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Selection, Use, and Pay of an Economist in an Antitrust Case

STEPHEN E. NAGIN*

In this practice-oriented article the author examines the use of economic experts in antitrust cases. He analyzes several factors that influence the selection of an economist such as the various schools of economic theory related to antitrust, the time commitments counsel can expect to receive from an expert, the demands of the case, and costs. The article reviews several kinds of payment agreements and recommends which to choose, based on the individual case. The author explains ways to use the economist from before the filing of a complaint through cross-examination of the adversary's expert. Also examining counsel's preparation of the expert, the author concludes with explanations of how to use or reject the information furnished by the expert, and how counsel should exercise control over an antitrust case.

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I. INTRODUCTION

Over the past decade, antitrust cases involving allegations other than per se offenses¹ have increasingly made use of sophisti-

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1. In *Northern Pac. Ry. v. United States*, 356 U.S. 1, 5 (1958), Justice Black explained that per se offenses are "certain agreements or practices which because of their pernicious effect on competition and lack of any redeeming virtue are conclusively presumed to be

cated, expert economic testimony.³ The reasons are several. Since economics is at the heart of most antitrust cases, judges and administrative hearing officers are increasingly unsympathetic to efforts by counsel to offer formalistic pleadings and motions as an alternative to an articulate, lucid analysis of the motives and consequences of the economic behavior at issue. To meet the trial test of a "rule of reason" analysis,³ which courts use to evaluate conduct that may have an adverse impact upon competition, counsel must have a thorough grasp of the economic implications and probable competitive effects of any business behavior in question. Therefore, it is important for counsel to consider as early as the initial pleading stage whether or not the advice and subsequent testimony of an economist will aid his client's cause.⁴

This is not to say that counsel should unduly rely on an expert

unreasonable and therefore illegal." The Court declared those practices illegal without any inquiry into whether the defendant's actions were reasonable under the circumstances of the case. Examples of *per se* violations are agreements between competitors to fix prices or to allocate territories in order to minimize competition.

2. See *International Air Indus., Inc. v. American Excelsior Co.*, 517 F.2d 714 (5th Cir. 1975); R. POSNER, *ANTITRUST LAW: AN ECONOMICS PERSPECTIVE* (1976); Holcombe & Meiners, *The Use of Economic Analysis in Law*, 41 ALA. LAW. 222 (1980); O'Hara, *The Economic Expert in the Antitrust Arena*, 12 ANTITRUST L. & ECON. REV. No. 2 at 17 (1980).

3. Under this rule, the factfinder weighs all of the circumstances of a case in deciding whether to prohibit a restrictive practice as imposing an unreasonable restraint on competition. See *Chicago Bd. of Trade v. United States*, 246 U.S. 231, 238 (1918). Expressing the view that this rule fails to provide business with adequate behavioral guidelines, Mr. Justice Marshall in *United States v. Topco Assocs., Inc.*, 405 U.S. 596, 609, n.10 (1972), implored that:

[w]ithout the *per se* rules, businessmen would be left with little to aid them in predicting in any particular case what courts will find to be legal and illegal under the Sherman Act. Should Congress ultimately determine that predictability is unimportant in this area of the law, it can, of course, make *per se* rules inapplicable in some or all cases, and leave courts free to ramble through the wilds of economic theory in order to maintain a flexible approach.

Nonetheless, the Burger Court's opinion in *Continental T.V. Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36 (1977), reintroduced a rule of reason approach to nonprice, vertical restraint cases and signaled a disinclination to use *per se* rules except in cases involving clearly pernicious acts or practices. See generally ANTITRUST & TRADE REG. REP. (BNA) No. 864, at A-7 (1978). Although it is true that economic evidence has assumed increased importance in recent rule of reason "conduct" cases (*e.g.*, those involving exclusionary, predatory, or facilitating practices), the antitrust "structure" cases (*e.g.*, those involving mergers, acquisitions and joint ventures) are traditionally considered the ones most heavily weighted with economic theory. The comments in this article apply equally to both kinds of cases.

4. Sometimes the failure to introduce economic evidence has disastrous consequences. Thus, the "complete lack of pro-Commission [economic] expert testimony" resulted in the reversal of an FTC decision when the Ninth Circuit could not find adequate proof of an anticompetitive effect, which would have allowed the court to uphold the Commission's ruling that a delivered pricing system for southern plywood was illegal. *Boise Cascade Corp. v. FTC*, 1980-2 Trade Cas. ¶ 63,323 at 75,668 (9th Cir. 1980).

at the early stages of a case. Nor is it realistic to assume that there are no other means to obtain some working understanding of the economic issues in, and perspectives of, an antitrust case. Counsel can obtain a basic appreciation of the economic issues germane to a particular antitrust case by reading relevant decisions, particularly those in which economic analysis provides the *ratio decidendi*.⁵ In addition, counsel can consult any of a reasonably wide range of specialized periodicals⁶ and textbooks⁷ dealing with antitrust economics, available in most law libraries. These sources of information, however, rarely do more than identify the types of economic evidence that may be relevant. They provide a starting point for deciding whether to resort to a consulting economist or a forensic expert witness.⁸

Unfortunately, periodicals and textbooks are silent on the central practical problems: locating,⁹ interviewing, retaining, and using an appropriate economic consultant or forensic expert.¹⁰ These

5. See, e.g., *Berkey Photo, Inc. v. Eastman Kodak Co.*, 603 F.2d 263 (2d Cir. 1979), *cert. denied*, 444 U.S. 1093 (1980); *In re IBM Peripheral EDP Devices Antitrust Litigation*, 481 F. Supp. 965 (N.D. Cal. 1979).

6. The American Economics Association publishes an *Index of Economic Journals* that lists all major periodicals on antitrust economics. Among the most prestigious are: *American Economic Review*, *Bell Journal of Economics*, *Review of Economics and Statistics*, *Econometrica*, *Journal of Political Economy*, *Quarterly Journal of Economics*, *Journal of Economic Theory*, *Journal of Law & Economics*, *Review of Economic Studies*, and the *Southern Economic Journal*. Other valuable references include: *Antitrust Bulletin*, *Antitrust Law & Economics Review*, *Industrial Economic Review*, and *Journal of Reprints for Antitrust Law and Economics*.

7. Four of the better textbooks are D. GREER, *INDUSTRIAL ORGANIZATION AND PUBLIC POLICY* (1980), J. KOCH, *INDUSTRIAL ORGANIZATION AND PRICES* (2d ed. 1980), D. NEEDHAM, *THE ECONOMICS OF INDUSTRIAL STRUCTURE, CONDUCT AND PERFORMANCE* (2d ed. 1978), and F. SCHERER, *INDUSTRIAL MARKET STRUCTURE AND ECONOMIC PERFORMANCE* (2d ed. 1980). These texts survey the field less technically than articles in the economics journals, and they provide references to economists who are experts in specific areas most relevant to a lawyer's needs.

8. The term "consulting economist" describes an expert who will assist in pretrial and help counsel select and prepare a forensic expert to testify. See note 34 and accompanying text *infra*. For an interesting discussion with many personal observations by a distinguished forensic economist about his appointment, responsibilities, fees, and assignments when serving as an expert witness in a merger case, see Bachman, *New Role for Economists - The United States Lines Case*, 23 ANTITRUST BULL. 797 (1978).

9. The most prevalent means of locating potential consulting or forensic economists is word-of-mouth reference by other economists and attorneys. Counsel can check on the basic credentials of suggested economists by using the biographical listing of members of the American Economic Association in 68 AMER. ECON. REV. No. 6 at 37 (1978).

10. For a sample direct and cross-examination of an economist, the reader may find helpful the ABA's Section of Antitrust Law reprint of the transcript from the National Institute on the Trial of an Antitrust Case in 46 ANTITRUST L.J. 1, 184-211 (1977). Also enlightening is the economic testimony from Golden Grain Macaroni Company, 78 F.T.C. 63

practical problems cause altogether too many counsel to delay or avoid retaining an economist despite the inherent importance of such assistance.

II. THE IMPORTANCE OF AN ECONOMIC EXPERT IN ANTITRUST CASES

Among the most important aspects of an economist's assistance in handling an antitrust case is his¹¹ ability to analyze and communicate the effects of certain economic behaviors. For example, in an attempt-to-monopolize case brought under section 2 of the Sherman Act,¹² an economic expert can explain how superficially benign conduct actually could be very harmful. Conversely, he can explain why practices that seem harsh, if not predatory, might be unobjectionable. The analysis necessary to determine whether such conduct is pernicious or benign usually includes a consideration of factors most trial lawyers are ill-equipped to pursue, such as a history of how the industry developed. It is routine, however, for an economist to research and analyze the *structure* of the industry, including such factors as a definition of the market, the number of firms within that market, their market shares, the sizes and size distribution of the firms, the barriers or impediments to entry, and the importance of patents or technology. He can provide an analysis of the traditional *conduct* of firms in that industry, such as their pricing and advertising practices. His analysis should also include the relevant criteria of *performance* of firms in the industry, such as each firm's return on investment, and its ratio of sales to assets. An economist should understand the competitive processes that underlie strategic interactions among firms and be able to distinguish between different types of economic behavior to ascertain which conduct causes real injury to competition and which does not. When contemplating litigation strategy, an economist should help develop the theory of the case based on a competition analysis that is consistent, logical, simple, and, most importantly, invulnerable to successful attack by an opposing expert.¹³

(1971), abridged and reprinted in Scanlon, *Economics in the Courtroom: The "Technology" of Antitrust Litigation*, 3 ANTITRUST L. & ECON. REV. 43, 54 (1969).

11. Throughout this article economists and counsel occasionally are referred to as "he" or "his" for sake of simplicity in writing.

12. 15 U.S.C. § 2 (1976).

13. Of course, such advice is valuable not only in litigation, it is also a useful aid in counseling.

It is in litigation, however, that an economist offers the most valuable contribution.¹⁴ Economic expertise lends itself to evaluating the potential bases for claims, designing and analyzing discovery, providing a focus on the important issues, preparing exhibits for trial, calculating damages, testifying at trial, and if necessary, assisting on appeal.

III. EARLY RETENTION OF AN EXPERT

An economist experienced in antitrust trials may play an important role in shaping the prosecution or defense strategy.¹⁵ Counsel should engage the expert before filing a complaint or answer, to enable the lawyer to narrow his focus at an early stage, and thus cut discovery time and expense. Early retention "permits the economist to help shape the theory of the complaint or answer, and . . . to suggest avenues for discovery."¹⁶ Moreover, if the economist thoroughly studies the case, counsel can develop his testimony without resort to cumbersome factual hypotheticals.¹⁷

Despite these reasons for early retention, some lawyers delay engaging an expert. In addition to the practical problems of locating, interviewing, and retaining an economist, some seasoned trial lawyers feel uncomfortable about sharing litigation strategy with a non-lawyer—perhaps because of liberal discovery permitted under rules of civil procedure,¹⁸ or because of their desire not to share control of the case. Other trial lawyers fear the high cost of an expert witness. Although cost may significantly limit the use of an expert in discovery and preparation for trial, able trial counsel increasingly decide to engage primary and backup economic experts on major issues. These trial lawyers address the potential problems caused by early retention by winnowing out their "excess" use of experts as the issues narrow. Accordingly, although cost may determine which expert to choose and how extensively to rely on him,

14. See generally Delong, *The Role, If Any, of Economic Analysis in Antitrust Litigation*, 12 Sw. U.L. Rev. — (1980).

15. See Stelzer, *The Role of the Economic Expert in Antitrust Litigation* (address before the Antitrust Section of the Los Angeles County Bar Association, Feb. 14, 1979) (available as a reprint from N.E.R.A., 1800 M Street, N.W., Washington, D.C. 20036).

16. Jentes, *Defining the Role of the Economist—A Lawyer's Perspective*, 48 ANTITRUST L.J. 1838, 1839 (1979).

17. This is not to say that hypothetical questions are without value in complex litigation. They do afford counsel an opportunity to sum up in the middle of a case and they may help simplify, for the jury, the nature of competitive relationships and their effects.

18. See Connors, *A New Look at an Old Concern—Protecting Expert Information from Discovery Under the Federal Rules*, 18 Duq. L. Rev. 271 (1980).

counsel should bring an expert into the case at the earliest opportunity.

IV. DECIDING WHO SHOULD HANDLE THE EXPERT WITNESS

Large, complicated antitrust cases usually require a trial team. For several reasons, the team member who primarily deals with the expert economists and coordinates the information should be the second or third in command.

First, the time required for dealing with the expert can unduly distract lead counsel. The economic expert does not limit his testimony to specific industry events, nor to a particular firm's conduct. He must place strategic interaction and the effects of events in the perspective of industrywide structure, conduct, and performance. He needs considerable time to amass and assess this information, and to develop a testimonial approach that places it in proper perspective. Although lead counsel must work with the expert to derive the maximum benefit from this expertise, he is unlikely to have the time required to oversee this process properly.

Second, the lead counsel must not get too bogged down in one part of a complex case. He must maintain an overview, to provide general guidance as well as "fine tuning" questions for the expert. Staying a step removed is essential to control of a complex case.

Yet the expert is much too important to relegate to too junior a counsel. An intermediate member of the team, perhaps the number two or number three attorney should have the experience to handle such a crucial but time-consuming witness. Moreover, the lawyer assigned to handle the expert must be able to grasp the full importance of the other testimony offered during the trial. He must keep the forensic economist abreast of the case as the trial unfolds—unless an economic consultant charged with that responsibility sits through the entire trial.

Finally, besides the need for objectivity and distance between the lead counsel and the expert, cost to the client offers another reason for shifting responsibility to the next in command. Presumably, lead counsel receives a higher rate of pay than others on the case. Given the time ordinarily required to develop the expert's economic testimony most effectively, the savings in dollars derived from a lower hourly rate could be considerable.

V. SELECTING THE PROPER ECONOMIST FOR LITIGATION

Since not all economists know how to evaluate economic evi-

dence, and since good economists are expensive and engaged in other pursuits as well, the selection of an economic expert is not simple. Four factors tend to control the selection process: 1) philosophical bias, 2) time, 3) personality, and 4) cost.

The branch of the "dismal science" that most directly deals with antitrust issues is industrial organization economics. Industrial organization economics (I.O.) is a distinct microeconomic specialty that examines the implications of alternative market structure and the effects of single firm behavior or multifirm interaction on competitive performance in the marketplace.¹⁹ There are three main schools of thought or *philosophical bias* within I.O. One of these is variously called the "New Learning" or "New Thinking" or "Chicago School," although by no means do its proponents work in just one academic location. The Chicago School economists argue that antimonopoly action should focus on cartels and horizontal mergers, not on the actions of individual firms.²⁰ Individual firms cannot obtain monopoly power unless they collude with others.²¹ Various business practices by individual firms, such as tie-in sales and advertising, are procompetitive, not anticompetitive, as economists once thought.²² The "Harvard School" disputes this view. The Harvard School argues that individual firms can create monopoly power without colluding with others.²³ Attention should focus on dynamic elements in competition, such as time lags and innovation, as well as the role of information, transaction, and control costs.²⁴ Members of the Harvard School also present arguments about the relationships between firm size and efficiency and between firm size and the concentration of power.²⁵ A third group of economists called the "New School" take a different approach. Members of the New School do not condemn a questioned business practice as anticompetitive per se. Instead, they describe

19. See generally Mueller, *Lawyer's Guide to the Economic Literature on Competition and Monopoly: An Introduction to the Doctoral Dissertations* (pts. 1-3), 5 ANTITRUST L. & ECON. REV. No. 4 at 83 (1972); 6 *id.* No. 1 at 67, No. 2 at 83 (1973).

20. See INDUSTRIAL CONCENTRATION: THE NEW LEARNING (Goldschmid, Mann, & Weston ed. 1974); Posner, *The Chicago School of Antitrust Analysis*, 127 U. PA. L. REV. 925 (1979).

21. *Id.*

22. *Id.*

23. Nelson, *Comments on a Paper by Posner*, 127 U. PA. L. REV. 949, 952 (1979).

24. *Id.* at 951, 952.

25. See Pitofsky, *The Political Content of Antitrust*, 127 U. PA. L. REV. 1051 (1979); Schwartz, *Justice and Other Non-Economic Goals of Antitrust*, *id.* at 1076. See also Mueller, *Lawyer's Guide to the Welfare-Loss Concept: An Introduction*, 5 ANTITRUST L. & ECON. REV. No. 3 at 75 (1972); Nagin, Book Review, 27 DE PAUL L. REV. 545 (1977).

the conditions under which the practice becomes anticompetitive and those under which it becomes procompetitive.²⁶

Obviously, selection of the economist chosen by counsel will depend upon the type of case he has.²⁷ One important factor is the philosophic bias of the expert. For example, if the client is a small franchisee suing a large franchisor for a traditional exculsory practice,²⁸ a Chicago School economist would probably be unsupportive. If, however, the case involves defending a large manufacturer against allegations of sales below cost, the attorney should probably seek a Chicago School economist. In this situation a Harvard School economist would likely subscribe to a long-run, dynamic test, but his Chicago School counterpart would probably prefer using a short-run, static test to evaluate the conduct.²⁹

The second major factor in selecting an economist is the amount of *time* he is prepared to spend on the case. Consultants or witnesses fall into three general categories of experience and likely time constraints. The first is eminent experts (either commercial consultants or academicians), with impressive credentials and intellectual clout. Unfortunately, such experts who do commercial consulting cost a good deal³⁰ while academicians' other pressing responsibilities will preclude total immersion in a case except during semester breaks and in the summer. The second general category of economists comprises those new to their field. Usually, they are very interested in becoming more eminent, but they may gain their expertise at the client's expense. A third and sizeable category are

26. See, e.g., Nelson, *supra* note 23, at 950-51.

27. A special situation arises when selection of an expert is based on offensive foreclosure of expertise and concealment of data to other parties in multi-party litigation. In such a case, counsel summarily seeks to preclude an expert previously retained by a party no longer involved in the litigation from providing advice to another party involved in the litigation. See *A Proposed Amendment to Rule 26(b)(4)(B): The Expert Twice Retained*, 12 U. MICH. J.L. REF. 533 (1979).

28. I.e., the franchisor might tie the sale of its product A to purchase of its less desirable products B, C and D.

29. See Joskow & Klevorick, *A Framework for Analyzing Predatory Pricing Policy*, 89 YALE L.J. 213 (1979); Greer, *A Critique of Areeda and Turner's Standard For Predatory Practices*, 24 ANTITRUST BULL. 233 (1979) (discussion of "static" versus "dynamic" tests in discerning evidence of predatory pricing). See also ANTITRUST & TRADE REG. REP. (BNA) No. 968, at A-4 (1980) FTC Conference on Strategic Predation and Antitrust Analysis (excellent New School analysis).

30. Professional consulting economists can give undivided attention to a client's case and may be of greater aid to a less experienced lawyer, although greater overhead and higher profit expectations tend to make them expensive. A drawback, perhaps, is that a "pro" may lack that thin veil of objectivity provided by academic robes and may seem to the jury too much like a "hired gun."

experienced but not yet eminent experts—generally able and conscientious, though not yet revered by their peers.

Counsel probably should not select an economist from the first category—the most eminent thinker or prolific writer—if the case will require hundreds of hours of input by the expert for effective advice and mastery of the facts. If the focus is on interpretation of readily available and relatively simple facts, then someone from the second category—an economist new to his field—will suffice, although an expert from the third category—an experienced but not yet eminent expert—is best and would more probably provide the needed assistance.³¹

One should note that the trend is to have two kinds of I.O. economists on an antitrust case. Concern both about the eminent experts' lack of available time and the constraints imposed by liberal discovery rules has prompted some trial lawyers to adopt a staffing practice similar to that of the Federal Trade Commission³² or the Antitrust Division of the Department of Justice.³³ Both the Department of Justice and the Federal Trade Commission economists help develop theories, assist in designing and analyzing discovery, and then help select and prepare a forensic economist, typically an academician, to serve as the expert at trial. If the in-house economist is conscientious though unheralded, he may help retain an eminent academician to present the economic evidence from the witness stand.³⁴

Allied to the expert's expected commitment of time is his level of energy. If the expert must prepare lengthy testimony, stamina is important. An economic expert must be able to withstand long hours during tense days, weeks, or months of trial. Therefore, counsel must determine at the outset whether the expert can hold up under the strain of trial.

The third major factor in selecting an economist is his *personality*—a key element in the psychology of persuasion. The expert

31. Although most I.O. economists are capable generalists, some have specialized expertise such as mergers or cartels. Also, some are industry specialists, expert in industries such as gasoline retailing, food manufacturing, automobiles, or energy.

32. The Federal Trade Commission has a Bureau of Economics, Division of Economic Evidence.

33. The Department of Justice's Antitrust Division has an Economic Policy Office.

34. See, e.g., Robert R. Nathan Associates, Inc., *The Economist as Expert Witness, NEWS & PERSPECTIVES* (Fall 1979). (Robert R. Nathan Assoc., Inc. is located in Washington, D.C.) Just outside the field of I.O. are countless professors of business administration who are familiar with I.O. techniques and issues. Many are also expert in certain industries and can testify about a definition of the relevant market, which does not require a close acquaintance with antitrust economics.

must persuade the trier of fact to accept the logic of his views and their practical and compelling quality. Thus, he must exude a sense of confidence and create empathy. He must be absolutely convincing and seem completely sincere.³⁵ Generally, an economic expert who testifies frequently in antitrust cases has learned by experience and has mastered these elements of persuasion and the subtleties of courtroom presentation. An eager economic expert who is a novice in the courtroom, even if equally knowledgeable about the subject matter, is less likely to prove effective (and may not appreciate the need to accept the role of a team player during trial preparation).

Even if the forensic economist recognizes the need to become an integral member of counsel's litigation team, his patina of wisdom and experience acquired in numerous courtroom jousts may have potential drawbacks. A savvy expert with remarkable courtroom credentials could have a background full of annoying witness habits that are difficult to break, become bored by lengthy preparations for testifying, or be cynical about the entire legal process. In addition, his own recorded contrary opinions of long standing may inhibit his testimony.³⁶ The trier of fact will perceive the expert's annoying habits and cynicism as easily as his candor, honesty, and sincerity. Counsel must consider the persuasiveness of the expert, therefore, along with his philosophic bias, the time he can spend on the case, and his energy level.

Counsel should explore these factors in the initial consultation with the potential expert, and ask the proposed expert what law firms he has worked with in the past. Later, counsel should ask the law firms that have worked with the prospective witness for information concerning his philosophic bias, energy level, in-court manner, ability to explain and persuade, and the time he devoted to prior assignments. Counsel should find out whether the expert was the only economist who testified, and if he had alerted counsel to probable defenses and cross-examination strategy. Finally, counsel should ask whether the firm would hire him again and request a

35. The eminent I.O. experts are in demand not merely for their knowledge of economic concepts and courtroom technique, but also for their ability to present even the most obtruse theory in a thorough yet understandable manner. They persuade not by bluster and semantics, but by simplicity, conciseness, and emphatic presentation.

36. Rule 26(b)(4) of the Federal Rules of Civil Procedure and Rules 702-06 of the Federal Rules of Evidence govern the extent of avoiding exposure of an expert's contrary opinions. See also J. WEINSTEIN, 3 WEINSTEIN'S EVIDENCE §§ 702-06 (1975). Engaging a consulting economist along with a forensic economist minimizes exposure to discovery. See *Exxon Corp. v. FTC*, 466 F. Supp. 1088 (D.D.C. 1978).

copy of prior testimony and any accompanying exhibits to enable review for potentially conflicting opinions.

VI. PREPARING QUESTIONS FOR AN ECONOMIC EXPERT

Counsel must be able to adjust to the expert's personality and the idiosyncratic demands of the case. Although no single approach is always effective, three techniques generally seem successful: the simple checklist, an index of key points, and a complete script of certain anticipated questions and answers.

At the beginning of a case, a forensic expert witness may usefully suggest a list of topics that counsel then should outline.³⁷ Such an outline comprises the gist of the expert's likely testimony, organized to coordinate it with his narrative. Thereafter, counsel should keep the outline up to date, with the expert's advice, as discovery progresses. This outline serves as the guide for the subsequent courtroom checklist.

Complex litigation requires the expert to cover a broad area. Thus, a simple checklist may be inadequate at the start of an expert's testimony. Once the expert has narrowed his testimony, however, a simple checklist or an equivalent device is necessary for that testimony to proceed fluidly. One other such technique uses an index of key points with each point supplemented by possibly dozens of questions. Counsel should list each question separately on a five-by-eight inch file card keyed to the index,³⁸ then revise the index as questions are added, revised, deleted, or changed in sequence. Counsel should rehearse these questions with the forensic economist until the economist feels comfortable with each question and counsel feels comfortable with each answer. At trial, another attorney on the team checks off the testimony elicited from the expert against the index of key points.

A third technique is the complete script of questions and anticipated answers. Prepared questions, although allowing for the benefits of clarity, do have drawbacks. An over prepared expert may appear less spontaneous in the courtroom. An expert overtrained on sequence creates the risk that a question asked out of sequence will generate confusion. This confusion can occur if, as is not unusual, the judge interjects questions that overlap with or su-

37. Counsel should keep to a minimum any written information transmitted to or from a forensic expert witness. This will limit discovery under FED. R. EVID. 612 and FED. R. CIV. P. 26(b)(4).

38. Three-by-five-inch index cards are too small to accommodate both the question and the narrative gist of a desired answer.

persede counsel's. Confusion also arises if anticipated questions get asked by opposing counsel on voir dire. And, of course, counsel at times may get sidetracked, asking less than all of the planned questions, and electing to skip around to complete the missed points. Further, a prepared list places counsel at a disadvantage when it becomes necessary to lead the expert through a difficult area if he falters under the pressure of the witness stand. Finally, a witness used to answering prepared questions may suffer when subjected to aggressive cross-examination unless first put through a mock cross-examination.

Counsel can minimize these drawbacks and still secure the benefits of clarity that prepared questions offer, through two practices. First, the expert should not reduce his answers to verbatim formulations. The script should reflect only the gist of the desired answer. This facilitates the use of spontaneous backup questions to round out each point. It also generates nondiscoverable work product—which may be a key consideration for federal government counsel, under the Jencks Act.³⁹ Second, counsel should avoid rehearsing the questions in identical order. He should develop recognizable cues and build them into each question. If he does this, the answers should not vary significantly, even if the sequence of the questions changes. Slight changes in emphasis or additional anecdotal pieces will keep the material fresh and the expert alert.

VII. AREAS TO COVER IN PREPARING AN EXPERT TO TESTIFY

After selecting the forensic expert, determining his scope of work, and establishing his fee basis, counsel must prepare for the testimony itself. Direct examination must cover the expert's qualifications to give an expert opinion, a definition of the procedures he followed or of the matter to be explained, a demonstration that the expert's testimony is credible and trustworthy, the ultimate opinion itself, and an explanation of that opinion.⁴⁰

The forensic expert must be advised that counsel will cover

39. 18 U.S.C. § 3500 (1976). The Jencks rule, which applies to federal criminal cases and civil administrative proceedings, permits defense counsel to inspect certain prior statements of government witnesses before cross-examination. *See generally Jencks to the Agencies!* 54 N.Y.U. L. Rev. 807 (1979).

40. Under FED. R. EVID. 705, counsel need not give notice of the expert's basis for reaching his conclusions on direct examination. Failure to cover the basis, however, may weaken his opinion. If counsel is setting a trap to get the cross-examiner to inquire into it and his opponent does not take the bait, but instead qualifies his own expert who testifies forcefully and in complete detail, the gambit may backfire.

these five steps in this order. The expert must know, as far as possible, the precise verbal route counsel intends to follow. In addition, counsel who will conduct the examination should give practical pointers on the art of testifying on direct and on cross-examination. But counsel should take into account the expert's previous experience. An expert of long experience in the courtroom may resent being preached at too much.

The first matter to establish in the expert's testimony is the need for an expert opinion.⁴¹ Presumably, counsel will have given notice by listing the expert on the witness list with his area of testimony mentioned in the trial brief. Thus, if opposing counsel raises the objection that there is no need for expertise on the subject, counsel can counter with the dual response that: 1) the economist will enlighten the finder of fact on a subject that involves special, advanced knowledge; and 2) many weeks or months of notice have been given without timely objection.

In presenting the expert's qualifications, counsel should be aware of the opposing counsel's suggestion to "put [only] his *curriculum vita* in the record." Opposing counsel will urge that there is no need to spend precious time expounding on the acknowledged expert's noble qualifications. The premise is that the *vita* will be in the record if anyone doubts his credentials. But the premise conceals a trap. Juries (and judges) are impressed with effective oral exposition of an expert's qualifications such as doctorates earned, articles written, and positions held. They may not appreciate or understand the highlights buried in a long, written resume. The expert will be more persuasive if he establishes his qualifications through oral testimony, even if counsel must condense his questions on the matter. One way to counter the *vita-in-the-record* ploy is to solicit an agreement from opposing counsel that the economist is an expert, and ask, through the judge: "Does opposing counsel also agree with this expert's opinion?" If such an agreement is absent, then counsel should insist on the right to establish credibility as well as expertise, through careful inquiry that develops the expert's credentials.

Among the preliminary matters counsel should consider is the phrasing of the ultimate opinion question. For example, counsel may ask: "Do you have an opinion to a degree of economic cer-

41. To establish need for expert economic testimony in an antitrust case counsel can stress the difficulty in evaluating the existence or effect of various structural, behavioral, and performance factors. See FED. R. EVID. 702 (Testimony by Experts).

tainty as an industrial organization economist about (say, what effect defendant's conduct will have in the relevant market)?" This demonstrates that the testimony sought transcends mere lay opinion. But care is essential. Questions designed to elicit answers that will serve as the legal building blocks for a central theory should be phrased to avoid unduly obtuse legalities. Therefore, counsel should not ask: "With respect to the issue of like grade and quality, do you have an opinion . . .?" Instead, he should inquire: "Turning your attention to defendant's products, do you have an opinion about how they compare to the plaintiff's products?" Further, if counsel uses hypothetical questions they should be simple enough for the trier of fact to understand, yet sufficiently comprehensive to be relevant to the case. Because there is a significant tradeoff between these qualities, counsel should favor simplicity and let opposing counsel appear to be adding complexity in cross-examination.

Enlivening the expert's direct examination aids its persuasiveness. Thus, putting before the jury such demonstrative evidence as a prepared chart that graphically presents the steps or procedures the expert followed in arriving at his opinion helps the jury to understand the expert's testimony. There is a simple litany to use when offering demonstrative evidence. It consists of three questions: "Have you prepared any charts in connection with your testimony today?" "Are those charts a fair and accurate representation of how you arrived at your opinion?" "Would it assist you in explaining your opinion to the jury if you could refer to your charts?" Counsel then requests permission to publish the exhibits to the jury.

Crucial to trial preparation is consideration of the likely course of cross-examination. The expert should know how to answer all substantive questions as unconditionally and unambiguously as possible. Counsel should advise the expert to be polite and not hedge his answers, lest he seem biased and untrustworthy. There should be practice sessions for stock cross-examination questions. Typical cross-examination questions include: "Were you paid to testify?" ("Yes, no expert works for free."); "How much were you paid to testify?" ("Forty-thousand dollars, my expertise is very valuable."); and "Did you discuss your testimony with counsel?" ("Yes, just as all witnesses discuss their testimony with counsel, including opposing counsel during deposition.")

Counsel should alert the expert to watch whenever counsel starts to stand up during cross-examination, and to wait for an ob-

jection and ruling before answering. The forensic expert—especially if an academician—should be reminded to confine his answers to the exact questions asked. He should not be professorial in the courtroom. Furthermore, he should never answer a question with a question, except when counsel does not object to an unclear question. In such a situation, the witness should ask the examiner to clarify what he means.

To respond to a broad, compound question, the witness may need to break the question into its separate parts and answer it step-by-step. Leading questions to which a simple “yes” or “no” would be misleading may require immediate explanation, especially if the examiner suggests an answer that omits facts, assumes facts beyond the witness’s knowledge, or contains implications only partially true.

A witness interrupted in the middle of his answer by the cross-examiner may need to request permission to finish his answer because counsel may not know whether the answer is complete. If the cross-examiner estimates or suggests any ranges, times, amounts, or percentages—as when varying or supplementing the facts of a hypothetical question asked on direct examination—the expert must not agree unless he would have arrived independently at the same calculations. Even then, however, counsel should have instructed him to state that his answer assumes the cross-examiner’s estimates, which may not be exact.

Counsel should educate the expert to recognize certain stock cross-examination techniques. Opposing counsel will search for a “soft” spot and attempt to weaken the testimony by showing that the expert made an assumption; other experts would or could make different assumptions; the expert relied on this assumption to arrive at his opinion; reliance on a different assumption would have resulted in a different opinion; and that different opinion differs significantly from the expert’s opinion. If opposing counsel repeatedly uses this line of examination in his cross-examination of the expert, it may become apparent to the finder of fact that different opinions may be extrapolated from virtually the same data.

Another cross-examination technique is to show gaps in the expert’s procedures, such as what the expert did not take into account. In addition, opposing counsel may try to show inconsistencies in the basis of the expert’s assumptions as being liberal in some areas and conservative in others. Furthermore, a good cross-examiner will attempt to identify and belabor material inaccuracies in computations or conclusions.

Therefore, counsel must take care not to permit the expert to overstate his basis for an opinion on direct examination or to be unduly defensive on cross-examination. An able opponent will seize on any such overstatement or defensiveness. Counsel must remember this when phrasing his thematic question so as to avoid undermining the effectiveness of an otherwise sound opinion.

VIII. CROSS-EXAMINATION OF AN OPPOSING ECONOMIC EXPERT

In conducting the cross-examination of an expert, counsel must establish control over both the pace and the direction of the questions and answers, thereby allowing the testimony to come from himself. Counsel should ask leading questions that allow the opponent's expert to say "yes" or "no," or "I agree" or "I disagree." He should not permit any opening for the opposing expert to "run with an answer."

An interim goal of cross-examination is to engage the expert in a battle on counsel's terms and cause the opposing expert to worry about the direction of counsel's questions. This may preoccupy the expert and force him to answer questions outside his frame of reference. Since most economists are theoretically oriented, placing the preoccupied expert in a real-world situation may underscore his reliance on terminology and leave him sounding overly theoretical. His opinion will then lose credibility. If, for example, the expert has used statistical data to arrive at his opinion, counsel should ask questions implying that in truth, the witness has no real knowledge of the market. "You never actually ran a petrochemical plant, did you, sir?" "In fact, you have never had to make a payroll, have you?" Counsel should make sure, of course, that the witness is testifying as an economist, not as a well-informed layman, about the specific market being evaluated.⁴² Cross-examination then should focus on the quality of the expert's preparation. For example, did he fail to check key financial records of all firms in the market? Counsel should seek to undermine any impression

42. Although Fed. R. Evid. 701 allows an expert to testify in part as a lay witness, the "reasonably relied upon" requirement of Rule 703 allows an "end run" around the hearsay rule. For example, the expert may testify that he conducted a survey of suppliers or consumers, that it is of the type customarily relied upon by economists, and that it shows XYZ. Even though the survey was conducted after-the-fact, in anticipation of litigation, and would not qualify for an exemption under Rule 803(17), it might be admitted under Rule 803(24) or 804(b)(5) and its results presented under Rule 703. On cross-examination, counsel can effectively attack the expert's lack of first-hand knowledge, as well as the survey results, by showing the witness relied on a survey of laymen and he is merely testifying as a well-informed layman rather than as an expert on the industry.

of the expert's thoroughness and otherwise seek to cut away at the building blocks for his opinion.

Thus, the direct examination of an economist should establish that the expert undertook and properly discharged an assignment to study a specified subject for the case and, as a result of care and wisdom, arrived at a sound opinion. The cross-examination of an economist should show that the expert is unqualified, partial to the adversary or philosophically biased, unthorough in preparation, and purely theoretical in approach, with the consequence that his opinions are intrinsically untrustworthy, although he may agree with the cross-examiner on some critical points.

Finally, a cross-examiner must be tenacious. Counsel should persist in a line of attack until he achieves the objective—even if he must pursue the same point by a different sequence of questions later in the cross-examination. A good cross-examination develops from something like a businessman's "decision-tree": counsel should plot out what to ask regardless of the answers given.

Despite this need for tenacity, however, the cross-examination should be as brief as possible. Counsel should elicit the facts needed to prove a case or disprove an opponent's case, and deal only with what is necessary to the credibility or opinion of the expert.

IX. THE BEST WAY TO PAY AN ANTITRUST ECONOMIST

Because fee schedules vary, counsel should inquire at the outset about the amount of the expert's fees. A recent graduate may charge as little as \$300 a day, but a renowned expert who is a courtroom veteran may charge in excess of \$2,500 per day. Counsel should ascertain past fee arrangements of the expert to establish a bargaining range with him. The proper arrangement for each case depends on factors such as the likelihood that the case will actually be litigated, the simplicity or complexity of the matter, and the expected length of the trial.

Four types of fee arrangements are common. The first is a *fixed daily rate* for each full day or prescribed part of a day. The expert presents bills at the conclusion of testimony, or possibly in interim billings before and during trial. Because the lawyer usually has limited ability to predict what expertise the case will demand, an open-ended daily rate has obvious drawbacks. In the simple case, however, it may be an appropriate fee arrangement.

A second form of fee arrangement is a *fixed fee* (plus reasonable and necessary expenses), in which the expert and the lawyer

agree on an estimate of the total amount of time necessary and the appropriate fee for the expected services. If the time required is seriously underestimated, however, the expert may be unhappy with the fee and may adjust his efforts accordingly. Conversely, if the time requirement is overestimated, the client will receive a large bill that he may believe unwarranted. Nonetheless, in a case with uncomplicated facts, limited application of economic theory, and damages not difficult to estimate, the financial certainty of the fixed fee arrangement may be desirable.

When counsel cannot accurately estimate how long he will need the expert, a *hybrid arrangement* with a low daily rate and fixed expenses, or a *sliding-scale* fee varying with such factors as the number of hours spent and the complexity of the case may be appropriate. One such hybrid arrangement would encourage a well-known economist to take on an extensive assignment in San Francisco at a low weekly fee, but with his expenses paid and accommodations provided at an exclusive Nob Hill hotel. In contrast, an expert of somewhat lesser standing may receive a prestigious case at half his customary rate in an effort to broaden his credentials.⁴³ When estimation of the expert's time is difficult, the goal should be to arrive at a flexible arrangement that is equitable and avoids the drawbacks inherent in a rigid daily rate or a fixed fee formula.

The fourth type of fee package, the *contract with severable, multiple parts*, offers varying rates for different stages of the case. During the initial phase the expert usually does little more than identify relevant economic issues, suggest information sources, and design an economic strategy or framework for litigation. Since this contractually defined phase of the case merely provides both parties a chance to evaluate the case and the economist's role, it should be of short duration. Usually, counsel and the expert complete these tasks within a week, and often in one or two days. The parties should agree on the length of the period and establish a daily rate—perhaps at a level equal to the expert's going rate in previous cases.

The second part of the severable contract covers pretrial discovery and trial preparation. When counsel cannot accurately predict the expert's time requirements, he should put performance in-

43. When applicable, counsel should attempt to persuade an economist, perhaps one who already has the background knowledge on a given issue from an earlier case, that a less expensive fee arrangement is appropriate because the expert can exploit that knowledge. The savings to the client (whether public or private) could be considerable.

dicators in the contract.⁴⁴ These progress points identify and evaluate the assistance of the expert. If either the lawyer or the expert is dissatisfied with progress when reaching a performance indicator—sometimes called a “deliverable” in government contracts—counsel can alter his theory or pretrial strategy or even the expert before financial or other exigencies preclude changes. Charges for this phase may be accumulated on the basis of days, weeks, or months with a fixed amount not to exceed a stipulated figure. This rate should be less than the expert’s usual daily rate, given the greater certainty afforded the expert, and the fact that he will receive a higher rate in the third stage of the trial.

The third part of the severable contract covers the actual testimony of the expert in deposition or at trial. Because testifying often produces more anxiety and stress than work under the other phases of the contract, and the length of direct and cross-examination is uncertain, the rate is higher and the time left open-ended. This higher rate also assuages the expert’s concern with the earlier discounted rate for services rendered in the second stage.⁴⁵

The contract with severable, multiple parts offers the certainty of the set daily-fee rate while minimizing some of its drawbacks. The client will know his maximum financial exposure, the expert will have a better estimate of the time and effort he must devote to the case, and the lawyer will have more control of this costly part of a complex case. Thus, the parties should use this fee arrangement in complicated cases that involve protracted litigation.

X. WHAT TO EXPECT OF AN EXPERT

An I.O. expert should focus on all reasonable economic detail⁴⁶ and yet realize that he is not preparing to write a treatise. The case is not a testing ground for the economist’s novel theories. Nonetheless, an antitrust case is expensive—very expensive.⁴⁷ One reason

44. A performance indicator is a tangible checkpoint to help the lawyer measure progress toward a goal. It can be a verbal or written report, survey, chart, or statistical compilation, depending upon the type of case and the expert’s assignment.

45. The contract may provide for a lump-sum bonus or payout during the second phase in the event of settlement. This provision may preclude bias by the expert against settling the case.

46. See Stelzer, *Defining the Role of the Antitrust Economist—An Economist’s Perspective*, 48 ANTITRUST L.J. 1844, 1845-46 (1979).

47. “In the eyes of the public, decade-long antitrust litigation with years of pre-trial discovery, months of trial, and years of appeals is a monument to economic waste and fee-producing futility.” *Panel Discussion: Critical Evaluation of the Preparation and Trial of Cases Involving Complex Economic Issues*, 47 ANTITRUST L.J. 851, 853 (1978) (statement of

for this enormous expense—as well as the slow pace of complex antitrust litigation—is counsel's failure to simplify issues and limit discovery at the earliest practicable time. Economists, therefore, should help counsel avoid unintended "pretrial litigation maneuvering."⁴⁸ An efficient expert should not look for data on minor issues when the outcome of the case depends on broader topics.⁴⁹

In summary, if counsel treats the expert like an integral member of the litigation team, he will become a team player. He can help draft or review discovery devices, prepare questions or suggest topics for depositions, analyze discovery returns, review the adversary expert's *curriculum vita* and analyze his relevant writings, attend the deposition of the adversary's expert and analyze the transcript, and help to prepare the cross-examination of the adversary's expert. If, on the other hand, the expert's role is limited to general testimony on economic principles, his responsibilities should include suggesting what *not* to ask. In either situation, an economic expert can help counsel develop and present graphic exhibits portraying the salient characteristics of the industry, the client's damages, or the proposed remedies. The expert's summary diagrams or charts may alleviate the boredom of complex financial transactions and enlighten the finder of fact about the significance of otherwise confusing statistical relationships.⁵⁰ These devices provide supplements to the expert's testimony and improve the effectiveness of counsel's closing argument or, if in an administrative hearing, the proposed findings of fact.

XI. THE (GENTLE) CONTROL OF AN EXPERT

Ordinarily, I.O. economists do not think like lawyers about law, facts, and the application of economic theory to law and facts.

Frederick M. Rowe).

48. Kingdon, *The "Big Antitrust Case": Thoughts On Procedural Reform*, 37 WASH. & LEE L. REV. 25, 34 (1980). See also Brazil, *Civil Discovery: How Bad Are the Problems?* 67 A.B.A.J. 450 (1981).

49. One proposal requires counsel to narrow the scope of document production through a requirement of greater specificity—Federal Discovery Rules for Complex Civil Actions, Rule 5(a): Document Production in Complex Civil Actions. See Kaminsky, *Proposed Federal Discovery Rules for Complex Civil Litigation*, 48 FORDHAM L. REV. 907, 971-72 (1980). The economist can alleviate unnecessary harassing requests by counsel and eliminate duplication by narrowing the areas of economic inquiry. *Id.*

50. The use of demonstrative evidence to summarize voluminous or complicated data is recommended in the MANUAL FOR COMPLEX AND MULTIDISTRICT LITIGATION (CCH) § 2.61 (1969).

I.O. economics encompasses both the economists' ideological framework from which they draw hypotheses, and the mathematical process for disproving hypotheses. Economists view their craft as a method of scientific investigation because of this continued scheme of testing—or modeling—used to refute or confirm hypotheses.

Trial lawyers, however, are advocates trained to develop a strong emotional current in the courtroom. A trial lawyer attempts to build a case on evidence presented persuasively so that the trier of fact will reach a logical and (the lawyer hopes) compelled conclusion. Law is a craft or an art, not a science.⁵¹

The strong emotional current that counsel must develop will not occur if he relies on weighty econometric theory. Jurors trying to understand the subtleties of demand substitutability will be confused or bored by discussions of elasticity coefficients. To the economist, however, quantitative data are significant. They support his hypothesis about the effect of an industry's structure or of a firm's conduct. Therefore, counsel must review the economist's statistical evidence, decide what is important to support his legal argument, and present it so that the jury can understand it. Unless the expert has honed his forensic skills to the tolerance and understanding of a lay jury, counsel must insist on presenting the evidence in his own way.

Moreover, counsel should question his expert's assumptions about the proper form in which to present statistical data. For example, if the economist tells counsel that certain data do not yield as clear a result as other data, counsel need not present the second set of data. Counsel must weigh the economist's advice—insuring that the data presented are strong enough to allow the economist's testimony to withstand cross-examination—against the need to present a clear and compelling case.

Counsel should also be cautious about accepting the expert's asserted need for data not embodied in typical industry sources or widely circulated governmental reports. The economist might want to use a Senate report, an FTC study, a report by the Counsel of Wage and Price Stability, and two surveys based on documents subpoenaed from third parties. Counsel should ask if the expert

51. The economist browsing through a trial lawyer's bookshelf will gain valuable insights. See generally ASSOCIATION OF TRIAL LAWYERS OF AMERICA, *PSYCHOLOGY AND PERSUASION IN ADVOCACY* (1978) (reprints on persuasion in the courtroom, law and language, and the presentation of evidence); C. CUSUMANO, *LAUGH AT THE LAWYER WHO CROSS-EXAMINES YOU!* (1942); R. HARRIS, *HINTS ON ADVOCACY* (1881).

really needs these reports to prove the case. Perhaps the expert is proceeding with an overabundance of caution when the simple factual setting of the case requires none.

If the expert wants to create an exhibit showing the interrelationship between several concepts that are important to the case, he should select a chart from a widely accepted textbook. This chart will probably be more persuasive than one created just for the case. Once the economic expert transcends the realm of his science to suggest how the lawyer should proceed with his art, counsel should consider the advice but not feel bound to follow it. The economist bases his view on a different expertise than that of counsel.

Finally, control over an expert's involvement is a delicate issue. Counsel must, on one hand, avoid the appearance of denying information to the economist lest his adversary create an impression at trial that he put blinders on the expert, thereby causing a biased opinion. On the other hand, without firm control, the case will lack direction and lose cohesiveness.

The kind of control that counsel should assert over the expert's activity depends upon the working relationship between counsel and the expert.⁵² If counsel and the expert develop rapport, mutual respect, and confidence in each other's abilities, there should be no problem in exercising prerogatives. The member of the trial team assigned to handle the expert should continuously work with him. If lead counsel monitors their progress he can control a large case better, keep it within manageable proportions, and succeed in making persuasive use of the substance and application of economic theory, which has become increasingly important in antitrust litigation.

52. See Jentes, *supra* note 16, at 1842-43.