and generally help shape the development of the case, all within the context of the attorney work product doctrine. Early attention to the building of a consulting and testifying expert team can give the legal team access to professional skills for determining key issues, possible legal strategies, and preliminary assessments of class certification, liability and damages and also reduce overall litigation costs, for example, by helping to target discovery.[17]

Consulting experts may be retained before the testifying expert, or as part of the same process. In many cases, it can be more efficient to retain a consulting expert that is affiliated with the same firm as the testifying expert, and many testifying experts employ teams of consulting experts with whom they are comfortable working with and upon whom they are comfortable relying. An expert that might not be able to testify may still prove valuable as a consultant. Prior to selecting a testifying expert, consulting experts can play a vital role in narrowing the appropriate fields to consider (e.g., industrial organization, health economics, finance, accounting) for potential experts to testify on a particular subject matter (e.g., damages in an indirect purchaser class action involving prescription pharmaceuticals). Once the relevant fields have been narrowed down, consulting experts can also help counsel understand the tools and standards of the fields.

F. Expert Report

According to Rule 26(a)(2)(B) of the Federal Rules of Civil Procedure, the expert witness must provide and sign a written report which, along with specific criteria concerning compensation and prior testimony, must also set out a complete statement of his or her opinions to be expressed along with the corresponding reasons for those opinions.[18] Courts generally apply the full Rule 26(a)(2)(B) disclosure requirements to class certification experts.[19] While the preparation of an

---

17. Asim Varma, *Working with Experts in Antitrust Cases*, *in* EXPERT WITNESSES IN ANTITRUST LITIGATION: MAKING (OR BREAKING) YOUR CASE, 11, 15 (Aug. 9-13, 2002) (American Bar Association Section of Business Law Annual Meeting, Committee on Business & Corporate Litigation).
18. FED. R. CIV. P. 26(a)(2)(B).
19. Colindres v. Quietflex Mfg., 228 F.R.D. 567, 571-72 (S.D. Tex. 2005) (applying Rule 26(a)(2)(B) disclosure requirements to class certification expert and requiring disclosure of e-mail sent by expert to attorney); *see also* Farrar & Farrar Dairy v. Miller-St. Nazianz, Inc., 2007 WL 4118519,

expert report that addresses the issues posed in an antitrust class action can be time consuming, information-intensive, and expensive, research suggests that it plays an important role in litigation and aids in the narrowing of issues and the assessment of the proposed testimony.[20]

In addition to a statement of expert opinions, Rule 26(a)(2)(B) also requires that the expert report include the data or other information "considered by the witness" in forming those opinions. The requirement to disclose all information "considered by" the expert in forming his or her opinions was adopted in 1993 and has created some uncertainty as to the precise obligations of the expert with respect to the retention and production of materials. At one end of the spectrum, courts find that "[e]ven if the expert avers under oath that he did not actually consider certain materials . . . anything received, reviewed, read, or authored by the expert" is deemed "considered."[21] Prior to 1993, the Federal Rules of Civil Procedure called for the expert witness to disclose all information "relied upon" in forming his or her opinions. Thus, in order to ensure consistency with the current rules, many attorneys now advise experts—and everyone working with experts—to assume that every communication is subject to discovery.

Even if one adopts this risk averse position, however, the status of drafts of expert reports under the "considered by" standard remains a difficult issue. Experts are certainly not required to prepare a draft report prior to the final report, but at the same time just about every report will go through numerous iterations. At what point does a draft report actually exist? What constitutes a new draft? While the legal standards in this area continue to evolve, a testifying expert seems free to continually update a single word processing file as work on the report progresses, and simply submit the final version as the report, particularly if overwriting drafts is the expert's usual working style.[22] At the same

---

at *2 (E.D.N.C. 2007) (applying Rule 26(a)(2)(B) disclosure requirements to class certification expert report); Grimes v. Invention Submission Corp., 2005 WL 6042731, at *1 (W.D. Okla. 2005) (requiring supplemental Rule 26(a)(2)(B) disclosures by class certification expert).

20. Krafka, *supra* note 1, at 323.

21 Employees Committed for Justice v. Eastman Kodak Co., 251 F.R.D. 101, 104 (W.D.N.Y. 2008) (quoting Euclid Chem. Co. v. Vector Corrosion Techs., 2007 WL 1560277, at *3-*4 (N.D. Ohio 2007)).

22. James A. Keyte, *A Risk-Averse Guide for Working with Non-Testifying Consultants or Experts*, 17 ANTITRUST 30, 31 (2003); Wechsler v. Hunt Health Sys., 2003 WL 470330, at *5 (S.D.N.Y. 2003).

time, more than one court has ruled that if the expert chooses to circulate a version of the report for comments, then that version of the report and any comments that the expert receives may be discoverable and should be preserved.[23] It has been suggested that the key event for analyzing whether a draft exists is the transmission of information between the expert and a third party.[24]

In large antitrust class actions, where both plaintiffs and defendants typically employ one or more testifying experts—subjecting both sides to the risks and difficulties posed by the disclosure requirements—counsel frequently will enter into a stipulation determining the timing and allowable scope of expert discovery. In many cases, such stipulations will make drafts of expert reports and communications between counsel and the testifying expert non-discoverable

Although the "considered by" standard may require transparency between counsel and testifying expert, this is not to say that counsel should withhold relevant information from the testifying expert. To be effective, the testifying expert must be aware of all relevant facts, whether helpful to the case or not. With respect to fulfilling "brainstorming" and "devil's advocate" roles, however, attorneys have increasingly turned to non-testifying experts and consultants.[25] This too can create important document management issues. Normally, counsel is free to share its legal strategy with non-testifying experts without fear of discovery. However, if a non-testifying expert works closely with the testifying expert, and the testifying expert cannot ultimately demonstrate complete "ownership" of the report, then discovery may cover

---

23. *See* W.R. Grace & Co. v. Zotos Int'l, 2000 WL 1843258, at *10-*11 (W.D.N.Y. 2000); Iridex Corp. v. Synergetics, Inc., 2007 WL 781254, at *5 (E.D. Mo. 2007).

24. Stephen D. Easton and Franklin D. Romines II, *Dealing with Draft Dodgers: Automatic Production of Drafts of Expert Witness Reports*, 22 REV. LITIG. 355, 396 (2003). *See also* Amster v. River Capital Int'l Group, 2002 WL 1733644, at *3 (S.D.N.Y. 2002) (holding that handwritten notes not actually provided to expert entitled to work product protection).

25. Rule 26(a)(2)(B) defines a testifying expert as "one retained or specially employed to provide expert testimony in the case or one whose duties as the party's employee regularly involve giving expert testimony." *See* Katherine A. Rocco, *Rule 26(a)(2)(B) of the Federal Rules of Civil Procedure: In the Interest of Full Disclosure?*, 76 FORDHAM L. REV. 2227, 2237 (2008) (courts divided as to whether employees automatically exempted from reporting requirement).

everything considered by the consulting expert, and may occasionally lead to the deposition of consulting experts.[26] In *Karn v. Ingersoll Rand*,[27] the court ruled that the discovery requirement trumps the protection that Rule 26(b)(3)(B) gives to "the mental impressions, conclusions, opinions, or legal theories of [an] attorney." Where an expert serves both testifying and non-testifying functions, one court has found that "the test must be whether the documents reviewed or generated by the expert could reasonably be viewed as germane."[28] While this area continues to evolve, class action attorneys who plan on utilizing both testifying and non-testifying experts should be mindful of such circumstances.

G. The Process of Testifying

1. Depositions

The expert deposition is meant to allow opposing counsel to understand better the expert's forthcoming trial testimony. Opposing counsel will explore topics such as the bases for the expert's opinions and the expert's qualifications to render such opinions. Thus, an expert should be well prepared to answer questions about education, employment, professional affiliations, publications, and prior expert witness engagements in a way that shows them applicable to the subject matter. Novice academic experts may be flustered by the scrutiny accorded to topics such as the timing of events leading up to the report, content of meetings, recollections, attorney contacts, and prior work, compared to the limited attention focused on the substance of the expert report and its technical subtleties, which may be more difficult for attorneys to explore.

Unlike a lay witness, an expert may testify in terms of opinion or inference and, therefore, be asked questions based on a set of hypothetical facts. Although it may be difficult to prepare for these types of hypothetical questions, an expert can prepare for likely questions that are directly related to his or her opinions. One way to prepare in this regard is to systematically review the underlying materials that support each opinion expressed in the report. This type of review can help an

---

26. *See* Estate of Manship v. United States, 240 F.R.D. 229, 238-39 (M.D. La. 2006).
27. 168 F.R.D. 633, 639 (N.D. Ind. 1996).
28. Oklahoma v. Tyson Foods, 2009 WL 1578937, at *5 n.7 (N.D. Okla. 2009).

expert going into deposition to recall details underlying the opinions expressed in his or her report.

2. Class Certification Hearing and Trial

When the expert presents live testimony, either at a class certification hearing or at trial, the attorney who hired the testifying expert will first ask questions of the expert that will have been discussed together in advance (i.e., direct examination). In the course of direct testimony, the expert usually will refer to demonstrative exhibits that serve as exposition aids. These exhibits, which are produced to opposing counsel in advance of the testimony, can be an effective tool for illustrating complex concepts and clarifying the testimony.

The direct examination usually includes questions related to qualifications and involvement in the case (e.g., who retained the expert, what work was the expert asked to perform, how many times the expert has testified, and how many times the expert has worked for this attorney, compensation). The expert will then be asked about the methods employed and the data relied upon in reaching an opinion. One author suggests that any known weaknesses in the expert's opinions be brought out in direct testimony rather "than having them exposed 'defensively' during cross-examination."[29]

Following direct examination, cross examination by opposing counsel will focus on all aspects of the expert's opinion.[30] Opposing counsel will likely try to show contradictions between the expert's testimony and past publications (as well as publications by reliable authorities), question the expert's qualifications, challenge whether the expert reached the opinion prior to doing the work reported, secure the expert's agreement with the opposing expert's opinion, or attack the expert's assumptions or methods as inconsistent with the facts of the case.

---

29. Brinig, *supra* note 5, at 5.
30. Varma, *supra* note 17, at 14, recommends that counsel conduct "a mock cross-examination of the expert, focusing particularly on potentially difficult questions; consider having a consulting expert assist in developing questions for cross-examination and/or bring in another attorney who the expert has not worked with on the matter to conduct the mock cross-examination."