Professional Perspective

Preparing Antitrust Experts for Trial

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Antitrust cases involve sophisticated economics usually reserved for high-level academic literature. For a lay jury to understand each party's position on liability and damages, expert witnesses need to be able to explain difficult economic theories and calculations in a manner that conveys both credibility and approachability—and it will be up to counsel to skillfully manage those dual aspects. This article presents four best practices for setting up economic experts for success in the courtroom.

Identify the Right Expert

The ideal economics expert candidate is one who has experience articulating complex ideas to an audience that is generally less familiar with those concepts. This, of course, leads many antitrust lawyers to turn to experts who have previously testified in other antitrust cases, trusting that their prior experience before a jury will help inform their preparation and performance in subsequent cases.

Beyond the antitrust expert short list, professors and other academics generally are a natural choice: They not only have the necessary substantive knowledge, but they also look and sound like experts. Even the simple label of "professor" may work as a rule-of-thumb for jurors who must assess the credibility and qualifications of an expert in a short window of time.

In 2012, Professor Rebecca Haw of Vanderbilt University Law School observed that "expert testimony is often the 'whole game' in an antitrust dispute." R. Haw, *Adversarial Economics in Antitrust Litigation: Losing Academic Consensus in the Battle of the Experts*, 106 Nw. U. L. Rev. 1261, 1261 (2012). Expert testimony has continued to be a prominent piece of the overall narrative in antitrust litigation over the last decade, which makes selecting the "right" expert a necessary first step.

For the *Epic Games, Inc. v. Apple Inc.* trial in 2021, perhaps a textbook example of the "battle of the experts," the parties collectively listed six current and former professors as antitrust economics experts—among thirteen academic experts overall—on their trial witness lists, underscoring not only the heavy reliance on expert witnesses but also the anticipated value of experts with backgrounds in academia.

As one example, in *In re Wholesale Grocery Products Antitrust Litigation*, in which Weil successfully defended C&S Wholesale Grocers, Inc. before a Minnesota jury, C&S called Professor Kenneth G. Elzinga from the University of Virginia to testify as an economics expert on wholesale grocery prices in the Midwest. Speaking as though he were teaching Antitrust 101 in a lecture hall and not a courtroom, Elzinga succinctly opined on the importance of economies of scale and the continuing levels of competition in the wholesale grocery industry.

C&S also called John H. Johnson, who had prior teaching experience as an economics and labor and industrial relations professor at the University of Illinois, Urbana-Champaign. Johnson's testimony highlighted flaws concerning the plaintiffs' damages methodology. The jury ultimately found for C&S.

Conduct a Thorough 'Background Check'

An expert may be the perfect candidate based on the depth of their economics expertise, as well as their familiarity with the industry at issue in the litigation. However, the expert cannot stand on subject-matter expertise alone. The expert also will be evaluated by the court, the jury, opposing parties, and those parties' own experts with an eye toward positions taken by the expert in prior academic writings or trade publications, prior testimony in other antitrust cases, if any, and any other publicly available fora, including potentially social media. All these aspects must be scrutinized prior to retention, or else counsel and client alike may be caught flat-footed and run the risk of putting forth an ineffective expert witness.

In particular, if the expert has previously participated in other antitrust cases, it is crucial to verify whether their testimony was ever excluded and, if so, on what basis. It is also worth considering whether the expert has been more often retained by plaintiff's counsel or defendant's counsel, as that might impact how they see the case and whether they might be perceived as biased by the jury.

Keep the Expert's Testimony Simple

A boring or overly confusing presentation by the economic expert on direct examination could be the death knell of the case. Therefore, even if the written expert report is lengthy and involved, the expert's oral testimony should ideally boil down to no more than three key takeaways stated in layperson terms as much as possible.

Depending on the complexity of the case or the breadth of the expert's testimony, the number of key takeaways may increase, but the points should always be stated in a way that is easy to comprehend and remember for the jury. In particular, using a memorable real-world analogy or example can reinforce the main points, while helping the expert connect with the jury.

Demonstratives are effective tools that can help reinforce the expert's testimony, if used tactfully. Although demonstratives can be used to highlight helpful charts, figures, and other images that are part of the expert's written report, counsel should avoid inundating the jury with too many displays, particularly if the underlying testimony is not mission-critical to the case.

And, as with all aspects of the trial, each demonstrative should be carefully considered to determine whether it adds or enhances anything to the story being told, or merely distracts from it. For example, a figure that explains the expert's regression model may be useful, but it should not bury the lede—i.e., the bottom-line damages calculation resulting from the model—in favor of meticulously cataloguing the model's components and rationales for including certain variables and excluding others. Remember that many people begin to lose focus the moment they see Greek letters and math symbols.

Aim for Objectivity

Although expert witnesses have undeniably taken on adversarial stances vis-à-vis opposing party experts, they are still meant to be impartial in their overall demeanor towards the case and grounded in their economics expertise. Even if the expert is opining on antitrust liability, the expert is not, and cannot be, tasked with drawing legal conclusions. It is up to counsel to zealously advocate for their client's positions based on counsel's mastery of antitrust law, and the expert needs only to state their conclusions in the most matter-of-fact way possible based on the expert's mastery of economics.

In order for the expert to convey objectivity, the expert must know all of the operative facts of the case, not just the ones that are favorable to the client and support the expert's conclusions. A comprehensive knowledge of the facts will enable the expert to perform better on cross-examination, where alternative assumptions or hypotheticals posed in opposing counsel's questions might be based on facts in the case that the expert might not have concentrated on in their report.

Part of acting as an objective expert also includes making appropriate concessions on cross-examination. Refusing to give simple admissions can undermine the expert's credibility far more than conceding a straightforward point that may seem facially contrary to the client's position. Counsel can help prepare the expert for such instances through mock cross-examinations, as well as rehabilitate the expert during trial through re-directs.

Conclusion

Where expert testimony can provide powerful evidence in support of a claim or defense, as in antitrust cases, it is critical that counsel help the expert put their best foot forward. By being judicious at all stages of case preparation—being thoughtful with respect to the expert's credentials and experience prior to retention, and focusing the expert's testimony on certain key points that are easy to understand and advance your case during trial—the expert's full potential and utility can be realized.